

# UJRAH INSTRUMENT IN TABARRU CONTRACT: A LEGAL BREAKTHROUGH IN THE FATWA OF THE NATIONAL SHARIA COUNCIL

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**Abstract:** *As one of the sharia financial instrument, ijarah be the model of contract which applied in sharia banking whether with single contract or hybrid contract. One of the reason why ijarah contract instrument in hybrid applied is because there is tabarru contract in a product in sharia banking. Various breakthrough made by National Sharia Council (DSN) is for make sure that Islamic (sharia) banking do not find a difficulty in the application in a product that has implications for the emergence of legal contradictions with classic fiqh. This research focus to the two issues, those are: first: the existence of ujarah instrument in the Tabarru contract which incidentally is a contract that has social dimension not a profit as implemented in National Sharia Council – DSN’s fatwa and be a basic legality in some products in sharia banking; second: the acquisition of ujarah which is calculated on a certain percentage. This research is legal research that can classified to the normative legal research, that is library research that base on legal material, whether primer or secondary. The characteristic of this research is explanatory which is a research that explain, strengthen or test and even refuse a theory or hypothesis also to the result of research. Findings in this research conclude that most of the ‘ulama are not allowing to take an advantage of kafalah contract, because the characteristic of contract is ‘uqud tabarru’at (social service) and ujarah in a form of hissah (a certain of comparison or percentage) is invalid). This is different with National Sharia Council – DSN in its fatwa that allow the ujarah instrument in kafalah contract and also stipulate that the determination of ujarah base on percentage.*

**Keywords:** *Ujarah, Tabarru’, Ijarah, Tijari, DSN*

**Abstrak:** *Sebagai salah satu instrumen keuangan syariah, ijarah menjadi model akad yang diterapkan di perbankan syariah baik dengan akad tunggal maupun dengan akad berbilang (hybrid contract). Penerapan instrumen akad ijarah secara hybrid salah satunya dikarenakan adanya instrumen akad tabarru dalam sebuah produk di bank syariah. Berbagai terobosan yang dilakukan oleh DSN agar memastikan bahwa bank syariah tidak kesulitan dalam menerapkannya dalam sebuah produk berimplikasi pada munculnya kontradiksi hukum dengan fikih klasik. Riset ini fokus pada dua isu, yaitu: pertama: adanya instrumen ujarah dalam akad tabarru yang notabenehnya merupakan akad yang berdimensi sosial bukan profit sebagaimana yang terimplementasi dalam fatwa DSN dan menjadi dasar legalitas dalam beberapa produk di bank syariah; kedua: perolehan ujarah yang dihitung atas persentase tertentu. Penelitian ini merupakan penelitian hukum yang dapat dikelompokkan kedalam jenis penelitian hukum normatif, yaitu berupa penelitian kepustakaan (library research) yang mendasarkan pada bahan hukum, baik primer maupun sekunder. Sifat penelitian ini bersifat ekplanatoris (explanatory research) merupakan suatu penelitian yang menerangkan, memperkuat atau menguji dan bahkan menolak suatu teori atau hipotesis serta terhadap hasil penelitian yang ada. Temuan rsiet ini menyimpulkan bahwa mayoritas para ulama tidak membolehkan mengambil keuntungan terhadap akad kafalah, karena sifat akad ini adalah ‘uqud tabarru’at (servis social dan tidak sah ujarah dalam bentuk hissah (nisbah tertentu/persentase). Hal ini berbeda dengan DSN dalam fatwanya yang membolehkan adanya instrumen ujarah dalam akad kafalah dan juga menetapkan bahwa penentuan ujarah berdasarkan prosentase.*

**Kata Kunci:** *ujrah, tabarru’, ijarah, tijari, DSN*

## Introduction

Ijarah as one of the sharia financial instrument grow and thrive in Indonesia and in a various part of the world, both in the areas with minority population and in the most of the population is Muslim. Sharia financial instrument now is not considered as the part of Islamic religious doctrine, but also is the view and the attitude of life for keeping away from the haram is believed have an impact to the formation of welfare and calmness. Haron points out that not all of Muslim people save the money in sharia bank motivated by profit (Haron, 2000; Khan, 2008).

As one of the sharia financial instrument, ijarah being a model of contract that applied in sharia banking either with single contract or *hybrict* contract like *ijarah muntabiah bi tamlik*, *ijarah mamsufah fi dbimmah*, and *kafalah bi al-ujrah* (Asni, 2018). The developing of *ijarah* contract model in *hybrict* is a part of the sharia financial innovation in sharia banking. Financial innovation is an inevitability, no exception the sharia financial (Kelly and Storey, 2000). Sharia financial innovation be urgent when the application of sharia contract based on classic fiqh cause a trouble in its application in the contemporary sharia financial institution such in sharia banking, although the literature of Islamic financial about innovation is still left behind than the conventional (Noman, 2002). The innovation is needed in order to try to looking for the solution about how to make a contract in classic *fiqh* can be applied in Islamic financial institution without strip away the sharia principle (sharia complaint). Factually, the literature of Islamic financial about innovation is still left behind than the conventional (Noman, 2002), so that it caused to the low level of innovation in Islamic financial institution (al Salem, 2009).

One of the reason *ijarah* contract instrument is applied in *hybrict* is because of there is *tabarru* contract instrument in a product of sharia banking. As a commercial institution, sharia bank is required to get an advantage. *Ijarah* contract instrument be a model by combining the other contract that has *tabarru* character. This is the case that taken by National Sharia Council (*Dewan Syariah Nasional – DSN*) in its fatwa, as Husaini's opinion (Husaini, 2018). According to him (Husaini), the step that taken by DSN is to combine *tabarru* contract with *tijari* contract. The fee (*ujrah* / gift) determination in *tabarru* contract with *tijari* contract, is because *ujrah* is the most important element in *ijarah* which most of it include in *tijari* contract.

Various breakthrough by DSN in order to make sure that sharia bank has no difficult in applying it in a product which has implication to the emergence of legal contradictions with classic *fiqh*. At least the result of the law which formulated in DSN's fatwa is different with classic *fiqh* law's view. One of the different is related to the *ujrah* instrument in *tabarru* contract and the *ujrah* acquisition that calculated on a certain percentage. DSN in its fatwa formulated the combination of *tabarru* contract with *tijari* contract and allowing a payment of *ujrah* in percentage, while the majority of 'ulama are not allowing to take an advantage of *kafalah* contract and that *ujrah* in *bissah* (certain comparison / percentage) form is invalid.

This research is focus to the two issues, that is: *first*: the existence of *ujrah* instrument in *tabarru* contract which incidentally is a contract that has social dimension not a profit as implemented in DSN fatwa and be a basic legality in some products in sharia banking; *second*: the acquisition of *ujrah* which is calculated on a certain percentage.

This research is legal research that can classified to the normative legal research, that is library research that base on legal material, whether primer or secondary. (Soekanto and Pamudji, 1985). The characteristic of this research is explanatory which is a research that explain, strengthen or test and even refuse a theory or hypothesis also to the result of research (Salim and Erlies, 2013)

### Concept of *Ujrah* in classic fiqh

Etymologically, the word of *ijarah* is from *al-Ajru* which means *al-‘iwadh*/replacement (S<sup>□</sup>biq, 2003), and among the meaning of *al-‘iwadh* is *al-tsawab* (reward) (Jumu’ah, 2009). Therefore *ats-Tsawabu* in the context of reward also has meaning *al-Ajru*/wage. Kamil said that *ujrah* in language is buying and selling a benefits (Kamil, t.th). *Ijarah* is a basic that has one meaning with the word *al-ajr* which means act (*al-fi’l*), so *ijarah* also interpreted as the payment of the act (Madina University, 2009). *Maqayis al-Lughah* book explained that *ijarah* terminologically has a meaning payment of the act (al-Za’tari, 2010). *Ijarah*’s meaning at least explain about these: the payment of a certain action, either worldly dimension (*ujrah*) or dimensioned ukhrawi (*ajr*/reward).

*Ijarah* contract is allowed on the basis of Qur’an, *hadith* and *ijma* (Ghuddah, 1998). The scholars from four genres of Islamic law have a little different about the right definition of *ijarah*. However, all *madhabib* agree, that *ijarah* is a benefits sales contract or known services and determined as the payment on compensation (look at Muwaffaq al-Din Ibn Qudamah, *al-Mughni*; Abu Sulayman *‘Aqd al-Ijarah*; Ali al-Khafif, *Abkam al-Mu’malat al-Shar’iyah*, Bahrain, al-Baraka Bank).

According to the religious scholars, *ujrah* terminologically are: (Al-Zuhayli, 1997)

- a. Syafi’iyah sect opine that the meaning of *ijarah* in terms is:

الاجارة هو عقد علي منفعة مقصودة معلومة مباحة قابلة للبدال والاباحة بعوض معلوم.

“Contract on the benefits that headed, known, and allowed with the known payment”

- b. Malikiah and Hanabilah explain that *ijarah* is:

إيجار تمليك منافع شيء مباحة مدة معلومة بعوض.

“Contract for moving the ownership of benefits of something that is permissible, in the known period of time, and with reward”

- c. Umar Abdullah Kamil informed three definitions of *ijarah* in terms. ‘*ulama* of Hanafiah, in the book of *Hasyiyah Ibn Abidin* has opinion that *ijarah* contract is:

الاجارة شرعا عقد على المنافع بعوض.

“*Ijarah* contract in terms is the contract on the benefits with the reward”

Mandhur in his book *Lisan Arab* gave the explanation that *ujrah* is from the word *ajr* that has meaning as a reward of achievement that has been achieved or did (Mandhur, 1999), or wages that earned on the basis of the work. The ‘*ulama* define *ujrah* as the reward that given by *musta’jir* (the rented side/the side who gets services) on the benefits that given corresponding to the both sides’ deal (Kuwait, 1983).

In consonance with Kamali, (Kamali, 2007) *ijarah* is from the basic word that has meaning reply, giving a compensation or giving consideration and back. *Ajr* refers to the worker wages, and *ujrah* for the rent payment. In the use now, *ijarah* divided into two types, that is operational lease and financial lease, where the last one is known as *ijarah wa iqtina'*, eventhough this *ijarah wa iqtina'* get a criticism. *Ujrah* or termed as *fee* is a reward that given as a cost or compensation for a work (Husaini, 2018). According to securities commission, as quoted by Jaman, and friends, *ujrah* can define as a financial cost for service utilization or benefits. In the current economic context, it can be a salary, wage, allowances and commissions (Jaman, 2014).

*Ujrah* is one of the *ijarah*'s pillar. *Ujrah* is '*iwadh* (reward/comparison) towards the received benefits by *musta'jir*'. Commonly, *ujrah* has to valuable and known, *ujrah* should not be in the same form as the benefits that *musta'jir* received. *Ujrah* can be in a form of: 1) money and stuff; 2) benefits; 3) sustenance; 4) *bissab* (percentage or a certain ratio) from the result; 5) comes from *Ajir* work. Related to *bissab*, the '*ulama*, among them, Hanafi, Maliki and Syafi'i sect explained that *ujrah* in a form percentage from the result of work is not valid or not applicable (al Maliki, t.th). Hambali sect explain that *ujrah* in *bissab*'s form is valid and the agreement is not canceled (al Hambali, 1983).

The '*Ulama* agree that *ujrah* is a reward compensation of the benefits that gained or a reward that workers get for their services in producing something. The '*Ulama* also agree that *ujrah* can be in the form of money or things that can be utilized by sharia. The '*Ulama* also agree that *ujrah* nominally has to be in a definite number which can be understood and understandable between both sides. Payment of fee (*ujrah*) should be based on the contract (employment agreement), so that it will create cooperative relationship between employee and entrepreneur. Contract should contain rights and obligations of each sides. Rights of one side is an obligations for the other. The main obligation of employer is giving a wage to the workers.

The majority of '*Ulama* are disagree about the quantity of *ujrah* in *bissab* (certain ratio/percentage). In the '*ulama* from Hanafiyah, Syafi'iyah, half of Malikiyah and Hanabilah sect's view, they opine that *ujrah* is invalid in a form of a certain ratio from the result of *ijarah* work. This opinion has proposition, that is; *first*: hadith about انه نهى عن قفيز الطحان this hadith explain the prohibition of giving a wage to the flour masher with his mash. *Second*: *ujrah* in a certain ratio is with looking that there is an obscurity in *ujrah* that can be rise and down depends on the result that has done by *ajir*.

A part of Hanafiyah, Malikiyah, and Hambali sect opine that *ujrah* in *bissab* (percentage or certain ration) is allowed. In *al-Bahjah* book explained that this is something permissible, example; use my car for public transportation, half of the proceeds is mine (Al-Taswuli, 1998). The opinion that allowed *ujrah* in percentage / a certain ratio because the analogize with *musaqab*, *muzara'ah* and *syirkah fil al-ghanimah* contract, has determined that it is allowed to the person who do the *musaqab* and *muzara'ah* contract to take a part from the things that produced from the arable land, based on hadith by Abdullah bin Umar:

عامل أهل خيبر بشرط ما يخرج منها من ثمر أو زرع

"Rasulullah Shallaallahu 'alaihi wa Sallam once hired Khaibar's resident and obtain a half of the proceeds that is fruits and plants"

***Ujrah* in the Fatwa of National Sharia Council (Dewan Syariah Nasional – DSN)**

DSN's fatwa was issued in the year of 2000 and until the year 2019, the amount of fatwas are 130 fatwas. In the writing research, in detail, the 130 fatwas are divided into four categories, that is: (1) fatwa about Islamic banking (sharia banking); (2) fatwa

about Islamic insurance (sharia insurance); (3) fatwa about Islamic capital market (sharia capital market), Islamic mutual funds and Islamic commodity; (4) fatwa about general Islamic economy (sharia economy).

Law product is a fatwa that DSN released about combining *tabarru* contract and *tijari* contract with *ujrah* instrument can seen in the amount of fatwa, that is: 1) National Sharia Council (*Dewan Syariah Nasional*)'s fatwa number 57/DSN-MUI/V/2007 about Letter of Credit (L/C) with *Kafalah Bil Ujrah* contract; 2) National Sharia Council (*Dewan Syariah Nasional*)'s fatwa number 58/DSN-MUI/V/2007 about *Hawalab Bil Ujrah*; 3) National Sharia Council (*Dewan Syariah Nasional*)'s fatwa number 113/DSN-MUI/IX/2017 about *Wakalah bi al-Ujrah* contract. Towards the fatwas above, therefore in the reminder consider, the legal basis which is used are al-Qur'an, hadith, *ijma*, and *qawa'id al-fiqhiyyah*. The fatwa legal basis about *Wakalah Bil Ujrah*, and are al-Qur'an, hadith and *qawa'id al-fiqhiyyah*, while fatwa legal basis about *Hawalab Bil Ujrah* are al-Qur'an, hadith, *ijma*, and *qawa'id al-fiqhiyyah*.

Basic law which used in DSN's fatwa relate to the *ujrah* instrument in *tabarru* contract refers to some *'ulama's* opinions. Fatwa about *Wakalah Bil Ujrah* is based to the Abu Muhammad Abdullah bin Ahmad bin Muhammad Ibnu Qudamah al-Hanbali al-Almaqdis, Muhammad bin Ali bin Muhammad bin Abdullah Asy-Syaukani Ash-Shan'ani and Wahbah bin Musthafa al-Zuhaili's opinion. Fatwa about *Kafalah Bil Ujrah* and *Hawalab Bil Ujrah* is based to the Musthafa Abdullah al Hamsyari's opinion.

Related with *Ijarah*, DSN-MUI released a fatwa number 112/DSN-MUI/IX/2017 about *Ijarah* contract. In the first page, DSN consider that people need one guideline in practicing *ijarah* contract relate to the activity in financial institution, National Sharia Council (*Dewan Syariah Nasional*) has stipulate a fatwa about *ijarah* for finance company, banking, and financial service. However, it is not stipulate fatwa about *ijarah* contract for the larger as main fatwa yet. After determining the point above, DSN thinks the need to release a fatwa about *ijarah* contract to be a basic reference in the Islamic financial institutions and Islamic banking practice.

National Sharia Council called the basic law of *ijarah* contract as it is:

a. Al-Qur'an al-Baqarah verse 233:  
 وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُمْ بِالْمَعْرُوفِ ۗ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ.

“And if you want your children is feeding by another person, it is not a sin for you if you give a worth payment. Be cautious to Allah and knows that Allah is All-Seeing what you do.”

b. Al-Qur'an al-Qashash verse 26:  
 قَالَتْ إِحْدَاهُمَا يَا أَبَتِ اسْتَأْجِرْهُ ۖ إِنَّ خَيْرَ مَنِ اسْتَأْجَرْتَ الْقَوِيُّ الْأَمِينُ.

“One of the two women said, ‘Hi my father, take him as the person who work (to us). Because he is the kind of a strong and trusted person that you can take to be a worker.’”

c. Prophet's hadith by Ibn Majah from Ibnu Umar::  
 أعطوا الأجير أجره قبل أن يجف عرقه.

“Give a wages to the worker before his sweat is dry”

d. Prophet's hadith by 'Abd ar-Razzaq from Abu Hurairah and Abu Said al-Khudri:  
 من استأجر أجيراً فليعلمه أجره

“Whoever that employ the employee, tell them the wages”

e. Prophet's hadith by Abu Daud from Sa'ad Ibn Abi Waqqash:  
 كنا نكري الأرض بما على السواقي من الزرع وما سعد بالماء منها فنهانا رسول الله صلى الله عليه وسلم عن ذلك وأمرنا أن نكريها بذهب أو فضة.

“We once rented a land with (payment) the agricultural product that they gained from a ditch land and irrigated land; then, Rasulullah forbid us to do that and told us to rent with gold and silver.”

f. Prophet’s hadith by al-Tirmidzi from his grandfather ‘Amr bin ‘Auf al-Muzani, and by al-Hakim from his grandfather Katsir bin Abdillah bin ‘Amr bin ‘Auf r.a: الصلح جائز بين المسلمين، إلا صلحاً حرم حلالاً، أو أحل حراماً. والمسلمون على شروطهم، إلا شرطاً حرم حلالاً، أو أحل حراماً.

“*Shulh* (dispute a resolution through deliberation to reach a consensus) is allowed among the Muslims except *shulh* that forbidding the halal and allowing the forbidden; and the Muslims are bound by their stipulations except the stipulation that forbidding the halal or allowing the forbidden”

g. ‘*ulama*’s *Ijtima*’ about the allowing of doing *ijarah* contract.

h. The basic rules of fiqh, that is; basically, all the form of *muamalah* is allowed to do except if there is a proposition which forbid it. And the proposition avoid *masfadat* (damage, danger) should be the first on bring in the benefit.

After National Sharia Council (*Dewan Syariah Nasional – DSN*) quoted the basic law above, then explain briefly of the fatwa about the terms which directly contact to the *ijarah* such as; *mu’jir*, *musta’jir*, *ajir* and so forth. The fatwa explain that *ujrah* according to National Sharia Council (*Dewan Syariah Nasional – DSN*) is the payment that has to pay of the service that has been done.

In this fatwa, *ujrah*’s concepts and provisions are mentioned as it is:

- a. *Ujrah* can be in the form of money, benefits of stuff, service or the stuff that can be used according to sharia (*muataqawwamah*) and legislation.
- b. Quantity and/or quality of *ujrah* should be clear, either in a number, certain percentage or the formula which is agreed and known by every part who did the contract.
- c. *Ujrah* can be pay in cash, gradually, and truly as what was agreed with sharia and/or the legislation.
- d. *Ujrah* that has been agreed can be reviewed of the benefits that is not accepted by *musta’jir* yet according to the agreement.

The last page explain that if one of the parts did not carry out the obligation or dispute occurred, then the solution is through the dispute resolution institutions based on the rules that has been set, but a deliberation is sought first to reach agreement. The stipulation of fatwa first should obtain an opinion by National Sharia Council (*Dewan Syariah Nasional – DSN*). And this fatwa is valid since it is stipulated and if on the other day there was a mistake, then the fatwa will be made and perfected as what it should be.

National Sharia Council (*Dewan Syariah Nasional – DSN*) is the fatwa institution which has release so many fatwa about Islamic economic transaction in Indonesia. This can be said as a progressive development in order to bring the innovation and the breakthrough of *muamalah* contract’s product in the contemporary era. These following are the collection of DSN-MUI’s fatwa about *ujrah*, such as:

- a. National Sharia Council (*Dewan Syariah Nasional – DSN*)’s fatwa number 20/DSN-MUI/IV.2001 about Investment Implementation Guidelines for Islamic (Sharia) Mutual Funds.

- b. National Sharia Council (*Dewan Syariah Nasional – DSN*)’s fatwa number 52/DSN-MUI/III/2006 about *Wakalah Bil Ujrah* Contract on the Islamic (Sharia) Insurance and Islamic (Sharia) Re-Insurance.
- c. National Sharia Council (*Dewan Syariah Nasional – DSN*)’s number 56/DSN-MUI/V/2007 about *Ujrah* Review Provisions on the Islamic (Sharia) Financial Institutions.
- d. National Sharia Council (*Dewan Syariah Nasional – DSN*)’s fatwa number 57/DSN-MUI/V/2007 about Letter of Credit (L/C) with *Kafalah Bil Ujrah* Contract.
- e. National Sharia Council (*Dewan Syariah Nasional – DSN*)’s fatwa number 58/DSN-MUI/V/2007 about *Hawalab Bil Ujrah*.
- f. National Sharia Council (*Dewan Syariah Nasional – DSN*)’s fatwa number 112/DSN-MUI/IX/2017 about *Ijarah* Contract.
- g. National Sharia Council (*Dewan Syariah Nasional – DSN*)’s fatwa number 113/DSN-MUI/IX/2017 about *Wakalah bi al-Ujrah* Contract.

### **The implementation of *Ujrah*’s instrument in a product at Islamic (Sharia) banking**

The ‘*Ulama* have a different opinion about *ujrah* in contract. At least, there are 2 (two) opinions, that is allowing and forbidding a charging fee. While the other who opine *ujrah* in *kafalah* contract is not allowed because the level of *kafalah* contract as ‘*uqud tabarru’at*’ where it is based on social service.

Most of the ‘*Ulama* are not allowing to take an advantage on *kafalah* contract, because the characteristic of this contract is ‘*uqud tabarru’at*’ (social service). A charging fee in *ujrah* in *kafalah* contract is the same as usury (*riba*) (Jamaan, 2014) and charging the fee for guarantee will cause uncertainty (*gharar*) and it is breaking the law. Guarantor who guarantee the other’s debt for the fee is the usury with ask the guaranteed person for paying back more than what he took (debt) (Hasnat, 2017). This is also be the Organization of Islam Cooperation (OIC)’s decision where the imposition of *ujrah* in *kafalah* means changing the contract from *tabarru* to *qard* (loan) and this is forbidden in Islam (sharia). Ibn Qudamah in *al-Mugni* book explain, that *kafalah* which using an *ujrah*’s scheme is not allowed in Islamic law, because *kafalah* contract is *tabarru*’ contract not *tijarah* contract (Qudamah, 1980). Ibn Jarir al-Thabari in his book, *al-ikhtilaf al fuqaha*, explain that it is not right the *kafalah* with using *ujrah* or *ju’alah* (al Tabari, 1999).

The word ‘*tabarru’* in Islamic law has the same meaning with *ṣadaqah*(charity) or *hibah* (gift). The word *tabarru’* is from the word *tabarra’ a-yatabarra’u- tabarru’an* that means charity, gift, charity fund, or charity. *Tabarru’* means voluntary contribution given by someone as long as his live to the others, without hoping any reward which cause the changing of the subject ownership. (Ali, 2015; Hammad, 2005). Some examples of *tabarru’* contract are: *ṣadaqah*, *hibah*, *waqf*, *kafalah*, *wadi’ah*, *qard*, *rahn* and *hawalah*.

DSN in its fatwa allowing the instrument of *ujrah* in *kafalah* contract. This is in DSN’s fatwa number 57 year 2007. The argumentation built in this fatwa is that *kafalah* with a reward is based on the reward of *jah* service (dignity, authority) and it is allowed. The implementation of *kafalah bil ujrah* contract in

Islamic banking is implemented in some financing products, among others is on the housing take over financing.

This *kafalah bi al-ujrah* contract on the take over financing is used for paying off the customer's debt on the other side because of his inability to do the pay off or the installment. BMT is giving insurance fund for the customers to pay off their debt to the others. *Kafalah* contract is guarantee contract or insurance contract. For the common take over problem that used in *kafalah bi al-mal*.

In the process of *kafalah bi al-ujrah* contract, Islamic bank (sharia bank) side act as *kafil* while the customer as *makful 'anhu* and conventional bank side as *makful labu*. *Kafalah* contract is used to guarantee customer's debt to LKK side. Related to *kafalah* contract that is used by Islamic bank is include in the *kafalah bil mal* contract's category, where the insurance or guarantee is with the assets.

*Kafalah* contract that used by Islamic (sharia) bank for take over financing is still added with *ujrah* (fee) that should be paid by the customer to the Islamic bank. In the determination of *ujrah*, then Islamic (sharia) bank is determine the amount according to the percentage and the number of financing ceilings. Also in the calculation, BMT do not explain to the customer about the calculation that using the percentage and directly told the nominal of *ujrah* which customer should pay.

On the case above, there are two things that firstly should be separated, first, *kafalah* contract is *tabarru'* contract, this contract has a meaning that the agreement or the contract that is not looking for material benefits. Second, there is an *ujrah* where this instrument in Rasulullah and the Companions' era are not known as *kafalah bi al-ujrah*. In the context now, that *kafalah* contract which developing now is based on *ujrah* of *kafil* service, because there is a difficulty to looking for a person who volunteer himself being a guarantor to the others. If *kafil* presuppose the wage on the *kafalah* that he did, while a person who volunteering himself freely is not found. This allowing can be analogous on the allowed of taking a wage in teaching al-Qur'an or other Islamic sciences.

The allowing of taking *ujrah* on *kafalah* contract which is *tabarru* contract is based on *maslahat* and the need of people for fulfil their needs (Jaman, 2014). Furthermore, Jaman quoted syeikh Ahmed Ali Abdullah's opinion, explain that legally *kafalah* contract is *tabarru* contract, but it will be *istithbaq* when the contract is stipulated has implications on the additional cost and this is not a *qard*. Therefore, the cost for guarantee service is not including in the forbidden practice. The using argument is the implementation of *qiyas* on *akhs al-ajr 'ala al-jah* (taking a charge for using a person's good reputation) and *akhs al-ju'l 'ala ruqyah min al-Qur'an* (taking a charge for incantations of al-Qur'an's verses) (Jaman, 2014).

According to Mustafa Abdullah al-Hamsyari, quoted Imam Syafi'i's opinion who reputes about giving a money to the person who assigned to tell a problem or presented something to the king is not considered as a bribe (*risymah*), but considered as a gift or reward (*jua'alab*) as a response of the effort



and the journey. The other *‘ulama* of contemporary, Abdul Sa’i al-Mirri said that a guarantor should get a wage appropriate to his work as a guarantor (Karim, 2001). This opinion open up the chance of the adding the consideration of a magnitude of the risk that should be borne by *kafil* (guarantor) in calculating the wage.

National Sharia Council (*Dewan Syariah Nasional – DSN*) in its fatwa about *kafalah* consider that in order someone is often needing a guarantee from the other part through *kafalah* contract, that is a guarantee that given by the guarantor (*kafuil*) to the third part for fulfilling the second part’s obligation or the one who borne (*maksfuul ‘anhu, ashil*), DSN obliged to provides one scheme of guarantee (*kafalah*) which based on the Islamic principles. A legal foundation that DSN took are from al-Qur’an surah Yusuf on verse 72, al-Maidah on verse 2, Prophet’s hadith, and fiqh’s rules (jurisprudence), such the following below:

قَالُوا نَفَقْدُ صُورَاعَ الْمَلِكِ وَلِمَنْ جَاءَ بِهِ جَمَلٌ بَعِيرٌ وَأَنَا بِهِ رَعِيمٌ.

“The callers are exclaim: ‘We lost the king’s trophy; and whoever can give it back, he will get a food material (as weigh as) the weight of camel, and I guarantee him.’”

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى، وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ.

“And help each other in (doing) a good things and god-fearing, and do not help each other in (doing) a sin and contravention.”

عن سلمة بن الأكوع أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ أَتَى بِجَنَازَةٍ لِيُصَلِّيَ عَلَيْهَا، فَقَالَ: هَلْ عَلَيْهِ مِنْ دَيْنٍ؟ قَالُوا: لَا، فَصَلَّى عَلَيْهِ، ثُمَّ أَتَى بِجَنَازَةٍ أُخْرَى، فَقَالَ: هَلْ عَلَيْهِ مِنْ دَيْنٍ؟ قَالُوا: نَعَمْ، قَالَ: صَلُّوا عَلَى صَاحِبِكُمْ، قَالَ أَبُو قَتَادَةَ: عَلَيَّ دَيْنُهُ يَا رَسُولَ اللَّهِ، فَصَلَّى عَلَيْهِ

“There was faced to Rasulullah SAW, a corpse of a man to be prayed. Rasulullah SAW asked, ‘Does he have a debt?’ Companions (*Shahabat*) answered, ‘No’. Then, he (Rasulullah SAW) was pray him. After that, Rasulullah was faced to the other corpse, he asked, ‘Does he have a debt?’ Companions answered, ‘Yes’. Rasulullah said, ‘just pray your friend’ (he did not want to pray the corpse). Then, Abu Qatadah said, ‘I guarantee his debt, ya Rasulullah’. Then, Rasulullah pray upon the corpse.” (Hadith from Bukhari by Salamah bin Akwa’)

وَاللَّهُ فِي عَوْنِ الْعَبْدِ مَا كَانَ الْعَبْدُ فِي عَوْنِ أَخِيهِ.

“Allah helps his servant as long as the servant helps his brother.”

الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ إِلَّا صُلْحًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا وَالْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرْطًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا

“A peace can be done among the Muslims except a peace that forbid the allowed or allowing the forbidden; and the Muslims related to their stipulations except the stipulation that forbid the allowed or allowing the forbidden.”

الْأَصْلُ فِي الْمُعَامَلَاتِ الْإِبَاحَةُ إِلَّا أَنْ يَدُلَّ دَلِيلٌ عَلَى تَحْرِيمِهَا.

“Basically, all the form of *muamalah* is allowed to do except there is a proposition that forbid it.”

الضَّرَرُ يُزَالُ

“A dangerous (heavy load) should be removed.”

Aside from the propositions above, DSN also refers to the *'ulama's* opinion, such Mushthafa 'Abdullah al-Hamsyari as quoted by Syaikh 'Athiyah Shaqr, in *Ahsan al-Kalam fi al-Fatawa wa al-Ahkam* book. Overall, the contents as it is:

*“Letter of Credit (L/C) that contains a stipulate that bank promises to exporter to pay the rights (exporter) on importer is allowed. The accepted wage from the bank as the pay off on publishing L/C is allowed. This “allowed” is from Mushtbafa al-Hamsyari based on the characteristic of L/C’s muamalah which range on the wakalah, hawalah and dhaman (kafalah) contract. Wakalah with the fee is not forbidden; also (not forbidden) hawalah with the fee. And also dhaman (kafalah) with the fee by Mushtbafa al-Hamsyari is based on the fee of jah service (dignity, authority) which according to Syafi’i sect, that this is allowed (jawaz) eventhough by the other is forbidden or Makruh. Mushtbafa al-Hamsyari also lean in dhaman (kafalah) with the fee on ju’alah that allowed by Syafi’i sect.*

*Mushtbafa 'Abdullah al-Hamsyari also opines about guarantee bank and the various of its types. Guarantee bank is a document that given by bank –on the request of its customer—which contains the bank guarantee that bank will fulfill the customer’s obligations toward the customer partner. Mushtbafa stated that guarantee bank is allowed. The guarantee bank by Mushtbafa is aligned with wakalah or kafalah; and these two contracts are allowed. And also the taking of fee on both contracts is not forbidden.*

With the argument above, then the National Sharia Council (*Dewan Syariah Nasional – DSN*) decides that in *kafalah* contract, the guarantor can receive *ujrah* (the fee) as long as it is not burdensome. *Kafalah bi al-Ujarah* contract is a binding contract and can not be canceled by one part.

From the explanation above, it can be understood that there is a different opinion between the ones who allowed *kafalah bi al-ujrah* and the ones who forbid it. One of the argumentation that justify *kafalah bi al-ujrah* is by analogizing with *ujrah* to the person who teaches al-Qur’an, also considering the intention and the *maslahah* need on this era is reinforced by the rules (*kaidah*); “basically, all the form of *muamalah* is allowed to do except there is a proposition that forbid it. While the opinion that forbid *kafalah bi al-ujrah*, arguing that *kafalah* contract beside of *tabarru'* contract which based on the volunteerism in doing the social activity without expecting the return, also if *ujrah* is found in *kafalah* contract, then the form is same with *qard* where legally *qard* followed by an addition is including usury.

## CONCLUSION

The *'ulama* agree that *ujrah* is a fee compensation on the benefit which obtained that can be in the form of money, or stuff that in amount should be with a definite number which can be understood among every parts. The difference among the *'ulama* occurs in the thing about that there is an instrument of *ujrah* in *tabarru* contract such *kafalah* contract. Most of the *'ulama* are not allowing to take a benefits on the *kafalah* contract, because of the characteristic of this contract is *'uqud tabarru'at* (social service). The difference among the *'ulama* also occurs in the quantity of *ujrah* in the form of *bissab* (a certain ratio/percentage). The *'ulama* opine that *ujrah* in the form of *bissab* (a certain ratio/percentagae) is not valid.

DSN in its fatwa allows the instrument of *ijarah* in *kafalah* contract where in the *kafalah* contract, the guarantor can receive *ujrah* (fee) as long as it is not burdensome and the characteristic is binding and can not be canceled by one part. DSN also stipulates that the determination of *ujrah* is based on percentage. The argumentation that built in this fatwa is the *kafalah* with the fee is lean on the fee of the *jab* service (dignity, authority) and it is allowed. What DSN did is combining *tabarru* contract, that is *kafalah* contract with *tijari* contract, that is *ijarah* which bring forth *kafalah bi al-ujrah*.

This is implemented in DSN's fatwa number 57 year 2007 and made as the legal basis in some financing products at Islamic banking which one of it is housing take over financing. The implementation of *ijarah* contract's instrument in hybrid because of there is a *tabarru* contract's instrument in a product at Islamic banking. As a commercial agency, then Islamic bank is required to obtain a benefits. *Ijarah* contract's instrument be a model with combining the other contract that has *tabarru* character.

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