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Research Article

Ujrah on KafÉlah in Islamic Jurisprudence: A Comparative Study

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Abstract

Many financial institutions usually charge ujrah for issuing a kafÉlah. Banks take between 0.125% and 0.25% from the kafÉlah money annually for offering a guarantee letter. If the customer delays the payment of the kafÉlah debt (letter of guarantee), the bank will accrue interest of up to 12% per year of the debt value. So, the question is: is it permissible in Islam to take ujrah on kafÉlah? The paper addresses three issues to answer this question. First: the definition of the terms kafÉlah and ujrah. Second: the jurists' viewpoints on the consequences of kafÉlah. Third: the jurists' position on demanding ujrah for kafÉlah.

Keywords: *Ujrah, Kafelah, Islamic*

Difinition of KafÉlah and Ujrah

1.1. Concept of KafÉlah

1.1.1. Linguistic definition of kafÉlah

KafÉlah is derived from the Arabic root that signifies joining and commitment [1], [2]. For instance, Allah the Almighty says: {He entrusted her to Zachariah's kafÉlah.} [Qurran 3:37] It means Zachariah let Mary join him and live under his guardianship. The Arabs also use the word kafÉlah in the sense of commitment and financial liability.

1.1.2. Definition of kafÉlah in Sharia literature

Muslim jurists use some variations for the word kafÉlah, such as ÌamÉnah, ÍamÉlah, zaÑÉmah, and qabÉlah. Al-MÉzirÊ in SharÍ At-TalqÊn said: "Al-ÍamÉlah, al-kafÉlah, aÌ-ÌamÉn, and az-zaÑÉmah – all these variations have the same meaning."[3]. The person undertaking kafÉlah is called ÌamÊn, kafÊl, qabÊl, ÍamÊl, zaÑÊm, or ÎabÊr.

Al-MÉwardÊ, however, said: "The term ÌamÊn is widely used in financial matters; ÍamÊl in blood money; zaÑÊm in heavy money liabilities; kafÊl in the souls; and ÎabÊr and qabÊl in all matters." Abu ×Étim said: "ZaÑÊm is common in the language of people of Madinah; ÍamÊl in the language of the Egyptians; and kafÊl in the language of the Iraqis."

Muslim jurists defined kafÉlah in two ways:

First: the majority of MÉlikÊ, ShÉfiÑi, and ×anbalÊ [4], [5] and [6]scholars said that kafÉlah means combining the guarantor's responsibility with the debtor's in paying the debt." The guarantor is responsible for paying the debt; nevertheless, the creditor is entitled to take it only once from either the guarantor or the debtor.

Second: ×anafÊ scholars stated that kafÉlah means adding responsibility to another in demanding the debt's payment [7]. There is no harm that many people share the responsibility for a debt because it is a legal matter, so it is acceptable that two individuals are accountable for the same subject. What is unacceptable is that a single item exists with more than one person at the same time. That is because a material thing cannot exist in two different places; it must occur in that place or the other [8].

Therefore, the guarantor is not liable for the debt; the creditor has the right only to demand them to settle it so that it urges the debtor to pay his debt. The difference in the two opinions brings about some results. For instance, if the guarantor swears he owes no debt, he shall not break his oath, according to the ×anafÊ jurists. But according to the majority of jurists, he has broken his oath [9].

1.2. Concept of Ujrah

1.2.1. Definition of Ujrah

Ujrah signifies what the leaser undertakes to pay in return for the benefit used. It refers to the compensation the lessee pays to the lessor in return for the benefit contracted. Ujrah resembles the price in a sale contract. Some scholars said that ujrah refers to the payment for the services humans offer, and kirÉ´ refers to the cost of the benefits derived from non-humans. Sometimes they are used interchangeably.

Juristic views on kafÉlah's effects:

KafÉlah, by default, is an act of worship intended for gaining reward from Allah the Almighty or alleviating hardships from friends [10]. Jurists require that a guarantor be competent to spend in charity, which indicates that kafÉlah is categorized under charity-based contracts, not exchange contracts. They say: "KafÉlah cannot be undertaken by those who are incompetent to give charity,"[11] "Only people competent to give charity can make it," [12] and "A guarantee is only accepted from someone whose transactions are valid."[13].

The excellent characteristics of kafÉlah include relieving the lender's distress, who is worried about his money. That is why kafÉlah is a solemn act Allah the Almighty blessed Mary with it, saying: {And He entrusted her to Zachariah's kafÉlah.} [Quran 3:37] Allah enjoined Zachariah to take care of her. Also, Allah named one of His prophets *Öhul-Kifl* when he looked after a group of prophets and saved them from a king who wanted to kill them [14].

Therefore, kafÉlah is a contract based on ease where the element of uncertainty is forgivable. In other words, the guarantor does not need to know what he is precisely committed to doing, and it is enough for him to bear the responsibility in general [15].

Jurists differed about the impact of kafÉlah. Does it result in both the guarantor and the borrower sharing the responsibility for the debt? Or the debt is transferred from the borrower's liability to the guarantor's? There are three opinions on this issue.

First: the majority of MÉlikÊ, ShÉfiÑÊ, and ×anbalÊ [16], [17] and [18] scholars see that kafÉlah makes debt settlement the responsibility of the guarantor while the debtor is still responsible for it. Both can be requested to repay the debt, and if any of them paid it, the other is discharged of it.

Second: ÚÉhirÊ scholars and Abu Thawr view that kafÉlah transfers the debt from the borrower to the guarantor's responsibility [19], and this opinion was reported from Ibn Abi LaylÉ and Ibn Shubrumah [20].
Third: ×anafÊ scholars say kafÉlah entails that the guarantor shares the responsibility with the borrower in demanding to pay only, not in payment itself. It means the debt remains the sole responsibility of the guaranteed person, and the guarantor can only be asked to settle it [21].
The question here is: can the guarantor ask the guaranteed person to pay him the money settled? Jurists have two opinions on this case. First, the majority of ×anafÊ, MÉlikÊ, ShÉfiÑÊ, [22], [23] and [24] and ×anbalÊ [25] scholars say that the guarantor volunteers to take the responsibility, not to pay the debt. His commitment to pay the debt is an act of righteousness, but the money he pays on behalf of the borrower remains a debt the latter has to reimburse.
Second: ÚÉhirÊ scholars consider kafÉlah a contract in which someone acquires money for free, such as gifts, charities, and other donations. An exception to this is when the debtor says to the guarantor: "Guarantee the money I owe to someone, and if you paid it on my behalf, I would owe you that money." In this case, the guarantor can request the money he paid because the debtor would be as if he borrowed the money from the guarantor [26]. ×anafÊ scholars also adopt this opinion when the person guarantees the debtor without his permission [27].

Jurists' Views on Legality of Taking Ujrah (Fees) on KafÉlah

Jurists differed over the legality of charging fees on kafÉlah into three opinions.
First: ×anafÊ, MÉlikÊ, ShÉfiÑÊ, and ×anbalÊ [28], [29], [30] and [31]scholars prohibited the guarantor from taking money in return for kafÉlah.
Second: IsÍÉq ibn RÉhawayh permitted taking ujrah on kafÉlah [32]. Some contemporary scholars approved this view, such as Ali Al-KhafÊf, AbdurrahmÉn ÔsÉ, Abdul-HalÊm MaÍmËd, AbdurrahmÉn As-SaÑdÊ, and AbdullÉh Al-BassÉm [33].
Third: NazÊh ×ammÉd, a contemporary jurist, stated that it is permissible to charge ujrah on kafÉlah in the cases where the kafÉlah and the debt arising from it end immediately. When the debt continues, and the money paid on behalf of the borrower becomes a deferred debt he owes, it is not allowed to take ujrah. Ujrah, in this case, turns to be a stratagem or means to devour RibÉ for postponement, which is forbidden in Islam [34].
Evidence on each view:
First: The majority of scholars prohibiting taking ujrah on kafÉlah mentioned five proofs.
The first evidence: KafÉlah is neither work nor money and thus charging fees on it is tantamount to wrongfully consuming people's wealth or earning ill-gotten money [35].
Al-×amawÊ said: "The reason for its invalidity is that the kafÉlah is not a work entailing ujrah." As-SarakhsÊ said: "If a man guarantees the debt of someone in return for a sum of money, the compensation is illegal. This ruling was reported from IbrÉhÊm (May Allah have mercy on him). Also, it is equal to bribery, which is forbidden in Islam. The borrower does not have to pay extra money for requesting the kafÉlah, and it is not permissible to impose compensation on him for it." [36] Ad-DardÊr said: "The rationale behind the prohibition is

that if the debtor settled the debt with the creditor, the compensation would be null and void because it pertains to eating up people's property by false means."[37]

This evidence could be argued as follows:

1. Considering charging ujrah on kafÉlah as bribery is not correct because bribery refers to what is given to nullify a right or make falsehood right."[38] Or it means: "Paying money to gain what is undeserved or to hurt a Muslim."[39] Charging fees on kafÉlah aims to confirm the debt owed by the borrower so that the creditor can receive his debt from the guarantor if the borrower defaults [40].
2. Commitment to undertaking kafÉlah can be exchanged for money and commands fees. Even if it is not a form of work, it is equivalent to work in that both bring about lawful benefits with value [41].

The second evidence: The guarantor demands an amount equal to what he indemnifies. Therefore, if he stipulates compensation or ujrah, he requires an increase over the amount he paid. It becomes as if he gave a loan and profited such an increase from the borrower. In this case, kafÉlah resembles an interest-based loan, which is a forbidden form of RibÉ [42].

This evidence could be argued as follows:

KafÉlah contract differs from a loan in nature and rulings. The former belongs to the documentation contracts, whereas the latter is a contract of acquisition. We cannot call the guaranteed person a borrower from the guarantor or subject him to the same rulings. Only after the guarantor pays the debt does the guaranteed person becomes indebted to the guarantor. But the debtor is not the borrower himself in name or rulings; he is broader than the borrower in general [43]. Therefore, the directives of debt, not the loan, should be implemented. In other words, every loan is a debt, not vice versa. Specifics always necessitate the generalities, not the opposite [44].

The third evidence: Allah made kafÉlah a charitable contract and a righteous deed that should be done for Allah's sake only. A Muslim should not receive compensation for doing good deeds, like prayer and fasting. These acts cannot be a means for worldly gains [45]. Some scholars said: "It pertains to acts of righteousness for which taking ujrah or compensation is banned."[46].

This evidence could be argued as follows:

1. Treating kafÉlah as prayer and fasting is neither accurate nor identical. Fasting and prayer are individual obligations a Muslim has to perform as a duty to Allah the Almighty. Undertaking kafÉlah for others is different, and man is not obligated to guarantee others' debts [47].
2. Saying that it is impermissible to receive compensation for acts of worship and righteousness needs reconsideration [48]. The Prophet (peace be upon him) allowed Muslims to require ujrah for applying Ruqyah with the Quran [49], and it is an act of worship. ShÉfiÑÊ scholars [50] and latest ×anafÊ jurists [51] stated that it is permissible to demand ujrah on acts of worship, such as teaching Quran, Azan, leading prayer, and other deeds. This statement was also reported from Imam AÍmad [52].

The majority of jurists [53] held that it is permissible to take ujrah on bathing and enshrouding the dead – acts that are supposed to be done for free, seeking reward from Allah the Almighty. Ibn Taymiyyah permitted taking ujrah on giving testimony [54]. ShÉfiÑÊ

scholars approved the permissibility of taking ujrah on some individual obligations, such as rescuing the drowned, teaching Al-FÉtiÍah to the ignorant, and the like [55].

The fourth evidence: IjmÉÑ. Ibn Al-MunÌhir said: "All scholars from whom we receive knowledge have unanimously agreed that undertaking ÍamÉlah in return for compensation given to the guarantor is unlawful." [56]

This evidence could be argued as follows:

This IjmÉÑ is contradicted by a statement reported from an early prominent jurist IsÍÉq ibn RÉhawayh who permitted taking ujrah on kafÉlah, and he lived before Ibn Al-MunÌhir (may Allah have mercy on them). Another point is that Ibn Al-MunÌhir was precise when he conveyed the IjmÉÑ, saying: "All scholars from whom we receive knowledge have unanimously agreed that…" and those scholars are not enough to issue the IjmÉÑ [57].

The fifth evidence: Stipulating ujrah in the kafÉlah contract leads to uncertainty, which is forbidden in Islamic Sharia. Al-MÉzirÊ said: "This transaction is categorized under the sales that involve uncertainty because the guarantor who takes ten for guaranteeing one hundred is unaware if the guaranteed person becomes insolvent or disappears. In this case, the guarantor shall lose one hundred and gains ten only. Another possibility is that he does not pay anything and thus wins the ten."[58].

Second: The third opinion stating that it is permissible to charge ujrah on kafÉlah in the cases where the debt arising from it ends immediately drew three proofs [59].

The first evidence is that commitment to undertaking kafÉlah in itself brings about lawful benefits with value approved by the Sharia and can thus be exchanged for money. Therefore, ×anafÊ and ×anbalÊ scholars permitted gaining profits in return for a guarantee [60] in al-wËjËh partnership [61]. Also, MÉlikÊ scholars see no harm in taking financial compensation for some non-financial commitments. For example, the husband agrees with his wife not to marry a second wife in return for money [62].

This evidence could be argued as follows:

A commitment commands no verdict; it exists and acquires its ruling from its subject. If the subject matter of the commitment is lawful, the commitment will be permitted as well, such as giving ujrah to the agent for his representation. If not, the commitment will be impermissible, such as paying ujrah to the creditor and guarantor for their loan and guarantee [63].

The second evidence is that kafÉlah used to be a benevolent act, but the change in people's circumstances and customs barred them from volunteering to undertake it. Such a change necessitates permitting to charge ujrah on kafÉlah. The change in law due to the eruption of the times and circumstances is not objectionable. For instance, jurists – in response to the change of time and circumstance – have allowed giving ujrah to the Imam, preacher, muezzin, witness, and teacher of Quran and Fiqh if they practice these skills as a profession [64].

The third evidence is that kafÉlah by default is an act of charity, but it can be transformed into a transaction by mutual agreement [65]. A gift, for example, can become a rewarded gift (sale). Suppose Sharia is not against receiving compensation or profit in donations, which are a basis for all charitable acts. In that case, it should be permissible in other activities that partially resemble the gift a fortiori [66].

This evidence could be argued as follows:

1. A gift has changed into a sale of a "rewarded gift", which is an exchange contract permitted by the Sharia, whereas kafÉlah becomes a loan contract for ujrah, which is RibÉ banned by the Sharia. Hence, As-SarakhsÊ said: "KafÉlah is equivalent to lending money [67]." Ad-DusËqÊ said: "If the guarantor indemnified the creditor, he would take the amount he paid plus the compensation, and this is not allowed because it is a loan with interest [68]." Ibn QudÉmah said: "The guarantor has to pay the debt, and the guaranteed person after the payment owes this money to him. It becomes like a loan, so charging any compensation makes the loan rendering a benefit, which is impermissible [69]."
2. A rewarded gift is an exchange contract from the outset and not transformed from another transaction [70]. Ibn ÑArafah defined it as "a gift intended for a financial compensation [71]." Al-QÉÌÊ Abdul-WahhÉb said: "A transaction intended for reward or compensation takes the ruling of exchange contracts. It is subject to all sale guidelines except in one aspect: the compensation and its amount may not be specified [72]."

The Preponderant View

I support the first opinion that it is forbidden to take ujrah on kafÉlah because their proofs are concrete. Also, the prohibition is built on the principle of Sadd AÌh-ÖharÉ´iÑ [73] that should not be opened or specified without a robust justification.

Ibn Rushd said: "Acts decided through the principles of MaÎÉliÍ and Sadd AÌh-ÖharÉ´iÑ cannot be exempted in individual cases [74]. For instance, a son cannot give testimony in favor of his father based on the principle of AÌh-ÖharÉ´iÑ. The situation remains unchanged even if the testimony is free of any suspicion and conflict of interests [75]."

The second opinion does not mention any evidence, and the third one is unpractical. Even Islamic banks that adopt the principle of gaining profits on all their transactions cannot apply it as it involves risk and loss [76]. Therefore, this opinion is not acceptable because any transaction failing to fulfill its purpose is not permissible.

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[2] See the root "kafala". Al-JawharÊ: AÎ-ØiÍÉÍ; Ibn ManÐËr: LisÉn Al-ÑArab.

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[33] Al-MÉwardÊ said: "If the borrower asked someone to guarantee him for an amount of money, it would be impermissible. This money cannot be taken, and the guarantee in which fees have been stipulated will be invalid. IsÍÉq ibn Réhawayh said something different. That is because fees are charged in return for work, and guarantee is not a work deserving fees." Al-×ÉwÊ Al-KabÊr, ibid, vol.6, p971.
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[48] Dr. ×ammÉd NazÊh, Journal of King Abdulaziz University, vol.9, p108.
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[50] Ibn ÑAbbÉs reported that some of the companions of the Prophet (peace be upon him) passed by some people staying at a place where there was water, and one of those people had been stung by a scorpion. A man from those staying near the water, came and said to the companions of the Prophet, "Is there anyone among you who can do Ruqyah as near the water there is a person who has been stung by a scorpion." So one of the Prophet's companions went to him and recited Sërat Al-FÉtiÍah for a sheep as his fees. The patient got cured and the man brought the sheep to his companions who disliked that and said, "You have taken wages for reciting Allah's Book." When they arrived at Madinah, they said, 'O Allah's Messenger! (This person) has taken wages for reciting Allah's Book" On that Allah's Messenger (peace be upon him) said, "You are most entitled to take wages for doing a Ruqyah with Allah's Book." Narrated by Al-BukhÉrÊ in his ØaÍÊÍ, Book: AÏ-Ùibb, Chapter: Ash-SharÏ fÊ Ar-Ruqyah bi QaÏÊÑmin Al-Ghanam.
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[55] Ibn Taymiyyah: Al-FatÉwÉ Al-KubrÉ, DÉr Al-Kutub Al-ÑIlmiyyah, Beirut,, 1st ed., 1408/1987, vol.4, pp208-209.

[56] Al-BujayramÊ: ×ÉshiyatAl-BujayramÊ ÑalÉ Al-KhaÏÊb (TuÍfat Al-×abÊb ÑalÉ SharÍ Al-KhaÏÊb), DÉr Al-Fikr, 1415/1995, vol.3, p294.

[57] Ibn Al-MunÌhir An-NaysÉbËrÊ: Al-IshrÉf ÑalÉ MaÌhÉhib ahl Al-ÑIlm, edited by MuÍammad NajÊb SirÉj Ad-DÊn, DÉr Ath-ThaqÉfah, Doha, 1st ed., vol.1, p120.

[58] Ibn ManÊÑ, AbdullÉh ibn SulaymÉn: At-Ta´mÊn Bayn Al-×alÉl wal-×arÉm (http://www.islamtoday.net.)

[59] ÑÔllÊsh: MinaÍ Al-JalÊl SharÍ MukhtaÎar KhalÊl, ibid, vol.6, p229.

[60] Dr. ×ammÉd NazÊh, ibid, pp102-103.

[61] According to their thought, if a reputable person enters into partnership wih a worthless one, agreeing that they share losses and profits equally, and the latter neither buys nor sells anything, he deserves profits just for guaranteeing losses (which is merely a financial commitment) without paying money or doing work.

[62] Al-KÉsÉnÊ defined it as: “When two individuals having no money enter into partnership based on their reputation and goodwill. They agree to buy on credit, sell for cash, and share the profits in proportion to their mutual agreement.” BadÉ´iÑ AÎ-ØanÉ´ÊÑ, ibid, vol.6, p57.

[63] ÑÔllÊsh: FatÍ Al-ÑAliyy Al-MÉlik fi Al-FatwÉ ÑalÉ MaÌhhab MÉlik, DÉr Al-MaÑrifah, vol.1, p276.

[64] Dr. AÌ-ÖarÊr AÎ-ØiddÊq MuÍammad Al-AmÊn: Journal of King Abdulaziz University: Islamic Economics, vol.11 (1419/1999), p98.

[65] Dr. ×ammÉd NazÊh, ibid, pp109-110.

[66] Dr. AÌ-ÖarÊr, ibid, p99.

[67] Ibid.

[68] Al-MabsËÏ: ibid, vol.30, p148.

[69] ×ÉshiyatAd-DusËqÊ, ibid, vol.3, p341.

[70] Al-MughnÊ, ibid, vol.4, p214.

[71] As-SulÉmi, MuÍammad Al-MukhtÉr: Journal of King Abdulaziz University: Islamic Economics, vol.12 (1420/2000), p126.

[72] Ar-RaÎÎÉÑ: ShaÍ ×udËd ibn ÑArafah (Al-HidÉyah Al-Kéfiyyah li BayÉn ×aqÉ´iq Al-ImÉm ibn ÑArafah Al-Wéfiyyah, Al-Maktabah Al-ÑIlmiyyah, Tunisia, 1st ed., 1350, p427.

[73] Al-MaÑËnah ÑalÉ MaÌhhabb ÑÓlim Al-MadÊnah Al-ImÉm MÉlik ibn Anas, edited by Dr. Abdul-×aqq ×imaysh, Maktabat NizÉr MuÎÏafÉ Al-BÉz, Makkah, Riyadh, vol.8, pp1609-1610.

[74] ÖharÉ´iÑ refer to the means that are outwardly lawful but lead to a prohibited act. Al-MawsËÑah Al-FiqhÊyyah Al-KËwaytiyyah, ibid, vol.24, p276.

[75] Al-MuqaddimÉt Al-MumahhidÉt li BayÉn ma IqtaÌathu RusËm Al-Mudawwanh min Al-AíkÉm Ash-SharÑiyyÉt wat-TaÍÎÊlÉt Al-MuÍkamÉt li UmmahÉt MasÉ´ilihÉ Al-MushkilÉt: edited by SaÑÊd AÍmad AñrÉb, DÉr Al-Gharb Al-IslÉmÊ, Beirut, 1988, vol.2, p244.

[76] An-NadawÊ said: “How is the customer expected to quickly discharge himself of liability and pay the debt arising from kafÉlah so that the bank recieves and eats up the ujrah?” Journal of King Abdulaziz University: Islamic Economics, vol.13 (1420/2000), Ép111.