

# SELECTED ESSAYS:

Essays on Constitution, Human Rights,  
Private and Criminal Law Perspectives

Faculty of Law of Universitas Sriwijaya, Indonesia and  
Fakulti Undang-Undang, Universiti Kebangsaan Malaysia



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**Sanctions for Violation of Article 113**  
**Law of the Republic of Indonesia Number 28 of 2014 on Copyright**

- (1) Any person who unlawfully violates the economic rights as referred to in Article 9 paragraph (1) letter i for Commercial Use shall be sentenced to a maximum imprisonment of 1 (one) year and/or a maximum fine of Rp. 100,000,000 (one hundred million rupiahs).
- (2) Any person who without rights and/or without permission of the Author or Copyright Holder violates the economic rights of the Author as referred to in Article 9 paragraph (1) letter c, letter d, letter f, and/or letter h for Commercial Use shall be sentenced to a maximum imprisonment of 3 (three) years and/or a maximum fine of Rp. 500,000,000 (five hundred million rupiahs).
- (3) Any person who without rights and/or without permission of the Author or Copyright Holder violates the economic rights of the Author as referred to in Article 9 paragraph (1) letter a, letter b, letter e, and/or letter g for Commercial Use shall be sentenced to a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 1,000,000,000 (one billion rupiahs).
- (4) Everyone who fulfills the elements as referred to in paragraph (3) committed in the form of piracy, shall be sentenced to a maximum imprisonment of 10 (ten) years and/or a maximum fine of Rp. 4,000,000,000 (four billion rupiahs).

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## FOREWORD

This book contains selected essays as a result of collaboration between the Faculty of Law Universitas Sriwijaya (FH UNSRI) and the Faculty of Law Universiti Kebangsaan Malaysia (FUU UKM), in a form of various legal themes written by various authors, including students. These essays are also arranged based on several main themes to make them easier to read and understand.

In addition, these also discuss legal policy practices, such as automatic exchange of financial accounts in the context of tax law enforcement, investment development and growth and regional autonomy. In private law, this book discusses material law related to the division of tangible objects with intangible objects as well as movable and immovable objects respectively regulated in Article 503, 504 of the Civil Code. In public law, it discusses the perspective of juvenile criminal law and human rights. Crimes against children must be prevented by the state. There must be an effort to ensure legal certainty to protect children's rights. Furthermore, these selected essays also contain articles written by academics from the Faculty of Law at the National University of Malaysia who discuss current issues of the Malaysian legal system on maritime security. The geographical conditions of the States in Southeast Asia, especially in the Malacca Strait, are very vulnerable due to the threat of piracy, terrorism, conflict, and environmental disasters.

By the publication of these selected essays, it can hopefully lead readers to gain new insights, as well as contribute ideas to the development and knowledge of law. As a conclusion, it is hoped that these selected essays will fulfill the expectations and desired goals.

Palembang, July 2022

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# CHAPTER IV Private Legal System in Indonesia

## Notarial Deeds Mandatory: Transfer of Patent and Plant Variety Protection due to Agreement

*Elmadiantini, Annalisa Y, and Febrian*

### 1. Introduction

In material laws the most important is the division of tangible (immaterial) and immaterial objects, as well as movable and immovable objects, respectively regulated in Articles 503 and 504 of the Civil Code (CC)<sup>1</sup>. The need for this division because it has important consequences related to the field of delivery and the field of goods guarantee<sup>2</sup>. Related to material law, property rights can be obtained by way of transfer or being transferred. Article 584 CC regulates the transfer in 5 ways, namely: ownership; attachment; inheritance; expired; and handover on the basis of personal facts carried out by authorized persons.

The model of obtaining ownership rights by handover on the basis of personal facts carried out by the authorized person is called by obtaining objects in a "derivative" manner because obtaining the ownership rights is due to the involvement of another party, meaning that the party has an interest in the will of those who wish or wish to have the right belongs to an object that is needed. Obtaining ownership rights by means of derivatives, namely through legal actions in the form of levering (handover) of their property to other parties. The personal titles or events are commonly used as a basis for handover in the form of a "sale-purchase" agreement; "exchange"; or "grant"<sup>3</sup>. Property rights

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<sup>1</sup> Moch. Isnaeni, *Hukum Benda Dalam Burgerlijk Wetboek* . (Surabaya: PT. Revka Petra Media, 2016).

<sup>2</sup> Moch Isnaeni, *Pengantar Hukum Jaminan Kebendaan* (Surabaya: PT. Revka Petra Media, 2016).

<sup>3</sup> Moch. Isnaeni.

obtained through handover on personal facts are dominated by the sale and purchase agreement. Most of one's assets are obtained because of the purchase proceeds. That's why in the "sale and purchase agreement" earned the nickname "cornerstone" in the area of the business world both nationally and internationally.

Intellectual property rights including immaterial movable objects<sup>4</sup> can be used as collateral for loans whose agreements are made with a notarial deed. In principle, intellectual property rights are classified as intangible movable property whose ownership can be transferred through inheritance, grants, endowments, sale and purchase agreements or debt guarantees<sup>5</sup>. Transfers of Patent Rights and Plant Variety Protection (PVP) due to a written agreement must use a notarial deed, where personal facts can occur in the form of buying and selling, exchanging or guarantees. The notary authority granted by Patent Law and Plant Variety Protection is the authority in the field of industrial property rights. The notary's authority to make the notarial deed constitutes the attribution authority.

The presence of a notary is necessary to meet the needs of the community who need legal documents (authentic deeds) in the field of civil law, so that the notary has the responsibility to serve the community. One form of services is transfer of rights to PVP and Patents<sup>6</sup>. The notary must continually equip himself with various sciences in order to keep pace with the progress of the era which is and will continue to develop. If a Patent and Plant Variety Protection are transferred in written form with a notarial deed, then the patent transfer shall be recorded and announced at the Director General of Intellectual Property Rights. While for the Protection of Plant Varieties the recording of transfers and announcements is made at the Office for Plant Variety Protection. However, what needs to be studied is whether

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<sup>4</sup> Yunial Laili Mutiari Annalisa Yahanan, Muhammad Syaifuddin, *Perjanjian Jual Beli Berklausula Perlindungan Hukum Paten*, ed. by Yuliani (Malang: Tunggal Mandiri Publishing, 2009).

<sup>5</sup> R. Serfianto D. Purnomo Iswi Haryani, Cita Yustisia Serfiyani, *Hak Kekayaan Intelektual Sebagai Jaminan Kredit* (Yogyakarta: Andi, 2018).

<sup>6</sup> Annalisa Yahanan and Elmadiantini, 'Akta Notaril: Keharusan Atau Pilihan Dalam Peralihan Kekayaan Intelektual', *LamLaj*, 4.1 (2019), pp. 119–28.

the terms and procedures for recording the transfer have been accommodated. All forms of transfer of rights both to Patents and Protection of Plant Varieties must be recorded and announced by paying a fee. Recording the transfer should be attached by certain conditions within a specified time period. If within the specified time period the requirements are not complete, the request for transfer of Patents and Plant Variety Protection in a form of written agreement is deemed withdrawn. Here, the role of a notary as a deed maker of a patent transfer and Plant Variety Protection is necessary to provide information on the parties related to the existence and function of the notary deed.

### **1.1. Authentic Deed as Perfect Evidence**

Proof instruments in civil law include written evidence; witness evidence; suspicion; avowal; and oath. Proof by writing is done by authentic writing or by writing under the hand. Written evidence or a letter is anything that contains reading signs that are intended to pour out one's heart or thoughts and are used as proof<sup>7</sup>. Letter of evidence contains statements (information, acknowledgments, decisions etc. regarding legal events made according to the applicable regulations, witnessed and validated by official officials. Letters as written evidence can be distinguished in deed and non-deed letter. Furthermore, the deed consists of authentic deed and deeds under the hand, so that in the evidentiary law three types of letters are known, namely an authentic deed, a deed under the hand, and a letter not a deed<sup>8</sup>.

According to Sudikno Mertokusumo<sup>9</sup>, an authentic deed is a deed made by an official who is authorized for this by the authorities, according to the stipulations that have been established, both with and without the assistance of the interested parties that record what is requested to be contained therein by the interested parties. On the basis

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<sup>7</sup> Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty Offset, 1998).

<sup>8</sup> Enju Juanda, 'Kekuatan Alat Bukti Dalam Perkara Perdata Menurut Hukum Positif Indonesia', *Jurnal Ilmiah Galuh Justisi*, 4.1 (2016), 27 <<https://doi.org/10.25157/jigj.v4i1.409>>.

<sup>9</sup> Sudikno Mertokusumo.

of the above definition, it can be mentioned that the main elements of an authentic deed are the deeds made by and or in front of public officials such as Notary, Judge, Clerk, Bailiff, and Civil Registrar. So the letter issued by the official concerned such as Notarial Deed, Verdict, Minutes of the Session, Minutes of Confiscation, Marriage Certificate, Birth Certificate are Authentic Deeds<sup>10</sup>.

Deed has two functions, namely formal function (*causa formalis*) and function as evidence (*probationis causa*). *Causa formalis*, the deed serves to complete or perfect a legal act. The existence of a deed is a formal condition for the existence of a legal act. *Probationis causa*, the deed has a function as evidence, because from the beginning the deed was made deliberately for proof in the future.

In procedural law, proof has a juridical meaning, it only applies to parties who have litigation or who have obtained rights from them and the purpose of this proof is to provide certainty to the judge about the existence of certain facts. Therefore the verification must be carried out by the parties. Whoever claims then has the right or he mentions something to power his rights or to deny the rights of others. Thus the person must prove the existence of that right or the existence of the incident. Who postulates something then he must prove.

To be able to prove the existence of a legal act (such as buying and selling), we need evidence that has the power of proof. In this case so that the deed as written evidence has perfect<sup>11</sup> proof power, then the deed must meet the authenticity requirements determined by law. One of them must be made by or in front of an authorized official, in this case the "Notary". As a public official, a notary plays a very important role in fulfilling the authenticity requirements of an authentic letter or deed in order to have perfect proofing power<sup>12</sup>.

Authentic deed is a perfect proof, as referred to in Article 1870 CC, which provides perfect proof of what was done / stated in the deed. The

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<sup>10</sup> Juanda.

<sup>11</sup> Tegas Hari Krisyanto, Zainul Daulay, and Benny Beatrix, 'Strength of Evidence of Notarial Deed in the Perspective of Cyber Notary in Indonesia', *International Journal of Multicultural and Multireligious Understanding*, 6.3 (2019), pp. 775–84 <<https://doi.org/10.18415/ijmmu.v6i3.906>>.

<sup>12</sup> Republic of Indonesia, Law of Notary Position (Jakarta, 2014).

perfect power of proof contained in an authentic deed is a combination of some of the powers of proof and the requirements contained therein. The absence of one of the evidentiary powers or requirements results in the authentic deed not having a perfect proof of value (*volledig*) and binding (*bindende*) so that the deed will lose its authenticity and no longer be an authentic deed.

In an authentic deed the power of proof of birth, formal and material must be fulfilled. The power of birth proof means the power of proof is based on the birth condition of the deed itself, and applies the principle of *acta publica probant sese ipsa* which means that a certificate which physically appears as authentic deed and fulfills specified conditions, then the deed is valid or can be considered as an authentic deed until it is proven otherwise. The power of formal proof means that from the authentic deed it is proven that what is stated and included in the deed is true and is a description of the wishes of the parties. Whereas the material evidence is that the contents of the deed are true for every person who asks to make the deed for evidence against him.

## 1.2. Notary Authority

The concept of authority starts from the characteristic of a country, namely the existence of power that has authority<sup>13</sup>. Miriam Budiardjo in her book stated that power is usually in the form of a relationship in the sense that there is one party that rules and another party that is ruled (the rule and the ruled)<sup>14</sup>.

In connection with the concept of attribution, delegation, or mandate, the attribution authority is the authority carried by the notary. According to J.G. Brouwer and A.E. Schilder<sup>15</sup>, with attribution, power is granted to an administrative authority by an independent legislative

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<sup>13</sup> Nandang Alamsah Deliarnoor. et.al, *Teori & Praktek Kewenangan*, 1st edn (Yogyakarta: Pandiva Buku, 2017).

<sup>14</sup> Miriam Budiardjo, *Dasar-Dasar Ilmu Politik* (Jakarta: Gramedia Pustaka Utama, 2008).

<sup>15</sup> J.G. Brouwer dan Schilder, *A Survey of Dutch Administrative Law* (Nijmegen: Ars Aequilibrari, 1998).

body. The power is initial (*originair*), which is to say that is not derived from a previously existing power. The legislative body creates independent and previously non-existent powers and assigns them to an authority. From the statement of J.G. Brouwer and A.E. Schilder, attribution authority is given to an organ (notary public official appointed by the government) based on the law given to the competent organ.

Law No. 2 of 2014 concerning Amendment to Law No. 30 of 2004 concerning the Notary Position (NPL) has given authority to the notary to make authentic deeds. This authority includes making authentic deeds in the field of Patent and Plant Variety Protection. An authentic deed is a deed made in the form determined by the law or in the presence of a public official authorized for that at the place the deed was made (Article 1868 CC). A deed can be said to be authentic if it has fulfilled elements such as: made in a form determined by law; drawn up by or in the presence of an authorized public official for the purpose of making the deed; and made in the area of authorized notary.

The existence of a notary deed in addition to as evidence, will provide legal certainty for the parties. Legal certainty refers to the implementation of clear, constant, consistent, and consequent laws, the implementation of which cannot be influenced by subjective circumstances in nature. The indicator of legal certainty in a country itself is the existence of clear legislation and the law is implemented well by judges and other legal officers<sup>16</sup>. Notaries as state officials are able to provide guarantees of certainty, order and legal protection that are needed authentic written evidence regarding the circumstances, events or legal actions carried out through certain positions.

The notary authority in general is regulated in Article 15 paragraph (1) of the NPL, namely "making an authentic deed concerning all deeds, agreements and stipulations required by statutory regulations and / or as desired by the parties concerned to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, keeping the deed, giving the grosse, copies and quotation of the deed, all of them as

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<sup>16</sup> Abdul Rachmad Budiono, *Pengantar Ilmu Hukum* (Malang: Bayumedia Publishing, 2005).



long as the deed making is not assigned or excluded to other officials or other people determined by the law ". The authority of a notary in making an authentic deed as mentioned in the NPL, it is also mentioned in the Patent Law and the Plant Variety Protection.

## **2. Notary Deed**

### **2.1. Notary Deed: Transfer of Patents and Plant Varieties due to Agreement**

Intellectual Property Rights are valuable assets that are non-material (immaterial) derived from the creativity and innovation of human beings. Creativity is human creativity in the fields of science, art and literature protected by copyright. While innovation is the result of human discovery in the field of technology and design that is protected by Industrial Property Rights such as (Patent Rights, Trademarks, Industrial Designs, Layout Designs of Integrated Circuits, Trade Secrets, and Protection of Plant Varieties)<sup>17</sup>.

Based on the distribution of types of Intellectual Property Rights mentioned above, Indonesia has 7 (seven) Laws in the Field of Intellectual Property Rights. However, this study is only focused on Law Number 13 of 2016 concerning Patents and Law Number 29 of 2000 concerning Plant Variety Protection. Both of these laws have unique arrangements compared to 5 other Intellectual Property Rights Laws. The uniqueness lies in the arrangement of the transfer of rights in the form of a written agreement. The Patent and Plant Variety Protection Laws require the transfer of Patents and Plant Variety Protection due to agreement is made in the form of a notarial deed. While the transfer of other intellectual property rights are adequate with a written agreement and do not require an authentic deed (notarial deed).

Therefore, if the transfer of Patent and Plant Variety Protection is due to an agreement (under the hand) but does not use a notarial deed, then the agreement is null and void, because it violates the norm or

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<sup>17</sup> Iswi Hariyani, 'Comparison of Warehouse Receipt, Pawn and Fiduciary in The Security Law Perspective', *Yustisia*, 6.3 (2017), pp. 649–71.

*causa* which contains a reason prohibited by law<sup>18</sup>, namely the Patent Law and the Law of Plant Variety Protection. The cause which is prohibited by law as regulated in Article 1337 CC which states "A cause is prohibited, if it is prohibited by law, or if it is contrary to good decency or public order".

Article 74 paragraph (1) of Law Number 13 Year 2016 concerning Patents, states that "The right to a Patent may switch or be transferred either in whole or in part because of inheritance; grant; will; waqf; written agreement; or other justified reasons based on statutory provisions. Furthermore, the Elucidation of Article 74 paragraph (1) states that "Transfer of Patent Rights must be done by Notary (authentic deed). Based on this explanation, "Transfer of Patent Rights must be done by Notary (authentic deed)". The explanation in Article 74 paragraph (1) can be interpreted in all forms of transition whether due to inheritance; grant; will; waqf; and a written agreement must be with a notarial deed. If the transfer of rights to a Patent does not use a notarial deed, the transfer is null and void.

Furthermore Article 40 paragraph (1) of Law Number 29 Year 2000 concerning Protection of Plant Varieties states that "the right to Protect Plant Varieties may transfer or be transferred because of inheritance; grant; will; agreement in the form of a notarial deed; or other reasons justified by law ". In this context it can be said that the notarial deed is used in the transfer process because the agreement is not only for the transfer in other forms such as inheritance, grants and wills.

It's just that the norm does not mention the word obligatory, so this norm becomes blurred whether it is a necessity to use a notarial deed or not.

Of the two, namely the Patent Law and the Plant Variety Protection Law there are differences in the transfer of rights. For the transfer of patent rights, all transferal forms are in good form due to inheritance; grant; will; waqf; or written agreement must be with a notarial deed.

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<sup>18</sup> Ifada Qurrata A'yun Amalia, 'Akibat Hukum Pembatalan Perjanjian Dalam Putusan Nomor 1572 K/PDT/2015 Berdasarkan Pasal 1320 Dan 1338 KUH Perdata', *Jurnal Hukum Bisnis Bonum Commune*, 1.1 (2018), pp. 61–72.

While the Plant Variety Protection Law, the transfer is due to an agreement in the form of a notarial deed. The rest is a transfer due to inheritance; grant; will; waqf does not need a notarial deed. But the parties can make an agreement if the transfer due to inheritance, grants and wills will be poured into a notarial deed in accordance with the principle of freedom of contract.

Intellectual property rights transferred to other parties must be recorded and announced, as well as the Patent and Protection of Plant Variety must be registered. So it can be known who the owner (recipient) of Patent and Plant Variety is. The registration for a patent is made at the Directorate General of Intellectual Property, the Ministry of Law and Human Rights of the Republic of Indonesia. Meanwhile, Plant Variety Protection is registered at the Office of Plant Variety Protection.

For patent, the requirements and procedures for recording its transfers there have been until now no new implementing regulations as mandated by Article 75 paragraph (5) of Law No. 13 of 2016 concerning Patent. But at least from the perspective of the historical approach, the old regulations set out in Presidential Regulation No. 37 of 2010 concerning the Requirements and Procedures for Recording Patent Transfers can be used as material for analysis and basis for future regulations. Presidential Regulation No. 37 of 2010 is the implementing regulation of Article 66 paragraph (5) of Law No. 14 of 2001 concerning Patent.

Based on Article 16 of Presidential Regulation No. 37 of 2010 related to the procedure for recording the transfer of patent in the form of written agreement, the patent recipient submits the application for recording the transfer of patents to the Directorate General by attaching:

- a. the relevant Patent certificate;
- b. written agreement regarding the transfer of Patent;
- c. Special Power of Attorney, if the application is filed through a power of attorney;
- d. proof of payment of the application for recording a patent transfer; and
- e. proof of payment of an annual fee for a Patent.

Based on Article 16 of Presidential Regulation No. 37 of 2010 above, it is necessary to attach a written agreement regarding the

transfer of patent. For future changes, that written agreement should be attached with a notarial deed, because the Elucidation of Article 74 paragraph (1) of Law No. 13 of 2016 concerning Patent states that the transfer of rights to a Patent must be done in a notarial (authentic deed). Therefore, for future implementing regulations, the requirements for recording the rights to patent need to include an agreement with a notarial deed. Implementation regulations related to the recording in Article 74 paragraph (5) of Law No. 13 of 2016 must be realized immediately in accordance with what is mandated in Article 172 of Law Number 13 of 2016 concerning Patent which states that "implementing regulations of this Law must be set no later than 2 (two) years from the date of promulgation of this Law August 26, 2016 ". But it is almost in the fourth year since it was promulgated and it is still not yet exist.

Recording the transfer of Plant Variety Protection is stipulated through Government Regulation (GR) of the Republic of Indonesia No. 14 of 2004 concerning Terms and Procedures for the Transfer of Plant Variety Protection and Use of Protected Variety by the Government (GR No. 14 of 2004). This Government Regulation as mandated by Article 40 paragraph (4) of Law Number 29 of 2000 concerning Plant Variety Protection states "The requirements and procedures for the transfer of PVP rights are further regulated by the Government". Plant Variety Protection Rights may transfer or be transferred through an agreement in the form of a notarial deed in which the procedure for transfer of PVP rights due to the agreement in the form of a notarial deed, the norm is regulated in Article 16 GR No. 14 of 2004, with the following procedures:

- (1) A recipient of Plant Variety Protection (PVP) rights due to an agreement in the form of a notarial deed shall submit an application for recording the PVP rights transfer to the PVP Office by filling in the PVT rights transfer application form and attaching: a. copy of notarial deed concerning transfer of PVP rights; b. the PVP rights certificate concerned; c. special power of attorney, if the application is filed through a power of attorney; d. proof of payment of the PVP rights transfer request registration fee.

- (2) Within a maximum period of 30 (thirty) days from the fulfillment of the requirements referred to in paragraph (1), the PVP Office shall record the transfer of PVP rights due to agreement in the form of a notarial deed into the PVP General Register and the PVP rights certificate concerned. and announcing it in the PVP Official Gazette and notifying PVP rights recipients.
- (3) Notification as referred to in paragraph (2) shall be accompanied by a PVP rights certificate that has been affixed with the recording of the transfer of PVP rights to the recipient of the PVP right because of the agreement in the form of a notarial deed.
- (4) If the requirements as referred to in paragraph (1) have not been fulfilled, then within a period of no later than 30 (thirty) days from the receipt of the application, the PVP Office notifies the applicant to complete the said requirements no later than 3 (three) months from the date notification from the PVP Office.
- (5) If within the period referred to in paragraph (4) the applicant does not complete the requirements, the PVP rights transfer request is deemed withdrawn.

Based on Article 16 paragraph (1) PP No. 14 of 2004, to submit a request for recording the transfer of PVP rights, it is necessary to attach a copy of the notary deed concerning the transfer of PVP rights. Meanwhile Article 16 paragraph (5), the request for transfer of PVP rights is deemed withdrawn, if within 30 days of receipt it does not complete the attachments as required, then the transfer is considered to be non-existent and has no legal consequences because this recording is mandatory (imperative) conducted at the PVP office.

As industrial property rights, both Patents and Plant Variety Protection in producing new inventions and assembling superior varieties require so much time, cost and energy that it is very reasonable

if the law requires the notary deed in order to create certainty and fairness as the basis for written evidence<sup>19</sup>.

## **2.2. Notary Deed Functions in Transfer of Patent and Plant Variety due to Agreement**

Notary is one of the public officials in Indonesia who has main authority to make an authentic deed<sup>20</sup> and other authorities as stipulated in Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning Notary Position (NPL). The notary authority granted by the law is the authority of attribution, in the framework of performing part of the State's duties to provide legal services to the public in the personal service field and to realize legal certainty.

Legal certainty is a protection given to the public from arbitrary actions or abuse of one's position and authority that can cause harm to other parties. In carrying out its authority and obligations, the Notary is obliged to refer normatively to the rule of law relating to all actions taken in the making of an authentic deed so that the deed is in accordance with applicable legal provisions and has a perfect proof of power. "Notaries only formulate legal relations between the parties in written form in a certain format in an authentic deed<sup>21</sup> (Article 38 NPL).

Based on Article 1868 CC, an authentic deed is a deed made in a form determined by law, made before an authorized official where the deed is made. An authentic deed is a legal product issued by a notary and has a perfect proof of power that includes outward, formal and material proofing. Matters set forth in the opening and closing of the deed is the responsibility of the notary as an expression that reflects the actual situation at the time of making the deed. In connection with this,

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<sup>19</sup> Andhita Fatmawati, Bambang Winarno, and Bambang Sudjito, 'Tinjauan Yuridis Terhadap Fungsi Notaris Dalam Peralihan Hak Atas Merek', *Jurnal Hukum*, 2015, pp. 1–20.

<sup>20</sup> R. Soegondo Notodisoerjo, *Hukum Notariat Di Indonesia Suatu Penjelasan* (Jakarta: CV. Rajawali Pers, 1982).

<sup>21</sup> Tan Thong Kie, *Studi Notariat-Serba Serbi Praktek Notaris* (Jakarta: Ichtiar Baru Van Hoeve, 2000).

HS Salim mentions 3 types of deed functions, namely<sup>22</sup>: (1) as proof of having entered into an agreement; (2) as evidence of what is written in the agreement is the wishes of the parties and (3) as proof that on a certain date the parties have entered into a certain agreement in accordance with the wishes of the parties.

The notary has been given the mandate by the Patent and Plant Variety Protection Laws relating to the transfer of rights due to agreement in the form of a notarial deed. An example of transfer of rights to Patent and Protection of Plant Variety due to agreements is sale and purchase agreement. Then the sale and purchase agreement of the Patent and Plant Variety Protection is made with a notarial deed. The functions of notary deed in this transfer are (1) as evidence that a personal fact has occurred, namely the agreement on the transfer of rights to Patent and Protection of Plant Variety, (2) as evidence of what is written in the agreement is the wishes of the parties of the Patent owner (inventor) and the owner of Plant Variety Protection (Plant Breeder) that are positioned as "seller" with transfer recipient as "buyer", and (3) notarial deed serves as proof that on certain date the parties have entered into an agreement to transfer rights to Patent and Protection of Plant Variety in accordance with the wishes of the parties.

The notary as public officer, in providing services to the public in connection with making an authentic deed, must be neutral and impartial. The transfer of rights to Patent and Protection of Plant Variety by notarial deed has a legal and economic function. Juridical function is to realize legal certainty for the parties who made the agreement. In addition, the economic function is to move the resources (rights) owned by the parties from a low utilization value to a high one<sup>23</sup>. Juridical functions and economic functions of an agreement can be developed to protect the interests of the parties who make the transfer of rights to Patents and Protection of Plant Varieties attached to the objects / goods that are the object of the agreement. Patent Protection

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<sup>22</sup> HS. Salim, *Hukum Kontrak-Teori Dan Teknik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 2006).

<sup>23</sup> Salim HS, *Perkembangan Hukum Kontrak Innominat Di Indonesia* (Jakarta: PT. Sinar Grafika, 2003).

and Plant Variety Protection by developing legal and economic functions means also an effort to protect preventively if there are parties who use it without permission or approval to the rightful owner<sup>24</sup>.

In order to ensure certainty, law and order of law requires authentic written evidence of circumstances, events or legal actions made before a particular official<sup>25</sup>. Further, the more advanced the era, the more developed the relationship of civil law that occurs in society, public awareness of legal certainty increases, authentic deed is needed to get a guarantee of legal certainty to the personal relationship that they make<sup>26</sup>.

The authentic deed must be made by an authorized official. Meanwhile, the authorized official having the authority to make an authentic deed in the field of civic law is a notary public listed in Article 1 number 1 of Act Number 2 of 2014 concerning Amendment to Act Number 30 of 2004 concerning Notary Position that the notary is a public official who is authorized to make an authentic deed and who has more authority as referred to in this Article or under other laws. The presence of a notary is necessary to meet the needs of the community who need legal documents (authentic deeds) in the field of civil law, so that the notary has the responsibility to serve the community. One of the services is in the form of making a notarial deed due to agreement related to the transfer of rights to Patent and Protection of Plant Variety<sup>27</sup>.

The authority of a notary in making an authentic deed is not only regulated in Law No. 2 of 2014 concerning Amendment to Law No. 30 of 2004 concerning Notary Position, but also in Patent Law and Plant Variety Protection Law which stipulates the transfer of rights to Patent

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<sup>24</sup> Annalisa Yahanan, Muhammad Syaifuddin.

<sup>25</sup> Aninditha Budi Prihapsari, M Khoidin, and Aries Harianto, 'Legal Certainty Principle of Notary ' s Liability to Attach Fingerprints on Minuta Deed', 75 (2018), pp. 13–21.

<sup>26</sup> Kuntum Chaira Annisaa, Azmi Fendri, and Rembrandt Rembrandt, 'Notary's Responsibility towards the Difference Found in the Content of Original Deed and Its Copy Given to Parties', *International Journal of Multicultural and Multireligious Understanding*, 6.5 (2019), 282 <<https://doi.org/10.18415/ijmmu.v6i5.1099>>.

<sup>27</sup> Yahanan and Elmadiantini.



and Protection of Plant Variety with a notarial deed (authentic deed). The agreement made in the form of an authentic deed is to create legal certainty for the transfer of the rights<sup>28</sup>. If it is violated in the sense that the agreement not with a notarial deed and only with a written agreement between the parties (under the hand) made, then the agreement will be null and void<sup>29</sup>. Because the agreement does not comply with the requirements set out in the law, namely the Patent Law and the Law on Plant Variety Protection, which normally states "transfer due to agreement (must) use a notarial deed," the cause then is unlawful and the results are null and void. For this review, Article 1320 CC can be used as the main instrument to test the validity of the agreement made by the parties related to the legal conditions of the agreement which must meet the objective element of a *halal causa*. If the transfer of rights to Patents and Protection of Plant Varieties due to the agreement does not use a notarial deed, then the transition because the agreement is null and void.

The notary function as a public official only records the things that are desired and stated by the parties. Related to the wishes of the parties to make the agreement, there is no obligation for the notary to investigate the material truth of matters stated by the parties. This is in accordance with the Supreme Court Decree No. 702K / SIP / 1973, dated September 5, 1973 which states: "the desire to make certain deeds will never come from a notary but must come from the parties" as stipulated in Article 1335 CC. If the notary public is involved as a defendant with sanctions to meet compensation, the notary may submit an argument from the Decision of the Supreme Court No. 703 / SIP / 1973, that "the deed of a party made by a notary is at the desire of the parties so that if there is a dispute between the two parties then the notary cannot be sued".

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<sup>28</sup> Aktualita, 'Peran Notaris Dalam Peralihan Hak Kekayaan Intelektual', *Notarius* (Surabaya, 2017), pp. 36–37.

<sup>29</sup> L.J. van Van Apeldoorn, *Inleiding tot de Studie van Het Nederlandse Recht* (Jakarta: : Pradnya Paramita, 1968).

In responding to a civil lawsuit against a notary, the steps that the Notary must take when receiving a lawsuit, according to Habib Adjie<sup>30</sup>, is to study the lawsuit in order to find out the reasons, whether breach of contract, acts against the law or cancellation of the deed. If the claim is in the form of default, it means that there is a liability of the parties that is not fulfilled by either party. If the act is against the law, it means that there are parties who feel aggrieved related to the existence of the deed. Furthermore, if a claim is canceled or revoked, the contents of the deed can be canceled or changed. It must be seen the aspects of the cancellation, whether they are outward, formal or material aspects.

Notarial deed is an authentic deed which has the power of proof such as: the power of physical, formal and material proofs<sup>31</sup>. The power of outward proof has the ability to prove itself to its validity, which is commonly referred to as "*acta publica proban sese ipsa*". The power of formal proof (*formale bewijskracht*) is the statement of the official in the writing contained in the deed which is the same as what was done and witnessed by the official concerned in carrying out his position, including certainty from the date of manufacture, the signature and place of making the deed and the identity of the present people and also the place where the deed was made. By not reducing the evidence to the contrary, then the complete proof, where the power of proof of the official deed and the parties' deed is the same, meaning that the official statement contained in both groups of deeds and the statement of the parties in the deed has the power of formal proof and applies to the parties<sup>32</sup>; and the power of material evidence (*materiele bewijskracht*), in the sense that the contents of the deed are true to every person who asks to make the deed for evidence against him. The power of proof of authentic deed material is a certainty that the parties not only face and explain to the notary but also prove that they also have done as stated in the deed material (see Article 38 NPL).

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<sup>30</sup> Agus Riyanto, 'Menyikapi Gugatan Perdata Terhadap Notaris, Aktualita', *Notarius* (Surabaya, 2017), p. 35.

<sup>31</sup> A.A. Andi Prajitno, *Apa Dan Siapa Notaris Di Indonesia* (Surabaya: CV. Perwira Media Nusantara, 2015).

<sup>32</sup> N.G.Yudara, *Pokok-Pokok Pemikiran, Di Sekitar Kedudukan Dan Fungsi Notaris Serta Notaris Menurut Sistem Hukum Indonesia* (Bandung: Renvoi, 2006).

### **3. Conclusion**

Patents and Plant Variety Protection are intellectual property rights that have a different character compared to other intellectual property rights, namely from the transfer of rights. The transfer of rights to a Patent whether due to inheritance, grants, wills, endowments, written agreements and other justified reasons based on statutory provisions, must be done by notarial (authentic deed). The meaning of the transfer of rights to a Patent because of inheritance, grants, wills, endowments, written agreements and other things that are justified by law, must use a notarial deed. Meanwhile the transfer of rights to the Protection of Plant Variety, the need for notarial deeds is only intended for transfer due to agreement only. Transfers in other forms do not need a notarial deed. Transfer of rights to Patent and Protection of Plant Variety, requires to be recorded and be announced. If it does not meet the specified recording requirements, the transfer is deemed withdrawn. Transfer of rights to Patent and Protection of Plant Variety still requires mandatory recording. If the transfer applicants do not meet the recording requirements in accordance with a predetermined time period, the request for the transfer of rights is deemed withdrawn. It's just that for Patent, regulations related to the terms and procedures for recording transfer have not yet been realized. For legal certainty, the government must immediately set the regulation.

As industrial property rights, both Patents and Plant Variety Protection in producing new inventions and assembling superior varieties require so much time, cost and energy that it is very reasonable if the law requires the notary deed in order to create certainty and fairness as the basis for written evidence. The notarial deed used in the transfer of Patent and Plant Variety Protection provides juridical and economic functions that can provide legal certainty and preventive protection to the parties making the agreement. Besides that notarial deed is an authentic deed which has the power of physical, formal and material proofs.

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