
DEFERRED PROSECUTION AGREEMENT: RESTORATIVE JUSTICE IN CORPORATE MINING CRIMES ACROSS MULTIPLE JURISDICTIONS

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ABSTRACT

Mining crimes by corporations have a serious impact on the environment and society. However, the role of Corporations in community life has two different sides, where there is a positive role and a role that causes negative things. Seeing the role of Corporations in this way, and in line with the implementation of restorative justice, it is necessary to study the form of law enforcement for Corporations in mining crimes that prioritize the aspect of restorative justice, this is known as the Deferred Prosecution Agreement (DPA), which has been practiced in countries such as the United States and the United Kingdom. The purpose of this study is to examine DPA as a manifestation of restorative justice in handling mining crimes by corporations. The research method used is normative legal research with a legislative, conceptual, and comparative approach from American and British countries that have implemented DPA. There are two legal issues that will be raised, namely (1) Application in mining cases in various countries, and (2) Parameters in determining the use of DPA in handling mining crimes. The conclusions of this study are (1) The application of DPA in mining cases in various countries, (2) Parameters for the use of DPA in mining cases against corporate actors.

Kata Kunci: *Deferred Prosecution Agreement, Restorative Justice, Corporate Mining Crimes, Legal Enforcement*

INTRODUCTION

In recent decades, the mining sector in Indonesia has become one of the main pillars of the national economy, contributing significantly to state revenue and job creation. However, despite its economic benefits, the sector is also often faced with various legal problems, especially those related to environmental crimes and mining regulations. Not infrequently, these violations involve large corporations that have strong influence and extensive resources, like *badamai* culture (Irpan & Shaddiq, 2023).

Legal settlements for mining crimes by corporations often encounter obstacles. The lengthy and complex litigation process is not only resource-draining, but can also create uncertainty for the company, workers, and the surrounding community. Additionally, traditional penal approaches are often less effective in encouraging corporations to improve their behavior and prevent future violations, such as *waqf* law for welfare (Aisyah, 2023).

It is in this context that the concept of a Deferred Prosecution Agreement (DPA) emerges as a potential alternative. DPA is an agreement between the prosecutor and the defendant, in which the prosecution of the defendant is suspended with certain conditions that must be met by the defendant within a specified period of time. If these conditions are met, then the prosecution can be canceled. On the other hand, if the conditions are violated, the prosecution can continue.

The use of DPA in mining crimes by corporations offers a number of advantages. First, DPAs allow for faster and more efficient case resolution, reducing court workload and avoiding prolonged litigation processes. Second, the DPA provides incentives for

corporations to take corrective steps and increase their compliance with applicable regulations. Third, through DPA, the government can obtain faster compensation and encourage the implementation of more effective environmental restoration programs.

However, the application of DPA in the context of mining crimes is also inseparable from challenges and criticisms. Some argue that the DPA can give the impression that large corporations can "buy" their freedom from prosecution. In addition, the supervision and enforcement of the DPA requirements requires a transparent and accountable mechanism to ensure that the objectives of the DPA are well achieved.

Therefore, this study aims to explore the potential application of DPA in mining crimes by corporations in Indonesia, as well as identify existing challenges and opportunities. Thus, it is hoped that it can provide policy recommendations that can increase the effectiveness of law enforcement in the mining sector, while still maintaining the interests of the environment and society.

I. Problem Formulation

Based on the description of the introduction, two legal issues can be drawn as follows:

1. Implementation of Deferred Prosecution Agreements in various countries?
2. What are the parameters for the implementation of *the Deferred Prosecution Agreement* on Corporations?

II. Purpose and Usefulness of Research

The objectives of this study are:

1. Knowing and analyzing the implementation of *the Deferred Prosecution Agreement* in various countries.
2. Knowing and analyzing the determination of parameters for the application of the *Deferred Prosecution Agreement* to the Corporation.

The usefulness of this study is:

1. Academically, it adds scientific literature on alternative mechanisms for resolving criminal cases, especially in the context of mining crimes by corporations, and provides a theoretical basis for further study in the field of law and public policy.
2. It practically provides practical guidance for law enforcement officials and policymakers in implementing DPAs, including procedures, criteria, and conditions that need to be met by corporations.

METHOD

A. Type of Research

This research uses a type of normative research, by conducting a study of various norms related to the theme of writing.

B. Nature of Research

This research is prescriptive in order to provide input on the implementation of the *Deferred Prosecution Agreement* in mining cases carried out by Corporations in Indonesia.

C. Research Approach

The approach taken in this study is to take a legislative approach, a conceptual approach, and a comparative approach by examining the implementation of *the Deferred Prosecution Agreement* in the United States and the United Kingdom.

I. Literature Review

1. The Concept of Deferred Prosecution Agreement

A *Deferred Prosecution Agreement* (DPA) is an agreement between the public prosecutor and the defendant who is a corporation or its legal representative to divert the prosecution

and judicial process or to handle corporate wrongdoing through an administrative or civil recovery process.¹

The *Deferred Prosecution Agreement* (DPA) is a form of simple, fast and low-cost principles and can be accepted and applied with a number of adjustments for Indonesia, especially in environmental crimes by corporations that are oriented towards recovery from losses incurred. This concept has also been applied in other *Civil Law* countries, as an implication of the convergence of legal systems. This means that between the legal systems of *Common Law* and *Civil Law* countries, there is not only divergence, but convergence has occurred. There has been a fusion, borrowing from each other, using concepts from other legal systems.² Although the DPA is basically a form of avoidance of crime, the prosecutor representing the state can consider criminal alternatives for corporations, so the criminal philosophy also applies to corporations.

The use of "*Financial Penalty*" is carried out by imposing fines both through DPA and criminal fines (*Criminal Fine*).³ Until now, it is indeed difficult to determine the order of criminal goals to be achieved. However, it should be noted that the essence of punishment for commensurate rewards (*Just Desert*) has been reduced by the recognition of the purpose of punishment in the form of *Deterrence*, *Rehabilitation*, *Incapacitation* (induction or making the perpetrator unable to commit crimes again), *Social Theories* (social theories) and *Reparation* (repair). The DPA, if seen in accordance with the criminal philosophy in Indonesia which does not take revenge for crimes, also aims to provide opportunities for perpetrators to realize their mistakes, not to repeat their actions and to be accepted back into society.

2. The Concept of Restorative Justice

According to Van Ness, *Restorative Justice* is a theory of justice that prioritizes the recovery of losses due to malicious behavior, where the recovery is completed through an inclusive and cooperative process.⁴ The *Restorative Justice* paradigm is in accordance with the penal model in Indonesia which no longer only aims to avenge crimes or like *Retributive Justice*, but also aims to provide justice that focuses on community justice.⁵

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1. Polly Sprenger, 2014, *Deferred Prosecution Agreement: The Law and Practice of Negotiated Corporate Criminal Penalties*, London: Penerbit Sweet & Maxwell, h. 77.
 2. Luhut M. P. Pangaribuan, 2016, *Special Criminal Law - Economic Crimes, Money Laundering, Corruption and International Cooperation and Asset Restitution*, Jakarta: Pustaka Kemang Publisher, Jakarta, p.179-180
 3. Febby Mutiara Nelson, 2019, "Simple, Fast, and Low-Cost Justice: Initiating the Handling of Corruption Crimes through the Concept of Plea Bargaining and Deffered Prosecution Agreement", *Dissertation*, University of Indonesia, Depok, h..48
 4. Eriyantouw Wahid, 2009, *Restorative Justice and Conventional Justice in Criminal Law*, Jakarta: ..Trisakti University Press, p.. 3.
 5. *Ibid.*
 6. Eva Achjani Zulfa, 2011, "Restorative Justice in Indonesia: Traditional Value", *Indonesia Law Review*, Vol. 2, No.1 (Agustus 2011), h.41.

Meanwhile, the definition of *Restorative Justice* in Indonesia is contained in the provisions of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA Law), where *Restorative Justice* is defined as the settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair settlement by emphasizing rehabilitation, not through retaliation.

An important thing in the application of the *Restorative Justice paradigm* is the process of dialogue between the perpetrator and the victim, where the victim can express his feelings and hopes for the resolution of the case that befalls him so that the perpetrator can admit his crime and accept responsibility for the actions he has committed according to his agreement with the victim.⁶ All of these dialogue processes take place in *Victim Offender Mediation* (VOM) led by a mediator.⁷ The community in the *Restorative Justice paradigm* plays a role as a participant in the agreement between the perpetrator and the victim and also monitors its implementation.⁸

II. *Deferred Prosecution Agreement* In Mining Law Enforcement

1. Implementation of Deffered Prosecution Agreements in Various Countries

In the United States, a DPA can be made if there is a corporate admission of the facts of the crime, an agreement to cooperate, a period of time specified specifically for the agreement and an agreement on a certain amount of monetary payment or an act beyond the payment of money as a condition. Commonly applied sanctions are restitution payments, fines, probation penalties, appointment of supervisors and termination of individual liability.³⁹ Judicial oversight of DPAs is limited, where judges are only required to accept DPAs submitted to court and do not adjudicate *Judicial* Hearings on a case-by-case basis.⁹

One example of the application of the Suspension of Prosecution Agreement in environmental cases is the decision of the United States, namely *United States of America v. Sheffield Pharmaceuticals Case No.16 CR 225 (AWT)*. This decision is a suspension agreement that is valid for a period of 7 years implemented by Sheffield Company (a manufacturer of pharmaceuticals and beauty products). Sheffield Company, a manufacturer of pharmaceutical products, including health and beauty products, from April 2004 to May 2011, has dumped industrial waste in the form of untreated wastewater into a New London publicly-owned treatment plant ("POTW") without the necessary environmental permits and without paying attention to the wastewater treatment system in accordance with the provisions of federal law and state law, namely a violation of the Clean Water Act 33 U.S.C. §1319.

The case was filed openly in the District Court of Connecticut, United States. In accordance with the substance contained in the existing prosecution suspension agreement that within the stipulated period of time, there are several things that must be done by *the Sheffield Company*, including the need to make a payment of 1 million United States dollars, following the existing provisions, namely installing a wastewater treatment system in its factory before disposing of waste to the Waste Disposal Site in New London.

7. Allison Morris dan Gabrielle Maxwell (ed.), 2001, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Oxford: Penerbit Hart Publishing, h.7.

8. Eva Achjani Zulfa, *Op.Cit.*, h.41.

9. Febby Mutiara Nelson, *Op.Cit.*, h. 424

Meanwhile, in the United Kingdom, DPA is a probation crime for corporations consisting of three stages.¹⁰ The first stage is negotiation in the form of corporate recognition of the facts of the criminal act and the obligations that must be carried out by the corporation in the points of the DPA that have an expiration date. Meanwhile, the second stage is approval in the form of a court judgment or *Crown Court* regarding the fulfillment of "fairness, rationality and proportionality" in the DPA points. The third stage is the implementation once the DPA takes effect, where the prosecutor can request a

reassessment from *the Crown Court* to prosecute if the corporation does not comply with the points in the DPA.¹¹

However, the DPA mechanism itself has not escaped criticism. According to David M. Uhlmann, the use of DPA causes "*Erosion of Corporate Criminal Liability*" or erosion of corporate criminal liability, where DPA damages the rule of law and limits the punitive nature of punishment and the preventive nature of law enforcement efforts.¹² Uhlmann's statement was based on a DPA between the public prosecutor and the U.S. mining company Massey Energy to avoid criminal prosecution for more than 300 violations of the law, including nine very serious offenses that led to a massive explosion that killed 29 workers on April 25, 2010.⁴⁵ With this criticism, it does not mean that the DPA is unacceptable in the Indonesian legal system, but it must be answered by anticipating these weaknesses if the DPA is applied in Indonesia.

Second, if the DPA has the potential to be applied in the Indonesian criminal justice system, then there needs to be an arrangement in the form of laws and regulations, both in separate laws and integrated in other laws such as the Criminal Procedure Code so that law enforcement officials have legality in using the DPA. In addition, there is a need for ethical guidelines that must be complied with and the enforcement of sanctions for deviations from the DPA process by law enforcement, considering that the DPA mechanism requires complex knowledge and integrity from the law enforcement officials themselves.

Third, regarding the procedure for non-litigation settlement because the characteristics of the British judicial system model are much more suitable for Indonesia because the court plays an active role in approving and supervising the DPA, the settlement can also refer to the DPA in the UK starting from the substance in the DPA which must contain financial penalties, compensation for victims involving the affected community as an effort for *Restorative Justice*, donations, handing over profits obtained from criminal acts, compliance programs, cooperation in investigations as a form of implementing *the Justice Collaborator*, payment of fees, and others so that in its implementation it will meet from justice from various parties, legal certainty, and also benefits.

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10. Grasso Costantino, 2016, "Peaks and Troughs of the U.K. Deferred Prosecution Agreement: The .. Lesson Learned from the First-Ever DPA between the SFO and ICBC SB PLC", *Journal of Business Law, Sweet and Maxwell (Forthcoming)*; Queen Mary School of Law Legal Studies Research Paper No.223/2016, (Maret 2016), h.1.
 11. Michael Bisgrove dan Mark Weekes, "Deferred Prosecution Agreements: a Practical Consideration", *Criminal Law Review*, Issue 6 (2014),h.4
 12. David M. Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of....Corporate Criminal Liability", *Maryland Law Review*, Vol.72, Issue 4, Article 15 (2013), h.1295-....1302.
 13. Moeljatno (translator), 1996, *Criminal Code [Wetboek van Strafrecht]*, Jakarta: Pradnya Paramita, . .Ps.82 Criminal Code.

Furthermore, the author brings the idea to strengthen the mechanism for the implementation of the DPA concept in Indonesia. First, the concept of DPA should only be applied to corporations in order to make corporate accountability effective in environmental crimes and accelerate compensation for losses due to environmental destruction. However, not all corporations can be subject if the DPA is applied in Indonesia, where corporations that commit criminal acts, even though they have been sentenced or participated in the DPA before, should be prohibited from having the opportunity to receive the DPA again, but must be criminally prosecuted in court. To track corporations that are prohibited from receiving DPAs again, the government and law

enforcement officials must have a blacklist of corporations that repeat criminal offenses, whether they have been convicted by the court or have followed previous DPAs.

Not only corporations, corporate administrators who have been convicted of criminal acts and/or played an important role in criminal acts committed by corporations should also be included in the individual blacklist. Thus, if the management of the corporation decides to do actions such as moving to another corporation, establishing a new corporation or transferring assets from the old corporation to the new corporation, then the corporation still cannot receive the DPA.

Second, the parties who can negotiate in the DPA are the public prosecutor and the defendant (corporation) or his legal representative. In addition, the presence of ecologists and economists is also important because each ecosystem has its own uniqueness and there are various methods that can be used both to calculate environmental damage and to restore environmental damage.

Other parties involved in DPA negotiations are independent judges such as in the United Kingdom who serve as supervisors of the content of negotiations with the aim that the negotiation process is transparent and there is clarity in the stages of justice for the defendant if the implementation of the negotiations fails. In the Indonesian context, the function of an independent judge can be held by the Preliminary Examining Judge who is authorized to assess the course of investigation, prosecution and other authorities in the Draft Criminal Procedure Code.

The third is the things negotiated in the DPA, where Indonesia can take the example of the DPA in the UK. The DPA offer to the defendant in the UK can only be granted if the corporation shows a cooperative attitude towards the investigation, admits the facts and accepts some penalty provisions such as reparations, fines and the implementation of some obligations so that the company does not repeat its actions again.

CONCLUSION

Based on the description, it can be concluded as follows:

1. The implementation of *the Deferred Prosecution Agreement* is a dispute resolution applied in the *Civil Law System* as a form of application of simple, fast and low-cost judicial principles for corporate mining criminals.
2. The parameters in the implementation of the *Deferred Prosecution Agreement* can be an example of countries that have successfully implemented this restorative justice-based dispute resolution system.

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