

**The Application of the Marriage Agreement After the Decision of the
Constitutional Court Num: 69/PUU-XIII/2015
About the Ratification of the Deed of Agreement
Marriage By Notary**

Sayuti

Email: sayuti.bian@gmail.com

Lecture of High School of Law Science (STIH) Gunung Jati, South Tangerang City, Indonesia

ABSTRACT

A marriage agreement can only be made at the time or before the marriage takes place but after the issuance of the Constitutional Court decision, Article 29 of the Marriage Law paragraph (1) adds the phrase "while in the marriage bond", resulting in the making of the marriage agreement no longer having to be done before or during the day. a marriage is carried out, but a married couple can make a marriage agreement as long as the marriage bond is in progress. Then in paragraph (1) there is also the addition of the phrase "a written agreement legalized by a marriage registrar or a notary public". Prior to this decision, the marriage registrar employee could ratify the marriage agreement. After the Constitutional Court decision, the Notary is given the authority to ratify the marriage agreement as stated in the Constitutional Court Ruling. ". The research used is juridical empirical research where the data collection is done by direct interviews with notaries, academics, advocates and the public. The results showed that the Constitutional Court Decision No. 69 / PUU-XIII / 2015 has expanded the scope of the principle of freedom of contract.

Keywords: Marriage Agreement, Constitutional Court Decision, Notary

A. Background

Humans as social , are created by God who have various needs in their lives and every human being certainly wants to fulfill their needs appropriately to be able to live as perfect humans, both individually and as part of society. Indonesia has positive laws that regulate and protect its citizens, both in general and in particular, including regarding marriage. Marriage is a sacred behavior that makes interaction behavior between the opposite sex honorable and of worship value.¹ This harmonious interaction creates married life.² Marriage is included as a basic need for every human being, the purpose of which is to form a happy and eternal family or household based on the One Godhead..³ Marriage is a social reality everywhere, encountered or experienced by almost everyone.⁴

Legally, marriage is regulated in the 1945 Constitution of the Republic of Indonesia Chapter X Article 28 b paragraph (1) of the fourth amendment, which reads that everyone has the right to form a family and continue their offspring through marriage. Marriage is then regulated in Law no. 16 of 2019 concerning amendments to Law no. 1 of 1974 concerning marriage.

Article 1338 jo.1340 of the Civil Code stipulates that a marriage agreement can deviate from the principles in contract law, for example an agreement only applies to the parties who make it while a marriage agreement, apart from being valid for married couples, can also be binding on third parties. In terms of binding for third parties, the marriage agreement must be ratified first in order to fulfill the principle of publicity. Based on the principle of publicity, the ratification of a marriage agreement by a Notary is considered contrary to Law Number 30 of 2004 as amended by Law Number 2 of 2014 concerning the Position of a Notary, so it is advisable that the marriage agreement must be registered with the marriage registrar to be recorded in the Register. and Quotations of Marriage Certificates, for those who are Muslim, namely at the Office of Religious Affairs and for non-Muslims at the Office of the Civil Registry. the recording, the elements of the principle of publicity are fulfilled and can be binding on third parties. The definition of ratification in the decision of the Constitutional Court is considered ambiguous, because

¹ Mohd. Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama dan Zakat Menurut Hukum Islam*, Jakarta: Sinar Grafika, 1995, hal. 44

² Monte Neil S, *Marriage Facts*, Harvard Journal of Law and Public Policy Vol 31 No. 1, 2008, hal 366

³ Tengku Erwin Syahbana, *Sistem Hukum Perkawinan Pada Negara Hukum Berdasarkan Pancasila*, Jurnal Ilmu Hukum Vol. 3 No. 1, Medan, 2014, hal. 1

⁴ Muhammad Amin Summa, *Hukum Keluarga Islam di Dunia Islam*, Jakarta: Raja Grafindo Persada, hal. 4

such as giving new authority to Notaries in the form of ratification of marriage agreements, there are no definite implementation instructions regarding the procedures or procedures for ratifying marriage agreements ratified by Notaries, related to the Notary's authority in ratifying Notaries must be careful and be careful about their powers.

B. Formulation of the Problem

1. How is the application of the marriage agreement by the Notary after the decision of the Constitutional Court Number: 69/PUU-XIII/2015?
2. What hinders the application of the decision of the Constitutional Court Number: 69/PUU-XIII/2015 by a Notary in terms of ratifying a marriage agreement?

C. Literacy

1. Legal Certainty Theory

According to Hans Kelsen, law is a system of norms. Norms are statements that emphasize the "should" or *das sollen* aspects by including some rules about what must be done. Norms are the product of deliberative human action. Laws containing general rules serve as guidelines for individuals to behave in society, both in relation to fellow individuals and in relations with the community. These rules become limitations for society in burdening or taking action against individuals. The existence of these rules and the implementation of these rules create legal certainty.⁵

This theory is used to answer how the legal certainty of an authentic deed made by an authorized official which in this case is a marriage agreement where the community trusts a notary to make or ratify a marriage agreement with the aim of providing legal certainty and having perfect evidentiary power.

a) Theory of Justice

Natural Law theories from Socrates to Francois Geny, still maintain justice as the crown of law. Natural Law Theory prioritizes "the search for justice".⁶

b) Theory of Legal Effectiveness

The study of legal effectiveness is an activity that shows a general problem formulation strategy, namely a comparison between legal reality and legal ideals, specifically seen the level between law in action (law in action) and law in theory

⁵ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Kencana, Jakarta, 2008, hal. 58

⁶ Carl Joachim Friedrich, *Filsafat Hukum Perspektif Historis*, Nuansa dan Nusamedia. Bandung. 2004. hal. 24

(law in theory) or with In other words, this activity will show the relationship between law in the book and law in action.⁷

D. Research Methodology

1. Types and Sources of Data

Data sources are one of the most important parts of research. Therefore, researchers must know the source of the data in the study is the subject from which the data can be obtained.⁸

a. Primary data

In this study, the writer used primary data from interviews and direct observations to several notaries in Tangerang. Primary data is data that comes from the original or first source where data is generated. The data obtained from the main actors are directly related to the object of research. This data must be sought through sources or in technical terms respondents, namely the people we make the object of research or the people we use as a means of getting information or data..⁹

b. Data sekunder

The writer uses secondary data that has been collected to solve the problem at hand. In this study, the secondary data sources are literature, articles, journals and websites on the internet related to research conducted related to the Constitutional Court Decision Number: 69/PUU-XIII/2015, and other supporting documents that can be used to strengthen the data. primary.

1) Primary legal Sources

- a) Basic norms or rules, namely the Preamble to the 1945 Constitution of the Republic of Indonesia;
- b) Basic Regulations, namely the 1945 Constitution of the Republic of Indonesia;
- c) Legislation (Laws, Government Regulations, and Regional Regulations).

The laws and regulations used in this research are:

- a) Law Number 16 of 2019 concerning Marriage
- b) Article 1313 of the Civil Code concerning Agreements

⁷ Soleman B. Taneko, *Pokok-Pokok Studi Hukum dalam Masyarakat*, Jakarta: Rajawali Press, 1993, hal. 47-48.

⁸ Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktik*, Rineka Cipta. Jakarta. 2006. hal. 129.

⁹ Umi Narimawati, *Metodologi Penelitian Kualitatif dan Kuantitatif : Teori dan Aplikasi*, Agung Media. Bandung. 2008. hal. 98.

2) Secondary Legal Sources

The material that is helpful or supports primary legal material in research that will strengthen the explanation in it. Among the secondary legal materials in this research are books, theses, journals, and documents that review the Application of Marriage Agreements After the Decision of the Constitutional Court Number: 69/PUU-XIII/2015 Regarding Ratification of Marriage Agreements by Notaries as analysis in this study.

3) Tertiary legal materials

The material that provides instructions or explanations of primary and secondary legal materials such as legal dictionaries, encyclopedias, newspapers, internet information, and others.

2. Data Collection Techniques

a. Document Study

Document study is a data collection technique that is not directly addressed to the research subject in order to obtain information related to the research object.¹⁰

b. Observasi

Observation is a data collection technique that has specific characteristics when compared to other techniques. Observation is not limited to people, but also other natural objects.”¹¹

c. Interview

“Interviews are used as a data collection technique if you want to conduct a preliminary study to find problems that must be investigated, and also if researchers want to know things from respondents who are more in-depth and the number of respondents is small. This data collection technique is based on self-reports or self-reports, or at least on knowledge and beliefs.

E. Finding & Discussion

1. Definition of Marriage

In the Marriage Law Number 1 of 1974 in Article 1 provides the understanding that marriage is an inner and outer bond between a man and a woman

¹⁰ M. Nazir, *Metode Penelitian*, Cet. 5, Ghalia Indonesia. Jakarta. 2003. hal. 27.

¹¹ Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif, dan R&D*, Cet. 26, Alfabeta. Bandung. 2017. hal.

as husband and wife with the aim of forming a happy and eternal family based on the One Godhead. Physical and spiritual ties are the foundation in forming a happy and eternal family. Eternal means that a marriage will last forever until death do us part without divorce. Understanding marriage in Islam has the value of worship, Article 2 of the Compilation of Islamic Law confirms that marriage is a contract that is carried out to obey Allah's commands, carrying it out is worship. The term marriage actually comes from Arabic, called the word marriage. Al-nikah means al-wathi" and al-dammu wa al-tadakhul.¹²

Marriage that aims to form a family is a variety of sociological and psychological serving relationships in traditional family functions, and the law as an instrument carrier for the desired social change. Marriage in fiqh is called by two words, namely marriage and zawaj. According to fiqh, is one of the main basic principles of life in a perfect association or society.¹³

2. Legal Basis of Marriage

- a. Chapter I Article 2 paragraph (1) of the Marriage Law stipulates that marriage is legal if it is carried out according to the laws of each religion and belief.
- b. Article 2 paragraph (2) stipulates that every marriage is recorded according to the prevailing laws and regulations.
- c. Article 3 paragraph (2) stipulates that the court may give permission to a husband to take more than one wife if desired by the parties concerned.
- d. Article 4 paragraph (1) stipulates that in the event that a husband will have more than one wife, as mentioned in Article 3 paragraph (2) of this law, he is obliged to submit an application to the Court in the area where he resides.

3. Marriage Agreement

- a. Understanding the Marriage Agreement

1. Marriage agreement based on the Marriage Law

¹² Aminur Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia, Studi Kritis Perkembangan Hukum Islam dan Fikih, UU No. 1/1974 Sampai KHI*, Prenada Media. Jakarta. 2004. hal. 38

¹³ Faiz Rahman dan Rizka Nur Faiza, *Perkawinan Siri Online Ditinjau Dari Perspektif Hukum Perkawinan Islam Yang Berlaku Di Indonesia*, FH Universitas Gadjah Mada. Yogyakarta. 2010. hal. 18

Marriage agreement in the sense of Law Number 1 of 1974 concerning Marriage is a mutual agreement for prospective husbands and prospective wives that must be fulfilled if they are married, but if one of them does not fulfill or violates the marriage agreement, one of them can sue and ask to cancel the marriage agreement. marriage and vice versa, this agreement can be referred to as a marriage agreement.

2. Marriage agreement according to KHI

- a) At or before the marriage takes place, the prospective bride and groom can make a written agreement ratified by the marriage registrar regarding the position of property in the marriage.
- b) The agreement referred to in paragraph (1) may include the mixing of personal assets and the separation of their respective personal pursuit assets as long as it does not conflict with Islam.
- c) In addition to the provisions in paragraphs (1) and (2) above, it is also permissible for the contents of the agreement to stipulate the respective authority to enter into mortgage bonds on personal assets and joint or company assets.

b. Consequences of the Marriage Agreement

The legal consequences of a marriage agreement between husband and wife are:¹⁴

- a. The agreement is binding on both husband and wife.
- b. The agreement is binding on interested third parties.
- c. The agreement can only be changed with the consent of both husband and wife, and does not harm the interests of third parties, and is ratified by the marriage registrar.

c. Marriage Agreement Before the Constitutional Court Decision

With the enactment of Law Number 1 1974, all provisions regarding marriage agreements in the Civil Code are declared no longer valid based on Article 66 of Law Number 1 of 1974. Not only revoking the provisions of

¹⁴ Abdulkadir Muhammad, *Pernikahan dalam Hukum Islam*, UII Press. Yogyakarta. 2005. hal. 19

marriage agreements in the Civil Code, Law Number 1 of 1974 also regulates how to implement marriage agreements. Article 29 paragraph (1) of the Marriage Law regulates the time of making a marriage agreement, it can be made before or at the time of the marriage. The marriage agreement made is legalized by the marriage registrar. Marriage Agreement After the Court's Decision

Based on the Constitutional Court Decision Number 69/PUU-XIII/2015, the positive law regarding marriage agreements has changed. One of the significant changes, the marriage agreement can be made while in the marriage bond. The next amendment, the Constitutional Court gave rise to an alternative ratification of a marriage agreement by a Notary. Previously, the ratification of a marriage agreement could only be carried out by a marriage registrar, through the Constitutional Court's Decision Number 69/PUU-XIII/2015, a marriage agreement could also be ratified by a Notary..¹⁵

d. The Constitutional Court's Decision Number 69/PUU-XIII/2015

Position Case (MK Decision)

An Indonesian citizen (WNI) named Ike Farida submitted a request for a judicial review to the Constitutional Court (MK) against the provisions in Article 21 paragraph (1), paragraph (3), and Article 36 paragraph (1) of Law no. 5 of 1960 concerning the Basic Regulations on Agrarian Principles (UUPA) as well as Article 29 paragraph (1), paragraph (3), paragraph (4) and Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage (UU no. 1 of 1974) in the middle of 2015.

This case began when on May 26, 2012, the Petitioner, Ike, bought a flat unit. However, after the Petitioner paid the Flats in full, the Flats (Rusun) were never handed over by the developer. Even then the apartment purchase agreement was canceled unilaterally by the developer on the grounds that the Petitioner's husband is a foreign citizen and the Petitioner does not have a marriage agreement.

The Petitioner feels that his right to own the condominium has been destroyed because of the enforcement of the provisions of Article 36 paragraph (1) of the LoGA and Article 35 paragraph (1) of Law no. 1 of 1974. In accordance with Article 36 paragraph (1) of the LoGA, a woman who marries a foreign citizen (WNA) is prohibited from buying land and or buildings with the status of Building

¹⁵ Zul Fadli, *Perjanjian perkawinan Pasca Putusan Mahkamah Konstitusi* dalam <http://www.boyyendratamin.com/201/03/perjanjian-kawin-pasca-putusan-mahkamah-konstitusi.html> diakses pada hari Kamis 12 November 2020 Pukul 10.57 WIB.

Use Rights, unless a marriage agreement is made. This is as stipulated in Article 35 paragraph (1) of Law no. 1 of 1974 which stipulates that property acquired during marriage becomes joint property, so that based on this provision, if a husband or wife buys immovable property (in this case a flat/apartment) during the marriage, the flat will become the joint property of husband and wife. concerned. This also includes if the marriage is a mixed marriage (marriage between an Indonesian citizen and a foreigner) which is held without making a separate marriage agreement, then the flat will become the property of the husband/wife with the status of a foreigner as well.

The Constitutional Court judges disagreed with the government's considerations and gave other considerations to Article 29 paragraph (1), paragraph (3) and paragraph (4) of Law no. 1 of 1974 which can be described as follows: Based on these considerations, the Constitutional Court Judge finally granted Ike Farida's request against Article 29 paragraph (1), paragraph (3), and paragraph (4) of Law no. 1 of 1974 while refusing to do anything other than the rest by issuing the Constitutional Court's Decision No. 69/PUU-XIII/2015 dated 27 October 2016, which essentially states that:

1. Article 29 paragraph (1), Law no. 1 of 1974 (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) is contrary to the 1945 Constitution and has no binding force as long as it is not interpreted "At the time, before it is held or during the marriage bond of both parties by mutual consent can submit a written agreement ratified by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party is involved.
2. Article 29 paragraph (3) of Law no. 1 of 1974 (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) is contrary to the 1945 Constitution and has no binding force as long as it is not interpreted as "The agreement shall come into force from the time the marriage takes place, unless otherwise stipulated in the Marriage Agreement".
3. Article 29 paragraph (4) of Law no. 1 of 1974 (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State

Gazette of the Republic of Indonesia Number 3019) is contrary to the 1945 Constitution and has no binding force as long as it is not interpreted, or revoked, unless from both parties there is an agreement to change or revoke, and the change or revocation does not harm a third party.

4. Reject the Petitioner's application for other than and the rest.

The Petitioners' argument concerns the unconstitutionality of Article 21 paragraph (1), paragraph (3), and Article 36 paragraph (1) of the UUPA and Article 35 paragraph (1) of Law no. 1 of 1974 was not granted by the Constitutional Court because the articles were deemed not to be in conflict with the 1945 Constitution.

- e. Conformity of the Constitutional Court Decision No. 69/PUU-XIII/2015 on Treaty Principles

Based on the above analysis, the Constitutional Court Decision No. 69/PUU-XIII/2015 has emphasized the principle of good faith in the making of a marriage agreement, its revocation or amendment because it opens the way for abuse of circumstances by parties with bad intentions.

1. Principle of Pacta Sunt Servanda

Agreements are binding and act as laws for those who make them. Agreements made must be obeyed and obeyed and considered as law for those who make them. Therefore, it cannot be withdrawn, except with the consent of the party who made it.

The principle of pacta sunt servanda in Law no. 1 of 1974 after the Constitutional Court Decision No. 69/PUU-XIII/2015 is reflected in Article 29 paragraph (1) and Article 29 paragraph (4). In the case of making, changing or revoking a marriage agreement, it must be based on the consent of the husband and wife. With the consent of the husband and wife, the power of binding the agreement arises as befits the law.

Based on the principle of pacta sunt sevanda, the marriage agreement after it has been written down by husband and wife is binding on husband and wife even though it has not been recorded in the marriage certificate. Approval of the will of husband and wife when making a marriage agreement becomes the basis for binding a marriage agreement for husband and wife.

2. Principles of Personality/Personal

The principle of personality is that an agreement is only valid and binding for the parties who make the agreement. Third parties, other than the party who promised, cannot be harmed or benefit from the agreement except in the event of derdenbeding as regulated in Article 1317 of the Civil Code..

f. Application of Marriage Agreements for Notaries after the Decision of the Constitutional Court Number: 69/PUU-XIII/2015

The reason for making a marriage agreement before the marriage takes place is so that it can be clearly seen what the contents of the marriage agreement are about what are the rights of the husband and what assets are the rights of the wife that can be applied by husband and wife in their domestic life. Thus, the marriage agreement can be a guide that provides legal certainty and guarantees, especially for the property rights of each party and is effective after the marriage takes place. However, the issuance of the Constitutional Court's Decision No. 69/PUU-XII/2015, has brought several new legal norms, including:

1. A marriage agreement can be made after the marriage takes place (as long as the marriage bond);
2. The ratification of the marriage agreement can be carried out by a Notary;
3. The marriage agreement is effective as of the date the marriage or marriage agreement is made; and
4. Marriage agreement can be revoked.

Seeing the new legal norms, of course it also brings new legal consequences not only to the status of marital property but also to the parties bound by the marriage agreement.

The legal consequences can be described as follows::

1. Legal consequences for husband and wife

Before the Constitutional Court Decision No. 69/PUU-XII/2015, a marriage agreement can only be made before the marriage takes place so that the marriage agreement is valid since the marriage is held. After the Constitutional Court Decision No. 69/PUU-XII/2015, a marriage agreement

can be made before or during the marriage bond. This makes the marriage agreement that was valid since the marriage took place, it also applies after the marriage agreement after the marriage is made.

Article 29 paragraph (1) of Law no. 1 of 1974 after the Constitutional Court Decision No. 69/PUU-XIII/2015 states that "at the time, before it takes place or during the marriage bond, both parties with mutual consent can submit a written agreement ratified by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party stuck." Furthermore, Article 29 paragraph (3) of Law no. 1 of 1974 after the decision of the Constitutional Court No. 69/PUU-XIII/2015 reads: "The agreement shall come into force from the time the marriage takes place, unless otherwise stipulated in the Marriage Agreement."

2. Legal consequences for third parties

Article 29 paragraph (1) of Law no. 1 of 1974 after the Constitutional Court Decision No. 69/PUU-XIII/2015 states that "at the time, before it takes place or during the marriage bond, both parties with mutual consent can submit a written agreement ratified by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party stuck."

g. Obstacles in the Implementation of the Decision of the Constitutional Court Number: 69/PUU-XIII/2015 For Notaries in the Case of Ratifying Marriage Agreements.

After the Constitutional Court Decision No. 69/PUU-XII, the new legal norm in a marriage agreement is that a marriage agreement can be made after marriage (during the marriage bond). This is reflected in the verdict against Article 29 paragraph (1) which states that "At the time, before it takes place or during the marriage bond, both parties with mutual consent can submit a written agreement.....".

1. Ratification of the marriage agreement can be carried out by a Notary or Marriage Registrar; This provision is completely different from Law no. 1 of 1974 which requires that the marriage agreement is only legalized by the Marriage Registrar.
2. The marriage agreement is effective as of the date the marriage or marriage agreement is made; Law No. 1 of 1974 confirms that the marriage agreement is valid from the time the marriage takes place, as is

the case with KHI. In the Civil Code it is expressly stated that other than that (since the marriage took place) cannot be ratified. Unlike the case with the Constitutional Court Decision No. 69/PUU-XIII/2015, a marriage agreement made after marriage is valid from the date of marriage unless otherwise specified, in the sense that since the marriage agreement was made.

3. The marriage agreement can be revoked

Article 29 of Law no. 1 of 1974 allows the amendment of the marriage agreement after the marriage is held on the condition that it is based on the agreement of husband and wife and does not harm third parties. UU no. 1 of 1974 does not explicitly mention the revocation of the marriage agreement. Meanwhile, KHI states that the marriage agreement can be revoked on the condition that there is a prior announcement, without an announcement the marriage agreement is invalid and does not bind third parties.

F. Conclusion

1. The application of a marriage agreement for a Notary after the decision of the Constitutional Court Number: 69/PUU-XIII/2015 in terms of ratifying a marriage agreement is that a marriage agreement can bind a third party if the marriage agreement has been recorded in the Marriage Certificate by the Marriage Registrar. Ratification by a notary without any recording as long as it is not known to a third party, then the third party is not bound by the contents of the marriage agreement. By recording a marriage agreement, a third party is considered to know about the existence of a marriage agreement and cannot claim protection against the principle of good faith only because of their negligence who did not check the marriage certificate of husband and wife at the time of making the debt agreement. If before the marriage agreement after the marriage, the husband and wife have made a debt agreement with a third party, then the third party who can prove it can demand repayment of the debt from the joint assets of the husband and wife. The positive law regarding marriage agreements has changed after the decision of the Constitutional Court Number: 69/PUU-XIII/2015, one of the significant changes is that a marriage agreement can be made while in the marriage bond. Changes in the norms of Article 29 paragraph (1) of Law No.1 of 1974 is very helpful and beneficial for Indonesian citizens (WNI) who

cannot own land with the status of property rights, business rights, building rights, because they are married to a citizen. Foreigners (foreigners).

2. Obstacles to the application of the decision of the Constitutional Court Number: 69/PUU-XIII/2015 for Notaries in terms of ratifying marriage agreements, namely a doctrine that has long been embedded in the minds of Indonesian people since they were still using the Civil Code until the unification of marriage law with the existence of Law no. 1 of 1974 is that the marriage agreement is made before the marriage takes place, even KHI also applies it. Constitutional Court Decision No. 69/PUU-XIII/2015 has explicitly and clearly stated that the marriage agreement can be revoked. However, the Constitutional Court's Decision No. 69/PUU-XIII/2015 concerning the possibility of a marriage agreement being made after the marriage has taken place and the revocation of a marriage agreement, raises the potential for a cycle of marriage agreements made and then revoked and then made again and then revoked and so on which can eliminate the guarantee of legal certainty that has been guaranteed by Law no. 1 of 1974.

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