

Limitations of the Principle of Freedom of Contract in Marriage Agreements Based on the Civil Code

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Abstract. *This study aims to determine and analyze the limitations of freedom in making a marriage contract based on the Civil Code, as well as to analyze the authority and responsibility of a notary in making a marriage contract. This study uses a statute approach and a conceptual approach. Based on the study, it is concluded that the existence of a marriage contract is based on the principle of freedom of contract as regulated in Article 1338 of the Civil Code, but this freedom is not absolute because it is limited by law, morality, public order, and the interests of third parties. Limitations in a marriage contract are normatively reflected in several aspects, namely limitations based on public order and morality, limitations on the rights and obligations of husband and wife, limitations on the protection of third parties, especially creditors, limitations on the substance or content of the agreement, limitations on the time of making and changing the marriage contract. Notaries have legal and strategic authority in making a marriage contract based on the Notary Law. This authority includes ensuring the identity of the parties, ensuring the legal capacity of the parties, providing legal explanations, preparing authentic deeds, recording and storing minutes of the deed. In exercising this authority, notaries bear extensive legal responsibilities, including civil, administrative, criminal, and ethical liability. Therefore, professionalism, independence, and prudence are key elements in carrying out the notary's office.*

Keywords: *Civil; Contract; Freedom; Marriage; Public.*

1. Introduction

Marriage is a legal institution that not only creates a civil relationship between husband and wife but also has legal consequences for personal status, property, and legal relationships with third parties. Therefore, marriage law allows prospective husbands and wives to regulate certain legal consequences through

a prenuptial agreement to protect the interests of both parties.¹A prenuptial agreement is essentially a special contract subject to both general contract law and specific marriage law. The importance of such agreements is growing as society's need for legal certainty in managing assets, business activities, and protecting the rights of the parties in a marriage grows.

The principle of freedom of contract is one of the fundamental principles in contract law which gives every legal subject the freedom to make or not make an agreement, determine the contents of the agreement, choose the party who will enter into the agreement, and determine the form of the agreement according to their wishes. This principle finds a normative basis in Article 1338 of the Civil Code which states that every agreement made legally applies as law for the parties who make it. However, this freedom is not absolute because Article 1337 of the Civil Code limits that an agreement must not conflict with law, morality and public order. Thus, the principle of freedom of contract must be understood as freedom that is limited by legal norms in order to guarantee certainty, justice and legal benefits.²Studies of contract law also emphasize that these limitations are a logical consequence of protecting the interests of the parties and third parties.

In the context of marriage agreements, the principle of freedom of contract acquired a new dynamic after the issuance of Constitutional Court Decision Number 69/PUU-XIII/2015 which provides the possibility for husband and wife to make marriage agreements not only before or at the time the marriage takes place, but also during the marriage as long as it does not harm third parties. This development expands the scope for autonomy of the parties in managing their legal relations, but at the same time raises issues regarding the limits of the content of marriage agreements that are permissible according to law. Therefore, a comprehensive study is needed regarding the limits of the application of the principle of freedom of contract in marriage agreements so that this freedom remains within the corridor of positive law and does not reduce legal protection for other parties.

According to the Civil Code, a marriage agreement must be made by a notary based on Article 147 of the Civil Code and is stated in the marriage agreement and is made before the marriage takes place, and comes into effect from the time the marriage takes place.³The agreement is placed on the marriage

¹Syaifuddin, Muhammad. (2016). *Contract Law: Understanding Contracts from the Perspective of Philosophy, Theory, Dogmatics, and Legal Practice* (Contract Law Enrichment Series). Bandung: Mandar Maju. p. 82.

²Adjie, Habib. (2009). *Indonesian Notary Law: Thematic Interpretation of Law No. 30 of 2004 concerning the Position of Notary*, Second Edition. Bandung: PT Refika Aditama. p. 77.

³Nazla. (2007). "Marriage Agreements Regulating Responsibilities for Children Born Outside of Marriage from an Islamic Law Perspective: Analysis of Marriage Agreement Deeds." in *Journal of Law and Development*, Year 37, No. 1, p. 124.

certificate and is an inseparable part of the marriage certificate, and the marriage agreement is made by mutual agreement, made in writing, approved by a civil registry officer, and does not conflict with law, religion, or morality.⁴

The role of a notary in drafting a marriage contract is crucial because a notary is a public official authorized to draft authentic deeds and provide legal certainty regarding the wishes of the parties. In exercising their authority, a notary not only documents the parties' agreement in a deed but is also required to ensure that the substance of the agreement meets the requirements for a valid agreement as stipulated in Article 1320 of the Civil Code, is not in conflict with the law, and does not harm the interests of third parties. Therefore, a notary has a legal and professional responsibility as a gatekeeper of legal certainty in the formation of a marriage contract.⁵

Although various studies have addressed the legal implications of Constitutional Court Decision No. 69/PUU-XIII/2015 and the authority of notaries in drafting marriage contracts, most of these studies have focused on changes in the timing of marriage contracts or the protection of marital assets. Studies specifically linking the limitations of the principle of freedom of contract under the Civil Code with the authority and responsibilities of notaries are still relatively limited. Yet, this issue is crucial in ensuring legal certainty and providing guidance for notaries in drafting marriage contracts in accordance with positive law.

Based on this description, this research aims to analyze the limits of the principle of freedom of contract in making marriage agreements based on the Civil Code.

2. Research Methods

The approaches used in this research are the statute approach and the conceptual approach. This type of research is normative legal research. The data used in this study are secondary data obtained through literature review. The analysis is prescriptive in nature.

3. Results and Discussion

3.1. Limitations on Freedom to Make Marriage Agreements Based on the Civil Code

Normative framework for the limitations of internal marriage agreements Civil Code(Civil Code/*Burgerlijk Wetboek*) is regulated in Articles 139 to 154. Although the Civil Code provides freedom of contract, there are strict limitations aimed at

⁴Pakaya, Susi Susanti G. (2016). "Legal Protection of Consigned Assets with Marriage Deeds." in Legal Opinion Journal of Legal Studies, Issue 2 Vol. 4, Issue 2, p. 67.

⁵Rahmatika, Wisda Rauyani Efa and Khisni, Akhmad. (2017). "Legal Analysis of Marriage Agreements Reviewed from Law Number 1 of 1974 concerning Marriage and the Implications of Constitutional Court Decision Number 69/PUU-XII/2015". in Jurnal Akta, Vol. 4, No. 3, p. 365.

protecting morality, public order, and the rights of third parties.

The following are details of the normative limitations of marriage agreements based on the Civil Code:

1) Limitations based on Public Order and Morality

Article 139 of the Civil Code states that "By entering into a marriage agreement, the prospective husband and wife have the right to prepare several deviations from the statutory regulations regarding the unity of property, as long as the agreement does not violate good morals or public order and as long as all provisions below are observed according to the following article."

Based on Article 139, a marriage agreement may not regulate matters that deviate from good morals or public order, where these matters must be in accordance with a lawful reason regarding deviations from the law on joint property.

2) Limitations on the Rights and Obligations of Husband and Wife

The marriage agreement as regulated in Article 140 paragraph (1), 141, 142, and 143 of the Civil Code may not and must fulfill the rights and obligations of living together as a husband and wife during the marriage in accordance with the provisions of positive law (Civil Code) which states that the contents of the marriage agreement provide freedom for prospective husband and wife to determine the contents of the marriage agreement that they make as long as it does not violate the provisions of the Civil Code and other rules and norms.

Marriage contracts should not infringe on the rights derived from the husband's position as the authority holder in the family and as a father. Similarly, these contracts should not prejudice the rights specifically granted to the husband in his capacity as leader in the marital union. However, a marriage contract should not restrict the wife's ability to manage and control her personal assets, which include all types of property, both movable and immovable, as well as the right to freely own her personal income. Within a marriage contract, the couple also has the right to make agreements. For example, even though there is joint property, immovable property, securities, and receivables acquired in the wife's name may not be transferred or encumbered by the husband without the wife's consent. (Article 140 of the Civil Code).⁶

3) Limitations on Third Parties

Prenuptial agreements are also limited by the principle of protection against third parties. This aligns with the principle that an agreement must not harm any

⁶Zulkarnain, Steven Agilo., Hakim, Arief Rachman. (2024). "Limitations of Marriage Agreements Based on the Civil Code." in the Darma Agung Journal Volume 32, Number 4, 164–175.

party not party to the agreement. Article 152 of the Civil Code stipulates that the provisions of a prenuptial agreement must not harm third parties, especially creditors. In practice, this often relates to efforts to separate assets to avoid liability for debts.

In the Supreme Court's decision, for example, the judge rejected the use of a prenuptial agreement as a tool to avoid the obligation to pay debts to creditors, on the grounds that this was contrary to the principle of good faith.

4) Limitations of the Contents of a Marriage Agreement

In principle, prenuptial agreements focus on the management of assets. The Civil Code itself regulates various forms of asset management, such as complete separation of assets, limited partnership, and debt liability arrangements. However, in modern practice, there is a tendency to expand the content of prenuptial agreements into non-economic areas. This has given rise to debate regarding the substantive limits of prenuptial agreements.

According to J. Satrio, prenuptial agreements should remain within the scope of property law, because the personal aspects of marriage are more appropriately regulated by social and moral norms, not legal contracts.⁷ Thus, clauses that are too restrictive about private life have the potential to be declared invalid or unenforceable, especially if they conflict with human rights, morality or public order as referred to in Article 1337 of the Civil Code.

5) Time Limits for Making a Marriage Agreement

Prior to Constitutional Court Decision No. 69/PUU-XIII/2015, the timing of a prenuptial agreement was strictly regulated in Article 147 of the Civil Code. This article states that a prenuptial agreement must be drawn up by notary before the marriage takes place and shall take effect upon the marriage taking place.⁸ This provision shows that the Civil Code initially only recognized prenuptial agreements or marriage agreements made before marriage.

Through Constitutional Court Decision Number 69/PUU-XIII/2015, the Constitutional Court stated that the time limit for making a marriage agreement is contrary to the constitutional rights of citizens, especially the right to own property and obtain fair legal protection.⁹ The Constitutional Court then provided a constitutional interpretation of Article 29 of the Marriage Law so that a marriage agreement can be made:

a. Before marriage;

⁷Satrio, J. (1991). *Marital Property Law*. Bandung: Citra Aditya Bakti. p. 89.

⁸Article 147 of the Civil Code.

⁹Constitutional Court Decision Number 69/PUU-XIII/2015.

- b. At the time the marriage takes place; or
- c. As long as the marriage bond is still in effect (postnuptial agreement).

This ruling represents a legal development that is more adaptive to the needs of modern society and expands the application of the principle of freedom of contract in marital relations. However, the Constitutional Court also emphasized that prenuptial agreements made during marriage must not be detrimental to third parties.¹⁰

6) imitations in Changing Marriage Agreements

A prenuptial agreement is essentially a binding agreement between the parties, as stipulated in the general provisions of contract law in the Civil Code. Therefore, changes to a prenuptial agreement cannot be made unilaterally but must meet certain requirements stipulated by law.

Prior to the legal developments through Constitutional Court Decision No. 69/PUU-XIII/2015, the Civil Code adhered to the principle that a prenuptial agreement remains permanent after the marriage has taken place. This is affirmed in Article 149 of the Civil Code, which states that once a marriage has taken place, a prenuptial agreement cannot be amended in any way.¹¹ This provision shows the principle of immutability or the inability to change the marriage agreement in order to maintain legal certainty in the relationship between husband and wife's assets.

These regulations are closely related to the protection of third parties, particularly creditors. If changes to a prenuptial agreement could be freely made after the marriage has taken place, this could potentially create legal uncertainty regarding pre-existing obligations. Therefore, the Civil Code has limited the possibility of changes from the outset to prevent abuse of the law.

Following legal developments through Constitutional Court Decision Number 69/PUU-XIII/2015, changes to or the creation of a prenuptial agreement during marriage are possible as long as they comply with legal provisions and do not harm third parties.¹² Thus, the principle of absolute immutability began to experience relaxation in line with the development of modern society.

These limitations show that the law does not position marriage solely as a private relationship, but also as a social institution that has a public interest dimension.

¹⁰Ibid.

¹¹Article 149 of the Civil Code.

¹²Constitutional Court Decision Number 69/PUU-XIII/2015.

3.2. The Authority and Legal Responsibilities of Notaries in Making Marriage Agreements

1) Notary's Authority in Making Marriage Agreements

A notary is a public official who is authorized by the state to make authentic deeds as regulated in Article 1 number 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN).¹³

The notary's authority in making a marriage contract includes:

a. Ensuring the identity of the parties

Notaries are required to verify the identities of the parties through official documents to avoid legal subject errors. This is stated in Article 16 paragraph (1) letter a of the UUJN:

"Notaries are required to act in a trustworthy, honest, thorough, independent, impartial manner and safeguard the interests of the parties involved in legal acts."

The term "saksaktor" (careful) means that the notary must carefully examine ID cards, family cards, birth certificates, marital status, and citizenship. This is crucial to avoid legal defects.

b. Ensuring the legal capacity of the parties

The notary must ensure that the parties meet the legal capacity requirements as stipulated in Article 1320 of the Civil Code.

c. Providing legal explanations/counseling

A notary not only acts as the author of the deed, but is also obliged to explain the legal consequences of the contents of the agreement to the parties. This is emphasized in Article 15 paragraph (2) letter e of the UUJN:

"Notaries are authorized to provide legal advice regarding the preparation of deeds."¹⁴

In the context of a marriage contract, a notary is obliged to explain the legal consequences of the separation of assets, the impact on inheritance, the impact on debts, and the impact on third parties.

Habib Adjie stated that the function of a notary does not stop at making deeds,

¹³Article 1 number 1 of Law No. 2 of 2014 concerning the Position of Notary.

¹⁴Article 15 paragraph (2) letter e Law on Notary Positions.

but also as a legal educator for the community.¹⁵

d. Drafting an authentic deed

The marriage contract must be made in the form of an authentic deed. Article 1868 of the Civil Code states:¹⁶

"An authentic deed is a deed made in a form determined by law by or before a public official authorized to do so at the place where the deed is made."

This means that if a marriage contract is not drawn up before a notary, its evidentiary force is weaker. Furthermore, Article 1870 of the Civil Code states:

"An authentic deed provides the parties and their heirs with perfect evidence."¹⁷

This means that a notarial deed provides perfect evidentiary power.

e. Recording and storing minutes of deeds

Minutes of the deed must be kept as part of the notary's protocol in accordance with Article 16 of the UUJN.¹⁸

2) Notary's Responsibilities in Making Marriage Agreements

The responsibilities and ethics of the notary profession are closely related to morals and integrity, so if a notary does not have good integrity and morals, then a notary cannot be said to have good professional responsibilities and ethics either.¹⁹

A notary's responsibility for the deeds he or she makes is based on fault (based on fault of liability), so a notary must be responsible if the deed he or she makes contains an error or intentional violation by the notary. However, on the other hand, if an element of error occurs between the parties, as long as the notary carries out his or her authority in accordance with what is stated in the law, the notary concerned cannot be held responsible because the notary only records all the information he or she obtains from the parties.²⁰ The liability for the deed includes:

¹⁵Adjie, Habib. (2015). Indonesian Notary Law. Bandung: Refika Aditama. p. 92.

¹⁶Article 1868 of the Civil Code.

¹⁷Article 1870 of the Civil Code.

¹⁸Article 16 of Law No. 2 of 2014 concerning the Position of Notary.

¹⁹Arsy, Eudea Adeli., Widhiyanti, Hanif Nur., Ruslijanto, Patricia Audrey. (2021). "Notary's Responsibility for Deeds that are Legally Defective and Do Not Comply with the Provisions for Making Deeds in the Notary Law". in Bina Mulia Hukum Journal, Volume 6, Number 1.

²⁰Mamminanga, Andi. (2008). Implementation of the Authority of the Regional Notary Supervisory Board in the Implementation of Notary Duties based on the UUJN. Thesis. Yogyakarta: Faculty of Law, Gadjah Mada University. p. 32.

a. Civil liability

A notary can be held civilly liable if their negligence results in harm. Examples include editorial errors, incorrect identification, or failure to read a deed. The legal basis for this is Article 1365 of the Civil Code concerning unlawful acts.²¹

"Every unlawful act that causes loss to another person requires the person whose fault it is that caused the loss to compensate for that loss."

b. Administrative responsibilities

Article 85 of the UUJN regulates administrative sanctions in the form of verbal warnings, written warnings, temporary dismissal, honorable dismissal, dishonorable dismissal.²² This sanction is given if the notary violates office procedures.

c. Criminal liability

Notaries can also be prosecuted criminally if they commit acts of falsifying documents or falsifying authentic deeds that they have made. If a notary intentionally falsifies the contents of a deed or assists in an unlawful act, they can be subject to criminal sanctions based on the Criminal Code. This is stated in Article 264 paragraph (1) of the Criminal Code which states:

"Forgery of an authentic deed is punishable by a maximum prison sentence of eight years."

d. Ethical responsibility

As a public official, a notary public must adhere to ethics in carrying out their duties. The ethics referred to here refer to the existing notarial professional code of ethics, which aims to ensure that notaries truly carry out their duties professionally, morally, and skillfully in rational argumentation.²³

Notaries are bound by the Indonesian Notaries Association (INI) Code of Ethics. Ethical violations include bias, lack of independence, and abuse of office. According to Tan Thong Kie, moral integrity is at the heart of the notarial profession.²⁴

Normatively, the notary's authority to draft marriage contracts is clearly granted by the Law on Marriage Contracts (UUJN). However, in practice, this authority

²¹Article 1365 of the Civil Code.

²²Article 85 of Law No. 2 of 2014 concerning the Position of Notary.

²³Rahmawati, I Gusti Ayu Ria, Budiarta, I Nyoman Putu Budiarta, Astiti, Ni Gusti Ketut Sri. (2020). "Notary's Responsibility for Authentic Deeds He Made Regarding Retirement Period". in the Journal of Legal Construction.

²⁴Kie, Tan Thong. (2011), Notary Studies. Jakarta: Ichtiar Baru van Hoeve. p. 215.

must be exercised based on the principles of prudence, independence, legal certainty, and legal protection for the parties. According to Gustav Radbruch, the objectives of law consist of three primary values: justice, legal certainty, and legal utility.²⁵In this context, notaries are at the forefront in ensuring that:

- a. The contents of the agreement do not violate the law;
- b. The parties understand the entire contents of the deed;
- c. The deed is made according to procedures; And
- d. Recording is carried out to bind third parties.

If this is implemented well, the role of the notary is not only as a deed maker, but as a guarantor of legal certainty in the marriage relationship.

4. Conclusion

A marriage contract is a special form of agreement that is subject to the general provisions of contract law and the specific provisions of marriage law. The existence of a marriage contract is based on the principle of freedom of contract as stipulated in Article 1338 of the Civil Code, but this freedom is not absolute because it is limited by law, morality, public order, and the interests of third parties. Thus, the parties cannot freely determine the contents of the agreement without considering imperative legal limitations. Notaries, as public officials, have legitimate and strategic authority in drafting marriage contracts based on the Notary Law. This authority includes confirming the identity of the parties, ensuring the legal capacity of the parties, providing legal explanations, preparing authentic deeds, recording and storing minutes of the deed. In exercising this authority, notaries bear extensive legal responsibilities including civil, administrative, criminal, and ethical responsibilities. Therefore, it is necessary to refine and harmonize regulations regarding prenuptial agreements to create legal certainty and provide balanced protection for both parties and third parties. Notaries must also consistently prioritize the principles of professionalism, independence, and prudence when drafting prenuptial agreements. Furthermore, continuous improvement of notary competence and oversight of the performance of their duties is necessary to ensure legal certainty and protection for the parties.

²⁵Radbruch, Gustav. (1950. *Legal Philosophy*, translated edition, Harvard University Press.

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