Towards an Effective Civil Decision Enforcement

A bailiff in a court was stunned when he was about to execute a civil decision. The object of enforcement was controlled by a number of unknown people who were ready to fight back. The bailiff had no preparation whatsoever to deal with all this. Also, sometimes there is no directive from the Chief Judge about what must be done if something like that happens. He must solve it himself. Or turn around as a signal of giving up.

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Bailiff: The Spearhead of Civil Decision Enforcement

The bailiff is the spearhead of the carrying out of court decisions in civil cases. However, in the field, as verdict only contain constricted information about the object of enforcement, bailiffs often have to do “improvisations" in facing various obstacles. Bailiffs in Indonesia should be jealous of their colleagues in Italy in terms of the availability of guidelines for carrying out their duties. In Italy, bailiffs who will carry out the enforcement of a court decision are equipped with a writ of execution (*precetto*) which contains a detailed description of the actions that can be taken in the field to ensure the success of the enforcement of the decision.

The lack of guidelines for bailiffs in implementing their duties for enforcements, both of a general nature - those contained in the Civil Procedural Code, as well as a casuistic nature contained in the writ of execution (execution court order), has yielded low success in the actual enforcement of decisions. In reality, in addition to the matter of duty implementation guidelines, bailiffs, courts and district court chief judges that oversees bailiffs have multiple institutional issues to carry out the actual enforcement of civil decisions.

The absence of any guarantee that court judgements in civil cases can be effectively enforced within a logical timeline can result in low public interest, especially for business people to use the court as a dispute resolution mechanism. Because what is the need to spend time and no small cost for court proceedings if in the end there is no guarantee that the judgement can be carried out and the plaintiff can regain its rights?

Data from 2012 to 2018 in fifteen district courts in Indonesia shows that not all petitions for the enforcement of civil disputes that have entered the court have been completed. Book II of the National Medium-Term Development Plan (RPJMN) 2015-2019 states, the factors inhibiting the completion of business contracts are difficulties in the court decision enforcement process, the lengthy process of case settlement, and the high cost of litigation.

Weak public trust in the judiciary is marked by the lack of civil cases, including business contract disputes that were submitted to the court. Delays in completing business contracts are also one of the factors affecting Indonesia's ranking in ease of doing business.

The Ease of Doing Business (EoDB) data released annually by the World Bank shows that in 2019, Indonesia is only ranked 73 out of 190 countries with a score of 67.96. Based on indicators relating to the court, Indonesia ranks 146th for enforcing contracts and 36th for resolving insolvencies. This ranking is a far cry from the Economic Reform Package’s target initiated by President Joko Widodo, which is 40.

Research carried out by the Indonesian Institute for Independent Judiciary (LeIP or *Lembaga Kajian dan Advokasi Independensi Peradilan*), which uses literature and field study methods finds a number of root causes of civil decision enforcement that will be described in the following sections of this article. The literature study was done to obtain a legal concept regarding civil decision enforcement, among others, on the Civil Procedural Law (HIR, RBg, and Rv), Law No. 48 of 2009 on Judicial Power, Law No. 2 of 1986 on Court of General Jurisdiction Law No. 7 of 1989 Court of Religious Jurisdiction, also literature on civil decision enforcement in other countries that have similarities with Indonesia's legal system. There were also field studies conducted in 24 district courts and 12 religious courts which were subject to enforcement from November 2018 to 2019.

The selection of these courts considered (1) the representation of large cities to look at enforcement loads and variants petitioned for enforcement; (2) the representation of the archipelago to see accessibility in reaching the petitioned debtor and the object of enforcement; (3) the representation of border areas to identify potential problems of civil decision enforcement with other countries, and (4) the representation of disaster-affected areas to identify issues of enforcement objects that have changed or been destroyed due to the disaster.

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Enforcement of Civil Decisions: The Heavy Responsibility of Chief Judges

Enforcement is the creditor's attempt to forcefully realize its rights because the debtor does not want to fulfil its obligations voluntarily as decided by the court. In Indonesia, the party that wishes to have the judgement carried out submits an enforcement petition to the Chief Judge the District Court or the Religious Court for a particular case, which has the jurisdiction over the area where the item/object to be executed is located.

In its development, the court not only accepts petitions for enforcement of court decisions but also decisions of quasi-judicial institutions, such as (1) arbitration awards; (2) the decisions of the *Badan Penyelesaian Sengketa Konsumen* (BPSK or the Consumer Dispute Settlement Agency); (3) decisions of the *Komisi Pengawas Persaingan Usaha* (KPPU or the Business Competition Supervisory Commission), and (4) decisions of the Information Commission. The implementors of enforcement consist of chief judges of the district courts, registrars, and bailiffs. The chief judge of the district court, ex-officio, is the party authorized to lead and order the enforcement of civil decisions (Article 54 paragraph (2) of Law No. 48 of 2009).

The task of leading this enforcement adds to the burden of responsibility of the chief judge of the district court. A chief judge of a district court is required to make quality judgements in handling cases, be reliable in leading court management, and at the same time have a high success rate in the enforcement of decisions. This accumulation of responsibilities has the potential to make the chief judge unfocused in his or her work. This is different, for example, with systems in Italy, Germany or the Netherlands.

In Italy, the enforcement is not handled by the head of the court, but by the executory judge. The executory judge is in charge of examining whether or not a decision is executed to ensure that the enforcement will be lawfully carried out. While in Germany, the carrying out

of enforcement are left to the assistant or legal servant (*rechtspfleger*) that are court employees. In the Netherlands the responsibility for enforcement is carried out by an institution outside of the court called *Koninklijke Beroeporganisatie van Gerechtsdeurwaarders* (KBvG). KBvG is a professional judicial organization established under the Judicial Officers Act (Law on Judicial Officials).

According to Article 196 of the HIR, the first thing that must be done by the chief judge of the court to execute judgements is to do *aanmaning*. Namely, ordering the bailiff to summon the petitioned debtor to be warned to adhere to the judgement voluntarily within 8 (eight) days.

Still, according to Article 196 of the HIR, judgements that meet enforcement requirements cannot be carried out without prior *aanmaning*. *Aanmaning* is conducted in an incidental hearing chaired by the chief judge of the court, which in practice usually takes place 1 (one) time. The problem is that the Civil Procedural Code does not regulate when the *aanmaning* hearing session should take place. As a result, it is possible that enforcement drag on because there are no fixed deadlines that must be followed by the chief judge of the court. For efficiency and certainty in the enforcement process, it is necessary to regulate when would be the maximum time for a chief judge to undertake *aanmaning*, taking into account the reasonable time required to examine and prepare for the smooth preparation of enforcement activities which are generally carried out by the chief judge before conducting *aanmaning*. In addition, it must also be regulated that *aanmaning* can be carried out only twice, at most. Whereby the second *aanmaning* can only be undertaken if the respondent is unable to attend with clear reasons on the first *aanmaning*, and the distance of the first *aanmaning* with the second must not be more than 7 (seven) business days.

In practice, the chief judge of the court usually does not directly call for an *aanmaning*, but examines the petition for enforcement first. The examination is a crucial process considering there are often complex situations / conditions on the object of enforcement. The examination is conducted by the chief judge of the court together with the reexamination team requesting the enforcement and [they will] produce a summary. If the chief judge of the court considers the request for enforcement can be granted, then the registrar and / or bailiff are ordered to summon the respondent to be given a warning. However, when the chief judge of the court considers that the application cannot be granted, the bailiff will make an official report stating that the judgement cannot be executed.

In connection with this examination process, clearer provisions are needed, which oblige and provide authority to the court to take the actions needed to ensure the smooth process of enforcement. For example, it is the court's obligation to carry out a local inspection in order to find out the final condition of the object of enforcement; and the chief judge of the court's authority will change the information regarding the condition of the object of enforcement that is listed in the judgement according to the latest situation in the field. In reference to the system of court decision enforcement in Germany, if the court ruling is unclear, the *rechtspfleger* (legal servant) can change the judgement in the leading case as long as there is a request from the enforcement petitioner to clarify the court ruling for the enforcement. The chief judge of the court also needs to be given more precise guidance if there are immovable objects belonging to third parties around the object of enforcement or the object of enforcement is controlled by a third party in good faith.

Inconsistencies in responding to unclear court rulings create not only legal uncertainty for the parties but also decreases public trust. For this reason, rules that regulate the steps taken for unclear court rulings are needed, namely on: (1) the submission of the petition to amend the court rulings to the chief judge of the court in accordance with the prayer for relief; (2) the chief judge of the court issuing a court order containing amendments to the judgement that corrects the unclear court ruling; (3) the ruling imposed in the court order must be as stated in the prayer for relief; (4) no legal remedies may be brought against the chief judge of the court's order; (5) the court order becomes the basis for the applicant to submit a petition for enforcement.

The system of judge's promotion and transfer also often results in the enforcement process being carried out within the leadership period of 2 (two) chief judges of the court. The former chief judge of court who made the writ of execution was replaced by the new chief judge of court before the enforcement was carried out. This raises two field practices. The new chief judge of the court only carries out the enforcement that has been set or can review the writ of execution, as for example happened in the District Court of Bojonegoro. There are no rules regarding this matter in the Indonesian Civil Procedural Code.

There is a provision in the "Enforcement Guidelines at the District Court" issued by the Directorate General of the Court of General Jurisdiction of the Supreme Court of the Republic of Indonesia, which states that "regarding any court order of any former chief judge of district court stating that the judgement cannot be executed and that any guaranteed item is being released if any error is found later, then the court order of the chief judge of the court can be revoked with or without the presence of a request for revocation". From this provision, it can be concluded that the chief judge of the court can change the writ of execution.

Therefore, rules that authorize the new chief judge of the court to review and amend the writ of execution issued by the former chief judge are needed. The regulations must affirm that the new chief judge cannot revoke the previous court order unless he or she meets 3 (three) requisites: (1) the court order to be revoked states that the judgement cannot be executed; (2) the new chief judge finds errors or mistakes in the court order, and (3) made based on the petition of the enforcement applicant.

It is likewise with the enforcement object and enforcement rules on security assistance in the enforcement process. It is necessary to have the court's authority to determine the mechanism for the maintenance of requested items that are in or on the object of enforcement. For example, if the applicant wishes to use the object of enforcement, the court is obliged to order the respondent to release the item. As for police assistance, it is necessary to add provisions in Law No. 2 of 2002 on the Police, which states that the police are required to provide security assistance if the court requires it, and is entitled to receive payment for such.

A number of new provisions must also be made for the enforcement object. For instance, any institution that seizes any movable property is obliged to record these items and announce them to the public. Whereas if the respondent is a regional government, the chief judge of the court is authorized to issue a writ of execution that instructs the regional government to enter the amount of money to be paid in the current year's APBD (regional government budget) or the following year's APBD.

In addition to improving the above procedures, administrative procedures for enforcement requests are also prerequisites or short-term solutions that must be immediately addressed by the Supreme Court. LeIP's study found no rules regarding the standard format of an enforcement request and the documents that must be attached when submitting an enforcement request. This is mainly due to the absence of the obligation to submit requests for enforcement in writing in Article 196 of the HIR. This article states that if the defeated party is unwilling or neglects to satisfy the court decision voluntarily, then the winning party (the plaintiff) shall submit an application for enforcement, both orally and in writing.

Furthermore, the non-existence of a standard format does not only affect the smooth carrying out of enforcement but also opens up opportunities for maladministration and corruption. Therefore, the administrative requirements for enforcement requests should be regulated in the Civil Procedural Code, the contents of which include the applicant's obligation to complete the form in a standard format.

The form details should be set out by a Supreme Court regulation that at least contains: (1) the identity of the parties; (2) number and date of the judgement being requested for enforcement; (3) the form of penalty based on the court ruling petitioned for enforcement; (4) list of assets that have been seized; (5) list of the assets of the respondent, and (6) a brief description of the efforts previously made by the applicant. Forms should be made available on and can be downloaded from the court's website. Registration of enforcement requests, in this digital age, should be done electronically. For this reason, it must be accompanied by a change in the way of which copies of judgements are handed over, that is, no longer conveyed by the court to the parties in printed form, but electronically.

The research also finds that there were parties who achieved settlement outside of court after the *aanmaning* court but did not report the settlement to the court. As a result, requests for enforcement remain recorded in the enforcement register because the court is not authorized to cross out the application if the applicant does not report the progress of the enforcement.

Courts in Italy, Germany and the Netherlands did not specifically regulate this matter. The practice in Italy is that the respondent can stop the enforcement of seizure by paying a sum of money to the applicant, either as a settlement or guarantee through a court officer so that the court is informed if the respondent has carried out the writ of execution.

Therefore, there needs to be a strict regulation that requires the applicant to provide information on the implementation of enforcement post *aanmaning* (warning), including if there is settlement within a specific period of time, for example, within (3) three months. In addition, the Civil Procedural Code must strictly regulate that the court is obliged to mediate at the aanmaning stage. Matters discussed and agreed upon in the *aanmaning* hearing should at least dwell on the manner and duration of the court decision enforcement by the respondent. The hearing outcomes must be made in a deed of settlement signed by the chief judge of the court, registrar / deputy registrar, bailiff, and the parties.

The final problem regarding enforcement procedures that became quite prominent in the research was the absence of a firm legal basis governing who should be charged to pay the court decision enforcement costs and when the costs were paid. Article 197 of the HIR does

not elucidate on who is charged with paying the enforcement's advance payment. In practice, this fee is borne by the applicant. Furthermore, there is also no legal basis governing if the enforcement costs do not match actual needs.

In Italy, the enforcement fee is charged to the respondent by reimbursing the applicant's money. It is likewise in Germany. In the Netherlands, the actual costs of the enforcement are charged to the applicant, while the fixed fees are charged to the respondent.

In Indonesia, the entire enforcement fees of judgements are borne by the enforcement applicant with four patterns of payment mechanism. First, the advance payment is made at the same time as the issuance of a Power of Attorney to Pay (SKUM or *Surat Kuasa untuk Membayar*) and instructs the applicant to pay for the enforcement after receiving the request. Second, the court requests an advance payment of enforcement from the applicant and registers the request for enforcement after the chief judge of the court issues the writ of execution. Third, the advance payment can be made incrementally in accordance with the Enforcement Guidelines in the District Court. The final pattern sets the payment of enforcement at once, even with security costs.

Based on the field study and comparisons with other countries, the payment of execution in Indonesia is divided into 2 (two) stages. First, the administration phase (from registration until the issuance of a writ of execution). Second, the implementation stage (since the writ of execution is issued up to when the enforcement is completed). Even if there is a short of payment of the enforcement fee, the bailiff should be able to collect additional costs - especially transportation money - with the knowledge of the chief judge of the court. It is necessary to adjust the enforcement costs, which have not been included in the Supreme Court Regulations (PERMA or *Peraturan Mahkamah Agung*), the Circular Edict of the Supreme Court Circular (SEMA or *Surat Edaran Mahkamah Agung*), or the Chief Judge Decree, such as the cost of staying overnight due to transportation limitations.

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The Success of Civil Decision Enforcement Not Just the Court's Responsibility

Reflecting on the complexity and magnitude of the challenges in carrying out the enforcement of civil decisions in Indonesia, it is necessary to regulate an adequate composition of executory officials in court. For this reason, it is necessary to consider certain judge-level positions at the court who are given the responsibility of assisting the chief judge of the court in carrying out the enforcement of civil decisions. The position should become an intermediary between the chief judge of the court and the bailiff. The appointment of officials other than this chief judge of the court is in line with the systems that also being carried out in other countries.

The number of bailiffs and the competency of bailiffs in court also needs to be increased. LeIP's research shows that the number of bailiffs is still limited, both in first instance courts and religious courts. There are even courts which for years do not have bailiffs, so the bailiff's function is carried out by registrars.

Looking at the breadth and geographical conditions of Indonesia, the determination of a decent number of bailiffs can mimic those applied by Germany as a minimum initial step. In Germany, the number of bailiffs (Enforcement Officers) is adjusted according to the number of sub-districts. If this system is implemented in Indonesia, then the minimum number of bailiffs is the same as the number of sub-districts in the jurisdiction of the court. If there are sub-districts where at certain times there is no request for enforcement, for example, bailiffs in these sub-districts can be seconded to other sub-districts where requests for enforcement are high. Further to that, the competency of bailiffs must be increased. The bailiff's educational requirements need to be changed from previously senior high school level to become a Bachelor of Laws. The Supreme Court must also provide specialized training for bailiffs by including material on civil law, business law, and economic law in the education and training of clerks.

Finally, the roles of the legislative, judicial, and executive institutions are needed for an effective civil decision enforcement system in Indonesia. The DPR and the Government must revise a number of laws to ensure the implementation of court judgements in order to create legal certainty.

Revisions, among others, are required for the Civil Procedural Law, Law No. 10 of 1998 *jo*. Law No. 7 of 1992 on Banking; Law No. 8 of 1995 on Capital Markets; the series of Laws on Intellectual Property Rights; Law No. 1 of 2004 on State Treasury; Law No. 10 of 2001 *jo*. Law No. 32 of 1997 Commodity Futures Trading; the series of Laws on the Judiciary Bodies; Law No. 32 of 2009 on the Environmental Protection and Management; and Law No. 2 of 2002 on the Police.

In the Law on Banking, for instance, it is necessary to have provisions affirming that banks that do not provide account information shall receive sanctions to the extent established in the writ of execution. Also, the rules for providing account information which has only been allowed between banks and bank customers need to be changed so that this can [be applied] for customers and other parties other than banks based on the court order of the chief judge of the court. While in the Capital Market Law, it is necessary to affirm that the Indonesian Central Securities Depository is allowed to block or seize securities based on the writ of execution of the chief judge of the district court or religious court.

Finally, the government also needs to start integrating information on the population, business, asset, financial, and tax so that it can support the ease of tracking assets for the smooth process of executing judgements. It is hoped that all of these improvements remove all obstacles in the process of civil decision enforcement, which in turn will realize the fulfilment of the rights of every citizen, public trust in the courts, strengthen legal certainty, and improve the business climate in Indonesia.

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