

# Reorientation of Corruption Criminal Act Removal in the Optimization of State Financial Loss Return Using Deferred Prosecution Agreement Concept

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**Abstract**— Current Corruption Criminal Act in Indonesia is in particularly systemic development, there are constraints because of no any removal tool by which it may be formed by using a restorative approach and making criminal law function to be ultimum remedium. The objective of this study is to examine Deferred Prosecution Agreement concept in the optimization of state financial loss return. The specification of study is descriptive, normative juridical, and methods used are statute approach and conceptual approach. The technique of data collection used is literature study. The data were analyzed by using qualitative method. The results of the study on problems under investigation showed that Deferred Prosecution Agreement concept may be an alternative solution to overcome constraints in the removal of corruption criminal act in terms of state financial loss return under optimal. Using Deferred Prosecution Agreement concept, the public prosecutors having prosecution authorities in cases of corruption criminal act are able to delay prosecution even abolish when corruption criminal actor corporation with voluntary and cooperative actions, as well as commitment to improve corporate management to prevent them from corruption acts in the future. Even Deferred Prosecution Agreement concept is in accordance with restorative approach and criminal law function as ultimum remedium.

**Keywords**— *Corruption, State Financial Loss, Deferred Prosecution Agreement*

## I. INTRODUCTION

The model of law enforcement against corporate and business crime actually also accommodates economic dimensions and other social aspects. Such a legal approach is needed because corporate and business crimes are not only a violation of criminal law, but are often in contact with aspects of administrative and civil law. These two aspects of law have two diametrically different purposes and have characteristics and characteristics that often conflict with one another. The aspect of civil law is more concerned with peace between the parties, while the criminal law aspect is more concerned with protecting the public interest and society at large. The nature and characteristics of civil law is to maintain balance and harmonization between the interests of the parties, while the nature of criminal law is to deter criminal offenses that have caused harm and damage.<sup>1</sup> Therefore, the law enforcement model that integrates civil and criminal legal processes is a necessity so that the practice of law enforcement can realize certainty, fairness, and simultaneously.

In relation to business transactions and various corporate activities, the true function of law and law enforcement officers is not only to realize certainty (legal certainty), but also to be able to integrate economic interests and various other social aspects. This means that law enforcement carried out by law enforcement officials must be

able to accommodate the sense of justice of the community and realize legal certainty, which at the same time is also able to benefit the interests of the nation and the country as a whole. The embodiment of the three main objectives of law simultaneously and simultaneously is commonly known as sustainable justice as in contemporary theory, which requires that the legal process and law enforcement be able to realize certainty, fairness, and usefulness.

On the basis of legal thinking and understanding, law is not only placed as a social control tool, but must be able to accommodate various aspects of human life so that it can become a mechanism of social integration (a law as an integrative mechanism). As stated by Charles Charles Bredemeier,<sup>2</sup> that law as a system is a mechanism that functions to create integration and political subsystems in order to achieve its goals (goal persuasion), economic subsystems in order to adapt the needs of the community (adaptation), cultural subsystems in order to preserve and sustain a steady pattern of life (pattern maintenance). The function of law as an integration mechanism developed by Harry C. Bredemeir, actually adopted Sybernetic Theory Talcott Parsons.<sup>3</sup> In Parsons' view, human life in the social fabric is an open system that is interrelated and influences with its environment. The sustainability of a society is determined by the functioning of each sub-system (economic,

<sup>2</sup> Harry C Bredemeier, *The Analysis of Social Systems*, New York: Holt, Rinehart and Winston, 1962.

<sup>3</sup> BeynardL Tanya, et al, *Legal Theory; Orderly Human Strategy across Spaces and Generations*, Yogyakarta: Genta Publishing, Third Matter, 2010, p. 152-153.

<sup>1</sup> Romli Atmasasmita, *Globalisasi dan Kejahatan Bisnis*, Jakarta: Kencana Prenada Media, Second Edition, First Printing, 2010, pp. 76-77.

political, cultural and social subsystems), according to their respective tasks. Therefore, the law has the duty to arrange harmony and synergy between the four subsystems.

The central role of institutions and law enforcement officials is so central, that each subsystem runs synergistically and does not collide with each other. The main function of law as part and culture subsystem is to control and coordinate other subsystems, and resolve conflicts that might arise in society. Its position as an institution that integrates the processes that take place in society, making the law must be open to receive input and other subsystems to be able to produce outputs and outcomes that are efficient and effective.

Parsons and Bredemeier's thinking is relevant now, considering that contextual law should be seen from various dimensions based on the prosperity approach, which always puts the interests of society as the sole purpose of law enforcement. Therefore, it is no longer appropriate to place the law enforcement apparatus in a diametric and face-to-face position with business practitioners and other development implementers.

In a modern country, there are three important pillars that must exist and always interact with one another, namely society, economic growth, and the rule of law. Economic growth and national development as an effort to prosper society will become stronger if it is supported by law, and vice versa.

In line with the constellation of the three important pillars of the modern state, Vice President Jusuf Kalla believes that good law enforcement is a process to uphold legal norms so that they are obeyed and used as guidelines in all aspects of life, while at the same time providing opportunities and opportunities for economic actors and the executor of development to create and innovate without feeling afraid in the context of prospering the community.<sup>4</sup> That is the true integrative function of law, which should inspire and inspire law enforcement officials in carrying out their duties and authorities, particularly related to business transactions and economic activities.

## II. LITERATURE REVIEW

### A. DPA TERMINOLOGY

A model of integrative law enforcement that has been practiced against corporate crime in the United States, called the Deferred Prosecution Agreement (DPA). In principle, the Deferred Prosecution Agreement is the Prosecutor's authority to prosecute corporate and business crimes, but agreed to postpone or not prosecute provided the corporation is willing to fulfill the terms and conditions set by the Prosecutor. The terms and conditions agreed upon between the Prosecutor and the corporation are subsequently set forth in an agreement so that it is referred to as the Deferred Prosecution Agreement.<sup>5</sup>

Although DPA is a model of the new law enforcement approach that is practiced in the United States Department of Justice, it has experienced significant developments and has received positive responses from corporations and corporate entities. In just four years (2002-2005), many companies have been bound by an agreement with the Prosecutor in the DPA mechanism called the Pretrial Diversion Agreement (PDA). The law enforcement model shows a fairly rapid trend, where there were 13 DPA.<sup>6</sup>

The increasing trend of DPA practices in the United States indirectly reflects the harmony between criminal goals and functions with the characteristics of corporations and companies in general. On the one hand, DPA is felt to provide many benefits for the corporation because they can still carry out business activities as usual, without being held hostage by various forced efforts by law enforcement officials, both for the purpose of sealing business premises, confiscation, and acts of detention against detention entities.

During the DPA process, each corporation can still conduct business relationships with partners or carry out production activities or provide services to customers who need company goods/services. In the case of corporations that are working on housing and residential projects, for example, they can still continue their project development during the DPA process so that they remain concerned about the survival of the workforce. Likewise, the case with the breasts of the people who have paid down payment and bought shelter will be maintained, and the banks will continue to support project financing without worrying about the criminal legal process.

On the other hand, DPA makes prosecutors not only prosecute mere and normative juridical aspects, but also can enable Prosecutors to thoroughly reform the governance and business process of a corporation. During the specified period agreed in the DPA, law enforcement officials can supervise a company to carry out substantial internal reforms voluntarily so as to build corporate governance and compliance with statutory provisions. In addition, the Prosecutors will also feel helped by the cooperative attitude of the corporation in uncovering cases involving corporate entities.

On the basis of the two positive aspects of the implementation of the DPA, many parties strongly believe that the Prosecution Suspension Agreement will become a standard and change the perspective of the Federal Attorney in the United States, when facing violations of law committed by corporations in conducting business activities. Through this, the US Attorney's Office has formed a new role in the oversight policy of American companies, referred to as "the new regulators". According to Peter Pivack and Sujit Raman:<sup>7</sup>

DOJ officials appear to believe that the principal role of corporate criminal enforcement is to reform corrupt corporate culture, that is to affect widespread structural reform rather than to indict, to prosecute, and to punish. By focusing more on

<sup>4</sup> Instruction of Vice President to the whole Head of High Attorney and Head of Regional Police, on July 19, 2016 in State Palace, Jakarta: Care about Cabinet Activity Support Sector, 2016, pp. 13-17.

<sup>5</sup> Asep N Mulyana, *Deferred Prosecution Agreement, dalam Kejahatan Bisnis*, Jakarta: Gramedia, 2019, p. 236.

<sup>6</sup> Peter Spivack & Sujit Rahman, *Regulating The New Regulators': Current Trends In Deferred Process execution Agreements*, American Criminal Law Review, 2008, p. 1

<sup>7</sup> *Ibid*, p. 2.

prospective questions of corporate governance and compliance, and less on the retrospective question of the entity's criminal liability, federal prosecutors have fashioned a new role for themselves in policing, and supervising, corporate America. They have become the New Regulators.

As a relatively new rule, many people question the legality of the role of the Federal Attorney in prosecuting corporate criminal cases and other business crimes. These public questions arose because the United States Department of Justice (US DOJ) did not make guidelines that were made public, regarding the procedures and mechanisms of DPA. During this time, US DOJ has focused more on experiments and empirical practices to encourage the adoption of DPA against corporate bribery and other business crimes. Therefore, the purpose and function of DPA is still part of the discussion and discourse of national legal policy in the United States.

For this reason, the United States Congress has initiated the creation of a regulation that can be used as a guideline for the implementation of DPA, especially against corporate and business crime. The general rules of the DPA are needed not only as an operational standard for prosecutors, but also to eliminate various criticisms of DPA implementation. Through the legislation that is generally binding, there will be consistency in the implementation of DPA, and at the same time it can be a means of parliamentary control over prosecutors in fulfilling the requirements by the corporation as outlined in the agreement.

## B. STATE FINANCIAL LOSSES

The problem of state financial losses is an element in corruption, specifically Article 2 and Article 3 of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001. According to Anwar Nasution, state finance viewed in a broad sense means seeing state finance as a consequence of public sector operations. Not only includes the State Budget but includes *nonbudgeter* members such as BUMN/BUMD, foundations and companies related to service and private institutions that receive subsidies from the state.<sup>8</sup>

In contrast to the above nomenclature namely "state financial losses" used in the Corruption Eradication Act. Another nomenclature is "state loss" (without the word financial) used in Indonesian laws and regulations. We can find the term "state loss" as we have seen above, in Article 1 number 15 of Law No. 15 of 2006 concerning the Supreme Audit Board (BPK): "The loss of the State/Region is a shortage of real and definite amounts of money, securities, and goods as a result of intentional or negligent unlawful acts."

The same term is also used in Article 1 number 22 of Law No. 1 of 2004 concerning the State Treasury (Law on the State Treasury) which states that: "State/Regional Losses are shortages of real, certain amounts of money, securities, and

goods, as a result of unlawful acts intentionally or negligently."

Losses to State Finance and State Finance in practice these two terms are used in the same sense. In resolving criminal acts of corruption using the nomenclature of "state financial losses" in various articles in Law No. 31 of 1999 in conjunction with Law No. 20 of 2001, when it came to proof of the element of "state financial loss" then law enforcement requested information from the BPK or BPKP, whether or not there was a financial loss in that country. Is state finance limited only to finances sourced from the state budget/regional budget? For judicial practice so far, state financial losses as stipulated in various articles in Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 is concerned with finances sourced from the APBN / APBD and the state financial losses stated by the BPK/ BPKP.

## C. STATE FINANCIAL RETURNS MODEL

Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 (UU PTPK) regulates two legal instruments regarding the recovery of state losses due to acts of corruption, namely through criminal and civil instruments. Related to criminal instruments, Article 18 paragraph (1) letter a extends additional penalties in the Criminal Code to the seizure of tangible or intangible movable or immovable property used for or obtained from a criminal act of corruption, including a company owned by a convict in which the criminal act corruption is carried out, as well as goods that replace these items. This appropriation also extends Article 39 paragraph (1) of the Criminal Code in which goods that can be seized are goods belonging to the convicted person obtained from crime, goods belonging to the convicted that deliberately used for crime.<sup>9</sup>

Article 38 paragraph (5) of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 stipulates that in the event that the defendant dies and there is sufficient strong evidence that the person concerned has committed a criminal act of corruption, the judge on the demands of the public prosecutor determine the confiscation of confiscated items. Meanwhile Article 38 paragraph (6) provides that the appropriation cannot be appealed for. Article 38 paragraph (7) states that everyone who has an interest in the determination within 30 (thirty) days from the date of announcement. This is a further regulation of Article 77 of the Criminal Code which states that the death of the defendant will waive the right to file criminal charges.

The mechanism through a criminal instrument is regulated through the following provisions: (1) A court decision which states that evidence is confiscated for the state in the form of money, building land and so on is the asset of the convicted person. Article 18 paragraph 1 letter a of the PTPK Law states that confiscation of tangible or intangible movable or immovable property used for or obtained from a criminal act of corruption, including a company owned by a

<sup>8</sup> Theodorus M. Tuanakotta, *Menghitung Kerugian Keuangan Negara dalam Tindak Pidana Korupsi*, Jakarta: Salemba Empat, 2014, p. 110.

<sup>9</sup> Indonesia, Criminal Procedure Code, Law No. 1 of 1981, State Gazette No. 76 of 1981 TN No. 3258 Article 39 paragraph (1).

convict where a criminal act of corruption is committed, as well as the price of the goods that replaces the item.

The Corruption Eradication Act also regulates the payment of replacement money which is as much as the amount of property obtained from criminal acts of corruption (Article 18 paragraph (1) letter b). If the convicted person is unable to pay the substitute money, then based on Article 18 paragraph (2) no later than 1 (one) month after the court's decision that has obtained permanent legal force, his property can be confiscated by the prosecutor and auctioned to cover the replacement money (confiscation) the assets of the convicted person as payment for replacement money (this is different from the confiscation at the time of the investigation, because the confiscation does not require permission from the Head of District Court). Likewise, if the convict does not have sufficient assets to pay the replacement money as referred to in Article 18 paragraph (1) letter b, then based on Article 18 paragraph (3), the person is sentenced to a prison term that does not exceed the maximum threat of the principal in accordance with the provisions in this law and the length of the sentence have already been determined in the court's decision.

According to the PTPK Law, law enforcers as State Attorneys or the competent authority can sue civil assets if there is evidence of state losses and there is not enough evidence to prove criminal elements of corruption (a free ruling does not preclude a civil suit),<sup>10</sup> the suspect died (sued his heir), and<sup>11</sup> the defendant died (sued his heir).<sup>12</sup>

### III. RESULT AND DISCUSSION

In the last two decades (1970-1990) the focus of international attention has been on issues that are closely related to development issues and quality of life. This can be seen from the development of the United Nations Congress on The Prevention of Crime and the Treatment of Offenders which highlights the forms and dimensions of crime against development, crime against social welfare and crime against environmental quality life (Crime Against the Quality of Life). Included in the category of crimes such crimes are economic crimes that are often expressed in various terms, including economic crimes, crime as business, business crimes and abuses of economic power. It can be said, that economic crime is a prominent feature and crime against the development of the community of nations in the world, both in societies that are already advanced/modern or that are undergoing development towards modernization.<sup>13</sup>

The 5th United Nations Congress on Prevention of Crimes and the Preaching of Crimes and Treatment of Offenders in 1975, then reaffirmed in the 1985 VII UN Congress as mentioned above, shows that there are new forms of crimes committed by corporations that are driven by

respected entrepreneurs who have a very negative impact on the country's economy.<sup>14</sup>

Increasingly sophisticated corporate crime both in form and type as well as its modus operandi often transcends national borders (trans border crime) and is also often influenced by other countries due to globalization era.<sup>15</sup> The 5th Congress on the Prevention of Crimes and the Development of Law Abuses organized by Laws The UN Agency in September in Geneva gave recommendations by broadening the notion of crimes against "illegal abuses of economic power", such as violations of tax regulations, labor, environmental pollution, fraud against consumers, fraud in marketing and trade by transnational companies.<sup>16</sup>

In connection with the above, the development of law in Indonesia essentially requires a change in mental attitude in such a way and requires that the law is no longer merely seen as a mere set of norms, but the law is also seen as a means of changing society. Laws no longer develop by following society, but the law must give direction to the community in accordance with the stages of development carried out.<sup>17</sup>

Andi Hamzah stated, that in Indonesia in the legislation, a legal entity/corporation had emerged and was the subject of a criminal offense in 1951, namely in the landfill and began to be widely known in Law No. 7 Drt. 1955 concerning Economic Crimes.<sup>18</sup> Furthermore, it can be found among others in the Law on Psychotropic in Article 5 paragraph (3) of Law No. 5 of 1997, Article 20 of Law No. 31 of 1999 jo. Law No. 20 of 2001, Article 6 of Law No. 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes.<sup>19</sup>

In various literature and legislation in Indonesia and other countries and international law it has been recognized that corporations are subject to criminal law and can be accounted for according to criminal law. Because corporations cannot act like humans and corporate actions are carried out through human actions, theoretical arguments are needed to explain that human actions are corporate or corporate actions that can be accounted for by human actions.

In connection with the problem in this writing of the corruption committed by the corporation that, if the corporation has become the subject of a criminal act and can be held responsible for the act of corruption, then the corporation can be prosecuted as the perpetrator of the intended corruption, although the management of the corporation is not required to corruption committed by corporations. When a corporation has become a suspect in a criminal act of corruption, a model such as a deferred prosecution agreement can be used in its resolution. The Public Prosecutor who has the authority to prosecute may offer a postponement of the prosecution to the corporation not to sue him in court, in return for the corporation recognizing his actions and agreeing to voluntarily pay a fine and compensate a certain amount to the state. In addition, another

<sup>10</sup> Indonesia, Law Amendment to Law No. 31 of 1999 concerning Eradication of Corruption, Law No. 20 of 001. LN No. 134 of 2001, TN No. 4150, Article 32.

<sup>11</sup> Indonesia, UUPTPK, Article 33.

<sup>12</sup> Indonesia, UUPTPK, Article 34.

<sup>13</sup> Barda Nawawi Arief, *Bunga Rampai Hukum Pidana*, Bandung: Alumni, 2010, him 159-160.

<sup>14</sup> Dwidja Priyatno, *Sistem Pertanggungjawaban Pidana Korporasi dalam Kebijakan Legislasi*, Depok: Kencana Prenadamedia Group, 2017, p. 2.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 3

<sup>17</sup> *Ibid.*

<sup>18</sup> Andi Hamzah in *Ibid.*, p. 6.

<sup>19</sup> *Ibid.*



requirement is that the corporation must undergo a corporate compliance program, the appointment of a corporate monitor or integrity counsel (appointment of a supervisor or corporate advisor).<sup>20</sup>

DPA is not a new concept, but has been carried out by the United States Attorney's Office for several decades. Although initially the DPA practice was carried out individually by prosecutors in the case of children and street criminals, which was intended so that the perpetrators could rehabilitate their din without being stigmatized as ex-convicts. At that time, it was rare for corporate crimes to be suspended for prosecution because Federal Prosecutors were more likely to prosecute corporate wrongdoing with relatively small fines. The prosecution of corporations seems not comparable to the prosecution of directors and company organs so that many directors are punished. In summary, the development of DPA practices by the United States Federal Attorney can be described in three periods.

Period 1990: The DPA practice was first carried out around 1990, when the government began an investigation of Salomon Brothers in a securities fraud case. In 1992, the Salomon Brothers Company cooperated with the United States Attorney, through paying large fines and losses, restructuring management, and voluntarily undertaking extensive reforms to avoid future mistakes. The cooperation and commitment of Salomon Brothers to change the company's culture, has convinced the Prosecutor not to indict and sue him.

Although the handling of the Salomon case did not go through an official Prosecution Suspension Agreement, such law enforcement practices have given a strong message to various corporate entities. Business people and company organs realize that companies that cooperate fully and sincerely and a willingness to realize clean corporate governance, will in fact have a positive effect on the work environment and benefit the corporation.

Then around 1994, the DPA practice was carried out by the District Attorney's Office in Southern New York over a fraud case involving a Prudential Securities Company. For approximately three years, the Prosecutor held a detention postponement in a special situation because at that time DOJ did not have a Standard Operational Procedure (SOP) related to DPA.

On the basis of law enforcement practices carried out by the Prosecutor, then in 1999 the United States Deputy Attorney General Erik Holder issued a memorandum entitled "Federal Corporate Prosecution". Erik Holder's Memorandum can be considered as a DPA SOP, which outlines various factors as a consideration for the Prosecutor to decide whether or not DPA can be applied to a corporation. However, the Memorandum Holder does not officially mention the suspension of prosecution so that the DPA mechanism is still rarely practiced against corporate and business crimes.

Period 2000: In order to respond to various fraud scandals involving corporations, then in the early 2000 US Congress by issuing the Sarbanes-Oxley Act. In addition, in

July 2002 President George Bush formed the Corporate Fraud Task Force to investigate and prosecute significant financial crimes.

Along with the emergence of the Enron case, Worldcom and the Adelphia case which committed fraud in its financial statements, has prompted US Attorney to pay special attention to corporate crime. Many parties argue that simply imposing fines on companies that commit a crime is considered insufficient.

On the basis of that thought, then the United States Government proceeded legally against accounting giant Arthur Andersen for his role in the fraud case on Enron's financial statements. Therefore, the Prosecutor charged the corporation and then Jun in the Texas Court sentenced Arthur Andersen.

One negative impact of the prosecution by the US Attorney on the corporation, made Arthur Andersen Company, which has been carrying out activities for about 89 years, eventually had to close down and tens of thousands of people had to find new jobs. The prosecution of Arthur Andersen's corporation has also had a very significant impact on the reputation of the insurance industry, which has led to a decline in public confidence in insurance companies.

Recognizing the negative impact of prosecution on corporations and the various domino effects that surround them, prompted Deputy Attorney General Larry D. Thompson to issue a Memorandum entitled "Federal Prosecution Principles of Business Organizations". Although the Thompson Memorandum issued in 2003 was intended to replace the Memorandum Holder, in principle the two memorandums have many similarities, with the main focus being to increase oversight of the company's authenticity and cooperation at the time of the government investigation. One difference in principle with the Memorandum Holder, in which the Thompson Memorandum does not Steel consider to respect the cooperation of the company, but also by giving immunity or amnesty to the corporation that cooperates through a prosecution suspension policy.

The issuance of the Thompson Memorandum has encouraged various corporations to cooperate with the US Attorney, through an agreement set forth in the DPA. Since 2003, there have been several giant corporations in the United States that have received Prosecution Suspensions, including AIG, America Online, Boeing, Bristol Myers Squibb, Health South, KPMG, MCI, and Merrill Lynch. Even some foreign companies such as British Proteleum and Smith Nephew have also been noted to use the DPA mechanism so that it can be said as a form of positive corporate response to the prosecution suspension policy.

In order to increase transparency and accountability for DPA implementation, in December 2006 Deputy Attorney General Paul McNulty issued a memorandum known as "The McNulty Memo" in lieu of Thompson's Memorandum. Some setting points from The McNulty Memo, including:

- a. clarify the communication between the lawyer and the client;
- b. endorsement by the Assistant Attorney General and Deputy Attorney General responsible for the DOJ Criminal Division for oversight prosecution;

<sup>20</sup> Febby Mutiara Nelson, "Peradilan Sederhana, Cepat, dan Biaya Ringan: Menggagas Penanganan Tindak Pidana Korupsi Melalui Konsep Plea Bargaining dan Deferred Prosecution Agreement." Disertasi, Depok: Universitas Indonesia, 2019, p. 64.

C. legal costs charged to employees.

Affirmation of employee costs is an important part of “The McNulty Memo”, in view of complaints from some corporations regarding the amount of funds that should be provided to finance oversight of corporate compliance. Even in a speech delivered by Deputy Attorney General Paul McNulty, reminded that the Prosecutors did not merely consider the implementation of the suspension of the prosecution of the proposed funds prepared by the corporation as attorney fees to employees or agents who were being investigated or charged. For this reason, “The McNulty Memo” was originally designed as a guideline in the implementation of DPA, in order to establish “transparency in the prosecutor's deliberative process” and to “improve the fairness, discipline and consistency” of their corporate decisions.<sup>21</sup>

On the one hand, the implementation of prosecution and non-prosecution suspension agreements for corporate and business crimes has been widely practiced by various attorney work units in the United States. This phenomenon shows that prosecutors and business people have made DPA, as a form of legal settlement for violations or crimes committed by corporations.

As explained above, one of main causes for discrepancies in the application of DPA in America is no any guidelines to be standard in the implementation of DPA. Some memorandums which have been issued by the Deputy Attorney General of the United States, mostly submit the application of DPA to the policies of each attorney work unit.

The absence of DPA standard criteria and standards is resulting in the use of different standards between one place and another, and even between different prosecutors in one assignment place. This has caused devolution of authority to occur, in which the Prosecutors can set certain conditions to the corporation, which sometimes has nothing to do with the substance of the violation of the law they have committed. As well as the conditions proposed by the District Attorney's Office of New Jersey and Bristol-Myers Squibb in 2005, which asked the company to provide financial support (endow a chair) to the Prosecutor's alma mater at Seton Hall. This is also the case with the requirements put forward by the Federal Attorney and the New York Racing Association (NYRA), which require operators of horse racing facilities to install slot machines, which are actually not related to tax fraud committed by the company.

The absence of standard standards in implementing DPA is what often confuses business people and corporate entities in responding to violations of laws involving corporations. They do not know and understand clearly the criteria related to violations of the law that can be resolved through the mechanism of DPA, how to propose the application of DPA, what conditions the company needs to prepare in the DPA, up to the amount of funds that need to be provided by the company when following the mechanism DPA.

The diversity of DPA implementation practices also makes it difficult for lawyers to accompany and advise their clients because it might be different from one case to another.

The lawyers will face different practices and each case is handled because it depends very much on the policy of the prosecutor, where the violation of the law occurs and the type of violation of the law involving the company.

In Indonesia, case settlements carried out outside the court have actually been carried out on the settlement of BLBI cases using the Matter of Settlement and Acquisition Agreement (MSAA), MRNIA and Release and Discharge (R and D) and finally the Bank Lippo Tbk case, is the Out of Settlement model out of Court Settlement. The settlement model is *lex specialis* in proceedings outside the court which is permitted by the relevant Law, namely Law No. 10 of 1998 and Law No. 8 of 1985.

The legal implication of completing the OCS model is that the parties can still file a lawsuit with the State Administrative Court because the decision of Bapepam officials is administrative or that a civil suit can still be made on the grounds that the decision of the Bapepam official is not final and binding because it is only legally binding for both parties and is temporary. If the peace is not obeyed, then the lawsuit process must be used. The decisions of the parties to carry out peace in advance of the proceedings are final and binding so that the parties may not make an appeal and appeal (Article 130 paragraph 3 HIR). The peace deed made at the court hearing has the power of a judge who has permanent legal force (in kracht van gewijsde). If one of the parties does not comply with what has been agreed, then the execution of the head of the district court can be requested because the peace certificate has a legal force such as a court decision that has obtained permanent legal force.

Synergy with the explanation above, the Indonesian criminal justice system needs to think about adapting the deferred prosecution agreement model in recovering state losses resulting from criminal acts of corruption. This thinking is based on the suitability of this model with the provisions in UNCAC which states that each participating country is obliged to consider reducing sentences for suspects/defendants who want to cooperate in the resolution of criminal acts of corruption with enforcement of legal objectives namely legal justice. In addition, this model also adheres to legal expertise, and the benefit of the law. This model also remains on the path to completion through the criminal justice system.<sup>22</sup>

The problem then is that, to what extent can the deferred prosecution agreement be applied in the Indonesian criminal justice system for corruption which is oriented to recovering state financial losses? What kind of deferred prosecution agreement is in accordance with the Indonesian criminal justice system and what adaptations are needed? These things will be discussed in the following description.<sup>23</sup>

If the “special path” is regulated in criminal procedure law as a mechanism carried out by law enforcers on certain cases, this issue must also be discussed for the sake of material criminal law, especially relating to the failure of the right to sue from the state for the party committing a crime. In the Criminal Code one of the reasons for the cancellation of the right to sue from the state is regulated in Article 82 of the

<sup>21</sup> Asep N Mulyana, Op. Cit., p. 242.

<sup>22</sup> Febby Mutiara Nelson, Op. Cit., p. 80.

<sup>23</sup> *Ibid.*

Criminal Code<sup>24</sup> which regulates the right of the state to claim death if the defendant has paid the maximum penalty on a criminal offense whose type of violation is only threatened by a fine. That matter, which is called the *Afdoening Buiten Process* in the Netherlands, and also *Transactie*, but there is not only a violation but also a crime with certain conditions.<sup>25</sup>

If there is an opportunity for DPA to be implemented in Indonesia in the future, of course there must be regulation in the form of legislation whether it is regulated by a separate law, or regulated in act, for example, it is included in the Criminal Procedure Code, so that law enforcers have legality in doing so, and not merely discretion by the Prosecutor or the Corruption Eradication Commission. In addition, given that this mechanism requires the ability of law enforcers to deal with complex case materials and requires integrity of law enforcers, it is emphasized that there is a special code of conduct on this matter that must be obeyed and enforced sanctions if there are deviations from law enforcement involved in this process from beginning to end.

The relevance of the application of DPA in Indonesia can be applied to corrupt acts committed by corporations. This is in line with the legal politics of the government and law enforcers in Indonesia to make corporate responsibility more effective, especially in economic crime, including corruption. Corporations are now subject to many laws such as the Customs Act, the Corruption Eradication Act, the Law on Prevention and Eradication of Money Laundering, the Banking Law, and others. The corporation has also been the subject of the RKUHP which has been discussed for a long time. In addition to material law, the direction of legal politics to further ensnare corporations is also evident from the birth of operational provisions such as PERMA and PERJA regarding corporate claimants.

A company that has committed a corporate crime before and has been sentenced (recidivism) or has taken part in a previous DPA, should not be given the opportunity to accept this DPA anymore, but should continue to be prosecuted in court. The government and law enforcers should have had a corporate black list that had previously committed a corporate criminal offense, both of which had been sentenced by the court and who had followed the DPA before. Furthermore, the author will discuss more focused who are the parties involved in the process of the Deferred Prosecution Agreement. If the defendant and the Public Prosecutor choose the DPA mechanism in the process of solving their legal problems. This is because the defendants in the Prosecution Postponement Agreement here are corporations not individuals or individuals. The parties involved in the DPA mechanism, the role of the Public Prosecutor, the KPK, the defendant or their Legal Counsel are still the most important factors in this process. The Prosecution Postponement Agreement/DPA of the legal subject who is the defendant are a corporation.

<sup>24</sup> Article 82 paragraph (1) of the Criminal Code, the authority of the violator who is threatened with a criminal fine is nullified, if the maximum fine is paid voluntarily, thus the costs incurred when the prosecution has started, under the authority of the official appointed for it, by the rules general rules, and in the time specified by him. Indonesia, KUHAP, Article 82 paragraph (1).

<sup>25</sup> *Ibid.*

In carrying out this authority the Preliminary Examining Judge has a discretion governed by Article 111 paragraph (3) of the Criminal Code Bill which stipulates that the Preliminary Examining Judge can decide on matters as referred to in paragraph (1) or his own initiative, except for provisions concerning the appropriateness or not of a case. to be prosecuted in court. In addition to the authority possessed by the Preliminary Examining Judge, the capacity of the Preliminary Examining Judge is also a consideration to make the judge play a role in the DPA process.<sup>26</sup>

After the defendant and the prosecutor agree to use the DPA mechanism in the process of resolving criminal cases, the defendant and the public prosecutor will negotiate. Negotiations carried out by the public prosecutor and the defendant or their attorneys in these two mechanisms are certainly different both from who will be involved in the negotiations and what matters will be negotiated by the parties.

The criminal offenses that can be negotiated in the DPA which focuses on recovering state financial losses are predominantly criminal in the field of crime. Corruption, TPPU, criminal acts in taxation, forestry, export and/ or import criminal acts and banking acts. In addition to the type of criminal act, the other most important factor to be used as a guideline in determining a case to be examined using the DPA mechanism is the value of the state financial losses incurred by the crime. According to the writer, the value of state losses that can be examined using the DPA mechanism is more than 1 billion. This is based on the provisions applicable to cases which are the authority of the KPK to examine them.

DPA is not used in cases where the consequences of criminal acts committed by corporations result in death or serious human injury for example by breaches that violate regulations regarding human safety and security. Likewise, according to the author DPA is not done in cases of repetition of criminal acts. And it cannot also be done on companies that do not have the ability to pay the penalty that will be prosecuted against the company.<sup>27</sup>

#### IV. CONCLUSION

The high level of corruption in Indonesia should be used as study material for the authorities to change the orientation of the handling of corruption that leads to the recovery of state financial losses. Where law enforcement on criminal acts of corruption in Indonesia still uses or adheres to the retributive principle, the priority is to convict the person. Ideally, to focus on the state financial return, the enforcement of law in Indonesia to accommodate economic dimensions and other social aspects. Such a legal approach is indispensable because specific corruption crimes committed by corporations are not only a violation of criminal law, but are often in contact with aspects of administrative and civil law.

The DPA concept is the most ideal model to recover state financial losses due to corruption, a good DPA to be applied in Indonesia must consider the Indonesian justice

<sup>26</sup> Indonesia, Draft Criminal Procedure Code, Article 115.

<sup>27</sup> *Ibid.*, p. 81-83.

system, constitutional arrangement and legal traditions. The role of the court in the DPA process must be taken into consideration given the existence of the doctrine of separation of powers and constitutional provisions related to the role and function of the court. Must also consider the impact of regulatory and compliance burdens on corporations that require additional costs so that Indonesia needs to compare whether the formal tracks of DPA are more economical and effective.

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