Insider Dealing: From an Islamic Perspective

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January 2021

A thesis submitted to Durham Law School, Durham University,

for the Degree of Doctor of Philosophy

Abstract

Insider dealing has attracted considerable attention, both scholarly and popular. Studies on market abuse show the importance of combating insider dealing in order to protect market integrity on a global scale. However, researchers in Islamic economic thought (IET) have not treated such conduct in much detail. No known empirical research has focused on exploring the positions of Ifta institutions toward insider dealing.

The aim of this thesis is to present a detailed theoretical analysis of insider dealing within IET. It seeks to portray the different ways in which IET perceives the topic not only through its amalgam of values but also via the economic and logical perspectives. The research involves an empirical study of rulings (*fatwas*) from Ifta institutions which are considered to be the epicentre of Islamic social organization. It adopts an epistemological approach that involves the interpretation of fatwas. It uncovers the reasons for the various opinions on insider dealing via comparative jurisprudence (*Ikhtilaf*).

I argue that insider dealing in IET is perceived as an ethical failure. IET promotes the notion of preventing damage during transactions through its notion of religious aims (*Maqasid al-shariʿa).* Traditionally, it focuses on individual practice rather than the concept of artificial entities which unfolds philosophical scepticism to the perception of artificial constructs within the Islamic thought. I claim that IET concentrates on the moral virtues of human interactions, reflecting a general trust responsibility (*Amanah*) among market participants (investors) which encourages them to be candid and to disclose inside information on an equal access basis. In IET, inside information is considered to be a substantial element in the transaction of shares and the parties have an equal right to be aware of such information. Islamic religion aims to avoid ignorance (*Jahl*) and to ensure that the transaction is based on a just price for both parties. The correlational analysis of the *fatwas* thesis strengthens the idea that IET has a robust moral posture towards insider dealing through its amalgam of values. The findings contribute to a better understanding of the topic in IET. The study should, therefore, be of much value to the academic field and religious institutions as well as the Islamic financial sector in Islamic countries.

Acknowledgements

It is not easy to express gratitude in short sentences for the people without whom this thesis would not have been possible. Their continued support and efforts cannot be articulated in brief words.

First, I extend sincere thanks to my supervisor, Federico Lupo-Pasini, for his patience, insightful guidance and trust. I am grateful that he supported my curiosities and kept encouraging me all the way through the submission of this thesis. Also, my gratitude goes to my second supervisor, Professor Habib Ahmed, for his support and helpful feedback.

Next, unending thanks must go my parents, Khaled and Fareeda, for their support financially and morally not just during my studies but throughout my life. Their support is one that could neither be forgotten nor repaid.

Also, special recognition must go to my wife, Sara, and my daughter, Maria, for their patience and love. It has been a difficult four years in our lives suffering from the emotional burdens of long-distant relationships. The support that Sara has offered over the previous four years cannot be sufficiently acknowledged but is something I will strive, as best I can, to return.

Finally, I would like to express my gratitude to my friend, Saad Alrayes, for the long, entertaining, intellectual discussions and brainstorming which developed the direction of this thesis, and to my colleague, Vinson Vaz, for his useful comments on the draft. I am indebted to all who provided assistance.

Acronyms

List of Acronyms	*Explanation*
EMH	Efficient Markets Hypothesis
IET	Islamic Economic Thought
MM	Masaleh Mursala
MS	Maqasid Al-shariʿa
LP	Legitimate policy

Glossary of Arabic Words

Term	*Meaning*
Ahl-Alhadith	Traditionalists. Early Islamic school of thought that is interested in the hadiths.
Ahl-Alray	Rationalists; an early Islamic movement that promoted the use of logic to arrive at legal rulings.
Aladala Al-Ijtimaiya	Social justice.
Allah	God in Islam.
Amanah	Trust; a moral duty of fulfilling obligations.
Ayat	Verses or signs within the Quran.
Ayatollah Al-Wali Alfaqih	The Guardianship, honorific title in the Islamic Shia sect.
Beit Al-Mal	The treasury of the Islamic State.
Dharar	The act of damage (Harm).
Dherar	The consequence of the act of damage (harming the other counterparty).
Ebaha	Permissibility.
Elm	Knowledge.
Falsafa	Philosophy.

Fatwa	Authoritative legal opinion given by an Islamic legal scholar.
Fiqh	Islamic jurisprudence.
Fiqh Alwaqe	Jurisprudence of Shariʿa realism.
Fiqh Al-Muamalat	The jurisprudence of dealings, interactions and exchange.
Gharar	High risk and uncertainty.
Ghish	Deception.
Hadith	Report of the words and deeds of the Prophet of Islam.
Halal	A Qur'anic term that indicates what is permitted and lawful.
Haraam	Forbidden act under Islamic law.
Hisbah	Safeguarding Islamic ethics in the markets.
Ijmaa	A recognized source of Islamic law (Consensus).
Ijtihad	Diligence and rationality in processing Islamic views.
Ikhtilaf	Disagreement of jurists or conflicting opinions among schools of thought.
Jahala	Lack of knowledge and ambiguity in a contract.
Jahiliyyah	The pre-Islamic period (the Age of Ignorance).
Jahl	Ignorance and obscurity.

Madhhab	Islamic school of legal thought.
Madrasa	Institution of learning where Islamic thought is taught.
Maqasid al-shariʿa	The goals and aims of Shari'a.
Masaleh Mursala	Muslims' interests as intended by Islamic law.
Mecca	Holiest city of Islam.
Medina	Second holiest city of Islam.
Mu'tazilite	An Islamic theological school that took a rationalist approach by preaching in favour of human reason and logic.
Mufti	An Islamic jurist that is capable of giving a legal opinion.
Mujtahid	The highest level of Mufti who exercises independent reasoning (*ijtihad*).
Muqallid	Follower of tradition by imitation (*taqlid*).
Muqarabat Altasawi	Closest to equality and equal opportunity.
Mustafti	Someone seeking religious guidance (fatwa).
Qimat Al-Adl	Fair price.
Qiyas	Careful syllogism of Islamic analogical reasoning.
Quran	The book of Islamic revelation (recitation).
Sad Althare'e'	An Islamic rule that prevents possible corruption or harm.

Shaykhulislam	An institution of Ifta in the Ottoman era concerned with issuing fatwas.
Siyasah al-Shar'iyah	Legitimate policy.
Souks	Markets.
Sunnah	The primary source of Islamic law that consists of the actions and sayings of Muhammad (Prophet of Islam).
Surah	A chapter of the Quran, which is divided into 114 surahs.
Taqlid	Imitation.
Tarjih	Islamic method of weighting views to select one.
Thaman al-Mithl	The price of the equivalent of the true value of the good.
Ulama	Men of knowledge who have been trained in religious sciences (Quran, hadith, fiqh, etc.).
Usul al-fiqh'	Islamic legal theory (Roots of law).
Waqf	Charitable endowment.
Zakah	An Islamic obligation of giving 2.5% of the net worth annually; one of the five pillars of Islam.

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Introduction

The subject of this thesis is insider dealing from an Islamic economic perspective. Although Islamic authors have researched important economic and legal topics previously, there remains a lack of research relating to insider dealing within the Islamic academic sphere. Consequently, this thesis attempts to explore insider dealing from the perspective of Islamic economic thought (IET) with the aim of filling the gap in Islamic knowledge and to provide a deeper understanding of the chasm between Islamic knowledge and Western perspectives on insider dealing.

In this thesis, I argue that IET perceives insider dealing as a moral failure. It endorses the notion of preventing harm during transactions through the concept of *Maqasid al-shariʿa*. I argue that IET focuses on the moral virtues of interactions manifesting a duty of trust (*Amanah*) among investors which urges them to be candid and to disclose inside information on an equal access footing. IET considers inside information to be an important component of the transaction; hence, I argue that the parties have an equal right to be aware of such information to avoid ignorance (*Jahl*) and to ensure that the transaction is built on a just price. In broad terms, IET can be defined as an economic doctrine that aims to organize economic life from an Islamic perspective.[1] It is an important field that contributes to knowledge[2] through the principles and rules derived from the sources of Islam and the diligence of Islamic scholars.[3]

What is known about insider dealing is (largely) derived from contemporary legal sources. Insider dealing is generally understood to mean the misuse of non-public information with the aim of gaining profit or avoiding loss from buying or selling shares in the stock market

[1]Alsadr Mohammad, *Iqtisaduna: Our Economics* (World Organization for Islamic Services, vols 1 & 2, 1987) 312.
[2] For example, a notable contribution by IET can be seen in several economic fields, including investment, banking and finance.
[3]Fuad Alomar, Introduction to the historical development of Islamic economy (research number 62 Deposit number 1424/3671) Islamic Research and Training Institute, the Islamic Bank for Development, 2003 84.

or even by abstaining from trading.[4] This understanding of the term implies that there are forms of behaviour whose aim is to gain profit or avoid loss through exposure to inside information. In the past, insider dealing was a problem that primarily affected stock markets. The US stock market controlled a sizeable share of the financial capital throughout the world, and the world's largest corporations were traded there or not at all. For someone to gain access to information on a deal before it was known to the public was a sure way to gaining untold riches, even though the endeavour was risky and illegal. Now, however, the financial markets are no longer restricted to the US; the Islamic, mixed and Western industrialised nations have become highly capitalised and, as such, subject to insider dealing. Given that the West has been exploring, developing and evaluating insider dealing laws over the past century, it is important to acknowledge the lessons derived from such laws. Therefore, the first chapter of this thesis introduces the topic and reviews the currently available literature on insider dealing. It contextualises the extant research by providing information on the historical background to the development of laws on insider dealing and the evolution of its theories in Western law.

As the definition of "Western law" varies among researchers, it is important to clarify how the term is used in this thesis. Western law is recognised as law which is drawn up by human authority; it contains the codes, statutes, regulations and precedents applied in the courts within a community.[5] The current research is focused on the jurisdiction of common law[6] countries – specifically, the United States and the United Kingdom, which are used as models and for the purpose of providing foundational material on the topic. These jurisdictions have been chosen because of their noted contribution to the topic of insider dealing and the important

[4] Jonathan Law, *A Dictionary of Finance and Banking*, (6th edition, Kindle Edition, Oxford University Press, 2018) location 18886. Also, Harry McVea, 'What's Wrong with Insider Dealing?' [1995] 15 Legal Studies 390.
[5] Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, Thomson Reuters 2011) 1280.
[6] The two main legal systems are *common law* and *civil law*. Common law is derived from judicial decisions rather than from statutes; ibid 313.

precedents and laws that revolutionized the regulatory positions, as will be explained in Chapter 1.[7]

The importance of insider dealing goes back to the Great Depression in the US, which led to the Securities Exchange Act of 1934. This was followed by a series of historical events that led to the evolution of insider dealing laws that ended with criminalising the conduct and imposing additional civil and administrative sanctions on convicted "insiders". Furthermore, following the 2007-2009 global financial crisis, as insider dealing became part of the public consciousness, more nations noted the importance of combating it. People's awareness of financial markets increased in both the Islamic and Western worlds, and there were more demands for just, fair and transparent markets that provide equal opportunities for shareholders with full disclosure of information.[8] The European Commission, for example, has proposed that criminal sanctions against insider dealing are necessary, as widespread media coverage of trials would send a strong message to the public that insider-dealing offences are dealt with very seriously. The Commission added that criminalising insider dealing would probably lead to alterations in behaviour and help deter potential offenders.[9]

In the Islamic sphere, insider dealing has not received scholarly attention even though there was a dramatic increase in the number of financial studies conducted on IET. Islamic economic growth can be seen in Western and Islamic countries.[10] It has been reported that the world's

[7] Chapter 1, pp 13 - 27.

[8]Owen Davis, 'Fed Officials Mull Global Financial Market Turmoil As Investors' Expectations Diverge' (*International Business Times*, 24 February 2016) <www.ibtimes.com/fed-officials-mull-global-financial-market-turmoil-investors-expectations-diverge-2321813> accessed 26 July 2019.

[9] Commission, 'EC Staff Working Paper: Impact Assessment, accompanying the document Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation and the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation' COM [2011] 651 final, SEC 1218 final, 28 <http://ec.europa.eu/internal_market/securities/docs/abuse/SEC_2011_1217_en.pdf> accessed 28 June 2016.

[10] Tareq Moqbel, 'Evaluating the Shariah Compliance and Operationalising Maqasid al Shariah: the case for Islamic Project Finance Contracts' (doctoral thesis, Durham University, 2014). For example, Islamic financial industry in

Muslim population currently exceeds 1.8 billion and may rise to 2.2 billion by 2030.[11] Such a large populace demands entities to deliver services and products that meet their faith-based requirements. Islamic finance is estimated to be worth $2.5 trillion and is expected to rise to US$3.5 trillion by 2024, according to a report published in 2019.[12] This is seen as an important driver for the current interest in Islamic studies and illustrates the importance of undertaking further Islamic financial and legal research. A significant challenge in the study of Islamic thought, however, is the mode of approach to modern concepts[13] such as insider dealing, which has not yet been well accounted for within IET.[14] This study aims not only to explore the topic through a modern Islamic lens but also to understand the reasons behind the differences within IET. This will lead to a new IET understanding of the subject, helping to raise the importance of the topic in Islamic public perception.

The thesis stresses that Islam is a robust moral regime and a rich source of ethical construction. It argues that IET identifies the elements of insider dealing (ownership, company, investment of shares, information) differently through a distinct ethical and philosophical understanding that is rooted within the Islamic tradition. By doing so, the thesis casts a sceptical eye on important economic concepts such as the artificial entity (company). This doubt reflects the different way in shareholders, partners and investors are dealt with in IET, which focuses

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the United Kingdom is one of the fastest growing industry in the worldwide market. See Elaine Housby, *Islamic Financial Services in the UK* (Edinburgh UP 2011).

[11] 'Report: State of the Global Islamic Economy 2019/20' (Dubai Islamic Economy Development Centre (DIEDC), Salaam Gateway, report dated 11/11/2019) pages 10 and 46.<www.salaamgateway.com/reports/report-state-of-the-global-islamic-economy-201920/> accessed 8 December 2019.

[12] ibid, see the 'Executive Summary' page 2. Still, Islamic finance in its application partially fails to realise its moral underpinnings as it is moving 'towards a capitalist direction. See, Tareq Moqbel 'The UK Islamic Finance Taxation Framework and the Substance v Form Debate in Islamic Finance' [2015] Legal Ethics, 18:1, 86.

[13]Shaheen Sadar Ali, *Modern Challenge to Islamic Law* (CUP 2016) 41.

[14]Faridah Abdul Jabbar, Siti, 'Insider Dealing: Fraud in Islam?' [2012] 19(2) Journal of Financial Crime 140; El-Rehim Mohamed Al-Kashif, Abd, 'Shariʿas Normative Framework as to Financial Crime and Abuse' [2009] 16(1) Journal of Financial Crime 86; Saleh Barbary, 'Abuse of Information by Insiders' [2007] The Conference of Stock Markets in United Arab Emirates, Islamic Studies College 1.

more on moral values and individual needs than on market efficiency and increasing liquidity. This difference underscores the need for further IET research on economic concepts. Notwithstanding, IET combats insider dealing through solid economic, moral and logical reasoning. It argues that developing the law in Islamic countries as per Islamic values and moral insights when combating market abuse, and specifically 'insider dealing', would benefit Islamic societies, given that Muslims tend to be greatly influenced by Islamic values.

The thesis is presented in two parts consisting of eight chapters in total. Part I is introductory, and includes three chapters. Chapter 1, the literature review, puts the topic of insider dealing under the microscope and presents an analysis of the development of insider dealing theories and laws. Chapter 2 describes the research hypothesis, research questions, methodology, theoretical framework, ethical factors and limitations of the study. Chapter 3 explores Islamic institutions and their role in developing legal concepts through the fatwas, as a tool to help answer legal concerns in Islamic societies. Part II, which focuses on insider dealing from an Islamic perspective, consists of five chapters. It begins, in Chapter 4, by taking a step back and exploring the philosophical concepts of the components of insider dealing through an Islamic lens. Chapters 5, 6 and 7 present the different Islamic economic, moral and legal arguments and the empirical findings from the fatwas. Finally, Chapter 8 discusses the reasons behind the different Islamic opinions toward insider dealing, focusing on two key themes, namely the dynamics of Islamic schools (*Madhhabs*) and the role of *ijtihad* and rationality in processing Islamic views. Each of these chapters is outlined in further detail below.

PART I: THE BASICS OF INSIDER DEALING AND ISLAMIC ECONOMIC THOUGHT

Chapter 1: Overview of Insider Dealing

The purpose of this chapter is to introduce the topic and to review the current literature on insider dealing. It contextualises the extant research by reviewing the literature on three main themes: (1) the evolution of theories regarding insider dealing in common law (the United States and the United Kingdom); (2) the historical background to the development of the laws on insider dealing; and (3) analysing insider dealing behaviour. The chapter also reviews current Islamic research on insider dealing. It claims that over the past century, insider dealing laws suffered from the narrow definition of 'insiders' which shifted their focus to fighting the different types of insiders rather than combating the behaviour. The chapter argues that this narrowed the scope of the prohibition due to (a) the influence of the formality of the legal norm 'legal positivism' and (b) the inadequacy of the moral dimension. The chapter also demonstrates that the greater part of the Islamic literature on insider dealing is exploratory in nature and lacks clarity regarding the Islamic position against the different scenarios of insider dealing conducts.

Chapter 2: Theoretical Framework and Research Methodology

The second chapter is concerned with the methodology employed for this study. It explains the research hypothesis that is framed on the premise that Islam is a religion that concerns itself with all aspects of human life. It suggests countering insider dealing in the Islamic context through the application of Shariʿa rules. The chapter presents the research questions and the theoretical framework for the study, which is based on a religiosity paradigm as per Islamic aims and goals (*Maqasid Al-shariʿa*). It then describes the research methods and the adopted epistemological approach.

The chapter assumes a posteriori knowledge derived from empirical evidence (fatwas) from Ifta institutions. It suggests that fatwas are a rich source that can generate in-depth data from elite Islamic institutions. It goes on to explain the use of comparative law and comparative

jurisprudence (*Ikhtilaf*), to discuss methodological challenges and constraints, and to describe the data collection process and the analysis of fatwas. Finally, it highlights the ethical factors and the limitations of the study.

Chapter 3: Islamic Institutions, Fatwas and Legal Developments

Chapter 3 explores the relationship between Islamic religious institutions and legal developments in Islamic countries by explaining why the impact of IET is crucial to legal development in Islamic countries. The chapter argues that Islamic societies are influenced by religious norms and that IET and religious institutions play a crucial role in legal development. It claims that Ifta is a very important tool for Islamic societies, delivering necessary authoritative religious guidance and moral agency to Muslims.

The chapter begins by exploring the interconnection between the philosophy of law and its practical development. It goes on to illustrate how the law is understood to be developed through different series and stages: it begins as common thought and may end as legislation. Accordingly, the chapter explores certain philosophical questions such as what affects human thoughts, and how Islamic communities and religious institutions impact the law. It attempts to tackle how Islamic shared thoughts and beliefs are incorporated into laws to better understand the mechanisms of religion and how it affects human thoughts, imagination, behaviours and law in Islamic countries, which would help to justify the methodology used throughout this thesis.

The chapter also explores the historical role of IET as a foundation of legal development. To better understand how fatwas are formed before tackling the fatwas of insider dealing, the chapter also tackles the differences between Islamic law and positive law in Islamic countries. In relation to the thesis as a whole, Part I is considered introductory as it aims to justify the use of fatwa as a development tool in order to better understand Islamic positions on the topic.

PART II: ISLAMIC ANALYSIS OF INSIDER DEALING

Chapter 4: Understanding Insider Dealing Components Through an Islamic Lens

The chapter aims to provide a philosophical understanding of basic economic concepts related to the components of insider dealing in order to better understand the topic. It seeks to answer the following research question: To what extent does IET organise ownership, recognise corporation and investment in shares and distinguish information differently?

The chapter argues that IET concentrates on individual rather than artificial entity, casting philosophical scepticism on the perception of artificial constructs within Islamic thought. It claims that IET ponders the ethical virtues of personal interactions, suggesting a universal trust duty (*Amanah*) among investors.

This argument is developed as follows. The first half of the chapter is devoted to a discussion of how Islamic views on securities are based on a different philosophical background. It explains the Islamic concept of ownership which is based on the concept of God's ownership, through which humans are provided with temporary ownership based on trusteeship. It approaches the topic chronologically, exploring the historical roots of IET in relation to the concept of proprietorship. It also examines the IET position on the artificial entity of the company and explains how IET deals differently with the concept of the separate legal entity. Additionally, it argues that Islamic literature focuses less on imaginary and artificial bodies and concentrates more on human interactions. Fatwas from leading authoritative Ifta institutions were obtained to enrich the discussion with the views of the leading Islamic scholars.

The chapter goes on to explain how the transaction of shares has been adapted under Shari'a law as a sum of multiple financial contracts that gather several rights and obligations in a complex contract. It indicates that inside information is considered to be a primary component of

the transaction and not separate from it. The chapter concludes by justifying the Islamic view of inside information. The Islamic position is based on two philosophical grounds: firstly, that regulation is premised on the parties' equal status and the right to equal access to information, and secondly, that the aim of the regulation of markets is meeting the needs of the participants, whereas the aim of the Western regulatory approach is to achieve an efficient financial market, with the objective of increasing liquidity.

Chapter 5: Fatwas Based on the Economic Reasoning

The chapter introduces the empirical rulings of Islamic opinions (fatwas) from authoritative Islamic institutions. The fatwas obtained on insider dealing have four main themes: (1) Islamic damage theory (*Dharar*), (2) morality, (3) permissibility and (4) legitimate policy (positive laws) on insider dealing in Islamic countries. By discussing the economic (fatwas) from Ifta institutions which focus on the notion of harm, the chapter partially answers the following question: 'What is the IET position on insider dealing?'

The chapter argues that IET fosters the view of avoiding harm during transactions through its notion of (*Maqasid al-shariʿa).* It highlights key theoretical concepts illustrated in the fatwas, with exclusive focus on Islamic damage theory, the ignorance norm (*Jahl*), the avoidance of high-risk and uncertainty (*gharar*), and deception (*ghish*), as per the data gathered from the fatwas. It concludes with a final comment on the outcome of the analysis and introduces Chapter 6, which focuses on the immoral facets of insider dealing.

Chapter 6: Fatwas Based on Islamic Ethics

The focus of discussion in this chapter is the immoral aspects of insider dealing from an Islamic perspective. A continuation of the response begun in the previous chapter to the research

question, ‘What is the IET position on insider dealing?’, the analysis presented is based on the Islamic ethical framework.

In this chapter, I argue that IET has an ethical domain and takes a morally superior position on modern practices such as insider dealing. I claim that IET places the behaviour outside the bounds of ethical practice through the concepts of fairness and equality. It takes a practical approach to combating insider dealing through the notion of ‘just price’ as an indicator of the application of fairness and equality in markets. The chapter stresses the general applicability of the principle of trusteeship (*amanah*) to all investors and the importance of them being candid. It provides a justification for the Islamic position and explains the importance of the collective interests of Islamic society in the fight against insider dealing. It complements the economic analysis conducted in Chapter 5 and substantially explains the moral justification within IET for combating insider dealing by providing additional support for the economic analysis through the concept of (*Thaman al-Mithl).*

Chapter 7: Fatwas Based on Internal Law and Regulation

Chapter 7 seeks to explain those fatwas that mention the doctrines of legitimate policy and permissibility in relation to insider dealing. In conjunction with the analysis presented in Chapters 5 and 6, it aims to provide a definitive answer to the third research sub-question, ‘What is the IET position on insider dealing?’

The chapter argues that some Ifta institutions require further specialization in their Ifta process, especially when queried about complicated financial issues such as insider dealing. Without this, inquirers may receive a simplistic explanation which does not consider the deeper issues of the question, as per the fatwas obtained by the author. The chapter also argues that the Ifta reference to positive laws when asked about insider dealing is a primary drawback in the

regulation of insider dealing in the Islamic countries because it ignores the amalgam of religious values. The chapter contends that IET is more focused on combating the conduct ethically than on pursuing the wrongdoer legally, and that this is a primary weakness of the legal formality adopted by some Ifta institutions.

This argument is developed as follows. The chapter begins with a critique of those fatwas that allow insider dealing based on the concept of permissibility (*ebaha*), noting that they take a simplistic approach by ostensibly reading the religious texts without considering the deeper principles and goals of Islam. Next, it tackles the theory of legitimate policy in contemporary realism, showing how Islamic countries regulate insider dealing through positive laws and how this is conceptualised. It discusses the way legitimate policy is used as a basis for market supervision and how this is reflected in the insider dealing laws of six Islamic countries (Kuwait, the United Arab Emirates, the Hashemite Kingdom of Jordan, the Arab Republic of Egypt, the State of Palestine, the Republic of Iraq). Lastly, the chapter provides a synthesis of the fatwas, and offers a general recommendation on the analysis of the laws.

Chapter 8: The Rationalisations Behind the Different IET Positions on Insider Dealing

Chapter 8 analyses the reason behind the different Islamic understandings of insider dealing (presented in Chapters 5-7). It aims to answer the fourth and final sub-question: 'Why does the approach to insider dealing differ within IET?' It explains why historically opinions have differed among Islamic schools. It explores the dynamics of the religious doctrines (*Madhhabs*) of the Sunni schools (the Hanafi, Maliki, Shafi'i, Hanbali) and the Jafari (Shi'a) school and goes on to explore diligence *(ijtihad)* and human reason as concrete explanations for the differences in the Islamic positions on insider dealing. In considering the various views from the Mufti's, the chapter examines the method of weighting the views (*Tarjih*) as per the aims Islam (*Maqasid Al-*

shariʿa) and the moral autonomy which the Muftis enjoy. The chapter concludes that the corpus of Islamic jurisprudence may well engage with financial topics on the basis of uniquely Islamic frameworks such as moral, economic and legitimate policy. It argues that Ifta institutions should be a manifestation of a synthesis between rationalism and traditionalism. In other words, they should not to refer simply to positive law, nor depend on entirely on religious texts, but rather seek to balance religious materials and rationality.

Conclusion

The concluding chapter explains how the primary goal of the study has been achieved in accordance with its design. The study sets out to examine whether IET addresses the issue of insider dealing and whether the general principles of Islamic thought have been applied to insider dealing. The chapter shows that the hypothesis stands the test, providing an IET perspective on insider dealing based on economic and moral incentives. Overall, it strengthens the idea that Islam is a robust ethical machine and a fruitful source of moral construction and that IET has a different but rich philosophical understanding of insider dealing. It also explains the strengths and limitations of the study in addition to providing some recommendations for future research.

PART 1: THE BASICS OF INSIDER DEALING AND ISLAMIC ECONOMIC THOUGHT

Chapter 1 : Overview of Insider Dealing

1.1 Introduction

This chapter aims to demonstrate how insider dealing on a practical level will be explored in this thesis. It argues that during the last century, insider dealing laws in the US and the UK jurisdictions suffered from a narrow definition of insiders, focusing on combating different types of actors rather than on the behaviours, with the result that the scope of the prohibition became very limited. This was due to the influence of legal positivism, which had a clear negative effect on the development of insider dealing laws in the past century.[1] Previous research has found that legal positivism had its own problematic issues because of lack of a moral dimension in considering the normativity of the law.[2] The chapter also contextualises the research by providing background information regarding Islamic studies on insider dealing, pointing to the lack of adequate research on the topic, and suggests a new methodological approach, which will be developed in Chapter 2.

The chapter is divided into five sections. The first section is introductory. Section two presents a critical review of (a) the evolution of insider dealing theories in Western literature,[3]

[1] Legal positivism and formalism assume that 'unconstrained legal actors threaten law's neutrality and objectivity'. Michael Robertson, "Legal Positivism," *Stanley Fish on Philosophy, Politics and Law: How Fish Works* (CUP 2014) 179.

[2]See Robert Alexy, *A Theory of Legal Argumentation* (OUP 2009); Robert Alexy, *A Theory of Constitutional Rights* (OUP 2009); Robert Alexy, *The Argument from Injustice* (OUP 2009); Robert Alexy, 'Law, Morality, and the Existence of Human Rights' [2012] Ratio Juris 25 (1):2-14; Robert Alexy, 'On Necessary Relations Between Law and Morality' [1989] Ratio Juris, 2: 167-183. Also, it is seen that 'moral reasoning is never required or appropriate in figuring out what makes the law'. See Murphy L, "Legal Positivism," *What Makes Law: An Introduction to the Philosophy of Law* (CUP 2014) 23-44.

[3]Eight insider dealing theories have been developed in Western law over the past century. See, pages 16 to 28.

and the development of insider dealing laws in (b) the United States and (c) the United Kingdom. Following this initial exploration of the theories and laws of insider dealing, the chapter presents in-depth observations on the conduct of insider dealing to better understand its dimensions. Towards this end, section three explains the practical stages of insider dealing as behaviour and how it is committed in an applied context. The section further explains *who* the insiders are and *how* distributing information influences human economic decision-making by justifying market control over investors' behaviour. It attempts to set the scope of the discussion by providing a solid basis for how insider dealing on a practical level will be explored during the thesis. It is important from the outset of the thesis not only to review the current foundational material related to insider dealing but also to critically examine the conduct of insider dealing itself and understand the complexities and weaknesses of current insider dealing laws. Section four explores insider dealing studies in Islamic literature. It discusses the drawbacks of existing studies and explains how the thesis will overcome these flaws. Section five summarises the chapter and introduces Chapter 2.

1.2 Literature review

The current section examines the background on insider dealing and provides an overview of relevant theories, laws and cases. A range of sources have been examined to analyse insider dealing. The analysis aims primarily to establish the basis for the current study. It makes no attempt to compare Western laws with Islamic rules.

1.2.1 Evolution of theories of insider dealing in Western law

In the 19th century, insider information was regarded as advantageous to stock brokers, who sought information through all means possible, even using carrier pigeons. Other more

advanced methods, such as the telegraph, later took over.[4] During those early days, brokers vied with each other for the fastest means of obtaining and transferring information. They would follow armies into the field, court ambassadors and stand in legislative halls just to receive advance information.[5] The importance of stock market information goes back to 1792, when the first instance of insider dealing caused the first US market crash.[6] This illustrates that even in the early era of the stock market world, information equalled power, as noted by Gibson: 'shares become publicly known in an open market, [and] the value which they acquire may be regarded as the judgment of the best intelligence concerning them'.[7] This view was later developed in the 20th century by several authors,[8] and the term 'efficient markets hypothesis' (EMH) was coined by Harry Roberts.[9] EMH suggests that share prices reflect all the information available at the time of listing[10] and that they react merely to new data.[11] This theory has significant disadvantages as various factors can cause stock prices to fluctuate, such as supply and demand and the earnings and evaluations of the shares via software, that is, the forecast.

After insider dealing became illegal, further theories began to emerge. The development began with a narrow concept, known as 'Classical Theory'.[12] Also called 'Fiduciary Theory',[13] it

[4]George Rutledge Gibson, *The Stock Exchanges* of *London, Paris, and New York: A Comparison* (Press of GP Putnam's Sons, 1889)12.
[5]ibid 12.
[6]Jane Elizabeth Hughes and Scott B MacDonald, *Carnival on Wall Street: Global Financial Markets in the 1990s* (Wiley, 2004) 26.
[7]ibid, 11.
[8]PA Samuelson, 'Proof that Properly Anticipated Prices Fluctuate Randomly' [1965] 6(2) Industrial Management Review 41. See also EF Fama, 'The Behaviour of Stock-Market Prices' [1965b] 38(1) Journal of Business 34.
[9]Martin Sewell, 'History of the Efficient Market Hypothesis' [2011] Research Note RN/11/04 20 January, 4 2016. The author refers to another unpublished manuscript by H Roberts, 'Statistical versus clinical prediction of the stock market'[1967].
[10] B Malkiel, 'Efficient Market Hypothesis' in P Newman, M Milgate and J Eatwell (eds), *Dictionary of Money and Finance* (Macmillan 1992).
[11] EF Fama, L Fisher, MC Jensen and R Roll, 'The adjustment of Stock Prices to New Information' [1969] 10(1) International Economic Review 1. Also, see LKC Chan, N Jegadeesh and J Lakonishok, 'Momentum Strategies' [1996] 51(5) The Journal of Finance 1681.
[12]Bondi, Bradley J. and Lofchie, Steven D., 'The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance' [2012] New York University Journal of Law and Business, Vol. 8, p. 157.

is based on the duty of directors towards shareholders to disclose information that they gain because of their position. There must be a relationship of trust and confidence between the directors and shareholders while in possession of non-public information. In an economic sense, this might be an agency relationship, whereby directors are seen as agents of the shareholders in a company. Fiduciary theory can be found in the US Securities Act 1934, section 16, which states its purpose as preventing the unfair use of information that may have been obtained by directors. Because of their relationships, an action can be brought against directors for any profit obtained by them through buying or selling. A fiduciary duty is illustrated in the common law in *Cady, Roberts and Co*,[14] which demonstrates that a corporate director owes a fiduciary duty not only to the corporation but also to the ultimate owners, that is, the shareholders. This judgement led the way for US Rule l0b-5 to counter insider dealing in US stock exchange transactions.[15] In *Chiarella v the United States*,[16] the Supreme Court stated that dealers were entitled to equivalent information before dealing when that relationship related to a specific link, such as a fiduciary or agency relationship. The fiduciary approach does not include other persons who misuse inside information; this is a significant drawback which other theories have addressed. The limitation of the classical theory relates to situations in which there is no direct link between the company, the insider information gained and the market abuser. Will the person who is using the insider information be punished even though he does not owe any fiduciary duty to the shareholders? This question was addressed in the 'Tipper-Tippee Theory', which holds that a tipper[17] breaches

[13] Alexander F Loke, 'From the Fiduciary Theory to Information Abuse: The Changing Fabric of Insider Trading Law in the U.K., Australia and Singapore' [2006] 54 (1) The American Journal of Comparative Law 123.
[14] *Cady, Roberts & Co* [1961] 40 SEC 907, relno 34-6668.
[15] Loke (n 13) 126.
[16] *Chiarella v United States* [1980] 445 US 222, 228.
[17] Tipper: 'A person who is in a fiduciary relationship with a company that the person possesses material insider information about, and who selectively discloses that information for trading or other personal purposes.' Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, Thomson Reuters 2011) 1621.

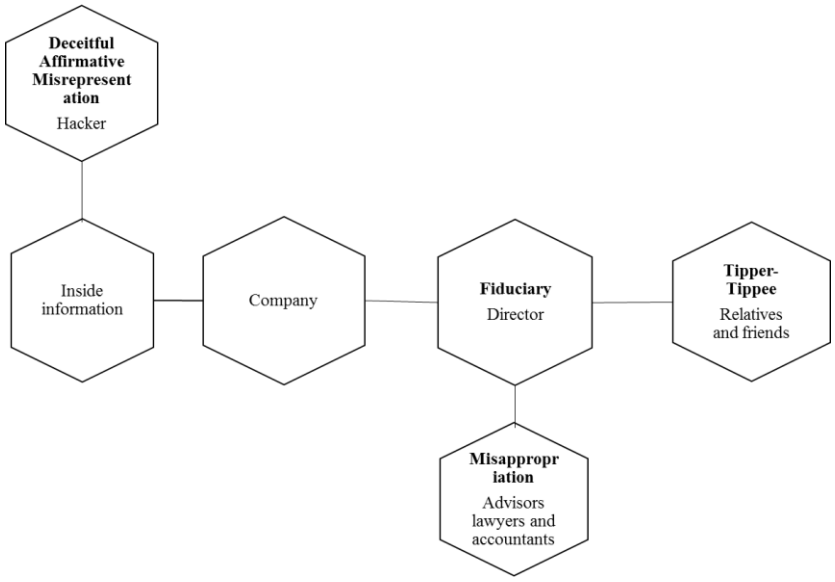
his fiduciary duty to shareholders by disclosing insider information to a tippee[18] who receives some personal benefit in return.[19] For example, the insider transaction could be from family members[20] or friends,[21] as when a director tips his wife with insider information and she uses this information to make a transaction. Tipper-tippee theory is illustrated by the decision of the US Supreme Court in *Dirks v SEC*.[22] The court stated that the insider must benefit personally from his disclosure to incur tipper-tippee liability.

The third theory is misappropriation theory. This theory was developed in *United States v O'Hagan*,[23] in which a lawyer became aware of inside information and subsequently used it for his benefit by buying shares. The court found him guilty of misappropriation. The ruling constitutes a development in the conception of insider dealing because it involved a non-insider with a professional duty: the lawyer was found guilty of using insider information even though he was not a director, employee or a shareholder of the company and did not owe a fiduciary duty to the corporation or to the directors. However, there was an agency relationship between the lawyer and the company based on the principles of trust and confidentiality.

Misappropriation theory is essential for avoiding the weaknesses of classical fiduciary theory.[24] Still, all three theories have a common element, which is a human link between the parties related to the insider dealing (the company, the insider information, the director, his family, friends, lawyer, accountant etc.). What if there is no link at all? That is, what if there is no chain in transferring the information? This question is addressed by the fourth theory,

[18]Tippee: 'A person who acquires material non-public information from someone in a fiduciary relationship with the company to which that information pertains.' ibid 1621.
[19]Bondi and Lofchie (n 12) 157.
[20]*United States v Chestman* [1992] 947 F.2d 551, 567–68 (2d Cir 1991), cert denied, 503 US 1004.
[21]*SEC v Maio*, [1995] 51 F 3d 623 Court of Appeals 7th Circuit.
[22]*Dirks v SEC* [1983] 463 US 646 Supreme Court.
[23]*United States v O'Hagan* [1997] 521 US 642, 652.
[24]Loke (n 13) 133.

'deceitful affirmative misrepresentation', which was raised in *SEC v Dorozhko*.[25] This theory is different from the others in that it evolved from a scenario in which there was no chain in transmitting the information, and there was no relationship between the outsider and any insider or the company, as the misuse of the information occurred through the hacking of the company's system. It follows that anyone who is dealing with non-public insider information is committing insider dealing *(figure 1.1).*



Author's own figure 1.1: *Theoretical insider dealing links, with examples of information abusers.*

But what if the information is outside information? For example, what if there is material information related to a governmental project near the company's site that would affect the value of the shares? In this case, the information concerned could be better described as price-sensitive rather than 'insider' information. The law therefore should prohibit any 'non-public, price-sensitive information' rather than focusing on information that is connected to the company itself.

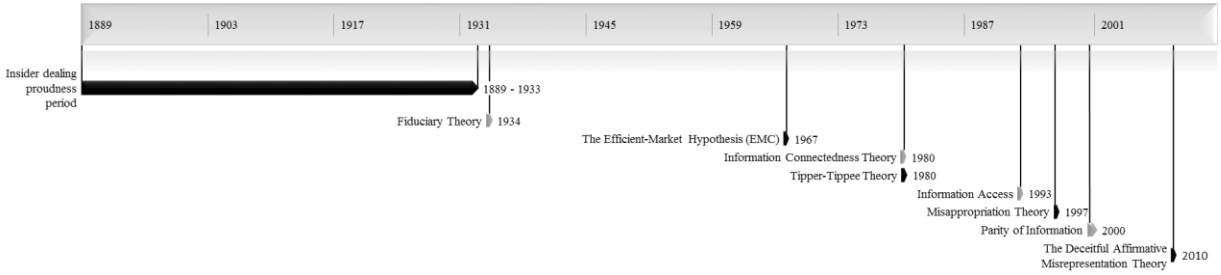
[25]*SEC v Dorozhko* [2010] no 07 Civ 9606 NRB, SDNY.

This can be better understood by examining how the concept of insider dealing was further developed through the UK Companies Act 1980 Part V, which introduced the fifth approach, 'Information Connectedness Theory',[26] which established insider dealing as a crime. A sixth approach emerged after further development through the Criminal Justice Act 1993, which changed the approach from information *connectedness* to information *access,* focusing more on the right to gain access to information.[27] Moreover, the UK Financial Services Authority developed the concept of insider dealing from information access towards parity of information, promoting information equality between investors.[28] This development was aimed at encouraging market efficiency through a smooth flow of data that ensures investors receive information equally – that is, that the public has equal access to information.

This overview suggests that new theories of insider dealing developed when judges faced cases that were not covered by existing theoretical positions. For example, fiduciary theory was conceived as an acknowledgement that insiders are responsible for violations of insider dealing. Tipper-tippee theory emerged following acknowledgements that family members and friends could be involved in insider dealing. Likewise, misappropriation theory developed to acknowledge the culpability of agents such as lawyers. When outsiders with no links to any insiders became involved in insider dealing, as in the *SEC v Dorozhko* case, deceitful affirmative misrepresentation theory appeared. In that case, the activity of insider dealing was examined from a different angle, one which considered how to organise the flow of information in the market. Information connectedness theory appeared in legislation, which evolved into an information access norm and developed into the concept of parity of information. This pattern of reactive development highlights the inability of legislators and courts to devise a model capable

[26]Loke (n 13) 133.
[27]ibid 142.
[28] ibid147.

of covering all the different incidents of insider dealing *(figure 1.2).* It also could be argued that this is because developments in actual insider dealing evolved over time. Nonetheless, it follows that developing a better model for fighting insider dealing was equally challenging. Such a template could be named for the misuse of non-public information.[29] An effective model for making insider-dealing illegal must clearly and accurately reflect the violations of the insider action and the responsibility of whoever commits it.



Author's own figure 1.2: *Historical timeline of the evolution of insider dealing theories.*

1.2.2 Development of USA insider dealing laws

This section presents an analysis of the historical timeline of insider dealing laws as the foundation for a better understanding of the topic. The starting point for making insider-dealing illegal goes back to the Great Depression, which began in 1929 and continued throughout the 1930s when an economic depression spread around the world after a collapse in stock market prices in the US.[30] This depression led to the US Securities Exchange Act of 1934, which is aimed at controlling the market abuses that triggered the crisis. Insider dealing was regulated under sections 20A-21A and rule numbers 10b5 and 10b5-2 and considered to be a type of fraud. Insider dealing laws in the US developed over the following decades. The US Insider Trading

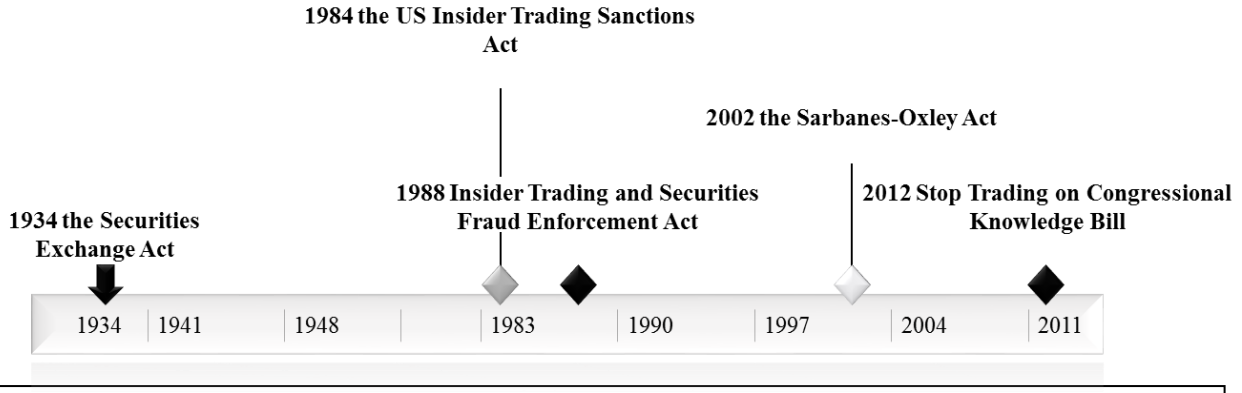
[29]US Investment Advisers Act 1940, Statute s 204A Prevention of Misuse of Non-public Information.
[30] See, Olivier Blanchard and Lawrence Summers J. Bradford De Long, 'Liquidation' Cycles: Old Fashioned Real Business Cycle Theory and the Great Depression', [1990] National Bureau of Economic Research, Working Paper no. 3546, p. 33.

Sanctions Act in 1984 increased the maximum penalty for the crime of insider trading to US$1 million and provided prison sentences of up to 10 years. It was followed by the 1988 Insider Trading and Securities Fraud Enforcement Act, which stipulates penalties for insider dealing activities. The laws passed in 1984 and 1988 increased the penalties for insider dealing to three times the total profit gained, or loss avoided.[31] In 2002, the Sarbanes-Oxley Act came into force, prohibiting insider trading during pension fund blackout periods, as per section 306. The Sarbanes-Oxley Act stresses the disclosure duty of investors. Ten years later, a new act was published, the Stop Trading on Congressional Knowledge Bill 2012, which banned insider dealing by members of Congress. These developments underscore the complexity of the crime of insider dealing, which can be committed by various persons, inside and outside a company. The source of the insider information is not limited to a company in the stock market; other public and private entities may play a major role in generating valuable information. For example, a decision by an authoritative body may establish a project near a company, adding value to its profits indirectly. A person linked to the authoritative body may invest in the company before starting the project. As the developments charted above indicate, regulators are realizing the intricacy of insider dealing and trying to address its various manifestations after facing different settings.

Again, it appears that some regulations were created in response to historical events.[32] Some authors have argued that the difference may relate may relate to the capitalist mindset of

[31]Thomsen LT, 'Testimony Concerning Insider Trading', SEC. https://www.sec.gov/news/testimony/2006/ts092606lct.htmaccessed 8/6/2016.
[32]Mehrsa Baradaran. 'Regulation by hypothetical' [2014] (5) Vanderbilt Law Review 1282 accessed 15-11-2016: http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1979&context=fac_artchop

US legislators, contending that the United States' business culture is governed by capitalism.[33] The US capitalist system is influenced by scholars of economics who prefer to link the laws to economic outcomes.[34] A less regulated market with minimal government interference is a primary element of an economic system whose aim is to increase transactions, as stock markets control financial activities and lead the development wheel.



Author's own figure 1.3: *Historical timeline showing the development of insider dealing laws in the US.*

1.2.3 Development of insider dealing laws in the United Kingdom

No insider dealing law appeared in the United Kingdom until '46' years after the US 1934 Act. It is believed that the spread of insider dealing laws only came about after the relaxation of capital controls and heightened competition among states for mobile portfolio capital in the 1980s.[35]

This lack of legislation is a structural weakness. The reluctance of UK legislators to bring in insider dealing laws over these years is peculiar, since the UK is home to one of the leading financial trading markets. This passiveness was exacerbated by the fact that the common law

[33]Hugh Evander Willis, 'Capitalism, The United States Constitution and the Supreme Court' [1934] volume XXII, Indiana University School of Law – Bloomington 3 <www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2254&context=facpub> accessed 25 March 2017.
[34]Curtis J Milhaupt and Katharina Pistor, *Law and Capitalism* (U of Chicago Press, 2008, 2).
[35]Andrew Kerner and Jeffrey Kucik, 'The International and Domestic Determinants of Insider Trading Laws' (2010) 54(3) International Studies Quarterly 678.

failed to impose an obligation to disclose insider information.[36] While listlessness of UK lawmakers is not acceptable, it can be justified by the case of *Percival v Wright*,[37] which demonstrates that directors of a company have no fiduciary duty towards shareholders and are at liberty to use insider information in purchasing shares from shareholders.

There were some attempts to prohibit insider dealing in the United Kingdom in the 1960s and 1970s, but those attempts failed.[38] For instance, the Companies Act of 1967 extended the duties of directors to include disclosure of dealings in a company's shares,[39] but did not delegalize insider dealing. UK legislation on insider dealing was ratified in 1980;[40] in 1986, another amendment on insider dealing was passed that provided regulators with a range of investigatory powers to fight it.[41] Subsequently, the UK recognised insider dealing as a crime through the Criminal Justice Act 1993, which created two offences related to insider dealing, 'tipping' and a 'dealing', in regulated markets.

In 2004, a new Companies Act came into force which developed insider dealing law by supporting the right of auditors to obtain information from directors and employees; it also extended the powers of the Financial Reporting Review Panel to attain information from auditors.[42] In 2005, a new regulation, number 381 of the FSMA,[43] was passed prohibiting insider dealing in qualifying investment activities and proposing definitions and identifying types of

[36]Barry Rider and others, *Market Abuse and Insider Dealing* (3rd ed., Bloomsbury Professional, 2016) 44.
[37]*Percival v Wright* [1902] 2 Ch. 421, 71 LJ Ch. 846, 9 Mans 443, 51 WR 31, 46 Sol Jo 616, 18 TLR 697.
[38] See Companies Bill 1973, the HC Bill 52 and the Companies Bill 1978.
[39] See chapter 81, section 27, of the UK Companies Act 1967.
[40]See, the UK Companies Act 1980, Chapter 22, part V, Articles 68 to 73, this law was later consolidated as the UK Company Securities (Insider Dealing) Act 1985. Provisions banning insider trading were additionally reviewed and re-branded and referred to as the Insider Dealing Act. Also see, Rider (n 48) 44.
[41] See, the Financial Service Act, part VII, section 177. Note that the market abuse regime was already formed under the UK Financial Services and Markets Act 2000.
[42] See, the Companies (Audit, Investigations, and Community Enterprise) Act 2004 section 449 schedule 15D, 9 (B).
[43] Note that the Financial Services and Markets Act 2000 introduced supplement prohibition on insider dealing. However, there are outstanding changes to the act such as the amendment on regulation number 381/2005 on 01/7/2005 and regulation number 680/2016 on 03/07/2016.

insider behaviour. Furthermore, Section 41 of the UK 2006 Company Act states that where a party to a transaction with a company is an insider, the transaction is voidable. Section 41 also stipulates that regardless of whether the transaction is voided, the insider is responsible for compensating the company for any loss or damage that the company has incurred. All the UK laws were focusing on combating insider-dealing crime by substantive and procedural law to cover loopholes or to aggravate penalties.

Domestic law on insider dealing was further developed on an international level when the UK became a member of the European Union (EU) on 1 January 1973. The EU new influence on insider dealing law provided an opportunity for the UK's Department of Trade and Industry to review its insider dealing laws,[44] enabling the UK to combat insider-dealing crimes linked to market abuses found elsewhere in the EU. The EU laws extended the obligation of the UK authorities to inspect people in the UK linked to market abuses found in other EU member countries.[45]

In 2011, the European Union proposed new sanctions on insider dealing, with the aim of making financial markets more sound and more transparent. The proposal extends the reporting of suspicious transactions and grants authorities the power to obtain telephone and data traffic records from telecom operators, or to access documents or premises where there is any suspicion of insider dealing. However, a prior judicial warrant is required for access to private premises.[46] Furthermore, in 2014, the European Union introduced a new directive requiring member states to constitute criminal offences for insider dealing and unlawful disclosure of insider information

[44] See, the EC directive on Insider Trading in 1989. The consultative document, the Law on Insider Dealing 1989, and the UK Criminal Justice Act 1993, Chapter 36, which replaced the 1985 Act, were further measures aimed at curbing insider trading.

[45]See, the EU Directive of 1989 which is revoked by the directive of 2003/6/EC of the European Parliament and of the Council.

[46]European Commission – Press release, Brussels, 20/10/2011: http://europa.eu/rapid/press-release_IP-11-1217_en.htm?locale=enaccessed 14/6/2016.

because they are deemed to be severe cases that have an excessive impact on the integrity of the market and erode investor confidence.[47] This means that in their national laws, member states must provide criminal penalties with respect to insider dealing and unlawful disclosure of insider information. Furthermore, the directive points out that member states should take all necessary measures to ensure that recommending or inducing another person to engage in insider dealing would be considered a criminal offence when committed intentionally.[48] Under the directive, member states must also ensure that the unlawful disclosure of insider information constitutes a crime.[49]

In 2014, the European Union promulgated a new regulation,[50] illustrating the points mentioned in the 2014 directive with an in-depth explanation. The regulation went on to add that insider dealing that takes place across markets as well as across borders. This leads to significant systemic risks, because the essential feature of insider dealing is that an unfair advantage is obtained from insider information to the detriment of third parties who are unaware of that information, which undermines the integrity of financial markets and investor confidence.[51]

Finally, yet importantly, the concept of insider dealing is related to fraud, as is specified by Section 3 of the UK Fraud Act 2006. This law states that failing to disclose insider information is an offence even if the recipient did not use it, which is considered the first stage of the insider dealing process. Justice Ginsburg commented on this, stating that undisclosed misappropriation of non-public information in violation of fiduciary duty constitutes fraud akin to embezzlement.[52]

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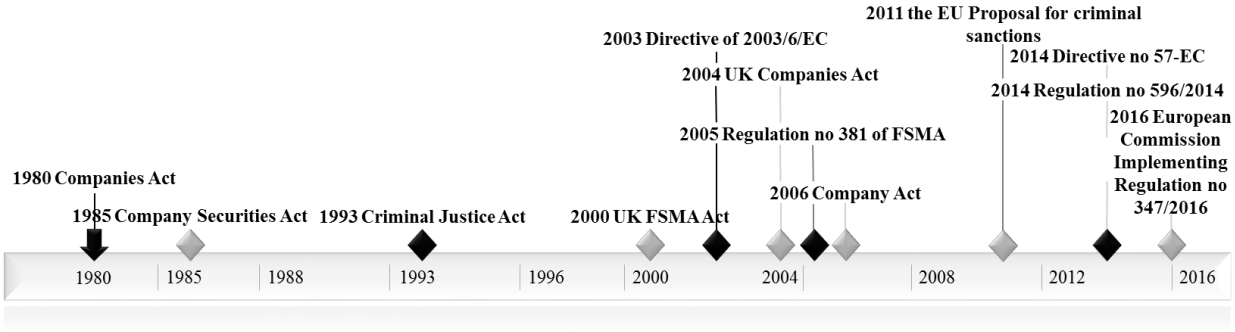
[47] See, EU directive, no. 2014-57-EC.
[48] ibid article 3.
[49] ibid article 4.
[50]Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16/4/2014 on market abuse.
[51]ibid.
[52] *O'Hagan* (n 23).

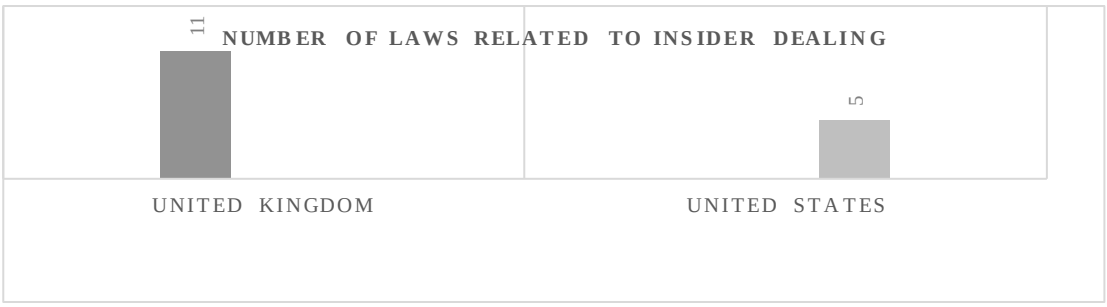


Author's own figure 1.4: *Historical timeline of the development of insider dealing laws in the UK*

In general, financial laws are being harmonised across different legal systems, and the laws on securities are mainly statutory on a global scale.[53] Still, various political, domestic and legal obstacles prevent some countries from standardising their laws.[54] Unlike the narrow approach taken by the United States, the United Kingdom has stricter laws that combat insider dealing. In the UK, the authorities can launch an investigation on the basis of a mere allegation of information abuse. This 'Information Abuse' model assumes that any market player could commit insider dealing; they are therefore required to provide pre-insider lists that include everyone who has access to insider information.[55] This list must be submitted to the Financial Conduct Authority on a regular basis. Because the process that the relevant parties must undergo to produce such a list is costly and time consuming, this approach can harm investors and have an adverse impact on the economy. Several previous studies have pointed to the absence of a relationship between such laws and stock market development.[56] Increased regulation of the stock exchange limits the attractiveness of the listed company and, consequently, harms the economy.[57] In other words, such laws have become 'too much of a good thing'.[58]

[53] John Armour and Simon Deakin, 'Law and Financial Development: What We are Learning from Time-Series Evidence' [2010] Centre for Business Research, University of Cambridge Working Paper No. 399, 10.
[54] Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' [2009] 34 Yale J. Int'l L 126.
[55] Including employees and advisors as per the Market Abuse Regulation (MAR), applied on 3/7/2016.
[56] Deakin (n 53) 39.
[57] ibid 41.
[58] Bruno, and Claessens, S., 'Corporate Governance and Regulation: Can There Be Too Much of a Good Thing?' [2009] European Corporate Governance Institute, Finance Working Paper No. 142/2007; Journal of Financial Intermediation, Forthcoming; AFA 2008 New Orleans Meetings Paper, (Last revised: 9 Nov 2018).

Previous literature on insider dealing shows how the concept has changed over time. Seminal material on the topic draws on examples of insider trading from the United States and the United Kingdom because of the rich data provided by the courts and legislators in those jurisdictions. However, the literature does not demonstrate a behavioural understanding of insider dealing, which is important to any argument for controlling the behaviour rather than focusing on the types of "insiders". In the next section, the practical behaviour of insider dealing is explored to better understand its dimensions.



Author's own figure 1.5: *Relative number of insider dealing laws in the UK and the US.*

1.3 The analysis of the insider's conduct

As the analysis in the previous sections indicates, it is crucial to take a step back from the way the law encounters insiders and refocus on the practical notion of insider behaviour. Therefore, this section aims to put insider dealing under the microscope by exploring the essential characteristics of its conduct. It then analyses insider dealing from a behavioural perspective, arguing that the legal focus should be on the prohibition of acts of deceit rather than on the perpetrators.

1.3.1 The basics of insider dealing

As noted earlier, a great deal of previous research into insider dealing has focused on the historical development of the law, the origin of the conduct and the theories related to it.

Together, the studies highlight the complexity of insider behaviour that derives from the various scenarios in which it can be committed. To simplify the topic and better understand the essential characteristics of insider dealing, this section aims to set the scope of the discussion by providing information about the market in which the conduct can be committed and the instruments which can be targeted by insider dealing. It also briefly explores the historical reasons behind the prohibition of insider dealing and explains how the term is used in the context of this thesis, in addition to providing some examples of the behaviour for the purpose of clarification.

Human beings developed the idea of markets as powerful platforms to trade and execute transactions, exchange stocks, and invest. They tend to organise themselves into groups according to the interests they share with others. That is why investors tend to gather with other investors and academics gather with other academics etc. Over time, humans began to institutionalise their gatherings, building small communities that exchanged similar thoughts and used an analogous vocabulary in a platform. An example of such a platform is the stock market, where human economic interactions take place between traders, and the exchange of stocks occurs.

The stock market is a sturdy structure that permits sellers and buyers to exchange shares.[59] The market has institutions that exist to simplify the exchange.[60] The exchange of money is known as a transaction.[61] Regulating investors' behaviours as per the moral assumptions of, and sometimes as per the religious scriptures in Islamic countries is one of the goals of the regulated markets. Markets try to apply notions of the common good and achieve social justice through financial regulation as per the shared expectations and the goals of the

[59] Arthur O'Sullivan and Steven M. Sheffrin, *Economics: Principles in Action* (Pearson Prentice Hall 2003) 28.
[60] Ronald Coase, *The Firm, the Market, and the Law* (University of Chicago Press 1990) 7.
[61] Zheng Y and Huang Y, "Market, State, and Capitalism," *Market in State: The Political Economy of Domination in China* (CUP 2018) 43.

regulators.[62] Capitalism developed the notion of the stock market and led to its current crucial economic role in most States.[63]

Today, regulated markets are the vessels of stock transactions. Stocks are a means of financing businesses.[64] Given that the scope of this research is relatively narrow, being primarily concerned with insider dealing, an act that is committed in stock markets, the first question to answer is which type of markets does regulation cover? This is important in order to narrow the focus of the discussion to the most relevant practical examples. There are several types of regulated markets, depending on which jurisdiction is under exploration. The market is not a simple structure, and it exists on both a national and an international level in various sizes.[65] Examples of the types of regulated markets include main markets,[66] secondary markets,[67] and the alternative investment market, to name a few. Insider dealing is discussed in most regulated stock markets.

Insider dealing can be committed from the start of a company's life in the regulated stock market during the initial public offering stage, when a company wants to raise funding through the issue of shares and sells them to the public. The purpose of raising capital is to enable business operations to begin. The shares are traded in stock exchanges after meeting the requirements for listing the company.[68] The total shares reflect the ownership concept through

[62] Roy Schotland, 'Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market', [1967] 53 VA. L. REV. 1425, 1439.
[63] Robert L. Heilbroner, *21st Century Capitalism* (WW Norton & Company 1993) 96.
[64] Rik Hafer and Scott Hein, *The Stock Market* (Greenwood Press 2007) 1.
[65] Zheng and Huang (n 61) 44.
[66] For example, the main market in the UK for trading shares is the London Stock Exchange. In *A Dictionary of Finance and Banking* (Jonathan Law (Ed.), 4th ed., Oxford University Press, 2008) 272.
[67] The term refers to markets in which securities are traded after the sale of the issuer in a primary market. See, Moloney, Niamh. "secondary markets." In *the New Oxford Companion to Law* (Oxford University Press, 2008) 1061.
[68] Sarah Clarke, *Insider Dealing Law and Practice* (Oxford University Press 2013) 10.

the company's shared capital.[69] Shareholders can be seen as investors, with the rights of stewardship by virtue of their ownership.[70] Insider dealing is usually committed using inside information about the company, through buying or selling or refraining from selling financial instruments such as shares, informed by ones knowledge of non-public information (such as a potential takeover).[71]

Some studies question the applicability of the prohibition against insider dealing to other types of investments in security markets such as bonds, claiming mistakenly that insider dealing laws do not apply to companies that issue junk bonds.[72] Regulators have for a long time focused on insider dealing in equity markets rather than in debt or credit derivatives markets.[73] This raises the question of what types of financial instruments 'the law of insider dealing'[74] covers. The question is important because it helps to understand the scope of the conduct.

There are several types of financial instruments that the insider dealing laws cover. For example, in both the UK and the USA there are laws existent which are applicable to securities, or what is also often called shares, stocks or equities, including other types of investments such as bonds.[75] All types of securities are under the threat of potential harm from insider dealing. The most 'common type'[76] in the stock markets are 'ordinary shares',[77] which generate a high

[69] ibid 8.
[70] Bloomfield S, "The Company and the Stock Market," *Theory and Practice of Corporate Governance: An Integrated Approach* (Cambridge University Press 2013) 201.
[71] See, Articles 1(3), 2, 3 and 4 of Directive 2003/6/EC.
[72] The example is from the US jurisdiction. See, 'Insider Trading in Junk Bonds' [1992] Harvard Law Review 105, no. 7 page 1721.
[73] Bondi and Lofchie (n 12) 163.
[74] By insider dealing law, we refer to the laws of the insider dealing conduct in the US and the UK and may refer to EU as examples.
[75] See section ten of the US Securities Exchange Act of 1934.
[76] For more explanation about common stocks verses preferred stock see, Hafer (n 64) 41.
[77] Ordinary Share is 'a fixed unit of the share capital of a company'. See, Law (n 66) 322. Also, Black, John, Nigar Hashimzade, and Gareth Myles. "equities." In *A Dictionary of Economics* (5th ed. Oxford University Press, 2017) 173. Also known as "equity securities" see, UK Companies Act 2006, section 560 (1) a.

volume of trade.[78] Still, companies may issue more than one kind of share class – for instance, 'redeemable shares'[79] and 'preference shares',[80] to name a few[81] – in order to vary capital rights, dividend and voting rights. These types of shares are also covered under the prohibition of insider dealing in most western jurisdictions.

Previous studies have shown that bonds are an important example of a financial instrument that is under the influence of insider dealing and there is a strong reaction in the bonds market to inside information.[82] This raises an intriguing question regarding the nature of the conduct and extent of the behaviour. Specifically, are authorities combating the behaviour or the persons who commit the behaviour? At first, this question seems simple. However, history reveals the opposite. When we examine the historical development of insider dealing laws,[83] we observe confusion in the courts when faced with different insider dealing behaviour by different types of insiders,[84] leading to paradoxical verdicts.[85] The continual potential of different insider defendants led to a quixotic effort to build a coherent theory of insiders by reference to the law relating to fraud.[86]

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[78] See, the 2019 Summary Order Book Analysis by Market, https://www.londonstockexchange.com/statistics/historic/secondary-markets/secondary-markets-archive-2019/secondary-market-factsheet-january-2019.pdf accessed 22/2/2019.

[79] A share that could be redeemed by the issuer under specific terms. See, Law (n 66) 370.

[80] It is a class of shares that has a fixed rate of interest rather than a variable dividend. See, *The Handbook of Fixed Income Securities* (Frank Fabozzi ed, Eighth ed., McGraw-Hill, 2012) 15. Also, Law (n 66) 346

[81] See the definition of security by the US Securities Exchange Act of 1934, sections 10 and 11.

[82] Sudip Datta, Mai E. Iskandar-Datta, 'Does insider trading have information content for the bond market?', [1996] Journal of Banking & Finance, Volume 20, Issue 3, page 574.

[83] See, chapter one, sections 1.2.2 and 1.2.3 pages 19 to 27.

[84]Fiduciary theory, e.g. director as insider see, *Cady* (n 14). Also, agency relationships insiders see, *Chiarella* (n 16). Family members as insiders see, *Chestman* (n 20). Friends as insiders see, *Maio* (n 21). Tipper-tippee insider dealing see, *Dirks* (n 22). Also, lawyers as insiders see, *O'Hagan* (n 23). Hackers as insiders see, *Dorozhko* (n 25).

[85] Whether insiders must benefit from insider dealing to be guilty or not, is a primary question in the legal discussion. See, for example, *Dirks* (n 22)

[86] Bainbridge, Stephen Mark, An Overview of Insider Trading Law and Policy: An Introduction to the Insider Trading Research Handbook (September 4, 2012). *Research Handbook on Insider Trading*, Stephen Bainbridge, ed., Edward Elgar Publishing Ltd., 2013; UCLA School of Law, Law-Econ Research Paper No. 12-15 page 10.

Over time, the circle of insiders began to grow wider, like the ripples that spread on the surface of the water after a stone is thrown. This was because of the repeated question posed to the courts regarding the identity of insiders. Insider dealing originally emerged because of the close relationships between directors and the sources of sensitive information. For example, managers and directors were a steadfast source of inside information. In fact, prior to the US Securities Exchange Act of 1934, directors were found not liable for insider dealing. The courts found that they do not carry any duty of disclosure to the shareholders.[87] In other words, because directors do not carry a trust or fiduciary responsibility to the shareholders as actual owners of the corporations, the courts found that they were free to benefit from the non-public information they knew.[88]

Since the 1900s, gradual changes in the rights of shareholders and workers have been observed. There were increasing demands by workers and minority shareholders to stop the disparity between them and the majority shareholders. Gradually, investors developed greater awareness of the problems of income inequality.[89] Economic growth was in direct conflict with workers' rights and those of minor shareholders. Labour unions had gained more political influence.[90] Regulators began to take into consideration the consecration of the principles of fairness and to acknowledge the need for social justice. Such an approach led to a re-examination of the epicentre of economic and social organisations.[91] Courts began to recognise the trust relationship between directors and shareholders. This did not occur directly, as initially courts

[87] *Deadrick v Wilson* [1874] 67 Tenn. 108. And *Crowell v Jackson* [1891] 23 A. 426 (N.J. 1891).
[88] See, for example UK: *Percival* (n 49). Also, *Haarstick v Fox*, 33 P. 251 (Utah 1893). Also, *Krumbhaar v Griffiths* [1892] 25 A. 64 (Penn. 1892).
[89] John Anderson, *Insider Trading: Law, Ethics, and Reform* (CUP 2018) 16.
[90] ibid.
[91] The question was whether to stress on economic freedom or social interest.

pointed out that directors must serve the interest of the "entire body of stockholders".[92] The courts were focusing on the interest of the company as a whole, rather than on shareholders.[93]

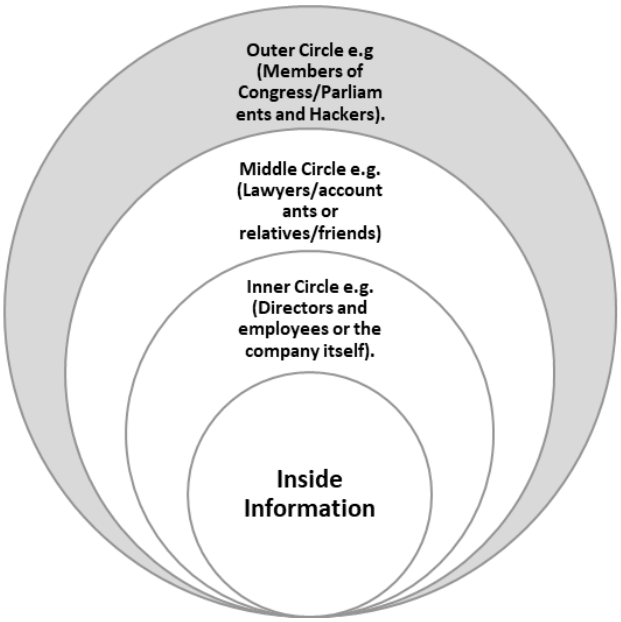
Corporate directors were the first to raise the issue of insider dealing.[94] They were involved in insider dealing in a large proportion of transactions in their companies.[95] The question was why should they not engage in it. In other words, the focus was on finding ground for prohibiting it. To do so, the courts had to revise their understanding of the director's duty to the shareholders. The fiduciary breach was an antifraud foundation based on a US classical interpretation in applying the prohibition against insider dealing, particularly in relation to securities law.[96] Still, courts were wavering between prohibiting the conduct on the basis of the principle of equivalent information[97] and fiduciary duty as an obligation of the agency relationship.[98] Then it was seen that directors carry a duty to disclose the information. If they did not, their silence would be considered to be fraudulent.

As explained earlier, in the initial stage of the fight against insider dealing, directors and employees were the main insiders; as such, they are categorised as part of the inner circle of insiders.[99] Does this mean that the basis of the prohibition of insider dealing was contract law? When we examine the debate over the justification for prohibition, we could conclude that it is based on contract law because it considers the relationship of trust and agency as a foundation for the duty to disclose.[100] Also, the inner circle could include separate artificial entities, that is,

[92] *Oliver v Oliver* [1903] 118 Ga. 362, at 233.
[93] ibid. at 234.
[94] *Cady* (n 14).
[95] Segre Claudio, 'The development of a European capital market. Report of a Group of Experts pointed by the EEC Commission' [1966] EU Commission - Working Document, November 1966, page 30.
[96] Georgakopoulos NL and Posner R, "Insider Trading Law," *The Logic of Securities Law* (Cambridge University Press 2017) 121.
[97] *Chiarella* (n 16).
[98] *SEC v Texas Gulf Sulfur* [1968] *Co.,* 401 F.2d 833, 848 (2d Cir.).
[99] Sarah categorised them to Inner, Middle and Outer circles, see, Clarke (n 68) pages 92-24.
[100] Anderson (n 89) 24 and 59.

companies, by virtue of the concept of the directing mind as the basis for the company's liability.[101]

The same criteria could be expanded to a middle circle that includes those who have access to the information by the virtue of their profession[102] and have a duty of confidentiality and secrecy, such as lawyers and accountants.[103] It is parochial to limit the scope of insider dealing to such a small circle, however. Thus, motivated by greed, insiders expanded their circle through more sophisticated trading to involve outsiders.



Author's own figure 1.6: *Types of insiders.*

The middle circle included others such as relatives and friends through the act of tipping. For instance, a senior manager that has access to price-sensitive information was not allowed to encourage his wife to buy shares based on non-public information.[104] The circle could expand still further like ripples spreading on the water to include an outer circle of insiders such as members of Congress[105] or hackers[106] as shown in *(figure 1.6).*

The approach of focusing on the types of insiders is one which features strongly in many jurisdictions. In term of detection, compiling an up-to-date list of insiders would help to better

[101]*Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1 31 March 1971. Also see, section (40) of the EU Regulation no 596/2014 of the European Parliament and of the Council of 16/4/2014.
[102] See, UK Criminal Justice Act 1993, section 52 (2) (ii).
[103] Bainbridge, Stephen Mark, Regulating Insider Trading in the Post-Fiduciary Duty Era: Equal Access or Property Rights? (May 8, 2012). UCLA School of Law, Law-Econ Research Paper No. 12-08. Page 9.
[104]*R v Rollins* [2011] All ER (D) 222 (Jun) [2011] EWCA Crim 1825.
[105] See, the US Stop Trading on Congressional Knowledge Act of 2012'' or the ''STOCK Act''.
[106] For example, *Securities and Exchange Commission v Dubovoy* [2015] et al., Civil Action No 2:15-cv-06076 (D.N.J., filed August 10, 2015), *United States v Vitaly Korchevsky*, et al., No. 1:15-cr-00381 (E.D.N.Y.). Also, *SEC v Zavodchikov*, et al., Civil Action No. 2:16-cv-00845 (D.N.J.).

expose violations by showing the authorities who has access to inside information. However, such a list should not serve as a basis for regulating the behaviour, as the prohibition should be focused on the conduct itself. The issue is the behaviour, not the wrongdoer. In other words, the basis of the prohibition should not be contract law and agency. The aim of prohibition should not be to combat insiders but to combat any conduct that falls into the category of market abuse. This would allow a broad application of the ethical side of the law. Market abuse refers to unlawful behaviour by investors who unjustly gain at the expense of other investors.[107] In the context of the financial markets, the concept encompasses market manipulation, insider dealing, and unlawful disclosure of inside information.[108]

In this thesis, the term 'insider dealing' is used in its broadest sense to refer to all the behaviours that fall under the heading of insider dealing. This means the term includes dealing in securities through non-public information or encouraging others to do so, as well as disclosing non-public information about any regulated market to another person.[109] The dealing could involve the acquisition or disposal of securities directly and indirectly by any person. This can take place before the ordering stage, through an agreement or contract to buy stocks or dispose of them based on inside information. It could be conducted in person or through an agent.[110]

[107]Paul Barners, *Stock Market Efficiency, Insider Dealing and Market Abuse* (Gower Publishing, 2009) pages 9 and 132.
[108] See, regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014, S (7).
[109] Andrew Haynes, 'The EU market abuse regulation, where does it leave us?' [2018] Journal of Financial Regulation & Compliance, 26(4), 486.
[110] See UK Criminal Justice Act 1993 section 52 and 55. Also, article 3 and 4 of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) OJ L 173, 12/6/2014, p. 179–189. Also, Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance Articles 8, 9 and 10.

For clarity, a well-known example of insider dealing is taking advantage of inside information to trade large amounts of stocks in a very short time.[111] For instance, a person keeps the discovery of a valuable mineral in one of the projects of the under wraps and buys stocks before the information is publicly announced.[112] Such activity is seen as a theft of the corporation's valuable information.[113] Another traditional example is that of a person who knew about a potential takeover and bought shares before the acquisition was announced. Such examples are common because most detected insider dealings are connected to mergers and acquisitions.[114] This begs the question of why mergers and acquisitions are prone to insider dealing.

The prevalence of insider dealing in mergers and acquisitions derives from the value of the shares that would probably be influenced by the expected future profitability. For example, in an acquisition, shareholders care about the new owner. A change in the ownership of the company and corporate control is a major factor in the change in the value of the shares.[115] The high demand for shares because of the acquisition is another reason for the increase in the value of the shares; it reflects the economic principle of supply and demand. The benefit of inside information about acquisitions is can be seen in many cases, such as that of *Ivan Boesky,*[116] *Sanders and other,*[117] *the Littlewood case,*[118] *Butt and others,*[119] *Smith, Spearman and Payne,*[120]

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[111] Donald C Langevoort, What Were They Thinking? Insider Trading and the Scienter Requirement, in Bainbridge(n 86) 56.
[112]*Texas Gulf Sulfur* (n 98).
[113] Stephen M Brainbridge, *Corporation Law and Economics* (Foundation Press 2002) 598-607.
[114]Huang, (Robin) Hui, The Regulation of Insider Trading in China: Law and Enforcement (January 14, 2014). In Bainbridge (n 86) Chapter 16, page 320. Also see, Clarke (n 68) 85. Also, Anup Agrawal and Tareque Nasser, 'Insider Trading in Takeover Targets' [2012] 18 J. Corp. Fin. 598.
[115] Barners (n 107) 87.
[116] See, Clarke (n 68) 2. The copy of the judgment A. v. Ivan F. Boesky 1987 Cr. 378 (MEL) http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1987_1218_LaskerBoeskyDraftSentencing.pdf accessed 27/2/2019.
[117]*R v James Sanders and others* unreported Southwark Crown Court, 20 June 2012 FSA/PN/060/2012.

and *Raj Rajaratnam*,[121] to name a few. These cases illustrate the importance of disclosing inside information to the public to avoid insider dealing.

Understanding the complexity of insider dealing is vitally important if it is going to be investigated from a different philosophical perspective (that is, the Islamic point of view). What is vital here is to recognise that there is another dimension of insider dealing that is not shown in the papers. This is passive insider dealing, that is refraining from selling shares when in possession of inside information. Examples of this practice are difficult to find, since not selling is something that the records fail to show. It is a challenge for the authorities to tackle passive insider dealing given that the decision to not sell is locked inside the insider's mind.[122] Moreover, it is worth noting that many cases of insider dealing involve serious financial crime and criminal conduct such as terrorist financing and money laundering.[123] Consequently, the question of when the conduct is committed is a crucial one. What motivate insiders to conduct insider dealing is another important question. The thoughts of insiders are a sort of reflection of the business culture. Consequently, to better understand the issue, the next section explores the factors that influence and motivate insiders to commit insider dealing.

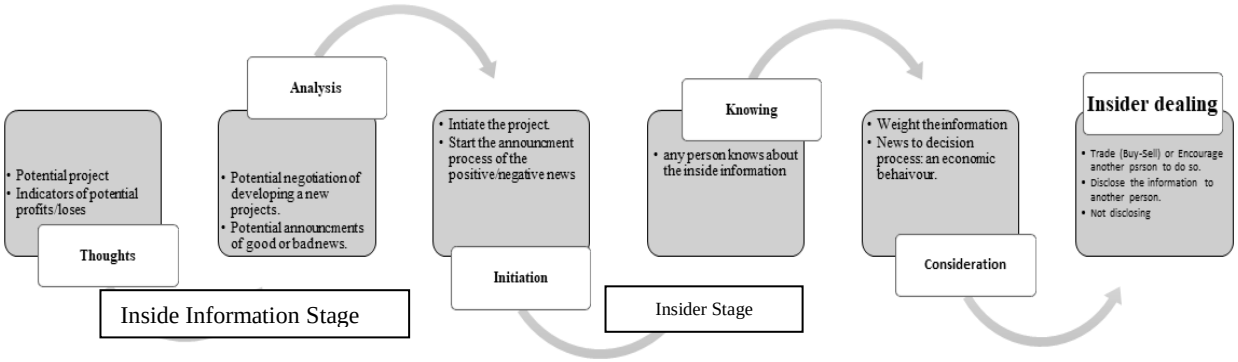
1.3.2 Behavioural analysis of insider dealing

[118] *R v Littlewood and others*, unreported, Southwark unreported Southwark Crown Court, 20 Aug 2012 FSA/PN/082/2012. Also see, Clarke (n 68) 3 and 4.
[119] Paul Barnes, 'Insider dealing and market abuse: The UK's record on enforcement', [2011] International Journal of Law, Crime and Justice, Volume 39, Issue 3, 2011, p 174.
[120] ibid 182.
[121] See, https://www.sec.gov/news/press/2009/2009-221.htm accessed 27/2/2019.
[122] Schouten, Michael C. and Nelemans, Matthijs, Takeover Bids and Insider Trading (March 1, 2013) In Bainbridge (n 86) 467.
[123] Alexander, Kern 'UK insider dealing and market abuse law: strengthening regulatory law to combat market misconduct' [2013] In Bainbridge (n 86) 419.

Giving a thought to the behaviour of insiders, insider dealing may be understood as a systematic process which consists of six phases.[124] The process begins with a thought in the corporate mind regarding potential projects or a potential fact about profits or losses. In stage two, the thought is developed into a potential negotiation or ongoing negotiation regarding a potential project etc. Stage three (action) marks the start of a new project that has a potentially positive economic outcome. In stage four (knowledge of non-public information), a person has inside information about the high-value project. In stage five (information analysis), the person weighs the information and makes a financial decision based on it. The act of insider dealing constitutes stage six, in which the person discloses the information to another person or starts (or stops or abstains from) trading based on the inside information.

Dividing insider dealing into six phases within the two main stages, the inside information development stage, and the insider analysis and consideration stage, draws attention to the evolution of information and its part in the process of decision making. Figure 1.7 below depicts the process through which the information is developed, learnt and used. It is well established that investors turn news and information into decisions.[125] But why does information have such importance? The complexity of the way the value of the shares is determined is a crucial factor. The collective thought of the investors influences the value through the way they act, buy, sell and refrain from selling shares because of continual assumptions about how much the gain might be in the future.

[124] These phases are based on the author's understanding.
[125] Barners (n 107) 58.



Author's own figure 1.7: *Practical Stages of committing insider dealing*

Stock Markets do not adequately capture all aspects of the law of supply and demand because of the fallibility of the price mechanism.[126] Supply and demand is not the only factor that influences the value of the shares. A share is unlike a normal good; it does not provide enjoyment or physical benefit to its owner; its value is based on expected future dividends and its potential sale price. Such a basis is associated with the company's past and future performance.[127] That is why information related to the company's operation, performance and control is crucial to the public. Investors tend to prefer fewer risks and more certainty of growth; this preference is based on the analysis of information, which reflects the behavioural paradox of avoiding risk of loss rather than focusing on the probability of profit.[128] Unfortunately, there is no simple mathematical or statistical rule that determines shares price.[129] In response to the mood of investors, markets adjust the share price, reflecting the market's tone.[130] If the investors' mood is a leading driver of share price, a crucial question is what shapes mood?

Negative emotional states such as fear of loss will affect the mood of investors.[131] Moods and emotions are related to the psychological state of mind. Researchers have tried to better understand insider dealing from a psychological point of view by exploring the insider's state of

[126]Michelle Baddeley, *Behavioural Economics* (OUP 2017) 34.
[127] Barners (n 107) 26.
[128] Baddeley (n 126) 52.
[129] ibid 42.
[130] ibid 87.
[131] See, Brain-imaging studies: Brian Knutson and Bossaerts, P. 'Neural antecedents of financial decisions' [2007] Journal of Neuroscience, 27(31): 8174-7.

mind.[132] In other words, behavioural economics extends economic principles by acknowledging that our decisions are affected by social and psychological influences and cognitive constraints.[133] The regulators must not turn their attention away from the limits of rationality. Investors are driven by information, and practical rationality fuels decision making through the available information rather than all the information, which leads to systematic behavioural biases.[134] Moreover, even when information is available, investors could fall into the heuristic behaviour of ignoring part of the information and make decisions on the basis of incomplete information.[135] So, does this mean that an insider's behaviour could undermine investor confidence[136] because he chooses not to disclose the inside information of which he has knowledge and uses it for his advantage? Is it a game of chess in which the plays should have equal access to such information? If they have equal access, will they make the same rational choices? Is it a skirmish between benefits and risks? How can we better understand the Orthodoxy of the economics of misconduct? Could it be claimed that insiders weigh the benefits of insider dealing against the risks involved?[137]

If investors tend to play safe, then they may try to avoid the risk of loss by using inside information, which could increase the probability of profit. But would they not still run the risk of prosecution and imprisonment? In the context of investing, risk is defined as the probability that a share will decrease in price.[138] Probability is problematic, because if some investors thought that the price of the shares could go down, then other investors, following the same line

[132] Mark (n 103) 10.
[133] Baddeley (n 126) 1.
[134] Brighton H., Gigerenzer G. 'The bias', [2015] Journal of Business Research, 68(8), pp. 1772–84.
[135]Gigerenzer G., Gaissmaier W. 'Decision making: Non-rational theories', [2015] Smelser N. J., Baltes P. B. (eds), International Encyclopedia of the Social and Behavioural Sciences, Volume 5, 2nd ed., Amsterdam, Elsevier, pp. 913.
[136] Kern (n 123) 422.
[137] Langevoort (n 111) 57.
[138] Shefrin Hersh Statman Meir 'Behavioural Portfolio Theory' [2000] Journal of Financial and Quantitative Analysis, 35 (June), 127–51.

of speculation, will make the same assumption. Speculators are not worried about the fundamental value of the shares; rather, they are anxious about the value others place on them, and the overall thought will probably determine the short-term and long-term value of the shares.[139]

Irrational behaviour in the regulated markets not only leads to discussions of risks versus benefits but also reflects the interaction between greed, hope and fear.[140] Investors take decisions by getting information, working on it according to their rational and emotional capabilities, then turning that information into financial decisions.[141] That is why some investors are keen to obtain inside information to increase the probability of profit from buying, selling or refraining.[142] Are there other factors that were not discussed? Research has shown that the main drivers of investor decision making are not only the pursuit of financial goals such as increasing dividend income by trading shares or from capital growth, and the balance between risk options,[143] but also their state of mind.[144]

Moreover, it is worth noting that many insiders and white-collar criminals engage in such conduct out of intuition and so-called gut instinct. This suggests the importance of exploring the extent to which some behavioural norms such as insider dealing are considered acceptable in the business culture.[145] By the same token, investigating how financial decisions are made and their relationship to religious economic culture is equally important. For example, previous research has shown Islamic institutional traders respond more strongly to information signals that induce

[139] John Maynard Keynes *The General Theory of Employment, Interest and Money* (CreateSpace Independent Publishing Platform 1936) chapter 12. Also, Thaler Richard H. 'Mental Accounting Matters,' [1999] Journal of Behavioral Decision Making , 12 (September), 183–206.
[140] Shefrin Hersh, 'Beyond Greed and Fear: Understanding Behavioural Finance and the Psychology of Investing', [1999] Boston: Harvard Business School Press.
[141] Barners (n 107) 58.
[142] Haynes (n 109) 484.
[143] Clarke (n 68) 14.
[144] Langevoort (n 111) 53.
[145] Eugene Soltes, *Why They Do It: Inside the Mind of the White-Collar Criminal* (Perseus Books, 2016) 329.

them to trade highly skewed stocks when they have inside information, and that this attitude is based on the belief that they should decrease the risk of loss in their investment.[146] When investors receive positive inside information, there is a high probability that they will want to buy the related shares before that information is announced, and if they already have bought the shares, that they will buy more or at least will not sell those they have. In contrast, if investors receive negative inside information, then they are likely to sell them before the announcement to avoid losses, and if they do not already own the shares, but were going to buy them, then they will avoid buying them and do nothing, which is a form of negative insider dealing.[147]

Distributing the information through the announcement's mechanism influences human choice. Market regulation drives investors' choice through public information, avoiding decisions made by the fruitfulness of inside information. Influencing investors' choices toward decisions made with equal access to information made it necessary to introduce the disclosure duty, which is why markets move toward simpler announcements systems through technology. By this, regulators aim to pursue the market's goals and to better acquaint investors with their investment options, helping them to make more accurate decisions. But what shapes market goals?

Regulation can be based on several justifications that rationalise the control of human behaviour in terms of investment decisions. Insider dealing has several justifications; control can be seen in basic construction, economic reasoning and ethical perspectives.[148] There is no simple justification for the prohibition of such conduct because the amount of harm or benefit varies with each incidence of the behaviour. That is why authors describe insider dealing as a "mixed

[146]Abdullah Al-Awadhi, 'Deviation From Religious Trading Norms', [2019] Journal of Behavioral and Experimental Finance, Volume 22, 2019, Page 29.
[147] For further information on possible decisions of insiders, see Seredyńska, Iwona, *Insider Dealing and Criminal Law*: *Dangerous liaisons* (Springer 2011) 233.
[148]ibid 21.

bag" of financial activity.[149] As previously noted, there are a number of important principles related to prohibiting insider dealing, including fairness, equality, harm, market protection and liquidity, to name a few. The following section describes the Islamic literature on insider dealing in greater detail.

1.4 Insider dealing in the Islamic studies literature

This thesis demonstrates that the subject of insider dealing can be examined through the empirical rulings (*fatwas*) from different authoritative Islamic entities by analysing their different approaches and explore the reasoning behind these differences. It suggests that Islam can provide alternative solutions to legal, social and economic problems.[150] The solutions are not dependent upon territoriality, but are relatively independent and are equally applicable on a worldwide scale.[151] One could argue that ancient sources like the Quran and Hadith, which were written more than 1,400 years ago, cannot provide solutions to modern problems. This concern is answered through the different tools provided by Islam, such as Qiyas, diligence (*Ijtihad*) and fatwa. A fatwa is issued by a Muslim jurist expert in Islamic law (*Muftis*) in response to a specific issue, taking into account the principles found in Islamic primary and secondary sources. In the modern world, Islamic rules are often provided by Ifta institutions through the internet as an interpretative tool and are considered to be an ever-expanding field of investigation. Internet fatwas differ because they emanate from various Islamic schools and different schools of juristic

[149]Lambert, Thomas Andrew, 'Decision Theory and the Case for a Disclosure-Based Insider Trading Regime' (June 12, 2012). University of Missouri School of Law Legal Studies Research Paper No. 2012-18. 1.
[150] Abd Al-Haqq et al., *Fatawa Haqqaniyya*, (vol 1, compiled by Mukhtar Haqqani, Dar al-'U1um 2002) 579-80.
[151]Shaheen Sadar Ali, *Modern Challenge to Islamic Law* (CUP 2016) 268.

thought,[152] which enriches the research. Such differences in fatwas have led to the suggestion that Islamic law is separate from the Muftis' rulings.[153]

Up to now, (very) little research has addressed the question of did Ifta institutions issue fatwas on the subject of insider dealing? To answer this question, one should first explore the current IET literature. In recent years, many modern issues have been explored by Islamic scholars, who have conducted several studies related to insider dealing through the lens of Islamic law. In 'Shariʿa Normative Framework as to Financial Crime and Abuse',[154] Al-Kashif pointed out that Islamic law as stated in the Hadith and the Quran prohibits financial crimes, including insider dealing. He considered insider dealing to be a form of misconduct arising from the failure of staff to observe the rules of conduct or the standards of behaviour prescribed by the particular organisation. Noting that Islam promotes good ethics, morals, integrity and honesty, he concluded that insider dealing is prohibited by Islamic law; however, he did not specify clear evidence for his conclusion. In fact, there is no obvious scripture prohibiting insider dealing; Al-Kashif's conclusion is derived merely from his understanding of the sacred texts. Also, his definition of insider dealing is very restricted as it is limited to an employment relationship, which is too narrow to cover all insider-dealing theories. If, for example, a hacker commits insider dealing, he will not be covered under the prohibition because there is no contract or relationship between the abuser and the organisation.

[152]ibid 233.
[153]Wael Hallaq, 'From Fatwas to Furu: Growth and Change in Islamic Substantive Law' [1994] 1(1) Brill Islamic Law and Society 65. The author prefers not to use the term 'Mufti Law' as Muftis provide non-legal opinions rather than binding laws.
[154] El-Rehim Mohamed Al-Kashif, Abd, 'Shariʿas Normative Framework as to Financial Crime and Abuse' [2009] 16(1) Journal of Financial Crime 86.

In 'The Prevention of Financial Crime within the Islamic Legal Framework',[155] Faisal Atbani stated that insider dealing is prohibited in Islamic law by virtue of the Prophet's Hadith that 'He who deceives is not of me'.[156] Atbani, therefore, concluded that any practice that harms market prices is prohibited by Islamic law. Does that mean that the prohibition is conditioned on an outcome of damage, that is, if it causes no harm, then insider dealing is permissible? Atbani's research is based on his own interpretation and took a simplistic approach without looking into the difficult questions related to the different Islamic views on the subject. Furthermore, Atbani's study did not consider the possibility of several forms of committing insider dealing from insiders and outsiders and it did not address the different ways of committing insider dealing according to modern theories. Developing an understanding of the Islamic philosophy of investment in shares and the outcome will enable the rules that govern any transaction to be determined, thereby enabling the question of the outcome of any insider dealing transaction to be explored.

In 'Insider Dealing: Fraud in Islam?',[157] Jabar examined insider dealing from an Islamic perspective. Using analogical reasoning (Qiyas), the author found that insider dealing constitutes fraud under Islamic law and should be prohibited; moreover, insider information is considered to be a hidden defect in the transaction. The study supports its conclusion through the Qiyas in Islamic literature and the Hadith and goes on to suggests that various schools of Islamic jurisprudence, including the Shafi'i, the Hanafi, the Hanbali and the Maliki, contend that the victim of insider dealing has the option to ratify the transaction.

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[155] Faisal Atbani, 'The Prevention of Financial Crimes within Islamic Legal Framework' [2007] Institute of Economic Affairs, Oxford: Blackwell Publishing, page 27.
[156] Imam Abul-Husain Muslim, *Sahih Muslim: An Islamic Legal Texts*, (The Islamic Foundation; Bilingual edition 2019) hadith no 183.
[157] Siti Faridah Abdul Jabar, 'Insider Dealing: Fraud in Islam?' [2012] 19 (2) Journal of Financial Crime 140.

However, none of the above studies uses fatwas as a source of Islamic law. Rather, they are all based on the authors' diligence in interpreting Islamic primary and secondary sources and in supporting their arguments with reference to jurisprudence. Jabar's study did not examine the subject of insider dealing in its different forms and did not explore the roots or foundation of the Islamic approach nor did it question the basic components of insider information. In sum, the previous research on the subject did not critically examine the different models that had already been developed by the Western law. The author had some difficulty referring to other Islamic studies and to the work of other Islamic authors on insider dealing because of their scarcity. Nevertheless, the thesis suggests that a philosophical approach should have been used to better understand the Islamic position on insider dealing in addition to the empirical rulings (fatwas), as discussed in Chapter 2.

1.5 Conclusion

The main goal of the chapter was to provide a brief summary of the literature relating to insider dealing in Western jurisdictions (the United Kingdom and the United States), which provides the foundation for this thesis. It aimed to understand the conduct on a legal, theoretical, and behavioural (practical) level in order to better discuss the topic from the Islamic perspective. The chapter successfully explored insider dealing theories and discussed the development of the laws in the chosen jurisdictions in section three. The section illustrated that the development of insider dealing laws evolved over time through a reactive pattern due to the complexity of the conduct and the failure of legislators and courts to develop a predictive model capable of covering the various instances of insider dealing. These findings indicate that the topic could have been better tackled through a moral lens, leading to the development of an ethical model focused more on the behavioural aspect of insider dealing. In Section 1.4, the basic elements and

phases of insider trading were discussed, while in Section 1.5 attention turned to Islamic studies of insider dealing. It showed that the relatively small body of Islamic literature on insider dealing took a simplistic approach that ignored the complexity of the conduct. Such an approach is problematic because it remains narrowly focused on only the classical view of insider dealing. These studies also ignored the availability of the *Ijtihad* mechanism and Ifta institutions, concentrating instead merely on the authors' opinion. The chapter concludes that this study can avoid the drawbacks of previous Islamic studies by adopting a different methodological approach that is based on empirical rulings (*fatwas*), which could be more useful for identifying and investigating the various Islamic positions in relation to the conduct. Also, the study could benefit from a range of opinion by applying the approach of comparative jurisprudence (*Ikhtilaf*). Furthermore, it proposes to apply a deep philosophical analysis of the topic within the Islamic jurisprudence, as will be explained in Chapter 2.

Chapter 2 : Theoretical Framework and Research Methodology

2.1 Introduction

In this study, the subject of insider dealing is investigated using an Islamic epistemological framework, which frames the subject in terms of Islamic ethical and economic considerations. This chapter discusses the specific methods through which the research and analysis are conducted. Chapter 1 contextualised the topic of insider dealing by providing background information on the historical development of the theories and laws of insider dealing along with a review of the literature. This chapter describes the methods used in investigating insider dealing from an Islamic perspective and is divided into seven sections.

The first and second sections present the research hypothesis and research questions. Section three begins by laying out the theoretical dimensions of the research and explains its focus on the theory of regulation through religion. It considers the role of *Maqasid Al Shariʿa* (aims of the religion) as a theoretical framework for the discussion. In section four, the research methodology, which is based on comparative jurisprudence (*Ikhtilaf)* and the empirical rulings (*fatwas*), is explored. Ethical considerations are outlined in section five, while section six presents the limitations of the study. The chapter concludes with a brief review of the methodology.

2.2 Research hypothesis

The current study is framed on the hypothesis that Islam is a religion that concerns itself with all aspects of human life.[1] Accordingly the research aims to explore how IET regulates insider

[1] The Quran, Almaeda [5:3], Almulk [67:14].

dealing. The research hypothesis tests insider dealing in the context of Shariʿa rules. This is achieved by examining the following questions:

(1) Does IET address the issue of insider dealing?

(2) If so, what general principles of Islamic thought apply to insider dealing?

This hypothesis will be tested using current knowledge on insider dealing in Western law. If the hypothesis withstands the test, eventually the study may yield an IET position on insider dealing. The study was initiated with a review of previous studies in this area (Chapter 1).
Given that IET is based on different Islamic schools, it could conceivably be hypothesised that Islamic thought will provide several different positions on insider dealing reflecting the different schools of thought and the role of *ijtihad* and logic in the process of providing fatwas. Therefore, this study sets out to test the following statement:

(3) IET not only covers insider dealing but also provides different positions from within Islamic thought on insider dealing, which will benefit the research field greatly.

2.3 Research questions

One primary research question and four secondary questions are addressed in this thesis. The specific questions which drive the research are:

Primary Research Question*: To what extent does IET recognize and cover insider dealing differently?*

Secondary Research Question No. 1: Why is the impact of IET crucial to the legal development in the Islamic countries?

Secondary Research Question No. 2: To what extent does IET organise ownership, recognise corporation and investment in shares and distinguish information differently?

Secondary Research Question No. 3: What is the IET position on insider dealing?

Secondary Research Question No. 4: Why does the approach to insider dealing differ within IET?

The primary question is answered indirectly by responding to the secondary questions. The initial secondary question justifies the research lens (Islamic perspective) by arguing that IET is of crucial importance to legal developments in Islamic countries and exploring how fatwas play a notable role in shaping Islamic legal thought (Chapter 3). The second secondary question takes a philosophical approach to the topic by exploring the Islamic position on the basic components and stages of insider dealing (Chapter 4). The third secondary question examines differences within Islamic thought in relation to insider dealing by considering the different themes (economic, moral, permissibility and legal positivist) that emerge from the fatwas (Chapters 5-7). The fourth and final secondary question explains why the answers provided by the fatwas interestingly differ in relation to insider dealing despite the fact that they all come from the same paradigm (Islamic thought).

The research questions are answered through a thorough and comprehensive analysis of currently published studies in doctrinal research. The purpose in so doing is to ascertain the unique insights, perspectives and experiences of leading scholars of Western and Islamic economics, especially in relation to primary and secondary sources of Shariʿa principles, values, rules and provisions. This is accomplished by investigating the Qur'an, Hadith, Islamic jurisprudence and fatwas, among other sources.

2.4 Theoretical framework

The research paradigm is influenced by Islamic thought, wherein a set of common beliefs, values and principles are shared in the sources of Islamic religion and addressed in an economic

sense. The paradigm then considers the issue of financial discipline and analyses the subject of market abuses from an Islamic perspective, explaining the topic of insider dealing through IET.

The Islamic theoretical framework is a system of ideas that aims to describe and explain insider dealing using a logical Islamic economic and moral approach consistent with the structure itself. This leads to an Islamic analysis of the laws on insider dealing and the application of IET to the topic of insider dealing based on the premise that the challenge of market abuse requires an ethical resolution.[2]

This study also considers the interrelationship of legal practices and doctrines in a moral context related to insider dealing in an Islamic ethical sense. In contrast to IET, Marxism views insider dealing through the lens of inequality between different classes, while the capitalist approach aims for economic efficiency.

The theoretical framework is based on the theory of regulation through the religion of Islam.[3] The religious framework places religion at the heart of the legal system.[4] IET consists of several legal rules and is considered a major source of many Islamic legal systems.[5] Originally, Islamic law was understood to be limited to the historical sources of the Quran and Sunnah,[6] yet it should not be confined to that. In addition to the clear binding rulings in the primary sources, the Quran and Sunnah, there is a second modern set of rules[7] comprised of the jurisprudential fatwas concerning modern issues, over which jurists differ and may issue different fatwas.[8] For this reason, the rules of Islamic law should not be binding in nature in the modern world unless a

[2] Wael Hallaq, *Impossible State* (Amr Othmantr, Arab Centre for Research and Policy Studies 2014) 24.
[3] Hassan Alomary, *Islamic Economy Thoughts by Ibn Qayyim* (MA dissertation, Yarmouk University 1997) 1.
[4]Domingo R, *God and the Secular Legal System* (CUP 2016) 166.
[5] For example, the Saudi Arabia, Pakistan,Yemen, Iran and Libya Egypt, Qatar, Bahrain, Kuwait, the United Arab Emirates, Syria, Sudan and Iraq. Chapter Three, page 94.
[6] See Shariʿa definition by Hallaq, (n 2) 300.
[7] Abdul Halim Awais, *Application of Islamic Law* (Saudi Research Company 2013) 182.
[8] The peremptory texts are limited so the term "Islamic law" should not be understood in its narrow sense but rather to include jurisprudence from a variety of jurists. See, Wael Hallaq, *A History of Islamic Legal Theories* (CUP 1997) 155.

decision has been made by the state to adopt a certain fatwa from a particular jurist and codify into law. The variety of Islamic rulings makes Shariʿa structurally and organically tied to the world around it,[9] which differs according to each social tradition. The process of developing Islamic law and its further sources has taken centuries,[10] and yet there is no single codified book that includes one agreed set of Islamic laws. This fact enriches the research field and contributes to the flexibility of Islamic law, which can vary from one school to another, as per their differing traditions.

When applying Islamic law, a primary question must be asked. Why do we have this rule? What is the purpose and aim of applying it? In positive law, these questions are considered mostly in the context of legal philosophy.[11] In simple terms, however, it could be argued that the law is there to achieve justice and it is there for the common good. Legal studies are merely an attempt to reconcile these goals in parallel with the legislation; in reality, however, these goals are not pursued. While, when applying Islamic law, the aims must be considered and applied along with the rules.

The term (*Maqasid Al-Sharia*) (MS) refers to the purpose of Islamic provisions, which is to preserve the five fundamentals: religion, soul, mind, family and money. All acts and behaviours that help to preserve those fundamentals are considered MS, while everything that does not serve that purpose is necessarily contrary to the purpose of the Islamic provisions.[12] In other words, the purpose of Islamic provisions – that is, of MS – can be recognised by examining the wisdom of the Islamic texts, which are mainly to benefit humanity and safeguard people's

[9]Wael Hallaq, *Sharia Theory, Practice, Transformations* (CUP 2009) 544.
[10]H Patrick Glenn, *Legal Traditions of the World* (5th edn, OUP 2014) 182.
[11] Faiz Hussain, *The Purposes of Shariʿa and the Philosophy of Law* (Al Furqan Islamic Heritage Foundation 2011) 76.
[12]Abu Hamid Al-Ghazali, Hamza bin Zuhair Hafez (ed), *Almstcefy of Osoul Knowledge* (Medina Printing Company 1992) 251; Ibn Ashour, *The Purposes of Islamic Law* (Tunisian Publishing Company 1978) 51.

interests.[13] Also defined as the soul of Islamic law,[14] MS can be divided into three major areas for the majority of Islamic scholars, namely, necessities, needs and improvements.[15] It has a significant influence on the fatwas, especially in the field of financial transaction, because of its ability to contribute to contemporary issues.[16]

Abu Al-Juwaini, one of the main Islamic authors who devoted his research to the general principles of MS, argued that MS can be recognised by developing an understanding of the main principles of Islam and having an insight into the Islamic religion. He explained the relationship between crime and punishment in Islam and the reasons behind them, which are based on the sanctity of blood, money and honour. He contended that 'Qiyas' must not be applied if they collide with the intent (goals) of the provision. His research focuses on the ideological and doctrinal aspects of the religion.[17]

The scholars Al-Ghazali, Alamdy[18] and Alrazy,[19] all from the Shafi'i school,[20] argue that the importance of maintaining MS is clearly demonstrated by Islamic primary sources. They argued that Islamic scholars should consider the five Islamic fundamentals and, in the event of a conflict between necessities and needs or improvements, then necessity provisions should be paramount.[21]

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[13] Ahmed Al-Risouni, *The Theory of Maqasid in Imam al-Shatby* (2nd edn, World Book House 1996) 7.
[14] Khalifa Ababaker Al-Hasan, *Philosophy of Maqasid al-shariʿa* (Wahba Library for Printing and Publishing 2000) 7.
[15] Abu al-Ma'ali Al-Juwaini, *Proof in the Origins of Jurisprudence*, pt III (Dar al-Kuttab al-Sultiyya 1997) 923; Taha Al-Alwani Al-Razi (ed), *Almahsoul* (3rd edn, Al-Resala 1997) 220.
[16] Riyad Al-Khulaifi, 'The Purpose of Shariʿa and its Impact on the Jurisprudence of Financial Transactions' [2004] 17(1) King Abdulaziz University Journal: Islamic Economics 45.
[17] Al-Juwaini (n 15).
[18] Abdul Razzaq Afifi Abohsen Al-Amedi (ed), *AlEhkam fe osoul Alahkam* (Dar Al-Sumai'i 2003).
[19] Al-Alwani (n 15).
[20]The Shafi'i is one of the four schools of Islamic law in Sunni Islam. See Wael Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 218.
[21]Hamad Al-Kubaisi Abu Hamid Al-Ghazali (ed), *Shefa Al-Ghaleel* (Al-Ershad Press 1971).

Al Ezz bin Abdul Salam is another main Al- Shafi'i'[22] author who has contributed to MS. He wrote in depth on the topic of achieving people's interests as a goal in Islamic law. In his book, he prioritised and divided these interests, weighing them according to their importance and identifying the main MS purposes and goals. However, much of his research was devoted to the purposes of worship, such as prayer, fasting, pilgrimage, *jihad* and faith.[23]

Ibn Taymiyyah[24] and Ibn Qyem also referred to the importance of MS, noting that MS is recognised by the jurisprudence and experts in the Islamic religion. They added that MS is not only about protecting the five fundamentals but also about bringing benefits to people and defeating evil. They indicated that those who say that Islamic provisions do not include these purposes are misrepresenting God, as wisdom is more important than the text.[25] They further asserted that by understanding the goals of Islamic provisions, we can change the rulings or fatwa over generations by considering people's interests. Such an approach provides a relatively flexible tool for tackling contemporary issues.

Al-Shatby, a leading authority on MS in the Maliki School,[26] divided MS into two sections, one being God's purpose and the other the people for whom these provisions are intended. He also explained that MS can help to explain the reasons for the provisions. He provided clarification on MS for other researchers[27] by showing the importance of providing new rules to address the issues that contemporary Muslims face via (*Masaleh Mursala)* (MM), which

[22] Ibrahim Al-Shatby and Salim Al-Hilali (eds), *Al-I'tasam*, (Dar Ibn Affan 1992) 133.
[23] Taha Abdul Raouf Ezz bin Abdul Salam (ed), *Rules of Judgments in the Interests of the Anam* (revised edn, Library of Al Azhar College 1991).
[24] Ibn Taymiyyah is considered one of the leading authors in the Hanbali School, which is one of the four orthodox Sunni Islamic schools.
[25] Ibn Taymiyyah, *Total Fatwas* (King Fahd Complex 1995); Al-Hasani Al-Hasan Ibn Qayyim al-Jawziyya (ed), *Healing Al-'Alil in Matters of Fate, Wisdom and Reasoning* (Obeikan Library 1999); Muhammad Azir Shams Ibn Qayyim al-Jawziyya (ed), *Eghathat Alehfan* (Islamic Jurisprudence Complex 2010).
[26]The Maliki School is one of the four major schools of Islamic Sunni law. See Hisham Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira 2006) 26.
[27] Muhammad Al-Youbi, *Maqasid Al-shariʿa* (Dar al-Hijra Publishing 1998) 70.

involves inferring whether an action serves the public interests of the Muslim community as intended in Islam.[28]

It is important to understand the differences between MS and MM because of the direct link between the two terms. The term (*Masaleh*) refers to the interests of Muslims as intended by Islamic law, which was originally based on the five fundamentals. There are three kinds of *Masaleh*. The first are binding; these are mentioned in Islamic primary sources. The protection of money is an example of this type. The second type are those that have been revoked and are no longer accepted by Islamic primary sources, such as the prohibition of very high-risk investment decisions. The third type is the (*Masaleh Mursala)* (MM), which are not mentioned in or cancelled by the Islamic sources but are determined by inference from general Islamic principles. This means contemporary issues such as insider dealing can be addressed by inferring the interests based on an understanding of the purposes and aims of the general Islamic doctrines, which are mainly to prevent harm, repair damage and achieve people's best interests. Therefore, when a contemporary issue is not regulated in the primary Islamic sources, a rule can be extracted through MM.[29]

Opinions differ between the Islamic schools as to whether to accept MM as a source of law. For instance, many of the scholars in the Al-Shafi'i and Hanafi schools do not accept MM as a way of extracting rules since it does not draw directly from Islamic primary sources,[30] while the Maliki and Hanbali schools rely on MM as a source of legislation[31] provided there is no

[28] Al-Shatby (n 22).
[29]Al-Ghazali (n 12) 528.
[30] Ibn Amir Haj, *Ataqreer and Tahbeer* (2nd edn, Dar Alkutub 1983) part III 286. See also Al-Amedi (n 18) 160.
[31] ibid 115. See also Mohammed Amin, *Masaleh Mursala* (Islamic University 1990) 10.

conflict between MM and the Quran, Hadith and the consensus, and provided MM is general and not related to matters of worship.[32]

A notable theory related to MM was discussed by Altofy, who stated that the aims and goals of Shariʿa are more important than its provisions. Therefore, MM should have supremacy over any other provisions that are in conflict with it, even when a provision arises from the consensus. Altofy's theory is based on the Hadith '*La Dharar Wala Dherar'*,[33] which states that no harm or damage should be caused by any Islamic law or provision. Therefore, any provision that brings harm should not be considered because it conflicts with this principle. He claims that there is a consistent primary interest in preventing harm in Islamic law, which must be considered before accepting any rule. He provided several hypotheses to which he applied the rule to test his theory.[34] His theory was rejected, however, because it was at odds with a basic doctrine of the Quran, which states that in the case of disputes, the Quran and Hadith are supreme.[35]

The main principles of MS relating to financial and economic transactions have been summarised in the works of Al-Saudi and Al-Khulaifi as follows: (1) the purpose of justice and the prevention of injustice, (2) honesty and transparency in preventing deceit and concealment, (3) promoting trade, (4) coalition building and cooperation, (5) facilitation, (6) damage prevention, (7) addressing and redressing the damage caused, (8) preventing the disposition of money unlawfully and (9) achieving security of funds.[36]

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[32]ibid 532.
[33] Ibn Rajab al-Hanbali, *Jame Aloloum* (Alresala Establishment, 2001, pt II, Hadith no 32) 207.
[34] Najm al-Din al-Tufi and Ahmed al-Sayeh (eds), A *Message in the Care of the Interest* (Egyptian Lebanese House 1993). See also Mustafa Zeid, *Interest in Islamic Legislation and Najm al-Din al-Tofi*, (2nd edn, Dar al-Ulum Library 1946).
[35] The Holy Quran, Alshoura [42:10]. See also Alnesa [4:59].
[36] Abdul-Wadoud Al-Saudi, 'The Purposes of the Maqasid Shariʿa and its Application in Contemporary Islamic Transactions' (International Conference on Islamic Banking and Saudi 2010) 3 and 26.

MS can be understood through the Quran, Hadith and consensus[37] and can be extracted by extrapolation from those primary sources.[38] Al- Al-Ghazali emphasised the importance of MS when applying Islamic law and Shariʿa to modern issues, stating that 'one of the main aims of Shariʿa's is to protect money'.[39] Any rule that can 'prevent harm and damages and provide for the interest of the people is a fundamental principle in MS[40] and in case of conflict between two MS, the rule that eliminates the most severe damage must be applied'.[41]

The primary aim of this thesis is to propose a conceptual theoretical framework based on the theory of regulation through religious thought and rules and to consider the role of MS when applying Islamic law in the operative frameworks from an Islamic jurisprudential perspective. The thesis proposes the application of the Hadith '*La Dharar Wala Dherar*'[42] from an economic perspective with the aim of preventing harm and damage, together with the application of the economic justice principle suggested by Al-Sadr,[43] who stressed on the idea of justice (*Aladala Al-Ijtimaiya*) as a fundamental foundation of IET. This principle is based on ethical standards,[44] which shows that the Islamic legal system is based on both morality and law.

2.5 Research methodology

The current research adopts a socio-legal comparative approach to examining the relationship between law and religion and the effect of Islam on insider dealing laws. The research emphasises the subjective nature of Islamic thought and aims to review insider dealing regulations through the lens of Islamic economic principles. The research assumes a posteriori

[37] ibid 258.
[38] ibid 259.
[39] Al-Ghazali (n 12) 251.
[40] ibid 251.
[41] ibid 256.
[42] Al-Ghazali (n 12).
[43] Alsadr Mohammad, *Iqtisaduna: Our Economics* (vols 1 & 2, World Organization for Islamic Services 1987) 312.
[44] Chibli Mallat, *The Renewal of Islamic Law: Muhammad Baqer Al-Sadr*, Najaf and the Shi'i International, (CUP 1993) 122.

knowledge derived from empirical research (that is, data collected from a survey of 'fatwas') in order to generate rich, in-depth data from elite Muslim scholars. In so doing, the study also attempts to defend the view that fatwas have a crucial role in developing legal thought as a moral and legal tool in Islamic countries, and that Islamic institutions have an essential share in the development of the legal notion.

2.5.1 Comparative law

Comparative law, which is considered to be as old as the law itself.[45] It takes several forms.[46] This study examines the subject through Islamic comparative jurisprudence,[47] which is a form of Islamic Jurisprudence that assesses the views and doctrines of Islamic jurisprudence on certain issues as derived from different Islamic schools (both Sunnis and Shi'a sects). Islamic scholars may produce different legal opinions according to their understanding of a case,[48] as Islamic jurisprudence is characterised by legal pluralism.[49] That is why Muslims require a certain method to assess the opinions systematically. This method is provided through 'Islamic comparative jurisprudence' (discussed in Chapter 8), which is concerned with examining all the opinions that are provided by the various doctrines so as to reach the correct opinion. Towards this end, the method suggests certain processes and steps which should be followed to compare and assess the legal opinions. The first step is for the author to present the facts of the case; then,

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[45] See Dagmar Schieck, 'Comparative Law and European Harmonisation – A Match Made in Heaven or Strange Bedfellows?' [2010] 21(2) European Business Law Review 25. Also see, Gyula Eörsi and Gábor Pulay (trs), *Comparative Civil (Private) Law* (Akadémiai Kiadó 1979) 17.

[46] Such as: universalism, Functionalism, Critical socio-legal, Numerical comparative law, Global comparative law, Implicit comparative law. See, David Clark, *History of Comparative Law and Society* (Edward Elgar 2012) 12. Also, Mauro Bussani (ed), *The Cambridge Companion to Comparative Law* (CUP 2012) 52. And, Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?* (Rabels Zeitchrift fur Auslandisches and International Privatrecht 2003) Vol. 67, 431. Plus, Mathias Siems, Comparative Law (CUP 2014) 28, 174 and 210.

[47] This science used to be called science of dispute. See, Muhammad Al-Tabari, *Differing views of scholars* (Dar Al-Kuttab al-Ulamia, Beirut 1999) 6.

[48] Muhammad Al-Derini, *Comparative Islamic Jurisprudence with the Schools of Thought* (Damascus University Press, 1992) 5.

[49] Hallaq (n 2) 124.

the problem should be specified. Thereafter, the source of the problem should be identified along with 'the origin of the dispute', that is, the source of the difference in opinion. Then, each opinion must be discussed along with the evidence used to support it. Lastly, the author must weigh the arguments in order to reach a conclusion.[50] The objectives of comparative jurisprudence are to develop jurisprudential studies benefit from the intellectual exercise of comparative analysis.[51] This research emanates from the idea that Islam constitutes a rich, diverse body of knowledge which can contribute to the literature through its different schools and fatwas.

It is important to distinguish Islamic law from Muslim countries, as most Muslim countries adopt either the French-based civil law system or a common law system, which, as will be shown in Chapter 3, means that frequently Islamic law is applied only to family law. Therefore, this thesis relies on Islamic primary and secondary sources plus the fatwas when referring to Islamic law.[52] On that basis, the thesis examines the differences and similarities between the rulings within Islamic thought. This leads to an exploration of the common elements from an ontological, methodological and epistemological perspective.[53] The main Islamic terms are translated to verify the concepts and ideas and make them accessible and understandable[54] while stating and retaining the original terms to avoid any misrepresentation.[55]

2.5.2 Empirical rulings 'surveys' (fatwas)

[50] Abdulkarim Al-Namla, *The Discipline of Comparative Jurisprudence in Islamic Jurisprudence* (Al-Rashed Library, Riyadh, 1999) 64.
[51] Mohamed Al-Bouti, *Lectures in Comparative Jurisprudence* (House of Contemporary Thought 1970) 5.
[52] Bussani (n 47) 328.
[53] Pier Giuseppe Monateri (ed),*Methods of Comparative Law* (Edward Elgar 2012) 2.
[54]Esin Örücü and David Nelken (eds) *Comparative Law: A Handbook* (Hart 2007) 426.
[55]Peter de Cruz, *Comparative Law in a Changing World,* (3rd edn. Routledge Cavendish 2007) 220. Bussani (n 47) 328. Monateri (n 49) 2. Örücü (n 50) 426.

The research also seeks to develop Islamic conceptions of insider dealing and show the differences in approach within IET. The research hypothesis indicates that Islamic thought covers all aspects of life, including economic issues. This hypothesis can be tested via the potential answers derived from the 'fatwas requests' gained from authoritative Islamic institutions and the interpretation of other Islamic material. The process through which the fatwas discussed in this research were selected and analysed can be divided into four stages. First, the researcher identified the questions to be asked. Second, the Islamic fatwa institutions were identified. Third, the researcher approached the authoritative Islamic institutions to obtain answers, most of which were in Arabic. Fourth, the fatwas were translated from Arabic into English through a certified translation body. At this stage, the study proceeded to content analysis (discussed in Chapters 4-8). The objective of this empirical research is to understand the approaches taken by Islamic jurists in relation to insider dealing and then to build a theoretical understanding of the body of knowledge.

The method involved the distribution of a survey comprising a series of structured questions posed to the Islamic 'Ifta' institutions. This was essential to gain an in-depth understanding of the Islamic view of insider dealing, as well as the effectiveness of Islamic law in relation to insider dealing. The data collected was interpreted by the researcher to assess its effectiveness.

The survey two questions designed to solicit an Islamic perspective: (1) What is the position of Shariʿa law towards insider dealing and information abuse in the stock market? (2) Where this act is prohibited by the law, what Islamic principles underpin this prohibition? The collected data was then categorised, and a qualitative approach was used to analyse the information gathered and assess the differences identified.

2.5.3 Collecting the fatwas

The survey adopted a 'constrained language' approach. The questions were developed in word form to establish the Islamic approach and the Islamic principles towards the topic. The researcher approached several Islamic authoritative bodies with the legal power to establish Islamic rulings in relation to various issues, including financial matters. The Ifta bodies consist of qualified jurists who issued formal opinions on the questions from an Islamic point of view. These opinions are based on Islamic primary and secondary sources.

During the collection process, the fatwas' response level can vary from one *ifta* institution to another. This means that some Ifta institutions may provide direct and short responses, (for instance, a one-sentence fatwa),[56] while other institutions may provide a much longer response.[57] The fatwa may be straightforward,[58] or may have a thorough reasoning,[59] or no justification at all.[60] Reasoning enriches the legitimacy and quality of the response.[61] Muftis usually have a tendency to refer to Islamic sources such as the Quran and the Hadith to augment the trustworthiness of the given opinion.[62] There is no restriction on the length of the fatwa. However, it is expected to be explicit as the aim of the *ifta* process is to guide the receiver (*mustafti*) on the issue at hand; thus, the content is goal-oriented towards advising him on what to

[56] ibid. Also, fatwa number gCT49Q5U3qA by Sayyid Ali Hosseini Khamenei leader office, Iran (7-12-2018).
[57] For example, a fatwa of three pages issued to the author, fatwa number 108819 by the General Iftaa Department the Hashemite Kingdom of Jordan to author (28-11-2018). Also note that fatwas may extend to 600 pages, for instance, the fatwa on suicide bombings and terrorism by Tahir-ul-Qadri. See, Muḥammad Tāhirulqādrī, *Fatwa on terrorism and suicide bombings* (Minhaj-ul-Quran International 2010). However, such length is rare.
[58] For example, fatwa number 82017 The Ministry of Awqaf and Islamic Affairs, the Eftaa and Islamic Research Sector, al-Eftaa Department, Kuwait to author (14-2-2017).
[59]For example, fatwa number FR-56945-2018 from Dubai Iftaa Department, United Arab Emirates iacad.gov.ae to author (10-3-2018).
[60]For example, fatwa number gCT49Q5U3qA by Sayyid Ali Hosseini Khamenei leader office, Iran (7-12-2018).
[61]Ahmed Fakhri, *Fatwas and court judgments: a genre analysis of Arabic legal opinion* (Columbus: The Ohio State University Press 2014) 99.
[62] For example, fatwa 108819 the General Iftaa Department, Jordan to author (28-11-2018). Also, fatwa number FR-37112-2017 from Dubai Iftaa Department, UAE, iacad.gov.ae (25-12-2017).

do.[63] The depth of knowledge the *ifta* institution has in relation to the topic under question is another reason for having a richer response.[64] Generally, lengthy fatwas are issued to the public, especially those related to societies' critical challenges, while fatwas issued to individuals are shorter in terms of their wordcount.[65]

The researcher approached the following Islamic authorities: (1) The Ministry of Awqaf and Islamic Affairs, the Eftaa and Islamic Research Sector, Eftaa Department in the State of Kuwait; (2) the Department of Islamic Affairs and Charitable Activities, Iftaa Department, Dubai government (IACAD), United Arab Emirates (UAE); (3) the General Authority of Islamic Affairs and Endowments in UAE; (4) the Permanent Committee for Scholarly Research and Ifta of the Member of the Council of Senior Scholars in the Kingdom of Saudi Arabia; (5) Ifta committee and research of Al-Azhar, the Arab Republic of Egypt; (6) Dar al-Iftaa Al-Missriyyah, Egypt; (7) the General Iftaa Department in the Hashemite Kingdom of Jordan; (8) Dar Al Ifta Al Falastinia, State of Palestine; (9) Sayyid Sistani Ifta office, Iraq; (10) the office of Grand Ayatollah Sheikh Basheer Al-Najafi, Iraq; and (11) Ifta office of Sayyid Ali Hosseini Khamenei (leader office) in the Islamic Republic of Iran. The data derived from this empirical research is original. Using this data, an answer the primary research question was developed, and the hypothesis was tested.

2.5.4 Fatwas analysis

[63] He ought to be specific with the objective of providing a realistic response on how to behave. See, Calder N and Gleave R, *Islamic Jurisprudence in the Classical Era* (Colin Imber ed, Cambridge University Press 2010) 167.
[64] Nevertheless, in a fatwa a Mufti tend not use academic phrases, such as 'there are two views on the matter'. See Nawawī, Rawḍat al-Ṭālibīn (Beirut: al-Kitāb al-Islāmī, 1985), XI, 113.
[65] Zubaida S, "Contemporary Trends in Muslim Legal Thought and Ideology" in Robert W Hefner (ed), *The New Cambridge History of Islam,* (Cambridge University Press 2010) vol 6, 282.

This research examines the fatwas received in response to the survey and categorises them according to the themes that emerged from the data collected. The themes will be assessed by examining the constructs that appear in the fatwas.[66] The research follows the steps prescribed by Harding for the identification of themes,[67] according to which themes were first organised into initial categories based on reading the fatwas. The author then began to code each fatwa based on conceptual themes. He then reviewed the list of themes and decided the order in which to discuss them. The author then completed the list of themes and coded them in a reflective manner. The fatwas were carefully re-read several times to make sure that all potential themes were included.[68] Because of the low number of fatwas received from the Ifta institutions, the researcher did not use NVivo but rather executed the coding process manually.[69]

Through this process, the research aims to systematically identify the specific characteristics of the IET position on insider dealing. This is achieved by determining the Islamic economic concepts in Islamic primary and secondary sources objectively and applying those principles to the sample data provided by Western law, as well as interpreting the conceptual data obtained from the Islamic institutions.

A fatwa is defined as an answer to a question or a statement as per the Islamic law.[70] It is also defined as the effort to search the Shariʿa in order to devise Islamic rules.[71] A fatwa should be issued through a scholar who has acquired a degree in Islamic science who can derive Shariʿa

[66]See the explanation of generating themes in Lisa M Given (ed), *The SAGE Encyclopaedia of Qualitative Research Methods* (vol 2, Sage Publications Ltd 2008) 868.
[67] Harding, *Qualitative Data Analysis* (2nd edn, Sage, 2019) 20.
[68] Rosaline S. Barbour, *Introduction Qualitative Research* (2nd edn, Sage Publications Ltd, 2014) 260.
[69] Lisa M Given (ed), *The SAGE Encyclopaedia of Qualitative Research Methods* (2nd edn, Sage Publications 2008) 149-172.
[70] Ali Al-Hakami, *The Origin of Fatwa* (2nd edn, Al-Makaya Library Al-Rayyan Foundation for Printing and Publishing, 2001) 7.
[71]Saleh Al-Fawzan,'Al'ijthad Wa'imkanuh fi Hatha Alzaman' [2003] Journal of Islamic Fiqh Counsil, 5th edn, p 260. Also, Mohammed Al-Shazly, 'Fateh Bab Al'ijtihad' [2003] Journal of Islamic Fiqh Counsel, 5th edn, p 257.

rulings through detailed evidence.[72] The primary principle of Islamic law is to accept that rule evolve and develop over time. This means a fatwa can be changed over time.[73] The principle is not absolute as it is not applicable to the clear and binding rules in the Quran and Hadith, such as the prohibition of banking operations related to usury. It applies only to customary rules. Such flexibility is derived from the Quran.[74]

Fatwas can be issued by an individual 'Mufti' or through an authoritative Islamic body (institution). The latter method is referred to as collective diligence (*Ijtihad Jamaei'*), meaning that the fatwa has been reached by the agreement of a majority of Islamic jurists following discussion and consultation.[75] This process in which a group of Islamic jurists consult and discuss a fatwa before issuing it is promoted by the Quran[76] and Hadith.[77] The current research relies on data collected from Islamic authoritative bodies (that is, a group of scholars) on the assumption that a ruling developed in this way will be more accurate than one issued individually.[78] The method of collective diligence addresses developments more effectively than individual diligence because it consists of a group of Muftis who understand the circumstances, culture and society in a better way as they utilise a group's method of thinking, which ensures accurate analysis and critical evaluation of the issues.[79] Most institutions include scholars who specialise in different fields and take part in regular discussions and brainstorming sessions to

[72] Al-Hakami (n 70) 17.
[73] Mohammed Al-Haskafi, *Al-Durr Al-Mukhtar* (Abdel-Moneim Ibrahim ed, Dar al-Kuttab Al-Alami for Publishing, 2002) 598. Ali Haider, *Durr Alhekam Majalat Alahkam*, (Dar Alam Alkutub, 2003) 36 (Article 39 – Majalat AlAhkam AlAdliya). Also see, Wael Hallaq, *Authority, Continuity and Change in Islamic law* (CUP 2001) 89.
[74] The Quran, Baqara, [2:185].
[75] Yusuf al-Qaradawi, *Ijtihad in Islamic Law* (Dar al-Qalam, 1968) 184.
[76] The Quran, Alshoura, [26:83]. Al Omran, [3:159].
[77]al-Jawziyya, (n 25) 62.
[78] Abdul Majeed Al Sharafi, *Collective Judgment in Islamic Legislation*, (Ministry of Awqaf and Islamic Affairs 1998) 77.
[79] al-Qaradawi (n 75) 182.

achieve the best answers to the questions posed.[80] This method achieves the principle of consultation, which is promoted by the Quran.[81] It is also an alternative to the method of consensus, which is one of the primary sources of Islamic law.[82]

Questions have been raised about the concept of fatwas and whether the *ifta* process should only be based on a lived situation, or whether it can also extend to cover theoretical ones. This is an important question that may reflect on how the author legal conditions the surveyed questions, and whether the outcome is a fatwa that has its religious preference or a mere legal opinion of the *ifta* institutions. A classical standpoint in the literature considers that fatwas must be centred only on lived situations and ought not to be theoretical.[83] However, such consideration lacks the philosophical understanding of fatwa in Islamic societies as a liberal education tool that answers both practical and theoretical questions (chapter three, 3.5.1). The fatwa is a statement of a Sharia posture that is provided upon request or need to correct people's conditions thus it should not be concentrated on mere lived situation but hypothesized situations too.[84] The process of *ifta* is a procedure of clarification and an informative practice that is not compulsory but discretionary.[85] It can take either practical or theoretical forms through a request of guidance about a proper future behaviour. This notion is supported by the obtained answers (fatwas) as all of them are titled by the ifta institutions as a 'fatwa' rather than a 'legal opinion' even though they are related to a theoretical question that is raised for the intent of this thesis.[86]

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[80] Mohammed Al-Shankaiti, *Ijtihad and its applications in the field of stock markets* (1st edn, Dar Ibn Hazm, 2008) 170.
[81] al-Jawziyya, (n 25) 56.
[82] Ali Hasab Allah, *The Origins of Islamic Legislation* (1st edn, Dar Al-Fikr Al-Arabi, 2011) 129.
[83] Nawawī, *Rawḍat al-Ṭālibīn* (Beirut: al-Kitāb al-Islāmī, 1985), XI, 103 and 110.
[84] The resolution of the International Islamic Fiqh Council No. 153 (17/2) regarding the fatwa and its conditions, the Organization of the Islamic Conference, seventeenth session, the Hashemite Kingdom of Jordan on 6/24/2006,
[85] Ahmed Attia, *Osul al'ifta' fi Qadaya Huquq Al'insan, Tajdid Alfatwaa* (Dar Al Iftaa Almasreya, 2018) 229.
[86] Ifta-01 to Ifta10.

Moreover, one could question that fatwas based on a real situation may be different or more valuable than when taking a theoretical approach. This argument is disputed for two reasons, first, the *ifta* institutions refrain from providing fatwas on issues that are related to ongoing judicial cases for ethical concerns,[87] as their role is to guide instead of provide a judgement (Chapter three, section 3.5.4 page 123). Second, the nature of the question at hand is practical as the author is looking into the viewpoint of Shariʿa regarding the use of inside information in stock markets, so whether it is conducted or not, the question is still valid. Also, the author requested the justification of the *ifta* position to clarify the principles behind the institutional standpoint against the behaviour.[88] This means the *ifta* position is oriented against the behaviour, not the persons behind the behaviour, as the outcome of the question is based on the notion of preventing the conduct, not combating the wrongdoer. The research aims to understand the Shariʿa perspective of the act to have a broader application of the ethical side of the conduct without attaching it to a culprit (Chapter One, section 1.3.1, page 35). Therefore, the author sees no value in surveying fatwas based on actual (lived) situation and considers the obtained answers as authoritative fatwa, especially that it is based on a practical phenomenon that may occur; hence, it is in the best interest of Islamic societies to prevent harmful financial acts through the process of producing fatwas.[89] Taking such a stance set off the opportunity for more constructive and fruitful academic debates further to shedding more light on contemporary issues.

2.6 Ethical considerations

[87] One of the main conditions of providing a fatwa by the Ministry of Awqaf and Islamic Affairs, Al-Eftaa and Islamic Research Sector, Eftaa Dept. Kuwait is to declare that there is no ongoing judicial dispute regarding the matter under question.
[88] Appendix one, page 362,
[89] For example, fatwa number 97010 from the General Authority of Islamic Affairs and Endowments in the UAE, Official Fatwa Centre, Awqaf.ae to author (19/12/2018). Also, fatwa number 63741 from Alazhar in Egypt, azhar.eg to author (5/12/2018).

The research is conducted according to the policy and principles outlined by Durham University in 'Ethical Approval of Research', the 'Code of Good Conduct in Research' and the 'Research Governance Framework Regulations' and in accordance with the 'Statement of Principles of the UK Socio-Legal Studies Association' (SLSA). The obtained fatwas were dealt with as per the regulations of each Ifta institution. Whenever necessary, consent was requested from the authoritative Islamic bodies. Information regarding the research was made available to them. The researcher informed the participants (that is, the Ifta institutions) that their participation was voluntary and they can ask questions about the topic. To clarify the focus of the research, an explanatory paper was sent along with the request for fatwas. The privacy of the fatwas is considered whenever requested by an authoritative Ifta institution. It was made clear that the official Islamic institutions may decide which information can be disclosed and which cannot be. Confidentiality and the secure storage of data were assured as per the Data Protection Act 1998 and the Freedom of Information Act 2000. The fatwas are kept and stored as per Durham University data repository policy and in accordance with its regulations and procedures. The researcher gained the necessary approval from the Law School's Research Ethics Committee. The intellectual property rights of the authoritative Islamic institutions which provided the fatwas have been taken into consideration. Consequently, the fatwas generated or used in the research are recognised as per the respective regulations.

2.7 Limitations of the study

1. The research should not be viewed as a set of Islamic provisions, fatwas and rules, but rather as an in-depth investigation of the topic within the context of IET for the purpose of deepening understanding of the topic through the lens of Islamic thought.

2. To bring different jurisprudential perspectives (‘*Fiqh’*) on insider dealing, thereby enriching the research, the study draws from several Islamic schools of jurisprudence without adopting one in particular.
3. The study posed open questions to a range of Islamic Ifta institutions from various Islamic schools to obtain several Islamic rulings ‘fatwas’ related to the topic. The fatwas are directed to the researcher by name because of this research. These fatwas are considered to indicate the basis on which elite scholars understand insider dealing in the context of religious rulings. The content of these fatwas is used as a reference in this research, together with other Islamic primary and secondary sources.
4. The explanation of the Islamic primary and secondary sources is focused exclusively on insider dealing. Consequently, the research does not provide a full explanation of the many principles that exist because of its limited scope. The research does not explain halal standards, usury, gambling and prohibited ‘*haraam’* practices. Furthermore, the research does not clarify the general Islamic economic principles that underpin the Islamic rules on ownership, possession, production theory, the concept of circulation, Takaful, Modaraba, Ijarah, and Shariʿa compliance, to name a few, as those principles are the subject of general Islamic economic studies, and any reference to them would be relatively limited to the topic.
5. The research may draw connections between different theories that relate to insider dealing for the purposes of clarification; these connections are not indicative of Islamic thought nor are they considered to be an Islamic way of conducting research.
6. The research also focuses on insider dealing in the regulated market, where investors trade shares among themselves and where companies do not take part in the transactions. The scope of this thesis is limited to insider dealing theories in Western and Shariʿa law. The

research points to insiders (directors, employees, senior and junior staff members), professional insiders, lawyers, accountants and consultants, market intermediates, financial advisors and brokers, relatives, spouses and family members. Outsiders include hackers.

7. "Western law" refers to codes, statutes, regulations, precedents, and any laws established by human authorities[90] in the United Kingdom and the United States, which, as noted previously, are considered to be foundation material from which to conduct the study. IET is indicated on the basis of the Islamic economic principles gleaned from primary sources, namely the Quran and Hadith, and secondary sources such as the consensus among Islamic jurists, the interpretation of Islamic provisions of the Quran and Hadith, and Qiyas, which is a method of comparison which involves applying Islamic rulings to new developments, in addition to the obtained fatwas, and obedience to any rule that maximises the public interests as long as it does not violate Islamic provisions.

2.8 Conclusion

The methods used in this thesis and the lens through which the researcher will investigate the topic were presented in this chapter. The chapter explains that the fatwas method was used to avoid the unreliability of previous studies on insider dealing from an Islamic perspective, which were based on subjective opinion. As noted in Chapter 1, previous scholars who have discussed the topic did not pursue fatwas from Ifta institutions but instead relied solely on their own understanding of the topic, as a result of which those studies suffer from some serious shortcomings. This chapter explains how this study has sought to overcome this weakness by adopting the fatwa which is recognized in most Islamic countries as a standardised method of

[90]Bryan A Garner (ed), *Black's Law Dictionary* (rev 9th edn, West 2009) 1280.

answering research questions and as supporting the concept of a hypothesis. The next chapter explores the interconnection between Islamic institutions, fatwas, and legal development. It illustrates the importance of fatwas as a crucial tool for legal development. It also focuses more on the components of the fatwas and explains the role logic plays in their development. It demonstrates that the fatwa can be used as a modernized instrument for exploring law, arguing against the widely held view that law in Shariʿa is not constructed, and cannot be applied to modern issues.

Chapter 3 : Islamic Institutions, Fatwas and Legal Development

3.1 Introduction

This chapter aims to answer the initial secondary question, namely, why is the impact of IET crucial to legal development in Islamic countries? The response to this question demonstrates that investors in Islamic countries tend to place great importance on religious values when conducting transactions. Thus, it would be better if the financial laws in those countries were aligned more closely to IET than to positive law. The chapter goes on to argue that investors in Islamic countries should be more aware of the amalgam of the religious values and ethical justifications that inform the prohibition of acts of market abuse such as insider dealing. Such an awareness would help to improve investment behaviour in a constructive manner and thus limit the incidence of infringement. The author maintains that such a position preferable to the abstract adoption of comparative laws. The argument begins with an attempt to provide an in-depth analysis of the impact of people's religious thoughts on the legal structure in Islamic societies. It then considers the importance of IET in terms of its historical role as a foundation for legal development as well its association with ethics and law. The chapter then provides a practical example of the role of IET through fatwas, arguing that fatwa as a method has an important role in developing the law in Islamic countries, which justifies the methodology that is adopted in this thesis. The section is based on the analysis of the practicality of those fatwas which are already gathered from the empirical rulings. The discussion is limited to the structural formality of the fatwas; the substantive aspects of the content shall be considered in Chapters 5-7.

Chapter 3 is further divided into seven main sections. Following this introduction, the socio-religious aspect of the law is explored in section two. Section three moves on to discuss the

impact of religious institutions on legal progress. Section four explains the crucial role IET plays in legal development. Section five examines the fatwa through a philosophical lens in order to understand its essence and dynamics, demonstrating that it is an important tool used by religious institutions. Section six explains the differences between Islamic countries and Islamic law, arguing that positive laws have been adopted by Islamic countries more frequently than Shariʿa rules. Section seven concludes the chapter.

3.2 Understanding the socio-religious dimensions of the law

This section acknowledges the socio-religious dimensions of the law,[1] and the important role played by Islam in shaping and developing the law in Islamic countries. The section also focuses on a point of commonality in the theoretical literature on the concept of law, namely, that thought is the main philosophical source of the law, therefore influencing people's thoughts may indirectly impact the law. The process through which this influence is exerted is complex, dynamic and long-term, involving several factors such as tradition, religion and culture along with other social factors. As the theoretical framework of the thesis is based on Islamic thought, the author draws on examples from Islamic countries throughout the discussion.

The last two decades have seen a growing trend towards the study of the Islamic economic field, but without considering the impact of IET on the law and its development. Exposure to Western laws that have been transplanted in Islamic countries has been shown to have adverse effects on the decency with which those laws are applied because the traditions in the recipient countries differ from those in the West.[2] Yet, the Islamic legal system is not completely a prisoner of its own past traditions and it has been successful in incorporating laws

[1] Felix Cohen, *The Legal Conscience* (Yale UP 1960) 187.
[2] Wael Hallaq, *Impossible State*, (Amr Othman tr, 1st edn, Arab Centre for Research and Policy Studies 2014) 67. Also, Wael Hallaq, A History of Islamic Legal Theories (New York: Cambridge University Press, 1997) 211.

from several other jurisdictions[3] as well as in contributing through its laws to external jurisdictions because it has been 'the subject of widespread and stubbornly persistent stereotypes'.[4] The process of transplanting laws is related to the recipient country.[5] The impact of the legal tradition on the law illustrates its effectiveness,[6] which is why it is important to understand the law in its social context[7] rather than taking a black-letter approach to reading the law, which scholars are steadily moving away from.[8]

Given the ongoing tendency to treat Islamic law in the Islamic world as if it holds the keys to unlocking the mysteries of Muslims' minds and hearts,[9] the question of how Muslims perceive the law is relevant. In general, the law is understood to be developed through different steps and stages, beginning as common thoughts and possibly ending up as a legislation. What factors shaped these thoughts and behaviour is a primary question. Tradition plays a crucial role;[10] this includes several elements, one of which is religion.[11] It is said that there is no concern more significant and problematic to the sociology of history than that of the relationship between faith, ideology, and the way people conceive religion.[12]

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[3] TT Arvind 'The "transplant effect" in harmonization' [2010] 59 International and Comparative Law Quarterly 65, 81.
[4] Fadl KAE, "The Islamic Legal Tradition" in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 297.
[5] Siems MM and Mac Síthigh D, 'Mapping Legal Research' [2012] 71 The Cambridge Law Journal 666.
[6] Tay-Cheng Ma; *Legal Transplant, Legal Origin, and Antitrust Effectiveness*, [2013] Journal of Competition Law & Economics, Volume 9, Issue 1, 1 March 2013, Pages 65–88.
[7] A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993) 3.
[8] In this regard, law is understood to be black and white. 'Yet, for all its efforts, it cannot help but express itself in all the colours of human imagination'. See, Winter SL, "What Is the 'Color' of Law?" in Raymond W Gibbs, Jr. (ed), *The Cambridge Handbook of Metaphor and Thought* (Cambridge University Press 2008) 376.
[9] Fadl KAE, "The Islamic Legal Tradition" in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 295.
[10]Harold Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press 2003). Also see, Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983).
[11]Joshua Neoh; 'Text, Doctrine and Tradition in Law and Religion' [2013] Oxford Journal of Law and Religion, Volume 2, Issue 1, 1 April 2013, 179.
[12]Tuveson E, 'The Power of Believing' [1963] 5 Comparative Studies in Society and History 466.

Muslims tend to view Islamic rules as a form of law that must be respected. The 'concept of law'[13] in Islamic countries could be understood as a system of compulsory rules that regulates their actions,[14] which may be enforced by the imposition of punishments if the law is violated. Such a description could be described as positivist because it focuses on the will of the state and the availability of sanctions.[15] It is inadequate for two reasons. Firstly, from the outset religious law exists before the state.[16] Secondly, laws have different forms that may not be related to the state directly, nor to sanctions such as international law, supranational law (e.g. European law), common law, non-state law, Islamic law, Jewish law etc. In general, religious laws are not compulsory rules imposed by the state and consequently, not state law,[17] unless the state has adopted religious law as the applicable law.[18]

Another way of approaching the concept of law is to divorce it from its social context. This is known as the positivist approach (positive legal theory), which concentrates on legal doctrines and the relationship between the rules and principles employed by courts and lawyers in the actual practice of the law.[19] In other words, it is a realist's approach interested in finding out 'what courts really do'.[20] This practical approach provides the understanding of the law from the end point where it is practised, while the sociological approach reflects the social

[13] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961) 1.
[14] *Oxford Dictionary of Law*, (Jonathan Law ed, 9th edn, Oxford University Press 2018) 392. Also see, *Oxford English Dictionary*, (Maurice Waite ed, 7th edn, Oxford University Press 2012) 410.
[15] Harold Berman, *The Nature and Functions of Law* (Brooklyn, New York, Foundation Press 1958) 21.
[16] ibid part I.
[17] Michaels R, "What Is Non-State Law?" in Michael A. Helfand (ed), Negotiating State and Non-State Law: *The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015) 44.
[18] See, Sherman A. Jackson, *Islamic Reform between Islamic Law and the Nation-State, in* The Oxford Handbook of Islam and Politics 42 (John L. Esposito & Emad El-Din Shahin eds., 2013).
[19] Justin Desautels-Stein, 'A Context for Legal History, or, this is not your Father's Contextualism' [2016] American Journal of Legal History Volume 56, Issue 1, 1 March 2016, 32.
[20] James Penner and Emmanuel Melissaris, *McCoubrey and White's Textbook on Jurisprudence* (5th edn, Oxford University Press 1996) 167.

phenomenon of the law.[21] Yet, in the Islamic world, some aspects of the positivist approach still exist in the form of recognising legitimate policy as a basis in the Islamic law for the obligation of citizens to obey the state and the ruler. Thus, the citizens are followers and have an obligation to obey the law of the ruler, and the courts recognise such obedience accordingly (Chapter 7).

For example, in Saudi Arabia, the legal system is based on Shariʿa law, and the theory of the law is the Divine law of God. The King is the head of the Justice system, and functions to maintain the Divine ordinances and give all individuals rights with obligations. The law exists independently of him and his will.[22] This way of understanding is what distinguishes Islamic law in Saudi Arabia from Western law, which is premised on the belief that society must accept the law because it expresses the will of the people. In this regard, Harts pointed out that in a system with a basic rule of recognition, we must wait to see whether a rule is accepted as a rule or not.[23] Such a view is considered to be indicative of a parliamentary democracy.[24]

What influences the representatives of a society to shape the law is a continuing concern for philosophers of law. The issue may be more easily tackled by looking at the matter through a different lens, that is, by asking what do legislators think when they legislate? The word "think" is frequently associated with beliefs, culture and ideology (religion).[25] By contrast, "tradition" is associated with races, nations and states, which is why from a global historical perspective we can see that the Talmudic, Christian and Islamic traditions played a vital role in the development of the law.[26] In those examples, legal traditions were based on the identity, religion and thoughts

[21]Raymond Wacks, *Philosophy of Law*, (2nd edn, Oxford University Press 2015). 90.
[22] Samir Shamma, "Law and Lawyers in Saudi Arabia" [1965] 14 International and Comparative Law Quarterly 1034.
[23] Cited from: Murphy L, *'What Makes Law: An Introduction to the Philosophy of Law'* (Cambridge University Press 2014) 151.
[24] WB Gallie, "Essentially Contested Concepts" [1955] Proceedings of the Aristotelian Society 56: 167 –98.
[25] Scott Shapiro, *Legality* (Harvard UP 2012) 12.
[26] ibid 60-287.

of the nations, especially because in a certain period of antiquity, the law was based on God's law.

In this regard, Tamanaha states that law is whatever people identify and treat through their social practices as law.[27] This view is informed by a consideration of 'the morals'[28] that are agreed upon in a certain society and how reasonably the law is compatible with that society's way of life.[29] When authors try to capture the essentials of the law, they typically ponder the question of how the nature of its foundations and morality can be one.[30] This means that in some instances, laws should reflect settled morals.[31] Thus, the Islamic ethical understanding of insider dealing is primary when we explore the Islamic position on insider dealing (in Chapter 6). If we understand the law as settled morals, then the certain economic scholars such as Henry Manne who advocate allowing insider dealing are justified in arguing that the practice does not violate any moral principles.[32] In fact, they argue that insider dealing is better for the economy because it produces more liquidity and makes the world wealthier,[33] therefore, it must be allowed. (This view is discussed in further detail in Chapter 5).

From a comparative standpoint, the law in the West developed in response to economic, political and scientific pressures.[34] The law in that context is a reflection of economic and social needs.[35] For example, when the law of insider dealing was explored in Chapter 1, it was said that

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[27] Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) 133-70.
[28]Cobbe FP, "What is the Moral Law," *An Essay on Intuitive Morals: Being an Attempt to Popularize Ethical Science,* (CUP 2010) vol 1.
[29] Nigel Simmonds, 'Bringing the Outside In' [1993] 13 OJLS 147–65, 151.
[30] Richard Mullender, 'Law, Morality and the Egalitarian Philosophy of Government' [2009] Oxford Journal of Legal Studies, Volume 29, Issue 2, 1 July 2009, Pages 398.
[31] Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, Oxford 2007).
[32] Henry G. Manne, 'In Defense of Insider Trading' [1966] HARV. BUS. REV., Nov.-Dec, 113.
[33]Henry G. Manne, 'Insider Trading and the Law Professor' [1970] 23 VAND. L. REV. 547, 565.
[34]Heikki Pihlajamäki; 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared' [2004] The American Journal of Comparative Law, Volume 52, Issue 2, 1 April 2004, 471.
[35]Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press 1995) 125-135.

the goals of the regulatory authorities in combating insider dealing are to enhance market efficiency and increase liquidity.[36] Seen through an Islamic lens, the law of insider dealing is viewed differently, as will be shown in the Chapters 4-7. Hence, legal theorists are obliged to improve the understanding of society by advancing the research on how people understand themselves through the analysis of their views of the law.[37] Thus, scholars have attempted to understand the shared traditions that single out the essential features of people's conception of law and authority.[38]

While debate continues about the best strategies for improving understanding of the law, a sociological approach is most suitable in this thesis because of its consistency with the theoretical framework.[39] The law begins as the collective thoughts of a given society. Such thoughts are processed by time and possibly transformed into laws. But how are these thoughts shared and beliefs bridged to laws?

The bridge between common thoughts and laws could be built on the idea of nation. In the modern world, a small difference in skin colour, religion or dialect has been enough to cause one group to avoid another.[40] Human beings bind themselves to those who are most similar to them, not only socially, but also in the economic sense, as they tend to feel similarly about the products they want to buy. For example, advertisers repeatedly work on making consumers feel that products are similar to them, they discovered that it is a good marketing strategy to advertise

[36] Chapter one, Sections 1.2.2 and 1.2.3
[37]Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press 1994) 221.
[38] Joseph Raz, *The Morality of Freedom*. (Oxford: Oxford University Press 1988) 65.
[39]Heikki Pihlajamäki; 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared' [2004] The American Journal of Comparative Law, Volume 52, Issue 2, 1 April 2004, 474.
[40]Harari Yuval Noah, *Sapiens: A Brief History of Humankind*, (UK: Random House 2014) 19.

products in a way that is based on human thoughts.[41] For instance, Muslims are attached to IET in the sense that many of their investments are associated with their Islamic beliefs through the concept of '*Halal*'.[42] It can be found that in the Islamic economic sector, investors tend to focus on Islamic finance products, Halal food, Halal pharmaceuticals and cosmetics etc.[43] If humans are attached to other humans and products that are compatible with their thoughts and beliefs, then it is not surprising that they would seek to regulate their societies in a way that maintains their traditions, cultures and customs in accordance with their common thoughts. This implies that they would also seek fatwas (legal opinions) that best reflect their economic needs.

Islamic nations are distinguished through the style in which they are imagined.[44] Whenever a substantial number of people picture themselves as forming a nation-state,[45] then we can have imagined realities of a state that distinguish them in a certain unique way.[46] The sacrifice of citizens in the name of the nation has been found to lie at the cultural roots of nationalism.[47] The concept of nations is recognized in the Quranic verses. In the Quran, God states that Muslims are a nation of moderation, and all the prophets were sent to the different nations to announce their messages to humanity.[48] The Quran states that humanity began as a

[41]Samuel B Barnett, Moran Cerf; 'A Ticket for Your Thoughts: Method for Predicting Content Recall and Sales Using Neural Similarity of Moviegoers' [2017] Journal of Consumer Research, Volume 44, Issue 1, 1 June 2017, Pages 160–181.
[42] Halal is a 'Quranic term used to indicate what is lawful or permitted'. The *Oxford Dictionary of Islam* edited by John L. Esposito, (Oxford University Press, 2003) 105.
[43] See, Thomson Reuters and DinarStandard, 'State of the Global Islamic Economy Report' [2018] Dubai International Financial Center, pages 33,63, and 139.
[44]John Anderson, *Insider Trading: Law, Ethics, and Reform* (Cambridge University Press 2018) 6.
[45]Seton-Watson, Hugh. *Nations and States. An Enquiry into the Origins of Nations and the Politics of Nationalism* (Boulder, Colo.: Westview Press. 1977) 5.
[46]Anderson (n 44) 81.
[47]ibid 7.
[48] The interpretation of the Quran, Albaqara, [2:143]. Muhammad Al-Qaimi, *Tafsir Kanez Aldaqaeq and the Baher Al-Gharaeb* (Hussein Darkahi ed, Revised edn (1st edn 1911) - part XIII Shams Al-Doha press 1967) 185-188. Also, Al-Mousa Al-Kashani, , *Tafsir al-Safi* (Hussein al-Alami ed, 3rd edn, Al-Sader press, 1994) part V, 197-198.

single nation[49] but became divided because different prophets were sent forth, resulting in the different understandings of the religions.[50] The Quran offers a unique philosophical explanation for the existence of different nations within Islam, providing a reasonable basis for significant internal differences and diversity of diligence. The expansion of the understanding of the words and religious texts is an important feature that is well recognized by the scriptural texts.[51] That is why the Islamic fatwas can differ so widely on every matter, including insider dealing as will be shown in Chapters 5-7. Diligence, effort and care are required from scholars seeking to contribute to the knowledge in the different fields intellectually from their different understanding of the texts.

The complexity of human interactions and their ability to picture and imagine led to the Islamic legal concepts of waqfs, Ifta institutions and mosques, to name a few. The ability of human beings to imagine religion, faith and Gods helped to shape communities with different traditions, cultures and laws. In this regard, Berman concludes that even in Christianity, one can observe that the origin of Western law is based on the emotions and beliefs of the people and shaped by their fear of Judgment Day.[52] Imagination is worth discussing because it turns 'is' into 'as if' even though what 'is' must be imagined.[53] Despite this, the subject of human cognition in relation to nationalism remains under-researched.[54] Islamic Ifta institutions are artificial entities

[49] The Quran verse [2:213] See *The Qur'an*, M. A. S. Abdel Haleem (Tr), Oxford World`s Classics (Oxford University Press 2016) 24.
[50] The interpretation of Albaqara, [2:213] See, Mohammed Tabatabai, *The Interpretation of the Balance*, (Hussein Alaalma (ed), 1st ed. Alaalma Foundation Publications Beirut, Daleel Amizan -1997) Part 1, 9.
[51]Abdulaziz Abdulhussein Sachedina. *The Islamic roots of democratic pluralism,* (Oxford University Press New York 2001).
[52] Berman (n 15) part I, 558.
[53]Bonnie Costello; Three Trusts: Imagination, Memory, Reflection, [2018] Literary Imagination, imy032, 8.
[54]Rogers Brubaker, Mara Loveman, and Peter Stamatov, "Ethnicity as Cognition," [2004] Theory and Society 33, no. 1, 31–64.

that have played and continue to play a vital role not only in legal development but also in the political arena.

In sum, the human ability to imagine communities, states and artificial entities helped to shape and reshape the laws in accordance with the society's shared thoughts and tradition. Through this transference of the collective thoughts and the shared recognition of certain rights, such as the rights and obligations of marriage, came into existence, because people collectively recognized the concept of a family union. Consequently, the states and courts accepted these concepts and enforced regulations related to them.[55] In short, what people collectively decide turns into institutional facts and legal actions.[56] The next section, therefore, moves on to discuss the effect of the Islamic religious institutions on the legal development.

3.3 Impact of religious institutions on legal development

The term "institution" has been used to refer to an organization, establishment, established law or custom. The term carries certain connotations that refers to some types of artificial legal entities and is generally understood to mean a large organization that has a specific goal and purpose.[57] For example, an institution could be a university, church, mosque or a bank, to name a few. A different definition is given by Douglass North, whose description provides a deeper insight into the role of institutions in the development process. North defines institutions broadly, stating that they shape human interactions and underpin the laws of the game in a given society. He describes them as the informal and formal constraints chosen by humans that define the boundaries of the interactions in societies in order to reduce uncertainty.

[55]Tamanaha (n 27) 52.
[56]Neil MacCormick, 'Norms, Institutions, and Institutional Fact' [1998] 17 Law and Philosophy 301.
[57] See, institute, institution, and institutional in Waite (n 14) 377.

In North's view, any "institutional change" is, in fact, a change in the way societies function through time.[58] An example of a formal constraint created by society is the constitution. North also explains that such constraints can evolve over time rather than be created by societies, such as the common law[59] or the fatwas in Islamic societies. Examples of informal constraints include codes of behaviour and cultural beliefs.[60]

Understood in this way, the term institution provides a better view of the structure of social interactions through the analysis of the set of rules which the society agrees upon[61] and which explain the law and justify the way it is shaped. Exploring institutions requires scholars to focus on broad sets of values and cultural norms, such as the institution of religion,[62] and link them to the specifics of the law. A division could be made between the concept of "institutions", as North conceives them, and that of "organizations", which North views as the agents of institutional change, influenced by the institutional framework that is initially based on choices made by humans[63] who structured the society in accordance with their collective thoughts. Classic examples of organizations include political, educational, social and economic bodies such as parliaments, regulatory agencies, universities, schools, churches, mosques, fatwa authorities, firms and cooperatives.[64]

Whenever the term "institution" is used, different understandings may arise. It could be understood as a reflection of the rules of the game and the behaviour of the actors, as per North's

[58] North DC, "An Introduction to Institutions and Institutional Change," *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 3.
[59] ibid 4.
[60] ibid.
[61] Jack Knight, *Institutions and Social Conflict* (Cambridge: Cambridge University Press, 1992) 2.
[62] Will Gibson and Dirk Vom Lehn, *Institutions, Interaction and Social Theor*y (Palgrave, Macmilan Publisher Limited 2018) 13.
[63] North (n 58) 5.
[64] Gibson (n 62) 13-14.

explanation.[65] Alternatively, it could be used to refer to the general concept of a social structure[66] and the designated patterns of correlated behaviours in a certain society.[67] The use of the term to refer to the broad social structure is particularly problematic for this study, because its aim is to understand the justification of certain laws, such as the law of insider dealing, in Islamic thought and to understand why these laws differ conceptually. Although North's definition of "institution" is most suitable for use in this thesis, there are limits to how far the concept can be taken.

There are two main problematic issues with this concept. The first is that North considers institutional change to be based on individual cognition and beliefs; he does not consider the role of collective thoughts and shared cognitive rules.[68] Arguably, one person might look out for his own personal interest, that is, wealth, in accordance with his beliefs, whereas a collective of people would consider the collective interests, needs and welfare of the community and seek to advance the interests of all its members equally, rather than adopt an excessively individualistic approach. The idea of the collective thought is well established within the Islamic philosophical thinking. This can be seen in the Quranic verses and the Islamic tradition, which devotes a considerable amount of attention to the concept of community. The Quran and Hadith stress the importance of the principles of cooperation,[69] togetherness[70] and community interest.[71] For

[65] North (n 58) 110.
[66] Wells, Alan, *Social Institutions.* (London: Heinemann, 1970) 3.
[67]John Foster 'The Papers of J. Fagg Foster' [1981] Journal of Economic Issues 15, no. 4 December: page 908.
[68]Greif Avner and Mokyr Joel, 'Cognitive Rules, Institutions, and Economic Growth: Douglass North and Beyond' [2017] 13 Journal of Institutional Economics 25.
[69] The interpretation of the Quran, Surah Al-Imran, [3:103]. Muhammad Al-Qaimi, *Tafsir Kanez Aldaqaeq and the Baher Al-Gharaeb* (Hussein Darkahi ed, Revised edn (1st edn 1911) Shams Al-Doha press 1967) part XIII 183.
[70] ibid (see, the interpretation of Quran, Surah Al-Imran, [3:105]) page 194.
[71] Muhammad al-Bukhaari, *Saheeh Al-Bukhari,* (Muhammad Al-Muhajihq, 1st edn, 2002) 16.

example, in the religious texts, the artificial entity *'Beit Al-Mal'* exists for the purpose of protecting the interests of society in general and satisfying communal needs.[72]

The second problem with North's conception of "institutions" is that even though it refers to the rules of the game, behaviour and rational choice,[73] it does not provide a causal link between the law and human thoughts and behaviours. Thus, it is unable to explain the voting behaviour of legislators. For example, if we claim that Islamic law appears in some states because most of the population are practicing Muslims and they think of Islamic law as the primary source of regulation, then we are assuming that because the majority of the people are religious, the law will be based on religion, or at least will include religious rules. This general casual claim that considers a particular thing such as "belief" to cause another thing such as "religious law" is questionable, because the causal link is assumed rather than proved.[74] Is there a pattern that led to a general causal truth? In other words, how can we be sure that a certain belief in a religion such as Islam led communities to adopt religious rules such as "Islamic law"? The importance of these questions is linked to the question this chapter aims to answer. The issue here is that proof of a causal link is a first step towards acknowledging the impact of IET on legal development.

It is important to recognise that some countries such as Iran,[75] Libya,[76] Yemen,[77] Saudi Arabia,[78] and Pakistan[79] have adopted Islamic law because the majority of their population is

[72] ibid 1403.
[73] North (n 57) 20-21.
[74]Wolfgang Spohn; 'Causation: An Alternative' [2006] The British Journal for the Philosophy of Science, Volume 57, Issue 1, 1 March 2006, page 93.
[75]The Constitution of the Islamic Republic of Iran 1989 art 5. <www.constituteproject.org/constitution/Iran_1989.pdf?lang=en> accessed 7 January 2020.
[76]The Constitution of Libya 2012 art 1 <www.constituteproject.org/constitution/Libya_2012.pdf?lang=en> accessed 7 January 2020.

Muslim. The constitutions of these countries acknowledge Islamic law as the only law that governs their people in accordance with the belief of most of the population. Is that enough to establish causation between the shared thoughts of their people and the laws that have been adopted? Unfortunately, the matter is more complicated.

If we apply the same reasoning to the Christian religion in the West, it may have the opposite outcome, as it is argued that the West overcame religion in favour of science and economic development by separating belief from civil interactions.[80] This view could be grounded in the idea that people may be religious, but societies and countries are not,[81] which promotes the concept of constitutional secularism.[82] This shows that individual cognitive belief does not necessarily affect the rules of the game. One cannot generalize from all the particular casual claims to say that individual cognitive belief affects the rules of the state. Nevertheless, religion undeniably plays a fundamental role in many other Islamic countries, including Kuwait,[83] Bahrain,[84] Qatar,[85] the United Arab Emirates,[86] Iraq,[87] Syria,[88] Sudan[89] and Egypt,[90] as

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[77]The Constitution of the Republic of Yemen 2001, art 3. http://www.refworld.org/pdfid/3fc4c1e94.pdf 7 January 2020.

[78] Eid Al-Juhani, *Council of Ministers in the Kingdom of Saudi Arabia between Islamic Shariʿa and Contemporary Constitutional Trends* (Riyadh Al Majd Printing Press 1984) 72.

[79]The Constitution of the Islamic Republic of Pakistan pt IX arts 227. <www.wipo.int/edocs/lexdocs/laws/en/pk/pk021en.pdf> accessed 7 January 2020.

[80]James V. Spickard, 'Multiple Secularities beyond the West: Religion and Modernity in the Global Age' [2016] Sociology of Religion, Volume 77, Issue 1, 1 January2016, Pages 107–109.

[81]Ingolf U Dalferth, 'Post-secular Society: Christianity and the Dialectics of the Secular' [2010] Journal of the American Academy of Religion, Volume 78, Issue 2, 1 June 2010, Pages 317–345.

[82]Lorenzo Zucca; 'The Crisis of the Secular State—A Reply to Professor Sajo' [2009] International Journal of Constitutional Law , Volume 7, Issue 3, 1 July 2009, Pages 494–514.

[83]The Constitution of Kuwait 1962 art 2 <www.constituteproject.org/constitution/Kuwait_1992.pdf?lang=en> accessed 7 January 2020.

[84]The Constitution of the Kingdom of Bahrain 2002 art 2 <www.wipo.int/wipolex/en/text.jsp?file_id=189442> accessed 7 January 2020.

[85] The Constitution of Qatar 2004 art 1 <www.constituteproject.org/constitution/Qatar_2003.pdf?lang=en> accessed 7 January 2020.

[86]The Constitution of the United Arab Emirates 2009 art 7 <www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf> accessed 7 January 2020.

[87]The Constitution of the Republic of Iraq 2005 art 2 www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en accessed 7 January 2020.

Islamic law is one of the primary sources in existence there, along with the positive law. This pattern indicates a general causal truth, namely, that in many cases Islamic thought and belief tend to affect the laws in Islamic countries, but it might not do so in every case as this does not apply to every country in which Islam is the major belief system. For example, Turkey is a secular country and although most Turks are Muslims, they support secularism and favour minimum religious interference from the state.[91]

To avoid the fallacy of begging the question and circular reasoning, this section will now consider the influence of religious institutions on the law', treating the issue as a tendency and probability rather than a solid causal link and certainty. In other words, this section tests how far IET influences the legal structure using some examples from Muslim countries. The level of influence could be gauged by the answer to the following question: How could a religious institution influence the law in Islamic countries?

In Islamic countries,[92] the impact of religious institutions can be seen at different levels of the state's legal structure. Not only do the constitutions of Islamic countries[93] state that the countries are regulated in accordance with Shariʿa rules, but also different laws show the strong influence of religious rules on daily interactions. For instance, many Islamic countries have established an Islamic framework to ensure that the legal structure is regulated in accordance with Islamic rules by filtering the laws through a legal governmental community. For example,

[88]The Constitution of the Syrian Arab Republic 2012 art 3 www.constituteproject.org/constitution/Syria_2012.pdf accessed 7 January 2020.
[89]The Constitution of the Republic of the Sudan 2005 art 5 https://wipolex.wipo.int/fr/text/241714 accessed 7 January 2020.
[90]The Constitution of Egypt 2014 art 2 <www.constituteproject.org/constitution/Egypt_2014.pdf?lang=en> accessed 7 January 2020.
[91]Turan Kayaoglu; 'Shariʿa in the Secular State: Evolving Meanings of Islamic Jurisprudence in Turkey' [2018] Russell Powell, Journal of Church and State, Volume 60, Issue 1, 1 January 2018, 130.
[92] For example, Kuwait, Saudi Arabia, Qatar, to name a few. (n 83, 78, 85).
[93] ibid.

'The Kuwaiti Supreme Consultation Committee'[94] works on the application of the Shariʿa rules, while 'The Supreme Council of Saudi Scholars'[95] conducts the necessary research and issues fatwas related to Muslims affairs.

Although Islamic countries have adopted various forms of legal systems, including secular, mixed and classical Shariʿa systems, Islamic laws are legislated with the positive law in many of the secular and mixed systems. Furthermore, the judicial and legal practices not only recognize Islamic laws but also accept Shariʿa graduates as judges and lawyers who influence day-to-day interactions in the courts and provide a Shari'a informed perspective when applying the law.[96]

The way Islamic countries organize spending on benevolence and public charity and to combat poverty is also worth mentioning.[97] Most Muslim countries recognize an artificial institution such as the Ministry of Islamic Affairs, the Kuwaiti Zakah House,[98] the Saudi Arabia General Authority of Zakat and Tax'[99] and the Qatari Zakat Fund[100] to gather and spend Zakah money donated or paid by individuals, organizations, public establishments, associations,

[94] For example, in Kuwait, see, Decree no. 139 of 1991 regarding the Establishment of the Supreme Consultation Committee to Work on Completing the Application of the Islamic Shariʿa Rules.
[95] Royal Decree No. A/90/1992 by King Fahd Bin Abdul Aziz Al Saud, Articles 7, 44 67, 70.
[96] For example, in Kuwait, see, Law no. 42 of 1964 with regard to the Organization of the Legal Profession before the Courts, dated 8/8/1964. Article 2. Also see, Decree-law no. 23 of 1990 Concerning Judicial Organization Law, dated 10/3/1990. Article 19. Also see, Article 31 of the Saudi Arabia Royal Decree no. 78/m dated 30/9/2007.Also see, Decree-Law of the Bahraini Judicial Authority no. 42 of 2002, Article 22. Also, the Federal Judicial Authority UAE Law no. 3 of 1983, Article 18.
[97] Zakah is 'one of the five pillars of Islam. Muslims with financial means are required to give 2.5 percent of their net worth annually as zakah'. See, Esposito (n 42) 345.
[98]See, Law no. 5 for the year 1982, regarding the Establishment of Al-Zakat House, dated 16/1/1982.
[99] See, the Saudi Arabia Royal Order no. 17/2/28/577 dated 19/10/1956. Plus, the Saudi Arabia Royal Order no. 10079 dated 7/4/1957. Also, the Saudi Arabia Royal Order no. 61/5/1 dated 29/5/1963. And, the Saudi Arabia Royal Order no. m/13 dated 27/1/1982. And, the Saudi Arabia Royal Order no. 5/506 dated 13/12/1984. Further to the Saudi Arabia Royal Order no. 40/m dated 24/3/1985. Furthermore, the Saudi Arabia Royal Order no. 7027 dated 7/1/2013. Also see, the Saudi Arabia Royal Order no. 16145 dated 12/1/2016.
[100] See, Qatari law no. 8 of 1992 on the Establishment of the Zakat Fund.

companies etc. These entities prioritise the ways this money is disbursed to help society, according to the doctrine of Shariʿa.

Another Islamic economic practical example is the Islamic banks.[101] Studies have shown that as an economic major player, Islamic banking poses fewer risks and is more stable than conventional banks.[102] On an institutional level, Islamic countries recognize several laws that regulate Islamic banking. The banks undertake financing operations but adopt Islamic law as a framework. They provide different kinds of banking and financial services and participate in direct investment and financial operations, as long as their operations do not conflict with Islamic laws. The major differences between Islamic banks and conventional banks are that the former are permitted to establish affiliated companies and practice investment in different commercial areas in accordance with Islamic law. Compliance with Shariʿa is achieved through the supervision of independent Shariʿa panels which issue fatwas governing the bank's activities. In some Islamic countries, the banks are connected with the Ministry of Islamic Affairs, which assures that the bank's work conforms to Islamic law.[103]

Moreover, Islamic countries regulate the activities of Islamic companies and set rules, enforce regulations and authorise licensees in accordance with Islamic rules. Islamic companies must ensure that their transactions comply with Islamic rules and must constitute an independent Shariʿa panel to ensure the legitimacy of their operations. The panel issues legal opinions

[101] Esposito (n 42) 35.
[102]Pejman Abedifar, Philip Molyneux, Amine Tarazi; 'Risk in Islamic Banking' [2013] Review of FinanceVolume 17, Issue 6, 1 November 2013, Pages 2035–2096.
[103] For instance, in Kuwait, see, Law no. 32/1968 with regard to Currency, Central Bank of Kuwait, and the Organization of the Banking Profession, 30/6/1968, articles 86 to 93. In Saudi Arabia, the regulation of Islamic banking goes back to 1931 by Royal Decree dated 2/6/1931. Also, the Royal Decree no. 23 dated 16/12/1957 'SAMA's Law'. Plus, the Royal Decree no. M/5 dated 8/10/1966.

(fatwas) regarding the operations, and the Ministry of Islamic Affairs may have a superior position in the event of a conflict between the panel and the board of directors.[104]

Financial activities are subject to fraud, corruption and financial crime. Several Islamic countries use the houses of faith and worship (mosques) to establish the values of honesty and integrity and raise awareness of the risk of corruption in the community and the individual. They use religious speech to advocate ethical values and strengthen religious morals based on Islamic rules promoting the principles of integrity, transparency and combating corruption on the argument that corruption is a waste of public funds, as per Islamic tradition. This is implemented through, for example, visits by preachers to schools, universities, clubs, youth centres, etc., to cultivate a culture that rejects corruption and promotes integrity.[105]

Fatwas have a crucial role in establishing fundamental opinions that help in combating corruption. The concept of fatwas has been regulated in many Islamic countries and the research into Ifta institutions has a long history. For example, the institution of Ifta (*Shaykhulislam*) in the Ottoman era (16th and 17th centuries) was concerned with issuing fatwas.[106] The same tradition is followed in Turkey today through the appointment of the grand Mufti of Istanbul and Ankara through law.[107] In Egypt, the highest religious position among Muslim clerics is considered to be

[104] For instance, in Kuwait, see, Law no.1/2016 promulgating the Commercial Companies Law, dated 24/1/2016, article 15. Also see, Law no. 7/2010 regarding the Establishment of the Authority for Money Markets and the Organization of the Securities' Activity, dated 21/2/2010, article 4. Also see, The Saudi Arabia Companies Law enacted by Royal Decree no M3 dated 10/11/2015, published in the Saudi Arabia Official Gazette on 4/12/2015 and came into force on 2/5/2016. Plus, the Qatari Law no 11/2015 of Companies Law, which regulates some aspects of Islamic economic rules including the issue of tradable Islamic Sukuks.
[105] For instance, in Kuwait, see, Decree no. 300/2016 regarding the Issuance of the Executive Regulations of Law no. 2/2016, dated 2/11/2016, article 8.
[106] See, Sami Zubaida, *Law and Power in the Islamic World* (I.B.Tauris 2005) 60.
[107] The Turkish Religious Head (Mufti) Law 1953 made in 25/3/1953 (MP 3/49/d (2).).

that of 'the Grand Mufti of Egypt', who issues highly influential fatwas (religious opinions) and is appointed officially by the president through law.[108]

Fatwa organizations are well established in Islamic countries, and include both independent and governmental bodies, such as those that are part of the Ministry of Islamic Affairs whose goals include spreading Islamic literature and reviving Islamic heritage. A primary rule of legal development in Islamic countries is the rendering of legal opinions within a religious framework to solve any doctrinal, economic, social or other issue.[109] All these examples support the notion that religious institutions have helped to shape the culture of these countries. They have influenced the legal and economic structures in Muslim countries at different institutional levels. Religious institutions are established through a sophisticated institutional system that is based on the financial backing of endowments which has helped them to function efficiently for centuries.[110]

3.4 IET and legal development

As stated in the previous section, Islamic religious institutions have a significant relationship to legal development in Muslim countries.[111] Courts and financial authorities recognize Islamic financial rules and investment structures. IET has contributed historically to legislation and to economic growth, while the concept of Islamic institutions can be traced back to the pre-Islamic Middle Eastern societies which gave important recognition to 'the Islamic

[108] See, Ahmed El-Ashker and Rodney Wilson, *Islamic Economics: A Short History* (The Netherlands Koninklijke Brill Academia Publisher, 2006) 322.
[109] For instance, in Kuwait, see, Decree regarding the Ministry of Awqaf and Islamic Affairs dated 7/1/1979, article 2. Also, in Saudi Arabia see, Royal Decree no. (A / 137) dated 30/8/1971.
[110] See, Sami Zubaida, *Law and Power in the Islamic World* (I.B.Tauris 2005) page 62. Also see, Gibb H.A.R and H. Bowen, *Islamic Society and the West*, (Oxford University Press 1957, Part II) 146-48.
[111] David Eisenberg, *Islamic Finance: Law and Practice* (OUP 2012).

practices of authority and symbols of legitimacy'.[112] Muslim religious elites, such as scholars, generated Islamic forms of administration within education, economics and law. Institutions in Islamic countries have certain religious aims, including promoting religious thoughts and practices through entities that are structured within the state. The basic institutions were originally the institutions of endowments (*waqf*) and Islamic schools (*madrasa*) which still function actively in some parts of the Islamic world, sometimes under state control.[113] Today, Islamic countries have institutionalized Shariʿa supervisory boards, Islamic financial institutions, Fatwas Authorities and Ministries of Awqaf and Islamic Affairs. These entities contribute to the financial and legal fields in Islamic countries. The global Islamic economy has a prospective value of US$11.3 trillion in Islamic wealth.[114] The question of the relationship between Islamic religious institutions and financial development is primary as the Islamic financial sector continues to grow in Muslim countries through their Islamic institutions, and Islamic financial assets are expected to surge to $3.5 trillion by the year 2024.[115]

These figures raise the question of the roles that Islamic religious institutions and IET have to play in such financial developments. The role of IET can be seen not only today but also in the time of the Prophet, when cities such as Mecca and Medina were heavily influenced by religious beliefs regarding capital, markets, and institutional development.[116] The expansion of

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[112] Ira Lapidus, "Introduction: Islamic Institutions," *A History of Islamic Societies* (3rd edn, Cambridge University Press 2014) 269.

[113] Jocelyne Cesari, "Nationalization of Islamic Institutions and Clerics," *The Awakening of Muslim Democracy: Religion, Modernity, and the State* (Cambridge University Press 2014) 49-59. 'The waqf has a legal personality and financial liability which make it capable of giving and accepting commitment. The legal personality of the waqf is quite separate from the personality of its manager' See, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Shari'ah Standards for Islamic Financial Institutions* (Manama: Dar AlMaiman for Publishing & Distributing, 1262p ISBN: 6-9616-01-603-978, Nov. 2015) p. 817.

[114] DinarStandard, Refinitiv, 'State of the Global Islamic Economy Report 2019/2020' [2019] Dubai: Salaam Gateway, page 7. https://ceif.iba.edu.pk/pdf/state-of-global-islamic-economy-report-2019-20.pdf accessed 6/3/2020,

[115] ibid 6.

[116] David Robinson, "The Basic Institutions of Islam," *Muslim Societies in African History* (Cambridge University Press 2004) 11-24.

wealth in Islamic countries is partially linked to Islamic economic practices. Islamic financial institutions play an indispensable role in supporting their financial systems.[117] They have a major role in economic growth. For instance, Islamic rules recognise and regulate Islamic investment practices to cater to these growing markets.[118] Western laws may benefit from the Islamic tradition especially with the current Islamic finance practices on an international scale. The legal opinions produced by Islamic religious institutions demonstrate the dynamic nature of Islamic business. In Islamic finance, the regulation of Islamic bonds has become one of the success stories in economic investment universally.[119] Muslims have successfully managed to institutionalize Islamic thought through the different Islamic schools, contributing not only to the ideological aspect but also to the economic and moral facets of Muslim society. The next section tackles the foundation of IET and its role in the jurisprudence *(Fiqh)*, ethics and law.

3.4.1 IET as a foundation for legal development

The role of IET in the economic field is not a new one.[120] Many authors point to Islamic economics as a thought which began with the advent of Islam.[121] They consider IET to be an economic doctrine that embodies the Islamic way of organising economic life from day one of the arrival of the religion.[122]

[117]Mahmoud El-Gamal MA, "Islamic Financial Institutions," *Islamic Finance: Law, Economics, and Practice* (Cambridge University Press 2006) 135-161.
[118]Frank Vogel, Samuel Hayes, *Islamic Law and Finance,* (Arab and Islamic Laws Series, Brill 1998) Vol. 13.
[119] Berkeley 'The Trade off between Brand-Name Distinctiveness ad Convergence' [2008] Journal of Middle Eastern and Islamic Law, Contemporary Islamic Law and Finance 193, 198.
[120] Abdul-Fattah Salama, *Lights on the Koran* (46th edn, Islamic University 1979) 899.
[121] Jonathan Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (One world Publications 2009) 3.
[122] Hassan Alomary, *Islamic Economy Thoughts by Ibn Qayyim* (MA dissertation, Yarmouk University 1997) 1. And Alsadr Mohammad, *Iqtisaduna: Our Economics* (World Organization for Islamic Services, vols 1 & 2, 1987) 312.

Islamic economics is seen by many authors as a science that examines the economic phenomena in an Islamic society.[123] Conceived in this way, its focus is on human behaviour towards financial resources and their relation to achieving well-being within the framework of Islamic teachings.[124] Another, more narrow description limits the concept to the diligence of Muslim scholars involved in the research and analysis of the economic problems faced by their societies in different eras, with the aim of devising an appropriate treatment for them without contradicting the rules of Islam.[125]

The main argument among Islamic scholars concerns how to consider the subject of Islamic economics: Is it an ideology or a science? This debate has developed over the past century, as demonstrated by the variety of definitions. The importance of this question lies in the different outcomes that follow from each definition. If we consider Islamic economics as a science, then it is best studied through experimentation and the observation of the economic activities and behaviour of society;[126] analysis then involves applying Islamic rules to such activities to determine whether they are practised within the confines of those rules. However, if we consider Islamic economics to be an ideology, then we should examine the subject as a way of organising economic life according to the principle of justice.[127] This ideology answers the

[123] Shawki Dunya, *Lessons in Islamic Economics Economic Theory from an Islamic Perspective* (Riyadh Alumni Library 1984) 14.
[124] Monzer Kahf, *Islamic Economics* (Kuwait: Dar Al Qalam 1979) 3. See also Khaled Almoqren, *Theoretical foundations of the Islamic Economics* (3rd edn, Mutanabi Library 2011) 11.
[125] Abdulrahman Yousry, *The Basic Priorities in the Islamic Approach to Economic Development and Social Progress*, (World Center for Islamic Economics Research 1982). For a more socially oriented perspective see, Muhammad Manaawi, *Altiysir Besharh Aljamie Alsaghir* (3rd edn, Riyadh: Imam Al - Shafei Publishing, 1988) 1622. Issa Abdo, *Islamic Economy* (Egypt's renaissance for printing and publishing Co, 1974).
[126] Science has been defined as the careful study of the structure and behaviour of the physical world, especially by watching, measuring and doing experiments, and the development of theories to describe the results of these activities. Cambridge Advanced Learner's Dictionary & Thesaurus (Cambridge University Press 2017) <http://dictionary.cambridge.org/dictionary/english/science> accessed 9 June 2017.
[127] Muhammad Al-Sadr, *What do you know about Islamic Economics?* (AlSadrain institution for Strategic Studies, 1968) 6.

question of how to organise the economy because it is a system of ideas and ideals which forms the basis of economic policy,[128] while science explores the outcome of applying the ideology.[129]

In this study, IET is referred to as an ideology, that is, a way of organising economic life from an Islamic perspective by applying the principles, ethics and rules which are stated in the primary and secondary Islamic sources. This concept is implemented heavily in Islamic economic literature. The next section tackles the elite authors who have contributed to the development of IET.

3.4.2 The historical development of IET

There is a growing body of literature that recognises the importance of IET. Islamic economic scholars[130] have developed several concepts related to IET, beginning from the Prophet Mohammad's era with the interpretation of the primary sources of Islam, the Quran and Hadith, and through Islamic jurisprudence, known as *Fiqh*. The responsibility of the state to help the impoverished by payment of the Zakat and the development of natural resources while ensuring an equal distribution of wealth, judicious financial freedom and social fairness are among the major themes of IET.[131] This section discusses the literature by the leading authors, with a historical transition between them to achieve coherence.

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[128] The Oxford English Dictionary defines ideology as 'a system of ideas and ideals, especially one which forms the basis of economic or political theory and policy'. *Oxford English Dictionary* (Oxford University Press, 2017) <https://en.oxforddictionaries.com/definition/ideology> accessed 9 June 2017.

[129] Al-Sadr (n 127).

[130] See IM Oweiss, *Ibn Khaldun, Arab Civilization: Challenges and Responses* (State University of New York Press 1988) 112. Ibn Khaldun in his work points out that states should not interfere in production, markets must be based on supply and demand theory and the ruler must make sure that moral economic principles such as fairness, equality and transparency are respected.

[131] Khan Mohd, 'Economic Thought of Muhammad Baqir al-Sadr: A Study of Iqtisaduna (Our Economics)' (MPhil dissertation, University of Kashmir Srinagar 2011) 140 <www.isfin.net/sites/isfin.com/files/economic_thought_of_muhammad_baqir_al-sadr-_a_study_of_iqtisaduna_our_economics.pdf> accessed 21 September 2017.

Al-Fadl Al-Dimashqi[132] is one of the first jurisprudential founders of Islamic economics. He outlined several Islamic economic concepts, such as establishing a hierarchy of basic human needs and rights, value pricing and exchange, the regulation of property and the best ways to invest. He cited the Quran and Hadith to explain how to organise economic affairs and link them to ethical principles.[133] Many other studies followed this approach of extracting fundamental Islamic economic principles from the Quran and Hadith.[134] This approach is considered a necessary prelude to establishing rules on sub-issues.

Ibn Taymiyyah[135] and Ibn Qayyim,[136] leading scholars of Islamic thought, have contributed to IET. Their ideas are in line with each other. Both followed the Hanbali school of thought, which is one of the Sunni Islamic schools named after Emam Ahmad Ibn Hanbal.[137] They believed that the universe was created for human use and that they can benefit from its resources in exchange for a life of hardship and work. They were focused more on creed, as they saw a relationship between obedience to Islamic principles and economic growth. They believed that the state plays a major role in ensuring that the ethical and moral aspects were safeguarded in the markets, known as '*Hisbah'*. They argued that the state must promote honesty and stressed the prohibition of acts which the primary sources forbid, such as usury, fraud and betrayal. They stated that if Islamic rules were applied, then the market would be just. They also highlighted the

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[132] (1150-1200), Shaikh Ghazanfar, *Medieval Islamic economic thought: filling the great gap in European economics*, (1st ed, London, Routledge Curzon, 2003) 93.
[133] Mustafa Kafry, *Theories of Heritage on Islamic Economic Trading through the Book of Reference to the Beauties of Commerce by Abu al-Fadl Jafar bin Ali al-Dimashqi* (research number 66/2014) Arabic Economic Research [2014] 168.
[134]See, Hassan Alomary, *'Islamic Economy Thoughts by Ibn Qayyim* (MA dissertation, Yarmouk University 1997) 1; Suad Saleh, *Principles of Islamic economic system and some of its applications*, (1st edn. Dar Alam Alkotob publishing 1997); Rafeq Almassry, *Economic Miracle in the Holy Qur'an* (Islamic Economics Research Center 2005).
[135] (1263-1328) See, Muhammad al-Mubarak, *Ibn Taymiyyah's views on the state and the extent of its interference in the economic field*, (3rd edn, Dar al-Fikr 1970) 11-18.
[136](1292-1350) See, Alomary (n 134).
[137]Christopher Melchert, *Ahmad ibn Hanbal* (Oneworld Publications 2006).

importance of the state's role in ensuring an adequate standard of living is provided, organising the market effectively and preventing the abuse of power and market manipulation.[138] Ibn Taymiyyah's classic approach applies the theory of regulation through religion. The '*Hisbah'* activity is linked directly to combating market manipulation, including insider dealing, by applying Islamic law.

Ibn Khaldun[139] further contributed to Islamic economic thought. He focused on the practical side of the economy and emphasised the importance of basic human needs and the state's role in fulfilling them. He addressed the concept of production and its importance and identified the elements of production and the principle of supply and demand. He believed that the state should not interfere in economic life and that there should be less regulation, fewer taxes and more free trade, arguing that in the absence of such interference, these measures will lead to economic development.[140] The non-intervention approach was considered by other authors such as Al-Sherazy, who pointed out that Islam promotes economic freedom in all areas and the government apparatus should not interfere in economic affairs.[141] Ibn Khaldun also introduced a major theory about the cycle of economic civilisation, noting that the condition of the economic and political community is linked to a structured rotation that leads to a state of automated upgrading.[142] Ibn Khaldun's views were a further step towards a better understanding of the economic developments of the Islamic region. However, his non-interventionist stance is

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[138] Alomary (n 134).
[139] (1332-1406). See, Allen Fromherz, *Ibn Khaldun* (Edinburgh University Press 2010).
[140]Shawqy Donia, Musl*im Scholars and Economics– Ibn Khaldun, Founder of Economics* (Om Alqoura University 1993).
[141] Mohhammad Sherazy, *Islamic Economy in Brief* (2nd edn, Al-Rasoul Al-Azam Center for Investigation and Publication 1998) 68.
[142]First, a powerful group takes over the reins of government. Second, the grip the ruling elite is softened, and the fruits of its struggle are harvested. Third, a new stage begins, in which the state passes into the hands of people pursuing great ideas. Fourth, a change occurs in the ruling class, which begins to engage in domination, corruption, intervention and the imposition of unfair laws and taxes. Finally, a new powerful group takes over again to stop the corruption. Abdulrahman Yussry, *Ibn Khaldun's Contribution to Economic Thought* [2006] 13(2) Economic Islamic Studies 39.

at odds with the theory of regulation through religion, as he believed that having less regulation has a better impact on the economy.

Muhammad Al-Sadr,[143] a Shi'a philosopher and one of the ideological founders of IET and a leading contemporary author on the subject of Islamic economics, identified a primary Islamic philosophy related to the concept of needs. The principle illustrates that IET is not built on the idea of production, as is capitalism, or on the concept of equality and sharing, as in Marxism. Rather, it is built on the concept of satisfying excessive growth. Al-Sadr also argued that IET is based on several moral and ethical principles related to dignity and the financing of the social welfare state. The fair distribution of wealth, therefore, must be considered in one of two ways: either as the outcome of a system of rewards based on workers' efforts or as a consequence of a commitment to help the poor. According to Al-Sadr, IET divides ownership according to several factors related to state ownership, private ownership and a general commitment to serving the common good, with restrictions on creating waste by consumption. He stressed that the prohibition of usury (that is, charging interest on loans) and the prohibition of non-halal products, together with an obligation to contribute to society and help poor people through charity and *Zakat*, thereby achieving an equitable standard of living for all individuals and furthermore reducing the gap between the rich and the poor.[144] Al-Sadr's views on regulating the economy through the Islamic law is based on his belief that Islamic law provides a proper platform for the economy that is based on the principle of justice and which can achieve equality, prevent corruption and eliminate any illegal exploitation. He believed that Islamic law provides a legislative guarantee that assures the necessary legal platform, which consists of

[143] (1935-1980) Muhammad Al-Husseini, the martyr Imam Muhammad Al-Sadr study in his biography and methodology, (1st edn, Beirut Dar Al-Furat, 1989) 48.
[144] Al-Sadr (n 122).

Islamic values and principles.[145] His thoughts reflect the view that Islamic law contains a moral feature, meaning it is underpinned by strong ethical values that could effectively regulate the economy in a more responsive governance structure. God's law illuminates the legal system from the outside, providing support for pillars such as justice, equality and dignity.[146]

Monzer Kahf, another contemporary leading Islamic author, devoted his research to Islamic economics in the Quran and Hadith, through which the sayings of the Prophet Muhammad have been passed down since his death in 632.[147] Monzer Kahf extracted the Islamic economic principles from those sources by summarising and categorising all Islamic economic texts in his book, *Economic Texts of the Quran and Sunnah*.[148] He retrieved 515 economic verses from the Quran and 2,461 texts from the Hadith and explained them in ten chapters. He believed that IET should not be based on historical factors but on an analysis of the primary sources from which economic principles can be derived. In his book, he explained the relationship between the economy and religion, the characteristics of the Islamic economy and the most important principles and ethical values as revealed by the Quran and Hadith. He further explained how Islam deals with essential issues such as wealth and income distribution, production and consumption, market regulation, the role of the state and public money. His research focused on general Islamic principles rather than on sub-provisions.

Most research on IET has been carried out on the general economic principles of Islam. Collectively, the studies show that IET encourages investment because it considers it a purpose

[145] Mohammed al-Husseini, *Muhammad Baqir al-Sadr Life and creative thought*, (Dar Al-Hijja Al-Bayda 2005) 399.
[146]Domingo R, *God and the Secular Legal System* (Cambridge University Press 2016) 167.
[147]Al-Suhaili Al-Khathami, *Al-Rawd Al-Nafs* (first published 1185, Publishing House of Scientific Books 1997) 440; Al - Hafez Ibn Katheer, *Biography of the Prophet* (first published 1372, Dar Al–Maarifah, 1976) vol IV, 509; Ahmed Ibn Hajar, *Fath Al-Bari* (Mohammed al-Baqi ed, Dar al-Kut al-Salafi, 1371) vol VIII, <https://archive.org/stream/FP2021/08_2029#page/n129/mode/2up 16/6/2017> accessed 21 September 2017.
[148] Monzer Kahf, *Economic Texts of the Quran and Sunnah* (Islamic Economics Research Center 1995).

of existence. In the Quran, Muslims are considered to be God's vicegerents, and they have a duty to improve the world through constructive activity.[149] However, such aims must be carried out within Islamic rules and provisions. This is usually accomplished in the economic sphere via Shariʿa compliance studies, which provide Shariʿa standards that must not be violated. It was noted that Al-Sadr and Kahf pointed out that IET consists of important moral principles. This raises the question of the role of ethics in IET. This question is vital since various economic, moral and legal themes may emerge from the fatwas when exploring insider dealing. If this thesis is limited to the economic perspective, then the moral aspects should not be addressed. Therefore, the next section is devoted to illustrating the relation between ethics and IET.

3.4.3 IET and ethics

As explained earlier in this chapter, IET is an ideology that is derived from the religion of Islam. It is one of many aspects of life addressed by the religion, which is also concerned with political, social, environmental and moral practice. This comprehensive application is considered one of the key characteristics of Islam.[150] Islam deals with moral principles extensively. The Prophet Mohammad states that he was sent to complete moral virtues,[151] and he stated that half of religion is good manners.[152] The sources of Islamic ethics are scriptural, namely the Quran and Hadith. Islamic ethical theory was discussed by the Mu'tazilite Islamic scholars, who hold that human reason can immediately discern whether an act is right or wrong, and therefore

[149]The Quran, Hod [11: 61].
[150] Ali Muttar, *Eqtesadna Almoyaser* (2nd edn, Imam Khomeini's Library 1993) 8. Also, the Quran, AlNahl, [16:89].
[151] The hadeeth of Abu Hurayrah: 'I was sent to complete the morals.' (6/3657). Hassan. Narrated by Ahmad, Malik, Bukhari in 'literature singular', and the Alhakem, and Bahaiqi 'Alsab'. See: Musnad, (17/80 / No. 8939 Shaker supplement), The Jame Alosoul (4/4), AlSelsela AlSahiha (1/75) http://shamela.ws/browse.php/book-2615/page-467 accessed 10 June 2017.
[152] Mohammad Alqomy, *Characteristics* (Islamic Publishing 1982) 30.

anyone who commits a wrongful act deserves blame. They maintain that logic and reason can also be applied to God's reasoning, and Muslims can use reason to judge what God is and is not commanding us to do. They consider humans to have freedom, in the sense of the power to perform both an act and its opposite.[153] The Mu'tazilite school developed a rational framework that influenced the Islamic tradition by involving rationality as a source of ethics and values. This led to a broader discussion about the objectives and the wisdom of the Islamic rules derived from Islamic spiritual sources. The Sufi tradition further developed the basis for the philosophy of ethics by dividing them into three main sources, the mind, the heart and the soul, which they claimed together produce morality and good behaviour.[154]

Islam is comprised of many economic and moral values and principles, including honesty, fulfilling the covenant and keeping promises,[155] as well as being trustworthy, not only towards people but also towards resources, as the Quran prohibits squandering.[156] Islam includes other moral principles, such as promoting the freedom of belief,[157] which is stated in several verses of the Quran. The Islamic moral system is invaluable as the system has remained steadfast and unwavering, despite the experience of colonialism.[158]

However, there is an idea among scholars of economics that religion provides moral guidance but does not constitute law.[159] The philosopher Immanuel Kant pointed out that the basis for morality is derived from the innermost self; it is innate. He claimed that religion

[153]Sophia Vasalou, *Moral Agents and Their Deserts: The Character of Mu'tazilite Ethics* (Princeton University Press 2008).
[154] Abdul Rahman Nemos, *Sufism between religion and philosophy* (1st edn, Alexandria: Dar al-Iman, 2008) 59.
[155]The Quran, Esra, [17:34-37].
[156]The Quran Aaraf, [7:31].
[157]The Quran, Baqara, [2:256]. Alkahf, [18:29]. Younes, [10:99]. Alshoura, [42:48]. Alghashia, [88:22].
[158] Hallaq (n 2) 293.
[159] Al-Sadr (n 122) 7.

provides a moral framework only. He distinguished ethics from the law, arguing that ethics is limited to motivations and intentions and does not impose sanctions, in contrast to law.[160]

Legal positivist theory is based on the separation of law and morals: it maintains that legal rules are valid and binding because they are legislated by parliament and not because they are grounded in morality or natural law.[161] Legal positivism and morality are relativistic, and there is no conceptual connection between law and ethics. Moral decisions can be just or valid only in relation to a given ethical framework.[162] In contrast, Islam is not limited to the provision of moral guidance but rather combines ethics with economic, social and political principles and laws within its primary and secondary sources.[163] Its laws are based on moral grounds, which are considered an essential element of Shariʿa principles and norms. In other words, its principles are grounded in morality, and there is no separation between ethics and Islamic economic principles. That is why Islamic thought can enrich the moral argument against insider dealing, as will be shown in Chapter 6.[164]

In deciding the merits of a dispute, for example, Islamic judges should consider the principle of justice before delivering any verdict.[165] The principle of justice is illustrated throughout the Quran.[166] For instance, the principle of punishing thieves with a severe penalty[167]

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[160] Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (T & T Clark 1887).
[161] HLA Hart, 'Positivism and the Separation of Law and Morals' [1958] 71(4) Harvard Law Review 593.
[162] Torben Spaak, 'Meta-Ethics and Legal Theory: The Case of Gustav Radbruch' [2008] 28 Law and Philosophy 3.
[163] Al-Sadr (n 122) 8.
[164] Maqasid is seen as a representation of the foundational cornerstone and reason on which the corpus of Islamic jurisprudence is based. See, Tareq Moqbel 'The Moral Interpretation of Law: Comparative Remarks on Dworkin's Legal Principles and Islamic Law's Maqāṣid' [2017] Legal Ethics, 20:2, 279. Chapter six tackles the moral problem of insider dealing from an Islamic perspective.
[165] The Quran, Alnesa, [4:58].
[166] The Quran, Alhujurat, [49:9]. Alnahel, [16:76-90]. Albaqara, [2:282]. Alnesa, [4:58]. Alaraf, [7:181]. Alanam, [6:152].
[167] The Quran, Almaeda, [5:38].

is not applicable if the thief is poor,[168] because of the fundamental principle that the state is responsible for helping the poor and if it fails to do so, then it is not the fault of the person but the state. This exception was illustrated by Khalifa Omar Ibn al-Khattab when he dropped the penalty for theft during a famine[169] in 639.[170] A thief was considered to be coerced to steal because of his hunger and therefore was exempted from the severe penalty.

It can be said that Islamic economics reflects the moral foundation on which Islamic rules are based. The Islamic rules are oriented in accordance with the goals and aims of the religion (*Maqasid Shariʿa*). One of these rules is that the principle of justice has supremacy over all other sub-principles.[171] Islamic economic rules should be consistent with the principle of justice.[172] But what is the principle of justice as seen through the Islamic lens? How can we define it, assess it and ensure that the rules are placed within its boundaries? The principle of justice originally was stated as an obligation in the Quran, in many verses; however, it was not defined. The Quran states that the principle of justice is a general obligation and it is a compulsory rule in several instances such as in the international relations,[173] trade, investments,[174] and in any transaction.[175] The Quran states that the principle of justice is the foundation of every verse in the Qur'anic vision, and therefore the philosophy of legislation in Islamic law is based on this principle.[176] There have been some attempts by scholars to clarify how to apply the principle of justice. Al-

[168]Fatwa no 55277 Ministry of Awqaf and Islamic Affairs in Qatar.
[169] Ahmad al-Kubaisi, *Ruling on Cutting of the Hand of the Thief in Islamic law* (2nd edn, Islamic University of Medina 1972) 36.Mustafa Sibai, *Socialism of Islam* (2nd edn, Dar Al-Watania for Printing and Publishing, 1960).
[170]Abu al-Fida ibn' Umar, *Ibn Katheer, The Beginning and the End*, (pt VII, Library of Knowledge 1981) 91.
[171]Al-Sadr (n 122) 30; Ahmed Nasser, *Principles of Islamic Economics* (Dar Nafaes Publishing 2010) 97. Also, Moqbel (n 164) 281.
[172]This definition is similar to Robert Alexy's definition of law. Robert Alexy, *Philosophy of Law* (Camel Caled tr, 2nd edn, Alhalaby Publishing 2013) 189.
[173] The Quran, Alhujorat [49:9].
[174] The Quran, Albaqara [2:282].
[175] The Quran, Alanam [6:152].
[176] The Quran, Alshoura [42:15-, Alaraf [7:181], Alnesa [4:58], Alnahel [16:90], and Alanam [6:115].

Farabi opined that justice could be applied through the application of the principle of equality.[177] Al-Ghazali and Alsobaie stated that the principle of justice could be upheld by applying the theory of socialism.[178] In contrast, Al-Sadr maintained that there is no way to measure the application of the principle of justice, as it is based on ethical and moral factors, and the application of this principle should be based on solving issues in Islamic society by applying Islamic laws. Al-Sadr stated that to define the principle of justice, we must first ask, what is the Islamic position towards ownership, production, distribution, etc.? (This question is discussed in Chapter 4.) He then pointed out the main aims and goals of Islam that must be considered when defining the principle of justice.[179] Islamic aims, termed *Maqasid Al-Sharia* (MS), are one of the main features of Islam, as the purpose of the rules is more important than the rules themselves. The meaning of MS was discussed in Chapter 2.[180] The application of the principle of justice is be one of the challenges in this thesis which will confronted when discussing the economic and moral problems of insider dealing in Chapter 6.[181]

3.4.4 IET, Islamic law and common law

When we explore IET, we find that the literature is engaged in discussing Islamic economic and legal rules and frequently refers to the term "Islamic law".[182] Islamic law is the

[177]Fawzi Mitri Najjar, *Abu Nasr al-Farabi* (1st edn, Beirut, Dar Al-Mashreq, 1971).
[178] Muhammad Al-Ghazali, *Islam and the socialist methods* (4th edn, Nahdet Misr for printing and publishing, 2005) 109. Mustafa Sibai, *Socialism of Islam* (2nd ed., National Publishing House, 1960) 233.
[179] Al-Sadr (n 122).
[180] Chapter two, section 2.4 page 53.
[181] Chapter six, sections 6.5 and 6.6. The level of abstractness is one of the central hurdles confronting Islamic scholars when applying maqasid to the laws. See, Moqbel (n 164) 281.
[182] For example, Pejman Abedifar, Philip Molyneux, Amine Tarazi; 'Risk in Islamic Banking' [2013] Review of Finance Volume 17, Issue 6, 1 November 2013, Pages 2035–2096. Also, Fuad Alomar, Introduction to the historical development of Islamic economy (research number 62 Deposit number 1424/3671) Islamic Research and Training Institute, the Islamic Bank for Development, 2003 84.

system of Muslim religious law, known as Shariʿa law.[183] It comes directly from God through the Quran, which is considered to be the backbone of IET.[184] In addition, IET comes indirectly from the Islamic jurists,[185] who provide legal opinions on issues through various methods, including (*Qiyas)*, the application of a Shariʿa value from an original case from the Quran or Hadith to a new case with the aim of extending the same ruling.[186] Consensus or (*Ijma)*[187] refers to the agreement of Muslim scholars on particular issues.[188] These sources form the basis of Islamic law, and obedience and submission to the law and the will of God that forms the core of the Islamic belief system.[189] Islamic jurists, or (*Muftis*), contributed to the Islamic legal field through their fundamental role in constructing fatwas (legal opinions); without them, Shariʿa would not have its unique features and would not be established in the same way.

Moreover, Islamic jurists, who depended in large part on the fatwas issued by Muftis, wrote the majority of Islamic law.[190] Islamic legal theory distinguishes five legal categories of human action based on the degree of obligation they impose: obligatory (*wajib*), recommended (*mandub*), permissible (*mubah*), prohibited (*haraam*) and repugnant (*makruh*).[191] All of these rules are derived from Islamic primary and secondary sources. In sum, Islamic law is both a system of law and a code of ethics.[192] This will be shown when discussing the fatwas on insider

[183]*Oxford English Dictionary* (n 128).
[184]Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan Amal* (2nd edn, Taylor and Francis 2002) 182.
[185] Abdulkarim Zidane, *Introduction to the studies of the Islamic Shariʿa Foundation*, (Thesis Publishers 1996) 153. Imam al-Shafi'i, *AlResalla* (Mustafa al-Babi al-Halabi 1940) 39.
[186] Abas bin Nordin, *The Rule of Qiyas* (LLM dissertation, International Islamic University of Malaysia 2008).
[187] Jami` at-Tirmidhi Vol. 4, Book 7, Hadith number 2167.
[188] Corinna Standke, *Shariʿa – The Islamic Law* (GRIN 2008) 4-5.
[189] CG Weeramantry, *Islamic Jurisprudence* (Waterstone Publishing 1988) 1.
[190]Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001) 188.
[191] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press, 2005). See also Hunt Janin and Andre Kahlmeyer, *Islamic Law: The Shariʿa from Muhammad's Time to the Present* (McFarland 2007) 22.
[192]Janin (n 191) 31.

dealing (Chapters 5 and 6), which show that the Islamic positions on insider dealing are based on legal and moral arguments.

In order to better understand Islamic law, it is important to discuss the other types of legal systems. The other well-known systems fall under the heading of positive law,[193] the source of which is human authority. Positive law contains the codes, statutes, regulations and precedents applied in the courts for the community.[194] The two main legal systems of positive law are common law and civil law. Common law is derived from judicial decisions rather than from statutes.[195] Originally, where common law pertained, judges decided cases according to contemporary moral norms and custom. Judges then referred to these precedents when passing judgement in subsequent cases. They followed the principles of the cases and the reasoning that underpins them rather than the wording '*ratio decidendi*'.[196] In terms of legal formalism, common law offers judges greater liberty to interpret the law more broadly and the power to create laws because it is based on facts and concrete cases, rather than adherence to the logical principles of codified law.[197] It is observed that both common law and religious law share the same approach of treating morals as a source of law.

Holmes explained the philosophy behind the common law, which holds that the only valid source of law is judicial decisions. Judges rule on the facts presented to them and then present the reasons that form the basis of their judgments. Their decisions are necessarily determined externally. Holmes believed that decisions could not be inferred through visual logic,

[193] 'man-made law'. Bryan A. Garner, ed., *Black's Law Dictionary*, rev. 9th ed. (St. Paul, Minn: West, 2009) 1280.
[194] ibid 1280.
[195] ibid 313.
[196] Patrick Baron, *The Judge* (Oxford University Press 1979) 177.
[197] Thorsten Beck and Ross Levin, 'Legal Institutions and Financial Development' [2003] World Bank Policy Research Working Paper No. 3136 <https://openknowledge.worldbank.org/handle/10986/18057> accessed 21 September 2017.

as laws are neither logic nor mathematics. As he put it, 'The life of the law has not been logic; it has been experience.'[198] Islamic thought considers experience to be an important source of knowledge and Muftis do apply their experiences and logic along with their scriptural acquaintance to their fatwas, as will be shown in Section 3.5.

With regard to financial transaction and contract law, there are some similarities between common law and Islamic law.[199] Several authors have traced the roots of the common law and found that it has Islamic origins.[200] For instance, the British system of trust has a similar basis as the Islamic institution of '*Waqf'*, or endowment.[201] Also, the Islamic practice of injecting new rulings by Islamic scholars (*Muftis*) by providing specific answers to new dilemmas in light of the Quran, Sunnah and the standards set by the earlier jurists is somewhat similar to the practice in common law of addressing new issues through the provision of new precedents by judges.[202]

Civil law is the other legal system in the Western world. The source of this law is the state and the authorities, which impose it. Historically, these laws were administered during the Roman Empire and are still influential in Europe.[203] The separation of positive legal systems into civil law and common law is challenged by the inconsistency of the data generated by the two legal systems.[204] It is argued that thinking in terms of legal families does more harm than good,

[198] Oliver Wendell Holmes, *The Common Law* (Little, Brown 1909).
[199] JA Makdisi, 'The Islamic Origins of the Common Law' [1999] 77(5) North Carolina Law Review 1635.
[200]Maha-Hanaan Balala, *Islamic Finance and Law: Theory and Practice in a Globalized World,* (IB Tauris 2011) 21.
[201] Ann van Thomas Wynan, 'A Note on the Origin of Uses and Trusts – Waqfs' [1949] 3 Southwest Law Journal 162.
[202]Mahmoud A El-Gamal, *Islamic Finance: Law, Economics, and Practice,* (Cambridge University Press, 2010) 16.
[203] Garner (n 17) 280.
[204] H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, Oxford University Press, 2010).

as there are similarities as well as differences between the two models, resulting in a much more mixed picture than this simple dichotomy suggests.[205]

In contrast to Islamic law, both civil and common law are human-made: one is codified, and the other is judge-created. According to Austin, there is another difference between human laws and godly laws. Pointing out that the law contains three elements, namely, (1) a command from a superior authority, which imposes (2) a binding duty, supported by (3) sanctions – he argued that these elements could not be found in religion.[206] He therefore rejected the classical Roman jurist's idea that human laws are fashioned from divine law, known as natural reason.[207]

A different conception of the law was presented by Fuller, who stated that in a moral sense, the law requires eight ethical principles: (1) the law must be general, (2) publicly accessible, (3) prospective, (4) clear, (5) non-contradictory, (6) reasonable, (7) constant and (8) applied literally. He believed that those principles constitute the eternal ethics of the law.[208] This concept was developed from Hart, who stressed the separation between the law and morals[209] and stated that Fuller's concepts should be considered as general instructions and guidance rather than ethical principles.[210] Looking at the different systems, it can be argued that the civil and common law systems have an impact on regulations by transferring ideology to institutions and laws and enforcing those laws accordingly.[211]

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[205] Mathias Siems, *Comparative Law* (Cambridge University Press, 2014) 135.
[206] John Austin, *The Province of Jurisprudence Determined* [1832] 21 <https://babel.hathitrust.org/cgi/pt?id=hvd.32044014632764;view=1up;seq=9> accessed 15 June 2017.
[207] ibid 135.
[208] Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' [2005] 24(3) Law and Philosophy 240-241.
[209] B Malkiel, in P Newman, M Milgate and J Eatwell (eds), *Dictionary of Money and Finance* (Macmillan 1992).
[210] Herbert Morris, 'The Concept of Law' [1962] 75(7) Harvard Law Review 1453.
[211] John Armour and Simon Deakin, 'Law and Financial Development: What We are Learning From Time-Series Evidence' [2010] Centre for Business Research, University of Cambridge Working Paper No. 399, 9.

As explained earlier, religion is a key feature that touches the law in many countries, albeit unevenly. The constitutions of some countries, including Saudi Arabia,[212] Pakistan,[213] Yemen,[214] Iran[215] and Libya,[216] acknowledge Islamic law as the only law that governs the state. According to the constitutions of those countries, the law must be derived from Islamic sources, or at least it must be compatible with Islamic law, and any legislation opposed to it should be considered invalid. Other countries, including Egypt,[217] Qatar,[218] Bahrain,[219] Kuwait,[220] the United Arab Emirates,[221] Syria,[222] Sudan[223] and Iraq,[224] acknowledge Islamic law as a primary source, together with positive law. In those countries, although Islamic law is one of the legislative sources, legislators may adopt positive laws that violate Shariʿa law because their constitutions allow regulation by other sources.

Regulation through religion is a feature not only of Islamic thought but also of other faiths. Thomas Aquinas, the prominent philosopher of the Roman Catholic church, observed that

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[212] Eid Al-Juhani, *Council of Ministers in the Kingdom of Saudi Arabia between Islamic Shariʿa and Contemporary Constitutional Trends* (Riyadh Al Majd Printing Press 1984) 72.
[213]The Constitution of the Islamic Republic of Pakistan pt IX arts 227. <www.wipo.int/edocs/lexdocs/laws/en/pk/pk021en.pdf> accessed 10 June 2017.
[214]The Constitution of the Republic of Yemen 2001, art 3. http://www.refworld.org/pdfid/3fc4c1e94.pdf 9/6/2017.
[215]The Constitution of the Islamic Republic of Iran 1989 art 5. <www.constituteproject.org/constitution/Iran_1989.pdf?lang=en> accessed 10 June 2017.
[216]The Constitution of Libya 2012 art 1 <www.constituteproject.org/constitution/Libya_2012.pdf?lang=en> accessed 10 June 2017.
[217]The Constitution of Egypt 2014 art 2 <www.constituteproject.org/constitution/Egypt_2014.pdf?lang=en> 10 June 2017.
[218] The Constitution of Qatar 2004 art 1 <www.constituteproject.org/constitution/Qatar_2003.pdf?lang=en> accessed 10 June 2017.
[219]The Constitution of the Kingdom of Bahrain 2002 art 2 <www.wipo.int/wipolex/en/text.jsp?file_id=189442> accessed 10 June 2017.
[220]The Constitution of Kuwait 1962 art 2 <www.constituteproject.org/constitution/Kuwait_1992.pdf> accessed 10 June 2017.
[221]The Constitution of the United Arab Emirates 2009 art 7 <www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf> accessed 11 June 2017
[222]The Constitution of the Syrian Arab Republic 2012 art 3 www.constituteproject.org/constitution/Syria_2012.pdf 10 June 2017.
[223]The Constitution of the Republic of the Sudan 2005 art 5 <www.wipo.int/wipolex/en/text.jsp?file_id=241714> accessed 10 June 2017.
[224]The Constitution of the Republic of Iraq 2005 art 2 <www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en> accessed 10 June 2017.

positive law is merely an application of the greater principles that prevail according to the law of God. If the law is opposed to the law of God, or if it is unjust, then it should not be obeyed.[225] In Islam, the principle of justice is the foundation of any application of the law.[226] Many authors stress the principle of justice,[227] including Stammler, who believed that while laws could be amended over time, there are a few fixed principles on which the law is based that cannot be changed, such as the principle of justice and rightness.[228] In addition, Radbruch noted that the law relies on a religio-philosophical framework. It is based on justice, equality, rights and integrity, and the criterion for validity requires that the law achieves the legislator's goal of achieving justice.[229] If positive law conflicts with the principle of justice, then it should be deemed null and void.[230] However, Ross refused to accept the principle of justice and rejected the idea of testing whether a law is fair or unfair, arguing that to do so would lead to chaos due to the different understandings of the concept of fairness.[231] Likewise, Kelsen asserted that 'justice is not a cognitive truth which can be objectively determined but rather a matter of value judgments which cannot be absolute'.[232] So how can the principle of justice in Islamic thought be applied to insider dealing?

[225] Thomas Aquinis and Boles Awad (tr), *Summa Theologica, Accurante* vol V, (Bodleian Libraries 1862) 20.
[226] Al-Sadr (n 122).
[227]Cristbal Orrego, 'HLA Hart's Understanding of Classical Natural Law Theory' [2004] 24(2) Oxford Journal of Legal Studies 302.
[228] Rudolf Stammler, 'The Idea of Justice' [1923] 71(4) University of Pennsylvania Law Review and American Law Register 303 and 305.
[229] Anton-Hermann Chroust, 'The Philosophy of Law of Gustav Radbruch' [1944] 53(1) The Philosophical Review 25.
[230]Stanley L Paulson, 'On the Background and Significance of Gustav Radbruch's Post-War Papers' [2006] 26(1) Oxford Journal of Legal Studies 27 and 28.
[231]AH Campbell, 'Review: What Is Justice?' Justice [1959] 22(6) The Modern Law Review 704. 7
[232] W. Friedmann, 'Reviewed Work(s): 'What Is Justice? Justice, Law and Politics in the Mirror of Science by Hans Kelsen' [1957] 9(4) Stanford Law Rev 844.

Overall, IET does not accept unjust laws.[233] Islamic law considers ethical values to be an essential element of its laws.[234] Nevertheless, the uncertainty of assessing whether Islamic thought is applied according to the Quranic vision of the principle of justice is a primary challenge among Islamic scholars because of the lack of a clear definition. That said, this lack of definition could be seen as a positive, given that, as Al-Sadr stated, reality is changeable, thus the ability to use discretion when interpreting Islamic law is an advantage that demonstrates the flexibility of the religion.[235] The philosophy of IET and the great importance it places on the purposes and goals of MS when devising laws to guide human conduct underscores this flexibility.[236]

The question of how IET influences the legal progress remains crucial. The answer lies in understanding how the development of the laws in Islamic countries is influenced by Muftis and fatwas. Therefore, understanding these fatwas, their importance and their economic dimensions is a crucial step that must be taken while exploring the role of Ifta institutions and their impact on the public as well as on financial and legal development. The next section is devoted to discussing the role of fatwas in legal development.

3.5 Fatwas and legal development

The power of the legal opinions (*fatwas*) issued by Ifta institutions and their role in relation to financial apparatuses can be better comprehended through an understanding of what drives Muslims to follow and rely on them. Exploring the philosophical meaning of fatwas

[233] Ibrahim Shatibi, Abdullah Draz (ed), *Almwafqat Fy 'Asowl Al-shariʿa*, vol II (Dar al kotob al ilmiyah 2010) 323.
[234] Gamal El-Din Attia *Towards the Activation of the Purposes of the Shariʿa* (The International Institute of Islamic Thought 2001) 119.
[235] Al-Sadr (n 122) 665 and 680.
[236] Abdul Nour Baza, *Human Interests Approaches Maqasid*, (International Institute of Islamic Thought 2008) 18. See also Omar Omar, *Purposes of Shariʿa at Imam Ezz bin Abdul Salam* (Dar Nafaes Publishing and Distribution 2003) 72.

generally is also an important step for investigating those empirical rulings (fatwas) from the authoritative Islamic institutions on insider dealing. This section argues that the concept of *ijtihad* is central to Islam. It suggests that fatwas demonstrate the ability of the human intellect to mediate between Allah's will and human behaviour. Likewise, the *Muftis'* minds are considered to be a channel through which a connection between earth and the sky is formed to address new developments, 'leading to analogical extensions of the body of textual theory'.[237] This section proposes that fatwa is a major contributor to Islamic legal jurisprudence and considers it to be the living spirit of Islam.[238] It is divided into four subsections. First, it examines the philosophical understanding of fatwa. Second, it explores the need for fatwas. Third, it discusses the dynamics of fatwas, that is, how they are structured and formed, from the analysis of the procured fatwas. Finally, it explores the differences between Muftis and judgments.

3.5.1 The philosophy of fatwas

Islamic scholars tend to describe Islam as a renewed religion that has the power to address contemporary and emerging issues through the concept of *ijtihad* and Iftaa.[239] But, what is fatwa and what is its role in the method of independent reasoning known as *ijtihad*?[240] Is it a law? There is a fundamental differentiation between the law and the fatwa. Still, some authors tend to erroneously consider fatwa as a part of Islamic law and that it is the Mufti's job to reply to a specific question about Islamic law.[241] Misguidedly, these authors state that the Mufti's task

[237]Messick, Brinkley. 'The Mufti, the Text and the World: Legal Interpretation in Yemen' [1986] Man, no. 1, vol. 21,117.
[238] ibid 110.
[239]Mohammed Al-Shankaiti, *Ijtihad and its applications in the field of stock markets* (1st edn, Dar Ibn Hazm, 2008) 124.
[240]Esposito (n 42) 134.
[241] See, for instance, Steve Sokić; 'Shari'a Compliant Trusts' [2009] Trusts and Trustees, Volume 15, Issue 10, 1 December 2009, page 760. Also see, Calder N and Gleave R, *Islamic Jurisprudence in the Classical Era* (Colin Imber ed, Cambridge University Press 2010) 116.

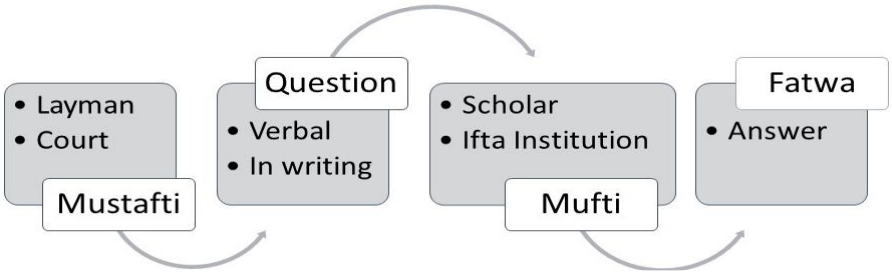
is to clarify 'Allah's'[242] rulings,[243] claiming that the aim of the answer provided through a fatwa is to offer information on God's law[244] or to provide a rule based on the interrelationship of religious law and fact.[245]

This understanding is problematic because it assumes that there is an Islamic law hidden somewhere and the Mufti's role is to dig out the information from its source. This is not true, because, as was explained previously, there is no code of law in Islam, and the Mufti's job is to interpret the Islamic texts and to consider the situation on which the question is focused, think about the status quo and then provide an answer based on the circumstances and his understanding of the Islamic sources. This answer is merely a non-binding opinion and could vary from one Mufti to another, which is why the process involves a form of religious interpretation known as *ijtihad*.[246]

The fatwa is usually a religious opinion on a social, economic or political issue.[247] This opinion is issued from a person who is called a Mufti to another person called a *Mustafti*, and the process itself is called Ifta (Figure 3.1).[248] Questions can be raised by a layperson or by a court. However, unlike the law, a fatwa is not enforceable nor compulsory on the inquirer or on anyone

[242] 'Allah God. Worship by Muslims, Christians and Jews to the exclusion of all others. See, Esposito (n 42) 16.
[243]Calder (n 241) 127. Also see, Ali Al-Hakami, *The Origin of Fatwa* (2nd edn, Al-Makaya Library Al-Rayyan Foundation for Printing and Publishing, 2001) 89.
[244] Ahmed Fakhri, *Fatwas and court judgments: a genre analysis of Arabic legal opinion* (Columbus: The Ohio State University Press 2014) 31 and 49.
[245] Brinkley (n 237) 104.
[246] ibid 103.
[247]El-Ashker (n 108) 410.
[248] Calder (n 241) 112.

else:[249] even if a court raised the question, it still has a full discretion to accept or reject the opinion.[250]



***Author's own figure 3.1**: Fatwa' elements*

Why would a mustafti ask a question? Obtaining a fatwa is an informational step typically taken for the purpose of regulating one's personal affairs through the guidance of religious opinion or for litigation purposes.[251] So, is it a mere legal opinion? Islamic scholars rarely address the philosophical connotation of the fatwa as a methodology. To allow a deeper insight into the meaning of the fatwa, it is useful to explore the Quranic use of the term 'Ifta' (the act of issuing fatwa).[252] God refers to Ifta in many Quranic verses,[253] including the following:

'They ask you (yastaftunak) [Prophet] for a ruling about woman, Say God Himself gives you a ruling about them…'[254]

'They ask you [Prophet] for a ruling about inheritance…'[255]

The verses above illustrate a link between the fatwa and society and show how Ifta, as a question-and-answer process, reforms society and benefits Muslims by providing adequate

[249]Layish, Aharon. 'The Fatwa as an Instrument of the Islamization of a Tribal Society in Process of Sedentarization' [1991] Bulletin of the School of Oriental and African Studies, University of London 54, no. 3, p. 449.
[250] ibid 453.
[251]Brinkley (n 237) 103.
[252]ibid 132.
[253] 'Ayah / Ayat, usually translated as a verse or (sign)'. Esposito (n 42) 30.
[254] The Quran, Alnesa 'Woman', [4:127]. The translation is from: Haleem (n 49) 62.
[255] Alnesa 'Woman', [4:176]. See, ibid 66.

answers to important problems related to children, women, orphans' rights and inheritance law. All these rules are used by Muslims currently. In these verses, the questions were raised by the people to the prophet, and God provided his answers in the form of binding laws. In the Quran, it can be noted that asking questions is a very important element that has shaped Islamic law. This can be seen in more than thirteen verses,[256] which all begins with the word *Wayas'alunak*, meaning 'They ask you'.[257] The questions raised concern different practical matters such as spending, permissible goods, food, and more sophisticated theological matters such as the soul, time, and judgment day as well as matters such as the change of the shape of the moon, and the mountains. From these verses, it is evident that the fatwas process is unique in that the Islamic religion has developed by asking questions. In this sense, the mechanism of the fatwa can be seen as the living soul of Islam and a contributing tool of Islamic legal jurisprudence.[258]

However, the *Oxford Dictionary of Islam* translation of *Yastaftunak* appears to be questionable. It is not accurate to consider the request for a fatwa as merely a question, since there is an important difference between asking a question and requesting a fatwa. The complexity of Arabic as a Semitic language that has historical diacritic marks with different semantic meanings is evident in the Quran given that both terms, *Wa yas'alunak* (they ask you) and *Yastaftunak*, are used in the Book in different contexts. The term *Yastaftunak* is used in the verses 'Woman' ('Al-Nisa', 4:127,176) and the term (*Iftina*) is used in the verse 'Joseph' ('Yusuf', 12:46) in a religious context about unknown matters. Also, the term (*Aftony)* is used in

[256] The Quran, Albaqara, [2:189, 215, 217, 219, 220, 222]. Almaeda, [5:4]. Al-A'raf, [7:187]. Al Anfal [8:1]. Esra [17:85]. Alkahf [18:83]. Taha [20:105]. An-Nazi'at [79:42].
[257] Haleem (n 49) pages 21, 24, 25, 68, 107, 110, 180, 188, 200, and 408.
[258]In this regard Ramadan states that: The spirit of the fatwas designates a dynamic vision of the Islamic law based on ijtihad. Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford: Oxford University Press, 2004) 10-17.

the Quranic verse 'an-Naml' (27:32)[259] in a request for counsel, aid, guidance and an explanation of the correct course of action for the questioner rather than a mere answer to a question, demonstrating the impenetrability of jargon, and the impossibility of obtaining the meaning through a simplistic translation. Likewise, the term (*yas'alunak)*, which is translated as '*They ask you*',[260] is used in other different forms, sometimes in a negative or unwanted manner to answer contexts. Although there have been no studies which compare these terms, the verses reviewed here seem to suggest that a central difference between them stems from the fact that questions can be asked about both known and unknown matters as well as both religious or nonreligious matters. That is why asking unnecessary questions is explicitly censured in the Hadith.[261] To ask for a fatwa is to ask an essential question about a religious matter to which one does not have an answer; such a request relates to a theological inquiry raised to Islamic authority for guidance and moral agency.

The philosophy underpinning fatwas can be better understood when we examine the Prophet Mohammad's saying that asking a good question is half of knowledge.[262] This saying advocate pursuing questions that are worth asking. Islamic jurisprudence has been built by asking good questions, and a similar method is used in the pursuit of knowledge and science.[263] Islamic wisdom considers knowledge as key to being able to ask the right question that is worth researching.[264] A question is the basis of any fatwa, and it can be formed in several ways by the mustafti, which could be either a court which is examining a legal dispute, or a person who is

[259] 'Counsellors (Aftony), give me your counsel in matter I now face; I only ever decide matters in your presence.' See, Haleem (n 49) 241.
[260] For example, in the verses [8:1], [17:85] and [7:187].
[261] See, The Quranic interpretation by: Muhammad AlSabouni, *Tafseer Ibn Katheer* (7th edn, Dar Al-Quran Al-Kareem, Beirut, Lebanon 1981) pages 68, 192, 353, 564, and 1235.
[262]Abdullah Ebadi Alhadji, *Mentaha Alsawl Sharah Wasayil Alwusul 'iilaa Shamayil Alrasul* (Beirut: Dar Almanhaj 2008) part 3, 316.
[263]Ali Alwasiti, *Euyun Alhukm Walmawaeth* (Hussein Albir Aljundi (ed) Dar Alhadith 1956) part 1, 424.
[264] ibid 451.

looking for ethical guidance on his own behaviour.[265] The mustafti is also known as '*Muqallid'* because he is supposed to follow the legal opinion and guidance provided by the Mufti.[266] Therefore, he is presumed to have chosen his Mufti carefully by looking for the one who has the best knowledge on the matter in question.[267]

The process of following the legal opinion that has been issued by a Mufti is called '*taqlid*' (imitation),[268] which is a recognised tradition in the Islamic world based on following a guidance of the elite Islamic jurists.[269] Taqlid has another meaning related to abandoning due diligence and taking a blindly imitative approach of the fundamentalists, by following the old fatwas. Such narrowness has a negative connotation for modern Islamic jurists and reformists, given that it leads to stagnation and prevents any development of Islamic rules in response to emerging ideas and issues.[270]

The question raised by a mustafti can take several forms. For example, it can be categorised as a legitimate question when it is about an actual situation the person is facing or may face and must choose between multiple options. This juristic kind of question concerns how rightful the person is in his position. Generally, there is a supposition that a question will address a real issue.[271] As Imam Al- Nawawi[272] states, 'One should ask the Mufti [only] when the event

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[265] Imam Muhiyyuddin Abu Zakariya Bin Sharaf Nawawi, *Adab Al-Fatwa Wal Mufti Wal Mustafti: The Etiquette's and Qualifications of Issuing Islamic-Judgement, of a Mufti, and of the One Seeking His Opinion* (Al-Fardani Publishers & Distributors 1997).
[266] Wael Hallaq, *Sharia:Theory, Practice, Transformations* (Cambridge University Press 2009) 111.
[267] Al-Hakami (n 243) 75.
[268] Esposito (n 42) 314
[269] ibid. However, Taqlid could be related to 'Muqallid' which also means a person that follows certain Islamic school of legal thought.
[270] ibid.
[271]Calder (n 241) 167.
[272] 'Al-Nawawī, Muḥyiddīn Abū Zakariyā Yaḥya ibn Sharaf (1233–1277 C.E.), a Shāfiʿī jurist and ḥadīth scholar. His dislike for logic is often cited' See, Qureshi, Jawad Anwar . "Nawawi, Muhyi al-Din." In *The [Oxford] Encyclopedia of Islam and Law*. *Oxford Islamic Studies Online*. 20-Dec-2018. <http://www.oxfordislamicstudies.com/article/opr/t349/e0070>.

occasioning the question has happened'[273] or is likely to happen', in which case the fatwa would have retrospective application. Another kind of question is investigatory and as such is more related to researching an issue of concern theoretically. Some Islamic Ifta institutions have a research department and provide answers for both types of questions,[274] while other Islamic institutions may refuse to answer investigatory questions either because of lack of time[275] or because research questions are outside the scope of their services.[276] There is a notion that Ifta institutions are essential social bodies that should be devoted only to real matters rather than research. In this regard, Al-Nawawi states that 'If a layperson asks about what has not happened, it is not necessary to respond'.[277] In sum, when a fatwa is issued by an authoritative well-known Islamic body, the outcome of the mustafi's request can be a rich, fruitful answer, whereas, as history as shown us, when fatwas are issued by dogmatic[278] and extremist[279] persons, they can be of poor quality or otherwise problematic, with awful consequences the society.[280]

The Ifta in this research is about exploring the religious legal opinions from several Islamic scholars from well-known Ifta institutions.[281] This process has an intellectual construction that involves logic and reasoning which pervades the interpretation. In order to

[273] Nawawī, *Rawḍat al-Ṭālibīn* (Beirut: al-Kitāb al-Islāmī, 1985), XI, 103.
[274] For example, Alazhar in Egypt, Ifta department in the UAE, and Ministry of Awaqaf and Ifta in Kuwait. See, fatwa number 97010 from the General Authority of Islamic Affairs and Endowments in the UAE, Official Fatwa Centre, Awqaf.ae to author (19/12/2018). Also, fatwa number 63741 from Alazhar in Egypt, azhar.eg to author (5/12/2018).
[275] See for example, fatwa number Z0zymLf5KX0 from Ifta office of Sayyid Ali Hosseini Khamenei, Leader.ir to author (5/12/2018).
[276] For example, Email ref 111999 from the Dar Ifta Al-Masriya, Egypt to author (5/12/2018). Also fatwa number 8/2017 The Ministry of Awqaf and Islamic Affairs, the Eftaa and Islamic Research Sector, al-Eftaa Dept. Kuwait to author (14/2/2017). And, Email ref 63741 from Alazhar in Egypt, azhar.eg to author (5/12/2018) online.
[277] Nawawī (n 273) XI, 110.
[278] Or extremist dogma. See, Manni Crone 'Radicalization revisited: violence, politics and the skills of the body' [2016] International Affairs, Issue 3, 1 May 2016, Volume 92, pages 601 and 602.
[279]Layish (n 249) 444.
[280] For example, Al-Qaeda, Taliban, and ISIS terrorism. Many jurists issue fatwas against terrorism and violence stating that there is no justification of any kind in Islam for the opposed extremist fatwas. See, Muḥammad Ṭāhirulqādrī, *Fatwa on terrorism and suicide bombings* (Minhaj-ul-Quran International 2010).
[281] 11 Ifta institutions in Islamic countries. See, Chapter Two, section 2.5.3.

understand this construction, one must first understand why we need fatwas when we have the primary sources of the Quran and Hadith. The next section investigates this question broadly.

3.5.2 The necessity of fatwas

Many Muslims face questions that are not answered clearly in the main Islamic sources.[282] To address this issue, Muftis use *ijtihad* as a tool to adapt to changes. Ifta became a notable feature in Islamic legal science and a reason for continued research.[283] Today, fatwas clearly have become widely available from many Ifta institutions and Muftis. Such availability informs the concept of 'fatwa shopping', [284] which has become the status quo. Given that one can approach several fatwas internationally in seconds through an online mechanism,[285] this is hardly surprising, but it does raise the question as to who can perform the *Ifta* process.

There appears to be some agreement on the conditions and characteristics of the Mufti. Most authors agree that a Mufti must be Muslim, mature, prudent, and just (impartial and unbiased).[286] Other authors added that the Mufti must be an Arabic-speaking and -writing scholar[287] who knows how to use syllogistic reasoning.[288] Other characteristics are more of an amalgam of values related to social good-standing,[289] for example, being of good faith,[290] learned, venerable, exhibiting patience, quietness, adequacy, and knowing one's society, people

[282] ibid 166.
[283] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964) 73.
[284] Hosen N, "Online Fatwa in Indonesia: From Fatwa Shopping to Googling a Kiai" in Greg Fealy and Sally White (eds), *Expressing Islam: Religious Life and Politics in Indonesia (*ISEAS–Yusof Ishak Institute 2008)164.
[285] ibid.
[286] Al-Hakami (n 243) 24.
[287] A scholar in matters of religion.
[288] Shahat Mansour, *The Rules Governing the Fatwa of the Mufti and the Judge* (1st edn, Dar Aljama Aljadeda, 2011) 25.
[289] Hosen (n 284) 167.
[290]Abu-alnaja Almaqdisi, *Al'iqnae Fe Fiqh Imam Ahmed Bin Hanbal* (Abdullatif Alsabaki (Ed) Dar Almaerif Beirut 1560) vol 4, 371.

and social customs.[291] Some authors add that a Mufti should be financially independent so that his fatwas will not be influenced by financial factors.[292]

When the Ifta process is traced, it is found that it is linked to a hierarchy that consists of a ranking based on the level of the scholars' religious knowledge. In this system, a junior scholar is dependent on the scholars at higher levels.[293] The highest level of Mufti is called a '*Mujtahid'* (diligent),[294] who is a highly qualified jurist who has become an authority in Islamic law over many years of in-depth study of the Islamic science.[295] This high level of authority can be seen in roughly six countries,[296] in which the person with the highest level of ijtihad[297] is usually referred to as a 'Grand Mufti'[298] or the '*Ayatollah Al-Wali Alfaqih*'.[299] At a lower level is the imam,[300] who is a mystical leader of a Muslim community.[301] A Mufti is a religious scholar who fulfils the conditions and demonstrates the characteristics specified previously, but at a lower level of authority than the diligent (*Mujtahid*). All these types of religious scholars have the authority to issue a fatwa.[302] The higher the rank of the Mufti, the more his fatwa is socially respected. In many important matters, the state turns to the Grand Mufti for admonishments designed to

[291] ibid.
[292] Ibn Qayyim al-Jawziyya, *Eelam Almowaqeen*, (Dar al-Kuttab al-Ulami, 1st ed., 1991) vol 4, p 199.
[293] Calder (n 241) 116.
[294] 'One who exercises independent reasoning (ijtihad) in the interpretation of Islamic law...' See, Esposito (n 42) 214.
[295] Hosen (n 284) 159.
[296]Calder (n 241) 99.
[297] Details of qualifications of mujtahids are the subject of many academic studies. See, Ali, Shaheen S., Resurrecting Siyar Through Fatwas? (Re) Constructing 'Islamic International Law' in a Post-(Iraq) Invasion World (May 9, 2012). Journal of Conflict & Security Law, Oxford University Press, 2009; Warwick School of Law Research Paper No. 2012/8, page 121.
[298] The Grand Mufti is the highest official in Sunni countries. See, ibid 85.
[299] The Guardianship 'Wilayah' of the Islamic Jurist 'Faqih' in Shia school, e.g. Iran, See, The Constitution of the Islamic Republic of Iran 1989 article 57, also see, The Wilayah of the Just Faqih page 6. <www.constituteproject.org/constitution/Iran_1989.pdf?lang=en> accessed 18/11/2018.
[300] Every Mufti is an imam, but not every imam is a Mufti, as Muftis have more knowledge than imams. For the Sunnis, an imam may be simply any religious Muslim who runs a mosque. See, Janin (n 191) 24.
[301] The term 'Imam' is also used to designate a leader of a particular school of thought (mazhab). Hosen (n 284) 159.
[302] ibid. However, it is seen that it is different to issue a fatwa than to repeat a higher Mufti's fatwa. See, Ibn Abidin al-Hanafi, *Rad Durr al-Mukhtar* (2nd edn, Beirut: Dar Al-fiker, 1992 Part 5) page 361.

combat corruption, prevent demonstrations and promote obedience to the ruler. This practice illustrates the importance of distinguishing the effect of those fatwas issued by the highest-ranking jurists from that of the normal ones,[303] as the impact on the community will be different.

The Ifta is organised according to a complex social system that is based on sophisticated rules and customs. In Muslim countries, an observer would find that Muftis are working in official and unofficial positions[304] and their level of influence is more related to their depth of knowledge than to formalities. Nevertheless, the Ifta has a primary role at the institutional and official level, since many governments have worked on the institutionalization of Muftis.[305]

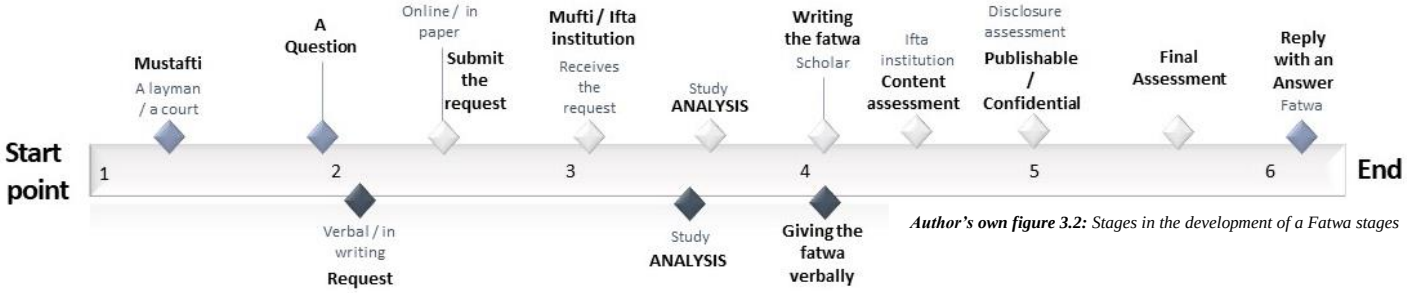
3.5.3 The dynamics of fatwas

This subsection explores the practical side of the fatwas obtained for this research. The discussion, which is based on the analysis of them, aims to provide a deeper understanding of the practicality of the fatwa process. It explains the steps the author followed to obtain the fatwas. The subsection refers to the obtained fatwas when explaining this process. It aims to explain the structure of the fatwa, how it is given and in what form. Accordingly, the discussion is constrained to the basic formality of the obtained fatwa.

At its most basic, the fatwa process could be described as having six logical stages. It begins with a question raised by an inquirer. Once the question has been submitted, the matter is processed through a Mufti who studies it and may request further information if required.[306] If the question has been directed to an Ifta institution, there may be a stage during which the

[303]Calder (n 241) 116.
[304]Brinkley (n 237) 103.
[305]Layish, Aharon 'The Contribution of the Modernists to the Secularization of Islamic Law' [2006] Middle Eastern Studies 14:3, 265.
[306] For example, email ref 2934-2018 from Dar Al Ifta Al Falastinia, State of Palestine to author (16-12-2018). Also, email from Almosleh.com to author (24-4-2018). Email ref 493865 from the Dar Ifta Al-Masriya, Egypt to author (6-12-2018).

fatwa's content is assessed, revised, and a decision taken as to whether it is publishable or not.[307] Afterwards, there may be a last assessment of the content,[308] and finally, a fatwa (an answer) is issued by the Ifta institution.



Author's own figure 3.2: *Stages in the development of a Fatwa stages*

The diversity and pluralism of the Islamic legal structure is a key feature which influences the multiplicity of fatwa opinions. What is interesting is how those different fatwas and answers are delivered.[309] The fatwa could be brought both orally and in writing. Many institutions in Islamic countries provide a hotline for a verbal fatwa service through certain governmental institutions.[310] However, typically, fatwas are given in writing[311] and many public and private institutions provide fatwas following submission of a written request.[312] In modern times, this is usually done through an online application or what is so called an 'electronic fatwa'

[307] For example, fatwa 108819 the General Iftaa Department the Hashemite Kingdom of Jordan to author (28-11-2018). It is stated that the fatwa is not for publishing. But after emailing the institution they allowed using it for research with refencing it.

[308] Specially if the institution is a governmental entity, for example, fatwa number 82017 The Ministry of Awqaf and Islamic Affairs, the Eftaa and Islamic Research Sector, al-Eftaa Dept., Kuwait to author (14-2-2017).

[309] Fakhri (n 244) 58.

[310] For example, most governments and institutions in Muslim countries provide such service, like Kuwait https://www.e.gov.kw/sites/kgoArabic/Pages/Services/MOIAI/FatwasPhoneService.aspx, and Dar Ifta Egypt http://dar-alIfta.org/AR/ViewService.aspx?ID=1, also, Dar Ifta Ghaza, Palestine http://www.darIfta.org/callus/index.php, Jordan http://www.alIftaa.jo/ShowContent.aspx?Id=61, Saudi Arabia https://www.saudi.gov.sa/wps/portal/snp/pages/agencies/agencydetails/organization-AC105/, Accessed 13/12/2018.

[311] Calder (n 241) 116.

[312] For example, a request was submitted by the author to the Kuwait Ministry of Islamic affairs, Al-Eftaa and Islamic Research Sector, fatwa number 8P/2017 dated 14/2/2017.

service.[313] The question and the answer are the two components of a written fatwa.[314] But how the content of the fatwa is structured?

A fatwa normally includes one Islamic legal opinion.[315] However, it may include several opinions. Consequently, a fatwa may consist of more than one rule.[316] The content of the fatwa is presumed to be for the mustafti. This means the mustafti owns the fatwa.[317] Its content is required to be written in a clear and uncomplicated language.[318] It may include simple,[319] detailed[320] justifications, or no justification at all.[321] The justification improves the quality and legitimacy of the fatwa.[322] The Mufti usually tends to refer to Islamic sources such as verses from the Quran, the Hadith and the sayings of the leading imams, to enhance the reliability of his opinion.[323] Traditionally, fatwas tend to provide brief answers with short, direct content; some are written only in one sentence.[324] However, fatwas also may be long and detailed[325] and can extend to 600 pages.[326] Usually, fatwas are lengthy when they are issued to the general public in

[313]See for example, UAE e-Fatwa service https://www.awqaf.gov.ae/en/efatwa . Also, Egypt, Dar Al-Ifta http://www.dar-alIfta.org/Foreign/FatwaRequest.aspx and Kuwait Fatwa Service https://www.e.gov.kw/sites/kgoenglish/Pages/Services/MOIAI/GeneralFatwas.aspx accessed 30/11/2018.
[314]Calder (n 241) 116.
[315] For example, fatwa number gCT49Q5U3qA by Sayyid Ali Hosseini Khamenei leader office, Iran to author (7-12-2018).
[316] Robert Gleave and Eugenia Kermeli, *Islamic Law: Theory and Practice* (I.B.Tauris, 1997) 80.
[317]Calder (n 241) 167.
[318] Nawawī (n 273) XI, 106. Also, ibid.
[319] Fatwa number 82017 The Ministry of Awqaf and Islamic Affairs, the Eftaa and Islamic Research Sector, al-Eftaa Department, Kuwait to author (14-2-2017).
[320]For example, fatwa number FR-56945-2018 from Department of Islamic Affairs and Charitable Activities, Iftaa Department, Dubai government (IACAD), United Arab Emirates iacad.gov.ae to author (10-3-2018).
[321]Fatwa number gCT49Q5U3qA by Sayyid Ali Hosseini Khamenei leader office, Iran (7-12-2018).
[322]Fakhri (n 244) 99.
[323] For example, fatwa 108819 the General Iftaa Department the Hashemite Kingdom of Jordan to author (28-11-2018). Also, fatwa number FR-37112-2017 from Department of Islamic Affairs and Charitable Activities, Iftaa Department, Dubai government (IACAD), United Arab Emirates iacad.gov.ae (25-12-2017).
[324] ibid. Also, fatwa number gCT49Q5U3qA by Sayyid Ali Hosseini Khamenei leader office, Iran (7-12-2018)
[325] For example, a fatwa of 3 pages issued to the author, fatwa number 108819 by the General Iftaa Department the Hashemite Kingdom of Jordan to author (28-11-2018).
[326] The Fatwa on terrorism and suicide bombings by Mufti Muhammad Tahir-ul-Qadri. See, (n 280). Such length is rare.

relation to critical issues.[327] Fatwas may also include hypotheses, assumptions and conditional opinions.[328] However, in a fatwa a Mufti ought not use phrases typical of academic research, such as 'there are two views on the matter'.[329] He ought to be precise with the aim of providing a practical answer on how to act.[330]

The fatwa by definition involves an intellectual process. Interpretation is an essential rational tool for building a bridge between the religious scriptures and the contemporary practicality of reality. This is seen in several of the fatwas obtained on insider dealing when referring to the Quran and Hadith to justify the position of the Ifta institution.[331] In these cases, the Muftis interpreted the text and determined its relevance to insider dealing through their own understanding of the meaning.[332] As per their understanding, their explanation and the link between the religious text and insider dealing are provided.[333] The process of interpretation usually leads to different understandings and enlightenments based on each person's experience, tradition and thought. That is why we can see various opinions from the distinctive Islamic schools[334] or '*Madhhab'*.[335] Such differences offer a robust framework that can enrich intellectual development (Chapter 8).[336]

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[327] Zubaida S, "Contemporary Trends in Muslim Legal Thought and Ideology" in Robert W Hefner (ed), *The New Cambridge History of Islam,* (Cambridge University Press 2010) vol 6, 282.
[328] For example, fatwa number FR-56945-2018 from Department of Islamic Affairs and Charitable Activities, Iftaa Department, Dubai government (IACAD), UAE iacad.gov.ae to author (10-3-2018). Also, fatwa number 82017 The Ministry of Awqaf and Islamic Affairs, the Eftaa and Islamic Research Sector, al-Eftaa Dept, Kuwait to author (14-2-2017). And fatwa number 123309 from the Dar Ifta Al-Masriya, Egypt to author (20-2-2017).
[329]Nawawī (n 273) XI, 113
[330]Calder (n 241) 167.
[331] Ifta-03, Ifta-06, Ifta-08, and Ifta-10.
[332] Esposito (n 42) 366.
[333]Waite (n 14) 380.
[334] For example, Yusuf al-Qaradawi and Abù-Saud, have different opinions on contemporary issues. See, El-Ashker (n 108) 360.
[335] The term Madhhab refers to the school of thought, for example, Hanafi, Hanbali, Shafi'i, Jafari Schools of Law. See Esposito (n 42) 183.
[336] Hosen (n 284) 165.

Generally, the fatwas framework is considered through the concept of trusteeship (*Amanah*), which is discussed in Chapter 4. Many scholars have tackled the notion of free-will and responsibility and associated it with the concept of trusteeship. The Muftis acknowledge that human beings are free to choose, but they provide guidance that creates harmony with Allah's code of conduct to help lead them onto a straight path to 'heaven'.[337] The trusteeship relationship between God and man is based on a delegation of the free-will and authority given to man by God.[338] The Muftis have a responsibility to determine the limits of the freedom of choice as per this super-contractual relationship. Such fathom exploration is in a way used by the judges too but in a logical level within the limits of the law to discover the interrelationship of fact and law. Therefore, an association between the judges and the Muftis in the Islamic world is usually assumed by Western scholars, since both use interpretation and logical methods. This raises the question of how a fatwa differs from a judgment, which is the next focus for discussion.

3.5.4 Fatwas and judgments

Muftis play an essential role in the social, moral and religious aspects of Muslim societies, yet one cannot bear not to ask if is there a relation between judges and Muftis in the Muslims world?

In order to answer this question, it is important to trace the history of judges and Muftis. Thinking of the first judge in Islam, the Prophet immediately comes to mind, appearing in the literature as a ruler, a judge and a legislator, among other imperative roles. The Prophet used to resolve disputes between his followers.[339] Given that many of his sayings are a source of the Islamic law, the role he played during his lifetime was clearly complex. However, society took a

[337] The Quran [90:8–10].
[338] El-Ashker (n 108) 39.
[339]Bowen JR, "Judging," *A New Anthropology of Islam* (Cambridge University Press 2012) 138.

different approach after his death. Judges and Muftis began to appear more and more on the surface in the different parts of the Islamic world.[340] A mixed framework between judges and Islamic jurists such as Muftis appeared by the time the second Caliph Umar (r. 634-644) governed.[341] He demanded that every judge must possess a systematic knowledge of religious science to face any difficulties arising from disputed matters.[342] From the beginning of the second century (720 AD), judges were encouraged to pursue the counsel of Muftis.[343] Many authors considered that judges should address questions arising from complex disputes to the Muftis.[344]

Eventually, the system developed to include the incorporation of the significant fatwas in court decisions, and the science of fatwas was relevant to the substantive law, configuring a combined judicial system that applies pure reason and religious opinions.[345] The judicial systems in the Islamic world were centralised on the fact that they function through the reliance of the courts on the imperative Muftis. The accommodation of change through fatwas contributed to the legal system significantly.[346] This system has extended its effects so far in many Islamic countries today.[347] Courts may ask for fatwas specially in Waqf and family law cases, as the

[340] Calder (n 241) 129. Also. Muhammad Masud, Brinkley Messick, and David S.Powers, 'Muftis, fatwas, and Islamic legal interpretation' in, *Islamic Legal Interpretation: Muftis and their Fatwas* (Cambridge, Mass. and London: Harvard University Press, 1996) 3-23.
[341]'Umar ibn al-Khattab (r. 634–644) Second caliph and Companion of Muhammad. Oversaw major expansion of the Islamic empire…' See, Esposito (n 42) 326.
[342] Juynboll GHA, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadith* (Cambridge University Press 1983) 36.
[343] Hallaq (n 266) 88.
[344] Ibn al-Ḥajib, Jamal al-Din b. Umar Jami *al-Ummahat.* (Abu-Abd al-Raḥman alAkhḍari. (d) Damascus: al-Yamama lil-Ṭibaa wal-Nashr, 2000) 464. Also see, Kasani, Ala al-Din b. Masud. *Bada al-Ṣanai fi Tartib al-Shara'i.* (Ala Adil and Muawwaḍ Abd al-Mawjud (ed) Beirut: Dar al-Kutub al-ʿIlmiyya, 1997) IX, 127.
[345] Hallaq (n 190) 153.
[346] Hallaq (n 266) 19.
[347] ibid 91-93.

distance between the Ifta institutions and courts grew wider following the adoption of the positivist and civil law systems.[348]

One of the most notable differences between fatwas and judgments is that the Ifta institutions, and Muftis in general, provide fatwas for free. This is based on the deep philosophical belief that the provision of fatwas is a religious and social responsibility designed to guide people onto the rightful path.[349] By contrast, in most countries today litigation is not free and the claimant must pay a minimal fee, usually a percentage of the claimed amount in civil and commercial disputes, in order to be able to present their case before the court.[350]

It is important to note that when we read a fatwa, our understanding is based on only a narrow conception of the rule. The same is true of judgments, in that it is not possible to understand judicial reasoning only by reading a judgement.[351] It is only through careful study of the other elements such as the place of judgment ('jurisdiction'), the type of legal system and the nature of the society on the macro level, and on a micro level, the documents, the facts, and the parties involved, that we can build a sufficiently clear picture of the reasoning. The same applies to fatwas; the Islamic setting must be explored, specifically the context in which the fatwa has been issued, further to the conditions of the society as well as the relevant laws (Chapter 7). For example, in the orthodoxy of Islam, fatwas may play a very important role in shaping nomadic

[348]Debroy, Bibek. "Law and Legal System." In *the New Oxford Companion to Economics in India*.: (Oxford University Press, 2012).

[349]For example, See the Kuwaiti Amiri Decree dated 7/1/1979. And the Ministerial Decision of the Ministry of Awqaf and Islamic Affairs number 247/1993.Also, in Egypt the decision of the Minister of Justice no. 1647/2008 and the resolution no. 1951/2008 and no 2060/2013 for the adoption of the rules, procedures and the organizational structure of the Dar Ifta Al-Masriya. Also, The Royal Decree no. (A / 137) of 30/8/1971 of the Supreme Council of Scholars in the Kingdom of Saudi Arabia and the establishment of the permanent committee which Specializes in issuing fatwas in the affairs of government, privates and individuals.

[350]For example, see the Kuwaiti Law no. 17/1973 Concerning the Judicial Charges (fees), article 6 states that: '… 2.5% up to ten thousand Dinars. 1% for more than ten thousand Dinars...'. Also, the Yemeni Parliament Decree no. 8/1997 on Presidential Law No. 43/1991, article 5 'the percentage is up to five percent of the total claim'. The Qatar Law No. (13) of 1990 promulgating the Civil and Commercial Procedures Law Article (531) provides that the fees may reach 3%.

[351] ibid.

Bedouin societies in a different way than they do in civil societies.[352] Also, in certain circumstances, fatwas allow Muslims residing in Europe to take loans in certain situations, which elsewhere this would be forbidden.[353]

The concept of changing fatwas is directly related to the concepts of time, place and custom in the Islamic literature.[354] In this regard, it is evident that new developments revolve with the rotation of days and nights, and thus fatwas must be changed by time.[355] A number of studies tackle the principle of 'changing rulings (fatwas) according to the changing times'.[356] This rule is also mentioned in the Civil Code 'Mecelle' of the Islamic Ottoman Empire in the late 19th century as a part of the Sharia-based law of the Ottoman state. However, time is an irrelevant factor in the equation of change. Human behaviour is linked to human thought, which has nothing to do with time and place. Thought relates to how human beings think and behave, whereas place and time are external elements that do not shape thought or behaviour, although tradition does. Then, is labelling time a stereotype?[357] It misses the concept of human logic and the collective rationale, which are the main factors of change in relation to fatwas. Therefore, when the thesis refers to fatwas, it focuses more on the context in which the fatwas are given, that is, the environment and relevant laws that govern the jurisdiction. Does this mean that there is a distinction between fatwas and positive law? The next section explains this issue further.

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[352]For example, in personal legal matters and succession. For further details see, Layish (n 249) 449.

[353] See, (ECFR 2003: 160–8, fatwa 26 from the 2nd collection of fatwas) Cited in, Khan AH, "Creating the Image of European Islam: the European Council for Fatwa and Research and Ireland" in Jørgen S Nielsen (ed), *Muslim Political Participation in Europe* (Edinburgh University Press 2013) 226.

[354]Shankaiti (n 239) 130

[355]Yusuf al-Qaradawi, *Al'ijthad Almueasir Bayn Alaindibat Walaifrat* (2nd edn, Beirut: Almaktab Al'Iislamii, 1998) 10.

[356] Mustafaa Ahmad Alzarqa, *Almadkhal Alfiqhiu Aleam* (2nd edn, Demascus: Dar Alqalam, 2004) 935. And Ismaeil Kuksal, *TaghayarAl'Ahkam in Islamic law* (Beirut: Alrisala Institute 2000) 82.

[357] For example, Edwin Lemert, Howard Becker, Joh n Kitsuse, Edwin Schur and other leading exponents deny that there is such a thing as labelling theory. See, Braithwaite J, "The Dominant Theoretical Traditions: Labelling, Subcultural, Control, Opportunity and Learning Theories," *Crime, Shame and Reintegration* (Cambridge University Press 1989) 17.

3.6 Muslim countries and positive laws

Although religion is a crucial factor that affects the law in many countries, albeit to varying degrees, it is important to bear in mind a possible misunderstanding of the distinction between Muslim countries and Islamic law. Many Islamic countries reshaped their laws because of the influence of positive law.[358] Positive law refers to 'law established by human authority',[359] which contains the codes, statutes, regulations and precedents applied in the courts for the community.[360] Colonization in the Islamic world helped to shift the Islamic legal structure towards national legislation, courts and administrative authorities.[361] Many studies have referred to the pattern of reproducing modern corporate, business and commercial laws in countries across the world due to the influence of Western colonialism.[362] Even though most constitutions in Islamic countries refer to Shariʿa law, their legal systems are much more influenced by Western models and laws.[363]

European legal systems affected Muslim countries and Islamic law has been severely reduced.[364] Large parts of Islamic law remained outside the scope of positive laws.[365] Many of the laws in Islamic countries are referred to as 'Canon', which consists mostly of legal norms.[366] Still, the systems comprise a mixture of national positive law, religious rules and laws that are

[358] It is seen that 'Sharia has been almost completely replaced by western law'. See, Jan Michiel Otto, *Sharia and National Law in Muslim Countries* (Leiden University Press 2008) page 11.
[359]Bryan A. Garner, ed., *Black's Law Dictionary*, rev. 9th ed. (St. Paul, Minn: West, 2009) 1280.
[360] ibid 1280.
[361] Otto (n 358) 7.
[362] Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2nd edn, 2018) pp 251–255. Also, Siems Mathias, "Malicious Legal Transplants" [2018] 38 Legal Studies 105.
[363] See, *The Rule of Law in Middle East and the Islamic World: Human Rights and the Judicial Process*, (edited by Eugene Cotran, and Mai Yamani, I. B. Tauris & Company, Limited, 2000, chapter 10. Frank Vogel, 'The Rule of Law in Saudi Arabia Exploring Contradictions and Traditions') 135.
[364] Bernard Weiss, 'Interpretation inlslamic Law: The Theory of Ijtihād' [1978] The American Journal of Comparative Law, Volume 26, Issue 2, Spring 1978, page 212.
[365] 'large parts of Islamic law, which was never adequately canonised in pre-modern times.'See, Birgit Krawietz (ed) *Islam and the Rule of Law: Between Sharia and Secularization* (Berlin: Konrad-Adenauer-Stiftung 2008) page 37.
[366] Jean-Louis Halperin, 'The Concept of Law: A Western Transplant?' [2009] Theoretical Inquiries in Law, vol 10.2 page 349.

transplanted from Western countries either during the colonial era or more recently.[367] This means that the laws of the Islamic countries that are examined in Chapter 7 have probably been influenced more by positive laws on insider dealing than Shariʿa law, given that they largely adopted positive laws. The countries seem to use a structure that is similar to the structure used in the modern legal system. For example, judges and lawyers play a very important role in the justice system.[368] Also, the promotion of legitimate policy in contemporary realism can be used as a justification for adopting positive laws. That is why, when we refer to Islamic thought, the author points to the fatwas, Islamic sources and Islamic jurisprudence to explore the IET position on insider dealing.

3.7 Conclusion

This chapter set out to answer the question, why is the impact of IET crucial to the legal development in the Islamic countries? This was achieved by conducting a socio-religious analysis that explained how humans are influenced by their religion and tradition when considering law. Such an approach shed light on the importance of the religious institutions in relation to legal development. The chapter went on to argue that Muslims shape their interactions and underpin their laws through their institutions as per their collective thoughts. This happens through the informal and formal constraints chosen by them to set the boundaries of their relations in their societies and to reduce uncertainty in their connections. The chapter showed that religious institutions are embedded into the structure of the state at various levels within Islamic countries, and that this has helped Muslims shape their interactions in a way that is more compatible with their beliefs. For instance, the chapter explains the important role played by

[367] George Mousourakis, 'Legal Transplants and Legal Development' [2013] Acta Juridica Hungarica 54, No 3, 225.
[368]Bibek (n 348).

religious institutions (Shariʿa Compliance committees, Ifta institutions, Ministries of Waqf and Islamic Affairs and mosques) in shaping Muslim thoughts over time, promoting an amalgam of Shariʿa values (subsections 3.2 and 3.3).

The chapter then moved on to discuss the impact of Islamic thought on legal development. It showed that IET is considered to be the foundation of legal development and has had a role historically in shaping Islamic thought, its ethics and laws. It showed that Muslims consider IET to an ideology which organises their economic life by applying its principles and ethics to financial transactions (subsection 3.4). The chapter shifted focus from the structural influence of IET to its practical impact by focusing on the Ifta institutions as an important example of how religious institutions influence legal thought through fatwas. This was explored in subsection 3.5), which showed the widespread availability of various Ifta institutions that have been established to issue fatwas in print, through electronic media and via the new smart applications in order to increase the impact of religious thought throughout society. Thus, the chapter cast a micro-focus on the fatwa as a tool that has contributed to the legal thought in the Islamic countries. It argued that there are some critical points scholars must consider when referring to fatwas. Specifically, they must (a) avoid referring to it as Islamic law, and (b) avoid considering it merely as a method of inquiry. Rather, the chapter suggests that fatwas are more related to the provision of essential religious guidance in response to a theological inquiry raised to an Islamic authority for advice and moral agencies. One important point that is discussed is the Ifta framework, which considers the concepts of trusteeship (*Amanah*), in the sense of the super-contractual relationship between Muslims and God when issuing fatwas, as well as free-will, responsibility and their limits (discussed in Chapter 4).

The chapter then explored the distinction between Islamic law and positive law in Islamic countries by noting that many Islamic countries have adopted western laws rather than canonizing Islamic law in their system, as is evident from an examination of the regulation on insider dealing (discussed in Chapter 7).

As a whole, this chapter supports the notion that IET has influenced legal thought through religious institutions and fatwas. The opinion of the Ifta institutions therefore would be a valuable device, particularly after in-depth explanations of the findings from the fatwas have been provided. Muslim thought has changed, and a great revolution has occurred in the financial, economic, technical and social settings of the planet.[369] Ifta must address the fact that practices are changing by providing a modern Islamic understanding that is compatible with the vehicles of global development in line with the new financial complications. An Islamic ethical framework is vital for tackling financial crimes such as insider dealing and market manipulation through fatwas and research, which are the epicentre of Islamic social organization. A more comprehensive notion is recommended when reading fatwas. This should consider macro elements such as Islamic settings, ethics and customs.

Part II of this thesis tackles the position of the Ifta institutions on the components and conduct of insider dealing. Among the important questions considered in Chapters 4-7 are whether insider dealing is lawful or illegal from an Islamic perspective, and whether it needs to be controlled in the sense of controlling human behaviour in the event it is considered a violation or not. A good starting point for this discussion is the Islamic position on the regulation of insider dealing. This topic is explored in Chapter 4.

[369] Shafiq Alvi and Amer al-Roubaie, *Islamic Economics* (1st edn, Taylor & Francis Ltd, Routledge imprint, 2014) page 400, chapter 50, S. Abul A'la Maududi, 'Re-Codification of Economic Laws in Modern Times', in *Economic System of Islam* (Lahore: Islamic Publications (Pvt) Ltd., 1997), pp. 295-310.

PART II: ISLAMIC ANALYSIS OF INSIDER DEALING

In the second part, the research attempts to focus on insider dealing from the Islamic economic perspective. It aims to answer the following questions: (1) To what extent does IET organise ownership, recognise corporation and investment in shares and distinguish information differently? (Chapter four). (2) What is IET position towards insider dealing? (Chapters five to seven). (3) Why does the approach to insider dealing differ within IET? (Chapter eight). Therefore, the part is divided into five chapters. In the first chapter of this part (Chapter four) the research takes a step back from the fatwas of insider dealing by seeking to explore the Islamic philosophical understanding of the components of insider dealing through looking into the Islamic understanding of the concept of ownership, company artificial entity, the transaction of shares, and information. The chapter provides a new understanding of the topic based on a religious lens. Then, the second chapter (Chapter five) is concerned with the economic position of fatwas on insider dealing. It argues that the Islamic economic position on insider dealing demonstrates that if there is no harm, insider dealing is not an issue from the economic perspective, however, other Islamic legal opinions argue that there are serious moral concerns toward insider dealing. Consequently, chapter six focuses on the moral fatwas on insider dealing to understand the ethical reasons behind IET position. Then, chapter seven explores the fatwas that refer to the concept of legitimate policy and explores how Islamic countries dealt with insider dealing laws with pointing out to their legal drawbacks. The last chapter answers the question of ‘why does the approach to insider dealing differ within Islamic institutions.’ It focuses on discussing the reasons behind the varied Islamic positions towards insider dealing which are mainly because of the different structural basis of Islamic schools and the use of fatwas mechanism to issue legal opinions on contemporary problems.

Chapter 4 : Understanding Insider Dealing Components Through an Islamic Lens

4.1 Introduction

Previous studies mostly define insider dealing as the misuse of non-public information for the purpose of buying or selling shares in the stock market.[1] This definition consists of three elements: (1) a transaction between two or more parties (2) that leads to owning shares in a company, (3) because of possessing non-public information. The concept of ownership is an important component of the transaction and plays a key role in insider dealing. The theory of ownership is at the heart of our understanding of any financial transaction and in the history of development economics, ownership has been thought of as a crucial factor in economic discussions.[2] In order to understand the Islamic perspective of insider dealing, one must understand first the Islamic philosophy of ownership and transaction.

This chapter aims to revisit the components of share activity and reconsiders the justification for it so as to provide a different Islamic understanding of financial transactions. A philosophical approach is adopted to reach a better understanding of the Islamic financial concepts so as to not end up with a window of Islamic framework that regulates prohibited activities (*Haraam*). The chapter argues that IET focuses on individual personas rather than artificial constructs, casting profound philosophical scepticism on the perception of artificial entities within Islamic thought. It claims that IET is concerned more with the moral virtues of interactions than on their economic aspects, implying a trust duty (*Amanah*) between investors. It provides an alternative

[1] Iwona Seredyn´ska, Insider Dealing, and Criminal Law, (Springer Heidelberg Dordrecht London New York 2012) 1. Also see, Ahmed Al-Melhem, 'Insider Dealing in the Companies Act of Kuwait no 15 of 1960' [1998] Arab Law Quarterly, Vol. 13, no. 1 p. 3. Also see, Ayres Ian, Bankman Joseph, 'Substitutes for Insider Trading' [2001] Stanford Law and Economics Olin working paper no. 214. Also, Wang, William K., 'Stock Market Insider Trading: Victims, Violators and Remedies' [2000] Villanova Law Review Vol. 45 p. 27.

[2]Stephen R. Munzer *Understanding property. In A Theory of Property* (Cambridge Studies in Philosophy and Law 1990), p. 15-36. Also see, Massin Olivier, 'The Metaphysics of Ownership: A Reinachian Account' [2017] Springer, Axiomathes; Oct 2017, 27 5, p577-p600, 24p.

understanding of the concepts of ownership and separate legal artificial entity through the Islamic notion of God's ultimate ownership and Islamic realism. This difference reflects the way market regulation is considered in IET by shifting the focus to satisfying the needs of the investors and organizing their relation in an ethical framework rather than focusing on the economic side which concentrates on growing the liquidity of the artificial platform (markets). Overall, the chapter promotes the use of an Islamic ethical theoretical framework to address modern financial problems in Islamic countries.

The chapter is divided into eight sections. It begins by discussing how Islamic economic thought (IET) considers the concepts of ownership and the company as a dynamic object through the analysis of the historical and social factors that shaped the Islamic approach towards them (sections 4.2 and 4.3). Sections 4.4 and 4.5 examine the way transactions and shares are understood in IET. Sections 4.6 and 4.7 discuss the information value of any transaction and the importance of secrecy in Islam together with the regulatory approaches to inside information, as those issues are directly related to insider dealing. The chapter concludes with a summary of its content, further to a brief discussion of the modernisation of IET in relation to contemporary economic concepts (section 4.8).

The principal theoretical implication of this chapter is that the notion of God's ownership encompasses interim ownership to investors. This narrative is framed around three sets of controls that impact the regulation of insider dealing from the IET angle. First, there is a general fiduciary duty among market participants that is moulded by the Quranic principle of honesty (*Amanah*).

Second, the equality of the parties' is a binary obligation that is based on the Islamic theory of God's successorship. IET is instituted on a thorough faith-based system in which

money is an instrument rather than an objective. It is a modest resource from God who is considered as the ultimate proprietor; hence, Muslims must comply with their ethical responsibilities that are grounded on the notion of (*Halal),* that exemplifies the onus to behave honestly and obtain wealth through legitimate means to fulfil Islamic goals. They have a duty to prevent the loss of people's money and to avoid market abuse. Their objectives must not be merely increasing their wealth as per the economic framework but, to transact in accordance with the amalgam of Islamic ethics and virtues.

Third, there are social and religious factors that are contemplated when transacting through the IET distinctive understanding of the artificial entity of a company. IET has a different legal adaptation to the transaction of shares as a sum of multiple financial contracts that gather several rights and obligations in one complex contract. The composite contract acknowledges inside information as a primary component of the transaction, which reveals a duty of disclosure, without it the transaction is null and void due to obscurity *(Jahala)* and *(Gharar)* rules.

4.2 The Islamic view of property

What is the Islamic conception of property? To this question, the study takes a chronological approach by exploring the sequential circumstances that shaped Islamic law. The historical roots of IET are grounded in certain economic, social and cultural realities. The nature of economic life in the pre-Islamic era cannot be isolated from Islamic law; in fact, the law is seen as a reflection of the needs created back then. The chronological economic factor has had a profound impact on the change of the path of history, as will be shown.[3]

[3] Zahir Al–Shammari, 'An overview of the economic conditions of the Arabs before Islam' [2014] Babil Center for Humanity Studies Vol. 4, Issue 2, 319.

The phase of the pre-Islamic period is known as the Age of Ignorance[4] (*Jahiliyyah*),[5] during which Arab society was suffering from social decay.[6] Arabs had a negative attitude towards religion even though they had witnessed the emergence of multiple civilisations in the nomadic period.[7] Previous studies have addressed the social dimension of the Age of Ignorance (410-610).[8] They have claimed that during this period, Arab society suffered from a spiral of social diseases such as tribalism[9] and the habits of tribal nepotism,[10] wars, bloodshed, retaliation,[11] social stratification,[12] moral degeneracy,[13] adultery, prostitution and obscenity.[14] Nevertheless, Arabs did contribute during this period to medical science,[15] poetry, and other aspects of culture.[16]

Traditionally, it has been argued that (*Jahiliyyah)* is an attribute that follows the chronological periods in which materialism and immorality overcame religious and spiritual aspects; thus, Islamic scholars see that the term *Jahiliyyah* could reflect the present status quo.[17]

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[4] Patrick S. O'Donnell, 'Poetry and Islam' [2011] Crosscurrents, Association for Religion and Intellectual Life, 72.

[5]'Jahiliyyah' is an Arabic word derived from the verbal origin 'Jahala' which means unknowing. Muslims used this word to refer to the period before the Islamic revelations. The phase is named as ignorance period because of the comparative moral and spiritual factors that contrasts with the Islamic era that changed many social and economic concepts. See, Syafiq Hasyim, *Understanding Women in Islam: An Indonesian Perspective* (Solstice Publishing, 2006) 11.

[6] Snjezana Akpinar, 'The Ethics of Islam' [2002] Religion East & `West, Issue 2 June 2002 117.

[7] Such as, Saba᾽ civilizations in 1000 BC in the Arabian Peninsula. Harun Yahya, *'Perished Nations'*, (4th edn, Ta-Ha Publishers Ltd, 1999) 113. Also see, Antonie Wessels, Henry Jansen, '*The Torah, the Gospel, and the Qur'an: Three Books, Two Cities, One Tale' (*Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 2013).

[8]Shawqi Daif, *The History of Arabic Literature in the Jahili Period* (11th edn, Dar Al Ma'arif, 2008) 38. Also see, Abi Othman Al - Jahiz, *Animal* (2nd edn, Scientific Books House, 1965) 74. The Age of Ignorance lasted 200 years before Islam. See, Safi Al-Mubarkafoori, *The Sealed Nectar* (Qatar: Ministry of Awqaf and Islamic Affairs, 2007) 66.

[9]Daif (n 8) 74.

[10]Nepotism is the practice among those with influence favouring relatives when they are in a position of power. See, Longman, *Dictionary of Contemporary English* (7th edn, Pearson Education Limited, 2012) 1166.

[11] ibid 62.

[12] ibid 67.

[13] Muhammad Shams al-Din, *Between Jahiliyah and Islam* (4th edn, International Publishing Institute, 1995) 13.

[14]Safi Al-Mubarkafoori, *The Sealed Nectar* (Ministry of Awqaf and Islamic Affairs, Qatar, 2007) 43.

[15] Amr Faroukh, *History of the Pre - Islamic era* (Dar al-Ilm for millions, Beirut 1964) 166.

[16] Al–Shammari, (n 3) 320. Also see, Faroukh (n 15) 165.

[17] Mohammed bin Abdul Wahab, *Issues of Ignorance* (1st edn Al-Himma Library 2016) 3. Also see, Muhammad Shams al-Din, *Between Jahiliyah and Islam* (4th edn, International Publishing Institute, 1995) 19.

But what were the historical economic circumstances in the age of ignorance? There is a lack of literature on economic life during that period, as most publications are focused on the religious views and social factors that pertained at that time rather than the chronology of economic conditions. The historical literature shows two important elements in relation to economic activity in the *Jahiliyyah* era which relate to agricultural,[18] commercial and industrial environments.[19] Economic production depended on geographic location, which played a major role in shaping Islamic economic traditions.[20] The unique location of the Arabian Peninsula made trading in agriculture an important activity which developed the trade movement.[21] Given that the industry of agriculture depends on water, Arab ideology was influenced by Nature through the sanctification of water during the pre-Islamic era.[22] Movement of trade was very active in several areas in the Arabian Peninsula, including Najd,[23] Yemen,[24] Oman, Bahrain, Iraq, the Levant[25] and Mecca,[26] which is a blessed site in Islam, as it is where the Prophet Mohammad was born in 570[27] and also the location of the revelation of the Quran.[28] Mecca was known as the commercial capital of the Arab world and their main financial centre[29] because of its reputation as a sacred shrine and its geographically strategic location, which played a

[18] Othman Kholi, *Arab Agriculture* (Arab House: House of new publications Egypt 1972) 17.
[19] Saleh Al-Ali, *Lectures in the History of the Arabs* (National Library Printing and Publishing - University of Mosul - Iraq, 1981) Part I, 96.
[20] Abu Bakr Ibn Yahya, *Nabataean Farming* (1st edn, French Scientific Institute for Arabic Studies, Damascus, 1993, part one) 307.
[21] Mohsen Khalil, *In Arab Islamic Economic Thought* (2nd edn, Al-Istiqama Printing Press, Baghdad 1986) 37.
[22] Ahmed Sousse, *History of the civilization of Mesopotamia* (Ministry of Information, Public Relations Department Baghdad 1986) part 2, 30.
[23] Jawad Ali, *Detailed in the History of the Arabs Before Islam* (Beirut, Dar Al - Alam Press, 2001) part 7, 314.
[24]Ignazio Guidi, 'Lectures in the History of Yemen and the Arabian Peninsula before Islam', Translated by Ibrahim Al Samurai (1st edn, Dar Alhadatha, Beirut - 1986) 88.
[25] Mohsen Khalil, *in Arab Islamic Economic Thought* (2nd edn, Baghdad: Al-Istiqama Printing Press, 1986) 38.
[26]Philip Hitti. *Capital Cities of Arab Islam*, (University of Minnesota Press, 1973) 5.
[27]Ahmed el-Ashker and Rodney Wilson, *Islamic economics: a short history* (Brill, Leiden ; Boston 2006) 19.
[28] Muhammad Hoih, *The Descent of the Quran and related History* (King Fahd Complex for Printing the Holy Quran in Medina 2000) 37.
[29] Wael Hallaq, *Sharia theory, Practice, Transformations* (Cambridge; New York: Cambridge University Press, 2009) 29.

significant role in the economic development of the region.[30] People in Mecca were experts in trade; they used to manufacture weapons such as spears, knives, swords, shields, darts and so on.[31] Mecca grew wealthy and its traders became rich and dominant.[32]

Trade was seen as the most important and honourable economic activity that characterised Arabs in the Age of Ignorance. The historical importance of trade for the economy helps to explain the Islamic approach to economics. This is evident when analysing the sources of income in the pre-Islamic era, which reflect the circumstances of the time, being largely based on monopoly,[33] very high-interest loans,[34] deceit, theft, arbitrariness,[35] cruelty[36] and brokerage,[37] in addition to insurance on the transport of goods[38] to protect them from theft; Bedouin tribes were charging traders to protect their convoys.[39] Traders concluded protection agreements with influential political tribes to secure their trade.[40] Tribal leaders were also competing to control the markets ('*Souks*')[41] for the purpose of collecting high tax. The most popular economic phenomenon was usury, which was dominated by the Jewish community.[42] Overall, the absence of the state system facilitated the commission of unfair commercial practices.

The furthermost imperative element that illustrates the hegemony of traders in the pre-Islamic era is the retreat from the idea of tribal nepotism. Disparity appeared in the level of

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[30]Hassan Ibrahim, *The History of Islam* (Four Vol.s, Egyptian Nahda Bookshop, 1959).
[31] Ali, (n 23) 126.
[32]Ibrahim (n 30).
[33] Ali, (n 23) 399.
[34] Said Al-Afghani, *The Arab Markets in Jahiliyya and Islam* (1st edn, Damascus, 1937) 60.
[35] Al-Shammari, (n 3) 327.
[36] Amr Faroukh, *History of the Pre-Islamic era* (Dar al-Ilm for millions, Beirut 1964) 78.
[37] Ali, (n 23) 413.
[38] ibid 411.
[39] Hallaq, (n 29) 29. Also see, Daif (n 8) 77.
[40] Ahmed Al-Baladhuri, *Genealogist knowledge for sheriffs* (1st edn Dar Almarefa - Beirut 1996) Part I, 59.
[41] Souk, is an Arabic term refers to Arabic market. See, Issa Faraj, *Markets 'Souks' rules and Ethics* (1st edn, Grass Publishing 2011) 27-32.
[42] Al-Afghani, (n 34) 60. Though, usury is prohibited in Judaism, Christianity, and Islam. See, Hillel Gamoran, *Jewish Law in Transition: How Economic Forces Overcame the Prohibition Against Lending on Interest* (Wayne State University Press, Detroit, MI, 2008).

wealth among the tribes, which led to the collapse of tribal solidarity because of individualism, economic self-interest and rational egoism.[43] There was a massive gap in the hierarchical structure of the social classes. The upper classes were dominant, leaving the lower classes, poor people, and slaves vulnerable to famine, malnutrition, and disease.[44]

Ibn Khaldun, in his explanation of the intellectual and social status of the Arabs, states that they were more nomadic than other nations, and they were brutal in nature.[45] Their lifestyle was based on harshness, war and cruelty.[46] They were inclined to seize people's funds.[47] It was nearly impossible for them to agree on a governing system unless that system was based on religious belief.[48] Given the fact of Arab intolerance and their inability to submit to one authority, their cultural readiness to accept a new faith-based system (Islam) is both logical and natural.

The literature identifies some of the economic features of the Age of Ignorance, which transformed differently in Islam, and led to a new philosophical concept of ownership. In the pre-Islamic era, the concept of ownership was absolute and was exploited to the fullest extent by the tribes. Ownership was understood to be a basic horizontal relation between the person and everything that grounds property rights.[49] It reflected self-ownership theory which is based on the premise that each man owns himself; consequently, whatever he constructs out of un-owned raw materials which must belong to him, and it can be disposed of without any restriction.

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[43] Al–Shammari, (n 3) 335.
[44] ibid 327.
[45] Abdulrahman Ibn Khaldun, *Introduction by Ibn Khaldun* (Khalil Shehadeh (ed), Dar Al-Fikr for Printing and Publishing, Beirut 2001) part 2, 405.
[46] ibid 405
[47] ibid 283.
[48] ibid 287-405.
[49] Olivier Massin, 'The Metaphysics of Ownership: A Reinachian Account' [2017] Axiomathes Springer Science 577.

Islam takes a different ontological view, in the sense that all property belongs to God[50] and that people are his successors; this view is a vital element in IET.[51] The relation between property and persons took a vertical religious perspective. Islam has determined the right of the individual to own property metaphorically and has granted him the right to use and invest in his property, within certain limitations. Property is considered temporary; it has a philosophical dimension which views the life of the Muslim as both a journey and a test that ends with his death.[52] In a human context, life is short lived; this fact must be considered part of a creative cosmic context.[53] Self-ownership is seen as an ownership derived from an original divine source.[54] This Islamic understanding of property helped to establish fertile ground for solving problems that had previously been created in the pre-Islamic era. For instance, usury was obscene, reflecting a purely selfish financial outlook. Islamic law released people from the burden of usury ('riba'[55]) by imposing an absolute prohibition on the practice.[56]

Another problem that appeared in the Age of Ignorance was the gap between the socioeconomic strata when poverty and slavery were at their peak.[57] Islam established compulsory rules that bound the rich to pay *Zakat* and provide charity to the poor.[58] An additional example is the phenomenon of inequality that was observed in the distribution of tribal wealth, which led to the collapse of tribal solidarity and limited the wealth to specific persons among the ethnic groups.[59]

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[50] The Quran, Almaeda, [5:120].
[51] The Quran, Al-Hadid [57:7]. Albaqara, [2:30].
[52]Abu Hamid Al-Ghazali, *Reviving the Sciences of Religion* (1st edn Dar Ibn Hazm, 2005) Part I, 1109.
[53]ibid 108.
[54]Hallaq, (n 29) 296-297.
[55] 'the increase, the surplus, the proliferation of something in whatever form and direction...' See, Carlson, A. Bruce, and others (ed), *A Collection of Early Century Whistles* (7 edn Native Central Americans, 1929) Vol. 5, 703.
[56] See, The Quran, Albaqara, [2:275-279], Al-Roum [30:39], Al-Omran [3:130], and An-Nisa [4:161].
[57] Al–Shammari, (n 3) 327.
[58] See, The Quran, Albaqara, [2:110], Al-Ma'arij [70:24], Esra, [17:26], Altawba [9:60].
[59] Hussain Marwa, *The Material Trends in Arab-Islamic Philosophy*, (2nd edn, Beirut: New Thought Library, Dar AlFarabi, 2008) Vol. 1, 377.

Islam provided mandatory rules for inheritance that included certain obligations to distribute wealth in a certain manner,[60] leading to social prosperity for all humankind.[61]

The principle of God's ownership[62] illustrates how Islamic law regulates property at different levels related to spending, living, and even to its distribution after death. The fundamental rule in Islamic property legislation is morality.[63] That is why so much real estate was registered as a charitable endowment[64] (*Waqf)*[65] under Islamic rule, and even at present *Waqf* is seen as a tool of wealth redistribution designed to facilitate economic development within the society.[66] The most interesting aspect of the philosophy behind the *Waqf* system is that it illustrates how a person can surrender his right of succession that allowed him temporary ownership and reassign it to God. Thereafter, the property would be registered as God's property,[67] and its income would be spent on the good deeds specified in the Waqf title deed. Once the property is registered as Waqf, it will remain so forever, because once a person has made this decision, it cannot be reversed.[68]

Taken together, these observations show the effect of IET on economic life in Muslim countries and its direct impact on financial regulation to date. The Islamic system per se had the ability to provide an effective norm and practical ethical model, as long as the surrounding environment was accommodating.[69] This can be seen when analysing the Islamic approach to insider dealing

[60] The Quran, Alnesa, [4:11-176].
[61] Adelina Zuleika, 'Islamic Inheritance Law and Its Economic Implication' [2014] Tazkia Islamic Finance and Business Review, Vol 8 first issue, 1.
[62] The Quran [19:40].
[63] Wael Hallaq, *The Impossible State, Islam, Politics, and Modernity's Moral Predicament*, (Omar Othman tr, 1st edn, Arab Centre for Research and Policy Studies, 2014) 110.
[64] Charitable endowments constituted about 40 to 50 percent of all real estates in the great majority of Muslim lands. See, Hallaq, (n 29) 401–404.
[65]Waqf is a charitable endowment, immovable property endowed to serve certain beneficiaries, like the poor and the general public, etc. See, Hallaq (n 63) 145.
[66] Mohamed Thaker, 'Exploring the Contemporary Issues of Corporate Share Waqf Model in Malaysia with the Reference to the Waqaf An-Nur Corporation Berhad' [2015] Jurnal Pengurusan, Vol. 45 165.
[67] See, the Kuwaiti Supreme Court judgment no. 153/2003 on 16/5/2004. Also see, the Kuwaiti Supreme Court judgment no. 80/2002 on 15/2/2004.
[68] See, the Kuwaiti Supreme Court judgment no. 303/2009 on 14/6/2010.
[69] el-Ashker (n 27) Vol. 3, 11.

and how it provides great ethical consideration when regulating financial conducts (Chapter six, section 6.2). Having understood the historical logic behind Islamic economic philosophy and given that the scope of this research is relatively narrow, being primarily concerned with insider dealing, the ontological components of insider dealing will now be examined through an Islamic lens by exploring the Islamic legal adaptation of the transactions in shares, its parties, information and secrecy, including the risks associated with it, prior to introducing the Islamic views on insider dealing.

4.3 The philosophy of company in IET

How does Islamic jurisprudence address the sale and purchase of shares? This is a modern transaction that was not available in the period of Islamic rule.[70] The jurisprudence did provide a legal adaptation template to it. Before discussing the legal adaptation, however, it is essential to understand the dynamic transaction as an act of buying or selling shares resulting in a change of its ownership within an artificial entity.[71]

The transaction process traditionally comprises (1) a contract to sell shares, (2) share transfer and (3) entry of the transferee's name on the register of members of the company.[72] Therefore, the company is the core vessel of the transaction. But why do we need a company that holds separate artificial entity to invest in the first place? The origins of these questions 'are always obscure'.[73] Tracing the history of the corporation and philosophical questions about the nature of it, one would find that it has a Roman origin. The practice of conducting commercial enterprises

[70] Islamic rule era is 600 to 1700. See, Hallaq (n 63) 19.
[71] Longman (n 10) 1876.
[72] See, 'transfer of shares', *Oxford Dictionary of Law*, (Elizabeth Martin ed, 7th edn, Oxford University Press 2013) 556.
[73] Robert Maclver, *the Modern State* (Oxford: Clarendon Press; London: Humphrey Milford 1926) 26.

was first established by the Second King of Rome (Numa).[74] Roman law adapted the theory of the artificial person, but the state alone could construct a corporation.[75] The need to form a large enterprise and raise substantial capital from outside investors is one of the reasons why the state tends to construct giant companies[76] such as banks, canals and railway companies[77] which by nature are long-term projects that may exceed the human life span; hence, the need for them to be carried out through artificial entities. The corporations were at first entities that enjoyed natural personalities, created by legislation for certain purposes.[78] From the perspective of the state, the justification for the need for state corporations was justified in terms of the general welfare of its citizens. The business corporation was seen as a socially useful apparatus of economic development;[79] thus, regulating the relationship between the corporation and the rest of society was a primary objective. The corporate state-based condition reflected in some instances through the *ultra vires* doctrine, which prevented corporations from acting outside the boundaries of the states on the grounds that their very existence rested on state law.[80] It was not until the mid-19th century[81] that private companies were envisioned,[82] and not until 1907[83] that the principle by which a company has a separate legal personality was recognized in the UK.[84]

[74]Robert Penington, 'Origin of Corporations' [1931] 3 (5) Corp Prac Rev 33.
[75]Charles Sherman, *Roman Law in the Modern World* (3rd edn, Boston University Law Review) vol. II, 117.
[76] ibid 342.
[77] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, University of Chicago Press 1976).
[78]David Millon, 'Theories of the Corporation' [1990] Duke Law Journal 206.
[79]James Hurst, *the Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Lawbook Exchange Ltd 2010) 47.
[80]*Bank of Augusta v. Earle* [1839] 38 U.S. 13 Pet. 588. However, this doctrine was rejected later in several cases such as, *Western Union Tel. Co. v. Kansas* [1910] 216 U.S. 1, 18. Also see, *Pullman Co. v. Kansas* [1910] 216 U.S. 56.
[81] See, the General Incorporation Act 1844.
[82]Ron Harris; 'The Private Origins of the Private Company: Britain 1862–1907' [2013] Oxford Journal of Legal Studies, Vol. 33, Issue 2, 1 June 2013, 339.
[83]*Salomon v Salomon & Co Ltd Salomon & Co Ltd v Salomon* Also known as: *Broderip v Salomon* House of Lords 16 November 1896 [1897] A.C. 22.
[84]While, the US successfully introduced the LLC, only a century later, in the 1980s. It is worth noting that the Private Limited Liability Company was first introduced in Germany in 1892 and then become a widespread

This principle separated the company's persona from the owners behind it.[85] The consequence of this is the limited liability of the company's owners, which has its own disadvantages.[86] The justification for the need for the private separate juristic person was merely economic, derived from the impersonal forces of market competition.[87]

Islamic jurisprudence recognises the artificial body differently in a number of respects. Analysis and interpretation of some special nature entities suggest that the basis of the recognition is centred on ethical and religious factors. For instance, the treasury of the Islamic State *'Beit Al-Mal'* was an independent and separate entity during the reign of Caliph Umar Ibn AlKhattab (634 AD). Zakat and taxes were considered to be the property of the Treasury, which also owned real estate and had rights and duties.[88] Furthermore, the endowment (*Waqf*) is seen as a model of an entity that enjoys a separate artificial personality.[89] It is an important traditional body of Islamic law whose ownership is passed to God (*Allah*).[90] This involves the dedication of a donated property, the income from which is committed to serving charitable purposes, such as helping the poor[91] or the upkeep of a mosque. The *Waqf* is an eternal endowment that can bear

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phenomenon, as in Britain in 1907, and in France in 1925. See, Harris (n.72) 342. However, 'the emergence of the limited liability concept has historically been associated by the construction of the British railway system'. See, Taj el din, S. e.-d. 'The stock-exchange from an Islamic perspective' [1996] Journal of King Abdulaziz University: Islamic Economics 8, 30.

[85]*Meadow Farm Ltd V Imperial Bank of Canada* [1922] 2 WWR 909.

[86] Some authors see that such principle has a great cost to the community because of the disasters and injuries to workers. See, G. R. Sullivan, 'Expressing Corporate Guilt' [1995] Oxford Journal of Legal Studies, Vol. 15, Issue 2, Summer 1995, page 281. Also, Stephanie Blankenburg, Dan Plesch, Frank Wilkinson, 'Limited Liability and the Modern Corporation in Theory and in Practice' [2010] Cambridge Journal of Economics, Vol. 34, Issue 5, page 821. The use of the concept of corporate separate entity led to the availability of claims that are based on criminal fraud and deception claims. See, Alan Dignam, Peter B Oh, 'Disregarding the *Salomon* Principle: An Empirical Analysis, 1885–2014' [2019] Oxford Journal of Legal Studies, Vol. 39, Issue 1, Spring 2019, page 16.

[87]Wilson (n 27) 213.

[88]Mohammed Arafa, 'Criminal Liability of the Director of the Commercial Establishment in the Saudi System in Comparison with Islamic Law and the Positive Laws' [2009] Naif University for Science, Riyadh, MA Thesis, 56.

[89]Abdulrahman Al-Luwaihek, 'The Personal Character of the Waqf in Islamic Jurisprudence' [2015] Al-Alouka Publishing, 23. Also see, Khalid Al-Jarid, 'Legal Person'[2006] Al-Adel Magazine, Saudi Arabia 69.

[90]According to Abu-Yusuf, Al-Shaybani and others. See, Layish A, "The Mālikī Family Waqf According to Wills and Waqfiyyāt" [1983] 46 Bulletin of the School of Oriental and African Studies 3.

[91]Khalfan KA and Ogura N, 'The Contribution of Islamic Waqf to Managing the Conservation of Buildings in the Historic Stone Town of Zanzibar' [2012] 19 International Journal of Cultural Property 153.

debts and obligations.[92] It has a separate financial and legal status, and the previous owner does not have any right to dispose of it to any of his heirs.[93] These features are justified by its altruistic aims,[94] which reflects the theory of divinity. Another example of an Islamic entity that enjoys a separate legal personality is the mosque.[95] It also has the right to own lands and properties and take part in an undertaking with others.[96] The artificial entity of the mosque is justified on religious and ideological grounds, as it is considered to be God's house, [97] which must remain for eternity.[98]

Islam did not recognise the economic concept of the separate legal personality of the company,[99] because jurists were concerned exclusively with natural personalities and charitable foundations.[100] It was inconceivable for Islamic jurists to consider that a non-living person[101] could acquire rights and assume duties.[102] However, this does not mean that the concept of an artificial economic entity is prohibited in Islam as the origin in all the objects is to be allowed. In principle, Islamic law is based on the premise that everything is permissible unless Shariʿa states otherwise (Chapter 7, section 7.2).[103] Nevertheless, many Islamic scholars held the view that

[92] Muhammad Ibn Abidin, *The Periodic Contracts in the Revision of Fatwas Al-Hamidiyya* (Dar Al-Maarefa 1836) 203.
[93] ibid 3.
[94]Ogura (n 91) 171.
[95]Alean Al-Krenawi, 'The Role of the Mosque and Its Relevance to Social Work' [2016] International Social Work, 59, 3, pp. 359-367.
[96]Zakaria Al-Ansari, Shahab Al-Ramli and Muhammad Al-Shobri, 'Asna Almataleb in Sharh Rawad Amataleb' (Mohammed al-Ghamrawi ed, 2nd edn, Yamani press, 1895) 2-363.
[97] Abi Abdullah Al-Qurtubi, *Tafseer al-Qurtubi, the whole of the provisions of the Qur'an* (Dar Al-Kotob Al-Ilmiyah 2013 part 6) 175. Also see, the Quran, Albaqara, 2:114, Al-Araf 7:29.
[98] Mohamad Rasdi, *Rethinking the Mosque In the Modern Muslim Society* (Institute Terjemaha and Buku Malaysia, Kuala Lumpur (ITBM) 2014) 93.
[99]Al-Luwaihek (n. 82) 15.
[100] Kira Hassan, *Origins of Law* (House of Cooperation, Alexandria 1979) 864.
[101] See, Macey's view on the corporation theory, he sees the company as nothing more than a net of contractual relationships among real people. Jonathan Macey, 'Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes' [1989] DUKE L. 173, 150.
[102] Abdulaziz Al-Khayat, *Companies in Islamic Law and Positive Law* (4th edn, Lebanon: Al-Resalah Foundation, 1994) 212.
[103] Ibn Taymiyyah, *Total Fatwas* (King Fahd Complex 1995) 21-535.

companies are infamous for unfair and inhumane industrial practices, abusing labourers and destroying the lives of consumers through toxic products and oil spillages.[104] The concept of an artificial entity was initially opposed on ethical grounds because it allowed the owners of the company to escape responsibility.[105] These issues generated much turbulence traditionally and was considered to be one of the most contested locally and globally.[106] The unjust foundation of English company law was illustrated at the beginning of the adoption of the principle,[107] as it was an ethical matter related to fraud.[108] The Court of Appeal in the Salomon case stated that the main purpose of incorporating the company was to commit fraud and to cloak Salomon's wrongdoings.[109] This was further established in several cases which found that the company's artificial conception is designed to enable owners to pursue investments without the exposure to the risk of personal liability.[110] This explain why regulators have been trying to increase the ethical standards for the behaviour of directors and develop the principle of corporate social responsibility on a global scale.[111]

Although Islamic economic traditions expressed no direct opinion on the justification of the existence of purely economic artificial entities, many Islamic scholars were of the opinion that Islamic law did not forbid the economically artificial character of a limited liability company. Noting that the Islamic tradition distinguishes the socio-artificial entities of the Waqf, the

[104] Hallaq (n. 63) 102.
[105] Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York: Free Press, 2004) 12.
[106]Max Radin, 'The Endless Problem of Corporate Personality' [1932] 32 Colum. L. Rev. 643.
[107]Chrispas Nyombi and David Bakibinga, 'Corporate Personality: The Unjust Foundation of English Company Law' [2014] Labor Law Journal, vol. 65, no. 2, pp. 94-103.
[108]The formal legal recognition of the private company was seen in the legal reaction of the courts in the famous unpredicted UK case of *Salomon v Salomon*. For further details see, Ron Harris, 'The Private Origins of the Private Company: Britain 1862–1907', [2013] Oxford Journal of Legal Studies, Vol. 33, Issue 2, Summer 2013, Pages 339–378.
[109]Salomon case (n 78).
[110]Ayton Ltd. v Popely, [2005] EWHC 810 Ch.
[111]E. Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' [1932] Harvard Law Review, Vol. 45, No. 7 May, 1932, 1161.

mosque and 'Beit Al-Mal', they argued that as long as its existence does not conflict with the Quran and Sunnah, then the artificial entity of a such a company is permissible.[112] This conclusion is debateable, however, because the problem is not with the artificial entity but with the limited financial liability of the owners of the company. Islamic tradition is familiar with the legal personality of the artificial bodies in a religious and charitable framework, yet Islamic economic and moral philosophy raises critical questions regarding the idea of the economic limited liability. The primary question could be seen within the context of contractual relations, especially when it is related to debt and transaction fulfilment. By examining the Sunnah as the most important source of law after the Quran, we can see the significance of the physical existence of the human personality and the importance of human creation that can bear obligations and fulfil the covenants. The Sunnah states that the human spirit is trapped by its debts until the debts are paid.[113] The importance of fulfilling the debts personally is essential in Islam, as many of the hadiths illustrate by example.[114] The problem of the artificial body is its independence, because even though in a contract, the manager represents the company by proxy, and yet does not bear any liability on a personal level. Unlike human beings that can be penalized physically by prison, if a company does not fulfil its obligations, this could lead to its insolvency, which marks the end of the fiction of the artificial body. Shariʿa law is at odds with this approach. Its tradition in relation to debt is directly related to human beings as body, mind and soul and debt is seen as an obligation both during life and after life. Islamic scholars should

[112]Mohammed Al-Mousa, *Companies of Persons between Shariʿa and Law* (2nd edn Dar Al-Amma for Publishing and Distribution, Riyadh 1998) 117.Also see, Omar Al-Qiziwani, *Criminal Liability of the Director of the Commercial Establishment in the Saudi System in Comparison with Islamic Law and the Laws of Status* (Naif Arab University for Science, 2009) 58-59.
[113] Hadith, Bukhari, *Ṣaḥīḥ*, 1811-2649, *Targheeb and Terheeb* (Abdul Azim Al-Manzari and Muhammad Al-Albani eds, 1st edn, Al-Ma'aref Library for Publishing and Distribution, Riyadh 2003) 730.
[114] ibid 733.

examine how this dilemma can be remedied, as Islamic law clearly holds partners liable for the company's debts.[115]

The use of the term "artificial entity" is misleading in the Islamic view when it comes to debts. Even though the juridical fictitious person is recognized economically in the same way as a real person, Islamic thought, through its traditional approach towards debts, approaches this entity in a different manner. From an Islamic perspective, the corporation is viewed as a real entity, not as an artificial one nor as a legal fiction but as a community. It is positioned as a community's corporation and as such, all the partners would be found liable for its debts.[116] The Islamic world should reconsider Western-based theories of the company as an entity that is both economic and legal in nature.[117] In the Western world, the rules of company law reflect wider political and economic forces that shape the legal environment.[118] The corporation is developed to be seen subject to the real entity theory, on the basis that it is more than the sum of its partners.[119] This difference in perspective provides an exciting opportunity to advance our knowledge of the corporation to include the religious factor in the Islamic world specifically, as the problem of escaping responsibility through the corporate veil is a global phenomenon.[120]

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[115] Ali Al-Khafif, *Companies in Islamic Jurisprudence*, (Dar Al-Fikr Al Arabi 2009) 35.

[116] Tony Lawson, 'Comparing conceptions of social ontology: emergent social entities and/or institutional facts?' [2015] Journal for the Theory of Social Behaviour, 29.

[117] Tony Lawson, 'The Nature of the Firm and Peculiarities of the Corporation' [2015] Cambridge Journal of Economics, Vol. 39, Issue 1, January 2015, page 1.

[118]Simon Deakin, 'Tony Lawson's Theory of the Corporation: Towards a Social Ontology of Law' [2017] Cambridge Journal of Economics, 41, 1514. Also, Paddy Ireland, 'Limited liability, Shareholder Rights and the Problem of Corporate Irresponsibility' [2010] Cambridge Journal of Economics, Vol. 34, Issue 5, September 2010, page 837,

[119]Arthur Machen, 'Corporate personality' [1911] Harvard Law Review, 24: 258.

[120] For example, fatwa number 106659 and 106114 from Al-Azhar, dated 16/1/2019. Also, fatwa number 97010 dated 19/12/2018 from the General Authority of Islamic Affairs and Endowments in the UAE, Official Fatwa Centre. Also, fatwa number gCT49Q5U3qA by Sayyid Ali Hosseini Khamenei leader office, dated 7/12/2018 Iran. However, other fatwas consider that the partners are not responsible based on the acknowledge of the parties of the conditions of the transaction, specifically the consent of dealing with artificial body, and the respect of the positive law. See, fatwa number 133/2018 dated 16/12/2018 from the Department of Islamic Affairs and Charitable Activities, IFTAA Department, Dubai government, UAE, coded FTD/F16/V1.0. Also, fatwa number 46945/2018,

It is worth noting that the Islam approaches the issue not from a social perspective such as that of Lawson, whose argument is based on materialist social ontology, in which the company is perceived as an existing 'community',[121] but rather largely considers the ethical factors in the religious text that is of interest to the Muslim community. Additionally, Islamic thought takes an overall view that illustrates the importance of the public-private relationship, in contrast to Western economists, whose thoughts are structured upon the distinction between them.[122] Islamic law implies that all the dimensions of the Islamic aims (*Maqasid Shariʿa*) (MS), including the economic ones, should be taken into account, and thus corporations shall orient their goals accordingly.[123] A further study with enhanced focus on the impact of IET on the concept of artificial economic entities is therefore suggested. This information can be used to help scholars with the never-ending task of better understanding the nature of both modem companies and society.[124] By specifically focusing on the shift in Muslim countries from a framework centred on corporate shareholders to one based on corporate social[125] and religious responsibility, it is evident that Islamic law takes a strategic approach which considers community welfare as the essential aim of commerce,[126] which reflects the fact that commercial morals are a greater consideration in Islamic law than in the Western business world, where

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dated 6/12/2018, IACAD, UAE. Also, fatwa number 108819 by the General Iftaa Department, Jordan. Also, fatwa number 641639 from the Dar Ifta Al-Masriya, Egypt to author (13/12/2018).

[121]Deakin (n 118) 1521.

[122]See, Milton Friedman, *Capitalism and Freedom* (The University of Chicago Press, 1982) 136. On the other hand, the legal realists justify private activity to the social and public utility. See, Morris Cohen, 'the Basis of Contract' [1933] 46 HARV. L. REV. 553, 558-65. Also see, Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' [1923] 38 POL. Sci. Q. 470.

[123] Mohammad Alsadr, *Iqtisaduna: Our Economics*, vols 1 & 2 (World Organization for Islamic Services 1987) 30.

[124]Charles O'Kelley, 'the Modern Corporation and a Theory of Fields' [2016] 39 Seattle U. L. Rev. 219.

[125] Companies as social institutions are shaped through the common understanding of what is best for the community or in other words, they are shaped by the 'wisdom of crowds'. See, NW Barber, 'The Significance of the Common Understanding in Legal Theory' [2015] Oxford Journal of Legal Studies, Vol. 35, Issue 4, Winter 2015, page 799.

[126]Sallyanne Decker and Christopher Sale, *Professionals' Perspectives of Corporate Social Responsibility*, (Samuel Idowu and Walter Filho eds., Springer Heidelberg Dordrecht London New York 2009) 140.

revenues are the final objective.[127] Such facts could be linked to the Islamic theory of God's successor,[128] which illustrates the importance of the imposition of reconstructing the property by reconsidering it as a resource that is grounded on a comprehensive faith-based system in which money is a tool and not a goal. It is a mere resource from God who is considered as the ultimate owner.[129] This means that the responsibility of Muslims is to work hard and behave in good faith and comply with their ethical obligations as will be shown when analysing IET position towards insider dealing (chapter six).[130] The responsibility of the successor is also to help others[131] in the form of charity, especially Zakat.[132]

The Islamic view of ownership adopted a broader perspective which affects several aspects of financial activity, including the parties to the transaction, information and risk. The implication of the concept of ownership by trusteeship and the individualistic approach to regulating real person relationship rather than artificial ones present a new social objective related to ethical responsibility towards others (chapter six, section 6.4).[133] This raises questions about the effect of trusteeship on trade and the parties involved in the transaction. These are discussed in the next section.

4.4 The parties to the transaction

Trade is an act of buying and selling a subject matter[134] between parties involved in a transaction,[135] involving the subsequent transfer of its ownership[136] from one party to another. It

[127] ibid 152.
[128] The Quran, Al-Baqarah [2:30].
[129] The Quran, Taha [20:6].
[130] The Quran, An-Nur [24:55].
[131] ibid 24:33. Also, Al-Hadid [57:7]. And Altawba [9:103].
[132] The Quran Albaqara, [2:43-83-110-177-277], Alnesa, [4:77-162], Almaeda, [5:55], Al-Araf [7:156], Altawba [9:5-11-18-71], Al-Anbya [21:73], Al-Haj [22:41-78], An-Nur [24:56], An-Naml [27:3], Luqman [31:4], Al-Ahzab [33:33], Fussilat [41:7], Al-Mujadila [58:13], Al-Muzzammil [73:20], and Al-Bayyinah [98:3].
[133]El-Ashker (n. 27) 62.
[134] Such as: shares; as equal parts into which the ownership of a company is divided. See, Longman (n 10) 1602.

is important to the social order and its wealth because it is the basis of revenue.[137] Trade has been seen as the blood of life and as its vital flowing artery, which has a direct effect on all aspects of the economy and reflects on the law, social institutions and even the military.[138] If there is no trade, there will be no transaction, which will lead to a socioeconomic stalemate status.

Awareness of the financial system is not recent, having possibly first been described in the 17th century BC. The existence of the financial system was related to religious factors, as temples provided safekeeping for valuables.[139] The genesis of written trade laws can be traced back to the time of Babylon, when the Hammurabi Code was written around 1760 BCE.[140] The primary source of Jewish religious laws and theology, the 'Talmud', regulated trade, transactions, fraud and compensation for damages[141] back in 530 BCE.[142] Likewise, Christian beliefs informed the regulation of financial contracts and the principles of fairness and equality in relation to pricing were applied as the basis of a significant underlying regulatory ethics to society as a whole.[143] Christians reviewed the intrinsic worth of a good and concluded that its value is determined by what it was worth to one of the parties to the transaction, introducing the concept of supply and demand.[144] Islam continued the practice of legislative involvement established set by its religious predecessors, Judaism and Christianity, acknowledging the contributions of their prophets and adopting some of their laws as secondary sources, unless Islamic law was clearly at odds with

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[135] See, parties (n 69) 396.
[136] See, trade (n 69) 554.
[137]El-Ashker (n 27) 124.
[138]Raad Ghaleb, 'Trade Controls in the Shariʿa' [2005] Issue no. 23 Journal of Fatah 91.
[139]Natalie Schoon, 'Islamic Finance – An Overview' [2008] 9 European Business Organization Law Review 622.
[140]Hammurabi, the Code of Hammurabi King of Babylon 2250 B.C. Translated and reorganized by Robert Francis Harper (Chicago: University of Chicago Press, 1904).
[141] *'the Mishnah'* (Mustafa Abdelmaboudtr, presented by Mohammed Hussein, 1st edn, Maktabat Alnafethah, 2007) part IV, 81.
[142]Before Christ.
[143] Schoon (n 139) 624.
[144] ibid 629.

them.[145] Islamic law introduced further financial and economic regulations for trade and other commercial endeavours. Indeed, economic instructions and laws comprise almost twenty-five percent of the entire body of Islamic law.[146] The Quran encourages the development of wealth and prosperity[147] and encourages Muslims to trade.[148] The Prophet Mohammad illustrated the importance of trade clearly as he was a trader[149] and he urged his followers to focus on trade and earnings along with their religious and spiritual duties.[150]

In the history of financial improvement, the religious groups have been thought of as a significant element in trade and overall financial performance.[151] Religions and civilisations shaped trade law differently and provided a sustainable development to the concept of trade eventually. The primary question, however, is what is the effect of IET on the transaction? It has been argued that the Islamic economy is a capitalist economy[152] because it promotes economic freedom and allows for private ownership. Many Islamic scholars have concluded that the Islamic economic approach does not differ from the capitalist approach, arguing that the restrictions are limited and Muslims enjoy the right to own wealth and the right to invest in different activities. On that basis, they assert that IET has the same effect on the transaction as capitalism, whose aim is merely to acquire wealth.[153] Such statements suffer from cultural and

[145]Najwa Karakeesh 'Applications launched by us from the rules of the verses of Surah Yusuf' [2015] Journal of the University of Zarqa no. 17/55, Department of jurisprudence, College of Sharia, Jordan 20.
[146] Hallaq (n 63) 265.
[147]The Quran, Surah Al-Jumu'ah 62:10. See, Muhammad AlSabouni, *Tafseer Ibn Katheer* (7th edn, Dar Al-Quran Al-Kareem, Beirut, Lebanon 1981) 1176. Also see, Al-Mousa Al-Kashani, *Tafsir al-Safi* (Hussein al-Alami ed, 3rd edn, Al-Sader press, part 1 1994) 175. Also, Muhammad Al-Qaimi, *Tafsir Kanez Aldaqaeq and the Baher Al-Gharaeb* (Hussein Darkahi ed, Revised edn (1st edn 1911) Shams Al-Doha press 1967) part XIII, 279.
[148]Abu Bakr Al-Baghdadi, *The Urge to Trade, Industry and Work and the Denial of who Claims to Trust in Leaving Work* (1st edn, Riyadh, Saudi Arabia: Dar Al-Amsa, 1986) 3.
[149] Abu Muhammad Al-Maqdisi, *Biography of the Prophet* (Khalid Al - Shaya ed, 2nd edn, Dar Balencian for publishing, 2003) 58.
[150] Al-Baghdadi (n 148).
[151]Mehmet Karaçuka, 'Religion and Economic Development in History: Institutions and the Role of Religious Networks' [2018] Journal of Economic Issues, Taylor & Francis Ltd, Vol. LII No. 1 March 2018 57.
[152] Alsadr (n 123) 402.
[153] Cross, Robert Prentice, *Law and Corporate Finance* (Edward Elgar Publishing, Incorporated, 2007) 4.

historical bias, however, because IET is founded on the concept of ownership through trusteeship that provides an ethical framework between the parties to the transaction. The regulation of the transaction is focused on these parties rather than on the transaction itself.[154] This could be understood by looking at the concept of (*Halal),* which illustrates the responsibility to behave morally and gain wealth through legitimate means. The relation between behaviour and trust is primary when examining the concept of *Halal*.[155] This moral concept is not considered when examining the capitalist theory and its effect on the transaction, as it is based on economic factors and merely gaining wealth is the ultimate goal, whereas for IET, it's the primary focus is on the ethical considerations that govern the transition, thereby moralizing the economic relationship as will be shown when examining IET economic view on insider dealing (chapter five, section 5.3).[156]

Islamic regulation controls economic life from birth to death, which is another deviation from the capitalist economic approach. It places a duty to pay taxes ('Zakat')[157] and thus, to redistribute the wealth for the advantage of the poorest,[158] whereas there is no room for this obligation in the traditional Western view, which holds that no authority in the world has the right to compel charity.[159] Also, throughout a person's economic life, Islam regulates their

[154]Saleh Al-Okdeh, 'Ethical Rules of Financial Transactions in Islam, [2007] Jordan Journal for Applied Science; Humanities 10 (1) 67. Islam does not provide a contract law but a general theory of contract that is built upon the jurisprudence, that is called Islamic legal term as Fiqh-al-muamalat (jurisprudence of dealings). 'muamalat are acts involving interaction and exchange among people such as sales...'. See, 'Muamalat' In the Oxford Dictionary of Islam. Ed. John L. Esposito. Oxford Islamic Studies Online. 17-Jul-2020. <http://www.oxfordislamicstudies.com/article/opr/t125/e1564>.

[155]Omar, Nor Asiah, Muhamad Nazri, Syed Alam, and Mohd Ali 'Consumer Retaliation to Halal Violation Incidents: The Mediating Role of Trust Recovery' [2017] Journal Pengurusan, (51), 1-21.

[156]Ibrahim Warde, "Islamic Finance in Theory and Practice," Islamic Finance in the Global Economy (Edinburgh University Press 2010) 7.

[157]AlSabouni, (n 147) 111.

[158] Douglas Ashford, *State Theory and State History* (Rolf Torstendahl (ed) London: Sage, 1992) 166.

[159]Timur Kuran, 'The Economic System in Contemporary Islamic Thought: Interpretation and Assessment' [1986] International Journal of Middle Eastern Studies, 18, 148.

activities by restricting certain financial transactions such as usury,[160] gambling[161] and the remuneration of risk-taking, which leads to the conclusion that Islam places protections against the risks of capitalism.[162] Furthermore, at the end of one's life, Islamic law provides a certain way to redistribute one's wealth to one's relatives through the Islamic inheritance laws discussed previously.

The relationship between the parties to a transaction is governed through a general trust relationship, and the duty of honesty in dealings is based on the philosophy of God's ownership of wealth, on the basis of which Muslims, as God's successors, must act accordingly. The Quran stresses the principle of honesty (*Al-Amanah*) and notes that all creatures in the heavens, earth and even mountains were offered the chance to bear this responsibility, but they refused to undertake it, being afraid thereof, except for humans, who undertook this obligation.[163] The Islamic theory of trusteeship permits ethical principles to be applied to all transactions including transacting in shares,[164] unlike the Western approach, which limits the ground for trusteeship to certain relationships, such as the relation of a director to the shareholders and the relations between professionals, such as lawyers and accountants, and their clients. This is evident when examining misappropriation theory,[165] which was explained in Chapter one. As previously noted, the theory developed from a case in which a lawyer became aware of insider information and subsequently used it for his benefit by buying shares. The lawyer was a non-insider who bore a duty of trust to the company which engaged him. In Western law, the lawyer would be found

[160] Mohammed Tabatabai, *Almeezan Fi Tafsir al-Quran* (Hussein Alaalma (ed), 1st ed. Alaalma Foundation Publications Beirut, Part II - Chapter III 1997) 412. The interpretation of the Quran, Albaqara, [2:278].
[161]ibid Part II, chapter II p 196. The interpretation of the Quran, Albaqara, [2:219].
[162]Wazir Karim, 'The Economic Crisis, Capitalism and Islam: The Making of a New Economic Order?' [2010] Journal Globalizations Vol. 7, 2010 - Issue 1-2, 105-125.
[163] The Quran, Al-Ahzab [33:72].
[164] The interpretation of The Quran, Alnesa, [4:58].Al-Qaimi, (n 147) 453.
[165]*SEC v Dorozhko*, no 07 Civ 9606 (NRB) (SDNY 2010).

guilty because of the agency relation between him and the corporation, which is based on the principles of trust and privacy. But if we consider the case in the context of the Islamic legal framework, we would find the lawyer guilty because of the universal fiduciary duty, and the duties of trusteeship and honesty. These are general duties that apply to all individuals toward the universe, others and toward God (*Allah*). Because humans are his successor and are entrusted with God's money, they have an obligation to act with care in the best religious interest reaching the Islamic objective.[166]

When we examine the Islamic law that regulates commercial life, we observe that it is not only focused on the law of contracts (object of sale) but also on the parties to the transaction as living beings who have the ability of choice. The theory of choice has a fundamental place in the Islamic tradition. From the religious-legal scholar's point of view, Islamic law (*fatwa*) is rooted in the Islamic text and to the Fiqh. Muftis tend to disregard the necessity of self-interest and resist worldly outer constraints. They tend to focus on free choice theory, which is based on a recognition of the ability to choose between what is true and what is false, and between good and evil.[167] The behaviour of investors is rational, their decisions are oriented to their own benefit and their choices are a manifestation of their preferences.[168] If that choice is based on an ultimate economic goal of profit, then it may exclude all the other important human factors such as the duty to trade honestly and other ethical and religious duties. By contrast, if an investor's choice is based on other considerations, such as the Islamic ethical framework, then the duty of trusteeship is binding in general, unlike the restrictive Western approach. The theory of choice

[166] Muslim sees life as a test and wealth as a trust, since wealth is possessed solely by Allah and money is held in trust by human beings as God's vicegerents. See, Siddiqi Nejatullah 'Islamic Economics and Finance in Encyclopaedia of Islamic Banking and Insurance' [1995] Institute of Islamic Banking and Insurance, p 1-9.
[167]Frank Vogel, *Islamic Law and Legal System* (Ruud Peters and Bernard Weiss (eds), Vol. 8, Leiden, The Netherlands: Brill, Studies in Islamic law and society, 2000) 146.
[168]Clara Martins Pereira; 'Reviewing the Literature on Behavioural Economics' [2016] Capital Markets Law Journal, Vol. 11, Issue 3, 1 July, 414.

would be based on achieving aims which are faith based.[169] This would lead to the question of what the economic objectives of Islam are and how one can achieve them.

In choice theory, Muslims first would consider the ethical restrictions, and follow what is admissible (Chapter 6). This does not mean that Islam opposes economic activities which are endorsed by some communities in Europe and the United States, despite their assumption Islam is a rigid doctrinal religion that leaves inadequate space for its followers to pursue profit and accumulate capital.[170] In contrast, Islamic sources show the importance of trade and encourage persons to practice trade but within ethical and religious boundaries.[171] Islamic rules have reshaped relations between traders and establish a different form of responsibility between individuals, governments and corporate interests that are working within a global trading environment that is initially owned by God during our temporary life.[172] This view, which is informed by a faith-based belief of Muslims, leads to a clearly different form of eternal regulation informed by a philosophy of the afterlife that has a direct impact on the economic choices of investors.[173] through an afterlife philosophy that has a direct impact on the economic choices. Choices related to halal products and Islamic banking investment decisions are examples of these.[174]

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[169]AlSabouni, (n 147) 980.

[170]Mathieu Rousselin, 'In the Name of Allah and of the Market: The Capitalist Leanings of Tunisian Islamists' [2016] Science & Society: Vol. 80, No. 2, pp. 196-220.

[171]Christopher Melchert, *Aḥmad Ibn Ḥanbal* (Oneworld Publications, Oxford, 2006) 113.

[172]However, most legal systems in Muslim countries are using Western models and laws due to colonization and other complex reasons. Islamic law is applied only in a limited scope of family law. Hence this research is based on 'Fatwas' through empirical rulings and library based literature to explore the Islamic view. See, Chapter Three, section 3.7.

[173]Jan Shafiullah, 'A Critique of Islamic Finance in Conceptualising a Development Model of Islam: An Attempt in Islamic Moral Economy' (Durham theses, Durham University. 2013) 233.

[174]Islamic banking represents the vast majority of Islamic assets which reached approximately $1000 billion in 2010. See, Mahmoud Mohieldin, 'Realising the Potential: Asset-Backed Financial Stability' [2012] World Econ. 13 (3), 127–141.

In summary, this review has shown that the Islamic universal fiduciary duty and the duties of trusteeship and honesty are generally applicable to the parties to transactions regardless of their legal status and position (chapter six, section 6.4). This is reflected in the interrelationships between the parties to any transaction, adding an ethical obligation to their dealings. This is a rather remarkable outcome based on the concept of the ownership of the creator. However, the overall response to the question, how does Islamic jurisprudence address the sale and purchase of shares, remains unanswered. Understanding the ethical Islamic philosophy that governs the parties' relationship is a first step towards exploring jurisprudential views on the legal adaptation to share transactions.

4.5 Shariʿa adaptation to share transactions

To understand the complexity of the transaction, it is vitally important to clarify what is meant by the term "share". The share is the core element that is transferred from one party to another. The term refers to a membership that is distinct from trading activities and a component that measures the holder's interest in a company. Shares are equal parts into which a company's capital is divided. A share is a property that carries rights related to the entitlement of a proportion of profits and voting. It can be sold and bought while the company is still operating. The shareholders are not responsible for the company's debts and the only risk they bear is that of losing their investment.[175]

The concept of shares illustrates that the ownership of a business activity is divisible into stocks and are transferable with the continuity of the commercial activity.[176] Owners may own a portion of an investment and ongoing commercial activities, and they have an easy exit door

[175] See, 'shares', *Oxford Dictionary of Law*, (Elizabeth Martin ed, 7th edn, Oxford University Press 2013) 509.
[176] *New Lambton Laud & Coal Co. v London Bank of Australia* [1901] 1 CLR 521, 514.

from the business. The owners (shareholders) own the company, not its assets, and they do not have executive control of the investment,[177] as initially, from a transactional point of view, they are investors who merely made an investment choice, which is a decision to buy a number of shares in an ongoing investment for the purpose of profit.[178] Owning shares reflects the separation of ownership from decision-making 'control' of the investment. The practice is linked to a historical period in which there was a growing separation between ownership and control in stock markets.[179] This link cannot be studied without noting its historical relationship to the legal transition from a personalised model of the partnership to the conception of the company as a separate legal artificial entity,[180] which has been discussed previously. The advantage of the separate artificial entity is that it enabled perpetual succession, meaning that regardless of the transfer of ownership of shares in the company, the company remains and continue to own its property and conduct its commercial activities.[181] Traditional Islamic legal texts do not address this kind of share, as such property is modern and considered to be a new form of ownership;[182] hence, their legitimacy has been questioned.[183]

Islamic tradition shows a specific kind of financial sharing system that is more associated with a partnership contract in a western sense. One example is the *Anan* company, whose the owners contribute the capital and then share the profit in accordance with the proportion of their dividends, or in accordance with their agreement; such a company is closest to the idea of joint

[177]Andreas Cahn and David Donald, *Comparative Company Law* (Cambridge University Press 2010) 259-294.
[178]Unless the investors buy a large portion of shares that leads to the ability to control the company.
[179]Adolf Berle, 'The Theory of Enterprise Entity' [1947] Columbia Law Review, 47: 343–358.
[180]John Commons, 'American shoemakers, 1648–1895: a study in industrial evolution' [1909] Quarterly Journal of Economics, 24: 39–84. For further explanation see, Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (New York and London: Macmillan 1932).
[181]C. W. Maughan; Kevin McGuinness, 'Towards an Economic Theory of the Corporation' [2001] 1 J. Corp. L. Stud. 168.
[182] Muhammad Abbasi, 'Islamic Law and Social Change: An Insight into the Making of Anglo-Muhammadan Law' [2014] Journal of Islamic Studies, Vol. 25, Issue 3, 1 September 2014, Pages 325.
[183] ibid 326.

stock company. The *Mufawatha* Company is another corporation that is provided for in the Islamic tradition. The *Mufawatha* has the same concept of the legal partnership, but all partners have equal equity in it. In both companies the shareholders are personally liable for the debts of their investment, which is a view shared by the different Islamic schools.[184]

Since this research is focused on insider dealing in a secondary market, where investors trade stocks amongst themselves as part of a joint stock company, the scope of the Islamic analysis presented in this thesis shall be narrowed down to the joint stock company, where insider dealing is primarily practiced (as per the limitations of the study explained in Chapter 2).[185]

The adaptation of the Islamic jurisprudence on the joint stock company varies, and such modern companies have been the subject of intense debate within the Islamic community. Islamic jurists have provided four different legal opinions on how to adapt and treat shares in joint stock companies, and each view has different implications for the subject of insider dealing, as will be shown below. The outcome of proper legal adaptation answers the question of whether inside information is considered to be a part of the product 'shares' or if it is a separate element that is not related to the transaction. The answer to this question has consequences for the obligation of disclosure that applies to the parties and thus has an effect on the transaction.

The first modern jurisprudential adaptation of shares in joint stock companies was based on considering shares as a form of common ownership[186] and a partnership. It is grounded on the idea that because shareholders own the company and its assets,[187] the provisions of partnership apply. Islamic jurists measured the shares transaction in the joint stock company because it is the

[184] Al-Khafif (n 113) 42-83.
[185] Chapter Two, Section 2.7.
[186] Ali Daghi, 'Investment in Shares' [2004] Journal of Islamic Jurisprudence Convention, 9th vol., 252.
[187] Al-Saddiq Mohammed Al-Dharir, 'Is It Permissible to Buy Shares of Companies and Banks?' [2004] Journal of Islamic Jurisprudence Convention, 9th vol., 135-143.

same as the *Anan* Company.[188] This adaptation leads to the consideration of inside information as an element that must be disclosed to the other party. Such information is considered to be of a precise nature that has the potential to trigger a variety of price movements[189] of the sold object, namely, the shares as a 'common ownership'. The problem with this adaptation is that it is inconsistent with the fact that the shareholders own the corporation and not the assets. In addition, it controverts the principle of separate legal artificial entity, which indicates that the shareholders have no liability in relation to the company's debts. Therefore, the first adaptation shall be excluded without further examination.

The second adaptation determines that the share in the joint stock company is considered to be a mere commodity.[190] This means it enjoys full separation from the company.[191] If this adaptation is applied, then inside information that is related to the activities of the corporation is deemed to be irrelevant to the commodity since the commodity is disconnected from the company. However, this view is also excluded from the study on the basis of its conflict with the fact that the stocks belong to the company and are part of its capital, and the shareholder has relevant rights associated with the company such as voting rights and gaining profits. The third opinion is based on recognizing the principle of the separate artificial legal entity by recognising stocks as a way to participate in the company, with the shares representing financial rights held by the shareholders in the company.[192] This opinion is merely statement of two facts, which are the recognition of the separate artificial legal entity and the financial rights associated with

[188] Saleh Al-Buqami, *The joint Stock Company in the Saudi System* (Center for Scientific Research and Revival of Islamic Heritage, Umm al-Qura University, 1985) 336.
[189]Lars Klohn, 'Inside information without an incentive to trade? What's at stake in Lafonta v AMF' [2015] Capital Markets Law Journal, Vol. 10, No. 2, 163.
[190]Fahad al-Yahya, 'Idiosyncratic Adaptation of Shares in Joint Stock Companies' [2016] Gate of the Islamic World Economy (Salaam), 8.
[191]Yousef al-Shubaily, 'Issuing and Trading of Shares, Sukuks and Investment Units with Money and Debt and its Shariʿa Rules' [2010] King Abdulaziz University Jeddah, 5.
[192] Hussein Hassan, 'Components of Shares and their Impact on Trading and the Control of Loans and Interest in their Transactions' [2001] Shariʿa Unified Secretariat General, Dallah Albarakad 18.

shares. It is not an adaptation that would suggest a certain legal framework, but a mere simplistic description of the two aforementioned financial realities.

The last contemporary jurisprudence adaptation is based on the concept of composite contract that is a sum of multiple financial contracts that gather several rights and obligations in one composite contract.[193] Islamic tradition permits certain composite contracts in transactions where there is no conflict between the agreements.[194] This view links the shares to the company, recognizing the rights as a special form of investment that has no relation to the company's assets, while recognizing the joint stock company as a separate legal entity and an ongoing business.[195] The first contract would be in the form of a transaction between a buyer and a seller that leads to the transfer of the ownership of the stocks from one party to the other. The shareholder has some rights towards the company, the board of directors and towards others such as potential buyers, which illustrates the variety of contracts being entered into. The source of these rights is specified in the Company's Memorandum of Association and the law that regulates the market. Also, the shareholder has some obligations to other market participants and to the Capital Market Authority in accordance with the financial regulations. This legal framework indicates that the purchase of shares is subject to Islamic trade provisions.[196] The religious framework highlights ethical obligations that shall be examined further in Chapter 6,

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[193] Abdullah Al-Omrani, *Complex Financial Contracts – PhD thesis* (2nd edn, Riyadh: Dar Knoze Ashbilia, 2010) 46.

[194] Abulhussain al-Omrani, *Al - Bayan in the doctrine of Imam Shafi'i* (Qasim Al - Nouri (ed), 1st edn, Jeddah: Dar Al - Menhaj, 2000) Part V, 148.

[195] While we still stress on the debts dilemma, when it is related to the company`s separate legal entity as the Islamic tradition links the liability to living individuals personally.

[196] Hassan al-Seif, *the Provisions of the Shares in the Joint Stock Company – A Comparative Jurisprudence Study* (Islamic booklets, Dar Ibn al-Jawzi 2006) 144. This understanding can be seen partially the AAOIFI guidelines which states that 'The general basis of a company (sharikah) is agency (wakālah) because each partner is acting as a principal partner on one hand and acting in the interest of the partnership on the other hand as the agent for the remaining partners'. See, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Shari'ah Standards for Islamic Financial Institutions* (Manama: Dar AlMaiman for Publishing & Distributing, 1262p ISBN: 6-9616-01-603-978, Nov. 2015) p. 353.

following discussion of the economic philosophical criticism in Chapter 5. The economic criticism is made by some economists who argue that morals should not play any role in the discussion of insider dealing on the basis of the efficiency argument, which is grounded on the idea that allowing insiders to trade on inside information causes share prices to move in the correct direction.[197] The composite contract view provides a link between the company and the shares transaction. Thus, in this model, inside information is a primary component of the transaction, which would indicate a duty of disclosure. Therefore, non-disclosure of inside information during transactions would be considered illegal,[198] as the information and the description of the subject of the transaction (the shares) is of crucial importance in the Islamic tradition.[199] This is explained further in the upcoming section.

4.6 Inside information

Inside information is a core element of insider dealing. The importance of information is not limited to insider dealing but extends to the whole of economic life. Tracing the history of trade, we can observe that information has been thought of as a key factor in any transaction. In the 7th century, Islamic traders used to seek information regarding the convoys and their routes to buy products outside their territories and sell them at a higher price in their cities. This practice was prohibited by the prophet[200] on the grounds that it was a form of deception and dishonesty and that it harmed individuals.[201]

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[197]Robert McGee, 'Analyzing Insider Trading from the Perspectives of Utilitarian Ethics and Rights Theory' [2010] Journal of Business Ethics, 91(1), 69.
[198]Marco Ventoruzzo. 'Comparing Insider Trading in the United States and in the European Union: History and Recent Developments' [2015] European Company and Financial Law Review 11(4) 558.
[199] Othman al-Zaili, *Tebyan Alhaqaeq Shareh Kanez Aldqaeq Hashyat al-Shalby* (Cairo: Grand Printing Press Amiri - Boulak, 1895) Vol. l, 47-10.
[200] Ben Daqeq Al-Eid, *Ihkam Al-ihkam Sharah Eumdat Al-ahkam* (Dar Aljil 1995) 496.
[201]Question number 43819. Fatwa of the Standing Committee for Scientific Research and Issuing Fatwas number 13/122, 2006.

Moreover, traders throughout history have used homing pigeons to transfer valuable information from one place to another and make investment decisions according to the information exchanged. This practice was continued by brokers and investors in the stock markets, who competed for information by all the available methods, including the telegraph, in order to gain an advantage through the knowledge they obtained and thereby make a profit.[202] Different theories exist in the literature regarding inside information. The efficient market hypothesis (EMH) has been the subject of many classic studies in the financial field. The EMH is theorised on the presumption that all the available information is reflected in the price of shares in the market, and the market is an automatic machine where information is reproduced in the value of the stocks.[203]

The EMH consists of three expectations. First, prices are correct and based on available information. Second, traders have a sensible economic reference that reflects their rational behaviour. Third, any price movements are constructed on the immediate transmission of newly available public information; therefore, share prices reflect their true fundamental value.[204] A serious weakness in this argument is the fact that insider dealers exist who use their inside information to their advantage to gain profit. This fact demonstrates that the value of the shares does not reflect all the available information. For instance, if we assume that the price of a share fully reflects all the available information, then traders cannot gain returns from their advantageous economic position of inside information. A second criticism of the EMH draws upon research evidence which suggests that positive and negative news may affect on Islamic

[202] George Rutledge Gibson, *The Stock Exchanges of London, Paris, and New York* (Press of GP Putnam's Sons 1889)12.
[203]Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' [1970] 25 J Finance 383.
[204]Nicholas Barberis and Richard Thaler, 'A Survey of Behavioral Finance' [2002] Nber Working Paper Series, Working Paper 9222, 3. Also, Razeen Sappideen, 'Explaining securities markets efficiency' [2008] Capital Markets Law Journal, Vol. 3, Issue 3, 1 July, 326.

and non-Islamic (conventional) shares prices.[205] If we take the EMH as a valid theory, then it is impossible to benefit from the information published in the news, thus traders can never earn superior returns based on public news.[206]

Another major weakness of the EMH is that it assumes that investors behave rationally. This is questioned both in the Islamic literature and in psychology. If we closely examine the Quran, we find more than three hundred verses that call for people to think rationally and use reasoning, indicating that human beings frequently behave illogically and fall into erroneous decisions.[207] In the Quranic framework, the human mind is seen as a machine and a means attributed to the person, which sometimes assists him to make intelligent choices, and at other times neglects him, leading him to suffer losses, deviation from good behaviour and towards injudicious decisions.[208] This could be interpreted as an indication that share prices are a reflection not only of economic realities but also of irrational behaviour. Data from several studies support the idea that traders rely on heuristics and biases rather than focusing on maximizing their wealth.[209] Biases are human characteristics that are difficult to overcome.[210] Overall, this indicates that psychology plays a vital role in shaping stock prices. The next theory, therefore, moves on to discuss the behavioural aspect of human beings and their reaction to information.

The second information theory is prospect theory, which has come to be referred to as human economic behaviour. The theory was first proposed by Kahneman and Tversky in

[205]Paresh Narayan and Deepa Bannigidadmath, 'Does Financial News Predict Stock Returns? New Evidence from Islamic and Non-Islamic Stocks' [2017] Pacific-Basin Finance Journal 42, 41.
[206]Michael Murphy, 'Efficient Markets, Index Funds, Illusion and Reality' [1977] 6 J Portf Manage 5–20.
[207] Tabatabai (n 160) 260.
[208]Ali Beydoun, 'Reason and Rationality in the Quran' [2003] Al-Menhaj Journal, Issue 28, 302.
[209]See, Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' [1974] 185 Science 1124–1131. Also, Legrenzi, Girotto and Johnson-Laird, 'Focussing in Reasoning and Decision Making' [1993] 49 Cognition 37–66. Also, Hersh Shefrin, *Beyond Greed and Fear: Understanding Behavioural Finance and the Psychology of Investing* (Boston: Harvard University Press, 1999).
[210]Razeen Sappideen, 'Explaining securities markets efficiency' [2008] Capital Markets Law Journal, Vol. 3, Issue 3, 1 July 2008, 334.

1979.[211] They reconsidered economic behaviour by examining the psychological process of decision making, showing that persons tend to choose probabilistic options that involve risk, which leads to uncertain outcomes.[212] The theory demonstrates that the expected utility is invalid because decisions have pre-heuristic phases. Initially, the person is faced with a probability which must be judged. He then is faced with several scenarios and instances leading him to adjust his decision.[213] On a physiological level, this is a two-stage process. The first is an initial editing stage in which the available information on the market is process, together with the ones the investors already have. This is followed by a second, evaluation stage, during which investors face the uncertain future, framing the facts in accordance with the available information and their own memories according to their past experiences, using mental shortcuts to make decisions.[214] This shows how important the availability of the information is in helping investors to take proper decisions by guiding them to the proper economic path to minimize their biases. However, having recognised that information is flawed and that obtaining it can be costly,[215] and since the market reacts negatively when faced with information asymmetry,[216] market authorities have been taking the lessons of behavioural economics into account. This started a while ago where a regulatory intervention approach to resolving those problems has been applied.[217]

[211]Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk' [1979] Econometrica, 47(2), March 1979 pp. 263-291.
[212] ibid 289.
[213]Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' [1974] Science, New Series, Vol. 185, No. 4157. (Sep. 27, 1974) 1131.
[214]Razeen Sappideen, 'Explaining securities markets efficiency' [2008] Capital Markets Law Journal, Vol. 3, Issue 3, 1 July 2008, 329.
[215]Joseph Stiglitz, 'The Contributions of the Economics of Information to Twentieth Century Economics' [2000] Quarterly Journal of Economics, 115, 1441–1478.
[216]Stewart Myers and Nicolas Majluf 'Corporate financing and investment decisions when firms have information that investors do not have' [1984] Journal of Financial Economics 13, 187 – 22.
[217]Clara Martins Pereira; 'Reviewing the Literature on Behavioural Economics' [2016] Capital Markets Law Journal, Vol. 11, Issue 3, 1 July 2016, 414. Pereira points to the USA and EU regulation as an example, pointing to the Consumer Protection Act and the Dodd-Frank Wall Street Reform in the United States. Also to the behavioural research used to provide a better policy in the European Union.

Regulators came up with a solution to the problem of information asymmetry[218] through disclosure provisions and through laws that combat insider dealing and other crimes related to market abuse and by adopting the principle of equal access.[219]

In several cases, the common law and the European Court of Justice (ECJ) have justified the prohibition of insider dealing with reference to the principle of equal access to market information.[220] Viewed through that lens, insider dealing is an imbalanced practice, because of the lack of information that one of the parties to the transaction suffers.[221] This principle is also known as the disclosure rule, which states that investors who have access to inside information should either disclose it or abstain from dealing in shares.[222] Having an efficient information management system would provide a better platform for investors to invest and may help them overcome human behavioural bias and provide equitable economic opportunities. EU Directive 2003/6/EC on insider trading and market manipulation, also known as market abuse, states that modern communication systems help to achieve more equal access to financial information and decrease the risk of the spread of false information.[223] The principle of equal access promotes organizing both public and non-public information. Inside information is considered to be a form

[218]Khaled Alhabashi, 'Financing for Small and Medium Enterprises: The Role of Islamic Financial Institutions in Kuwait' (PhD thesis, University of Gloucestershire 2015) 44.

[219] The principle of equal access is central principle of Market Abuse Directive (MAD) Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse.

[220]See, The S.E.C. v. Texas Gulf Sulphur Co. [1968] 401 F.2d 833 2nd Cir. at 848. The theory of equal information was rejected by the Supreme Court in *Chiarella v United States* [1980] 445 US 222, 228. Also ECJ stressed on the importance of the principle of equal access in; C-45/08 *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen* [2009] ECR I-12073. And, C-445/09 *IMC Securities BV v Stichting Autoriteit Financiële Markten* [2011] ECR I-5917.

[221]*EC v Great American Industries* [1968] 407 F.2d. 453 at 462. Also, *Birdman v. Electro-Catheter Corp* [1973] 352 F. Supp. 1271 at 1274.

[222] Henry Cheeseman, *Business Law: Legal Environment, Online Commerce, Business Ethics and International Issues* (8th edn, Pearson Education 2013) 701.

[223]Article 25 of Directive 2003/6/EC of The European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). This Directive was repealed by the EU Regulation No 596/2014 of the European Parliament and of the Council of 16 April 2014, but the same concept continues as article 24 states the prohibition on insider dealing is based on the purpose of this Regulation, which is to protect the integrity of the market and to enhance investor confidence, placing traders on an equal footing protecting them from the misuse of inside information.

of non-public information that must be protected from misuse, thereby protecting the integrity of the market. This raises the question of the meaning of the term "inside information".

Inside information relates to facts learned about certain corporate activities. The value of the shares that are related to the underlying corporation could be affected by the information. In simple terms, this information could be disclosed, in which it would be considered public information from a legal perspective; otherwise, it would be considered non-public information. This simplistic analysis is not satisfactory, however, because the issue is much more problematic. Information begins life unknown; it is then thought up and is known to a limited number of persons who are called insiders from a legal point of view; eventually, the information is provided to the public.[224] In other words, information is comprised of facts or at least potential facts about a corporation. Because corporations are artificial bodies, and natural persons such as directors represent their interests, directors are key contributors to the information lifecycle. Directors may start with a thought and in time such thoughts may be transformed into physical acts. For instance, in the beginning, a project is merely an idea in the mind of the director; this idea will be studied, planned and then implemented through the corporation. If the project is prosperous and may have an effect on the share price, then the information regarding this project qualifies as inside information until it is disclosed through the proper channels. By this we can understand that inside information is valuable, non-public information, and there is a thin line between public and non-public information. However, can all non-public information be considered inside information? If so, is it illegal to use it or even not to disclose it?

The definition of inside information varies in the literature, creating terminological confusion. Inside information is a core component of an insider dealing offence. It has been

[224]Eric Engle, 'Insider Trading: Incoherent in Theory, Inefficient in Practice' [2008] Oklahoma City University Law Review, Vol. 32, No. 1, 503.

defined both as specific, unpublished, price-sensitive information[225] and as secret information about a company or its activities that is available to a limited number of people and may be used to buy or sell shares at a profit.[226]

Regulators agree on the need to define inside information. EU regulation provides greater legal certainty for market participants about the key features of inside information, namely (a) the precise nature of the information and (b) the significance of its potential effect on the price of financial instruments.[227] The UK Criminal Justice Act 1993 requires certain conditions to be verified for information to qualify as inside information. According to Article 56 of the Act,[228] inside information must relate to a particular share, be specific or precise, not have been made public, and if it were made public it would be likely to have a significant effect on the price of the shares. In addressing the question of what constitutes inside information, the US courts have stated that the information must be material, meaning it must be price relevant; however, it is not important for the information to be certain, but important that its probability is possible.[229] Additionally, in order to test whether the information qualifies as inside information or not, the court should predict the attitude of any reasonable investor by assessing the relevant basic facts surrounding the information.[230]

These definitions have unique complexities as they raise serious questions, such as: What is meant by 'precise' information, how can one determine the potential effect of the information on share price? What if the share price did not change upon announcement of the information?

[225]*Oxford Dictionary of Law* (n 72) 287.
[226]Longman (n 10) 911.
[227]Legislative acts - Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
[228] Of the UK Criminal Justice Act 1993.
[229]*The United States case, SEC v. Geon Industries, Inc.* [1976] 531 F.2d 39 2d Cir.
[230]*The S.E.C. v. Texas Gulf Sulphur Co.* [1968] 401 F.2d 833 2nd Cir.

What if the price increased due to other reasons unrelated to the information at issue? For instance, what if the inside information was related to serious negotiations regarding a potential takeover, which ultimately were unsuccessful? Given these difficulties, prosecutors usually seek expert opinions to identify whether the information can be considered inside information and to assess its sensitivity.[231]

The existing questions on inside information raises the lack of clarity in its application. The lack of adequate clarification led to a deep discussion regarding the behavioural aspect of the concept of inside information in the ECJ in the case of Lafonta.[232] The questions which were investigated by the ECJ in response to a request for a preliminary ruling from the 'French Court de Cassation' which sought an interpretation of the definition of "inside information" specifically regarding the meaning of the word 'precise' to describe the nature of the information and its potential effect on the prices of the shares.[233] The discretionary opinion of the advocate general in that case stated that it is not apparent from the wording of article 1 of directive 2003/124 that 'precise' information covers only information which makes it possible to determine the likely direction of a change in the price of the shares. The court held that the only information excluded from the concept of 'inside information' by virtue of that law is information that is vague or general, from which it is impossible to conclude the probable impact on the share price.[234] The ECJ concluded in its ruling that the information does not need to be sufficient to support an assumption about its potential effect on the price of the shares in a particular direction.[235] The main weakness of this decision is that it does not consider the insider's motive for trading, as the main goal is to profit from the inside information before it goes public. Traders usually predict

[231] Sarah Clarke, *Insider Dealing Law and Practice* (Oxford University Press 2013) 56.
[232]Case C-628/13 *Jean-Bernard Lafonta v Autorite´ des marche´s financiers* [2014] OJ C39, 8.2.2014.
[233]ibid para. 20.
[234] ibid para 30 and 35.
[235]ibid, the Court (Second Chamber) ruling.

the direction of the shares and they act according to their analysis of the future direction of the shares. If traders cannot tell whether the price of the shares concerned will go up or down, why should they trade in the first place?[236] It is worth noting that, in another ruling, the ECJ stated that the idea of insider information assumes a motivation to trade, as motive plays a role in the decision-making process because owning precise, non-public information grants insiders an economic advantage in relation to all the other market participants who are unaware of it.[237]

Taken together, these rulings and regulations support the notion that inside information is non-public, precise in nature, and gives a trader an incentive to trade for the purpose of profit. The justification for prohibiting inside information is to provide an efficient financial market that is based on integrity and transparency,[238] which, from a Western perspective, is considered to be a prerequisite for states' wealth and economic growth. Many countries aim to encourage investment through the smooth functioning of the securities markets and to boost public confidence in them. Regulators find that market abuse such as insider dealing damages the reliability of the financial markets and reduce public confidence in securities.[239]

However, the Islamic perspective on inside information is based on two different philosophies. In the Islamic view, inside information is considered to be a primary element in the transaction of shares.[240] Normally, important information that has a significant value to the transaction must be disclosed, otherwise, the transaction may become null and void due to

[236]Klohn, (n 184) 174.
[237] C-45/08 *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen* [2009] ECR I-12073.
[238]Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013.
[239]Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC para 24.
[240]Chapter Four, section 4.5.

obscurity the *(Jahala)* and *(Gharar)* rules (chapter five, section 5.4).[241] *Jahala* is a fundamental rule in the Islamic tradition, which holds that if important information related to a transaction has not been disclosed to the other party, then he may ask for the transaction to be annulled[242] because it is based on biased and unfair grounds, given that one party was in an advantageous position by virtue of being aware of the undisclosed information.[243] The test for obscurity known as the *(Jahala rule*) is whether the undisclosed information is primary and if the other party knew it will change his position towards the transaction.[244] This means that when one buys shares, one has the right to know all the information related to the shares that must be disclosed to the other party to the transaction.[245] This is discussed further in Chapter 5.

The second element is related to the justification for the Islamic view of inside information as an important element of the transaction. Islamic tradition places enormous importance on regulating the relationship between the parties to the transaction.[246] This means that regulation is based on a horizontal approach in which the parties must have an equal position,[247] and deal with each other on a moral basis. Market efficiency is not the main aim of Islamic regulation, as the market is an artificial matter and a mere platform that serves the needs of the participants, who are mainly Muslims. Participants generally must uphold the proper moral standards that have been established by Islamic law. The main Islamic aim is to fulfil the Islamic goals, which are to

[241] Trahian Termajan, 'Gharar and Its Applications in Contemporary Islamic Transactions' (Masters Thesis, University of Muhammadiyah Sora Caretta 2015) 6.
[242] Abu Bakr al-Maarafi, *the book of Qabas in the explanation of Mawta Malik bin Anas* (1st edn, Muhammad Karim ed, Beirut: Dar al-Gharb al-Islami, 1992)787-788.
[243] ibid 789.
[244] ibid 809.
[245] Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge University Press 1997) 108.
[246] Hallaq (n 63) 105.
[247]See, AlSabouni, (n 147) 1237.

prevent loss of people's money and to avoid market abuse.[248] This means that the goal is not to increase wealth as per the economic framework, but to establish a platform based on morality that applies Islamic ethics to the transaction.[249] This view leads to a different approach towards the issue of information asymmetry. Consequently, the next section is devoted to the effort to regulate the risks of information abuse.

4.7 The regulatory approaches to inside information

Previous studies have demonstrated that both asymmetric information and moral hazard play a significant role in the financial market, and the fact of asymmetric information may lead to moral hazard.[250] Furthermore, the incentive of gaining profit leads to moral hazard, information abuse and thus to financial manipulation and corruption.[251] Weak regulation is one of the factors that leads to moral fragility and increases the risk of information abuse, which is a core issue in insider dealing.[252] Information in general may be used to gain profit by several means, including market manipulation, whereby investors generate false information such as rumours to manipulate share price. Alternatively, investors may obtain valuable non-public information, such as a potential takeover, and buy stocks in response to that information to profit from the losses suffered by the sellers (shareholders). As a consequence, proper supervisory control and better regulation are among the solutions scholars have suggested.[253]

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[248]Abu Hamid Al-Ghazali, Hamza bin Zuhair Hafez (ed), *Almstcefy of Osoul Knowledge* (Medina Printing Company 1992) 251.
[249]Hallaq, (n 29) 296-297.
[250] Hafiz Hoque, 'Role of Asymmetric Information and Moral Hazard on IPO Under-pricing and Lockup' [2014] Journal of International Financial Markets, Institutions & Money 30, 81-105.
[251]Gabriel Martinez, 'The Political Economy of the Ecuadorian Financial Crisis' [2006] Cambridge Journal of Economics, Vol. 30, Issue 4, 1 July 2006, Pages 567–585.
[252]Nguyen, Vinh, Anh Tran, and Richard Zeckhauser. 'Stock Splits to Profit Insider Trading: Lessons From an Emerging Market' [2017] Journal of International Money and Finance 74, (June 1, 2017): 69-87.
[253] Emilios Avgouleas, *The Mechanics and Regulation of Market Abuse* (Oxford: Oxford University Press, 2005) 173,199.

Different regulatory approaches have been adopted globally ever since the first economic uprising in the late eighteenth and early nineteenth centuries,[254] and the level of government intervention in the stock markets continues to change to this day.[255] The approaches range from deregulation,[256] to self-regulation to extensive and intensive regulation.[257] The problem with regulating the market for the purpose of controlling and providing equal access to information is directly related to the complexity of human economic behaviour. For instance, investors have been found to evaluate information only if it tallies with the conclusion they have arrived at, and to ignore information which does not.[258] This means that disclosure and the duty to continue to disclose will not solve the problem of human economic bias, which leads to the conclusion that the way the information is distributed is more important than the distribution itself.[259] However, do we want to regulate the market so as to direct investors toward making certain economic decisions?[260] Regulators also may suffer from economic bias, so why should we rely on extensive regulation and the supervision of the financial authority when they suffer from human bias, too? The way the markets should be regulated raises intriguing questions regarding the nature and extent of regulation. The lens and framework of such answers differ depending on whether the approach taken is capitalist, post-capitalist, socialist, Marxist or Islamist, to name

[254]Cathy Matson, 'The Atlantic Economy in an Era of Revolutions: An Introduction' [2005] The William and Mary Quarterly, Third Series, 62, no. 3, 357-64.
[255]Philip Cerny, 'The Deregulation and Re-regulation of Financial Markets in a More Open World' [1993] Finance and World Politics : Markets, Regimes and States in the Post-hegemonic Era, 52.
[256]Tanndal Julia, and Daniel Waldenström. 'Does Financial Deregulation Boost Top Incomes? Evidence from the Big Bang' [2018] Economica 85, no. 338: 232-265.
[257]Yahno Tetiana, and Husakovska Tetiana, 'The Theoretical and Methodological Bases to Form the Parity of State Regulation of the National Economy and Market Self-Regulation' [2017] Problemi Ekonomiki, Vol 3, Pp 123-129.
[258] Robert Forsythe, Forrest Nelson, George Neumann and Jack Wright, 'Anatomy of an Experimental Stock Market' [1992] 82 Am Econ Rev 1142).
[259] It is worth noting that the philosophy of disclosure and continue to disclose, has its cons as traders will eventually end up with much information than what they essentially need. See, Klohn, (n 184) 169.
[260] Michael Galanis, 'Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re) Balancing?' [2011] Oxford Journal of Legal Studies, Vol. 31, Issue 2, 1 July 2011, 327.

but a few. As the theoretical framework for this thesis is concerned with the Islamic regulatory approach, the Islamic Ifta positions on insider dealing will be tackled in the next three chapters.

4.8 Conclusion

This chapter set out to provide a better understanding of the IET view on the components of insider dealing. The most obvious finding to emerge from the analysis is that the Islamic view is based initially on a different philosophical understanding of many financial concepts. The chapter raises serious scepticism regarding how IET addresses the concept of ownership, the artificial constructs, and partners' liabilities. The study has taken a chronological approach, beginning by exploring the historical roots of IET and ending with the implication of the concept of God's ownership, which provides human beings with temporary ownership based on trusteeship. It has also shown that in the IET approach to the artificial entity of a company, shareholders would be liable personally for the debts arising from their investment in the company, suggesting that the IET should reconsider some Western-based theories of the company, taking social and religious factors into account.

Thereafter, the chapter identified a third finding, which is that the relationship between the parties to the transaction is governed by a general fiduciary duty in IET. It suggests that the duties of trusteeship and honesty have a broad application from an Islamic point of view and are not limited to certain professional relations.

The fourth finding relates to the Shariʿa's legal adaptation to the transaction of shares as a sum of multiple financial contracts that gather several rights and obligations in one complex contract. The finding indicates that the purchase of shares is subject to the Islamic laws governing trade and inside information and is considered to be a primary component of the transaction. The investigation of inside information has shown that while the justification for

prohibiting inside information from a Western perspective is based on achieving an efficient financial market, IET is based on the equality of the parties' position, to which market efficiency is irrelevant, as markets are seen as artificial platforms that serves the needs of the participants. Thus, Islamic capital markets would benefit from Islamic laws which are deeply based on moral philosophy.[261] Finally, the chapter has raised important questions about the nature of regulation that should be provided in the Islamic world in order to address asymmetric information, moral hazards and irrational and biased human economic behaviour.

Overall, the implication of God's ownership and IET individual realistic approach suggests a different ideology of the financial system in terms of the type of conduct regulatory approach. IET position is not based on economic abstraction but, more based on prudential regulation and a stronger social ethic where faith influences insider dealing through the social, ethical and religious factors designed primarily to protect individuals' money from harm.

The next chapter explores the fatwas on insider dealing with the aim of helping the reader to establish a greater degree of understanding of the IET position on the conduct.

[261] It is worth noting that the need for moral rules to organize better the capital markets globally is promoted by some authors. For example see, Philip R Wood, 'Does Moral Philosophy Apply to Capital Markets?', [2018] Capital Markets Law Journal, Vol. 13, Issue 2, April 2018, page 185.

Chapter 5 : Fatwas Based on Economic Reasoning

5.1 Introduction

The aim of this chapter is to explore the Islamic economic thought (IET) position towards insider dealing. It attempts to answer the third secondary research question, which is: What is IET position towards insider dealing? The chapter at the outset investigates the qualitative data of the surveys (*fatwas*) collected from ten Ifta institutions.[1] The fatwas were based on questions prepared earlier. These questions are:

1. What is the viewpoint of Shariʿa regarding the use of inside information in the stock market?
2. In the case of the prohibition of this act, what are the Shariʿa principles on which this prohibition is based?

The chapter highlights the key theoretical concepts that were obtained from Ifta institutions. It then seeks to explore the Islamic economic position on insider dealing by focusing on the Islamic understanding of damage (*Dharar*), ignorance (*Jahl*), high risk and uncertainty (*Gharar*) and fraud (*Ghish*) that are mentioned in the obtained fatwas.

In the pages that follow, it will be argued that IET combats insider dealing based on its approach of preventing harm through its notion of (*Maqasid al-shariʿa).* The argument is developed over the course of the chapter, which is divided into six main sections. The first section is introductory, while the second presents the main themes relating to the collected fatwas. The third, fourth and fifth sections are related to the exploration of the Islamic economic positions on insider dealing. They discuss the theory of damage, ignorance, the high risk of

[1]In presenting the findings, the fatwas are represented in codes (Ifta-01, to Ifta-10) because of confidentiality concerns. This is because several Ifta institutions requested to keep the secrecy of the answer by stating that: 'This answer is not for the purpose of publication or media' e.g. Ifta-03 and Ifta-07.

uncertainty, fraud and deception. The last section concludes the chapter and introduces the second theme related to the Islamic moral position on insider dealing, which will be discussed in Chapter 6.

5.2 The fatwas on insider dealing

This section describes the data (fatwas) collected on insider dealing. It is exploratory and interpretative in nature.[2] The fatwas were gathered from surveys sent to the Ifta institutions in seven Islamic countries, which offered the research a wide-angle lens on the Islamic perspective.[3] In some countries, the author approached more than one Ifta institution due to their different school of thoughts and rich historical backgrounds. The author approached the Ifta institutions in several ways, through online applications, an exchange of emails, and sometimes through direct personal appointments with the Muftis. All Ifta institutions conveyed that the fatwas were conducted for the purpose of research. The questions and answers were produced in Arabic, as per the preference of the institutions. The fatwas were analysed through coding,[4] which is viewed as the heart of the qualitative method.[5] Their content was explored using thematic analysis.[6] Initially, the responses were transcribed and translated into English. Due to the low numbers of fatwas and the low volume of notes, the author conducted a manual analysis

[2]Graham Gibbs, *Analysing Qualitative Data* (SAGE Publication Ltd, 2007) 40. Also see, John W. Creswell, *Qualitative Inquiry Research Design* (3rd edn, SAGE Publications Inc, 2013) 187.
[3]This is one of the advantages of the survey. See, Terry G and Braun V, "Short but Often Sweet" in Virginia Braun, Victoria Clarke and Debra Gray (eds), *Collecting Qualitative Data* (Cambridge University Press 2017) 15. Also see, David de Vaus, *Survey in Social Research* (6th edn, Routledge, 2014) 3.
[4]Coding is used in term of how the author defines the data he is analysing. See, Gibbs (n 2) 38.
[5]*The SAGE Handbook of Qualitative Data Analysis* (Uwe Flick (ed) Sage Publication Ltd 2014) 170. Also, it is seen that the quality of the qualitative research rests in large part on the coding. See, Anselm L. Strauss, *Qualitative Analysis for Social Scientists*, (Cambridge University Press, print publication year 1987, online publication date: January 2010) 27. Also see, Claus Moser and Graham Kalton, *Survey Methods in Social Investigation*, (2nd edn Gower 1971, reprinted 1985) 414.
[6]See, Johnny Saldana, *the Coding Manual for Qualitative Researchers* (3rd edn, Sage Publications Ltd, 2016) 13.

and coding after reading, understanding and re-reading the fatwas several times.[7] The themes are the outcomes of the coding process and the categorization of the data is a reflection of the fatwas.

The research attempts not only to employ the qualitative modes of enquiry but also to enrich the fatwas through the discussion of library-based material (existing research) on a theoretical level. One of the main features of qualitative data is its ability to reveal different perspectives and to facilitate understanding of the topic from the social point of view.[8] The discussion moves from the fatwas to the existing literature, as per the themes that emerged from the collected data. The themes are assessed by examining constructs that appeared in the fatwas.[9] The findings not only supported and confirmed the current literature and research hypothesis, but also provided additional in-depth information about the variety of Islamic opinions on insider dealing.[10]

Based on the obtained fatwas, certain conceptual themes are categorised as per the answers provided by the Ifta institutions and coded in a reflective manner.[11] The analysis of the responses of the fatwas identified four main themes. These themes are (1) Damage, (2) Morality, (3) Permissibility and (4) Legitimate Policy. It was noted previously in (chapter three, section 3.4.3) that IET is a mixture of both economic and ethical directives. Thus, a question may arise regarding the basis of distinguishing between 'economic' fatwas and 'ethical' fatwas. The research separates between different themes for clarification purposes; the author systematically marks analogous strings of text identifying patterns, sorting and labelling them, further, to synthesize them according to the theoretical structure. The western arguments of insider dealing

[7]This is decision was made based on the guide regarding making decision about the analysis from: Rosaline S. Barbour, *Introduction Qualitative Research* (2nd edn, Sage Publications Ltd, 2014) 260.
[8]See, Jamie Harding, *Qualitative Data Analysis* (2nd edn, Sage, 2019) 20.
[9]See the explanation of generating themes in *The SAGE Encyclopaedia of Qualitative Research Methods* (Lisa M Given ed, Sage Publications Ltd, 2008) vol 2, page 868.
[10]Thus, the data lye somewhere between the inductive and deductive approaches. See, ibid 222.
[11] ibid pages 149-172.

are structured around economic and moral arguments (chapter six, section 6.5). Therefore, selective coding is applied through connecting the core category (IET) to the related categories elicited from the fatwas (economic and moral arguments) to create a thorough narrative. Categorising is an essential step for determining what is in the data while theming is detected by thinking interpretively and answering: what is the fatwa's content? The connections between the texts are not indicative of Islamic thought nor are they considered an Islamic way of conducting research but rather a scholarly analysis commenced to illuminate the viewpoints of the fatwas and compare it with Western thought. The quotations of the fatwas are presented during the discussion of each theme to better engage in the academic commentary by allowing the data to support the argument[12] and use them to generate and associating ideas.[13]

The analysis of the fatwas revealed that 33% of the Ifta institutions find insider dealing to be a prohibited conduct because of the harm that might be caused to the counterparties (discussed in section 5.3). A further 19% of the fatwas prohibit the conduct because they find it morally wrong (Chapter 6). A third (33%) of the responses point out that insider dealing is a matter that should be a concern for the positive law, and 15% of the fatwas stated that it is a legitimate conduct unless the law states otherwise (Chapter 7). This means that five out of the ten fatwas concerned with the themes of Legitimate Policy and Permissibility stated that Islamic law does not forbid insider dealing unless the conduct is restricted by the positive law.

[12]Since qualitative research does not generally use statistics but present the content in the context of an abstract allowing the data to speak for itself. See, Strauss AL, "Presenting Case Materials: Data and Interpretations," *Qualitative Analysis for Social Scientists* (Cambridge University Press 1987) 215. Also see, Janice Morse, 'Confusing Categories and Themes' [2008] Qualitative Health Research, Volume 18 Number 6, June, p 727-728.
[13]See, The Sage (n 5) 123.

Ifta Institutions	Themes				
	Location	Damage	Moral	Legitimate Policy	Permissibility
Ifta-01	Kuwait			X	X
Ifta-02	Iraq		X	X	X
Ifta-03	Jordan	X	X	X	
Ifta-04	Iraq	X		X	
Ifta-05	Egypt			X	X
Ifta-06	UAE	X		X	
Ifta-07	UAE	X	X		
Ifta-08	KSA	X			
Ifta-09	Egypt	X	X		
Ifta-10	Palestine	X		X	
Total	7	7	4	7	3
Percentage		33%	19%	33%	15%

The following sections explore the Islamic economic view of insider dealing, by exploring the fatwa content which referred to damage theory (*Dharar*). The obtained fatwas are referred to during the discussions and engaged with the literature and theory in sections (5.3 to 5.5). The themes of morality view, legitimate policy and permissibility are discussed in Chapters 6 and 7.

5.3 Islamic damage (*Dharar*) theory

This section takes a standard approach that describes the results of fatwas that are related to the economic position in a systematic and detailed way by comprising quotations from the data. Thereafter, the section critically discusses the concept of *Dharar* (damage) through an Islamic lens and engage the related fatwas in the discussion. There are seven fatwas which refer to the concept of damage as a justification for combating insider dealing. Through closer inspection of the first fatwa, it is evident that insider dealing was seen as a source of damage to the company itself. The authoritative fatwa states that: ‘Access to the company’s inside information which has not been disclosed is not permissible for those who are not authorised to do so because they have access to a secret. The insider with such information must not disclose it

to any person; otherwise, it is a betrayal. The consequence of such behaviour causes damage to the company.'[14]

The second fatwa refers to combating insider dealing to prevent damage to other investors. It states that:

> This exploitation is completely prohibited by Shariʿa, and by law too, as the case is that the exploiter of this information exploits his position and his job authorizes him to know that such information may harm others. Islam has forbidden harm to others of any kind. Our Prophet (praise be upon him) said: "There is no harm, no foul, and he who harms others, Allah harms him." Moreover, Islam has forbidden the exposure of secret information as well as the meeting of the convoys before their arrival in a country for the reason that it is harmful to the poor. Therefore, the provisions of the holy Shariʿa prohibit such acts for the aforementioned reasons. This prohibition has been supported by the legal status that must be complied and obeyed with. When the legislator enacted such legislation, it becomes a part of the legitimate policy to achieve the interests of the people and to protect them against any harm. It is known how much damage this entails. Many people go bankrupt because of these unilateral measures, which are caused by panic and greed at the expense of weak investors and novices and it is necessary to stop doing that and to fear Allah regarding harming people.[15]

The other fatwas in this group refer insider dealing as a form of cheating, fraud and deceit that causes harm to other investors. One fatwa linked this justification to a Hadith by stating that: 'It is forbidden in Islam for someone to harm the rest of the investors by deceiving them, and it is

[14]Ifta-07.
[15]Ifta-06.

considered to be disobedience to the Prophet's Hadith: "There should be neither harming nor reciprocating harm."[16]

Another two fatwas referred to the primary sources, the Quran and the Hadith, to justify the prohibition of this act, stating:

> [T]he Almighty Allah has vituperated persons who cheated the people in the Holy Quran and threatened them with tribulation, and this is understood from the verse: "Woe to those who give short measure" Surah Al-Mutaffifin [83:1].[17] This verse signifies that those who steal, subdue and underestimate others' assets by undervaluing the weights or measures are going to suffer. The Prophet, Shuayb, warned his people against the inferiority of people, their assets, and the manipulation of scales. The Prophet warned of cheating. In an incident, *He* passed by a pile of food and put his hand into it, and his fingers touched something wet. *He* said, "What is this, O seller of the food?" The man replied, "It got rained on, O Messenger of Allah." *He* said, "Why did you not put it (the wet part) on the top of the pile so that the people could see it? He who deceives does not belong to me." According to other reports, "He who deceives us is not one of us" and, "He is not one of us who deceives us" (Narrated by Muslims). It is sufficient to state the words of the Prophet: "not one of us" if it is for the purpose of repelling cheating and as a deterrent to peddling, and a barrier from falling into the quagmire bilge.[18]

Another fatwa states that 'if the use of insider information is allowed, fraud will spread, as well as the exploitation of people's needs, and robbing them of their money'.[19] Another fatwa developed this argument, stating: 'This is a kind of fraud and deception to plunder others' money viciously. The profit obtained as a result of this is illegal due to the lack of equal opportunities between the parties.'[20] Likewise, another fatwa stated that 'it is forbidden in Islam for someone to harm the rest of the investors by deceiving them'.[21] An

[16]Ifta-10.
[17]*The Qu`ran*, (M. A. S. Abdel Haleem (tr), Oxford University Press, an Oxford World's Classics paperback 2005) 413.
[18]Ifta-08.
[19]Ifta-03.
[20]Ifta-09.
[21]Ifta-10.

addition fatwa justified the damage in terms of the undervaluing of the price, stating that, 'according to Shariʿa, the person or entity that is harmed due to this forbidden exploitation of inside information has been cheated because they have sold their stocks for a lower price than the actual price in the stock market'.[22] The results of the correlational analysis of these fatwas show that preventing damage is a fundamental concept that regulates the behaviour of Muslims. It illustrates a tendency towards a policy that is based on the idea of a market that is free from *Dharar* (damage).[23] To better understand what is meant by *Dharar,* first, some theories shall be explored.

In the history of the development of torts jurisprudence, damage has been thought of as a key factor in tort theory. How to address harm caused by an act is a primary question that is explored by many leading authors. For example, Holmes explored both liability based on negligence and the strict liability rule which holds that a person is not only liable for his fault but also for not obeying ethical norms.[24] The philosophy of strict liability can be traced back to the mid-19th century. Thereafter, near the end of the century, the concept was developed by the courts into the fault principle.[25] In the eye of the policymakers, it is crucial to think about the justification for deciding which approach is adopted. Normally, the policy arguments are based on deterrence, whereby the regulatory bodies try to prevent a particular behaviour as well as risk-spreading and administrative costs, which are essential concerns for shaping the regulation.

Damages are classified under two types. The first is 'compensatory damages', which are granted to compensate victims for losses suffered as the result of damage. The second type are

[22]Ifta-04.
[23]The policy is explained at the end of this section.
[24]Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, And Company, 1881) at 77–129.
[25]Keith N. Hylton, *Tort Law: A Modern Perspective* (Cambridge University Press 2016) 32.

'punitive damages', which are awarded to the plaintiff to deter and punish 'tortfeasors'.[26] Unlike the negligence principle, the strict liability regime prevents investors from exploiting their informational advantage, which is seen as a reason for an error-free legal system.[27] This is done through certain regulatory restrictions on the investors for the interest of the public good (Ifta-03 and Ifta-06). Informational advantage is understood as a material advantage that is important enough in the sense that an investor could expect it to have a significant market value[28] and if disclosed it would affect the supply and demand of the shares (Ifta-01).

Of course, it is preposterous to imagine any financial system that is error-free, given that human behaviour is usually not predictable nor systematic when it comes to economic choices. However, having a moral standpoint that connects the wrongdoer and the victim of harm in a way which balances the economic interaction through tort law reflects the concept of 'corrective justice'.[29] The concept of corrective justice emphasises the fairness of interactions between investors.[30] Correcting the position of the harmed party is a goal of the strict liability regime.[31] The goal of preventing harm caused by using inside information is seen as a primary target, not only in Islamic law (Ifta-6, Ifta-10) but universally. Does this mean that the regime is based on promoting efficient resource allocation?[32] Or at least equal opportunities? (Ifta-03, Ifta-09). The

[26]ibid 377.
[27]ibid 335.
[28]Donald C Langevoort, *What Were They Thinking? Insider Trading and the Scienter Requirement*, in Stephen Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing 2013) 445; John Anderson, *Insider Trading: Law, Ethics, and Reform* (CUP 2018) 59.
[29]Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press 1995) 134.
[30]See, Allan Beever; 'Corrective Justice and Personal Responsibility in Tort Law' [2008] Oxford Journal of Legal Studies, Vol. 28, Issue 3, 1 October, 500.
[31]G Calabresi 'Some Thoughts on Risk Distribution and the Law of Torts' [1961] 70 Yale LJ 499. Also, G Calabresi and J Hirschoff 'Towards a Test for Strict Liability in Torts' [1972] 81 Yale LJ 1054.
[32]William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987), at 1 and 15.

idea of allocation is seen as a positive economic theory of tort law, which assumes that judges seek to maximise market efficiency.[33]

This assumption is problematic because it is based on the idea that insider dealing is a wrongful act, whereas, before we can accept this premise, we must first take a step back and carefully consider the justification for it. This means that the approach should tackle first the question of why there should be a prohibition on insider dealing. Is this question related to the topic of the limitation of economic freedom and restrictions on the use of properties? Is it related to what is allowed and what is prohibited in the law? (Ifta-01). Taking the 'rights-based model'[34] of tort law and looking into the rights before the harm is a good starting point from which to address these questions.[35] Several Islamic authors see that is it permissible to harm others if this results from the disposal of one's property, which is by definition an act of good faith.[36] This means that if a person is selling his shares based on the advantage of inside information, then, the act is permissible, as there is no explicit restriction in the Islamic sources against exposing and exploiting inside information (Ifta-05). In fact, Islam promotes economic freedom, which means that a person is free to dispose of his property as he wishes (Ifta-02).[37] Is that the Islamic perspective? It is simplistic to contextualise the concept of *Dharar* to such a narrow point of view, which is why the definition of *Dharar* should be re-examined.

To understand the Islamic concept of damage (*Dharar),*[38] first it is necessary to clarify exactly what is meant by this term in the Arabic language for the reason that Islam was initially

[33]Richard A. Posner, 'An Economic Theory of Intentional Torts' [1981] 1 The International Review of Law and Economics, Elsevier 127, 920.
[34]Robert Stevens *Torts and Rights* (Oxford University Press; 2007) 2.
[35]ibid 306.
[36]Imam Khomeini, *Bada'idal-Dardar in the Base of the Exile of Damage* (the Organization and publication of Imam Khomeini traditions ed, Al-Arouj Press 1995) 134.
[37]Ifta-01, Ifta-02, and Ifta-05. These fatwas are explored later in chapter seven section 7.2.
[38]*The Oxford Dictionary of Islam* (John Esposito (Ed) Oxford University Press, 2003) 63.

revealed through the Quranic material[39] in the Arabic language.[40] The Quran[41] states that 'We have sent it down as an Arabic Quran so that you [people] may understand'.[42] *Dharar* is defined as harm,[43] damage,[44] loss[45] and prejudice.[46] The term is linked to the Arabic term *madror*, which means a victim of *Dharar*.[47] In an economic sense, it is an act that causes a shortage of money,[48] failure and even a bankruptcy (ifta-06).

The Quranic verses use the term *Dharar* in several Ayat.[49] The book refers to the term in 62[50] Ayat (verses)[51] in 30 Surahs.[52] The Quran introduces the term *Dharar* in the context of seven main themes: affliction and scourge, abuse and opposition to utility, lack of status and potential, pain and illness, fear of destruction, distress, poverty, and hunger.[53] Such broad use of the term shows that the prevention of harm is an absolute value in the sacred text. This means that any harm that is caused because of an act that violates Islamic law is considered to fall under

[39]By Quranic material we refer to the Ayat, for example, the Quranic verses include more than 170 personal, civil and penal laws, plus about 20 testimony and judiciary matters. See, A Khallaf, *Concise History of Islamic Legislation* [Arabic] (Kuwait: Dar Al-Qalam, 1982) 28–9.
[40]There are 11 Ayat that state that the Quran is shaped in Arabic. See, The Quran [13:37], [16:103], [20:113], [26:195], [39:28], [41:3], [41:44], [42:7], [43:3], and [46:12].
[41]It is worth noting that Even though the Arabic language was used before Islam, still the language was developed to serve the inimitable style of the Quran.
[42]The Quran [12:2]. See, Abdel Haleem (tr), (n 17) 145.
[43]Harith Faruqi, *Faruqi`s Law Dictionary* (2nd edn, Beirut: Libraries du Liban Publishers, 1983) 216. Also,Muneer Baalbaki, *Al-Mawrid Alwaseet* (2nd edn, Beirut: Dar El-Ilm Lilmalyin,1997) 464.
[44]"damage." In A Dictionary of Law, (Jonathan Law (ed) Oxford University Press, 2018).
[45]Or opposite of benefit. See, Elias, *Elias Modern Dictionary*, (16th edn, Cairo: Elias Modern Publishing House and Co, 1988) 391. Also, P A Cowie (ed), *Oxford Advanced Learner`s Dictionary*, (4th edn, Oxford University Press, 1990) 299.
[46]Rohi Baalbaki, *Al-Mawrid* (5th edn, Beirut: Dar El-Ilm Lilmalyin, 1993) 711.
[47]Abdullah Al-Elaly (ed) *Al-Sahah*, (1st edn, Beirut: Dar Al-Hadara Al-Arabiya, 1975) 642.
[48]Ahmed Mowafy, *Damage in Islamic Jurisprudence* (Dar Ibn Affan Publishing and Distribution 1997) 21.
[49]The Quran is structured into 114 Surahs (chapters) which consist of 6348 Ayat (verses).
[50]Other authors claim that it is mentioned in 74 verses. See, Mowafy (n 48) 21.
[51]Some verses mention *Dharar* several times. For example, in Al-Baqara [2:102] Dharar is mentioned two times. Also, in Al-Zumar [39:38] Dharar is mentioned two times.
[52]Al-Baqara [2:102, 177, 214, 233, 282], Al-EImran [3:111, 120, 134, 144, 176, 177], Al-Nisaa [4:12, 95,113]. Al-Maida [5:42, 76, 105]. Al-Anam [6:17, 42, 71]. Al-Araf [7:94, 95,188]. Al-Tawba [9:39, 170]. Yunus [10:12, 18, 21, 49, 106, 17]. Hud [11:10, 57]. Yusuf [12:88]. Al-Rad [13:16]. Al-Nahl [16:53, 54]. Al-Isra [17:56, 67]. Ta Ha [20:89]. Al-Anbiya [21:66, 83, 84]. Al-Hajj [22:12, 13]. Al-Muminun [23:75]. Al-Furqan [25:3, 55]. Al-Shuara [26:73]. Al-Rum [30:33]. Luqman [31:24].Saba [34:42]. Ya Sin [36:23]. Al-Zumar [39:8, 38, 49]. Fussilat [41:50].Muhammad [47:32].Al-Fath [48:11]. Al-Mujadala [58:10]. Al-Talaq [65:6].Al-Jinn [72:21].
[53]Mowafy (n 48) 24-46.

the concept of *Dharar* and in consequence should be prevented.[54] Muslims cannot accept *riba* (interest), gamble, or deceive others because those actions cause harm and hence, must be avoided.

Islamic scholars and fundamentalists addressed the meaning of *Dharar* when explaining the Hadith of the Prophet,[55] *'La Dharar wala Dherar'*.[56] However, the definitions used by these scholars differ. For example, some authors state that what is meant by *Dharar* is what benefits the person and hurts the counterparty by causing financial damage,[57] while *Dherar* is what harms the counterparty but does not benefit the person.[58] Other jurists argued that *Dherar* is not used in term of repetition,[59] but it refers to prohibiting the process of delivering the abomination and damage.[60] In this sense, it focuses on the preventive aspect of the act by eliminating the pre-actions of *Dharar*. Ibn Athir[61] offered a different explanation of *Dherar*, stating that the term refers to the outcome of the damage, which is the loss.[62] As he understands the terms, *Dharar* is the act of damage, while *Dherar* is the consequence of the act.

To better understand the Hadith, the circumstance of the Hadith should be recalled. The issue could be understood as a socio-economic one in the form of a dispute between two persons, regarding the entry by one (the stranger) into the property of another (the landlord) to look after his (the stranger's) assets (trees) on land owned by the landlord. The stranger's access to his land

[54]ibid 173.
[55]The hadith is mentioned in eight sources, one of them is from Musnad Ahmad Ibn Hanbal: (d. 855) Ibn Hanbal is the eponym of Hanbali Islamic School. Known for literal interpretation of the Quran and Hadith. To examine all the sources of the Hadith 'LaDharar', see, Sayyed Al-Sistani, Sayyed Al-Sistani, *Qaeidat La Dharar Wala Dherar* (Qom Mehr Press, 1993) 11.
[56]Musnad Ahmed Ibn Hanbal vol 5 page 327 cited from: Khomeini (n 36) 61.
[57]ibid 70.
[58] Farouk Karim, *Moral Damage Compensation in Islamic Jurisprudence* (Dar Al Kotob Al Ilmiyah 2011) 22.
[59]Khomeini (n 36) 72.
[60]ibid 70.
[61]Ibn al-Athir, Abu al-Hasan Ali Izz al-Din (d. 1234) is 'Historian…' '…Believed history had both religious and mundane value and that moral lessons could be drawn from it to reform kingdoms' Esposito (n 37) 124.
[62]Ibn Al-athir, *Al-Nihayat Fi Ghurayb Alhadith Aal'athar* (Taher Alzaawaa (ed) Beirut: Almaktaba Aleilmia, 1979 vol 3) 81.

caused the landlord concern because the stranger was entering regularly without obtaining permission from him. The stranger was disturbing the landlord and his family, especially because of the Islamic ethos of women's sanctity. The landlord went to the Prophet for a resolution. The owner of the trees (the stranger) was asked by the Prophet to either sell his assets at a higher value to the landlord or to transfer them to other land. However, the owner of the trees (the stranger) refused both options. The Prophet then issued a verdict ordering the removal of the trees by force, stating that the owner of trees (the stranger) is '*mudar*', meaning that he is intentionally causing damage to the landlord. Islamic scholars saw this verdict as a rule of jurisprudence,[63] or one of the main ones, around which they built the theory of freedom from *Dharar*.[64] Such theory was embraced by several fatwas (Ifta-06, Ifta-10). However, other modern scholars stated that the Hadith should not be considered as a general doctrine ('fundamentalist rule') in Islamic law since it is not a sacred text or a divine law.[65] It is a rule that is limited to the parties of the dispute, and the Prophet acted in his capacity as a judge.[66] Therefore, when Muftis want to issue an opinion on a modern matter, they should refer to other sacred texts from the Quran and Hadith to support their fatwas (ifta-8), avoiding reliance solely on this rule.[67] They could, however, refer to it as a judicial precedent, which, while not binding, offers a lesson to be learned from.[68]

Moreover, it is important to acknowledge that the Prophet expressed a major concern to the Islamic nation in his final days with regard to the theory of damage. He articulated a general

[63]Falah Alduwkhiu, *Nafy Altashrie Aldarriu Fi Al-Islam* (Mwasisat Wali Aleasr Lildirasat Al'iislamia, 2006) 26-29.
[64]Jalal-Aldiyn Alsayuti, *Tanwir Alhawalik, Fiqh Almadhhab Almaliki* (Muhamad Alkhalidi (ed), Beirut: Manshurat Muhamad Ali Baydun, Dar Alkutub Aleilmia, 1997) 556. Also see, Alshaykh Alansari, *Faraid Alusul* (Lajnat Tahqiq Turath Alshaykh Alaezam 1996) vol 2, 455.
[65]Muhamad Alnnayiynia, *Ajud Altaqrirat Lil Sayyyed Alkhoiyi* (2nd edn, Usul Alfiqh End Al-Shia, 1990) Vol. 2, 341.
[66]Or a ruler. See, Al-Sistani,(n 55) 151.
[67]Alduwkhiu (n 63) 35.
[68]Muhamad Albhsudi, *Misbah Al-Usul Taqarir Bahath Alkhoiyi*, (5th edn, Qum: Aleilmia Publishing, 1997) vol 2, 513.

rule that is based on the inviolability of the people against each other. This sanctity is expressed in three areas: blood, money and honour.[69] For the purpose of this research, the focus on *Dharar* is limited to the loss of money and financial harm arising from illegal acts.[70] The assault on money is a crime in the view of some jurists of the Hanafi and Shaafai schools (Ifta-06).[71] In other words, the justification for the prohibition of an act is the harm it inflicts on the person's money.[72] It is not about the act in itself, but rather about the outcome of it, which is the assault on the money. Thus, the prohibition shall be on any action that causes harm.[73] However, it seems that taking such a general approach is problematic in the sense that the approach considers damage as a wrongful act. The common approach places great emphasis on defining what is right and what is wrong before examining the implications of an act.[74] Thus, a much-debated question that must be explored is whether the act of insider dealing is wrong or not. Only then can the question of the impact (outcome) of the act be explored.[75]

5.4 Ignorance (*jahl)*, high risk and uncertainty (*gharar)*

The issue of inside information may be more problematic in Islamic societies, where communities gather routinely and have access to inside information from the local gatherings such as '*Diwaniyas*'[76] and '*Masjids*'.[77] These informal meetings are attended by members of the

[69]Mohammed al-Bukhari, *Saheeh al-Bukhari* (Muhammad al-Nasser (ed) Dar Taq al-Najat 2001) 765.
[70]Abdul-Jabbar Hussein, *Theory of Denial of Damages in Islamic Jurisprudence, A Comparative Study of Law*, (Iraq University Press, 1990) 31.
[71]Karim (n 58) 30.
[72]Mahmoud Shaltout, *Islam is Aqeeda and Shariʿa* (Dar Alshorouq 2007) 412.
[73]Such as theft, fraud, market abuse, or any type of financial crime or any future acts.
[74]Cecil Wright, 'Introduction to the Law of Torts' [1944] 8 The Cambridge Law Journal 224.
[75]ibid 246.
[76]It is a heritage and traditions of many Islamic societies such as the gulf states like Kuwait. People from all aspect of thoughts gather and discuss the economic, legal, and political issues. Share information on a weekly, and sometimes daily basis. See, Alhajeri, Abdullah M. "Dīwānīyah." In the Oxford Encyclopedia of Islam and Politics: Oxford University Press, 2014.
[77]A Mosque (Masjid, "place of prostration") has become the primary building of worship for Muslims. The mosque functions both as place of worship and as meeting-place for the community. See, "Masjid Jāmiʿ." In the Oxford

community five times a day;[78] consequently, information is easily transferred between members, who may mimic the behaviour of other investors.[79] Problems arise when one party has advanced information about shares which have a value that would cause uncertainty (*jahalah*) for the counterparty.[80] In Islamic literature, the term *Jahl* (ignorance) tends to be used to refer to the lack of information. From a financial point of view, it is not acceptable that one party benefits from the other party because of an informational advantage[81] as this act is against the principle of equivalence (Ifta-09). Usually, investors tend to have close relations with other investors, to benefit from their insights and information. Information is valuable to investors because it allows them to make better investment choices, and thus increase their expected profits (Chapter 3).[82] Investors tend to focus on their self-interest and maximising their own profits rather than those the company, the market or the wider world.[83]

The failure to disclose inside information to the counterparty is likely to increase the chances of loss and expose him to the risk of harm (Ifta-06). Such an attitude is known as *Jahalah* and *Gharar* in Islamic jurisprudence.[84] The term *Gharar* means risk and uncertainty

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Encyclopedia of Islam and Politics.: Oxford University Press, 2014. http://www.oxfordreference.com/view/10.1093/acref:oiso/9780199739356.001.0001/acref-9780199739356-e-0018.

[78]Kabir Hassan (n 78) 64.

[79]Hartnut Schmidt, *Insider Regulation and Economic Theory in European Insider Dealing Law* (Klaus Hope and Eddy Wymeersh (ed) Butterworths, 1991) 24.

[80]Jahalah is related to the term Jahl, which means lack of information and uncertainty caused to the other party. The term is usually used under the topic Gharar which will be discussed in the upcoming sentences. See, Rittenberg, Ryan. "Commercial Law." In The Oxford Encyclopedia of Islam and Law. Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/article/opr/t349/e0034 (accessed 20-Apr-2019).

[81]Bacha, Obiyathulla Ismath, and Abbas Mirakhor, *Islamic Capital Markets: A Comparative Approach*, (John Wiley & Sons, Incorporated, 2013) 68.

[82]Paul Fenn, Alistair McGuire and Dan Prentice, *Information Imbalances and the Securities Markets, in European Insider Dealing Law* (Klaus Hope and Eddy Wymeersh (ed) Butterworths, 1991) 4.

[83]'Rationalism' point of view on the human economic behaviour. See, M. Kabir Hassan Mervyn K. Lewis, *Handbook on Islam and Economic Life* (Edward Elgar Publishing 2014) 241.

[84]Abdul-Sattar Abu-Ghada,*Al-Khiyar Wa Atharuhu fi Al-Uqud* (2nd edn, Kuwait: Matba'at Mqhawi, 1985) 39.

arising from a lack of information related to the contract.[85] The Hanafi school adopted the same definition,[86] while the Maliki school defines it as a suspicion, and the Shafi'i describes it as a high risk.[87] Ibn Taymiyyah defines *Gharar* as an unknown consequence.[88] The Prophet forbade 'the sale of gharar', asserting that God knows the unknown (e.g. hidden information) and 'knows what you are doing'.[89]

Gharar is seen as a kind of deception because it exposes the counterparty knowingly to the risk that the price of what is bought or sold will decrease.[90] There is a general assumption that in every transaction, there will be a kind of *gharar*, since one party will usually have more information than the other, and economically, one party will gain more benefit than the other.[91] Therefore, a question that needs to be asked is whether or not *gharar* is generally allowed or if it is only prohibited when the damage caused exceeds a certain amount. Authors tend to address this question carefully by deciding the level of *gharar* that is considered to be unacceptable.[92] Consequently, different outcomes may be arrived at for each transaction depending on the jurist's opinion as per his particular school of thought.

The problem with insider dealing is that it is based on an unbalanced economic situation; for example, one party could buy shares for less than their true value, using his advantage of knowing inside information that is not known to the other party. Comparable acts were practised

[85]See, Assenhaji, S. Al-Qarafi, *Anwar al-Buruq fi Anwa' al- Furuq*, (Khaleel Almansour (ed) Beirut: Dar Alkutub Al-Ilmiyah 1998) Vol. 1, 275. Also, Ali, S. S. and Ahmad, A. 'Islamic Banking and Finance: Fundamentals and Contemporary Issues' [2007] Islamic Development Bank, Islamic Research and Training Institute 54.
[86]Al-Saati, A. 'The Permissible Gharar in Classical Islamic Jurisprudence' [2003] J.KAU: Islamic Econ, 16, 54.
[87] Bacha (n 76) 68.
[88]Ibn Taymiyyah, *Total Fatwas* (King Fahd Complex, 1995) part 3, 275.
[89]Muhammad AlSabouni, *Tafseer Ibn Katheer* (7th edn, Beirut: Dar Al-Quran Al-Kareem, 1981) 139.
[90]Ali, S. S. and Ahmad, A. 'Islamic Banking and Finance: Fundamentals and Contemporary Issues' [2007] Islamic Development Bank, Islamic Research and Training Institute, 303.
[91]Mohammad Kamali 'Uncertainty and Risk-Taking (Gharar) in Islamic Law' [1999] International Conference on Takaful Islamic Insurance, Kuala lampur 2-3 July.
[92]Rittenberg, Ryan "Commercial Law." In The [Oxford] Encyclopedia of Islam and Law. Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/article/opr/t349/e0034 (accessed 20-Apr-2019).

in the early days of Islam, albeit in different forms, and the Muftis prohibited it. For example, a transaction known as (*Mulamasa*), meaning touch sale, was not allowed due to the inherently high level of uncertainty involved. The touch sale is based on the idea that the sale becomes mandatory simply by the buyer's touching the item.[93] A *mulamasa* involves a high risk of information asymmetry because the buyer might be not aware of crucial information that is not disclosed by the seller. Similarly, today, shares can be bought by touch in the form of an online click. A party may buy shares without knowing that the seller has insider information, in other words, on the basis of asymmetrical information, putting him at risk of becoming a victim of insider dealing.

Investors often tend to avoid exposure to risk and to protect their investments from losses.[94] However, a key characteristic of investors is instability due to their tendency to make choices that are based on impulsive optimism rather than on mathematical expectation.[95] Information is a key element in investment decisions since information provides a sense of the risk exposure, which forms an integral part of investors' choices. Islamic law prohibits exposure to high risk that may lead to damage.[96] The insider information which is unknown to the counterparty is considered to be a hidden fault in the contract in the Islamic framework,[97] consequently, the affected person has the right to revoke the transaction (Ifta-04). This means that information risk is an issue from an Islamic perspective, and also a fault if not disclosed (Ifta-09). If so, how much information must be hidden for the behaviour to be prohibited under

[93]Laher, Suheil "Muʿāmalāt." In The [Oxford] Encyclopaedia of Islam and Law. Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/article/opr/t349/e0065 (accessed 20-Apr-2019).
[94]Hylton, (n 130) 346.
[95]John Keynes, *The General Theory of Employment, Interest and Money*, (London-McMillan, St. Martin's Press 1970) page 161.
[96]Hassan, Kabir, and Michael Mahlknecht, *Islamic Capital Markets: Products and Strategies*, (John Wiley & Sons, Incorporated, 2011) 43.
[97]Siti Faridah Abdul Jabbar, 'Insider Dealing: Fraud in Islam?' [2012] 19(2) Journal of Financial Crime 140.

Islamic law? Investing in shares is relatively a common practice, but different from all the other economic goods. The exchange of shares has a speculative nature because the buyer or seller does not know what the actual price of the shares is due to the complexity of the market price system. Some authors observe that in the absence of relevant information about the shares, the investor is engaging in gambling, which is *gharar* and must be avoided.[98]

Given the lack of knowledge (*Jahl*) about the future share price, buying and selling stock is a risky activity, which the essential prohibition of *gharar* is designed to combat. The *gharar* principle proposes to remove that risk. However, there is no zero-sum scheme, in which the parties enter into a transaction with perfect information about the future outcome of the transaction.[99] In other words, there is always some uncertainty, and the Islamic jurists simplify that by stating that it a 'basic level of risk-taking' is permissible but investors ought to avoid excessive risk-taking.[100] This leads to a question regarding what is meant by a 'basic level of risk-taking'. Is this determined by the outcome of the sale, when the results are dissimilar 'from rational expectations'?[101] Is it about *Jahl* (lack of knowledge) or *Dharar* (damage and harm)? *Gharar* indicates uncertainty in the information about the financial transaction. This means the Islamic principle asserts the equal access to the information (Ifta-03, Ifta-09).[102] Neglecting to disclose any form of non-public, price-sensitive information introduces an unacceptable level of risk, making the transaction null and void from an Islamic perspective (Ifta-04). In fact, the act of accessing information in the first place could be seen as a form of bribe,[103] and corruption (Ifta-

[98]Taj el din, S. e.-d. 'The Stock-Exchange from an Islamic Perspective' [1996] Journal of King Abdulaziz University: Islamic Economics 8, 34.
[99]Kabir Hassan (n 78) 329.
[100]ibid 156.
[101]Frank Vogel, Samuel Jayes, *Islamic Law and Finance, Religion, Risk and Return* (The Hague: Kluwer Law International 1998) 93.
[102]Kabir Hassan (n 78) 641.
[103]Sung Hu Kim, 'What Governmental Insider Trading Teaches Us About Corporate Insider Trading', [2013] In (n 28) 167.

10). Therefore, to avoid *gharar* in contract of shares, the information must be accessible to the market participants, along with the analytical skills required to help them process such information.[104]

5.5 Fraud and deception (*ghish*)

An important factor in the analytic process by which Islamic literature is generated was the focus on intentions. This can be observed in the transaction between investors. The intention of one party to hide information from the other may indicate a potential risk of deception and fraud committed by him[105] *'Ghish'* (Ifta-08). Islamic authors generally place emphasis on the prohibition of insider dealing on the basis that it is a form of deception[106] and fraud.[107] They state that insider dealing is prohibited in Islamic law by virtue of the Prophet's Hadith 'It is not permissible for a Muslim to cheat'[108] and 'He who deceives is not of me'[109] and 'Deceit is in hell'.[110] That is why some fatwas have explained the prohibition in such terms, stating that 'it is forbidden in Islam for someone to harm the rest of the investors by deceiving them'.[111] Other fatwas take a similar approach: '[I]f the use of insider information is allowed, the fraud on people will begin to spread';[112] '[it] is a kind of fraud and deception to plunder others' money viciously';[113]

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[104]Taj el din (n 98) 34.
[105]Al-Suwailem, Sami, Towards an Objective Measure of Gharar in Exchange (April 1, 2000). Islamic Economic Studies, Vol. 7, No. 1 & 2, 2000.
[106]Faisal Atbani, 'The Prevention of Financial Crimes within Islamic Legal Framework' [2007] Institute of Economic Affairs, Oxford: Blackwell Publishing, p 31.
[107]Abdul Jabbar (n 97) 140.
[108]Tafseer Ibn Katheer (n 89) 240.
[109]Al-Imam Abou Al-Houssein Moelim, *Mukhtasar Sahih Muslim*, (Ahmad Shamseddin (ed) Beirut: Dar Al-Kotob Al-Ilmiyah 2nd ed. 1971) 24.
[110] al-Bukhari (n 69) 940.
[111]Ifta-10 and Ifta-08.
[112]Ifta-03.
[113]Ifta-09.

The debate over cheating has a long history in the Islamic literature; it can be traced back to the beginning of Islam, given that the Quran clearly states that cheating was widespread in Mecca and was strongly condemned in the Quran in (*Al-Mutaffifin*)[114] and in many other surahs.[115] Evidently, *Al-Mutaffifin* surah was a justification of combating insider dealing by some muftis (Ifta-08). Fraud is prohibited in the sacred text, and one of the justifications offered for this position is that the outcome of fraud harms the other party as per the Hadith '*La Dharar wala Dherar'*.[116] Islam stresses the importance of the sanctity of money and the prohibition of fraud in both their positive[117] and negative[118] forms.[119] Fraud can take different forms, the outcome of which will harm the counterparty.[120] Why is insider dealing considered to be fraud? Some authors consider that deception takes place when one party does not disclose the true value of the shares to the counterparty, exploiting his ignorance.[121] In the Hadith, it is stated that whoever sells an item with a fault that he has not disclosed, is an abomination to Allah, and he shall be cursed by the angels (Ifta-08, Ifta-09). Another Hadith states that it is not permissible for a Muslim to make to others a sale that has a defect (Ifta-04).[122] The element of fraud lies in the fact that if the counterparty knew about the hidden information, he would not buy the shares, or would not sell them.[123]

[114]Surah Al-Mutaffifin [83:1].
[115]The Quran [11: 84–8], [7:85].
[116]Alhusayni Almaraghiu, *Aleanawin Alfaqhia* (Mwasisat Alnashr Al'iislami, 1996) Vol 1, 304.
[117]For instance, making an effort to deceive the counterparty.
[118]For example, hiding insider information and refraining from disclosing it.
[119]Mowafy (n 48) 200.
[120]ibid 201.
[121]Abdialrazaq Alsanhuri, *Masadir Alhaq Fi Alfaqih Al-Islami* (vol 2, Dar Ihya' Alturath Al-Arabi, 1954) 119.
[122]Ibn Majeh al-Qazwini, *Sunan Ibn Majeh* (Bashshar Ewad (Ed) Dar Aljil 1998) 578.
[123]Zayn-Aldiyn Ibn-Abdeen, *Alrrayiq Sharah Kanz Aldaqayiq, Wa maeaho Minhat Alkhaliq* (Zakaria Eamirat (ed) Beirut: Dar Alkutub Aleilmia, vol 6 1997) page 38.

From the victim's point of view, the quantum of damages and the principles on which to assess that quantum is a primary issue.[124] According to the law of torts, this figure can be estimated on the basis of the difference between the real value of shares at the time of sale and the price paid to the insider.[125] The economic loss could be objectively determined in most cases.[126] Islamic scholars have addressed the question of how to assess the amount of damage differently. For instance, Ibn Qudama stated that the issue would be a concern if the value of the good was above or below the custom.[127] Some Islamic scholars state that the value should not be more or less than one-third of the true value.[128] Other authors state it should not be more than the one sixth of the true value. Late Hanafis state that the *gubun* (undervalue) should not exceed half of a tenth of the actual value. Of course, the question here concerns the value rather than the evidence, since the economic analysis in this thesis is limited to the Islamic view of the law of torts rather than the law of evidence.

The true value may be understood as the value which the shares achieve after the sale or the value which the shares are expected to achieve, especially in circumstances where the inside information concerns their long-term value. Some authors state that an expert should be appointed to decide whether the damage is significant (*Muatabar*).[129] Malki and Hanafi scholars took such an approach, stating that only grave undervaluing (*Gubun Fahesh*) raises liability.[130] Late Hanafis tend to prefer to leave the evaluation to the court's discretion on a case-by-case

[124]Such concern is also raised by courts. See, Barry Alexander, K. Rider and H. Leigh Ffrench, *The Regulation of Insider Dealing* (London: The Macmillan Press 1979) 92.
[125]ibid.
[126]Hylton (n 130) 378.
[127]Muafaq-Aldiyn Ibn Qudama, *Almaghni* (3rd edn, Abudlah Alturkii (ed) Dar Alam Alkutub, 1997) Vol 3, p 498. Ibn Qudama, Muwaffaq al-Din (d. 1223) is a 'Hanbali theologian and jurist… he censures human judgment (ijtihad) and speculation in matters of faith, especially the Mu'tazilite method of allegorical interpretation (tawil) of the Quran… [He] advocated the unconditional acceptance of scriptural depictions of the divine attributes'. See, Esposito (n 37) 129.
[128]Imam Malik and others see, Mowafy (n 48) 210.
[129]ibid 741. Which the Malki and Shafi'i position ibid pages 751 and 758.
[130]ibid 211.

basis.[131] Overall, there is a tendency in the Shafi'i and Hanafi schools to minimize restriction of the freedom to use property,[132] while the Hanbali and Malki schools tend to expand liability for damage.[133]

In the event of damage, what are the options for the victim from an Islamic perspective? Several Islamic schools of jurisprudence, including the Hanbali, the Maliki, the Shafi'i, the Hanafi and the Shi'a, conclude that the victim of insider dealing has the choice to ratify the transaction[134] or revoke it (Ifta-04). Any costs of such ratification shall be the responsibility of the one who caused the damage.[135] This is a standard position within tort law that aims to shift the costs from the victim to the wrongdoer.[136] The victim has the right to compensation for any loss.[137]

Such approaches to assessing damage should be dealt with carefully, since they are based on the outcome of insider dealing and the amount of damage, rather than looking into the legality of the act with the aim of compensating the victims for losses suffered.[138] This means that, in the event of market abuse, when economic harm[139] is caused, compensation is expected.[140] Some Islamic scholars take an approach which is somewhat similar to that of the United States, which associates insider dealing with the condition of benefiting from the trading. This approach is

[131]Article 165 – Majalat AlAhkam AlAdliya See, Ali Haider, *Durr Alhekam Majalat Alahkam* (1st edn, Dar Alam Alkutub, 2003) 36.
[132]Mowafy (n 48) 770.
[133]ibid 771.
[134]Abdul Jabbar (n 97) 140. Also see, Muhammad ibn Idris al-Shafi'i, *The Epistle on Legal Theory*, (Joseph E. Lowry (ed) (tr), New York University Press, 2013) 430. Also, see Khomeini (n 36) 131.
[135]Abu Bakar Abdul Razzaq Al-Sanani, *Al-Musannaf*, (Lebanon Vol. 8, 1972) 28.
[136]Mauro Bussani, Marta Infantino; 'Tort Law and Legal Cultures' [2015] The American Journal of Comparative Law, Vol. 63, Issue 1, 1 January, 77.
[137] See, Muhammad Al-Youbi, *Maqasid Al-shari'a* (Dar al-Hijra Publishing 1998) 302. Also, Mowafy (n 153) pages 208, 209, 210, 216 and 217.
[138]*Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n*, 837 P.2d 330, 341 (Kan. 1992). *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App. 1998).
[139]*Causation in European Tort Law* (Marta Infantino & Eleni Zervogianni (eds.), Cambridge University Press, 2017) 423.
[140]John Murphy 'Rethinking Injunctions in Tort Law' [2007] Oxford Journal of Legal Studies, Vol. 27, Issue 3, 1 October, 526. Also, Clarke (n 13) 23.

problematic because it focuses on the economic side of the issue, ignoring its moral aspects. Sometimes the regulators aim to punish and deter tortfeasors with the aim of preventing an unethical act.[141] Compensation could be seen as a way of promoting a certain economic culture, encouraging investors to conduct healthy financial transactions in the market by eradicating the profits from unlawful acts. Additionally, it could be seen as a means of expressing the community's detestation at the insider's conduct and as a tool for putting pressure on criminals by punishing wrongdoers through compensatory obligation.

5.6 Conclusion

The main goal of this chapter was to determine the IET position on insider dealing. The results indicate that insider dealing is prohibited in IET if a certain amount of harm accrues because of the conduct. This means the position is based on the outcome of the conduct (harm), which is compatible with the goals of Shariʿa, which is to prevent harm (Ifta-06. Ifta-10).[142]

IET begins from the standpoint that all contracts are permissible, and people should have the freedom to dispose of their properties and monies according to their will. However, Islamic law forbids certain economic behaviours, especially if the act harms the counterparties as in the case of *gharar* transactions and insider dealing (Ifta-04, Ifta08). It seems that the IET approach is to generalize the prohibition to all avenues that may lead to damage, rather than identifying specific acts that should be prohibited (Ifta-09). It tries to control all possible scenarios in order to minimize damage. The Hadith '*La Dharar wala Dherar'* asks Muslims to avoid all means of harm, which may provide a healthy platform for societies by excluding harmful behaviours (Ifta-06). The damage suffered by the counterparty is based on ignorance and lack of information

[141]*Kemezy v. Peters,* 79 F.3d 33, 34–36 (7th Cir. 1996). Also see, Goudkamp J and Murphy J, 'The Failure of Universal Theories of Tort Law' [2015] 21 Legal Theory 62.
[142]Also see, Chapter Two, section 2.4.

(*Jahl*) inflicted on him as a result of the non-disclosure of inside information, which puts him at a higher risk of losing money because of economic uncertainty (*Gharar*). Furthermore, having the intention to hide insider information from the counterparty puts a person under suspicion of fraud and deception, as the act is considered to be a form of cheating by selling defective shares (Ifta-08). This approach is based on the idea that human beings from a Shariʿa perspective are a subset of the social order with obligations to God as well as obligations to other individuals (Ifta-06).

The Islamic system not only protects property rights but also highlights investors' obligations to society at large, which is where the importance of religious values and ethics appears specifically in Islamic countries (Ifta04). Investors are liable for damages arising from the violation of community rights, (Ifta04) which in turn may decrease the risk of future corporate scandals[143] and increase investor confidence, market integrity, and stock's efficiency.[144]

Pursing a policy of freedom from *Dharar* is a key priority in IET (Ifta-06). By freedom of *Dharar*, we mean avoiding causing harm to others while entering any contract.[145] By adopting such a policy, regulators in Islamic countries should ensure that investors enjoy equal opportunities and equivalent access to information (Ifta-03, Ifta-09). Also, the regulators need to guide investors by raising their legal awareness of acts which constitute *Dharar* in order to protect them from the losses that can be caused by unhealthy practices in the stock market.[146]

One could mistakenly assume that the principal theoretical implication of this chapter is that the IET position on insider dealing is that if no harm is caused, insider dealing is not an

[143]Abu Chowdhury, Sabur Mollah, Omar Al Farooque, 'Insider-Trading, Discretionary Accruals and Information Asymmetry' [2018] The British Accounting Review, Vol. 50, Issue 4, page 341.
[144]Financial Services and Markets Tribunal v Philippe Jabre [2006] (Decision on Jurisdiction) 10/7/2006, pages 3-4.
[145]Muhammad Ayub, *Understanding Islamic Finance* (John Wiley & Sons, Incorporated, 2007) 69.
[146]Obaidullah, Mohammed (n.d.) Islamic Financial Services, (Jeddah: King Abdul Aziz University, Scientific Publishing Centre, 2005) 13.

issue. This is not true, as many legal opinions (*fatwas*) expressed moral concerns regarding insider dealing (Ifta-02, Ifta-03, Ifta-07, Ifta-10). IET is shaped by the moral values that are extracted from its religious texts. It imposes an ethical framework and standards on most aspects of economic behaviour.[147] Understanding the values of the rules and the moral justifications for the prohibition of illegal conduct should be a primary objective. Yet the Islamic *Dharar* theory focuses only on the possible outcome of insider dealing rather than on the act itself, which raises a primary concern about the ethical position of investors that commit insider dealing. Therefore, the next chapter moves on to discuss the moral character of the IET position on insider dealing.

[147]Yousef Alqardawi, 'Maqasid Al-shariʿa Almutaealiqa Bi-Almal' [2008] European Council for Fatwa and Research, 18th Session of the Council, July, 16.

Chapter 6 : Fatwas Based on Islamic Ethics

6.1 Introduction

This chapter continues to answer the third secondary research question, which is: What is the IET position on insider dealing? It aims to explore the second theme that emerged from the fatwas, which concerns the immoral facets of insider dealing from an Islamic perspective. The chapter discusses the fatwas that referred to the moral aspects of IET. It begins by unfolding the fatwas through quotations from the data. The concepts of morality and fairness and how they are applied to insider dealing are then discussed. The chapter argues that IET provides an ethical infrastructure for the financial platform and that it takes a strong moral standpoint against insider dealing 'which aligns with the economic position that was discussed in Chapter 5. The moral notions of fairness and the just price are central to combating insider dealing. Through them, Muslims have a general duty to be candid with one another. The duty is a consequence for the duty of trust (*Amanah*) that was suggested in Chapter 4. This chapter illustrates how Islam combats greedy behaviours and promotes moral superiority based on the collective interests of Islamic society.

The chapter is divided into seven sections. Following this introductory section, the second section explores the moral fatwas. The third section explores the concept of morality through an Islamic lens. The fourth, fifth and sixth sections are devoted to exploring the general applicability of the principle of trusteeship (*Amanah*) between investors, the notion of fairness and the concept of the just price. The seventh section concludes the chapter with a final comment on the outcome of the analysis of the moral position on insider dealing and introduces Chapter 7.

6.2 The moral fatwas on insider dealing

There are four fatwas that refer to the ethical justifications for combating insider dealing. A close examination of the first fatwa reveals that insider dealing is viewed as corruption. The fatwa states that 'the purchase of shares based on inside information which is exploited by the buyer through the virtue of his work in the company, is a form of corruption'.[1] The second fatwa refers to the loyalty obligation and to trustworthiness, depicting insider dealing as a form of betrayal because it involves the disclosure of secrets. The fatwas states that:

> Accessing the company's inside information which has not been disclosed is not permissible for those who are not authorised to do so because they have access to a secret. The insider with such information must not disclose it to any person; otherwise, it is a betrayal.[2]

The third fatwa asserted the importance of equality among investors, stating that the purpose of combating insider dealing is 'to ensure equal opportunities among dealers'.[3] The last fatwa stated that while there is no explicit prohibition against the practice in the scripture text, the Islamic ruler thinks it should be avoided as it is believed to be 'a form of ethical consideration' and a 'community interest-based position' which 'uses rationality as the basis for its moral view'. Is that the meaning. The fatwa states that 'It is not forbidden by itself… [but] His Eminence Sayyed does not permit it'.[4]

An interesting aspect of the fatwas is that they focus on morality as a core element of their positions. Although morality is a cornerstone in IET, the concept was not well recognised in the regulatory minds of the global financial markets for many years. Generally, the typical understanding of the markets is that they are an efficient mechanism that provides for the needs

[1] Ifta-10.
[2] Ifta-07.
[3] Ifta-03.
[4] Ifta-02.

of the people.[5] Some fatwas refer to the idea of ethical control.[6] Such control has its share of discussion in economic history. Many jurists promoted the idea of controlling markets and human behaviour by eradicating immoral and evil acts such as corruption, selfishness and greed from the market in favour of moral virtues and economic efficiency.[7] After many financial crises,[8] regulators began to devote more time and effort to adopting a moral standpoint by implementing ethical regulations and injecting moral values into the laws.[9] For example, after the 1845 stock market crisis, market confidence decreased due to financial abuses.[10] The high level of panic among investors led to the belief in the importance of regulating ethical codes and even attracted criminal liability for financial abuses.[11]

The adoption of moral standards in financial markets is an object of major disagreement for many economic scholars. They considered the moral justification as more of an 'outgrowth of frustration than [. . .] of cogent analysis'[12] and a 'refuge for the intellectually bankrupt'[13] as well as a norm of confusion by critics between the laws and their ethical preferences.[14] They observed

[5] Don Locke 'Markets and Morals: A Response' [1989] 26 Royal Institute of Philosophy Supplement 33.
[6] Ifta-03 and Ifta-05.
[7] Ibid.
[8] For further information about the history of financial crises see, Johan A. Lybeck, "Financial Crises in Modern History," *A Global History of the Financial Crash of 2007–10* (Cambridge University Press, 2011) pp 280-311. Also, Emilios Avgouleas, "Financial Markets and Financial Crises," *Governance of Global Financial Markets: The Law, the Economics, the Politics* (Cambridge University Press 2012) pp 21-88. And, de Haan J, Oosterloo S and Schoenmaker D, "Financial Crises," *Financial Markets and Institutions: A European Perspective* (Cambridge University Press, 2nd ed, 2012) pp 39-70.
[9] The US Securities Exchange Act of 1934, section 4. Also, the US Sarbanes-Oxley Act of 2002 section (10) (B) and section (406). Plus, the EU Regulation No 596/2014, dated 16/4/2014, article (22). Also, Kuwaiti law no. 7/2010 Concerning the Capital Markets Authority and Regulating Securities activity. Also, the Kingdom of Saudi Arabia Capital Market Law, pursuant to Royal Decree No. (M/30) dated 2/6/1424H - 31/7/2003, article five, (para 4 and 5). The attention on combating financial crimes can be seen in the Islamic financial institutions too. See, Tareq Moqbel 'The UK Islamic Finance Taxation Framework and the Substance v Form Debate in Islamic Finance' [2015] Legal Ethics, 18:1, 84.
[10] Wilson, S. 'Law, morality and regulation Victorian experiences of financial crime' [2006] British Journal of Criminology, 46(6), 1073–1090.
[11] ibid.
[12] Henry G. Manne, 'Insider Trading and the Law Professors', [1970] 23 Vand. L. Rev. 547-548.
[13]ibid 549.
[14]ibid 589.

that the moral arguments were not convincing,[15] stating that financial matters such as insider dealing are purely economic issues which should not be discussed by moralists,[16] and concluding that insider dealing is not an immoral and victimless crime.[17] Other economic scholars were less aggressive, calling instead for more theoretical and empirical studies on the ethical and social foundations of the financial issues involved before over-regulating insider dealing.[18] Others found that moral studies that are based on theories of ethics led to more confusion due to the paradoxical empirical results which illustrated different outcomes.[19] Economic scholars have observed that the notion of financial freedom shapes markets and ethical standards may clash with such freedom. As the economic aspects of insider dealing have been discussed already in Chapter 5, the next section focuses on the moral theological point of view.

6.3 Where should the ethical line be drawn?

It is worth noting that IET does not draw a line between law and ethics. This is because the purposes of Shariʿa is to provide an economic platform that is based on ethical standards and that prevents economic harm. Such an approach is based on the profound belief that all property is ultimately owned by God,[20] and humans are his successors (see Chapter 4 for details), which establishes an agency and trust relationship that is based on an amalgam of values and ethics. That is why several fatwas emphasised the idea of respect for ethical standards as a mandatory

[15]McVea, Harry, 'What's Wrong with Insider Dealing.' [1995] 15(3) Legal Stud 390. 409.
[16] JR Macey, *Insider Trading: Economic, Politics, and Policy* (AIE Press, Washington DC, 1991) 802
[17] Ma, Yulong, and Huey-Lian Sun. 'Where Should the Line Be Drawn on Insider Trading Ethics?' [1998] Journal of Business Ethics 17, no. 1 : 67.
[18] Phillip Anthony O'Hara, 'Insider trading in financial markets: legality, ethics, efficiency' [2001] International Journal of Social Economics, Vol. 28 Issue: 10/11/12, 1046.
[19] David Howden, 'Knowledge Flows and Insider Trading' [2014] The Review of Austrian Economics, 27, p 45. Also, Bainbridge, Stephen Mark, ''*An Overview of Insider Trading Law and Policy: An Introduction to the Insider Trading Research Handbook''* in *Research Handbook on Insider Trading*, (Stephen Bainbridge, ed., Edward Elgar Publishing Ltd., 2013) page 19.
[20]Yousef Alqardawi, 'Maqasid Al-shariʿa Almutaealiqa Bi-Almal' [2008] European Council for Fatwa and Research, 18th Session of the Council, July, page 10.

obligation when considering combating insider dealing.[21] From a theological perspective, there is strong moral condemnation from the religious community for noncompliance with the religious ethical standards in all aspects of life, including the financial. Islam gives vital importance to ethical values in economic matters.[22] This means that the pursuit of financial activities needs to be carried out in a manner that is consistent with the Islamic ethical framework.[23]

In general, morals are thoughts that settle in our consciences which reflect our understanding of the standard behaviour and our conceptions of right and wrong.[24] By contrast, ethics are our understanding of what is expected from us towards others, or our 'moral obligations towards others'.[25] The concern of ethics can be understood as the question of what one should do and what one should avoid doing.[26] In the context of the markets, it is the collective moral understanding that counts.[27] This means that collective moral values shape the ethical codes,[28] which in turn shape behaviour.[29] Like genes replicating themselves, human beings tend to replicate the accepted behaviour that leads to profit. Morals can vary from one community to another,[30] which raises the questions of where morals come from. Many factors

[21] Ifta-02, Ifta-03, Ifta-07 and Ifta-10.
[22] Chapra, M. Umer, 'The Future of Economics: An Islamic Perspective' [2000] Leicester, UK: Islamic Foundation 57.
[23] M. Kabir Hassan Mervyn K. Lewis, *Handbook on Islam and Economic Life* (Edward Elgar Publishing 2014) 1. It is crucial to note that the ethical segment is essential to the very definition of maqasid in Islamic Law. Tareq Moqbel 'The Moral Interpretation of Law: Comparative Remarks on Dworkin's Legal Principles and Islamic Law's Maqāṣid' [2017] Legal Ethics, 20:2, 279.
[24] Simon Blackburn, *Ethics* (Oxford University Press 2003) 1.
[25] ibid.
[26] Fr. Oswald A. J. Mascarenhas, S. J., 'The Ethics of Corporate Moral Reasoning, Moral Judgment, and Moral Justification' [2019] Corporate Ethics for Turbulent Markets, page 221.
[27] Hume, David, *A Treatise of Human Nature: A Critical Edition*, (David Fate Norton and Mary J. Norton (eds.), Oxford: Clarendon Press, 2007) 2.1.12.
[28] Immanuel Kant, *Groundwork of the Metaphysics of Morals, in Practical Philosophy* (Mary J. Gregor (trans., ed.), Cambridge: Cambridge University Press, 1996, first published in 1785) 4:399.
[29] ibid 40
[30] Luciano Floridi, "Information Ethics" in Luciano Floridi (ed), *The Cambridge Handbook of Information and Computer Ethics* (Cambridge University Press 2010) 88.

may influence the development of ethical values, including customs and religion.[31] We have a collective responsibility to develop our ability to apply reason and logic to avoid moral failings.[32] Religions are seen as lawgivers, which in history have the merit of promoting morality and settling many ethical codes.[33] That is why many fatwas often refer to Allah and his Messenger (the prophet) as a lawgivers and ethical regulators.[34] Islam continues to develop ethical codes through the mechanism of *ijtihad* by Muftis and Islamic jurists. However, in the West, by the 19th-century religious thought began to lose its grip, leading several scholars to conclude that morals were neglected, too.[35]

Through the Islamic lens, the human need for morality is one of the main reasons for the revelation of the Islamic religion.[36] In the Quran and Hadith, it is revealed that the Prophet was sent to complete the morals.[37] The Quran describes the Prophet as the noblest character and that he has been sent to be an example to his followers,[38] which is why it is thought that Islamic morality is in a way a positive law enacted by God.[39] This belief led to the construction of a philosophical Islamic theology based on the ontological status of ethics being limited to the source of divine command;[40] this view was developed by the Asharis.[41] This understanding is

[31] Cranston, Maurice, *1957, John Locke, A Biography*, (reprinted Oxford: Oxford University Press, 1985) page 140.
[32] See, "*Some Thoughts Concerning Education"* and *"The Conduct of the Understanding"*, Ruth W. Grant and Nathan Tarcov (eds), Indianapolis: Hackett Publishing Co., 1996. xii. Also Kant pointed out that morals are based on human reason. Blackburn (n 24) 100.
[33] ibid 9.
[34] Ifta-01 and Ifta-03.
[35] Tarcov (n 32) 10.
[36] Mohammed al-Bukhari, *Saheeh al-Bukhari* (Muhammad al-Nasser (ed) Dar Taq al-Najat, 2001) Pages 1567 and 2698.
[37] See, Mohammad Aleathimayn, *Makarim Al-akhlaq* (Dar Alwatan 2001) 11. The interpretation of the Quran Sura: The Day of Congregation (Al-Jumua) [62:2]. See, Muhammad AlSabouni, *Tafseer Ibn Katheer* (7th edn, Beirut: Dar Al-Quran Al-Kareem, 1981) pages 92 and 623.
[38] Sura the Pen (Al-Qalam) [68:4]. *The Quran*, (M. A. S. Abdel Haleem (tr), Oxford University Press, an Oxford World's Classics, 2005) 384. Also see, Abu Ḥamid al-Ghazali, *Iḥyaulum al-din.* (Beirut: Dar al-Maʿrifa, 2010) 3:48–51.
[39] Patricia Crone, *God's Rule: Government and Islam* (New York: Columbia University Press, 2004) 264.
[40] "*Ethics.*" In *The Oxford Dictionary of Islam* (John L. Esposito (ed) Oxford University Press, 2003) page 75.

known as voluntarism, which states that God chooses all the ethics.[42] Other Islamic schools such as the Mu'tazilites[43] and the Shi'a[44] adopted a rationalist approach, stating that human reason has a functional role in judging what is right and wrong.[45] This can be seen in the fatwa regarding insider dealing from the Shi'a jurist Sayyed Sistani.[46] The fatwa demonstrates that the basis for prohibition is the rationale of the Mufti.[47] The rational approach can be seen through the Quranic verse which states that 'There truly are signs in the creation … for those with understanding'.[48] Ali Ibn Abi Ṭaleb[49] stated that the mind is a human virtue,[50] a strong foundation of rights,[51] and its fruits are good morals.[52] Leading Islamic jurists such as Ibn Rushd,[53] Al-Razi,[54] Ibn Sina,[55]

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[41] Asharis is a classical Sunni school that held with the Shafi'i school of law that 'all moral actions are governed by God'. ibid 26.

[42] Blackburn, Simon. "voluntarism." In *The Oxford Dictionary of Philosophy* (Oxford University Press, 2008). http://www.oxfordreference.com/view/10.1093/acref/9780199541430.001.0001/acref-9780199541430-e-3271.

[43] Mu'tazilites are an Islamic theological school that is opposed to the Ashari. They preached for human reason and logic, and rationalistic ethics. See, Esposito (n 40) page 222.

[44] One of the two major departments of Islam that derives its authority from the fourth caliphate Ali Ibn Abi-Taleb who's the Prophet's cousin and son-in-law (the other branch is the Sunni). See, "Shi'a." In Brewer's Dictionary of Phrase & Fable (Susie Dent (ed) Chambers Harrap Publishers, 2012).

[45] See, Esposito (n 40) page 292.

[46] Grand Ayatollah Ali al-Sistani is a leading Shia cleric and jurists in Iraq, he prompts the application of Islamic laws. He headed the main Shia religious seminary (al-Hawza) in Najaf. See, Isakhan B, "Shattering the Shia: A Maliki Political Strategy in Post-Saddam Iraq" in Benjamin Isakhan (ed), *The Legacy of Iraq: From the 2003 War to the 'Islamic State'* (Edinburgh University Press, 2015) pages 67, 77, and 81.

[47] Ifta-02.

[48]The Family of Imran [3:190]. See, *The Quran* (n 38) page 49.

[49]Ali b. Abi Ṭalib, fourth caliph. The cousin and son-in-law of the Prophet and one of the first to believe in Islam. He was a valued counsellor of the caliphs who preceded him; specially on legal matters in the view of his excellent knowledge of the Quran and Hadith. See, Veccia Vaglieri, L. 'Ali Ibn Abi Ṭaleb'. In *Encyclopaedia of Islam*, 2nd ed, (P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, P.J. Bearman (eds), Vol.s X, XI, XII, Th. Bianquis, Vol.s X, XI, XII, et al. Accessed May 25, 2019.

[50]Ali Alwasiti, *Euyun Alhukm Walmawaeth* (Hussein Albir Aljundi (ed) Dar Alhadith, 1956,) part 1, page 27.

[51]ibid pages 35 and 27.

[52]ibid 47.

[53] ibid, 24.

[54] Abu Bakr Muhammad b. Zakariyya. Major philosopher of Islam, born in Rayy, where he was well trained in the Greek sciences. See, 'Al-Razi' in *Encyclopaedia of Islam* (n 49).

[55] 'Abu Ali al-Ḥusayn b. Abd Allah b. Sina, known in the West as Avicenna. He followed the encyclopaedic conception of the sciences that had been traditional since the time of the Greek Sages in uniting philosophy with the study of nature and in seeing the perfection of man as lying in both knowledge and action'. See, 'Ibn Sina' *Encyclopaedia of Islam* (n 49).

and Ghazali[56] believe that morals are natural laws that are known through reason.[57] Islamic jurists tend to dedicate a sense of balance between 'demonstrative-philosophical proofs and realised-spiritual knowledge'.[58]

Ethics derive from both divine and human sources according to the different Islamic schools. This means that an ethical line can be drawn through the rational method in order to tackle modern concepts such as insider dealing. Even though the Quranic verses and Hadith could be used to explain the Islamic moral standpoint, logic and reason most likely would be required to build a bridge between the moral point of understanding and its practical application to contemporary challenges. The aim here is to develop Islamic ethicists who apply Islamic ethics to actual practical issues[59] through reason, which may help to develop a better moral understanding of much of the law in Islamic countries.[60] The fatwa mechanism is a valuable tool for bridging the gap between legal theory and practice in Muslim societies.[61] However, the Muftis may lack expertise in various modern issues such as insider dealing, as was noted in some fatwas,[62] so there is a need for intellectual cooperation and critical engagement between Islamic experts and practitioners to better contribute to Islamic societies.[63] The Quranic verses[64] and Hadith[65] promote the idea of developing a platform for consultation, which turned out to help

[56]Abu Ḥamid Muḥammad b. al-Ṭusi' (1058-1111). born at Tus in Khurasan. Outstanding theologian, jurist, original thinker, mystic and religious reformer. Studied philosophy and wrote several books. See, 'Al-Ghazali' *Encyclopaedia of Islam* (n 49).
[57] Karen Taliaferro, 'Ibn Rushd and Natural Law: Mediating Human and Divine Law' [2017] Journal of Islamic Studies, Vol. 28, Issue 1, January 2017, 24.
[58] Ayman Shihadeh, *The Teleological Ethics of Fakhr al-Din al-Razi* (Leiden: E. J. Brill, 2006) 200.
[59] See, "ethics, applied" in *The Oxford Dictionary of Philosophy* (n 42).
[60] Russell Hardin 'Law and Social Order' [2001] Philosophical Issues 11, 61.
[61] Alexandre Caeiro, 'The Shifting Moral Universes of the Islamic Tradition of Ifta: A Diachronic Study of Four Adab al-Fatwa Manuals' [2006] The Muslim World 96 (4): 661-685. Reprinted in Islamic Law. Critical Concepts in Islamic Studies. Vol. 4: *Islamic Law in the Modern World* (London: Routledge, 2009) 661.
[62] Ifta-02 and Ifta-05.
[63] Tariq Ramadan, 'The challenges and future of applied Islamic ethics discourse: a radical reform?' [2013] Springer Science Theor Med Bioeth, 34, 105.
[64] The Family of Imran (Al-Imran) [3:159]. Abdel Haleem (n 38) 46.
[65] AlSabouni (n 37) 210.

make regulatory decisions.[66] This is seen as responsible for achieving efficiency in the Islamic financial markets through the guidance of Islamic morals.[67]

6.4 The general applicability of the principle of trusteeship (*Amanah*)

A reasonable approach to tackling the issue of insider dealing could be through thinking about the basis for prohibition. A primary argument related to insider dealing is that the parties to a transaction are expected to volunteer the truth by disclosing any hidden information that is related to the transaction since morality entails candour (*Ifta-09*).[68] Hence, this moral obligation to be candid with one's principal is said to be based on the fiduciary duty,[69] which is itself based on a trust and agency relationship such as the relationship between the directors and shareholders (*Ifta-10*).[70] If directors are not honest then they are betraying their shareholders because of the trust relationship.[71] The duty led to claims for criminal sanctions against directors who commit insider dealing further to promoting the enhancement of the disclosure duties on companies.[72] Nevertheless, the argument is problematic because it is narrowed the prohibition down to a limited number of situations, since not all insiders are directors. In fact, they may be outsiders,

[66] See, Al-Mousa Al-Kashani, *Tafsir al-Safi* (Hussein al-Alami (ed) 3rd edn, Al-Sader Press, 1994) vol 1, 359.
[67] Taj el din, S. e.-d 'The stock-exchange from an Islamic perspective' [1996] Journal of King Abdulaziz University: Islamic Economics 8, 29.
[68] Alan Strudler, '*The Moral Problem in Insider Trading*' i*n the Oxford Handbook of Business Ethics* (Oxford University Press, 2009) 394.
[69] Many authors adopt the view that insider trading prohibition is based on a breach of fiduciary duty. See, Phillip Anthony O'Hara, 'Insider trading in financial markets: legality, ethics, efficiency' [2001] International Journal of Social Economics, Vol. 28 Issue: 10/11/12, p 1046. Also, John Anderson, *Insider Trading: Law, Ethics, and Reform* (Cambridge University Press 2018) 59.
[70]ibid 396.
[71]Ashe and Counsel, *Insider Trading* (2nd ed, Tolley Publication 1993) pages 117 to 127. Also, H. L. Wiglus, 'Purchase of Shares of Corporation by a Director from a Shareholder', [1927] Michigan Law Review VIII, page 827.
[72] Robert Walker, 'The Duty of Disclosure by a Director Purchasing Stock from his Stockholders' [1923] Yale Law Journal XXXII, page 637. Also, Adolf A. Berle, 'Publicity of Accounts and Director's Purchases of Stock' [1927] Michigan Law Review XXV, page 827.

including friends and family members (as in the example of tipper-tippee theory),[73] congressmen and hackers (Chapter 1).[74] However, from an Islamic point of view, the matter can be seen differently.

When we examine insider dealing, we find that it is usually committed on ordinary shares. This conveys the same meaning as a partnership in Islamic jurisprudence, since shares affirm a partner's ownership of a percentage of the corporate capital.[75] This takes us back to the concept of ownership, which was discussed in Chapter 4.[76] Seen through a religious lens, the true owner of the shares is not the investor, but God.[77] The concept of God's ultimate ownership, and of humans as God's successors and trustees, confer an ongoing obligation of trust on whoever holds money. The trustees are expected to respect the moral virtues and ideals in their use of money. The Quran further emphasises that fair, honest trade is based on the consent of the parties,[78] which illustrates that financial transactions cannot take place in isolation from morality[79] or without safeguarding other people's interests and properties (*Amanah)* as if they were one's own and being trustworthy in general.[80] Islam teaches that property and money were created for the purpose of building humanity and developing the community.[81] It is evident that trade should be based on moral rationality, and a sound heart.[82] The application of the trust relationship leads to dealing honestly on the basis of one's conscience. That is why one of the

[73]For instance, *Dirks v SEC, 463 US 646 Supreme Court* (1983). Also see, Donald C Langevoort, What Were They Thinking? Insider Trading and the Scienter Requirement, in (n 28) page 52.
[74]For example, *SEC v Dorozhko, no 07 Civ 9606* (NRB) (SDNY 2010).
[75] Taj el din, S. e.-d. 'The stock-exchange from an Islamic perspective' [1996] Journal of King Abdulaziz University: Islamic Economics 8, 33.
[76] See, Section 4.2 'The Islamic View of Property'.
[77] See, The Cow (Al-Baqara) [2:30] and Iron (Al-Hadid) [57:7]. See t*he Quran* (n 38) pages 7 and 359.
[78] See, The Cow (Al-Baqara) [2:188]. Also, Women (Al-Nisa) [4:29].
[79] Yusuf al-Qaradawi, 'Maqasid al-shariʿa Almotaaleqa Bilmal' [2008] European Council for Fatwa and Research, 18th Session of the Council July 2008, page 10.
[80]Hassan, Abdullah Alwi Haji, 'Sales and Contracts in Early Islamic Commercial Law' [1993] Islamic Research Institute, International Islamic University, Islamabad, page 486.
[81] In the interpretation of [2:18] See, Mohammed Tabatabai, *Almeezan Fi Tafsir al-Quran*, (Hussein Alaalma (ed), 1st ed. Alaalma Foundation Publications Beirut, 1997) Part II, page 53.
[82]In the interpretation of [4:29] ibid, Part III, pages 223 and 224.

fatwas is based on the principle of trusteeship by stating that insider dealing is a form of betrayal.[83]

Having broad applicability on the principle of trusteeship (*Amanah*) leads to enhancing transparency and raising confidence in the market by encouraging investors to sell at market price without concealing any inside information.[84] Relying on morals reinforces the concepts of brotherhood and cooperation, and avoids the selfish gene (*Ifta-03* and *Ifta-06*).[85] The concept of succession puts the person in a self-monitoring and self-supervising position, with the aim of reaching self-sufficiency. Self-monitoring is a fundamental concept of censorship that is established in the Quran.[86] This means that the alertness of conscience is high to reach a level of self-censorship and a sense of control. The Quran also refers to God monitoring people's behaviour and actions to encourage people to stay attentive and behave well, achieving integrity and trusteeship.[87] The *Amanah* principle is connected with the Quranic objective of achieving fairness.[88]

6.5 Is it simply unfair?

The idea of fairness is deeply rooted in the human being's moral thoughts.[89] It goes back to the religions that existed before Islam such as Christianity.[90] It is even used by several authors

[83] Ifta-07.
[84] Ahmed Mowafy, *Damage in Islamic Jurisprudence* (Dar Ibn Affan Publishing and Distribution 1997) 208.
[85] Ahmad, Ziauddin, 'Islam, Poverty and Income Distribution' [1991] Leicester, UK: Islamic Foundation, page 112.
[86]See, The Night Journey (Al-Isra) [17:13-15] *The Quran,* (n 38) 176.
[87]See, The Earthquake (Al-Zalzala) [99:7-8]. Also, The Joint Forces (Al-Ahzab) [33:52].
[88] See, *Women* (Al-Nisa) [4:14-58] see, the interpretation of [4:14] in AlSabouni (n 37) 257. And, the interpretation of; Muhammad Al-Qaimi, *Tafsir Kanez Aldaqaeq and the Baher Al-Gharaeb* (Hussein Darkahi (ed), revised edn (1st edn 1911), Shams Al-Doha Press, 1967) Part III, page 453. Further to, *Iron* (Al-Hadid) [57:25], the interpretation of Quran in Al-Kashani (n 66) 139.Also see AlSabouni (n 37) 1144. Also, *Consultation* (Al-Shura) [42:58] see the interpretation of AlSabouni (n 37) 1024.
[89] A. C. Ewing, *The Morality of Punishment* (London: Kegan Paul, Trench, Trubner & Co., Ltd. 1929) page 45.
[90] See for example, The Bible: 2 Chronicles [2:8] See, *The New Oxford Annotated Bible: Revised Standard Version, Containing the Old and New Testaments* (Herbert G. May, Bruce M. Metzger (eds) New York: Oxford University Press, 1962) 539. Also, Deuteronomy [16:20]. Further to [16.18-17.20]: 18-20. ibid page 236. Also, [19.1-21]: ibid page 239. And in the Quran, *Sad* [38:26]. Also, *The Feast* (Al-Maida) [5:8].

who cited fairness as a philosophical justification for combatting insider dealing through criminal, civil and administrative laws, in order to protect the community.[91] Other authors simply use ethical arguments against insider dealing on the presumption that it is merely unfair.[92] Usually, courts tend to refuse contracts that impose unfair conditions on a party.[93] But when we examine the position on insider dealing on the basis of fairness arguments,[94] there is often an assumption that the term "fairness" is clear. In fact, it is a very general and ambiguous term and there is no general understanding of morals and ethics that is shared by all.[95] This means, the term fairness or justice continuously reveals a broad spectrum of the meaning[96] that can lead to different applications because each court will apply its own concept of fairness to the various situations it confronts, which causes uncertainty and confusion.[97] This leads necessarily to the question of what is meant by fairness.

Fairness could be understood initially as a concept of political morality based on the idea that citizens enjoy the state's allocation of life's fortunes equally on the basis of agency.[98] In addition, if the situation is unequal, then corrective justice is necessary. Corrective justice is a concept that is based on the idea that persons should be prohibited from shifting the costs of their

[91] Alexander, Kern (2013). UK insider dealing and market abuse law: strengthening regulatory law to combat market misconduct. In (n 19) 428. Also, Victor Brudney, 'Insiders, Outsiders, and Informational Advantage Under the Federal Securities Laws,' [1979] Harvard Law Review 93, 322–378. Also, Patrici H. Werhane, 'The Indefensibility of Insider Trading' [1991] Journal of Business Ethics 10, 729–731. Further to, Kim Lane Scheppele, 'It's Just Not Right: The Ethics of Insider Trading', [1993] Law and Contemporary Problems 56, 123–173. 'Judge fairly between people'.*The Quran,* (n 38) page 291.
[92] ibid Lane, pp. 123–173.
[93] Strudler (n 68) 396.
[94] See for Frank H. Easterbrook, 'Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information' [1981] Sup. Ct. Rev. 309, 323-30.
[95] Statman, Meir. 'The Cultures of Insider Trading.' [2009] Journal of Business Ethics 89: 57.
[96] Engle, Eric Allen, 'Insider Trading: Incoherent in Theory, Inefficient in Practice' [2008] Oklahoma City University Law Review, Vol. 32, No. 1, page 522. Also, Ian B. Lee, 'Fairness and Insider Trading' [2002] Colum. Bus. L. Rev. 119, 141
[97] Barry Alexander, K. Rider and H. Leigh Ffrench, *The Regulation of Insider Dealing* (London: The Macmillan Press, 1979) 94.
[98] Gerald Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press, 2001) 14.

harmful activities onto others and should be held responsible for their duties of care.[99] This means that on an institutional level, in cases of harmful acts or breaches of duties of care, the institution should ensure that the persons repair the damage caused by their wrongful actions.[100] In simple terms, they should clean up their own messes.[101] The idea of protecting others from all forms of harm and having equal duties and responsibilities can be traced back to early societies before the concept of the state appeared. Societies at that time tended to implement retribution and compensation on the wrongdoers through customary arbitration processes designed to secure correction for the wrong in the aim of retributive and compensatory laws.[102] Back then, applying a criminal penalty was seen to be easier when it was cloaked in a religion framework or customary laws so as to apply the laws with a good conscience and avoid any doubt about the justification for the punishment.[103] This was necessary to convince the people and to curb revenge that could cause further harm and disturbance to the society as a whole.[104] That is why the law of tort and damage was historically connected to criminal law on the presumption that the harm caused is not limited to the individual but extends to the community.[105]

Initially, the courts applied tort and criminal laws as remedies for the harm done to the individual and to protect the community.[106] So, does this mean that the concept of fairness is initially based on what the community believes about what is right and what is wrong? Subsequently, moral standards and the concept of fairness are recognised by social customs and

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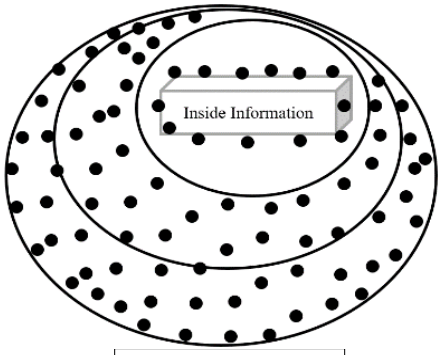
[99] Coleman, Jules, 'Justice and Reciprocity in Tort Theory' [1975] Western Ontario Law Review 14:105–118. Also, Coleman, Jules, 'Corrective Justice and Wrongful Gain' [1982] Journal of Legal Studies 11: 421–440.
[100] Coleman, Jules, 'Tort Law and the Demands of Justice' [1992b] Indiana Law Journal 67: 349–379. Also, Coleman, Jules, 'The Practice of Corrective Justice' [1995] Arizona Law Review 37: 15–31.
[101] Postema (n 98) 14.
[102] Baker, J. H. *An Introduction to English Legal History* (3rd edn, London: Butterworths, 1990) 571.
[103] Nils Jareborg, 'Criminalization as Last Resort' [2005] Ohio State Journal of Criminal Law, Vol. 2, page 522.
[104] Pollack, Frederick, and Frederick Maitland, *The History of English Law Before the Time of Edward I. (2nd edn,* Cambridge: Cambridge University Press, 1968) 530.
[105] Milsom, S. F. C, *Historical Foundations of the Common Law. (*2nd edn, Boston, MA: Butterworths, 1981) 285.
[106] Keeton, W. Page, *Prosser and Keeton on the Law of Torts. (*5th edn, St. Paul: West Publishing, 1984) 8.

shared beliefs (*Ifta-01*).[107] To narrow the issue down to the financial markets, one should ask: Is fairness what regulators think is a better approach to regulating the market in favour of the community? Is it about knowing what is in the market's best interest? Does it involve increasing market efficiency? If so, does this mean that insider dealing is immoral because it weakens the efficient and appropriate functioning of the financial market?[108] Some authors adopted the market efficiency argument on the basis of spreading information among competitors in an equally accessible form (*Ifta-09*).[109] The efficiency argument could be seen in terms of achieving the purpose of establishing the stock market, which was designed to help economic entities obtain much-needed finance from natural and artificial persons.[110] So, when investors enter the market, they should be able to identify those companies that are likely to be profitable by allowing them to assess all the available information that may help them to make the correct financial decisions.[111] This means if investors observe that the information in the stock market is not accurate and there is a high risk of a gamble because of insider dealing, then they may lose confidence in the market because of the lack of integrity (*Ifta-06*).[112] But why does insider dealing lead to a lack of integrity in the markets?



Author's own figure 6.1: *investors and inside information*

[107] Shihadeh (n 55) pages 80, 82, 89, and 100.
[108] Werhane, Patricia, 'The Ethics of Insider Trading.' [1989] Journal of Business Ethics 8, no. 11, 841.
[109] Salbu, S. R., 'A Legal and Economic Analysis of Insider Trading: Establishing an Appropriate Sphere of Regulation' [1989] Business & Professional Ethics Journal 8 (2) 17.
[110] See for example, article 8 of Regulation (EU) no 596/2014 of the EU Parliament and of the Council of 16 April 2014, Official Journal of the EU, L 173/1, dated 12.6.2014.
[111]See, article one of the Directive 2004/109/EC of the EU Parliament and of the Council of 15 December [2004] Official Journal of the European Union, L 390/38, 31.12.2004 which was repealed by Regulation (EU) no 596/2014 of the EU Parliament and of the Council of 16 April 2014, Official Journal of the EU, L 173/1, dated 12.6.2014.
[112] John Hynes Farrar, Nigel E Furey, Brenda M Hannigan and Philip Wylie, *Farrar's Company Law* (Butterworths, 2nd ed, 1988) 365.

This is because of the unfair distribution of wealth to insiders[113] that could lead to an unfair economic situation whereby the wealth is concentrated within a small group of insiders.[114] The argument is based on the assumption that insiders create a small closed network that monopolizes inside information, which could lead them to corner the wealth within a small circle of insiders. This is illustrated in Figure 6.1, which demonstrates that a very limited number of investors who have inside information will hegemonize wealth.[115] What if the investors knew about the disadvantages of insider dealing and the risks involved but accepted those hazards and still invested in shares?[116] Such a transaction would be based on the parties' consent to accept the risk of hidden information. However, while seeing the whole picture, this could lead to the development of a separate market that offers the opportunity to sell and buy inside information before going on to trade the shares.

It is a widely held opinion that the community interest is based on the idea that the equal distribution of wealth[117] can be achieved through the equal distribution of information (*Ifta-09*).[118] Yet, in this regard, the fairness argument relies on moral rationalism plus a form of

[113] Gunter Franke, *Inside information in Bank Lending and the European Insider Directive, in the United States, in European Insider dealing law* (Klaus Hope and Eddy Wymeersh (ed) Butterworths, 1991) 280.
[114] Angel, JJ and McCabe, DM, 'Insider Trading 2.0? The Ethics of Information Sales' [2018] Journal of Business Ethics 147, 747.
[115]See, for example, Figure 6.1, which illustrates the unfair distribution of wealth resulting from inside information. A similar figure is presented by Mark Geiger in a lecture titled 'When Insider Trading was Legal' presented at the John W. Kluge Center at the Library of Congress, Washington, D. C., April 19, 2012. He presented a figure of insider trading that illustrate a situation dated 1870 about the grain trade and how the trading was monopolized by certain families.
[116] Kenneth Scott, 'Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy' [1980] 9 J. Legal Stud. 801, 807-09.
[117] Yousef Alqardawi, 'Maqasid Al-shariʿa Almutaealiqa Bi-Almal' [2008] European Council for Fatwa and Research, 18th Session of the Council, July, page 84.
[118] Lawson, G, 'The Ethics of Insider Trading' [1988] Harvard Journal of Law & Public Policy 11, p. 736. Also, Saul Levmore, 'Securities and Secrets: Insider Trading and the Law of Contracts,' [1982] 68 Virginia Law Review 117, p 122 and 126.

speculation, as there are no empirical premises that support it.[119] That is why many philosophers have rejected the argument of unfairness.[120]

IET takes into account the importance of social solidarity in the context of the Muslim community. It is evident from the fatwas that IET supports the idea of the prosperity and unity of its members (*Ifta-03*). This is developed as a variation on the concept of brotherhood, which requires that the strong help the weak and that the rich support the poor. In the Hadith, the Prophet referred to the concept of brotherhood by forbidding greedy sales and the abuse of others' need, stating that 'the Muslim is a brother to the other Muslim, he shall not wrong him nor harm him'.[121]

The highest levels of morality can be seen in the way the Prophet explained the social structure through the use of an eloquent analogy comparing the members of a community to a single body, so that if one part of the body suffered, the whole body will suffer, too.[122] In an economic sense, the whole society should be united in ensuring the benefit of each member. When two parties enter into an agreement equipped with the proper information, the presumption is that both will benefit from the transaction.[123] The core objective of Shariʿa is to ensure fairness 'in the community development process'[124] through the contribution to the overall social

[119] Strudler (n 68) 396. Also see, Florian Hauser, Klaus Schredelseker, 'Who benefits from insider regulation?' [2018] The Quarterly Review of Economics and Finance, Vol. 68, page 209.
[120]See, Werhane (n 108) 841-845. Werhane (n 91). Moore, J.: 'What is Really Unethical about Insider Trading?', [1990] Journal of Business Ethics 9, 171-182. Machan, T. R. 'What is Morally Right with Insider Trading' [1996] Public Affairs Quarterly 10(2), 135-142. Snoeyenbos, M. and K. Smith: ;Ma and Sun on Insider Trading Ethics' [2000] Journal of Business Ethics 28, 361-363.
[121]See, AlSabouni (37) pages 139, 649, 931 and 1082. Also, Al-Hujurat [49:10] *The Quran*, (n 38) page 338.
[122] Al-Bukhari (n 36) pages 235,1070 and 2696. (Hadiths number 481-2446-6026)
[123] See, Ng Y-K, *Markets and Morals* (Cambridge University Press, 2019) 123.
[124] Abbas J. AlĂ (ed) *Handbook of Research on Islamic Business Ethics* (Cheltenham and Northampton, MA: Edward Elgar Publishing, Research Handbooks in Business and Management Series, 2015) 138.

justice.[125] However, given that it is difficult to measure the concept of justice in finance, how could this be translated in the financial markets?

The statements of equality could conflict with the fact that in any economic transaction, one party may possibly benefit more than the other. Should the financial system be based on the idea that investors should put others' interests before their own, as per the well-known Islamic concept of *Ethar*,[126] or if not, then at least on the same level as their own?[127] The Prophet Hadith emphasises the richness of the soul rather than the richness of money, and that the true wealth is a moral one.[128] It follows that if there is a conflict between self-interest and others' interest, then the person should resist the appeal of money in favour of his society.[129]

The idea of social justice may be better understood on the basis that IET is based on the idea of earning money through hard work and striving, which is one of the main reasons for refusing the idea of loans, where time equals money through interest.[130] For this reason, the Quran attributed money to community efforts rather on the people's ignorance and foolishness[131] and pointed out that money should be spent on Islamic causes.[132] This means that, to achieve the virtue of altruism, investment decisions shall be based on effort rather than undisclosed information. But what if obtaining inside information is based on the quixotic effort of the investor because of his networking skills, connections and intelligence? Doesn't this mean that he gained the economic advantage through his efforts? Then, the issue could be seen on an

[125]ibid, chapter 11.
[126] See, *The Gathering [of Forces]* (Al-Hashr) [59:9] *The Quran*, (n 38) page 366.
[127] Lawson (n 118) 743.
[128] See, Hadith, Ṣaḥiḥ Bukhari, 1701-2488, in *Targheeb and Terheeb* (Abdul Azim Al-Manzari ed, commentary and editing by Muhammad Al-Albani ed, 1st edn, Riyadh: Al-Ma'aref Library for Publishing and Distribution, 2003) 694.
[129]See, Al-Kashani, (n 66) vol V, page 157. Also, *The Gathering [of Forces]* (Al-Hashr) [59:7] See, the interpolation of the verse by: Tabatabai, (n 77) part 19, page 211.
[130]See, Chapter Three, section 3.6.5 and Chapter Four, section 4.2.
[131] See, Women (Al-Nisa) [4:5].
[132]*Repentance* (Al-Tawba) [9:41]. See, Al-Kashani, (n 66) vol 1 479.

alternative view which is that preventing insider dealing may cause the obstruction of Muslims' needs of financing?

The answer to such presumption has already been established by pointing out that the problem is not related to the speed of access to information but to the unequal distribution of information. This means that if a platform provides all available price-sensitive information to investors, then whoever accesses this information first deserves his advantage because of his diligence.[133] The speed of access is not an issue because it is based on the personal effort involved in following up the data and conducting one's own analysis and assessments. In fact, swift access to information does not affect share price but rather supports the market to achieve the true value of the shares, correcting the market efficiency as early as possible[134] by reflecting accurate prices.[135]

Another Western economic argument that is against the unfairness argument is based on the idea that insider dealing is an effective method of compensating investors.[136] The argument was promoted by Manne, who considered insider dealing to be a unique compensation device that 'encourage[s] a culture of innovation'.[137] In his view, inside information satisfies the

[133] The Criminal Justice Act 1993 section 56. Also see, Sarah Clarke, *Insider Dealing Law and Practice* (Oxford University Press, 2013). 83.
[134] Angel (n 114) 758.
[135] Patrick Diaz and Rosemary Maxwell, 'Insider Trading and the Corporate Acquier: Private Actions Under Rule 10b-5 Against Agents Who Trade on Misappropriate Information', [1988] The George Washington Law Review, 56(3), page 609.
[136] Bainbridge (n 19) page 22. Also see, Nicholas Wolfson, 'Trade Secrets and Secret Trading' [1988] 25 San Diego Law Review, 109.
[137] Manne, Henry G., 'Entrepreneurship, Compensation, and the Corporation' [2011] Quarterly Journal of Austrian Economics, Vol. 14, no. 1, page 3. This argument was first suggested in his book; Henry Manne, *Insider Trading and Stock Market* (New York: The Free Press, 1966) pp. xiii, 274. Which led to the replies of the main authors at his time against his views, like J.A.C Hetherington, 'Insider Trading and the Logic of Law [1976] Wisconsin Law Review, pages 720–737. Also, Roy Schotland, 'Unsafe At Any Price: A Reply to Manne Insider Trading and the Stock Market', [1967] Virginia Law Review Vol. 53, no. 7, pp. 1425-1478. Also, Morris Mendelson, 'The Economic of Insider Trading Reconsidered', [1969] The University of Pennsylvania Law Review, vol. 117, page 470. Which led to the reply of Manne stressing on his position that is based on the idea that insider dealing is a good economic behaviour that benefits the market through correcting the shares prices and compensate the insiders for their efforts and overall contribution to the market. In addition, he states that the moral arguments are an intellectual

requirements of a reward system.[138] Additionally, investors are cashing in on the overall development of the market; therefore, they deserve compensation because of their positive participation in financing the total costs of the complex financial system.[139] This argument is invalid for two reasons. First, if the issue is related to the unfair compensation system, then the remedies should be focused on providing better incentives to the shareholders or the directors. Research has shown that equity incentives may reduce insider dealing by improving the management earning system and by encouraging better 'managerial opportunistic behaviour'.[140] The argument is also based on the assumption that the director deserves such benefits because of his efforts, but what if the information concerns negative outcomes, and the directors are selling to avoid a loss? In that case it is not about incentives, as the company will suffer a loss. Second, a primary concern is related to the ownership of the information. Thus, the question to ask is, who owns the inside information? To answer this, first one should ask, what is the nature of the inside information?[141] Can it be owned? Is inside information owned by the corporation?[142] Or is it owned by the directors or shareholders?[143]

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bankrupt giving that they fail to proof their points through empirical evidence. See, Henry Manne, 'Insider Trading and Law Professor', [1970] The Vanderbilt Law Review, 547.

[138] ibid page 15.

[139]ibid 20. Also see, Seitzinger, Michael V. 2009. "Executive Compensation: SEC Regulations and Congressional Proposals." No. RS22583, Congressional Research Service, U.S. Congress, Washington, D.C.

[140] For instance, Yanyan Chen, Gary Gang Tian, Daifei Troy Yao, 'Does regulating executive compensation impact insider trading?' [2019] Pacific-Basin Finance Journal, page 54.

[141] Huang, (Robin) Hui, The Regulation of Insider Trading in China: Law and Enforcement [2014] (n 19) chapter 16, page 318.

[142] Moore assigns the property rights of inside information to the company. See, Moore (n 120) 171-182. Also, *Boardman V. Phipps* [1967] AC 46, [1996] 3 ALL ER 721. Also, *Carpenter V. United States* (108 S.Ct 316 1987). Patrick Diaz and Rosemary Maxwell, 'Insider Trading and the Corporate Acquier: Private Actions Under Rule 10b-5 Against Agents Who Trade on Misappropriate Information', [1988] The George Washington Law Review, 56(3), page 608. Also, Ashe(n 71) page 21.

[143] Defenders of insider dealing prohibition base their fairness argument on agency. See, Lambert, Thomas Andrew, 'Decision Theory and the Case for a Disclosure-Based Insider Trading Regime' [2012] University of Missouri School of Law Legal Studies Research Paper No. 2012-18. Also, Jennings, Book Review, [1967] 55 California Law Review, page 1234. Cited from Henry G. Manne, Insider Trading and the Law Professors, 23 Vand. L. Rev. (1969-1970) 547.

In other words, is inside information property in itself?[144] This is question vital because if it is assumed that inside information belongs to the company, then only the company could trade based on it, or has the right to give it away to its directors, shareholders or even outsiders.[145] In Chapter 4, the issue of the ownership of inside information from an Islamic perspective was examined by explaining that inside information is not property in itself, but it is a key element of the share transaction.[146] The share transaction does not only include the shares but its surroundings, such as the price-sensitive information that must be disclosed to the counterparty. In other words, if the information is an element of the transaction, then it must be disclosed at the time of the sale, since the absence of such an element entails deceit *(Gharar*) (*Ifta-08* and *Ifta-09*).[147] Inside information is not a property, but a component of the transaction.[148] The share transaction includes many components, including the company, the parties, the shares, and the inside information. Any regulation should recognise and protect all the elements of the transaction to achieve the fairness required. Such an understanding would lead to a consideration not only of the prohibition of insider dealing but also of the duty to disclose the information[149] to ensure the integrity of financial markets.[150] But how can fairness be assessed in practice?

6.6 The concept of just price

[144] If inside information is a property, then the issue evolves a violation of property rights. See, Engelen, Peter-Jan, and Luc Van Liedekerke. 'The Ethics of Insider Trading Revisited' [2007] Journal of Business Ethics 74, no. 4, 503.
[145] Manne, Henry. *Insider Trading and the Stock Market* (New York: The Free Press, 1966) 70.
[146]See, chapter four, 4.6.
[147] See, chapter five, section 5.4. Also, Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge University Press, 1997) 108.
[148] Bainbridge, Stephen Mark, 'Regulating Insider Trading in the Post-Fiduciary Duty Era: Equal Access or Property Rights?' [2012] UCLA School of Law, Law-Econ Research Paper No. 12-08, May 8, page 21.
[149] See for instance Article 2(1) of Directive 2003/6. Also, Case C 391/04 Georgakis [2007] ECR I 3741, para 38.
[150] See, Katja Langenbucher Insider Trading in European Law, in: Bainbridge (n 19) page 429. Also, *Case C-45/08 Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen* (CBFA) paragraph 52.

Can fairness be defined as selling or buying on the basis of a just price?[151] This is an important question since a fatwa referred to the concept of just price as justification for the prohibition of inside information by stating that the conduct could lead to a price that does not reflect the true value of the shares (*Ifta-04*). Just price is one which reflects the fundamental value of the good, based on all the available information. So, if one did not disclose the inside information to the counterparty, then he is acting unfairly because he profited from an informational advantage[152] and received more than the true value.[153] Is profit that is based on an informational advantage unjustifiable?[154] If the sale of shares is a viewed as a contract between its parties, then one may argue that the value of the shares is measured by the appetite of the investors, and therefore the just price is the value they are satisfied with.[155] However, in stock markets, the value of the shares fluctuates in response to several factors and different circumstances, such as the economic atmosphere, regional and political stability, and the mood of the market. The share value is connected to its market value, which is something that is not engaged directly in the share transaction. This takes us back to the question of evaluating the fairness of the share transaction.

Islamic tradition assesses the fairness of a transaction by measuring what is a fair price (*Qimat Al-Adl*).[156] First, one should note that the principle of just price is one which aims to achieve justice rather than equality.[157] This means that it is not related to the idea that the

[151]The concept of the 'just price' is deeply rooted in the religions, for example, the Bible bans charging unfairly high prices. See, Leviticus 25:16-17, *The New Oxford Annotated Bible: Revised Standard Version, Containing the Old and New Testaments* (Herbert G. May, Bruce M. Metzger (eds) New York: Oxford University Press, 1962) page 154.
[152] Moore (n 120) 172.
[153] Lawson (n 118) 741.
[154] Bainbridge (n 19) page 372.
[155] Frederick Pollock, *Principles of Contract* (4th edn, London: Stevens & Sons, 1885) page 172.
[156] Hussein Hassan, 'Contracts in Islamic Law: The Principles of Commutative Justice and Liberality', [2002] Journal of Islamic Studies, Vol. 13, Issue 3, September, pages 257–297.
[157] Abdul Azim Islahi, E*conomic Concepts of Ibn Taimiyah* (Leicester, The Islamic Foundation, 1988) 75.

position of each party should be equal. However, the price of a share should reflect its correct value to compensate the other party equivalently. This principle is known as (*Thaman Al-Mithl*),[158] which means the price of the equivalent of the true value of the shares, the rate which is similar to the true value of the shares[159] whose price reflects all the complicated elements, the surroundings of the shares and the information related to it. In this regard, Ibn Taymiyyah explained that the just price is measured by its equivalent in the market.[160] He stated that the different elements that naturally affect the price without direct interference from the investor, such as population growth and increasing demands, are from God, therefore they are acceptable.[161] This means that fairness can be achieved through an exchange of items that are equivalent in value.[162] The concept of money is relatively new, the Islamic tradition focused more on exchanging items, or an item, for gold.[163] If we consider money as an item, and a share as another item, then the value of a share should be equal to the amount of money. The focus then would be on ensuring that the outcome of every transaction preserved the equality between the items. Therefore, justice could be defined as proximity to equality (*Muqarabat Altasawi).*[164] In this conception, the fairness of the price is defined more by the economic equivalence of the items than that of the parties to the transaction.[165] Parties should focus on entering into a transaction that is valued by all the ordinary circumstances that may affect the price without their

[158] ibid. 81.
[159] Taqi Aldiyn Ibn Taymiyyah, *Majmu Fatawa* (Riyadh: Dar Ibn Hazem, 1963), 345.
[160] ibid 521.
[161] Taqi Aldiyn Ibn Taymiyyah, *al-Hisba* (Cairo: Dar Hajr, 1976), 25
[162] Serdar Kurnaz, 'Ibn Rushd's Legal Hermeneutics and Moral Theory for a 'living Sharīʿa' an Alternative Approach to Islamic Law in Ibn Rushd's Bidāyat al-mujtahid1', [2019] Oxford Journal of Law and Religion, rwz006, 20.
[163]Abu al-Walid Ibn Rushd, *Bidayat al-mujtahid wa-nihayat al-muqtas*: (Bayt al-afkar al-duwaliyya, 2007) 659.
[164] ibid. And, Abd Al-Wahhab Ili-Shin, Al-Qawaiid Wl-daw: Abit: Al-Fiqhiyya Min Khilal Ketab Bidayat Almujtahid Wa-Nihayat Al-Muqtas: L Ibn Rushd (Islamic University Press, 2009) vol 3, 1391–404.
[165] Levmore (n 118) 122.

positive or negative interference, for example, without spreading rumours or concealing inside information – thereby achieving equality between the amount paid and the value of the shares.

The 'equality argument'[166] takes us back to the fatwa, which states that the aim of prohibiting insider dealing is to ensure 'equal opportunities among dealers'.[167] The phrase 'equal opportunities' is well-stated, because it illustrates that every transaction involves an element of risk. So, the problem is manipulating the surroundings of the transaction, that is, the factors that can be changed through interference by investors, such as concealing price-sensitive information. According to our previous argument, namely, that inside information is an element that is attached to a transaction and concealing it may lead to uncertainty (*Gharar)*, then the loss that an investor suffers when information is concealed entitles him to compensation. The information need not relate directly to the company but could, for example, be related to a project that the government is developing near the premises of the company. Even in such circumstances, the information is price-sensitive, and should, in an ethical sense, be disclosed.

This illustrates how vital it is for the parties to be as candid as possible; thus, to reiterate, concealing information is a failure of the duty to be candid and truthful.[168] Honesty is the core principle of Islam, and it is an ethical virtue that reflects righteousness, and a means of success.[169] If an investor is concealing price-sensitive information, then in a way, he is affecting

[166] The equal access theory that all investors owe a duty to the market to disclose the non-public information to their counterparties. Reinier Kraakman, *The Legal Theory of Insider Trading Regulation in the United States, in European Insider dealing* law (Klaus Hope and Eddy Wymeersh (ed) Butterworths, 1991) 41. Also see, Ashe (n 71) page 19.
[167] Ifta-03.
[168]Honesty is an obligation in the financial transactions and if it is practiced, a promise of a blessing outcome (from God) shall be obtained. See, Hadtihs number 2079, 2082 and 2114. In, Al-Bukhari, (n 36) pages 910, 912, and 926. Also, AlSabouni (n 37) page 907. Also, Hadiths number 2585-1774 (11), 2586-1775 (12), and 0-1094 (4), and 2608-1785 (4), and 2607-1784 (3), cited from Ṣaḥiḥ Bukhari (n 36) pages 714, 715 and 720.
[169] See, Alwasiti, (n 47) part 1 pages 19, 22, 24, 36, 41 and 42. Also *Majmue Fatawaa Wa-Maqalat Al-Shaikh Ibn Baz: 4/103* (Medina: Journal of Islamic University, 1974) vol. 4, pages 3-5.

the autonomy of the decision-making process.[170] The aim is to establish a genuine relationship in which the items exchanged in the transaction have an equal position (*Ifta-09*), leading to a just price during dealing. Thus, the loss suffered due to insider dealing is a wrongful loss, and the wrong is done to the sufferer by the insider. By this, the ground for liability arises from features of the situation that is based on the premise that both parties to the transaction are equal[171] and advances a conception of distributive equality.[172] Consequently, the equal footing is a step toward avoiding unjust price that is caused by concealing inside information.[173]

Investors will trust the market as a regulated platform if they know that they are paying for something that is worth the price they paid for it, in other words, something that is being sold at a just price. Being on an equal footing would increase investors' confidence in the market (*Ifta-06*),[174] which in return increases market demand and raises liquidity.[175] As in a chess game, information in this model is available to all market participants,[176] there is no hidden information, and the transaction is based on public information that is absorbed by the investment community,[177] allowing the participants to benefit from their diligence and intelligence. The market needs time to respond to information. Information does not directly incorporate in the share price, which is the why the window of time between the dealings and the

[170] Strudler (n 68) 392. Also see, Public Prosecutor V. Allan Ng Pohmeng [1990] I MJL cited from Ashe (n 71) 21.
[171] Postema (n 98) page 12.
[172] ibid page 160.
[173]The equal footing position is related to the problem the propriety of 'Information Asymmetries' which was debated for more than two thousand years from Cicero to Laidlaw. See, John Anderson, *Insider Trading: Law, Ethics, and Reform* (Cambridge University Press 2018) 6.
[174] Katja Langenbucher Insider Trading in European Law, in Bainbridge (n 19) p. 435. Although it is hard to measure things like the confidence and integrity of the market. See, Ausubel, L. M. 'Insider trading in a Rational Expectations Economy' [1990] The American Economic Review, 80(5), 1022–1041. The argument of equity is also known as 'market egalitarianism' by American scholars. See, John Hynes Farrar; Nigel E Furey; Brenda M Hannigan; Philip Wylie, *Farrar's Company Law* (2nd edn, London: Butterworths, 1988) 365.
[175] Kyle, A. S. 'Continuous Auctions and Insider Trading' [1985] Econometrica: Journal of the Econometric Society, 53(6), 1315–1335.
[176] Clarke (n 129) 5.
[177]See, Bondi, Bradley Joseph and Lofchie, Steven D., 'The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance' [2012]. New York University Journal of Law and Business, Vol. 8, page 170.

disclosure is crucial.[178] The process of absorbing the information raises a concern regarding when such information becomes public.

Some courts have applied two tests: the efficient market test plus the dissemination and absorption test.[179] The courts have suggested that it may require some time for information to be absorbed in the market.[180] This means that the news might not immediately translate into investment decisions. In other words, insiders are not allowed to take advantage of their advanced position by acting immediately upon announcement.[181] The internet and social media has made dissemination more difficult to assess, since with one click information appears, yet it is difficult to assess the extent to which it has been absorbed.[182] The average time required to absorb information is left to the court's discretion as it is not always clear when information has been digested.[183] The courts would face some challenges especially in relation to technological advancements such as algorithmic trading, which raises a vital contest not only for the court but also for the regulation of insider dealing.[184]

The obligation to be candid raises another question, namely, what information should be disclosed? Or, to put it another way, must all information be disclosed? What about soft information? By "soft information", we refer to 'inherently involved subjective analysis or

[178] Schouten, Michael C. and Nelemans, Matthijs, Takeover Bids and Insider Trading (March 1, 2013). In (n 18) page 466.
[179] Wang, William Kai-Sheng and Steinberg, Marc, Insider Trading (3rd ed, Oxford University Press, 2010) page 143.
[180] For example, in Texas Gulf Sulphur, 401 F.2d at 854 n. 18.
[181] See also, S.E.C. v. Ingoldsby, Civ. A. No. 88–1001-MA, 1990 WL 120731 (D. Mass. May 15, 1990).
[182] Robert A. Prentice, 'The Internet and Its Challenges for the Future of Insider Trading Regulation' [1999] Harvard Journal of Law and Technology 12, page 279.
[183] See, Robert A. Prentice, 'The Internet and Its Challenges for the Future of Insider Trading Regulation' [1999] Harvard Journal of Law and Technology 12.
[184]See, Yadav, Yesha, 'Insider Trading and Market Structure' [2015] UCLA Law Review, Vol. 63, page 968.

extrapolation, such as projections, estimates, opinions, motives, or intentions'.[185] Some authors consider soft information to be preliminary inside information that is expected to come into existence.[186] As such, it is not merely an expectation about the future but rather opinions, evaluations, and statements that can be supported by evidence of probability.[187] For instance, soft information could concern a potential opportunity for a proposed trade or problems that may appear in the future and that, if so, would have a retrospective impact on share price.[188] First, it should be stressed that the law on insider dealing prohibits the use of material price-sensitive information, which is defined as clear, specific in nature,[189] and based on facts, or probable facts.[190] With soft information, the problem lies with the level of probability that the event may or may not occur.

The question here concerns how serious the soft information is. It is not about the degree of probability or on what evidence it is based. In terms of the probability of the information, a judge would measure the possibility of the event based on evidence and not opinions.[191] This means if the opinion is not based on evidence but merely on logic, or speculation regarding relative frequency, then it does not constitute inside information but rather intelligence and diligence on the part of the investor, and therefore is out the scope of inside information. If the investor has made an analytical study of the share price based on the theory of probability, then this is not inside information because it is based on inductive conclusion. However, if there was a

[185] William K. S. Wang and Marc I. Steinberg, *Insider Trading* (New York: Oxford University Press, 2010) (quoting Bruce A. Hiler, "The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views," Maryland Law Review 46 (1987): 1116).
[186] Langenbucher (n 19) page 437.
[187] ibid.
[188] See, Adam Prichard, 'Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers' [1999] Virginia Law Review 85, 936–37.
[189] Information should be specific. See, (n 18) chapter 19, page 370. Still, some courts accepted the idea of insider dealing based on 'factual knowledge of a concert kind'. See, Hooker Investments Pty Ltd v Baring Brothers Halkerston Securities Ltd (1986) 10 ACLR 462.
[190] See, the UK Criminal Justice Act 1993 section 56.
[191] Seredyńska, Iwona. *Insider dealing and criminal law: Dangerous liaisons* (Springer 2011) page 28.

serious indication that an event will occur that is based on soft information which itself is based on evidence, then there could be a duty to disclose. This duty shall be assessed by judges on a case-by-case basis and left to their discretion.[192]

The equal footing approach is a good one because it addresses the egoism of human nature, which tends to be ruthless and greedy (*Ifta-06*).[193] Recognising the fact of human nature raises the importance of injecting ethics into the law. Even though humans need binding moral rules, the different ethical systems that coexist need to be recognized and distinguished.[194] This means that each society may accept a different ethical framework. Thus, the Islamic ethical understanding should be adopted in Islamic counties, and the secular moral understanding could be adopted in secular countries, et cetera. Investors adhere to the laws when they observe that they have an ethical obligation to obey.[195] To achieve moral excellence, it is found that the aim should be to strengthen the people's sense of duty.[196] This means that, given a sound moral justification for combating insider dealing, investors may accept the imposition of criminal sanctions on the practice by understanding first the ethical disapproval of it in Islam, which may in turn enhance deterrence[197] in Islamic countries. Successful legal systems tend to have

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[192] See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. (1976) 448. Also see, Market Abuse Directive Level 3, second set of CESR guidance and information on the common operation of the Directive to the market, CESR/06-562b, 12 July 2007, page 4.

[193] There should be moral reading of the laws, and moral consideration when examining any issues. An interpretation and application of the moral principles when examining legal problems, in the aim of answering any moral questions. See, Striker G, *"Greek Ethics and Moral Theory," Essays on Hellenistic Epistemology and Ethics* (Cambridge University Press 1996) 174. Also, Richard Posner. 'Reply to Critics of The Problematics of Moral and Legal Theory' [1998b] Harvard Law Review 111–1823. Fuller, Lon L. The Morality of Law. (New Haven, CT: Yale University Press, revised edn, 1969). Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press 1996).

[194] Howden, David, 'Knowledge Flows and Insider Trading' [2014] The Review of Austrian Economics. 27, 51.

[195] See, DM Kahan, 'Social Influence, Social Meaning and Deterrence' [1997] 83 Virginia Law Review 349, 358, 379. Also, JT Scholz and N Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behaviour' [1995] 39 American Journal of Political Science 490, 508–09

[196] Simon Blackburn, *Ethics* (Oxford University Press 2003) 103.

[197] Jacob Öberg 'Is it "Essential" to Imprison Insider Dealers to Enforce Insider Dealing Laws?' [2014] Journal of Corporate Law Studies, 14:1, page 127.

reasonably clear moral principles underpinning at least the majority of their laws.[198] As Immanuel Kant (1724-1824) stated, the standards of conduct encourage people to act in accordance with a rule out of respect rather than fear.[199]

6.7 Conclusion

The main goal of the current chapter was to determine the Islamic moral standpoint on insider dealing. It aimed to continue answering the third secondary question: What is the IET position on insider dealing? The chapter successfully identified the main Islamic ethical justification for combating insider dealing in section two. Section three went on to discuss the importance of the moral theological perspective on the conduct. It began by arguing that Islam came with a main purpose which was to complete the moral values and shape the ethical codes as per its scriptural text. It was argued that the rational method is a primary way of tackling modern concepts through the fatwa mechanism, which reflects a value that helps to build a bridge of understanding between insider dealing and Islamic ethical values.

Section four referred to the issue of trusteeship (*Amanah*) that was discussed in Chapter 4. The impact of the notion of God's definitive ownership, and that Muslims are his successors and trustees of his money was shown to have broad implications for the parties to the transaction by imposing a general moral obligation to be candid with each other. Such understanding informs the duty to disclose inside information to the counterparty and refrain from dealing on the basis of concealed information.

The concept of fairness, which is deeply rooted in the history of human thought and is widely mentioned in most religions, was then discussed in section five, which showed how the

[198] Hardin, Russell. 'Law and Social Order.' [2001] Philosophical Issues 11, page 61.
[199] Simon Blackburn, *Ethics* (Oxford University Press 2003) 15.

concept of fairness applies to insider dealing through the notion of equal footing between investors. Noting that Islam emphasises the prohibition against greedy behaviours, an alternative approach was suggested that is based on boosting confidence in the market and raising its integrity in favour of society as a whole rather than the self. However, as it is difficult to evaluate how the concept of fairness can be applied to each transaction, a key issue from a moral perspective is that conceptually, it does not have a legal force. In practice, morals cannot be enforced by courts but rather must be viewed as acts that are favoured, therefore, the section went on to suggest the concept of the "just price" as a practical and ethical means of combatting the conduct.

Section six examined the notion of just price, noting that, although share prices fluctuate in response to various complex factors, Islam nevertheless acknowledges the right of investors to obtain those shares for a fair price that is based on all the factors that may affect them. IET, through the concepts of *Qimat Al-Adl*, *Thaman al-Mithl* and *Muqarabat Altasawi*, supported investors' right to have a free choice that is based on their right to know all the available information that are absurd in the market before making their trading decisions. Being candid is an ethical obligation that rests on both parties to the transaction. They have a duty to let the counterparty know all the fundamental and price-sensitive information they have. However, this duty does not include the duty to disclose information that is based on the investor's own analytical efforts and diligence, as Islam urges investors to exert themselves and to be attentive.

The chapter concluded that the primary goal in IET is to fight avaricious behaviours in order to achieve moral superiority. It suggests that investors should respect the law on the basis of understanding the values that underpin the rules rather than out of fearing of the consequences of violation. An implication of this is that the moral analysis complements the economic

analysis, which in this thesis was conducted in Chapter 5. This means that the general moral theory has contributed substantially to explaining the moral justification for combating insider dealing from an Islamic perspective. Moreover, it provides additional support for the economic analysis. Therefore, both economic and moral reasoning help to illuminate the Islamic position on insider dealing in a parallel and complementary way. The next chapter moves on from this discussion to examine the remaining fatwas, which took a positivist position towards insider dealing through the concepts of permissibility and legitimate policy, which are the last two themes that inform the Islamic position on the conduct.

Chapter 7 : Fatwas Based on Internal Law and Regulation

7.1 Introduction

This chapter analyses the obtained fatwas that refer to the positive laws (internal laws and regulations in Islamic countries) by comprising quotations from the data. It critically discusses the concepts of permissibility and legitimate policy (LP) and their relation to positive laws in Islamic countries. By positive law (states law), the chapter refers to the concept of human law (man-made law) that contains the codes, statutes, regulations in Islamic countries.[1] For the ease of the reader, by "LP", I refer to the flexibility of Islam in dealing with contemporary issues by allowing the reformation of the laws in favour of the better good, as per the discretionary powers of the ruler and regulatory authorities. LP is a function that allows Muslims to provide regulations that promote community interests. Such regulations are compulsory even if the Quran and Hadith did not reveal them. In the Western sense, they are the internal laws and regulations which are issued by the regulatory authorities (as will be explained further in section 7.4). Through the concept of LP, the chapter seeks to assess the insider dealing laws in the Islamic countries to which the Ifta institutions refer.

The chapter continues to answer the third secondary research question, namely, what is the IET position on insider dealing? By the end of this chapter, all the fatwas related to insider dealing will have been examined and discussed and the question of the IET position on insider dealing will be finally answered. This chapter argues that the reference to the positive laws by some Ifta institutions led to a primary drawback in the regulation of insider dealing, which is that it focuses less on the amalgam of the Islamic ethical values than on legal positivism. It argues further that some Ifta institutions need more financial specialism in their Ifta process, otherwise

[1] See Chapter 3, s 3.4.4.

simplistic conclusions may be offered to the Mustaftis. It claims that while IET focuses more on combating the conduct ethically than fighting the wrongdoer legally, the Ifta institutions were influenced by the legal formality, ignoring the moral view of IET.

The chapter is divided into seven sections. The first section is introductory. The second section is devoted to exploring the concept of permissibility (*Ebaha*) and its significance for the regulatory restrictions. The third section explores the concept of LP with reconnoitring the fatwas that refers to the insider dealing laws in Islamic countries. The fourth section critically discusses the laws in the six countries (Kuwait, the United Arab Emirates, Jordan, Egypt, the State of Palestine, and Iraq) that are mentioned by the Ifta institutions. It is therefore divided into six subsections. The sixth section synthesises and evaluates the discussed laws on insider dealing. The last section concludes the chapter by offering a final comment on the outcome of the analysis of the fatwas on insider dealing, and introduces Chapter 8.

7.2 Permissibility (*Ebaha*)

There are three fatwas that allow the use of inside information based on the permissibility principle on the condition that the positive law does not prohibit insider dealing. All three use similar language: 'as long as it is not against the law or regulation to exploit this information, then, it is allowed';[2] 'if such information is allowed to be exposed, then there is no restriction to expose and exploit it';[3] 'It is not forbidden by itself'.[4] The idea of permissibility is very important given that humans tend to be addicted to providing rules to govern their societies through extensive legislation. Members of the community must comply with the promulgated

[2] Ifta-05.
[3] Ifta-01.
[4] Ifta-02.

laws.[5] Human minds rely on the cognitive acceptance and subjection of conduct to the rule of law through the operations of the legal system.[6] Such beliefs led to a system of control which varies in the degree of enforceability from normative expectations, such as shame and community condemnation, to the systems of surveillance and punishment by certain institutions, such as the police and courts.[7]

The Islamic religion ostensibly allows most activities unless they conflict with a clear rule or purpose ('*Maqasid al-shariʿa'*, MS), which reflects a less regulatory approach. Allowing insider dealing means it should not be subject to discipline and punishment. Islamic law originated from an idea of permissibility as the starting point for all activities, which contrasts with the idea of religion as an agency which formulates rules, demands compliance, creates customs that must be respected and generates symbols that must be followed.[8] This could be deduced from the Quran, which contains thousands of verses, yet only 10% of them relate to compulsory laws.[9] Though, does the Islamic religion apply the principle of permissibility to economic activities?

The Quran states that 'God has allowed trade…'.[10] Other verses are broadly supportive of this claim: 'It was He who created all that is on the earth for you';[11] 'He has subjected all that is in the heavens and the earth for your benefit, as a gift from Him';[12] '[People], do you not see how God has made what is in the heavens and on the earth useful to you and has lavished His

[5] Lon Fuller, *The Morality of Law*, (revised edn, New Haven 1969), chapter two.
[6] Matthew H. Kramer, 'On the Moral Status of the Rule of Law' [2004] 63 The Cambridge Law Journal 65, page 65.
[7] Mathieu Deflem, "Social Control: the Enforcement of Law," *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008) p 227.
[8] Religions showed a true challenge between the authority of human sovereignty and divine sovereignty. See, Philip Marshall Brown, "Law and Religion" [1943] 37 American Journal of International Law, page 505.
[9] Malise Ruthven, *Islam* (2nd edn, Oxford University Press, 2012) page 84.
[10] The Quran, The Cow (Al-Baqar) [2:275]. See, *The Quran*, (M. A. S. Abdel Haleem (tr), Oxford University Press, an Oxford World's Classics, 2005) page 32.
[11] The Cow, (Al-Baqara) [2:29]. See, *The Quran*, ibid page 6.
[12] Kneeling (Al-Jathiya) [45:13]. See, *The Quran*, ibid page 324.

blessings on you both outwardly and inwardly?'[13] These verses illustrate that all things, including transactions, are permissible unless there is a clear rule that states otherwise.[14] In other words, every sale is halal except what is prescribed by Shariʿa as not halal. Therefore, rules restricting transactions are limited. In fact, the origin of the Arabic meaning of the term "transaction" is permission.[15]

However, there is another principle that must be taken into account when discussing the permissibility principle, which is the importance of just and fair practice, meaning that any unjust transaction that causes harm to the counterparty is prohibited (Chapter 5, section 5.3).[16] The permissibility rule is a main juristic rule in the fiqh. This is agreed by most Islamic schools, including the Hanifa, Shafi'ia, Maliki and Hanbali schools, which have stressed the originality of the permissibility principle and the importance of considering that everything is allowed unless there is evidence that indicates a prohibition.[17] This means that there is a tendency to widen the concept of halal and allow all transactions and actions unless there is an explicit prohibition.

The Prophet stressed the idea of halal by stating that 'What Allah has permitted is halal (allowed), and what is haraam (forbidden) is haraam, and what is silent about it is amnesty, so accept God's exoneration. God would not forget anything'.[18] He promoted the idea that anything which benefits the society is allowed and encouraged: 'Whatever Muslims see as good, it is good

[13] Luqman [31:20]. See, *The Quran*, ibid page 262.
[14] The Cow, (Al-Baqara) [2:168]. See, Muhammad AlSabouni, *Tafseer Ibn Katheer* (7th edn, Beirut: Dar Al-Quran Al-Kareem, 1981) page 96. This concept is also repeated in other verses, for example, Women, (Al-Nisa) [4:24].
[15] Yousef Alqardawi, 'Maqasid Al-shariʿa Almutaealiqa Bi-Almal' [2008] European Council for Fatwa and Research, 18th Session of the Council, July, page 75.
[16] ibid 76.
[17] The Islamic law is triggered on the idea that everything is Halal unless evidence indicates the prohibition. See, Tareq Moqbel 'The UK Islamic Finance Taxation Framework and the Substance v Form Debate in Islamic Finance' [2015] Legal Ethics, 18:1, 84. Also see, Muhammad al-Zuhaili, *Alqawaeid Alfqhiat Watatbiquha fi Almadhahib Alarba* (Damascus: Dar al-Fikr, 2006) Part 1, page 190.
[18] AlSabouni (n 14) page 399.

towards Allah.'[19] However, a primary question that must be examined is whether inside dealing benefits or harms the community. The majority of fatwas prohibits insider dealing on economic, moral and logical grounds (Chapters 5 and 6). The economic argument stands on the idea that the counterparty in the transaction is harmed because of the unequal footing of the parties to the transaction (Chapter 5), while the moral view is based on the fairness argument, which is also based on the just price argument and supports the economic argument (Chapter 6). The author cannot but find himself convinced that insider dealing should be prohibited based on the arguments mentioned in the previous chapters.[20] It seems that the fatwas which allowed insider dealing took a simplistic approach through an ostensible reading of the scriptural text without looking into the deep principles and goals of the religion (MS).[21] This oversimplification could be due to the complexity of the conduct and a lack of expertise in the financial field among some committees of Muftis, which are usually specialized in religious studies rather than the economic and financial disciplines. This illustrates the importance of having interdisciplinary committees in Ifta institutions.[22] The fatwas which are examined in this section refer to the idea of respecting human-made laws. Referring to the regulation and positive law is an Islamic approach that is based on a notion known as legitimate policy. The next section examined this concept.

7.3 The Legitimate Policy Fatwas on Insider Dealing

Eight fatwas from six jurisdictions refer to the positive laws for combating insider dealing in Islamic countries. These fatwas give priority to the legislative function of the state to regulate the matter over religious principles. Upon closer examination of the fatwas, they appear

[19] Ibn Qudama, Rawdatul Nazir page 85. Cited from Mohd. Masum Billah 'A Model of Life Insurance in the Contemporary Islamic Economy.' [1997] Arab Law Quarterly 12, no. 3: 287-306.
[20]See, economic argument in Chapter five. While the moral argument is in Chapter six.
[21]See Chapter Two, section 2.4.
[22]See Chapter 3, s 3.5.

to agree that positive laws must be respected as long as they do not contradict with Islamic rules *(Ifta-01, Ifta-02, Ifta-04, Ifta-05).* Also, some fatwas pointed out that the purpose of the law is to achieve the community interest, which is compulsory under the legitimate policy (*Siyasah al-Shar'iyah*) (*Ifta-03 and Ifta-06*). This view is expressed in the fatwas as follows:

> This prohibition has been supported by the legal status that must be complied with and obeyed. When the legislator enacted such legislation, it is part of the legitimate policy to achieve the interests of the people and to protect them against any harm.[23]
>
> If the legislation governing the operation of the stock market prevents access to insider information, in order to ensure equal opportunities among dealers and to preserve the rights of shareholders in companies, it is not permissible to violate this legislation, such legislation falls under the domain of the legitimate policy, which gives the legislator the power to restrict some permissible matters to the citizens, if there is any benefit that requires that, and it is known that the Governor acts for the citizens for their benefit.[24]
>
> If such information is confidential and not allowed to be exposed according to laws or customs, and [it is] effective in selling and purchasing, then it is not allowed to be exposed, or exploited.[25]
>
> It is not forbidden by itself, unless it is forbidden by the law of the country. It is a crime punishable by law in many countries.[26]
>
> [I]t is not allowed to breach the law as long as he undertakes to abide by the laws of the country as it is required to obtain the visa, and if it is in an Islamic country, then His Eminence Sayyed does not permit any breach or violation.[27]

[23] Ifta-06.
[24] Ifta-03.
[25] Ifta-01.
[26] Ifta-10.
[27] Ifta-02.

> This is determined by the laws and regulations in this concern, and in cases where it is against laws and regulations, then the exploitation of this information is not allowed, and in cases where it is not against laws and regulations to exploit this information, then it is permitted'.[28]
>
> [I]f the exploitation of inside information includes the violation of a law that has been issued in order to organize people's matters, then this action is completely forbidden because we abide by laws of the region where we live as this law organizes the life of people in different aspects, provided that these laws do not contradict with holy Islamic Sharia.[29]

7.4 Analysing the Correlation of the Fatwas

A key aspect of the fatwas is that they consider positive laws as tools that organise the interests of the community. Such recognition is a feature that is recognized under the concept of legitimate policy (LP). Thus, it is necessary here to clarify exactly what is meant by LP. LP refers to the reform and management of the parishioner's interests.[30] It could be positive law which is legislated to achieve community's interests.[31] LP refers to the man-made laws which can be changed over time.[32] Through LP, Islam allows the laws to be reformed in favour of the better good as per the discretionary powers of the ruler.[33] LP aims to provide regulations that benefit the people and combat corruption, even if the Quran and Hadith did not reveal such laws

[28] Ifta-05.
[29] Ifta-04.
[30]Ibn al-Azraq, *Badayie Alsulik Fi Tabayie Almalik*, (Ali Al-Nashar (ed) Iraq: Iraqi Ministry of Information, 1978) vol 1, page 32. Also, Sulaiman al-Bajirmi, *Altajrid Linafe Aleabid* (Beirut: Dar al-Fikr, 1950) vol 2, p. 172. Also, Abu-Albqa, *Alkuliyaat* (Adnan Darwish and Muhammad Al-Masri (eds) Damascus: Ministry of Culture, 1974) vol 3, page 31.
[31] Zein al-Din ibn Muhammad (Ibn Najim al-Hanafi), *Albahr Alrrayiq Sharah Kanz Aldaqayiq* (Beirut: 2nd edn, Dar al-Kitab al-Islami, 1997) vol 5, page 76.
[32] Ahmed al-Tai, *Almuazanat Bayn Almasalih, Dirasatan Tatbiqia Fi Alsiyasa Alshareia* (Jordan: Dar Nafaes Press, 2007) page 193.
[33] ibid 197.

directly.[34] One problem with LP is the question of who will decide what is best for the community. LP referred such authority to the ruler and authorised him to evaluate what serves the community's interest.[35] That is why many authors refer to LP as the Sultan's provisions.[36] Since the Islamic religion provides specific laws, including many principles and guidelines, there could be a gap in the regulation, especially in relation to contemporary issues. LP is designed to be a tool to contribute to civil policy by giving the ruler the right to control, regulate and impose sanctions on violators.[37] LP permits the very concept of law considering that it is 'made for the sake of human beings'.[38]

Ibn Abidin[39] states that LP is used for discipline[40] which means in many instances, it is related to penalty.[41] This implies that LP could be used by Islamic countries as a discipline that regulates social and economic policies and practices. It is seen as a legislative tool that organises the community from above, through the ruler's practical wisdom.[42] But can the legislation conflict with the Islamic rules? Imam al-Shafi'i stated that LP must be consistent with Islamic

[34] Ibn Qayyim al-Jawziyya, *Iielam Al-Muaqiein* (Dar al-Kuttab al-Alami, 1991) vol 4, page 372.
[35] Muhammad Ibn Abidin, *Al-Mihtar ala al-Dur al-Mukhtar* (Beirut: 2nd edn, Dar al-Fikr, 1992) vol 4, page 15. Also, Abu Jaafar al-Tabari, *Tarikh al-Rusul Walmuluk* (Muhammad Ibrahim (ed), Egypt: Dar Al Ma'arif, 1967) Part 5, page 68.
[36] Abu al-Hasan al-Mawardi, *Al-ahkam Alsultania* (Ahmed Gad (ed) Cairo: Dar al-Hadith, 2006). Also, Muhammad Abu-Yaali, *al-Ahkam al-Sultaniat lil-Fira* (Muhammad al-Faqi (ed) Lebanon: 2nd edn, Dar al-Kitab al-Alami, 2000).
[37] Mahmoud Abdel Moneim, *Maejam Almustalahat Wal'alfaz Alfaqhia* (Cairo: Dar Al Fadila Publishing, 1998) vol. 2, page 307.
[38] John Finnis, *'The Priority of Persons' in Oxford Essays in Jurisprudence* (J. Horder (ed.), Oxford: Oxford University Press, (Fourth Series) 2000) 1.
[39] Muḥammad Amin Abidin, (1784-1842) in Damascus, studied Shafi'i and Ḥanafi laws. One of the most noted authors of his time. His best-known work is a commentary on the Radd al-Muhtar. See, Ed. 'Ibn ʿĀbidīn'. In Encyclopaedia of Islam, 2nd Ed, P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, P.J. Bearman (eds) (Volumes X, XI, XII), Accessed May 25, 2019.
[40] Muhammad Ibn Abidin, *Almihtar Ala Aldur Al-Mukhtar* (Beirut: Dar al-Fikr, 2nd edn, 1992) Part 4, page 15.
[41] *Encyclopaedia of Islamic Jurisprudence* (Kuwait: Ministry of Awqaf and Islamic Affairs, Dar Al Safwa Printing Press, 1992) vol 25, page 296. Also, Ibn Najim (n 10) 77. Also, Abi Hafs al-Hanafi, *al-Gharat al-Manfiat Fi Tahqiq Masayil al-Iimam Abi-Hanifa* (Muhammad al-Kuthari (ed), Beirut: 2nd edn, Library of Imam Abu Hanifa, 1988) vol 1, page 171.
[42] Tash Zadeh, *MIftah al-Saeada* (Beirut: al-Kutub al-Eilmiat, 1985) vol 1, page 665.

law, and it must not violate the Quran or Sunnah.[43] Ibn Taymiyyah provided a prominent example of LP from Quranic verses,[44] stressing the point that some applications of the law can be based on an understanding of the purposes and wisdom underpinning the law rather than its literal, parochial meaning.[45] The concept of legitimate policy stems from the idea that the ruler can implement laws that are based on his wisdom and understanding of what is in the best interest of society, even if such laws are at odds with common logic.[46] For instance, in the time of the companions, the third Caliph, Othman Ibn Affan, ordered to keep one version of the Quran, and burnt all the other versions. This act is viewed as falling under the scope of LP.[47]

LP provides the rulers of Islamic countries with the religious legitimacy to issue positive laws. It is a form of *ijtihad*, not from Islamic jurists, but the political authority (the ruler).[48] Also, when the opinions of Islamic scholars differ on a matter, then the issue shall be adjudicated by the ruler who will decide which of the opinions he thinks is best to adopt and apply.[49] Also, LP can provide regulations to prevent possible corruption or harm to society through preventive measures known as '*Sad Althare'e'*.[50] Overall, the LP mechanism provides a flexible tool for rulers and Islamic countries to adopt positive laws, which is an advantage that may have a

[43] Ibn al-Qayyim al-Jawziyya, *Bdayie al-Fawa'ed* (Hisham Atta (ed), Makkah: Nizar Mustafa al-Baz Publishing, 1996) vol 3, page 673.
[44] The Quran, the Cave (Al-Kahf) [18:60-80].
[45] Ahmad Ibn Taymiyyah, *Majmue Fatawa* (Saudi Arabia: Ministry of Islamic Affairs, King Fahd Holy Quran Publishing, 2004) vol 14, page 475.
[46] Abi Bakr al-Arabi, *Ahkam al-Quran,* (3rd edn, Beirut: Dar al-Kuttab al-Alami, 2004) vol 2, page 597. Interpreting the Quran, the Prophets (Al-Anbiya) [21:78-79].
[47] Ibn Taymiyyah (n 24) vol 28, page 110.
[48] Hadith number 7352, Mohammed al-Bukhari, *Saheeh al-Bukhari* (Muhammad al-Nasser (ed) Dar Taq al-Najat, 2001) page 3233. Also, Abu al-Abbas al-Qarafi, *Anwar al-Buruq fi Anwa al-Furuq*, (Beirut: Alam al-Kitab 2010) vol 2, page 104.
[49] Salem Alsanafi, *The Impact of Legitimate policy on Contemporary Islamic Economic Development* (Cairo University Press, 2012). Also see, Women (Al-Nisa) [4:59].
[50] Ahmed Mowafy, *Damage in Islamic Jurisprudence* (Dar Ibn Affan Publishing and Distribution 1997) 496. Also, Al-Qarafi (n 27) 32.

positive impact on the economy and still control the markets within the Islamic framework.[51] As the fatwas which refer to LP are from six jurisdictions, the next section presents a critical analysis of the insider dealing laws of each country in turn.

7.5 Evaluating Insider Dealing Laws in Six Islamic Countries

7.5.1 The State of Kuwait

The law in the State of Kuwait prohibited insider dealing initially in 1969 through the Kuwait Commercial Companies Law No. 15 of 1960. The prohibition of insider dealing was limited to the members of the board of directors who were prohibited from benefiting from inside information obtained by the virtue of their positions. The law also prohibited the benefit of others.[52] Thereafter 'Law No. 7/2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities' focused further on combating insider dealing.[53] It states that the Kuwaiti Capital Markets Authority aimed to achieve fairness, transparency and efficiency in the market for the purpose of growing the capital market and developing investment instruments in accordance with best international practices. The law states that the overall goal is to enhance the protection of investors and decrease the systemic risks arising from securities activities. Article 3(5) of the law states that one of the main objectives is to prevent insider dealing,[54] viewing the conduct as an unfair practice resulting from the leakage and exploitation of inside information.[55] The law defines insiders as 'any person' who 'by virtue of his position' has information on a 'listed company'. The definition of inside information is given at the

[51] Issa Baroni, *al-Raqabat fi Eahd al-Rasul wal-Khulafa alRrashidin* (Libya: Jameiat al-Daewa al-Islamia al-Ealamia, 1986) page 11.
[52]See, Article 140 of the Kuwait Commercial Companies Law no. 15 of 1960 and its amendment by Legislative Decree No. 52 dated 15/06/1999). The law was deleted, and a new company law was legislated law no. 1/2016.
[53] There were several amendments, on the law such as: Law no. 108/2014 and Law no. 22/2015.
[54] See, article 3 of law no. 7/2010.
[55] See the Explanatory Memorandum of law no. 7/2010.

beginning of the law, stating that inside information is any information that is not disclosed to the public and, if announced, would affect the price of the security.[56]

The definition seems to place particular focus on combating insider dealing against classical insiders such as directors and executive management, seeing them as the main perpetrators of such conduct, which is a traditional approach.[57] However, the law still combats other insiders by referring to 'any person' as per article 118. A main issue with the law is that it defines insiders as persons who have information that is related to a 'listed company', even though the information may be influential but unrelated to the company. This means that if the insider used information that is not directly related to the company, then dealing in such information may be outside the scope of the prohibition. For example, information that is related to a governmental project that is not linked to the company but is established near its site, such as a main railway route, would increase the value of the shares. Thus, the definition of 'insiders' and 'information' should be reconsidered to eliminate the narrow scope of the conduct. Otherwise, a primary defence that could be used to escape liability for insider dealing is that the information is irrelevant to the company itself.

Another example of using such defence to escape liability would be when the insider uses information related to a new law that may benefit a certain industry, such as a new medical insurance policy, that would allow retired people to benefit from private sector medical care. Such laws may increase the price of the listed companies in the medical industry, and a member of parliament might buy stocks in these companies and escape criminal sanctions since he is benefiting from information that is not related to a certain company but rather to a new law.

[56] See, Article 1 of law no. 7/2010. Note that article one was amended several times, to improve and extent of combating insider dealing. See, law no. 22/2015.
[57] See, Article 103 of law no. 7/2010 which is amended pursuant to law no. 22/2015.

Therefore, the law should redefine insiders to include all sorts of insiders who benefit from undisclosed material information that accrues directly and indirectly from any non-public information that is precise in nature on any financial instruments. This step is important to enhance market confidence and achieve a just price, as was discussed in relation to the Islamic moral standpoint of insider dealing (Chapter 6).

A point worth noting is that the Kuwaiti law gave serious consideration to fighting the conduct by viewing it as a major criminal offence (felony) and imposing a punishment of up to five years in prison.[58] However, the law limits the conduct to sale or purchase, whereas it is best to include every type of trader to cover all sorts of deals in all their forms.[59]

7.5.2 The United Arab Emirates

In the United Arab Emirates, Federal Law no. 4/2000 Concerning the Securities and Commodities Authority and Market regulates insider dealing. The law delegated to the administrative authority, 'the UAE Securities and Commodities Authority (SCA)', to issue further regulations. Insider dealing is prohibited under articles 37 and 39. The law prohibits exploitation of price-sensitive non-public information as per article 37, which states that such conduct shall render the transaction null and void. Article 39 prohibits insider dealing when the information is known by virtue of the insider's position (career). The second paragraph of article 39 prohibits insider dealing by the employees of a company, the chairman and members of the board of directors. It seems that the law again takes classical approach toward insider dealing by focusing on the narrow circle of insiders, ignoring outsiders such as hackers and governmental persons who might have price-sensitive information about governmental projects that may

[58] See, Articles 118 and 119 in law no. 22/2015. Also see, the Explanatory Memorandum of articles 118-119.
[59] ibid.

benefit some listed companies indirectly. Again, the law should take a broader position by including (any person) and prohibiting the use of any price-sensitive information. It also should classify the conduct as a major crime (felony) as per Kuwaiti law to enhance market integrity, since the UAE law considers the conduct as a misdemeanour as per article 41.

7.5.3 The Hashemite Kingdom of Jordan

In the Hashemite Kingdom of Jordan, the law prohibits insider dealing through law No. 18/2017.[60] Article 8(a) of that law states that the authority shall protect investors and regulate the capital market with the aim of achieving justice, transparency and efficiency. The law also prohibits the use of inside information for any sort of gain, without specifying an amount, further to prohibiting the disclosure of inside information.[61] Article 2 defines inside information as any non-public information that may impact the price of any security in case of disclosure. The article excludes the decisions that are based on financial analysis studies. It defines essential information as any information that affects the person's decision to buy, retain, sell, or dispose of any security. The law defines insiders as any person who benefits from inside information because of his position and career. The fine imposed on insider dealers can be up to one hundred thousand Jordanian Dinars, plus double the amount of profit or avoided loss, further to a prison sentence of up to three years.[62] It seems that the law narrows down the concept of insiders by linking them to certain positions or careers, which is a classical approach. It is better to keep the definition of an insider linked to the fact of knowing inside information regardless of their

[60] Securities Law number 18 of the year 2017 publish in the official Gazette number 3362 on 5/4/2017.
[61] Jordan Securities Law number 18/2017 Article 105 (e) and (f).
[62] Securities Law number 18 of the year 2017 Article 107 (a).

position or career, so as to include any outsiders that may know inside information.[63] Since the tangible problem is knowing and using inside information, only knowing the information by virtue of having a certain career could increase liability and responsibility for violation of other duties such as the fiduciary duty or professional confidentiality duty in case of an insider lawyer or accountant. However, the law should first tackle the problem on a behavioural level, by considering insiders as any person who knows and uses inside information or reveals inside information to others.

7.5.4 The Arab Republic of Egypt

In Egypt, the law prohibits insider dealing through the Capital Market Law No. 95/1992, which was recently amended by Law No. 17/2018.[64] Article 64 prohibits benefiting from 'confidential' information.[65] The use of the term *confidential information* rather than *inside information* would cause confusion, since the two terms reflect different concepts. Confidentiality involves more of an obligation or process of keeping information and documents secret.[66] This means it is a right of the counterparty on the concerned party who has information to withhold it. Such a concept usually relates to the medical information and legal documents that are possessed by doctors and attorneys,[67] who have a strong and longstanding obligation to

[63] Still, this is the author's subjective opinion. A study of cases in the six countries about insider dealing by non-company employees is suggested. And due to the relatively new legislation and lack of availability of such cases the author could not implement such practical analysis.
[64] Published in the Official Gazette no. 10 on 14 March 2018, Law No. 17 of 2018 amending certain provisions of the Capital Market Law promulgated by Law No. 95 of 1992.
[65] See article 64 of Egyptian Capital Market law number 95/1992 which was amended by law number 123/2008 and recently by law number 17/2018.
[66]"confidentiality." In *Concise Medical Dictionary* (Oxford University Press, 2010). Cited from Oxford Reference. https://www.oxfordreference.com/view/10.1093/acref/9780199557141.001.0001/acref-9780199557141-e-11268 Accessed 31/5/2019.
[67]*A Dictionary of Public Health*, (Last, John M (ed), Oxford University Press, 2007). Cited from Oxford Reference. https://www.oxfordreference.com/view/10.1093/acref/9780195160901.001.0001/acref-9780195160901-e-875 Accessed 31/5/2019 Also see, "confidentiality." In *A Dictionary of Dentistry* (Ireland, Robert (ed) Oxford University Press, 2010) Cited from Oxford

not reveal the client's or patient's entrusted private information to others.[68] Inside information differs from confidential information as it is price-sensitive, non-public information that would be likely to have a material effect on the price of certain securities if it were known.[69] Therefore, the law should be amended to use the correct term, 'inside information', and eliminate the current overlapping and confusing meaning.

Moreover, Egyptian law authorizes the assembly of rules to organize the markets' activities through executive regulations. The executive regulation prohibits the use of inside information in the first and second chapters in articles 316 to 324. The regulation recognizes insider dealing through such delegation. Article 318(2) prohibits insider dealing by any person while article 219 defines essential information as any information that has a material impact on the securities price or has an impact on investment decisions in financial markets. Inside information is defined as material information which is not yet disclosed and is linked to the works of a listed company or its other associated entities. One disadvantage of the law that can be observed in the previous examples is that it connects the component of information to the company or its associated entities, whereas the information could be price-sensitive but related to something else that would affect the company's share price, as previously discussed. Article 219(d) defines insiders as any person who has acquired inside information through any means.

Reference.https://www.oxfordreference.com/view/10.1093/acref/9780199533015.001.0001/acref-9780199533015-e-962 Accessed 31/5/2019.

[68] *A Dictionary of Law*, (Law, Jonathan, and Elizabeth A. Martin (eds) Oxford University Press, 2014 online version) Cited from Oxford Reference. https://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-4419 Accessed 31/5/2019

[69] See, "inside information." In *Australian Law Dictionary* (Trischa Mann (ed) Oxford University Press, 2017). https://www.oxfordreference.com/view/10.1093/acref/9780190304737.001.0001/acref-9780190304737-e-2003. Accessed 31/5/2019. Also, *New Oxford American Dictionary* (Angus Stevenson, Christine Lindberg (eds) Oxford University Press, 2010). https://www.oxfordreference.com/view/10.1093/acref/9780195392883.001.0001/m_en_us1258321 Accessed 31/5/2019. Also, *The Canadian Oxford Dictionary*, (Katherine Barber (ed) Oxford University Press, 2004) https://www.oxfordreference.com/view/10.1093/acref/9780195418163.001.0001/m_en_ca0035110 Accessed 31/5/2019. Also see, *A Dictionary of Finance and Banking* (Jonathan Law (ed) Oxford University Press, Kindle Edition) location 18924.

The article of executive regulation then refers to article 64 of the Capital Market Law No. 17/2018, which originally did not mention the concept of inside information.

7.5.5 The State of Palestine

Palestine recognises insider dealing through the Securities Law No. 12/2004.[70] The law stipulates that one of the functions of the Capital Market Authority is to regulate, supervise and control securities trading activities and protect investors and the public from unfair practices and fraud. The law delegates regulatory powers to the authority to establish rules and practices that ensure the proper operation and control of the market and to take into account the ethics of the profession which is approved and valid in accordance with the instructions issued by the commission. Article 2 defines insider information as any non-public information about a company or its securities. The article also defines insiders as any person who has access to inside information by virtue of his position, career, or relationship, directly or indirectly, with the holder of the information. Again, this excludes outsiders and third parties such as hackers. The law reflects an imaginary picture in which there are insiders and outsiders with a chain (link) between them, whereas in reality insiders could be entirely unrelated and there could be no link between them and the company or its members and employees. Chapter IX of the law[71] prohibits the conduct of insider dealing, fraud and deception. Article 87 prohibits all direct and indirect acts of deception and fraud, including concealing and misrepresenting any essential information.[72] The article does not use the term 'inside information' but rather 'essential information', which reflects an economic focus on materiality and price sensitivity. Overall, the

[70] The Palestinian Securities Law number (12) of 2004 was issued on 5/10/2004 in the official Gazette.
[71] The Palestinian Securities Law number (12) of 2004.
[72] The regulation of the securities trading was approved in meeting no. (20) on 18/12/2006 (Resolution No. 4/20).

law seems to treat the use of inside information as an act of fraud, similar to the approach taken in the United States.[73]

7.5.6 The Republic of Iraq

Iraqi law prohibits insider dealing in accordance with the Securities Market Law No. 74/2004.[74] Article 4 of the law specifies that the stock market aims to provide a transparent, honest, and fair platform that enhances investor confidence in the market. The law delegates some regulatory powers to the Capital Market Authority to better regulate the market and to issue regulations that combat market abuse. However, it does not mention insider dealing.[75] The authority issued a regulation titled 'Instructions No. 16/2015'[76] prohibiting insider dealing in a limited manner and defining basic terms such as "insiders", "inside information" and "essential information". Insiders are defined as any persons who have access to inside information by virtue of their position, work, property or their relationships directly or indirectly.[77] The regulation points out that insiders may be members of the board of directors, their advisors, managers, commissioner, CFO, internal and external auditors and any other person that obtains inside information, which illustrates that the regulator is focused more on the inner and middle circles of insiders, ignoring the outsiders.[78] This is clearly evident in Article 2, which specifies an obligation on listed companies to provide lists of the insiders on a specific basis (e.g. on a yearly

[73] The United States of America Securities Exchange Act of 1934, sections 20A-21A and rule numbers 10b5 and 10b5-2 which considers insider trading as a type of fraud.
[74]The law was issued by the Coalition Authority (Governor of Iraq Paul Bremer) on 19/4/2004 in the Iraqi Official Gazette Issue No. 3983 published on 1/6/2004. Note that, the previous law is the Baghdad Stock Exchange Law no. 24 of 1991.
[75]The law established an Iraqi Interim Securities and Stock Exchange Authority to regulate the market. This law is a temporary law, and there is a draft on a new securities law which is not yet adopted. See, the Iraqi Stock Market website, http://www.isx-iq.net/isxportal/files/ISX0072-0121-0001-032608%20Securities%20Law%20Arabic%20only%20version%20clean109_8_2_4_46_4.pdf accessed 1/6/2019.
[76]Regulation number 16/2015 is the latest instructions related to insider dealing as per an email from 'Iraq Stock Exchange' isx-iq.net to author (02 June 2019).
[77] See, article one of the regulation number 16/2015.
[78]See, Chapter Five, for more explanation.

basis, and within 15 days of any changes that may occurs, linking the prohibition of insider dealing). This limits the scope of the prohibition through a statute of limitations; moreover, the prohibition is governed by specific periods such as before the publication of the quarterly financial statements and where there is important information.[79] This shows that the law has a crucial drawback due to its failure to combat the conduct properly, because of the temporary prohibition of the conduct in specific periods and the limitation of only combating those persons who are in the insider list. Moreover, article 4 prohibits tipping or leaking inside information before it is officially disclosed,[80] while article 8 refers to the applicability of the penalties that are stipulated in the law.[81] Overall, it seems that Iraqi law is most concerned with the obligations of the company's directors, employees, and professionals and other affiliated persons, as the prohibition of insider dealing is prohibited only in specific means, which is consistent with a traditional approach towards the inner circle of insiders. The law does not specify whether the conduct is criminal, nor does it offer a general prohibition, which is a main weakness.

7.6 Synthesis

Table 7.1 presents a comparison between the six countries in terms of how they regulate insider dealing and whether they consider the main Islamic perspective towards the topic. It highlights the key differences and similarities between their legal frameworks with a link to the evidence gathered from the fatwas. It appears that insider dealing laws in these six Islamic states have been exposed to the legal transplants of positive laws from foreign jurisdictions which cause adverse effects on the decency of their application.[82] They have been influenced by the

[79] Article three of the 'Instructions Number (16)'.
[80]Again, this regulation seems to illustrate how insider dealing is understood by regulators as a conduct that is related to the company's member, employees etc. ignoring all the possibilities of outsiders.
[81] See, the securities market law no. 74/2004, Section 12 subsection 15 Paragraph (B) and section 15.
[82] For instance, Kuwaiti law number 7/2010 refers to the adaptation of the best international practices.

legal positivist approach, which has manifested a negative effect on the consideration of insider dealing laws. This is evidenced by several facets: (a) they do not consider the ethical argument against insider dealing; (b) their focus is on the legal formality (insiders) rather than prohibiting the conduct itself and combating whoever commits it; and (c) they are focused narrowly on 'insider information' rather than considering prohibiting the use of any 'non-public information' that has price-sensitive implications (outside information).

Countries	Islamic morals	Amanah	Concept of Dharar(Materiality)	Lack of Definition	Covering Outside information	Felony	Focus on the behaviour
Kuwait	×	×	×	√	×	√	×
UAE	×	×	×	√	×	×	×
Jordan	×	×	×	√	√	×	×
Egypt	×	×	×	×	×	×	×
Palastine	×	×	√	√	×	×	×
Iraq	×	×	×	√	×	×	×

Table 7-1 Comparison table of the six countries insider dealing regulations.

Overall, the effect of this orientation towards legal positivism can be seen not only in the movement away from cultivating an ethical framework, but also in the absence of reference to Islamic economic and moral values such as (1) the general applicability of the principle of trust (*amanah*), (2) the concept of the just price (*Thaman Al-Mithl*) (Chapters 4 and 6) or (3) the general concept of avoiding harm (*Dharar*) (Chapter 5, section 5.3). This position has its own drawbacks, as studies reveal that Muslims tend to be more influenced by religious norms in

Islamic countries than in other countries.[83] This result was expected as Islamic countries tend to copy modern corporate and commercial laws, as stated previously (Chapter 3, section 3.6). One important detail that can be observed from the table is that only one country considers insider dealing to be a felony, while the rest consider it to be either a minor crime (misdemeanour) or merely a violation of the law. Taking a more robust regulatory approach which views insider dealing as a major crime is advised. This approach should be adopted in conjunction with injecting Islamic values into laws to avoid the disorder in the behaviours because of the paradoxical double standards of the understanding of law in Islamic countries.

IET suggests a more focused approach towards combating the conduct than focusing exclusively on fighting the wrongdoer (the performer of conduct) (Chapters 5 and 6). This is primarily to escape the weaknesses of the legal formality and focus more on the morality of the law. The Islamic rules emphasize developing social merits through operational and informational efficiency (Chapter 4, sections 4.6 and 4.7).[84] Many of the crucial moral foundations related to combating insider dealing such as honesty[85] and truthfulness (*Amanah*) (Chapter 6, section 6.4) are stated in the Quranic verses[86] The Prophet stated that an honest and trustworthy trader commands a high level of respect and would be accompanied by the prophets.[87] He also stated

[83]See, level of religiosity in Kuwait is 86.5%, in Iraq is 84.7%, in Egypt 94.1%, in Palestine 87.5%. In Jordan 93.3%. While in the US the level of religiosity is only 40.4%. See, the World Values Survey (2010–2014), WV6_Results Kuwait 2014_v20180912. Page 2. And WV6_Results Iraq 2013_v20180912 page 3.WV6_Results Egypt 2012_v20180912 page 3. WV6_Results Palestine 2013_v20180912, page 3. WV6_Results Jordan 2014_v20180912 page 3. Also, WV6_Results Technical record Study, United States 2011_v20180912 page 3. http://www.worldvaluessurvey.org/WVSDocumentationWV6.jsp Accessed 1/5/2019.

[84] Taj el din, S. e.-d, 'The stock-exchange from an Islamic perspective' [1996] Journal of King Abdulaziz University: Islamic Economics 8, 29.

[85] The Quran, Repentance (Al-Tawba) [9:119]. See, AlSabouni (n 14) page 518. Also, The Joint Forces (Al-Ahzab) [33:8-23-33]. The Cow [2:177]. The Feast (Al-Maida) [5:119]. The Poets (Al-Shuara) [26:84].

[86] See, The Earthquake (Al-Zalzala) [99:7-8]. The Joint Forces (Al-Ahzab) [33:52]. The Cow (al-Baqara) [2:283]. The Women [4:58]. Battle Gains (Al-Anfal) [8:27]. The Believers (Al-Muminun) [23:8-11]. The Story (Al-Qasas) [28:26]. The Ways of Ascent (Al-Maarij) [70:32].

[87]Hadith number 1209 Sunan al-Tarmathi 3/515. Cited from AlSabouni (n 14) page 216.

that honest trading is based on the autonomy of choice, which leads to prosperity.[88] Furthermore, the Hadith states that there is no faith for those who cannot be trusted.[89] By this, the conduct of insider dealing should be combated in a broader sense regardless of the legal constraints that are on the perpetrators and the source of the information. Such an approach should be considered in the law with the aim of injecting it with Islamic values. Having a better understanding of the reasons for the rules may lead to greater compliance by investors.

7.7 Conclusion

The purpose of this chapter was to examine the positive laws which were referred to by the Ifta institutions in six Islamic countries. The most important finding was that they adopted a positive law while regulating insider dealing without consideration to the Islamic point of view. Their laws focused particularly on combating insider dealing against classical insiders taking the traditional approach, with a special emphasis on the protection of information that is directly related to the company, thereby excluding in many cases price-sensitive information related to outside sources such as the parliament or a third project that would affect the value of the shares. This led to a narrowing of the prohibition of the conduct to a very limited scope, which is a predicted drawback of the legal positivism.

The explored laws did not refer to the religious moral framework, nor to the Qur'anic and Hadith values. This approach conflicts with the fact that Muslims consider Islamic rules to be the primary source of regulation and that they are obliged to submit to these rules from a legal and moral point of view. Efficiency in the Islamic financial market could be better developed through the enforcement of Islamic rules and values, especially the Islamic moral foundations of financial

[88] Hadith number 1973 Sahih Bukhari 2/732. Hadith number 1532 Sahih Muslim 3/1164. Cited from AlSabouni (n 14) page 240.
[89] Misnah Ahmad 3/135. Hadith number 2863 Misnad Abu yaila Al-mosli 5/246. Also, Hadith number 194 Sahih Ibn Haban 1/422.

conduct. Even though insider trading is relatively new to the Islamic world and LP allows the adaptation of state laws, nevertheless Islamic jurisprudence should have a role in shaping such positive laws by injecting them with Islamic morals.

Overall, an interesting finding of the previous chapters (4 to 7) is the variety of Islamic Ifta positions towards insider dealing. Some fatwas adopted moral and economical justifications for combatting insider dealing, while other fatwas adopted the legitimate policy by referring to positive laws. Regarding those fatwas which saw insider dealing as permissible conduct, different opinions raise the question of why such a difference exists in Islam? This is the focus of discussion in the next chapter.

Chapter 8 : The Rationalisations Behind the Different IET Positions on Insider Dealing

8.1 Introduction

This chapter critically analyses the main reasons behind the different Islamic opinions (fatwas) on insider dealing which have been discussed in Chapters 5-7. It focuses on answering the fourth sub-question: Why does the approach to insider dealing differ within IET? The findings that emerged from the obtained fatwas indicate that IET can tackle financial topics (specifically insider dealing) on the basis of different frameworks such as economic, moral and legitimate policy. Also, interestingly, the positions vary between the different Ifta institutions even though they function under the same paradigm (Islamic thought). It was noted that the variations between the Ifta institutions are so different that one sees insider dealing as a permissible practice (Chapter 7, section 7.2) while other institutions prohibit the conduct for several economic and moral reasons (Chapters 5 and 6). Additionally, a third position adopted by some Ifta institutions leaves the Islamic position on insider dealing to state law without considering the ethical values embedded in the religion (Chapter 7). Such variety in the IET approach to tackling the same topic (insider dealing) necessitates exploration of the reasons behind the divergent positions within Islam.

The current chapter demonstrates that there are two main reasons behind the different Ifta positions towards insider dealing. The first is related to the availability of various Islamic schools (*Madhhabs*), which causes dissimilarity (*ikhtilaf*) in Ifta opinions. The chapter argues that *Madhhabs* have been deeply rooted in the Islamic tradition historically, and they have extended to the modern days and affected the Ifta institutions. The second reason is related to the diligence tool (*ijtihad)* that is instituted within the Ifta institutions. The *Ijtihad* device led to the creation of

distinct views from Muftis because of the inherited cognitive capacities that are centred on the changing contexts (locations, time and circumstances). To address such differences (*ikhtilaf*), Islamic jurisprudence created a weighting method (*tarjih*) to select from the distinct opinions.

It could be argued that the Islamic schools of thought (*Madhhabs*) and reasoning (*ijtihad*) are intertwined notions; thus, why they are separated during the course of the discussion? Three reasons led to such distinction between the two notions. First, although rationale is the main element in both concepts, the rationality in the *Madhhabs* are bonded with divine law and reasoning must be within the boundaries of Islamic religious identity. In contrast, reasoning is an action of logical thinking which is not necessarily bonded with religious thought. Second, the author took a historical approach when discussing the establishment of *Madhhabs* and their institutional development, pointing to their connection with the obtained fatwas; thus, such distinction was necessary for academic clarification purposes. The section concluded that the ifta institutions' adaptation to certain *Madhhabs* built a probable relationship between the fatwas position and the ifta-accommodated jurisprudence. However, the separation between *Madhhabs* and *ijtihad* is not indicative of Islamic thought nor is considered an Islamic way of doing research. Rather, it is considered as an intellectual examination conducted to enlighten the discussion. Third, when exploring logical reasoning, the chapter switched the focus form the ifta *Madhhabs* to the notion of rationalistic jurisprudence and the role rationalists (*Ahl Al-Ray*) and the traditionalists (*Ahl-Alhadith*) in the development of the Islamic legal theory (*usul al-fiqh*) and the contribution of the Islamic philosophers in the development of the thought and how Islamic scholars were widely accepting the Aristotelian approach of observation and experience. Hence, the implementation of such a distinction was seen as important.

Consequently, this chapter is divided into five sections. The first section is introductory. The second section explains the dynamics of religious doctrines (*Madhhabs*) and their historical development. The third section explores how *ijtihad* and reasoning are fundamental justifications for the differences in the Islamic positions toward insider dealing. Next, the fourth section explores the method of weighting the different opinions (*Tarjih*). The last section concludes the chapter with a final comment on the reasons behind the different opinions within IET and introduces the concluding chapter.

8.2 The Islamic schools of jurisprudence (*Madhhabs*)

This section describes how the Ifta institutions were influenced by the Islamic schools of thoughts (*Madhhabs*), which led to the various positions on insider dealing. This influence is not a recent phenomenon but rather it has a long historical existence in the Islamic world. The availability of the *Madhhabs* is seen as a probable justification for the diverse outcomes of the fatwas on insider dealing. This section is important because it answers the primary question that drove this thesis, which is why the positions on insider dealing varied even though they come from the same vessel of thought (IET). It argues that the adoption of a certain school of thought by some Ifta institutions or the adoption of a certain sect in providing legal opinions (fatwas) played a probable role in producing the variety of views toward insider dealing. It also indicates that the dynamic way in which an Ifta institution works is not accidental but is related to historical events that shaped the Islamic tradition in such a creative way that led to a different understanding of contemporary issues by the institutions. Thus, the first question which drives the section is how does one determine what school or schools of Islamic thought have been adopted by an Ifta institution when issuing a fatwa?

The dialectical relationship between the fatwas and the *Madhhabs* could confirm the adopted school through procedural phrases that are used, such as 'This is what is agreed upon in the School'.[1] However, when the contents of the obtained fatwas on insider dealing were examined, it was observed that they did not specify which school of thought each fatwa was based upon. This may be due to the traditional approach in writing the fatwas, which is in brief and short.[2] For example, some of the obtained fatwas were comprised of only one sentence.[3] Therefore, the school of thought adopted by the Ifta institution could not be determined through the fatwa itself. Yet, since the Sunni jurisprudential tradition has been settled by the four main schools of jurisprudence (Shafi'i, Hanafi, Maliki, and Hanbali) one cannot but assume that each Ifta institution in Sunni Islamic countries would adopt one of these schools as a starting point when providing fatwas to the Mustaftis. By the same token, the countries that are based on the Shi'a sect such as Iraq and Iran are likely to adopt the *Jaafari* school.

When we dig deeper into the process of the Ifta institutions that issued the obtained fatwas, interesting outcomes appear. Even though the state adopts certain schools of thought, the Ifta institution may adopt a different school or several schools of thought. For example, although the Kingdom of Saudi Arabia adheres to the Hanbali school of thought as the official school in the state, the Ifta institution declared that its fatwa to the author is independent and does not adhere to a certain doctrine and does not follow a particular school, but rather chooses what the Mufti sees as the best answer from the four Sunni schools.[4] The Ifta institution in Kuwait adopts

[1] Department of Ifta State of Kuwait, Four Doctrines of Jurisprudence (Ahmad al-Kurdi and others eds, Department of Ifta 2015) page 270.
[2] See, fatwa number gCT49Q5U3qA by Sayyid Ali Hosseini Khamenei leader office, dated 7/12/2018 the Islamic Republic of Iran. Also, Ibrahim Ibn Farhoun, *TabsiratAlhukkam fi UsulAlaqdiatWamanahijAlahkam* (Cairo: Library of Al Azhar colleges, 1986) part I page 56.
[3] For instance, Ifta-01. Also see, chapter three, section, 3.5.3.
[4] Fatwa of the Standing Committee for Scientific Research and Issuing Fatwas 5/7 The second issue, fatwa number 9580. Also, Abdul Rahman Al-Jabreen, *Manhaj Alfatwaa* (Journal of the Saudi Jurisprudence Association, 2015) Issue 29 page 30.

the same approach, as the country adopts the Maliki school[5] but the Ifta institution appointed several Muftis from the four Sunni schools, and their legal opinions would be within their school of thought.[6]

Moreover, the fatwa obtained from Dar Al-Iftaa Al-Missriyyah in the Arab Republic of Egypt stated that the method of the fatwa is not only based exclusively on the four main Islamic Sunni schools but also on other schools. The Ifta institution indicated that it recognises the other sects and schools such as the *Jaafari* (*Shi'a*), Zaidiyyah and Ibadi, and they have Muftis from these schools.[7] Its approach is more open to the other schools of thought. However, there are other Ifta institutions which are less open to the other schools of jurisprudence. For example, the Ifta institution in the Hashemite Kingdom of Jordan takes a narrower position in its process of Ifta by directing the Muftis to abide by the Shafi'i school of thought.[8] The United Arab Emirates Ifta institution also has a narrow approach as it focuses on the Maliki school of thought (*Madhhab*) as the official school of thought of the state.[9] The analysis of the process followed by the Ifta institutions undertaken here has illustrated that it is heavily influenced by the jurisprudence of the main orthodox madhhabs (Shafi'i, Hanafi, Maliki, and Hanbali) in Sunni countries.[10] By contrast, the fatwas from the Ifta institutions in the Shi'a countries (the Republic

[5] See, the Sharia provisions issued from the ruler of Kuwait Sheikh Abdullah Al-Salem Al-Sabah on April 5 1951. The law was issued based on a request submitted by the Sharia Court to His Excellency the President of the Courts on 10/3/1951, letter no. 118 which specified that it follows the doctrine of Imam Malik school of thought concerning awqaf issues.

[6] *MajmueaAlfatawi Al-Shareia* (Kuwait: Ministry of Awqaf and Islamic Affairs, 1996)vol 1, page 39.

[7] See, the method of Ifta in Dar al-Iftaa Al-Missriyyah, article published in their website on 25th July 2011, accessed 18/6/2019 http://www.dar-alIfta.org/ar/ViewFatawaConcept.aspx?Sec=fatwa&ID=64.

[8] Email from 'Jordan General Iftaa Department' alIftaa.jo to author (16 June 2019). Also see, Fatwa no. 695 from Dar Ifta of the Hashemite Kingdom of Jordan Issued by the former Grand Mufti Dr. Noah Ali Salman on the subject of the differences of fatwas on 10-05-2010.

[9] See, the method of Ifta in General Authority of Islamic Affairs and Endowments in the United Arab Emirates, Official Fatwa Centre, as per an article published in their official website on 27 February 2018, accessed 18/6/2019 https://www.awqaf.gov.ae/en/officialfatwacenter.

[10] John Makdisi, Legal Logic and Equity in Islamic Law, [1985] The American Journal of Comparative Law, Volume 33, Issue 1, Winter 1985, pages 63.

of Iraq and the Islamic Republic of Iran) are more influenced by the Shi'a sect (*Jafari*) school of thought.[11]

However, when the content (text) of the obtained fatwas was examined, it was observed that the language of the fatwas was written in a straightforward manner. The fatwas were oriented towards a certain goal, which is to guide the author (*mustafti*) to an answer to his specific question. This means that the purpose was not to initiate an intellectual platform for discussing the scholarly views of the schools. The fatwas were written as a set of facts rather than opinions which immediately exclude all the other views. For instance, one fatwa pointed out that insider dealing is allowed (permissible)[12] which means it excluded all the other probable views that prohibited the conduct on economic and moral grounds.[13] Religious language can be problematic because 'Once something is said to be true, alternatives are ruled out'.[14] Does this mean that the language of the fatwa language should be written in a way that is less certain?

When the scriptural text is analysed, it is observed that the Prophet assumed that the Muftis could provide erroneous opinions, stating that the differences between the Muftis in their fatwas are expected and allowed and they would still be rewarded by God for their efforts.[15] This means that the process of Ifta should be dealt with carefully by trying to justify the reasoning of the fatwas' position to avoid the confusion arising from the reality of availability of different fatwas from the diverse jurisprudential schools. Some of the obtained fatwas took such an approach, indicating that their opinion could be incorrect by stating so at the end of their fatwas:

[11] For example, Ifta-02. Ifta-04, and Ifta-a3. The fatwas are from 'Grand Ayatollahs' (ayatallah al-'uzma, 'Supreme Signs of God') Sistani, Khamenei and Bashir Al Najafi. The term 'Ayatollah' is a title used for the most learned Shi'i scholars. See, Morgan Clarke, "Becoming an Ayatollah," *Islam and Law in Lebanon: Sharia within and without the State* (Cambridge University Press 2018) page 250.
[12] Ifta-05.
[13] As per Ifta-07, Ifta-09, and Ifta-10.
[14] Roger Trigg, *Religious Diversity* (Cambridge University Press 2014) page 42.
[15] Hadith number 7352 in: Mohammed al-Bukhari, *Saheeh al-Bukhari* (Muhammad al-Nasser (ed) Dar Taq al-Najat, 2001) page 3234.

'and God knows better'.[16] Their method not only shows that *Madhhabs* have different views on the sub-issues ('furu') but also encourages keeping a record of the various views of each unique *Madhhab*. The differences in the opinions (*ikhtilaf*) are very rich arguments that grew out of this complex mechanism (as seen in Chapters 5-7). If jurists invest the data of the *Madhhabs*, they could contribute to the jurisprudence in a liberal education environment in Islamic societies. The Mufti's analytic works (the collection of fatwas) are fruitful products that would contribute to IET.[17]

The schools (*Madhhab*) share the same passion towards seeking knowledge (*Elm*).[18] They are voluntary in nature, and scholars tend to turn up and help explain Islamic law over the course of Islamic history.[19] The term *Madhhab* has several meanings, all of which are interrelated, but it is best defined as a school of legal thought.[20] There are different schools within the Islamic religious body. The Islamic schools adopted by Ifta institutions are not random but well established throughout the historical development of Islamic jurisprudence. The Islamic schools were established between 632, the year the Prophet passed away, and 875, the year when all the five founders of Sunni and Shi'a Islamic schools of jurisprudence deceased during the classical period.[21] Muhammad Ibn Idris al-Shafi'i (d. 820) had the most fundamental

[16]For instance, Ifta-01, Ifta-03, Ifta-04, Ifta-05, Ifta-06, Ifta-07, and Ifta-10.
[17] Calder N and Gleave R, "The Social Function of Fatwas" in Colin Imber (ed), *Islamic Jurisprudence in the Classical Era* (Cambridge University Press 2010) page 167.
[18] Makdisi (n 10) 63.
[19] Bernard Weiss, *The Islamic School of Law: Evolution, Devolution, and Progress*, (Peri Bearman, Rudolph Peters and Frank Vogel eds, Harvard Law School, Cambridge: Harvard University Press, 2005), chapter 1.
[20] Such as Hanafi, Hanbali, Shafi'i, Maliki Schools of Thought, and Jafari. See, Juynboll GHA, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadith*, (Cambridge University Press 1983) 197-8. Also, for the definition of Madhhab see, *The Oxford Dictionary of Islam* (Esposito, J. (Ed.), Oxford University Press 2003) page 183.
[21] L. Ali Khan, Hisham Ramadan, "Classical Era of Ijtihad, 632–875," *Contemporary Ijtihad: Limits and Controversies* (Edinburgh University Press 2011) page 14.

role in the early development of Islamic law.[22] Joseph Schacht demonstrated Shafi'is notable success in articulating Islamic legal theory, in his book, *Al-Risala*.[23] By the ninth century, the schools of thought were consolidated into systematised religious movements.[24] Shortly after the middle of the tenth century, the legal schools settled and became a highly developed body of knowledge that includes legal studies that organise the social and economic environments of the jurists.[25] Thereafter, in the tenth century, the phenomenon of personal affiliation to the Islamic schools began to grow and developed remarkably in the eleventh century. Many disciples of the Imams of the schools began spreading the doctrines to their communities, such as Ibn Sarig of the Shafi'i doctrines.[26] The famous jurisprudential views of the schools were further elevated in the late 12th century.[27]

The process of developing the *Madhhabs* was inherently lengthy.[28] After the four schools were established, there appears to have been some temptation among other scholars to provide their own ideas outside the orthodoxy of the main schools; however, this was strongly resisted by the scholars from these schools.[29]

It is worth noting that Islamic schools were not shaped by the founder jurists such as Imam Shafi'i for the Shafi'i school, as historical sources indicate that the starting point of the schools were built heavily by the previous knowledge[30] and the schools came as intellectual institutional developments that not only filled the gap in Islamic knowledge but also built a

[22] Wael B. Hallaq, 'Was Al-Shafi'i the Master Architect of Islamic Jurisprudence?' [1993] 25 International Journal of Middle East Studies, Cambridge University Press, 587.
[23] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford University Press, 1967) 12.
[24] Ira M. Lapidus, 'State and Religion in Islamic Societies, Past & Present' [1996] Volume 151, Issue 1, page 11.
[25]Wael Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) page 46.
[26]Hallaq (n 22) 595.
[27] Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Almnar Al-Islamiedn tr, Cambridge University Press 2001) page 107.
[28] Christopher Melchert, *Formation of the Sunni Schools* (Brill, 1997) page 87.
[29]Hallaq (n 25) 104.
[30] ibid 58.

systematic structure and framework of religious thought.[31] Different Islamic schools originated divergent legal opinions on various topics. Legal opinions of early authorities used to be compared according to the topic, which is a process known as (*Ikhtilaf*).[32] This *Ikhtilaf* is clearly evidenced by the ten fatwas that were obtained. The disagreement among jurists was based on the fact that each legal school of thought had its own boundaries set by the Imam of the *madhhab*. However, the conflicting opinions do not threaten the madhhab's existence; rather, jurists tend to incorporate the differences as legal treatises[33] and engage in specific interpretive approaches[34] that are intended to select the best solution to the problems at hand.[35] For example, in *'Almawte'* for Imam Malik, his views comprised no more than 39% of the content of the book, while the remaining 61% referred to previous views.[36] The process of choosing the best opinion in the eyes of the jurist after weighing all the other opinions is known as *Tarjih,* which means evaluating the views.[37] The greater the number of opinions that agree on a certain point of view (position), the greater the weight of importance the opinion enjoys (section 8.4).[38]

The Imams and master jurists developed the legal thought through the process of *ijtihad* which helped to produce a compendium of law made up of citations from earlier *fiqh*.[39] The orthodox age of *ijtihad* persisted for about two hundred fifty years (632–875), which was seen as a historical jurisprudential dynamic and diverse era of the Islamic law that was seen as evidence

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[31] Wael B. Hallaq, 'From fatwas to furuʿ: Growth and change in Islamic substantive law' [1994] Islamic Law and Society, I;I: page 39.
[32]Ikhtilaf al-Fiqh. Esposito (n 20) 134.
[33] For instance, Imam Malik in his book Almawte', pointed out the views of the earlier jurists like Muhhamad Bin Ajlan and others. See, Shams al-Din ibn Farhoun, *AldiybajAlmadhhab Fi MaerifatAeyanEulamaAlmadhhab* (Beirut: Dar al-Kotob al-Elmia, 1996) 80.
[34] Weiss (n 19) chapter 9.
[35] Omar Ibn Maza, *SharahAdabAlqadi*, (Afghan Abualwafa ed, Beirut: Dar al- Kotob al-Elmia, 1994) 20.
[36]Hallaq (n 25) 69.
[37] ibid 187.
[38] Muhammad al-Hattab, *MuahibAljalil fi SharahMukhtasirAlshaykh Khalil* (Mohammad Al-Shanqiti ed, Dar Radwan, 2010) Vol IV, page 68. Therefore, since most of the fatwas were against insider dealing for several justifications, thus the opinion in the concluding chapter would be to stand against such conduct.
[39] On Ijtihad see Chapter Three.

of the claim that Islamic law is applicable during all times and places.[40] When we have a specific legal opinion from an Islamic school on an issue such as insider dealing, then one would find that each issue (*Masala*) has a reason (*Ela*).[41] If this issue is repeated in a similar way, the same solution applies. If the issue arises again in a different form, but the justifications for the juristic position are the same, then the legal opinion and its reasons will be applied.[42] Such opinions are moral constructs that reflect the rich variety of human experience.

The diligent Muftis (*mujtahids*) in the Islamic schools imitate previous scholars (*Muqallids*).[43] The act of imitation (*taqlid*) appeared as a phenomenon during the rise and establishment of the Islamic Schools as a notable institutional thought. *Taqlid* led to the idea of the acceptance of the doctrinal rules of a certain Islamic school.[44] There are several types of taqlid, one of which can be merely by copying the rule. It also can be through an analogy, or through the creative engine of learning from previous lessons. The process of imitation (*taqlid*) can lead to new rules that are developed from the previous ones.[45] However, the obtained fatwas were not based on imitation as there were no previous questions concerning insider dealing, thus the Ifta institutions used ijtihad to provide an answer to the research question (Ifta-01 to Ifta-10).

Another point worthy of scholarly attention is that there is a long relationship between the *Madhhabs* and the states. Many states referred to a certain school of thought. This relationship can be traced back in history to the Abbasid Caliphs and later of the sixteenth century at the time of the Ottoman Empire (sultans), when the role of the Hanafi school of thought was primary and their school was considered to be the official law school of the ruling reign, and the school's

[40] Khan (n 21) 14.
[41] Badr al-Baali, *MukhtasirAlfatawaaalmasria Li Ibn-Taymiyyah* (Abdel Majid Selim ed, Beirut: Dar al – KuttabAleilmia, 1949).
[42] Sulaiman al-Tufi, *SharahMukhtasir al-Rawda* (MoasasatAlrisala, 1987) vol III, page 638.
[43] See, Chapter Three, section 3.5.1.
[44] Hallaq (n 25) 138.
[45] ibid 159.

views were applied in the judicial system as the primary source of law.[46] Such relations between Islamic schools and states have continued for generations to the present day. Muslims still rely on *Madhhabs* and fatwas, which are usually written based on one of the schools of thought on matters related to the different aspects of life.[47]

Historically, scholars (*ulama*) and Islamic *ethos* (religious scholars) engaged in an intense struggle with the caliphates and the representatives of the rulers.[48] The political arena was separated from Islamic intellectual insights. The scholars were too busy developing Islamic jurisprudence (*fiqh*). The jurists followed different local normative traditions, plus diverse interpretative approaches to understanding the scriptural texts, which led to several schools producing different Islamic laws within the religion, which changed over time and places.[49] This led to the appearance of an interesting institutional development in the Islamic religion[50] (schools of thoughts), which to date is a significant feature of the Shariʿa law.[51]

So how did these different schools affect the obtained fatwas? Each school of thought has a conceptual juristic boundary of reasoning.[52] For instance, the meaning of misappropriation differs between the Hanafi, which sees it as a seizure of property, and the Hanbali, which considers it as a recovery of damages, generating important differences in tackling the issue as per the lens of each school.[53] The Shi'a 'Jafari'[54] school of thought (sect) has a dissimilar

[46] Weiss (n 19) page 87.
[47] Department of Ifta State of Kuwait, *Four Doctrines of Jurisprudence* (Ahmad al-Kurdi and others eds, Department of Ifta, 2015) page vi.
[48]Lapidus (n 24) 11.
[49]Joseph Schacht , *An Introduction to Islamic Law* (Oxford : Clarendon, 1964), chapter 9. Also, Noel Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), chapters 6 and 8. Also, Salaymeh (n 6) 22.
[50] George Makdisi, 'The Significance of the Sunni Schools of Law in Islamic Religious History' [1979] 10 International Journal of Middle East Studies 1.
[51] Hallaq (n 25) 45.
[52] Islamic juristic reasoning is informed and directed by maqasid. See, Tareq Moqbel 'The Moral Interpretation of Law: Comparative Remarks on Dworkin's Legal Principles and Islamic Law's Maqāṣid' [2017] Legal Ethics, 20:2, 279.
[53]Hallaq (n 25) 45.

political argument regarding who should succeed the Prophet. They are called a sect due to their rejection of a large number of Sunni Hadiths.[55] This is reflected in the fact that the fatwas by the Muftis' consider the distinct sources of references (*hadiths*) while presenting their legal opinion (fatwas).[56] Also, the *fiqh* represent prolix collections of traditions, and the legal opinions of the master jurists were still within the primary ideological basis (Islamic religion) but the legal theory was developed differently through the fatwa.[57] The Mufti looks at the so-called jurisprudence of Shariʿa realism (*Fiqh Alwaqe*), looking at new and difficult issues to find solutions derived from the principles of Shariʿa, while the judge applies those solutions to the issues after a hearing and after exploring the evidence.[58]

Going back to the main argument of this section, there might be a probable conclusion that the differences between the fatwas on insider dealing are based on the different schools of thought adopted by Ifta institutions. Yet, there is no absolute indication that the fatwas were influenced by a certain school of thought, as there is no evidence of specific materials or books of the *Madhhabs* in the answers of the fatwas. The only justification could be the reference by the Ifta institution that it follows a certain Islamic school of thought. This means that the reality of the availability of different schools leads to a probability that the positions presented in the fatwas toward insider dealing will differ. The schools could disagree on some issues based on their different jurisprudential points of view because of dissimilar interpretations of the scriptural texts or even because of different positions of the confirmation of some hadiths, especially

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[54] The Jafari school is named after the Sixth Imam Jafaar Al-Sadiq in which the sayings of Imam Ali Ibn Abi-Taleb and the other 11 Imams are considered a sort of Hadith and feature prominently alongside those of the Prophet's Hadith. See, Malise Ruthven, *Islam* (2ndedn, Oxford University Press, 2012) page 87.
[55] GHA (n 20) 197-8.
[56] Ifta-02 and Ifta-04.
[57] Baker PW and Edge ID, "Islamic Legal Literature" in MJL Young, JD Latham and RB Serjeant (eds), *Religion, Learning and Science in the Abbasid Period* (Cambridge University Press, 1990) 139.
[58] Shihab al-Din Quraafi, *Aliihkam fi TamyizAlfatawaa an AlahkamWatasarufatAlqadiWalimam* (Izzat al-Attar (ed) Alanwar Press, 1967) 30.

between the Sunni and Shi'a sects. Furthermore, jurists may have a different understanding of the mustafti's questions as each Mufti lives in a different location and is surrounded by a dissimilar environment with unalike customs. However, they all share the same fundamentals (pillars of Islam).

Mufti's experience different traditions and realities compared to their peers; for example, the Muftis in Saudi Arabia would have a different mindset than those in Egypt or Iran. This religious pluralism does not exist only in Islamic tradition, but is also considered in human life.[59] It is the mind that explains the adoption of particular divine law in diverse social dynamics.[60] The heart of Madhhab's opinion in Islamic jurisprudence and divine law making could be related to the role of rationality in the process of *ijtihad*. In the next section, *ijtihad* is explored as a key reason for the variety of fatwas and opinions.

8.3 *Ijtihad* and rationality

Islamic scholars tend to address modern challenges through the notion of *ijtihad*.[61] Through *ijtihad*, Muslims adopt a general framework for legal inquiry that involves a cyclical pattern of examining primary Islamic sources along with reason and other forms of evidence. Islamic law and jurisprudence (*fiqh*) were developed through specialists who acknowledged the differences between schools of Islamic law. *Fiqh* is seen as knowledge of the Islamic rules relating to human action that have been extracted from scriptural sources.[62] But what role does rationality have in?

[59] Rowe, William, 'Religious Pluralism' [1999] 35 Religious Studies 139.
[60] Omar Farahat, "The Persistence of Natural Law in Islamic Jurisprudence," *The Foundation of Norms in Islamic Jurisprudence and Theology* (Cambridge University Press, 2019) page 199.
[61] Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2008) 79-80.
[62] Wahbahaz-Zuhayli, *Al-Fiqh al-Islami wa-Adillatuhu* (3rdedn, Lebanon: Dar al-Fikr, 1989) 16–18.

Islamic Rationalists argue that scriptural texts should be interpreted in light of contemporary knowledge through rationality.[63] By rationality, it is meant that scholars have a tendency to consider reason as one of the principal devices for dealing with some contemporary and theological matters.[64] Humans have the ability to engage in theoretical and practical reasoning because of their virtues of rational capacity and emotional intelligence.[65] Several Islamic philosophers consider experience to be a source of knowledge, and reason as a source of learning and benefiting. The Aristotelian approach which advocates the idea of knowing on the basis of empirical observation and experience is widely accepted by Islamic jurists such as al-Kindi, al-Farabi, and ibn Ṭufayl.[66]

Experience and rationality can lead each person to a different conclusion that is based on his own understanding of the scriptural text. When a scholar does not find a clear solution to the question at hand, he begins to extract a rule from the Islamic principles and values (*Ifta-06*, *Ifta-08*, *Ifta-10*), and this is how Islamic jurisprudence (*Fiqh*) on insider dealing develops. Moreover, that is the reason why fatwas on the same issue usually differ between Muftis. Variation between Muftis' opinions is expected not only because of the Muftis' different rationales and understanding of the context but also because of their distinct surroundings, customs, and era on which the ruling is based upon.[67]

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[63] Hunt Janin and Andre Kahlmeyer, *Islamic Law: The Shariʿa from Muhammad's Time to the Present* (North Carolina, and London: McFarland & Company, Inc., Publishers: Jefferson, 2007) 19.

[64]Binyamin Abrahamov, *Islamic Theology: Traditionalism and Rationalism* (Edinburgh: Edinburgh University Press, 1998) ix.

[65] Erik Baldwin, 'Why Islamic Traditionalists and Rationalists Both Ought to Accept Rational Objectivism' [2017] 53 Religious Studies 475.

[66] Baldwin (n 65) 474. Also see, Ali Alwasiti, *Euyun Alhukm Walmawaeth* (Hussein Albir Aljundi ed, Dar Alhadith, 1956) part 1, 27.

[67] See a fatwa on the acceptance of the different Mufti opinion which is seen as a healthy practice. Fatwa no. 695 from Dar Ifta of the Hashemite Kingdom of Jordan Issued by the former Grand Mufti Dr. Noah Ali Salman on the subject of the differences of fatwas on 10-05-2010.

Shariʿa texts are not a clear one nor absolute; in fact, they are evidence of the religion in a broader sense. That is another reason why jurists understand or interpret the texts differently,[68] in ways which may clash with each other, as in the case of their position on insider dealing, which some jurists allowed (*Ifta-1*, *Ifta-02*, *Ifta-05*) and others prohibited (*Ifta-03*, *Ifta-04*, *Ifta-06* - *Ifta-10*).[69] This does not indicate that the conflict arises from the scriptural text, as the main fundamentals are clear;[70] rather, it arises from the scholar's imagination, logic and understanding. When scholars refer to the scriptural text, they are not referring to God's words but to their understanding of what is read.

It is the wisdom of God that required the unevenness of creation in the minds, which lead to disparities in the understanding, and the difference in the provisions, over the ages.[71] The wisdom of having dissimilar mindsets could be related to the continual need to extend the law to new and changing conditions and times. This is where the rationalist legal tools are essential to adapt to the changes necessitated by situations which are not regulated in the theological sources.[72] Human minds are allowed to renew the laws in accordance with the need for development.[73] Scholars with theological rhetoric adorned the sky of science by their dissimilar thoughts and mindsets. Their differences could be so broad like the diverse planets in the

[68] Muhammad al-Zarkshi, *Albahr Almuhit fi Usul Al-Faqih* (Muhammad Tamer ed, Lebanon: Dar al-Kuttab al-Alami, 2000), part 4, page 406.
[69] Also see, Ali Ibn Sayida, *Almahkim Walmahit Al-Aezam* (Abdel Hamid Hindawi ed, Beirut: Dar al-Kuttab al-Ulami, 2000) part 18, page 419.
[70] Ibrahim al-Shatby, *Almuafaqat* (1st edn, Abu Obeida al-Salman ed, Saudi Arabia: Dar Ibn Affan, 1997) part 5, p 59.
[71] Safwan Reza, 'Asbab Alaikhtilaf alfiqhi' [2014] Islamic Academic Quest Journal, no. 23, page 1.
[72] Jonathan Ercanbrack, "The Sharia: Sources, Legal Theory and Unofficial Sources of Law," *The Transformation of Islamic Law in Global Financial Markets* (Cambridge University Press 2015) 36.
[73] Ministry of Awqaf and Islamic Affairs, *MajmueaAlfatawi Al-Shareia* (Kuwait: Ministry of Awqaf and Islamic Affairs, 2000) vol V, page 6. Also see for more information about the role of rationality and reasoning as flexible tools in developing Islamic law. Yusuf Al-Qaradawi, *El-Awamil Alsa wal-Murona Fi Alshriah al-Islamia*, (1st edn, Dar Al-Sahwa Publishing, 1985).

universe.[74] But how can they be so different when they all have the same genes and use a similar organ (brains)?

The Islamic scholars who resort to logical reasoning in understanding the scriptural texts are called (*Ahl Al-Kalaam and Ahl Al-Ray).*[75] The notion of rationalistic jurisprudence is a perception of legal problems managed by practical rational considerations.[76] The genesis of Islamic legal theory (*usul al-fiqh*) can be traced back to the time of the conflict between the rationalists (*Ahl-Alray*) and the traditionalists (*Ahl-Alhadith*).[77] The Hanbali school was seen as traditionalist and too rigid and firm, whereas the rationalism of the Mu'tazilite school[78] rationalists[79] were too liberal.[80] In contrast, the Zahiri school, remained in its own literalist mindset repudiated to use rationale in the legal thought which led to the end of their school because of their strict method and textualism that let to unanswered legal problems.[81] The scriptural sources lack the availability of answers to Zahiri's issues.[82]

Historically, Islamic jurisprudence has been thought of as a key factor in the development of IET. Until the eighth century, Muslim traditionalists had the upper hand, but by the end of the ninth century, an equilibrium position of using reason and referring to scriptural texts was

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[74] Ali Al-Sabki, *Al-iibhaj fi Sharah Almunhaj* (United Arab Emirates: Government of Dubai, House of Research and Islamic Studies and Heritage Revival, 2004) part 2, 294.
[75] Ahmed Ibn Hanbal, *The Foundation of The Sunnah*, (The Vista ed, Salafi Publication, 2007) page 174.
[76] Wael Hallaq, *The Origin and Evolution of Islamic Law*, (Cambridge University Press, 2005) 74.
[77] ibid 122.
[78]In Baghdad, in 814 the Caliph al-Mamun established his rule, on the Mu'tazilite school of thought as the official law. Which is why many leading scholars like Shafi's left for Egypt. It is worth mentioning that al-Shafi'i is a figure in the development of legal schools. He synthesis between ahl al-hadith approach with ahl al-ray approach which helped in fulfilling the need for a general framework that enabled Islamic legal jurists to remain faithful to primary sources and to use reason and rationale as a tool that contributes to the legal field and accepts the diversity of the different legal opinions. See, Ramadan (n 61) 44.
[79]Mu'tazilites were called rationalists by Shafi'is. They contributed to the Iraqi laws. See, Schacht (n 49) 255.
[80]ibid 125.
[81]ibid 127.
[82] Which is unlike the Ashari textualism that did not refuse the rationale, but they preferred looking into the text as a start point, then proceed with rationale in understanding the meaning and purposes of the text. See, Felicitas Opwis, 'Maslaha in Contemporary Legal theory' [2005] Brill, vol 12 Islamic Law and Society, page 190.

reached. This mixed approach contributed to the development of Islamic legal theory.[83] Thereafter, many Islamic philosophers and Sunni rationalists such as Abu Hamid Al-Ghazali (1058-1111) contributed to legal theory through their original thinking and their adaptation of Aristotelian logic, introducing philosophy into theology.[84] Likewise, the Shi'a school supported the rationalistic approach[85] by introducing the concept of mind (*Aql*) as a logical system that developed Islamic law (*Usul*) through reason and logic.[86] How, then, do Muftis use logic and reason to develop Islamic rules (*ahkam*)?

The first step for Islamic scholars when exploring the solution to any contemporary issue is to consider the notion of public interest (*Maslahah*) and Shariʿa goals (*Maqasid Al-shariʿa)* (MS). The term (*Maslahah)* interest is sometimes equated with (*istislah),*[87] which in legal terms means a source of something good and beneficial.[88] Islamic scholars gave great attention to the general interest (*maslahah*) of the Muslim community when they practiced rationalising (*ijtihad*), which is a cumbersome rulemaking process.[89]

Islamic scholars tend to benefit from the significant concept of MS (the aims of Islam) to provide guidance and rules.[90] This is evident in several fatwas (e.g. *Ifta-02*, *Ifta-03*, *Ifta-06*). They give remarkable consideration to the protection of human life, property, money, mind,

[83] Except the case of Shafi'i school. ibid 148.
[84] Al-Ghazali was Sufi and a member of the Ashari Sunni school. The Hanbali school of law were against his approach for promoting philosophy to the theology. See, Janin (n 63) 66.
[85] What us more is that they used reason as a tool in matters of revelation. See, ibid 75.
[86]Chibli Mallat, *The Renewal of Islamic Law* (Cambridge University Press 1993) page 29.
[87] The scholars tend to refer to maslahah, sad al-dharei (blocking the means) and istihsan to regulate the issues in accordance to what they feel is best to the party's interests and the community interest.
[88] Felicitas Opwis, 'Islamic Law and Legal Change: the Concept of Maslaha in Classical and Contemporary Islamic Legal theory' in Abbas Amanat and Frank Grifel (eds.), *Shari'a: Islamic Law in the Contemporary Context* (Stanford University Press, 2007) page 62.
[89] Ercanbrack (n 72) 35.
[90] Sami Zubaida, "Contemporary Trends in Muslim Legal Thought and Ideology" in Robert W Hefner (ed), *The New Cambridge History of Islam* (Cambridge University Press, 2010) vol 6, 281.

religion and the offspring of believers.[91] This means that their opinion should be compatible with MS. The philosophy of IET and the great importance it places on the aims of Shariʿa when developing laws to guide humans underlines the flexibility of Islam.[92] It seems that there is a connection between the two concepts, *maslahah* and MS, since the main purpose of Islam is to benefit humanity and safeguard its interests.[93] That is why leading jurists such as Al-Shatby[94] divided MS into two segments, one being the purpose of Allah and the other the individuals for whom these provisions are intended; this is why scholars often refer to (*Masaleh Mursala),*[95] which is through inferring the interests.[96] Muslim scholars used MS when developing laws on financial matters to ensure justice is achieved and to prevent injustice by promoting honest trading, transparency and cooperation and preventing deceit and damage, thereby ensuring the safety of investors' funds.[97] It is worth noting that, even when scholars share the same religion, refer to the same scriptural texts, and invoke the same MS and *masaleh,* they differ in their opinions, necessitating the selection of one opinion from several.

For example, when the concept of damage was discussed in Chapter 5, it was noted that authors refer to the concept of fairness in different ways because of their distinct rational expectation of the outcome of a transaction.[98] This is to be expected because each jurist lived in a different jurisdiction and their opinions may be based on dissimilar periods. Their definitions of

[91] Wael B. Hallaq, *A history of Islamic legal theories: An introduction to Sunni usul al-fiqh* (Cambridge University Press, 1997), p. 112.
[92] Abdul Nour Baza, *Human Interests Approaches Maqasid,* (International Institute of Islamic Thought, 2008) 18. See also Omar, *Purposes of Shariʿa at Imam Ezz bin Abdul Salam* (Dar Nafaes Publishing and Distribution, 2003) 72.
[93] Ahmed Al-Risouni, *The Theory of Maqasid in Imam al-Shatby* (2nd edn, World Book House, 1996) 7.
[94] Alshatibi is a leading authority in the Maliki School. See Hisham Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira, 2006) 26.
[95] See, Chapter two, section 2.4 page 55.
[96] Ibrahim Shatibi, *AlmwafqatFy 'Asowl Al-Sharia,* (Abdullah Draz (ed), Dar al kotob al ilmiyah 2010) vol II, page 166.
[97] Abdul-Wadoud Al-Saudi, 'The Purposes of the Maqasid Shariʿa and its Application in Contemporary Islamic Transactions' [2010] International Conference on Islamic Banking and Saudi, 2010, page 3.
[98] Frank Vogel, Samuel Jayes, *Islamic Law and Finance, Religion, Risk and Return* (The Hague: Kluwer Law International, 1998) 93.

rational expectation would differ as per the customs of their time. Some assessed damage (*Dharar*) as being less than one-third of the true value of the good sold.[99] Others argued that *Dharar* could be avoided if the sale price exceeded a sixth of the true value, or half of a tenth of the actual value.[100] When faced with such a variety of opinions, all of which are based on rational within the Islamic framework, what should a Mufti do? How can he choose the most appropriate opinion? This question is explored in the next section.

8.4 Weighting the different opinions (*Tarjih*)

In the previous sections, it was observed that different opinions from Muftis are expected. In fact, variety of opinion is considered to be a feature of IET due to the various doctrinal institutions (*Madhhabs*), and the unique scholarly understandings and interpretations of the texts (rationalization). This raised the need to choose a certain opinion from two or more options. This need is recognized in Islam through a process of weighting competing views known as *Tarjih*. *Tarjih* (preponderance) is a method used to select the most likely correct opinion from the different views that are issued by the Muftis.[101] The jurist depends on how convinced he is that his choice reflects the purpose of Shariʿa (MS).[102] Through his moral autonomy, he tries to ensure that the chosen opinion reveals the benefit to society as a whole.[103] Today, such a method

[99]Imam Malik and others see, Ahmed Mowafy, *Damage in Islamic Jurisprudence* (Dar Ibn Affan Publishing and Distribution, 1997) 210.
[100] See Chapter five, section 5.5.
[101]Wael Hallaq,'Usul Al-Fiqh: Beyond Tradition' [1992] Journal of Islamic Studies, Volume 3, Issue 2, July, p 180.
[102]Michael Dann, 'Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss Edited by A. Kevin Reinhart and Robert Gleave, with an appreciation by Peter Slugfest' [2016] Journal of Islamic Studies, Volume 27, Issue 1, January, pages 65–68.
[103] Ibid.

is crucial, especially with the availability of the internet which offers Ifta institutions a way to bring their opinions in front of a worldwide audience.[104]

Ibn Rushd[105] along with other leading scholars adapted the method of benefiting from the various opinions of the diverse Islamic schools. They used *Tarjih* to select the opinion that reflects the best solution as per their understanding. Ibn Rushd developed a framework that was based on philosophical ethics by analysing the legal opinions that were passed by Islamic schools (*madahhab).* He then used logic through *ijtihad* to shed new light on the solutions to the legal challenges.[106] His methodological approach contributed to the notion of natural law in Islamic theological and legal contexts.[107] His method provides an alternative to that of the dogmatic literalists who do not find any room for philosophy and do not question the justifications for the religious laws, viewing them as accepted faith, not by reason but belief.[108]

Ibn Rushd accepted the challenge of having different opinions and the fact of having dissimilar legal interpretations. Through this, he took a step further towards the inevitable development and amendment of laws. It is worth noting that he was not the first to inject natural law into the Islamic rules, as this can be traced back to earlier traditions of the classical *fiqh.*[109]

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[104]Nadirsyah Hosen, "Online Fatwa in Indonesia: From Fatwa Shopping to Googling a Kiai" in Greg Fealy and Sally White (eds), *Expressing Islam: Religious Life and Politics in Indonesia* (ISEAS–Yusof Ishak Institute, Cambridge University Press, 2008) pp 159-173.

[105]Abu-l-Walid Muhammad Ibn Muhammad Ibn-Rushd, known as 'Averroes', was, like his ancestors. He was a leading Islamic jurist in Andalusia. Appointed as the Chief Judges. He contributed to the Islamic law through the rationale and philosophy. See, Gerhard Endress, "Averroes (Ibn Rushd)" in Graham Oppy (ed), *The History of Western Philosophy of Religion*, vol 2 (Acumen Publishing, Cambridge Core, 2009) pp 121-136.

[106] Serdar Kurnaz, 'Ibn Rushd's Legal Hermeneutics and Moral Theory for a 'living Shariʿa'- an Alternative Approach to Islamic Law in Ibn Rushd's Bidayat al-mujtahid' [2019] Oxford Journal of Law and Religion, Volume 8, Issue 1, February, pages 174–205.

[107] Karen Taliaferro, 'Ibn Rushd and Natural Law: Mediating Human and Divine Law' [2017] Journal of Islamic Studies, Volume 28, Issue 1, January 2017, Page 1.

[108] Charles Butterworth, 'Philosophy of Law in Medieval Judaism and Islam' in Fred D. Miller, Carrie-Ann Biondi (eds.), A Treatise of Legal Philosophy and General Jurisprudence, Volume 6: *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (Heidelberg: Springer Dordrecht, 2007), 219.

[109] Reading traditional materials, one could note that natural law pervades the Islamic literature. Such as al-Jaṣṣaṣ, Abd al-Jabbar, al-Razi, al-Qarafi and others considered natural reason, as directed toward human fulfilment, to be a

However, this does not mean that natural law is a separate source of law in the Islamic religion, since Islam provides the fundamentals and the general principles from which everything follows.[110] The proposition to consider natural law as a part of Islamic law is based on the belief that God created everything, including natural law.[111] This led to the consideration of natural law as an obligatory source of Islamic law, which is the unorthodox position of the Mu'tazilite school and Ibn Rushd.[112] If such an approach is adopted, then it could inject philosophy (*falsafa*) into the *ijtihad* process while discovering the Islamic position towards contemporary issues.

This approach would help improve understanding of much needed laws on the basis of MS. This can be achieved by taking a step back and discovering the nature of the issues by combining mental knowledge with the purification of the issues and wellbeing (Chapter 4).[113] Islamic scholars should refrain from taking the *fiqh* as a given fact and challenge the ideas through reason and philosophy, examining the core issues from within the MS framework. Also, some degree of scepticism can be healthy, as accepting the possibility that different opinions exist that are based on dissimilar justifications (*ikhtilaf*) ultimately helps to improve knowledge.[114]

However, referring to logical reasoning as an excuse to point out to the positive law could be problematic. This is seen in the six fatwas on insider dealing which referred to the concepts of

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source of Islamic law. See, Anver M. Emon, *Islamic Natural Law Theories* (New York: Oxford University Press, 2010).

[110] al-Farabi, Enumeration of the Sciences V.5, as quoted in, Charles Butterworth, 'Philosophy of Law in Medieval Judaism and Islam' in Fred D. Miller, Carrie-Ann Biondi (eds.), A Treatise of Legal Philosophy and General Jurisprudence, Volume 6: *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (Heidelberg: Springer Dordrecht, 2007), 220.

[111] The Quran [3:190] states: 'There truly are signs in the creation of the heavens and earth, and in the alternation of night and day, for those with understanding,'. See, *The Quran*, (M. A. S. Abdel Haleem (tr), Oxford University Press, an Oxford World's Classics, 2005) page 49.

[112] See, Karen Taliaferro, Ibn Rushd and Natural Law: Mediating Human and Divine Law, [2017] Journal of Islamic Studies, Volume 28, Issue 1, January 2017, Page 24.

[113]Seyyed Hossein Nasr, 'The meaning and concept of philosophy in Islam' in Seyyed Hossein Nasr and Oliver Leaman (eds.), *History of Islamic Philosophy,* (London: Routledge Press, 1996) Part I, page 24.

[114] Baker (n 57) 152.

legitimate policy and positive laws.[115] The Muftis assumed that the positive law is legislated to achieve the interests of the people.[116] Yet, such consideration is problematic because it fails to consider the Islamic (ethical and economic) frameworks. In other words, referring to the positive law may lead Muftis to ignore the wisdom of the Quranic verses, Sunnah, Qiyas, Ijmaa, and the opinions of the different Islamic schools (*Madhhab*) and focus exclusively on human reason and manmade law. When Muftis use *ijtihad* for extracting Islamic rules, they are expected to use their reason as an agent device of divine guidance based on their understanding of the scriptural texts and the goals of the religion. By contrast, when Muftis refer to the positive law, they are referring to law derived merely on the basis of human reason without no consideration of the divine perspective, which could be an issue in countries where the level of religiosity is high, particularly in Islamic countries where religious values are primary and the Quran is seen as a window into 'the moral universe' and a 'true system of ethics' that is heavily based 'moral knowledge'.[117]

8.5 Conclusion

This chapter has explored why the Ifta institutions approach insider dealing differently and examined the reasons behind the discrepancies in their views. It has argued that the grounds for the different positions can be traced back to historical reasons rooted in Islamic tradition. Islamic tradition shows that the content of Islamic jurisprudence is shaped by various distinct schools (*Madhhabs*) and that scholars (*ulama*) used the mechanism of *ijtihad* to develop new insights and fatwas through logical reasoning. It was also observed that the *Tarjih* method is used to weigh past, current and future opinions. IET addresses the issue of insider dealing and various

[115] Ifta-01, Ifta-02, Ifta-03, Ifta-04, Ifta-05, Ifta-06, and Ifta-10.
[116]Zein al-Din ibn Muhammad (IbnNajim al-Hanafi), *AlbahrAlrrayiqSharahKanzAldaqayiq* (2nd edn, Beirut: Dar al-Kitab al-Islami, 1997) vol 5, page 76.
[117]Kevin Reinhart, 'Islamic Law as Islamic Ethics' [1983] Journal of Religious Ethics, 11, (2), page 190.

principles of Islamic thought apply to both its economic and moral aspects. The *Tarjih* mechanism could be used to weigh the various opinions on the issue from Islamic Muftis, those that contradict each other due to the Islamic feature of difference (*ikhtilaf*).

The most obvious finding to emerge from this study is that the corpus of Islamic jurisprudence could tackle financial topics on the basis of different frameworks, such as economic, moral and legitimate policy. The relevance of human rationality to legal development is clearly supported by the current findings. However, because the fatwas varied in their guidance on how to address insider dealing, the principal theoretical implication would be that Ifta institutions should reflect a synthesis between traditionalism and rationalism. In other words, they should not to refer merely to positive law, nor rely absolutely upon religious texts but strike a balance between logical reasoning and religious materials.

The conclusion and recommendations on the topic as a whole will be discussed in the next and final chapter, which will shed new light on the topic and explain the contribution of this comprehensive investigation to our understanding of insider dealing. The next chapter aims to strengthen the argument that IET offers a different philosophical understanding of insider dealing by commenting on the strengths of the current study, acknowledging its limitations and suggesting some fruitful areas for future research.

Conclusion

The lack of research on insider dealing in Islamic Economic Thought (IET) drove this study towards having a unifying theme, which has been the search for a detailed theoretical analysis of insider dealing within IET with the aim of filling the gap in the academic sphere. This research demonstrates its objective by carrying out an investigation of the topic using fatwas from Ifta institutions along with the interpretation of Islamic economic and legal materials. The thesis explores the various opinions of the collective institutional fatwas using Islamic comparative law (Chapter 2, section 2.4.1).

Many countries focus on the integrity and transparency of their financial markets by combating corruption, such as fraud and insider dealing. Regulators claim that laws concerning insider dealing are justified on moral and economic grounds. It is claimed by the regulators that the aim of such laws is to create an efficient market that enhances investor confidence and increases market liquidity. Many states oppose insider dealing, and the vast majority of their laws impose criminal penalties when it occurs. Islamic countries are no exception. Yet, the research on insider dealing is limited by the fact that there is a shortage of studies in IET. The issue of insider dealing has not received the attention that it deserves within Islamic academic debates even though it is a serious crime that appears in the Islamic world, too.

A central conclusion of this thesis has been its answer to the primary question regarding the extent to which IET recognizes and addresses insider dealing differently. The question has not been answered straightforwardly, because the question assumes that Islam recognizes insider dealing and the hypothesis it provides are with several opinions towards it. That is why Part I of the thesis concentrated on explaining the literature and the meaning of fatwas in order to explain the structure of the Islamic sources and show how Muftis differ in their opinions regarding

contemporary issues. The second half of the thesis explored the Islamic positions on insider dealing and its components. It concludes that the Islamic understanding of the conduct is based on the needs of the parties rather than on market efficiency, as shown hereunder.

The study has been built on previous works by Wael Hallaq[1] and Tariq Ramadan,[2] which emphasise the values and moralities in Islamic law which emerge when the academic debates and philosophical battles within the field are examined. The study defends the simple claim that IET provides a solid moral and economic framework for combating insider dealing. The research also provides practical evidence that IET offers a compelling mechanism, the fatwa, through which to regulate the emerging issue of insider dealing. It demonstrates that Islamic law is a robust machine that tackles the topic to a great degree through its ethical framework. These results corroborate the findings from most of the previously mentioned works, showing that Islam is a rich source of moral construction.

The thesis pursued one primary question: To what extent does Islamic thought recognize and address insider dealing differently? The answer was reached by answering the following four sub-questions:

1. Why is the impact of IET crucial to legal development in Islamic countries?
2. To what extent does IET organise ownership, recognise corporation and investment in shares and distinguish information differently?
3. What is the IET position on insider dealing?

[1]Wael Hallaq, *Impossible State*, (Amr Othman tr, 1st edn, Arab Centre for Research and Policy Studies 2014). Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge University Press 2009). Hallaq, *The Origins and Evolution of Islamic law* (Cambridge: Cambridge University Press 2005). Hallaq,*Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001). . Hallaq, A *History of Islamic Legal Theories* (New York: Cambridge University Press, 1997). Hallaq, 'From Fatwās to Furu: Growth and Change in Islamic Substantive Law' [1994] 1(1) Brill Islamic Law and Society. Hallaq, 'Was the Gate of Ijtihad Closed?' [1984] 16 International Journal of Middle East Studies.

[2]Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2008). Tariq Ramadan,*Western Muslims and the Future of Islam* (Oxford: Oxford University Press, 2004).

4. Why does the approach to insider dealing differ within IET?

The first sub-question was essential to justify why it is important to study insider dealing through the lens of IET. It showed that IET is a crucial source of moral construction that has played a key role in the development of Islamic law through the mechanism of fatwas. The second question was critical to understand the components of insider dealing in a philosophical context by examining how Islam originally recognized ownership, artificial entities, and share transactions differently. The third sub-question was exploratory and focused on the fatwas on insider dealing. Three key features of IET were found to inform its response to insider dealing: (1) IET has a perception of economic fairness that is concerned with achieving justice through the notion of a 'just price' between the parties to the transaction; (2) IET takes a preventive position that is based on avoiding the causes of harm (*la Dharar)* to the counterparties to the transaction; (3) IET asserts the right of both parties to have equal access to information in order to avoid ignorance (*jahl*). The fourth sub-question explains the reason behind the different Islamic positions on insider dealing. These differences were found to be based on two main factors: (1) *ikhtilaf*, the qualities of difference and divergence between Islamic schools (*Madhhabs*), which is rooted in Islamic historical tradition, and (2) the creativeness of the ijtihad mechanism through which individual Muftis apply their innate intellectual capacity for reason which itself is informed by the specific contexts (circumstances) in which it developed.

The thesis began with a claim that in the West, over the past century, insider dealing laws have been weakened by a narrow definition of insiders which is focused only on fighting the diverse types of actors rather than their motivation for the act of insider dealing itself. This has led to a restriction of the prohibition to a very narrow scope of behaviours because of the formality of the legal norm of legal positivism, which has had a manifestly negative effect on the

development of insider dealing laws. The study explored insider dealing laws in Islamic countries and concluded that they suffer from the absence of Islamic moral standards arising from their adaptation of the positive Western laws. Therefore, it was suggested that the laws based on Islamic rules should be reconsidered to better influence investors through the religious norms. A policy of operational and informational efficiency would benefit the markets further as per the Islamic moral foundations of financial conduct, which is based on trusteeship (*Amanah*).

The importance and originality of this thesis is that it explores insider dealing through the lens of IET from both philosophical and practical perspectives. The thesis began by pursuing the topic through a philosophical lens in an effort to understand the conduct within the Islamic ethical tradition. It found that, in contrast with the economic approach, Islam takes an ethical approach which was arrived at by the elaboration of a philosophical and conceptual framework that is based on the notion of God's ownership. The investigation of that notion was a first step in this research towards examining the components of insider dealing (the concepts of ownership, company, shares, and the parties to the transaction) in IET. Through the concept of God's ownership, humans are provided with temporary ownership based on trusteeship. Such a view indicates a relationship that is based on trust between the parties horizontally, with an obligation of good behaviour vertically based on the agency relationship between God and humans. Through this, the sense of competition between unequal parties in the markets is changed to a sense of cooperation and transparency. The will of the parties has a primary role in this philosophical understanding of the notion of temporary human ownership, both conceptually and structurally, as the scope of rights is expanded to the right of shares and the information that surrounds them, informing the view that humans have a duty to fully disclose all price-sensitive information.

Another area of philosophical importance is the scepticism raised by the IET perspective on the company's separate legal entity and its different approach to the liability of shareholders and partners. The thesis illustrates that Islamic literature focuses less on fictional entities and artificial constructs (such as corporations) and more on human relationships and interactions. This opinion is not only based on examining the literature but also supported by some fatwas from Ifta institutions. The sceptical attitude towards artificial constructs is based primarily on the notion of God's ownership and the focus in religious sources on the responsibility of real persons rather than artificial ones. The Islamic realism of acknowledging the transactions between real persons rather than on non-natural persons suggests that the regulation should be based on satisfying the needs of individuals, rather than increasing the liquidity of the market. This scepticism towards the theory of artificial constructs is not only philosophical; it is also practical, in that it is reflected in the Islamic legal adaptation of the share transaction as a sum of multiple financial contracts that gather several rights and obligations of the parties in a complex relationship.

The originality of the thesis also can be seen from a practical perspective that is based on the IET functional position towards insider dealing. The thesis makes an original contribution to the understanding of insider dealing in several important areas by proposing that the conduct should be avoided because of the harm it does to the counterparty. In fact, it suggests that any conduct that has a harmful outcome should be avoided. This does not by any means imply that there is a conditional prohibition on insider dealing that is based on harm and therefore if there is no harm there is no prohibition, because Islam expresses critical moral concerns against insider dealing as well. Islam perceives insider dealing as an ethical failure. From this moral perspective, insider dealing is wrong because it is considered to be a form of corruption. The ethical

obligation to avoid the conduct is based on the principle of equality and the aim of achieving justice. The notion of justice is understood through the idea of the 'just price' as an important argument that contributes to the prohibition debate, and even though it is limited in its scope, this thesis has engaged it to contribute to the discussion. When the Islamic perspective is turned on the practicality of insider dealing, one notes that the concept of *Jahl* (ignorance) reflects positively on the transaction in that inside information is considered to be a primary component of the transaction. This means that the parties have an obligation to disclose information that is related to the transaction as that information is a part of the shares. In other words, information is a part of the transaction and not a separate element. Inside information is not property, but it is a key element of the share transaction. The share transaction includes not only the shares but also their surroundings, which includes any sensitive information that must be disclosed to the counterparty. Such philosophical and practical conclusions suggest further studies that will be discussed later. Here below I briefly recap how I reached these conclusions.

First Conclusion: There is a lack of scholarship on insider dealing in IET despite its crucial impact on legal development in Islamic countries through fatwas.

It can be said that Chapter 1 acknowledges that the Islamic approach towards insider dealing has remained largely unexamined, while in the West it has been investigated, evaluated and developed over the past century. An analysis of the historical timeline of the laws, precedents and theories on insider dealing in the United Kingdom and the United States was conducted for context and to provide a foundation for better understanding of the topic. The chapter indicates that the notion of insider dealing was developed because the courts were confronting cases that were not covered by existing laws. The analysis suggests a pattern of reactive development that highlights the failure of courts and legislators to devise a model that

could cover the different scenarios of insider dealing. This is indicated by the narrow definition of insiders in these insider dealing laws, whose focus was limited to combatting several types of 'insiders' rather than what stimulated their actions. This significantly restricted the focus of the ban on insider dealing because of the formality of the legal norm, which had an obvious negative effect on the progress of insider dealing laws and explains the lack of a moral dimension in these laws. The chapter went on to explain the lack of research on insider dealing within IET, with the assumption that Islam would, when examine, provide a position on it as the religion concerns itself with all aspects of human life, including the economic.

Chapter 2 described the research methodology, explaining how the research would be conducted and clarifying the theoretical framework it adopted. The research hypothesis was then explained, and the research questions presented as follows: does IET address the issue of insider dealing? If so, what general principles of Islamic thought apply to insider dealing? The chapter hypothesised that Islamic thought provides several different positions on insider dealing because there are different schools of thought within Islam and due to the nature of the *ijtihad* mechanism; therefore, the chapter identified a further aim, which is to examine the different positions on insider dealing to enrich the field of research.

The chapter noted that textual analysis of institutional fatwas is employed to counteract the weaknesses of self-opinion method used in previous IET studies on insider dealing. This method comprised structured questions posed to the Ifta institutions in eight Islamic countries, which allowed the study to evaluate various opinions through Islamic comparative jurisprudence (*Elm Al-ikhtilaf*). The chapter stressed that fatwas are an important method that are used to peruse information from Ifta institutions who have an indispensable role in the development of Islamic thought. Unlike most previous Islamic studies of insider dealing which have suffered

from the lack of a strong theoretical framework, two conceptual theoretical frameworks have been used in this study. As explained in Chapter 2, the first is based on the purpose of Islamic provisions, that is, the wisdom and goals of Islamic law known as *Maqasid Al-shariʿa* (MS). The second framework is centred on the theory of regulation through religious thought, which is to allow the religious text to be involved in the regulatory framework. In other words, the framework suggests the collaboration of positive law and religious texts when regulating.

Chapter 3 answers the fundamental question of why is the impact of IET is crucial to legal development in Islamic countries. Answering this question is an essential step to understand the role of Islamic institutions in legal development and to justify the research methodology that is based on the fatwa mechanism. The findings indicate that IET has changed, and a great revolution has transpired after more than 1400 years since Islam first appeared. Financial, economic, and social alterations have taken place. It begins an argument that the Ifta mechanism may have helped shaped the Islamic intellectual world and stopped it from falling behind in modern issues. Muslims have successfully adopted religious institutions at the different levels of their states' legal structure because they find religion to be a symbolic model of good governance.

Chapter 3 provided various examples to support the notion that Ifta institutions helped shape culture and affect Muslim behaviour in different aspects of life. It suggested that today, fatwas would help to develop Islamic thought in a way that is compatible with advancements in modern financial concepts. It also implied that ethical consideration is vital to tackle insider dealing through fatwas. Furthermore, it argued that scholars should revise their current understanding of fatwas by refraining from referring to it as a question-and-answer methodology but rather recognise it as a theological inquiry raised before Islamic authorities for guidance and

moral agency. Such an understanding supports the notion that fatwas are a valuable device for developing research and places the fatwa at the epicentre of Islamic contemporary thought.

The chapter supports the research methodology by demonstrating that Muslims create authoritative Ifta institutions to better organize and control ethico-legal opinions and to limit the divergent, interpretive views that have been frequently altered. Fatwas may differ in their opinions but can be still equally valid, leaving the *mustafti* to choose one authoritative opinion to be applied in practice. This fact can lead to a debate that could advance intellectual understanding by improving understanding of the issue and help to embed ethics into the law. The chapter implied that research benefits from the new applications of online fatwa mechanisms that further diversify the responses available, increasing the impact of the religious thought on the topic, as shown in Part II.

The chapter highlighted the fact that Muslim countries have reduced the adaptation of Islamic law and limited its scope to family and inheritance law, as well as Waqf law. It pointed to the literature which reveals that the laws in Islamic countries are frequently transplanted from Western countries during the colonial era and some throughout the contemporary periods. Hence, the chapter proposed that insider dealing laws in Islamic countries may be more influenced by positive laws than Shariʿa law (Chapter7). However, the chapter revealed that people in Islamic countries tend to place great importance on religious morals and principles. Therefore, it proposed that it is better if their financial laws are more associated with IET than positive law. Investors in Islamic countries are more likely to be influenced when they understand the moral justifications for banning insider dealing, which in return would better orient their investment behaviour ethically and thus curb the acts of encroachment on the market.

In summary, Part I of the thesis explored the literature on insider dealing laws (Chapter 1), the research questions and hypothesis, and explained the methodology and framework, further to the ethical concerns and limitations of the study (Chapter 2). Furthermore, it provided a justification for the methodological approach (Chapter 3). Part I suggests that it is necessary to involve the fatwas mechanism when regulating financial issues through a framework of cooperation between Ifta institutions and regulatory authorities in Islamic counties.

Second Conclusions: IET recognizes the components of insider dealing (ownership, company, investment of shares, information) differently through a distinct philosophical understanding that is rooted within the Islamic tradition. Notwithstanding, IET combats insider dealing through solid economic, moral, and logical reasoning. The IET position on insider dealing is diverse because of the different Islamic schools that use the *Ijtihad* mechanism.

Part II of the thesis began with Chapter 4, which concluded that IET organises investment in shares and conceptualizes information differently from the traditional Western approach. The most obvious finding from this chapter is that the Islamic view is based initially on a different philosophical understanding of the notion of ownership. This conclusion was arrived at by taking a historical and chronological approach to explore the roots of IET. The chapter also explored the Islamic philosophy of property and sought to uncover the reasons why Islamic law unfolded in the way it did. It went on to investigate the pre-Islamic period known as *Jahiliyyah* to better understand the social and economic backgrounds of Arab society. In addition to exploring Arab ideology, it examined the way trade was organized in the region. The chapter attempted to distinguish between the changes that accrued before Islam and after it appeared and how the historical economic status influenced the Islamic approach. It showed how Islam dealt with the

absence of the state system and fought unfair commercial practices and how it dealt with the gap between the socioeconomic strata.

The chapter implied that Islam introduced a new belief that is based on the perception of God's ultimate ownership. The view is underpinned by a notion that everything is from Allah and to Allah all things will return, which offers humans temporary ownership based on trusteeship. This means that Islam came with an idiosyncratic ontological view, in the sense that all property belongs to God and that people are his successors. The right of the individual to own properties is metaphorical, temporary and limited by certain restrictions and caveats. Such understanding has a philosophical facet, in which a Muslim's life is understood as a journey of travel; it is a test that ends with his death. During his journey, self-ownership is seen as a temporary; it is derived from the original celestial source and persons are entrusted with temporary ownership as per the *Amanah* principle.

Chapter 4 then demonstrated that the artificial entity of the company is approached differently in IET than in the West. It suggested that this difference is based on an understanding that is underpinned by a central idea grounded by divine agency to humanity in Islamic theological hermeneutics. By examining Islamic literature, the chapter showed that historically, IET did not recognize artificial entities and imagined bodies such as corporations, markets, states etc., but rather focused more on human relations and needs. This conclusion impacts the notion of shareholders' liability by seeing them as liable personally for the debts of their investments. The understanding of the company as a partnership and a complex contract suggests that IET should reconsider the Western-based theories of the artificial entity in a way that is more relevant to the social and religious aspects. The chapter does not suggest that Islam ignores artificial bodies, but that the tradition is more similar to social constructs in religious and charitable

frameworks. Such a view casts scepticism on IET's recognition of economic limited liability. The primary question could be seen within the context of contractual relations, especially when it is relates to transaction fulfilment. IET recognizes more of the physical existence of the human personality that bears obligations and fulfils the covenants. The implication of the concept of ownership by trusteeship presents a new social objective related to the ethical responsibility of individual's towards other investors (transparency, candid and honesty). Such a statement suffers from cultural and historical bias, as IET is founded on the concept of ownership by trusteeship and provides an ethical framework between the parties to the transaction.

From an Islamic perspective, the relationship between the parties to the transaction is governed by a general fiduciary duty, as the duty of trusteeship and honesty has a broad application that is not limited to professional relations. The Shariʿa legal adaptation to the transaction of shares as a sum of multiple financial contracts that gather several rights and obligations in one complex structure indicates that the purchase of shares is subject to Islamic trade laws. This information is a primary component of the transaction of shares, which implies a primary obligation of the duty to disclose, since information is a part of the sale of shares; without it, the transaction would be null and void. Notably, the justification for prohibiting inside information from a Western perspective is based on achieving market efficiency, while in IET it is based on the assumption that the parties hold an equal position, and is irrelative to market efficiency because markets are seen as artificial platforms that serve the needs of the participants. This philosophical understanding provides a deeper insight into the Islamic viewpoint on investment. Normally, important information that has a significant value to the transaction should be disclosed, otherwise, the transaction may be null and void due to the obscurity of *'Jahala and Gharar'* rules. The *Jahala* rule is a fundamental rule in the Islamic tradition; it

implies that if an important piece information related to the transaction was not disclosed to the other party, then he may ask for the transaction to be voided, as it would be based on biased and unfair grounds given that one party was in an advantageous position by virtue of knowing undisclosed information. The test of the obscure (*Jahala rule)* is whether the undisclosed information is primary and if the other party had known about it, he would have changed his mind about the transaction. This means when one buys shares, he has the right to know the information surrounding the shares and decide accordingly whether to proceed or not. Such an approach of candour helps to shape investor's choice, given that the information must be disclosed from the other party to the transaction. It creates a right to information or, to put it another way, a right to perceive the missing information.

The second element is related to the justification of the way Islam considers inside information which is an important element of the transaction. Islamic tradition gives huge importance to regulating the relationship between the parties to the transaction. This means that regulation is based on a horizontal approach whereby the parties should have an equal position, and deal with each other on a moral basis. Market efficiency is not the main aim of Islamic regulation as the market is an artificial matter and a mere platform that serves the needs of the participants (Muslims). Participants generally must act on proper moral standards that are established in Islamic law. The main Islamic aim is to fulfil the Islamic goal of *(Maqasid Al-shariʿa*), which is to prevent harm to people's money and to curb market abuse. This means that the goal is not to increase the wealth as in the Western model, but to establish a platform based on morals that applies Islamic ethics to the transaction. This approach reflects the concept of divine property, which emphasises that a participant, in the end, is governed by the concept of

God's ownership of wealth and therefore is entrusted as God's successor and must act accordingly.

Chapters 5, 6 and 7 answer the third secondary research question, what is the IET position towards insider dealing? Together, they aimed to explore the economic and moral facets of insider dealing from the Islamic perspective. Each chapter began by investigating the qualitative data the 'fatwas' collected from ten Ifta institutions in nine Islamic countries. The fatwas demonstrate that the majority of the opinions forbid insider dealing on economic, moral and logical grounds. The economic argument is based on the idea that the counterparty in the transaction may be harmed as a result of the unequal footing of the parties to the transaction (Chapter 5). While the moral viewpoint is based on the fairness argument, we observe that the idea of fairness is too broad, which may lead to a paradoxical implication because of its ambiguity. Consequently, *prima facie* the moral standpoint could be vague and opaque. This led to a consideration of the economic notion of 'just price', in other words, to consider whether or not the transaction was based on a just price in the IET framework (Chapter 6). On this basis, the author cannot but locate himself against insider dealing.

In Chapter 5, the economic position towards insider dealing was considered in terms of the accountability of the outcome of the conduct (harm) which is compatible with the goals of Shariʿa which were examined in Chapter 2. It confirmed that Islamic law encompasses a broad view of the prohibition, which includes all the possibilities that may lead to damage, rather than selecting the acts that should be prohibited. Islam strives to control all probable harm and consequences in order to minimize damage. The Hadith *'La Dharar wala Dherar'* asks Muslims to avoid all means of harm. This hadith provides a platform that excludes harmful behaviours. This approach is based on the idea that humans in the eye of Shariʿa are a subset of the social

order with obligations to God as well as obligations to their fellow individuals. Chapter 5 suggested an approach that is based on a policy that promotes the freedom of *Dharar*. A key policy priority should therefore be to plan for the long-term care of avoiding harm to others when entering into contracts. By adopting such a policy, regulators in Islamic countries should ensure that investors enjoy equal opportunities and equivalent access to information. Furthermore, regulators need to guide investors by raising their legal awareness of *Dharar* acts to protect them from the losses that could result from some unhealthy and unethical practices in the stock market.

At first, one would assume that a principal theoretical implication of Chapter 5 is that the Islamic economic point of view on insider dealing is that that if no harm is done, then insider dealing is permissible. However, this is not true, since many fatwas express serious moral concerns towards insider dealing. This led to exploring the moral justifications behind the prohibition of insider dealing.

In Chapter 6, the moral arguments began with the concept of corruption, which is considered to be an indication of ethical failure. The chapter investigated the moral justifications behind combating insider dealing. It showed that Islamic thought gives a detailed justification to the principles of equality in terms of the equal opportunity of traders to achieve fairness through the concept of the just price. An implication of this argument is that moral analysis complements the economic analysis, which was conducted in the previous chapter. Therefore, both the economic and moral perspectives contribute to a better understanding of the IET position on insider dealing in a complementary and parallel way.

Chapter 7 illustrated that Islamic countries have adopted mere positive laws for regulating insider dealing, without consideration to IET. This conclusion was reached through

critical analysis of the positive laws in Islamic countries, which do not refer to the economic and religious moral standpoints nor to Islamic values when regulating insider dealings. This approach undermines the claim that Muslims consider Islamic law to be the primary source of regulation and that they are obliged to submit to Islamic rules from a legal and moral point of consideration. The chapter proposes a reconsideration of the laws so as to better influence Muslims through advocating the religious norms. It pointed out that overlooking the IET position may lead to disorderly economic behaviour because of the paradoxical double agents of the law, and the disregard of Islamic values. The positive (Western) laws may benefit from IET through its focus on combating the behaviour itself and not the performer of the behaviour. In this way the conduct of insider dealing should be prevented regardless of who commits it and regardless of the source of information. Such an approach should be adopted by the positive law. Furthermore, the injection of Islamic values into the positive laws in Islamic countries could lead to greater compliance with the rules among Muslims, given the variety of their background, thoughts and traditions.

Chapter 8 discussed the reasons for the different positions on insider dealing within IET. It explored the various Islamic schools from a historical perspective and investigated the *ijtihad* mechanism and the role of logic when fatwas are issued. The chapter indicates that the idea of divergence (*ikhtilaf*) is deep rooted within the Islamic tradition, which creates a rich source of knowledge that contributes to contemporary financial issues on the basis of various frameworks, including economic, moral and legitimate policy. The relevance of religious rationality to legal developments is supported by these findings. The diverse Ifta opinions and the unique scholarly interpretations were dealt with through the Islamic process of preponderance (*Tarjih*).

In summary, the study found that there are two reasons for the existence of different IET positions on insider dealing: (1) the roots of the different structural bases of the Islamic schools (*Madhhabs)* and (2) the extensive use of *ijtihad* and the fatwas mechanism to develop new insights through logic by the Islamic scholars (*ulama*). Those grounds are the epicentre of the Islamic Ifta institutions which continue to contribute to the knowledge through the provisions of drastic propositions to contemporary issues.

Significance of the findings and the contribution of the study

These findings will be of interest to Islamic economic (and legal) scholars and more generally to the field of financial research. This thesis provides a deeper insight into insider dealing from an Islamic perspective by exploring the topic from its historical roots in IET. It is the first study of substantial duration to examine associations between the philosophical understanding and the practical side of insider dealing within IET. It sheds new light on how Ifta institutions can contribute to the financial field through their fatwas, thereby contributing to our understanding of why insider dealing is wrong according to both economic and moral reasoning in IET. These results add to the rapidly expanding field of Islamic economics.

Prior to this study, the position of Islamic scholars in relation to insider dealing was based purely on anecdote. This study provides a profound philosophical and practical understanding of the issue supported by the Muftis' opinions. The empirical findings from this study provide a new understanding of insider dealing from different religious dimensions. Approaching Ifta institutions proved useful in expanding our understanding as to how financial topics are understood in IET. This study casts doubt on the parochial assumption that Islam has the same understanding of contemporary issues. It lays the groundwork for future research into the primary Islamic position on artificial entities and financial markets. These findings are relevant

to both practitioners and policymakers. The principal theoretical implication is that Ifta institutions should reflect a synthesis between traditionalism and rationalism. Islamic states should not refer merely to positive law, nor rely exclusively upon religious texts, but should strike a balance between positive laws and religious materials which would help to achieve ethical excellence and equilibrium. Adopting religious values in Islamic countries would strengthen investors' sense of duty. Successful legal systems tend to have reasonably clear moral principles underpinning many of their laws at least. Having a sound moral justification for combating insider dealing may help investors to accept criminal sanctions against it. Likewise, moral disapproval of the practice may in turn enhance the deterrent power of those sanctions.

Strengths of the study

A key strength of the present study is its focus on insider dealing. Its long duration enabled the author to include in-depth analysis of insider dealing. The findings may well have a bearing on both the philosophical consideration and basic understanding of financial topics such as the position of IET on corporations as a religious social construct and on the regulation of shares on the basis of individual realism rather than market efficiency. However, these findings should be interpreted with caution, as the primary concern was not the corporate entity itself, but its role as a component of insider dealing conduct.

Nevertheless, this study has several strengths related to its understanding of the IET philosophical consideration of the financial discipline by recognizing the company as a socio-religious construct rather than an economic one, and by considering the market as a servant platform to the participants rather than a target for finance. This profound understanding opposition to insider dealing from a moral standpoint. IET generalises the prohibition of financial acts to all avenues which may lead to damage, rather than specifying which acts should

be prohibited. This approach is comprehensively justified on the principle of equality, which in this context refers to equal opportunities between the dealer to achieve a just price. The just price is seen as a logical test to determine whether or not to prohibit insider dealing. In this way, the study represents a comprehensive examination of the whole set of fatwas obtained on insider dealing and discusses them within the IET framework.

Limitations of the study

A number of limitations need to be considered in relation to this thesis. First, it does not tackle the different Islamic economic concepts that were used during the research because the focus of the research is primarily on insider dealing. In other words, because its scope is limited to insider dealing, the study does not include an explanation of many of the principles of Islamic economics, such as the concept of circulation, *takaful, modaraba, ijarah,* or even of some more vital topics such as the concepts of *Gharar* and *Jahala*. Second, with regard to the research methods, the reliance on fatwas must be acknowledged as a limitation, as their content was written in short sentences. This led the author to expand his explanation by referring to library-based material and putting his voice in discussing the content through his own understanding of the fatwas, which perhaps led to the author bias. Some fatwas suffered from the generalisability of their positions. For instance, some fatwas pointed out that insider dealing should be avoided because the conduct causes harm to the counterparty. These types of answers seem to be weakened by the Muftis' lack of expertise, as in practice insider dealing does not necessarily elicit harm to the counterparty because its benefits are uncertain, which is why in many instances some jurisdictions do not punish the act of insider dealing if the insider does not benefit from the conduct (like the example of tipper-tippee situation in *Dirks v SEC* in the US).

Furthermore, although the study successfully demonstrates that IET combats insider dealing through its economic and moral lenses, it has certain limitations in that it does not adopt the viewpoint of a particular Islamic school (*Madhhab*) or the opinion of a particular Ifta institution. This limitation was deliberately imposed by the author because the aim of the thesis was to enrich the findings by examining different opinions from within IET on insider dealing.

Additionally, given the small sample of the fatwas obtained, caution should be applied, as the findings might not be transferable as an absolute Islamic law nor as an official fatwa. The researcher does not claim to be a Mufti, nor does he claim that he is qualified to be one.

The system of fatwas also has a number of serious drawbacks. For instance, the fatwas which allowed insider dealing took a simplistic approach through readings of the scripture text without looking into the deep principles and goals of the religion. The problem of oversimplifying could be faced in the future studies. This could be because of the Muftis' lack of expertise in the financial field. This shall be addressed in the recommendation section.

Lastly, the thesis was not specifically designed to evaluate factors related to Western laws on insider dealing. The sources from the United States and United Kingdom (codes, laws, regulations, precedents) to which it refers are used merely as foundation material for conducting the study from an Islamic perspective. Also, the study did not attempt to compare Western laws and Islamic laws, as its main aim was to approach the topic with a new framework, related to Islamic economic thought. Despite its exploratory nature, this study offers some insight into how to address insider dealing on a conceptual level by focusing on the act rather than on the actors. It illustrated the importance of the ethical side of the issue and tries to explain both the moral and economic problems of insider dealing through the lens of IET.

Recommendations for further research

Studies of IET on financial topics should be repeated using Ifta institutions as important constructions of moral developments. Financial topics such as market abuse and particularly market manipulation would be a fruitful area for further work within IET. Also worthy of further research is the conflict between some concepts that were examined as part of this study, such as the need to prevent high risk taking (*gharar*) and the need to seek out information to avoid a high level of risk. Muslim investors may face some challenges while seeking for information that would help them to avoid the act of (*haraam)* of high risk-taking when investing in shares. Islamic rules are centred on targeting the most significant potential socio-religious benefits, hence demanding for information effectiveness.

More broadly speaking, research is also required to determine the Islamic position on important topics such as the concepts of 'artificial persons' and how to deal with them when entering into share transactions as well as how to handle artificial intelligence and technology in the financial markets. For example, what if the machines have the necessary intelligence to enable them to learn about inside information and trade accordingly? The inescapable fact of machine intelligence is something that is going to be seen soon in the stock markets. The accelerated growth of the online environment and the emergence of artificial intelligence presents significant difficulties in Islamic countries regarding ethical concerns and moral anxieties which call for further research by IET. These issues need to be studied from both the philosophical and practical perspective. This study also suggests that research through fatwas should be conducted with care, given that they have their own centrality in igniting the debate within the IET.

Indeed, fatwas have a crucial role in developing Islamic legal thought through the Ifta institutions, which have an indispensable share in the development of the legal notion. This study

is proof that fatwas are a vibrant and diverse source of knowledge that contributes to Islamic research and the financial field. Nevertheless, given the drawbacks arising from the simplicity of some fatwas, one cannot but suggest the need for interdisciplinary committees in the Ifta institutions to provide in-depth opinions, especially with regard to topics that are specialised in nature.

Another natural progression of this thesis is to analyse the financial laws in Islamic countries to determine the extent to which the Shariʿa rules have been adopted. The study demonstrates the need for further injection of the religious moral standpoint and Qur'anic values into the positive laws in Islamic countries. Most Islamic countries adopt Shariʿa in their constitutions, stating that it is a primary source for regulation or at least one of the main sources. Muslims have a tendency to be inspired by religious norms in Islamic states at a higher degree than in other countries. This fact asserts the importance of Islamic rules, as without them a disorder in the behaviour may perhaps be expected. Many Muftis presumed that the positive law is legislated to protect Muslim interests. This presumption is problematic, however, because it fails to consider the Islamic framework. Referring merely to the positive law may lead the wisdom of the scriptural texts and the thoughts of the *Madhhab* to be overlooked. For instance, when Muftis utilize *ijtihad* as a process of extracting Islamic rules, it is expected that they use logic as an agent to provide divine guidance. When Muftis refer to the mere positive law, however, the law would be through the mere human rationale without any consideration to the interpretation of the scriptural texts or divine perception, which might be an issue in countries where the level of religiosity is high, and the values of Islam are superior.

A final comment may well be included which shall make suggestions for progress and thinking on future directions. Islamic nations should rely more on logic and reason to build a

bridge between the moral and economic lenses within IET and the practical application of it to modern challenges. Islamic ethicists should work on applying Islamic ethics to issues through reason to help Muslims to have better moral standpoint. Again, the fatwa mechanism is a valuable tool that would help them in constructing a bridge between legal theory and moralistic practice.[3] A call for the path of virtue through intellectual cooperation and critical engagement between the corpus of Islamic scholars and Muftis and specialists is requisite. An adaptation of a consultation platform may prove to facilitate regulatory decision making.

A greater focus on fatwas in IET could produce interesting findings that account for more Islamic wisdom by drawing on various mindsets to extend the law as conditions change over time. Rationality is crucial to acclimatize to these changes while facing situations which are not cited in the theological sources. Such flexibility deepens the knowledge and encourages intellectual renewal that would exemplify textual and rational harmony. In IET, evaluating the opinions and opting for the one which suggests the best resolution as per logic (*Tarjeeh*) is seen as a good method of accepting the different mindsets.

Future studies should include the philosophy of the *ijtihad* mechanism in order to discover the Islamic position on modern issues and provide drastic suggestions. The philosophical approach to IET studies allows researchers to take a step back and discover the nature of the problems and resolve them by blending conceptual knowledge with a practical approach.

In summary, continued efforts are needed to make IET research more accessible to Islamic societies by allowing more scepticism towards Western economic concepts. Perhaps an approach is needed that accepts the prospects of having different views on financial matters, or a

[3] This is a first step that may help in reshaping the financial industry towards a constructive Islamic moral economy. See, Tareq Moqbel, 'Evaluating the Shariah Compliance and Operationalising Maqasid al Shariah: the case for Islamic Project Finance Contracts' (Doctoral thesis, Durham University, 2014).

view which shifts the focus of institutional consideration of financial matters to the effect of financial law on individual investors rather than on the market. There is also a definite need to explore the reasons behind any differences (*ikhtilaf*) that appear within IET, which in turn would contribute further to knowledge.

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Appendice

Appendix one

Empirical Questions regarding insider dealing sent to Ifta institutions.

1- What is the viewpoint of Shariʿa regarding the use of inside information in the stock market?
2- In the case of the prohibition of this act, what are the Shariʿa principles on which this prohibition is based?