

**THE ROLE OF BAILIFFS TO CONDUCT A LEGAL AND PROPER SUMMONS ON A CIVIL DISPUTE SETTLEMENT IN BALE BANDUNG AND BANDUNG DISTRICT COURT****Anita Afriana**Faculty of Law, Padjadjaran University  
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Telp./Fax: +62-22-2506210 Email: [anita.afriana@unpad.ac.id](mailto:anita.afriana@unpad.ac.id)*Submitted: Jun 29, 2018; Reviewed: Jun 29, 2018; Accepted: Jun 29, 2018***Abstract**

*One of the officers who engage actively as an executive in court is a bailiff. All duties and obligations undertaken by the bailiff are conducted legitimately and properly in line with the law. Bailiffs execute their mandate and functions in enforcing the law, as they are the forefront of the court. This article presents a part of a research results conducted with normative juridical research method with a descriptive analytical specification. The research prioritizes secondary data complemented by primary data. The research examines issues on official and proper practices of bailiff summons at District Court of Bandung and Bale Bandung as well as legal consequences if the summon is improper in relation to legal certainty. The research concludes that in practice, the summons have been conducted properly based on the law as provided in Article 122 of HIR. However, in some cases, due to certain factors, there are summons carried out properly, but informally. Illegitimate and improper summons conducted due to negligence of the bailiffs may cause harm or loss to the litigants as it can complicate the case settlement, hence, the process becomes longer that leads to more legal cost. Further, this practice disregards the primary purpose of the law itself: legal certainty.*

**Keywords:** *Bailiff; Legal Certainty; Summons***INTRODUCTION**

Indonesia is a country that bases on the rule of law. In accordance with Article 28D Letter 1 of the 1945 Constitution of the Fourth Amendment, it is stated that everyone is entitled to equal protection, guarantee, and legal certainty before the law. One of the law enforcement agencies responsible to provide and guarantee the protection is the court.

Civil disputes settlement process through courts consists of several stages which are conducted in a sequence starting from filing of a lawsuit, response, reply, rejoinder and verification of the parties to litigation, conclusions and judgment. From these stages, it is critical that the parties as well as legal counsel are present in the hearing, although according to the Indonesian procedural law system contained in *Het Heriene Indonesisch*

*Reglement* (hereinafter referred to as HIR), there is no obligation for parties to be represented by legal counsel.

In principle, everyone may be involved in a litigation process in court, however, there is an exception for those who are underage and are mentally ill.<sup>1</sup> They should not be present before the court by themselves, but should be represented by their parents or guardians. The presence of the parties in the hearing is very important, one of the reasons is because there is a principle that the judge is obliged to hear both parties (*audi et alteram partem*), although in principle, in resolving civil disputes, the judge only conducts formal judicial review on the case file.

In principle, when an initial lawsuit is filled to a District Court, a mediation process begins. Until the decision is read, the parties or their attorneys shall be present at the hearing. A civil proceeding begins with summons of parties that can be specified into 3 (three) parts:<sup>2</sup>

<sup>1</sup> Retnowulan Sutantio dan Iskandar Oeripkartawinata. 1980. *Hukum Acara Perdata dalam Teori dan Praktik*. Bandung: Mandar Maju. Pg. 18. [Law of Civil Procedure in Theory and Practice]

<sup>2</sup> Subagyo. *Peranan Organisasi dan Manajemen Dalam Badan Peradilan. Makalah disampaikan dalam Pelatihan Teknis Fungsional Peningkatan Profesionalisme Bagi Pejabat Kepaniteraan*. Jakarta, 7 August 2011, Pg. 7 [The Role of Organization and Management in Judicial Body]

1. A summons conducted prior to the hearing;
2. A summons performed after the examination (trial);
3. A summons made after the examination is completed with the final judgment verdict.

If the parties are not properly summoned on the first day of the trial, the result is that a the lawsuit will be dropped (if all Plaintiffs and Legal Counsels are absent) or will be adjudicated by the defendant's absence (default judgment). Hence, the hearing is conducted with a special examination.<sup>3</sup>

The parties to attend each of the litigation stage must be legitimately and properly summoned. According to Article 122 of the HIR, a meaning that a summon has been conducted legitimately and properly is that the related parties have been summoned based on the prevailing law in which the summons is made by a bailiff. The bailiff should make proceedings of the summons to the related parties or their authorized representatives by considering time period. Unless in an urgent event, the time period shall not be less than three working days. In a mediation, a peace agreement in the court, or a reading of a decision if one of the parties is absent,

<sup>3</sup> Op.Cit. Pg. 22

the law enforcement process will be obstructed, thus, the case settlement is delayed.

Legal development does not only originate from the legislator since juridical practices has an important role for the growth of law. In fact, legal reformation is mostly originated and created from practices in courts. One of practitioners who plays an active role as an executive in court is a bailiff (*deurwaander*).

To execute its duty successfully, a court is dependent on its executive officers, one of which is bailiff. This is more apparent in courts with the main tasks are to receive, examine, and judge as well as resolve every case submitted to it. In a general judicial environment, the existence bailiff has already existed since the Dutch era, when the court is still named *Laandraad*, while for Religious Courts, the existence of the bailiff is still relatively new.

A bailiff is assigned to handle technical judicial tasks. Technical judicial task is a court duty that basically commence from case registration, management, court fees, completion of court administration, case administration, transmission or receipt of files to the Higher Court and/or Supreme Court (where there is an appeal), as well as the execution of civil case rul-

ings. All heavy duties and obligations undertaken by bailiffs should be conducted properly or in accordance with the provisions of legislation.

A case cannot be solved legitimately and properly as regulated by the law without the role and assistance of the bailiffs. The judge cannot possibly settle a case without the support of the bailiff, nor it is possible to serve without a judge's order. Both requires each other's presence.

In carrying out those aforementioned duties, it is a mandatory that a bailiff master issues related to the function of bailiff in accordance with his/her authority. The mastery of issues on bailiff has become a necessity because, in practice, the bailiffs are always faced with difficulties in conducting of their tasks. The problems arise because there is a gap between theory and practice in the field.

This article will review problems of legitimate and proper summons conducted by bailiffs in Bandung District Court and Bale Bandung District Court as well as the legal consequences if there is inappropriate summons in civil disputes settlement in relation to legal certainty.

Based on problems that exist in reality, this research aims to investigate the practice of implementing legitimate and proper summons conducted by bailiffs in

Bandung District Court and Bale Bandung District Court as well as the legal consequences arising when the bailiffs conducted a summons illegitimately and improperly.

## RESEARCH METHODOLOGY

This article is based on results of a completed research. This article uses normative juridical research method that puts forward secondary data consisting of primary, secondary, and tertiary legal materials. The primary data is used as a complement of the secondary data subsequent to qualitative juridical analysis. The research is conducted in Bandung and Bale Bandung District Courts in the form of interviews with judges and civil clerks.

## FINDINGS AND ANALYSIS

### **The Implementation of Legitimate and Proper Summons by Bailiffs in Civil Dispute Settlement in Bandung and Bale Bandung District Courts.**

There is always a legal relationship between members of the community as they live and interact with each other. The legal relationship originates as a consequence of law or a deliberate agreement. If there is a dispute due to a disruption of the legal relationship of either party, usually, the party experiencing loss requires a

settlement either from outside or through the courts by filing a lawsuit to the court.

Justice system has been known since the ancient times and is a necessity in living within a society, state, and nation. A government cannot operate without justice system because it is necessary to resolve disputes among its citizens. The judiciary as a system consists of sub-systems including supporting apparatus that comprise of judges and clerks inclusive of a bailiff.

As one of supporting apparatus of the judicial system, the bailiff is the forefront in executing the court decision which has a permanent legal force if it is not carried out voluntarily. With such a position, the task of the bailiff is not merely foreclosure, but more broadly and more importantly, such as to make a court proceeding, summons of the parties, notices, announcements, etc., all of which are governed by law.

A bailiff is authorized to perform his/her duties in the jurisdiction of the courts. Article 8 of the Decree of the Supreme Court Chief Justice of the Republic of Indonesia No. KMA/055/SK/X/1996 provides that:

- (1) In conducting an execution, a bailiff is responsible to the Chief Judge/Judge;

- (2) In conducting a summons/delivering orders of announcement, warning, protests and notices, the bailiff shall be responsible to the Chief Judge/Judge;
- (3) In conducting confiscation, a bailiff is responsible to the Chief Judge/Judge.

The point is that that the duties and authorities of the bailiffs are closely related to the summons of the parties. The parties shall be appropriately summoned. According to Article 124 of HIR and Article 125 of HIR, what is meant by "has been summoned appropriately" is a summons that fulfil the following elements.

1. That the parties have been summoned in line with the provision of the law, that is, the summons conducted by a bailiff by making an official report of summons of the parties. The summons is said to 'directly meet' if the bailiffs directly face the parties concerned.
2. The summons shall be made to the parties concerned or their authorized representatives. If the party who is summoned is not available, then the summons can only be deposited to the local government office of the village, and sub-district (or Head of Neighborhood Unit and Community Unit).

The author considers that the above provision is appropriate when it is associated to a quick, simple, and low-cost principle as to achieve the objective of legitimate and proper summons. The summons, then, may be communicated through the Head of Neighborhood Unit for the parties who cannot be found. This is an expansion of Article 390 of HIR/Article 718 of RBg.

3. The summons shall be made by observing the time period (except for urgent matters, it should not be less than 3 working days)

Article 391 HIR is the basis for determining the time period of the summons (the day of summons and the day of trial are not used). While Article 122 of HIR is the legal basis for a timeframe that must exist between the summons of the parties and the day of trial (no less than 3 working days)

In practice, it is widely known as a "legitimate and proper" summons, some use a term called "official and proper". The term "legitimate" contains a meaning of formal and official. Formal means that a summons is made by a summons letter and is conducted directly at the residence of the party. Meanwhile, the the word "of-

ficial", the summons is delivered by the bailiff and signed by the bailiff him/herself. The word "proper" means a timeframe between a summons to a trial day of at least 3 (three) working days. Therefore the word "legitimate and proper" cannot be separated.

The summons of the parties within the jurisdictional areas is conducted legitimately and properly. Subsequently, there are terms of home address and residence. Proper summons should be conducted in the Defendant's or Plaintiff's home address based on their identity card, while for parties beyond the jurisdiction, the summons is conducted through the Department of Foreign Affairs Cq. Director General of Protocol and enclosed to the Ambassador to which the parties are resided.<sup>4</sup> With the Regulation of the Supreme Court (PerMA) No. 3 of 2018 on Electronic Administration of Cases in Court applicable since April 2018, whereas if the lawsuit is submitted electronically, then, the summons shall be made based on the electronic account identity of the parties in the form of electronic-mail address and/or verified mobile phone number. Based on Article 5 paragraph (1) of PerMA No. 3 of

<sup>4</sup> Wildan Suyuthi Musthofa. (2001). *Praktik kejurusitaan Pengadilan*. Jakarta: Mahkamah Agung Republik Indonesia, Pg. 27 [Bailiff Practices in Court]

2018, it is mentioned that the registered domicile is the electronic residence.

The summons letter to the parties is an authentic deed because it is made by an authorized official, thus, the parties are bound to the summons letter, including the bailiff. Hence, the bailiff must definitely deliver the summons letter to the parties. If the bailiff does not directly meet the parties, then, the summons is rendered invalid. It can even be called an act of fraud (falsification of authentic deeds) if the bailiff conduct a summons by asking other persons to replace/represent him/her in doing a summons.<sup>5</sup>

In Bandung District Court, the summons of the parties is conducted legitimately and appropriately using a 2P3T formula, meaning the summons is conducted 2x (twice) to the Plaintiff and 3x (three times) to the Defendant. The summons is conducted by means of a letter/court summons. Legitimate and proper summons is only made during the first hearing, subsequently, the summons is made after the trial is dismissed by a judge.

In addition, the data obtained from Bale Bandung District Court indicates the procedures and media used, as well as an

<sup>5</sup> Wawancara dengan Wakil PN Klas I(A) Bandung. 18 November 2015. [An Interview with A Deputy of Court Chief in Bandung District Court]

explanation of legitimate and proper summons, which is similar to the data obtained from Bandung District Court. This shows that the judges, in general, and the bailiffs, in particular, have a good grasp of the legal proceeding procedure.

The time period used by Bale Bandung District Court in relation to the summons of the parties is that if the party is within the jurisdiction, then it is conducted in at least 3 days. Meanwhile, if the party is beyond the jurisdiction, then, it is done at least 2 weeks from the determination of the trial day and 1 month if it is beyond the jurisdiction and is too far away so it takes a relatively long time.<sup>6</sup>

The task of a bailiff is truly in the context of law enforcement. In a narrow sense, in terms of the subject, law enforcement can be interpreted as an effort of law enforcement apparatus to guarantee and ensure that a certain rule of law runs as it should. In further interpretation, in dispute settlement process, the presence of the parties to appear on a hearing shall be conducted properly and in accordance with the laws and regulations of the court apparatus.

The purpose of law is to bring about justice, legal certainty, and expediency. Legal certainty is a certainty as to how laws and regulations solve legal problems as well as how the role and function of legal institutions in the society. Moreover, legal certainty can also be in a form of decisions of authorized officials concerning a particular event. It can be concluded that legal certainty is the certainty of the rule of law, not the certainty of action against or in accordance with the rule of law.

Three pillars in realizing the aforementioned legal certainty can be divided into legal certainty from the elements of legislation, institutions and legal apparatus. To realize legal certainty, it is critical that the law/legislation is definitive and clear. The current legislation is sometimes multi-interpretive. This situation requires the judicial bodies (judges) to take actions to realize justice.<sup>7</sup>

Meanwhile, from a normative perspective, legal certainty is defined when a regulation is made and enacted in certainty as it regulates the things that are definite and logical. In relation to legislation in deciding civil disputes under Article 5 paragraph (1) of the Emergency Law No.

<sup>6</sup> Wawancara dengan Panitera Muda Hukum dan Panitia Muda Perdata. PN Bale Bandung, 22 November 2015. [An Interview with Civil Bailiff in Bale Bandung District Code]

<sup>7</sup> Pamadi Sarkadi. (2007). *Sistem Hukum Indonesia*. Jakarta: Universitas Terbuka. Pg. 11 [Indonesian Law System]

1 of 1951 that legitimize HIR and RBg. Based on Article 5 paragraph (1) of the Emergency Law No. 1 of 1951 which enacted HIR and RBg for the jurisdiction of Indonesia (and is still valid until now), it is evident that a jurisdiction imposed two different provisions.

In line with the definitions of legal certainty above, by doing legitimate and proper summons, then, legal certainty will be realized, namely through the role of legal apparatus, i.e., bailiff in the practice of summoning disputing parties to attend trial.

### **Legal Consequences of Illegitimate and Improper Summons in the Settlement of Civil Disputes**

The provisions of Article 126 of HIR grants the judge a freedom, if it is deemed necessary, to summons and re-summons either one or both parties, provided that at the first hearing, both the Plaintiff and the Defendant, or either one of them does not appear or keep postponing the hearing.

The order to re-summon the parties is usually conducted if the non-arrival party resides far from the district court. A second summons may be made if the first one is considered did not reach the party, for instance in the case that the summons

letter is delivered through the Local Government Office, Sub-District Office, Municipality, and so on.

The freedom granted to the judge to postpone the hearing is contained in Article 126 of HIR stating that there is no obligation to impose a default judgment or a dismissal, even if either the Plaintiff or Defendant did not arrive. Article 127 of HIR affirms that if the Defendant did not arrive at the first hearing, nor did he/she has another to appear as his/her representative, while he/she was properly summoned, the investigation of the case was adjourned.

The provisions in the above HIR indicates that the judge does not necessarily impose a default judgment or a dismissal when the Plaintiff or Defendant is absent, but checks whether the parties have been legitimately and properly summoned so that the next summons can be conducted. A default judgment or dismissal can only be imposed if it is proven that the parties do not appear before the judge even though they have been summoned appropriately.

In carrying out their duty to summon the parties, bailiffs oftentimes face several obstacles since theory and practice are sometimes different. These barriers may be geographical conditions that may



result in delayed notices or summons to the litigants. In fact, when the bailiffs perform their duty to conduct execution or seizure, there are obstacles from the parties, especially those who lose in court. Even though the verdict has been in accordance with the law, for example, if it is more than 3 days, then, the summons remains legitimate but improper. On the basis of consideration, the judge determines the time period of the summons by taking into account the place of trial and the residence of the parties (in term of distance). Although it means that the decision violates law, for example, in the highly-isolated Tual Maluku region, the term of summons for the parties before the trial is approximately 2-3 weeks or, at most, 1 month.

If there are parties (Plaintiff and Defendant) residing in a place that are difficult to reach by transportation since there are barriers such as waves or other natural difficulties and the barriers are temporary, then, bailiff make a summons letter stating that there will be another summons after the barriers have passed. Meanwhile, if the barriers is fixed and unavoidable, then, the summons is nevertheless conducted by any means of existing communication at the expense of the litigants. The District Court of Bandung provides another exam-

ple that when the summons is delivered to the parties at a place where he/she does not reside, they meet at a point that has been promised. In the court summons, the parties will sign the proof of receipt of the summons, then, unless the parties have no formal objection, the summons is considered legitimate and proper.

The author does not agree with the above opinion. By referring to the legal notion of formality, then, the summons should be properly addressed to where the parties reside, hence, the author argues that there is a proper summons made (at least 3 days before the hearing) conducted legitimately with court summons, but not formal.

A proper summons is an provision that enforces, not regulates, thus, it should be implemented and the provisions of formal procedural law shall be governed by law. Hence, if the bailiff is proven to conduct illegitimate and improper summons, which resulted in the absence of the Plaintiff /Defendant, the summons fee should be borne by the bailiff who has committed the illegitimate invitation. In addition, there should be at least a warning or administrative sanctions for the bailiff.

The importance of proper summons is related to legal purpose, namely certain-

ty. With legal certainty, then, law enforcement will work properly, thus, a quick, simple, and low-cost implementation principles can be realized. This is predominantly because the absence of the parties can result in an adjourned trial since the judge is not allowed to impose a default judgment or a dismissal. The process of dispute settlement becomes longer due to the absence of the parties.

Based on a document analysis (court summons) in Bandung District Court on finished cases (with final and binding judgments) during 2010-2015, it is seen that a bailiff has applied the provisions of the law in respect of proper summons of the parties, in fact, there is a summons made 13 days before the hearing was held. Meanwhile, the document research in Bale Bandung District Court on cases with final and binding judgments during 2010-2011, there are many who received the summons letter that was only signed by the head of local government, even the Court had to properly summons as much as 4 times (Case No. 75/ Pdt.G/2011/PN BB), while for a case No. 125/Pdt.G/2011/PN BB the summons was conducted 23 days before the trial was held.

Actually, by looking at the facts above, it can be concluded that there is a gap between theory and practice of sum-

mons that is developed and executed by the court. The gap is when the summons is adjusted to the difficulty level related to demographics and residential areas, the number of parties, and so forth.

The number of a default judgment and dismissal, both in Bandung and Bale Bandung District Courts, accounted to only about 3-5 annually. This suggests that the absence of either party is due to individual's own obstacles, instead of improper summons, as it has been described previously that the judge does not necessarily conduct a special decision, but must ensure in advance whether the parties have been properly summoned or not. If there is an evidence that the summons has been repeatedly done. For the sake of justice and legal certainty, the judge will impose a default judgment if the defendant is absent and a dismissal if the plaintiff is not present.

The existence of a court as an institution that serves to organize the judicial process in receiving, examining, and adjudicating community disputes. The duties are represented by a judge. Therefore, public trust in law system and judicial institutions in this country is determined by the credibility and professionalism of the judges in carrying out their duties to resolve disputes and uphold justice.

In line with the demands of society to the judiciary institutions and its support personnel to be able to uphold the rule of law, a bailiff is demanded to improve the ability and professionalism. The problem that the bailiffs face as the spearhead of the court since the beginning of the case until by the time that the verdict is read, is a legal matter because each phase requires legal certainty. This is because if the phases do not refer to the law as legal standing, it will bring legal consequences, i.e., the loss for the parties.

The rise of public awareness on the field of law must be balanced by the ability and professionalism of the apparatus supporting the judiciary system<sup>8</sup> so that it can realize and guarantee that the law is upheld to fulfill the sense of justice and legal certainty for the society.

## CONCLUSION

In practice, the implementation of legitimate and proper summons is in accordance with the provisions of a law enforcement that is based on the provisions of Article 122 of HIR that the summons should be executed 3 (three) days prior to the first trial. Meanwhile, for the subse-

quent hearings, the bailiff does not perform any summons since it will be announced when the first trial was closed. For special causes, in some cases, summons to the parties were carried out legitimately and properly, but not formally. The role of a bailiff which implements the provisions of the law properly, provides legal certainty to the litigants.

The absence of the parties on the first day of the trial does not necessarily cause the examination to not be conducted in *contradictoire* (Judgment given after due hearing of the parties), meaning that the judge is not supposed to conduct a special examination of a case and impose a default judgment or a dismissal. A judge has an obligation to check evidences of court summons so as to gain confidence whether the bailiff has executed the summons properly in accordance with his/her professionalism. Based on document analysis and interviews conducted at Bandung and Bale Bandung District Court. Findings show that annually, there are only about 3-5 cases that are decided by a default judgment or dismissed. This proves that the bailiff has correctly referred to the law. Given that the bailiff is the spearhead of the court, his/her negligence that cause improper summons may result in loss of the litigants. The case set-

<sup>8</sup> Soetandyo Wignjosoebroto. (1994). *Dari Hukum Kolonial ke Hukum Nasional-Dinamika Sosial Politik Dalam Perkembangan Hukum Di Indonesia*. Jakarta: Grafindo Persada. hlm 13

tlement becomes longer and more expensive, and the purpose of legal certainty is neglected.

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