

August 29th 2018

THE 4th INTERNATIONAL AND CALL FOR PAPER

Legal Construction and Development in Comparative Study
The Role of Indigenous and Global Community in Constructing National Law

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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INFORMATION OF THE CONFERENCE AND CALL PAPER

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THE 4th INTERNATIONAL AND CALL FOR PAPERS

"Legal Construction and Development In Comparative Study"
The Role of Indigenous and Global Community in Constructing National Law

29-30 August 2018

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

INVITED SPEAKERS :

1. Prof. Henning Glaser
Thammasat University, Thailand
2. Dr. Hilaire Tegnau, LL.M.
Faculty of Law, Sorbonne University
3. Prof. Shimada Yuzuru
Nagoya University, Japan
4. Prof. Dr. Topo Santoso, S.H., M.H.
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Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584

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AND CALL FOR PAPER**

“Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)”

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.**

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fifth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, August 31th 2018

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah is an absolute act that we must say after conducting the International Conference and Call for Paper by theme : “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” which was held by Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang, on August 29th 2018.

This conference tried to reviews different theories of legal development focusing on The Role of Indigenous and Global Community in Constructing National Law in order to highlight their similarities and differences. In the field of law, the substance of the discussion does not lie in 'whether the law is traditional because of the heritage of the past or not', but on the meaning of justice contained in the law. Often in discussing legal matters, we are caught up in the understanding of law in a procedural sense, not a law in a substantive sense-that satisfies the sense of justice. So it is not realized, there is a reduction of the meaning of the law substantively (which meets the sense of justice) becomes law procedurally. Especially when human life enters the era of globalization characterized by modern, as well as loaded with contemporary challenges and issues.

Globalization, in general people understand it is a process in the life of mankind to a society that covers the whole globe. This process is possible and facilitated by advances in technology, especially communication and transportation technology. Such understanding is not much different from the understanding of globalization as a process that refers to "a single interdependent world in which capital, technology, people, ideas, and cultural influences flow across borders". With such understanding, we are gradually going to live in a one world where individuals, groups and nations become more interdependent. In the global human society there will be patterns of social relationships that are different from before. And that too is a portrait of social life not found before.

Therefore, to discuss more about legal construction and development, Faculty of Law, Sultan Agung Islamic University was confidence to conduct a conference by the theme “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who had contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, August 31th 2018

Dean,

A handwritten signature in black ink, consisting of a long horizontal stroke with a small upward flick at the end.

Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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EXISTENCE OF NOTARY DEEDS RELATED TO THE PROCEDURE OF PAULIAN PROPERTY RESERVATION

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Students of Master of Notarial Law, Faculty of Law, Universitas Islam Sultan Agung

ABSTRACT

In the making of the Deed by a Notary, there are several things that can cause the cancellation of the Notary Deed in relation to the existence of Actio Pauliana in bankruptcy, namely the notary deed can be canceled, null and void or has the power of proof under hand, if the Notary deed was made 1 year before the statement. bankruptcy.

Notary accountability for the cancellation of the authenticity, the Notary must be responsible for all impacts that occur, in the form of: Administrative responsibility if the Notary commits a violation of the obligations and prohibitions for the Notary in carrying out his position, Liability according to Civil law in accordance with Article 1365 of the Civil Code. As well as Liability according to criminal law if the Notary in making the Deed has deliberately falsified the authentic deed or falsified the untrue information in the authentic deed he made.

Keywords: Notary Deed, Bankruptcy Order, Actio Pauliana.

A. PRELIMINARY

Based on Article 15 UUJN, the Notary's authority is to make Authentic Deeds regarding all actions, agreements and regulations required by laws and / or that which the interested party wants, to be stated in an authentic deed, guarantees the certainty of the deed creation date, keeps the deed, provides a copy and an excerpt of the deed.

Authentic deeds have three kinds of proof as stated by Retnowulan and Oeripkartawinata, namely:¹

1. The power of formal proof.
2. The power of material proof.
3. Binding strength.

So the Notary Deed is a perfect evidence tool so that it can guarantee legal certainty, order and protection for parties who have the essence of truth and justice.²

A Deed can be canceled or null and void if the Deed does not meet the objective requirements. And it is caused by several things, namely:

1. There was an error in the deed making process that was not in accordance with the law.
2. There is a typo on the copy of the Notary deed.
3. There is an error in the form of notary's deed.
4. There is an error in the contents of the notary deed.
5. There is an act against the law.

Based on the provisions of article 21 UUK, "Bankruptcy includes all assets of the Debtor at the time the bankruptcy declaration was pronounced as well as everything obtained during the bankruptcy".

In its development, many debtors have committed various legal actions to transfer their assets prior to the decision of bankruptcy by the Commercial Court, so that it is very detrimental to creditors because the decreasing of the bankruptcy assets, the payment of debts to creditors is not

¹Retnowulan Sutandio dan Iskandar Oeripkartawinata, 1997, *Hukum Acara Perdata dalam Teori dan Praktek*, Mandar Maju, Bandung, p. 49.

²Herlien Budiono, 2013, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan*, PT. Citra Aditya Bakti, Bandung, p. 173.

optimal. is a legal attempt to cancel a transaction made by the debtor for the benefit of the debtor, which may harm the interests of his creditors.

Then in case if it turns out that the enactment of the Actio Pauliana Principle has canceled the debtor's legal actions made before a Notary and contained in an authentic deed, then the legal consequences and how the responsibility of the Notary concerned will be further discussed in this study.

Therefore, based on the above background, the authors chose the title in this study "The existence of a Notary Deed Regarding the Process of Settling Bankruptcy Assets based on Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations"

The formulation of the problem raised is as follows:

1. How is the existence of the Notary Deed made before the bankruptcy statement as a due to the application of the Actio Pauliana Principle in the process of clearing bankruptcy assets.
2. What is the responsibility of the Notary for the cancellation of the Notary Deed made before the declaration of bankruptcy as a result of the application of the Actio Pauliana Principle.

B. DISCUSSION

1. The existence of a Notary Deed made prior to the Bankruptcy statement as a result of the application of the Actio Pauliana Principle in the Process of Settling Bankruptcy Assets.

As in the elucidation of Article 15 paragraph (1) UUJN, Notaries are authorized to make Authentic Deeds regarding all actions, agreements, and provisions that are required by those with an interest to be stated in the Authentic Deed, guarantee the certainty of the date of making the deed, keep the deed, provide grosse, copy and excerpts of deeds, all of that as long as the making of the deeds is not assigned and excluded from other officials or other people determined by law.

Bankruptcy is a court decision that results in general confiscation of all assets of the bankrupt Debtor, both existing and future.³ Bankruptcy aims to protect the interests of creditors to get their receivables paid proportionally.

In law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, there is the Actio Pauliana Principle which is an effort provided by law to protect the interests of creditors from fraudulent acts committed by debtors.

In its development, there are debtors who have taken various legal actions to transfer various assets before the bankruptcy decision was put together by the Commercial Court, such as buying and selling of their goods, so that they are not secured by the creditors.

According to Kartini Muljadi, the condition for Pauliana's action in bankruptcy is that the debtor must carry out a rechtshan deling or legal action before the bankruptcy statement is pronounced, that when the bankruptcy statement is pronounced and / done, the debtor knows that the action will result in losses to the creditor, and the debtor commits the legal act even though there is no obligation of the debtor to do so.⁴

Actio Pauliana's lawsuit in bankruptcy requires that the debtor with the party with whom the act was committed is deemed to know or should know that the act will result in loss to the creditor. Actio Pauliana's bankruptcy lawsuit must meet the following criteria:⁵

1. The legal action that was sued by Actio Pauliana in the bankruptcy was an act that was detrimental to the creditor which was committed within a period of 1 (one) year prior to the bankruptcy decision.

³ M. Hadi Shubhan, 2009, *Hukum Kepailitan*, Cetakan II, Kencana, Jakarta, p. 1.

⁴ Kartini Muljadi, 2001, *Penundaan Kewajiban Pembayaran Utang serta Dampak Hukumnya*, Alumni, Bandung, p. 304.

⁵ M. Hadi Shubhan, 2008, op. cit, p. 176.

2. The legal action that was sued by Actio Pauliana in the bankruptcy was an act that was detrimental to the creditor which was not obliged to be carried out by the bankrupt debtor.
3. The legal action that was sued by Actio Pauliana in the bankruptcy was an act that was detrimental to the creditor, which was an agreement in which the debtor's obligations far exceeded the obligations of the party with whom the agreement was made.
4. The legal action that was held by Actio Pauliana in the bankruptcy was an act that was detrimental to the creditor which was the payment of, or the provision of guarantees for debt that was not due and / or not yet or could not be collected.
5. The legal action that was sued by Actio Puliana in the bankruptcy was an act that was detrimental to the creditor against an affiliated party. Affiliated parties are determined as in Article 42 UUK ..

Article 41 UUK states that actions classified by Actio Pauliana can be requested to be canceled and can be declared canceled by the curators of the bankrupt debtor. If the debtor has already sold his assets, the sale and purchase can be canceled and the assets of the debtor have to get back to him. However, if for some reason the asset cannot be returned, according to Article 49 paragraph 2 of the UUK, the buyer must restore it to the curator. In addition, the price of the goods received by the debtor must also be returned by the curator on the condition that the price of the goods is useful for the bankruptcy property.

2. The responsibility of the Notary for the cancellation of the Notary Deed made prior to the declaration of bankruptcy as a result of the application of the Actio Pauliana Principle.

In carrying out his / her position, a notary must be based on accuracy, accuracy and determination. The three elements of personal character that must receive special attention which form the character in carrying out an office are:⁶

1. Be honest with yourself;
2. Good and right;
3. Professional.

In connection with the issue of the Notary's responsibility for the cancellation of deeds made before the bankruptcy statement due to the application of the Actio Pauliana Principle, the Notary is individually or personally responsible for the deeds he makes. Because in the Actio Pauliana Principle Theory, the Deed made by the Notary before the bankruptcy statement can be null and void 1 year before the Bankruptcy statement.

In Actio Pauliana, in bankruptcy, the Notary Deed can be canceled by the creditor 1 (one) year before the bankruptcy decision. So that the Notary is liable in a civil manner for the material correctness of the deed he made. The UUJN stipulates that when a Notary performs his / her duties proven to have committed a violation, the Notary may be subject to sanctions in the form of:

- a. Administratively
- b. In Civil Code
- c. Criminally

The responsibility of a Notary based on UUJN for the deed he makes can be seen from the provisions of the article in the UUJN. So that with the Cancellation of the Notary Deed or Notary Deed it has the power to prove it is a Under-Handed Deed Due to Actio Pauliana which was made 1 (one) year before the bankruptcy statement, The notary is obliged to be responsible for the Deed he makes.

C. CLOSING

Based on the discussion above it can be concluded:

⁶ A.A. Andi Prajitno, 2010, *Apa dan Siapa Notaris di Indonesia?*, Cetakan Pertama, Putra Media Nusantara, Surabaya, p. 92.

- a. Notary Deed made 1 (one) year prior to the statement of bankruptcy. As a result of the existence of Actio Pauliana, the Deed is null and void by law or has the power of evidence to fall as an underhanded Deed. Because the debtor has taken a legal action by transferring his assets or selling his assets with third parties which are detrimental to the interests of the creditors.
- b. The notary's responsibility for the Deed that he has made has the power of evidence down as an underhand deed, if the deed becomes null and void, and causes losses to the parties, then the notary may be held accountable both administratively, civil and criminally.

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