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## Article

### Fiqh maxim of "al-ghurm bi al-ghunm" : a critique on the interpretation of the maxim relating to risk-return concept in Islamic banking and finance

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# THE *FIQH* MAXIM *AL-GHUNM BI AL-GHURM*: A CRITIQUE ON INTERPRETATION OF THE MAXIM RELATING TO THE RISK-RETURN CONCEPT IN ISLAMIC BANKING AND FINANCE

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## ABSTRACT

**Purpose** — This paper aims to critically review the interpretation of the *fiqh* maxim *al-ghunm bi al-ghurm*, which, while being associated with the risk-return concept, is widely adopted in the Islamic banking and finance industry. Tracing back to the doctrinal sources of Sharī‘ah (Islamic law), the review intends to examine the actual meaning of the maxim based on its original context and Sharī‘ah evidences.

**Design/Methodology/Approach** — This paper inclines to the doctrinal methodology specified for Islamic law whereby the observations, documents and records are comparatively reviewed to establish a critical evaluation. A number of doctrinal sources have been gathered to analyse the Sharī‘ah essence of the subject matter; the two types of materials referred to are mainly classical Arabic dictionaries and the books of hadith along with the commentaries on them.

**Findings** — The review demonstrates a discrepancy concerning the adaptation of the maxim in Islamic banking and finance in relation to the risk-return concept. Though both principles of *ghunm* (gain) and *ghurm* (liability) have similarities in risk-return precepts, there are also differences between them in terms of interpretation and application. The context of the hadiths which are the Sharī‘ah basis of the maxim is a specific scenario in relation to asset-based transactions, whereas the risk-return concept is quite generic for the risk measurement system and is commonly used in financial management and investment.

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**Originality/Value** — The paper identifies the apparent gap in the current theories to assist researchers in examining this area of research.

**Research Limitations/Implications** — While it is generally believed that Islamic financial services should be based on risk-sharing modes, such as *mushārah* and *muḍārabah*, as alternatives to interest-bearing services, discussion on risk-sharing modes from the Sharī'ah perspective is not widely substantiated in contemporary academic literature. While this may limit the range of available research references, it does not compromise the validity of the findings of this study.

**Keywords** — *Al-ghunm bi al-ghurm*, *Fiqh* maxim, Islamic finance, Risk return

**Article Classification** — Conceptual paper

## INTRODUCTION

The study of modern finance since the 1960s has been framed within a Western perspective. It is seen as a positive economic tool, devoid of normative values, and hence, the matter of Sharī'ah compliance and non-compliance is not a concern. Financing within the capitalist system has been based on interest (*ribā*) for many centuries. Islamic finance emerged within this larger structure and co-exists with it, although its *raison d'être* is to provide a halal alternative to interest-based financing. The dominant juristic approach to Sharī'ah issues in Islamic banking and finance has been limited to ensuring that the activities are permissible and the transactions are valid by means of *fiqh* (Islamic jurisprudence) adaptations. One such juristic adaptation vis-à-vis the dual system is the *fiqh* maxim '*al-ghunm bi al-ghurm*' (no gain without risk).

The maxim provides an important criterion in determining the Sharī'ah compliance of any contract applied in Islamic banking and finance. It is often associated with the risk-return concept, which should be adopted by financial institutions offering Islamic financial services. Consequently, these institutions should engage in risk-based economic activities to obtain eligible returns, unlike the deposit-lending activity of conventional banking and finance, which is limited to credit risk and not business (venture) risk. Thus, only risk-based or profit-loss sharing modes, such as *muḍārabah* (profit sharing), *mushārah* (profit-and-loss sharing) or an equivalent contract, are promoted or even allowed. This is because the hope of gaining or the risk of losing does not involve the unjust appropriation of another's wealth, which is prohibited in Sharī'ah. Reluctance to apply such modes has led to criticisms that Islamic financial institutions are not truly Islamic.

Given the broader exposition of risk-return behaviour, the question arises as to whether the maxim '*al-ghunm bi al-ghurm*' gives the exact meaning of such a risk-return concept. It is also unknown whether the concept regarding the maxim, together with the respective Sharī'ah rulings, are appropriately applied to the Islamic banking and finance operations, which can be discerned by observing the financial institutions' roles as intermediaries. A more precise and insightful understanding of this maxim would allow its relevant application to the risk-return concept that can be adopted in Islamic banking and finance.

Based on the commendable works by scholars in Sharī'ah, economics and finance on this topic, this article will analyse the maxim to understand its actual meaning and context in light of Sharī'ah evidence. The article ends with a discussion of the research question: Has the maxim been accurately interpreted based on the original context? Has the risk-return concept articulated by the maxim been properly adopted in the current context of banking and finance? From there, some improvements shall be proposed to address the gap and foster future research on the topic.

## LITERATURE REVIEW

Various terms have been used by scholars for the maxim, such as '*al-ghunm bi al-ghurm*', '*man 'alaihi al-ghurm lahu al-ghunm*' and '*al-ghurm muqābal bi al-ghunm*'. Although the wordings vary, they nevertheless have similar connotations; they could be paraphrased in English as 'no reward without risk' or 'no risk, no gain'. This maxim seems to describe a general concept of risk in Islam. Based on this maxim, wealth acquisition and profit earning in Islam is only permissible if it is involved in an economic venture, and any gain should accompany liability for loss in order to acquire halal earnings (Waemustafa & Sukri, 2015).

In the field of finance, the term ‘risk’ is simply understood as the consequential effect of exposure or possible loss, either financial or non-financial. According to ISO (2018), risk is defined as the effect of uncertainty on objectives. This effect is a deviation from what is expected. It can be positive and/or negative for speculative risk or negative only for pure risk, which might create or result in opportunities and threats. Risk is often expressed in terms of risk sources, potential events, their consequences (including changes in circumstances), and their likelihood. The motivation for risk-taking is the ‘return’, which is defined as the income from an investment (profit), service (fee) or trade (mark-up/margin), and frequently expressed as a percentage of the cost (Oxford Dictionary of Finance and Banking, 2014). In simpler terms, it is understood as a yield, profit or gain. Therefore, pairing the terms ‘risk’ and ‘return’ connotes the possible profit that a particular activity may make in relation to the risk involved in doing it (Cambridge Business English Dictionary, 2011).

Risk-return is a fundamental pairing concept used in investment or financial management. Specifically, for an investment, the concept is an analysis of the risk impact and likelihood while measuring the return obtained therefrom. Many methods are used to analyse and evaluate a market, industry or company, as well as to manage risk and diversify a portfolio to amplify returns. In the case of investments in company securities, the return refers to the income from a security after a defined period in the form of interest, dividend, or market appreciation in security value, whereas the risk refers to the potential for either loss or gain resulting from uncertainty about future outcomes, specifically in relation to the return on this security (Singal, 2020). Therefore, it is essential for investors or fund managers to study the risk-return characteristics and profiles of the securities for risk-taking before making an investment therein. It is common, though not always the case, for such relationships of risk and return to exhibit a correlation; such that a higher return can only be generated by taking on a higher risk investment, whereas a lower risk and risk-free investment will only result in a lower return.

Associating the maxim ‘*al-ghunm bi al-ghurm*’ with the risk-return concept creates a new dimension in Islamic banking and finance. In a limited number of recent academic studies, contradictory perspectives have been expressed on the matter. Waemustafa and Sukri (2015) concluded that the concept of risk is associated with the fundamental concept of ‘*al-ghunm bil ghurmi*’, where profit is only legitimate when a party engages in real economic activities or venture. Fundamentally, Islamic banks seek to obtain returns by taking risks, the ultimate aim being to maximise the welfare of the *ummah* (nation) via activities that are free from prohibited elements.

Proclaimed as one of the main principles of Islamic banking and finance, the maxim should be applied through profit-sharing arrangements, such as through the use of *muḍārabah* and *mushārah* contracts. According to Trakic (2018), Islamic finance is achieved through the intensive and creative use of Islamic finance contracts, even though arguably they are not meant to be used by institutions in which the main objectives are profit maximisation with no, or very little, risk, such as banks—the fundamental rule of business in Islam is that if there is no risk there will be no gain. According to Rafi (2015), Mirakhor and his co-researchers have spent the past thirty years defining the structure of an economy and financial system based exclusively on risk-sharing, devoid of interest-based debt. Their work emphasises a financial system centered on real-sector activities as a more viable alternative to the current debt-based conventional financial

system. Their research presents Islamic finance in its classical form, centered on the maxim *al-ghunm bi al-ghurm*, which they argue is significantly different from the operational procedures adopted by present-day Islamic banks.

This risk-sharing approach has been proposed as an alternative to the current financial system to address financial stability. Therefore, Islamic finance must be designed to fully embody Sharī'ah-based risk-sharing characteristics rather than simply being a Sharī'ah-compliant repackaging of the debt-based conventional system. To appeal to the whole world instead of just the Muslim population, Islamic finance must address the weaknesses of the conventional financial system. Building on the discussion of debt, the Islamic legal maxim '*al-ghunm bi al-ghurm*' is established as the defining characteristic of Islamic finance. This principle aligns (almost) identically with the defining characteristic of antifragility—to have 'skin in the game' (Rafi & Mirakhor, 2018).

It is generally believed that the real Islamic alternatives to interest-bearing loans as the form of financial services are *mushārah* and *muḍārah*. However, the reality is that Islamic law also allows trade besides investment, but not interest-bearing loans. Furthermore, it does not make any distinction between the exchange contracts of *murābahah* and *ijārah*, and the equity-based contracts of *mushārah* and *muḍārah*. They all possess a similar status as far as their validity and legitimacy are concerned (Mansoori, 2011). Accordingly, analysing the actual meaning and context of the maxim and its sources, evaluating the arguments, and addressing the gap are essential for better understanding and development of Islamic banking and finance.

## METHODOLOGY

In general, this research adopts the document analysis method. Specifically, the doctrinal method is used. Doctrinal legal research methodology is library-based research and the most common methodology employed by those undertaking research in law (Ali *et al.*, 2017). The term doctrine essentially covers everything under the legal umbrella in terms of rules, precedents and statutes, and where it can be abstractly binding or non-binding (Malhotra, 2021). This method, the so-called 'black letter' methodology, necessitates the researcher to compose a descriptive and detailed analysis of the legal rules found in legal sources, such as cases, statutes or regulations to support a hypothesis or opinion (Jerome Hall Law Library, 2019). However, the method does not consider contemporary doctrine or rulings regarding the matter. Although the method may limit the scope of discussion, it does not hamper the findings as the objective is to trace back the origin of the text, including its context and interpretation, to the early period of Islamic law. In the context of this article, the Sharī'ah is referred to.

Pursuant to the sources of Sharī'ah, two types of material are referred to:

- i. Arabic dictionaries: Although Arabic dictionaries are not a source of Islamic jurisprudence, reference to them is necessary for gaining an understanding of the Arabic terms according to the context in which such terms originated. For this purpose, many dictionaries were screened, and only those that provided proper and clear meanings were selected. These included classical and contemporary Arabic dictionaries, as well as classical dictionaries of terms in the Qur'ān and hadith. Priority was given to classical dictionaries due to their authenticity in relation to the Arabic language and *fiqh*.

- ii. Books of hadith: Every *fiqh* maxim has a basis that is derived from Sharī‘ah sources, mainly hadith. Therefore, it is essential to refer to the respective hadiths to understand their context and applicability for deriving the Sharī‘ah ruling and maxim. Pursuant to that, each relevant hadith was screened from a number of source books, and their authenticity was studied as per hadith methodology. In addition, commentaries (*shurūh*) on the relevant hadiths were consulted, written by authors from various schools of *fiqh*. Moreover, the books of Islamic jurisprudence (*fiqh*) were referred to in order to further understand the various schools’ interpretations of the relevant Sharī‘ah texts.

## RESULTS

The meaning of the individual terms ‘*ghurm*’ and ‘*ghunm*’, as well as the maxim ‘*al-ghunm bi al-ghurm*’ that were described in the above-mentioned doctrinal sources of Sharī‘ah are summarised in **Table 1**.

**Table 1: Interpretation of Doctrinal Sources**

No.	Doctrinal Sources	Interpretation of Text
A.	Arabic Dictionaries	<p>Meaning of terms <i>ghurm</i> and <i>ghunm</i>:</p> <ul style="list-style-type: none"> <li>• <i>Ghurm</i>: Debt, fine, obligation, impost, damage or loss – to indicate loss, liability, obligation or risk exposure faced by a party</li> <li>• <i>Ghunm</i>: Booty, spoil, plunder, loot, gain, profit, advantage, or benefit – to indicate gain obtained by a party</li> </ul>
B.	Islamic Jurisprudence Sources - Understanding of the hadith associated with <i>ghurm</i> and <i>ghunm</i>	
i.	Hadith of <i>Rahn</i>	<ul style="list-style-type: none"> <li>• Pledging involves an asset to be pledged, which encapsulates the benefit, cost and risk. It is constructively or physically held by the creditor to secure the debtor’s debt, while the ownership of the asset remains with the owner.</li> <li>• Benefit is tied back to the expenditure of the asset that is incumbent on the responsible party. Cost-benefit is an inherent element of the pledged asset that is owned by the pledgor.</li> </ul>
ii.	Hadith of Sale	<ul style="list-style-type: none"> <li>• The sale contract involves an asset sold by the seller and the price paid by the buyer for the subject matter. It should not contain any defect and fault. In case it does, it must be disclosed and agreed between contracting parties.</li> <li>• Ownership of the asset will then be transferred from the seller to the buyer along with the inherent risk associated with it, the benefit to be gained and expenditure to be spent. In other words, the asset possession entitles the buyer to the benefit of the asset, which is encapsulated with its expenditure and risk.</li> </ul>

Source: Authors’ own

## DISCUSSION

The meanings of the terms and the maxim, as summarised above, do not exactly match the aforesaid risk-return concept. They are similar in certain aspects but differ in others. The concept that is commonly applied in investment is used to analyse the risk impact and likelihood when measuring the return on investment. Therefore, the concept is quite generic and used for financial management purposes, whereas the context of the maxim's hadith is specific to the inherent risk arising in pledging and sale, which are asset-based transactions. Further discussion is provided in the following section.

### Classical Arabic Dictionaries

*Ghurm* is an infinitive of the verb *gharima-yaghramu*, which means to be incumbent on someone in settling a matter with money or wealth. If it is used in the form of *gharima al-diyah wa al-dayn*, it means to settle the *diyah* (blood money) and debt; whereas, if it is said *gharima fi al-tijārah*, it means to incur a loss in business (*Al-Mu'jam al-Wasīt*, n.d.). Therefore, *ghurm* means something that is necessary to be carried out or settled (Ibn Fāris, 1985); for example, a debt or business loss. It is also defined as performing something that is necessary in terms of surety or necessary monetary or wealth replacement for non-criminal matters (Al-Farāhīdī, n.d.). According to Ibn Manẓūr (n.d.), the term *ghurm* is also defined as debt. When used in the phrase *rajul ghārim*, it means 'a man obliged with debt'. In the hadith of *rahn*, *ghurm* refers to fulfilling the obligations associated with the pledge (Al-Harawī, 1999). In another hadith, the term *ghurm mufẓi'* is used, meaning significant liability of heavy damages (Ibn al-Athīr, 1979). The term can be translated into English as debt, fine, obligation, impost, as well as damage or loss (Wehr, 1976).

Meanwhile, the term *ghunm* is an infinitive of the verb *ghanima-yaghnamu*, which means to attain or gain something. Therefore, *al-ghunm* means attainment of something, and some scholars added 'without hardship' (*Al-Mu'jam al-Wasīt*, n.d.). As mentioned in the hadith of *rahn*, *ghunm* means addition and growth of the pledged item (Al-Harawī, 1999) and an increase of its value (Al-Zabīdī, n.d.). The term can be translated into English as booty, spoil, plunder, anything obtained without trouble, loot, gain, profit, advantage, or benefit (Wehr, 1976).

### Islamic Jurisprudence Sources

The above-mentioned definitions of the terms do not substantially differ from the technical meaning of their usage in the two relevant hadiths that have been identified for context analysis. These are elucidated as follows.

#### *The Hadith of Rahn (Pledging)*

Allah's Messenger (SAW) said:

«لَا يَغْلُقُ الرَّهْنُ مِنْ صَاحِبِهِ الَّذِي رَهْنَهُ، لَهُ غُنْمُهُ وَعَلَيْهِ غُرْمُهُ»

The mortgaged item does not become the property of the mortgagee; it remains the property of the owner who mortgaged it; he is entitled to its benefits (or increase in value) and is liable for its expenses (or loss) (Al-Ṣan'ānī, 1982, hadith no. 15033-15034; Abū Dāwūd, 1987, hadith no. 186-187; Ibn Abī Shaybah, 1988,



hadith no. 22799; Al-Jāwuli, 2004, hadith no. 1477-1480; Al-Bazzār, 2009, hadith no. 7741).

With similar meaning, the hadith is also narrated as «لَا يُعَلُّ الرَّهْنُ، لَهُ غُنْمُهُ، وَعَلَيْهِ غُرْمُهُ» (Al-Dāraqutnī, 2004).

Scholars have extensively debated the hadith with regard to its chains of narration, variant wordings and their meanings, which are reflected in the various *fiqh* rulings involving it. There was a long discussion by hadith scholars on the chains of narration (*isnāds*) of the hadith. They debated whether it was accurately attributed to the Prophet (SAW) through a companion (Abū Hurayrah (RA)), or whether the more authentic version is that the statement was attributed to him by the Tābi‘ī Sa‘īd ibn al-Musayyib, which would make it *mursal* (discontinuous). There is also another possibility: that the statement is actually the words of Sa‘īd and not of the Prophet (SAW). Yet another possibility is that only the additional words ‘*lahu ghunmuhu wa ‘alayhi ghurmuh*’ were the statement of Sa‘īd al-Musayyib. Some narrations attribute it to him while others do not. Another issue is the status of the narrators (*rijāl*) and the judgements of hadith experts on their reliability (*jarḥ wa ta’dīl*), which then leads to the issue of the hadith’s reliability. Is it *ṣaḥīḥ* (rigorously authenticated), *ḥasan* (acceptable but not of the highest standard) or *ḍa‘īf* (fails to meet the required conditions of authenticity)? Its admissibility as evidence for a *fiqh* ruling depends on the judgement regarding the reliability of its *isnāds*. In summary, the hadith is accepted by many hadith experts and is used as evidence by many *fuqahā’* (scholars of *fiqh*) (al-Shawkānī, 1993). Although Abū Dāwūd (1987) reported the hadith as *mursal* (hadith nos. 186 & 187)—i.e., it being attributed to the Prophet (SAW) by Sa‘īd ibn al-Musayyib—he argued that *mursal* hadiths can be used as evidence for *fiqh* judgements (Abū Dāwūd, 1984). Even if the hadith is classified as *ḍa‘īf*, it has been narrated by multiple branching chains that strengthen each other. Therefore, the hadith can be used as the basis for *fiqh* rulings. However, the admissibility of the phrase ‘*lahu ghunmuhu wa ‘alayhi ghurmuh*’ has been disputed due to the aforementioned issue of it being the statement of Sa‘īd.

The majority of scholars have interpreted *ghunm* as benefit, growth and yield of the pledged item (Ibn ‘Abd al-Barr, 2000; Al-Bājī, n.d.). It could also mean an addition to it (Al-Jāwuli, 2004). However, according to Abū Ḥanīfah (and those who share his opinion), *ghunmuhū* means any excess from the sale (of the pledged item) after the debt amount has been subtracted (Al-Ṭaḥāwī, 1994), as in most cases, the pledge is used to secure a debt. As for the term *ghurm*, scholars have offered several meanings of it including calamity, destruction or diminishment of the pledge, expenditure on it, and redemption of it. However, according to Abū Ḥanīfah, it means outstanding debt after sale of the pledge (Al-Ṭaḥāwī, 1994). Badr al-Dīn al-Aynī said:

Al-Shāfi‘ī’s\* interpretation of Sa‘īd ibn al-Musayyib’s statement ‘*lahu ghunmuh wa ‘alayhi ghurmuh*’ was rejected by all linguistic scholars. It was narrated from Abū ‘Amr Ghulām Tha‘lab: ‘Those who said that *ghurm* means destruction are in error; rather, *ghurm* is necessity/obligation. The term *ghārim* is derived from it because [the *ghārim*] is obliged with debt’ (al-Aynī, 2008, Vol. 15, p. 160).

[\* According to al-Shāfi‘ī in the *Musnad*, *ghurm* means destruction or deficiency of the pledge (Al-Jāwuli, 2004)]

Perhaps, these differing meanings could apply in various contexts and scenarios. Specifically, *ghunm* refers to the gain or benefit related to the pledged asset, whereas *ghurm* denotes the potential risks, deficits, or other financial implications, especially in the context of settling debts secured by the pledge. Nevertheless, the overall concept encompasses elements of benefit, obligation, risk and ownership concerning the asset, i.e., the pledge that secures a debt.

There are also several arguments concerning the derived rulings of this hadith. With regard to the statement '*lahu ghunmuhu wa 'alayhi ghurmuh*', most scholars opined that the benefit of the pledge is for the pledgor. According to al-Shāfi'ī, who shares a similar opinion to that of Mālik and Aḥmad, the benefit, yield or addition belongs to the pledgor. If the pledge is an animal, then its food and drink are the responsibility of the pledgor. If, however, such expenditure is borne by the pledgee, then he is entitled to claim the expenditure from the pledgor (Ibn al-Athīr, 2005). Ibn Rushd said: 'The benefit is for the pledgor unless the pledgee stipulates otherwise; this is well-known in the Mālikī *madhhab* (Ibn Rushd, 1988, Vol. 11, p. 64). Similarly, Ibn Qudāmah mentioned: '...because the usufruct/benefit belongs to the pledgor, so it is not permissible to take it without his permission, with [assets] other than a pledge...' (Ibn Qudāmah, 1994, Vol. 2, p. 84). According to Mālik, the benefit remains in the pledgee's possession along with the *aṣl* (asset). If the pledgor wishes, he can settle it under the control of the pledgee, either personally or through a representative, ensuring that the owner retains ownership while the preservation right remains with the pledgee (Ibn al-'Arabī, 2007). However, according to Abū Ḥanīfah, the benefit of the pledge remains idle as the pledgee has no right to it, but it does not go to the pledgor as it has been sequestered from him (Al-Ṭaḥāwī, 1994). Al-Kāsānī said:

The mortgagor cannot benefit from the mortgage—neither usage, nor riding, nor wearing, nor residence, nor anything else—because the mortgagee has the preservation right at all time, which disallows recovery and usufruct/benefit. Additionally, the mortgagor is not allowed to sell the mortgage to anyone other than the mortgagee without his permission, as this would infringe on the mortgagee's rights without his consent (Al-Kāsānī, 1986, Vol. 6, p. 146).

Scholars also have different views regarding the destruction or deficiency of the mortgage. According to al-Shāfi'ī (1990a), the mortgagee does not guarantee the mortgage on the basis of being a trustee, except in cases of misconduct, where the mortgagee must provide the guarantee. This opinion is also held by Alī ibn Abī Tālib (RA), 'Aṭā' ibn Abī Rabbāḥ, al-Awzā'ī, Aḥmad, Abū Yūsuf and Abū 'Ubayd, and it was preferred by Ibn al-Munzir. Meanwhile, Abū Ḥanīfah and al-Thawrī held that a mortgage is guaranteed based on the lower of its value or the debt amount, as narrated from 'Umar ibn al-Khaṭṭāb (RA) (Ibn al-Athīr, 1979). The guarantee is measured by the settlement of the debt. In this context, any increase in value is considered a trust due to excess debt and is held with the owner's permission. However, if the value decreases, it is used to settle the debt, and any remaining balance is to be settled accordingly (al-Mawṣulī, 1937). According to Mālik, a mortgage is guaranteed if it consists of items whose loss is not immediately apparent, such as gold, silver, and goods. It is not guaranteed if it consists of items whose loss is obvious such as animals and real estate. According to al-Nakhā'ī, al-Ḥasan al-

Baṣrī, al-Sha‘bī, and Shurayḥ, the mortgage is guaranteed for the entire debt, even if the debt exceeds the value of the mortgage (Ibn al-Athīr, 2005).

In addition, there are different views if the pledgee spends his money on the pledge. The aforesaid hadith seems to contradict another hadith reported on the authority of Abū Hurayrah (RA):

قال الرسول ﷺ: «الظَّهْرُ يُرْكَبُ بِنَفَقَتِهِ إِذَا كَانَ مَرْهُونًا، وَلَبَنُ الدَّرِّ يُشْرَبُ بِنَفَقَتِهِ إِذَا كَانَ مَرْهُونًا وَعَلَى الَّذِي يَرْكَبُ وَيَشْرَبُ النَّفَقَةُ» رواه الجماعة إلا مسلما والنسائي... قال الشوكاني: الحديث له ألفاظ: منها ما ذكره المصنف، ومنها بلفظ: «الرَّهْنُ مَرْكُوبٌ وَمَحْلُوبٌ» رواه الدارقطني والحاكم...

Allah’s Messenger (SAW) said: ‘An animal [some said: a camel] can be used for riding if it is pledged, due to the spending on it; the milk of a milch animal can be drunk if it is pledged, due to the spending on it. And the one who rides and who drinks should provide the expenditure.’ It was narrated by the Jamā‘ah (all the major hadith collectors) except Muslim and al-Nasā‘i (Ibn Taymiyyah al-Harrani, 2008). Al-Shawkānī (1993) said: ‘The hadith has been narrated by various wordings: one of them was mentioned by the author [Ibn Taymiyyah]; another version, reported by Dāraqūṭnī and al-Hākim, states: ‘the pledge is ridden and milked’.

و على الذي ي حلب ويركب (على الذي ي حلب ويركب) Al-Khattābī (1932) explained that, according to Abū Dāwūd, the statement (على الذي ي حلب ويركب) is *mubham* (ambiguous). It is not clear who is meant, whether it is the pledgor, pledgee, or someone who holds the pledge; therefore, scholars have different interpretations of it. Aḥmad ibn Ḥanbal and Ishāq ibn Rāḥawayh opined that the pledgee benefits from the pledge by the amount of expenditure incurred. Al-Shāfi‘ī asserted that the benefit and expenditure of the pledge are on the pledgor, and the pledgee does not benefit anything from the pledge, and the statement (الرهن مركوب ومحلوب) goes to the pledgor as the owner. This is also narrated from al-Sha‘bī and Ibn Sirīn, and it is the opinion preferred by Abū Dāwūd. According to the Ḥanafīs, this increase is owned by virtue of owning the original asset, so it does not fall under the rules of the mortgage, such as earnings and yields (Al-Sarakhsī, 1993). According to the Mālikīs, it goes back to custom or mutual consent between both parties (Ibn al-‘Arabī, 2007).

Concisely, several points can be understood from the context of the hadith:

- Pledging involves an asset that encapsulates the benefit, cost and risk to be pledged to, and physically or constructively held by the creditor to secure the debtor’s debt while the ownership remains with the owner.
- The majority of scholars agreed that, in principle, the pledgor, as the owner, is obliged to bear the cost of the asset’s maintenance (where applicable) as well as the loss in case it is destroyed or diminished, and any associated risk, therefore making him entitled to the yield from the pledged asset.
- Pursuant to the above, in case the pledgee spends his money or wealth for asset maintenance, there is an argument as to whether he is entitled to the benefit. Some say he is entitled to benefit from the asset based on the value of his expenditure, while others say

he is not and that he merely has the right to claim recovery of his expenditure from the pledgor.

- Basically, the benefit is linked to the expenditure on the asset that is incumbent on the responsible party. Despite the argument on the sub-matter of the third point, cost-benefit is an inherent element of the pledged asset, which is owned by the pledgor.

### ***The Hadith of Sale***

According to some scholars, the maxim is associated with another maxim: *al-kharāj bi al-ḍamān* (al-Suyūṭī, 1991), which is derived from a hadith reported by ‘Ā’ishah (RA) that Allah’s Messenger (SAW) said:

«الْخَرَجُ بِالْضَّمَانِ»

*Al-kharāj* (benefit or profit [from the purchased item]) belongs to the buyer (who possesses it and bears responsibility for it) (Al-Tirmidhī, 1975, hadith nos. 1285-1286; Al-Nasā’ī, 2001, hadith no. 4490; Abū Dāwūd, n.d., hadith nos. 3508-3510).

With similar meaning, the hadith is also narrated as (الْغَلَّةُ بِالضَّمَانِ) (Ibn Abī Shaybah, 1988, hadith no. 21182; Aḥmad, 2001, hadith nos. 24514, 24847, 25276).

There is an argument from the narrators of these chains that reflects the *fiqh* ruling. The hadith is narrated via ‘Urwah ibn Zubayr from his aunt, Umm al-Mu’minīn ‘Ā’ishah (RA). It is narrated from him by his son, Hishām ibn ‘Urwah, Makhḥad ibn Khufaf and Ibn Jurayj. There is a long discussion by *muḥaddiths* on the narrators of these chains (*jarḥ wa ta’dīl*); they differ on the status of the hadith, whether it is *ṣaḥīḥ*, *ḥasan*, or *ḍa’īf*. However, the hadith has been used by groups of *fuqahā’* as the basis of a ruling, and its meaning has been applied in practise (al-Bājī, n.d.).

Some of the hadith books mentioned that the Prophet (SAW) made the statement in the case of two men who came to him to settle a dispute arising from the sale of a slave. The buyer found a defect after some time that the seller had not disclosed at the time of the sale. The buyer returned the slave and claimed a refund, but the seller refused to give it, arguing that the buyer had utilised the slave. The Prophet (SAW) then said ‘*al-kharāj bi al-ḍamān*’ (al-Shāfi’ī, 1990b; al-Suyūṭī, 1996). The reasoning behind it is that if the slave had died while in the buyer’s possession, the buyer would have borne the loss.

In the context of this hadith, several points can be understood:

- The sale contract involves an asset sold by the seller and the price paid by the buyer for a subject matter that should not contain defects and faults; if there are any, they must be disclosed and agreed between the contracting parties.
- The ownership of the asset will be transferred from the seller to the buyer along with the inherent benefit to be gained, expenditure to be spent, and any risk associated with it. Hence, the above point is pertinent, and the asset possession entitles the buyer to its benefit, which is inextricably linked to its expenditure and risk.
- Even during the period prior to returning the asset to the seller, such entitlement remains intact as the seller is unable to fulfil the requirement that is mentioned in the first point.

It is noted that some *muḥaddiths* narrated the hadith under the rubric of *khiyār al-‘ayb* (the option annul due to a defect) and some scholars also related the hadith with the hadith relating to *bay‘ al-mušarrāh* (sale of a sheep that has not been milked for several days before the sale). Ibn Nujaym (1999) even stated that the hadith on *al-kharāj bi al-ḍamān* is an example of *jawāmi‘ al-kalim*, in which a comprehensive meaning, comprising the above-mentioned points, is expressed in a few words.

## CONCLUSION

Based on the above-mentioned features, the substance of the hadiths can be explained as follows:

- i. The *ghurm* and *ghunm* principle applies to commutative contracts, such as sale or lease (*ijārah*) and to corollary contracts, such as pledge (*rahn*). By extension, it may also apply to any kind of similar contract where an asset is the subject matter of a transaction.
- ii. Pursuant to the above, the underlying asset is transacted as a subject matter, which encapsulates inherent benefits or gains defined as *ghunm*, with cost or expenditure and associated risk defined as *ghurm* earlier.

In a nutshell, the context of the above-mentioned hadiths is more specific than the subject matter of its use in Islamic finance discussions. In other words, this maxim should not be used to simplistically invoke the risk-return principle. The mere observation that the risk undertaken results in an uncertain degree of gain or loss would not automatically cause it to be labelled as Sharī‘ah non-compliant or identify it as gambling or some other prohibited practice. Instead, it may involve mere investment risk or business risk. It is worth noting that the generic meaning of risk is possible loss—financial or non-financial. Its specific connotations vary from one context to another.

Risk comprises various types of risks including credit risk and investment risk. The former can be secured with collateral whilst the latter is mitigated subject to the requirement for adequate solvency reserve. Return, too, covers a spectrum of various types, such as profit from a mark-up or margin sale, or lease payments, or return on investment/equity. Limiting both to those associated with profit-sharing contracts would reflect a lack of understanding of the possible types of risk and return. The specific textual references to *ghurm* and *ghunm* further support the broader spectrum of risk and return in both trading and investment, and not just investment alone.

The migration from loans to equity contracts, prompted by the prohibition of interest, primarily addresses the prohibition of *ribā*. While both credit and interest rate risks are relevant to loans, attempting to equate credit and interest rate risks associated with loans to trading credit risk, including markup and margin as return, is unjustified and possibly misleading. This is because trading risk encompasses delivery and price risks alongside credit risk. By examining specific textual evidence regarding *ghurm* and *ghunm* in the trading context, this paper aims to enlighten scholars and encourage them to reconsider the limited applications of the maxim, applying it more appropriately within trading, investment and financial systems.

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## DECLARATION

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### **Data Availability**

None

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### **Appendix**

None