JURNAL

WAWASAN YURIDIKA

Vol. 6 | No. 2 | September 2022 | Pages : 138-152
ACCREDITED by Ministry of Research, Technology, and Higher Education of the Republic of Indonesia, No. 36/E/KPT/2019
http://ejournal.sthb.ac.id/index.php/jwy

Deferred Prosecution Agreement: a Restorative Approach in Tackling Corruption Committed by Corporations

Mas Putra Zenno Januarsyah[1], **A. Widiada Gunakaya**[1], **Asep N. Mulyana**[2]
[1] Sekolah Tinggi Hukum Bandung, Bandung, Indonesia
[2] Ministry of Law and Human Rights Republic of Indonesia, Jakarta, Indonesia
✉ Corresponding author: putrazenno@gmail.com

Article history:
DOI: 10.25072/jwy.v6i2.545

Received: 28 July 2022 | Accepted: 25 September 2022 | Published: 30 September 2022

Keywords:
Deferred Prosecution Agreement; Corruption Crime; Corporations.

Abstract
This study aims to analyze the restorative approach to overcoming criminal acts of corruption committed by corporations through a deferred prosecution agreement. This research is descriptive with normative juridical research using secondary data in the form of primary, secondary, and tertiary legal materials through a statute approach and a conceptual approach. Data was collected using a document study, then analyzed qualitatively. The study results show that the deferred prosecution agreement is the ideal model for returning state financial losses due to corruption. This concept can be applied in Indonesia. In addition, this model provides legal certainty and legal benefits. As a consequence, as a dual-track system, deferred prosecution agreements also remain in the corridor of settlement through the criminal justice system.

A. INTRODUCTION

The role of corporations as non-state actors, national or transnational corporations (TNC), or multinational (MNC) in modern society in this globalization era has a strategic function in the economy and significantly influences political and defense policies. Corporate crime is a complex crime with its characteristics as a "serious crime" because it is committed by financially and politically strong actors. Corporate crime is also a type of "white-collar crime."

Economic development as an effect of industrialization and trade development has encouraged each country to stipulate regulations that corporations are legal subjects because, in practice, corporations carry out economic activities and criminal acts. The recognition of corporations as legal subjects has attracted worldwide attention. This is evidenced by the 14th International Conference on Corporate Criminal Responsibility in Athens, from 31 July to 6 August 1994. This conference has successfully motivated countries that have not yet regulated corporations as subjects of criminal law to recognize

ISSN
2549-0664 (print)
2549-0753 (online)

corporations as subjects of criminal law and responsible for criminal acts. Thus, the principle of delinquere non-potest university or delinquere non-potest society (legal entities cannot commit criminal acts) has changed in connection with accepting the concept of functional actors (functioneel daderschap). According to Rolling, the makers of the offense included corporations into functioneel daderschap (functional actors) because, in the modern world, corporations have an essential role in economic life which has many functions, namely employer, producer, price setter, foreign exchange user, and others.[1]

Based on comparative research in several countries, criminal sanctions for corporations vary, for example: 1). A fine or financial sanction such as a monetary fine; 2). Seizing profits from the proceeds of crime; 3). Takeover; 4). Closing buildings used to commit crimes temporarily or permanently; 5). Closing the corporation temporarily or permanently; 6). Revoke temporary or permanent licenses; 7). Providing administrative action, carried out under an administrator temporarily appointed by the court; 8). Announcement of adjudication; 9). Prohibition to do certain things, such as entering into contracts with the government or public institutions temporarily or permanently; 10). Restoration orders or orders to do something that the corporation has ignored or not for something that has insulted the court done by the corporation; 11). Mandatory management supervision, probationary period, and 12). Community service.[2]

Brickey said that the basic penalty for the corporate crime is simply paying a fine, but if a corporation is sentenced to wind up an entire company, it has called a "corporate death sentence." Criminal sanctions in the form of restrictions on corporate activities are similar to imprisonment or "corporate imprisonment." Additional crimes, such as publication, are the crimes that corporations fear the most.[3]

Based on Article 26 of the United Nations Convention Against Corruption (UNCAC), it has been determined that corporations can be held accountable through criminal, civil, or administrative law, and criminal responsibility for corporations does not erase individual responsibility. Article 26 UNCAC,

[1] Rolling in Muladi and Dwidja Priyatno as quoted by Marco Parasian Tambunan, "Pertanggungjawaban Pidana Korporasi dalam Tindak Pidana Pencucian Uang," *Mimbar Keadilan: Jurnal Ilmu Hukum*, (Januari-Juli 2016), 111-128, p. 112.

[2] Pujiyono, "Corporation Criminal Responsibility Model Based on Restorative Justice Approach in Indonesia," *Diponegoro Law Review* 01, No. 01 (2016): 127-142, https://doi.org/10.14710/dilrev.1.1.2016.127-142, p. 130-131.

[3] Brickey in *ibid*.

which Indonesia has ratified through Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption, 2003 (United Nations Convention Against Corruption, 2003), emphasizes the importance of each country participating in the convention having regulations governing corporate responsibility if committing criminal acts of corruption in the form of criminal sanctions, civil sanctions, and administrative sanctions, including monetary sanctions.[4] The main objectives of formulating corporate criminal responsibility policies are 1). Deterrent effect; 2). Fair levies; 3). Rehabilitation, both for corporations or the effects of criminal acts; 4). A symbolic message that no crime will go unpunished; 5). Moral condemnation of society; 6). Efficiency, predictability, and consistency with the principles of criminal law; and 7). Justice.[5]

It cannot be forgotten that the existence of corporations significantly influences meeting the needs of society and the state. There is hardly a fulfilment of human needs that needs to be noticed by corporate interference. In other words, efforts to meet human needs are inherent in corporations. State-owned corporations, for example, State-Owned Enterprises, have an essential role as an economic pillar, especially in increasing state revenue (tax revenue), providing employment, and meeting community needs. The relationship between the state and society, on the one hand, and the relationship with corporations, on the other hand, is called a symbiosis of mutualism.

There is a dilemma concerning corporate crime law enforcement between the urgency to prosecute and keep the corporation alive. The criminalization of corporations is related to law and social problems in society. Sanctions that emphasize a retributive approach will have more negative effects, especially for innocent people who rely on corporations. Therefore, sanctions for corporations, especially the imposition of criminal sanctions, must be carried out carefully and wisely. Innocent workers, shareholders, consumers, and others who rely on corporations, including governments, must be protected from harm.

Referring to Muladi's statement, before using criminal law and other legal means (civil and administrative law), settlement using a process such as a restorative approach must be a priority. In this case, criminal law should

[4] Ferguso in Mas Putra Zenno Januarsyah *et al.*, "The Idea of Implementing a Deferred Prosecution Agreement with The Anti-Bribery Management System in Corruption Crime Management by Corporations in Indonesia," *International Journal of Criminology and Sociology* 9 (2020): 1379-1384, https://doi.org/10.6000/1929-4409.2020.09.158, p. 1381.

[5] Pujiyono, *op.cit.*, p. 131-132.

be used as a last resort. However, under certain conditions, criminal law can be determined as a priority (primum remedium).[6] In connection with this problem, Clinard and Yeager provide 11 (eleven) criteria: 1). The degree of loss to the public; 2). The level of complexity by high corporate managers; 3). The duration of violation (duration of a violation); 4). The frequency of the violation by the corporation; 5). Evidence of intent to violate; 6). Evidence of extortion, as in bribery cases; 7). The degree of notoriety engendered by the media (the degree of public knowledge about the negative things engendered by media coverage); 8). The precedent of law (jurisprudence); 9). The history of serious violation by the corporation; 10). Deterrence potential (possible prevention); and 11). The degree of cooperation evinced by the corporation.[7]

Research regarding restorative approaches in overcoming criminal acts of corruption has received much attention from several researchers, including First, Rida Ista Sitepu and Rudi Hermawan's research on "Restorative Justice Approaches in Eradicating Corruption Crimes" the results of their research indicate that the restorative justice approach in the sentencing of perpetrators of corruption can be carried out, including by strengthening the norms for returning state financial losses which were initially an additional crime to become the principal crime.[8] Second, Mirsa Astuti and Muhammad Faris Aksa researched "Restorative Approach as an Alternative to Criminal Sanctions in Corporate Crime" the results of their research indicate that in tackling corporate crime, it is necessary to use a restorative approach because a restorative approach aims to resolve crimes, namely to restore conditions to the beginning.[9] Third, Febby Mutiara Nelson researched "In Search of a Deferred Prosecution Agreement Model for Effective Anti-Corruption Framework in Indonesia" the results of her research show that a deferred prosecution agreement can be a concern in making the criminal justice process more effective and efficient and less time-consuming. time, and can resolve significant corruption cases.[10]

---

6 Muladi in *ibid*., p. 133.

7 Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* (London: Collier MacMillan Publishers, 2010), p. 39.

8 Rida Isda Sitepu and Rudi Hermawan, "Pendekatan Restorative Justice dalam Pemberantasan Tindak Pidana Korupsi," *Jurnal Rechten: Riset Hukum dan Hak Asasi Manusia* 1, No. 3 (2019): 11-18, https://doi.org/10.52005/rechten.v3i3.61, p. 11.

9 Mirsa Astuti and Muhammad Faris Aksa, "Pendekatan Restoratif Sebagai Alternatif Sanksi Pidana dalam Kejahatan Korporasi," *Iuris Studia: Jurnal Kajian Hukum* 2, No. 3 (2021): 679-684, https://doi.org/10.55357/is.v2i3.195, p. 679.

10 Febby Mutiara Nelson, "In Search of a Deferred Prosecution Agreement Model for Effective Anti-Corruption Framework in Indonesia," *Hasanuddin Law Review* 8, No. 2 (2022): 122-138, https://doi.org/10.20956/halrev.v8i2.3292, p. 122.

Based on the previous studies described above, although they have the same theme as examining a restorative approach, it needs to be understood that this research is substantially focused on discussing corruption crime prevention with a restorative approach through the concept of a deferred prosecution agreement. Based on the background of the problems described above, this study aims to identify and analyze a restorative approach to dealing with corruption committed by corporations in Indonesia through the deferred prosecution agreement.

B. RESEARCH METHODS

This research is descriptive, with the type of normative juridical research, using secondary data in the form of primary legal materials, including Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003 (United Nations Convention Against Corruption, 2003), and Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 regarding Termination of Prosecution Based on Restorative Justice, as well as secondary legal materials and tertiary legal materials. The method used is a statute approach and a conceptual approach which are combined philosophically that there has been a paradigm shift from initially retributive justice to restorative justice, which is the goal of contemporary punishment. Data collection techniques were carried out through document studies and then analyzed qualitatively

C. RESULTS AND DISCUSSION

The limited ability of criminal law from its function/work perspective means looking at how it works or functions. Barda Nawawi Arief identifies several causes that limit the ability of criminal law to deal with crime in the following explanations: 1). The causes of such crimes are complex beyond the reach of criminal law; 2). Criminal law is only a tiny part (subsystem) of a means of social control, which is impossible to address the problem of crime as a very complex humanitarian and social problem (as a socio-psychological, socio-political, socio-economic, socio-cultural, and so on the problem); 3). Using criminal law to tackle crime is only a "kurieren am symptom" (overcoming/curing symptoms). So, criminal sanctions are only "symptomatic treatment" and not "causative treatment"; 4). Criminal law sanctions are "remedium," contradictory/paradoxical, and contain harmful elements or side effects; 5). The punishment system is fragmentary and individual, not structural or functional; 6). Limited types of criminal sanctions and a system for formulating criminal sanctions that are rigid and imperative;

and 7). The operation/function of criminal law requires more supporting facilities and more "high costs."[11]

Jeremy Bentham stated that criminals should not be imposed/used if they are groundless, needless, unprofitable, or inefficacious.[12] Likewise, Herbert L. Packer said that using criminal sanctions indiscriminately/indiscriminately and used coercively would cause the criminal facility to become a "prime threatener."[13]

Corporate crimes are serious, especially those related to the country's economy. Investigations and trials are relatively expensive, slow, and complicated. In this regard, innovation must also have high legal certainty. These innovations have been developed in the United States, Britain, and several other countries.[14] However, judging from corporate crimes' quality, damage, and steps, not all corporate crimes can be resolved with a restorative approach. In some cases, punishment for corporations still has to be carried out, and a restorative approach is not applied if the crime is mala in se (not mala prohibita).

Settlement through formal means usually leaves a feeling of bias for the victim. Justice will be achieved if the justice system has been implemented relatively, and the parameters are only based on the procedural law that has been followed. However, restorative justice is achieved when there is a harmonious relationship between the victim and the crime. The criminal law system chooses to settle criminal acts through a restorative approach as an alternative. Therefore, there must be a settlement system that can apply a restorative approach. To achieve this, Van Ness introduces four restorative approach models, including 1) Unified Model; 2) Dual Track System; 3) Safeguard System; and 4) Hybrid Systems.[15]

Based on the four restorative approach models introduced by Van Ness above, this study will only discuss the restorative approach with the dual-track system model or two-track system. This dual-track system model can be an alternative companion to the existing criminal justice system. In a dual-track model, restorative and conventional processes will coexist, where the parties determine the discourse on the course of the process of a particular case. If an agreement to enter into a restorative process cannot be reached (with the

[11] Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana* (Bandung: Citra Aditya Bakti, 2005), p. 74-75.
[12] Jeremy Bentham in *ibid*., p. 75.
[13] Herbert L. Packer in *ibid*., p. 76.
[14] Michael Bisgrove and Mark Weekes in Mas Putra Zenno Januarsyah *et al*., "The Implementation of the Deferred Prosecution Agreement Concept to Corruption by Corporations with the Anti-Bribery Management System (SNI ISO 37001 : 2016)," *Padjadjaran Journal of Law* 8, No. 2 (2021): 232-254, p. 237.
[15] Van Ness in Rufinus Hotmaulana Hutauruk, *Penanggulangan Kejahatan Korporasi: Suatu Terobosan Hukum* (Jakarta: KPG, 2008), p. 148-153.

consensus of all interested parties), the criminal justice system will remain available. So, in this case, the restorative approach is placed in a primary position, while formal institutions play a role as a supporting element.

In a two-track system, informally, law enforcement officials (police, public prosecutors, and judges) encourage steps that support the actual implementation of medicinal values by allowing victims and offenders to determine whether the case is forwarded to a formal or informal process. Law enforcement officials encourage perpetrators of criminal acts to admit their guilt and express remorse within the limits of their guilt (as evidenced by payment of restitution or compensation). Victims are encouraged to forgive and accept restitution payments or compensation. Communities are encouraged to reintegrate perpetrators who have regretted their mistakes and consider the nature and gravity of the violation when deciding what formal action to take against a particular offender (such as in most democracies with advanced systems of judicial power).

The two-track system primarily pays attention to values and corrective actions to overcome criminal acts. The two-track system also integrates the conditions mentioned above when making decisions regarding the perpetrator's admission of wrongdoing, expression of genuine remorse, payment of restitution or compensation, and forgiveness by the victim. Therefore, the system is willing to adopt the formal penal system to support correctional goals. The same goes for informal processes if these processes are used to support correctional goals.

The law enforcement model against corporate and business crimes accommodates economic and social dimensions. Such a legal approach is urgently needed because corporate and business crimes are violations of criminal law and often come into contact with administrative and civil law aspects. These two aspects of the law have two diametrically different purposes and have traits and characteristics that often conflict with one another. The nature and characteristics of civil law are to maintain balance and harmonization between the interests of the parties, while the nature of criminal law is to deter criminals who have caused loss and damage. Aspects of civil law are more concerned with peace between parties, while aspects of criminal law are more concerned with protecting the public interest and society.[16] Therefore, a law enforcement model that integrates civil and criminal legal processes is necessary so that law enforcement practices can create certainty and justice simultaneously.

[16] Romli Atmasasmita, *Globalisasi dan Kejahatan Bisnis* (Jakarta: Kencana Prenada Media Grup, 2010), p. 76-77.

The concept of a restorative approach through a dual-track system can be concluded using a deferred prosecution agreement. The agreement on the deferred of prosecution referred to by Asep N. Mulyana as one of the integrative law enforcement models that have been practiced against corporate crimes, in principle, is the authority of the Public Prosecutor (JPU) to prosecute criminal acts committed by corporations, but agrees to postpone or does not prosecute as long as the corporation is willing to comply with the terms and conditions set by the prosecutor. The terms and conditions agreed upon between the prosecutor and the corporation are then outlined in an agreement referred to as the deferred prosecution agreement or non-prosecution agreement.[17] A suspension of prosecution agreement is an agreement between corporations that stipulates certain conditions that must be met. Provisions for corporations can include compliance programs, the appointment of integrity supervisors or advisors, or significant monetary penalties.

Deferred prosecution agreements are a new concept in the UK but well-developed in the US. The United States has implemented a deferred prosecution agreements against corporations that are suspected of having committed criminal acts several decades ago. The introduction of suspension of prosecution agreements in the UK has also been driven mainly by the failure of prosecutors to hold corporations criminally responsible for crimes committed on behalf of corporations. This results from the corporate criminal responsibility model, which many criminal law experts consider inappropriate for dealing with modern and global corporations. The successful prosecution of corporate entities takes different forms across legal jurisdictions. However, establishing malicious intent and imposing criminal penalties on corporations is one of the most significant obstacles to the successful prosecution of commercial entities.

The dynamics of the development of the practice of implementing a deferred prosecution agreement in the United States can be divided into 3 (three) stages, as follows: The first stage, in the period 1990. The practice of postponing the prosecution agreement was first carried out around 1990. The government began an investigation into the Salomon Brothers in the case of securities fraud. In 1992, the Salomon Brothers company teamed up with United States prosecutors by paying significant fines and damages, restructuring management, and voluntarily implementing extensive reforms to avoid future wrongdoing. Salomon Brothers' cooperation and

[17] *Ibid.*

commitment to changing the company's culture has convinced prosecutors not to indict and prosecute him. In the second stage, to respond to various fraud scandals involving corporations, then in early 2000, the US Congress passed the Sarbanes-Oxley law.

In July 2002, President George Bush created the Corporate Fraud Task Force to investigate and prosecute significant financial crimes. The emergence of the Enron, Worldcom, and Adelphia cases that committed fraud in their financial statements has prompted United States prosecutors to pay special attention to corporate crime. Many argue that merely imposing a fine on a company that commits a crime is considered insufficient. In the third stage, in 2007, there was 37 suspension of prosecution agreements negotiated by Federal prosecutors. The prosecution suspension agreement was carried out by prosecutorial work units spread across various places in the United States. The implementation of the prosecution suspension agreement, as well as agreements not prosecuting corporate and business crimes, has been widely practiced by various prosecutorial work units in the United States. This phenomenon shows that prosecutors and business people have made agreements on the deferred of prosecutions and agreements not to be prosecuted as a form of legal settlement for violations and crimes committed by corporations.[18]

On the other hand, it illustrates that the reality of law enforcement practices shows no uniformity in the implementation of agreements to postpone prosecution or not to be prosecuted in various work units of the United States Attorney as was done by the prosecutor's office in the Southern District of New York which uses the mechanism of a deferred prosecution or deferred prosecution agreement. A river only separates two prosecutor's offices, also implementing a mechanism for a deferred prosecution agreement that differs from one another. In contrast, other prosecutors' offices choose to use the agreement mechanism not to be prosecuted by not prosecuting corporations involved in a crime.

A suspension of prosecution agreement is a negotiated agreement between a public prosecutor (or, in some cases, the government) and a corporate entity (a corporation) operating in a situation where a corporation has committed a crime under one of several laws.[19] The public prosecutor can offer a suspension of prosecution agreement when the corporation has indicated a

[18] Asep N Mulyana, *Deferred Prosecution Agreement dalam Kejahatan Bisnis* (Jakarta: Grasindo, 2019), p. 239-242.

[19] Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (London: Thomson Reuters, CPI Group, 2011), p. 8.

willingness to cooperate with criminal investigations, acknowledges specific facts, and accepts various conditions that will serve as sanctions, remedies, and consequences for the said activity. The terms of the agreement can impose one of several legal obligations on the corporation, such as 1). Acknowledgement that the alleged behaviour occurred; 2). Payment of fines and compensation; 3). Appointment of an independent supervisor to oversee the functions of the corporate organization for a certain period; 4). Termination of specific corporate staff; and 5). Implementation of the legal compliance program.[20]

Based on the terms of the agreement, the public prosecutor agreed to postpone the prosecution of the crime, provided that the corporation complies with the terms of the agreement during its implementation period. The suspension of the prosecution agreement allows a prosecution to be initiated if the company fails to perform its duties.

According to Thompson, the criteria that must be considered in deciding between a suspension of prosecution agreement and prosecution are 1). The nature and seriousness of the offense, including the risk to public harm, and whether specific policies and priorities apply concerning certain categories of crimes; 2). The "widespread" wrongdoing within the corporation and the existence of high participation or support by an organ in the corporation; 3). Any history of similar behaviour, including previous law enforcement, criminal, and civil actions; 4). Timely and voluntary disclosure of wrongdoing by the corporation, its willingness to cooperate in investigations, and the waiver of privileges concerning advice received; 5). The existence and adequacy of internal compliance and corporate governance systems, together with any improvement or implementation of the program; 6). Steps taken by management to discipline or terminate the guilty person, pay compensation, and cooperate with relevant government agencies; 7). Consequences of bail include disproportionate losses to shareholders, pensioners, and employees for which it is not proven that they are personally liable and any effects on the country arising from prosecution; and 8). Whether the prosecution of individuals liable for violations or other civil or regulatory enforcement action will provide an adequate remedy.[21]

Although the suspension of prosecution agreement is a model of a new law enforcement approach practised in the United States Department of Justice, it has experienced significant

[20] *Ibid.*
[21] Thompson in *ibid.*, p. 13.

developments and received a positive response from corporations and corporate entities. In just four years (2002-2005), many companies have entered into agreements with the public prosecutor in the mechanism of a deferred prosecution agreements known as pretrial diversion agreements. This law enforcement model shows a reasonably rapid trend, with 13 agreements on the deferred of prosecution and agreements not to be prosecuted, as well as 37 pretrial diversion agreements made in 2006.[22] The increasing trend of suspension of prosecution agreements and agreements not to be prosecuted in the United States indirectly reflects the harmony between the goals and functions of crime with the characteristics of corporations and companies in general. On the one hand, the deferred prosecution agreements is felt to provide many benefits for corporations because they can still carry out business activities as usual without being held hostage by various forced efforts by law enforcement officials, whether in the form of the sealing of business premises, confiscation, or detention of company organs.

During the deferred prosecution agreements, each corporation can still conduct business relations with partners, carry out production activities, or provide services to customers who need company goods/services. In the case of corporations working on housing or residential projects, for example, they can continue the construction of their projects while delaying prosecution agreements so that they still pay attention to the fate of the survival of the workforce. Likewise, public funds that have paid down payments and bought housing will be maintained, and the banking sector will continue to support project financing without worrying about criminal proceedings.

On the other hand, the agreement on the deferred prosecution allows the prosecutor not only to prosecute solely from a normative juridical aspect but also allows the prosecutor to make overall improvements to a corporation's governance and business processes. During a certain period agreed in the prosecution suspension agreement, law enforcement officials can voluntarily supervise a company to carry out substantial internal reforms to build corporate governance and comply with statutory provisions. In addition, the prosecutors will also feel helped by the cooperative attitude of corporations in disclosing cases involving corporate entities.

Based on the positive side of the implementation of the suspension of prosecution agreement, many parties

[22] Peter Spivack and Sujit Raman, "Regulating The New Regulators: Current Trends in Deferred Prosecution Agreements," *American Criminal Law Review* 45, No. 2 (2008): 1-28, p. 1.

firmly believe that the suspension of prosecution agreement will become a standard and change the perspective of federal prosecutors in the United States when facing legal violations committed by corporations in conducting business activities. Through this, US attorneys have established a new role in oversight policies for American companies, which are referred to as "the new regulators."

Meanwhile, in Indonesia, the mechanism for dealing with criminal acts of corruption committed by corporations still uses a retributive approach (handling cases through criminal prosecution). This is reflected in the provisions of Article 4 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the Eradication of Corruption Crimes emphasizes that returning losses to state finances or the country's economy does not eliminate the punishment of perpetrators of corruption as referred to in Article 2 and Article 3 of the law. The existence of Article 4 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the Eradication of Corruption Crimes shows that the eradication of corruption in Indonesia is not focused on saving state finances. It can be seen in several cases where corporate actors have been convicted, such as the Giri Jaladhiwana Company and Nusa Construction Engineering Company, where the fines are not commensurate with the number of losses suffered by the state as a result of criminal acts of corruption.

About the description above, it is necessary to reevaluate and reorient the Indonesian criminal justice system to adopt the model of the deferred prosecution agreements in order to optimize the recovery of state losses due to criminal acts of corruption. This thinking is also based on the harmony of the deferred prosecution agreement with the provisions of the UNCAC, which states that each participating country is obliged to consider providing a reduced sentence for suspects/defendants who want to cooperate in solving corruption crimes with law enforcement officials with the aim of law namely justice. In addition, this model also adheres to legal certainty and legal benefits. Consequently, as a dual-track system, deferred prosecution agreements remain in the corridor of settlement through the criminal justice system.

The application of the deferred prosecution agreement in the Indonesian criminal justice system is based on the central issues in criminal law, which include: material criminal law, formal criminal law (criminal procedure law), and criminal law enforcement, especially regarding formal criminal law (criminal procedure law) as a mechanism carried out by Law Enforcement Officials in some instances, in this connection it is also necessary to discuss material criminal law, especially concerning the loss of the right to sue from the state against those who commit a crime.

One of the reasons for the failure of the right to sue is regulated in Article 82 of the Criminal Code, which regulates the state's right to sue if the defendant

has paid the maximum fine for a crime whose type of violation is only punishable by a fine. The provisions referred to in the Netherlands are called afdoening buiten process and transactie, which are oriented to violations and crimes with certain conditions. In addition, the Attorney General's Office of the Republic of Indonesia recently issued a regulation regarding the termination of prosecution, namely the Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice. This is an advancement because it has adopted a restorative approach model in resolving a criminal case.

Even though some regulations adopt a restorative approach in settlement of criminal cases, these regulations limit what criminal cases can be resolved with a restorative approach. This can be seen in Article 5, paragraph (8) of the regulation, criminal cases that are punishable by a minimum penalty and crimes committed by corporations cannot be resolved using a restorative approach. Based on this, when referring to these regulations, corruption crimes committed by corporations cannot be resolved using a restorative approach.

A restorative approach should be used in solving corruption cases by postponing the prosecution agreement. This has the opportunity to return the state's financial losses in total. If this can be used in Indonesia, there should be regulations in the form of laws and regulations, whether regulated by separate laws or regulated in-laws, for example, included in the Criminal Code (as a reference to material criminal law) Furthermore, the Criminal Procedure Code (as a reference to formal criminal law) so that Law Enforcement Officials have legality in entering into agreements to postpone prosecution, and not solely at the discretion of the prosecutor or the Corruption Eradication Commission. In addition, considering that this mechanism requires the ability of law enforcement officials regarding the complexity of cases and requires very high integrity from law enforcement officials, a code of conduct is needed that contains everything that must be obeyed and sanctions if there are deviations from the apparatus. Law Enforcers who handle or are involved in the prosecution suspension agreement from the beginning to the end of the process.

D. CONCLUSION

The restorative approach in tackling corruption committed by corporations through a postponement of prosecution agreements is the ideal model to be applied in Indonesia to recover state financial losses due to acts of corruption committed by corporations. This thinking is also based on the harmony of the prosecution postponement agreement with the provisions of the UNCAC, which states that each participating country is obliged to consider providing a reduced sentence for suspects/defendants who want to cooperate in solving corruption

crimes with law enforcement officials with the aim of law namely justice. In addition, this model also adheres to legal certainty and legal benefits. Consequently, as a dual-track system, deferred prosecution agreements remain in the corridor of settlement through the criminal justice system.

REFERENCES

Arief, Barda Nawawi. *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*. Bandung: Citra Aditya Bakti, 2005.

Astuti, Mirsa, and Muhammad Faris Aksa. "Pendekatan Restoratif Sebagai Alternatif Sanksi Pidana falam Kejahatan Korporasi." *Iuris Studia: Jurnal Kajian Hukum* 2, No. 3 (2021): 679-684. https://doi.org/10.55357/is.v2i3.195.

Atmasasmita, Romli. *Globalisasi dan Kejahatan Bisnis*. Jakarta: Kencana Prenada Media Grup, 2010.

Clinard, Marshall B., and Peter C. Yeager. *Corporate Crime*. London: Collier MacMillan Publishers, 2010.

Hutauruk, Rufinus Hotmaulana. *Penanggulangan Kejahatan Korporasi: Suatu Terobosan Hukum*. Jakarta: KPG, 2008.

Januarsyah, Mas Putra Zenno, Mochamad Ramdhan Pratama, Pujiyono, and Elisatris Gultom. "The Implementation of the Deferred Prosecution Agreement Concept to Corruption by Corporations with the Anti-Bribery Management System (SNI ISO 37001 : 2016)." *Padjadjaran Jurnal of Law* 8, No. 2 (2021): 232-254.

Januarsyah, Mas Putra Zenno, I. Gde Pantja Astawa, Romli Atmasasmita, and Elisatris Gultom. "The Idea of Implementing a Deferred Prosecution Agreement with The Anti-Bribery Management System in Corruption Crime Management by Corporations in Indonesia." *International Journal of Criminology and Sociology* 9 (2020): 1379-1384. https://doi.org/10.6000/1929-4409.2020.09.158.

Mulyana, Asep N. *Deferred Prosecution Agreement dalam Kejahatan Bisnis*. Jakarta: Grasindo, 2019.

Nelson, Febby Mutiara. "In Search of a Deferred Prosecution Agreement Model for Effective Anti-Corruption Framework in Indonesia." *Hasanuddin Law Review* 8, No. 2 (2022): 122-138. https://doi.org/10.20956/halrev.v8i2.3292.

Pujiyono. "Corporation Criminal Responsibility Model Based on Restorative Justice Approach in Indonesia." *Diponegoro Law Review*

01, No. 01 (2016): 127–142. https://doi.org/10.14710/dilrev.1.1.2016.127-142.

Sitepu, Rida Isda, and Rudi Hermawan. "Pendekatan Restorative Justice dalam Pemberantasan Tindak Pidana Korupsi." *Jurnal Rechten: Riset Hukum dan Hak Asasi Manusia* 1, No. 3 (2019): 11-18. https://doi.org/10.52005/rechten.v3i3.61.

Spivack, Peter, and Sujit Raman. "Regulating The New Regulators: Current Trends in Deferred Prosecution Agreements." *American Criminal Law Review* 45, No. 2 (2008): 1-28.

Sprenger, Polly. *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties*. London: Thomson Reuters, CPI Group, 2011.

Tambunan, Marco Parasian. "Pertanggungjawaban Pidana Korporasi dalam Tindak Pidana Pencucian Uang." *Mimbar Keadilan: Jurnal Ilmu Hukum*, 2016, 111-128.