BALANCING JUSTICE AND CORPORATE IMMUNITY: DPAS AND THE 'TOO BIG TO JAIL' DILEMMA ACROSS JURISDICTIONS

Jeevitha R, B.A. LL.B. (Hons.), Damodaram Sanjivayya National Law University, Visakhapatnam

ABSTRACT

Deferred Prosecution Agreements ("**DPAs**)" have emerged as a central tool for resolving corporate criminal liability, allowing prosecutors to defer indictment in exchange for a company's compliance with negotiated conditions such as fines, remedial reforms, and cooperation with investigations. This essay undertakes a comparative examination of DPA frameworks across the United States, the United Kingdom, and Canada, tracing their divergent approaches to judicial oversight, transparency, and discretion of the prosecution. While the U.S. model grants prosecutors near-unchecked authority with minimal judicial review, the U.K. and Canadian regimes embed courts more directly into the approval process, requiring findings that an agreement serves the interests of justice and is fair, reasonable, and proportionate. The essay then turns to the central legitimacy critique of DPAs , the "Too Big to Jail" problem while arguing that their disproportionate use for large corporations undermines equality before the law, weakens deterrence, and sits uneasily with retributive theories of punishment. Having established that DPAs, left unchecked, threaten core rule-of-law values, the essay evaluates the prospects for introducing a DPA framework in India, where no equivalent mechanism currently exists beyond limited compounding provisions under company, tax, and securities law.

Keywords: Deferred Prosecution Agreements, indictment, prosecution, judicial review, justice, Too big to jail.

I. Introduction:

This essay examines the evolving role of Deferred Prosecution Agreements ("**DPA**s") in addressing corporate misconduct, with particular attention to the legitimacy challenges posed by the "Too Big to Jail" dilemma. Justice for corporations often comes not through trials, but through deals raising the dilemma of whether DPAs uphold the law or undermine it. Popular legal dramas have long romanticized the high-stakes negotiations between prosecutors and corporate counsel that precede such settlements, but the reality of these arrangements raises far more sobering questions about accountability and the rule of law.[1] While DPAs have emerged as a pragmatic tool for resolving complex cases of corporate fraud and corruption such as the United States(**"US"**) and the United Kingdom ("**UK"**), their reliance on negotiated settlements raises concerns about leniency, transparency, and equality before the law. This study undertakes a comparative analysis of DPA frameworks in the U.S., U.K., and Canada, and critically evaluates the prospects for their adoption in India. The essay is structured into four key parts. Part I DPAs and examines their relevance. Part II undertakes a cross-jurisdictional analysis of DPAs, focusing on their application in the US, the UK, and Canada. Part III explores the major criticisms of DPAs, particularly in relation to their tension with the rule of law. Finally, Part IV addresses the challenge of corporate crime and considers the potential framework and safeguards for introducing DPAs in India

II. Deferred Prosecution agreements: Background

In recent times, DPA refers to an alternative to the adjudication in which prosecutor and a corporate entity, where the corporation agrees to meet certain conditions, like paying fines or implementing reforms, to avoid criminal prosecution for offenses such as bribery or fraud. Prosecutors offered low-level criminals DPAs in the early and mid-20th century instead of prosecuting them with minor violations. Therefore, the prosecutors were able to prevent young, non-violent offenders from being drawn into the traditional criminal justice process and from bearing the lasting stigma of a criminal conviction.[2]

Traditionally, prosecutors dealt with criminal cases against corporations in two main ways; Firstly, by filing charges and taking the case to trial or by plea bargaining. In recent years, they

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[1] Valerie P. Hans & Juliet Dee, *Media Coverage of Law: Its Impact on Juries and the Public*, 35 Am. Behav. Scientist 136 (1991).

[2] Andrea Amuli, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred Prosecution Agreements in the United States*, 116 Mich. L. Rev. 123, 123–53 (2017).

have increasingly turned to a newer tool for addressing corporate crime that is pre-trial diversion through DPAs and Non-Prosecution Agreements ("**NPA**").[3] Yet there is a critical difference between DPAs and plea bargains: in plea agreements, the court is permitted to approve or reject the negotiated deal based on a meaningful review of its substantive terms.[4] To simplify the position of DPA's, it is a provisional settlement of a criminal case in which the prosecutor agrees to defer the charges against the company in return that the company will abide its contractual agreement.[5] The defendant is exempt from prosecution if the prosecutor determines that the defendant has complied with the requirements of the DPA at the conclusion of the agreement. However, the Prosecutor may initiate prosecution right away if they determine that the DPA's provisions have been significantly violated.

DPAs are commonly applied in cases involving fraud, bribery, and other forms of economic crime. While the United States has relied on them for decades, the United Kingdom has seen a steady rise in their use since their introduction under UK law in 2014. Several other countries, such as France, Singapore, and Australia, have also adopted or are exploring the adoption of DPAs.

III. Deferred Prosecution Agreements: Cross Jurisdictional study

A. United States:

In response to widespread criticism of the Department of Justice's (DOJ) management of the Arthur Andersen case, which culminated in the firm's dissolution, the revised guidelines formally incorporated deferred prosecution as a recognized mechanism for addressing and reforming corporate misconduct.[6] Arthur Andersen, who served as Enron's auditor, approved the company's financial statements despite evident warning signs. Although the firm was initially convicted, the decision was subsequently overturned. For corporations, the case became a cautionary example, illustrating that choosing indictment over even the most stringent settlement could threaten the very survival of a business.[7] In practice, corporations

[3] Brian Grenadier & Steven R. Grenadier, *An Equilibrium Model of Deferred Prosecution Agreements*, Stan. L. & Econ. Olin Working Paper No. 596 (Nov. 22, 2024), https://ssrn.com/abstract=5119619.
[4] Amuli, *supra* note 1.
[5] *Id.*
[6] Gus De Franco, R. Christopher Small & Aida Sijamic Wahid, *The Effect of Deferred Prosecution Agreements on Firm Performance* (Aug. 19, 2019) (unpublished manuscript) (Univ. of Pa.), https://accounting.wharton.upenn.edu/wp-content/uploads/2019/10/De-Franco-Small-and-Wahid-2019-WP.pdf.
[7] Gary M. Cunningham & Jean E. Harris, *Enron and Arthur Andersen: The Case of the Crooked E and the Fallen A*, 3 Global Persp. on Acct. Educ. 27, 27–48 (2006).

enter into DPAs through carefully negotiated settlements with the Department of Justice (DOJ).

Under the U.S. framework, first, the process of a DPA begins with the corporation waiving its right to a grand jury indictment pursuant to Federal Rule of Criminal Procedure 7(b), and consenting instead to the formal filing of an information that sets out the alleged offenses. Second, the company accepts responsibility for the facts stated and further pledges to refrain from making any public statements that contradict its own statements or are involved in a legal dispute.[8] Thirdly, the company consents to pay the fines outlined in the contract, implement specific programs, comply with the court-appointed monitor, and provide reports to the DOJ on a regular basis. Fourth, the corporation must assist with investigations and frequently provide information that implicates the people. Finally, at the conclusion of the agreement, if the company has, in the majority of situations, fulfilled all the obligations within the three-year period. In accordance with Federal Rule of Criminal Procedure 48(a), the prosecution will request dismissal.[9]

DPAs provide government authorities the authority to enforce a specific set of requirements, sometimes involving modifications to governance and compliance as well as monetary penalties, on a company that has consented to be implicated in misconduct. In exchange, the government consents to postpone or forego future prosecution of the company.[10] The Prosecutors, not judges, seem to have the last say on the fines and penalties levied against DPAs. As long as a requirement does not contravene the Constitution, another statute, or DOJ policy, judges do not seem to have the authority to reject it.[11] In the cases such as Fokker Services BV and HSBC Bank have set the parameters for the district court in approving the DPAs. The rulings in *Fokker* and *HSBC Bank* establish an important principle, especially within the D.C. and Second Circuits and potentially beyond and once a federal prosecutor extends a DPA to a corporate defendant and the defendant accepts, the district court lacks authority to decline the agreement on the basis of disagreement with its substantive provisions.[12] Consequently, such agreements proceed with minimal scope for judicial review.[13]

[8] Frederick T. Davis, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*, 60 Colum. J. Transnat'l L. 751 (2022).
[9] *Id.*
[10] De Franco, Small & Wahid, *supra* note 5.
[11] Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. Legal Analysis 191, 191–234 (2016).
[12] Peter Reilly, *Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 Ariz. St. L.J. 1113 (2018).
[13] *Id.*

The U.S. Department of Justice has, in effect, empowered individual prosecutors' offices to use DPAs to impose, interpret, and enforce obligations, but this authority operates with minimal restrictions and lacks robust internal or external oversight.

B. United Kingdom:

In England and Wales, DPA functions as a discretionary mechanism through which designated prosecutors may, with judicial approval, negotiate a formal yet voluntary arrangement with a corporation. This arrangement defers criminal prosecution for alleged misconduct, contingent upon the corporation's compliance with specified conditions.[14] DPA was introduced into English and Welsh law on 24 February 2014 by the Crime and Courts Act 2013. The UK's provision for judicial review of the process and review of the outcome is arguably the most substantial divergence from the U.S. model. A DPA may be entered into in relation to the offences listed in Part 2 of Schedule 17 of the Act, such as fraud, theft, false accounting, forgery, bribery and money laundering.[15] According to Schedule 17, a prosecutor who is considering negotiating a DPA on whether the Director of Public Prosecutions or the Director of the SFO must take two separate measures to seek and get court permission. First, without judicial authorisation, a prosecutor cannot even hold final talks with the legal representative of a corporate defendant. After deciding whether to pursue a negotiated DPA at all, the prosecutor must "invite" a company to see whether it would be interested in discussing one.[16] DPA negotiations includes an evidential stage and a public interest stage. Once negotiations for a DPA commence between a prosecutor and a corporation, but prior to finalizing its terms, the prosecutor is required to seek a declaration from the Crown Court affirming that the proposed DPA is likely to serve the interests of justice, and its terms are fair, reasonable, and proportionate manner.[17]

Under U.K. law, a DPA becomes effective only upon approval by the Crown Court, which is required to provide reasons for its decision on whether to issue such approval. While the application may initially be considered in a private hearing, if the court ultimately authorizes

[14] Tomáš Diviák & Nicholas Lord, *From Text to Ties: Extraction of Corruption Network Data from Deferred Prosecution Agreements*, 5 Data & Pol'y e4 (2023).
[15] Crime and Courts Act 2013, c. 22, sch. 17 (UK).
[16] Jennifer Schöberlein & Roberto Martinez B. Kukutschka, *Prosecuting Corporate Corruption in Europe: An Analysis of Legal Frameworks and Their Implementation Across Selected Jurisdictions* (Transparency Int'l 2019), http://www.jstor.org/stable/resrep20469.
[17] Arlen, *supra* note 10, at 231.

the DPA, both the declaration and the accompanying reasons must be delivered in open court.[18] DPA proceedings are required to be conducted publicly to the greatest extent possible, though this does not render the process fully transparent. Negotiations remain confidential, with both parties bound by mutual confidentiality undertakings. In practice, the decision to grant a DPA primarily rests on three factors: the gravity of the misconduct, the level of cooperation demonstrated by the corporation, and the extent of the company's remedial efforts.[19] Cooperation is a key element of the DPA Code of Practice which was issued when the scheme became law and it involves making a self-report and supplying the documents. The indulgence granted by the court to Rolls-Royce in the case, that a company could secure a DPA in the absence of a self-report so long as it can demonstrate extraordinary cooperation, may give rise to some disquiet. The modest financial sanction imposed on Rolls-Royce has been criticised for undermining the incentives to self-report.[20]

According to King and Lord (2020), U.K. DPAs may be viewed as 'castles made of sand,' insofar as they present the appearance of a strong legal framework but rest on unstable foundations that risk collapsing under the scrutiny of a criminal trial. The concern is that, while a corporation's breach of DPA terms should lead to prosecution, the likelihood of securing a conviction remains low, thereby weakening the overall effectiveness of the mechanism. This structural weakness makes it especially difficult to hold large multinational corporations accountable under criminal law, ultimately eroding the principles of legal equality and diminishing public confidence in both law and business[21]

C. Cannada

In late 2018 Canada enacted a comprehensive DPA procedure called the Remediation Agreement Regime ("RAR"). Like the U.K. model upon which it is largely based, Canada's regime provides for judicial review at several different steps. A prosecutor may propose a remediation agreement to corporations accused of certain enumerated financial fraud, securities, and corruption offenses. The new law mandates court approval of the agreements, which will be granted if the court finds the agreement to be "in the public interest" and terms

[18] Crime and Courts Act 2013, c. 22, sch. 17, ¶ 7 (UK).
[19] Kaunain Rahman, *Consideration of Victims in the Enforcement of the FCPA and the UKBA* (Transparency Int'l 2020), http://www.jstor.org/stable/resrep24895.
[20] Rebecca Cheung, *Deferred Prosecution Agreements: Cooperation and Confession*, 77 Cambridge L.J. 12, 12–15 (2018); Serious Fraud Office v. Rolls-Royce PLC [2017] Lloyd's Rep. F.C. 249.
[21] Nicholas Lord, *Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery*, 63 Brit. J. Criminology 848, 848–66 (2023).

to be "fair, reasonable, and proportionate to the gravity of the offence.[22] The public hearing to consider approval of the agreement may include presentations by both the victims of the misconduct, as well as representatives of the corporate entity accused of wrongdoing. Upon judicial approval of a remediation agreement, both the decision and the underlying reasons must be published at the earliest opportunity. Conversely, if the court declines to approve such an agreement, the decision and the rationale for its rejection are likewise required to be made public without delay.[23]

D. India

DPAs, as recognized in jurisdictions such as the United States and the United Kingdom, are not presently available under Indian law. Indian criminal procedure does not provide for an arrangement whereby prosecution is deferred or suspended conditionally, subject to compliance with negotiated terms between the prosecuting authority and the accused corporate entity. The Indian legal framework, however, does recognize the compounding of certain offences. Section 441 permits compounding of certain offences punishable with fine only or with fine and imprisonment. The application for compounding must be made to the Registrar of Companies, Regional Director, or the National Company Law Tribunal (NCLT), depending on the quantum of penalty.[24] Section 279(2) empowers the Principal Chief Commissioner/Chief Commissioner to compound offences under direct tax laws, subject to CBDT guidelines.[25] Section 15JB read with SEBI (Settlement Proceedings) Regulations, 2018, provides for settlement of civil and quasi-criminal offences through settlement orders.[26] By contrast, DPAs operate on the principle of conditional deferral of prosecution, where criminal liability remains contingent on compliance with the terms of the agreement. Further, Indian settlement/compounding generally requires approval of statutory authorities or courts, while DPAs may be negotiated between prosecutors and corporations though subject to judicial oversight in some jurisdictions like the UK.

[22] Reilly, *supra* note 11.
[23] Norm Keith & Justine Reisler, *The New Canadian DPA Regime: An International Comparative Analysis*, 67 Crim. L.Q. 306 (2019).
[24] Companies Act, 2013, § 441 (India).
[25] Income Tax Act, 1961, § 279(2) (India).
[26] Securities and Exchange Board of India Act, 1992, § 15J (as it currently stands; verify whether your source meant § 15J or § 15-I) (India); SEBI (Settlement Proceedings) Regulations, 2018 (India).

IV. Economic Expediency Over Justice: A critique of Deferred Prosecution Agreements

Theoretically, DPAs may help all parties involved. Prosecutors can get criminal sanctions and extensive internal reforms from corporate wrongdoers in less time and money, while businesses can avoid the potentially severe collateral implications of going through the criminal justice system.[27] Whereas, the critique of DPAs is that they weaken the rule of law, which is exacerbated by their sub-rosa character.[28] According to the deontological principle, wrongdoers should be held responsible for their acts by receiving retributive punishment, even if it has no other beneficial effects such as re-educating them or reducing recidivism.[29]

Retributivism is grounded in the moral principle that wrongdoing necessitates punishment, irrespective of whether such punishment yields positive or negative consequences. From this perspective, DPAs appear ethically problematic, as they conflict with the retributive demand for proportionate punishment.[30] It is often misconceived that a corporation subjected to indictment performs worse than one that has entered into a DPA. This argument is weak, as a comparison of firms subject to different enforcement mechanisms such as DPAs and prosecutions reveals that, on average, companies entering DPAs perform worse in the post-agreement period than those that were prosecuted. Furthermore, there is no evidence that DPAs mitigate negative effects for stakeholders. In fact, the findings indicate that stakeholders of DPA firms face greater adverse consequences after the agreement, both relative to control firms and to prosecuted firms.[31] The Anglo-American legal tradition's core principle is that no one should judge his own case; however, the federal prosecutor's authority to specify the terms of an agreement and choose whether and how to enforce them amounts to a significant concentration of power. Commentators on corporate criminal liability have remarked that federal prosecutors exercise near-absolute authority, echoing the notion that concentrated power fosters corruption.[32]

[27] Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 Harv. J. on Legis. (2015).
[28] *Id.*
[29] Alec Walen, *Retributive Justice*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta & Uri Nodelman eds., Winter 2023 ed.), https://plato.stanford.edu/archives/win2023/entries/justice-retributive/.
[30] Glauco De Vita & Donato Vozza, *The Ethics of Deferred Prosecution Agreements for MNEs Culpable of Foreign Corruption: Relativistic Pragmatism or Devil's Pact?*, 34 Bus. Ethics Q. 605, 605–33 (2024).
[31] De Franco, Small & Wahid, *supra* note 5.
[32] *Id.*

A. The Problem of Too Big to Jail

The 'Too Big to Jail' phenomenon exacerbates concerns of legitimacy, fostering wider criminal behaviour within society. In practice, larger corporations are more frequently granted DPAs compared to smaller firms.[33] These are businesses that have engaged in misconduct, but their vulnerability to unintended repercussions might be very detrimental to society. The effectiveness of DPAs appears to be demonstrated in these situations by imposing severe penalties without a criminal indictment.[34] Public perception is undermined when large corporations are seen as able to bypass the ordinary criminal process. Much like instances where wealthy and influential individuals appear to evade accountability disproportionately, this fosters the belief, that there exist two parallel systems of justice that is one for the elite and another for the broader public.[35] The impact of paying a corporate financial punishment may primarily affect a company's shareholders rather than the corporate insiders who committed the misconduct, raising major questions about whether it has any deterrent effect.[36]

The financial and managerial strain brought on by the DPA's approval may be so significant that it forces the company to streamline operations or implement cost-cutting strategies, which will ultimately hinder its ability to continue operating and result in similar downsizing and detrimental effects on stakeholders. It's unclear if the goal has been achieved.[37] Therefore, existing academic research about DPAs, mostly hosted in the pages of law journals, focuses primarily on the merits and demerits of the jurisprudence of these agreements and their specific implications for criminal enforcement, with insufficient attention paid as to whether DPAs can be regarded as morally acceptable.[38]

V. Bringing DPAs Under the Rule of Law: Comparative Analysis

To begin with, judicial oversight is essential as it not implemented in US law. Judicial review of DPAs must form an integral part of any attempt to align such mandates with the principles of the rule of law. However, strengthening judicial review by itself is not adequate to ensure that the practice of imposing mandates on companies engaged in misconduct fully complies

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[33] Schöberlein & Kukutschka, *supra* note 15.
[34] Todd Haugh & Mason McCartney, *DPA Discounts*, 61 Am. Crim. L. Rev. 35 (2024).
[35] Bourjaily, *supra* note 26.
[36] *Deferred Prosecution Agreements: Code of Practice*, Crime and Courts Act 2013 (Serious Fraud Office & Crown Prosecution Serv. 2014).
[37] De Franco, Small & Wahid, *supra* note 5.
[38] De Vita & Vozza, *supra* note 28.

with rule of law standards. One of the primary objectives of DPA's is to encourage voluntary self-reporting, which may help curb the most serious forms of corruption during the approval stage. There has to be the course of a public hearing to assess the approval of the agreement, both the victims of the misconduct and representatives of the implicated corporate entity may be given the opportunity to present their views.[39] Certain fundamental principles have been adopted in nearly all jurisdictions and they are as follows: First, the terms of the agreement must be subject to judicial or official review to ensure fairness and reasonableness. Second, with limited exceptions, agreements are required to be disclosed and made publicly accessible. Lastly, the DPA framework is established through a formal process of public deliberation. But these components have not played a role within functioning of the U.S. corporate DPA program. In the United States, DPAs are negotiated privately, raising concerns regarding transparency. By contrast, the UK has addressed this issue through a two-stage process: the initial stage is deliberately confidential to shield the entity from adverse publicity should it choose not to proceed with the DPA, whereas once it is determined by the parties and the court that a fair and appropriate agreement can be reached, the proceedings are made fully accessible for public scrutiny.[40] The concept of deviance elasticity suggests that as the gravity of an offence increases, the public interest increasingly demands prosecution, thereby reducing the likelihood that a DPA would be regarded as consistent with the interests of justice.[41]

A. Combatting Corporate crime through Deferred Prosecution Agreements

To effectively deter corporate crime, enforcement agencies must incentivize publicly traded firms to cooperate in detecting and proving misconduct. Such cooperation may take the form of implementing robust compliance programs to prevent and identify violations, voluntarily disclosing detected wrongdoing, and supplying authorities with evidence concerning its scope and the individuals involved.[42] Oversight serves as an additional safeguard on discretionary authority by enabling a secondary actor to evaluate whether the primary decision-maker has acted within lawful limits. Such oversight may be either internal or external. Internal oversight arises when it is exercised by actors within the executive branch itself, whereas external oversight is carried out by another branch of government, most commonly the judiciary. While judicial oversight is generally confined to the approval or rejection of executive decisions,

[39] Norm Keith & Justine Reisler, supra note 22.
[40] *Id*.
[41] Nicholas Lord *supra* note 20.
[42] Arlen, *supra* note 10.

internal oversight can also play a significant role in ensuring that executive discretion remains consistent with the rule of law.[43]

VI. CONCLUSION

In conclusion, even if the implementation of DPAs is a positive step, other components must fit together to form a cohesive system to fight corporate crime. If DPAs are to be established in India, then it would be by proper means and provisions. A comprehensive legal framework that defines DPAs, admissible offences for white collar and economic crimes, and excluded acts should be in place. Similar to the UK, the judicial review structure must be put into place and all DPAs must have High Court approval. Courts must evaluate whether the DPA serves the interests of justice and if its provisions are reasonable, fair, and proportionate. Organisations that self-report misbehaviour and show significant cooperation with authorities during investigations should be the only ones granted DPAs. In India, a significant portion of crimes remain unreported, and the crime is made public during the inquiry. Direct corrective actions, compliance initiatives, and continued collaboration with enquiries into those accountable for misconduct inside the company.

The foregoing analysis demonstrates that India's predominantly punitive approach has not yielded the desired results in addressing corporate misconduct. It is therefore necessary to explore alternative models that can more effectively and efficiently tackle white-collar crime. In this regard, a UK-style DPA framework, adapted to the specific requirements of the Indian legal system, presents a promising solution. For India, the lessons from these jurisdictions suggest that a wholesale transplantation of foreign models would be insufficient. Instead, a carefully designed framework is needed one that restricts eligibility to serious financial and corporate offences, incorporates strong judicial oversight, mandates transparency, and requires corporations to self-report and demonstrate genuine cooperation. Such a framework would not only align DPAs with the principles of justice and fairness but also provide India with a more balanced and effective mechanism for addressing white-collar crime. In this way, DPAs could evolve into a tool that strengthens, rather than weakens, the rule of law. The true test of DPAs lies not in their adoption, but in whether they can uphold justice without compromising the rule of law.

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[43] De Vita & Vozza, *supra* note 28.