

***Fiqh Sosial* Perspective on Prenuptial Agreements: Harmonizing the Tradition and Modernity in Muslim Communities**

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Abstract

The acceptance of prenuptial agreements presents contradictory issues among traditional Muslim communities that adhere to conventional Islamic values and modern Muslim communities that seek more comprehensive legal protection. This study aims to analyze these contradictions through the lens of *fiqh sosial* perspective, relating it to the applicable legal context to provide a thorough understanding of the relevance of these viewpoints in contemporary social and legal practices. Unlike previous research, this study highlights the *fiqh sosial* approach, positing that this perspective is pertinent in addressing the diverse community attitudes towards prenuptial agreements. The findings indicate that the *fiqh sosial* approach transcends texts of *fiqh* by emphasizing contextualization to meet the demands of modern times. In this context, prenuptial agreements can be seen as a way to reinterpret *fiqh* texts through a formal agreement, specifically through a written prenuptial agreement. Furthermore, prenuptial agreements can serve the public good in marriage practices in Indonesia by developing the *kaidah fiqhiyyah* “*ad-daf’u aqwa min ar-rafi’i*” through asset protection and preventive measures against potential negative occurrences during the marriage.

Keywords: *fiqh sosial*, prenuptial agreements, traditional and modern muslim communities.

Introduction

The Marriage Law does not regulate what a prenuptial agreement means (Djasmine & Ridwan, 2022). However, a prenuptial agreement is a legal agreement a couple makes before marriage. The content of prenuptial agreements varies widely, but usually includes arrangements for the division of property, maintenance of spouses and children, and guardianship of children in the event of divorce (Rajamanickam et al., 2019, p. 98).

A prenuptial agreement protects women's rights and assets during marriage. It is a tool to maintain balance and fairness between husband and wife, especially amid modern challenges (Hefner, 2000). This agreement is a legal instrument to protect both parties' rights, especially regarding assets obtained before marriage (Handayani & Cahyaningsih, 2024). This means that this prenuptial agreement aims to regulate the consequences of the marriage that may arise in the future (Faradilla Asyatama & Ridwan, 2021).

In Indonesian civil law, this agreement is regulated by Article 29 of Law Number 1 of 1974 (Law Number 1 of 1974, 1974). Prenuptial agreements emerged as a mechanism to regulate the distribution of financial assets and liabilities and as a protective measure against uncertainty, especially in divorce situations (Kamali, 1996). This agreement is made before the marriage and becomes effective when the marriage is officially solemnized (Rimi, 2023, p. 378).

However, the acceptance of prenuptial agreements presents a complex interplay of issues within traditional Muslim communities that adhere to conventional Islamic values and modern Muslim communities that seek more comprehensive legal protections. Previous research by Rajamanickam et al. indicates that members of traditional Muslim communities often view such agreements as diminishing the essence of love and trust in marriage (Rajamanickam et al., 2019, p. 98). Additionally, certain cases have demonstrated that prenuptial agreements may disproportionately benefit the male party (Sutanto, 2019, p. 67).

In contrast, modern Muslim communities adopt a more progressive stance toward marriage law and asset protection (Handayani & Cahyaningsih, 2024). Notably, 59.3% of respondents believe that prenuptial agreements play a crucial role in safeguarding assets and preventing financial disputes in the event of divorce (Mansyuroh et al., 2022). Furthermore, the modern Muslim community recognizes the need for more comprehensive legal protections as essential (Hosen, 2007).

The divergence between traditional and modern Muslim communities regarding prenuptial agreements arises from the differing arguments put forth by each group. Traditional Muslims often adhere to cultural and religious values, viewing prenuptial agreements as unnecessary, particularly regarding assets acquired prior to marriage (Fauzillah, 2023). Such agreements are often regarded as taboo and conflicting with Eastern cultural values (Mansyuroh et al., 2022). They are seen as inconsistent with the principle of trust (*mitsaqan ghalidzan*), which represents a sacred promise between husband and wife (Fauzi, 2016, p. 65), so this agreement may disrupt household harmony, creating an atmosphere of mistrust between engaged couples.

Modern Muslim communities adopt a more progressive approach toward these agreements, highlighting their importance in asset protection. They recognize the vital role of legal frameworks in safeguarding individual rights within marital relationships, particularly concerning asset ownership featured in

prenuptial agreements (Handayani & Cahyaningsih, 2024).

A survey conducted in Banjarmasin revealed that a significant majority of Gen-Z Muslims perceive the function and purpose of prenuptial agreements positively, especially in terms of protecting rights within marriage. Approximately 59.3% of respondents viewed prenuptial agreements as essential for ensuring asset security and preventing financial disputes in the event of divorce (Mansyuroh et al., 2022). To ensure the validity of such agreements, they must be executed in the form of a notarial deed, as mandated by Article 29 of the Marriage Law (Law Number 1 of 1974, 1974).

Thus, it becomes essential to examine the contradictions between traditional and modern Muslims regarding prenuptial agreements in a contextual manner. This article adopts the perspective of Fiqh Sosial by Kiai Sahal Mahfudh. The choice of fiqh sosial is pertinent because it views fiqh not merely as a set of normative laws but also as a contextual discipline that addresses social aspects and the realities of contemporary life (Mahfudh, 2011). This approach is crucial for understanding the conflicting interpretations of prenuptial agreements, moving from a purely textual or normative viewpoint to one that considers the social needs of today's society. Fiqh sosial focuses on the harmonious integration of Islamic law with prevailing social conditions (Hakim, 2019).

This study seeks to explore the discrepancies between traditional and modern Muslim communities concerning prenuptial agreements through the lens of fiqh sosial. From this perspective, the analysis is intended to offer a deeper understanding of the law's role in marital life. Furthermore, it aims to influence society's acceptance and implementation of legal frameworks.

Several prior studies have been utilized as reference materials, particularly those pertinent to the focus of this research. One notable study is authored by Ahmad Assidik and A. Qadir Gassing, titled “*Tinjauan Hukum Islam dan Hukum Positif Terhadap Prenuptial Agreement atau Perjanjian Pra Nikah*” (Assidik & Gassing, 2019). Additionally, Kharisma Yona Devari and Gusti Ayu Arya Prima Dewi contributed an article relevant to this topic, entitled “*Urgensi Implementasi Perjanjian Pra Nikah Ditinjau Dari Hukum Nasional Indonesia*” (Kharisma et al., 2024).

Another significant research work is conducted by Filma Tamengkel, titled “*Dampak Yuridis Perjanjian Pra Nikah (Prenuptial Agreement) Ditinjau Dari Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan*” highlighting deficiencies in regulating prenuptial agreements (Tamengkel, 2015).

Furthermore, a related study by Irda Pratiwi, Emmi Rahmiwita, and Rohimah Tanjung explores “*Perspektif Hukum Perjanjian Kawin Sebelum dan Sesudah Dilangsungkan Perkawinan*” (Pratiwi et al., 2022).

In contrast to these previous studies, this research employs a *fiqh sosial* approach to analyze the data. The researchers believe this approach is particularly relevant for addressing community differences regarding prenuptial agreements. While such agreements intend to safeguard the rights and obligations of couples after marriage, it is essential to acknowledge that not everyone is willing to accept or agree with the provisions of prenuptial agreements as outlined in the law. By utilizing *fiqh sosial* as a framework, this research aims to thoroughly examine how this approach can address varying opinions surrounding prenuptial agreements.

Results and Discussion

Fiqh Sosial: The Development of Madzhab Qauli and Manhaji

In its implementation, *fiqh sosial* (social fiqh) employs two distinct approaches. Kiai Sahal elucidates the foundational principles of *fiqh sosial* methodology in his book “*Nuansa Fiqh Sosial*”: In the *madzhab qauli* approach, the evolution of fiqh can be realized by contextualizing traditional texts, or through the development of practical applications of the rules of *ushul fiqh* and *qawā'id al-fiqhiyyah*. Conversely, the development of *madzhab manhaji* approach can be achieved by advancing the theory of *masalik al-'illat*, ensuring that the resulting fiqh aligns with *maṣlaḥah al-'ammah*.” The evolution of *fiqh sosial* is firmly anchored in the principle of “*al-muhāfaḍah 'ala al-qadim al-ṣāliḥ wa al-akhdhu bi al-jadid al-aṣlah*” (Mahfudh, 2011, p. xxxvii), which emphasizes the importance of preserving valuable old traditions while embracing new practices that are more responsive and effective.

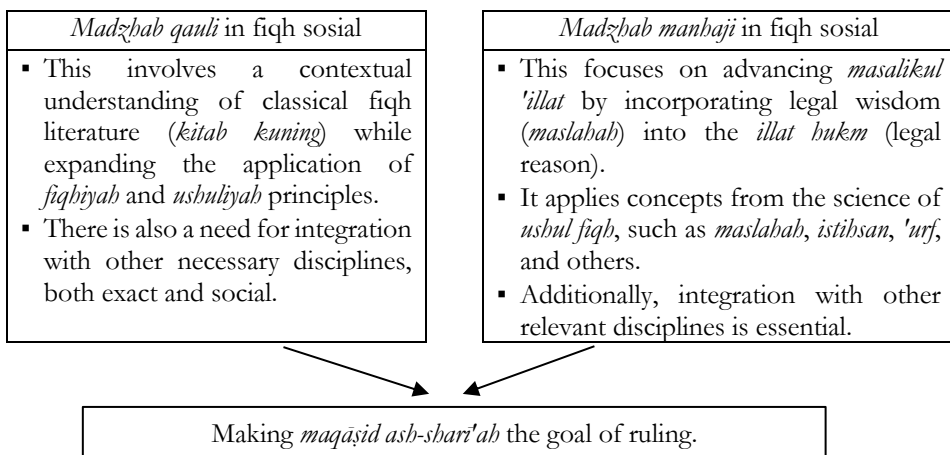
Additionally, the *madzhab manhaji* approach, through the development of *masālikul 'illat*, involves integrating the wisdom of the law with the '*illat* (reason) of the law in *qiyas*, directing the understanding of *qiyas* toward the objectives of sharia application (*maqāṣid ash-shari'ah*) (Mahfudh, 2011, p. li). The essence of *maqāṣid ash-shari'ah* will be a significant factor in legal determinations. Preserving religion, life, intellect, property, and lineage signifies attaining the common good.

Masālikul 'illat is defined by *ushul* scholars as a methodology for identifying the '*illat* (reason) that informs legal determinations (Baroroh, 2020). The process of finding the '*illat* occurs through several stages. First, one

examines the texts of the Qur'an or hadith. Second, one considers the *ijma'* (consensus) of scholars. Third, *ijtihad* involves assessing the relationship between the *illat* and the law (*al-munāsabah*) or employing trial and verification (*as-sabr wa at-taqsīm*). The development of *masālikul 'illat* falls within the domain of *ijtihad* in *fiqh sosial* (Janah & Baroroh, 2016, p. 75). *Fiqh sosial* not only advances the understanding of *masālik al-'illat* but also engages in discussions of key concepts in *ushul fiqh*, such as *maṣlaḥah*, *saddu adh-dhari'ah*, *istiḥsān*, *al-'urf*, and others. This engagement is crucial because many contemporary legal issues lack parallels in *fiqh* texts (Mahfudh, 2011, p. xvi).

Moreover, the application of *fiqh sosial* aims to integrate *'illat* and legal wisdom (*hikmah*) while also connecting with disciplines beyond *fiqh* and *ushul fiqh*. This integration occurs whether one is developing *madzhab qauli* or exploring *madzhab manhaji* (Mahfudh, 2011, p. xlii). *Fiqh's* scope encompasses all human practices, and it cannot be divorced from other scientific methodologies that enhance analysis and lead to comprehensive outcomes.

The formulation of *fiqh sosial* methodology in the process of *istimbāt al-ahkām* involves two key approaches. The first approach is the development of *madzhab qauli*, which is achieved by contextualizing *fiqh* texts and advancing the applications of *qawaid uṣūliyyah* and *fiqhīyah* (*ushul dan fiqh* rules). The second approach is the *madzhab manhaji*, characterized by the integration of the *illat* of law with the wisdom of law (*maqāṣid ash-shari'ah*), as well as incorporating insights from other fields of knowledge that complement *fiqh* and *ushul* (Janah & Baroroh, 2016). The subsequent table illustrates the formulation of the *Fiqh sosial* methodology:



***Fiqh Sosial* Perspective on Prenuptial Agreements: Harmonizing the Tradition and Modernity in Muslim Communities**

Prenuptial agreements have long been established within the Marriage Law and Civil Code framework. However, many individuals who adhere to cultural and religious values view these agreements as unnecessary, particularly concerning assets owned prior to marriage. They prioritize domestic harmony as the primary goal of marriage, considering it more significant than the assets that existed before the union (Fauzillah, 2023). Traditional Muslims in Indonesia, especially those holding conservative views, often regard prenuptial agreements as taboo and incompatible with Eastern cultural values (Mansyuroh et al., 2022).

This perspective contrasts sharply with that of modern Muslims in Indonesia. In today's context, they increasingly recognize the importance of legal protections for individual rights within marital relationships, including asset ownership matters, a central focus in prenuptial agreements. Such agreements are considered essential legal instruments that safeguard each party's rights, particularly regarding assets acquired before marriage. They also prevent future disputes, such as property division in the event of a divorce, and protect assets from claims related to a spouse's debts (Handayani & Cahyaningsih, 2024).

The debate surrounding favorable laws governing civil law, including prenuptial agreements, is common in countries with legal plurality, such as Indonesia. According to Soerjono Soekanto, this tension arises because state law is often perceived as a tool for regulating public interests, whereas religious law holds greater authority among its adherents. This contradiction between the two legal systems can lead to confusion among the public, particularly regarding enforcing binding rules—especially in the context of prenuptial agreements (Soekanto, 2016, p. 102).

In light of the theory of legal pluralism, a diverse society needs to cultivate a legal framework that accommodates the various norms and values within it, thereby providing more comprehensive legal certainty and protection (Tamanaha, 2017, p. 45). As such, fostering education and encouraging discussions are vital to help individuals understand that civil law does not inherently contradict religious principles; instead, it seeks to safeguard the broader interests of society.

Additionally, the friction between modern and traditional Muslim communities regarding this issue is seen as a natural phenomenon. This is

mainly because pre-nuptial agreements have not been traditionally embraced within Indonesia's cultural context. Nevertheless, these agreements can represent a new paradigm within the Indonesian legal system. By serving as a preventive measure, prenuptial agreements can help minimize the potential for household disputes that may lead to divorce (Permana & Pramana, 2022).

A prenuptial agreement should reflect the mutual commitment established by both parties, rather than merely serving as a legal formalism. This commitment, whether articulated in writing or not, is crucial for fostering a harmonious relationship and ensuring a shared understanding of the purpose of marriage. It is not solely an expression of love; it is about sustaining that love through mutual understanding and shared responsibility (Baroroh, 2024). By social agreement theory, a marriage covenant represents an agreement between individuals to organize their lives. While it has a legal dimension, it should fundamentally be grounded in moral values and emotional concord (Macneil, 1985).

According to the concept of interpersonal relationships, commitment in the context of marriage is an important element in maintaining long-term relationships. This commitment involves the decision to remain in the relationship, despite challenges or difficulties (Rusbult, 1983). Commitment built on a shared understanding of the purpose of life and marriage is essential to creating a stable and harmonious relationship.

In addition, the absence of fiqh texts that explicitly explain prenuptial agreements as regulated in legislation triggers different views in the community. On the one hand, there are communities that support them, and on the other hand, there are also communities that oppose them for their own reasons. Although prenuptial agreements are not explicitly explained in classical fiqh (*kitab kuning*) literature, most scholars (*ulama' fiqh*) agree that fulfilling the conditions listed in the agreement is obligatory, as with agreements in general, especially those related to marriage (Sabiq, 2008). However, the law of the prenuptial agreement itself is permissible, so not all couples are obliged to make it (Syarifuddin, 2011).

Another important requirement is that the contents of the prenuptial agreement must not contradict Islamic law or the essence of marriage. If it is contrary, the agreement is considered invalid and does not need to be followed. Conversely, the agreement is considered valid if it does not contradict with Islamic law or the essence of marriage (Law Number 1 of 1974, 1974).

In responding to this contradiction, *fiqh sosial* sees the aspect of public benefit (*al-maslahah al-'ammah*) as the benchmark used. As a social problem that arises in society, the step used by *fiqh sosial* is to make efforts to develop *madzhab qauli* (Mahfudh, 2011). This step begins by tracing *fiqh* texts related to marriage agreements or other terms that have similar meanings.

Applying *madzhab qauli fiqh sosial* to the controversy over prenuptial agreements in the Marriage Law involves a *fiqh* approach that is contextual and responsive to changing times. This approach is relevant in responding to the differing views of traditional and modern Muslims.

Traditional Muslims generally adhere to classical texts of *fiqh*, which views marriage as a sacred agreement with fixed laws, with no room for innovations such as pre-nuptial agreements. They argue that adding new clauses in the marriage agreement may contradict the essence of marriage according to traditional Islamic law, which emphasizes full commitment between husband and wife without additional conditions. As argued by Azyumardi Azra, this view is influenced by the textualist *madhhab* approach, focusing on primary sources such as the Qur'an and Hadith without considering the modern social context (Azra, 2004).

Meanwhile, Modern Muslims tend to be more open to pre-nuptial agreements, seeing them as protecting women's rights and marital assets and maintaining balance and justice between husband and wife, especially in the face of challenges such as divorce and asset division (Hefner, 2000). This approach is influenced by Islamic modernism, which views Islamic law as dynamic and adaptive to social change.

The principles of *fiqh sosial* are relevant to this agreement because they emphasize contextualizing *fiqh* texts, including marriage agreements. The point is to ensure that Islamic law is oriented towards benefit, which is to provide benefits and protect common interests. Thus, a prenuptial agreement designed for the security of both parties is in line with the principles of social *fiqh*.

The *madzhab qauli* approach in *fiqh sosial* balances the classical principles of *fiqh* and contemporary social realities. According to *Kiai* Sahal, *fiqh* must be flexible and responsive to the needs of the times. As long as the prenuptial agreement does not contradict Sharia, it can be accepted as an adaptation of Islamic law (Mahfudh, 2011). Implementing *fiqh sosial* bridges the views of traditional textualist Muslims and progressive modern Muslims, emphasizing *maslahah ammah* in this issue (Hakim, 2022).

The implementation of prenuptial agreements must be in line with the fiqh rule (*qaidah fiqhiyyah*) “*tasharruf al-imam 'ala al-ra'iyah manuth bi al-maslahah*” (Zaidan, 2001), which aims to protect the rights of spouses, especially the rights to personal assets before marriage. These agreements help prevent conflicts over asset ownership in cases of divorce or dispute (Farida, 2019). In addition, these agreements support the equality of husband and wife by fairly regulating financial responsibilities and ownership, and preventing exploitation (Sugianto, 2021).

The leading spirit of this agreement is to protect vulnerable parties, especially women, while maintaining marital commitment. However, these agreements can trigger conflict without a clear understanding and mutual agreement. Therefore, education about the purpose of prenuptial agreements is important to support harmonious marriages (Baroroh, 2024).

This agreement is a legal instrument that guarantees joint property obtained during marriage, often a sensitive issue in divorce or domestic conflict (Subekti, 2017). The agreement will have stronger legal force if it is made in writing as an authentic deed and registered by the marriage registration officer (Sriono, 2015).

Article 29 of Law Number 1/1974 on Marriage stipulates that a prenuptial agreement aims to ensure fairness in property ownership during and after marriage (Penyusun, 2020). However, for this protection goal to be achieved, a clear understanding and mutual agreement are required. An imbalance of understanding or coercion in drafting the agreement can trigger tensions threatening domestic harmony.

Marital agreements should also not be viewed as material agreements, such as buying and selling, because marriage is a human relationship with complex dynamics. Instead, they should be seen as an effort to realize the principles of justice, equity, and benefit. Their main purpose is to provide guarantees for both parties while strengthening commitment and understanding (Baroroh, 2024).

Applying fiqh sosial principles to prenuptial agreements can use the fiqh rule (*qaidah fiqhiyyah*) “*ad-daf'u aqwa min ar-raf'i*” (As-Suyuthi, 1997), emphasizing prevention is better than treatment. Prenuptial agreements are considered relevant as a preventive measure to reduce the negative impacts that may arise from divorce. This rule can also be applied in the legal context of prenuptial agreements, as stipulated in the Marriage Law, to anticipate risks rather than find solutions later.

Based on the discussion above, *Fiqh sosial* offers a middle ground to the contradictions of prenuptial agreements. On the one hand, this approach contextualizes texts of fiqh to suit the needs of the times, including through the interpretation of agreements into written agreements. On the other hand, prenuptial agreements contribute to the public good through asset protection and conflict prevention in Indonesian marriage practices.

Conclusion

The fiqh sosial approach developed by Kiai Sahal Mahfudh offers a relevant solution to this problem. By prioritizing the principle of public benefit (*al-maslahah al-'ammah*), fiqh sosial views that prenuptial agreements, as long as they do not contradict with shari'ah, can be a form of adaptation of Islamic law from textual agreements to contextual written agreements. Fiqh rules (*qawaid fiqhiyyah*) such as “*ad-daf'u aqwa min ar-rafi'*” can be applied to prevent potential conflicts in marriage while protecting individual rights and assets. With proper application, prenuptial agreements can support the sustainability of a fair and harmonious marriage.

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