

## THE PROBLEMATICS OF EXECUTION LAW AGAINST NON-EXECUTABLE JUDGMENTS AND COMPARISONS WITH MALAYSIAN LAW

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### *Abstracts*

*In public courts, the litigation of civil case is under civil law procedure. This is a legal regulation to maintain material civil laws. The procedural law is also a way to file a particular civil case to civil court and to organize judges' ways in making judgment toward legal subject. Civil law procedure prevents any vigilante actions that creates public legal order. Judiciaries provide protection for legal subject in preserving their rights and prevent any arbitrary actions. After case investigation process set under procedural law, a court judgment is made to judge and solve case. Legal actions are subsequently conducted to reach fixed legal judgment (inkracht van gewijsde). Some executions for civil cases in Indonesia is suspended since the object is different from reality or non-executable. Furthermore, civil case judgment is sometimes contradictory to criminal cases, although the objects are similar. Either litigant and/or defendant files request to the Supreme Court to have a legal protection or the chairman of district court requests for an instruction from the Supreme Court, may suspend court judgment. Therefore, the implementation of court judgments with legal power is still undeniably problematic. If the execution is suspended or not allowed, it may disadvantage "the justice seekers"; public society. The suspended or non-executable judgment should be immediately addressed on its implementation, instead of its law.*

*Di pengadilan umum, proses kasus perdata berada dalam prosedur hukum perdata. Ini adalah peraturan hukum untuk mempertahankan hukum sipil material. Undang-Undang prosedural ialah cara mengajukan kasus perdata ke pengadilan sipil dan mengatur cara hakim memutuskan subjek hukum. Prosedur hukum perdata bertujuan mencegah tindakan hakim-sendiri sehingga tercipta tatanan hukum publik. Peradilan memberikan perlindungan bagi subjek hukum dalam melestarikan*

*haknya dan mencegah kesewenang-wenangan. Setelah proses penyelidikan kasus sebagaimana diatur dalam hukum prosedural, putusan pengadilan dibuat untuk menilai dan memecahkan kasus. Tindakan hukum selanjutnya dilakukan hingga mendapat keputusan hukum tetap (inkracht van gewijsde). Beberapa putusan kasus perdata Indonesia ditangguhkan karena objek berbeda dari kenyataan atau tidak dapat dieksekusi. Selanjutnya, putusan kasus perdata terkadang bertentangan dengan kasus pidana, meskipun objeknya sama. Baik penggugat dan/atau terdakwa mengajukan permintaan ke Mahkamah Agung untuk memiliki perlindungan hukum atau ketua dari pengadilan distrik meminta instruksi dari Mahkamah Agung, bisa menangguhkan keputusan pengadilan. Karenanya, pelaksanaan putusan pengadilan dengan kekuatan hukum masih bermasalah. Jika eksekusi ditangguhkan atau tidak diizinkan, tentu dapat merugikan “para pencari keadilan”; masyarakat umum. Putusan yang ditangguhkan atau tidak dapat dieksekusi harus segera ditangani pada pelaksanaannya, bukan hukumnya.*

*Keywords: civil case, judgment, non-executable*

## Introduction

Article 24 subsection (1) The Constitution 1945 (in Indonesia context, it is known as UUD 1945) mentions that judicial power is an independent power to organize a judiciary in order to uphold law and justice. The subsection (2) asserts that judicial power is on the Supreme Court, public courts, courts of religion, military courts, administrative courts, and constitutional courts. Through amendment of UUD 1945, the regulation that deals with judicial power is amended, of which the Law No. 4/ 2004 on Judicial Power is then amended with the Law No. 48/ 2009 on Judicial Power (latterly known as Regulation of Judicial Power).

Article 1 subsection (1) Regulation of Judicial Power asserts that judicial power is an authority of an independent country to organize a judiciary in order to enforce law and justice based on Pancasila and UUD 1945, for the sake of the Republic of Indonesia as the state of law. Hence, the role of judiciaries is to create an autonomous judiciary -clean, professional, and no influence from any parties- which functions as set under UUD 1945.

One judiciary asserted in article 24 subsection (2) UUD 1945 is public courts, assigned to receive, investigate, judge, and solve any criminal and civil cases filed. In regard to civil cases, for example child labore<sup>1</sup>, trade union<sup>2</sup>, people with violated rights may sue the suspect to the public court. Therefore, the government provides facilities to uphold the right, particularly in regard to civil

1 Asri Wijayanti, “Framework Of Child Laborers Legal Protection In Marginal Communities, Man in India”, vol 97 No. 24, 2017, p. 203-212.

2 Asri Wijayanti, “Rights to the Freedom of Trade Unions in the Constitution and its Implementation, International Journal of Applied Business in Economic Research”, Vo. 15 No 7, p.107-115.

matter, including labor<sup>3</sup>.

Civil cases in public courts are under a regulation known as the procedures of civil law. It is a legal rule that organizes ways to maintain and preserve material civil law. It is also defined as a way to file a civil case to a civil court, and organize ways the judges take in making judgment for a civil case toward a legal subject. The procedures of civil law aim to prevent any vigilante actions, and thus, create a public legal order. Judiciaries provide a legal protection for legal subjects to preserve their rights and prevent any arbitrary and vigilante actions.<sup>4</sup> After having a process of case investigation as set under the procedural law, a court judgment is made which aims to judge and solve the case. Legal actions are subsequently conducted until a fixed legal judgment (*inkracht van gewijsde*) is made. Some executions of judgment for civil cases in Indonesia is not allowed to conduct -suspended- due to any resistance; the executed object is different from the reality or it is considered non-executable.

In order to implement the court judgment, execution is conducted. M. Yahya Harahap argued that according to the provision on Chapter 10 at section 5 of *Het Herziene Indonesisch Reglement, Staatsblad* 1848 No. 16 (latterly known as HIR) or Chapter 4 at section four *Rechtsreglement Buitengewesten, Staatsblad* 1927 (latterly known as RBg), the definition of execution is similar to the definition of “executing the judgment” (*Ten uit voerlegging van vonnissen*).<sup>5</sup> Executing the court judgment is similar to “forcing” the judgment under the provision of law, if the defendant (executed party) is not willing to do the judgment by themselves. Such term is applied as well in article 54 Law of Judicial Power.

Article 54 subsection (2) Law of Judicial Power mentions that the implementation of court judgment in civil cases conducted by registrars and bailiffs is directed by the chief judge. In civil cases, execution can be actually conducted only on court judgment with fixed legal power. Some legal regulations, however, allow execution to be conducted toward other court judgments with no fixed legal power. Those regulations are as follow. The implementation of judgment is prior conducted, called *uit voerbaar bij voorraad* (Article 180 subsection [1] HIR, Article 191 subsection [1] RBg); The implementation of provisional judgment (Article 180 subsection [1] HIR, Article 191 subsection [1] RBg); Deed of Peace (Article 130 HIR, Article 154 RBg); The implementation of *grosse deed*, either

3 Asri Wijayanti, *Legal Aids For Marginal Communities, Man in India*, Vol 97 No. 18, 2017, p 251-262.

4 See Sudikno Mertokusumo, *Hukum Acara Perdata* (Liberty, Yogyakarta, 1992), p. 3; And Compare to Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, 11<sup>st</sup> edition, (Mandar Maju: Bandung, 2009), p. 2.

5 M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Edisi Kedua, 5<sup>th</sup> edition (Sinar Grafika: Jakarta, 2010), p. 5.

mortgage or debt recognition (Article 224 HIR, Article 258 RBg).<sup>6</sup>

Court judgments with fixed legal power can be executed only if the dictum is condemnatory (containing the element of penalization). Nevertheless, if the judgment has fixed legal power but no element of penalization, the execution cannot be conducted. Hence, there are two options can be selected to conduct the court judgment, as follow. With voluntary; With execution.

If the defendant is willing to do the judgment voluntarily, any legal execution is no need to conduct. However, if the defendant is not willing to do the judgment, the execution must be conducted. A court judgment is considered condemnatory if the dictum contains an order to sentence the “defeated” party by: Sentencing or ordering to submit particular objects; Sentencing or ordering to clear off a piece of land or house; Sentencing or ordering to do particular action; Sentencing or ordering to stop particular action or condition; Sentencing or ordering to do some payments.<sup>7</sup>

We saw that some executions of court judgments on civil cases were suspended due to any resistance; the execution object is different from the reality or considered non executable or even contradictory to the judgment on criminal cases although it deals with the same executed object. Furthermore, it found that either litigant and/or defendant filed a request for legal protection to the Supreme Court or the chairman of public court proposed a request to have instruction from the Supreme Court, which may latterly make many judgments with fixed legal power suspended or even not executable. Thus, it is undeniable that the implementation of the court judgments with fixed legal power is still problematic.

The provision of law that regulates the implementation of civil judgments is set in Article 195-244 HIR and Article 206-254 RBg. Besides, it is set under Article 50 and 60 Law No. 2/ 1986 as amended with Law No. 8/ 2004 on the first amendment of Law No. 2/ 1986 and latterly amended with Law No. 49/ 2009 on the second amendment of Law No. 2/ 1986 on Public Judiciary (latterly known as Law of Public Judiciary), Article 54 Law of Judicial Power and within several Circular Letters of the Supreme Court. It shows that the provision of execution is mostly set under HIR and RBg, which both are derived from the Dutch colonial and need to correspond to this current era. Therefore, forthcoming procedural draft of law must contain a simple provision on its implementation of civil judgments, capable to encounter the current international association of law; in this case, the

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6 Mohammad Saleh, *Penerapan Asas Peradilan Sederhana, Cepat dan Biaya Ringan Pada Eksekusi Putusan Perkara Perdata* (Graha Cendekia: Jakarta, 2011), p. 13.

7 Mohammad Saleh, *Penerapan Asas Peradilan Sederhana, Cepat dan Biaya Ringan Pada Eksekusi Putusan Perkara Perdata*, p. 14.

nations should not lose their national identities.<sup>8</sup> The principles of national law -whatever its origin- need to be reinforced in order to preserve the national law of Indonesia as a positive law system.

The notion of executing a court judgment is a hot issue and inseparable from people live and morality of legal officials. Thus, the more civil cases are judged in court, the more legal problems related to the implementation of court judgment may reveal. Almost each of the execution schedules may encounter new problems that appear in sudden. That is problematic, instead of challenging for the chief judge, since the execution is an art that requires skills, patience, prudence, and firmness.<sup>9</sup>

If the implementation of civil judgment is suspended or not executable, it may disadvantage “the seeker of justice”, public society. The implementation of either suspended or non-executable civil judgment should be immediately addressed on its implementation, instead of its law. Therefore, the primary issue of this research refers to “The Development of Dynamic of Law Related to The Problematics of Execution on Non-Executable Judgment”. Moreover, this study would examine the origin of provision related to executions, which encounter many problems on its implementation, and analyze any suspended or non-executable judgments due to either formality of judgment or their implementations.

In regard to that notion, some research problems are proposed as follow. The antecedents of non-executable judgment on civil cases. The analysis of nont-executable civil judgments. The analysis of executable civil judgments in Malaysia.

## Research Method

This research is normative legal research with a legal approach and a comparative approach. Legal materials are obtained through literature studies. This research analyzed by descriptive method to compare the problematics of execution law against non-executable judgments between Indonesia and Malaysia.

## Discussion

### Antecedents of Non-Executable Civil Judgment

Procedural law regulates the method and parties authorized to uphold a material law if any legal violence on material law happens. In general, the procedures of civil law is a legal rule that regulates the process of addressing civil

8 Setiawan, *Aneka Masalah Hukum dan Hukum Acara Perdata* (Alumni: Bandung, 1992), p. 361.

9 Djazuli Bahar, *Eksekusi Putusan Perkara Perdata, Segi Hukum dan Penegakan Hukum* (Akademika Pressindo: Jakarta, 1987), p. 72.

cases through judges (at court) since a lawsuit is filed and implemented, and up to the implementation of court judgment. According to Wirjono Prodjodikoro, the procedures of civil law is a set of law containing ways to act at court and to act at one another in order to implement the regulation of civil law. The procedure of civil law is also identified as formal civil law; legal rules that regulate and determine ways to conduct civil rights and obligations as set under material civil law.<sup>10</sup>

As previously described, execution is a form of implementing the court judgment with fixed legal power. The judgment is classified into two types: seminal judgment and final judgment. One seminal judgment identified in HIR is provisional judgment. In relation to its characteristics, court judgments are categorized into three types, including:<sup>11</sup> Declaratory Judgment, This kind of judgment solely explains and emphasizes a particular legal situation. For instance, A is a legitimate adopted child from X and Y, and that A, B, and C are the heirs of the deceased Z; Constitutive Judgment, This kind of judgment nullifies a particular legal situation or reveals a new one. For instance, a judgment of divorce case and a judgment considering that an individual is bankrupt; Condemnatory Judgment, It contains sentences. For instance, a defendant is sentenced to submit a piece of land along with his/her house or to pay debts.

Commonly, a court judgment contains some judgments. In other words, statements are a composite of declaratory and constitutive judgments or declaratory and condemnatory judgment, etc. As previously described, the procedure of civil law recognizes a contradictory judgment against a vested judgment. In regard to seminal judgment, it is classified into three types as follow. Preparatory judgment; Incidental judgment; Provisional judgment.

Those three judgments -preparatory, incidental, or provisional judgments- are identified as seminal judgments, thus, the difference between them are not necessary to consider. Preparatory judgments are for preparing cases as well as incidental judgments, however, provisional judgments are made in relation to the claim of a case and thus some preliminary actions are conducted for the sake of each party. Such judgments are mostly applied in a short judicial procedure and should be immediately made. For instance, it found that the roof of a rented house was wrecked by a defendant and the incident happened in rainy season, therefore, the defendant had to be sentenced to fix the roof. In another case -divorce case-, a wife wanted to be allowed to leave her house during the judicial process runs.

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10 Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, 11<sup>st</sup> edition (Mandar Maju: Bandung, 2009), p. 1-2.

11 Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, p. 109-110.

Since it needs to be immediately made, provisional judgments may always be conducted previously (e.g. Article 180 HIR).

The court judgment may either fully or partly accede a claim, due to several considerations. The systematic and minimum content of judgment is set under article 178, article 182, article 283, article 184, and article 185 HIR. Article 178 HIR mentions that: A Judge, when having discussion due to his function, must provide several legal premises, which may not be presented by both parties; He must judge the suit entirely; He is not allowed to judge cases that are not sued or to judge more than what it is supposed to be.

Legal premises refer to canon law (*regel van het objectieve recht*). If the litigant does not mention the base of his/her claim, or if he/she mistakenly uses a base of claim, the judge may provide any legal premises on his consideration in order to address the case.<sup>12</sup>

In article 178 subsection (2) HIR, it mentions that a judge must make a judgment for all petitums, nothing left, and must be considered carefully. In article 178 subsection (3) HIR, a judge is not allowed to either make a judgment on non-sued cases or judge more than what is sued. If the litigant, in a petitem, forgets to mention that the defendant must be sentenced by paying the cost of case, he/she -the litigant- may not be allowed to give such sentence toward the defendant, when the litigant win the case. In other word, since the litigant does not mention such claim, it may not be acceded. If the claim merely deals with main debt payment, any interest is not allowed to take into account. In this case, the amount of interest that cannot be allowed is 5% per month. Therefore the litigant should set a complete petitem.

Article 185 HIR mentions that: A seminal judgment, although it must be presented like a final judgment, needs to be noted in Minutes of proceedings; Both parties are not allowed to ask for a valid copy of the note by paying some cost.

Based on the provision of article 185 HIR, some notions are identified, as follow. All seminal judgments are presented in court; All seminal judgment are parts of the record of proceeding; The authentic copy can be provided from the record of proceeding and it contains the seminal judgment for both parties.

Article 187 HIR mentions that: If the jud, in abstruseness, signs a judgment or the record of proceedings, it is conducted by members whose positions are directly under the chairman and they may examine the case; If the court registrar is in abstruseness, it must be truly mentioned in the record of proceedings.

<sup>12</sup> Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, p. 111.

Based on the provision of article 187 HIR, some notions are identified, as follow. If the chairman of the assembly, due to particular premises, is transferred or passed away so that he cannot sign the judgment or the record of proceedings, the first member judge may give his sign, or if the first member judge cannot do that, the second member judge may do that. Note that the responsibility to sign the court judgment or the record of proceedings is on the chairman of public court, since he does not see the case in court; If the court registrar cannot sign the record, it will be mentioned in letter of judgment or in the record itself. Note that it is represented by the registrar of public court, thus, no registrar's signature is put within.

Article 184 HIR mentions that: The court judgment should contain a real summary of the claim and rejoinder, the premises behind the judgment, as mentioned in article 7 subsection (4) *Reglemen* dealing with the judicial structure and prudence in Indonesia, and the public court's final judgment on a case along with its cost and notification whether or not both parties attend on the proceedings when the judgment is made; Law-based judgments must be mentioned. The judgments are signed by the chairman and the registrar of the court.

Article 184 HIR tersebut organizes the contents of judgment, which must contain: A brief summary on claim and rejoinder; Premises used as the base of judicial judgment; Judicial judgment for the main case; The judgment for the cost of case; The judgment contains explanations on whether the both parties attend in the proceedings when it is made; If the judgment is based on the fixed regulation, it must be mentioned.

Therefore, it is clear that not everything in a legal proceeding should be mentioned in a judgment. In this case, everything that happens during the proceedings is noted in the record. In "case" section, it only needs to mention a brief analysis of what is being sued and of the rejoinder, and refer to every point within the record. It is considered wrong if the "case" section immediately begins by loading the petitum. Such judgment will be short and may less the registrar's exhaustion. Such situation is not supposed to happen.

A very long judgment may contain *replics-duplics*, conclusions that previously expressed, and the witness' long statements. Considering its thickness, such judgment may not be mentioned in the jurisprudence of the Supreme Court, which commonly consists of some papers only. A letter of judgment must be brief and only contain what it is supposed to be. R. Subekti argued that, as we previously saw, the judicial judgment of civil cases always begins to infer which propositions are recognized and undeniable to be applied as things "beyond a dispute", and



thus, it can be correctly applied.<sup>13</sup> The opponent propositions, which are argued and disclaimed, should have evidence to prove.

Thus, it implies that a good systematical judgment (e.g., the statement of judgment is well structured) begins to infer which propositions selected as the basis of a recognized claim, at least it will not be argued by the defendant. Subsequently, deniable propositions which may reveal problems will be mentioned as well. Deniable propositions which may not seem problematic are not taken into account. In order to consider a proposition, it needs to propose important evidence such as authentic deeds or private deeds and then followed by evidence and witnesses.<sup>14</sup>

### Non-Executable Judgments of Civil Cases

There are some judgments with fixed legal power cannot be implemented (non executable) such as: The Executed Assets are Not Available, When the defendant has no assets to execute for particular payment, the execution cannot be conducted, as well as in real execution that deals with goods whether it has been damaged or transferred its ownership. The definition of unavailable asset in part of the executed party must be interpreted in broad manner. The definition can be seen from the following context.

The executed assets are absolutely unavailable, In this case, the executed assets absolutely no longer exist. In other words, the assets are all gone due to several causes, such as: It has been all sold out before the execution is conducted; or Due to natural disasters such as fire, flood, etc.

In such case, it is impossible to conduct an execution since the object to be executed is unavailable. Therefore, it must be considered as non-executable judgment due to unavailable objects to execute. When it is being executed, the litigant cannot show the assets to be executed, The second interpretation on the unavailability of assets to be executed refers to the litigant's incapability to show what and where the executed assets are. In this case, the executed assets are still in question, since the litigant cannot show what and where the assets are. It is consistent with a legal obligation charged toward the litigant. He/she must be able to show the executed assets that become the object of execution. The execution will never be conducted unless the litigant is able to show the executed assets in physical manner and based on its identity and location. Thus, the chairman of public court is authorized to consider that the request of execution is non-executable.

13 R. Subekti, *Hukum Pembuktian*, 5<sup>th</sup> edition (Pradnya Paramita: Jakarta, 1998), p. 49.

14 Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, p. 115.

### The assets to be executed are not found

The litigant shows an object to be executed, however, when it is about to be executed, the bailiff cannot clearly find the object. Hence, the execution cannot be conducted due to the fact that the object is “unavailable” or “not found”.

Declaratory Judgment, Commonly a condemnatory injunction contain a “contentiosa” case; a dispute between two parties in which the litigant against the defendant. However, by not mitigating the common notions expressed, a declaratory judgment may reveal in a contentiosa case. Thus, if the case solely contains declaratory injunctions, the execution of the judgment may become non-executable. For instance, an injunction only mentions that the litigant is the owner of the sued land, without mentioning that the defendant is sentenced to give the land to the litigant. Such injunction is declaratory, not condemnatory. Therefore, such judgment is not executable. Another example shows a case in which the judgment only mentions that the defendant is owing to the litigant without saying that the defendant is sentenced to fully pay his/her debt toward the litigant. Such judgment is not executable due to its declaratory nature.

In regard to the difference between declaratory and condemnatory judgments, the characteristic and reference are clearly shown. Declaratory judgment is a judgment which injunction refers to “statements” emphasizing a position, right, situation, or obligation. The notion of position (e.g., the litigant is considered as the heir), right (e.g., the litigant is considered as the owner of an object), situation (e.g., the defendant is considered as one that breaks the law or has no good faith), and obligation (e.g., the defendant is considered as one owing the litigant) are all not attributed with a “condemnatory” statement. Some characteristics and references to determine whether or not a judgment is considered condemnatory are as follow;<sup>15</sup> It is preceded by an injunction stressing on position, right, situation, or obligation. The statement is directly attributed by an injunction to sentence the defendant; and The condemnatory judgment can be in the form of: Sentencing the defendant to give; Sentencing the defendant to vacate; Sentencing the defendant to wreck; Sentencing the defendant to “do something” and Sentencing the defendant to pay some amount of money (whether in the form of obligation or amends).

How is the judgment in voluntary form? It refers to “request” (it solely consists of a litigant without any defendant). The judgment is absolute and declaratory. Thus, the absolute judgment of voluntary case is declaratory and the execution against the judgment is not executable. In voluntary judgment, any injunction of condemnation is not allowed to mention. However, such case does not have

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15 M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, p. 337-338.

any defendant to sue, does it? If there is no defendant to sue, how is it possible to sentence a party who is not considered as the defendant in a case? Due to this reason, it is impossible to attribute the voluntary judgment with a condemnatory nature. Therefore, such judgment is considered declaratory, and thus, it is not executable.

The Object to be Executed is on The Third Party, Without ignoring the explanation that relates to the judgment and execution which may cover the available object of non-defendant parties, the execution is basically considered non-executable when the executed object has been taken over toward the third party, and this third party is not considered as the defendant. This principle, however, deals with several factors such as: The legality of rights the third party has over the related object; There is an injunction that mentions a condemnation to whoever taking benefit from the defendant's right.

Those two factors are the basis that helps the chairman of public court to determine whether an object owned by the non-defendant party may or may not be executed. Although the injunction mentions a statement sentencing any party that has rights from the defendant over particular object, the execution of that object must be examined whether or not the right over the object is based on a valid right. If the right is clear, the execution toward that third party (considered as non-defendant party) is not executable.

Execution Against Tenants is Not Executable, Execution against tenants considered as non-defendant party is similar to one on the third party who owns the executed object based on a valid right, and simultaneously against a principle set under the article 1576 BW mentioning that commerce does not cut the tenancy - *koop breekt geen huur; lease goes before sale*. If the execution is forced to be conducted, the tenant may file a petition against the execution. This petition is aimed to defend his/her position as tenant.

Indeed, in encountering a lawsuit that deals with the ownership of an object rent to the third party, the litigant need to be careful in arranging the *posita* and *petitum* if she/he is willing to make the tenant as the defendant. A careless arrangement may make the claim unclear (*obsuur libel*). Therefore, it must be carefully arranged by relating the proposition of ownership right with invalid tenancy over the defendant's motive (one who gives the rent is not an individual who own the right to rent, thus, it is considered as an action against the law). This is clarified in regard to the ability to sue the tenant, as long as the proposition of the claim over the right of ownership is included in a set of proposition asking for the termination of tenancy. In order to save time and cost, it may be helpful

for the litigant to make the tenant as a defendant, so that the execution can be pointed to the tenant as well.

The Object to be Executed is Being Pledged to The Third Party, This case often practically happens, in which the object to be executed is, in fact, being pledged to the third party. Such case mostly happens in an execution of payment. When the debtor's assets are to be executed, the assets are, in fact, found pledged to the third party. Some references to implement the execution are as follow.<sup>16</sup> Non-executable judgment points to the objects pledged to the third party; Executable objects refers to debtor's assets that are free from any pledge; and If any assets are not found but pledged objects, the execution is considered non-executable.

Those are all the implementation of judgment when any pledged objects are not found in loan transaction. However, when it deals with pledged objects and those objects are, again, pledged to the third party, it will be another case. Execution may still likely be conducted after a series of investigation by comparing the time on which the object is pledged toward the litigant and toward the third party.

The Boundaries of Land to be Executed is Not Clear, It is in regard to the fact that the executed objects are not found or unavailable. Therefore, this motive -saying that the boundaries of land to be executed are not clear- is to emphasize such situation as a non-executable one. Although this case can be put as a base for non-executable judgment, the implementation needs to be careful and open. Directly judging that execution cannot be conducted due to the unclear boundaries of land before taking a deep investigation on it should be avoided. Nevertheless, it is often finding such hurry judgment deciding that it is a non-executable object to be executed due to the unclear boundaries of land, although the court has not made any effort to look into it yet.

The Shift of the Status of Land into State Property, When the execution deals with the shift of the status of land -in case that disputed land to be executed is shifted into the State property-, the execution is considered non-executable. It is often found in land/area with Building Rights Title or Cultivation Rights Title. The shifted status of those rights is due to its time limit. Building Rights Title is commonly established for some periods of time (approximately 20 years period of time) and it is likely to be extended. Furthermore, when a civil case dealing with that object happens, the disputed land still belongs to the defendant. However, when it comes to the execution, the Building Rights Title on that disputed land has ended and the extended period of time for the status of that land is not established yet or objected to be extended, and thus, the government may take over the status

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16 M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, p. 347-348.

of that disputed land. For instance, a debtor has mortgaged his Building Rights Title to a creditor. When the execution is about to come based on the article 224 HIR, the period of time for his Building Rights Title has ended, and thus, the government may take over the land. Sometimes, however, it is not that easy. Many cases show an unclear status, although its period of time has ended. There are still so many lands with disputed status; neither extension for period of time nor legal statement asserting that it has been shifted into the State property. Therefore, the implementation of execution needs to take this case into account as well.

The Executed Object is in Overseas, Basically, executing objects in overseas is considered non-executable. This is consistent with the principle of “nationality” and “extraterritory” in the procedural regulation of civil law. In relation to nationality and the principle of extraterritory within, the legal regulation (formal and material for civil case) is applied to every individual with no exception. However, the implementation is restricted to the principle of territory; it is applied in the territorial area of Indonesia. Instead, another condition that deals with the principle of “sovereignty” of every country may reveal. Every country has its own sovereignty, which may not be interfered by other countries unless they have made any legal aid agreement ((*judicial assistance*) for that. Similarly, Indonesia applied such agreement with another country in implementing its civil law. Execution against objects in overseas can be conducted if both countries (e.g., Indonesia and another country) have made an agreement in legal context and delegated their legal authority in civil law. Therefore, the principles of judiciary applied in Indonesia must be fully recognized, as set under the article 431 Rv: The execution is applied only in Indonesia; Therefore, the execution is not allowed to do in other country; As the vice versa, the judgment from foreign court is not recognized and not applied in Indonesia.

Contradictory Judgments, Sometimes, it is surprising when two judgments on the same subject and object but with different injunctions are found having fixed legal power; even it may lead to either the highest level of jurisdiction - a request for cassation to the supreme court- or the initial level taking an appealing phase. Commonly, It is derived from the same public court. Those two different injunctions will be examined and judged by the same judges. Note that if the public court encounters an execution over two conflicting judgments, it can be taken as a base to do no execution (non-executable). A fact that deals with two conflicting judgments; and It is not appropriate due to *ne bis in idem*.

Two conflicting judgments can be taken as a base of non-executable judgment. However, when it points to *ne bis in idem*, the court is considered seeing the truth

of law within the judgment, whereas, in case of implementing an execution, the court is not allowed to assess the legal consideration and content within the judgment. The only one having authority to assess the content is the proceedings and court judgment. It should be noted in order to avoid any fallacy. If an execution were allowed to assess the content of judgment, the assessment could be taken as a base to consider that it is a non-executable judgment, and the execution will be problematic. For instance, according to the final judgment, a particular area must be discharged. If the execution were allowed to assess the content of the judgment, the chairman of the public court might consider that the execution could not be conducted since the legal consideration within the judgment did not fit his arguments. In order to avoid such subject assessment, therefore, conducting an execution must not assess the judgment unless some qualified “facts” proving that it is not likely to be executed are found by the executors. For instance: the staff found that the executed object had belonged to the third party who is not included as the defendant, the executed objects are not found or unavailable, the executed objects belongs to the government, the executed objects are pledged to the third party, or the executed land has unclear boundaries. Those all facts can be taken as a base not to conduct an execution. The public court may examine whether or not the facts are true.

Execution Against Mutual Assets, Mutual assets due to marriage are defined as assets that belong to a married spouse. Therefore, it will always be their mutual assets during their marriage. This principle is based on the article 35 Law No. 1/ 1974 on marriage and fixed jurisprudence, including the rule of the Supreme Court on 19<sup>th</sup> February 1976, No. 985 K/Sip.1973 that: all assets a spouse get in a marriage are assumed as mutual assets, although it comes from one of them”. Therefore, execution against mutual assets must be linked to the definition of the assets itself along with particular events underlying the execution. Relating the definition of marriage assets to each event underlying the execution may reveal some methods of execution for that case.

### **The Analysis of Executable Civil Judgments in Malaysia.**

Large commercial disputes with a claim value exceeding RM1 million are brought before the High Court, while those below RM1 million are brought before the Sessions Court. The High Court has five divisions: Criminal Division; Civil Division; Commercial Division; Appellate and Special Powers Division dan Family Division.

The Commercial Division handles all commercial disputes including admiralty, insurance, companies winding-up, banking and intellectual property disputes. There are also intellectual property courts that handle intellectual property cases and specialist construction courts that handle construction disputes. Large commercial disputes are mainly settled by the High Court, which deals with claims of a value of RM1 million or more. The Malaysian court procedure is mostly adversarial, and judges exercise minimal intervention in the fact-finding process. To succeed, the claimant must prove its case on a balance of probabilities.

During case management of large commercial disputes, the courts are more likely to direct parties to reach an amicable settlement through mediation. In addition, following the implementation of the Arbitration Act 2005, industry players are gradually moving towards alternative dispute resolution methods (such as arbitration) to resolve technical commercial disputes, that require an arbitrator who is experienced in the particular subject matter (see *Questions 31 to 34*).

Limitation periods are as follows: Contractual and tort disputes: six years from the date the cause of action accrued (that is, the date of the breach of contract or the date on which the wrongful act caused loss/damage) (*section 6, Limitations Act 1953 (LA)*). Fraudulent breach of trust: no limitation period (*section 22(1), LA*). Other breach of trust: six years from the date on which the right of action accrued (that is, the date on which the transaction amounting to breach of trust occurred) (*section 22(2), LA*). Enforcement of judgment: 12 years from the date the judgment became enforceable (*section 6(3), LA*). Action to recover land: 12 years from the date the right of action accrued (that is, the last agreed date for completion of the sale of the land) (*section 9, LA*).

There are several procedures available to enforce a judgment. The three following points must be noted: The time limit to enforce a judgment is 12 years from the date on which the judgment becomes enforceable (*section 6(3), Limitations Act (LA)*). Arrears of interest in respect of any judgment debt cannot be recovered after six years from the date on which the interest becomes due. Judgments against a government can only be enforced through section 33 of the Government Proceedings Act 1956. The claimant must make an application after the expiration of 21 days from the date of an order against the government or an officer of the government. If the order provides for the payment of costs and the costs are taxable, the claimant must issue a certificate in the prescribed form containing particulars of the order.

The procedures applicable to the different methods of execution are discussed below. A writ of execution can take the form of a (*order 46, rule 1, Rules of Court*

(ROC)): Writ of seizure and sale for payment of money. Writ of possession for immovable property. Writ of delivery for movable property.

Generally, the leave of the court is necessary when (*order 46, rule 2(1), ROC*): Six years have lapsed since the date of judgment/order. Any change has taken place in the parties entitled/liable. The judgment/order is against a deceased person's assets, which have come into the hands of the executor/administrator after the date of the judgment/order. Any relief is subject to the fulfilment of conditions. Movable property is in the hands of a receiver.

The leave of the court ceases to have effect after one year. However, a fresh order can be made for leave after then. An application for a writ of execution can be made ex parte through a notice of application on Form 8 supported by an affidavit (*order 46, rule 3(1)-(2), ROC*). A praecipe on Form 89 must then be filed and signed by the solicitor of the party entitled to execution. A writ of seizure and sale can be issued regarding a judgment for the payment of money when there are special circumstances or when the judgment debtor is unable to pay (*order 47, rule 1(1), ROC*). An application for a writ of seizure and sale can be made through a notice of application supported by affidavit (*order 47, rule 1(2)-(3), ROC*). The notice of application and affidavit must be served on the judgment creditor not less than four days before the return day (*order 47, rule 1(4), ROC*).

The court can also grant a prohibitory order (PO) prohibiting the transfer, charge, lien or lease of title (*order 47, rule 6(a), ROC*). To obtain a PO, an application can be made by way of a notice of application supported by an affidavit (*order 4, rule 6(b)-(c), ROC*). A copy must then be served to the judgment debtor, issued to the judgment creditor for presentation to the Land Office Registrar, and issued to the Registrar (*order 47, rule 6(d), ROC*). Once the PO is registered, the property is deemed to be seized. A PO awarded under order 47, rule 6 expires after six months from the date of issue, and an application for the sale of any immovable property seized must be made within that time frame.

### **The Concept of Maslahah Mursalah within Judge Decision on Law Enforcement**

*Maslahah al mursalah* is a legal discovery on a matter or concrete phenomenon which is not explained in the Qur'an and Sunnah based on the welfare of the society or the public interest. The benefit element is the main parameter in this method of interpretation. Wahbah Zuhaili, cited in Abdul Manan, defines *mashlahah mursalah* as an effort to find the law from several characteristics which are in line with the objectives of syara', but not certain arguments which justify or abort. The



enactment of such law will achieve prosperity and avoid *mafsadat* (loss, damage) along the lives of society<sup>17</sup>.

This definition concludes that *mashlahah mursalah* intends to draw benefits and to avoid mafsadat. In the context of Islamic law, it is associated with *dlaruriyah*, which is an emergency condition in which a legal change or adjustment in on demand. Therefore, the application of *mashlahah mursalah* includes several elements. They are: The matter or phenomenon (the subject of dispute) has not been regulated in the Qur'an and Sunnah; There are no related commands or prohibitions in religious texts (arguments, rules); There is an element of benefit achieved if the law is applied.

However, the application of *mashlahah* is not that simple because the element of benefit for most society is different from the context of the current *mashlahah mursalah*. Hasb ash Shiddieqy argues that the application of the principle of *mashlahah* supposed to be *mashlahah haqiqiyah* (the true benefit). It is measured by the agreement of *ahlul halli wal aqdbi* that the law is true. Manan, proposes three conditions to consider when expressing the problem: No rejection against the benefit; The benefit must be concrete, not imaginative or vague; It must be for public benefit, not personal or individual.

Judges are not obliged to achieve a material truth in Islam, but to attain formal truth. Thus, the existence of evidence is highly needed. If the evidence is sufficient, a person may win. However, if it is insufficient, he/she cannot win even if the judge believes that the respected person is the right one and must win<sup>18</sup>. As explained in the hadith of the Prophet SAW:

*I'm merely a human being and you all complain about your dispute with me. Perhaps some of you can debate better. I just decide according to what I heard. Therefore, whosoever I have given a verdict to obtain a right from the rights of his brother(s), do not take it. What I have decided upon him (according to his birth, if it is in contrary to the truth) is a piece of hell fire* <sup>(cited in community of hadith experts)</sup>.<sup>19</sup>

A judge in a civil case may decide under formal truth only. And if an error occurs in decision making because it is only based on formal truth, the legal consequences are:

The Prophet Muhammad, according to Amr bin Ash r.a., stated that when the judge wants to make a decision, he does *ijtihad*, and it turns out to be right,

17 M. Natsir Asnawi, *Hermeneutika Putusan Hakim* (Yogyakarta: UII Press, 2014), p. 25.

18 Muhammad bin Ismail al-Kahlani Al-San'any, *Subul as Salam* (Bandung: Dahlan, Bandung, tt), p. 125.

19 Fatchur Rahman, *Hadits-Hadits Tentang Peradilan Agama*, Cet.pertama (Jakarta: Bulan Bintang, 1977), p.165.

he has the right for two rewards. If it is wrong, he has the right for one reward. “(Muttafaq Alaih)<sup>20</sup>.

### Conclusion

Overall, several judgments in civil cases are found non executable due to several reasons, including: 1) the executed objects are unavailable or not found; 2) the court judgment is declaratory; 3) the executed object is on the third party; 4) the execution is conducted toward the tenant of executed objects; 5) the executed objects are pledged to the third party; 6) the executed objects -in case of land- have unclear boundaries; 7) the status of objects in case of land- have shifted into the State property; 8) the executed object are in overseas; 9) there are two conflicting judgments; and 10) the execution against mutual assets. Therefore, judges should carefully consider such facts in making judgment, so that the implementation may not reveal any new problems. But according to Malaysian law, it seems unknown non executable civil judgments.

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20 Fatchur Rahman, *Hadits-Hadits Tentang Peradilan Agama*, p. 126.

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