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CRITICAL ANALYSIS OF DSN-MUI FATWAS ON HYBRID CONTRACTS: TOWARD A RECONSTRUCTIVE DRAFTING FRAMEWORK

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Abstract

This study examines the regulatory construction of hybrid contracts (*al- ʿuqūd al-murakkabah*) in fatwas issued by the National Sharia Council of the Indonesian Ulama Council (DSN-MUI) following Constitutional Court Decision No. 65/PUU-XIX/2021. It focuses on Fatwa No. 71 on Sale and Lease Back, Fatwa No. 73 on *Musyārakah Mutanāqiṣah*, and Fatwa No. 104 on Shariah Subrogation. Employing doctrinal legal research with statutory, conceptual, and comparative approaches, the study evaluates the legislative drafting quality of these fatwas under Law No. 12 of 2011 and assesses their transformation into binding law through Financial Services Authority Regulations (POJK) and Bank Indonesia Regulations (PBI). The findings are threefold. First, although DSN-MUI applies the Hanbali-based principles of *taysīr* and *maṣlaḥah*, ambiguities in risk allocation and asset separation create doctrinal tensions. Second, when assessed under Law No. 12 of 2011, the fatwas fall short of legislative drafting standards because theological narratives predominate, operational definitions are limited, and legal terminology is inconsistent. These shortcomings may create uncertainty when the fatwas are incorporated into regulations and contracts. Third, the study proposes a reconstruction model that places theological reasoning in a "Shariah Resolution" and codifies technical norms in a "Regulatory Standard" specifying definitions, obligations, prohibitions, oversight mechanisms, and legal consequences. This model preserves DSN-MUI's authority to exercise *ijtihād* while enabling the Financial Services Authority and Bank Indonesia to formulate clearer and more enforceable rules for Islamic financial institutions.

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Keywords: DSN-MUI fatwas; Hybrid contract; Legal drafting; Sharia governance.

Abstrak

Penelitian ini mengkaji konstruksi regulasi kontrak hibrida (al-ʿuqūd al-murakkabah) dalam fatwa DSN-MUI pasca Putusan Mahkamah Konstitusi No. 65/PUU-XIX/2021, dengan fokus pada Fatwa No. 71 (Sale and Lease Back), Fatwa No. 73 (Musyārakah Mutanāqiṣah), dan Fatwa No. 104 (Subrogasi Syariah). Menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan, konseptual, dan komparatif, penelitian ini mengevaluasi kualitas perancangan peraturan dari fatwa tersebut berdasarkan UU No. 12/2011 untuk menilai transformasinya menjadi hukum positif melalui POJK dan PBI. Temuan penelitian menunjukkan tiga hal. Pertama, meskipun DSN-MUI menerapkan prinsip taysīr dan maṣlahah berbasis doktrin Hanbali, ambiguitas dalam alokasi risiko dan pemisahan aset memicu ketegangan doktrinal. Kedua, berdasarkan UU No. 12/2011, fatwa-fatwa tersebut menyimpang dari standar legislatif karena didominasi narasi teologis, minim definisi operasional, dan diksi hukum yang tidak konsisten. Karakteristik ini dapat menimbulkan ketidakpastian ketika fatwa diterjemahkan ke dalam regulasi dan kontrak. Ketiga, penelitian ini menawarkan model rekonstruksi yang memisahkan rasionalitas teologis ke dalam "Resolusi Syariah" dan mengodifikasi norma teknis ke dalam "Standar Regulasi" yang memuat definisi, kewajiban, larangan, pengawasan, dan akibat hukum. Model ini mempertahankan otoritas ijtihad DSN-MUI sekaligus memungkinkan OJK dan Bank Indonesia merumuskan aturan yang lebih jelas dan dapat ditegakkan bagi lembaga keuangan syariah.

Kata kunci: Fatwa DSN-MUI; Kontrak hibrida; Legal drafting; Tata kelola syariah.

A. INTRODUCTION

Constitutional Court Decision No. 65/PUU-XIX/2021 confirms DSN-MUI fatwas function as material legal sources, not delegated legislation.[1] Consequently, under Article 1337 of the Indonesian Civil Code (KUHPerdata), these uncodified fatwas do not possess autonomous statutory power to void a private contract until they are formally transformed into state regulations, meaning that any contract non-compliance with the fatwa text does not automatically constitute an unlawful cause (*ongeoorloofde oorzaak*). To maintain legal certainty within Indonesia's dual banking system, these fatwas require formal codification into binding state regulations (POJK/PBI) under Law No. 21/2008.[2] This

[1] Mahkamah Konstitusi Republik Indonesia, Putusan Mahkamah Konstitusi Republik Indonesia Nomor 65/PUU-XIX/2021 (2021).

[2] Republik Indonesia, "Undang-Undang No. 21 Tahun 2008 Tentang Perbankan Syariah" (2008), https://ojk.go.id/en/kanal/syariah/regulasi/undang-undang/Pages/law-no-21-of-2008-on-sharia-banking.aspx.

regulatory transformation is urgent, given that global Islamic finance assets have reached USD 3.06 trillion.[3] At this scale, classical jurisprudence cannot accommodate complex hybrid contracts (*al-ʿuqūd al-murakkabah*), which frequently create regulatory ambiguity and interpretive uncertainty when transposed into formal state law.[4]

Historically, DSN-MUI utilizes the Hanbali doctrines of *taysīr* (facilitation) and *maṣlaḥah* (public interest) to accommodate modern transactional speeds and bypass the classical prohibition of *bay'atayn fī bay'* (two sales in one transaction).[5] However, the legislative drafting style of these fatwas often lacks technical precision and persistently deviates from the structural standards mandated by Law No. 12/2011 on Legislation Formation.[6] The over-dominance of theological-paradigmatic narratives at the expense of definitive prescriptive norms, the absence of standardized operational definitions, and inconsistent legal dictions produce structural grey areas when translated into banking practices. This ambiguity directly implicates Gustav Radbruch's triadic theory of law, which holds that legal order must balance justice (*Gerechtigkeit*), utility (*Zweckmäßigkeit*), and legal certainty (*Rechtssicherheit*).[7] While DSN-MUI fatwas may fulfill justice and utility through *maṣlahah*-based *ijtihād*, their *Rechtssicherheit* remains fragile precisely because weak drafting techniques prevent consistent application by courts and regulators.

In judicial practice, this drafting deficit carries real-world litigation risks, as manifested in the volatile and contradictory interpretations within the Indonesian religious court systems. A profound example of this structural vulnerability is highlighted in the dispute of Tangerang Religious Court Decision No. 847/Pdt.G/2019/PA.Tng,[8] which was

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[3] Islamic Financial Services Board, "Islamic Financial Services Industry Stability Report 2022" (Kuala Lumpur: IFSB, 2022), 4–10, https://www.ifsb.org./.

[4]DSN-MUI Fatwa No. 71 (Sale and Lease Back), Fatwa No. 73 (*Musyārakah Mutanāqiṣah*), and Fatwa No. 104 (Shariah Subrogation).

[5] Ahmad ibn Hanbal, "Musnad Ahmad, No. 6918," n.d., https://dorar.net/hadith/sharh/69118.

[6] Republik Indonesia, "Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan" (2011).

[7] Gustav Radbruch, *Legal Philosophy* (Cambridge: Harvard University Press, 1950), 107–8.

[8] Pengadilan Agama Tangerang, Putusan Pengadilan Agama Tangerang Nomor 847/Pdt.G/2019/PA.Tng (2019).

subsequently overturned by the Supreme Court in the Judicial Review Decision No. 46 PK/Ag/2020.[9] In the *judex facti* phase, the lower court focused primarily on the theological protections of the client, granting a tort claim due to an obscured execution of a hybrid *murābaḥah bil wakālah* contract. Conversely, the Supreme Court as *judex juris* nullified the lower court's reasoning, prioritizing strict prudential banking principles and formal statutory procedures over the ambiguous multi-contract structure. This stark reversal directly proves that textual and semantic ambiguities within the normative frameworks of hybrid fatwas cause high levels of interpretive divergence among judicial authorities, expanding litigation vulnerability instead of offering a predictable framework for dispute resolution.

Previous studies have primarily examined the permissibility and implementation of hybrid contracts. Nurfadilah Sindika Sari found that the implementation of *murābaḥah bil wakālah* remained suboptimal because supervisory mechanisms were inadequate.[10] Muhammad Yusran Hadi and Utari Silvia Roja examined a dual-contract arrangement in an Acehnese Islamic cooperative and reported that the scheme was generally accepted when it complied with *fiqh muʿāmalāt*.[11] Supriyadi and Nina Kurniawati likewise concluded that hybrid contracts were permissible insofar as they did not violate the principles of commutative justice.[12] At the institutional level, Agus Susehno and Rial Fuadi found that the products of BPRS Dana Amanah generally conformed to DSN-MUI fatwas, although the parallel *ijārah* contract used for Umroh Hebat financing

[9] Mahkamah Agung Republik Indonesia, Putusan Mahkamah Agung Republik Indonesia Nomor 46 PK/Ag/2020 (2020).

[10] Nurfadilah Sindika Sari, "Inovasi Akad Hybrid Contract Murabahah Bil Wakalah Dalam Lembaga Keuangan Syariah," *Journal Asy-Syarikah* 6, no. 2 (2024): 99–112, https://doi.org/10.47435/asy-syarikah.v6i2.3155.

[11] Muhammad Yusran Hadi and Utari Silvia Roja, "The Application of Hybrid Contract System in Gala Bank Financing According to Fiqh Muamalah: A Study on KSPPS Baitul Qiradh Abdya, Indonesia," *Journal Al-Mudharabah* 6, no. 1 (2025): 45–61, https://doi.org/10.22373/al-mudharabah.v6i1.7659.

[12] Supriyadi and Nina Kurniawati, "Hybrid Contracts in Islamic Banking: A Shariah and Fiqh Muʿāmalāt Perspective," *Masyrif: Jurnal Ekonomi, Bisnis Dan Manajemen* 6, no. 2 (2025): 347–70, https://doi.org/10.28944/masyrif.v6i2.2474.

lacked a specific fatwa.[13] Chinta Khusna's study of Shariah cards reached a similar compliance-oriented conclusion by identifying the use of *kafālah*, *ijārah*, and *qarḍ* within Islamic economic law.[14] Ana Latifatuz Zahro shifted attention to litigation by comparing the legal reasoning in Decision No. 847/Pdt.G/2019/PA.Tng and Decision No. 46 PK/Ag/2020, but the analysis did not connect the origin of the dispute to the drafting and regulatory construction of the relevant DSN-MUI fatwas. [15]

Extensive scholarly literature has evaluated the multi-layered dimensions of hybrid contracts (*al-ʿuqūd al-murakkabah*) within Islamic financial ecosystems, falling broadly into two thematic paradigms. The first paradigm centers on doctrinal permissibility and institutional compliance. It generally accepts hybrid contracts when their components remain within Shariah parameters and preserve commutative justice.[16] Studies of Shariah cards,[17] cooperative financing,[18] and Islamic banking products[19] show how multiple contracts are used to meet contemporary financial needs. At the same time, this strand identifies weak supervision[20] and the absence of specific regulatory coverage for certain products.[21] The

[13] Agus Susehno and Rial Fuadi, "Implementasi Hybrid Contract Di Perbankan Syariah Perspektif Fatwa DSN MUI," *Ad-Deenar: Jurnal Ekonomi Dan Bisnis Islam* 8, no. 1 (2024): 43–56, https://doi.org/10.30868/ad.v8i01.6486.

[14] Chinta Khusna, "Hybrid Contract Pada Syariah Card Dalam Perspektif Ekonomi Islam," *Adzkiya: Jurnal Hukum Dan Ekonomi Syariah* 13, no. 1 (2025): 56–67, https://doi.org/10.32332/adzkiya.v13i1.8567.

[15] Ana Latifatuz Zahro, "Analisa Putusan Nomor 46 PK/Ag/2020 Juncto Putusan Nomor 847/Pdt.G/2019/PA.Tng Terhadap Sengketa Hybrid Contract," *ASAS* 16, no. 1 (2024): 108–23, https://doi.org/10.24042/asas.v16i1.21521.

[16] Supriyadi and Kurniawati, "Hybrid Contracts in Islamic Banking: A Shariah and Fiqh Muʻāmalāt Perspective."

[17] Khusna, "Hybrid Contract Pada Syariah Card Dalam Perspektif Ekonomi Islam."

[18] Hadi and Roja, "The Application of Hybrid Contract System in Gala Bank Financing According to Fiqh Muamalah: A Study on KSPPS Baitul Qiradh Abdya, Indonesia."

[19] Susehno and Fuadi, "Implementasi Hybrid Contract Di Perbankan Syariah Perspektif Fatwa DSN MUI."

[20] Sari, "Inovasi Akad Hybrid Contract Murabahah Bil Wakalah Dalam Lembaga Keuangan Syariah."

[21] Susehno and Fuadi, "Implementasi Hybrid Contract Di Perbankan Syariah Perspektif Fatwa DSN MUI."

second thematic paradigm shifts the scholarly focus from static institutional compliance toward judicial outcomes and litigation vulnerabilities. This strand exemplified and shows a marked divergence between the reasoning of *judex facti* and *judex juris* in hybrid-contract disputes.[22] Both strands clarify what forms of hybrid contracts are considered permissible, how they are implemented, and how disputes have been decided. Neither strand, however, sufficiently examines the fatwa itself as a drafted regulatory text whose structure and language shape subsequent implementation and adjudication.

The research gap therefore lies in the absence of an integrated analysis of legal substance, drafting technique, and institutional transformation. First, earlier studies treat DSN-MUI fatwas mainly as standards for measuring product compliance, rather than as normative texts that must be translated into binding state regulation. Second, the literature has not adequately connected the constitutional status of DSN-MUI fatwas after Decision No. 65/PUU-XIX/2021 with the drafting requirements of Law No. 12 of 2011 and the demand for legal certainty in Radbruch's framework. Third, the available studies do not provide a comparative reconstruction of Indonesian hybrid-contract fatwas using the more operational standards of Bank Negara Malaysia (BNM) and the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). As a result, the literature explains permissibility, implementation, and judicial divergence, but does not yet offer a drafting model capable of reducing ambiguity before a fatwa is incorporated into positive law.

The state of the art of this study lies in shifting the unit of analysis from the permissibility or institutional use of hybrid contracts to the regulatory architecture of the fatwa itself. Fatwa Nos. 71, 73, and 104 are examined simultaneously through Islamic economic law and the legal-drafting principles of Law No. 12 of 2011, and their formulation is compared with BNM Shariah Standards and AAOIFI standards. On that basis, the study's novelty is a reconstruction model that links the substantive reasoning of *ʿillah* and *maqāṣid al-sharīʿah* with clearer normative formulation, while adapting comparative standards to Indonesia's dual-authority context. The proposed contribution is therefore not a new ruling on the general permissibility of hybrid

[22] Zahro, "Analisa Putusan Nomor 46 PK/Ag/2020 Juncto Putusan Nomor 847/Pdt.G/2019/PA.Tng Terhadap Sengketa Hybrid Contract."

contracts, but a method for formulating their norms more coherently so that Shariah compliance can be translated into greater legal certainty.

Accordingly, this study evaluates the regulatory construction of hybrid contracts in DSN-MUI fatwas from the perspective of Islamic economic law; assesses the legal-drafting quality of Fatwa Nos. 71, 73, and 104 under Law No. 12 of 2011; and develops a reconstruction model informed by BNM and AAOIFI standards. It addresses three questions: (1) How is the regulatory construction of hybrid contracts in DSN-MUI fatwas evaluated from the perspective of Islamic economic law? (2) How should the legality and drafting quality of these fatwas be assessed under Law No. 12 of 2011? and (3) How can their regulatory construction be reconstructed by adapting BNM and AAOIFI standards to Indonesia's dual-authority framework?

B. METHOD

This study employs normative legal research to examine the technical drafting of religious rulings and their incorporation into positive law. The research design operates through three integrated approaches: statutory, conceptual, and functional comparative. The statutory approach uses Law No. 12/2011, as amended by Law No. 13/2022, and Law No. 21/2008 as primary benchmarks. The regulatory translation of fatwas is examined through POJK No. 13/POJK.03/2021 on Commercial Bank Products and relevant OJK product codification. The conceptual approach treats fatwas as authoritative material legal sources after Constitutional Court Decision No. 65/PUU-XIX/2021 and distinguishes their regulatory status from questions of contractual validity under Articles 1320, 1333, and 1337 of the Civil Code. The functional comparative approach benchmarks domestic formulations against relevant Bank Negara Malaysia (BNM) policy documents and Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) Shariah standards.

The primary legal materials consist of three multi-contract (*al-ʿuqūd al-murakkabah*) instruments selected based on their structural vulnerability to drafting ambiguities: DSN-MUI Fatwa No. 71/DSN-MUI/VI/2008 (Sale and Lease Back), Fatwa No. 73/DSN-MUI/XI/2008 (*Musyārakah Mutanāqiṣah*), and Fatwa No. 104/DSN-MUI/X/2016 (Shariah Subrogation), tracked up to their 2026 regulatory status. Secondary materials include academic journals and legal treatises on legislative drafting.

Data were analyzed using a qualitative-prescriptive method driven by deductive logic. The analysis operationalizes three statutory indicators: clarity (semantic absence of theological metaphors in preambles), precision (syntactical deployment of imperative verbs like "wajib" or "harus" in dictums), and enforceability (teleological assessment of civil sanctions or regulatory penalties). The doctrinal assessment applies four criteria: economic substance, alignment with *maqāṣid al-sharīʿah*, the absence or effective management of *gharar*, and the structural independence of the constituent contracts. The comparative analysis then identifies drafting practices that may be adapted to Indonesia's institutional framework.

C. RESULTS AND DISCUSSION

1. The Legal Validity Debate

Hybrid contracts face a fundamental doctrinal conflict between two legal principles. The prophetic hadith prohibits *bayʿatayn fī bayʿ* dual contracts in one transaction session due to *jahalah fi al-tsaman* (price ambiguity) that invalidates consent. This restriction forms the textual basis for invalidating combined sale-lease or sale-loan contracts.[23] Conversely, the juristic principle *al-asl fi al-'uqud al-ibahah*[24] asserts that all contracts are permissible unless explicitly prohibited by *nash* (definitive scriptural text), providing the doctrinal basis for contractual freedom and financial innovation. This classical jurisprudential debate provides the doctrinal foundation for understanding the normative and structural design of contemporary hybrid contracts. Specifically, the regulatory layout of DSN-MUI Fatwa Nos. 71, 73, and 104 directly mirrors this unresolved tension between rigid scriptural prohibitions and the necessity of contractual flexibility.

This debate crystallizes into two opposing positions. The Hanafiyah and Shafi'iyah schools invalidate hybrid contracts when the combination creates *gharar* (excessive uncertainty) or ambiguity in object and price, as

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[23] Hayreddin Karaman, *Mukayeseli İslam Hukuki 2* (Istanbul: İz Yayıncılık, 2013), 187–88; Rusyd al-Qurhubi Ibnu, "Bidayatul Mujtahid Wa Nihayatul Muqtashid," in *Vol 2* (Kairo: Maktabah Taufiqiyah, n.d.), 173–74.

[24] Alvian Chasanal Mubarroq and Luluk Latifah, "Analisis Konsep Muamalah Berdasarkan Kaidah Fiqh Muamalah Kontemporer," *Tadayun: Jurnal Hukum Ekonomi Syariah* 4, no. 1 (2023): 95–108, https://doi.org/10.24239/tadayun.v4i1.101.; Ibnu Qayyim Al-Jauziyah, *I'lam Al-Muwaqi'in 'an Rabb Al-'Alamin*, vol. 2 (Beirut: Dar al-Jail, n.d.), 553.

argued by Al-Kasani[25] and Imam Shafi'i.[26] The *bai'ataini* prohibition is thus applied as a safeguard against contractual uncertainty. Conversely, the contextual-substantive approach of Hanbali scholars following Ibn Taymiyyah and Ibn Qayyim argues the prohibition targets *ribā* (interest) or deception, not contract combination per se. For them, combining contracts is valid so long as the substantive meaning does not violate *maqāṣid al-sharīʻah* (the objectives of Islamic law).[27]

The tension intensifies with *gharar* as the key defect. The restrictive position treats *gharar* arising from dual pricing or ambiguous objects as the reason *bai'ataini* is prohibited. The Hanbali position treats *gharar* as manageable if the contract's purpose is legitimate and free from deception. Thus, this subsection therefore identifies the central doctrinal tension: hybrid contracts test the boundaries between the prohibition of contractual combinations that generate uncertainty and the principle of contractual freedom.

2. *Taysīr* and *Ḥīlah* in DSN-MUI Fatwas

DSN-MUI Fatwas Nos. 71, 73, and 104 position contractual innovation between *taysīr* as legitimate facilitation and *ḥīlah* as an impermissible legal stratagem. Hybrid contracts (*al-ʿuqūd al-murakkabah*) is distinguished not merely by the presence of multiple contracts,[28] but by the juridical relationship among them *taʿalluq* which creates rights and obligations different from those generated by each contract independently.[29]

Islamic law recognizes *taysīr* as a means of removing hardship (*'adam al-haraj*).[30] In economic transactions, it may operate through: *isqāṭ*

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[25] Abu Bakar bin Mas'ud Al-Kasani, *Bada'i as-Sana'i Fi Tartib Ash-Syarai*, vol. 7 (Beirut: Dar al-Kutub al-Ilmiyyah, 1986), 3–16;

[26] Karaman, *Mukayeseli İslam Hukuki 2*, 190.

[27] Karaman, 192–93; Al-Jauziyah, *I'lam Al-Muwaqi'in 'an Rabb Al-'Alamin*, 2:553; Abdul Fatah and Syahrul Anwar, "Integration of Maqasid Al-Shari'ah in the Design of Hybrid Financial Contracts ('Uqud Murakkabah)," *Jurnal Iman Dan Spiritualitas* 5, no. 4 (2025): 719–32, https://doi.org/10.15575/jis.v5i4.48280.

[28] Abdullah Al-Imrani, *Al-'Uqud Al-Maliyah Al-Murakkabah: Dirasah Fiqhiyah Ta'shiliyah Tatbiqiyah* (Riyadh: Dar Kunuz Isybiliya, 2010), 41.

[29] Nazih Hammad, *Al-'Uqud Al-Murakkabah Fil Fiqh Al-Islami* (Damaskus: Dar al-Qalam, 2015), 244.

[30] Nadirsyah Hosen, *Ngaji Fiqh: Pemahaman Tekstual Dengan Aplikasi Yang Kontekstual* (Bandung: Mizan, 2022), 12–13.

(exemption), *naqṣ* (reduction), *ibdāl* (substitution), *taqdīm* (advancement), *ta'khīr* (delaying), *taghyīr* (modification), and *tarkhīṣ* (permission). DSN-MUI applies these forms to justify hybrid structures: t*aqdīm* and *taghyīr* in MMQ Fatwa 73, *naqṣ* and *tarkhīṣ* in Sale and Lease Back Fatwa 71, and *ibdāl* with *tarkhīṣ* in subrogation based on sharia principles Fatwa 104. The critical issue is whether such applications remain *taysīr* or cross into *ḥīlah* when the *'illah* of hardship is absent and the structure merely replicates interest-based cash flows.

This approach reflects *taysīr al-manhaj,* a methodological shift from *sadd al-dhari'ah* to *fath al-dhari'ah*. Citing Hanbali flexibility and Ibn Taymiyyah's principle of *al-aṣl fi al-mu'amalat al-ibahah*,[31] DSN-MUI justifies hybrid structures such as MMQ by prioritizing benefit over formalistic prohibition. Nevertheless, contractual permissibility cannot be determined solely from formal compliance. Ibn Qayyim al-Jawziyyah rejected legal devices intended to circumvent Shariah obligations despite their formally valid appearance.[32] Although Najib characterizes certain uses of *ḥīlah* in DSN-MUI fatwas as permissible.[33] Permitting *ḥīlah* in hybrid contracts is problematic when textual compliance displaces *maqāṣid al-sharīʿah*, *ʿillah al-ḥukm*, and the law's underlying wisdom.[34] A device that changes only its legal form while preserving a prohibited economic effect cannot qualify as *ḥīlah sharʿiyyah.*[35] Under *sadd al-dharīʿah*, such a device must be rejected, and the original ruling remains controlling.

[31] Lukita Fahriana and J M Muslimin, "Penerapan Al-Qawa'id Al-Usuliyyah Dan Al-Qawa'id Al-Fiqhiyah Dalam Kasus Riba Dan Bank Syari'ah," *Jurnal Indo-Islamika* 10, no. 2 (2020): 131, https://doi.org/10.15408/idi.v10i2.17527.

[32] Muhammad Abdurrahman Sadique, "Legal Contrivances in Islamic Legal Texts: Their Classification and Relevance to Transactional Expressions," *South East Asia Journal of Contemporary Business, Economics and Law* 28, no. 2 (2022): 55–60, https://seajbel.com/wp-content/uploads/2023/01/SEAJBEL28.ISU-2_076.pdf.

[33] Ahmad Najib, "Analisis Penerapan Hilah Pada Fatwa Dewan Syariah Nasional-Majelis Ulama Indonesia (DSN-MUI) Tentang Murabahah Ijarah Muntahiyah Bi Al-Tamlik (IMBT) Dan Rahn" (Pascasarjana Institut Agama Islam Negeri Purwokerto, 2020), 114.

[34] Chamim Tohari, *Teori Perubahan Hukum Islam: Implementasi Maqashid Al-Syari'ah Al-'Ammah Sebagai Metode Penetapan Hukum Islam Dalam Konteks Reformulasi Hukum Islam Di Indonesia* (Malang: UMM Press, 2025), 38–39.

[35] In terminology, *hilah shar'iyyah* is a strategy used to achieve benefits, avoid prohibitions, or get out of difficulties, without violating Islamic principles. Siti Marhamah and Mahsun, "Al-Hilah Al-Shar'iyyah as a Method in Responding to Prayer Problems in Space," *Jurnal Al-Ahkam* 31, no. 2 (2021): 241–58, https://doi.org/10.21580/ahkam.2021.31.2.9004.

This study therefore distinguishes legitimate *taysīr* from impermissible *ḥīlah* through four criteria: economic substance, consistency with *maqāṣid al-sharīʿah*, transparency and the management of *gharar*, and the independence of the constituent contracts.

a. Fatwa No. 73 on Mus*yārakah Mutanāqiṣah*

Fatwa No. 73 defines *Musyārakah Mutanāqiṣah* as "a partnership in which the asset ownership of one party diminishes due to gradual purchase by the other party" and stipulates that "in a *musyārakah mutanāqiṣah* contract, the first party is required to promise to sell its entire *ḥiṣṣah* gradually, and the second party is required to purchase it".[36] Assessed against the four criteria, the arrangement initially possesses economic substance through shared capital and profit-and-loss allocation, but this substance weakens when a binding purchase undertaking shifts residual ownership risk to the customer. Its alignment with *maqāṣid* is similarly weakened by asymmetric risk allocation, while *gharar* may arise if the future price of the institution's *ḥiṣṣah* is predetermined. Contractual independence is also compromised when the sale is conditioned on the partnership, potentially approaching *bayʿatayn fī bayʿ*. Fatwa No. 73 thus applies *taysīr* through *taqdīm* and *taghyīr*, but may become *ḥīlah* when the binding promise converts risk sharing into secured financing.

b. Fatwa No. 71 on Sale and Lease Back

Fatwa No. 71 defines Sale and Lease Back as "an asset sale followed by leasing it back to the seller" and stipulates that "*bai*' and *ijārah* contracts must be executed separately. Once the *baiʿ* contract has been completed, the *ijārah* contract may be executed."[37] Assessed against the four criteria, the arrangement preserves economic substance because ownership risk, maintenance obligations, and residual value remain with the lessor throughout the lease. Its alignment with *maqāṣid* is comparatively strong because *ujrah* compensates for the usufruct of a genuine asset rather than the passage of time. *Gharar* is limited by requiring clear rights, obligations, rental amounts, and lease periods.

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[36] Dewan Syariah Nasional-Majelis Ulama Indonesia, "Fatwa Dewan Syariah Nasional No. 73/DSN-MUI/XI/2008 Tentang Musyarakah Mutanaqisah," 2008, https://dsnmui.or.id/kategori/fatwa/page/10/. Data accessed on June 27, 2026

[37] Dewan Syariah Nasional-Majelis Ulama Indonesia, "Fatwa Dewan Syariah Nasional No. 71/DSN-MUI/VI/2008 Tentang Sale and Lease Back," 2008, https://dsnmui.or.id/kategori/fatwa/page/10/. Data accessed on June 29, 2026.

Contractual independence is also maintained through sequential execution, avoiding the conditional combination associated with *bayʿatayn fī bayʿ*. Fatwa No. 71 thus applies *taysīr* through *naqṣ* and provides a baseline of *taysīr* without *ḥīlah* for assessing Fatwa Nos. 73 and 104.

c. Fatwa No. 104 on Shariah Subrogation

Fatwa No. 104 defines Shariah subrogation as the replacement of the original creditor by a new creditor because the original creditor's receivable is paid off by the new creditor and, in separate clauses, requires that the transferred receivable be clear in amount and specifications; that the commodity (silʿah) used as the price be lawful, clearly identified, and agreed in value; that the new creditor own the commodity when the transfer is executed; and that payment be made on a spot basis.[38] Assessed against the four criteria, the arrangement possesses economic substance when the new creditor genuinely assumes ownership risk, distinguishing it from debt discounting. Its alignment with *maqāṣid* depends on genuine consideration (*ʿiwaḍ*) through an asset exchange rather than money for money. *Gharar* is limited by requiring clarity regarding the receivable, commodity, value, and timing of payment. Contractual independence is maintained by separating *ḥiwālah al-ḥaqq*, *wakālah*, and sale into distinct mechanisms. Fatwa No. 104 therefore constitutes legitimate *taysīr* only when the commodity transfer and associated ownership risk are genuine and verifiable.

The transition from prohibition to permissibility is explained through the shift in *ʻillah* of *bayʻatayn fī bayʻah*. Classical prohibition targeted *jahālah* and exploitation. Under the *uṣūlī* principle *al-ḥukmu yadūru maʻa al-ʻillati wujūdan wa ʻadaman* (the law follows the existence or absence of *'illah*) the ruling changes when the effective cause disappears.[39] Contemporary documentation and supervision remove the original *ʻillah* of ambiguity. Hence, permissibility does not reject the hadith but

[38] Dewan Syariah Nasional-Majelis Ulama Indonesia, "Fatwa Dewan Syariah Nasional No. 104/DSN-MUI/X/2016 Tentang Subrogasi Berdasarkan Prinsip Syariah," 2016, https://dsnmui.or.id/kategori/fatwa/page/7/. Data accessed on June 29, 2026.

[39] Saadal Jannah, Andi Dahmayanti, and Windy Sulfiana, "Pelanggaran Terhadap Akad Mudarabah Dalam Perspektif Fikih Mu'amalah (Studi Analisis Kaidah Al-Hukmu Yadūru Ma'a 'Illatihi Wujūdan Wa 'Adaman)," *AL-KHIYAR: Jurnal Bidang Muamalah Dan Ekonomi Islam* 4, no. 2 (2024): 124–45, https://doi.org/10.36701/al-khiyar.v4i2.1443.

recognizes that the new *'illah* fulfillment of *maqāṣid* through transparent contracts justifies hybrid forms as means, not ends.

3. Hybrid Contracts from a Legal Drafting Perspective

Fatwas differ from statutes in both binding force and source of legitimacy. Applying legal drafting standards to DSN-MUI fatwas is nevertheless justified because their provisions serve as normative references for regulations and contractual documents governing Islamic financial institutions. A financial fatwa also structures ownership, rights, obligations, and risk allocation. Its language must therefore be sufficiently precise for later regulatory implementation.

In the Indonesian legal system, DSN-MUI fatwas occupy a unique position as "soft law" that is transformed into positive law through the regulatory process.[40] Article 1(27) of Law No. 21/2008 on Shariah Banking mandates that Shariah business activities must comply with DSN-MUI fatwas. Bank Indonesia Regulation No. 10/16/PBI/2008 and POJK No. 16/POJK.03/2014 further operationalize fatwa provisions into binding rules for banks and financial institutions. This transformation means that while the fatwa itself is not legislation, its content acquires normative force once adopted by the state. Thus, applying legal drafting standards to fatwas is not an equation of fatwa with statute, but an evaluation of the quality of the source material that will become the basis of enforceable law. The analysis of Fatwa Nos. 71, 73, and 104 identifies four recurring problems:

a. Structural Imbalance Between Theological Reasoning and Prescriptive Norms

Legislative drafting distinguishes explanatory considerations from provisions that define rights, duties, prohibitions, and legal consequences.[41] In the fatwas examined, theological and jurisprudential reasoning occupies considerably more space than the operative rules.

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[40] H Aspan, "Legal Mechanisms for Business Accountability: A Comparison of Soft and Hard Law in Indonesia," *Law Reform* 20, no. 2 (2024): 353–82, https://doi.org/10.14710/lr.v20i2.59273.

[41] Muhammad Ishom, *Legal Drafting* (Malang: Intrans Publishing, 2017), 105; Aziz Syamsuddin, *Proses Dan Teknik Penyusunan Undang-Undang* (Jakarta: Sekretariat Jenderal DPR RI, 2021), 242.

The structure of Fatwa No. 73/DSN-MUI/XI/2008 on MMQ reveals a striking imbalance. The "Remembering" (containing verses from the Quran and Hadith) and "Considering" (jurisprudential arguments) sections constitute a substantial proportion of the fatwa, whereas the operative provisions are comparatively brief and provide limited technical detail. Meanwhile, the "Deciding" (legal dictum) section offers limited technical guidance. Fatwa No. 104 constructs a theological narrative of *taysīr* by framing Shariah Subrogation (*ḥiwālah al-ḥaqq*) as a mechanisms for debt takeover via *ibdāl* and *tarkhīṣ*. Yet, its prescriptive norms create structural disproportion because the text fails to legally isolate the underlying asset transfer from the debt assignment mechanism. In banking practices, this structural vagueness allows financial institutions to execute paper-driven debt discounting while remaining formally compliant with the literal text, effectively bypassing the *'iwadh* requirement and reducing the theological claim of real economic transfer to a financial structure that replicates interest-based conventional refinancing.

Extensive theological reasoning is important to the legitimacy of a fatwa, but it should not obscure the provisions needed by judges, bankers, notaries, and compliance officers. Separating explanatory reasoning from operative norms would improve accessibility without reducing the doctrinal basis of the ruling.

b. Absence of Operational Definitions

The principle of *lex certa* requires legal norms to be clear, precise, and sufficiently determinate.[42] This requirement is particularly important for hybrid contracts because the legal effect of one contract may depend on its relationship with another.

The divergent reasoning in Supreme Court Decision No. 46 PK/Ag/2020 and Tangerang Religious Court Decision No. 847/Pdt.G/2019/PA.Tng illustrates how unclear contractual relationships can widen judicial discretion. Although that divergence cannot be attributed solely to fatwa drafting, it demonstrates the need for precise definitions of contractual relationships. Two definitional issues are especially significant:

First, the legal status of *waʿd* is not stated consistently. DSN-MUI Fatwa No. 85/2012 describes *waʿd* as binding (*mulzim*), but Fatwa Nos. 71 and 73 do not expressly incorporate that definition. This omission may

[42] Erina Pane, *Legal Drafting* (Lampung: Harakino Publishing, 2019), 343.

permit asymmetric interpretation, particularly where an institution treats the customer's promise as binding while preserving its own discretion.[43]

Second, the expression administrative *ta'alluq* lacks a limiting definition. If 'administrative' is not distinguished from substantive contractual dependence, cross-default or similar provisions may be introduced under that label. Adiwarman A. Karim argues that such dependence may undermine the independence of the contracts and reintroduce the concern underlying the prohibition of *bay'atayn fī bay'ah*.[44]

These definitional gaps weaken *lex certa* and leave courts with broad interpretive discretion. They may also affect *ḥifẓ al-māl*, which requires clear ownership (*wuḍūḥ al-milkiyyah*) and a corresponding allocation of liability. Lease-based or diminishing partnership arrangements should state when ownership and its associated risks pass from the institution to the customer. Otherwise, the customer may bear maintenance or loss risks while legal ownership remains with the institution.

c. Inconsistent Prescriptive Diction

Legal language differs from the persuasive language of *da*ʿ*wah* and discursive *fiqh*. An operative norm must indicate whether conduct is mandatory, prohibited, or permitted. Imprecise wording may shift a provision from *dwingend recht* (mandatory law) to *aanvullend recht* (supplementary law) or nonbinding ethical guidance. Inconsistent modal language may also obscure whether a provision imposes a binding duty or merely permits particular conduct.[45]

This problem appears in expressions such as *hendaknya* ('should') and *diharapkan LKS memperhatikan* ('the Islamic financial institution is expected to consider'). Replacing these formulations with *wajib* ('must' or 'shall') where a binding duty is intended would clarify the prescriptive force of the provision.[46]

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[43] Sutan Remy Sjahdeini, *Perbankan Syariah: Produk-Produk Dan Aspek-Aspek Hukumnya* (Jakarta: Kencana, 2018), 467.

[44] Adiwarman A Karim, *Bank Islam: Analisis Fiqih Dan Keuangan* (Jakarta: Raja Grafindo Persada, 2014), 167.

[45] Mateusz Zeifert, "How to Do 'Ought' with 'Is'? A Cognitive Linguistics Approach to the Normativity of Legal Language," *International Journal for the Semiotics of Law* 38, no. 1 (2025): 73–98, https://doi.org/10.1007/s11196-024-10153-z.

[46] Dewan Syariah Nasional Majelis Ulama Indonesia (DSN-MUI), Fatwa No. 71/DSN-MUI/VI/2008 tentang Sale and Lease Back

d. Absence of Specified Legal Consequences

Kelsenian legal theory posits that an organized sanction distinguishes a coercive legal norm from a moral directive. Consequently, a rule that prescribes an obligation without specifying its legal consequence operates as a *lex imperfecta.*[47] An examination of DSN-MUI fatwas on hybrid contracts (e.g., Fatwas No. 71 and 73) reveals a notable absence of explicit juridical consequences (*'uqūbah*) or sanctions for violating the essential pillars and conditions of the hybrid scheme. The closing clauses typically only address dispute resolution through negotiation or recourse to the Religious Court and Basyarnas, but do not state whether noncompliance renders a contract void, voidable, or subject to administrative correction.

Fatwa No. 104 presents the same difficulty. It contains no *waʿd* requirement. It requires, among other matters, that a monetary receivable be transferred in exchange for a commodity (silʿah), that the receivable and commodity be clearly specified, that the new creditor own the commodity when the transfer is executed, and that payment be made on a spot basis. Its closing provision directs unresolved disputes to a Shariah based dispute resolution institution but does not define the legal effect of violating those requirements. The problem is not merely the absence of punishment. It is the absence of a determinate legal consequence. This uncertainty is particularly significant in standard-form banking contracts, where the parties rarely possess equal bargaining power.

4. Reconstruction with Reference to BNM and AAOIFI

Bank Negara Malaysia (BNM) does not issue a single generic 'hybrid contract standard.' Instead, it regulates individual Shariah contracts through contract-specific policy documents that combine Shariah requirements with operational and governance provisions.[48] The *musyārakah* policy distinguishes mandatory standards ('S') from guidance ('G'). Paragraph 7.2 states that failure to comply with an 'S' requirement

[47] Cahya Iradi Arimba, "Hans Kelsen's Nomostatics and Nomodinamics Legal Theory," *Journal of Justice Voice* 2, no. 2 (2023): 56–57, https://doi.org/10.37893/jv.v2i2.773.

[48] Bank Negara Malaysia, "Contract-Based Regulatory Framework for Islamic Finance," *Financial Stability and Payment Systems Report 2012* (Kuala Lumpur: Bank Negara Malaysia, 2012), https://www.bnm.gov.my/documents/20124/856383/cp02_003_box.pdf. Data accessed on March, 5, 2026.

may result in enforcement action; the policy then uses 'shall' for operational requirements, including documentation, *waʿd,* default, and ownership records. This formulation provides a more precise comparator for assessing prescriptive diction in the DSN-MUI fatwas[49]

BNM's contract specific policy-document approach promotes clearer Shariah, operational, and governance requirements. It can therefore serve as a comparative drafting reference for Indonesian Islamic-finance regulation, while remaining subject to differences between the Malaysian and Indonesian institutional frameworks.

Table 1
Tripartite Comparative Analysis: DSN-MUI, BNM, and AAOIFI

Comparative Aspects	**DSN-MUI Fatwa (Indonesia)**	**Shariah Standards BNM (Malaysia)[50]**	**AAOIFI Standards[51] (Global/Bahrain)**
Document Structure	Single document combining arguments and norms	Separate Shariah standards (norms) and resolutions (reasoning)	Separate Shariah standard (norm) and basis of standard (reasoning)
Language style	Persuasive or advisory language	Legal/Imperative ("Shall", "Must")	Legal/Imperatif ("It is required")
Operational Definition	Limited or absent	Detailed definitions in the opening provisions	Detailed definitions and scope
Sanctions Clause	No specified sanction; consultation or dispute resolution	Specified regulatory consequences, includ applicable compensation or penalties	Specified treatment of default
Legal Status	Source material for POJK	Directly binding under the	Voluntary or mandatory, depending

[49] Bank Negara Malaysia, "Musyarakah" (Kuala Lumpur: Bank Negara Malaysia, 2015), https://www.bnm.gov.my/documents/20124/938039/Musyarakah.pdf/e99baaa9-d7cd-a61f-8d0a-9c9f2521dd4d?t=1592218252160.

[50] Bank Negara Malaysia, "Mudarabah" (Kuala Lumpur: Bank Negara Malaysia, Islamic Banking and Takaful Department, 2015), https://www.bnm.gov.my/-/Shariahh-standard-on-mudarabah. Data accessed on March, 9, 2026.

[51] Accounting and Auditing Organization for Islamic Financial Institutions, "Shariah Standards," n.d., https://aaoifi.com/shariaa-standards/?lang=en. Data accessed on March, 9, 2026.

Comparative Aspects	DSN-MUI Fatwa (Indonesia)	Shariah Standards BNM (Malaysia)[50]	AAOIFI Standards[51] (Global/Bahrain)
	instruments	statutory framework	on national adoption

Source: Author's analysis from various sources.

The comparison shows that BNM and AAOIFI distinguish operative standards more clearly from their doctrinal foundations. DSN-MUI fatwas generally combines both functions in a single document. The concern is therefore not the inclusion of theological reasoning, but the absence of a separate and sufficiently detailed body of operative provisions.

Reconstruction of Indonesia's could adapt this drafting technique while remaining grounded in the *uṣūl al-fiqh* principle *al-ḥukmu yadūru maʿa al-ʿillah.* A regulatory standard should identify the effective cause supporting permissibility, require transparent pricing and independent documentation, establish an auditable transaction trail, and specify appropriate remedies, including *taʿwīḍ* for proven actual loss where doctrinally and legally justified. These elements would reduce the risk that *taysīr* is used to justify a structure that functions as *ḥīlah.*

Table 2

Comparative Analytical Framework of DSN-MUI Fatwas

Analytical Dimension	Fatwa DSN-MUI No. 73	Fatwa DSN-MUI No. 71	Fatwa DSN-MUI No. 104
Clause Reference	Section II, Clause 2 "LKS is obliged to promise to sell its entire *ḥiṣṣah* gradually, while the customer is obliged to purchase it."[52]	Section II, Clause 2 "*Bai'* and *ijārah* contracts must be executed separately and *ijārah* may only occur after the sale completed."[53]	Section III, Clause 3 "The new creditor must already possess the asset used as payment before the contract is executed."[54]
Analytical Criteria	Economic substance; *maqāṣid* alignment;	Economic substance;	Economic substance; maqāṣid

[52] Dewan Syariah Nasional-Majelis Ulama Indonesia, "Fatwa Dewan Syariah Nasional No. 73/DSN-MUI/XI/2008 Tentang Musyarakah Mutanaqisah."

[53] Dewan Syariah Nasional-Majelis Ulama Indonesia, "Fatwa Dewan Syariah Nasional No. 71/DSN-MUI/VI/2008 Tentang Sale and Lease Back."

[54] Dewan Syariah Nasional-Majelis Ulama Indonesia, "Fatwa Dewan Syariah Nasional No. 104/DSN-MUI/X/2016 Tentang Subrogasi Berdasarkan Prinsip Syariah."

Analytical Dimension	Fatwa DSN-MUI No. 73	Fatwa DSN-MUI No. 71	Fatwa DSN-MUI No. 104
	gharar and transparency; contractual independence	maqāṣid alignment; gharar and transparency; contractual independence	alignment; gharar and transparency; contractual independence.
Identified issue	The binding purchase undertaking (*wa'd*) may shift residual ownership risk to the customer and make the arrangement resemble a conventional loan.	No structural weakness is evident in the clause because it requires sequential execution and prevents the contracts from forming a single conditional transaction.	The arrangement becomes vulnerable when market participants bypass the requirement of a genuine physical or constructive transfer of the commodity
Finding and potential risk	The arrangement may lose part of its shared-capital character. Asymmetric risk allocation may move it toward *ḥīlah* and compromise *ʿadl*	The arrangement preserves economic substance when ownership risk remains with the lessor. It provides a baseline for *taysīr* without *ḥīlah* because *ujrah* compensates for the usufruct of a real asset.	Consistency with *maqāṣid* depends on linking *ʿiwaḍ* to a genuine economic transfer. Simulated asset backing may transform the arrangement into *ḥīlah* through the discounting of monetary debt.
International Standard (BNM / AAOIFI)	AAOIFI Shariah Standard No. 12 (Sharika):[55] Losses must be borne	AAOIFI Shariah Standard No. 9 (Ijarah):[56] The lessor must retain	BNM Policy Document (Debt Assignment:[57] Mandates that debt

[55] Accounting and Auditing Organization for Islamic Financial Institutions, "Shari'ah Standards for Islamic Financial Institutions, Shari'ah Standard No. 12: Sharikah (Musharakah) and Modern Corporations" (Manama: AAOIFI, 2015).

[56] Accounting and Auditing Organization for Islamic Financial Institutions, "Shari'ah Standards for Islamic Financial Institutions, Shari'ah Standard No. 9: Ijarah and Ijarah Muntahia Bittamleek" (Manama: AAOIFI, 2015).

[57] Bank Negara Malaysia, "Hiwalah Policy Document" (Kuala Lumpur: Bank Negara Malaysia, 2018).

Analytical Dimension	Fatwa DSN-MUI No. 73	Fatwa DSN-MUI No. 71	Fatwa DSN-MUI No. 104
	strictly in proportion to capital contribution. A partner cannot guarantee the capital of another partner.	ownership liabilities and maintenance obligations of the leased asset throughout the lease term.	assignment or substitution must not produce prohibited monetary discounting (*riba/baimudhaf*).
Proposed revision	State expressly that the purchase undertaking is suspended or voidable if force majeure destroys the underlying asset before final transfer.	Retain the provision but add an operational clause on maintenance obligations to prevent unauthorized risk shifting.	Declare the subrogation arrangement void ab initio when the physical or constructive transfer of the silʿah cannot be verified.
Responsible Indonesian Authority	DSN-MUI (for fatwa amendment) & OJK (for risk-sharing product guidelines)	OJK (to monitor actual implementation in standard bank contract templates)	OJK (for microprudential audit on assets) & BASYARNAS / Religious Courts (for judicial enforcement)

Source: Author's analysis from various sources

Fatwa No. 71 provides the clearest protection of contractual independence. Fatwa Nos. 73 and 104 present greater implementation risks because their structures may operate as *ḥīlah* when risk allocation or asset transfer lacks economic substance. The institutional response should correspond to the nature of the weakness. A substantive concern, such as the transfer of ownership risk through a binding promise under Fatwa No. 73, may require amendment by DSN-MUI. An operational concern, such as simulated asset backing under Fatwa No. 104, falls more directly within OJK's supervisory competence and may require verifiable records of ownership and transfer. BASYARNAS and the Religious Courts would then determine the legal consequences in individual disputes. A *maqāṣid*-oriented approach should apply the principle *al-ghunm bi al-ghurm* ('gain accompanies liability')[58] to assess whether the contractual form preserves genuine economic substance.

[58] Mustafa Ahmad al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Amm*, vol. 2 (Damascus: Dar al-Qalam, 1998), 1005.

5. Reconstruction of Hybrid Contract Legal Norms

The proposed model separates Shariah reasoning from regulatory implementation without diminishing either function. Article 1320 of the Civil Code distinguishes the requirement of a certain subject matter from the requirement of a lawful cause. Article 1333 further requires the contractual object to be at least determinable by kind, whereas Article 1337 concerns a cause prohibited by law, morality, or public order. Ambiguity in asset ownership or in the object of an MMQ contract should therefore be analysed under Articles 1320(3) and 1333, not Article 1337. In the absence of a published precedent specifically annulling an MMQ contract on this basis, the effect of any defect on validity remains dependent on the contractual facts and the court's legal characterization.

Constitutional Court Decision No. 65/PUU-XIX/2021 clarifies the institutional division between DSN-MUI and Bank Indonesia/OJK, but it does not assess the drafting quality of individual fatwas or require a two-document model. The proposed separation should therefore be presented as the authors' normative recommendation, informed by legal-drafting principles, rather than as a consequence required by the Court. To provide a concrete illustration, the following is a simulation of editorial improvements to the MMQ Fatwa to meet legal drafting standards.

Table 3

Illustrative Reconstruction of Selected MMQ Provisions

Analytical Dimension	Original Text of Fatwa (Existing)	Reconstruction Proposal (Legal Drafting)
Definition	There is no specific operational definition of *wa'd* in the body	Article 1 (General Provisions): *Wa'd*[59] is a legally binding promise for the party making the promise (promisor) to carry out the contract at a specified time.
Obligation	"Islamic financial institutions may carry out *wa'd* ..."	Article ...: The Islamic financial institution shall execute the transfer stipulated in the *waʿd* once all specified contractual conditions have been fulfilled.

[59] *Waʿd* is a unilateral promise. Most jurists regard a unilateral *waʿd* as non-binding, whereas the Maliki school recognizes a binding promise in specified circumstances and permits compensation for actual loss. Consistent with DSN-MUI Fatwa No. 85/2012 and AAOIFI Shariah Standard No. 30, the proposed formulation records the *waʿd* separately and limits *taʿwīḍ* to proven actual loss

Analytical Dimension	Original Text of Fatwa (Existing)	Reconstruction Proposal (Legal Drafting)
Sanctions	"If one party does not fulfill its obligations... it will be resolved through deliberation."	Article ...: Violation of the *wa'd* obligation shall be categorized as a breach of contract. The violating party shall pay compensation (*ta'widh*) amounting to the real loss suffered by the other party.

Source: Author's analysis from various sources

The legal drafting approach proposed here does not alter the substance of *ijtihād* contained in the Shariah Resolution Document. *Ijtihād* determines the *ḥukm, 'illah*, and *dalīl* (legal basis). The Regulatory Standard Document only translates the result of *ijtihād* into clear, systematic, and imperative language so it can be operationalized by judges and compliance officers without distorting its normative intent. Thus, drafting standards complement the distinctive character of fatwa as a product of *ijtihād*, rather than dominate it.

Given that fatwas serve as raw material for banking legislation under Law No. 21/2008, adopting a dual-document format offers a practical pathway to enhance legal certainty while preserving *ijtihād*. The separation into two documents is not merely administrative but reflects a distinct legal function:

a. Shariah Resolution Document: Contains *dalīl, fiqh* arguments, and ulama's *ijtihād*. Its function is explanatory and doctrinal. It is addressed to ulama, academics, and Shariah supervisors. This document preserves the role of *ijtihād* and prevents the ossification of legal reasoning.
b. Regulatory Standard Document: Contains technical articles, operational definitions, scope, and sanctions written in imperative legal language. Its function is prescriptive and enforceable. It is addressed to judges, lawyers, notaries, and compliance officers. This separation resolves the tension between *fiqh* discourse and legislative drafting standards required by Law No. 12/2011.

This division reflects Indonesia's institutional structure. In Malaysia, rulings of the Shariah Advisory Council are directly binding under the Central Bank of Malaysia Act 2009. In Indonesia, DSN-MUI fatwas acquire binding regulatory force only after their provisions are incorporated into POJK or PBI instruments under Law No. 21 of 2008. The proposed model adapts the drafting practices of BNM and AAOIFI without transferring Malaysia's institutional framework wholesale.

The illustration changes the legal operation of the selected provisions in three ways. First, defining *waʿd* identifies whether the promise is a moral undertaking or a legally relevant obligation. Second, replacing permissive language with 'shall' creates a duty when the specified conditions are satisfied. Third, a compensation clause gives the court a stated basis for awarding proven actual loss, subject to Article 1243 of the Civil Code and the applicable Shariah limits on *taʿwīḍ*.

These changes would not make every fatwa provision directly enforceable. Enforceability would still depend on incorporation into an instrument issued by the competent state authority. The revised language would instead provide a clearer normative basis for that process while ensuring that a unilateral promise is not converted into an impermissible guarantee.

6. Juridical Implications of Constitutional Court Decision No. 65/PUU-XIX/2021

Constitutional Court Decision No. 65/PUU-XIX/2021 confirms the institutional need for accurate translation of DSN-MUI fatwas into state regulation. The decision does not transform each fatwa into independently binding legislation. It establishes the relevance of fatwas as authoritative material sources for regulations issued by Financial Services Authority Regulations and Bank Indonesia Regulations.

The implication is not that every fatwa must assume the form of legislation, but that provisions intended for regulatory incorporation should be capable of clear legal translation. Law No. 12/2011 emphasizes clarity, consistency, precision, and implementability in legislation. If an incorporated provision contains an undefined term, uncertain obligation, or unspecified consequence, that weakness may be carried into the resulting POJK or PBI instrument.

This position creates two related risks. First, inconsistent judicial treatment. Courts applying Article 1320 and the principle of *lex certa* must identify the contractual object, ownership structure, and obligations of the parties. An MMQ or Shariah-subrogation arrangement may therefore face legal challenge when asset separation or transfer is unclear. Whether the defect affects validity will depend on the applicable rule, contractual facts, and remedy recognized by the court. Second, there is a risk of regulatory inconsistency. A POJK or PBI instrument requires language appropriate to binding regulation. If it reproduces terms such as "should" or "may" without defining their legal effect, the resulting provision may be difficult to distinguish from nonbinding guidance.

Decision No. 65/PUU-XIX/2021 therefore provides an institutional rationale for improving the legal translation of fatwa norms. Separate Shariah Resolutions and Regulatory Standards would preserve doctrinal reasoning while allowing competent state authorities to formulate clearer and enforceable provisions. This two-document model remains a proposed drafting solution, not a requirement expressly imposed by the Constitutional Court.

D. CONCLUSION

This study examined the regulatory construction of hybrid contracts in three DSN-MUI fatwas. First, the fatwas draw on *taysīr* and *maṣlaḥah*, particularly Hanbali reasoning associated with Ibn Taymiyyah and Ibn Qayyim. Their permissibility nevertheless depends on economic substance, transparent risk allocation, and consistency with *ʿadl* and *maqāṣid al-sharīʿah*. In *musyārakah mutanāqiṣah*, for example, a binding purchase undertaking may weaken substantive risk sharing if it transfers residual ownership risk disproportionately to the customer. Second, the three fatwas do not consistently reflect the clarity, precision, and implementability expected of norms that may be incorporated into regulation. The principal weaknesses are the imbalance between theological reasoning and operative provisions, limited operational definitions, inconsistent prescriptive diction, and the absence of specified legal consequences. Under Articles 1320(3) and 1333 of the Civil Code, uncertainty concerning the contractual object may create a doctrinal vulnerability. Because the study identifies no published precedent invalidating an MMQ contract specifically on this basis, the finding should be understood as a conditional litigation risk rather than evidence of automatic invalidity. Third, the study proposes a dual-document model adapted from BNM and AAOIFI drafting practices. A Shariah Resolution would retain the dalīl, *ʿillah*, and juristic reasoning, while a Regulatory Standard would specify definitions, duties, prohibitions, supervisory requirements, and legal consequences. Within Indonesia's dual-authority framework, DSN-MUI would remain responsible for the Shariah determination, whereas OJK or Bank Indonesia would issue enforceable regulatory provisions within its statutory mandate. OJK could also require verifiable asset records where asset ownership is essential to the transaction, while BASYARNAS and the religious courts could apply a *maqāṣid*-oriented analysis in individual disputes. The principle *al-ghunm bi al-ghurm* provides an appropriate substantive test: a party entitled to gain must also bear the corresponding liability. This model strengthens the legal translation of fatwa norms without reducing ijtihād to a legislative drafting exercise.

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