

## **Restorative Justice In The Settlement Of Traffic Accident Cases (An Approach To Criminal Law Reform)**

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**Abstract:** This study aims to discover, analyze and find out the nature of criminal law policy in the settlement of traffic accident cases, the implementation of criminal law policies in the settlement of traffic accident cases and the ideal concept in solving traffic accident cases. This is normative-empirical research and, therefore in its study on normative law (legal research) this research uses descriptive approach (descriptive research). The results of this study indicate that the essence of restorative justice in the settlement of traffic accident cases is the transfer of the settlement of traffic accident cases from the criminal justice process to the process outside the fair criminal justice with an emphasis on restoring the original state, rather than looking for retaliation. The implementation of diversion in restorative justice in the settlement of traffic accidents is handled through formal procedures. The factors influencing the implementation of diversion in restorative justice in the settlement of traffic accident cases are legal substance, human resource apparatus, facility and infrastructure and victim/victim family.

**Keywords:** Restorative Justice, Traffic Accident, Law Reform

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### **I. INTRODUCTION**

The current development as *das sein*, research indicates that the number of traffic accident cases is increasing. Based on the Data from the Traffic Directorate of Regional Police Office of South Sulawesi, from 2013 to 2017 there have been 10,209 traffic accident cases. The death toll of these traffic accidents in South Sulawesi is 910. In more detail, from this number of accident cases, Makassar has the highest cases at 5,362, followed by Bone at 2,032, then Gowa at 1,612, Takalar at 740, and Tana Toraja at 463 cases. Meanwhile, in the Police Station Areas of Barru, Maros and others it ranges from 100 to 200 traffic accident cases.<sup>1</sup>

It is not uncommon that in practice the police as an investigator, particularly in dealing with traffic cases which lead to injury or death to others, can accept its settlement to be made beyond the court. This is possible since the law fail to accomodate all actions existing in the community.

This settlement process is made by the relevant parties themselves for they agree to settle it without having to go through complicated process which might takes time to finish. This extra-court settlement of traffic accident cases involves the police as investigators and law enforcers who are tasked as a mediator of each party (Penal Mediator), wherein the police endeavor for the perpetrator and the victim family to have a deliberation to reach an agreement to settle the case amicably.

The penal mediation by the Police Office constitutes an implementation of rules/norms implied in Law of the Republic of Indonesia Number 2 Year 2002 concerning Indonesian National Police (particularly Articles 16 and 18). This penal mediation by the Police Office implies the people's response to the police's performance in dealing with traffic accident cases, since this penal mediation institution indeed constitutes the police's positive attempt in settling traffic accident cases through a way beyond the court/Alternative Dispute Resolution (ADR)<sup>2</sup>.

One approach employed to deal with various legal chaoses as depicted above is the restorative justice approach. This restorative justice approach in settling penal cases is considered as a new method, even though the patterns it uses have mostly rooted in the local people's wisdom values.

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<sup>1</sup> Darul Amri Lobubun, Journalist for Tribun Timur Makassar <http://makassar.tribunnews.com/2017/12/26/6762-kasus-kecelakaan-lalu-lintas-di-sulsel-sepanjang-2017-makassar-tertinggi>, accessed on 4 January 2018.

<sup>2</sup> Roeslan Saleh, Mr, 1984. *Segi Lain Hukum Pidana*, Jakarta: Ghalia Indonesia, p.14

The restorative justice approach concept is an approach which emphasizes more on the condition wherein justice and balance is created for a crime perpetrator and their victim(s). The penal trial mechanism and procedure focusing on sentencing is changed into a dialogue and mediation process to reach an agreement for settling the penal case in a more fair and balanced manner for both the victim(s) and the perpetrator.

The restorative justice approach can be applied in enforcing the penal law in traffic field. Traffic accident cases are part of penal law whose characters and settlement are different from general penal law.<sup>3</sup> Such a case approach and handling, when implemented using the general Penal Procedural Law, cannot achieve the final goal of justice seeker to settle the problems they encounter and, on the contrary, it can even give birth to injustice.<sup>4</sup>

The application of restorative justice approach is deemed appropriate to settle traffic accident cases. In general, in traffic accident cases the perpetrator meets the negligent, rather than intentional criteria. If the imprisonment sentence is applied, then the convict will placed into a penitentiary for the purpose of making the convict a better person. However, the life within penitentiaries in Indonesia has not succeeded in making its inhabitants better persons considering that most of these penitentiaries have overcapacity.

At the beginning of February 2017, the Directorate General of Penitentiary even records that five penitentiaries have overcapacity of greater than 500 percents from its actual capacity. From 33 Provincial Offices, 28 of them have overcapacity of detainees and inmates. Class IIA Penitentiary in Jambi is the most-occupied at an overcapacity more than 700 percent.<sup>5</sup>

This not-so-supportive condition of most penitentiaries can counterproductively turn convicts who actually never have ill intentions will turn into malefactors as they enter the life in penitentiaries. The clash between inmates and prison guards in Class I Penitentiary Tanjung Gusta, Medan, North Sumatera, March 2017 is an example of this case.

To deal with this, a shift in paradigm is needed. The imprisonment sentence which initially serves as a penal means in settling traffic accident cases needs to be reconsidered by procuring its prevention through the application of restorative justice. The arrangement regarding the application of restorative justice to traffic accident cases, particularly those traffic accidents which causes others to lose their lives have not been expressly governed in any law, particularly Traffic and Road Transport Law.

The restorative approach in settling traffic accident cases can be applied at each stage in the penal trial system, namely the police, attorney's office and court.<sup>6</sup> On the contrary, however, the settlement is frequently made at preliminary and full investigation stages under the police's discretionary authority. When the restorative justice approach is applied at the police office, it will be more efficient, effective and useful to deal with traffic accident cases. In reality, the application of restorative approach in settling traffic accident cases by the law enforcer apparatus find many obstacles. These obstacles can come from the law enforcer apparatus' ability, the victims, the perpetrator, the society and the available facilities and infrastructures.

From this phenomenon, it is suspected that the currently applicable penal law cannot fully meet people's sense of justice. It is also suspected that there has been a law which grows and develops together with the people. It is suspected even further that people demand some reconstruction to the justice concept in the national penal law according to the law living in the community. Based on the foregoing, an indication exists that the application of restorative justice to traffic accident case settlement has not find its ideal form. Additionally, many law enforcer apparatus, particularly the police, have not applied restorative justice approach in settling traffic accident cases for various reasons.

## II. RESEARCH METHOD

This is a normative-empirical study, and therefore in its normative law review (legal research) this study uses descriptive approach, i.e. an approach in legal research to analyze the normative provisions and give a description by viewing the law as what is written in the regulations of law (law in books) or as a norm used by

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<sup>3</sup> Penal Law in Indonesia is divided into two, namely General Penal Law and Special Penal Law. Per definition, General Penal Law can be defined as regulations and law on crimes and they apply in general. Meanwhile, the Special Penal Law is defined as the regulations and laws in certain fields which have penal sanctions, or the crimes governed by special laws, other than KUHP... Azis Syamsuddin. 2013. *Tindak Pidana Khusus*. Sinar Grafika, Jakarta. p.8.

<sup>4</sup> Ridwan Mansyur. 2006. *Persidangan Perkara Berperspektif Gender*. Yayasan Obor Indonesia. Jakarta. p. 361.

<sup>5</sup> Akbar Hadi, Head of Sub-Directorate of Communication at Directorate General of Penitentiary, <https://databoks.katadata.co.id/datapublish/2017/02/07/5-lapas-di-indonesia-over-kapasitas-lebih-dari-500> accessed on 6 January 2018.

<sup>6</sup> Mahfud MD. *Restoratif Dalam Penegakan Hukum*, Paper, Ditreskrimsus Polda Kalsel 27 July 2013

everyone in living in their community as a guideline to behave, including the law enforcer apparatus in settling traffic accident cases which causes others to die by applying the restorative justice principles in the traffic accident case settlement.

### III. RESULT & DISCUSSION

The discussion on the meaning and definition of crimes which are not necessarily deemed as the state's responsibility to settle is highly important in restorative justice approach. The state should be able to give an example that a solving a problem constructively is the right way in dealing with conflicts, and the parties are authorized to solve their disagreement themselves and the state only ensure that a fair and thorough recovery process has been done. This way, the authority to sue or adjudicate that the state has will be exercised only when the perpetrator fail to compensate the loss adequately.

Traffic accident is a crime, and it is governed in Article 310 paragraphs (2), (3), and (4) of Law Number 22 Year 2009 on Traffic and Road Transport.<sup>7</sup> Before the Traffic and Road Transport Law is enacted, traffic accidents are deemed only as private matters. The Traffic and Road Transport Law is deemed as a legal breakthrough since it places traffic accidents, previously deemed only as a negligence (*culva*), as a criminal act/crime to which the public law shall apply. In Public Law, in this case the penal law, any arising problem shall be assigned to the state through a trial system for its settlement. The settlement process in penal trial system does not involve either the perpetrator or the victim. Both the victim and perpetrator play only minor role and no room is available for the perpetrator and victim to find a more personal justice.

In addition to being harmful to the victim and their family, the traffic accident cases also harm the surrounding community. The people are forced to witness injustice and crime occurring in their vicinity. Sometimes these people are involved when the traffic accident victim experiences physical, psychological, and social problem as a result of the traffic accident. Therefore, the community needs to be involved in settling traffic accident cases. The intensive and thorough settlement of traffic accident cases does not target the victim, perpetrator and their family only, rather it also targets the surrounding people involved with their traffic accident issue. The involvement of perpetrator, victim, family and community has conformed the definition of restorative justice according to Tony F. Marshall who suggests that restorative justice approach is a process of settling a criminal case which involves all related parties to eventually collectively find the solution and also settlement in facing the events after the crime exists and to find a way to deal with it in the future.

Restorative justice approach is a new paradigm in responding to the occurrence of a crime.<sup>8</sup> Douglas H. Yarn states that restorative justice focuses on the suffering or loss suffered by the victim, rather than the sentencing of the perpetrator. The sentencing to the perpetrator brings no benefit to the traffic accident victim. On the contrary, it will cause many more problems considering the limitations of penal law in dealing with crimes. Barda Nawawi Arief suggests that the penal law's limited ability is partly due to the nature/essence and function of penal law itself. The penal (law) sanction so far is not a medicine obat (*remedium*) to deal with the causes (sources) of illness and it also contains the dangerous negative elements.

The settlement of traffic accident issues through penal mediation method, in principle, is done by the police to accelerate and facilitate the case settlement both parties can benefit from.<sup>9</sup> The sentencing which is personal in nature does not touch the victim's interest. The limited types of penal sanctions governed in Traffic and Road Transport Law weaken the penal law application even further. The Traffic and Road Transport Law only sets forth the penal sanctions singularly or cumulatively, i.e. imprisonment and fine.

An update of penal law which is oriented to traffic accident victim is needed as an embodiment of administration of Indonesia as a nation of law to allow everyone to gain the access to justice (not just the perpetrator) and as a balanced policy in the penal law update. Thus, the update of penal law shall neither merely prioritize the perpetrator's interest protection and ignore the victim's interest, nor prioritize the victim's interest protection and ignore the perpetrator's interest. The attention paid to the victim is demanded in recent development to prevent the impression as if it pays attention only to the perpetrator's rights, rather than the victim. This has been a need since the suffering of a crime victim in general and traffic accident victim in particular, is not adequately considered by the penal trial system. On the other hand, the policy of crime prevention through a penal trial system focuses too much on the crime perpetrator and less consideration is

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<sup>7</sup> Subekti, Lushiana Primasari, Model Penyelesaian Perkara Kecelakaan Lalu Lintas (Studi Kasus Di Kepolisian Daerah Jawa Tengah), *Yustisia Jurnal Ilmu Hukum*, Vol. 3, No. 2, 2017, p. 43.

<sup>8</sup> Nefa Claudia Meliala, Pendekatan Keadilan Restoratif: Upaya Melibatkan Partisipasi Korban Dan Pelaku Secara Langsung Dalam Penyelesaian Perkara Pidana, *Jurnal Veritas Et Justitia*, Vol. 1, No. 2, 2015, p.116

<sup>9</sup> Akbar Hairuddin, Legalitas Penyidik Polri Pada Penyelesaian Perkara Kecelakaan Lalu Lintas, *Lex Et Societatis*, Vol. 4, No. 4, 2016, p. 11.

given to what the crime might result in to the victim in every decision made. The crime victim becomes a subject to secondary victimization as a result of formal reaction to the crime by the penal trial system authority.

The penal law update (both formal and material) which is oriented towards the traffic accident victim needs to be provided with a robust foundation to allow the interest of victim and the community experiencing the suffering and loss is legally protected. The victim needs immediate attention, hence a victim-oriented law and justice enforcement policy by considering the victim's perspective and restorative justice needs to be considered, such as by amending Law Number 22 Year 2009 concerning Traffic and Road Transport.

The essence of this restorative justice is the respect to human dignity. Human is both personal and social creature who cannot completely be separated from errors and mistakes. The problem is that the person authorized or entitled to pass a punishment to others who are considered to have committed a crime or violated a regulation of law is not necessarily better than the punished ones. Furthermore, the law on which the punishment passed is based does not necessarily have the justice integrity. In divine philosophy, it is God who is the most fairest, most cleanest from any mistakes, most omnipotent and most eternal. Therefore, it is God who most deserves to pass punishments. In addition, humans should be forgiving each other, completing each other and protecting each other among themselves. For the victim suffering from loss, it will be more useful if their loss is compensated, remedied or restored to its initial state. And to perpetrators, a chance is given to reflect on and remedy their mistake as well as reconcile the victim and perpetrator. This is needed even more if the parties used to have intimate relationship such as a husband and a wife.

People still think that their problems, including traffic accident is a domestic one which should never be brought to penal law domain. It is better for traffic accident issues to be settled amicably since the parties involved are members of some families and community. The traffic accident settlement through a penal law process is deemed to have not successfully provided good solutions since it ends up in sentencing (imprisonment) which can harm the harmonious relationship in the society, disrupted family economy particularly the sustenance for children and this can even further end up in the abandonment of children and family.<sup>10</sup>

The above event is one story to happen as a result of traffic accident case settlement which does not prioritize deliberation and amicable resolution. The losses suffered by the victim will be greater, thus any traffic accident case ought not to be immediately settled using a penal law process. This is more needed when the traffic accident results in heavy injury or death if this result is not what the perpetrator aims.<sup>11</sup> What needs to be emphasized more is the concept of utilization or penal mediation or amicability as a form of restorative justice to achieve the state's goal.<sup>12</sup>

In determining whether an individual can be held penally responsible, what should be noted is the relatedness between thought, feeling, and action as important elements in determining the mistake and making legal decisions for this mistake. This assumption actually confirms 2 (two) important criteria to demand for penal responsibility, namely *mens rea* (guilty of mind) and *actus reus* (guilty act). The first criterion, *mens rea*, suggests that the subject is said to commit a crime and therefore deserves to be held legally accountable if this subject is well aware and understands what he/she does. In other words, the subject is in his/her adequate mental capacity to be subjected to legal responsibility. However, these awareness and understanding are insufficient to determine that an individual commits a crime. It should also be proven that the subject commits or actually commits the crime he is accused of (*actus reus*). The second criterion, *actus reus*, is important because it becomes the most crystal clear evidence that the suspect is not just aware of it, yet he/she has the ability to commit the action he/she is accused of. If the traffic accident occurs due to the perpetrator's negligence, is committed once and not a repeated accident, then, in the researchers' opinion this perpetrator does not have to undergo any penal law process.

Social justice consideration is a robust reason to apply restorative justice approach to traffic accident case settlement. Traffic accident cases will influence not only the relationship between the perpetrator and the victim, rather it also affects the relationship between the perpetrator and the children, the big families of both parties and the community. Thus a thorough remedial attempt is needed, rather than only to the victim. The restorative justice approach to traffic accident case settlement will lead the victim and the perpetrator to a peace, hence they can continue to live better in the future. Their relationship with the big families and surrounding community will also be maintained and harmonious, since the accident will also have some influence on the big families of both parties and the society.

Based on the philosophical, juridical and sociological considerations above, the concept of traffic accident settlement through restorative justice approach can then be implemented by procuring a penal

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<sup>10</sup> Processed from an interview with a Public Figure.

<sup>11</sup> Interview with victim's (SF) parents on 22 June 2018.

<sup>12</sup> Edi As'adi, Problematika Penerapan Asas *Recklessnes* Dalam Perkara Perspektif Pembaharuan Hukum Lalu Lintas Di Indonesia, *Jurnal Dinamika Hukum*, Vol. 14, No. 3, 2014, p.501

mediation. This penal mediation is made in the effort of shifting traffic accident cases from a penal trial process to something beyond it or non penal.

The penal mediation offered can be implemented through two models. The first model is where the parties choose to settle their problem themselves through the help of their families before reporting the results to investigators and revoking the report at the same time. The mediation made by the investigators is limited to only gathering the victim and the perpetrator, giving information regarding the condition they are about to face should their traffic accident case be brought to a court and suggesting the two parties to settle it amicably. When an agreement is reached to settle it amicably, then the perpetrator shall make a statement letter that he/she will not repeat the accident to the victim. This model is adopted from the *Conferencing* model which is applied in Wagga-Wagga, New South Wales State. Their cases used to be settled under the coordination of police office. The police plays a role as a single gate keeper and determine and select the case which can be settled through *conferencing* model. In South Australia State, it is known as "*family conference*" model.

Secondly, the investigator plays the role of a party who guides and helps find the solution of the problem. The second mediation model has something in common with the mediation model in HALT program. HALT program which is applied in the Netherlands is one of the causes why some penitentiaries in the country are empty. The Dutch legal system recently focuses more on neither accusing of nor detaining a crime perpetrator, rehabilitating, sentencing only short-time verdict, enrolling to skill-learning program and resocializing to the community.

This HALT program is implemented by the police by gathering the crime perpetrator and the victim and his/her family. The effort of leading the parties to come to a term is known as penal mediation. This mediation model should still under the police supervision without having to worry that the police will act not independently, since to traffic accident cases the parties have a very close relationship.

The penal mediation in traffic accident case settlements must be under the police's supervision. According to Douglas H. Yarn, this is what distinguishes penal mediation from Alternative Dispute Resolution (ADR) known in civil law. The penal mediation must remain at the penal trial stage, thus the supervision by the police in Indonesia is still highly required.

The weakness of applying diversion to legal cases involving children as the perpetrator is the difficulty of bringing together the perpetrator and the victim. In traffic accident cases, the investigators have no difficulty in bringing together the parties. The initiatives of traffic accident case settlement through mediation include:

1. On the advice of the police investigator
2. On the initiative of the perpetrator or his/her family
3. At the initiative of the victim or his/her family
4. On the advice of public figures.

Investigators will usually give sufficient time for the parties to ease their emotions and then serve a summons for investigation and the parties are always present as scheduled. The parties will be brought together to be advised to reconcile as well as provided with an overview of the legal process they will have to go through should the case continues to be brought to the court.

Another weakness of diversion is that this institution might be used as a tool by the victim or his family to request enormous compensation to the perpetrator, so that it seems that there has been an "extortion" from the victim to the perpetrator. This weakness, however, is not experienced by the perpetrator in traffic accident cases. Most of the traffic accident victims only request a statement letter that the perpetrator will not repeat his/her action, then they give voluntary forgiveness. This is possible since the parties agree to settle it amicably.<sup>13</sup>

The diversion in the SPPA Law is applied at every stage of juvenile penal trial, yet in traffic accident cases it is ideally applied at the stage of police inspection. **The application of diversions in the traffic accident case settlement at its stage in the police office** will be more effective than if the parties must face each other in a court to prove each other's mistakes.

The integrity and harmony of a happy, safe, friendly and peaceful society is the dream of every person in the community. Realizing this integrity and harmony of the community depends highly on everyone in the community. The efforts to create a complete and harmonious society are taken not only by making peace efforts, rather it also involves choosing a good solution for every problem in the community.

One of the appropriate approach to deal with many legal chaoses above is Restorative Justice approach. Restorative justice approach in settling penal cases is thought as a new method, even though the patterns it uses have mostly rooted in the primitive people's local wisdom values.

The concept of restorative justice approach is an approach which gives more emphasis on creating justice and balance for both the crime perpetrator and his/her victim. The penal trial mechanism and procedure which focus

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<sup>13</sup> Processed from an interview with the unit chief and investigators in traffic accident unit.

on punishing is changed into a dialog and mediation process to reach an agreement for settling the criminal case in a fairer and more balanced manner for both the victim and the perpetrator.

The restorative justice is present as an alternative solution to criminal acts including traffic accidents. Restorative justice is basically in accordance with local wisdom, customary law and religious teachings. provides an alternative traffic accident case settlement by providing the opportunity for the parties to participate and deal with the consequences. Restorative justice approach can re-create balance in the lives of people who were affected by the occurrence of a traffic accident.

Restorative justice must also be supported by law enforcer apparatus, particularly the police. Police officers can think and act progressively by not only implementing the rules textually, rather they need to break through the rules since a fair law is the law for humans, not the other way around. The positive impact of restorative justice approach is that it changes the negative image of law enforcement by the police which in the common people's perspective is something "scary" and full of cheats. The application of restorative justice by the police will bring the law closer to the values of local wisdom in the community, including family values.

#### IV. CONCLUSION

The Indonesian penal law policy in traffic accident case settlement with restorative justice approach both in terms of material and formal penal laws has not been fulfilled. The formulation of the type of traffic accident cases is still too broad and unclear. The penal provisions only include imprisonment and fines, thus no attempt is made to restore the victim's condition. The process and procedure of traffic accident case settlement do not involve the participation of public figure, and child protection institutions.

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