

# Penal Mediation in the Dispute Settlement of Traffic Accidents in Indonesia

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**Abstract-** Penal mediation by using a restorative justice approach has been considered as the best way to speed the dispute settlement process of the traffic accident in Indonesia. This approach is not only quick and simple, but it is also cost efficient. However, discussion on this issue appears to be limited. For that reason, this paper aims at discussing penal mediation in the traffic accidents dispute settlement in Indonesia. This study found that penal mediation of traffic accident dispute in Indonesia is quite different in comparison to the type of mediation in several countries. In Indonesia the mediation process consists of the agreement from parties involved and restitution from the offender to the victim. Such restitution could be in form of apology or in the form of compensation agreed by both parties. Settlement through this mediation can be considered as a negative form of law enforcement. Therefore, mediation through this way should be in accordance of the positive law.

**Index Terms—** Penal mediation, traffic accidents, dispute settlements, restitution, law enforcement, positive law.

## I. INTRODUCTION

Traffic disputes are problems that are not only faced in developing countries, but also in developed countries. However, these problems in Indonesia become severely complex, particularly towards traffic accidents (Arif Budiarto and Mahmudal, 2007). In the last 10 years, for instance, traffic accident that occurred in Indonesia has claimed lives an average of 10,000 lives per year. Marka (2004) estimated that about 332 people died in 1000 accidents in Indonesia. Apart from death casualties, traffic accident also caused financial or material loss. In Indonesia, such loss is estimated around 41.3 trillion rupiah (Marka, 2004). Therefore, if there is no strategic steps to improve safety and traffic law compliance, the loss will be much greater.

Of the many reasons of traffic accidents, the increasing number of vehicles in Indonesia is indeed as one significant reason causing traffic accidents. It was recorded that the number of vehicles has increased from 24,671,330 in 2000 to 32,774,299 in 2013. The increasing number of vehicles, however, has not been accompanied by the increasing roads and streets. Thus, it is not surprising these problems caused traffic accidents.

This paper aims at discussing penal mediation in the traffic accidents dispute settlement in Indonesia. However, as the analytical background, the following section deals with the state of the art of laws as well as factors in regulating traffic and road transport in Indonesia in section 2. This is followed by mediation rules in the national law in section 3. Section 4 discussed the advantage of penal mediation. Finally, concluding remarks are drawn in section 5.

## II. LAWS AND FACTORS IN REGULATING TRAFFIC AND ROAD TRANSPORT

It is understandable that the traffic and public transportation has a strategic role in supporting the development and national integration as part of efforts to promote the general welfare, as mandated by the Constitution of the Republic of Indonesia Year 1945 which stated that traffic and road transport as part of national transport system, should be developed to embody the potential and role of security, safety, order, and efficient transportation in order to support economic and regional development. Thus, the strategic environment development of national and international requires the implementation of traffic and public transportation in accordance with the development of science and technology, regional autonomy, and State accountability. Therefore, in the implementation of traffic, there are 4 (four) main factors that must be considered, as follows:

- a. Traffic safety and public transportation is a state of freedom of any person, goods, and/or vehicles of nuisance, criminal act, and/or fear in the means transport.
- b. Traffic safety and public transportation is a condition of avoiding any risk of accidents during the transportation caused by humans, vehicles, roads, and/or the environment.
- c. Traffic order and public transportation is a situation which takes place regularly in accordance with the rights and obligations of all road users.
- d. The well ordered traffic and public transportation is a condition of obstacle free conveyance, including the absence of traffic jams.

Article 3 of Law No. 22 of 2009 stated, Traffic and Transportation is held with the aim of the following:

- a. The realization of the implementation of secure, safe, orderly, well-organized traffic and public transportation as well as integrated with other mode of transport to encourage national economy, promote the general welfare, strengthening the unity of the nation, and able to uphold the dignity of the nation;
- b. The realization of nation culture in traffic ethics; and
- c. The realization of the rule of law and legal certainty for the community.

Understanding Article 3 of Law No. 22 of 2009 means the Traffic and Public Transportation held with the objectives as stated in the letter b and c will be achieved if people's behavior in law of traffic law reflects legal awareness. Such awareness

became the main object in this "Assessment Law" program. Legal awareness is perceived from how society views the traffic violation and their behavior towards traffic violation evidence (speeding ticket).

Against traffic violations, the metropolitan police of DKI Jakarta, for example, held various "Traffic Operations", namely:

- a. "Operation Ketupat", held in order to support the well-ordered operation of Muslims in celebration of Eid Adha and Eid Fitri and has become a national issue of "homecoming";
- b. "Operation Lilin", held in order to support well-ordered transportation for the Christian during Christmas and New Year celebration as well as dealing with terror issues of vandalism of churches;
- c. "Operation Zebra", held in the means of prosecution of all forms of violation of security and on the highway;
- d. "Operation Simpatik", held in order to maintain calm and ordered conditions when coinciding with national events such as elections, as well as international events such as ASEAN, APEC, ASEAN GAMES. Such operations are more of a warning and the call to comply with the law;
- e. Backup is done in order to support the function of the sense case of drugs, terrorism and vehicle theft;
- f. "Operation Kawasan", done in order to support the authority of the government and public awareness in certain areas, for example in the main road.

Not all traffic operations above involve a speeding ticket, only in the "Operation Kawasan", for example, the officer that entitled to give away tickets is only police who be in charge in that area. Prosecution of traffic violations and public transport system is also implemented based on a quick investigation, which can be classified into:

a. examination of the misdemeanor conducted in accordance with the provisions of the legislation.

b. case investigation of the particular Law Traffic and Public Transportation offenses is implemented by issuing speeding tickets.

Unfortunately, penalties in the form of a ticket, apparently is no longer feared by all road users. Proved by many road users who involved in various forms of abuse. There are 5 categories of road users, which are pedestrians, two-wheels riders (motorcycle) three-wheels riders (bajaj, rickshaw), four-wheels riders (private car, public transports, taxi), six-wheels riders or more (buses, trucks). Each of these forms of abuse often show distinctive. Pedestrian crossing roads not on the bridge or zebra cross. Motorcycles often use pavement reserved for pedestrians, parked haphazardly, driving without a license, do not use a helmet, do not use a turn signal to turn left and right, or do not have a rearview mirror. Bajaj driver suddenly swerved often without notice or giving signal. The taxi drivers sometimes involved in crimes such as robbery mode. Public transportation speeding frequently and risk the lives of their passengers. While the general car drivers, in addition to speeding, also likes to stop abruptly without proper notice, tend to pick up / drop off passengers in the middle of the road, and stopped long enough in addition to stop waiting for passengers. Similarly, the bus driver in the city or between cities, they often perform the same offense by the public four-

wheeled vehicle driver. While the 6-wheeled vehicle driver such as trucks often get into the type D (street district) that should not be passed because of the large weight of the vehicle. Such traffic disorder will result in injury to other road users such as the death of the victim or injured due to the accident.

Indonesian National Police (locally called as Polri) is a tool of the state that plays a role in the maintenance of security and public order, law enforcement, protection, guidance, and service to the community within the framework of maintaining internal security. Therefore, the police are required to continue to develop into a more professional and more close to the people. In other words, the police are required to develop its institution into a civilian police force. As a civilian police, then the position of the police in the state organization has a dominant influence in the organization of professional police force proportionally and as a condition of supporting good governance (Sadjijono, 2008). Thus, the reduction in traffic accidents, police as the responsible party, in a professional manner, attempting to reconcile the parties involved in the accident by way of penal mediation, or better known as penal mediation.

The existence of disputes settling out of court through penal mediation is a new dimension studied from both theoretical and practical aspects. Examined from the practice dimension, penal mediation will be correlated with justice achievement. Simultaneously, the increasing number of violation and crime that continue to trial will consequently become a burden to the court in examining and deciding cases according the principle of efficiency, simplicity and low cost without compromising the goals of justice, which is legal equity, expediency and justice. Whether all kinds of criminal cases must be filed and resolved in court, or if there certain matters, which allows to determine through penal mediation pattern. On polarization and penal mediation mechanisms, as long as it is earnestly desired by all parties (suspects and victims), as well as to achieve a wider interest, which is social harmony.

While the legal basis for the National Police to settle a criminal case out of court or alternative dispute resolution by way of peace, is as follows:

a. settling disputes out of court on the basis of the law by way of peace, according to the legislation, namely:

1. Article 3 paragraph (1) of Law No. 14 of 1970 on Judicial Power, National Document No. 74 of 1970 stated "All courts in the entire territory of the Republic of Indonesia is a judicial state and determined by the Constitutional Law.

Explanation: This article implies that only State Courts are allowed to performed judicial activities. While disputes resolution out of court on the basis law by the way of peace or by arbitration is still allowed.

2. Article 3 paragraph (1) of Law No. 4 of 2004 on Judicial Power, National Document of 2004 No. 8 which has been amended several times, the latest by Law No. 48 of 2009 on Judicial Power, stated that all courts across the country Republic of Indonesia is a judicial state and defined by statute; stated in the description: "This provision does not preclude the settlement done outside the country through peace or judicial arbitration".

3. Article 3 paragraph (2) of Law No. 4 of 2004 on The Power of Judicial State implements the law and justice affirmed based on Pancasila.

According to Benny Riyanto (2010), the main advantages of a settlement (including criminal cases) out of court with the alternative dispute resolution (ADR) or win-win solution, is a decision that was built by the parties themselves and reflects more of the sense of justice. Although the examination of the case for peace is usually happened in general civil cases, such practices also performed in the criminal case settlement. In Western societies (USA, UK, Canada and Japan) the crisis in the judiciary triggered the emergence of alternative dispute resolution.

Hence, the law has been in line with the guidelines of the Indonesian National Police "Tri Brata", which number 2 stated: "We Indonesian Police uphold truth, justice, and humanity in the Homeland enforce the law based on Pancasila and the Constitution of the Republic of Indonesia Year 1945 ". Also, Police Guidelines Catur Prasetya Number 3 is stated "As a soldier, our pride is to sacrifice for society, nation, and state, to ensure the certainty of law (Suparman,2011). In addition, Criminal Justice System about the important role the profession of judges, which is expected as the last frontier to embodied the fulfillment of justice for the community through its decisions, turned out to be one of the factors which contributed badly to poor enforcement of the law itself. Therefore, in Indonesia in 1968 came the idea of the establishment of Research Advisory Council of Judges (MPPH). In the context of Indonesia, many decisions of judges in various levels and various cases does not reflect a sense of justice.

The legal law for the Police in carrying out investigations against all offenses of Article 14 paragraph (1) letter g Act No. 2 of 2002 on the Police of the Republic of Indonesia; "In carrying out basic tasks as referred to in Article 13, the Indonesian National Police in charge of "conducting the investigation of all criminal offenses in accordance with the criminal procedure law and other legislation."

b. Article 7 paragraph (1) letter j Criminal Code in conjunction with Article 16 paragraph (1) letter i of Act No. 2 of 2002 on the Police crime (the investigation) is authorized "to hold any other action under the law of charge".

The definition of other measures are:

- 1 Does not conflict with a rule of law
- 2 In line with the legal obligations that require action; is performed;
- 3 It should be appropriate, reasonable, and included in his environment;
- 4 Consideration of appropriate based on the circumstances that force;
5. Respect for human rights. On the basis of these considerations in the codification of criminal law will guarantee legal protection of basic human rights in the criminal law.

Thus the police are authorized to perform any action, including the completion of a criminal case out of court, that they meet the provisions of the numbers 1 to 5 mentioned above.

The police discretionary powers under Article 16 paragraph (2) in conjunction with Article 18 paragraph (10) of Law No. 2 of 2002 on the Indonesian National Police confirmed "in terms

of a very necessary and urgent, public interest in performing official police duties and authorities can act according to his own judgment. Could be done in a state that is very necessary to pay attention to professional ethics police.

However, procedures for settling disputes (crime clearance) criminal acts by police in the implementation needs to be transparent and accountable mechanism, provided that:

1. Preferred protect the interests of the victim, so as not to be harmed;
- 2 Involve the social system or the police and community partnership forum (FKPM);
- 3 There is participation and strict supervision, so that implementation of the resolution of the case (crime clearance) criminal acts are not misused.

At the level of completion of a traffic accident, police as the investigator of an accident, that impact both the death of the victim, or a physical disability, has sought to use mediation to resolve the accident cases, as in the case of a traffic accident Dwi Prasetyo Utomo on behalf of, 20 Years, with No. BP / 105 / V / 2013 / LL South Jakarta.

From the above-mentioned accident case, police had attempted to do penal mediation by bringing perpetrators-victims and families to come to terms as agreed by the parties. In the context of the investigation by the police is restorative justice is the gatekeepers of the criminal justice system. As said Donald Black, his role as investigator and investigator of a crime, the police put in touch with the most common criminal offense or regular (ordinary or common crime). Largely reactive rather than proactive police work, with very dependent on citizens to complain or report on allegations of a criminal offense. With enough evidence, based on the law of criminal procedure (Code of Criminal Procedure), as the police investigator delegate a case to the Attorney for prosecution. The important question in this case, the police possible as investigator applying restorative justice processes? This is mainly related to the authority of investigators to search for information, make arrests and other actions necessary, detention or stop the investigation. As set forth in Article 7 paragraph (1) Criminal Procedure Code (Act No. 8 of 1981 on the Law of Criminal Procedure) jo.

Police Act (Act No. 2 of 2002 on the Police of the Republic of Indonesia), authorized investigators include:

- 1 Receiving reports or complaints of criminal activity;
- 2 Perform an action first on the scene at the time;
- 3 Telling stopped the suspect and the suspect checking personal identification;
4. arrest, detention, search, and seizure;
5. inspection and seizure of the letter;
6. Taking a person's fingerprints and photograph;
7. Calling someone to be heard and questioned as a suspect or a witness;
8. Bring the necessary expertise in conjunction with the examination of the case;
9. Conducting investigations termination;
10. Conducting other acts legally responsible.

As disclosed above, the way of thinking, normative positivistic, in Indonesia there has been no specific legislation or specific provisions governing the process of restorative justice in the investigation, such as for child delinquency

(juvenile delinquency). Indeed, in the Juvenile Justice Act there is a provision that allows the investigator to take steps to protect the investigation of children's rights, as has been the trend internationally, but the legislation has not expressly define the procedural and implementation processes of restorative justice models. So, still often seen that investigation on that bad boy with the ironic protection of children's rights. The more we have learned that the Criminal Procedure Code specifically oriented towards criminal handling (Offender centered) rather than pay attention to the interests of the victim (victim oriented). Though restorative justice is not just managing the judicial system to treat criminals well, so that the transition process back as part of community members can be done well, but also the interests of the victims, their families, and communities affected to recover from the suffering caused by crime.

If restorative justice is defined as (1) the reintegration of criminals into society, and (2) restore the relationship between the victims of crime, criminals, and other parties affected by the occurrence of a crime, the investigation processes undoubtedly designed to progressively in that direction. Practical changes in the criminal justice thus seeks to incorporate the principles of restorative justice, including the transfer of the meeting (conference), which is mostly in the juvenile justice (although there really is not limited to juvenile justice), which distract the child from the prosecution and adjudication of the court (to meetings in the model [conference]. when possible variations in organization, personnel involved, and the framework of laws and regulations established, the hope is criminal child for example, when confronted by the victim, it will learn any distress caused by the criminal behavior, then he regretted what he did, shame, and empathy, which is also educating. While conference provide an opportunity for an apology, compensation for victims or recover losses, and especially the children would stop from further criminal behavior.

Changes in investigation model that are solely punishing toward restorative (recovery perpetrators and victims) are more than just technical changes, but the culture of investigation. Therefore, it requires a long process of adaptation, which apparently can not be delayed. For example, victim's participation scheme in the process of inquiry or investigation is not easy because it requires a change from the usual patterns "closed" to be more "open". Not to mention the issue, the participation of the victim is hard to define what it means to the extent that participation is possible, although the overall potential benefits of restorative, especially the recovery and rehabilitation of victims.

### III. MEDIATION REGULATION IN NATIONAL LAW

#### 3.1 Setting Mediation According to the Civil Procedure Code

According to the provisions of Civil Procedure Code are applicable to the area of Java and Madura (HIR) and to areas outside Java and Madura (RBg) that the material is almost the same substance is determined there is an obligation on the judge to reconcile the conflicting parties. This provision stated in Article 130 HIR / 154 RBg which reads as follows:

(1) If on any given day, the two sides came, and the District Court to try, by the hand of the chairman will reconcile them.

- (2) If peace is the peace that happens, then about it at the time in session, done a deed, by which both parties are obliged to fulfill the agreement was done, then a letter (certificate) that will be powered and the Judge's decision will be made as usual
- (3) On such a decision was not allowed to ask the apple.
- (4) If at the time attempted to reconcile the two sides, it needs to use an interpreter, then it follows regulations following passage.

According Tresna (1970), indeed referred to paragraph (2) the so-called "acte van vergelijk" letter of dispute resolution. However, in explaining this issue of former Chief Justice of HM Abdurrahman in his writings suggests that in the case of both parties on the appointed day comes, and based on Article 130 RIB / Article 154 of the RDS, the chairman of the trial court by means of trying to reconcile them. If peace is achieved in the time trial, then their case will end with the establishment of a "Settlement Deed" (*van vergelijk deed*) in which both parties must be punished to implement the agreement. But if they can not be reconciled and the defendant continued to recognize the truth of Plaintiff's claim, the Court will examine in depth their case, while recognition remains an evidence Defendants, because Defendants throughout the examination was tied to his confession.

For further explanation on the issue of peace is the former Chairman of the Supreme Court of Subekti in his book elaborated on this need to make our consideration. It is said that the role of the judge in an attempt to resolve the matter peacefully is very important. Verdict peace has great significance to society in general and especially for those who seek justice (*justitiabelen*). Dispute completed at all, the solution quickly and the cost of the hostility between the two sides that litigants be reduced. It is much better than the case when the decision to cut with a regular, for example where the defendant can be defeated and the decision should be implemented by force. If the judge managed to reconcile the two sides sentenced to abide by the contents of the Settlement Deed.

Settlement Deed is as strong as a fixed judge decision (*inkracht van gewijsde*). For those who are required to submit something or are required to pay a certain amount of money, if they are not willing to voluntarily comply with its legal obligations, the executions were carried out according to the usual manner, meaning that delivery of the goods to be submitted it is done by force, or auction (public sale) carried out on the goods in question to obtain the amount to be paid to the party entitled to receive the payment and the payment of court fees. Therefore peace is voluntary and is an agreement between two parties, then the decision of the peace under the provisions of Article 130 paragraph (3) HIR concerned not allowed to appeal and cassation. The process is completed at all and if a time refilled the same issue by a party or by the deceased and those who get the right of him, the last lawsuit will be declared "unacceptable" by reason of "ne bis in idem."

Peace in front judges had much success in the case of debts and inheritance cases. Debts in case the amount of money that should be paid at once, paid by installments, such 4-5 installments and court costs to be shared by both sides of each for half of them. in Plaintiff's legacy is usually the case relented and received less than it should be, even this issue in court fees incurred by both parties. Such peace is just sort of magnitude as the mere consent of both parties, which, if not adhered to by

either party, still must be filed through a court process. The problem just finished for a while and in no way can be guaranteed that one day will not erupt again and probably more powerful than the original. In a contested divorce, the Judge must try to reconcile the husband and wife to be divorced. If the judge managed, contested in general be revoked. Therefore, according to Article 39 of the Marriage Act, the Judge must try to reconcile the two sides, can not be justified that both parties authorize the same. This would rule out the possibility for peace and contrary to the intention of the law.

On September 11, 2003 has been designated the Supreme Court Regulation No. 2 of 2003 on Mediation Procedures in court. These regulations revoke and replace the Supreme Court Circular letter No. 1 of 2002 of the Court of First Implement Empowerment Institute of Peace (ex Article 130 HIR / 154 RBg) were considered not complete so it needs to be refined. This Regulation is made in order to meet the demands of law practice events experienced by the judges of the District Court Rules Supreme Court preparation was carried out by a team headed by Chairman Young Civil Law Written Suharto, SH. with members of the Mariana Sutadi, SH, Abdul Rahman Saleh, SH, Abdul Kadir Mappong, SH, and Susanti Adi Nugroho, SH in collaboration with some NGOs.

In accordance with the foundation (Article 130 HIR / 154 RBg) which is a provision of the Civil Procedure Code on the General Court and in accordance with the background described above, in this provision is aimed principally at the District Court / High Court and adjudicates civil cases generally.

However, this provision can also be used by the courts in other jurisdictions such as the environment of the Religious and Administrative courts. It can be seen from:

1. Article 16 of the Supreme Court rules which stipulates that if deemed necessary, the provisions of the Rules of the Supreme Court, other than used in general courts can also be applied to the environment of other judicial bodies. Given this mediation can also be applied in the practice of religious courts and the State Administrative Court should in the two jurisdictions under the auspices of the Supreme Court then it should this provision be applied to all environments except Military Justice that do not handle civil cases.

2. Circular Letter of Head of the Directorate of Law and Justice of the Supreme Court dated October 22, 2003 No. MA / KUMDIL / 330 / X / K / PERMA No. 03 on Delivery 2 In 2003, the letter addressed to the Chairman of the High Court, Chairman of the High Religious Court, President of the High Administrative Court, the Chairman of the District Court, Chief of the State Court, President of the TUN Court and Chairman of Religious Court throughout Indonesia. The letter reads, herewith submitted Rule-RI Supreme Court (Supreme Court) No. 2 of 2003 on Mediation Procedures in the Court, to be used as an instrument to overcome the possibility of piling cases in Courts. Thus this rule can also be used in the Religious Courts and TUN Court.

There are 6 considerations underlying the enactment of the Supreme Court, namely:

a. That the integration of mediation into the proceedings in the court may be one effective instrument to overcome the possibility of accumulation of cases in court.

b. That mediation is one of the faster and cheaper process, and can provide access to the disputing parties to obtain justice or satisfactory resolution of the dispute at hand.

c. That the institutionalization process of mediation into the judicial system to strengthen and maximize the function of the courts in settling disputes in addition to the formal court process disconnects (adjudicative).

d. That Circular 1 of 2002 on the Court of First Implement Empowerment Institute of Peace (ex Article 130 HIR / 154 RBg) is not yet complete so it needs to be refined.

e. That the applicable procedural law, both Article 130 Article 154 HIR or RBg encourage the parties to take the peace process can be intensified by integrating mediation into the litigation procedure in the court of first instance.

f. That pending legislation and noticed the Supreme Court authority to regulate court proceedings were not sufficiently regulated by legislation, then for the sake of certainty, order, and fluency in the process of reconciling the parties to resolve a civil dispute, it is necessary to establish a Rule Supreme Court.

In addition, the Foundation of the Supreme Court Rules, mentioned there are 6 statutory provisions, which are:

1. Article 28D of the Constitution 1945

2. HIR (Stb 1941 No. 44) and RBg (Stb 1927 No. 277).

3. Law No.14 of 1970 on Basic Provisions of Judicial Power (now repealed and replaced by Act No. 4 of 2004).

4. Law No.14 of 1985 on the Supreme Court (now amended by Law No. 5 of 2004).

5. Law No. 2 of 1986 on the General Court (now amended by Law No. 8 of 2004).

6 of Law No. 25 Year 2000 on National Development Program.

In consideration of the Supreme Court Rules is not included Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. This suggests that mediation which is stipulated in the Supreme Court is not mediation is in the law meant that as a form of dispute resolution Akternatif or Alternative Dispute Resolution (ADR), but included in the Court Dispute Resolution (CDR) or rather Mediation through Mediation or Court justice.

### 3.2 Setting Mediation In Criminal Law

Penal mediation is not included in the criminal justice system of Indonesia, there is only a form of court settlement arranged by both parties. It is, as the authors conducted interviews with Andi Hamzah, he said that Indonesia does not adhere as well in some countries such as the United States, Europe, and some Asian countries, but in line with the government's efforts to optimize the resolution of the case at the beginning of the level to both parties were present at the inquiry, the investigation before the prosecution at the trial, it is recommended to conduct mediation or restorative justice known at this time.

In Indonesia, the characteristics of customary law in each area very supportive to the application of restorative justice, the willingness and participation of victims, offenders, and communities in improving the criminal act that happened. With the sanctions as a form of restitution may be;

a. Replacement immaterial loss

b. Customs payments to the affected person as a substitute for a spiritual loss.

c. apologies

d. Alienation from society and putting people outside the legal system with the imposition of restrictions on his rights as a member of the indigenous peoples.

For example, the mechanism of settlement through mediation with the restorative justice approach, among others;

a. Settlement between personal, family, or the environment;

b. Completion of the chief mediator relatives or community leader.

Therefore, restorative justice can be incorporated in the Indonesian criminal justice system to resolve criminal cases in general and in particular cases of traffic accidents. According to Remington and Ohlin argued, that the criminal justice system can be defined as the use of a systems approach to the mechanisms of criminal justice administration, and criminal justice as a system is the result of interaction between legislation, administrative practices and attitudes or social behavior. Understanding the system itself imply a process of interaction that is prepared in a manner rationally and efficiently to provide certain result with all its limitations (Romli Atmasasmita, 1996).

Mardjono (1994) provides definitions of the criminal justice system is a system within a community to tackle the crime problem. Tackling crime is defined as the control is within the limits of public tolerance.

The legal system can be divided into two, namely the Anglo-Saxon legal system and the Continental system. Both of these legal systems have considerable differences in the development of the criminal justice system, due to differences in philosophy and political roots behind them (Soedjono Dirdjosisworo, 1984).

Although the two systems are built in the spirit of liberalism but a different approach is taken. The Anglo-Saxon system shows ideas of individualism and decentralization prioritize justice and the protection of individual rights is very high. While the Continental System lean principle of uniformity, bureaucratic organization, centralization and emphasizes the development of the legal system is adequate, to ascertain the facts, in order to achieve justice (Soedjono Dirdjosisworo, 1984).

Criminal justice system of the Anglo-Saxon and Continental Europe, led to the discovery of the fact that the method is essentially different from the method that was taken from the Anglo-Saxon and Continental European inquisitors. Each of these methods grows in the history of the application of the law of criminal procedure in a long time and well established in the community. So the American system is not necessarily effective for use in Continental Europe, and vice versa. There are various theories relating to the criminal justice system (criminal justice system). Some use the approach or approaches dichotomy and Tri-chotomies.

Dichotomous approach commonly used by the criminal law theory in the United States. Herbert Packer, a legal expert from Stanford University, with a normative approach oriented on practical values, in carrying mechanisms of the criminal justice process. However, there is a dichotomy in the approach of data models. First, crime control models, combating crime is the most important function and must be transformed from a criminal justice process, so the main attention should be directed to the efficiency of the criminal justice process. Pressure point in this model is the effectiveness of the speed and certainty. Refutation suspect has been obtained in the examination process by police officers. Presumption of guilty

used to speed up the processing of the suspect or the accused to trial. The values, that underlie crime control models are :

1. repressive action against a criminal act is the most important function of a judicial process;

2 The main concern should be addressed to the efficiency of a law enforcement suspects to select, define and guarantee fault or protecting the rights of suspects in the judicial process;

3. criminal law enforcement process should be implemented based on the principle of rapid and complete, and that the model can support the process of law enforcement is a model of administrative and managerial models;

4. the presumption of innocence will cause the system is implemented efficiently;

5. process of law enforcement should focus on the quality of the administrative findings of fact, because of these findings will lead to: 1) Acquisition of a suspect from prosecution, or 2) Willingness declared himself innocent suspects.

Second, due process models, this model emphasizes the entire findings of fact from the case, which must be obtained through the formal procedures set forth by law. Each procedure is important and should not be ignored, through a rigorous inspection stages ranging from investigation, arrest, detention and trial as well as the existence of a reaction for each stage of the examination, it can be expected of a suspect who was obviously not guilty will be able to gain freedom from accusation committing a crime. Presumption of innocence is the backbone of this model. The underlying values of due process models are :

1. priority, and adversary formal adjudicative fact-findings, this means that in each case the suspect must be brought before an impartial court and examined after the suspect gained full rights to file a defense;

2. emphasis on prevention and elimination of errors as far as possible mechanisms of the administration of justice;

3. judicial process must be controlled in order to prevent its use until the optimum point because power tends to be abused or choosing the potential to place individuals on the coercive power of the state;

4. audit firm hold legal doctrine, namely:

a. considered guilty if a fault determination is done procedurally and done by those who have authority for that task;

b. a person can not be guilty even if the reality would be burdensome legal protection given to the statute in question is not effective. Determination of error can only be done by someone who is not an impartial tribunal;

5. the idea of equality before the law takes precedence;

6. prefer the morality and usefulness of criminal sanctions.

Due to the process models concept upholds the rule of law, in a criminal case and no one is putting himself above the law. Every law enforcement must be in accordance with its constitutional requirements, must obey the law, and must respect to :

1. The right of self-incrimination. No one may be compelled to be a witness against him in a criminal act.

2. Prohibited revoked, removing the right to life, liberty, or property without accordance with the provisions of procedural law.

3. Each person must be "guaranteed rights to self, residence, papers on the examination and seizure unreasonable.

4. The right of confrontation in the form of cross-examination by the person who accused or reported.
5. Right to obtain a quick examination.
6. Rights of equal protection and equal treatment in law.
7. Right to assistance of legal counsel.

Trichotomy approach, introduced by Denis Szabo, Director of the International Centre for Comparative Criminology, the University of Montreal, Canada in UNAFEI Conference in Fuchu, Tokyo, Japan in December 1982. There are three models in the trichotomy approach. First, medical models, this approach originated from the teachings of Lombroso, who declared a criminal is someone who has a personality that is distorted, and is referred to as a sick person. Therefore, the criminal justice system should be therapeutic, so that perpetrators be a normal human being. This thought is reinforced by social defense theory, put forward by stating Grammatica social protection law should replace the existing criminal law in the article entitled "La lotta contra la pena" so that an individual criminal reintegrated in society not given offense to his actions, and updated by Marc Ancel.

Secondly, justice models, this model approaches the issues of morality, social and legal norms as well as the effects of the criminal justice system. Justice approach to the model introduced by Norval Morris, with a thought that adhering to the mechanisms of justice and punishment changes. These models undergo a reevaluation of the results of the administration of criminal justice and give special attention to criminal sanctions, the moral and social cost to achieve the goals of prevention and protection of the community from crime .

Third, the combined models of preventive and restorative justice model. Model focuses on compensation for victims of crime. The rationale for this model places the state in addition to the eradication of crime and protection of the community must also provide social security to a victim of crime, as well as social security derived from state income tax from the sector. Through this model approach to the criminal justice system should consider the financial-accountability factors.

Continental has become a popular third model called the criminal justice system Family Model, which was introduced by John Griffith. This model is a reaction to the adversary model, which is considered unfavorable. Family Model putting criminals not as an enemy of society, but rather seen as a family member who should be scolded to control his personal control, but should not be denied or exiled. All guided by love and peace.

#### IV. ADVANTAGES OF PENAL MEDIATION

Based on comparison of penal mediation with restorative justice approach in Common Law systems; including the United States, Britain, New Zealand, Australia, Canada, Civil Law legal system, among others Austria, Belgium, Germany, France, Poland, Sweden, and the Islamic Legal System of Pakistan, Sudan, Malaysia Trenggano state, the application of mediation in traffic accidents involving victims, offenders, and other interested parties.

The process of mediation in criminal offenses in traffic accident occurred at the level of investigation. This is consistent with restorative justice which form of settlement can be completed without going through the trial process, thereby resolving cases these accidents happen fast, easy, and

inexpensive. The advantages of applying the criminal mediation in a traffic accident are as follows ;

1. avoid a win-lose but a win-win solution, not only in the sense of the material but also moral and psychological gain.
2. informal procedure, which does not give priority to legal considerations, but rather on the basis of equality of the parties against each other and put aside the legal provisions.
3. efficient, because the procedure is informal, simple, and the parties do not prove themselves.
4. fair, because the settlement based on tolerance and mutual interests .
5. good relationship of the parties is maintained, tolerance, mutual understanding of interests between the parties that the decision not to hurt each other.
6. Confidential, because the dispute is not being disseminated to journalists, so that the dignity, reputation, good name is maintained.
7. Execution or implementation of the decision is voluntarily, because of the decision is determined by the parties to comply with the voluntary mediation.
8. The cost is relatively cheap, because its solution with a quick and simple.
9. Growing pacifist mutual respect and respect of the parties, foster a sense of kinship, as well as a view of life at the same time instilling resolve disputes without destroying the relationship.

The advantage of mediation is viewed from the aspect of the administration of justice, namely:

- a. More disputes that can be resolved through mediation, will reduce the number of cases handled at the level of the police, prosecution and courts. This will affect the small presence of an appeal. That would affect his chances in the settlement of arrears or pending in the Supreme Court case especially. So the court (judge) has the opportunity to explore other cases which will improve the quality of decisions, both for the benefit of the litigants and legal interests.
- b. At low levels of social trust to the reputation of judges, mediation is one deterrent, and alternative or option (for the parties), because the mediation settlement is determined by the parties, not by the judge.
- c. Gradually litigants in court may be directed only against certain cases (cases that should not be mediated and mediated cases that failed), as well as the legal issues are complex and fundamental, which will influence the development of law and legal studies.

Mediation is done by reference to customary law in Indonesia and is based on the approach of restorative justice through mediation in some countries it is very suitable and appropriate mediation applied in resolving cases of traffic accidents by means of the parties, especially victims, perpetrators and accompanied by relevant parties including the Police Investigator, Advocates, and community leaders who are neutral to help the meeting to make an agreement between the parties. Restitution may be in the form of an apology or compensation has been agreed upon by both parties. Settlement through mediation at the level of investigation is a form of law enforcement that is a negative control for settling disputes without geared in court. Mediation is a form of restorative justice that the emphasis is not only on the completion of the case but on the actions of counseling to the parties by the investigators reconcile. So that the litigants can live with either of mutual respect, forgiveness and lack of rancor among others.

The application of mediation in criminal offenses in traffic accidents conducted by bringing the two sides to reach an agreement. Then the agreement is set forth in the Settlement Deed. The agreement binds both parties so that both parties have to do exactly what has been agreed in the Settlement Deed.

Based on the fact the settlement of domestic violence do not use the approach of restorative justice through mediation then there are some drawbacks, namely;

1. Very slow and long, because it is full of formality in the expected achievement of restorative justice;
2. The court fees are expensive, as a result of a long process to get the decision;
3. Law is an adversary event, resulting in hostility between the parties because of dissatisfaction fellow;
4. The existence of winning and losing decisions, poor relations between the two sides;
5. The hearing is open to the public, so that the good name and trust become polluted;
6. Hostility and mutual resentment could be increased.

Dispute is primarily a reflection of the character and the will of the people who could not be in unison. In a society where the dispute is generally resolved through a variety of ways to accommodate and handle disputes include:

- 1) lumping it
- 2) avoidance
- 3) exit
- 4) coercion
- 5) negotiation
- 6) Mediation
- 7) arbitration
- 8) Self help
- 9) judicial

Each approach uses a different paradigm in accordance with the purpose, culture or values that are believed by the parties to the dispute, it relates to the identity, which is a chain that connects the social and cultural values of the past with the present. Identity is an overview of the past and are shaping the present and possible future so that is something that is jointly owned by a community or a particular group of people who also distinguish their community or other community groups. Even the identity is a key element in the formation of social reality.

It is, as has been done by the Metro Jaya Regional Police Directorate of Traffic Traffic South Jakarta District against perpetrators Dwi Prasetyo Utomo on behalf of, 20 Years.

In the inspection process based on BP No. / 105 / V / 2013 / LL South Jakarta in question violated the provisions of Article 310 (4) in conjunction with 310 (3) in conjunction with Article 312 Jo. Article 106 (1) of Law No. 22 of 2009, as a result of the accident the driver of the motorcycle died.

Police give priority to the completion of the restorative justice between the parties, families, and stakeholders to be able to resolve this case in the best way for the parties. This is done by the Police as the case of a traffic accident that resulted in the death of a motorcycle driver to make a statement that the material between the parties set about peace between:

1. Name : Sukaisih  
Place/Date of Birth : Jakarta, 19 August 1974  
Occupation : Housewife

Address : Jl. Kebagusan I/49 RT. 04/01 Kel. Kebagusan Pasar Minggu, Jakarta Selatan

As the wife of a motorcyclist Honda Suprafit B-6020-BIC named Widi Sutisna, 46 years and called the Party I (First)

2. Name : H. Sukarto  
Place/Date of Birth : Jepara, 3 May 1956  
Occupation : Traders

Address : Jl. Mabes RT. 04/06 Kel. Jatimurni, Pondok Melati Bekasi Kota

As a responsible / vehicle driver father Nissan Grand Livina 1651 B-KFS Prastiyo named Dwi Utomo, 20 Years, and called Party II (Second)

With this both sides agreed to solve the problem of traffic accidents by consensus/ familiarity with the agreement as follows:

1. Both parties recognize that traffic accidents are an unfortunate event.
2. Party II (Second) giving compensation to the Party I (First) of Rp. 50.000.000, - (fifty million rupiah) also replacing motorcycle of Party I (First) and has ben accepted with sincerity. Party II also intends to help children school fees of Party I (First).
3. Both parties accept willingly the point number 2, without coercion from others
4. Both parties agreed not to sue each other in criminal or civil, present and future, and accident problems between the two sides declared finished
5. Everything that happens in the future due to the following statement made is the responsibility of each party who signed this letter and does not involve other parties.

With the approval of this agreement the parties have to be unenforceable, then the agreement is set forth in a deed of agreement.

## V. CONCLUDING REMARKS

Criminal Mediation in Indonesia with the approach of restorative justice as a way of resolving the traffic accident. Mediation is the best way to speed up the process of completion is based on the principle of justice is fast, simple, low cost. Mediation in criminal offense in traffic accidents can be performed at the level of the police investigation, the prosecutor and to the court. The mediation process is done by reference in accordance with customary law in Indonesia comparative results of the mediation process at some Civil law countries, Common Law, Islamic countries. The results of these references indicate that the mediation process is agreed by the parties and restitution from the perpetrator to the victim. The refund can be either an apology or compensation agreed upon by both parties. Settlement through mediation at the level of investigation is a form of law enforcement that is a negative control for settling disputes without geared in court. Mediation is a form of restorative justice that the emphasis is not only on the completion of the case but on the actions of counselling to the parties by the investigators reconcile.

The application of mediation in criminal offense in traffic accidents with restorative justice approach in Indonesia involving victims, offenders, and related parties, in the process of reaching an agreement. The deal is a meeting point of interests of the parties. ie how far the demands of the victim and the perpetrator's ability to fulfill the compensation and

restitution. Application of mediation involves perpetrators, victims, and the parties concerned. The suggestions can be put forward in this paper are as follows. First, there is a need for regulation of the positive law of criminal mediation with a restorative justice approach in the resolution of traffic accidents. Positive law is abstracted from the mediation process in customary law in Indonesia in the form of Regulation Court (Supreme Court), such as Perma 1 in 2008, about the necessity of mediation in civil cases. Second, it should be noted regarding the deed tie force peace upon the parties (offender, victim) in the application of mediation in cases of traffic accidents. Stakeholders such as the police, prosecutors, lawyers, community leaders, and clergies must realise and optimise the resolution of cases by way of mediation.

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