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Legal Research on The Return of State Financial Losses Through Additional Punishment of Restitution Payments Based on Judge's Consideration (Comparative Study Between Indonesia and South Africa)

Jaco Barkhuizen
University of Limpopo, South Africa
jaco.barkhuizen@ul.ac.za

Singgih Purnomo
Duta Bangsa University Surakarta, Indonesia
singgih_purnomo@udb.ac.id

Rina Arum Prastyanti
Duta Bangsa University Surakarta, Indonesia
rina_arum@udb.ac.id

Du Ngoc Bich
Ho Chi Minh City Open University Vietnam, Vietnam
bich.dn@ou.edu.vn

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Corresponding Author:

Jaco Barkhuizen
jaco.barkhuizen@ul.ac.za

ABSTRACT

Purpose of the study (*Tujuan*):
This study aims to ascertain the judge's consideration in determining additional punishment and describe the problematic implementation of the judge's consideration (Comparative study of Indonesia and South Africa).

Methodology (*Metodologi*):
This study's type is normative juridical legal research. This approach was employed to obtain a description of the analysis of legal regulations governing restitution as an additional punishment for corruption offenses. The case approach is normative juridical research aimed at studying the application of legal norms or rules carried out in legal practice. Concerning this research, the example of a case to be studied was a corruption case with permanent legal force, namely the Corruption Court Decision (Comparative study between Indonesia and South Africa). Primary data

were specifically gathered to answer research questions by interview method. The data analysis technique utilized was a qualitative analysis technique using the interactive method.

Results:

Based on the results of the aforementioned research, 1) South Africa uses the asset recovery system and involves third parties. In corruption cases in South Africa, the courts seek to ensure that money lost due to corruption is returned to the state. On February 25, 2019, the president of South Africa announced that a special court would be established in accordance with section 2 (1) of the Special Investigative Units and Courts Act, Act No. 74 of 1996, to hear cases arising in court proceedings. 2) In Indonesia, judges have obstacles in interpreting Article 18 of Law No. 31 of 1999 on Corruption Crime Law. The additional restitution punishment is regulated in Article 18 of Law Number 31 of 1999, and the general explanation states, "This law also contains imprisonment for perpetrators of corruption crimes who cannot pay additional punishment in the form of restitution for state losses." However, in practice, the implementation of court decisions on restitution turns out to experience many obstacles because the convicted person does not want to pay and prefers substitute imprisonment or is unable to pay because his property no longer exists. 3) The dualism of sentencing money payment in lieu of additional punishment exists. On the one hand, the judge can decide whether to impose an additional penalty. On the other hand, it is not the case in several corruption cassation decisions, which interpret restitution payments as mandatory, where the *judex facti* has misapplied the law; it is because the *judex facti* did not impose restitution payments on the defendant.

Applications of this study:

Explaining the problematic legal system of returning state financial losses due to corruption crimes through additional compensation payments based on substance factors is contained in Article 18 (1) point b of Law on Corruption Crime.

Novelty: The reconstruction of legal substance needs to be prepared so that there is no overlap in the treatment of evidence that uses the instrument of Article 46 Section (1) point c of the Criminal Procedure Code and Article 33 of Law Number 31

of 1999 on the Eradication of Corruption to create guidelines/technicalinstructions to determine which alifications / parameters /mechanisms / methods / criteria of evidence that use the instrument from both regulations.
Keywords: corruption, judge's consideration, state financial losses

ABSTRAK

Tujuan:Penelitian ini bertujuan untuk mengetahui pertimbangan hakim dalam menetapkan pidana tambahan dan mendeskripsikan problematika pelaksanaan pertimbangan hakim (Studi banding Indonesia dan Afrika Selatan).
Metodologi: Jenis penelitian ini adalah penelitian hukum yuridis normatif. Pendekatan ini digunakan untuk memperoleh gambaran tentang analisis peraturan perundang-undangan yang mengatur tentang restitusi sebagai pidana tambahan bagi tindak pidana korupsi. Pendekatan kasus adalah penelitian yuridis normatif yang bertujuan untuk mempelajari penerapan norma atau aturan hukum yang dilakukan dalam praktek hukum. Dalam penelitian ini, contoh kasus yang akan diteliti adalah kasus korupsi yang telah berkekuatan hukum tetap, yaitu Putusan Pengadilan Tindak Pidana Korupsi (Studi Perbandingan antara Indonesia dan Afrika Selatan). Data primer dikumpulkan secara khusus untuk menjawab pertanyaan penelitian dengan metode wawancara. Teknik analisis data yang digunakan adalah teknik analisis kualitatif dengan metode interaktif.
Hasil: Berdasarkan hasil penelitian di atas, 1) Afrika Selatan menggunakan sistem pemulihan aset dan melibatkan pihak ketiga. Dalam kasus korupsi di Afrika Selatan, pengadilan berusaha memastikan bahwa uang yang hilang akibat korupsi dikembalikan ke negara. Pada tanggal 25 Februari 2019, presiden Afrika Selatan mengumumkan bahwa pengadilan khusus akan dibentuk sesuai dengan pasal 2 (1) Undang-Undang Unit Investigasi Khusus dan Pengadilan, Undang-Undang No. 74 tahun 1996, untuk mengadili kasus-kasus yang timbul dalam proses pengadilan . 2) Di Indonesia, hakim memiliki kendala dalam menafsirkan Pasal

18 Undang-Undang Nomor 31 Tahun 1999 tentang Undang-Undang Tindak Pidana Korupsi. Pidana tambahan restitusi diatur dalam Pasal 18 Undang-Undang Nomor 31 Tahun 1999, dan penjelasan umumnya menyebutkan, “UU ini juga memuat pidana penjara bagi pelaku tindak pidana korupsi yang tidak dapat membayar pidana tambahan berupa penggantian kerugian negara.” Namun dalam praktiknya, pelaksanaan putusan pengadilan tentang restitusi ternyata banyak mengalami kendala karena terpidana tidak mau membayar dan lebih memilih pidana penjara pengganti atau tidak mampu membayar karena hartanya sudah tidak ada. 3) Adanya dualisme pidana pembayaran uang sebagai pengganti pidana tambahan. Di satu sisi, hakim dapat memutuskan apakah akan menjatuhkan hukuman tambahan. Sebaliknya, tidak demikian halnya dalam beberapa putusan kasasi korupsi yang mengartikan pembayaran restitusi sebagai wajib, di mana judex facti telah salah menerapkan hukum; Hal itu karena judex facti tidak membebankan pembayaran restitusi kepada terdakwa.
Kegunaan: Penjelasan sistem hukum bermasalah pengembalian kerugian keuangan negara akibat tindak pidana korupsi melalui pembayaran ganti kerugian tambahan berdasarkan faktor substansi terdapat dalam Pasal 18 (1) huruf b UU Tindak Pidana Korupsi.
Kebaruan: Rekonstruksi substansi hukum perlu disiapkan agar tidak terjadi tumpang tindih dalam perlakuan alat bukti yang menggunakan instrumen Pasal 46 Ayat (1) huruf c KUHAP dan Pasal 33 Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan. Tipikor untuk membuat pedoman/petunjuk teknis untuk menentukan kualifikasi / parameter / mekanisme/metode /kriteria pembuktian mana yang menggunakan instrumen dari kedua peraturan tersebut.
Kata kunci: korupsi, pertimbangan hakim, kerugian keuangan negara

INTRODUCTION

Corruption can destroy developing countries' hopes for prosperity and stability and devastate the global economy. Corruption also absorbs the budget that should be reserved for public service facilities that are highly important to the people (Stefan D. Cassella, 2016). Therefore, it must be responded to with criminal sanctions (Sudarto, 2009).

In the context of corruption offenses, it appears that the philosophy and theory of punishment are heavily influenced by the retributive justice school (Aleksandar Fatic, 1995). It is irrelevant to the big goal of corruption eradication law in Indonesia, which is to focus on protecting state assets or wealth. The legal interest to be protected here is state finances (Agus Rusianto, 2015). In addition, the current issue is that the law in Indonesia finds it difficult to interpret because it does not have a solid picture, a clear long-term strategy, and draft laws that often change. The main causes of corruption are decentralized decision-making processes, legal uncertainty, convoluted regulations, and Indonesia's electoral system, which facilitates corruption (Hanim Hamzah, 2021).

In Indonesia, Law Number 31 of 1999 jo. Law Number 20 of 2001 also regulates the issue of restitution. Article 18 (1) (b) stipulates that perpetrators of corruption offenses may be sentenced to additional punishment in the form of restitution payments, the maximum amount of which is equal to the property obtained from corruption offenses. However, these regulations have not fully implemented the concept of restorative justice. Besides, problems that arise from the Corruption Crime Law require the public prosecutor to stipulate that if the case has been decided and the convict does not pay the restitution within one month, the property can be confiscated and then auctioned to cover the restitution, the amount of which is in accordance with the court verdict that has permanent legal force. If the convicted person has insufficient property to pay the restitution, the convicted person shall be sentenced to imprisonment, which does not exceed the length of the principal punishment.

Again, this norm indicates that the return of state losses is only an additional punishment, not the main one. If the convict cannot return the state’s losses, the solution is to imprison the convict as a substitute; he must also serve the main prison sentence (Sanyoto, 2018). Referring to data from the Supreme Audit Agency, the rate of restitution settlement is only around 31.38% of the total restitution decided by the court (Efi Laila Kholis, 2010). Further, the stagnation in the execution of restitution payments occurs for various reasons. One of them is the lack of rules regarding the payment of restitution, resulting in confusion and inconsistency in its implementation.

The state's success in law enforcement to optimally seek the return of the proceeds of corruption is a sign that the legal system for the return of the proceeds of corruption is working effectively to restore various interests in the harmed community. The recovery of losses to the

state and society due to corruption is a tangible manifestation of the creation of legal certainty, legal justice, and legal expediency. Thus, legal protection of the balance of various interests in the Indonesian legal state, namely the interests of society and individual interests, is maintained.

Based on the above-mentioned explanation, the problem statements of this research are: What is the judge's consideration in determining additional punishment? What is the problematic implementation of the judge's consideration (Comparative study between Indonesia and South Africa)?

RESEARCH METHOD

This type of research is normative juridical legal research. A normative dogmatic-juridical method examines the rules or norms in the applicable positive law. "The statutory approach is carried out to examine the legal rules that are the focus of research" (Barda Nawawi, 2003). A statutory approach is also conducted by examining all laws and regulations regarding the legal issues being addressed.

This study used this approach to obtain a description of the analysis of legal regulations governing restitution as an additional punishment for corruption offenses. "This approach opens up opportunities for researchers to study whether there is consistency and compatibility between a law and other laws or between regulations and laws" (Bernard L. Tanya, 2012). In addition, the case approach is normative juridical research aimed at studying the application of legal norms or rules carried out in legal practice. Concerning this research, the example of a case to be studied was a corruption case with permanent legal force, namely the Corruption Court (Comparative study between Indonesia and South Africa). A conceptual approach is taken when the researcher does not depart from the existing legal rules. It is done because of no legal rule found for the problem. In this approach, the researcher needs to refer to legal principles. These principles can be found in the views of scholars or legal doctrines (CST. Kansil, 2007).

Moreover, since primary data sources were obtained directly from first sources, individuals, and groups, this study specifically gathered primary data to answer research questions using the interview method. This interview was conducted to obtain information from the corruption judge of Indonesia and South Africa Courts concerning the basis of the judge's consideration in imposing a verdict in the form of additional compensation. Besides, the data analysis technique used was a qualitative analysis technique with an interactive method.

RESULTS & DISCUSSION

The enforcement of corruption laws currently encounters various obstacles. It is shown by the non-optimal restitution submitted to the state to cover state financial losses due to corruption. In this case, the researcher compares judges' considerations in Indonesia and South Africa.

A. The Return of State Financial Losses through Additional Punishment of Restitution Payment Based on Indonesia Court Consideration

As in the Decision of the Court of First Instance Corruption in Indonesia, a case study at the Yogyakarta District Court Number 4/Pid.Sus-TPK/2015/PN.Yyk with the defendant MYN binti MU, dated October 13, 2015, Member Judge I (one) expressed disagreement (dissenting opinion) regarding the Panel of Judges of the Court of First Instance Corruption at the Yogyakarta District Court.

The legal facts revealed in the trial of the Panel of Judges at the Corruption Court at the Yogyakarta High Court improved the consideration of the Panel of Judges at the Corruption Court of First Instance at the Yogyakarta District Court. Considering the agreement letter dated November 15, 2010, the restitution that should be returned to the state by MYN binti MU for IDR 230,448,710 (two hundred and thirty million four hundred forty-eight thousandseven hundred and ten rupiahs), in which a reasonable service fee should reduce it becausethe defendant has helped Persiba in the amount of IDR 100,000,000 (one hundred million rupiahs). However, in the decision of the Corruption Court of the Yogyakarta High Court, the defendant MYN was ordered to pay restitution to the state in IDR 130,448,710 (one hundred and thirty million four hundred forty-eight thousand seven hundred and ten rupiahs) with the provision that if the defendant did not pay the restitution within one month after the court decision, her property would be confiscated by the prosecutor and auctioned off to cover the restitution. If the defendant had insufficient assets to pay the restitution, the defendant should be sent to prison for three months.

In fact, in the Yogyakarta High Court Decision Number 10/PID.Sus-TPK/2015/PT YYK with the defendant MYN binti MU, dated October 13, 2015, the restitution that Maryani should pay was IDR 130,448,710, - (one hundred and thirty million four hundred forty-eight thousand seven hundred and ten rupiahs). This figure was smaller than the District Court Decision, which initially decided IDR 230.448,710 (two hundred and thirty million four hundred forty-eight thousand seven hundred and ten rupiahs), meaning that the aspect used by the judge is that the

additional criminal punishment for returning state money is "smaller than the loss of state money" (Harnold Ferry Makawimbang, 2014).

B. The Return of State Financial Losses through Additional Punishment of Restitution Payment Based on South Africa Court Consideration

South Africa basically has laws against corruption that contain anti-corruption provisions covering the administrative, public service, security, services, and financial sectors. These laws include the Prevention and Combating Corrupt Activities Act 2004 (PCCA) (John C Mubangizi, 2021). The PCCA regulates general corruption offenses in connection with corruption activities relating to public officials, members of legislative authorities, judicial officials, and members of prosecutorial authorities. Another anti-corruption law is the Prevention of Organized Crime Act 121 of 1998, which regulates organized crime, money laundering, and criminal activities (John, 2022).

For example, JZ, the former president of South Africa, has been accused of being involved in corruption and bribery cases for over 20 years. The charges against JZ include fraud, corruption, and extortion. He faced 16 fraud, extortion, and corruption charges in purchasing fighter jets, patrol boats and military equipment in 1999 from five European arms companies. Therefore, the South African High Court 2021 gave JZ a prison sentence of 15 months. In practice, the national commission of correctional services granted medical parole. Two courts subsequently ruled that JZ had to return to prison and serve the remainder of his sentence (Gerald, 2023).

The South African Prevention of Organized Crime Act ("POCA") No. 12 of 2004 provides for civil asset recovery under Section 5 of POCA without the need for criminal convictions. A perceived benefit of civil asset recovery is that the onus of proof in civil proceedings is significantly lower than in criminal proceedings. However, in practice, only a few cases were filed under Section 5 of POCA. More concerning is that the individuals involved were still unaffected, largely due to incompetence and delays at the National Prosecuting Authority (Joseph, 2022). The lack of accountability in criminal prosecutions has been identified as a key factor in criminal behavior.

In South Africa, a Tribunal (to adjudicate on cases arising from the State Capture Inquiry) has limited jurisdiction concerning cases arising from Specialized Investigation Unit (SIU) investigations. Section 8 (2) of the Act states that the Tribunal will have "the power to adjudicate in civil disputes brought by the specialized investigation unit or any interested person arising out of an SIU investigation". The latter reference to "interested person" suggests that the state (including municipalities, state-owned enterprises, or other state bodies), the subject of the investigation, may bring proceedings at the Tribunal through private lawyers. In theory, the Asset Forfeiture Unit (AFU) can also bring proceedings in court on behalf of the state (Charles, 2009).

Based on the aforementioned research results, there are two differences in judges' decisions in Indonesia and South Africa. Based on these differences, it can be analyzed that:

a. South Africa Uses the Asset Recovery System and Involves Third Parties.

In corruption cases in South Africa, the courts seek to ensure that money lost due to corruption is returned to the state. On February 25, 2019, the president of South Africa announced that a special court would be established in accordance with section 2 (1) of the Special Investigative Units and Courts Act, Act No. 74 of 1996, to hear cases arising in court proceedings. More specifically, a third party would be appointed to expedite the asset recovery process of high-priority cases mandated to the South African Special Investigations Unit ("SIU").

The SIU is a specialist and independent investigative unit established under the Act and the Department of Justice and Correctional Services. The SIU is generally regarded as a state forensic investigator; however, its powers and mandate include civil recovery of state monies and assets, providing evidence into inquiries arising from investigations, and referring criminal matters to the National Prosecuting Authority (NPA) for criminal prosecution. The NPA has the sole mandate to conduct criminal actions on behalf of the state, and the final decision to conduct criminal actions rests solely with the National Director of Public Prosecutions. The SIU can only make recommendations to the NPA.

b. Judges' Obstacles in Interpreting Article 18 of Law No. 31 of 1999 on Corruption Crime Law

In Indonesia, the additional restitution punishment is regulated in Article 18 of Law Number 31 of 1999 on Corruption Crime Law, and the general explanation states, "This

law also contains imprisonment for perpetrators of corruption crimes who cannot pay additional punishment in the form of restitution for state losses." However, in practice, the implementation of court decisions on restitution turns out to experience many obstacles because the convicted person does not want to pay and prefers substitute imprisonment or is unable to pay because his property no longer exists.

The dualism in the application of restitution calculation, in fact, complicatesthe process of calculating the amount of restitution. According to Article 18, section 1, point b, of Law Number 31 of 1999 on Corruption Crime Law and Law Number 20 of 2001, the amendment to Law Number 31 of 1999 on the Eradication of Corruption, the value of restitution is at least equal to the property obtained through corruption. In reality, calculating the amount of restitution is not simple. If restitution is defined as the confiscation of property due to corruption, all parts of the defendant's property must be first calculated and classified to determine the property's value obtained through corruption.

The separation between assets obtained due to corruption and thosenot obtained due to corruption is also difficult to implement in practice. In addition to specialized expertise and complete data and information, it requires high precision and diplomatic and bureaucratic support (if the proceeds of corruption are abroad). In fact, corruption is a complex problem. One manifestation of this complexity is that there are usually many people who come from intellectual circles and several actors who hold important positions, so they can easily divert or hide the proceeds of corruption through various financial and/or banking transaction services. In addition, the lengthy process of disclosing corruption cases makes it difficult to trace the proceeds of corruption that have changed their form and ownership.

Concerning the parameters of agency authority seen from the legality or validity of government actions according to the concept of Philipus M Hardjon's (2017) thinking, it can be observed from the "*Rechmatig Bestuur*" in moredetail mentioning that *Rechmatige Bestuure* is the principle of government that rests on the principle of the rule of law, i.e., the principle of legality. Based on the principle of legality, every government action must be based on legal authority, correct procedures, and the right substance. Finding the right term for *Rechmatige Bestuure* is difficult, but *rechmatigheid* means legality or validity.

Furthermore, from the aspect of procedural authority and substance, it is stated that the scope of the legality of government actions includes procedure and substance. Authority and substance are the basis of formal legality. Based on formal legality, the principle of presumption of innocence (*presamsio iustae causa/vermoeden van rechtmatigheid*) was born. The non-fulfillment of these three components of legality results in a juridical defect in government action. Juridical defects concern the authority of procedure and substance. In addition, every necessary government action must be based on legal authority. This authority is obtained through attribution, delegation, and mandate. In exercising the inherent authority of attribution, state agencies must be carried out in accordance with the general principles of good governance and not exceed the limits of their authority. In this case, an important element when calculating state financial losses is the authority to access data acquisition to request state financial documents regulated by law in the state financial audit process. It is outlined in Article 10 of Law Number 15 of 2004 concerning the Audit of State Financial Management and Responsibility.

c. The Dualism in the Sentencing of Payment of Money in Lieu as Additional Punishment

Dualism arises not only in calculating the value of out-of-pocket payments and the purpose of out-of-pocket payments but also in applying criminal sanctions. As the name "additional" suggests, additional penalties are optional and may apply but are not required (Inggrid Palili, 2015). The judge is free to decide whether to impose an additional penalty. However, it is not the case in several corruption cassation decisions, which interpret restitution payments as mandatory, where the *judex facti* has misapplied the law; it is because the *judex facti* did not impose restitution payments on the defendant.

This condition is unfair to the state because the statement is poor and chooses to carry out substitute imprisonment for punishment to be achieved. Nevertheless, the state finances are not restored. In terms of administrative law, it is fulfilled. However, from the object, it is not restored.

It is because, actually, it is to realize justice for the state. Article 18 Section (1) point b states that, concerning retributive justice for the recovery of state losses, the return of state money does not have to be obtained through corruption. In other words, the payment of restitution is facultative.

In the decision, the Panel of Judges argued that: (a) from Article 17 of the Corruption Crime Law, it can be concluded that the additional punishment as referred to in Article 18 is not imperative, considering that Article 17 determines that "In addition to the punishment referred to in Articles 2, 3, 5, up to Article 14, the defendant "may" be sentenced to additional punishment as referred to in Article 18;" (b) that therefore, "whether or not an additional punishment of payment of restitution is imposed" as referred to in Article 18 Section (1) point (b), is the authority of the judge or discretion of the judge, not a "must" and"not imperative." As can be concluded from the word "may", in other words, it is "facultative".

Consequently, dualism in applying restitution as an additional punishment creates legal uncertainty. This legal uncertainty undermines the sense of justice and increases the number of cases in the Supreme Court. In fact, as the Court of Cassation, the main function of the Supreme Court is to maintain the unity of law and apply the law. Concerning the relationship between aspects of state financial losses and the determination of criminal penalties in corruption court decisions, according to Barda Nawawi Arif (2012) regarding criminal sanctions, there are types of punishment in contrast to the method of criminal implementation, i.e., the types of criminal sanctions in criminal punishment can be in the form of criminal punishment and sanctions. In practice, laws and regulations so far generally only formulate the main and additional punishment types. There is no uniformity in the formulation of the types of measures. Sometimes, it is called (including) additional punishment; sometimes, it is called action sanctions.

Based on the example above, it can be seen that the judge's decision contains an optional or facultative principle. The judge did not consider the aspect of state financial losses as shown in "If a defendant does not have enough property to pay restitution, it will be replaced by imprisonment for 3 (three) months". It indicates that corruption is considered an ordinary crime, not a serious crime that must be handled extraordinarily so that a facultative sentence is decided. According to the author, the decision in the corruption case does not reflect the values of justice,legal certainty, and expediency. The Panel of Judges did not try to explore the facts, which are the logical consequences of the defendant's actions.

The judicial practice has also disregarded the provisions of Article 244 of the Criminal Procedure Code in a *contra legem manner*, i.e., the practice and application of law blatantly contrary to the law. It is not without debate (Rogaiyah, 2016). This situation raises many pros and cons. Many areagainst the existence of this situation because it will cause legal uncertainty.

According to Yahya Harahap (2006), it is too risky to give unlimited discretion to the Court of First Instance that it is the court of first and last instance. Suppose the acquittal decision can no longer be contested. In that case, if a decision is an impure acquittal because the decision is based on an erroneous interpretation of the criminal offense mentioned in the indictment or if, in issuing an acquittal decision, the court has exceeded the limits of its authority, which is an obligation for the Supreme Court as the court of last resort to make corrections. Based on the author's analysis, the factors causing the disparity of criminal decisions in corruption offenses are influenced by several things, including statutory factors. According to Muladi, this criminal disparity starts from the law itself. In Indonesian positive law, judges have broad freedom to choose the type of punishment they want in connection with using an alternative system of criminal punishment (Muladi and Barda Nawawi Arief. 1992). In addition, the judge is also free to choose the severity of the punishment to be imposed (Helmi Muammar, 2021). It is because what is determined by the law is only the maximum and minimum.

The cause of disparity stems from legislation, i.e., no sentencing guidelines for judges in deciding cases (Sandy Doyoba, 2023). Relating it to the threat of criminal formulation in the criminal offense of corruption, there are no clear guidelines on punishment in imposing minimum and maximum punishment.

According to Sri Sumarwani, the meaning and function of truth and justicein judicial decisions are introverted or should be inherent in the intended decision and extroverted, which is a measure of the decision (Sri Suwarni, 2012). From the formulation of truth and justice, several notions can be drawn, which are the basis and constitutive elements of the value of justice; namely, truth is the basis of both formal and substantial and essential material truth.

Generally, the law enforcement process involves at least three related factors, namely the statutory factors, the factors of law enforcement officials orbodies, and the factors of legal awareness (Vivi Ariyanti, 2019). In a legal culture related to the application of law, it means how to raise legal awareness.The issue of increasing legal awareness is closely related to various factors, especially the attitude of law enforcement officials, which implies that law enforcement officials play a major role in encouraging the growth of public awareness. Legal awareness here means awareness to act in accordance with the law and serves as a bridge between the rule of law and the behavior of community members (Atang Hermawan Usman,

2014). Indonesian law enforcement still clings to legal positivism. In this case, especially in articles and criminal proceedings, legal positivism often hinders the prosecution process.

It is certainly not in accordance with the theory of legal certainty, which states that the formation of positive law is a legislative activity carried out by institutions formally authorized to do so in accordance with statutory regulations (Joko Riskiyono, 2015). It is done by forming various sets of laws and regulations or changing existing ones. Each provision of the legislation is intended to regulate the behavior of citizens by determining what should be done or not done.

Moreover, the freedom of judges in carrying out judicial functions includes the authority to interpret laws and regulations, seek and find principles and foundations of law, form new laws when facing a void in laws and regulations, and follow jurisprudence. According to Yahya Harahap (2008), judges are justified in *contra legem* if a provision in the legislation is contrary to the public interest. Interpreting statutory provisions is inherent in the judge's duty to uphold the law.

Therefore, the provisions of laws and regulations, which are general and abstract in nature, often cannot quickly keep up with the development of society. In such a situation, the judge individualizes unconcreted events by interpreting concrete facts' general and abstract provisions. The reason this must be done is to ensure measurable legal certainty.

According to Sunaryati Hartono (1994), the court is not only the mouth or trumpet of laws and government regulations but also participates in shaping new laws; even though the ways of interpretation limit it, it can use. Thus, it is said to be pseudo or quasi. It is because the process of law formation by judges is unlike the formal or positive law formation carried out by legislators. The law also prohibits judges from refusing to examine a case because the law does not or has not regulated it.

CONCLUSION

Based on the results of the aforementioned research, there are two differences in judges' decisions (a case study between Indonesia and South Africa). Based on these differences, it can be concluded that 1) South Africa uses the asset recovery system and involves third parties. In corruption cases in South Africa, the courts seek to ensure that money lost due to corruption is returned to the state. On February 25, 2019, the president of South Africa announced that a special court would be established in accordance with section 2 (1) of the Special Investigative Units and Courts Act, Act No. 74 of 1996, to hear cases arising in court proceedings. More

specifically, a third party would be appointed to expedite the asset recovery process of high-priority cases mandated to the South African Special Investigations Unit ("SIU"). 2) In Indonesia, there are judges' obstacles in interpreting Article 18 of Law No. 31 of 1999 on Corruption Crime Law. The additional restitution punishment is regulated in Article 18 of Law Number 31 of 1999, and the general explanation states, "This law also contains imprisonment for perpetrators of corruption crimes who cannot pay additional punishment in the form of restitution for state losses." However, in practice, the implementation of court decisions on restitution turns out to experience many obstacles because the convicted person does not want to pay and prefers substitute imprisonment or is unable to pay because his property no longer exists. 3) There is a dualism in the sentencing of payment of money in lieu of additional punishment. Actually, the judge is free to decide whether to impose an additional penalty. However, it is not the case in several corruption cassation decisions, which interpret restitution payments as mandatory, where the *judex facti* has misapplied the law; it is because the *judex facti* did not impose restitution payments on the defendant.

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