

# The Transformation of the Kafālah and Ḥawālah Contracts into the Mu‘āwadah Contract Maṣlahah Perspective: An Analytical Study of DSN-MUI Fatwa

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## Abstract

This research is motivated by the paradigm shift of *kafālah* and *ḥawālah* contracts within the Islamic finance industry in Indonesia. While classical jurisprudence categorizes these contracts as non-profit *tabarru'* (social) contracts, the fatwas issued by the National Sharia Council of the Indonesian Ulama Council (DSN-MUI) have transformed them into *mu‘āwadah* (commercial) contracts through the implementation of *ujrah* (fees). This study aims to analyze the form of this contract transformation, examine the *ijtihad* methods and approaches employed by DSN-MUI, and explore the substance of *maṣlahah* (public interest) that validates this shift, particularly in supporting the halal economy and tourism ecosystem. The research employs a qualitative method with a library research design, utilizing content and conceptual analysis approaches on relevant fatwas. The results indicate that: (1) The transformation of *kafālah* and *ḥawālah* contracts in DSN-MUI fatwas substantively shifts them into *ijārah* (lease of services) or *wakālah bi al-ajrah* contracts, which is valid based on the principle of legal substantiality. (2) DSN-MUI utilizes the *intiqā'i* (selective) *ijtihad* method combined with *manhajī* approaches, specifically *at-tayṣir al-manhajī* (methodological facilitation) and *i‘ādah an-nażar* (re-evaluation) of classical legal causes ('illat). (3) The substance of *maṣlahah* in this transformation is manifested in mutual interest (sustainability of financial institutions), product flexibility (such as support for smart tourism), and the effectiveness of legal certainty within Indonesia's positive law.

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## INTRODUCTION

In the treasures of Islamic law, the fiqh architecture of muamalah traditionally separates transaction contracts into two diametric categories based on their motivation and orientation, namely the *tabarru'* (welfare/social) contract and the *mu‘āwadah* (exchange/commercial) contract. *Tabarru'* contracts such as *qard* (loan), *wadi‘ah* (deposit), *wakālah* (representation), *kafālah* (guarantee), and *ḥawālah* (debt transfer) are built on the foundation of *ta‘awun* or help-help, where the perpetrator of the contract does not target material gains but ukhrawi rewards. On the other hand, *mu‘āwadah* contracts such as buying and selling (*bay'*) and rent-renting (*ijārah*) are designed for value exchange and *profit-oriented*. This demarcation has been established in classical fiqh literature to

maintain the purity of social intentions so as not to be contaminated by elements of exploitation that are prohibited by the shari'a (Al-Miṣrī, 2005).

However, the dynamics of the times and the complexity of the modern economy present new challenges that demand the adaptability of Islamic law, especially with the presence of Sharia Financial Institutions (LKS) as business entities. LKS, whether in the form of banking, insurance, or financing institutions, operates with a corporate structure that bears high operational costs and the obligation to provide competitive returns to customers. This reality creates paradigmatic tension when LKS has to implement service products based on *tabarru's contract*. If contracts such as *kafalāh* (e.g. in Bank Guarantees) or *hawālah* (in factoring) are executed purely socially without levying, the financial sustainability of the institution will be threatened (Mubarok & Hasanudin, 2017).

This tension between classical fiqh idealism and modern business pragmatism triggered the phenomenon of contract transformation (*tahawwul al-'aqd*). In practice, contracts that were originally of a social character (*tabarru'*) are reconstructed into contracts with commercial nuances (*mu'awadah*) through the mechanism of enforcing *ujrah* (fee). This transformation is evident in modern Islamic banking products where debt guarantee and transfer services are no longer free, but are charged, which is often a source of *fee-based income* for banks. This shift in orientation from *non-profit* to *profit* raises fundamental questions about the validity of sharia.

Specifically, the *kafalāh* and *hawālah contracts* are the focal point of the debate because of their proximity to debt transactions (*dayn*). The majority of classical scholars (*Jumhur*), including the imams of the four schools (Hanafiyah, Mālikiyah, Shafi'iyyah, and Ḥanābilah), view *kafalāh* as a virtue contract that should not be compensated for by materiality. Taking wages on guarantees is considered to resemble *riba*, because the guarantor who pays the secured debt is essentially giving a loan (*qard*), and any loan that attracts benefits is *riba* (*kullu qardin jarra naf'an fahwra riba*). The same is true of *hawālah*, which is a mechanism for transferring the burden of debt (Al-Munzir, 2005).

Responding to the needs of the industry and to provide legal certainty, the National Sharia Council of the Indonesian Ulema Council (DSN-MUI) took a progressive step of *ijtihad* by issuing fatwas that legitimize the implementation of *ujrah* in these contracts. Fatwas such as Fatwa No. 11 of 2000 on Kafalah and Fatwa No. 58 of 2007 on *Hawalah bi al-Ujrah*, explicitly allow for this transformation with certain limitations. DSN-MUI uses the approach that in the context of modern business, guarantee services are "benefits" or services of economic value (*mutaqawwam*) so that they are entitled to compensation, resembling a *ijārah* or *ju'ālah contract* (DSN-MUI, 2000; DSN-MUI, 2007).

This DSN-MUI move, although it provides a practical solution (*makhārij fiqhīyyah*), still leaves a sharp theoretical discourse space between textualist and contextualist groups. Groups that reject (contr), such as Rafiq Yūnus al-Miṣrī, insist that this transformation is a hilah (engineering) that legalizes covert usury. Meanwhile, pro-contemporary scholars, such as Wahbah az-Zuhaylī and Nazīh Hammād, argue that urgent needs (*hājat*) and changes in socio-economic structure justify such changes in law for the common good. They use the analogy (*qiyās*) of the ability to take wages for *jab* (reputation/position) in the Shafī‘ī madhab as the gateway to legitimacy (Hammād, 2001; Az-Zuhaylī, 2004).

It is in this context that the theory of *maṣlahah* and *maqāṣid as-syāri‘ah* becomes a crucial analytical instrument to bridge the gap between classical texts and modern contexts. As theorized by as-Syāṭibī and developed by Ibn ‘Āsyūr, Islamic law is oriented towards the realization of benefits (*jālib al-maṣāliḥ*) and the rejection of harm (*dar‘ al-mafāsid*). The transformation of the *kafalāh* and *hawālāh* contracts into *mu‘āwadah* must be tested for validity: whether it really presents a maslahah that protects the wealth (*hifz al-māl*) and religion (*hifz ad-dīn*) of the ummah, or whether it actually opens the door to mafsat in the form of economic exploitation (Al-Garnaṭī, 2009; ‘Āsyūr, 2018).

The urgency of this research is even more relevant if it is associated with the broader sharia economic ecosystem, such as the halal tourism industry. Hidayat (2023) emphasized that the development of halal tourism in Indonesia requires a *Smart Tourism* approach supported by strong infrastructure and service systems. The availability of flexible Islamic financial instruments, such as *Sharia Cards* (based on *kafalāh bi al-ujrah*) and travel guarantees, is a vital part of such infrastructure to facilitate the needs of Muslim tourists. Without a transformation of the contract that allows these products to operate commercially but comply with sharia, it will be difficult for the halal industry ecosystem to develop optimally (Hidayat, 2023).

Based on the above explanation, this study is focused on in-depth analysis of the transformation of *tabarru‘ akad* into *mu‘āwadah* in the DSN-MUI fatwa through the lens of *maṣlahah*. This research is important not only to provide academic legitimacy for Islamic finance practices in Indonesia, but also to provide constructive critical notes so that product innovation does not deviate from sharia goals.

## METHODS

This research uses a type of qualitative research with a style of library *research*. This research does not deal with numerical data in the field, but focuses on the analysis of fatwa texts,

jurisprudence, and Islamic law literature to explore the deepest meaning of *the construction of contract transformation law*. The main focus is to unravel the epistemological building of Islamic law related to the change in the status of contracts from social to commercial (Akbar, 2024).

The approaches used are content *analysis* and conceptual *approach*. Conceptual analysis is used to dissect key concepts such as *tabarru'*, *mu'āwadah*, *ujrah*, and *maṣlahah* as defined by authoritative scholars. Meanwhile, content analysis is used to dissect the structure of DSN-MUI fatwa, starting from the considerations, the legal basis of the Qur'an and Hadith, the opinions of the scholars cited, to the dictum of fatwa decisions, in order to understand *the manhaj al-iftā'* (method of determining fatwa) used.

The primary data source in this study is the collection of DSN-MUI Fatwas which is directly related to *the kafalāh* and *hawālah contracts* and the implementation of *ujrah*. The documents include: 1) Fatwa No. 11/DSN-MUI/IV/2000 concerning Kafalah; 2) Fatwa No. 54/DSN-MUI/X/2006 concerning Sharia Card; 3) Fatwa No. 57/DSN-MUI/V/2007 concerning Letter of Credit (L/C) with the Kafalah bi al-Ujrah Agreement; 4) Fatwa No. 58/DSN-MUI/V/2007 concerning Hawalah bi al-Ujrah; and 5) Fatwa No. 74/DSN-MUI/I/2009 concerning Sharia Guarantee (DSN-MUI, 2000; 2006; 2007; 2009).

Secondary data sources include relevant supporting literature, such as classical jurisprudence books (*turāts*) from various schools, sharia economic law books by contemporary experts (such as Wahbah az-Zuhaylī, Nazīh Ḥammād, Raṭīq Yūnus al-Miṣrī), as well as relevant journal articles such as Hidayat's (2023) work on halal tourism strategies. This secondary data serves as a tool to interpret, compare, and critique the arguments contained in the primary data.

The data analysis technique is carried out in a deductive-inductive manner. The researcher begins by mapping the general concepts of *maṣlahah* theory and the rules of fiqh, then applying them to analyze specific cases in the DSN-MUI fatwa. The analysis is carried out by *comparing the* views of classical scholars who prohibit *ujrah* and the views of DSN-MUI that allow it, and then draw legal conclusions about the validity of the transformation of the contract based on the principles *of Maqāṣid as-Syāri‘ah*.

## RESULTS AND DISCUSSION

### Map of Contract Transformation in DSN-MUI Fatwa

This study found that the fatwas of DSN-MUI have made a fundamental shift in the character of the *kafalāh* and *hawālah* contracts. If in classical literature these two contracts are purely social instruments (*tabarru'*), in the DSN-MUI fatwa, both have been transformed into business

instruments (*mu‘āwadah*). This transformation occurs through hybridization with *ijārah* (hire of services) or *ju‘ālah* (conditional wages).

To comprehensively dissect this transformation, the following is presented a table of analysis of related fatwas along with the form of transformation and justification of *ujrah*.

**Table 1. Analysis of Contract Transformation and Ujrah Justification in DSN-MUI Fatwa**

No	Fatwa DSN-MUI	Object and Context Akad	Forms of Transformation	Mechanism & Evidence of Ujrah Justification
1.	<b>Fatwa No. 11/2000</b> on Kafalah	General guarantee of debts/obligations of other parties.	<i>Tabarru‘</i> \$\\rightarrow\$ <i>Mu‘āwadah</i> (Parsial)	This fatwa opens a gap by stating that "Kafil can receive a reward (fee) as long as it is not burdensome". The justification is based on the principle of convenience and the absence of <i>a prohibition of sarib</i> in the nas.
2.	<b>Fatwa No. 54/2006</b> on Sharia Card	Credit card holder transaction guarantee to <i>the Merchant</i> .	<i>Kafalah</i> \$\\rightarrow\$ <i>Kafalah bi al-Ujrah</i>	The card issuer (Bank) acts as <i>Kafil</i> . For this guarantee service, the Bank is entitled to receive a <i>Membership Fee</i> . The transformation occurred because the guarantee function was packaged as a professional service product that was <i>mutaqawwam</i> (valuable).
3.	<b>Fatwa No. 57/2007</b> on Import L/C	Payment guarantee to overseas exporters.	<i>Kafalah</i> \$\\rightarrow\$ <i>Wakālah bi al-Ujrah / Kafalah bi al-Ujrah</i>	The bank guarantees the importer's payment. The fatwa explicitly mentions the contract "Kafalah bi al-Ujrah". <i>Ujrah</i> is determined as a reward for services, not interest on bailouts. The amount must be a fixed nominal, not a ceiling percentage.

4.	<b>Fatwa No.</b> <b>58/2007</b> on Hawalah bi al-Ujrah	Debt Forgiveness (Debt Forgiveness).	<i>Hawālah</i> \$ \rightarrow <i>Ijārah / Ju‘ālah</i>	<i>Muḥāl’alayh</i> (LKS) accepted the transfer of the debt and collected it. For collection/administration services, the Bank accepts <i>ujrah</i> . DSN adopted <i>Hawalah Mutlaqah</i> of the Hanafi school and performed its <i>ujrah</i> with <i>Wakalah bi al-Ujrah</i> .
5.	<b>Fatwa No.</b> <b>74/2009</b> on Sharia Guarantee	Suretyship business by Assurance Company.	<i>Kafālah</i> \$ \rightarrow <i>Mu‘āwadah</i> (Penuh)	The guarantee industry is purely fee-based. The guarantee company receives a "Guarantee Service Fee" (IJP). This is the culmination of the transformation in which <i>Kafālah</i> becomes a full-fledged business commodity.

Source: Processed from the DSN-MUI Fatwa Association (DSN-MUI, 2000; 2006; 2007; 2009)

#### Transformation Form Analysis: Hybridization into Ijārah

Based on the data in Table 1, a systematic transformation pattern can be seen. In Fatwa No. 11/2000, DSN-MUI was still cautious, but in subsequent fatwas (Nos. 57, 58, 74), the nomenclature "*bi al-Ujrah*" was permanently attached. This study analyzes that substantially, the form of transformation of *kafālah* and *hawālah* contracts in the DSN-MUI fatwa is the mutation into the Ijārah (Rental of Services) or Wakālah bi al-Ujrah contract.

This is based on the perspective of *Maqāṣid as-Syari‘ah* which prioritizes the substance of the law over its formalities. This principle is crystallized in the rules of fiqh adopted by DSN-MUI: "*Al-‘ibrāh fī al-‘uqūd li al-maqāṣid wa al-ma‘āni lā bi al-al-alfāz wa al-mabāni*" (The benchmark in the contract is its purpose and meaning, not its words and construction). In this context, although the contract is called *Kafālah* (which historically is *tabarru‘*), the substantial meaning that occurs is "the provision of risk protection services" or "debt collection services" by professional institutions. This service (*manfa‘ah*) is something of economic value (*mutaqawwam*), measurable, and can be traded.

This transformation makes *Kafalāh* and *Hawālah* in LKS equivalent to legal or insurance products, where *fees* are reasonable compensation for expertise, systems, and risks incurred. This view is in line with the opinion of Hammād (2001) who states that contracts that are originally *tabarru'* can be transformed into *mu'āwadah* through the agreement (*tarādi*) of the parties, as *wakālah* (representatives) can be charged.

### Analysis of DSN-MUI Ijtihad Method: Selective and Solutive

This quite radical transformation of the contract was not born from a vacuum, but the result of a structured *ijtihad* methodology. This study identifies three layers of methodology used by DSN-MUI:

1. Ijtihad *Intiqā'ī* (Selective) method: DSN-MUI is not rigidly bound to one sect. They select the most relevant opinion (*arjah*).
  - a. In the case of *Kafalāh*, DSN-MUI chose the opinion of Imam as-Shafī'i which requires the object of collateral to be known (*ma'lūm*), as opposed to the *jumhur* which allows the object of *majhūl*. This choice is taken to avoid *gharar* (ambiguity) when the contract turns commercial (Al-Ḥiṣnī, 2009).
  - b. In the case of *Hawālah*, DSN-MUI chose the opinion of the Ḥanafīyyah School which allows *Hawālah Mutlaqah* (transfer of debt without the recipient's debt to the transferee) (Ibn ‘Ābidīn, 2003). This choice is crucial because Islamic banks usually do not owe customers anything, so without this concept, sharia *takeover* products are impossible to run.
2. *Manhājī* Approach (*Taysīr al-Manhājī*): DSN-MUI applies the principle of *at-Taysīr al-Manhājī*, which provides legal convenience (*taysīr*) that is methodologically measurable. The rules "*Al-aṣlu fi al-mu'amalāt al-iḥāḥah*" (The original law of muamalah is permissible) and "*Ad-dararu yuẓal*" (Harm should be eliminated) became the main foundation (As-Suyūṭī, 1990). DSN-MUI argues that a total ban on *ujrah* guarantees will cause difficulties (*masyaqqaḥ*) for Muslims in accessing modern financial services.
3. *I‘ādah an-Nazār* (Illat Review) Method: DSN-MUI conducts a review of the *illat* (legal grounds) of the classical prohibition. The classical *illat* prohibits *ujrah* kafalah because it is considered a *qard* that attracts benefits (*riba*). However, DSN-MUI sees a *new illat*: in the context of business institutions, *kafil* incurs real costs (operations, HR, risk analysis). If it is not compensated, the LKS will lose (*darar*). Therefore, *ujrah* is permissible as *iwād al-misl* (equivalent compensation), not as debt interest. This is supported by the view of Az-Zuhaylī

(2004) who states that in conditions of urgent need (*hājāh*), wage taking is permissible.

### **Maṣlahah Substance and Sectoral Relevance**

The validity of the DSN-MUI *ijtihad* is strongest when tested with the analysis knife of *Maṣlahah* and *Maqāṣid as-Syari‘ah*. This study found three main benefit dimensions:

1. Aspect of Mutual Interest (Maṣlahah 'Āmmah): This transformation realizes *hifz al-mal* (protection of property). For customers (such as MSMEs), access to guarantees allows them to get business capital. For LKS, *ujrah's* ability to protect their assets from being eroded by operational costs. This synergy creates economic growth for the people. Without this fatwa, the intermediation function of Islamic banking will be jammed (Hasanudin, 2024).
2. Flexibility Aspect (Al-Murūnah): The ability to transform contracts provides flexibility for the sharia industry to innovate and compete. This is very relevant to the findings of Hidayat (2023) regarding halal tourism development strategies through the *Smart Tourism* approach. *Smart Tourism* requires the support of a sophisticated digital payment ecosystem. *The Sharia Card* product (based on the fatwa *kafalāh bi al-ujrah*) is a tangible manifestation of this flexibility, allowing Muslim tourists to make cashless transactions safely and halal while traveling (Hidayat, 2023).
3. Legal Effectiveness Aspects (Nufūz as-Syari‘ah): These fatwas have been positivized into state regulations, such as Law No. 1 of 2016 concerning Guarantee and POJK. This provides legal *certainty* and *enforceability*, ensuring the rights and obligations of the parties are protected by the state. This is the highest form of benefit in the context of the state of law (Amin, 2017).

Thus, the transformation of the contract in the DSN-MUI fatwa is not an aberration, but a sophisticated form of *Ijtihad Maqāṣidi* to maintain the relevance of Islamic law in the global economy.

## **CONCLUSION**

Based on the description and in-depth analysis that has been carried out, this study concludes three main things. First, the form of transformation of the *kafalah* and *hawalah* contracts in the DSN-MUI fatwa is substantively the change from the *tabarru‘* (social) contract to the *mu‘āwadah* (commercial) contract which resembles the characteristics of the *ijārah* contract or *wakalah bi al-ujrah*. This transformation is legitimized based on the principle of legal substantiality in *Maqāṣid as-Syari‘ah* which views that professional guarantee services are commodity benefits that are entitled to compensation. Second, the *ijtihad* method used by DSN-MUI is the *Ijtihad*

*Initiqā'ī* (selective) method by selecting the opinions of scholars who are most relevant to the needs of the times, as well as applying the manhaj of *Taysīr al-Manhājī* (methodological ease) and *I'ādah an-Nāzār* (review) to classical legal *illat* which is considered no longer relevant to the context of modern industry.

Third, the substance of *maṣlahah* in the transformation of this contract is manifested in the aspects of common interest, flexibility, and effectiveness of the law. This fatwa provides liquidity solutions for the community, ensures the sustainability of LKS operations, and supports the national halal economic ecosystem, including the halal tourism sector that requires smart financial infrastructure as emphasized in the *smart tourism* strategy. Thus, DSN-MUI succeeded in formulating adaptive laws without losing sharia principles. It is recommended that DSN-MUI continue to strengthen the foundation of the *nass* postulate in future fatwas and issue technical guidelines on the nominal limit of *ujrah* to avoid practices that resemble flowers substantially.

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