

Deferred Prosecution Agreement (Dpa) Concept In The System Of Criminal Jurisdiction In Indonesia

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Abstract.

This study aims to determine the application of the DPA concept in the criminal justice system in Indonesia. This research also analyzes the stages and mechanisms for implementing DPA in the justice system in Indonesia. The research method used is juridical normative or literature research related to normative legal substances, to find the truth based on scientific logic from a normative perspective by examining library materials or secondary data consisting of primary legal materials and secondary legal materials. The research results show that the concept of DPA in the criminal justice system in Indonesia needs to consider several things: DPA, which will be applied in Indonesia, must consider the Indonesian judicial system in its constitutional structure and legal tradition. The impact of regulatory and compliance burdens on corporations, where corporations require additional costs. Crimes that can use the DPA mechanism are serious (but not limited), so a special law is required to regulate this.

Keyword: Deferred Prosecution Agreement, Corporate Crime, Indonesian Criminal Justice System

1. Introduction

The simple definition of the Deferred Prosecution Agreement (from now on abbreviated as DPA) is the authority that the Prosecutor has to carry out prosecutions but agrees not to prosecute with certain terms and criteria. The concept of postponement of prosecution agreements in criminal cases has been commonly used in several countries adhering to the common law legal system. The aim is none other than exploring the potential state revenue from certain corporate crime cases. Popular in its home country of the United States, DPA is a treatment for solving criminal cases in the business sector using an economic analysis approach. According to the law in the United States, this is possible. Apart from natural persons and legal entities, assets or assets are also included in the legal subject in that country.

Referring to the meaning of the dominus litis principle, the Prosecutor is the ruler of the case, who can emphasize that the DPA concept can be applied in Indonesia. Regarding the Prosecutor's authority as a Public Prosecutor, the opportunity principle gives the Attorney General a prerogative to continue or stop the proceedings of a case. The concept of DPA does not have to wait to be regulated in advance in the Criminal Procedure Code (KUHAP). This concept is sufficient whether there is an agreement by the Prosecutor so that in the next stage, the judge's approval is asked for. The court is in charge of overseeing the agreement between the Prosecutor and the Corporation. The goal is that there is a third party guarding this process, then publish the points that become the agreement between the Prosecutor and the Corporation. Likewise, the problem of law enforcement to eradicate corruption against corporations has always encountered obstacles, so that the alternative solution is the application of the Deferred Prosecution Agreement concept to optimize the return of state financial losses so that they can be accommodated (Triwijaya, Faisol, Fajrin, & Nurrahma, 2020).

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Who can apply not all cases to the DPA concept in it, several criteria are outlined. Among others, a case has no relation to state finances. If applied in corruption, it is limited to bribery corruption cases in the licensing sector. Because this right only involves corporate entities with state officials in the licensing sector so that it does not fall into the category of corruption as regulated in Article 2 and Article 3 of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Corruption Eradication. . Then another criterion is for corporations that have a lot of assets down to the regions. The last is corporations that have a large contribution in the form of taxes to the state (Artha, I Gede, & Adiyaryani, 2020).

To optimize the return of state losses caused by corruption in which the perpetrators are corporations, through the concept of Deferred Prosecution Agreement. The existence of the DPA concept is marked by the change in the principle of corruption eradication from premium remedium to ultimum remedium. Criminal sanctions are used after other administrative and civil sanctions are unable to effectively tackle crimes committed by corporations and recover state financial losses committed by corporations. On the other hand, the DPA settlement model will benefit both parties and be acceptable (B. Diskant & Edward, 2003).

The concept of DPA is one of the developments in the Criminal Justice System, the philosophical basis of criminal procedural law, which is not intended to process criminals but rather to control the power of law enforcement officials so that they do not act arbitrarily (Donald, LBN Toruan, & Henry, 2014). The concept of DPA is a form of a paradigm shift in criminal law enforcement in the modern era, and there is a concept of corrective justice that focuses on the perpetrator, rehabilitative justice that focuses on the victim, and restorative justice that pays attention to both (Setiawan & Wahyu, 2014). Of course, this paradigm has its consequences in upholding criminal law, especially special crimes. The concept of DPA is expected to be one of the most influential concepts on the functioning of the criminal justice system in Indonesia as a form of therapeutic justice application (Huzaini, 2020).

1.1. Formulation of the problem

Based on the above background, the problems raised in this study are: How does the application of the DPA concept in the criminal justice system in Indonesia provide justice for criminals? And how the Deferred Prosecution Agreement Implementation Mechanism in the Criminal Justice System in Indonesia.

1.2. Research purposes

The purpose of this research is to provide theoretical contributions, especially the development of theories, principles, and concepts of criminal law, and to understand the concept of criminal law reform. To study and understand the application of the DPA concept in the criminal justice system in Indonesia and to identify the Deferred Prosecution Agreement Application Mechanism in the Criminal Justice System in Indonesia as a form of a paradigm shift in criminal law enforcement in the modern era.

2. Methodology

This paper is based on normative legal research that uses a statutory approach and a conceptual approach. These two approaches are used to build arguments in answering the legal issues raised in this study. The statutory approach is used to review all laws and regulations related to the DPA concept in the criminal justice system in Indonesia (H. Bucy & Pamela, 2007). A conceptual approach that departs from expert views and doctrines in legal science explains concepts that are not found in conceptual definitions in regulations. To discuss the problems raised in this study, legal materials were used, both in primary and secondary legal materials. The primary legal materials used include Law Number 8 of 1981 concerning the Criminal Procedure Code. Secondary legal materials include legal literature relevant to the legal issues discussed. In addition, non-legal materials are used to support this writing, such as news in print and online media.

The collection of research materials above is carried out through literature searches in libraries and the internet using recording techniques that mimic the working model of the card system. The collected research materials are processed and analyzed qualitatively with reasoning and legal argumentation techniques, such as legal construction and legal interpretation. Furthermore, the overall research results are presented descriptively in the form of a narrative description.

3. Result

3.1. Application of the Deferred Prosecution Agreement Concept in Indonesia

The Indonesian criminal justice system needs to be considered in adapting the DPA. This is by the law enforcement model against the specified corruption crime, namely the return of state losses due to criminal acts of corruption and considering providing reduced sentences for the suspect or defendant. The principle of opportunity in the law enforcement model in Indonesia still does not accommodate the provisions in the United Nations Convention Against Corruption (UNCAC) (Nasution & Bismar, 2006).

Deferred Prosecution Agreement is a negotiation carried out by the Prosecutor with the defendant or his lawyer, where the defendant here is a corporation, to divert the prosecution from the judicial process or deal with corporate errors through administrative or civil recovery procedures (Sprenger, 2015). Deferred Prosecution Agreement is carried out voluntarily between prosecutors and corporations based on self-reporting of the perpetrator or the Prosecutor's findings for crimes. The DPA mechanism always requires a compliance program for corporations. The DPA concept directly or indirectly regulates a concept adhered to by procedural law in Indonesia, namely the simple, fast, and low-cost principles. It is also hoped that the Deferred Prosecution Agreement can solve the problems in handling corporate criminal cases (Sinaga, 2021).

In implementing DPA in Indonesia, it is necessary to consider the following matters (Mutriana, 2019):

1. The DPA to be implemented in Indonesia must consider the Indonesian judicial system in its constitutional structure and legal traditions. The impact of regulatory and compliance burdens on corporations, where corporations require additional costs.
2. Crimes that can use the DPA mechanism are serious (but not limited), so a special law is necessary to regulate this.
3. DPA is only allowed for corporations, so there is an opportunity to have a preventive effect and possibly sue employees (company organs). However, if it is limited to corporations, the

individual may have committed a crime but are reluctant to commit it for fear of being convicted.

4. DPA must be balanced between the interests of building public trust and the interests of pursuing fraudulent corporations.
5. To increase public trust, the Indonesian DPA scheme may require an agreement in the public interest and be fair, reasonable, and proportionate.
6. There needs to be clear guidance on how who will negotiate the DPA and an effective monitoring mechanism.

Who should consider the above matters in implementing DPA in Indonesia so that justice, legal certainty, and legal benefits are maintained and reduce potential conflicts of interest.

3.2. The Deferred Prosecution Agreement Implementation Mechanism in the Criminal Justice System in Indonesia

The concept of DPA itself has been adopted by various international countries and has become one solution to overcome corruption eradication by corporations. The international convention on eradicating corruption, namely UNCAC in 2003, has implicitly included in Article 26 concerning the responsibility of legal entities that open up corporate responsibility, not in the form of criminal sanctions but can also apply non-criminal sanctions that are effective proportional. Article 26 states that the state party is obliged to ensure that the responsible Corporation is subject to criminal or non-criminal sanctions, which are effective, proportional, and prohibited, including financial sanctions. The conjunction "or" is a sign that the choice of using a criminal policy is a last resort when non-criminal sanctions are deemed unreliable (Sinaga, 2021).

UNCAC encourages an integrated approach to law enforcement. The pursuit of corruption results is an integral part of every corruption case so that national authorities can return state losses or return these assets. In this case, who can interpret that UNCAC directs state parties to prioritize settlement efforts with concepts such as DPA in handling corporate cases involved in criminal acts of corruption .

Corporate crime is a serious problem. The victims caused by these crimes are generally not individual victims but group victims (Ali, 2017). Also related to the economy and can affect the country's economy as well. The current criminal process against corporations, from investigations, prosecutions, and trials, is very costly, slow, and complex. So, the Corporation should not apply criminal responsibility, but civil or administrative accountability can be applied. This is in line with the fundamental principle in criminal law, which states that criminal law must be carried out as a last resort (*ultimum remedium*) (Kristian, 2018).

The Prosecutor's power not to proceed with a criminal case is to use the principle of opportunity. The principle of opportunity has been adhered to by the prosecutors of the Republic of Indonesia since ancient times. This principle initially applies based on the unwritten law of the Dutch law. Prosecutors have practiced it in Indonesia to terminate the prosecution of cases, even if the evidence and witnesses are sufficient. In scientific language, it is called termination of prosecution for policy reasons (policy), and in everyday language, it is called stopping a case (Waluyo, 2018). In the Law of the Republic of Indonesia Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia in article 35 letter c, it is stated that the termination of a case can only be carried out by

the attorney general while what is meant by putting aside a case in the public interest is explained in the explanation of the article of the law.

About the DPA, the Prosecutor in conducting negotiations with the Corporation is not to stop the case but to put aside the case with a certain time limit. The Prosecutor considers the general interest in implementing the DPA.

Deferred Prosecution Agreements can be offered by prosecutors or regulators when the company shows a cooperative attitude towards the criminal investigation process, acknowledges facts, and accepts several provisions such as punishment, reparations, fines, funds, usually preventive measures so as not to repeat themselves. These provisions can take the form of legal obligations such as (Sprenger, 2015):

1. Acknowledgment of violations committed
2. Payment of fines and compensation
3. The appointment of an independent auditor to supervise the company's activities for a specified period
4. The dismissal of certain employees
5. Implementation of compliance programs

Suppose the DPA is to be applied in Indonesia, with the defendant being a corporation. In that case, the defendant, in this case, is represented by his organs as stipulated in the articles of association or the laws and regulations applicable to the Corporation. Besides these two parties, there is a judge who will agree and know the agreement made by both parties. Regarding judges who will play a role in the DPA process, we refer to the draft Criminal Procedure Code provisions concerning preliminary examining judges. The preliminary examining judge is a court official who is given the authority to assess the course of the investigation, prosecution, and other powers determined by the Draft Criminal Procedure Code. Who should regulate the capacity and authority of the preliminary examining judge about this process in the Draft Criminal Procedure Code.

The concept of DPA, which is appropriate to be applied to criminal acts of corruption in Indonesia and its implications, needs to be well prepared and designed if you have accepted the DPA concept in the criminal justice system in Indonesia, especially in corruption by corporations that focus on recovering state financial losses. The DPA concept must be by the Indonesian legal culture, by the simple, fast, and low-cost judicial concept. The concept of DPA here needs to be determined in what kind of case the DPA is, who can agree, it is necessary to guarantee the fulfillment of the agreement and the consequences if it is violated, as well as other things. The concept of DPA in Indonesia in the future must also be by conditions where the community still has doubts about the credibility of law enforcers. Therefore, the existing model must be open, and who must monitor its bias. Who must strengthen it in its accountability. Every agreement obtained must be explained and accounted for. If the Corporation does not implement the conditions that have been negotiated to be met, the case can be prosecuted. The involvement of judges in the DPA process serves as a counterweight to the corporate interests of the prosecutors. The Corporation will not be treated too leniently, and the Prosecutor cannot act arbitrarily in the DPA process. However, the court may not intervene on both parties.

With the DPA mechanism, the Corporation does not lose its reputation or good name because the case does not take long to be processed through the court process from the first stage, appeal to cassation. Corporate employees do not become victims because the company does not collapse and its shares do not fall. And still, be able to work at the company. Corporations continue to be subject to action sanctions, namely by paying fines and other fees to the state. Countries get benefits faster by paying fines and recovering the country's losses. Corporations also receive the consequences of improving management and compliance with state regulations because they can provide several conditions with the DPA.

For DPA to be implemented, there are 2 (two) stages that must be fulfilled for a case to be applied by DPA; the Prosecutor must consider these stages in determining whether or not DPA applies a case. These stages are (Iqbal, 2020):

1. The Evidence Stage

In this stage, the Prosecutor proves whether the evidence that a criminal act has been committed is. Still, suppose there is no concrete evidence. In that case, it can also be considered an allegation that has reasonable grounds to say that the Corporation has committed a criminal act. If an investigation is carried out, it will find evidence. -Evidence of the conjecture.

2. Public Interest Stage

The Prosecutor must consider the public interest in determining whether who can implement the DPA. The public interest in question is usually related to the seriousness of the crime that has been committed, the fault of the Corporation, and the size of the damage caused to the victim (Iqbal, 2020). Determining whether or not DPA is appropriate for companies is borne by the objectivity of the Prosecutor itself so that the basis for consideration differs from one case to another.

The general interest means to consider the seriousness of the evil act which causes harm to the victim. As in the case of so v. rolls Royce, one of the considerations of public interest in the case is a crime that has made roll Royce (Iqbal, 2020) has caused substantial losses to integrity and market confidence.

If these stages are considered fulfilled, the Prosecutor can invite the Corporation to carry out DPA negotiations. The negotiations are carried out to determine what conditions the Corporation must meet within a certain period. These conditions include the following (Iqbal, 2020):

1. pay a fine;
2. the obligation to pay compensation to the victim;
3. donating an amount of money to a charity or other designated third party;
4. the obligation to return any profit resulting from a criminal act;
5. the obligation to improve company policies and employee training so that the crime does not occur again;
6. the obligation to cooperate in investigations;
7. pay court fees.

Depending on the negotiation between the Prosecutor and the Corporation, who can impose these conditions more than one. These predetermined and agreed conditions must later be carried out and fulfilled by the Corporation within a certain agreed period.

4. Conclusion

The DPA concept in Indonesia's criminal justice system needs to consider several things: The DPA to be implemented in Indonesia must consider the Indonesian judicial system in its constitutional structure and legal tradition. The impact of regulatory and compliance burdens on corporations, where corporations require additional costs. Crimes that can use the DPA mechanism are serious (but not limited), so it is necessary to establish a special law regulating this. DPA is only allowed for corporations, so there is an opportunity to have a preventive effect and possibly sue employees (company organs). However, if it is limited to corporations, there is a possibility that individuals have committed crimes but are reluctant to report for fear of being convicted. The role of the courts will be very important for DPA. Judicial involvement will increase trust. DPA must be balanced between the interests of building public trust and the interests of pursuing fraudulent corporations. To increase public trust, Indonesia's DPA scheme can require an agreement in the public interest and be fair, reasonable, and proportionate. There needs to be clear guidance on how who will negotiate the DPA and an effective monitoring mechanism.

Deferred Prosecution Agreements can be offered by prosecutors or regulators when the company shows a cooperative attitude towards the criminal investigation process, acknowledges facts, and accepts several provisions such as punishment, reparations, fines, funds, usually preventive measures so as not to repeat themselves. These provisions can be in the form of legal obligations such as acknowledgment of violations committed, payment of fines and compensation, the appointment of independent auditors to supervise company activities for a certain period, dismissal of certain employees, implementation of fulfillment programs.

5. References

1. Ali, M. (2017). Principles of Corporate Criminal Law. In M. Ali, *Principles of Corporate Criminal Law* (p. 20). Jakarta: Grafindo.
2. Artha, I Gede, & Adiyaryani, N. (2020). The Role of the Prosecutor in Executing the Payment of Replacement Money. *Udayana Master Law Journal* (*Udayana Master Law Journal*) 9, No. 3, 521-534.
3. B. Diskant, & Edward. (2003). Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure. *The Yale Law Journal*.
4. Donald, LBN Toruan, & Henry. (2014). Corporate Criminal Liability. *Journal of Rechts Vinding*.
5. H. Bucy, & Pamela. (2007). Why Punish? Trends in Corporate Criminal Prosecutions. 1287.
6. Huzaini, M. P. (2020). Online Law. From Hukumonline Website: www.Hukumonline.com/berita/baca/lt5e45d0202267/implementasi-i-deferred-prosecution-agreement-i-di-indonesia-dalam-senomor-case/
7. Iqbal, A. (2020). Implementation of the Deferred Prosecution Agreement in Indonesia as an Alternative for Settlement of Economic Crimes Perpetrated by Corporations. *Juridical Journal*, Vol. 7, No. 1, 197.
8. Christian. (2018). Corporate Criminal Liability System. In Kristian, *Corporate Criminal Liability System* (p. 123). Jakarta: Sinar Graphic.

9. Mutiara, F. (2019). Simple, Fast, and Low Cost Judiciary: Initiating the Handling of Corruption Crimes through the Plea Bargaining Concept and Deferred Prosecution Agreement. In F. Mutiara, Dissertation. Depok: University of Indonesia.
10. Nasution, & Bismar. (2006). Corporate Crime and Accountability. Medan.
11. Setiawan, B. M., & Wahyu. (2014). Corporate Accountability in Corporate Crimes. Rechtstaat Journal, Vol. 8, No. 1.
12. Sinaga, M. R. (2021). Concept of Deffered Prosecution Agreement (DPA) in Efforts to Eradicating Corruption by Corporations in Indonesia. Journal of Delegalata, Vol. 6, No. 1, 89.
13. Sprenger, P. (2015). Deferred Prosecution Agreements: The law and practice of Negotiate Corporate Criminal Penalties. In P. Sprenger, Deferred Prosecution Agreements (p. 1). UK: Sweet & Maxwell.
14. Triwijaya, Faisol, A., Fajrin, Y. A., & Nurrahma, C. M. (2020). Dual Mediation: Settlement of Environmental Cases Involving Corporations as Actors through a Restorative Justice Approach. Udayana Master Law Journal (Udayana Master Law Journal) 9, No. 2, 401-428.
15. Waluyo, B. (2018). Corruption Eradication (Strategy and Optimization). Jakarta: Sinar Graphic.