

Signing of Notarial Deed by A Convict Whose Rights to Certain Livelihood Is Revoked

Nanang Selamat^{1*} Aries Harianto² Ainul Azizah²

1. Master Students at Faculty of Law, University of Jember

2. Doctor and Lecturer at the faculty of Law, University of Jember

Abstract

The provision of the Civil Code (*KUHPerdata*) Article 3 mentioned that none of punishment can eliminate a person's civil right, and no single penalty can result in civil death or the loss of all civil rights. One of a person's civil rights is binding himself to other people in form of an agreement in accordance with the provision of Article 1329 of the Civil Code. These rights are reflected in a person's way to meet the needs of living as a livelihood. Meanwhile, the Article 35 paragraph (1) of the Criminal Code (*KUHPidana*) stated that the right to pursue certain livelihoods of a person can be revoked as a form of punishment received. These two different provisions originating from the two different laws indicate that conflict of norms exists. Norm conflicts may lead to legal uncertainty, especially when the law is required to solve various problems occur in society. The issue concerns convict's legal position on the person who has an interest in appearing before a notary for signing a notarial deed, because the deed may be very decisive for a person's business wherever he is, including a prisoner. The above conflicting norms academically may raise various legal issues, including the revocation of the right to pursue specific livelihoods, and whether the revocation is also a barrier for the convict to appear before a notary because the legal interests require it. Through this research, some of these questions will be answered using a normative juridical type of research.

Keywords: Certain Livelihood, Legal Certainty, Norm Conflict, Notary Deed,

DOI: 10.7176/JLPG/120-02

Publication date: April 30th 2022

1. Introduction

The Civil law is likened to a responsibility between individuals. Every individual has civil rights. These rights are a system of rules regulating various human relations in the context of their position as individuals to other individuals. Civil rights can also be interpreted as rules that regulate a person's rights and obligations in family and community relations, as well as the way of enforcement and defense to a dispute.

One of a person's civil rights is binding himself to other people in form of an agreement. The provisions in Article 1329 of the Civil Code explain that each person is authorized to conclude an engagement/agreement, unless he is declared incompetent. Based on the provisions of Book One Article 3 of the Civil Code, it is stated that there is no punishment that results in civil death, or the loss of all citizenship rights. Therefore, "a sentence" can also refer to a convict who has received a judge's decision or is found guilty and is sentenced by the court, thus his status becomes a convict.

The Civil Code indirectly interprets that a convict own civil rights, even though he has been found guilty based on a court decision. Based on the provisions of Article 1 number 32 of the Criminal Procedure Code (hereinafter referred to as *KUHAP*) it is stated, the convict is a person who is convicted by a court decision that has permanent legal force.

Article 35 (1) of the Criminal Code stated that the rights of the convict which can be revoked by a judge's decision specified in this law book, or in other general rules, one of which is the right to pursue certain livelihoods. One of the livelihoods carried is the sale and purchase between one party and another. Book III Article 1457 of the Civil Code stated that buying and selling is an agreement in which one party binds himself to deliver an item, and the other party pays the price they agreed. Rights and obligations between the seller and the buyer emerge as the legal consequence, where the seller is the right of the buyer, and the obligation of the buyer is the right of the seller. Thus, by mutual agreement, selling and buying occurs between the two.

The engagement of sale and purchase is part of an authentic deed. According to the provisions of Article 1868 of the Civil Code (*KUHPerdata*), an authentic deed is a deed formed by law, made by or before the authorized public official in certain place. According to R. Soergondo, an authentic deed is a deed made and formalized in legal form, by or before a public official, who is authorized to do so, at the place where the deed was made. Irwan Soerodjo stated that there are 3 (three) essential elements in order to fulfill the formal requirements of an authentic deed, namely in the form determined by law, made by and before a public official, deed made by or before a public official authorized to, and at the place where the deed was made.¹ In other words, the Sale and Purchase Binding Agreement (hereinafter referred to as PJB) is made by a notary.

¹ R. Soergondo. 1991. Hukum Pembuktian. PT. Pradnya Paramita. Jakarta. P. 89

As a public official, the role of a notary is to accommodate all matters relating to civil law, especially the public's need for authentication by making authentic deeds. Legal skills and the legality of the appearer's signature are significant to consider since it can turn the authentic deed to become a private deed. Furthermore, such a strong evidentiary power arises from the fact that a notary in civil law countries has a formal obligation that arises from the implementation of the principle of *tabellionis officium fideliter exercebo*. The obligation requires the notary himself shall come, see and listen in every deed making and is signed by the notary himself and the respective appearers directly at the place where the deed was read by the notary. The inscribed signature must be the original signature of the Notary and the appearers. This formal obligation is meaningful and beneficial in ensuring that the party making the agreement is the party whose name is stated in the comparison, that he is not under duress, deception or oversight, and that the agreement is in accordance with the will of the parties. This obligation makes the notary responsible not only for his signature as a public notary, but also for the contents of the authentic deed he made. This opinion is in line with the arrangement of an authentic deed based on Article 1867 of the Civil Code, stating that a perfect authentication shall meet the requirements made before or by a public official.¹

Based on the above description, by referring to the provisions in Article 3 of the Civil Code which states that none of punishment results in civil death, or the loss of all civil rights, it becomes a legal issue if a convicted person appears before a notary, while the appearer has an obstacle on Article 35 paragraph (1) number 6 of the Criminal Code regarding the revocation of rights to certain livelihoods. Therefore, through this legal research, these legal issues are interesting to examine, namely:

1. What does the phrase revocation of rights to certain livelihoods for convicts as regulated in Article 35 paragraph (1) of the Criminal Code imply?
2. Is the revocation of the right to certain livelihoods a barrier for the convict as appearer before a notary public to sign the deed?
3. What is the proper concept of the arrangement for a convict whose rights to a certain livelihood are revoked to pursue his own interests to appear before a notary in making a deed?

This research aimed to find the meaning of the phrase revocation of rights to certain livelihoods for convicts as regulated in Article 35 paragraph (1) of the Criminal Code, and to find aspects of legal certainty for convicts whose rights to certain livelihoods were revoked in relation to appearing before a notary to sign the authentic deed.

2. Research Method

The normative juridical method is applied in this research which emphasizes on normative legal science; meanwhile, in researching legal materials, it adhered to the legal aspects contained in the law and decisions concerning the convicted applicant's legal position whose rights to certain livelihoods are revoked in signing a notarial deed. This research was conducted based on principle of legal certainty perspective to analyze various problems arising due to the ambiguity of norms related to the legal position of the convicted applicant. The problem approaches used are: historical approach, conceptual approach, case approach, statutory approach and comparative approach. The statutory approach is carried out by reviewing all laws and regulations related to the legal issues raised.² Conceptual Approach refers to legal principles found in the views of scholars or legal doctrines. A case approach examines a case viewed from certain legal aspects. The case approach is to examine several cases to be used as a reference for a legal issue.³

3. Result and Discussion

3.1 Implications of the Revocation of Certain Livelihood Rights for Convicts

The revocation of the right to hold a special position does not mean the removal of the occupation, but the revocation of the right to run the office. Meanwhile, the dismissal of a certain position cannot be carried out by a judge, but it is decided by an administrative official who is determined according to state administrative law, for example a state superior. The regent fires the village head or the education minister fires lecturers, etc.

The law does not explicitly explain the implication of the position as referred to in Article 35 paragraph (1) number 1 of the Criminal Code, several doctrines explaining the purpose of the position, which according to Van Hamel is a position of public law, which regulates certain obligations and must be carried out for the sake of the State interest or for the benefit of the department.⁴ Regarding to the meaning of function in relation to the meaning of *ambtenaar* in the arrest of Honge Raad on October 25, 1915, Pompe states that the function is due to the right of public power/ authority that has been appointed to a public body that carries out part of the state's

¹ Zainatun Rosalina, 2016, *Keabsahan Akta Notaris Yang Menggunakan Cyber Notary Sebagai Akta Otentik*, Magister, Universitas Brawijaya. p 56.

² Dr A'an Efendi M.H S. H. and Dr Dyah Octorina Susanti M.Hum S. H., 2021, *Ilmu Hukum*, Prenada Media.

³ *Ibid.*, p..94

⁴ Adami Chazawi, 2002, *Pelajaran hukum pidana*, RajaGrafindo Persada, Jakarta. p. 47.

duties or part of the function of the state's institution. Departments are works performed by public officials. Position is the work carried out by civil servants.¹ Hazawinkel Suringa opines that position has a broader meaning than the Honge Raad mentioned above, a person can carry out a state function without the need to be appointed for that purpose, for example on the basis of the purpose of service attached to certain citizens. Besides, he can be appointed or he shall become a civil servant, since he has not carried out several functions of state institutions such as a notary.²

Adami Chazawi defines function as a set of positions of public law that require certain legal requirements, such as by appointment and/or by decree, letter of appointment, etc., whether formal or official, which is in contrary to the Indonesian Criminal Code which is read based on general rules. Therefore, according to the Criminal Code, the right to vote and the right to vote have a broader meaning. Active or passive right to vote is regulated by the law and in some other form of arrangement under the law.³

At the time, the drafters of the Criminal Code did not reject the revocation of rights, but the rights to be revoked were only rights related to the nature and crime committed by that person. Therefore, the revocation of the right to a certain livelihood owned by a person that results in civil death (*burgelijke daad*) is not permitted for any reason.

The provisions contained in the Criminal Code are basically derived from Roman law which also often applies to eliminate a person's dignity. In Roman law, the revocation of certain rights was limited to their behavior. Therefore, since the revocation of rights to certain livelihoods is an integral part of the revocation of certain rights, the revocation of this right shall consider the crimes committed by a criminal.⁴

The phrase revocation of rights to certain livelihoods of a right revocation means that the revocation cannot be applied for all rights. Only certain rights can be revoked. When all the rights are deprived, prisoners lose their chance to live. The 1950 Constitution also explicitly prohibits sanctions that cause the loss of a person's civil rights. Construction after the amendment to the 1945 Constitution also has human rights that cannot be revoked.⁵

The principle of legality can be used to understand the limitation of the convict's rights. Basically, there are no provisions that can be punished based on the principle of legitimacy, except on the basis of the law that has been stipulated.⁶ The correlation with the limitation of pursuing certain livelihoods for convicts is it stems from the concept of livelihood itself considering that if the livelihood is not prohibited either in the verdict of the court of law or other regulations that control more specifically, it cannot be banned.

Whenever the court judge does not decide nor choose to impose additional penalties in the form of revocation of the right to a certain livelihood from a convicted person, the profession carried out cannot be limited for any reason. In addition, the concept of specific livelihoods is the main work carried out by convicts where a person commits a crime, for example, revocation of the livelihood of a doctor who commits malpractice. The person's main job is to become a doctor but since he commits a crime in the form of malpractice, then the main work can be revoked based on Article 35 Paragraph (1) of the Criminal Code.

On the contrary to the example of court decisions on certain rights related to the right to pursue a livelihood, in relation to the validity of a notarial deed signed by a convict in a correctional center, a notarial deed signed by a convict is still valid according to law. As long as the convict is legally capable, he is allowed to sign the deed before a notary. The convicts are different from the suspects, even though they are both involved in criminal cases. Convicts face criminal sanctions after receiving a court decision that has permanent legal force.

According to the Supreme Court Decision No. 943 K/Pdt/2012, a deed signed by one of the appearers or witnesses as a convict appearer who is serving a sentence in a correctional institution is declared valid and has the power of evidence as an authentic deed, as long as the signing of the deed outside the notary's office is not carried out by a notary successively or by still continuing to rule the respective positions. If such signings are carried out successively, the notary may be subject to sanctions both in the Law on Notary Positions and in the Notary Code of Ethics.

The revocation of the right to certain livelihoods can basically be applied only based on the court decision, meaning that a job or livelihood cannot be eliminated without the judge's verdict. Article 35 of the Criminal Code also does not state that the civil rights of a person involved in a criminal case can be revoked. It is in line with the provisions of Article 3 of the Criminal Code which basically states that there is no single sanction that causes civil death. These provisions are synchronous with the provisions of agreement. There has not been a single provision found stating that an agreement is void or invalid if one of the parties is a criminal person.

¹ Ibid.

² Ibid.

³ Ibid.

⁴ P. A. F. Lamintang dan Theo Lamintang, 2012, *Hukum Penitensier*, Sinar Grafika (Bumi Aksara), Jakarta, p. 17.

⁵ S. R. Sianturi dan E. Y. Kanter, 1982, *Asas-Asas Hukum Pidana Indonesia*, Alumni, Jakarta, p. 23.

⁶ Danel Aditia Situngkir, "Asas Legalitas Dalam Hukum Pidana Nasional Dan Hukum Pidana Internasional," *Soumatra Law Review*, Vol. 1, No. 1, May, 2018

3.2 The Right of Convicts Whose Rights to Certain Livelihoods Have been Revoked to Face a Notary To Sign the Deed

In principle, the convict does not lose the rights to carry out legal actions. In certain cases, some of the convict's rights may be revoked by the judge in his decision as an additional sentence of a maximum of 5 years or life imprisonment, as long as the criminal rules violated allow the judge to impose the additional punishment. The rights that can be revoked by judges are regulated in Article 35 of the Criminal Code, namely:

1. The right to hold general or certain positions.
2. The right to enroll the armed forces.
3. The right to vote and be elected in elections held based on general rules.
4. The right to become a legal advisor or administrator for court decisions, the right to become a guardian, supervisory guardian, supervisor for other people who are not their own children.
5. The right to exercise the power of the father, to exercise guardianship over his own child.
6. The right to pursue certain livelihoods.

Article 1329 of the Civil Code states that every person is authorized to enter into an agreement, unless he is declared incompetent. Article 1330 of the Civil Code classifies incompetents are immature children, people who are placed under guardianship, and married women, as well as all people who are prohibited by law from making certain agreements. Regarding the legal position of married women, based on the Circular Letter of the Supreme Court No. 3/1963, married women are capable of taking full legal action, both regarding personal or joint assets or to appear before the court. It means that none of the imperative provisions in Article 1330 of the Civil Code which prohibits the convicts from making an agreement, especially signing the deed, as long as the convicts appear to meet the qualification criteria in the Civil Code.

Based on the type, the notary deed has two forms, namely, the official deed and the party deed. These deeds have different characteristics. In addition to having their own characteristics, the party deed and the official deed have basic differences which can be explained as follows.

First is the Official Deed. Official Deed is a deed designed by an authorized official aiming to prove what the official has observed, experienced and done himself. This deed has no comparison and the notary is fully responsible for proving this deed. Notaries are prohibited from conducting assessments during the making of the official deed. Examples of official deed are deed of minutes of auction, deed of general meeting of shareholders, deed of drawing of lottery, etc. In shorts, characteristic of an official deed listed as follows:¹

1. The notary creates a deed based on what he saw, experienced and heard himself before the notary at one time.
2. The Deed is made under the general official's authority.
3. Notaries are responsible for the correctness of the content and form of the deed.
4. The deed made remains an authentic deed even though the parties do not affix their signatures, because the deed was an official deed and cannot be sued unless it has been declared false.
5. At the end of the deed it is stated that the parties left the place or did not sign before the deed had been drafted.

Second is the Deed of Party. A party deed is designed in the presence of an authorized official and the deed is made at the request or will of the interested parties. The special feature of this deed is the existence of a comparison of the parties that explains the authority of the parties to carry out legal actions contained in the deed. For example: deed of sale, lease, establishment of a limited liability company, recognition of debt, etc. In short, the differences between these two deeds are:²

1. The Deed of Party may results in other consequences, namely if one of the parties does not sign the deed, it is interpreted as disagreement to the agreement unless there is a strong reason for the signing, for example giving a thumbprint when the hand is injured. However, the reason must be stated clearly at the end of the deed.
2. An official deed can be claimed as legal and valid as evidence as long as the notary discloses the reasons the parties did not sign the deed when one or more parties are not able to appear.

The Supreme Court of the Republic of Indonesia number 1420/K/Sip/1978, dated May 1, 1979, stated that the court cannot annul a notarial deed, but the court can declare that a notarial deed has no legal force. Therefore, only the parties can cancel the authentic deed. This notarial deed can be canceled or considered invalid according to the Supreme Court Decision No. 1420/K/Sip/1978 in its position as an authentic deed includes the following five parts:

1. can be cancelled;
2. null and void;
3. has the power of authentication as a private deed;

¹ Zainatun Rosalina, *Op. cit.* p 56.

² Habib Adjie, 2013, *Menjalani Pemikiran-Pendapat tentang Kenotariatan*, Citra Aditya Bakti, Bandung, p. 109.

4. being canceled by the parties;
5. The court's decision declared null and void because it already has permanent legal force due to the application of the principle of valid presumption.

Based on the Supreme Court Decision No. 1420/K/Sip/1978, a notarial deed can be invalid if it is canceled, null and void, has the power of proof as a private deed, and the court declares void. Its classification does not state that convicted persons are included in this section. Therefore, the notarial deed signed by the convict is legal.

The Criminal Procedure Code mentioned that the right to carry out legal actions of a convict is not deprived. The signing of a notarial deed by one of the parties will not cancel the deed as long as it adheres to the principle of freedom of contract. The status of a defendant will not eliminate a person's right to perform legal actions. It is in line with Article 3 of the Civil Code which states: "*there is no crime that causes the death of civil rights or the loss of all citizenship*" There is no legal action that can eliminate the civil rights of the convict.

Furthermore, the law prohibits legal incompetent person from taking legal action, regardless the subject can understand the consequences of his actions. A person who is actually immature, and who is in a state of memory loss is considered to be under guardianship. A person is unable to take legal action except through the consent of his parent or legal guardian which is considered legally valid.

In the Civil Code, including Article 307 and Article 308, and Article 383, as well as Article 47 and Article 50 of Act Number 1 of 1974 concerning Marriage, Article 1330 and Article 1446 of the Civil Code, it can be concluded that in principle those who can file a lawsuit legally with perfect legal consequences are adults.¹ Cancellation of a notarial deed may occur due to disconformity to the objective requirements; absolute incompetence; incompetent to act; relative incompetence; contrary to law, public order or decency; completion of the legal event in accordance with the Cancellation Conditions; lack of will; abuse of situation; default as a condition of cancellation; non-compliance with formal agreements. The legal implications of cancellations by notaries and interested parties are varied. First, the notarial deed can be revoked, the notary deed is void, the notary deed has the same effect as the bent deed, and the notary deed is canceled by the parties themselves, being valid since the date of termination by the parties concerned, the notarized deed is void based on the presumption principle that legitimate.²

Notaries appointed by the government to support some of the government's tasks and are supervised by the supervisory board will not cancel the notarial deed of a criminal. The rights of notaries and criminals in taking legal action is not eliminated either. It is in line with Article 3 of the Civil Code stating that "there is no penalty that results in the death of a citizen's civil rights or the loss of all citizenship." Therefore, there is no legal action that can eliminate the civil rights of a criminal person. A criminal person will not lose his freedom to carry out legal actions, such as buying, selling, inheriting, renting out, etc., regardless of whether the legal action is taking place or not. It can apply as long as it does not violate the principle of freedom of contract and the legal provisions of the agreement in the Civil Code to appear before a notary.³

3.3. Proper Concept of Arrangement for A Convict Whose Rights to A Certain Livelihood Are Revoked to Pursue His Own Interests to Appear Before A Notary in Making A Deed

The role of a notary is to determine whether the party appearing, in this case the legal subject, who will sue, has fulfilled the element of jurisdiction.⁴ In addition, the role of a notary is very important and necessary for community activities. Notary carried out his functions only for the public interest.⁵ Therefore, notaries as public officials play an important role in law enforcement in Indonesia.⁶ Socially, economically, politically and psychologically, the notary profession is considered to have a high position in the general social structure.⁷ The existence of a notary (*openbaar ambtenaar*) is to answer all questions related to civil law, especially the public's need for authentication based on Act Number 2 of 2014 concerning Amendments to Act Number 30 of 2004 concerning the Position of a Notary (hereinafter referred to as *UUJN*) as referred to in paragraph (1). Article 1 paragraph (1) of *UUJN* states that a notary is a public official who is authorized to make an authentic deed.

In addition to provide legal counseling in relation to making a deed, a notary also has the authority to ratify signatures and determine the certainty of the date of the private letter by registering it in a special book. At the end or closing of the deed made before a notary, it contains a description of the signer and the place of signing or

¹ Juswito Satrio, 1995, *Hukum Perikatan: Perikatan yang Lahir dari Perjanjian: Buku II*, Citra Aditya Bakti, Bandung, p. 63.

² Anny Mawartiningsih dan Maryanto Maryanto, *Op. cit.* p. 105

³ Mahalia Nola Pohan, Sri Hidayani, dan Zaini Munawir, *Op. cit.* p. 75

⁴ Dian Pramesti Stia, 2008, *Peranan Notaris Dalam Proses Peradilan Kaitannya Dengan Kewajiban Menjaga Kerahasiaan Jabatan Di Kota Surakarta*, PhD Thesis, Postgraduate Program of Universitas Diponegoro.

⁵ Soetomo Ramelan, "Peranan Notaris dalam Pembangunan Hukum," *Jurnal Hukum & Pembangunan*, Vol. 16, No. 4, 2017.

⁶ Mokhamad Dafirul Fajar Rahman, 2014, *Kewenangan, Kewajiban Notaris dan Calon Notaris dalam Membuat Akta Autentik*, PhD Thesis, Brawijaya University.

⁷ Vincent Gnoffo, "Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act," *HeinOnline J. Marshall L. Rev.*, Vol. 30, 1996.

translation of the deed, if any. In making an authentic deed, the signer must be affixed by the appearer because the authentic deed made before a notary, in this case the minutes of the deed, is the original deed that includes the signatures of the appraisers, witnesses, and notaries. Basically, the function of the signature is to guarantee the certainty of the date and to ensure that the parties do not evade the contents of the deed so that it will be legally binding for the parties.¹ The signing in the deed is to affix the signature of the signatory, to affix initials, and to be handwritten by the signer himself of his own free will.² The appearer shall meet the minimum age of 18 (eighteen) years or have been married and capable of carrying out legal actions. The signature on an authentic deed is a sign of approval of the rights and obligations attached to the deed he made.

Essentially, the signature functioned to guarantee the certainty of the date and to ensure that the parties do not evade the contents of the deed so that it will be legally binding for the parties.³ The signatory shall affix official stamp on the signature, to affix initials, and is being hand written by signer of his own free will.⁴ The appearer shall at least at the age of 18 (eighteen) years or married and is capable of doing legal actions. This signing of the authentic deed indicates the signer's approval of the incumbency adhered to the deed being made.

A signature is a statement of signatory's will that he wants the writing to be legal. In general, the definition of a signature is an arrangement of letters or signs in the form of writing from the signer, in which the person making the statement can be individualized. A written statement including a deed must be signed by the person concerned.⁵

A signature is a requirement of a deed which aims to distinguish one deed from another or from a deed made by another person to meet legal certainty.⁶ The function of a signature is to characterize a person who signed or to individualize a deed he signed.⁷ Deeds made by A and B can be identified from the signatures affixed to the deeds, where the inclusion of names or signatures written in block letters is not sufficient because it does not show the characteristics of the maker.⁸

The mechanism for signing an authentic deed is not only limited to the issue that the deed must be signed, but the signing of the deed must also be before a notary as regulated in Article 16 paragraph (1) letter m of the *UUJN* stating that "reading the deed before an audience in the presence of at least 2 witnesses, or four special witnesses for making a personal will and signed at the same time by the appearers, witnesses, and notaries."

Reading to signing the deed is an integral part of the inauguration of the deed, where before the deed is signed, the deed is read out in front of the parties concerned. It is intended to convey the truth of the contents of the deed based on the wishes of the parties, and it is signed in front of the parties and two witnesses. In general, the signing of a document has the following objectives:⁹

1. Evidence: a signature identifies the signer with the document he signed. When the signer signs a special form, the writing will have an attribute with the signer;
2. Ceremony: the signing of a document indicates that the signer has committed a legal act, thus eliminating any unconsidered engagement;
3. Approval: the signature symbolizes the approval or authorization of a piece of writing.

The signing of deed is absolute requirement and shall be clearly stated at the end of the deed, unless the parties are unable to sign it, they must provide a clear reason that should be written down on the deed in lieu of a signature.¹⁰

A notary also has the authority to ratify signatures and determine the certainty of the date of the private letter by registering it in a special book. At the end or closing of the deed made before a notary, it contains a description of the signer and the place of signing or translation of the deed, if any. In making an authentic deed, the signer must be affixed by the appearer because the authentic deed made before a notary, in this case the minutes of the deed, is the original deed that includes the signatures of the appraisers, witnesses, and notaries. Basically, the function of the signature is to guarantee the certainty of the date and to ensure that the parties do

¹ Sudiharto. (2015). *Keotentikan Akta Jaminan fidusia yang tidak Ditandatangani Di Hadapan Notaris*. Jurnal Pembaharuan Hukum, II(3), 412418

² Mawartiningsih, A., & Maryanto. (2017). *Tinjauan Yuridis Praktek Pembuatan Akta Notaris Dalam Hal Penghadap Menghadap Dalam Kurun Waktu Dan Tempat Yang Berbeda*. Jurnal Akta, 4(2), 119124

³ Sudiharto Sudiharto, "Keotentikan Akta Jaminan fidusia yang tidak Ditandatangani Di Hadapan Notaris," *Jurnal Pembaharuan Hukum*, Vol. 2, No. 3, 2015.

⁴ Anny Mawartiningsih dan Maryanto Maryanto, Op. Cit 127.

⁵ Tutwuri Handayani, SH YUNANTO, dan M. HUM, 2009, *Pengakuan Tanda Tangan Pada Suatu Dokumen Elektronik Di Dalam Pembuktian Hukum Acara Perdata Di Indonesia*, Universitas Diponegoro, Semarang.

⁶ Michael L. Closen, Op. Cit 130.

⁷ Stephen A. Rains dan Anna M. Young, "A Sign Of The Times: An Analysis Of Organizational Members' Email Signatures," Oxford University Press Oxford, UK *Journal of computer-mediated communication*, Vol. 11, No. 4, 2006.

⁸ John Sherblom, "Direction, function, and signature in electronic mail," Sage Publications Sage CA: Thousand Oaks, CA *The Journal of Business Communication* (1973), Vol. 25, No. 4, 1988.

⁹ Ibnu Sajadi and Noor Saptanti, "Tanggung Jawab Notaris Terhadap Keabsahan Akta Notaris Yang Dibuatnya Atas Penghadap Yang Tidak Dapat Membaca Dan Menulis," *Repertorium*, Vol. 2, No. 2, 2015. p. 5.

¹⁰ Ayu Riskiana Dinaryanti, 2013, *Tinjauan Yuridis Legalisasi Akta di Bawah Tangan oleh Notaris*, Tadulako University, p. 5.

not evade the contents of the deed so that it will be legally binding for the parties.¹ The signing in the deed is to affix the signature of the signatory, to affix initials, and to be handwritten by the signer himself of his own free will.² The appearer shall meet the minimum age of 18 (eighteen) years or have been married and capable of carrying out legal actions. The signature on an authentic deed is a sign of approval of the rights and obligations attached to the deed he made.

The signing of deed is absolute requirement and shall be clearly stated at the end of the deed, unless the parties are unable to sign it, they must provide a clear reason that should be written down on the deed in lieu of a signature.³ Signing must be done at the same time by the appearer, witness, and notary after reading the deed before the appearer in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for making a private will. Therefore, the notary must be physically present and sign the deed before the appearers and witnesses.

In relation to the convict as one of the signatories of the deed, suspect and convict appearer shall be first defined. A suspect according to Article 1 number 14 of the Criminal Code (hereinafter referred to as the Criminal Procedure Code) is a person who should be suspected as a criminal act due to his actions or circumstances based on preliminary evidence. The defendant according to Article 1 point 15 of the Criminal Procedure Code is a suspect who is prosecuted, examined and tried in a court session, and the convicted person according to Article 1 number 32 of the Criminal Procedure Code is a person convicted based on a court decision that has obtained permanent legal force. If someone based on preliminary evidence is reasonably suspected of being a criminal, then he is called a suspect. The suspect is determined by the investigator based on the investigation. An investigation is a series of actions to seek and collect evidence to clarify the criminal occurred. In order to find the suspect as referred to in Article 1 point 2 of the Criminal Procedure Code, it is done by carrying out the investigation as a series of actions of investigators to seek and find an event that is suspected of being a criminal act to determine whether or not an investigation can be carried out according to the method regulated in this law as referred to in Article 1 point 5 of the Criminal Procedure Code. It means that there is a difference between the suspect and the convict. A suspect means the perpetrator is still suspected of being the perpetrator of a crime and is usually detained in a state detention house, while the convicted person is a person who is legally and convincingly proven to have committed a crime based on a court decision that has permanent legal force and is serving a sentence in a correctional institution.

Article 44 of the *UUJN* states that every deed made before a notary must be signed by the parties, witnesses and a notary. The meaning of the word sign (*ondertekenen*) etymologically (the science of our origins) means to sign under something. In practice, this definition does not provide a clear and specific description of the implication of signing. Giving a sign under something is certainly related to legal actions carried out by legal subjects.⁴ Therefore, the act of affixing a signature is a legal action that cannot be separated from the routine duty of a notary from his authority to make an authentic deed.

Article 16 paragraph (1) letter m of the *UUJN* states that at the conclusion of the notarial deed, the sentence states "after me, the notary reads this deed to the appearers and witnesses, then immediately the appearers, witnesses and I, and the notary, sign this deed." All notarial deeds must be signed by each appearer, immediately after reading the deed. The word immediately signed the deed, which means that after the deed was read, immediately the parties, witnesses and the notary signed it, without any grace period.

If the appearers states the inability to put their signatures on the deed or are unable to do so, then the statement and the reasons for the obstruction must be notified expressly by a notary in the deed. An authentic or private deed is not legal before being signed. If the appearer is unable to affix his signature due to paralysis, serious illness, or other reasons, then as a substitute for the signature, the appearer may affix a finger stamp on the minutes of the deed. It means that people who are in correctional institutions has no reason to undergo criminal sanctions that already have permanent legal force. None of points contained in the Article 1330 of the Civil Code stating that a person in a correctional institution undergoing criminal sanctions is declared incompetent to act under the law, thus as long as a person is 18 years old or married, and is not under a guardian, everyone is capable to perform legal act. As stipulated in Article 1 paragraph (3) of the Civil Code stating that none of the law results in civil death, or the loss of all citizenship rights.

The deed made before a notary does not sufficiently fulfill the form and nature of the deed as stated in Article 38 of the *UUJN* as a requirement for an authentic deed, but it must be made based on the procedure or process of making the deed, therefore the deed is valid as an authentic deed which has perfect evidentiary power.

¹ Sudiharto Sudiharto, "Keotentikan Akta Jaminan Fidusia yang Tidak Ditandatangani di Hadapan Notaris," *Jurnal Pembaharuan Hukum*, Vol. 2, No. 3, 2015 p. 4.

² Anny Mawartingsih dan Maryanto Maryanto, "Tinjauan Yuridis Praktek Pembuatan Akta Notaris Dalam Hal Penghadap Menghadap Dalam Kurun Waktu dan Tempat yang Berbeda," *Jurnal Akta*, Vol. 4, No. 2, 2017, p. 119-124.

³ Ayu Riskiana Dinaryanti, *Op. cit.*, p. 5.

⁴ Dhea Mardheana, 2017, Implikasi Yuridis Pemalsuan Tanda Tangan Pada Minuta Akta terhadap Jabatan Notaris (Studi Putusan Mahkamah Agung Nomor 1234 K/Pid/2012), Universitas Islam Indonesia, p. 285

The procedure for making a deed made before a notary consists of the following processes:¹

1. To Identify the appearer based on the identity shown to the notary;
2. Understanding the will, intent, and purpose of the parties;
3. Verifying documentary evidence relating to the will of the parties;
4. To provide legal counseling on to the deed to fulfill the wishes or will of the parties;
To carry out all notarial deed making procedures, such as reading, signing, providing copies and filing for minutes;
5. To carry out other obligations based on the duties of a notary position as regulated in the Law on Notary Positions.

The series of deed-making processes applies the principle of prudence to minimize problems that may occur in the future. In examining the deed made by the notary, it shall adhere to the parameters of deed making procedure based on the Law on Notary Positions. When the procedures are carried well, the deed is binding to legal subjects and has a legal force.

The notary shall recognize the appearers in accordance with Article 39 paragraph (2) of the *UUJN* stating that the appearers must be known by a notary or introduced to him by 2 (two) identifying witnesses who are at least 18 (eighteen) years old or are married and capable of performing legal action or are introduced by 2 (two) other appearers. Therefore, the notary needs to recognize the appearers before making the deed to identify whether or not the appearers/parties are capable and authorized to make a deed and are allowed by the applicable law.

The notary must be able to identify the intentions and objectives of the parties in making this deed, and that the legal action is carried out sincerely without any coercion, as written in Article 1321 of the Civil Code which states that: "an agreement is invalid if it was made by mistake or obtained under coercion or deception." As long as the intent and purpose of making the deed does not violate the law, ideology, customs, culture, and then the several data/documents can be submitted. The supporting data or documents include personal identity, residency status, licenses, ownership certificates, etc., in which the validity must be carefully examined. The possible legal consequences must also be explained clearly and firmly.

After making the deed, notaries shall read and sign the deed to finally fill the minutes. However, notaries do not always perform this procedure correctly. They usually only see that signatory meets the requirements without considering the physical condition of the signer who may be in a state of stress, etc., that may affects the freedom to sign the deed as evidence of an agreement.

The provisions of Article 19 *UUJN* regulate some prohibitions of notaries to perform the authority. A notary is prohibited from having more than one office or from running certain jobs outside his current position. Article 18 *UUJN* mentioned that notaries work at district or city area. The official area of a notary covers the entire province from his place of domicile.

In running the function, the notary's authority is only limited to the entire province where the notary's office is located, meaning that making an authentic deed outside the province is not allowed. However, this provision becomes ambiguous in relation to the provisions of Article 19 paragraph (3) of the *UUJN*, that Notaries are not authorized successively by continuing to carry out positions outside their domicile.

The notarial deed signed by the convict in the correctional institution when the appearer is serving a prison sentence is valid and fulfills the requirements of being capable of making the deed as long as the convicted person is capable of acting according to the law. However, since the deed was signed by a notary outside the office of the notary concerned, it is necessary to question the legal consequences of the deed. On one side, the notary signs the deed at the notary's office, but it is still possible for the notary to sign the deed outside the notary office as long as it is not carried out consecutively, as in Article 19 paragraph (3) of the *UUJN*, that the notary is not authorized successively by continuing to run the position outside the office. It means that as long as the signing of the deed is carried out in the notary's working area, even though it is not carried out in his office, namely at the house of the convict or in the detention house, and is not carried out consecutively, then the signing process is still allowed.

4. Conclusions

Based on the research elaboration presented above, the following conclusions can be drawn:

1. The phrase revocation of the right to a certain livelihood as an additional criminal regulated in Article 35 paragraph (1) of the Criminal Code implies that the revocation of the right to work or business which is the convict's main source of income. Business is any process that produces and distributes and provides goods or services needed by the community which is on the basis of their willingness to buy or pay. The criminal conviction is not aimed to eliminate a person's honor and rights, but is based on appropriateness such as prevention for someone from committing similar criminal acts. The revocation of certain rights in

¹ Habib Adjie, *Op. cit.*, p. 12.

the Criminal Code exists because the legislators consider the additional punishment is appropriate to be given.

As additional penalties, the rights of convicts that can be revoked are the right to hold common or certain positions, the right to enter the armed forces, the right to vote and be elected in elections held based on statutory regulations, the right to become legal advisors or administrators upon court decisions, the right to become a guardian, supervisory guardian, supervisor over people who are not their own children, the right to exercise the power of the father, to carry out guardianship or custody of their own children, the right to carry out certain livelihoods, all of which are specifically determined by each law.

2. The revocation of the right to carry out certain livelihoods does not become a barrier for the convicted person to sign a notarial deed because the convicted person serving a sentence in a correctional institution is capable of acting in law by signing the deed before a notary. As referred to in Article 1330 of the Civil Code, none of the provision states that a person in a correctional institution undergoing criminal sanctions is declared incompetent to act in law. Thus, as long as the person concerned is 18 years old or married and is not under guardian, everyone is capable of performing legal act. Article 1 paragraph (3) of the Civil Code stated that there is no punishment that results in civil death, or the loss of all civil rights.
3. In the process of signing a notarial deed for people whose rights for certain livelihood is revoked, and when an authentic deed is signed by an appellant, a witness and then a notary, then one of the appearers or witnesses is a convict, then the deed is still valid and has the strength of authentication as an authentic deed, as long as the signing of the deed outside the notary's office is not carried out by a notary successively by still carrying out his position outside his domicile. It is in accordance with the provisions of Article 19 paragraph (3) *UUJN*, as long as the right of the convicted person relates to reasonable livelihood or work and does not violate the provisions of the legislation, for example, signing of the sale and purchase binding deed. However, a Notary shall adhere to all rules and provisions contained in the *UUJN* and the notary code of ethics in performing the work. Therefore, to uphold legal certainty, the rights of convicts who receive additional penalties shall not be eliminated. These arrangements must explicitly provide a solution related to the main duties and functions of a notary in providing services for making an authentic deed for the convict as the rights of the community on notary service in general.

5. Suggestions

Based on the analysis elaborated above, the authors provide the following suggestions:

1. Although a convicted person serving a sentence in a correctional institution is capable of performing legal act by signing a notarial deed, a notary should not successively sign the deed outside the office, since it affect the authenticity of the deed and to avoid sanctions for the notary concerned.
2. Notaries and law enforcement officers should not discriminate convicts who wish to involve in an engagement, especially in the case of signing a notarial deed, as long as the convict does not violate the provisions of the applicable laws and regulations. Because there are no criminal provisions that can negate the civil rights of citizens.
3. Harmonization of regulations and affirmations related to the civil rights of convicts by the government is needed by involving notary organizations related to the regulation of the need for signing a notarial deed for convicts whose rights to certain livelihoods are revoked in order to achieve legal certainty.

References

- A'an Efendi and Dr. Dyah Ochterina Susanti, Ilmu Hukum, Prenada Media, Jakarta, 2019
- Adjie, Habib, 2013, Menjalain Pemikiran-Pendapat tentang Kenotariatan, Citra Aditya Bakti, Bandung.
- Chazawi, Adami, 2002, Pelajaran hukum pidana, RajaGrafindo Persada.
- Closen, Michael L., 1997, Notary Law & Practice: Cases & Materials, National Notary Association.
- Dinaryanti, Ayu Riskiana, 2013, Tinjauan Yuridis Legalisasi Akta di Bawah Tangan oleh Notaris, Tadulako University.
- Gnoffo, Vincent, "Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Noraty Act," HeinOnline J. Marshall L. Rev., Vol. 30, 1996.
- Handayani, Tutwuri, SH YUNANTO, and M. HUM, 2009, Pengakuan Tanda Tangan Pada Suatu Dokumen Elektronik Di Dalam Pembuktian Hukum Acara Perdata Di Indonesia, Universitas Diponegoro, Semarang.
- Lamintang, P. A. F. and Theo Lamintang, 2012, Hukum Penitensier, Sinar Grafika (Bumi Aksara), Jakarta.
- Mardheana, Dhea, 2017, Implikasi Yuridis Pemalsuan Tanda Tangan Pada Minuta Akta terhadap Jabatan Notaris (Studi Putusan Mahkamah Agung Nomor 1234 K/Pid/2012), Universitas Islam Indonesia.
- Mawartiningsih, Anny and Maryanto Maryanto, "Tinjauan Yuridis Praktek Pembuatan Akta Notaris Dalam Hal Penghadap Menghadap Dalam Kurun Waktu Dan Tempat Yang Berbeda," Jurnal Akta, Vol. 4, No. 2, 2017.
- Mawartiningsih, Anny and Maryanto Maryanto, "Tinjauan Yuridis Praktek Pembuatan Akta Notaris Dalam Hal Penghadap Menghadap Dalam Kurun Waktu dan Tempat yang Berbeda," Jurnal Akta, Vol. 4, No. 2, 2017.

- Pohan, Mahalia Nola, Sri Hidayani, and Zaini Munawir, "Tinjauan Hukum tentang kecakapan tahanan dalam Penandatanganan Akta Notaris di Rumah Tahanan," *Jurnal Normatif*, Vol. 1, No. 2, 2021.
- Rahman, Mokhammad Dafirul Fajar, 2014, *Kewenangan, Kewajiban Notaris dan Calon Notaris dalam Membuat Akta Autentik*, PhD Thesis, Brawijaya University.
- Rains, Stephen A. and Anna M. Young, "A Sign Of The Times: An Analysis Of Organizational Members' Email Signatures," *Oxford University Press Oxford, UK Journal of computer-mediated communication*, Vol. 11, No. 4, 2006.
- Ramelan, Soetomo, "Peranan Notaris dalam Pembangunan Hukum," *Jurnal Hukum & Pembangunan*, Vol. 16, No. 4, 2017.
- Rosalina, Zainatun, 2016, *Keabsahan Akta Notaris Yang Menggunakan Cyber Notary Sebagai Akta Otentik*, Magister, Universitas Brawijaya.
- Sajadi, Ibnu and Noor Saptanti, "Tanggung Jawab Notaris Terhadap Keabsahan Akta Notaris Yang Dibuatnya Atas Penghadap Yang Tidak Dapat Membaca Dan Menulis," *Repertorium*, Vol. 2, No. 2, 2015.
- Satrio, Juswito, 1995, *Hukum Perikatan: Perikatan yang Lahir dari Perjanjian: Buku II*, Citra Aditya Bakti, Bandung.
- Sherblom, John, "Direction, function, and signature in electronic mail," *Sage Publications Sage CA: Thousand Oaks, CA The Journal of Business Communication (1973)*, Vol. 25, No. 4, 1988.
- Sianturi, S. R. and E. Y. Kanter, 1982, *Asas-Asas Hukum Pidana Indonesia*, Alumni, Jakarta.
- Situngkir, Danel Aditia, "Asas Legalitas Dalam Hukum Pidana Nasional Dan Hukum Pidana Internasional," *Soumatera Law Review*, Vol. 1, No. 1, May, 2018.
- Stia, Dian Pramesti, 2008, *Peranan Notaris Dalam Proses Peradilan Kaitannya Dengan Kewajiban Menjaga Kerahasiaan Jabatan Di Kota Surakarta*, PhD Thesis, program Pascasarjana Universitas Diponegoro.
- Sudiharto, Sudiharto, "Keotentikan Akta Jaminan fidusia yang tidak Ditandatangani Di Hadapan Notaris," *Jurnal Pembaharuan Hukum*, Vol. 2, No. 3, 2015.
- Sudiharto, Sudiharto, "Keotentikan Akta Jaminan Fidusia yang Tidak Ditandatangani di Hadapan Notaris," *Jurnal Pembaharuan Hukum*, Vol. 2, No. 3, 2015.