Legal Comparison of Deferred Prosecution Agreement (DPA) Methods in the USA, UK and Indonesia for Recovering State Financial Losses Due to Corruption Crimes

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A deferred prosecution agreement (DPA) is an attempt to delay prosecution by making an agreement between the prosecutor and the corporation that committed the crime. This system has been implemented in the United Kingdom and the United States. DPA is one of the solutions to problems in the process of eradicating corruption. However, differences in the legal system are obstacles to its application in Indonesia. So it is necessary to develop an approach to be able to determine a model that is in accordance with the existing laws in Indonesia. Using normative juridical methods, how do DPA in USA, UK, and similar legal institutions compare with DPAs in Indonesia and their obstacles. Based on the research findings and discussions, it can be concluded that in the USA, DPA can be executed when there is corporate acknowledgment of criminal facts, an agreement to cooperate, a specified timeframe for the agreement, and an agreement involving a certain amount of monetary payments as a condition. In the UK, DPA serves as a probation for corporations, involving a negotiation, approval, and enforcement process. Furthermore, because Indonesia has not yet implemented DPA, but there are legal mechanisms with characteristics similar to DPA, namely diversion, restorative justice, the prosecutor's principle of opportunity, fines payment, and the MSAA/MRNIA model applied in the case of the Bank Indonesia Liquidity Assistance.
A. Introduction

Deferred prosecution agreement (DPA) is a concept developed in the United States and the United Kingdom to address corporate crime issues in the respective countries. DPA is a negotiation conducted by the prosecutor with the defendant or his lawyer, where the defendant is a corporation, in an attempt to divert the prosecution from judicial proceedings or to deal with the corporation's misconduct through administrative or civil recovery procedures. Various forms of agreements are available to public prosecutors and corporations in an attempt to divert corporate prosecutions from judicial proceedings or to deal with corporate misconduct through administrative or civil recovery procedures.

The DPA approach model is not a new concept but has been carried out by the USA Prosecutor’s Office for decades. Although the DPA was initially conducted by prosecutors individually against child cases and street offenders, it meant that perpetrators could rehabilitate themselves without being stigmatized as ex-convicts. In essence, criminal law is expected to provide justice in the midst of the times. In the era of globalization that continues to develop, criminal law regulations should develop following the times, and the application of criminal law should be carried out professionally.

DPA has many similarities with the concept of restorative justice in Indonesia, the restorative justice approach emphasizes recovery back to its original form and does not focus on sentencing perpetrators. The existence of legal institutions in Indonesia that are similar to DPAs applied in common-law countries and also the renewal of criminal law by applying the concept of restorative justice to corporations that commit corruption crimes effectively, wisely, and efficiently will be able to optimize the return of state losses due to corruption. To adapt to the needs of current developments, criminal law must be updated. Looking at the handling of corruption crimes with the conventional criminal justice system in Indonesia, especially in terms of returning state losses, there are still many obstacles with large costs and a long time in the settlement process. Corporations involved in corruption crimes must go through the trial stage until they get a verdict that has permanent legal force. As a result, a new concept or approach to combating corruption crimes, particularly those committed by corporations, is required, because the amount of state losses they cause is enormous.

DPA is voluntarily entered into between the prosecutor and the corporation based on self-reporting by the offender or discoveries made by the prosecutor regarding the crime. The DPA mechanism always requires a compliance program for the corporation. With the concept of DPA, it indirectly or directly addresses a concept embraced by procedural law in Indonesia, which is the principle of simplicity, speed, and cost-effectiveness. DPA are also expected to help resolve issues in handling corporate criminal cases.

Referring to the meaning of the dominus litis principle, which signifies the Prosecutor as the master of the case, it can be emphasized that the concept of DPA can be applied in Indonesia. Regarding the authority of the Prosecutor as a public prosecutor, the opportunism principle grants a prerogative to the Attorney General to either proceed with or terminate the course of a case. The DPA concept doesn't necessarily have to wait for specific regulation within the Criminal Procedure Code (KUHAP). This concept hinges on the existence of an agreement between the Prosecutor, and subsequently seeks approval from the Judge in the next stage. The Court's role is to oversee the agreement between the Prosecutor and the Corporation, with the aim of involving a third party to monitor this process. Furthermore, the key points of the agreement between the Prosecutor and the Corporation are to be made public.

Similarly, the issue of enforcing laws to combat corporate corruption consistently encounters obstacles, thus an alternative solution is the implementation of the Deferred Prosecution Agreement concept to optimize the recovery of state financial losses for accommodation purposes.  

To optimize the recovery of state losses resulting from corporate corruption, the concept of DPA can be employed. The presence of the DPA concept is marked by a shift in the principle of corruption eradication from being a premium remedy to an ultimum remedy. Criminal sanctions are utilized only after other sanctions, such as administrative and civil, prove ineffective in addressing corporate wrongdoing and the financial recovery of state losses incurred by corporations. On the other hand, the DPA resolution model can potentially benefit both parties and be mutually acceptable.

In the application of criminal sanctions, they should really be viewed as a last resort in the event that other alternatives are not available. To maintain public order, the use of criminal sanctions as a last resort must also be maintained. Based on this, criminal sanctions need to be avoided in the event that there are other efforts that are balanced with the losses caused. Thus, the problems in this discussion can be formulated as follows: First, a. How is the application of the deferred prosecution agreement (DPA) method in USA, UK, and Indonesia oriented toward the restorative justice paradigm? Second, b. what are the factors that impede the use of the deferred prosecution agreement (DPA) method in Indonesia? In this study, the author used a research method with normative judicial legal norms. In this study, it is based on the substance of the law, namely using legal norms or rules, applicable laws and regulations, theories, legal doctrines from experts, jurisprudence, and other literature materials, as well as conducting field interviews with law enforcement and academics.

B. Discussion
1. Application of the Deferred Prosecution Agreement (DPA) Method in USA, UK, and Indonesia Oriented to the Restorative Justice Paradigm

A Deferred Prosecution Agreement (DPA) is a simple definition of the prosecutor’s authority to prosecute but agreement not to prosecute under certain conditions and criteria. The concept of a delay in prosecution agreement in criminal cases has been commonly used in a number of countries that adhere to the common law legal system. The goal is to investigate the potential state revenue from specific corporate crime cases. DPA, which is popular in its home country of the United States, is a treatment for resolving criminal cases in the business sector through an economic analysis approach. In USA, in addition to consisting of individuals and legal entities, assets are also included in the legal subjects of the count. Unlike the UK, the application of this DPA can only be made to corporations.

After the Enron scandal, which also involved auditors Arthur Anderson and Cons New Jersey v. Bristol-Myers Squibb Company (pharmaceutical company Tog Fortune), the DPA came to the fore in the United States. Examples of the implementation of the DLIN DPA in the USA have been widely carried out, namely in 2008 with as many as 11 agreements, in 2009 with as many as 32 agreements, in 2010 with as many as 31 agreements, and in 2015 with as many as 100 agreements. The DPA in the UK came into force on February 24, 2014, and was introduced through Section 45 and Schedule 17 of the Crime and Courts Act 2013 (CCA 2013). The DPA has been applied to several cases in the UK, namely Standard Bank (CBC Standard Bank PLC) on November 30, 2015; XYZ Limited Company on July 11, 2016;

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and Daln Rolls-Royce PLC on January 17, 2017.\textsuperscript{6}

The USA and UK moves sparked a debate in Australia, which began by examining the options and then adopted a DPA model that fit the country's context. This means that even with the same DPA designation, it turns out that the model is still different. For example, in the United States, this DPA actually has an affinity with the concept of a NPA (non-prosecution agreement), but it is not exactly the same. However, the basic idea behind the introduction of the DPA was to increase effectiveness and efficiency in handling criminal cases.

Investigations in USA have developed methods where investigators are allowed to ask outside parties for help to conduct investigations. The author cannot find an explanation in the law of who is meant by the outsider, but in the opinion of the author, the outside party can be equated with the help of experts in Indonesia. Meanwhile, in the UK, the rules for investigations are more closed, and investigators are not allowed to involve outside parties. The author can understand the intention of not allowing outsiders to interfere in the investigation, so that there is no outside intervention in the investigation carried out by the designated special investigator. so that the special investigators appointed in the UK really have good integrity. The similarity of the investigation process in the two countries is that, in conducting the investigation, it must coordinate with the prosecutor. In USA, the public prosecutor follows his locus delicti whether following federal rules (prosecution is carried out by federal prosecutors) or state rules (prosecutions are carried out by state prosecutors). Meanwhile, in the UK, it has an anti-bribery commission (the Serious Fraud Office) and a public prosecution office (the Director of Public Prosecutions), so that special prosecutions are carried out by these two agencies.\textsuperscript{7}

In USA, the prosecutor handles the involvement of the court in resolving cases using the DPA rather than the courts. The court is only acting as a supervisor to monitor the progress of the case. Whereas in the UK, the decision on whether a case is resolved through the DPA or not depends on the decision of the jury in court. Even the conditions that the defendant must meet are determined at the request of the court’s jury. In the UK, a “jury trial” is a legal process in which the jury plays the role of making decisions or making findings of fact, which are then applied by the judge.

To make it easier to understand the different concepts of DPA settings in USA and UK, the author will present the following table:

<table>
<thead>
<tr>
<th>Concept</th>
<th>USA</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subjet of Law</td>
<td>Recht Persoon dan natuurlijk persoon</td>
<td>Recht Persoon</td>
</tr>
<tr>
<td>Court Involvement</td>
<td>Only prosecutors are involved</td>
<td>Jury involvement required</td>
</tr>
<tr>
<td>Investigation</td>
<td>Allowed to ask outside parties for help</td>
<td>Special investigators, not allowed to involve outside parties</td>
</tr>
<tr>
<td>Prosecution</td>
<td>Federal prosecutors and state prosecutors</td>
<td>Only appointed prosecutors</td>
</tr>
<tr>
<td>Judge</td>
<td>Passive</td>
<td>Active</td>
</tr>
<tr>
<td>Criminal acts that can be solved via DPA</td>
<td>All cases, except those involving national security, foreign affairs, and state officials</td>
<td>Criminal bribery and corporate criminal acts</td>
</tr>
</tbody>
</table>

Table 1. Differences in the Concept of DPA Regulation of USA and UK Countries


\textsuperscript{7} Ibid.
DPA is a form of simple, fast, and low-cost principles that can be accepted and applied with a number of adjustments in Indonesia, especially to corruption crimes by corporations that are oriented towards recovery due to losses incurred. This concept has also been applied in other civil law countries as an implication of the convergence of legal systems. That is, between the legal systems of the common law and civil law countries, there has not only been a divergence but rather a convergence. There has been a fusion, with both parties borrowing from and employing each other's legal concepts. Although the DPA is essentially a form of criminal evasion, prosecutors can consider criminal penalties for corporations, so the philosophy of punishment also applies to corporations.

In addition, another equally important goal is to reduce the stigmatization and accumulation of cases and simplify the judicial process. Regarding out-of-court settlements, there has been a legal basis for them to be reversed in the Criminal Code and even outside the Criminal Code. If it is associated with a DPA, there are legal institutions that have similar characteristics, including:

a. Diversion and Restorative Justice

Diversion is applied to children who are in conflict with the law through restorative justice regulated in the SPPA (Juvenile Criminal Justice System) Law. The restorative justice approach emphasizes restoring justice to its original form and does not focus on criminal convictions.

b. The prosecutor's principle of opportunity

The authority of the prosecutor in the investigation and prosecution process is related to corruption. The prosecutor's discretion can be exercised in prosecutions, probationary charges, waivers of cases, and even sentencing without the court's consent.

c. MSAA and MRNIA models

The massive state losses caused by the "national banking situation" (BLBI) have been attempted to be resolved in a non-criminal manner, namely through the Master Settlement and Acquisition Agreement (MSAA) and the Master Refinancing and Note Issuance Agreement (MRNIA). Although the MSAA/MRNIA is a government decision that is considered a civil instrument subject to civil law, especially Article 1338 of the Civil Code, the investigation of the BLBI case has been stopped, which is an attempt by the government to recover the country's financial losses.

2. Factors inhibiting the Deferred Prosecution Agreement (DPA) method if applied in Indonesia

Indonesia's criminal justice system needs to be considered in adapting the DPA; this is in line with the prescribed model of law enforcement against corruption crimes, namely the return of state losses due to corruption crimes and considering providing reduced sentences for suspects or defendants. Not all cases can be applied to the concept of DPA; some of the criteria outlined include that a case has no relation to state finances and, if applied in the context of corruption, is only limited to the category of bribery and corruption cases in the field of licensing. Because this only involves corporate entities with state officials in the licensing sector, they do 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 the Eradication of Corruption Crimes. Then another criterion is against corporations that have a lot of assets in the regions, and the last is against corporations that

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9 RM & Andi Hamzah, 1996, Prosecutor of Various Countries and Their Positions, Jakarta: Sinar Grafika, P.45
make a large contribution in the form of taxes to the state.\textsuperscript{11}

Efforts to return assets resulting from criminal acts can generally be carried out if they have gone through a judicial decision in Indonesia. Meanwhile, in USA, which uses the DPA mechanism through asset expropriation, it is carried out without a court decision. In Indonesia, assets are included in the subject matter in the legal sense of a corporation. In accordance with the DPA mechanism, efforts to seize assets related to corruption crimes that are the result or means of criminal acts are positioned as legal subjects or parties. The party will be represented by the state or investigator as the applicant against assets suspected to be the result of corruption crimes. Recognizing the return of assets due to corruption according to the Law on the Eradication of Corruption Crimes in Article 4 states that the return of state financial losses or the state economy does not eliminate the conviction of the perpetrator.

The concept of DPA (Deferred Prosecution Agreement) represents a significant development within the Criminal Justice System, rooted in the philosophical foundation of criminal procedure law. Essentially, criminal procedure law is not solely intended for prosecuting criminal offenders but also for controlling the power of law enforcement authorities to prevent abuse of authority. The DPA concept signifies a shift in the paradigm of criminal law enforcement in the modern era, encompassing the principles of corrective justice, which focuses on offenders, rehabilitative justice, which emphasizes victims, and restorative justice, which addresses both. This paradigm undoubtedly carries its own consequences for criminal law enforcement, particularly in the context of specialized criminal cases. The DPA concept is expected to have a significant impact on the functioning of the criminal justice system in Indonesia as a means of applying restorative justice principles.\textsuperscript{12}

The absence of DPA arrangements in Indonesia needs to be considered in resolving corruption crimes, because until now the settlement of corruption crimes with the current law enforcement model has not met justice, legal certainty and legal expediency is still carried out and reduces potential conflicts of interest. On the other hand, the inequality of costs and benefits in the seizure of assets is large, where the cost of expropriating assets is greater than the assets to be seized. Corruption also incurs costs, such as Rent-Seeking Costs (RSC), Victim fees, criminal justice system costs, and the cost of anticipating corruption. Transaction costs and other downstream costs mean here are the transaction costs of corruption actors, for example in bribery, in preparation for corrupting a project, and others. This transaction fee is certainly a calculation for the perpetrator of corruption because he certainly wants a large result from his corruption so that it is not lower than transaction costs and other costs.

If discussed further, there are actually very many victims due to corruption such as loss of time, loss of money for the community, people who fall ill for example due to accidents due to damaged roads that are corrupted, victims because hospital costs are getting bigger because people have low health because the health budget is corrupted, victims because of low community productivity due to corruption in various sectors (economy, educational, social, health, etc.), and much more.

Analyzed in terms of the purpose of punishment, the concept proposed by the author is considered more in line with the purpose of the punishment itself, namely providing rehabilitation for perpetrators and restoration for the recovery of financial losses of the state and the wider community affected. Therefore, the implementation of the DPA as an alternative settlement does not eliminate the purpose of the punishment itself. DPA is also not a completely foreign concept in the Criminal Justice System in Indonesia, where the Criminal


Code already recognizes the Afdoening Buiten Process or out-of-court settlement as a matter that aborts prosecutions, even though it only applies to offenses.

In implementing the DPA in Indonesia, it is necessary to consider the following:\(^{13}\)

1. 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;
2. Crimes that can use the DPA mechanism include serious (but not limited) crimes, so it is necessary to establish a special law regulating them;
3. DPA is only allowed for corporations so there is an opportunity to provide a preventive effect and the possibility of suing employees (company organs). However, if it is limited to corporations, then it is possible that individuals have committed crimes but are reluctant to report for fear of being convicted;
4. The role of the courts will be critical to the DPA. Judicial involvement will increase trust;
5. DPAs must be balanced between the interests of building public trust and also the interests of pursuing fraudulent corporations;
6. To increase public trust, Indonesia's DPA scheme may require an agreement in the public interest and be fair, reasonable and proportionate;
7. There needs to be clear guidance on how the DPA will be negotiated and effective oversight mechanisms. The above should be considered in implementing the DPA in Indonesia so that justice, legal certainty and legal expediency are still carried out and to reduce potential conflicts of interest.

According to Efiyanto\(^{14}\), if the DPA is to be implemented in Indonesia, there must be a formulation with a policy of harsh administrative penalties, such as permanent closure of companies, prohibition of individual and family activities (registration of state schools and civil servants), transfer to remote places, etc., thus providing a deterrent effect to perpetrators. With the obstacles to the implementation of DPA in Indonesia, it is necessary to formulate it in such a way in accordance with the legal culture in Indonesia and it needs expert research and punishment that has a deterrent effect.

C. Conclusion

Based on the discussion in this study, the authors conclude that DPAs in the United States and the United Kingdom can be carried out if there is a corporate recognition of the fact of a criminal act, an agreement to cooperate, a period of time specifically specified for the agreement, and an agreement on a certain amount of money or actions outside the payment of money as a condition. Commonly applied sanctions are payment of restitution, fines, and suspended sentences, where judges are only required to accept the DPA filed with the court and not try the case in court. Furthermore, because Indonesia has not yet implemented DPA, but there are legal mechanisms with characteristics similar to DPA, namely diversion, restorative justice, the prosecutor's principle of opportunity, fines payment, and the MSAA/MRNIA model applied in the case of the Bank Indonesia Liquidity Assistance.

For the presentation of this problem, the author has suggested that the government can use the DPA as an alternative method to replace the current criminal justice system in cases of corruption crimes, especially against corporations. For the KPK, the Prosecutor's Office, and the Police as the implementers of corruption crime enforcement, they should not only prioritize the aspect of expediency but also consider all aspects, one of which is the adverse impacts caused by the existence of corruption crimes, so that instead they collaborate to conduct

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\(^{14}\) Interview with Efiyanto as a Typical Judge of the Tanjung Karang District Court. November 17, 2022 at 08.20 WIB
research with experts in Indonesia to formulate normative provisions in the form of laws, and in the future, DPA can be used in an effective manner.

References