

## Optimising Legal Execution in Creating A Justice-Based Legal Certainty

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### Abstract

*This dissertation is aimed at deeply understanding and analysing the root cause of incapability of the execution of the court which has definitive legal decision (incracht decision). In addition, it will be focused on analysing and developing an optimal model of legal execution in frame work of creating justice-based legal certainty. To manifest the above objective, it uses doctrinal and non-doctrinal approaches. In doctrinal approach, it will use statute and case approach by using primary and secondary legal materials, such as acts, court decisions. While the non-doctrinal approach applies socio-legal approach by focusing on primary legal materials which stemmed from interview with judges and advocates. The result of this research shows that the root cause of the failure of the implementation of the execution is caused by: (i) the different of legal interpretation on the legal substance of the existing norms; (ii) the lack of legal awareness, and even tends to the absence of the goodfaith among of the disputants; (iii) the lack of commitment of the chief justice at the district courts; (iv) inconsistency of legal politic of Indonesian Supreme Court; (v) the existence of legal mafia; (vi) there is political, economic and social influences; (vii) supporting infrastructure and facilities. At the end, this research proposes some strategic steps in optimising the implementation of legal execution, that are: (i) harmonising legal rules, particularly which related to process of execution; (ii) developing and strengthening legal culture; (iii) improving and strenghtening public control to ascertain the consistence of the Inodnesian Supremen Courts's legal-political commitment in implementing the process of execution; (iv) improving credibility and professionalism of judges; (v). Developing mediation; and (vi) strengthening supporting infrastructure and facilities of legal execution.\*\*\**

**Keywords:** optimisation, legal execution, legal certainty, and justice.

### Introduction

High complexity in legal enforcement, particularly in the failure of private legal execution<sup>1</sup> has deteriorated the level of legal certainty.<sup>2</sup> This the core issue in this article that will be discussed and elaborated. Undoubtedly, this uncertainty may damage the economic atmosphere, particularly in inviting investment activities in Indonesia. Therefore, the government or executive and judicatory party should find the root cause of the failure of the private legal execution.

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<sup>1</sup> Based on field research, more than 95 % of the private legal execution cannot be executed. This number raises a deep concern in the quality of legal enforcement in Indonesia. In 2016, Legal Aid Institution, Jakarta, (LBH, Jakarta) indicates that there are 27 cases that involve legal apparatur in Indonesian Supreme Court, 7 clerck, and 20 judges including the head of district court have been investigated by the committee of Eradicating Corruption. From a recent survey, 75, 7 responses assessed that the quality and integrity of judges are bad. In addition, from 8 of 10 responses said that the legal reformation in Indonesia failed. See: "71 tahun MA: Kondisi Peradilan Semakin Memprihatinkan" (71 Years of Indonesian Supreme Court Condition of Court of Justice is increasing Concern", in DETIK, 19 Agustus 2016., retrieved at: [news.detik.com/berita/3278819](http://news.detik.com/berita/3278819)

<sup>2</sup> This uncertainty has impact on the the socio-economic life of society, particularly in economic and investment activities. The impact of this uncertainty can be seen from the wide gap of the national budget plan and its realization. We know that the Jokowi's government planned that the national budget as many as 1350 trillion rupiahs. In fact, the government only received the national funding from tax sector up to 1010 trillion rupiahs. This mismatch number has open up a wide gap in financing national development. Therefore, the Jokowi's government expected the lack of funding for the national development can be supported from foreign investment activities. Ironically, on one hand, the government try to invite foreign investment, but the government fail to show an adequate legal certainty in Indonesia. This can be seen from the number of the failure of private legal execution.

Principally, in private law, the implementation of the court decision is conducted by the defeated parties. In fact, most of the defeated parties will refuse to implement the court decision voluntarily. Moreover, under the existing regulation, there is no fixed duration to implement the decision by the defeated party after request for execution. In this point, the winner party can ask support from the Head of District Court to force the process of the execution based on article 196 HIR:

“Jika pihak yang dikalahkan tidak mau atau lalai untuk memenuhi isi keputusan itu dengan damai, maka pihak yang menang memasukkan permintaan, baik dengan lisan, maupun dengan surat, kepada ketua, pengadilan negeri yang tersebut pada ayat pertama pasal 195, buat menjalankan keputusan itu ketua menyuruh memanggil pihak yang dikalahkan itu serta memperingatkan, supaya ia memenuhi keputusan itu di dalam tempo yang ditentukan oleh ketua, yang selama-lamanya delapan hari.” (the translation from the Dutch regulation HIR in Bahasa Indonesia)”

In reality of private execution, to achieve justice which is obtained by the winner does not stop after receiving a definitive and binding decision. Effort to execute the court decision is not rarely finding many problems for the head of district court who govern instruct the execution process.<sup>3</sup> There is a trend that the private execution is not conducted voluntarily. Commonly, the defeated party conducted resistance. Nevertheless, the article 197 HIR had regulated that if the due date of the execution has been decided, the decision of the execution process is still not conducted, so the head of the district court can instruct to seize all stuffs and any treasury owned by the defeated party to reimburse to recover the sum of money that has been stated in the decision. In addition, the head of district court can also add some cost for the implementation of the decision.

The head of the district court is core exponent in the process of the private law execution. Strong commitment and a progressive strategy of conflict resolution to handle the problem of complex execution is the primary solution for the head of district court. To change the process of legal enforcement, the government needs behavioral transformation and real action. This can be manifested through change and value transformation. The transformation of this value is increasingly relevant with Anthony Giddens' view in his work on “*the third way*”,<sup>4</sup> which emphasises the importance of the value transformation in the global era.<sup>5</sup>

In recent development, at the practical level, the weak legal support has weakened competition power of state to invite investment. Various deregulation which are introduced oftenly obstruct investment activities<sup>6</sup> because they are contradict each other. This situation may raise legal uncertainty that impact on the competition power in investment and investor's interests for investment.<sup>7</sup> The condition is still deteriorated by legal uncertainty in the scope of private legal execution. In society, most of defeated parties will refuse to obey and implement court decision. Even, when the legal officers will execute the court decision. The defeated party tend to block the execution process. Ironically, in the legal state (*rechtstaat*), its legal officers seem to “give up” to handle the above situation. The consequence is the definitive (*inkracht*) court decision cannot be implemented. By reviewing the above problems, the government need to find an certainty.

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<sup>3</sup> Purwoto, S Ganda Subrata, *Eksekusi Putusan Perkara Perdata*, Kata sambutan Djazuli Bahar, Penerbit Akadmika Pressindo.

<sup>4</sup> Anthony Giddens in his work on, *The Third Way* offers the third way to integrate all diametric interests. One of important requirements in the integration is the value transformation. In detail, Giddens stated that the rapid development of science and technology causes world situation cannot be predicted easily and accurately. Recently, the globalization has impact on the uncertainty that surpassed our capabilities to anticipate it. Scrutinising and analyzing this situation, we are demanded to find a new and appropriate method that may anticipate and reduce the uncertainty. See: [http://en.wikipedia.org/wiki/Anthony\\_Giddens](http://en.wikipedia.org/wiki/Anthony_Giddens); retrieved at 20 June 2016, at 20.50.

<sup>5</sup> Thus, the globalisation had impacted on political, economic, social, cultural and legal aspect of human life, even our daily live. See: Anthony Giddens, *Runway World, Bagaimana Globalisasi Merombak Kehidupan Kita*, Gramedia, Jakarta, 2001, at 54.

<sup>6</sup> This can be seen from the government policy, which canceled 3.143 government regulations that block investment and business activities. See. DetikNews.Com. retrieved on 17 June 2016, at 23:33.

<sup>7</sup> In political theory, the government has function to commercialise any potentials owned by a certain region for society. This function has provide a legitimation to the government to play a important and active role in business. See: Tajuk Rencana Media Indonesia, “Harmonisasi Hubungan Pemerintah Pusat dan Swasta Terkait Perijinan” (Harmonization of the Relationship between Central Government and Private Sector related to the Licence to Business).

The failure to find the appropriate solution will left public distrust to the legal enforcement in Indonesia,<sup>8</sup> particularly in improving business and investment activities. In order to manifest the justice-based legal certainty is an appropriate strategy to improve investment activities towards a conducive and stable economic, this article will focus its study and its analysis to optimise the private legal execution in order to create justice-based legal certainty. In detail, the analysis will address: (i) the reason in behind of the failure of the definitive court decision to create justice-based legal certainty; (ii) the strategy to optimise the private legal execution which may guarantee the justice-based legal certainty. This research will apply doctrinal and non-doctrinal research research. For the doctrinal research, it will use statutory approach, that apply primary and secondary legal materials, such as acts, jurisprudence, and court decision. While, non-doctrinal research will use *socio-legal approach*, that focuses on primary legal materials, stemmed from judges and advocaat. All methods as part of academic effort that would be dedicated to find strategic ways to optimize the implementation of the legal execution process in Indonesia. At the end, this article offers a cultural-based mediation to optimize the legal execution process in Indonesia.

## **2. Finding the Root Cause of the Difficulties in Legal Execution in Indonesia**

To formulate the best strategy and method in optimizing the private execution process in Indonesia, we need to find the root cause of the problem or difficulties in the execution process. This is important to obtain the accurate picture on the weaknesses in the execution process in order to allow us to formulate the best and appropriate approaches and methods in the execution process. The research results shows that the problems or difficulties of the legal execution process can be classified into: (i) Legal Substance; (ii) Legal Structure; (iii) Legal Culture; (iv) Legal Supporting Infrastructure; (v) Political Will of Executive, Legislative and Judiciary Parties. The legal substance may refer to the different legal interpretation of judges in the execution process.

### **2.1. Different Legal Interpretation of the Judges in Legal Execution**

The different interpretation to the legal substance in settling the disputes had caused the difficulties in the legal execution process. This can be seen from the Indonesian Supreme Court decision **No. 2158 K / Pdt / 2009, the dispute case for obtaining land of Alas Tlogo between people, whoc has rights title in the form of Letter C (Petuk C), versus Indonesian Army (Naval), that ha rights title in the form of land use. The judge who decided the case said was assumed has lack alert**, that causes the quality of decision only refers to the formal justice not substantive justice. This is reflected by people resistance by occupying the disputed land. The people believed that the state should protect them. The injustice of this case can be seen from the consideration of the judge that ignore the socio-economic facts that the local people already occupied, inhabit and managed the land for 30 years. This fact has been formalized by the State that provided people letter C as the evidence to own the land. The most concern is the execution process had caused the death of one of local people. This case shows that the law is needed by the weaker parties, either the weak socially, economically or politically.<sup>9</sup> Similar cases can be seen from various cases such as the execution process No. W4.U2/1052/Ht.04.10/V/2011 on 2 Mei 2011; or the case of the execution process which is based on the Yogyakarta District Court No. 5/Pdt/Plw/2007/PN.YK and Case Decision No. 59/Pdt/2007/PTY on 16 January 2008, that indicated the low or bad quality of the judge decision. The Jakarta District Court tha asked support from the Yogyakarta District Court to execute the object, ironically Jogjakarta Distrcit Court invalidated the Jakarta District Court, which has a definitive decision.

### **2.2. The Lack of Legal Awareness of the Disputants**

In practice, the failure of the execution process are caused by the absence of the legal awareness of disputants. They are not cognize or do not know the substance of the execution process. In theory, the execution process could be delayed for a certain reasons. According M. Yahya Harahap, the delay of the execution process require the case circumstance analysis or case analysis and exeptional examination.<sup>10</sup>

<sup>8</sup> Clearly that the above condition shows the government's incapability to guarantee the legal certainty and safety in business for investors, either foreign or local investor. The results of literature review shows that at least there are three main issues cannot be answered by investors and pioneers, who develop their business in a certain region: (i) legal certainty and safety guarantee, (ii) supporting infrastructure condition, and (iii) simple, fast, and transparent bearoucration in public services.

<sup>9</sup> Sunaryati Hartono, 1991, "Politik Hukum menuju Satu Sistem Hukum Nasional", Alumni, Bandung, at 55.

<sup>10</sup> According to M. Yahya Harahap, the request of legal execution in private law can be delayed. Principally, He admitted the delay of legal execution. However, he does not agree to the liberty of judges that use the reasons to delay the legal execution without considering case circumstances on one hand and exceptional characteristic on the other hand. The relationship between the

The court practices and jurisprudence or legal precedents also recognizes the delay of the execution process. The chief justice of the Indonesian Supreme Court maintains that: “the hesitance of the loser party to obey and support the execution process frequently causes the delay of the execution process which spark disappointment of the justice seekers. The dissipated expressions are frequently sent to the chief justice of Indonesian Supreme Court.”<sup>11</sup> From all letters that have sent to the Secretary of Indonesian Supreme Court from July 2003 to August 2004 concerning the delay of the execution process, there are 4137 letter and request for legal protection.<sup>12</sup>

### 2.3. The Lack Supporting Infrastructure and Facilities

The supporting infrastructure and facilities in the execution process may refer to the hard facilities such as sophisticated computer, flexible vehicles, and soft supporting facilities, such efficient computer program, and so forth. The above supporting infrastructure and facility examples are required to support the manifestation of the legal execution process. This is important to anticipate the failure of execution process. In the execution object which related to sensitive issues, such as religion, ethnic, and so forth, the legal apparatuses have no facilities to manifest the execution. The consequence, the execution process was stag at the documentary level. The example of this case can be seen from the execution process case, No.38/PDT.G/2012/PN.BKN, on 23 October 2013, in the lawsuit of Legal Standing, to Piter Wongso’s palm garden.<sup>13</sup> The execution process cannot be implemented as the absence of police and its supporting facilities to secure and to control the execution process to the palm garden as many as 200 Ha.

### 2.4. Inconsistence of the Chief Justice of District Courts

Admittedly that in real situation, judge is influenced by socio-political and economic situation. Those situations often influence the independency of judges in making decision. Van Doorn<sup>14</sup>, maintains that in his position as judge who hold function in organization, he tend to implement or endeavor his function by based on his interests which are influenced by various factors such as his personality, integrity, socio-cultural, socio-economy and political oriented or his life view.<sup>15</sup> Therefore, a judge should be sterilized from various interest in order to protect them from outer influence or heteronom influences.<sup>16</sup> Parallel to the above description, Charles Dicken<sup>17</sup> described concerning the court in United Kingdom, as “(it) ...so exhausts finances, patience courage, hope, so overthrows the brain and breaks the heart; that there is not an honourable man amongst its practioners who would not give the warning: Suffer any wrong that can be done to you rather tahan come here!”. The same case also happened in United State, the state which is become indicator for an ideal legal enforcement, we can also found injustice practices in the court practices. The high social status<sup>18</sup> has special treatment in the court practices. This ignores the principle of equal before the law, “Equal treatment is at the heart of the administration of justice”<sup>19</sup>.

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consideration of case circumstances and exceptional characteristic, should be used as foundation to consider the delaying of the legal execution. See: M. Yahya Harahap, *Beberapa Tinjauan mengenai Sistem Peradilan dan Penyelesaian Sengketa*, PT. Citra Aditya Bhakti, Bandung, 1997, at 2.

<sup>11</sup> Interview with Abdul Manan, Chief Justice in the Indonesian Supreme Court. He is also the head of Religion Department in the Indonesian Supreme Court, on 8 August 2016 in MA, Jakarta.

<sup>12</sup> Indonesian Supreme Court, Report of Supreme Court, 2003 – 2004, Jakarta 2004, at 36. See also: In the dispute case between *Ni Wayan Kepregvs. Udayana University*, the Udayana University management, as the loser party, refused to implement the court decision voluntarily. The university refused the execution by initiating and provoking students to make demonstration. See: The execution of Indonesian Supreme Court No. 981K/Pdt/2013, based on Denpasar District Court No. 463/Pdt.G/2011/PN.DPS.

<sup>13</sup> “Warga Menuntut PN Bangkinang”, (Citizen demands Bangkinang District Court), retrieved at:

<http://www.wajhampar.com/2016/06/warga-menuntut-pn-bangkinang-eksekusi.html>; “Eksekusi Lahan Gagal”, retrieved at: <http://detakkampar.co.id/blog/2016/08/10/eksekusi-lahan-gagal-ninik-mamak-dan-anak-kemanakankenegarian-rumbio-kecewa/>

<sup>14</sup> Adi Sulistiyono, 2006. *Mengembangkan Paradigma Non-Litigasi*, UNS Press, Solo, at 434.

<sup>15</sup> See: Legal studies from Realist and critical legal studies.

<sup>16</sup> See: Immanuel Kant, *Imperative Gategoric*, Republished, in 1987, Oxford Press, London; See also: Steven Box, 1983, *Crime, and Mystification*, London, Tavistock Publications, 1983, at 215-216; M. Yahya Harahap, *Beberapa Tinjauan...*, *Op. cit.*, at 2.

<sup>17</sup> See: Murgiana, “Copy Right Infringement and Alternative Dispute Resolution”, *JIII, AOTS*, 1998, at 5.

<sup>18</sup> Donald Black, 1976, *The Behaviour of Law*, Academic Press, New York, at 29; Donald Black, 1994, *Sociological Justice*, Oxford University Press, New York, US., at 1; Galanter, “Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change”, dalam L. Abel (ed), 1995, *The Law of Society*, New York, New York University Press, at 297 - 323.

<sup>19</sup> See: Thomas E. Carbonneau, *Alternative Dispute Resolution, Melting the Lances and Diemouting the Steeds*, Chicago University of Illionis, 1989, at 5.

The discrimination practice can be seen from A.M. Dershowitz<sup>20</sup> view which stated that money can influence the result of the judges' decision. In the murder case, O.J. Simpson was not guilty by jurors because O.J. Simpsons can hire skillfull lawyers to shift the focus of the jurors to the ignorance of police in handling the evidences. Parallel to the case, Rothwax said that in the United State, people do not fight for justice, but they fight to be winner by all means.<sup>21</sup>

### **2.5. The Lack of Legal-Political Commitment of the Indonesian Supreme Court**

Normally, the key success of the legal execution process is highly depending on high and strong commitment of the head of court decision. In private law, the head of district court is mandated to govern the implementation of legal execution process. Under Law No. 48/2009 concerning the judge authority, article 54 (2) and (3) stated that "...the implementation of the court decision in private case, is conducted by clerk and seize officer which are leaded the head of district court." Then, in verse (3) stated "court decision is conducted by considering humanistic and justice values." From the above article, it is clear that the execution process in private cases are decided, implemented and executed by the head of district court. Admittedly that as the key exponent in the legal execution process, the head of district court acts to undertake decision is not in the free and sterile from various interests. Therefore, the credibility of personality and professionalism of the head of district court is very important as it has strong influence in making justice-based legal certainty in the execution process. Under article 55 (1), Law No. 48/2009, the head of district court is obliged to control the implementation of the legal execution process which has a final and definitive status. In fact, these theoretic and normative rules are not followed by its implementation, as much final and definitive court decision cannot be executed from years to years.<sup>22</sup>

### **3. The Strategy in Optimising Legal Execution in Indonesia towards Justice-based Legal Certainty**

The strategy in optimizing legal execution is highly required to improve legal certainty in the legal enforcement in Indonesia. Some strategies that need to be considered are: (i) how to coherence the legal substance in legal execution process; (ii) how to build an effective legal structure in legal execution process. In this point, the challenges of the government are how to make a consistence legal-political commitment and how to improve credibility and professionalism of Indonesian judges; (iii) developing legal culture and (iv) strengthening supporting infrastructure in legal execution process.

#### **3.1. Coherencing Legal Substance in Legal Execution**

The coherence is one of legal theories in measuring and finding the truth. Principally, an entity could be stated as the true entity if all elements that form the entity is subsumed systematically, consistence, comprehensive and interlinked each other. In this point, one legal substance is stated as true if all elements or norms that form the rules refers to the above requirements. The failure of the executive (i.e., government) and parliament and judiciary parties maintaining the coherence of the substance of law or the legal norms may bring about the substance becomes invalid. The invalidity of the norms causes ineffective norms, particularly the legal rules on the legal execution process. In this case, the government and judges have no validity to enforce their action in executing the object of execution. The above explanation shows that the coherence of the legal substance of the legal norms are key or foundation in guaranteeing the enforcement of any legal action, as well as to warrant the effectivity of the execution process.

#### **3.2. Building Effective Legal Structure in the Execution Process**

The legal structure refers to the Friedmanian theory on legal theory. The legal structure is one of elements of legal systems that determine the quality of legal enforcement. Friedmanian thought stated that the legal structure is the institution that implement the legal substance or legal norms.

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<sup>20</sup> Alan Morton Dershowitz, 1996, the Criminal Justice Systems and O.J. Simpson Case and the Criminal Justice Systems, Simon and Schuster, NewYork, at 149.

<sup>21</sup> See: Satjipto Rahardjo, "Negara Hukum Tanpa Moral dan Disiplin". *Kompas*, 23 Februari 1996; dan 4 April 1996.

<sup>22</sup> For example, the dispute of Meruya Selatan Land (West Jakarta) between the citizen (H. Djuhari bin H. Geni, Yahya bin H. Geni, and Muh.Yatim Tugono) and PT.Portanigra in 1972 – 1973 and Indonesian Supreme Court (MA) Decision that winning PT. Portanigra. Because of the lack of commitment of the head of district court, the legal execution to the land just conducted after 34 years, in 2007, where part of the land rights is owned by people who live in that object of execution. This land possession has been certified by the National Land Board (BPN). It proves incoherence and complicated land regulation and management in Indonesia.

While the legal culture refers to the level of awareness of people in supporting and implementing the legal substance. In this point, the legal structure need to be strengthened in order to improve its capability and professionalism in legal enforcement. Some legal structure that are involved in legal execution process are judges, prosecutors as States' lawyer, police, lawyer or advocate. All of them should have professionalism and capability in handling any case related to dispute object, particularly that are related to the collective interests. For example, adat land or ulayat rights, public school or university and other public facilities.<sup>23</sup> To strengthen the legal structure, this work proposes that the government need to improve coordination and cooperation among of the legal structure staffs. The coordination could be focused on the substance issues or the techniques or method in handling public interests.<sup>24</sup>

In addition, the government should create and maintain the consistence of legal-political commitment and action of Indonesian Supreme Court. This can be manifested through initiating and nurturing substantive communication forum among of legal officers, particularly under the Indonesian Supreme Court authority. For improving credibility and professionalism of Indonesian judges, the government can cooperate with Indonesian Supreme Court and independent institution such as Judicial Commission to prepare and to make an appropriate recruitment for scrutinizing, and examining not only professionalism in legal knowledge and skill, but also controlling integrity of judges. The government can design a comprehensive educational and training for judges and other legal officers on the legal substance, which are related to the execution process.

The most important strategy is to develop legal culture. This is important to improve the legal awareness, not only society, but also legal officers to appreciate and to support the implementation of legal court decision. The equitable legal awareness will support the quality of legal enforcement comprehensively. Then, in order to support and guarantee the successful implementation or manifestation of execution process, the government should develop and improve the quality and quantity of supporting infrastructure and facilities in the execution process.

#### ***4. Developing Innovation in Mediation Model***

To optimize the implementation of legal execution in private law, this article has already developed an appropriate model of mediation, which is based on cultural values. It is not surprisingly that geographically and demographically, Indonesian people who inhabit more than 3.000 islands from 17.506 islands have many uniqueness in various socio-cultural life. Those facts, undoubtedly, creates cultural richness that contain many inspiration and local wisdom that used to maintain and to conserve harmony life from generation to generation. The cultural wisdom-based mediation play an important role in nurturing the harmony in Indonesian people.<sup>25</sup> In practice, this mediation uses and apply Adat and cultural values. It also involves Adat or cultural exponents to interpret and to operate the adat values substance. From time to time, this cultural values are used and applied by adat exponents in settling many local disputes. Thus, those adat and cultural instruments may also be use to improve effectivity of the execution process in Indonesia. This is because the mediation has been practiced by Indonesian people, particularly adat community.<sup>26</sup>

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<sup>23</sup> Personal communication, consultation and interview with Abdul Manan, the Indonesian chief justice in religion court, in Jakarta on 7 August 2016. Personal communication and interview with Hari Trihadianto, former of head of district of Barabe, Kalimantan, on 30 Juli 2016, and Wisnu Gautama, judges in District Court, Kediri, East Java, on 10 October 2016, Ni wayan Wirawati, judge in District Court of Sleman, Yogyakarta, from November 2015 till August 2016.

<sup>24</sup> Personal communication and consultation with Hayyan ul Haq, on 1 November 2015.

<sup>25</sup> Personal communication and consultation with Hayyan ul Haq on his view and works concerning effectivity of culture in settling disputes. Haq maintains that the cultural elements become effective instrument in settling certain disputes, particularly any disputes related to or involve collective authority. He further mentioned that this cultural-based mediation is a part of cultural approaches in settling internal disputes in Indonesian local communities. He provided an example of mediation in Lombok.

<sup>26</sup> From generation to generation, Indonesian communities have used and integrated local cultural wisdom into internal legal mechanism to solve their own disputes or conflicts, some example can be seen from Dayak community in Kalimantan, which use institution of Kombong as the mediation instrument and process to solve local dispute. In Bali, we can find the mediation institution which is called as Sangkepan. (the meeting of Adat village to solve any civil case or dispute). In Papua, the mediation institution is called Ondoafi or Ondofolo that solve any cases or conflict of Adat land disputes. In South Sulawesi, the mediation institution is called as Ammatoa, which is used to solve any adat disputes. In Lombok, we can find the Kerama Gubuk as the mediation institution to solve civil or criminal cases. See: Hayyan ul Haq, et.al., *Mediation in Indonesia, in the Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World*, Eleven,

The model of mediation that could be offered in the legal execution process should consider and introduce cultural elements or values, in the form of local wisdom.<sup>27</sup> For example, Hayyan ul Haq, elaborated an example of mediation in Lombok that has been practiced by Adat Sasak Community. In Lombok, even though there are two institutions of mediation (Kerama Gubuk and Majelis Pemusungan), which are classified based on the region indicator, that are West Lombok and North Lombok, to solve the dispute among Adat community, both cultural-based mediation institutions applied the same principles in settling their own conflicts, that are: (i) Soloh (peace) principle;<sup>28</sup> and (ii) Selaras-Serasi (Harmony)<sup>29</sup> Principle.

#### 4.1. Designing Mediation in the Execution Process

Mediation in legal execution process is needed to support and ascertain the successful of the execution. Analyzing several cases related to the delay and the failure of the execution process even the government use a definitive court decision, this article shows that the crucial problem is at the awareness and the respect of society to the definitive court decision. Most of society do not trust the court institution,<sup>30</sup> which are assumed as a product of collusion among of the disputants and legal officers.<sup>31</sup>

In legal technique. The mediation model should also consider the legal elements that guarantee the fundamental values of law, such as usefulness, certainty, justice, unity and sustainability. This is required to obtain acceptability from all related parties in the legal execution process.

#### 4.2. Constitutive Elements of Mediation in Execution Process

To strengthen the effectivity of the mediation results, the mediation should be designed and constructed by containing constitutive elements of mediation that refers to fundamental elements of law. Constitutive elements are the core elements that should be exists in constructing the mediation. This is important in order to maintain the coherence of the substance and process of mediation to the foundational values of law. Technically, in this point, the head of district court should ascertain that all fundamental values or elements such as usefulness, legal certainty, justice, unity and sustainability should be exist in formulating the substance of mediation at the execution process. First, the head of district court can review and check that the execution process bring about the usefulness not only for the disputants, but also for public.

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International Publishing, 2014, at 243-245. Another example related to the execution of land as collective owners. Frequently, this land as execution object cannot be executed by the definitive court decision. From 245 cases, 79% of those cases have been solved through adat mediation in West Sumatera province. See also: Zaiyardam Zubir, et. al., 2005, Perbedayaan Penyelesaian Konflik Tanah berbasiskan Perdamaian Adat Minangkabau di Nagari Lawang, Mandailing dan Salimpaung, Kabupaten Tanah Datar Sumatera Barat, Universitas Andalas.

<sup>27</sup> See: Hayyan ul Haq, et.al., 2014, Mediation in Indonesia, in Schonewille and Schonewille, 2014, *the Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World*, Eleven, International Publishing, 2014, at 243-245.

<sup>28</sup> Soloh (peace) principle reflected the communities' capability to maintain and protect as well as to respect the feeling, interests of their community. In this respect, the disputants try to understand each other on the deep message or deep interest or will of their counterparts or their opponents, or contender, or challengers. (*tao saling undur pasang*). See: Hayyan ul Haq, et.al., 2014, Mediation in Indonesia, in Schonewille and Schonewille, 2014, *the Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World*, Eleven, International Publishing, 2014.

<sup>29</sup> Serasi (Harmony) principle emphasizes the importance of the harmony of environment for maintaining comfortable environment. They applied the local wisdom "*empa q bau, aik meneng, tunjung tilah*" that means the fish is caught in the pond without destroy the water, and waterlily flower. See: Hayyan ul Haq, 2014. Therefore, referring to the above local wisdom, we can design the mediation in the private execution process should guarantee the stability, comfortability and harmony of the disputants and other related parties and society. Still according to Haq, et.al., it is illustrated as the principle of (*adeq tat tao jauk aiq*) that means the water that could milder and calmer disputants and society. See: Hayyan ul Haq, et.al., 2014.

<sup>30</sup> Many critiques to the court decision and services stemmed from the slow or even the late of case handling. The most important point is the level of the legal knowledge and maximum skill of judges in creating and producing a just decision. Most of resources from legal community said that the most serious obstacles is the integrity and the honesty of judge in making decision. According to survey, most of resources and responses (85%) do not trust the court decision. See: National Board of Legal Development (BPHN), "Laporan Akhir Team Penelitian Hukum tentang Masalah Hukum Pelaksanaan Putusan Peradilan dalam Penegakkan Hukum, BPHN, Kementerian Hukum dan HAM, 2005, at xiv.

<sup>31</sup> See: many legal officers in Indonesian Supreme Court, Jakarta District Court, Padang District court, who are caught by the committee of Eradicating Corruption (KPK).

However, the usefulness for all, should guarantee the legal certainty that would be dedicated to justice values, not only formal justice but also substantive justice. In light of the justice which is decided by judge refers to the consistence between positive norms or law and facts, it tends to create a formal justice. Therefore, this mediation in the execution process should not stop up to formal justice, based on the court decision only, but it should consider the objective of the justice. By referring Hayyan ul Haq view, the formal justice should be dedicated to maintain unity that guarantee sustainability of disputants.<sup>32</sup>

To visualize the above concept, in practice, referring my experiences in doing execution process, even though there is no regulation and instruction from judge that the looser party receive some lump sum (money) as *tali-asih* money, I suggested my client to allocate some money as *tali-asih* to the looser party. This *tali-asih* money has function to maintain a good relationship among of disputants so that they can transform together. Another example, we could offer a payment or buying the execution object but the prices is less than standard or normal price. This kind of negotiation could maintain the unity of the disputants and sustainability of their relationship. Those examples are parts of practical insights in embodying unity and sustainability in the execution process.

## 5. Closing Remarks

To sum up this article, We will conclude and provide recommendation for completing this article.

### 5.1. Conclusion

Undoubtedly that this article proved that the uncertainty in legal execution in private law, may contribute to the unconducive economic and investment climate. Therefore, the legal execution in private law plays an important role to improve public trust, not only to the government's commitment and capabilities to enforce law professionally based on legal certainty and justice, but also to improve the economic and investment activities. For that reason, the government should eradicate any obstacle in the implementation of legal execution in private law, such as the diametric and different interpretation in private law, the lack of legal awareness of society and legal officers, the lack supporting infrastructure and facilities, inconsistency of head of district court, and the lack of legal and political commitment of Indonesian Supreme Court, and legal mafia in execution process in private law.

Clearly this article shows some significant information and relevant which related to the legal execution. Therefore, this article becomes highly relevant to support the government in finding some strategic and comprehensive solution, not only for legal officers, but also for public, particularly business actor and investors. The failure of the implementation of this execution will raise public distrust, not only to the Indonesian legal enforcement, but also its court institutions, which imply on the prospective and conducive economic and investment climate.

### 5.2. Recommendation

To eradicate the above problems in order to optimize legal execution process in Indonesia, this article has proposed some ideas, such as (i) coherencing interpretation and implementation of legal substance in the legal execution process; (ii) building effective legal structure in legal execution, particularly in improving consistence of legal-political commitment in Indonesian Supreme Court and improving credibility and professionalism of Indonesian judges. In addition, the government should develop legal culture and strengthening supporting infrastructure and facilities in legal execution process in Indonesia. The core idea of the legal execution process that has been offered in this article is to create a cultural-based mediation in the legal execution process, such as the existing values that live and develop in the society, including Adat or cultural exponents, and other adat instruments. This is important and relevant to optimize the legal execution process. Certainly, the core values or elements in the legal execution process that cannot be ignored are usefulness, certainty, justice, unity, and sustainability. The above model of mediation could involve or engage both disputant parties to the unity corridor in order to optimize the legal execution process.\*\*\*

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<sup>32</sup> Hayyan ul Haq, 2013, "Strengthening the Philosophical and Axiological Legal Framework of Corporate Social Responsibility in Indonesia", in T. Lambooy, 2013, *Corporate Social Responsibility in Indonesia: Legislative Development and Case Studies*, Constitute Press, Indonesian Constitutional Court.

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