MARRIAGE AGREEMENT IN THE PERSPECTIVE OF FIQH MUAMALAH PRINCIPLES OF IBNU TAIMIYAH

(Study on Constitutional Court Decision Number 69/PUU-XIII/2015)

Thesis

by:

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SHARIA FACULTY

ISLAMIC STATE UNIVERSITY MAULANA MALIK IBRAHIM

MALANG

2018

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STATEMENT OF THE AUTHENTICITY

In the name of Allah (SWT),

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

MARRIAGE AGREEMENT IN THE PERSPECTIVE OF FIQH MUAMALAH PRINCIPLES OF IBNU TAIMIYAH

(Study on Constitutional Court Decision Number 69/PUU-XIII/2015)

is truly the author's original work. It does not incorporate any material previously written or published by another person. If it is proven to be another person's work, duplication, plagiarism, this thesis and my degree as the result of this action will be deemed legally invalid.

Malang, 21 st of July 2018

Author,

Ahmad Masrur Roziqi

Student ID Number 14210108

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APPROVAL SHEET

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MARRIAGE AGREEMENT IN THE PERSPECTIVE OF FIQH MUAMALAH PRINCIPLES OF IBNU TAIMIYAH

(Study on Constitutional Court Decision Number 69/PUU-XIII/2015)

The supervisor states that this thesis has met the scientific requirements to be proposed and to be tested by the Thesis Board of Examiners.

Malang, 21st of July 2018

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The The Thesis Board of Examiners state that Ahmad Masrur Roziqi, Student ID Number 14210108, student of the Islamic Family Law Department of the Sharia Faculty of State Islamic University of Maulana Malik Ibrahim Malang, has thesis entitled:

MARRIAGE AGREEMENT IN THE PERSPECTIVE OF FIQH MUAMALAH PRINCIPLE OF IBNU TAIMIYAH

(Study on Constitutional Court Decision Number 69/PUU-XIII/2015)

He passed and certified with grade A (excellent).

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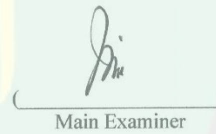

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MOTTO

يَاأَيُّهَا الَّذِيْنَ آمَنُوْا أَوْفُوْا بِالْعُقُوْدِ

(o believers fill the transactions (your promises)[1]

[1] QS. Al Maidah (5): 1

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ACKNOWLEDGMENT

All praises due to Allah, the Cherisher and Sustainer of the worlds. There is neither might nor power but with Allah the Great., the Exalted. With only His grace and guidance, this thesis entitled "Marriage Agreement Under Perspective of Fiqh Muamalah Rules of Ibnu Taimiyah (Study on Constitutional Court Decision Number 69/PUU-XIII/2015) could be completed, and also with His benevolence and love, peace and tranquility of the soul. Peace be upon to Prophet Muhammad who had brought us from the darkness into the lightness, in this life may we be together with those who believed and receive intercession from Him in the day in Judgement, Aamin.

With all supports and help, discussions, guidance, and directions from all parties involved in the process of writing this thesis, the author with his great humility expressed his thanks infinitely to:

1. Prof. Dr. H. Abdul Haris, M.Ag., as the Rector of State Islamic University of Maulana Malik Ibrahim Malang.
2. Dr. H. Saifullah, S.H., M.Hum., as the Dean of Sharia Faculty of State Islamic University of Maulana Malik Ibrahim Malang.
3. Dr. Sudirman, M.A., as the Head of Islamic Family Law Department of Sharia Faculty, State Islamic University of Maulana Malik Ibrahim Malang.
4. Dr. H., Ishroqunnajah, M.H.I, as my guardian lecturer during I study at Sharia Faculty of State Islamic University of Maulana Malik Ibrahim Malang.

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5. Dr. H. M. Jaiz Kumkelo, M.H., as my first supervisor and may Allah gives special place so you always deserve it. I have so hope you to rest in peace.
6. Erik Sabti Rahmawati, M.A., MAg, as my supervisor in writing this thesis. Thank's for all time that she gave for guidance, briefing, and motivation in completing this thesis.
7. To all lectures of Sharia Faculty who has gave many teaching, guiding, briefing, and knowledge with great sincerity. May Allah reward them for what they have done.
8. Staff and employee of Sharia Faculty participating in the completion of this thesis.
9. My family when I study in Sharia Faculty especially for my father, my teacher Imam Ghozali and my mother Siti Khalimah who gave me everything in my life.
10. To my beloved family, for supporting me and always asking me to end this thesis.
11. All of my classmates as my first friend in campus and we have name as class C. finally I thank to my 2014 grade for togetherness and support wish we earn our own bright future.

Hopefully, by imparting what has been learned during study course in Sharia Faculty of State Islamic University of Mulana Malik Ibrahim Malang, it will benefit all readers and researcher himself. Realizing facts that error and weakness is

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impartial to being human, and this thesis is still far from perfection, the author or researcher appreciates constructive critics and suggestions for improvement and betterment.

Malang, 21st of July 2018

Author,

Ahmad Masrur Roziqi

Student ID Number 14210108

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TRANSLITERATION GUIDANCE

A. **Consonant**

Arab	Latin	Arab	Latin
ا	A	ط	Th
ب	B	ظ	Zh
ت	T	ع	‘
ث	Ts	غ	Gh
ج	J	ف	F
خ	H	ق	Q
ح	Kh	ك	K
د	D	ل	L
ذ	Dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	ە	H
ش	Sy	ء	‘
ص	Sh	ي	Y
ض	Dl		

B. **Vocal, Long-pronounce and Diphthong**

Vocal *fathah* = A

Vocal *kasrah* = I

Vocal *dlommah* = U

Long-vocal (a) = Â e.g. قال became *Qâla*

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Long-vocal (i) = Î e.g. قيل become *Qîla*

Long-vocal (u) = Û e.g. د ون become *Dûna*

Dipthong (aw) = و e.g. قول become *Qawlun*

Diphthong (ay) = ي e.g خير become *Khayrun*

C. **Ta' Marbûthah**

Ta' marbûthah transliterated as "*t*" in the middle of word, but if *Ta' marbûthah* in the end of word, it transliterated as "h" e.g. الرسالة للمدرسة become *al-risalat li al-mudarrisah*, or in the standing among two word that in the form of *mudlaf* and *mudlaf ilayh*, it transliterated as t and connected to the next word, e.g. فى رحمة الله become *fi rahmatillâh*.

D. Auxiliary Verb and Lafdh al-Jalalah

Auxiliary verb "al" (ال) written with lowercase form, except if it located it the first position, and "al" in *lafadh jalâlah* which located in the middle of two word or being or become *idhâfah*, it remove from writing.

a. Al-Imâm al-Bukhâriy said …

b. Al-Bukhâriy in muqaddimah of his book said …

c. *Masyâ' Allâh kâna wa mâ lam yasya' lam yakun*.

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ABSTRACT

Roziqi, Ahmad Masrur, 14210108, 2018, ***Marriage Agreement Under Perspective Fiqh Muamalah Principles Of Ibnu Taimiyah (Study On Constitutional Court Decision Number 69/ PUU-XIII/2015).*** Thesis. Islamic Family Law Department, Syaria Faculty, State Islamic University Maulana Malik Ibrahim Malang Supervisor: Erik Sabti Rahmawati, M.A., M.Ag.

Key Words: Constitutional Court, Fiqh Muamalah Principle of Ibnu Taimiyah, Marriage Agreement

The marriage agreement creation which has limited to time before or when marriage procession caused problem for Ike Farida and her husband. Ike Farida and her husband proposed a judicial review for several articles of Basic Agrarian Law (Law Number 5 of 1960) and articles of Marriage Law (Law Number 1 of 1974). Judges decided the marriage agreement has no time limit. The author interested to analyse marriage agreement in the perspective of Fiqh Muamalah Principles of Ibnu Taimiyah. In this study, the author formulated two problem formulations, both are: What is the legal basis of Judges Panel in Constitutional Court Decision Number 69 / PUU-XIII / 2015 concerning Marriage Agreement? How is the marriage agreement viewed from the perspective of fiqh muamalah principles of Ibnu Taimiyah?

This research is included in the type of normative legal research using conceptual approach. The legal materials of this research came from primary legal materials, such as the Constitutional Court Decision No. 69 / PUU-XIII / 2015 and the Ibn Taimiyah' book named *Al Qawaid An Nuraniyyah*. Secondary legal materials such as books, research reports, and other documentary materials relating to marriage agreement.

The research results are, (1) Judges argued with Law Number 5 of 1960 of Indonesian People's relationship to the natural resources and Law Number 12 of 2006 about Indonesian Citizenship. All of natural resources of Indonesian Republic are full right of the nation. The Indonesian people's rights are sacred, eternal, and fundamental. People's authority to process and own everything in Indonesia cannot be contested or seized. The Judges also found contradiction of legislation related to human rights which have been forgotten by lawmakers. (2) The marriage agreement of fiqh muamalah principle is free for everyone and especially for husband and wife. The makers of agreement have to discuss in order to make it happen and legal. Husband and wife are able to make any of materials and they have rights to make anytime. The fiqh principle does obligate husband and wife to apply the conditions and materials of agreement. When they violate the materials of agreement then they would become null and void. The makers have to bring any of kindness within agreement and they prohibited to damage. The materials and points of agreement can be altered by husband and wife and both can make new materials.

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ملخص البحث

أحمد مسرور رازقي, 14210108. 2018. **الاتفاق النكاحي فى نظرة قواعد فقه المعاملة لابن تيمية (دراسة قضاء المحكمة الدستورية رقم 2015/XIII-PUU/69)**. كلية الشريعة قسم الأحوال الشخصية بجامعة مولانا مالك إبراهيم مالنك. إيريك سبت رحماواتي الماجيستير

الكلمات الرئيسية: المحكمة الدستورية, ,الاتفاق النكاحي, قواعد فقه المعاملة لابن تيمية

كانت صناعة الاتفاق النكاحي موقوتة قبل عقد النكاح وأثناءه وهي تشكل إيكا فاريدا والزوج. فيقدمان اختبار المواد لبعض الفصول من القانون الرقم الخامس عام 1960 أو القانون الزراعي والقانون الرقم الأول عام 1974 أو القانون النكاحي فى المحكمة الدستورية. فقد قضى هيئة التحكيم أن الاتفاق النكاحي غير موقوت.وود الباحث أن يبحث الاتفاق النكاحي بنظر قواعد فقه المعاملة لابن تيمية وسبك الباحث الصيغتين وكتبهما توضيحا للمشكلة, فالصيغة الأولى كالسؤال ما هو الأساس القانوني الذي يستعمله هيئة التحكيم عن الاتفاق النكاحي فى قضاء المحكمة الدستورية؟ والصيغة الثانية هي كيف قضاء الاتفاق النكاحي فى نظرة قواعد فقه المعاملة لابن التيمية؟

يكون البحث فى نوع البحوث القنونية المعيارية باستعمال المنهج المفاهمي. تناول الباحث المواد القانونية من المواد الأساسية كالقضاء من المحكمة الدستورية رقم 2015/XIII-PUU/69 وكتاب القواعد النورانية لابن تيمية حيث فيه تكتب القواعد الفقهية.والمواد القانونية الثناوية التي تناولها الباحث من الكتب والوقائع والمواد الأخرى المتعلقة بموضوع البحث.

تناول الباحث النتيجتين. فالأولى تحجج القضاة بالقانون رقم 5 عام 1960 عن علاقة الرعية بالثروة العالمية والقانون الرقم الثانى عشر عام 2006 عن الجنسية الإندونيسية.نظر الباحث أن جميع ثروة عالم الأندونيسي تحت يد حقوق الأمة. وتكون الحقوق مقدسة أبدية أساسية.. وجد القضاة تعارض القوانين بالحقوق الإنسانية حيث ينسونها المشرعين.والثانية أن الزوج والزوجة يقدران أن يتفقا فى الاتفاق الزوجي. يجب عليهما أن يتشاورا لأن يكون الاتفاق صحيحا. ولا حد فى المضمون والوقت بل يجب عليهما أن يؤديا ما فى الاتفاق الزوجي. إذا اجتاح أحدهما أو كلاهما فبطل الاتفاق لأن الاتفاق لازم بالمصلحة ولاالمفسدة. وجاز للزوج والزوجة أن يبدلا الاتفاق الزوجي متى شاء.

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ABSTRAK

Roziqi, Ahmad Masrur, 14210108, 2018, ***Perjanjian Perkawinan Perspektif Kaidah Fikih Muamalah Ibnu Taimiyah (Studi Putusan Mahkamah Konstitusi Nomor 69/ PUU-XIII/2015)*** Skripsi, Jurusan Al-Ahwal AlSyakhsiyyah, Fakultas Syariah Universitas Islam Negeri (UIN) Maulana Malik Ibrahim Malang, Dosen Pembimbing: Erik Sabti Rahmawati, M.A., M.Ag.

Kata Kunci: Mahkamah Konstitusi, Perjanjian Perkawinan, Kaidah Fikih Muamalah Ibnu Taimiyah,.

Pembuatan perjanjian perkawinan yang waktunya dibatasi sebelum atau ketika proses pernikahan menimbulkan sebuah masalah bagi Ike Farida dan suaminya. Sehingga mereka mengajukan uji materil terhadap beberapa pasal dari Undang-Undang Pokok Agraria atau Undang-Undang Nomor 5 Tahun 1960 dan Undang-Undang Perkawinan atau Undang-Undang Nomor 1 Tahun 1974. Majelis Hakim memutuskan bahwa tidak ada lagi pembatasan waktu dalam membuat perjanjian perkawinan. Penulis tertarik untuk menganalisis perjanjian perkawinan dengan pandangan kaidah fikih muamalah Ibnu Taimiyah. Penulis merumuskan dua rumusan masalah, yaitu Apakah dasar hukum Majelis Hakim pada putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 tentang Perjanjian Perkawinan? Bagaimanakah perjanjian perkawinan perspektif kaidah fikih muamalah Ibnu Taimiyah?.

Penelitian ini termasuk ke dalam jenis penelitian hukum normatif dengan menggunakan pendekatan konseptual. Bahan-bahan hukum dari penelitian ini berasal dari bahan hukum primer, seperti Putusan Mahkamah Konstitusi No. 69/PUU-XIII/2015 dan kitab Ibnu Taimiyah. Bahan hukum sekunder seperti buku, laporan penelitian, dan bahan dokumenter lainnya yang berkaitan dengan perjanjian perkawinan.

Hasil penelitian ini yaitu (1) Majelis Hakim menggunakan Undang-Undang Nomor 5 Tahun 1960 tentang hubungan warga negara Indonesia dengan sumber kekayaan alam dan Undang-Undang Nomor 12 Tahun 2006 tentang Kewarganegaraan Indonesia. Seluruh kekayaan alam Republik Indonesia menjadi hak penuh bangsanya. Kewenangan rakyat untuk mengolah dan memiliki segala yang ada di Indonesia tidak dapat diganggu gugat. Adanya kontradiksi perundang-undangan terkait hak asasi manusia yang telah dilupakan oleh pembuat hukum. (2) Setiap orang atau suami dan istri bebas membuat perjanjian perkawinan. Para pembuat perjanjian wajib bermusyawarah agar perjanjian perkawinan menjadi sah. Suami dan istri dapat membuat segala isi dan tidak dibatasi waktu untuk membuat perjanjian. Wajib bagi suami dan istri atau siapapun yang terlibat dalam perjanjian perkawinan untuk memenuhi dan melaksanakannya. Sebuah perjanjian perkawinan menjadi batal ketika suami dan istri atau pihak yang terlibat melanggar ketentuan yang ada. Sebab menurut kaidah fikih bahwa perjanjian harus mendatangkan kebaikan dan tidak boleh membawa kerusakan. Perjanjian perkawinan dapat diganti kapanpun oleh suami dan istri.

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CHAPTER I

INTRODUCTION

A. BACKGROUND OF RESEARCH

Household life does not always go well. The problem that afflicts household life is always exist, and problem of family is common in our society such as problem of joint property. Case of joint property must be resolved through a marriage agreement. However, marriage agreement had not been popular yet among society, especially for making an agreement in marital tie.

Many families are disadvantaged due to the law enactments which are relating to marriage agreement. Once a family has affected by impact and the couple have different nationality. They have built a household for more than ten years but they cannot have a home until now. They bought an apartment unit and were canceled by

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developer because the husband was a foreign national. The developer's reason was likely husband and wife can legally own an apartment, but the husband was a foreign national so he could not own it and must be settled through a marriage agreement to separate the joint property. [2]

When a husband and wife did not have a marriage agreement yet to separate joint property, the developer requested the determination of a court to strengthen the reason for purchase agreement termination. The problem above happened to Ike Farida who was married to a Japanese citizen. She questioned the rules regarding marriage agreement and property right to the Constitutional Court. Ike proposed a judicial review of Law Number 5 of 1960 concerning Basic Agrarian Principles (Basic Agrarian Law) and Law Number 1 of 1974 concerning Marriage (Marriage Law) against the 1945 Constitution.

Ike Farida proposed a judicial review of the provisions of Article 21 verse (1), verse (3), Article 36 verse (1) of the Basic Agarian Law and Article 29 verse (1), Article 35 verse (1) of the Marriage Law.[3] According to Ike, these norms have deprived their rights to obtain ownership right and building right. Ike's case began with an apartment purchase agreement which has canceled unilaterally by developer. The developer's reason, because Ike's husband was a foreign and has no marriage agreement. The developer refused the purchasing agreement by determination of East Jakarta District

[2] Majalah Mahkamah Konstitusi, *Perjanjian dalam Ikatan Perkawinan,* www.mahkamahkonstitusi.go.id accessed in 21st Saturday of July 2018 page 11
[3] Constitutional Court decision copy Number 69/PUU-XIII/2015, 3

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Court. The determination has decided that order status became null and void as a result of the non-fulfillment of the legal objective conditions of an agreement, and this was a violation of Article 36 verse (1) of the Basic Agrarian Law. Ike Farida at the Constitutional Court which was held on Thursday 11 June 2015 concluded that her right to own an apartment was lost because of articles in the Basic Agrarian Law and Marriage Law.

Ike farida asked the Constitutional Court to declare the phrase 'Indonesian citizen' in Article 21 verse (1) and so asked to declare the contradiction of Article 36 verse (1) in Basic Agrarian Law with 1945 Constitution. Ike proposed that both of articles have not legal force as long as not interpreted in 'single Indonesian citizen without exception'. She asked the Constitutional Court to state the phrase "at the time or before the marriage was held" and so asked the contradiction of Article 29 verse (1) The Marriage Law with 1945 Constitution and have not binding legal force. At the end of her proposition, Ike asked to declare the contradiction of phrase "joint property" in Article 35 verse (1) of the Marriage Law with the Constitution as long as not interpreted with "right to sue".[4]

The Ike's case has been included in the marriage sector, so it can be understood that the marriage does not always concern in the inner bond but also in the treasure. As a way to resolve her case, Ike can make a marriage agreement to separate property and buy an apartment with her own money. The further problem that legislations only allow

[4] Constitutional Court decision copy Number 69/PUU-XIII/2015, 28.

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to make an agreement before or when the marriage takes place. The rule stated in Article 29 verse (1) of the Marriage Law Number 1 of 1974 , *"pada waktu atau sebelum perkawinan dilangsungkan, kedua belah pihak atas persetujuan bersama dapat mengadakan perjanjian tertulis yang disahkan oleh Pegawai pencatat perkawinan, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut."*[5]

Ike's material exam was only partially received by Constitutional Court. We can see in the Constitutional Court's decision number: 69 / PUU-XIII / 2015, the judges stated that Article 29 verse (1) of Law Number 1 of 1974 of Marriage became "*pada waktu, sebelum dilangsungkan atau selama dalam ikatan perkawinan kedua belah pihak atas persetujuan bersama dapat mengajukan perjanjian tertulis yang disahkan oleh pegawai pencatat perkawinan atau notaris, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut".* Furthermore, judges so stated Article 29 verse (3) of Law Number 1 of 1974 *"Selama perkawinan berlangsung, perjanjian perkawinan dapat mengenai harta perkawinan atau perjanjian lainnya, tidak dapat diubah atau dicabut, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah atau mencabut, dan perubahan atau pencabutan itu tidak merugikan pihak ketiga"*.[6]

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[5] Article 29 Law No. 1 year 1974.
[6] Constitutional Court decision copy Number 69/PUU-XIII/2015, 156

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Marriage agreement, although it have not specifically found in the verses of the Qur'an and hadith, author can include it to the agreement verse:

وَلَاتَقرَبُوْا مَالَ الْيَتِيْمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّى يَبْلُغَ أَشُدَّهُ وَأَوْفُوْا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْؤُوْلاً

this verse means: And do not approach the property of the orphan, except in a better (useful) way until he grows up and fulfil the promise! actually the promise has should been asked. (Surah Al Isra 'verse 34)[7]

The Messenger of Allah has explained in the hadith written in the book Bulughul Maram by Imam Ibn Hajar Al 'Asqalani, the hadith reads:

عَنْ عَمْرِوْ بْنِ عَوْف الْمُزَنِيِّ رَضِيَ اللهُ عَنْهُ أَنَّ رَسُوْلُ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِيْنَ إِلَّا صُلْحًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا,وَالْمُسلِمُوْنَ عَلَى شُرُوْطِهِمْ إِلَّا شَرْطًا حَرَّمَ حَلَالًا, أَوْ أَحَلّ حَرَامًا, رَوَاهُ التِرْمِيْذِيْ وَ صَحَّحَهُ, وَأَنْكَرُوْا عَلَيْهِ لِأَنَّ رَاوِيَهُ كَثِيْرُ بْنُ عَبْدِ اللهِ بْنِ عَمْرِوْ بْنِ عَوْف ضَعِيْف وَكَأَنَّهُ اعْتَبَرَهُ بِكَثْرَةِ طُرُقِهِ, وَقَدْ صَحَّحَهُ ابْنُ حِبَّانَ مِنْ حَدِيْثِ أَبِي هُرَيْرَةَ رَضِيَ اللهُ عَنْهُ.

> This hadith means: (narrated) from Amr bin Auf Al Muzaniy RA, that the Messenger of Allah said: a reconciliation with fellow Muslims is permitted except reconciliation which forbids halal goods and justifies illicit goods and the Muslims must fulfill the conditions among them except the conditions forbid halal goods or justify illegitimate goods, (the hadith is narrated by Imam At Tirmidhi and he justifies this).[8]

[7] Departemen Agama Republik Indonesia, *Al Qur'an dan Terjemahannya,* (Bandung: Syamil Quran), 285

[8] Imam at Tirmidzi, *Shahih Sunan at Tirmidzi,* (Riyadh: Maktabah Ma'arif, 2002) II, 104

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The Qur'anic verse states the obligation to fulfil an agreed promise. The parties (husband and wife) are prohibited from betraying each other, because an agreement is a joint responsibility and it will be questioned in the afterlife. The agreement creation, according to the hadith is husband and wife are mutually makes requirement. The purpose of making a requirement is humans can mutually make a conditional agreement and it should not violate the law of Allah SWT.

Author has explored the decision of judges, and want to analyse the marriage agreement in the perspective of fiqh muamalah principle of Ibn Taimiyah. Author used fiqh muamalah principle because it has one of the rules that specifically addressed kinds of agreement on human transactions. The author's consideration in the decision of the Constitutional Court is Experts have not explicitly explained how the fiqh reviewed a marriage agreement in Constitution. Author argues the fiqh is as a human's way life, so this consideration becomes one of the strong reasons if author can analyse with the principles of fiqh. The principles as a tool to strengthen the decision of the judges and can help academics to answer the anxiety of decision that does not explain in fiqh term.[9]

B. STATEMENT OF PROBLEM

Based on the above background, the author presents two statements of problem, both statements are:

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[9] Ahmad bin Muhammad Ad Dimyaty, *Hasyiatu al Dimyaty 'ala Syarhi al Waraqat,* (Surabaya:Al Haramain, 2012), 6

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1. What is legal basis of Judges in the Constitutional Court Decision Number 69 / PUU-XIII / 2015 in Marriage Agreement?
2. How is the marriage agreement viewed from the perspective of fiqh muamalah principles of Ibnu Taimiyah?

C. RESEARCH PURPOSE

1. To explain the legal basis of Judges in the decision of the Constitutional Court Number 69 / PUU-XIII / 2015 in Marriage Agreement.
2. To understand the decision of marriage agreement in the perspective of fiqh muamalah principles of Ibnu Taimiyah.

D. RESEARCH BENEFITS

Author expects good results and can benefit to society. In this section author explains the benefits of research, they are:

1. benefits in theory

The results of this research are expected for academic contributions. Author hopes these can add the treasury and insight in developing law science especially in the Decision of the Constitutional Court Number 69 / PUU-XIII / 2015.

2. Benefits in Practice

The research can be expected to contribute for general public knowledge, especially for academics of Islamic family law and in the same issue with

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Constitutional Court Decision Number 69 / PUU-XIII / 2015. This research also can be expected to give thought contribution to law enforcement officers (judicial institution) so that they can carry out their duties properly, give fairness justice and can maintain their performance better.

E. OPERATIONAL DEFINITION

- **Constitutional Court**: The Court has authority in judge to examine the Law in the Constitution, solving the dispute of state institutions in which their authorities are granted by 1945 Constitution of the Indonesian Republic, to decide upon dissolution of political parties and to decide upon disputes concerning the results of general election, and is one of the actors of judicial power as referred to in the constitution. [10]
- **Judicial Review:** a review of laws or regulations that are deemed to violate the constitutional rights of citizens.
- **Marriage Agreement:** an agreement of joint property during marriage as long as an agreement deviates from the principle of law.[11]

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[10] Dzulkifli Umar dan Utsman Handoyo, *Kamus Hukum,* quantum media press,2010,266

[11] Annisa Isrianty, *Akibat Hukum Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan Berlangsung,* jurnal (Surakarta: Universitas Sebelas Maret, 2015) 85, see : R. Subekti, *Pokok-Pokok Hukum Perdata.* Jakarta: Intermasa.

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- **Fiqh Muamalah Principles of Ibnu Taimiyah:** the rules or laws of Allah to govern humans in worldly affairs of social intercourse, or obligatory rules of Allah that regulate human relationships to acquire and develop the treasure. [12]

F. RESEARCH METHOD

The method is as a thing as usual in certain way, while research is a scientific activity related to analysis and construction. The research is carried out methodologically, systematically and consistently.[13] Author processes data and requires analysis in the legal basis for judges. Research began by author with collecting of legal basic materials from Constitutional Court decision. Author collects the legal basics and analyses to know how Judges have reached to the decision. In the further step, author takes and records the material for the marriage agreement. Author begins to analyse the legal basic of Judges and marriage agreement in the perspective of fiqh muamalah principles. Author details the method to clarify and there are research types, source of legal material until analysis process, they are:

1. Research Types and Approaches

This type of research is juridical normative research, namely legal research is done by examining library material or secondary data.[14] The object of research is legal

[12] Tafakulumum.co.id, accessed in 22nd of March 2018
[13] Soerjono Soekanto, *Pengantar Penelitian Hukum,* (Jakarta: UI-PRESS 2006), 42.
[14] Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif* (Jakarta: Raja Grafindo, 2003) 13-14

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basis of Constitution judge and the decision of marriage agreement. Constitutional Court Decision No 69 / PUU-XIII / 2015 as the main ingredient in this study, so it is commonly said that the research entered the library research category.

In the research approach researcher uses conceptual approach. This approach departs from the views of legal experts on the decision of the Constitutional Court. Here through studying the views and doctrines in the decision, researcher can find ideas that produce the notions of marriage agreements, concepts, and principles of marriage agreements that are relevant to the issue at hand. Understanding of the views and doctrines is the basis for researcher in building a legal argument to solve the issues at hand.[15]

2. Source of Legal Material

Normative legal research is the study of legal materials, both primary legal material and secondary legal material. If a researcher has found the problem to be investigated, the next activity is to gather all the information that has to do with the problem, then select relevant and essential information, then determine legal issues.[16] Legal material can be divided into three types, they are:

a. Primary Legal Material

The research is formulated in accordance with the formulation and objectives which are the main topics of research to be studied. The primary legal material in this study are: 1. the decision of the Republic of Indonesia Constitutional Court Registration

[15] Peter Mahmud Marzuki, *Penelitian Hukum,* (Jakarta: Kencana, 2007), 95
[16] Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum,* 97.

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Number: 69 / PUU-XIII / 2015 concerning Marriage Agreements, 2. the rules of fiqh muamalah in the book of Al Qawa'id an Nuraniyyah by Ibn Taymiyyah.

b. Secondary Legal Material

Researcher obtains legal material from various research results, scientific works and documents directly related to research. In this study, secondary legal materials include books on positive law such book of Constitutional Court, book of marriage agreement and joint property, Laws Number 1 of 1974 and Number 5 of 1960 and classic book of basics of Islamic Jurisprudence.

c. Tertiary Legal Material or supporting legal material

In this section tertiary legal material can be explained such as materials that give instructions or provide an explanation of primary and secondary legal material. The tertiary legal materials in this study include legal dictionary of Chrly Rudiyat and legal magazine of Constittutional Court Number 117 with the title *"Perjanjian Dalam Ikatan Perkawinan"*,

3. Legal Material Collection Methods

The legal material collection method section researcher uses the documentation method, which is a method of collecting data by looking for data about things or variables in the form of notes, transcripts, books, newspapers, magazines, and so on. While the researcher obtains documentation from the Constitutional Court Decision, books and articles that explain the Constitutional Court Decision relating to Material Tests on marriage agreement.

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4. Processing Method and Legal Material Analysis

Researcher selects data according to the studied problems and processes with several steps, they are:

a. Editing

Editing is the process of re-researching files, records, information collected by data seekers. The examination is mainly in terms of clarity's meaning, problem relevance to other data groups so that the data is sufficient to solve the problem under study. Examination is also to minimize errors and lack of data in research and to improve data quality. In this case, what was examined was the Constitutional Court Decision Number. 69 / PUU-XIII / 2015 concerning Marriage Agreement.

b. Classification

This step is the step of data reduction by composing and classifying data into certain patterns to facilitate reading and discussion according to research needs.

c. Verifying

As a further step, proof of the correctness of the data to ensure the validity of the collected data. Researcher verifies for some data through triangulation, that is matching between the results of the data with one another, so that it can be concluded proportionally.

d. Analysing

Analysis of research material with the aim that the obtained data can be understood. Researcher analysis by using the theory of content analysis, it means that method or analysis carried out by researcher on the object of study in this paper

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concerns aspects of the content. As expressed by Holsti quoted by Lexi J. Moleong that the content analysis technique is any technique used to draw conclusions through efforts to attract message characteristics and be carried out objectively and systematically.[17] With this technique, the obtained qualitative data then presented and analysed critically to get the right analysis results. Then the data is studied more deeply so that it reaches the right conclusion. To make it easier to conduct research, then researcher need approach. In this study researcher uses conceptual approaches.

e. Concluding

In this step, the researcher concludes the results of the research from the data that has been processed to get an answer. Researcher makes conclusions or important points which then produce a concise, clear and easy to understand picture.

G. PRIOR RESEARCH

Author compiles prior research in this section in order to know the originality of the research. The prior researches are in the same theme but they have several objects. The compiled researches are:

1. Uswatun Hasanah is a student of Law Faculty of Hasanuddin University, in 2017 "Legal Review of Marriage Agreement Post Constitution Court Decision Number 69/PUU-XIII/2015 (*Tinjauan Hukum Terhadap Perjanjian Perkawinan (Prenuptial Agreement) Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015*)"[18]

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[17] Lexi J. Moleong. *Metode Penelitian Kualitatif.* (Yogyakarta: 1999, Liberty). 163

[18] Hasanah, Uswatun Hasanah *Tinjauan Hukum Terhadap Perjanjian Perkawinan (Prenuptial Agreement) Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015* skripsi (Makassar: Universitas Hasanudin, 2017)

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and the focus of the discussion is on the procedure of recording the marriage agreement which made during the marriage bond (based on the decision of the Constitutional Court No. 69 / PUU-XIII / 2015) on the marriage certificate and to know the protection of the third party in relation with the loss in the case of making the marriage agreement during the marriage. The results of the research are, in order to bind a third party then the marriage agreement must be registered / registered in Religious Affair Office (Moslem) and Civil Service and Registration (Non Moslem). The requirements and procedures for registration are regulated in the Letter of the Directorate General of Population and Civil Registration No. 472.2 / 5876 / DUKCAPIL. In order to protect a third party from loss, the making of a marriage agreement must be made in the form of a notarial deed (authentic) and a notary is expected to request a list of inventory of property which acquired during the marriage bond in making the marriage agreement and will be attached to the deed and make a statement the property never transacted in any way and to anyone.

2. Inas Sacharissa is a student of Faculty of Law, State University of Semarang, in 2015 "The Marriage Agreement Law Effect on Joint Property after Divorce (Study of East Jakarta Religious Court Decision Number 0502/Pdt.G/2013/PAJS) (*Akibat Hukum Perjanjian Perkawinan Terhadap Harta Bersama Pasca Perceraian (Studi Putusan Pengadilan Agama Jakarta Selatan Nomor* 0502/Pdt.G/2013/PAJS)[19]. The

[19] Sacharissa, Inas *Akibat Hukum Perjanjian Perkawinan Terhadap Harta Bersama Pasca Perceraian (Studi Putusan Pengadilan Agama Jakarta Selatan Nomor 0502/Pdt.G/2013/PAJS)* thesis (Semarang: Universitas Negeri Semarang, 2015)

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focus of the discussion is on what the position and effect of marriage law on post-divorce property in the decision no. 0502 / Pdt.G / 2013 / PAJS and about the judge's judgment regarding the marriage agreement on joint property in decision No. 0502 / Pdt.G / 2013 / PAJS. The results of research is the position of the marriage agreement is adjusted with Article 1320 of the Civil Code in accordance with the agreement in general. The law effect of making marriage agreement becomes a binding law for the parties and the contents of the agreement which are in accordance with the specified conditions. On the judge's consideration, the marriage properties are divided by each half of the part. In conclusion, the marriage agreement resulted the separation of property on the agreement of both parties, and it included in the marriage agreement. The consideration of the judges, the marriage agreement was legitimated by the judges' panel with the theory of "free evidence" where previously there was an oversight in the registration.

3. Jeanita Adeline a student at Faculty of Law University of Indonesia in 2013, "Marriage Agreement Legal Status Based on Code of Civil Law and Marriage Constitution (Analysis of Decision Number 69/Pdt.G/2010/Pn.Dps) (*Status Hukum Perjanjian Perkawinan Berdasarkan Kitab Undang-Undang Hukum Perdata Dan Undang-Undang Hukum Perkawinan (Analisis Kasus Putusan Nomor* 69/Pdt.G/2010/Pn.Dps))". Focus of study is about how the validity of the changed marriage agreement after the marriage took place and how the analysis of decision number 69 / Pdt.G / 2010 / PN.Dps to a marriage agreement which legitimated by the District Court at the time of the divorce. The results are the validity of a changed

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marriage agreement after marriage takes place is valid and remains binding on the parties. The Civil Code strictly prohibits the change of the marriage agreement after marriage, but the Marriage Law regulates that the marriage agreement can be changed as long as agreed by the parties and have been previously agreed by the parties, so with reference to the principle *lex specialist derogate legi generali,* marriage agreement may be changed. And the Result of decision analysis are the marriage agreement has terms or conditions, both in terms of content and technical terms in order to be declared legally valid. A marriage agreement should be valid as long as fulfill the provisions of the law, both in terms of content and technical terms.[20]

4. Oly Viana Agustine is a researcher of the Constitutional Court in 2017, "The Political Law of Marriage Agreement After Constitutional Court Decision Number 69 / PUU-XIII / 2015 In Creating Marriage Harmony (*Politik Hukum Perjanjian Perkawinan Pasca utusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 Dalam Menciptakan Keharmoisan Perkawinan*)". The focus of the study is about when people can make marriage agreement. The result of this study are the extension of time on the marriage agreement can minimizes the conflict in marriage and able to create a harmony for the property rights of citizens who marry foreigners. So

[20] Jeanita Adeline, *Status Hukum Perjanjian Perkawinan Berdasarkan Kitab Undang-Undang Hukum Perdata Dan Undang-Undang Hukum Perkawinan (Analisis Kasus Putusan Nomor 69/Pdt.G/2010/Pn.Dps),* Tesis (Depok: Universitas Indonesia, 2013)

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citizens for whom marry foreigners and do not have a marriage agreement, they can make it when marriage has been held. [21]

Based on the results of above researches, there is no research discusses marriage agreement in the perspective of fiqh muamalah rules of Ibnu Taimiyah. The fundamental difference is that the author focused more on the concept of marriage agreement which has written in the decision of the Constitutional Court No.69 / PUU-XIII / 2015 in the perspective of fiqih muamalah principle of Ibn Taimiyah, and this has not been found from previous researches. Author has reviewed some previous research and to facilitates the observation, the researcher made a table of similarities and differences of previous research.

Table of Similarities and Differences of Prior Research

NO.	Name/PR/Year/Title of Research	Focus of Discussion	
		Equation	Difference
1.	Uswatun Hasanah, University of Hasanudin, 2017, Legal Review of Marriage Agreement After Constitutional Court Decision Number 69/PUU-XIII/2015	• the point of equation with previous research lies in the object of research, that is marriage agreement	• previous research has seen at how the legal review of marriage agreement after the decision of the Court of No. 69 / PUU-XII / 2015 • previous research reviewed the marriage agreement recording procedure

[21] Oly Viana Agustine, *Politik Hukum Perjanjian Perkawinan Pasca utusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 Dalam Menciptakan Keharmoisan Perkawinan,* jurnal (Jakarta: Media Pembinaan Hukum Nasional, 2017), 53

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			and third party protection related to the loss with making of a marriage agreement. • This research focuses on the concept of a marriage agreement on the joint property which contained in the decision of the Constitutional Court
2.	Inas Sacharissa, Semarang State University, 2015 The Marriage Agreement Law Effect on Joint Property after Divorce (Study of East Jakarta Religious Court Decision Number 0502/Pdt.G/2013/PAJS)	• The point of equation with previous research is that both discuss the marriage agreement	• Previous research has analyzed how the legal effects of marriage agreement on joint post-divorce property • Previous research reviewed how the judge's judgment on the marriage agreement on joint property in decision No. 0502 / Pdt.G / 2013 / PAJS. • This study analyzes the concept of marriage agreement in the decision of Constitutional Court which uses fiqh muamalah principles of Ibnu Taimiyah
3.	Jeanita Adeline is a student, University of Indonesia 2013, Marriage Agreement Legal Status Based on Code of Civil Law and Marriage Constitution (Analysis of Decision Number 69/Pdt.G/2010/Pn.Dps)	• The similarity with previous research is to examine a theme of a marriage agreement	• Analysis of previous research used the Civil Code and Marriage Act • Previous research focused on the validity of the marriage agreement which has changed after the marriage took place

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			• This study analyzes the decision of the Constitutional Court using the fiqh muamalah principle of Ibnu Taimiyah
4.	Oly Viana Agustine, Media of National Law Development, 2017, Political Law of Marriage Agreement After Decision of Constitutional Court Number 69 / PUU-XIII / 2015 In Creating Marriage Harmony	• the point of equation with previous research lies in the object of research (marriage agreement)	• Previous research examined the time of a marriage agreement • Previous research used theories of legal politics, the concept of marriage, and the principle of agreement in the Civil Code • This research finds out the marriage agreement in the Constitutional Court Decision in the perspective of fiqh muamalah principle of Ibnu Taimiyah

The researches focus on one major theme of marriage agreement. Author can distinguish this research path after observing the studies above. There is no same study, and author chooses the research on marriage agreement in the Constitutional Court Decision No. 69 / PUU-XIII / 2015 in the perspective of fiqh muamalah principles of Ibn Taimiyah.

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H. WRITING SYSTEMATIC

The study consists of four chapters, each chapter contains several sub-chapters and they are interconnected. The systematic discussion in the study includes:

CHAPTER 1: INTRODUCTION

In this chapter the researcher provides general knowledge about the direction of the research that it will be carried out. This chapter contains the background of the problem containing an overview that relates to the object of research. After background of the problem, the researcher includes the formulation of the problem to focus more on the research objectives. Furthermore, explaining the benefits of research, operational definitions and research method that contains theories or concepts and the way the research will be conducted. In this section the researcher also includes previous studies to take references and compare with the research that researchers are currently doing. The final part of the chapter is the description of writing systematics.

CHAPTER II: CONSTITUSIONAL COURT AND MARRIAGE AGREEMENT

In this chapter the researcher presents a review of the Constitutional Court which covers the meaning, authority, legal sources of proceedings, and the principles of the Constitutional Court. In the next section to sharpen the marriage agreement analysis, the researcher lists marriage agreement law. Researcher also writes understanding of marriage agreements, laws and regulations, forms, contents of marriage agreements, terms and procedures for marriage agreements. Other supporting matters such as a summary of the Constitutional Court's decision No. 69 / PUU-XIII / 2015.

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CHAPTER III: MARRIAGE AGREEMENT IN THE PERSPECTIVE OF FIQH MUAMALAH PRINCIPLES OF IBNU TAIMIYAH

In this chapter, author obtained the data from research results. The data is described then edited, classified, verified and analysed to answer the formulation of the predetermined problem. The data such as the legal basis of the Constitution Judges and the marriage agreement opinion will be analysed and processed according to the method. In the first section, author described the judge's legal basis and to know how they reach final decision on the marriage agreement. Second section, author divided this section in to two branches. At the first branch author described fiqh muamalah principles and the contents, Contents include Ibnu Taimiyah's profil and his fiqh principles. Second branch author analysed expert's opinions on marriage agreement. The marriage agreement in the Constitutional Court Decision Number 69 / PUU-XIII / 2015 will be analysed for its suitability with the agreement in the principles of fiqh muamalah.

CHAPTER IV: CONCLUSIONS AND SUGGESTIONS

Closing is the last chapter which contains conclusion and suggestion. The conclusion in this chapter is not a summary of the conducted research but a short answer to the formulation of the problem that has been set. Answers such as the legal basis of the panel of judges and the correlation of marriage agreement decision will be written by the researcher in the conclusion. The advice section, as a recommendation for academics and legal practitioners if they can refer to this research as material for marriage agreement.

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CHAPTER II

CONSTITUTIONAL COURT AND MARRIAGE AGREEMENT

A. THE CONSTITUSIONAL COURT IN INDONESIA

1. The Definition of Constitutional Court

The Constitutional Court of Indonesian Republic is one of the perpetrators of judicial power with Supreme Court and other judicial bodies.[22] Constitutional Court has a strategic role in guarding and guarantee the implementation of the Constitution Principles. The principles as the highest norm of the state organizer and the institution is also called guardian of the constitution. The obligation of Constitutional Court is to

[22] Article 24 verse (2) 1945 Constitution

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give a decision on the opinion of Representatives House regarding alleged violations by President and / or Vice President in accordance with the Basic Law.[23]

The establishment of the Constitutional Court became a new era in the system of judicial power in Indonesia. Some areas were not untouchable by law, such as the issue of judicial review of the law, now judicial review can be carried out by the Constitutional Court, including other authorities regulated in the 1945 Constitution after Amendment. The existence of the Constitutional Court also be equipped with a clear organizational structure, adequate procedural law, legal principles and legal sources are used as references for the Constitutional Court in carrying out the judicial duties and authorities. The emergence of the Constitutional Court as an agent of judicial power and expected to be an "entry point" encourages the realization of a modern judicial power system in Indonesia.[24]

2. The Authorities of Constitutional Court

The function and main role of the Constitutional Court are to safeguard the constitution and to uphold the principle of legal constitutionality. In order to safeguard the constitution, the function of law examination must be applicated in the Indonesian state administration because the 1945 Constitution affirms that the role model of the system is no longer the supremacy of parliament but the supremacy of the constitution. In fact, this also happens in other countries that previously adopted the parliamentary

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[23] Article 24C verse (2) 1945 Constitution

[24] Bambang Sutiyoso, *Tata Cara Penyelesaian Sengketa di Lingkungan Mahkamah Konstitusi,*(Yogyakarta: UII Press, 2009), 1.

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supremacy system and later turned into a democratic state. The Constitutional Court has a function to make no legal products come out of the constitution's corridor. The function is also to maintain constitutional rights of citizens and the constitution partially derived from Article 24 C verse (1) and verse (2) outlines the authority of the Constitutional Court as follows:

a. The Constitutional Court has the authority to adjudicate at the first and last level. The decision of Constitutional Court is final to examine the law against the Constitution. This institution is able to decide on disputes over the authority of State institutions, to decide the dissolution of political parties, and decide on disputes over election results.
b. The Constitutional Court must make a decision on the opinion of the People's Legislative Assembly or Representative House regarding the alleged violation of the President and / or Vice President according to the Act or Constitution.[25]

The Law examination on 1945 Constitution is a task that dominates the authority of the Constitutional Court as seen from the incoming and registering proposition at the Registrar's Office of the Constitutional Court. The institution has experienced a long history and obtained the clear form and substance after Supreme Court of the United States under John Marshal examined and decided the case.

William Mabury was elected as a judge at the end of the time of President Thomas Jefferson's government but his decision letter was not handed over to him by

[25] Maruar Siahan, *Huku Acara Mahkamah Konstitusi,* (Jakarta: Sinar Grafika, 2012), 11

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the new government. In practice, there are three types of legal norms can be examined or commonly called "as norm control mechanisms". All three types are legal norms as a result of legal decision and they are: (i) normative decision contains legal decision making, namely (i) normative decision contains and intensifies regulating system, (ii) normative decision contains and intensifies administrative determination, and (iii) normative decision contains and intensifies judgmental, commonly called verdict. The three forms of legal norms can be examined through judicial mechanism (judicial) or non-judicial mechanism. If examination is carried out by a judicial institution, so examining process is called as a judicial review or examinng by a judicial or court institution. However, if examination is not carried out by judiciary, then cannot be called as a judicial review. [26]

3. The Sources of Legal Proceeding

The Constitutional Court come with several sources in carrying out role and function, they are:

a. The 1945 Constitution of the Republic of Indonesia.

b. Law Number 24 Year 2003 (and related Laws).

c. Regulation of the Constitutional Court.

d. Decision of the Constitutional Court.

e. International Convention / Agreement PMK Number 006 / PMK / 2005 concerning Procedure Guidelines in the Case of Examining Laws.

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[26] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang,* (Jakarta: Sinar Grafika, 2010), 1

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f. Constitutional Court Regulation Number 008 / PMK / 2006 concerning Guidelines for Procedures in Disputing Constitutional Authority of State Institutions.

g. Constitutional Court Regulation Number 15 / PMK / 2008 concerning Guidelines for Procedures in Disputes over Results of Regional Head General Elections.

h. Constitutional Court Regulation Number 16 / PMK / 2009 concerning Guidelines for Procedures in Disputes over General Election Results for Members of House of Representative, Regional Representative Council, and Regional House of Assembly.

i. Constitutional Court Regulation Number 17 / PMK / 2009 concerning Guidelines for Procedures in Disputes on the Results of the Presidential and Vice-Presidential Elections.

j. Constitutional Court Regulation Number 18 / PMK / 2009 concerning Guidelines for Proposing Electronic Applications (Electronic Filing) and Remote Trial Examination (Video Conference).

k. Constitutional Court Regulation Number 19 / PMK / 2009 concerning Court Rules Procedure.

l. Constitutional Court Regulation Number 21 / PMK / 2009 concerning Guidelines Procedure in deciding the opinion of the House of

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Representatives regarding alleged violations by the President and / or Vice President.[27]

4. Procedural Law Principles of Constitutional Court

The role of the Constitutional Court has some characteristics. The institution issues decisions and they are not only applicable to the applicant but also apply to the public. The Constitutional Court has the following law principles, they are:

a. Opening Trial for Public,

The principle purposes a trial will be open to the public unless the law determines other than purpose and the rule written in Law No. 48 Article (13) in 2009 Judicial Power (Judicial Power Act). This principle has been applicable in all judicial environments and universal.[28]

b. Independent and Impartial

The character of the judiciary is not intervened by any institution, and judges who are obliged to carry out judicial independence. The principle stated in the Law of the Constitutional Court Article (2) which has stated the Constitutional Court is one of the state institutions that execute independent judicial power to conduct justice for enforcing law and justice. The Law on Judicial Power Article (3) has so stated judges are required to maintain judicial independence in carrying out the duties and functions.[29]

[27] Mahkamah Konstitusi, "Sejarah Mahkamah Konstitusi", http://www.mahkamahkonstitusi.go.id, di akses pada tanggal 17 Mei 2018
[28] Siahan, *Hukum Acara Mahkamah Konstitusi,* 44
[29] Siahan, *Hukum Acara Mahkamah Konstitusi,* 45

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c. Fast, Simple and Low-Cost Court

The judiciary has been widely known in the implementation as a simple and low-cost court. The simple purpose is examination and settlement of cases being executed with an efficient and effective way, while the low cost is fee case that can be paid by people.[30] The fundamental difference from other courts is the Constitutional Court has another meaning about speedy judicial process. The judicial process is executed quickly, such as the merger of cases that have the same substance, specifically for the case at the Law examination. The merger of cases can be executed based on the judge's proposal on similarity cases in the subject matter of the request and stated in Article 11 verse (6) of the Constitutional Court Regulation Number 6 of 2005 concerning Guidelines Procedure in the Case of Law Examination. The material's relevance for application and consideration is in applicant's request. Cheap financing in the proceedings of Constitutional Court is more precisely called free financing. The Differences of fees from other courts because the cases which handled by Constitutional Court are more dominated by public interest. The Constitutional Court solved constitutional cases, namely cases in which involve the state's interest so the costs of proceedings are charged to state budget.[31]

[30] Siahan, *Hukum Acara Mahkamah Konstitusi,* 51
[31] Tim Penyusun Hukum Acara Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi,* (Jakarta: Sekretariat Jendral dan Kepaniteraan MKRI, 2010), 21

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d. Right to be Heard in a Balanced Manner

The judicial institution generally gives parties same chances and rights to hear the statements, as well as information conveyed by plaintiffs (civil court) and defendants (general court) have same rights to be heard. The Constitutional Court has also given same rights to be heard for relevant parties. [32]

e. Active and Passive Judges in the Trial Process

Specific characteristic of constitutional cases which are dominated with public interests rather than individual interests have caused the trial process to not always be left to the initiative of the parties. The constitutional control mechanism must be mobilized by applicant with one application. In this cases judges are passive and must not actively undertake an initiative to mobilize the mechanism of the Constitutional Court in examining the case without being submitted with one request. So once the application is registered, the judge will actively procesing it in order to obtain information and evidence deemed necessary. This last thing can be called an active judge in the trial.[33]

f. *Ius Coria Novit*

Applicant submitts cases to the court and the cases must not be rejected with the reason that the legal requirement is unclear. The judiciary or Court is considered to know the needed law and written in the Law on Judicial Power Article (10) which states

[32] Siahan, *Huku Acara Mahkamah Konstitusi,* 52
[33] Siahan, *Hukum Acara Mahkamah Konstitusi,* 54

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"*Pengadilan dilarang menolak untuk memeriksa, mengadili, dan memutus suatu perkara yang diajukan dengan dalih bahwa hukum tidak ada atau kurang jelas melainkan wajib untuk memeriksa dan mengadiliya*".[34]

B. MARRIAGE AGREEMENT

1. The Definition of Marriage Agreement

The agreement term according to W.J.S Poerwadarminta is defined an agreement (written or verbal) made by two or more parties, each party promises to obey what is written in the agreement.[35] Marriage agreement is an agreement regarding husband and wife property during their marriage which deviates from the principle of law. [36] Whereas another definition of marriage agreement is a contract of two parties which aim to bond each othrer with mutual voluntary agreement and the contract must comply with the will of the Shari'a (Islamic Law).[37]

Islamic civil law in Indonesia regulates marriage agreement in Article 29 of Law Number 1 of 1974 and generally governs the procurement of marriage agreement.[38] The law governs time of procurement, validity procedure, changes and tempo of validity. In the Compilation of Islamic Law Article 45 to Article 52, details marriage agreement in form of taklik talak and joint property. The taklik talak in the

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[34] Siahan, *Hukum Acara Mahkamah Konstitusi,* 55
[35] Yulies Tiena Masrini, *Perjanjian Perkawinan Dalam Pandangan Hukum Islam,* jurnal (Semarang: UNTAG) 129, lihat juga W.J.S Poerwadarminta, 2003: 470
[36]Annisa Isrianty, *Akibat Hukum Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan Berlangsung,* jurnal (Surakarta: Universitas Sebelas Maret, 2015) 85, lihat juga: R. Subekti, *Pokok-Pokok Hukum Perdata.* Jakarta: Intermasa.
[37]Masrini, *Perjanjian Perkawinan Dalam Pandangan Hukum Islam,* 129
[38] Rofiq, *Hukum Perdata Islam Di Indonesia,* (Jakarta: Rajawali Press, 2013), 127

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Compilation of Islamic Law is free, no laws obligate for making it and taklik talak has procedure for complaints of problems. The separation of asset in the Compilation of Islamic Law is the asset brought by husband and wife before marriage takes place.

2. The Laws and The Regulations of Marriage Agreement

In this section, author accommodates legislations of marriage agreement. Legislations taken from Marriage Law and Compilation of Islamic Law. The collected verses are used as a benchmark for regulations of marriage agreement and regulations before being examined by Constitutional Court.

The first article of Marriage Law Number 1 of 1974 before judicial review in the Constitutional Court, the marriage agreement verse is contained in Article 29 verse (1): *"pada waktu atau sebelum perkawinan dilangsungkan, kedua pihak atas persetujuan bersama dapat mengadakan perjanjian tertulis yang disahkan oleh Pegawai Pencatat perkawinan, perjanjian yang telah dibuat berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut"*.[39] The provision of the agreement in which not violate legal or religious restrictions is stated in the law of the agreement, it contained in paragraph (2): *"perjanjian tersebut tidak dapat disahkan apabila melanggar batas-batas hukum, agama, dan kesusilaan*". Regarding the time of the marriage agreement written in verse (3) which reads *"perjanjian tersebut berlaku sejak perkawinan dilangsungkan"*.[40] The time limit which is underlined by author lies in

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[39] Marriage Law No. 1 year 1974.
[40] Marriage Law No. 1 year 1974.

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verse (4) and reads: *"selama perkawinan berlangsung perjanjian tersebut tidak dapat diubah, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah dan perubahan tidak merugikan pihak ketiga"*. The problem that arises according to the judges is the time limit for making agreement, while the change of provision for the amendment is free according to the involved parties.

The marriage agreement regulation is further regulated in the Compilation of Islamic Law Article 47. The provision of the marriage agreement in the Compilation of Islamic Law has a point of equality. Verse (1) in the Compilation of Islamic Law Article is: *"pada waktu atau sebelum perkawinan dilangsungkan, kedua calon mempelai dapat membuat perjanjian tertulis yang disahkan Pegawai Pencatat Nikah mengenai kedudukan harta dalam perkawinan"*.[41] The article provides a time for making an agreement and the time means when a marriage agreement can be made and submitted. The object in the marriage agreement is also specified in verse. Object of agreement specifically concerns joint property for husband and wife. Joint property is a serious problem in household life when both of husband and wife have the results of hard work. The Islamic Law Compilation was deliberately made for Muslims so that they have a solution to the problem of common property. Provision for joint property is contained in paragraph (2) : *"perjanjian tersebut dalam ayat (1) dapat meliputi percampuran harta pribadi dan pemisahan harta pencaharian masing-masing sepanjang hal itu tidak bertentangan dengan Islam"*.[42] Husband and wife are also free

[41] Compilation of Islamic Law Article 47 verse (1)
[42] Compilation of Islamic Law Article 47 verse (2)

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to determine the contents of the marriage agreement and has same way with the article in the Marriage Law. The core reference from articles that marriage agreement is not permitted to violate religious provisions. Religion is becoming balancing pillar for the marriage agreement boundaries so as not to exceed the benefits.

3. The Form and The Content of Marriage Agreement

Form of marriage agreement as a reference for husband and wife in making, some forms of agreement as follows:[43]

a. Profit and Loss Agreement

The intent of profit and loss agreement is each party will retain their property ownership, either in the form of innate personal wealth or in the form of gifts specifically reserved for each party. The rights that have been given by law, such as inheritance, grants and wills. All of incomes derived from labor or capital during marriage become joint property. All of losses in the household life become joint losses and burdens.

b. The Agreement on The Unity of Income

Agreement on the unity of income as an agreement between a pair of prospective husband and wife to unite every profit (yield and income) only. This agreement has the same meaning as "profit agreement", while all losses are not agreed

[43] Damanhuri, *Segi-Segi Hukum Perjanjian Perkawinan Harta Bersama,* (Bandung: Mandar Maju, 2007), 15

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upon. In this case Wirjono Prodjodikoro stated that "the wife is only responsible for the losses because of her own actions".[44]

4. Requirements and Procedures for Marriage Agreement

Husband and wife need requirements in order to look for legalization of marriage agreement, there are four requerements:

a. The Approval or agreement of husband and wife.

b. The ability to make an engagement.

c. A certain thing.

d. A lawful reason.

The requirements for marriage agreement according to Abdul Kadir Muhammad are:

a. The marriage agreement creation is at the time or before the marriage was held.

b. The marriage agreement in written form legalized by Marriage Registration Officer.

c. The contents of marriage agreement do not violate the limitations of law, religion and decency.

d. The marriage agreement be in effect since the marriage takes place.

e. An agreement cannot be changed during marriage takes place.

[44] Damanhuri, *Segi-Segi Hukum Perjanjian Perkawinan Harta Bersama,...*15 Lihat juga Wirjono Prodjodikoro, 121

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f. The agreement is contained in the Marriage Certificate (article 2 12 PP No. 9 of 1975)[45]

5. The Summary of Material Test No. 69 / PUU-XIII / 2015

Ike Farida was married to a Japanese and proposed a judicial review of the injustice she experienced. At the time of marriage and established a life together, Ike and her husband have not make a marriage agreement because marriage agreement was not mandatory. Once, a marriage agreement was to separate the property of husband and wife. Ike was married on August 22, 1995 and her marriage was registered at the Office of Religious Affairs, Makassar District, East Jakarta City Number 3948 / VIII / 1995. Their marriage has also been registered at the DKI Jakarta Provincial Civil Registry Office with proof of Marriage Report Number 36 / KHS / AI / 1849/1999, dated 24 May 1999.

Ike Farida and her husband was planned to buy a flat in Jakarta, so on May 26, 2012 they bought 1 (one) flat unit. However, after repayment was fulfilled, the developer canceled the purchase agreement. The developer reasoned Ike's husband is a foreigner and they have not a Marriage Agreement. The developer canceled it with a letter number 267 / S / LNC / X2014, dated October 8, 2014 and Ref. 214 / LGL / CG-EPH / IX / 2012. The developer also seeked reinforcement for reason with asking for the determination in the East Jakarta District Court through Determination of Number

[45] Damanhuri, *Segi-Segi Hukum Perjanjian Perkawinan Harta Bersama,* ....19 lihat juga Abdul Kadir Muhammad,88

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04 / CONS / 2014 / PN.JKT.Tim, at month of November 2014. Based on the cancellation procession and the existing law, author can conclude Ike's right to possess a flat is destroyed by the coming into effect of Article 36 verse (1) of the Basic Agrarian Law and Article 35 verse (1) of the Marriage Law. In addition to these articles, the applicant was also disadvantaged by Article 21 verse (1), verse (3) of the Basic Agrarian Law and Article 29 verse (1), verse (3) and the verse (4) of the Marriage Law also has the potential to impair Ike's Constitutional Rights.

At the time of the trial, applicant proposed several application points and although not all of them are accepted. The applicant proposed the abolition of legal on the phrase "Indonesian citizen", the acquisition of rights, the time of the marriage agreement, and joint property.[46]

The Constitutional Court accepted some applicant's request on Thursday, 27th of October. Some of considerations, such as the narrowing definition of "Indonesian citizens" over the applicant's phrase. The judges rejected the applicant's phrase because the notion of "Indonesian citizens" had been regulated in Article 2 and Article 4 of Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia (furthermore referred to as Law 12/2006) and if the applicant's phrase was accepted it would be detrimental to many parties including the applicant.[47] The applicant's proposition about the terms of marriage agreement is at the time of making an agreement. Both parties (husband and wife) have difficulty in making marriage agreements, because the time

[46] Constitutional Court decision copy Number 69/PUU-XIII/2015, 34
[47] Constitutional Court decision copy Number 69/PUU-XIII/2015, 150

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for making an agreement is only limited before or when the marriage takes place. Therefore the judges received the points of this application in order to widen the time for making the agreement.[48] The intended time was the marriage agreement can be made when both parties have become husband and wife, means husband and wife can make a marriage agreement and submit it at any time after marriage. The last point in the proposition isa bout “phrase joint property" in Article 5 verse (1) of the Marriage Law. The judges have not accepted the point because they have not found the problem of unconstitutionality so there was not a problem with the 1945 Constitution of the Republic of Indonesia.[49]

[48] Constitutional Court decision copy Number 69/PUU-XIII/2015, 154
[49] Constitutional Court decision copy Number 69/PUU-XIII/2015, 155

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CHAPTER III

MARRIAGE AGREEMENT IN THE PERSPECTIVE OF FIQIH MUAMALAH PRINCIPLES OF IBNU TAIMIYAH

A. The Legal Basis of Judges in the Constitutional Court Decision Number 69 / PUU-XIII / 2015 concerning Marriage Agreement

The main of proposition in the judicial review of Marriage Law and Basic Agrarian Law are: constriction of the phrase "*warga negara Indonesia*", "*pertentangan perolehan hak*", the time for making a marriage agreement, and joint property. Here main points of proposition so that they can be directly compared to the legal basis of judges, they are:

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1). In this section the author writes judge's legal basis about provisions of Article 21 verse (1) and verse (3) and Article 36 verse (1) of Law Number 5 of 1960.[50] The applicant argued the phrase "Indonesian citizen / *warga negara Indonesia*" if not interpreted by judges as in her petition could be contrary to the 1945 Constitution and could have not binding legal force. There is a phrase "*sejak diperoleh hak*" as long as it was not interpreted according to the applicant's application then it could be contrary to the 1945 Constitution and could not have binding legal force.[51]

The judges have revealed the phrase "*warga negara Indonesia*" in Article 21 paragraph (1) of Law Number 5 of 1960 would further narrow the meaning of the previous phrase. They usesd to base Article 2 and Article 4 of Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia (currently referred to as Act 12 of 2006) which reads in article 2: *"yang menjadi Warga Negara Indonesia adalah orang-orang bangsa Indonesia asli dan orang-orang bangsa lain yang disahkan dengan undang-undang sebagai warga negara".* Article 4 which reads:

> "warga Negara Indonesia adalah:
>
> "Setiap orang yang berdasarkan peraturan perundang-undangan dan/atau berdasarkan perjanjian Pemerintah Republik Indonesia dengan negara lain sebelum Undang-Undang ini berlaku sudah menjadi Warga Negara Indonesia."
>
> "Anak yang lahir dari perkawinan yang sah dari seorang ayah da ibu Warga Negara Indonesia"

[50] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 144
[51] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 33

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> "Anak yang lahir dari perkawinan yang sah dari seorang ayah Warga Negara Indonesia dan ibu warga negara asing."[52]

The prhase "*warga negara Indonesia*" is only appropriate with the definition of marriage. The applicant proposed the phrase and not based on all legal reasons. If judges agreed and followed applicant's think then will cause a parallel loss. The loss will not only befall for applicant but all concerned parties. Restrictions on citizen phrases further press the space for Indonesian people and obscure existing legal values. The judges with the legal basis stated as long as the application in unconstitutionality of Article 21 verse (1) and verse (3) and Article 36 verse (1) of Law Number 5 of 1960 then could become unreasonable by law.

The provisions of examining law and according to the judges an arrangement of land management must be in values of democracy which have been embedded in Indonesia. The values of democracy include economic democracy, means with accommodating the interests of all Indonesian tribes and nations. Through this reason we can expect the land as a basic source of capital and social resources can be used as a source of social welfare and justice for all the people of Indonesia. As a supporter and to make everything happens, the 1945 Constitution has laid the political foundation of national land law as part of the regulation of earth, water and natural resources which are contained in law. The political foundation was confirmed by Article 33 verse (3) of the 1945 Constitution, that the earth, water and contained natural resources were

[52] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 150

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controlled by state and used for the greatest prosperity of the people. Furthermore, the Law Number 5 of 1960 enacted and legalized.[53]

The judges used Article 1 verse (2) of Law Number 5 of 1960 confirmed that the earth, water and space and natural wealth in the territory of Indonesia belong to the people in Indonesian nation. Whereas the rights of the nation are sacred, eternal, and fundamental. Sacred because of awareness and acknowledgment that the land and natural resources are gift of God Almighty. The right is also eternal because relationship between nation and land in the territory of Indonesia will never end. Although, as long as Indonesian people become subjects and land as objects are always exist. Fundamental, because the right of nation becomes basis for the birth of basic right for every person or group to master, utilize, and enjoy the land and result for their welfare.

There was a legal dualism in governing land law before enactment of Law Number 5 of 1960, namely people who were subject to the Civil Code (*Burgerlijk Wetboek*) and indigenous people who were subject to customary law. The government ratified and promulgated Law Number 5 of 1960 because of the discriminatory state of the colonial law politics which was very detrimental to the Indonesian people. The constitutional basis which commanded for the establishment of Law Number 5 of 1960 was Article 33 of the 1945 Constitution.[54] The Article 33 is, "*perekonomian disusun sebagai usaha bersama berdasar atas asas kekeluargaan"*. The sentence of the article

[53] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 145
[54] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 146

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contains elements of togetherness in managing the existing economic situation. Whereas the next paragraph sentence is *"cabang-cabang produksi yang penting bagi negara dan yang menguasai hajat hidup orang banyak dikuasai oleh negara"*. The state has full right or authority over the affairs or interests of people. Therefore, all branches of production or industry are in the state's provision. Regarding Indonesia's natural processing that the government also has the power to manage in order to pick up people's welfare. This is stated in verse three, *"bumi dan air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besar kemakmuran rakyat"*.

The judges included articles in the basic consideration because of Law Number 5 of 1960 was to affirm the points of law must be the explanation of Article 33 of the 1945 Constitution. The principle of Law Number 5 year 1960 can also be explained as a principle of nationality. The principle implies only Indonesian people can have a full relationship with earth (land), water, space, and wealth. The principle of nationality can also be understood as a principle states that only Indonesian citizens have land rights, they have a relationship with the earth (land), water and space without distinguishing between men, women and fellow citizens. These laws stipulate the entire territory of Indonesia is the homeland unity of all Indonesians and they unite as an Indonesian nation.

Provisions in the norm of Law Number 5 of 1960 which are based on the principle of nationality contained in Article 1, Article 2, Article 9, Article 20 verse (1),

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Article 21 verse (2), Article 30 verse (1), Article 31 verse (1), and Article 46 verse (1). The axample of Article 9 of Law Number 5 of 1960 states:

> "Hanya warga negara Indonesia dapat mempunyai hubungan sepenuhnya dengan bumi, air dan ruang angkasa, dalam batas-batas ketentuan Pasal 1 dan 2"
>
> "Tiap-tiap warga negara Indonesia, baik laki-laki maupun wanita mempunyai kesempatan yang sama untuk memperoleh sesuatu hak atas tanah serta untuk mendapat manfaat dari hasilnya, baik bagi diri sendiri maupun keluarganya." [55]

The essence of norm in this article is only Indonesian citizens can have a full relationship with earth, water and space. Every Indonesian citizen, both male and female, has the same opportunity to obtain land right and to get benefits and results. The existence of this article because of strict regulation of land ownership. Foreigners are not permitted to own land assets except foreign companies in Indonesia and to develop the country. Foreigners or foreign companies only have usage rights and are preferred to the interests of Indonesian citizens. Another aim of the law's principle is to protect land rights or property rights, so that land in this country will not fall into foreign hands. In the colonial era Indonesians had only used BW and now there is no tolerance for foreign nationals to own land or have a direct relationship with earth, water, space and natural wealth.

[55] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 148

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2). Legal basis for judges in the provisions of Article 29 verse (1), verse (3) and verse (4) Article 35 verse (1) of Act Number 1 of 1974.[56]

The judges in the case of marriage based on Article 1 of Act Number 1 of 1974 revealed a marriage was the bond of a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the One God Almighty. Judges explained the wife's right and position are balanced with husband's right and position, both in domestic life and in the community so that everything or problems arise can be resolved and discussed together. The discussion which held by husband and wife is in the form of agreement, panel of judges based on Article 29 paragraph (1) of Act Number 1 of 1974. Husband and wife use the marriage article can make an agreement at the time or before marriage takes place. Both husband and wife with mutual consent can make written agreement authorized by marriage registrars or notaries. The judges explained an agreement could not be ratified if violates the law's limits, religion and decency, as well as the legal conditions of the agreement. Lawmakers make marriage agreement's instruments because everything in the household life was not only related to the rights and obligations of husband and wife, but was dealing with property problems. The problem of property can be a factor of disharmony between two parties (husband and woman).

In the section of wealth or property ownership rules, the judges explained based on Law Number 5 Year1960, they stated that Indonesian citizens could have a

[56] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 152

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certificate with land ownership right. If someone has obtained a certificate of ownership then he married to a foreign national, so he must release the ownership rights to another legal subject who has the right within one year after marriage. The rules have been written clearly that foreign people eternally not permitted to have any form of property or land, so applicant's proposition can be justified if the applicant cannot have a house at any time. However, through human right instrument that have been forgotten by some special lawmakers, the existing contradiction of legislations would become increasingly clear.

The applicant's phrase "*pada waktu atau sebelum perkawinan dilangsungkan"* in Article 29 verse (1), phrase "*sejak perkawinan dilangsungkan"* in Article 29 verse (3), and phrase "*selama perkawinan berlangsung"* in Article 29 verse (4) Law Number 1 of 1974 hav limited the freedom of both parties (applicant and husband) for accomplishing "*perjanjian*" or when they will do it.[57] These articles should be contradictory to Article 28E verse (2) of the 1945 Constitution. Regarding unconstitutionality of Article 35 verse (1) of Law Number 1 of 1974 the judges stated with the stipulation of Article 29 verse (1) Law Number 1 of 1974 was contradictory to the 1945 Constitution. In conditional, provision of Article 35 verse (1) of Act Number 1 of 1974 was related to the proposition of Article 29 verse (1) of Act Number 1 of 1974. In other words, there are no unconstitutional problem on Article 35 verse (1) of Act Number 1 of 1974. Based on above legal basis, the judges stated Article 29

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[57] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 154

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verse (1) Law Number 1 of 1974. Based on above basic laws that panel of judge stated Article 29 verse (1), verse (3) and verse (4) of Law Number 1 of 1974 are reasonable on law and Article 35 verse (1) of Law Number 1 Year 1974 is unreasonable on law.[58]

The judges accepted the phrase of applicant in their conclusion. The phrase in the time of making and filing a marriage agreement will no longer limited before and when the marriage held. Husband and wife can make and submit a marriage agreement during marriage's life. Furthermore, regarding the phrase in the validity period of a marriage agreement, a marriage agreement will apply from the date of marriage holding. The last part in receipt of application, an agreement can be regarding property or other agreement in the marriage time. The contents cannot be changed except with an agreement of both parties (husband and wife) and the change must not harm a third party.

B. Fiqh Muamalah Principles of Ibnu Taimiyah and Marriage Agreement

1. Fiqh Muamalah Principles of Ibnu Taimiyah

Fiqh muamalah has been contributed a lot in the human's transactions. Author written through fiqh muamalah view and taken fiqh principles of Ibnu Taimiyah. Ibn Taimiyah had wrote fiqh muamalah principles in making easy transaction laws. The written transactions are including waqf transactions, grants, marriage assets, marriages and so on. Ibnu Tamiyah had especially provided an overview of how Muslims can carry out all possible transactions and distinguish them from prohibited transactions.

[58] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 155

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According to Ibn Taimiyah, all about transaction laws are permitted when they do not violate religious provisions.

Based on the fiqh muamalah principles of Ibn Taimiyah, that all humans's transactions are permissible when they do not deny religion. The statement became a big point from his view when we look at the context of human transactions. Ibn Taimiyah had replied the problem of fiqh muamalah through compilation of scholar's opinions, such as opinions of Imam Abu Hanifah, Imam Malik, Imam Syafi'i and Imam Ahmad ibn Hanbal, Abu Daud Az Dzahiri, and also the scholar followers of these schools. Ibn Taimiyah accommodated scholar's opinions and made number of rules to facilitate the public in seeing legal provisions of the transactions. In this section, author describes the profile of Ibn Taimiyah, the course of his life, scientific competence and explanation of the fiqh muamalah rules. The principles of fiqh muamalah are explained by author as tool in anylising marriage agreement. The describtions are:

a. Ibnu Taimiyah

Ibn Taimiyah's real name is Taqiyuddin Abu al Abbas Ibnu Abd al Halim bin al Imam Majduddin Abil Barakat Abd al Salam bin Muhammad bin Abdullah bin Abi Qasim Muhammad bin Khuddlarbin Ali bin Taimiyah al Harrani al Hambali.[59] Experts briefly had mentioned his full name with Taqiyuddin Abu Abbas bin Abd al Halim bin Abd al Salam bin Taimiyah al Harrani al Hambali.[60] But people are quicker to recognize

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[59] Jon Kamil, *Perkawinan Antar Pemeluk Agama Perspektif Fiqh Ibnu Taimiyyah*, *Tesis,* (UIN Suska Riau : pasca sarjana, 2011), 18

[60] Khalid Ibrahim Jindan, *Teori Politik Islam : Telaah Kritis Ibnu Taimiyyah tentang Pemerintahan Islam,* Alih bahasa Masrinin,(Jakarta:Risalah Gusti, 1995), 24

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his name as Taqiyuddin Ibn Taimiyah or more popular Ibn Taimiyah. He was born on Monday the 10th of Rabiul Awal in 661 H to coincide with January 22, 1263 AD in the city of Harran.[61] He was born at the house of a Hanbali school leader in one of the most important bases of this school, the city of Harran. In this house, he grew up spent his first six years so that later debriefings he had received in the neighbourhood gave him influence until his old age. When Harran was invaded by Mongol army in 1270 AD, the Taimiyah family moved to Damascus to continue to live and settle in the city.[62] At that time Ibn Taimiyah was only about seven years old, the family settled in Damascus until they fell in love with their place of residence and status there. So Sheikh Abdul Halim-the father-obtained the position at the Damascus Mosque to teach there and became a hadith teacher who later became famous. Meanwhile, little Ibn Taimiyah was not known in any case because he was a child until he began his study with father in Damascus and then he moved between a number of teachers there.[63]

Ibn Taimiyah came from a large, educated and respected family. Ibn Taimiyah received his education in the midst of his own family environment, which for generations was a clever figure. In addition to learning from his own family environment, he went to study with a number of prominent scholars in the city of Damascus at that time. Although Ibn Taimiyah grew up under the shade of the Hanbali

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[61] Syaikh Ahmad Farid,*60 Biografi Ulama Salaf*, *Terj Masturi Irham dan Assmu'i Taman*,(Jakarta: Pusstaka Al-Kautsar, 2006), 784

[62] M. Arskal Salim G.P., *Etika Intervensi Negara Perspektif Etika Politik Ibnu Taimiyah,* (Jakarta: Logos Wacana Ilmu, 1998) 40, lihat juga *Ibnu Katsir,* vol 14,136-137

[63] Shaib Abdul Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,* (Jakarta: Citra, 2009), 68

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school, his insights were very broad covering other legal schools. His knowledge also reached out about philosophy, sufism, kalam, mantiq, literature, history, and various other disciplines.

Ibnu Taimiyah was known as a true person who has a kind and generous character, especially for the poor and needy. He was also known as a person who was firm in his stand and was not want to be uncompromising in upholding the truth. However, personally Ibn Taimiyah was not a perfect figure. On many occasions, he was precisely not able to hold anger and emotion.[64] Ibn Taimiyah was lived in a house which in more than a century carried the banner of the Hanbali school. That's where the figures of this school come and go. They inherited language fluency, so they mastered rhetoric and wrote many books.

During the days of his life, he was a teacher, orator, and author until 698 H. At the age of 22, he was got a big examination and that was losing his father. Then the position left by his father in the Great Mosque of Damascus was left empty just to be occupied by one of his children. Like his predecessors, people left each other as teacher and sermon. So a young Ibn Taimiyah, was called to replace his father's position in a ceremony witnessed by several prominent scholars. He was explained in the field of interpretation that he was famous only within a month and then Ibn Taimiyah was provided with the opportunity to deliver his second lecture at Umawi Mosque of Damascus.

[64] Salim G.P., *Etika Intervensi Negara Perspektif Etika Politik Ibnu Taimiyah,* 40

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Ibn Taimiyah was once disputed by fuqaha and Sufis. they were from Damascus, Sham, Cairo and Alexandria. The problem of dispute was the result of the lecture he delivered on the pulpit. In his lecture he talked about the substance and character of Allah SWT. In the discussion that he used was never carried out by the scholars before, because of fear, *warak* attitude, and clinging to the limits of the Shari'a which forbade in depth discussion of substances and the attributes of Allah. He was also included the arguments that contain the beliefs of *Tajsim* adherent, namely understanding the character of Allah SWT and He resided above the *Arsy* is in the true meaning, and He moved (place). The faces, hands, eyes and feet of Allah which mentioned in several verses of the Qur'an and hadits are essential meanings, not metaphors. The problem was a major dispute directed at Ibn Taimiyah so that the Governor of Damascus immediately put it out even though the problem was extinguished like a coal that was still embedded in ash.[65]

There was another dispute broke out until Ibn Taimiyah was summoned to Egypt and brought to trial in the era 795. Imprisoned for approximately one and a half (1.5) years. Then he was released and ordered to settle in Alexandria and then spent eight months at an island fortress. In Alexandria he launched attacks against the Sufis until there was some great chaos during his existence there. In 708 H, Sultan Nasir summoned him to Cairo after taking up the throne of the sultanate. Sultan Nashir glorified and honoured and appointed Ibn Taimiyah as a teacher in a school which he

[65] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,*71

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founded later, until in 712 H he returned to Damascus. Previously, in 699 H he took part in the resistance to fight the Tatars and the Muslim forces lost, even the Tatars occupied several cities in Sham and the sultan retreated to Egypt.[66]

In the several years later, in 720 H there was another dispute with the people in Damascus. Because Ibn Taimiyah argued about the *talak* (divorce) which contradicted the fatwa of four recognized schools. Ibn Taimiyah was called before the court and was prohibited from giving fatwas. He was sentenced to five months in prison by court then released on order from the Sultan and the situation calmed down again. Riots due to disagreements with Ibn Taimiyah occurred again in 728 H, it was about the fatwa on the prohibition of traveling to make pilgrimages to the graves of the Prophets and pious people. Ibn Taimiyah was reproached everywhere until a great fitnah. However, there was several scholars who defended him, so that they able to ease the tension.

Ibn Taimiyah defended his opinion by showing books of his opinion and the scholars who agreed him like Ibn Kutubi Shafi'i, Muhammad ibn Abdurrahman Baghdadi Maliki (the Sheikh of the Maliki school of Muntashiriyah School), Abdul Mukmin bin Abdul Khatib, and Jamaluddin bin Bulti Hanbali. In addition, there were books from some of the scholars of Damascus who defended him and among them was Abu Amr bin Aul Walid Maliki. The figure of a good sultan moved Ibn Taimiyah to a place in Damascus to reduce tension. He was accompanied by his brother in a room

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[66] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,*72

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that had been reserved for him. All existing needs had always fulfilled by the Sultan. In a place that Ibn Taimiyah lived with his brother, he wrote books to refute his opponents.[67]

Ibnu Tamiyah's opponents from the Maliki school also refuted in the section of interpretation. The books Ibnu Taimiyah had written were issued and there were many answers or statements supporting his views. Many people known the contents of a book written by Ibn Taimiyah after being disseminated. So after that he suffered severe illness for about twenty days. On Monday 20 Zulqa'dah 728 H coincided with September 26 or 27, 1328 AD, Ibn Taimiyah passed away after completing his hard struggle.[68]

Ibn Taimiyah as a scholar has great competences, he became Syeikh Mujtahid in his lifetime. The story about his life began when he showed his wisdom at the time after his beloved father died. He was appointed to give interpretive lectures in the Great Mosque of Damascus. Like the predecessors who always and mutually pass on the position of teacher and preacher. He was young at the age of 22 at the time, but had given interpretive lectures in a large mosque in the presence of scholars and great figures such as the highest judge (*qadhi al qudhat*), Shafi'i religious leaders, Tajudin Fizari in addition to the leading scholars of Hanbali school. Until after his first lecture, many people discussed the contents of the lecture delivered by young Ibn Taimiyah. Reputation that quickly skyrocketed and about a month or more after that Ibn Taimiyah

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[67] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,*75
[68] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,* 76

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provided a pulpit for his second lecture at Damascus Umawi Mosque in the section of interpretation.[69]

At the beginning of Ibnu Taimiyah's expertise before interpretation, he was already an expert in the field of fiqh and his *usul* and *furu*. With his fiqh expertise he has been known as mujtahid and reformer. The ijtihad he has done and has led him to the dispute point between those who admired and supported him with those who reject him. That is the main factor for the emergence and dissemination of his works. There were two branches became theme of the conversation, such as reproach on the matter of *taqlid* and his fatwas which was contrary to his own school. Regarding Ibnu Taimiyah's reproach, such as reproach the applying way in the taqlid of the four schools and denials of Ibn Taimiyah on the scholar's fatwas even though there was a definite proof (dalil) that showed opposite. The slogan in this case is "Let the door of ijtihad be open to competent people".[70]Furthermore, in the case of the fatwa Ibn Taimiyah issued fatwas which contrary to his own school, namely the Hanbali school and sometimes contrary to the four schools. Although, the latter fatwa was not much, but it caused a tremendous thirst in a world that was immersed in the *taqlid* which man seen the truth only in what was inherited from his school and anything contradicted the school was vanity no matter argument.

Ibn Taimiyah in his life had attended school where his scientific environment was in the Hanbali school. The school was one of the schools that strictly adhered to

[69] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,* 79
[70] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,* 81

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the hadith, this was very natural that school leaders gave special attention to the hadiths and hadith science more than existence as a source of Shari'a. He was often referred to hadith and postulated with it when giving lectures and in his writings. In many ways Ibn Taimiyah was very eager to convey the quality of hadith, such as *shahih*, weak or *dhaif*. Imam Ibn Taimiyah also referred to the source of hadiths in the sunan books, for example he stated a hadith which he had mentioned and the hadith was narrated by Imam At Tirmidhi and or Imam Ahmad, Ibn Taimiyah also stated whether there was a hadith in the Sunan books and whether this hadith was practiced or not by the salaf scholars. The above disclosures have a major influence on listeners and readers.[71]

The above explanation as result of admirer's assesment for Ibn Taimiyah, but there was an opinion stated this assessment was not supported by facts. Shaib Abdul Hamid said Ibn Taimiyah with his position has no competence in the field of hadith.[72] Sahib said Ibnu Taimiyah has often made mistakes in hadith, there are extraordinary contradictions almost unmatched, for example:

1). Ibn Taimiyah was not hold on to the hadith texts which he has narrated, both those he wrote and those narrated from the memorization in the assemblies, as in his argument he quoted a Qudsi hadith, "Verily Allah says, 'Verily my guardians are men people who are devoted regardless of their circumstances and wherever they are.[73] This Hadith is narrated by Hakim in the *al-*

[71] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,*83, see *Tarikh Ibnu Wardi,* Jil. 2, 409
[72] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,*83, see *Tarikh Ibnu Wardi,* Jil. 2, 85
[73] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,* 83, see *Tarikh Ibnu Wardi,* Jil. 2, 86, lihat juga *Al Furqan baina Auliya' ar-Rahman wa Auliya' asy-Syaitahan,* 11

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Mustadrak, namely the Prophet's hadith is *marfu*', not the Qudsi hadith. The original text was, "My guardians among you are devoted people," while the phrase "regardless their circumstances are" is Mujahid's words.[74]

2). Ibn Taimiyah was often repeated the association of hadith at source or narration, such as the hadith narrated by Bukhari and others from Abu Hurairah, that the Prophet said, Allah said, "Whoever opposes My guardian means he declares war on Me.[75] "This Hadith is not narrated by Bukhari from Abu Hurairah, but narrated by Tabhrani of Abu Umamah.[76]

b. Fiqh Muamalah Principles of Ibnu Taimiyah

Fiqh Muamalah Principles of Ibnu Taimiyah divide into several human's transaction cases. The transactions of human are contract, agreement, marriage, grant, waqf (religious foundation) and other cases. However, author chooses two relevant principles for marriage agreement. The first principle is the validity of agreement and transaction based on oral agreement and application and the second principle is permission and prohibition of agreement. The second principle also divided into two sections. Two relevant principles of Ibnu Taimiyah are:

1). اَلْعُقُوْدُ تَصِحُّ بِكُلِّ مَا دَلَّ عَلَى مَقْصُوْدِهَا مِنْ قَوْلٍ أَوْ فِعْلٍ

[74] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,* 83, see *Tarikh Ibnu Wardi,* Jil. 2, 86 lihat juga *Al Mustadrak,* jil. 4, 73

[75] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu,* 87, see *Al Furqan baina Auliya' ar-Rahman wa Auliya' asy-Syaitahan,* 5

[76] Hamid, *Ibnu Taimiyah Rekam Jejak Sang Pembaharu* ,87, see *Jamaah Ad Da'wah ila al Qur'an wa as Sunnah.*

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Ibnu Taimiyah writes this first second for human's basic law in order to make several agreements or transactions. The principle is a compilation of fiqh scholar's opinions and they are from among schools of fiqh.[77] He explains the principle through scholar's opinions and they are tree sections:

a). The scholars of fiqh permit people to make several transaction or agreements. Ibnu Taimiyah explains the agreements must be applied through *ijab* and *qabul* agreement, for example lease, grant, marriage, waqf, slavering and others. He writes this principle from Imam Ahmad's opinion and this opinion derived from Shafi'i School's opinion. The principle gives dispensation for disabilities for example a dumb and another disability whom does not able to make the agreements and transactions. Ibnu Taimiyah permits a dumb to make agreements through signs and writings. He requires the willingness in every agreement with verse of Al Qur'an:

إِلَّا أَنْ تَكُوْنَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ

The verse means: except in the applied trading on the basis of willingness among you.[78]

People are able to make agreements or transactions as long as they apply them with willingness. Willingness as substance to fulfill people's agreement in order to make no denials and betrayals.

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[77] Syaikh Ibnu Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* (Riyadh: Daar al Jauzy, 2003), 153

[78] Departemen Agama Republik Indonesia, *Al Qur'an dan Terjemahannya,* (Bandung: Syamil Qur'an), 83

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b). The scholars of fiqh permit every transaction and agreement through application. The agreement could arise and happen becauce of application. Ibnu Taimiyah states every transaction or agreement unless agreed and fulfilled through application. Agreements are also permitted by scholars of fiqh because people always agree them through application without oral agreement and writing agreement. Ibnu Taimiyah gives example people build a mousqe and permit everyone to pray inside. People do not need to agree with others in order to pray and use because they have already intended for society. The next example people build a place for washing and other people are free to use without making an agreement with makers, and several examples of leasing tarnsactions are laundry, tailor, boat leasing and others. Once people lease a tailor to wash their clothes, tailor to make their clothes and lease the boat in order to bring the s [79]

Ibnu Taimiyah says everyone can make an agreement as long as they fulfiill through application and execution. People always require applications and executions in order to make no destruction and cancellation. He argued with people's transaction in the era of Prophet PBUH, people make any of transaction and agreement through application and execution without oral agreement and writing agreement. Ibnu Taimiyah derives the axplanation from Imam Ahmad's

[79] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 154

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opinion and Imam Ahmad taken from Hanafi school's majority opinion. The Syafi'i's opinion in the principle is included in this explanation.

c). The scholars of fiqh permit all of transactions with conditions which are able to fulfil the purpose. The conditions are oral agreement and writing agreement or in the term of sale and lease. People can make any of agreement with their own language and custom. Ibnu Taimiyah explains syara' does not limit the terminology for agreement. There is no limitation for determining any language in order to make conditions in the agreement. We can understand people can make any of agreement and transaction with their own language as long as able to fulfill the purpose. The third opinion derived from majority opinion of Imam Malik and Imam Ahmad.[80]

Ibnu Taimiyah does not only discus this principle through three majority opinions of scholars but he so discus the custom of society. Everyone can make an agreement in accordance with their custom and permitted by Ibnu Taimiyah. According to Ibnu Taimiyah, basically all of customs are permissible and people are free to make. He explains people are able to make any of transactions in accordance with their custom as long as no religious literature of syara' that prohibit.

Author concludes that Ibnu Taimiyah has already permitted people to make any of agreement through *ijab-qabul*, application, oral and writing. He so has permitted all of people's customs as long as no religious literature that prohibit and it meant every custom is permissible. Ibnu Taimiyah writes these priciple's explanation and he derives

[80] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 155

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a lot of explanations from Imam Ahmad's opinions. The little Ibnu Taimiyah grew up among Hanbali School's environment then he always argued with Hanbali's opinions.

2). الْعُقُوْدُ وَالشُّرُوْطُ فِيْهَا فِيْمَا يَحِلُّ مِنْهَا وَيَحْرُمُ وَمَا يَصِحُّ مِنْهَا وَيَفْسُدُ

Ibnu Taimiyah writes this second principle regarding permissible transaction, forbidden transaction, a legitimated transaction and a broken transaction. The second transaction divided by Ibnu Taimiyah into two sections, the first section is basically all of transactions are prohibited and the second transaction is basically all of transactions are permissible.[81] The two sections of principle are:

a). الْأَصْلُ فِى الْعُقُوْدِ وَالشُّرُوْطِ الحَظَرُ

Ibnu Taimiyah explains all of transactions or people agreements are prohibited as long as no prohibiting literature of syara'. This principle can also mean everyone can not make any of transaction or agreements as long as syara' prohibits them. The second principle seem as textual expression because it derived by Ibnu Taimiyah from scholars of Dzahiri school. The scholars of Dzahiri have always textually argued with Al Qur'an and Hadits. There are lot of Abu Hanifah's opinions derived from Dzahiri's

[81] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah*, 256

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opinions. The scholars of Syafi'i, a group of Maliki's scholar and Hanbali's scholar have also derived the argumentations from Dzahiri.

Ibnu Taimiyah does not claim that Imam Ahmad always agree with Abu Daud Ad Dzahiri. Hanbali has been analogy an agreement's cancellation because there no *atsar* and *qiyas.* The group of Hanbali's scholar have also canceled the agreement because conditions cannot fulfill the substance of agreement. The scholars of Hanbali school stated the cancellation of conditions as long as deny the agreement. The scholars of Dzahiri school have not permitted all of transactions and conditions as long as there are no religious literatures and scholar's agreement that permit them. When scholars of Dzahiri school do not permit the agreement then they use previous law. However, they are more out of the opinion oh the majority of scholars.

Imam Abu Hanifah said in the book that he prohibited the conditions as long as they deny the agreement. He argued the case but allowed conditions which able to suspend the agreement. He has also prohibited a choice of time in the sale transaction, a termination of good's delivery and rented goods.[82] Ibnu Taimiyah gives an example a man agrees with buyer to sell the tree then he has right to take the fruits because their agreement is only selling the tree. Imam Abu Hanifah allows a termination in the lease and freeing slaves through the job. Ibnu Taimiyah explains people cannot absolutely make any of transaction because of their fulfilment but Abu Hanifah allows the cancellation of agreement through peoples's willingness.

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[82] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 257

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The principle allows everyone to make all of transactions and agreements, so Ibnu Taimiyah justify the agreement as long as not destruct it. Author understand people can make several conditions to reach an agreement dan they able to cancel as long as comes with kindness. Finally, Ibnu Taimiyah has majority explanation of scholar's opinions which allow conditions as long as not deny the agreement.

b). اَلْأَصْلُ فِى اْلعُقُوْدِ وَالشُّرُوْطِ الْجَوَازُ وَالصِّحَّةُ

Ibnu Taimiyah explains people are able to make an agreement, conditions and transactions. The principle allows all of agreements as long as no prohibiters of *nas* and *qiyas*. This second principle written by Ibnu Taimiyah dan he derived the explanations from original opinions of Imam Ahmad bin Hanbal. According to Ibnu Taimiyah that scholars of Hanbali have argued in the first principle but their majority opinions are in this second principle. Imam Malik has also allowed people to make agreements and conditions, however Imam Ahmad has more argumentations to allow people. Ibnu Taimiyah concludes that argumentations of majority scholars have not allowed a making of conditions than Imam Ahmad's argumentations.[83]

Imam Ahmad generally allows people to make conditions and agreements through his arguments of *atsar* and *qiyas*. He does not prohibit the agreement with previous scholar's argumentations. Ibnu Taimiyah gives example of Imam Ahmad's

[83] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 261

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opinions such marriage conditions, he allows people to make several conditions in order to reach good purpose. Imam Ahmad argues with hadith of Prophet Muhammad PBUH which means the most appropriate conditions for people are conditions which able to allow marriage relationship.[84] The scholars of fiqh state conditions of marriage are most appropriate to fulfill than conditions of sale and lease. Ibnu Taimiyah also allows conditions of agreement as long as not deny the purposes, his explanation is based on Al Qur'an, Prophetic Traditions, *ijma', i'tibar*, *istishab*. The verse of Al Qur'an is:

يَاأَيُّهَا الَّذِيْنَ آمَنُوْا أَوْفُوْا بِالْعُقُوْدِ

The verse means: o believers fill the transactions (your promises)[85]

The word "transactions" means agreements, this meaning of verse is general then Ibnu Taimiyah says Allah's promises are included in every agreement. If Allah does not directly command to make an agreement although he commands to fulfil all of transactions. People are obligated to agree each other in order to fulfill an agreement they made. Ibnu Taimiyah argues for this case with verse of Al Qur'an whis is:

وَاتَّقُوْا اللهَ الَّذِيْ تَسَاءَلُوْنَ بِهِ وَالْأَرْحَامَ

[84] Hadits oleh Imam Bukhari nomor 2721, Muslim nomor 1418, Turmudzi 1127 dan beberapa perawi dengan kitab sunnahnya.
[85] QS. Al Maidah (5): 1

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The verse means: and have fear all of you to Allah whom you ask each other by His name, and (nurture) kinship relationship.[86]

Ibnu Taimiyah says word "you ask each other by His Name" according to Dhihaq it means "all of you are making agreement and transactions". Based on this meaning. People have right to obligate others in order to apply the agreement. People are obligateed to fulfill the agreements and the transactions such as fulfillment, calncellation and profit.[87] According to Ibnu Taimiyah's explanation there are command to fulfill an agreement, to make an agreement, conditions, ways to fulfill the obligations, to keep the obligations, prohibition, violation and betrayal in the Al Qur'an and Hadith. He said when there is a commad to fulfill and keep an agreement than its allowed by fiqh. There is no legitimation for agreement as long as not come with kindness and goof fulfillment. Author concludes when Syari' really commanded to fulfill an agreement the people are free to apply. Ibnu Taimiyah also writes the hadith of Prophet Muhammad PBUH:

[86] QS. An Nisa: 1

[87] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 266

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حَدَثَنَا كَثِيْرٌ بْنِ زَيْدٍ عَنِ الوَلِيْدِ بْنِ رِبَاحٍ عَنْ أَبِيْ هُرَيْرَةَ قَالَ: قَالَ رَسُوْلُ اللهِ صَلَى اللهُ عَلَيْهِ وَسَلَمَ "الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِيْنَ, إِلَّا صُلْحًا أَحَلَّ حَرَامًا أَوْ حَرَّمَ حَلَالًا, وَالْمُسْلِمُوْنَ عَلَى شُرُوْطِهِمْ إِلَّا شَرْطًا حَرَّمَ حَلَالًا, أَوْ أَحَلَّ حَرَامًا, رَوَاهُ التِرْمِيْذِي وَصَحَحَهُ

> Artinya: Zaid bin Katsir had told us and he heard from Walid bin Ribah from Abu Hurairah said: Prophet Muhammad pbuh has said: Moslems are permitted to make a peace agreement, unless they permit all kinds of prohibitions or prohibit all of permissions, and people of moslem are obligated to fulfil their conditions unless they prohibit all kinds of permission or permit all kinds of prohibitions.[88]

This hadith means people can make several agreements, conditions, and transactions. They are prohibited by Allah to make agreements and conditions which allow Allah's prohibitions dan prohibit His pemissions.[89] People are able to make several conditions in order to obligate the fulfilment of agreement and they must come with kindness. Ibnu Taimiyah gives an example such people of purchase agreement must fulfill their obligations, allow needs and properties as long as they do not deny the agreement.

Author concludes Ibnu Taimiyah is more focused on the second principle because the majority of Hanbali's school scholars agreed more cases in the second principle. The principle described people are able and free to make several transactions

[88] Imam at Tirmidzi, *Shahih Sunan at Tirmidzi,* 104

[89] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 274

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as long as no prohibiter of Al Qur'an, hadith, *atsar,* and *qiyas.* The entire kinds of transactions or agreements are prohibited to violate Allah's law and prohibitions.

We cannot separate emergence of Ibnu Taimiyah's principle of fiqh muamalah from the sophistication of his thoughts and he has a high capacity as a scholar. The Evidences and explanations of the quality of Ibn Taimiyah can be taken from the recognition of other scholars who lived in his time or afterwards, their assessment and / or comments on him. Like the adulation of Al Hafizh Syamsuddin Adz Dhahabi who said that our Shaykh Ibnu Taimiyah was an Islamic shaykh, a superior son of the time, sea of science and guardian of religion, then he also said that Ibn Taimiyah had a perfect insight on hadith narrators, *jarh wa ta'dil*, knows the ins and outs of the science of hadith, the short *sanad* and the long *sanad*, *shahih* and *dhaif,* memorizes the traditions of the hadith. Also, there is no one who equals his scientific degree or approaches him, he is extraordinary in mentioning the hadith and issuing the arguments, the one who is the most master of Al Kutub As Sittah and predicated on Al Musnid so that it is true that one who says that every hadith known to Ibn Taimiyah is not a hadith.[90]

There are other opinions mention the superiority of Ibn Taimiyah like Al Hafidz Ibn Sayyidans whom says Ibn Taimiyah from those who knew him. Ibn Taimiyah does have extensive knowledge and memorizes almost all the *sunnah* and *atsar*. If he speaks in interpretation, Ibn Taimiyah becomes holder of the flag, if he

[90] Syaikh Ahmad Farid, *60 Biografi Ulama' Salaf,* (Jakarta Timur: Pustaka Al Kautsar, 2006), 784

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gives a fatwa in jurisprudence then he becomes a person who knows his ultimate goals, if he speaks of hadith then he becomes the owner of his knowledge and history. If someone talks about comparative religion, no one does broader and has more knowledge than Ibn Taimiyah. He is a prominent person in every branch of science and scholars' who are smarter than his friends. The eyes of the person who saw Ibn Taimiyah and his own eyes did not see anyone approaching him.[91] Imam Kamaluddin Az Zamlakani says that since five hundred years ago no one seemed to know more about the hadith than Ibn Taimiyah. He also says that Ibn Taimiyah was their master, their shaykh, a shaykh, a priest, a great scholar who was second to none, Al Hafidz who was skilled, *zuhud*, *wira'i*, perfect insight, guardian of religion, Shaykh Al Islam, sir scholars, role models of noble priest or imam, defenders of the *sunnah*, heretics, heresy for Allah's servants, denier of heretics and religious dissident, leader of the scholars who practices his knowledge, the end of the mujtahid. That he was Abu Al Abbas Ahmad ibn Abdil Halim bi Abdissalam bin Taimiyah Al Harrani. May God elevates his tower and strengthen the pillars of religion with him.[92]

One of the students of Ibn Taimiyah like Al Hafidz Jalaludin As Suyuthi said while mentioning Allah's great names his eyes did not see someone who had more knowledge and stronger intelligence than someone who was called Ibn Taimiyah. A person who was zuhud in food, clothing and women. Ibn Taimiyah was also a man who was steadfast in defending the truth and jihad with everything possible. Imam Suyuthi

[91] Farid, *60 Biografi Ulama' Salaf,* 785
[92] Farid, *60 Biografi Ulama' Salaf,* 786

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also said that the Ibn Taimiyah was a syeikh, a priest, a great scholar, Al Hafidz, a critic, a jurist, a mujtahid, a mufassir, a man who had high expertise. He also called syeikh Al Islam, a zuhud figure, a rare person in his day, one of greatest scholars, one who is in the category of the ocean of knowledge, intelligent, zuhud, and unequaled. There is still some evidence of Ibn Taimiyah's greatness, as author took from the words of Imam Muhammad ibn Ali Asy Syaukani, he stated after Ibn Hazm passed away, he did not know humans whose knowledge is equal to Ibn Taimiyah. He did not think that the age between the two figures would not allow people to approach him. He stated that Ibn Taimiyah had the right to do ijtihad because he had accumulated conditions of ijtihad. Ibn Taimiyah was not only assessed when he reached his adult age, but his scientific capacity has been recognized from his childhood. Narrated from Al Hafidz Al Bazzar stated that he had received a story from someone he trusted about Shaykh Ibn Taimiyah when he was a child.[93]

When Ibn Taimiyah wanted to go to a library, he was blocked by a Jew whose house was on the road to the library. The Jew asked him about certain problems because he saw in the child an extraordinary intelligence. Every time he is asked, he answered with quick and precise answers. This made the Jews amazed. Then every time he passed the Jew he gave information that showed the religious falsehood of the Jews. As a result of Ibnu Taimiyah did, the Jew converted to Islam and tried his best to practice Islam. According to Muhammad Ali As Syaukani, this was due to the blessings of Shaykh Ibn

[93] Farid, *60 Biografi Ulama' Salaf,* 787

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Taimiyah, who at that time was still a child. The Mufassir Al Hafiz Ibn Katsir in his book that when Ibn Taimiyah came with her father and his family in Damascus when he was a child. Ibnu Taimiyah heard the hadith of Ibn Abdiddaim, Ibn Abi Al Yusr, Ibn Abdan, Shaikh Shamsuddin Al Hanbali, Sheikh Shamsuddin bin Ata 'Al Hanafi, Sheikh Jamaluddin Al Baghdadi, An Najib bin Al Miqdad Ibn Abi Al Khair, Ibn Allan, Ibn Abi Bakr Al Jews, Al Kuhli Abdurrahim Al Fakh Ali, Ibn Syaiban, Ash Neural bin Al Qawas, Zaynab bint Makki and other scholars. Besides hearing the hadith from them, he also read and researched his own hadith.[94]

2. Marriage Agreement in The Perspective of Fiqh Muamalah Principles of Ibnu Taimiyah

Author will explain and analyze the marriage agreement from judge's decision. The marriage agreement will be reviewed and analyzed with fiqh muamalah principle of Ibn Taimiyah. Author took principles of fiqh from Ibn Taimiyah's composition book called "*al Qawa'id an Nuraniyyah*". Ibn Taimiyah compiled and accommodated a number of scholar's opinions to become a number of fiqh muamalah principle, while author took two fiqh principles which appropriate with concept of agreement. Author also used conceptual research as a form of research approach in this case. This approach were departed from the views and doctrines that were so developed in law science.

[94] Syaikh Ahmad Farid, *60 Biografi Ulama' Salaf,* 788, lihat juga *Al Bidayah wa An Nihayah* karya Ibnu Katsir, hlm 49-50

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Marriage Agreement according to judges is an agreement between husband and wife based on deliberation and their decision. Judges explained husband and wife are able to make an agreement before marriage or during household life. Marriage authority and notary can legalize the marriage agreement. The marriage agreement is prohibited to violate law's limits, religious norms, immoral, and conditions.[95] The judges revealed this concept of marriage agreement from Article 29 verse (1) Law Number 1 of 1974 before judicial review. Marriage agreement is always about property agreement which has owned by husband and wife during their marriage or household life. Both husband and wife seek their own property through their effort, then a marriage agreement as a tool to separate the joint property. When there is a third party within agreement then also be in effect to them.[96]

The judges revealed a marriage agreement heads for separate the joint property in order to give their own responsibility. Both husband and wife so have their own responsibility to settle the debt. They have no obligation to take any permission for each other in order to process the property after making a marriage agreement. Author found a main point of the case, people are able to make any of marriage agreement before marriage and when marriage takes place. The point means there is a limitation time in making a marriage agreement. We are able to find this case in all of marriage laws including positive laws and Islamic Law. Finally, the judges decided to remove this limitation time in making marriage agreement. Husband and wife can make

[95] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 152
[96] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 153

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marriage agreement during their household life. They have freedom to decide every material within marriage agreement such as forms and points.

The judges decided husband and wife are able to make marriage agreement before marriage and during household life. Officer of Marriage or notary can validate the marriage agreement. Husband and wife whom have made marriage agreement with third party must be obey the obligation. The marriage agreement might be in effect to third party. The decision of Judges of Constitutional Court is, *""Pada waktu, sebelum dilangsungkan atau selama dalam ikatan perkawinan kedua belah pihak atas persetujuan bersama dapat mengajukan perjanjian tertulis yang disahkan oleh pegawai pencatat perkawinan atau notaris, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut"*.[97]

Judges have announced a marriage agreement can be in effect to husband and wife when marriage takes place unless both husband and wife have decided another decision within agreement. Husband and wife are free to decide everything within marriage agreement as long as not violate laws of marriage. Several materials of marriage agreement will never be permitted to violate the third party. The freedom for husband and wife to make any point of agreement has derived from Constitutional Court's decision and it reads, *"Perjanjian tersebut mulai berlaku sejak perkawinan dilangsungkan, kecuali ditentukan lain dalam Perjanjian Perkawinan*", dan "*Selama perkawinan berlangsung, perjanjian perkawinan dapat mengenai harta perkawinan*

[97] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 156

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atau perjanjian lainnya, tidak dapat diubah atau dicabut, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah atau menncabut, dan perubahan atau pencabutan itu tidak merugikan pihak ketiga".[98]

Author views these points of marriage agreement with agreement's concept of fiqh muamalah principles and takes materials from decision of Constitutional Court Number 69/PUU-XIII/2015. Here, fiqh muamalah principles divide into two sections. Each of section has its own explanation according scholar's opinions, they are:

a. Each of agreement and transaction become valid as long as based with oral agreement or agreed through applications.[99]

    1. The marriage agreement is made with joint decision among husband, wife and third party. Makers of agreement are husband and wife or they have extra maker such as third party. They can agree and make any decision with application of agreement. Principle of fiqh explains an agreement must be made with oral agreement and later its application. Husband and wife have not only agreed with oral agreement but they must be with letter agreement. The marriage agreement could be valid by principle because husband and wife have made with oral agreement, and it could not be valid as long as parties have not agreed each other. Author understood a marriage agreement's creation must be based with willingness of

[98] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 157
[99] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 153

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agreement. Ibnu Taimiyah revealed in the principle of fiqh an agreement can be validated as long as based with *ijab-qabul*, willingness, and in another case of agreement could only be validated with application. The transactions and any of agreements have also be legal as long as people fulfil their conditions.

2. The judges of Constitutional Court revealed a marriage agreement is made for separating joint property. Husband and wife can separate their property in order to make no more case of property, in example a wife has no need to ask husband's permission to use her own property and vice versa.[100] This concept is not much different with any transactions in the fiqh principle because fiqh principle said a transaction must be with application and without any oral agreement. Ibnu Taimiyah gave an example once people built a mosque and cleaning room for society and they did not need an oral agreement in order to use.
3. People or husband and wife are able to make a marriage agreement before marriage or during household life. Fiqh principle specifically does not give a time in order to make marriage agreement, and means husband and wife can make marriage agreement whenever they agree. Author only finds the limitation time in the Marriage Laws. The Judges have no find several problems when they remove the limitation then husband and wife are free

[100] Constitutional Court Decision Copy Number 69/PUU-XIII/2015, 152

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to decide anything about agreement. Husband and wife are able to make several conditions as long as not violate the Laws. Judges give a freedom for husband and wife to make their conditions and agreement. This freedom is in line with fiqh principle that everyone is free to make any of agreement, transactions and conditions. Husband and wife can make written conditions within marriage agreement as long as able to fulfil the agreement.

b. The law of agreement and conditions (allowed agreement, prescribed agreement, legal agreement and broken agreement)[101]

1. The marriage agreement as a solution for husband and wife in order to separate their joint property. Marriage agreement creation becomes necessity as long as husband and wife have a big problem of property. They are able to create any of agreement anytime and have laws. Fiqh Principle revealed to prohibit all of agreements and conditions unless people have religious literature of allowance. This prohibition derived by Ibnu Taimiyah from az Dzahiri's opinion. Az Dzahiri has always textually decided in a problem with using al Qur'an and Hadith. Author found religious literature of agreement and it says Allah commands people to fulfil the promises. The literature as a verse of al Maidah verse 1 and it

[101] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 256

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says in term of agreement or promises. We can understand people have to make an agreement or promises and they so have to fulfil them later.

Husband and wife are able to make a marriage agreement before marriage and during household life. Here, Imam Abu Daud az Dzahiri does not limit the time of agreement creation then people are free to make an agreement anytime. The note for marriage agreement have become common thing among people, the we cannot state its allowance or prohibition. Although Imam Abu Daud az Dzahiri have no explanation of literature but we have a reason for allowing the note. Husband and wife sometimes have conditions in which to fulfil an agreement. Conditions must be fulfilled by husband and wife and none can remove it. The making of conditions is in line with Imam Ahmad bin Hanbal's opnion and he says people can make several conditions in order to reach an agreement. Imam Ahmad reveals an agreement could be invalid as long as makers do not fulfil the conditions.

People or husband and wife are able to make several conditions in order to reach an agreement. The agreement could be invalid as long as husband or wife violate the conditions. Judges announced through trial of Constitutional Court a marriage agreement would become invalid as long as husband and wife violate their conditions. The legal conditions of a marriage agreement as an obligation for them. When husband and wife agree in an immoral condition then fiqh principle would be prohibit their

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agreement or conditions. The fiqh principle points an example such husband and wife separate their joint property in order to reach an immoral condition. This principle prohibits and cancels all of conditions which have built to bring immoral. When there is a third party within marriage agreement there is another responsibility of husband and wife. They have to give a profit for third party in order to obey the law. People may look to the marriage law that prohibits husband and wife to harm the third party. Principle of fiqh muamalah have no legalization to permit any of damage and loss, it obliges a kindness and an advantage within agreement. Marriage agreement of judge's decision did not explicitly the cancellation of marriage agreement but their explanation was able to include the cancellation of an agreement. Principle of fiqh muamalah permited the cancellation of agreement and this permission has been explained by Ibnu Taimiyah. The principle explained people are able to cancel an agreement or transaction based on their agreement. Author can see husband and wife are able to cancel their points of marriage agreement and alter them with new points. Ibnu Taimiyah explained through his principle to permit people's cancellation on the agreement. The cancellation of agreement must be based on a willingness and agreement of makers.

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2. The entire of agreements and conditions are legalized and permitted by fiqh principle.[102] Marriage agreement in the perspective of Indonesian Law must be made by husband and wife. The state law of marriage was not prohibited husband and wife to make a marriage agreement unfortunately it limited the time of making an agreement. Judges of Constitutional Court removed the limitation for making an agreement through judicial review because it was damaged people' right. In the day after judicial review people are able to make a marriage agreement whenever they want. The regulation legalizes every husband and wife to process the points of marriage agreement. Fiqh principle have also permitted everyone to make the agreements and conditions, it means husband and wife are free to make any of marriage agreement. The society are free to make the agreements and conditions as long as no prohibition of religious text according to principle of fiqh muamalah. Ibnu Taimiyah derived the permission from Imam Ahmad's opinion and he has been permitted agreements and conditions. Husband and wife can make several agreements as long as not violate laws, religion and conditions. The limitations of marriage agreement become positive value for family and obviously for husbands and wives. These limitations are in line with fiqh principle in which prohibit the violation on sharia and conditions.

[102] Taimiyah, *Al Qawa'id an Nuraniyyah al Fiqhiyyah,* 256

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The separation of joint property by husband and wife in order to process their own property without permission later. Husband and wife are able to set each of property during the household life and to make no trouble on the properties. The principle of fiqh have not explicitly explained the separation of joint property but its separation can be permitted by principle. Separation of joint property permitted by fiqh because it has been included in the agreement. The agreement has several purposes and they are separation of properties, separation of debt, removing a permission on properties and assets. The makers of marriage agreement have to reach the purposes later because principle of fiqh has been obligated people to reach the purposes. The fiqh principle has explained the legalization of agreement by reaching the purposes. The materials, points, conditions, and purposes or marriage agreement are prohibited to violate the laws, religion and morality. These prohibitions are in line with fiqh principle's prohibitions.

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CHAPTER IV

CONCLUSIONS AND SUGGESTIONS

A. Conclusions

The author can take two conclusions from legal materials analysis in previous chapter. The first conclusion is about legal basis which have used by panel of judges to decide the constitution case and second conclusion is marriage agreement which has analyzed by researcher through fiqh rules of Ibnu Taimiyah's. Both conclusions of the study are:

1. The judge panel has argued that all of Indonesian Republic natural resources are full rights of nation and this argument is based on Law Number 5 of 1960. The Indonesian people rights are sacred, eternal, and fundamental. In Law Number 5 of 1960 there is also principle of Nationality. Based on the law, the people authority to process and own everything in Indonesia cannot be disturbed or seized. Foreign

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nationals are not entitled to own Indonesia's natural wealth for any reason. Article 28E verse (2) of the 1945 Constitution has also been used by judge panel in their legal argument. A problem that panel found there was contradiction in legislation, this law was related to human rights that had been forgotten by lawmakers. Applicant's application can be accepted in part by judge panel on the reason of human rights inequality.

2. Marriage agreement is a legal agreement which is made by husband and wife through a discussion. Husband and wife are free to create the materials and points of agreement and they are free to set them all time. The makers of agreement or husband and wife have to apply the materials and points, when they violate the agreement then it could be null and void. The fiqh principle does not always obligate the discussion of makers but they can deal with the custom. People are free to make any of materials and points of agreement as long as not violate sharia, and they have to create kindness without failure. Husband and wife or every maker are able to agree in order to revoke the agreement and alter it with new one. The agreement concept of fiqh principle is in line with judge's decision in term of limitation and freedom of creation.

B. Suggestions

1. The government and lawmakers may consider human right provisions for disappearing contradiction between laws. The existing law such as marriage agreement so as not to harm Indonesian citizen's lives.

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2. The study results are to be a supporting material for legal practitioners and academics so that they can be broader in studying law science. The deepening and detailing of marriage law studies can help society to understand more law in environment.

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APENDIXES

CENTRAL LIBRARY OF MAULANA MALIK IBRAHIM STATE ISLAMIC UNIVERSITY OF MALANG

CENTRAL LIBRARY OF MAULANA MALIK IBRAHIM STATE ISLAMIC UNIVERSITY OF MALANG

SALINAN

PUTUSAN
Nomor 69/PUU-XIII/2015

DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA

MAHKAMAH KONSTITUSI REPUBLIK INDONESIA

[1.1] Yang mengadili perkara konstitusi pada tingkat pertama dan terakhir, menjatuhkan putusan dalam perkara Pengujian Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria dan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, diajukan oleh:

Nama : **Ny. Ike Farida**
Alamat : Perum Gd. Asri Nomor A-6/1, Jalan Raya Tengah, Gedong, Jakarta Timur

Dalam hal ini berdasarkan Surat Kuasa Khusus, bertanggal 24 Juni 2015, memberi kuasa kepada Yahya Tulus Nami. S.H., Ahmad Basrafi, S.H., Stanley Gunadi, S.H., Edwin Reynold, S.H., dan Ismayati, S.H., Advokat, Advokat Magang, dan Konsultan Hukum, beralamat di Jalan H.R. Rasuna Said Kav. C-5, Jakarta 12940, baik bersama-sama maupun sendiri-sendiri, yang bertindak untuk dan atas nama pemberi kuasa;

Selanjutnya disebut sebagai -- **Pemohon;**

[1.2] Membaca permohonan Pemohon;
Mendengar keterangan Pemohon;
Mendengar dan membaca Keterangan Presiden;
Mendengar dan membaca keterangan ahli dan saksi Pemohon;
Memeriksa bukti-bukti Pemohon;
Membaca kesimpulan Pemohon;

2. DUDUK PERKARA

[2.1] **Menimbang bahwa Pemohon telah mengajukan permohonan dengan surat permohonan, bertanggal 11 Mei 2015, yang diterima di Kepaniteraan**

II. KEDUDUKAN HUKUM (*LEGAL STANDING*) PEMOHON

Pemohon adalah perorangan warga negara Indonesia yang mempunyai kapasitas hukum, hubungan hukum, dan kepentingan hukum untuk mengajukan permohonan *a quo*.

9. Bahwa Pasal 51 ayat (1) huruf a UU MK dan penjelasannya mengatur sebagai berikut:

   "(1) Pemohon adalah pihak yang menganggap hak dan/atau kewenangan konstitusionalnya dirugikan oleh berlakunya undang-undang, yaitu:
   a. perorangan warga negara Indonesia.
   b. ....."

   Penjelasannya menyatakan:

   "Ayat (1)
   Yang dimaksud dengan "hak konstitusional" adalah hak-hak yang diatur dalam UUD 1945."
   "Huruf a
   Yang dimaksud dengan "perorangan" termasuk kelompok orang yang mempunyai kepentingan sama."

   Dengan demikian, Pemohon diklasifikasikan sebagai perorangan warga negara Indonesia yang dirugikan hak konstitusionalnya karena diperlakukan berbeda dimuka hukum oleh Undang-Undang.

10. Bahwa selanjutnya dalam PMK No. 06/PUU-III/2005 dan PMK No. 11/PUU-V/2007 telah menentukan 5 (lima) syarat kerugian hak dan/atau kewenangan konstitusional sebagaimana dimaksud dalam Pasal 51 ayat (1) UU MK sebagai berikut:
    a. adanya hak dan/atau kewenangan konstitusional Pemohon yang diberikan oleh UUD 1945.
    b. hak dan/atau kewenangan konstitusional tersebut, dianggap telah dirugikan oleh berlakunya Undang-Undang yang dimohonkan pengujian.
    c. hak dan/atau kewenangan tersebut harus bersifat spesifik (khusus) dan aktual atau setidak-tidaknya potensial yang menurut penalaran yang wajar dapat dipastikan akan terjadi.
    d. adanya hubungan sebab-akibat (*causal verband*) antara kerugian yang dimaksud dengan berlakunya Undang-Undang yang dimohonkan pengujian.

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e. adanya kemungkinan bahwa dengan dikabulkannya permohonan maka kerugian konstitusional tersebut tidak akan atau tidak lagi terjadi.

11. Bahwa Pemohon adalah perorangan warga negara Indonesia berdasarkan bukti: *(i)* Kartu Tanda Penduduk warga negara Indonesia Nomor 3175054101700023, *(ii)* Visa Kunjungan Orang Asing Nomor DA 3078438 (yang dikeluarkan oleh pemerintah Jepang) dan *(iii)* Kartu Keluarga No. 3175051201093850. Pemohon adalah seorang perempuan yang menikah dengan laki-laki berkewarganegaraan Jepang berdasarkan perkawinan yang sah dan telah dicatatkan di Kantor Urusan Agama Kecamatan Makasar Kotamadya Jakarta Timur Nomor 3948/VIII/1995, pada tanggal 22 Agustus 1995, dan telah dicatatkan juga pada Kantor Catatan Sipil Propinsi DKI Jakarta sebagaimana dimaksud dalam Tanda Bukti Laporan Perkawinan Nomor 36/KHS/AI/1849/1995/1999, tertanggal 24 Mei 1999. Terkait pernikahannya, Pemohon tidak memilki perjanjian perkawinan pisah harta, tidak pernah melepaskan kewarganegaraannya dan tetap memilih kewarganegaraan Indonesia serta tinggal di Indonesia.

12. Bahwa bukti di atas adalah bukti resmi, valid, dan sah yang dikeluarkan oleh pemerintah negara Republik Indonesia dan pemerintah negara Jepang (visa kunjungan) yang tidak dapat dibantah kebenarannya bahwa Pemohon adalah warga negara Indonesia asli, tunggal, dan tidak berkewarganegaraan ganda.

13. Bahwa Pemohon kerap bercita-cita untuk dapat membeli sebuah Rumah Susun ("Rusun") di Jakarta, dan dengan segala daya upaya selama belasan tahun Pemohon menabung, akhirnya pada tanggal 26 Mei 2012 Pemohon membeli 1 (satu) unit Rusun. Akan tetapi setelah Pemohon membayar lunas Rusun tersebut, Rusun tidak kunjung diserahkan. Bahkan kemudian perjanjian pembelian dibatalkan secara sepihak oleh pengembang dengan alasan suami Pemohon adalah warga negara asing, dan Pemohon tidak memiliki Perjanjian Perkawinan. Dalam suratnya Nomor 267/S/LNC/X/2014/IP, tertanggal 8 Oktober 2014 pada angka 4, pada pokoknya pengembang menyatakan:

    Bahwa sesuai Pasal 36 ayat (1) UUPA dan Pasal 35 ayat (1) UU Perkawinan, seorang perempuan yang kawin dengan warga negara asing dilarang untuk membeli tanah dan atau bangunan dengan status

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Hak Guna Bangunan. Oleh karenanya pengembang memutuskan untuk tidak melakukan Perjanjian Pengikatan Jual Beli (PPJB) ataupun Akta Jual Beli (AJB) dengan Pemohon, karena hal tersebut akan melanggar Pasal 36 ayat (1) UUPA.

Surat Pengembang Nomor Ref. 214/LGL/CG-EPH/IX/2012, tertanggal 17 September 2012, angka 4 yang menyatakan:

"Bahwa menurut... Berdasarkan Pasal 35 Undang-Undang Nomor 1 Tahun 1974 tentang Pekawinan (UU Perkawinan) yang mengatur sebagai berikut:

"Harta benda yang diperoleh selama perkawinan menjadi harta bersama"

Berdasarkan ketentuan tersebut diatas, maka dapat kami simpulkan bahwa apabila seorang suami atau isteri membeli benda tidak bergerak (dalam hal ini adalah rumah susun/apartemen) sepanjang perkawinan maka apartemen tersebut akan menjadi harta bersama/ gono gini suami istri yang bersangkutan. Termasuk juga jika perkawinan tersebut adalah perkawinan campuran (perkawinan antara seorang WNI dengan seorang WNA) yang dilangsungkan tanpa membuat perjanjian kawin harta terpisah, maka demi hukum apartemen yang dibeli oleh seorang suami/isteri WNI dengan sendirinya menjadi milik isteri/suami yang WNA juga."

14. Bahwa belum hilang rasa kecewa dan dirampasnya hak-hak asasi Pemohon, serta perasaan diperlakukan diskriminatif oleh pengembang, Pemohon dikejutkan dengan adanya penolakan pembelian dari pengembang yang kemudian dikuatkan oleh Pengadilan Negeri Jakarta Timur melalui Penetapan Nomor 04/CONS/2014/ PN.JKT.Tim, tertanggal 12 November 2014, yang pada amarnya berbunyi:

"Memerintahkan kepada Panitera/Sekretaris Pengadilan Negeri Jakarta Timur.... untuk melakukan penawaran uang..... kepada: IKE FARIDA, S.H., LL.M, beralamat di..... Selanjutnya disebut sebagai TERMOHON CONSIGNATIE.

Sebagai Uang Titipan/consignatie untuk pembayaran kepada Termohon akibat batalnya Surat Pesanan sebagai akibat dari tidak terpenuhinya

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syarat obyektif sahnya suatu perjanjian sebagaimana diatur dalam Pasal 1320 KUHPerdata, yaitu pelanggaran Pasal 36 ayat (1) Undang-Undang No. 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria".

Bahwa dapat disimpulkan hak PEMOHON untuk memiliki Rusun musnah oleh berlakunya Pasal 36 ayat (1) UUPA dan Pasal 35 ayat (1) UU Perkawinan.

15. Bahwa selanjutnya selain pasal-pasal tersebut diatas, Pasal 21 ayat (1), ayat (3) UUPA dan Pasal 29 ayat (1), ayat (3) dan ayat (4) UU Perkawinan juga sangat berpotensi merugikan Hak Konstitusional Pemohon, karena pasal-pasal tersebut dapat menghilangkan dan merampas Hak Pemohon untuk dapat mempunyai Hak Milik dan Hak Guna Bangunan.
16. Bahwa dengan berlakunya pasal-pasal "*Objek Pengujian*" dalam Permohonan ini, menyebabkan hak Pemohon untuk memiliki Hak Milik dan Hak Guna Bangunan atas tanah menjadi hilang dan terampas selamanya. Sehingga Pemohon sebagai warga negara Indonesia tidak akan pernah berhak untuk mempunyai Hak Milik dan Hak Guna Bangunan seumur hidupnya. Pemohon sangat terdiskriminasikan dan dilanggar hak konstitusionalnya.
17. *Bahwa sebagai warga negara Indonesia*, Pemohon mempunyai hak-hak konstitusional yang sama dengan warga negara Indonesia lainnya sebagaimana dijamin dalam Pasal 28D ayat (1), Pasal 27 ayat (1), Pasal 28E ayat (1), Pasal 28H ayat (1) dan ayat (4) UUD 1945.

   Pasal 28D ayat (1) UUD 1945:

   "(1) Setiap orang berhak atas pengakuan, jaminan, perlindungan, dan kepastian hukum yang adil serta perlakuan yang sama di hadapan hukum."

   Pasal 27 ayat (1) UUD 1945:

   "Segala warga negara bersamaan kedudukannya di dalam hukum dan pemerintahan dan wajib menjunjung hukum dan pemerintahan itu dengan tidak ada kecualinya."

   Pasal 28E ayat (1) UUD 1945:

   "Setiap orang bebas …., memilih tempat tinggal di wilayah negara…."

   Pasal 28H ayat (1) UUD 1945:

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"Setiap orang berhak hidup sejahtera lahir dan batin, bertempat tinggal, dan mendapatkan lingkungan hidup yang baik dan sehat serta berhak memperoleh pelayanan kesehatan."

Pasal 28H ayat (4) UUD 1945:

"Setiap orang berhak mempunyai hak milik pribadi dan hak milik tersebut tidak dapat diambil alih secara sewenang-wenang oleh siapa pun"

Pasal 28I ayat (2) UUD 1945:

"Setiap orang berhak bebas dari perlakuan yang bersifat diskriminatif atas dasar apapun dan berhak mendapatkan perlindungan terhadap perlakuan yang bersifat diskriminatif itu."

Pasal 28I ayat (4) UUD 1945:

"Perlindungan, pemajuan, penegakan, dan pemenuhan hak asasi manusia adalah tanggung jawab negara, terutama pemerintah."

18. Bahwa oleh karenanya berdasarkan Pasal 51 ayat (1) huruf a UU MK, Pemohon mempunyai kapasitas hukum dan kepentingan hukum untuk mengajukan permohonan *a quo*.

    Pasal 51 ayat (1) huruf a UU MK:

    "(1) Pemohon *adalah pihak yang menganggap hak dan/atau kewenangan konstitusionalnya dirugikan oleh berlakunya undang-undang, yaitu*

    a. Perorangan warga negara Indonesia."

19. Berdasarkan uraian tersebut diatas, maka telah NYATA dan TERANG Pemohon mempunyai Kedudukan Hukum (*legal standing*) dan hubungan hukum (*causal verband*) untuk mengajukan permohonan pemeriksaan Pengujian Materiil (*Judicial Review*) atas Pasal 21 ayat (1), ayat (3) dan Pasal 36 ayat (1) UUPA; serta Pasal 29 ayat (1), ayat (3), ayat (4) dan Pasal 35 ayat (1) UU Perkawinan terhadap UUD 1945

III. BAHWA PEMOHON SANGAT MENDERITA DAN SENGSARA KARENA DIBERLAKUKANNYA PASAL 21 AYAT (1), AYAT (3) DAN PASAL 36 AYAT (1) UUPA; SERTA PASAL 29 AYAT (1), AYAT (3), AYAT (4) DAN PASAL 35 AYAT (1) UU PERKAWINAN

20. Bahwa Pemohon sangat terluka, terdiskriminasikan hak-haknya, sengsara dan menderita baik secara psikologis/kejiwaan maupun secara moral, dan

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[3.7] Menimbang bahwa oleh karena Mahkamah berwenang mengadili permohonan *a quo* dan Pemohon memiliki kedudukan hukum (*legal standing*) untuk mengajukan permohonan *a quo*, selanjutnya Mahkamah akan mempertimbangkan pokok permohonan;

Pokok Permohonan

[3.8] Menimbang bahwa pokok permohonan Pemohon adalah pengujian konstitusionalitas norma Undang-Undang, *in casu* Pasal 21 ayat (1) dan ayat (3) serta Pasal 36 ayat (1) UU 5/1960 dan Pasal 29 ayat (1), ayat (3), dan ayat (4), serta Pasal 35 ayat (1) UU 1/1974 yang menyatakan:

Pasal 21 ayat (1) dan ayat (3) UU 5/1960:

(1) Hanya warga negara Indonesia dapat mempunyai hak milik.

...

(3) Orang asing yang sesudah berlakunya Undang-Undang ini memperoleh hak milik karena pewarisan tanpa wasiat atau percampuran harta karena perkawinan, demikian pula warga negara Indonesia yang mempunyai hak milik dan setelah berlakunya Undang-Undang ini kehilangan kewarganegaraannya wajib melepaskan hak itu di dalam jangka waktu satu tahun sejak diperolehnya hak tersebut atau hilangnya kewarganegaraan itu.

Jika sesudah jangka waktu tersebut lampau hak milik itu tidak dilepaskan, maka hak tersebut hapus karena hukum dan tanahnya jatuh pada Negara, dengan ketentuan bahwa hak-hak pihak lain yang membebaninya tetap berlangsung.

Pasal 36 ayat (1) UU 5/1960:

(1) Yang dapat mempunyai hak guna bangunan ialah:

a. warga negara Indonesia;

b. badan hukum yang didirikan menurut hukum Indonesia dan berkedudukan di Indonesia.

Pasal 29 ayat (1), ayat (3), dan ayat (4) UU 1/1974:

(1) Pada waktu atau sebelum perkawinan dilangsungkan, kedua pihak atas persetujuan bersama dapat mengadakan perjanjian tertulis yang disahkan oleh Pegawai pencatat perkawinan, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut.

...

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(3) Perjanjian tersebut mulai berlaku sejak perkawinan dilangsungkan.

(4) Selama perkawinan berlangsung perjanjian tersebut tidak dapat dirubah, kecuali bila dari kedua belah pihak ada persetujuan untuk merubah dan perubahan tidak merugikan pihak ketiga.

Pasal 35 ayat (1) UU 1/1974:

(1) Harta benda yang diperoleh selama perkawinan menjadi harta bersama.

terhadap Pasal 28D ayat (1), Pasal 27 ayat (1), Pasal 28E ayat (1), serta Pasal 28H ayat (1) dan ayat (4) UUD 1945;

Menurut Pemohon berlakunya Pasal 21 ayat (1) dan ayat (3) serta Pasal 36 ayat (1) UU 5/1960 dan Pasal 29 ayat (1), ayat (3), dan ayat (4) serta Pasal 35 ayat (1) UU 1/1974 merampas hak konstitusionalnya sebagai warga negara. Hak konstitusional Pemohon tersebut, antara lain, hak untuk bertempat tinggal dan mendapatkan lingkungan hidup yang baik. Setiap orang (warga negara) ingin memiliki atau memberikan bekal bagi dirinya dan anak-anaknya untuk masa depan yang salah satunya dengan membeli tanah dan bangunan yang bertujuan sebagai tempat tinggal, tempat berlindung, dan juga sebagai tabungan atau bekal di masa depan;

[3.9] Menimbang bahwa terhadap dalil Pemohon tersebut, Mahkamah selanjutnya mempertimbangkan sebagai berikut:

Pengujian Pasal 21 ayat (1) dan ayat (3) serta Pasal 36 ayat (1) UU 5/1960

[3.9.1] Bahwa terhadap pengujian konstitusionalitas Pasal 21 ayat (1) dan ayat (3) serta Pasal 36 ayat (1) UU 5/1960, Mahkamah mempertimbangkan sebagai berikut:

Bahwa sejalan dengan pandangan hidup berbangsa dan bernegara, kesadaran, dan cita hukum bangsa Indonesia berdasarkan Pancasila, tanah merupakan karunia Tuhan Yang Mahakuasa bagi seluruh rakyat Indonesia yang wajib disyukuri keberadaannya. Wujud dari rasa syukur itu adalah bahwa tanah harus dikelola dengan sebaik-baiknya untuk kepentingan pembangunan manusia Indonesia seutuhnya sesuai dengan perkembangan peradaban dan budaya bangsa Indonesia. Pengelolaan tanah harus berdasarkan kepada pengaturan hukum yang mampu mempersatukan bangsa Indonesia yang terdiri atas berbagai latar belakang budaya dan adat-istiadat bangsa Indonesia yang bersifat komunal

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5. AMAR PUTUSAN

Mengadili,

Menyatakan:

1. Mengabulkan permohonan Pemohon untuk sebagian;

1.1. Pasal 29 ayat (1) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 3019) bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 sepanjang tidak dimaknai "*Pada waktu, sebelum dilangsungkan atau selama dalam ikatan perkawinan kedua belah pihak atas persetujuan bersama dapat mengajukan perjanjian tertulis yang disahkan oleh pegawai pencatat perkawinan atau notaris, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut*";

1.2. Pasal 29 ayat (1) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 3019) tidak mempunyai kekuataan hukum mengikat sepanjang tidak dimaknai "*Pada waktu, sebelum dilangsungkan atau selama dalam ikatan perkawinan kedua belah pihak atas persetujuan bersama dapat mengajukan perjanjian tertulis yang disahkan oleh pegawai pencatat perkawinan atau notaris, setelah mana isinya berlaku juga terhadap pihak ketiga sepanjang pihak ketiga tersangkut*";

1.3. Pasal 29 ayat (3) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 3019) bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 sepanjang tidak dimaknai "*Perjanjian tersebut mulai berlaku sejak perkawinan dilangsungkan, kecuali ditentukan lain dalam Perjanjian Perkawinan*";

1.4. Pasal 29 ayat (3) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor

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3019) tidak mempunyai kekuatan hukum mengikat sepanjang tidak dimaknai "*Perjanjian tersebut mulai berlaku sejak perkawinan dilangsungkan, kecuali ditentukan lain dalam Perjanjian Perkawinan*";

1.5. Pasal 29 ayat (4) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 3019) bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 sepanjang tidak dimaknai "*Selama perkawinan berlangsung, perjanjian perkawinan dapat mengenai harta perkawinan atau perjanjian lainnya, tidak dapat diubah atau dicabut, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah atau mencabut, dan perubahan atau pencabutan itu tidak merugikan pihak ketiga*";

1.6. Pasal 29 ayat (4) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 3019) tidak mempunyai kekuatan hukum mengikat sepanjang tidak dimaknai "*Selama perkawinan berlangsung, perjanjian perkawinan dapat mengenai harta perkawinan atau perjanjian lainnya, tidak dapat diubah atau dicabut, kecuali bila dari kedua belah pihak ada persetujuan untuk mengubah atau mencabut, dan perubahan atau pencabutan itu tidak merugikan pihak ketiga*";

2. Memerintahkan pemuatan putusan ini dalam Berita Negara Republik Indonesia sebagaimana mestinya;
3. Menolak permohonan Pemohon untuk selain dan selebihnya.

Demikian diputuskan dalam Rapat Permusyawaratan Hakim oleh sembilan Hakim Konstitusi yaitu Arief Hidayat, selaku Ketua merangkap Anggota, Anwar Usman, Wahiduddin Adams, Manahan M.P Sitompul, Patrialis Akbar, Aswanto, Suhartoyo, Maria Farida Indrati, dan I Dewa Gede Palguna, masing-masing sebagai Anggota, pada **hari Senin, tanggal dua puluh satu, bulan Maret, tahun dua ribu enam belas**, dan **hari Selasa, tanggal delapan belas, bulan Oktober, tahun dua ribu enam belas,** yang diucapkan dalam Sidang Pleno Mahkamah Konstitusi terbuka untuk umum pada **hari Kamis, tanggal dua puluh tujuh, bulan**

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Oktober, tahun dua ribu enam belas, selesai diucapkan **Pukul 10.51 WIB**, oleh sembilan Hakim Konstitusi, yaitu Arief Hidayat, selaku Ketua merangkap Anggota, Anwar Usman, Wahiduddin Adams, Manahan M.P Sitompul, Patrialis Akbar, Aswanto, Suhartoyo, Maria Farida Indrati, dan I Dewa Gede Palguna, masing-masing sebagai Anggota, dengan didampingi oleh Achmad Edi Subiyanto sebagai Panitera Pengganti, dihadiri oleh Pemohon, Presiden atau yang mewakili, dan Dewan Perwakilan Rakyat atau yang mewakili.

KETUA,

ttd.

Arief Hidayat

ANGGOTA-ANGGOTA,

ttd.	**ttd.**
Anwar Usman	**Wahiduddin Adams**
ttd.	**ttd.**
Manahan M.P Sitompul	**Aswanto**
ttd.	**ttd.**
Patrialis Akbar	**Suhartoyo**
ttd.	**ttd.**
Maria Farida Indrati	**I Dewa Gede Palguna**

PANITERA PENGGANTI,

ttd.

Achmad Edi Subiyanto

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No	Day/Date	Subject of Consultation	Signature
1.	April, 24 2018	Proposal	
2.	Mei, 19 2018	Proposal Review	
3.	June, 06 2018	Chapter 1 and layout	
4.	July, 20 2018	Chapter 2 and 3	
5.	August, 30 2018	Review of Chapter 1, 2 and 3	
6.	September, 7 2018	Review all of Indonesian Chapter	
7.	October, 31 2018	Review all of English Chapter	
8.	November, 1 2018	Review all of English Chapter	
9.	November, 15 2018	Review all of English Chapter	
10.	November, 21 2018	Review all of English Chapter	

Malang, 29 November 2018
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o.b. Dean
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