

Market Manipulation and the role of Hisbah**Market Manipulation and the role of *Hisbah***

Associate Professor

Fiqh Department, Shariah College & Islamic Studies

Qassim University

Abstract

This article examines the Market Manipulation and the role of *Hisbah* from an Islamic perspective. I begin with a snapshot of financial markets and the meaning of manipulation. Understanding more about how jurisprudence was designed to adapt to existing Islamic Shari'ah laws and institutions will help clarify some of the unique features in Shari'ah principles concerning financial markets. I will discuss the Islamic *hisbah* (حسبة) developed in Muslim societies and how it benefits from International law. *Hisbah* system means 'accountability' or a duty to 'enjoin good and forbid wrong'. The institution of *hisbah* system, once revived, came to represent a semi-governmental agency that takes charge of different aspects of market regulations, especially those that do not fall under the macro-policies. Finally, I will discuss whether principles of market manipulation, supplemented in Shari'ah principles, have attained their purpose and provide some recommendation.

KeywordsIslamic perspective – market manipulation – *Hisbah* – regulation

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١- Market Manipulation and early Islamic response

The word ‘manipulation’ has a specific meaning in terms of stock market strategy and entails more than a simple tactic or market gamble; it involves committing a premeditated crime with corrupt intention. In other words, stock market manipulation represents deviant behaviour. Definitions in Islamic finance which are closely related to market manipulation shall now be outlined.

Endangerment (*taqiīr*) means that individual(s) may be exposed to danger or put in jeopardy or harm’s way:^(١) for example, when given an exaggerated or deceptive account of an item’s qualities, *e.g.*, falsely portrayed as having a higher value, or when misled into purchasing an item under false pretences,^(٢) or when encouraged or deceived into performing some act.^(٣) One example of

^(١) Jamāl ad-Dīn Ibn Manzūr al-Inṣārī, *Lisān al-‘Arab* (Beirut: Dār Ṣābr, ١٩٩٧); Muḥammad al-Rāzī, *Muḥtār al-Ṣaḥāḥ* (Beirut: Al-Maktabat al-‘Aṣriyyah, ١٩٨٦), pp. ٤٧١-٤٧٢.

^(٢) Ali al-khif, *Provisions of Legitimate Transactions* (Aḥkām al-Mu‘amalāt aṣ-Ṣariyyah) (Beirut: Dār Sadir, ١٩٩٧), pp. ٣٧٧-٣٨٠; Nazīh Ḥamāda, *Maḡmū‘at al-Muṣṭalaḥat al-Māliyah wa l-Iqtisādiyah fī Luḡah al-Fuqāḥa* (Dubai: Dār al-Qalam, ٢٠٠٨), p. ١١٩.

^(٣) Muḥammad al-Zarqā, *Al-Madḥal al-Fiḥī al-Ām*, (Damascus: Dār al-Qalam, ١٩٩٨) Part ١, pp. ٣٧٩.

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endangerment might be failing to milk dairy cattle for a long time before selling them in order to delude the buyer into overestimating the quantity of milk they produce.^(٤) However, there is a difference between endangerment and danger which can be defined as: (١) something which has an unknown consequence,^(٥) or (٢) something that was unknown between two allowances and the best of them is the most fair.^(٦)

There is, however, some similarity between the concepts 'danger' and 'ignorance' as differentiated by Al-Qarāfī^(٧):

The danger is the unknown whether it will happen or not, like selling the birds before caching it or selling fish in the water. While what is known has happened and was ignorance about its character, like selling anything he has in his bag, but he does not know what it is.

(٤) *Ibid.*, pp. ٤٦٣-٤٦٤.

(٥) *Ibid.*

(٦) Alī al-Māwardī, *Al-Ḥāwī al-Kabīr*, Vol. ٥ (Beirut: Dār al-Kutub al-ʿIlmiyyah, ١٩٩٤), pp. ٣٢٥.

(٧) Shihāb al-Dīn al-Qarāfī or in full Shihāb al-Dīn Abū al-'Abbās Aḥmad ibn Idrīs (al-Sanhaji al-Bihinsi al-Misri) al-Qarāfī (١٢٢٨-١٢٨٥), was a Maliki jurist of Berber (Sanhaja) origin who lived in Ayyubid and Mamluk Egypt. <https://peoplepill.com/people/shihab-al-din-al-qarafi/>

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Danger and unknown, every one of them is more general than other on one side and more specific on another side.^(٨)

There is a distinct difference between ‘danger’ and ‘endangerment’, although danger refers to unknown consequences while endangerment refers to sayings or actions, which serve to trick someone. Hence, danger involves risk while endangerment involves trickery, which leads to risk. From the definition of endangerment first given in this section, and its closely related terms, one can reasonably deduce that endangerment is one form of ‘market manipulation’ since the manipulation of others is typically done through trickery, fraud, deceit and illusion.

Regarding fraud, Ibn Qudāma^(٩) says:

If one, with the intention of concealing a defect, hides it from the buyer instead of declaring it or covers it to delude the buyer into thinking that

^(٨) Aḥmad al-Ṣanhāḡī al-Qarāfī, *Anwār al-Burūq fī Anwā’ al-Furūq*, Vol. ٣ (Cairo: Dār al-Salām ٢٠٠١), pp. ٣٦٥.

^(٩) Imam Mawaffaq ad-Din Abdullah Ibn Ahmad Ibn Qudama al-Maqdisi) (١١٤٧ - ١٢٢٣) was a noted Hanbali ascetic, jurisconsult and traditionalist theologian. <https://peoplepill.com/people/ibn-qudamah/>

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there is no defect, then they have committed fraud, meaning an injustice towards the buyer.^(١٠)

It has been said that 'fraud can be committed in two ways: first by hiding a defect and second by adding a mark-up to raise the price. From previous definitions it can be deduced that fraud is another form of market manipulation.'^(١١)

Similarly, trickery occurs when someone pursues illegal ways to achieve his purpose in such a manner that his deceit remains undetected without some semblance of intelligence and insight.^(١٢) And this thing does exist in manipulation by showing some things different from what is hiding in order to reach a specific purpose.^(١٣) Both a scam or confidence trick as well as endangerment can be used to 'rip-off', dupe, deceive or induce an individual into buying a commodity that will result in profit for the seller at the buyer's

^(١٠) Muḥammad Ibn Qudāma al-Maqdissī, *Al-Muḡnī*, Vol. ٦ (Cairo: Dār 'Alām al-Kutub, ١٩٩٧), pp. ٢٣٤.

^(١١) Muḥammad al-Ba'ī, *Al-Muṭṭala'ah fī Abwāb il-Fiqh*, Vol. ١١ (Beirut: Al-Maktab al-Islāmiyy, ١٩٨٨), pp. ٢٣٦.

^(١٢) Ibn Qayyim al-Jawziyyah, *A'lām al-Mawqa'ayn 'an Rabb il-Ālamayn*, Vol. ٣ (Riyadh: Dār Ibn al-Jawziyy, ٢٠٠٨), pp. ٣٠٩.

^(١٣) Al-Maqdissī, *supra* note ٩ at ٣٠٤.

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loss. Trickery or deception are not just restricted to this definition and can also involve danger (where the commodity was sold by dishonest advertisement) and, thus, the scam may be considered a specialist form of manipulation.^(١٤) Thus a market manipulator is one who solicits and stimulates others into thinking that a profit can be made in a trade whereas, in reality, the outcome will be a loss for the trader. Should one consider this manoeuvre as simply playfulness or is it cheating and betrayal?

Theoretically we need to differentiate between stock exchange traders, speculators, manipulators and investors, the latter of whom actually possess currency as an asset to gain profit, like a production asset generating profit over time. In contrast speculators use currency as a commodity, hoping its price will increase before getting rid of it to make a profit; the speculator buys with the intention to sell quickly for a profit.^(١٥)

Thus, we can assume that an investor will remain in possession of his currency much longer than the speculator. That is to say, both investor and speculator should have sufficient reliable information about the currency with which they are dealing. Like a merchant keen to invest in commodities, the

^(١٤) *Ibid.*

^(١٥) <https://www.investopedia.com/ask/answers/٠٩/difference-between-investing-speculating.asp>

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speculator is also truly a merchant in this sense, where the market is his shop and stocks his commodities. Therefore, if he fails to trade on reliable information and buys on chance, then he is merely gambling. In contrast, a manipulator neither bases his manoeuvres on market information nor on the chance a trader might buy; rather he spreads false information and creates tempting circumstances to entice people to trade. Then he enters and exits the market with hopefully huge profits, gained at the expense of buyers' heavy losses. Real investors are few on stock exchanges, compared to expert speculators who are even far outnumbered by gamblers. However, as for numbers of traders, manipulators are very few although they exert a substantial influence on stock markets.^(١٦)

Market maker is a trader whose primary purpose of trading is to profit from providing liquidity by constantly announcing offers and requests to the rest of the traders in the market. The market maker is a trader unfamiliar with the value of the security, and therefore it determines the prices of its offers and requests mainly based on the market demand and supply position.

The market maker focuses on achieving the best balance between supply and demand, because the differences between the best offers and demands are its

^(١٦) Ibn Baṭṭah (Ubayd Allāh b. Muḥammad Abū 'Abd Allāh al-Akbarī), *Prohibition of Fraud* (Riyadh: Ar-Risālah, ١٩٩٦), pp. ١١٢-١٢٢.

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source of profit. Since the manipulator interferes with the normal functioning of offers and demands in the market, the market maker may be a victim of the manipulator. Even worse, some of the manipulators sometimes act as if they were a market maker by sending offers and requests to the market at the same time.^(١٧)

The types of manipulation are old, and their tools and methods change with the development of information and communication technologies. Indeed, Especially the Internet type of manipulation and market abuse, which, as far as it facilitated the investor's access to information quickly and accurately.

It has provided ample room for manipulators to spread prejudiced rumors through sites with great output that suggests that left behind a large company and a network of distinguished analysts. The development of electronic trading systems and ease of access also provided an opportunity for the manipulator to achieve his strategies away from market oversight, and at the same time facilitated the access of small investors and large quantities to the market, who represent the largest segment subject to change in the market.

On the other hand, electronic systems were able to prevent many forms of tampering by setting the priority of executing orders and preventing the

^(١٧) <https://www.investopedia.com/ask/answers/.٦/brokerandmarketmaker.asp>

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implementation of counterfeit cross orders if they were from the trader himself.^(١٨) The computerized centre of the Saudi capital market was ESIS a widely distributed computer network trading system linking the banks of Saudi Arabia via the existing telecommunications infrastructure of the country.

In ١٩٩٠, Electronic Securities Information System (ESISLINE) began delivering market price and volume information to member banks. Five years later, there were over ٤٠٠ outlet locations of ESISLINE. SAMA unveiled ESISNET, the actual trading network linked to a central computer trading system in ١٩٩٢. By ١٩٩٥, over ٢٥٠ banks were linked to this system, allowing them to input trading orders, track trade execution and print trade confirmations. Orders entered at remote locations were and transmitted to the Central Trading Unit, where they were matched against other buy or sell orders.

The central market surveillance unit at SAMA's oversaw the matching process. After SAMA's surveillance unit matched the orders, confirmation was instantly available at the remote locations. SAMA owned and operated ESIS and

^(١٨) Anthony H Cordesman, *Saudi Arabia Enters The Twenty-First Century* (Praeger ٢٠٠٣) ٤٣٩; Rolf Meyer-Reumann, 'The Banking System In Saudi Arabia' (١٩٩٥) ١٠ Arab Law Quarterly, ٢٢٨-٢٢٩.

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recouped the operating costs through indirect fees charged to all Saudi banks regardless of their participation in the network.^(١٩)

٢ Financial Markets and Shari'ah principle

While Shari'ah principle acknowledges that financial markets are indispensable for individuals and societies, it also states the need to respect all rules and regulations in any market to prevent violations and harmful behaviour such as cheating, creating monopolies, fraud, stimulation, etc. Shari'ah principle recognizes that rulers have the priority to control markets, oversee them and punish any trouble makers.^(٢٠)

^(١٩) Joseph W. Beach, 'The Saudi Arabian Capital Market Law: A Practical Study of the Creation of Law in Developing Markets' (٢٠٠٥) ٤١ (٢) Stanford Journal of International Law ١٨١, ٣١٠. Mohammad Al-Jarf, 'eBanking in Saudi Arabia: Trends and Perspectives' (Umm al-Qura University, Makkah, Saudi Arabia). <<https://domino.fov.unimb.si/ECBledHome.nsf/٥f٥٣٧.١٦٢bfefab٨c١٢٥٦٥ef.٠٦٠٠a٠c/٤٦.١db٦٦٤b٥١٨٣١dc١٢٥٦d٤٤٠٠٢be٨٧٧?OpenDocument>> accessed ٢٤ November ٢٠١٥.

^(٢٠) Mubārak al-Sulaymān, *Aḥkām al-Mu'āmalāt fī l-Aswāqi l-Māliyyah*, Vol. ١ (Riyadh: Knoz Ishbyla, ٢٠٠٥), pp. ١٥-١٨; M. Fahim Khan & Mario Porzio, *Islamic Banking and Finance in the European Union* (UK: Edward Elgar, ٢٠١٠), pp. ١١-١٧; Asyraf Wajdi Dusuki, *Islamic Financial System* (Kuala Lumpur: International Sharī'ah Research Academy for Islamic Finance, ٢٠١١).

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One of the first decisions regarding market manipulation was to create a market specifically for Muslims in Medina market. However, he also established guidelines for this market, announcing publicly: 'Whoever cheats is not one of us'. Cheating was considered a major sin that would result in exile from the Muslim community. The Prophet also appointed several of his Companions to control and check regularly the attitudes and behaviours of people in the marketplace.^(٢١)

His successors continued his policy and we can relate many stories of Omar ibn al-Khaṭṭab, the second Khalif, who was strict with manipulators and monopolists, was interested in establishing a stable market, and obliged merchants neither to increase nor decrease the price of some goods, although a drop in price would have been advantageous for customers. Omar followed a

^(٢١) Alam, M.M., Akbar, C.S., Shahriar, S.M., and Elahi, M.M. ٢٠١٧. The Islamic Shariah Principles for Investment in Stock Market, Qualitative Research in Financial Markets, ٩(٢): ١٣٢-١٤٦); Mubarak Alsulyman, *Ahkam Altaamul Fe Alaswaq Almalyah* (Knoz Ishbylah, ٢٠٠٥) Pt ١, ١٥.

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policy which would be less likely to lead to disputes between merchants that might affect the stability of the entire market.^(٢٢)

Shari'ah principl has paid great attention to how businesses and markets function and has strived to protect them from any type of misconduct or manipulation. The scholar Yahya Ibn Omar^(٢٣) said: 'any governor intending to establish justice within his citizens, has to control the markets and appoint the most trusted people to keep an eye on it'.^(٢٤)

While talking about trouble makers in the marketplace, scholar Ibn al-Kiyām said: 'these people are spoiling the interest of the nation, the harm they create is general so the governor must harass and lock them and punish them continuously because their harm affects every body'.^(٢٥) As such we can see how Shari'ah principl stood against anyone trying to behave in a market in a way that might harm others or create confusion, causing it to lose the purpose of its creation.

^(٢٢) Al-Sulaymān, *supra* note ٢٠ at ١٥.

^(٢٣) Abu Zakariyya Yahya ibn Umar, was the first emir of the Almoravids in the mid-١١th century, a movement he constructed in collaboration with the religious leader Abdallah ibn Yasin.

^(٢٤) Yahya Ibn Omar, *Market Provisions*, (Tunise: Al-tabah al-Tuniseh).

^(٢٥) Ibn al-Kiyām, *'i'elam almuaqiein ean rabi alealamin*, (Beirut: Dār alkitub aleilmia).

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٢,١ Jurisprudential Legislation

Regardless of the type of manipulation, it is in itself illegal in financial markets and manifests mainly as verbal deception similar to those deceptions discussed above, *i.e.*, fraud, scams, cheating, concealment of defects, since all of these behaviours lead to a corruption of information in financial papers and, hence, a real loss for traders.^(٢٦)

There is an abundance of evidence in the Holy Qur'ān and the Sunnah pointing to the justification for forbidding cheating and fraud. For example, Allah said: 'O you believers, do not consume your wealth among yourselves in falsehood, except where you trade in mutual agreement. And do not kill yourselves. Allah is the most merciful to you'.^(٢٧)

Thus, manipulation and deception in financial transactions is forbidden. The difference between the marketplace and financial markets is that prices in the former are defined by unilateral outbidding (*e.g.*, a seller and group of buyers in an auction) or unilateral bidding (*e.g.*, one buyer and a group of

^(٢٦) Muḥammad al-Saḥibānī & 'Abd Allāh al-'Umarānī, *Qawā'id ut-Tadāwul ul-Iliktrūnī wa Naẓarāt fī Mustanidihā al-Fiqī*, (*Rules of Electronic Negotiation in Stock Markets and Views on its Islamic Evidences: Securities Markets and Bourses, Prospects and Challenges*), (Dubai: Dubai Conference, ٢٠٠٧).

^(٢٧) Qur'ān ٤:٢٩.

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sellers in a government bid), while the control on prices in the financial markets is decided through auctions and outbidding where sellers compete to decrease prices and buyers compete to raise prices. Deception in the financial market occurs by both sellers and buyers. Vendors try pushing for price decrease while buyers do the opposite.

Qais ibn Saad ibn Ebada said: “The Prophet said, “the deceiving is in the hell” [the text states that deceit is as an action in hell; but it means the deceiver]’.^(٢٨)

Cheating leads to hell and, accordingly, it attracts a harsh punishment, which seeks to deter such behaviour. Omar’s son said: ‘The Prophet forbids scams’.^(٢٩) Scams are detrimental to any contractor since cheating can artificially raise the price of a product; therefore, fraud, cheating and concealment in the financial market are forbidden.^(٣٠)

^(٢٨) Muslim, Ḥadīth No. ١٠٢.

^(٢٩) Al-Bukhārī, Ḥadīth No. ٢١٤٢; Muslim, Ḥadīth No. ١٥١٦.

^(٣٠) Abd Allāh al-Salamī, *Al-Ġašš wa Aṭruha fī l-Uqūd (Fraud and its Impact on Contracts)*, Vol. ١ (Riyadh: Knoz Ishbylah, ٢٠٠٤), p. ١٠٣.

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٢,٢ Effects of Manipulation on Financial Markets

There are a number of legal effects of prohibition of manipulation on the financial markets. That is why such attitudes and behaviour are forbidden and invalidate such contracts and request compensation. Manipulation in the financial markets is included in the rules on cheating and actual and verbal deceit. Jurists agreed that the rules consider scams and informal money exchanges as verbal deception, while fraud is deemed 'actual deception'. An overview of jurists' decisions will now be provided.

Most scholars say that exchanging money^(٢١) is forbidden but there are different views about its effects on the validity of a contract. The general consensus among scholars seems to be that a contract is valid but unnecessary. Ibn Taymiyya accredited this view to most jurists.^(٢٢)

In this case some scholars said that "nullifying contracts and cancelling transactions within a certain definite time period and repurchasing is legal".^(٢٣)

^(٢١) Islamic law always seeks to view money not as a commodity of trade that can be easily bought and sold without restrictions. Imam al-Ghazali, one of the greatest philosophers and jurists in Islamic history, made it very clear that those who utilised money for other than its original purpose, that is as a price, are corrupt and unjust.

^(٢٢) Ahmad Ibn Taymiyya, *Mağmū' al-Fatāwī*, Vol. ٢٨ (Riyadh: Dār al-Waqfa & Dār Ibn Hazm), p. ١٠٢.

^(٢٣) Sālih al-Sultān, *Al-Ashumī, Hukmahā wa Atārahā* (*Shares and their Provisions and*

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On the other hand some of scholars said that "validity of a contract and invalidity of the choice and claim back the extra value by the ruler and may levy a fine proportional to his cheating and deceiving".^(٣٤)

٢,٣ Islamic Ruling on Manipulations

Imām Tirmidhī (may Allah grant him mercy) said, ‘*Najash* happens if a man comes to a dealer and offers him a high price just with the intention to make other buyers stimulated (not with intention to buy himself), and this is a sort of cunning and guile’.^(٣٥) We have seen the effects of *Najash* (concealment) such as the issue of city merchants offering to sell goods to men in the countryside and how this can harm people.

Here I will discuss different scholarly opinions on the effect of *najash* selling contracts because *najash* is the closest form of trading to the manipulations in

Implications) (Riyadh: Dār Ibn al-Jawzī, ٢٠٠٦).

^(٣٤) Abd Allāh al-Salamī, *Al-Taḡīr fī l-Maḍārabāt fī l-Aswāqi l-Māliyyah: Baḥṭ Muqaddamu l-Fiqhi l-Islāmī* (*The Rule of Speculation in Financial Markets: Seminar on ‘Speculation and Manipulation in the Financial Markets*), Islamic World League, Islamic International Foundation for Economics & Finance, p. ١٠٢.

^(٣٥) Imām al-Tirmidhī, Mentioned after Ḥadīth No. ١٣٠٤ (n١٢). For more information see: Muḥammad al-Qaḥṭānī, ‘*An-Najāṣ*’, *Ministry of Justice Journal* ٢٩ (٢٠٠٦): ١٠٥-١٠٦.

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stock market; what it contains is the increase of the prices and stimulating buyers to buy due to higher unreal bidding offers, and this is what is happening in stock markets nowadays. Scholars have three different opinions about contracts with the existence of *najash*.

٢,٣,١ First Opinion

The sale is true but the buyer has a right to choose to keep or nullify it. This is the opinion of the Mālikī,^(٢٦) Shāfi'ī^(٢٧) and Ḥanbalī schools,^(٢٨) as well as both Ibn Hazm^(٢٩) and Ibn Taymiyya.^(٤٠) Offered as proof: (١) The onus for prevention lies with the one who practises *najash* not the one who signs the contract. (٢) Shari'ah principle did not prevent *najash* as Allah's right, but because it is a man's right who has been cheated and betrayed so he reserves the

(٢٦) Muḥammad al-Ṭarābulsī al-Ḥaṭṭāb, *Muwāhib al-Ġaīl*, Vol. ٤ (Beirut: Dār al-Fikr, ١٩٩٢), pp. ٣٧٨.

(٢٧) Yahya Ibn Sharīf al-Nawawī, *Al-Muḥadḍab*, Vol. ١ (Beirut: Dār al-Fikr, ١٩٩٧), pp. ٢٩١.

(٢٨) Muwafaq al-Dīn Ibn Qudāmah, *Aṣ-Ṣaḥīḥ al-Kabīr Ma'a l-Inṣāf*, Vol. ١١ (Cairo: Dār Hajir, ١٩٩٣), pp. ٣٤٠.

(٢٩) Alī Ibn Hazm al-Ṭāharī, *Al-Muḥalla bi-Atā'ir*, Vol. ٨ (Beirut: Dār al-Kutub al-Ilmiyyah, ١٩٩٧), pp. ٤٤٨.

(٤٠) Ibn Taymiyya, *supra* note ٣٢ at ٢٨٣.

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right to keep or nullify it.^(٤١) (٣) Comparing with the intercepting of merchants, where the Prophet (pbuh) left for them the choice once they arrive to the market, and this is a correction of the contract and confirming the choice.

٢,٣,٢ Second Opinion

The deal is void; this is an opinion of Imām Ahmad as well as several Ḥadīth scholars.^(٤٢) For them, forbidding means deprivation, and *najash* has been prevented in true Ḥadīths. We can argue that if the prevention is because of a fault in the prevented good, then it voids it, but if the cause is external – as in our cases – this will not void it, that is why we can see that even the Prophet prevented interception but still he kept the choice option to the seller once in the market.

٢,٣,٣ Third Opinion

The deal is correct and obligatory. There is no way to terminate the contract without the agreement of both parties. This is the opinion of the Ḥanafī

^(٤١) *Ibid.*

^(٤٢) Alī bin Ḥajar al-‘Asqalānī, *Fatḥ al-Bānī fī Šarḥ Ṣaḥīḥ al-Bukhārī*, Vol. ٤ (Riyadh: Dār al-Riyādh, ٢٠٠١), pp. ٣٥٥.

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school,^(٤٣) of Imām Ahmad, as well as the most correct opinion in the Shāfi'ī school.^(٤٤) Offered as proof: (١) It is the buyer's fault, as he neglected to make sure or to seek advice from others who knew the prices better.^(٤٥) (٢) The issue is in an external issue not in the sale itself.^(٤٦)

٢,٣,٤ The Preponderant

It is an evidentiary fact that the option addressed first consists of all the evidences and hence recommended. However, the option third lacks to address the rights of the victims therefore, is on the weakest side. Based on the above, the dealing made by the victim of any of the above methods, his trading in the stock market is correct but still preserves the right to keep or nullify the deal,. Usually, he will choose to nullify, especially if the loss is heavy.

The penalties and fines made against some manipulators who violated the Saudi Stock Market system contained an obligation for the violating trader to pay back all that has been gained through these violations,^(٤٧) but did not state

^(٤٣) *Ibid.*, Vol. ٥, p. ٢٣٩.

^(٤٤) Yahya Ibn Sharīf al-Nawawī, *Rawḍat al-Ṭālibayn*, Vol. ٣ (Beirut: Al-Maktab al-Islāmī, ١٩٩١), pp. ٤١٤.

^(٤٥) Al-Jawziyyah, *supra* note ١٢ at ٢٤٠.

^(٤٦) *Ibid.*

^(٤٧) Saleh al-Barbary, 'Speculation and Market Manipulation' (٢٠٠٧). ١٤th Conference

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whether the victims would be repaid whenever they are determined by working out the number of transactions related to the shares in question. In this case, should Saudi Capital Market Authority divided this fine to types. The first one go to victims and second type go to Saudi Capital Market Authority. Other systems have proposed a different way of punishment, by cancelling all transactions related to that particular share and all implications from the beginning of the violation to the end.^(٤٨) It is suggest that this is an annulment of the contract and I believe this is a wise choice, though most dealers like the annulments due to their heavy losses. For example, If during one hour found one guilty and his did abuse, then Market Authority will cancel all transaction during this hour.

Nowadays, catching any dealings related to any share during any given period of time may be easy to be easily facilitated, to a situation back to its original place before the dealers started manipulating. Of course it does not mean not punishing the violators to deter them, and cancelling all transactions by the violators.

on Islamic Institute, Emirates University (UAEU).

(٤٨) *Ibid.*

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٣ Doctrine of *Al-Ḥisbah*

The doctrine of *Hisbah* system (ombudsmanship) is a function of supervising the activities and transactions that take place in the market from three angles: (١) that all activities and transactions are undertaken within the boundaries of the rules of Sharī'ah; (٢) that all activities and transactions are done with observation of the moral values and ethical principles of Islam as a religion; and (٣) that the ombudsman (*muḥtasib*) is also charged with the function of 'ordaining what is known as good and forbidding what is known as wrong' in the market.^(٤٩)

Allah created us to do worship that for him only. In Muslim life theret is *wājib* (obligatory) or *mandūb* (commendable or recommended) is *marūf* (commonally known) or good. It is good because a healthy conscience agrees with it. *Munkar* (disapproved), on the other hand, is whatever Allah asks us to refrain from doing, whether it is *ḥarām* (prohibited) or *makūh* (detested), it is evil and wrong because a healthy conscience abhors it. Mere liking or disliking

^(٤٩) Ahmad Ibn Taymiyyah, *Al-Ḥisbah fī l-Islām*, Muhammad al-Mubarak (Ed.) (Beirut: Dār al-Kutub al-ʿIlmiyyah, ١٩٦٧); Saleh Fauzan, The Institution of *Ḥisbah*: Its Roles in Nurturing Fair and Just Economic System in Islam, The National Conference On Islamic Economics ٢٠٠٩, ١٠-١١ February ٢٠٠٩, University Malaya.

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does not make a thing *ma'rūf* or *munkar*, but how Allah labeled it. Human intellect only confirms and understands what is transmitted as such.^(٥٠)

These functions have been implemented throughout Islamic history from the time of the Prophet Muḥammad (pbuh) until the end of the ١٩th century. In fact, there have been *muḥtasibs* throughout Islamic history. We should keep in mind that, when a society fails or deteriorates in its cultural standards or at least stagnates, all functions including those of the *muḥtasib* go along with the general decline or stagnation.^(٥١)

The idea of the *muḥtasib* tells that one of the major objectives of market regulations is to promote a two-tier filtration of economic activities and transactions. That is, the filtration at the level of the consciousness of the economic actor and within his/her heart and the filtration at the level of monitoring the observance of legal and moral values and rules in market relationships by a special semi-governmental agency.

This second filtration comes from the presence of the *muḥtasib* in the market and her/his authority in ordaining what is good and preventing what is wrong. It should be noted that the authority of the *muḥtasib* lies somewhere

^(٥٠) *Ibid.*

^(٥١) Muhammad al-Mubarak, *Al-Dawlah wa Niẓām al-Ḥisbah 'Inda Ibn Taymiyyah*, (Beirut: Dār al-Fikr Alarabiu, ١٩٦٧).

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between personal moral advices and supervision, on the one hand, and a legally binding action of a judiciary system, on the other hand. In other words, the *muhtasib*'s authority is a little below a judge who gives final dictates on the compliance of transactions and economic relationships with the rules of Sharī'ah.^(٥٢)

Thus, while the *muhtasib* must protect economic freedom of individual actors she/he must also see to it that no actor abuses this freedom and transgress on other's ability to practice their respective freedom.^(٥٣)

ξ Tools for Market Regulation in the Private Sector

It is important at the outset of this section to recall the nature of the institution of *hisbah* as a regulatory agency and its historical role and functions in the Muslim market. It may be one of the most deep-rooted institutions of market regulation, not only in the Islamic history, but also in the history of mankind at large.

It is irrelevant and perhaps futile to argue whether *hisbah* has been created as an Islamic institution or whether it existed before Islam. What really matters is that it is an institution that has existed since the time of the Prophet (pbuh),

^(٥٢) Al-Shirāzī, *Nihāyat ar-Rutba fī Ṭalabī l-Ḥisbah* (Al-Arini (Ed.) (Cairo: Taḥqīq Laġnata t-Tā'lif wa t-Tarjamah wa n-Našr Publ, ١٩٤٦).

^(٥٣) Ibn Taymiyyah, *supra* note ٤٩.

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with an important market role, to the extent that it has become a powerful institution that was intrinsically attached to the Muslim markets throughout the economic history of Islam. It is reported that Prophet Muḥammad (pbuh) was the first ruler in Islamic history that practiced *ḥisbah* in the market. And it has been assigned to outstanding and Sharī'ah-knowledgeable persons ever since the death of the Prophet (pbuh).^(٥٤)

The *muḥtasib* (ombudsman) has assistants around him and can enforce her/his decisions with the help of the law enforcement agencies. The word itself is derived from *ḥisab* (account/accountability), and the institution of *ḥisbah*, was assigned several market functions in the Islamic history and jurisprudence.^(٥٥) These functions include the following:

١. Quality control, whereby all kinds of products were subjected to quality checks and supervision to maintain a quality standard that is desired by the society.

^(٥٤) *Ibid.*

^(٥٥) Saleh Fauzan, *The Institution of Ḥisbah: Its Roles in Nurturing Fair and Just Economic System in Islam*, The National Conference on Islamic Economics ٢٠٠٩, ١٠-١١ February ٢٠٠٩, University Malaya; Ahmad Bello Dogarawa, 'Ḥisbah and the Promotion of Ethical Business Practices', *J. Islam Mid. East Fin. and Mgt.* ٦/I (٢٠١٣).

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٢. Sharī'ah control, including supervision of the market actors from the viewpoint of Sharī'ah-compatible contracts, avoidance of *ribā*, deception, fraud, etc., in contracts.
٣. Moral filtering, including the assurance that all actors and their market transactions adhere to Sharī'ah's moral and ethical values: *i.e.*, truthfulness in transactions, honest description of the characteristics of all merchandise, fair treatment of apprentices, concern for the wellbeing of animals, etc.
٤. Environment control, including control that traders do not overstep the boundaries in their own domain. For instance, merchants may not exhibit goods or merchandise outside their own shops, hence infringing on the rights of buyers or passers-by; craftsmen may not produce noxious fumes or other irritants that might harm passers-by or neighbours; craftsmen who produce noise must keep their shops at a distance from residential areas or other businesses.^(٥٦)
٥. Health control, also assigned to *hisbah* institutions in the Islamic market. For instance, edible merchandise may not be exposed to insects; production must be done under healthy conditions; harmful or rotten

^(٥٦) Al-Mubarak, supra note ٥١.

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ingredients are forbidden for use by the producer; producers of bread, meat, and other food items must follow all rules of cleanliness, even having to hire workers to fan the air continuously to scare away insects; soap (invented by Muslims) must be used for cleanliness; the nose, mouth and hair must be covered when working with dough and fresh bread, etc. In fact, classical books on *ḥisbah* detail health and cleanliness rules and suggest methods of inspection, including surprise visits, etc.^(٥٧)

٦. Arbitration function, assigned to *ḥisbah* institution in market disputes between workers and employers, between sellers and buyers, as well as between the merchants themselves. In this sense, *ḥisbah* represents an agency that provides quick and immediate arbitration to solve disputes before they reach the court. Once both parties have accepted arbitration by the *muḥtasib*, or by any of his assistants or sometimes by a committee formed by the *muḥtasib*, the dispute is usually solved on the spot without waiting for court procedures.^(٥٨)
٧. Anti-monopoly functions and pricing, assigned to the *ḥisbah* institution to guarantee that monopolies do not occur, the type of monopolies

^(٥٧) Muhammad al-Mubarak, *Al-Dawlah wa Niẓām al-Ḥisbah 'Inda Ibn Taymiyyah*, (Beirut: Dār al-Fikr Alarabiu, ١٩٦٧).

^(٥٨) *Ibid.*

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mentioned in the books of *hisbah* where the *muhtasib* has to interfere include an implicit agreement between producers to raise the prices of their services or goods, the existence of one producer/seller of a commodity if he/she hoards or stores a commodity in order to reduce the market supply. If a commodity is actually produced by a single producer, then the *hisbah* institution must enforce pricing, as argued by Ibn Taymiyyah and others. Hence this function includes pricing if it is the only way to eliminate monopolistic practices.

٨. Supervision over the continued provision of public utility services in the market and society. The *hisbah* institution was also assigned the task of seeing to it that the public utilities are maintained properly. These include roads, bridges, and streetlights. Water fountains for homes and mosques, public bathrooms, drainage, sewage, etc. If any of these public services is damaged or affected by wear and tear or naturally calamities, the *hisbah* institution steps in to supervise repair and maintenance. If there are no financial resources in the local government's treasury, help from the centre is sought or taxes are imposed upon the wealthy for repair and maintenance of public services.^(٥٩)

(٥٩) Ibn Taymiyyah, *supra* note ٣٢,٤٩.

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All Islamic countries and major Muslim cities have a heritage of *ḥisbah*, developed in Muslim societies. The institution of *ḥisbah*, once revived, came to represent a semi-governmental agency that takes charge of different aspects of market regulations, especially those that do not fall under the macro-policies. It can be charged with all or most of the above-mentioned functions of which we have a rich historical past. There remain other tools for direct regulation of the market and macro-lend regulations, which will be discussed in the following subsections.^(٦٠)

٥,١ Market Manipulation and its Techniques

Market Manipulation or Stock Price Manipulation is the act by an individual or a group of individuals of influencing the stock price in such a manner as to which it would not if left to the natural rhythm/pattern of supply and demand.^(٦١) It is also defined as the intentional conduct of an individual or group with the aforethought design of deceiving investors by regulating or artificially affecting the market of security.^(٦٢) Market Manipulation with the aim of affecting Stock Market Price is done in a variety of manners the most

^(٦٠) *Ibid.*; Nichola Ziadeh, *Al-Ḥisbah wa l-Muhtasib fī l-Islām* (old texts collected and edited with an introduction) (Beirut: Catholic Press, ١٩٦٢); Al-Shirazi, *supra* note ٤١.

^(٦١) Twentieth Century Fund (١٩٣٥), p. ٤٤٤.

^(٦٢) As defined by the U. S. Securities and Exchange Commission.

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prominent of which are “manipulation” by: (i) provision of false information, (ii) Stock transactions/Orders and (iii) practice/action leading to a false impression.

(i) **Market Manipulation by provision of False Information:**

The Stock Exchange is an open Secondary Market, where shares and equities are freely bought and sold. The majority of the traders on the Stock Exchange lack very in-depth understanding of the operations of the company, whose shares they are dealing and its prospects. Thus trade activity on the exchange is heavily influenced by rumors and information, which can be inaccurate.

(ii) **Market Manipulation by Misleading Transactions:**

As aforementioned most investors and traders have limited knowledge of the companies whose shares they trade in, they closely follow the trend or pattern of movement in the stock exchange. The prices of shares follow their active demand and supply in the market. Certain traders can manipulate the price of these shares by creating an artificial appearance of trading activity on them. Stock prices via transactions can be manipulated in a number of ways, traders start selling a particular stock quickly and in concentration during a short duration,

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which results in other shareholders selling their shares as well which the manipulators then buy at lower prices (since the sudden abundance of supply results in a decrease of price).

This strategy is colloquially referred to as a “bear raid”. Similarly certain traders start buying certain stock during a short period which gives an impression of increased demand driving both demand and prices up, benefiting from which the manipulators then start selling their own shares (bought when the prices are low) at the inflated market price, this is colloquially referred to as a “bull raid”.

When a particular stock starts to become actively traded, usually its market value increases. Using these strategies certain traders aim to artificially create an appearance of trading on a particular stock and then benefiting from the higher price. Variations of the above methods as well as other tactics are used by a few traders in order to manipulate the market and profit from it.

(iii) **Market Manipulation by practice/actions which leads to a false impression:**

In addition to misleading the concerned people with transactions, the stock market can also be misled by actions or practices which mislead people. An example of this could be a trader flooding the market with

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a rumor that a cell phone company has developed a revolutionary technology, which would allow phones to generate holograms. Regardless of whether or not the rumor is accurate if people believe the rumor to be true, they will start buying this cell phone company's shares in anticipation that the price will go up.

This will lead to a price hike and any trader who had bought shares earlier at lower prices, can now sell them at the inflated price thus making a handsome profit. Similarly people can make false statements about how profitable their involvement would make a company, with the aim of misleading the public about its profitability. This in turn would drive up stock prices, shareholders who decide to sell capitalizing on the price boom would be selling their shares at prices higher than they bought them for, hence profiting from the false statement.

٥,٢ Importance of the Stock Exchange

The Stock Exchange is the forum of company ownership exchange in the country that it is used. Stock Markets are essential to the progress of a country as they are a means of generating funds and capital from investors to inject into the economy of a country. A healthy stock market depicts a healthy economy, however there exists a knowledge gap between the actual future of a company

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and its price in stock, this gap is filled by speculation. All the shareholders and stake holders operating in the stock exchange represent a large collective, all of whom are dependent on fair operation of the exchange and stock trading for their livelihood. If investors are not protected this would stunt the development of the financial market. As stock exchanges grow amateur traders enter the market, investing their savings aiming to secure profits to meet their expenses, these amateur traders are exceptionally vulnerable to market manipulation.^(٦٣)

With such high stakes if a few traders benefit exorbitantly at the sake of others, this leads to a poor investment climate. Where people avoid investing in the stock exchange, which leads to less investment, less capital which starts a vicious cycle by in turn causing less growth, smaller profits, smaller salaries, lesser buying power and hence ultimately a weaker economy.^(٦٤)

In ٢٠٠٣ the Capital Market Law was promulgated under Royal Decree No (M/٣٠) dated ٢/٦/١٤٢٤ H (١٦ June ٢٠٠٣), which officially created/established the Capital Market Authority (CMA), a government body to protect investors and

^(٦٣) Avgouleas (n٧٧); Viktoria Dalko and Michael Wang, *Regulating Competition In Stock Markets* (Wiley ٢٠١٢).

^(٦٤) Ibid.

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illegal acts in the stock market.^(٦٥) Pursuant to article ٤٩ (b) of the Capital Market Law, which states that the CMA would set out rules to further elaborate and clarify upon the offences listed in the Capital Market Law,^(٦٦) the CMA set out the Market Conduct Regulations(MCR).^(٦٧)

The Capital Market Law and the MCR are meant to be read and applied in conjunction. In application article ٤٩ of the Capital Market Law and Articles ٢ & ٣ of the MCR, contain a “material” as well as a “moral” element.^(٦٨) The “material” element is physical such as the conducting of a series of transactions, which would create a false impression of active trading and inflate stock price. The “moral” element is mental and is satisfied when the person conducting the act is aware of its nature and had the intention of conducting the act that implies manipulation or fraud.

^(٦٥) Mohamed A. Ramady, *The Saudi Arabian Economy: Policies, Achievements, and Challenges* (Springer ٢٠٠٥) ١٤٨-١٤٩.

^(٦٦) CML art ٤٩(b).

^(٦٧) Amr Daoud Marar, 'The Duality of The Saudi Legal System and Its Implications on Securitisations' (٢٠٠٦) ٢٠. Arab law Quarterly ٣٣٣, ٣٨٩-٣٩٠.

^(٦٨) See Case No. ٣٨/٣١ CRSD Decision No. ٧٩٨/L/D١/٢٠١٠ of ١٤٣١ H.; Case No.: ١١/٣. CRSD Decision No. ٦٦٤/L/D١/٢٠٠٩ of ١٤٣١ H.; Case No.: ٦٣/٣. CRSD Decision No: ٦٦٣/L/D١/٢٠٠٩ of ١٤٣٠ H.; Case No.: ٩١/٣. CRSD Decision No. ٦٦٥/L/D١/٢٠٠٩ of ١٤٣١ H.

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An example of the “moral” element would be the individual who conducted the series of transactions above, doing them intentionally with the knowledge that his actions would lead to an artificial alteration of price.

٥,٣ Insider Trading

Insider trading is classically defined as the using of material, nonpublic information by a trader, corporate insider or somebody who owes the company a fiduciary duty.^(٦٩) The United States Securities and Exchange Commission makes a distinction between legal and illegal insider trading, the former being when “corporate insiders”^(٧٠) buy and sell stock in their own companies and the latter the buying or selling of a security, in breach of a fiduciary duty while in possession of material, non-public information about the particular stock.^(٧١)

Insider trading like market manipulation removes the traders’ confidence in the market, hence less investment enters the market, which leads to a downward spiral of lesser capital, lesser growth, less production, less profits, etc. until it adversely affects the entire economy. The minimization of insider trading

^(٦٩) Black’s Law Dictionary (٩th Edition, ٢٠٠٩), p. ٨٦٦.

^(٧٠) “Corporate insiders” meaning a company's officers and directors, and any beneficial owners of more than ten percent of a class of the company's equity securities registered under Section ١٢ of the U. S. Securities Exchange Act of ١٩٣٤.

^(٧١) <http://www.sec.gov/answers/insider.htm> (as seen on ٠٧/٠١/٢٠٢٠).

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requires “both good corporate control and effective enforcement of insider trading regulations.”^(٧٢)

The Saudi Authorities realizing the importance of protecting the market and other stake holders have proscribed it under Article ٥٠ of the Capital Market Law, which is further elaborated upon by Articles ٤ to ٦ of the MCR. Article ٥٠ of the Capital Market Law prohibits any individual who is aware of or comes into possession of such information which is not publicly known (or disclosed) and the release of which would have a material effect on share prices. Articles ٤ to ٦ of the MCR (set out under Article ٥٠ (c)) further elaborate and clarify upon Article ٥٠ of the Capital Market Law, they also expressly make the disclosing of insider information (Article ٥ of the MCR) and acting upon knowledge of the same (Article ٦ of the MCR) offences.

٦ Market and Macro-Regulations

Financial lawmakers, who govern contracts, require *ijtihād* (independent reasoning) and *ikhtilāf* (differences) to reconcile complex issues which relate to financial law. As financial contracts, derivatives and other principles require innovation to comply with financial rules, the need for *ijtihād* in aid of expert

^(٧٢) Financial Institutions and Markets, Current Issues in Financial Markets (٢٠٠٨), p. ٢٠٣.

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knowledge from jurists is critical and necessary. This will ensure any change or a difference in approach is in line with the Qur'ān and the Sunnah.

Ijtihād and *ikhtilāf* have a limited, but permissible, leeway of variance, as opposed to a rigid set of rules. This does not mean, in turn, that one can pick and choose, nor does it mean no established set of fundamental principles require conforming to. There are indeed fundamental principles in which *ijtihād* and *ikhtilāf* are forbidden; however, in our present discussion, we are arguing room for opinions in certain cases and certain minor principles, which relate to Islamic finance.

v Conclusion

Islamic economics presents the basic principles, such as the prohibition of usury, agreed upon by mainstream religions in the world. This has changed the lending system, so that a failure to repay a loan does not result in accrual of interest by the individual, but rather the lender is encouraged to give the borrower time to repay. It also offers systems to support the poorest in society, such as *zakāt*^(٧٣) and Islamic insurance (*takāful*).^(٧٤) These principles protect

^(٧٣) *Zakāt* is a compulsory payment of ٢,٥% of a person's wealth that is distributed to the poor through charities.

^(٧٤) *Takāful* in Islamic finance is similar to insurance in Western finance: PwC, Financial

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financial markets from sources of imbalance and deviation in economic activity that could lead them to fall into crisis and subsequently create global economic and human disasters. If we avoid these imbalances, the market will function more transparently and foster economic stability.^(٧٥)

An Islamic economy achieves a balance between the profit sector (represented by the market) and the non-profit sector (represented by social institutions); finding this balance helps to contain the negative effects of the market.^(٧٦) In a scientific study conducted by a sector of the economic world, it was confirmed that the profit sector should be maintained to support the non-profit sector and encourage that, which will bring stability to the economic market.

In order to addressing this obstacle facing the capital market authority should the Saudi government establish independent committee. This committee should have an independent entity and not accountable to capital market authority anyway. It is to counter the market manipulations, effectively

Services; available at: www.pwc.com/gx/en/financial-services/islamic-finance-programme/takaful-growth-opportunities.jhtml, accessed ٢٨ November ٢٠١٩.

^(٧٥) Dr. Abul Hassan, *The Global Financial Crisis and Islamic Banking*; available at: www.islamic-foundation.org.uk/IslamicEconomicsPDF/Hassan-financialcrisis-if.pdf, accessed ٢٨ November ٢٠١٩.

^(٧٦) *Ibid.*

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and if anyone found guilty the committee can take the cognizance of the case, and punish the accused without taking further permission from capital market authorities.

However, if an accused disagree with the decision, an option he may be able to invoke the cognizance of the court. In this regard the courts should have the excess to the experts relating to market manipulations, in-order to get the advisory opinion and further recommendations. There should be a body wise enough and knowledgeable like a *Muslim Judicial Council* to seek advice and if required get recommendations on the issues related to the market manipulations time to time.

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التلاعب في الأسواق المالية ونظام الحسبة

الدكتور/ سعد بن علي بن تركي الجلعود

الأستاذ المشارك بقسم الفقه

كلية الشريعة والدراسات الإسلامية بجامعة القصيم

ملخص البحث:

أضحت الأسواق العالمية اليوم مركزاً هاماً وحيوياً في النشاط الاقتصادي، الذي هو عصب الحياة اليوم، وتعد أسواق البورصات المالية أحد شرايين الحياة المالية، وأكبر خطر يهددها وتواجهه هو التلاعب والاحتيال الذي يقع في السوق المالية من جهات عديدة، وهذا النوع يؤثر على نزاهة السوق المالية وكفاءتها، ولقد حاولت الهيئات المالية والجهات المشرفة على نظام السوق سن أنظمة محاولة الحد من جريمة التلاعب والاحتيال في السوق إلا أنه هذه التنظيمات ما زالت عاجزة عن إيقاف مثل هذه الجرائم أو التقليل منها بشكل يؤمن استقرار السوق المالي للمشاركين والمستثمرين. هذا البحث سيناقش معنى التلاعب والحكم الفقهي له ثم يبين كيف أن النظام في الفقه الإسلامي عالج هذه الإشكالية عبر نظام الحسبة، وكيف استطاع النظام في تقليل وتقليص التلاعب والاحتيال من خلال الرقابة على عمل السوق من جهة كون جهاز الحسب مؤسسة خارج إدارة السوق، كما سيتناول البحث معنى الحسبة والدور المنوط بها في رقابة السوق المالية، وقبل نهاية البحث سيعرج الباحث على معنى التلاعب في نظام هيئة سوق المال السعودي ثم في نهاية البحث خاتمة فيها سمو النظام المالي الإسلامي واستقلالية الجهاز الرقابي عليه والتي تعد أكبر عوامل نجاحه مع توصية حول نموذج يعالج هذه الظاهرة التي تؤثر على نزاهة السوق وكفاءته.

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