

Criminal Law Policy in an Efforts to Overcome Traffic Accidents Based on Restorative *Justice* in the New Criminal Code

Aufa Salsabil

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia, E-mail: aufasalsabila153@gmail.com

Abstract. *This research is about Criminal Law Policy in Efforts to Tackle Traffic Accidents Based on Restorative Justice in the New Criminal Code aims to find out and analyze criminal law policies in efforts to overcome traffic accidents based on restorative justice in current positive law and the New Criminal Code. The approach method used is normative juridical. Data collection through literature studies and documentation. Data analysis is carried out descriptively qualitatively. The study concludes that criminal law policies in efforts to overcome traffic accidents based on restorative justice in current positive law are still sectoral in each law enforcement agency, namely at the level of investigation, prosecution and examination in court hearings have their respective legal bases. The implementation of restorative justice has only received a firm legal umbrella for all law enforcement officers in Law Number 11 of 2012 concerning the Child Criminal Regulation System in the form of an obligation to implement diversion efforts at all levels of criminal justice for criminal acts committed by children, namely the level of investigation, prosecution and Examination in Court Hearings. The provisions in question were followed by the issuance of Supreme Court Regulation Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System. The criminal law policy in an effort to overcome traffic accidents based on restorative justice in the New Criminal Code is in the form of the cessation of prosecution authority if the criminal case has been resolved outside the court process and the judge's forgiveness or rechterlijke pardon or judicial pardon or dipensa de pena is the idea of judge forgiveness and forgiveness. This concept gives the judge the authority to forgive and not impose criminal penalties or actions even though the crime and error have been proven. However, the New Criminal Code does not provide detailed regulations regarding the authority to apply restorative justice to investigators. The New Criminal Code only provides an opportunity for the settlement of criminal cases outside the court which can vacate the authority to prosecute. However, the New Criminal Code is a fundamental*

basis for the application of restorative justice in the legal system in Indonesia.

Keywords: *Accidents; Criminal; Justice.*

1. Introduction

Efforts to overcome criminal acts of traffic accidents regulated in Law Number 22 of 2009 concerning Traffic and Road Transportation are basically efforts to realize security, safety, order, and smoothness of traffic and road transportation in order to support economic development and regional development. Therefore, in organizing traffic there are 4 (four) main factors that must be considered, namely: 1) Traffic and road transportation safety is a state of freedom of every person, goods, and/or vehicle from disturbances of unlawful acts, and/or fear in traffic. 2) Traffic and road transportation safety is a state of avoiding every person from the risk of accidents during traffic caused by humans, vehicles, roads, and/or the environment. 3) Traffic and road transportation order is a state of traffic that occurs regularly in accordance with the rights and obligations of every road user. 4) Smooth traffic and road transportation is a condition of traffic and use of transportation that is free from obstacles and congestion on the road.¹

Law Number 22 of 2009 concerning Traffic and Road Transportation in handling criminal acts of traffic accidents is still oriented towards law enforcement with criminal penalties. This can be seen from the criminal provisions that can be applied to perpetrators of criminal acts of traffic accidents. Several articles in Law Number 22 of 2009 concerning Traffic and Road Transportation that include criminal acts of traffic accidents and their criminal threats are in Article 310 and Article 311.

Observing Law Number 22 of 2009 concerning Traffic and Road Transportation which places more emphasis on actions and legal protection for victims of traffic accidents² in the form of bringing the perpetrator before the court with the hope that the perpetrator will be sentenced to a criminal sentence. In criminal law, there is a study of victimology. Etymologically, victimology comes from the word victim which means victim and logos which means science. In terminology, victimology is a study that studies victims and all aspects of it, especially concerning the causes of victims and the consequences of victims as a social reality. The study of victimology aims to understand and minimize criminal victimization as a means of overcoming crime and anticipating the development of crime in society.

Protection for traffic accident victims by filing a traffic accident criminal case has not been able to provide maximum legal protection. This is because the losses of

¹Article 1 numbers 30,31,32, and 33 of Law Number 22 concerning Road Traffic and Transportation.

²Victimology,www.replaz.blogspot.com), accessed on July 10, 2024.

traffic accident victims cannot be given directly. It should be stated that in addition to being criminally responsible, the law provides an opportunity for victims to file a civil lawsuit for losses suffered due to accidents caused by the perpetrator's actions so that the perpetrator can also be held civilly responsible. However, providing compensation to the victim in question requires a complicated procedure and a long time.

Based on this, a criminal law policy is needed that provides comprehensive protection for victims of traffic accidents, namely legal protection that provides accountability to perpetrators of criminal acts and/or at the same time provides compensation to victims or restoration to the original state experienced by the victim. The criminal law policy in question is the application of restorative justice in resolving criminal cases in traffic accidents.

The application of restorative justice in resolving criminal cases of traffic accidents in the Republic of Indonesia Law Number 22 of 2009 concerning Traffic and Road Transportation, is implied in Article 229 paragraph (2) namely minor traffic accidents as referred to in paragraph (1) letter (a) while moderate and severe traffic accidents go through the criminal justice process. The provisions for the application of restorative justice have not been able to provide maximum protection to victims because they do not explicitly provide a legal basis for the application of restorative justice. Restorative justice as an idea or concept in criminal law in order to maximize the role of human dignity in implementing the law. Restorative justice in resolving criminal cases of traffic accidents as one of the products of criminal law policy is an approach in efforts to overcome traffic accidents.

Criminal law policy is one way or alternative in resolving crime problems because basically legal policy is essentially a state policy through authorized bodies to establish the desired regulations that are estimated to be used to express what is contained in society and to achieve what it aspires to.³

In Indonesia, restorative justice practices have also been carried out, known as family settlement. The existing practices still have a basis in restorative justice that has been recognized by many countries, which in its implementation has now been implemented in a number of rules and patterns or methods.

In addition to Law Number 22 of 2009 concerning Traffic and Road Transportation, the restorative justice approach to resolving criminal cases of traffic accidents has been accommodated in various laws and regulations as a criminal law policy in an effort to overcome criminal acts of traffic accidents. In addition, restorative justice is a crime prevention policy that is accommodated in the new Criminal Code. This indicates a renewal of criminal law in the field of restorative justice that is

³T. Subarsyah Sumadikara, 2010, *Law Enforcement (A Legal and Criminal Political Approach)*, Kencana Utama, Bandung, p. 96

currently being implemented. Restorative justice is further accommodated by Law Number 1 of 2023 concerning the Criminal Code.

Restorative justice actually existed before the enactment of Law Number 1 of 2023 concerning the Criminal Code. which has been spread across various internal regulations of law enforcement institutions, such as: Letter of the Chief of Police No. Pol: B/3022/XII/2009/SDOPS dated December 14, 2009 concerning Handling of Cases through Alternative Dispute Resolution (ADR), Perma No. 2 of 2012 concerning Adjustment of the Limits of Minor Crimes and the Amount of Fines in the Criminal Code, Perma No. 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System, Regulation of the Chief of Police Number 6 of 2019 concerning Criminal Investigation, and Regulation of the Prosecutor's Office Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, including also contained in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.⁴Of the various restorative justice provisions, the main weakness of restorative justice with regulations spread across each institution is the potential for disharmony in restorative justice provisions which can also be caused by the sectoral egos of each law enforcement institution which makes restorative justice provisions different between one law enforcement institution and another.⁵This has the potential to cause legal uncertainty in society.

The substance of restorative justice in Law Number 1 of 2023 concerning the Criminal Code includes as stated in Article 51 of Law Number 1 of 2023 concerning the Criminal Code. Article 51 of Law Number 1 of 2023 concerning the Criminal Code explains the purpose of criminal punishment which substantively confirms that criminal punishment aims to: uphold legal norms and protect society, guide prisoners to become good and useful people in society, choose balance and create a sense of peace in society, and foster a sense of guilt and regret for perpetrators of criminal acts so that they do not repeat their actions. Furthermore, Article 52 of Law Number 1 of 2023 concerning the Criminal Code also emphasizes that criminal punishment must pay attention to human dignity. This emphasizes that in the name of criminal punishment, methods that are not in accordance with human dignity may not be taken. Referring to the formulation of the articles in Law Number 1 of 2023 concerning the Criminal Code, in fact the orientation of restorative justice after the enactment of Law Number 1 of 2023 concerning the Criminal Code as a Law will strengthen the ideals of Indonesian law so that in

⁴CT Lesmana, "Implementation of Penal Mediation in Handling Criminal Cases (Case Study at Satreskrim Polres Sukabumi City," *Rechten*, vol. 2, no. 2, 2020, p. 20

⁵H. Widodo and FP Disantara, "Problematics of Legal Certainty of Public Health Emergency During the COVID-19 Pandemic," *J. Suara Huk.*, vol. 3, no. 1, p. 197, Mar. 2021, doi: 10.26740/jsh.v3n1.p. 197-226.

enforcing criminal law it involves active participation between the roles of the community and law enforcement officers.⁶

Based on the description above, this study will discuss restorative justice in resolving criminal cases of traffic accidents. The orientation of this writing is restorative justice in resolving criminal cases of traffic accidents which are currently being carried out with restorative justice in resolving criminal cases of traffic accidents based on the New Criminal Code.

2. Research Methods

The approach method used in this research is the normative legal approach method. This is because this research focuses its attention on the discussion of legal norms in the form of statutory regulations, namely in particular the New Criminal Code.

Data collection through literature study and documentation. Literature study, namely literature review is intended to obtain complete information and to determine the actions to be taken as an important step in scientific activities.⁷ Documentation study, namely research on documents related to the research. The documents studied are the minutes of the application of restorative justice in resolving traffic accident cases.

3. Results and Discussion

3.1. Criminal Law Policy in Efforts to Tackle Traffic Accidents Based on Restorative Justice in Current Positive Law

Currently, there has been a shift in the perspective of criminal justice in resolving traffic accident cases from the concept of retributive justice (criminal justice) to the concept of restorative justice. This shift is oriented towards effective and more just settlement of criminal cases, especially for perpetrators and victims. So if seen from the victim's side, the settlement of traffic accident cases through the concept of restorative justice is basically a concept of protection for traffic accident victims who have so far not received justice when their cases are resolved through the courts.

The policy for resolving traffic accidents using a restorative justice approach is based on several laws and regulations, including Law Number 22 of 2009 concerning Traffic and Road Transportation, Regulation of the Chief of Police Number 15 of 2013 concerning Procedures for Handling Traffic Accidents, Regulation of the Chief of Police Number 16 of 2019 concerning Criminal Investigation, Circular of the Indonesian National Police Number: SE/8/VII/2018 concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases, Letter of the Chief of Police No. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009 concerning Handling Cases Through Alternative Dispute

⁶Henny Saida Flora, "Restorative Justice in the New Criminal Code in Indonesia: A Prophetic Legal Study", *Rechtsidee* Vol 10 No 2 (2022): December, p. 11.

⁷P. Joko Subagyo, *op. cit.*, p. 109.

Resolution (ADR), Regulation of the Chief of Police of the Republic of Indonesia Number 7 of 2008 concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Police Duties and Regulation of the Chief of Police Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice. Then the restorative justice approach in dealing with traffic accidents committed by children can be implemented by referring to Law Number 11 of 2012 concerning the Juvenile Criminal Justice System through diversion efforts.

The application of restorative justice in resolving criminal cases of traffic accidents in the Republic of Indonesia Law Number 22 of 2009 concerning Traffic and Road Transportation, is implied in Article 229 paragraph (2) namely minor traffic accidents as referred to in paragraph (1) letter (a) while moderate and severe traffic accidents go through the criminal justice process. The provisions for the application of restorative justice have not been able to provide maximum protection to victims because they do not explicitly provide a legal basis for the application of restorative justice. Restorative justice as an idea or concept in criminal law in order to maximize the role of human dignity in implementing the law. Restorative justice in resolving criminal cases of traffic accidents as one of the products of criminal law policy is an approach in efforts to overcome traffic accidents.

Furthermore, in the Regulation of the Chief of Police Number 15 of 2013 concerning the Procedures for Handling Traffic Accidents, Article 63 implicitly provides an opportunity for the application of restorative justice in resolving criminal cases of traffic accidents, which states that in resolving cases of Minor Traffic Accidents, the following is carried out:

- a. The obligation to compensate for losses, a peace agreement was reached between the parties involved in the Traffic Accident, so that the settlement of the case can be resolved outside the court hearing.
- b. The peace agreement between the parties involved in the traffic accident is stated in a peace agreement statement.
- c. Settlement of cases outside the court session as referred to in point b, can be carried out as long as a Police Report has not been made.
- d. In cases of minor traffic accidents, if the elements of a criminal act are fulfilled and no peace agreement is reached between the parties involved in the traffic accident, the case will be resolved quickly.
- e. Settlement outside of court must be registered and a statement of peace agreement attached.

Circular Letter of the Republic of Indonesia Police Number: SE/8/VII/2018 Concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases. In part 2 of the Circular Letter, it is explained regarding the settlement of criminal cases with the Restorative Justice approach as follows:

- a. That the process of investigating and investigating a crime is the entry point for criminal law enforcement through the criminal justice system in Indonesia. Therefore, the process of investigating and investigating a crime is the main key to determining whether or not a criminal case can be continued to the prosecution and criminal trial process in order to realize the objectives of the law, namely justice, legal certainty and benefit while still prioritizing the principles of simple, fast and low-cost justice;
- b. That the development of the law enforcement system and methods in Indonesia shows a tendency to follow the development of social justice, especially the development of the principle of restorative justice which reflects justice as a form of balance in human life, so that deviant behavior from perpetrators of crimes is considered as behavior that eliminates balance. Thus, the case resolution model carried out is an effort to restore this balance, by burdening the perpetrator with the obligation to consciously admit mistakes, apologize, and restore the damage and losses of the victim to their original state or at least resemble their original condition, which can fulfill the victim's sense of justice;
- c. That the development of the concept of law enforcement in the criminal law enforcement system in various countries that adopt the principle of restorative justice and along with the emergence of various problems in the criminal law enforcement process in Indonesia such as over capacity of the Correctional Institution, arrears, increasing cases, the number of law enforcers that is not balanced with the development of cases, court costs that are unable to support the increase in cases and so on, have an impact on changes in the legal culture of society, especially the way Indonesian society views the criminal law enforcement process;
- d. That in order to answer the development of the legal needs of the community and fulfill the sense of justice of all parties, the Republic of Indonesia National Police as an institution that is given the authority as an investigator and investigator as well as coordinator and supervisor of criminal investigations, feels the need to formulate a new concept in the criminal law enforcement system, especially the process of investigating and investigating criminal acts that is able to accommodate the values of justice in society while providing legal certainty, especially certainty of the process;
- e. That the application of the principle of restorative justice in the concept of criminal investigation and inquiry in order to realize the public interest and sense of justice in society that does not yet have a legal basis and can be used as a guideline for its implementation and in order to realize the non-uniformity of understanding and application of restorative justice in the environment of the Republic of Indonesia National Police, a legally binding product is needed as a guideline for investigators and Polri investigators who implement it, including guarantees of legal protection and supervision and control;

f. That the principle of restorative justice cannot be interpreted as a method of terminating a case peacefully, but more broadly on fulfilling the sense of justice of all parties involved in a criminal case through efforts involving victims, perpetrators and local communities as well as investigators/investigators as mediators, while the resolution of the case, one of which is in the form of a peace agreement and the revocation of the victim's right to sue, requires a judge's decision through the public prosecutor to revoke the authority to sue the victim and the public prosecutor;

g. that various methods of resolving criminal cases that reflect the application of the principle of restorative justice and can be used as a reference in applying the principle of restorative justice to criminal cases are as follows:

1) Article 76 paragraph (1) of the Criminal Code states that except in cases where the judge's decision may still be repeated, a person may not be prosecuted twice for an act for which an Indonesian judge has already tried him with a final decision;

2) Article 7 paragraph (1) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System states that at the level of investigation, prosecution and examination of children in district courts, diversion must be attempted;

3) Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees states that Fiduciary Guarantee Certificates have the same executive power as court decisions that have permanent legal force;

4) Article 51 paragraph (7) of Law Number 21 of 2001 concerning Special Autonomy for Papua Province states that in order to release a criminal perpetrator from criminal charges according to the applicable criminal law provisions, a statement of approval is required to be implemented from the Head of the District Court in the jurisdiction thereof, which is obtained through the Head of the District Attorney's Office in the area where the criminal incident occurred;

h. that the implementation of the authority to investigate and/or investigate criminal acts by Police Investigators who apply the principle of restorative justice in their investigation methods can be based on the following provisions:

1) Article 7 paragraph (1) letter j of Law Number 8 of 1981 concerning Criminal Procedure Law, states that investigators, due to their obligations, have the authority to carry out other actions according to the law for which they are responsible;

2) Article 16 paragraph (1) letter L and Article 18 of Law Number 2 of 2002 concerning the Republic of Indonesia National Police and Article 5 paragraph (1) number 4 of Law Number 8 of 1981 concerning Criminal Procedure Law state that other actions as referred to in Article 16 paragraph (1) letter L are investigative and investigative actions which are carried out if the following requirements are met:

1) does not conflict with any legal regulations;

2) in accordance with the legal obligations that require such action to be taken;

- 3) must be appropriate, reasonable, and within the scope of the position;
- 4) reasonable considerations based on compelling circumstances; And
- 5) respect human rights.

The Indonesian National Police Policy issued a Circular Letter of the Indonesian National Police Number: SE/8/VII/2018 Concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases aimed at creating a sense of justice and humanity, prioritizing the interests of victims and perpetrators in order to reach an agreement together to seek a resolution to the crime and its implications by emphasizing recovery rather than retaliation. The implementation of the law can take place normally, peacefully, but can also occur due to violations of the law. In this case the law that is violated must be enforced. Through law enforcement, it becomes a reality. However, in enforcing the law there are 3 (three) elements that need to be considered, namely: Legal certainty (*rechtssicherheit*), benefit (*zweckmassigkeit*) and justice (*gerechtigkeit*).⁸

The policy of resolving traffic accidents with a restorative justice approach continues with the issuance of Regulation of the Chief of Police Number 16 of 2019 concerning Criminal Investigation. Article 12 states that in the investigation process, restorative justice can be carried out if the following conditions are met:

a. Materials, including:

- 1) does not cause public unrest or there is no public rejection;
- 2) does not result in social conflict;
- 3) there is a statement from all parties involved that they do not object and waive their right to sue before the law;
- 4) limiting principle:
 - a) for the perpetrator: a) the level of the perpetrator's guilt is relatively not serious, namely the error is in the form of intent; and b) the perpetrator is not a recidivist;
 - b) in criminal acts in the process of: a) investigation; and b) inquiry, before the SPDP is sent to the Public Prosecutor;

b. Formal, including:

- 1) a letter of request for peace from both parties (the complainant and the accused);
- 2) the statement of peace (deed of settlement) and settlement of the dispute between the parties to the case (the reporter and/or the reporter's family, the reported party and/or the reported party's family and representatives of community leaders) is acknowledged by the investigator's superior;
- 3) minutes of additional examination of the parties to the case after the case has been resolved through restorative justice;

⁸Sudikno Mertokusumo, 1995, *Understanding Law: An Introduction*, Liberty, Yogyakarta, p. 14.

4) recommendations from a special case title approving restorative justice resolution; and

5) the perpetrator does not object and it is done voluntarily with responsibility and compensation.

Letter of the Chief of Police No. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009 concerning Handling of Cases Through Alternative Dispute Resolution (ADR) and Regulation of the Chief of the Indonesian National Police Number 7 of 2008 Concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Police Duties. In the letter of the Chief of Police, several steps are determined for handling cases through ADR, namely:

a. Trying to handle criminal cases that have small material losses, the resolution of which can be directed through the ADR concept.

b. Settlement of criminal cases using ADR must be agreed upon by the parties to the case, but if there is no agreement, it will be resolved in accordance with applicable legal procedures in a professional and proportional manner.

c. Settlement of criminal cases using ADR must be based on the principle of consensus and must be known by the surrounding community by including the local RT RW.

d. Settlement of criminal cases using ADR must respect social/customary legal norms and fulfill the principles of justice.

e. Empowering Polmas members and playing the role of FKPM in each region to be able to identify criminal cases that have small material losses and can be resolved through the ADR concept.

f. For cases that have been resolved through the ADR concept so that they are no longer touched by other legal actions that are counterproductive to the objectives of Polmas.

Then the settlement of criminal acts of traffic accidents using the principle of restorative justice at the investigation level can also be guided by the Regulation of the Chief of Police Number 8 of 2018 concerning Handling of Criminal Acts Based on Restorative Justice. Article 2 of the Regulation of the Chief of Police states that pHandling of criminal acts based on Restorative Justice is carried out in the implementation of criminal investigation, investigation or inquiry functions.

At the prosecution level, in addition to the Investigation Regulation, the Attorney General's Regulation on Restorative Justice also regulates restorative justice. In July 2020, the Attorney General of the Republic of Indonesia issued the Restorative Justice Regulation. Basically, this is a further regulation of the Criminal Procedure Code regarding the Authority to Terminate Prosecution held by the Public Prosecutor. Article 140 paragraph (2) of the Criminal Procedure Code provides three reasons for the public prosecutor to terminate the prosecution, namely the act is not a criminal act, insufficient evidence, and closed by law. Closed "by law" then refers to the provisions of material law. According to Eddy OS Hiariej, the

reasons for the prosecution to be dropped are based on the provisions in the Criminal Code and outside the Criminal Code. The provisions outside the Criminal Code are contained in Chapter VIII Book I of the Criminal Code concerning the Elimination of the Authority to Prosecute and the Authority to Execute Criminal Procedure. Closed by law based on the Criminal Code means if the case is *Ne Bis in Idem* (Article 76), the defendant dies (Article 77), and the case has expired (Article 78). Moreover, the Restorative Justice Regulation added the reason for stopping the prosecution, namely that "there has been a settlement of the case outside the court (*afdoening buiten process*)."⁹

The regulation in the Attorney General Regulation shows the spirit of Penal Mediation or resolving cases outside the court. *Afdoening buiten process* is interpreted as resolving cases outside the court. According to Barda Nawawi Arief, out-of-court settlements have been carried out in practice in various criminal cases through law enforcement discretion, perpetrator-victim deliberations, and various other methods.¹⁰ The concept introduced by Barda Nawawi Arief is also close to the concept of restorative justice that has developed in Indonesia. The out-of-court settlement is needed to help the State reduce unnecessary costs in the judicial process. To achieve the principle of fast, simple, and low-cost justice, out-of-court settlement is a necessity.¹¹ In addition, diversion is applied to children who have problems with the law to resolve their problems with the victim, but also to reduce the considerable legal costs.

The Attorney General's Regulation on Restorative Justice also provides further regulations regarding the conditions for out-of-court settlement. One of the conditions is that "there has been a restoration of the original state using the Restorative Justice approach." In this context, the Restorative Justice Regulation is in accordance with the principle of *restitutio in integrum*.

The issuance of the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice provides a legal umbrella for prosecutors to be able to prioritize conscience and humanity in carrying out their duties not only as law enforcement officers but also as protectors of the community. This is also in accordance with the direction of the Attorney General and one of the 7 (seven) priority work programs of the Attorney General's Office of the Republic of Indonesia in 2021, namely "Just law enforcement, and providing benefits, especially in restoring victims of crime and improving perpetrators" (Attorney General's Office of the Republic of Indonesia, 2021).¹²

⁹Hiariej, EO 2015. Principles of Criminal Law. Cahaya Atma Pustaka, Jakarta.

¹⁰Barda Nawawi Arief, 2008. Penal Mediation: Settlement of Criminal Cases Outside the Court. Pustaka Magister. Jakarta.

¹¹Hariyanto, DRS, & S, PY 2019. "Penal Mediation in *Ius Constitutum* and *Ius Contituendum* in Indonesia". Kertha Wicaksana Journal, 13(1).

¹²Attorney General's Office of the Republic of Indonesia. (2021). Priority Work Program of the Attorney General's Office of the Republic of Indonesia in 2021. Attorney General's Office of the

Restorative justice also carried out at the level of examination in court. In addition to the concept in Investigation and Prosecution, the Supreme Court also applies the concept of restorative justice in its Decision. In Supreme Court Decision Number 1600 K / Pid.2009 as explained above where in the decision the Supreme Court released the Defendant with the consideration that the peace between the Victim and the Defendant has a very high value and must be appreciated. So that the compensation and the withdrawal of the complaint must be respected by the court, even though the embezzlement and fraud in the case are not a complaint offense. Perkap, Perja, and Supreme Court Decisions are the basis for the Indonesian people to be ready for restorative justice. So that the implementation of restorative justice is a necessity in other criminal case laws, other than child criminal cases.

In addition to its decisions, at the end of 2020, the Directorate General of the Supreme Court's General Court issued Decree of the Director General of the Supreme Court's General Court Number 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Restorative Justice Guidelines in the Scope of General Courts. In the Decree Guidelines, Restorative Justice can be applied to four types of cases, namely minor crimes with losses below Rp. 2,500,000 (Chapter II Sub Chapter A), child cases (Chapter II Sub Chapter B), Women in conflict with the law (Chapter II Sub Chapter C), and Narcotics Cases (Chapter II Sub Chapter D).

Then in the case of a traffic accident crime committed by a child, the application of restorative justice is carried out through diversion efforts as stipulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Furthermore, there is Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System.

Restorative justice or restorative justice has become one of the principles in resolving criminal acts committed by children. This is as expressly stated in Article 1 to 6 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which states that restorative justice is the resolution of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a just resolution by emphasizing restoration to the original state, and not retaliation. The application of restorative justice in resolving criminal acts committed by children is carried out with diversion, namely the transfer of the resolution of the Child's case from the criminal justice process to a process outside the criminal justice system (Article 1 to 6).

The application of restorative justice in resolving criminal acts committed by children can be implemented at the level of investigation, prosecution, and examination of children's cases in the district court by requiring Diversion efforts. Diversion is implemented in cases where the crime committed is threatened with imprisonment of less than 7 (seven) years and is not a repetition of the crime. This

Republic of Indonesia. https://www.kejaksaan.go.id/agenda_kegiatan.php?id=695, accessed July 20, 2024,

statement is stated in Article 7 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

Article 8 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System states that the diversion process is carried out through deliberation involving the Child and his/her parents/Guardians, victims and/or parents/Guardians, Community Counselors, and Professional Social Workers based on the Restorative Justice approach. If necessary, deliberation may involve Social Welfare Workers, and/or the community. The Diversion Process must consider the interests of the victim; the welfare and responsibility of the Child; avoidance of negative stigma; avoidance of retaliation; harmony in society; and propriety, morality, and public order. Based on this, it can be said that the application of restorative justice in resolving criminal cases committed by children through diversion cannot be done carelessly but must consider matters relating to the child's future and balance in society.

The application of restorative justice through diversion can reach an agreement on the settlement of criminal cases that are in dispute. The results of the Diversion agreement according to Article 11 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System can be in the form of: 1. Peace with or without compensation; 2. Return to parents/guardians; 3. Participation in education or training at educational institutions or LPKS for a maximum of 3 (three) months; or 4. Community service.

The implementation of the restorative justice policy in resolving traffic cases in providing protection for victims refers to legal protection for the fulfillment of their rights as regulated in Law Number 22 of 2009 concerning Traffic and Road Transportation, namely:

a. Help and Care

Protection of accident victims for assistance and treatment is provided by Article 240 letter a of Law Number 22 of 2009 concerning Traffic and Road Transportation, which states that victims of Traffic Accidents have the right to receive: assistance and treatment from the party responsible for the occurrence of the Traffic Accident and/or the Government.

Traffic accident victims have also received protection with the existence of a party responsible for traffic accidents as referred to in Article 231 paragraph (1) of Law Number 22 of 2009 concerning Traffic and Road Transportation which states that Motor Vehicle Drivers involved in Traffic Accidents are required to: a. stop the Vehicle they are driving; b. provide assistance to the victim; c. report the accident to the nearest Indonesian National Police; and d. provide information related to the accident. Then it is explained in Article 231 paragraph (2) that Motor Vehicle Drivers, who due to compelling circumstances cannot carry out the provisions as referred to in paragraph (1) letters a and b, must immediately report themselves to the nearest Indonesian National Police.

Protection of traffic accident victims for treatment and assistance is not only the obligation of the driver but the obligation of every person as stated in Article 232 which states that every person who hears, sees, and/or knows about the occurrence of a Traffic Accident is obliged to: a. provide assistance to the Traffic Accident victim; b. report the accident to the Indonesian National Police; and/or c. provide information to the Indonesian National Police.

In addition to the above treatment and assistance, every victim of a traffic accident has the right to receive priority first aid and treatment at the nearest hospital in accordance with the provisions of laws and regulations. This is determined by Article 241.

b. Compensation

Protection for victims of traffic accidents for compensation for losses due to traffic accidents is stated in Article 240 letter b of the Law on Traffic and Road Transportation, which states that Accident victims have the right to receive compensation from the party responsible for the traffic accident.

Then in Article 234 it is regulated regarding the responsibility for providing compensation, namely the driver, owner of the Motor Vehicle, and/or Public Transportation Company is responsible for losses suffered by Passengers and/or owners of goods and/or third parties due to the negligence of the Driver. Every Driver, owner of the Motor Vehicle, and/or Public Transportation Company is responsible for damage to the road and/or road equipment due to the negligence or error of the Driver. The provisions on the responsibility for compensation do not apply if there is a force majeure that cannot be avoided or is beyond the ability of the Driver; b. caused by the behavior of the victim himself or a third party; and/or c. caused by the movement of people and/or animals even though preventive measures have been taken.

Regarding the amount of compensation, it is determined by the court as stated in Article 236 paragraph (1) which states that the party causing the traffic accident is obliged to compensate for the losses, the amount of which is determined based on a court decision.

Then in Article 235 paragraph (1) it is stated that if the victim dies as a result of a traffic accident, the driver, owner and/or public transportation company are obliged to provide assistance to the victim's heirs in the form of medical expenses and/or funeral expenses without dropping the criminal case charges.

c. Traffic accident compensation

Protection in the form of compensation for traffic accidents is provided by establishing a traffic accident and road transport insurance company as referred to in Article 239 paragraph (2). Law Number 22 of 2009 concerning Traffic and Road Transportation

The peace model in restorative justice between victims and perpetrators in traffic accidents, investigators adhere to Article 235 paragraph (1) and (2) and Article 236

paragraph (2) of Law Number 22 of 2009., the parties involved in the traffic accident are brought together to hold a discussion to determine how much the medical costs and/or vehicle repairs will be. The mutual agreement process, if desired by the parties, can be witnessed by community leaders or local village officials without interference from investigators. After a peace agreement is reached and continued by implementing what has been agreed upon, a Letter is made. Joint Statement between the parties involved in implementing peace in traffic accidents, namely the perpetrator, the accident victim or their family representative, the owner/manager of the vehicle company.

In practical legal terms, "peace" can be used as a legal umbrella in the implementation of restorative justice at the level of traffic crime investigation because it can be accepted by the parties involved in the traffic accident, but in formal legal terms it cannot yet be done, because there are no clear regulations or decisions regarding restorative justice. Currently, investigators still adhere to police discretion, legal benefits, justice and humanity as stated in Article 18 paragraph (1) of Law Number 2 of 2002.

The concept of restorative justice in handling traffic crimes is law for humans, a humane law, prioritizing conscience, legal benefits and justice. With Restorative Justice justice and legal benefits are more felt by the public and give the impression that the Police or Investigators work by prioritizing conscience.

The application of the concept of restorative justice for perpetrators of traffic crimes is that in principle traffic accidents occur not as a result of deliberate elements but are negligence, even as a result of traffic accidents the perpetrator can also be a victim. It is very inhumane if people who have suffered are made to suffer even more, so it will be more effective if the resolution uses a family approach.

Peace between the parties involved in a traffic accident has a very high philosophical value of justice, even exceeding the value of justice created by the judge in his decision, so there is no need for the case to be brought to the court.

The law enforcement process is based on three pillars, namely legal certainty, justice and benefit. If there is a conflict between legal certainty and justice and benefit, then the aspect of justice and benefit is prioritized. Therefore, with the existence of peace between the parties in a traffic accident case, in this case, justice and benefit have been achieved, so that legal certainty can be set aside.

If in a traffic accident case a settlement has been reached amicably (peacefully) then there is no need for the case to be continued to court, this is based on the consideration that the criminal process is the *ultimum remedium* which is the ultimate weapon in resolving criminal cases, if other mechanisms are still possible (for example deliberation and consensus) then the mechanism in question can be implemented to resolve it first because the settlement provides benefits for both parties, referring to Gustaf Radbruch's opinion that the law enforcement process is based on three pillars, namely legal certainty, justice and benefit, if the aspect

of legal certainty is prioritized then it will sacrifice the aspect of justice, and vice versa, however if the aspect of benefit is chosen then the aspect of legal certainty and the aspect of justice are immediately included in it, this is in line with Satjipto Rahardjo's Progressive Legal Theory which states that the law is for humans not for themselves, if a problem occurs with the law then what is defeated is the law, not the humans, this is in line with police discretion as referred to in Article 18 paragraph (1) of Law Number 2 of 2002.

The problem Criminal law in Indonesia is increasingly developing along with the rapid growth of society. These various problems require appropriate solutions to restore conditions as before the crime occurred. However, the understanding of society in Indonesia identifies the resolution of legal problems with law enforcement officers, including the police, prosecutors and judges. All three are part of the criminal justice system. The resolution of criminal cases is carried out through the justice system regulated in the Criminal Procedure Code, namely the first thing to do is to make a police report. Through this police report, the victim hopes for justice where the perpetrator will be sentenced. However, the end of the justice system often does not necessarily guarantee a sense of justice in society. The severity of the verdict imposed by the judge on the defendant has not created balance and restored the social situation in society.

Law enforcement is very closely related to society, as stated in the theory put forward by Carl von Savigny, according to which "Das recht wird nicht gemacht, est ist und wird mit dem volke" (the law is not made but grows and develops with society).¹³ However, it turns out that the modern law used by the Indonesian people was not developed from within Indonesian society, but was instead implanted from outside. Law modern is a social, economic and cultural product of the West, especially Europe. So actually the story of the history of the birth of modern law is a story about European social history.¹⁴ Modern law has a liberal type. In the liberal type, not only substantive law is important, but also procedures. Procedures become important and have their own meaning, because they are needed to maintain and secure individual freedom. Thought regarding the law which later gave birth to positivism, cannot be separated from the presence of the modern state.¹⁵ This positivism has been embedded in the minds of most legal scholars in Indonesia. As a result, it greatly influences the thinking patterns of law enforcers in handling criminal cases including criminal cases in the field of traffic, namely that they must be in accordance with existing positive law.

¹³Darji Darmodiharjo and Shidarta, 2008, Principles of Philosophy Law: *What and How is the Philosophy of Law Indonesia*, Gramedia Pustaka Utama, Jakarta, p. 124

¹⁴Satjipto Rahardjo, 2009, *Law Progressive A Synthesis of Indonesian Law*, Genta Publishing, Yogyakarta, p. 138

¹⁵Satjipto Rahardjo, "Reconstruction Thinking Law in the Reformation Era", paper presented at the National Seminar on Questioning Positivism in the Reform Era, PDIH, UNDIP, Semarang, 22 July 2000, p. 4

According to Satjipto Rahardjo, resolving cases through the judicial system that culminates in a court verdict is a law enforcement towards the slow lane. This is because law enforcement is through a long distance, through various levels starting from the police, prosecutors, district courts, high courts and even to the Supreme Court. In the end, it has an impact on the accumulation of cases that are not small in number in court.¹⁶

LawCriminal law is ultimum remidium which means a last resort taken when there is no other way to resolve the case. However, in its development, criminal law is actually used as the first resort in resolving a problem between one person and another. There is even a case that is actually included in the civil realm that is forced to become a criminal case. This shift in the function of criminal law shows that society has gradually abandoned the culture of law. Whereas in a society there is still customary law that functions more effectively in resolving a problem.

The extent to which customary criminal law is covered or plays a role in influencing criminal law that has been regulated in legislation, depends largely on the appreciation of noble values that constitute the legal awareness of local communities, whether or not customary law is recognized by state law, and the extent to which customary criminal law is still considered in line with or tolerated by the Pancasila philosophy and applicable laws. The latter dependency is an absolute limitation on the application of customary criminal law. Thus, the principle of legality is actually still adhered to or maintained, only in some cases there are exceptions. In the event of a conflict between customary criminal law and applicable laws, the judge as the main figure to resolve a case plays a large role. The judge is considered to know the law. The judge is obliged to seek and find the law. The judge has a high position in society, therefore the judge as a wise and prudent human being, who is responsible to God, the state and personally, must not refuse to provide justice.¹⁷As stated by van Apeldoorn, judges must adjust (waarderen) the law to the concrete things that occur in society and judges can add (aanvullen) to the law if necessary. Judges must adjust the law to the concrete things, because the law does not cover all events that arise in society.¹⁸

The settlement of criminal cases should prioritize social balance in society. The balance referred to here is between the perpetrator and the victim of the crime, so that social harmony is recreated in society. This form of settlement is carried out in a balanced manner through deliberation between the perpetrator and the victim. The principle of a win-win solution must be prioritized in order to reach an agreement in resolving the case. In the end, it is hoped that the perpetrator will apologize to the victim and promise not to repeat it again, if necessary, replace all losses suffered by the victim. On the other hand, the victim forgives the

¹⁶Satjipto Rahardjo, *Other Sides of Law in Indonesia*, Op. Cit, p. 170

¹⁷EY Kanterand SR Sianturi, 1982, *Principles-Legal PrinciplesCriminalin Indonesia and its Implementation*, Alumni AHM- PTHM, Jakarta, p. 16

¹⁸E. Utrecht, 1962, *Introduction to LawIndonesia*, Ichtar Book Hall, Jakarta, p. 230

perpetrator and does not continue the case to court. This concept of settlement is called restorative justice. The concept of restorative justice places crime as part of a symptom that is part of social action, so that its resolution must of course prioritize local wisdom that is in accordance with the rules in the local community and prioritize deliberation for consensus in accordance with the 4th principle of Pancasila.. Actually, this form of settlement has been around for a long time. However, often the community and law enforcement are reluctant to do it on the grounds that the law must be enforced even though it takes a long time.

in the Handbook on Restorative Justice Programs published by the UN is stated that: "*Restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community.*"¹⁹ In relation to criminal law enforcement, restorative justice is an approach to solving criminal problems that involves victims, perpetrators, and elements of society in order to create justice.

According to Bagir Manan, the substance of restorative justice contains principles that can build joint participation between perpetrators, victims, and community groups to resolve an event or crime. In addition, it also places perpetrators, victims, and the community as "stakeholders" who work together and directly try to find a solution that is considered fair for all parties (win-win solutions).²⁰ According to Bagir Manan, the principle of restorative justice greatly enables community participation in determining balanced and just laws.

The concept of restorative justice in the perspective of law enforcement is part of law enforcement efforts that emphasize the involvement of victims and other related parties in the criminal acts that occur. Restorative justice places a higher value on the direct involvement of the parties. Victims able to restore elements of control, while the perpetrator is encouraged to take responsibility as a step in correcting the mistakes caused by the crime and in building its social value system. Community involvement actively strengthens the community itself and binds the community to values of respect and mutual love for each other. The role of government is substantially reduced in monopolizing the current justice process. Restorative justice requires cooperative efforts from the community and government to create conditions where victims and perpetrators can reconcile their conflicts and repair their wounds.²¹

¹⁹United Nations, 2006, Handbook on Restorative Justice Programs, United Nations Publication, New York, p. 6

²⁰The Great Man, 2008, Restorative Justice (An Introduction), in Reflection of Legal Dynamics Chain of Thoughts in the last decade, State Printing Company RI, Jakarta, p. 7

²¹The Greatest Showman, "System Criminalization in Law Criminal Restorative Based Justice" paper presented in Focus Group Discussion (FGD) activity on "Politics of Formulating Criminal Threats in Laws Outside the Criminal Code", organized by the National Legal Development Planning Center Agency National Legal Development / BPHN Department of Law and Human Rights, in Jakarta, 21 October 2010

This fundamental thing then makes the concept of Restorative Justice a new *prima donna* in the law enforcement system in Indonesia. Restorative Justice is an alternative method of resolving legal cases that focuses on its main objective, namely implementing a sense of justice to the parties involved in the case. The restorative justice approach is an approach that focuses more on the conditions for creating justice and balance for perpetrators of criminal acts and their victims.²²

Besides restorative justice return the conflict to the most affected parties, the victims, the perpetrators and their “community interests” and give priority to their interests. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore them rather than simply giving the perpetrators formal or legal justice and the victims do not get any justice. Then restorative justice also seeks to restore the victim's security, personal respect, dignity, and more importantly a sense of control.²³

Through restorative justice, not all criminal cases have to be resolved in court, but can be resolved independently between the perpetrator and the victim. The resolution achieved through restorative justice is in accordance with the culture and ideology of the Indonesian nation as mandated in Pancasila. The results of the settlement can be accounted for to God Almighty. The settlement takes into account just and civilized human values and contains social justice values for both parties, and of course can recreate social conditions as before the crime occurred.

Restorative justice reviewed from the theory of justice is basically one form of manifestation of the purpose of law in the form of justice. In this case the principle of restorative justice is an approach that seeks to provide a resolution of criminal cases that is as fair as possible for all parties, not only justice for the parties in dispute in criminal cases but furthermore seeks to realize justice for society in general. The justice in question is reflected in efforts to restore conditions as before the crime occurred. Although this is very difficult to realize, at least there is an effort to realize it so that a sense of justice can be obtained in society.

3.2. KCriminal Law Policy in Efforts to Tackle Traffic Accidents Based on Restorative Justice in the New Criminal Code

The criminal law policy in an effort to overcome traffic accidents based on restorative justice in the New Criminal Code is based on the fact that restorative justice is a concept that has been known in law enforcement practices in Indonesia, but its regulations are still very limited. The regulation of restorative justice that is strictly regulated is only contained in the Law on the Juvenile Criminal Justice System. Restorative justice is then regulated for various criminal

²²Purwadi Arianto. 2013. “Restorative Justice Approach in Law Enforcement Efforts by the Indonesian National Police (A Study in the Implementation of Criminal Law)” National Seminar of the Directorate of Criminal Investigation of the Central Java Regional Police. Semarang, p. 5

²³Ibid

acts based on regulations established by law enforcement agencies, such as the Police and the Prosecutor's Office.

At the investigation level, Regulation of the Chief of Police Number 16 of 2019 concerning Criminal Investigation was formed. The Regulation regulates the implementation of restorative justice at the investigation level with material and formal requirements. However, this Regulation does not provide an explanation of the procedures that must be taken by the Investigator if restorative justice is achieved, so that its implementation is left to the investigator's discretion.

Then, at the prosecution stage, the Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice was formed to implement restorative justice. In this Regulation, the regulation is more specific where the Public Prosecutor can issue SKP2. However, the two regulations formed by these institutions cannot be a comprehensive legal basis for implementing restorative justice.

Based on Article 3 of the Criminal Procedure Code, the application of procedural law cannot be contrary to the Law. Therefore, it is necessary to form restorative justice regulations that apply universally at the level of law. The New Criminal Code Bill can be the basis for the implementation of restorative justice.

The ratification of the RKUHP into the New Criminal Code is actually an important momentum in the effort to reform criminal law in Indonesia. This is because it formally marks the enactment of Indonesian-made criminal law which is expected to implement the ideals of Indonesian law. The ratification of the RKUHP into the New Criminal Code is actually a formal effort to break the "domination" of Indonesian positive law which is based on colonial legal products, namely the Netherlands.

The Criminal Code with Dutch legal culture certainly has substantial differences with Indonesia. The difference in legal culture between the Netherlands and Indonesia creates a legal gap where the inconsistency of the legal ideals of a society with the legal ideals of a statutory regulation can cause inconsistency and disparity in its application. The difference in legal culture between the Netherlands and Indonesia has implications for the conception and application of the Criminal Code in society. The *Wetboek Van Strafrecht (WvS)* which later became the Criminal Code has a strong Continental European legal character so that it prioritizes written positive law. This is as manifested in Article 1 of the Criminal Code which emphasizes the principle of legality as the main principle in criminal law. In Indonesia, the understanding and views with the Continental European legal character as in the Criminal Code are considered irrelevant in society. This is as emphasized by Van Vollenhoven that before positive law was present in the Dutch East Indies (the name of Indonesia during the colonial era), society had existed with unwritten law, which is commonly referred to as customary law. This

actually confirms that apart from having to be based on written law, Indonesian society is also subject to unwritten laws of a local nature.²⁴

Based on this, the implementation and practice of the Criminal Code tend not to be in accordance with the ideals of Indonesian law and the character of Indonesian society, this can be seen for example in the Criminal Code and Criminal Procedure Code which do not explain at all about dispute resolution based on local wisdom of the community, in this context restorative justice. In the Criminal Code and Criminal Procedure Code all criminal cases must be resolved through an integrated criminal justice system through law enforcement officers. This means that dispute resolution by involving the role of the community which is actually recognized and developing in society does not get facilities in positive criminal law in Indonesia.

After the ratification of the New Criminal Code in early 2023, optimism regarding criminal law based on Pancasila law has increased because the substance of the New Criminal Code has been adjusted to the legal culture of the Indonesian nation. In this context, the concept of restorative justice has also been formulated in the New Criminal Code as explained in various articles in the New Criminal Code. Such as Article 54 of the New Criminal Code explaining that in sentencing, it is mandatory to consider forgiveness from the victim and/or the victim's family, then Article 132 the authority to prosecute is declared null and void if there has been a settlement outside the judicial process. Therefore, the idea of restorative justice in the New Criminal Code, in addition to efforts to build the ideals of Indonesian law, also seeks to present a correction to the criminal justice system that emphasizes the punishment of the perpetrator, not the recovery of the victim. The emphasis on the punishment of the perpetrator only tends to simplify criminal problems because criminal problems are not only resolved when the perpetrator has been imprisoned. The resolution of criminal problems must be complex where there is a meeting point between the legal interests of society, victims, and perpetrators of criminal acts.

Based on the explanation above, it can be concluded that the concept of restorative justice has not been explained implicitly in the old Criminal Code, but is explained in regulations outside the Criminal Code, while in the New Criminal Code the concept of restorative justice has been explained implicitly as stated in Articles 54 and 132. In addition, before the New Criminal Code, the concept of restorative justice tended to be less emphasized in the criminal law system in Indonesia.

The existence of restorative justice regulations in the New Criminal Code cannot be separated from the idea that the concept of restorative justice that currently exists needs to be improved according to existing requirements and applied optimally to various types of criminal acts. The renewal of criminal law with

²⁴Henny Saida Flora, "Restorative Justice in the New Criminal Code in Indonesia: A Prophetic Legal Study", *RECHTSIDE: Criminal Law*, Vol. X, No. 2, (2022), p. 10. DOI: <https://doi.org/10.21070/jjhr.v11i0.836>, accessed July 18, 2024.

restorative justice is certainly in line with integrative legal theory. This concept is based on the purpose of law for human dignity, happiness, welfare, and nobility.²⁵

The formation of integrative theory emphasizes the rule of recognition, not the emphasis on community compliance with the law.²⁶ Integrative Legal Theory is the basis that bureaucratic engineering and social engineering must be based on Pancasila as the ideology of the Indonesian nation. If explored further, integrative legal theory refers to the philosophy of the Indonesian nation, Pancasila. This Integrative Legal Theory emphasizes that law essentially consists of norms, actors, and values as can be called the tripartite character of Indonesia's social engineering.

Basically, in the formation of the New Criminal Code, the spirit that is carried is restorative justice. The restorative concept can be seen from the regulation of the Purpose of punishment in the New Criminal Code. The Purpose of Punishment was previously not regulated in any legal product. Article 51 letter c of the New Criminal Code describes restorative justice by stating that the purpose of punishment is "to resolve conflicts caused by Criminal Acts, restore balance, and bring a sense of security and peace in society". Even Article 52 rejects the retributive concept altogether by stating that "punishment is not intended to degrade human dignity".²⁷ The full objectives of criminal punishment as stipulated in Article 51 of the New Criminal Code are as follows:

- a. Preventing criminal acts by enforcing legal norms for the protection and care of society;
- b. Socializing convicts by providing guidance and mentoring to make them good and useful people;
- c. Resolving conflicts caused by criminal acts, restoring balance, and bringing a sense of order and peace to society; and
- d. Cultivate a sense of regret and free the convict from guilt.

Based on the concept of punishment, the judge is then equipped with the Sentencing Guidelines with one of the ammunitions in the form of *rectherlijk* pardon or known as the judge's forgiveness. Article 54 paragraph (2) states "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened later can be used as a basis for consideration not to impose a penalty or not to impose action by considering aspects of justice and humanity". With this authority, even

²⁵Atmasasmita, R. 2012. *Integrative Legal Theory: Reconstruction of Development Legal Theory and Progressive Legal Theory*. Genta Publishing, Jakarta.

²⁶Farida, A. 2016. "Pancasila Legal Theory as a Synthesis of Convergence of Legal Theories in Indonesia". *Perspektif Journal*, 11(1).

²⁷Muhammad Fatahillah Akbar, "Reform of Restorative Justice in the Indonesian Criminal Justice System", *Journal of Legal Issues*, Volume 51 No.2, April 2022, p. 206.

if the formulation of the crime is fulfilled, the judge can not impose a penalty and action at all.

Article 54 of the New Criminal Code reads in full:

(1) In sentencing, the following must be taken into consideration:

- a. Form of guilt of the perpetrator of the crime;
- b. Motive and purpose of committing a crime;
- c. The mental attitude of the perpetrator of the crime;
- d. Criminal acts are committed with or without planning;
- e. How to commit a crime;
- f. The attitude and actions of the perpetrator after committing a crime;
- g. Life history, social circumstances, and economic circumstances of the perpetrator of the crime;
- h. The impact of criminal penalties on the future of the perpetrator of the crime;
- i. The impact of the crime on the victim or the victim's family;
- j. Forgiveness from the victim and/or the victim's family; and/or
- k. Legal and justice values that exist in society.

(2) The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened afterwards can be used as a basis for considering not imposing a criminal penalty or not imposing action by taking into account aspects of justice and humanity.

Judicial pardon or *rechterlijke pardon* or judicial pardon or *dipensa de pena* is the idea of judicial forgiveness and pardon. This concept gives the judge the authority to forgive and not impose criminal penalties or actions even though the crime and mistake have been proven.²⁸The current Indonesian Criminal Code does not regulate *rechterlijke pardon*. The Criminal Code is the result of the classical school of thought based on three pillars, namely the principle of legality, the principle of guilt and the principle of secular retribution (retaliation), which states that concrete punishment is not imposed with the intention of achieving a beneficial result, but rather commensurate with the severity of the act committed.²⁹With the reform of criminal law, the development of a restorative-based criminal law system will be more optimal.

The restorative concept is also reflected in Article 70 of the New Criminal Code, which contains guidelines for not imposing imprisonment in several conditions. One condition that shows the restorative concept is when "the defendant has paid

²⁸Barda Nawawi Arief. 2016. "The Never-ending Reform of the Criminal Code and Criminal Procedure Code: The Fate of the Draft Criminal Code and Draft Criminal Procedure Code". Mahupiki National Seminar.

²⁹Sudarto. 1979. A Dilemma of Reforming the Indonesian Criminal System. Faculty of Law, Diponegoro University. Semarang.

compensation to the victim". This concept places a resolution of the settlement of the crime between the perpetrator and the victim which is reflected in the concept of restorative justice. In addition, if "the defendant is not aware that the crime committed will cause great losses", imprisonment is also not appropriate to be imposed. The provisions of Article 70 of the New Criminal Code in full are as follows:

(1) While still considering the provisions as referred to in Articles 51 to 54, imprisonment should as far as possible not be imposed if the following circumstances are found:

- a. The defendant is a child;
- b. The defendant is over 75 (seventy five) years old;
- c. The defendant has committed a crime for the first time;
- d. The victim's losses and suffering are not too great;
- e. The Defendant has paid compensation to the Victim;
- f. The defendant did not realize that the crime he committed would result in major losses;
- g. Criminal acts occur due to very strong incitement from other people;
- h. The victim of the crime encourages or instigates the occurrence of the crime;
- i. The crime is the result of a situation that is unlikely to be repeated;
- j. The defendant's personality and behavior convince him that he will not commit another crime;
- k. Imprisonment will cause great suffering for the accused or his family;
- l. Guidance outside of correctional institutions is expected to be successful for the defendant;
- m. Imposing a lighter sentence will not reduce the serious nature of the crime committed by the defendant;
- n. The crime occurred within the family; and/or
- o. Criminal acts occur due to negligence.

(2) The provisions referred to in paragraph (1) do not apply to:

- a. Criminal acts punishable by imprisonment of 5 (five) years or more;
- b. Criminal acts that are subject to special minimum penalties;
- c. Certain criminal acts that are very dangerous or detrimental to society; or
- d. Criminal acts that harm the country's finances or economy.

Handling of criminal acts by applying the principle of restorative justice is also accommodated by Article 132 paragraph (1) letter g of the New Criminal Code which regulates the cessation of prosecution authority in the event of a settlement

outside the judicial process as regulated in the Law. The provisions of Article 132 of the New Criminal Code in full read as follows:

(1) The authority to prosecute is declared to have lapsed if:

- a. There is a court decision that has obtained permanent legal force against every person for the same case;
- b. The suspect or defendant dies;
- c. Expiry;
- d. The maximum criminal fine must be paid voluntarily for criminal acts that are only threatened with a maximum fine of category II;
- e. The maximum category IV fine must be paid voluntarily for crimes that are punishable by a maximum prison sentence of 1 (one) year or a maximum category III fine;
- f. Withdrawal of complaint for Criminal Offenses;
- g. There has been a settlement outside the judicial process as regulated in the Law;
or
- h. Granting amnesty or abolition.

(2) Provisions regarding the lapse of prosecution authority for Corporations take into account the provisions as referred to in Article 121.

Based on the description above, it can be seen that restorative justice in the New Criminal Code is a unification of the application of restorative justice which was previously spread across various laws and regulations in accordance with the level of criminal justice institutions, namely investigation, prosecution and examination in court. This will certainly provide legal certainty in the application of restorative justice because the Criminal Code is a fundamental criminal regulation for the criminal law system in Indonesia.

However, the restorative justice regulation in the New Criminal Code still shows the regulation at the level of prosecution and examination in court hearings only, namely the provision of the cessation of prosecution and the judge's forgiveness in imposing a sentence in the event that the criminal case has been resolved amicably or settled out of court. There is no regulation in the New Criminal Code regarding the application of restorative justice at the investigation level, but the application of restorative justice is emphasized in the criminal sentencing process, namely at the level of prosecution and examination in court hearings. This can certainly hinder the application of restorative justice. This is because the investigation level is the beginning of case handling. The New Criminal Code does not expressly regulate that "settlement outside the judicial process" which can lapse prosecution and grant the judge's forgiveness is carried out at the investigation stage.

For that reason, there needs to be further regulation regarding the restorative justice referred to in the New Criminal Code in implementing laws and regulations

such as government regulations. This is to provide technical provisions regarding its implementation in the field so as not to cause misinterpretation regarding restorative justice in the New Criminal Code which is still general in nature.

4. Conclusion

The criminal law policy in an effort to overcome traffic accidents based on restorative justice in positive law is currently still sectoral in each law enforcement agency. The restorative justice policy at the investigation level is Regulation of the Chief of Police Number 16 of 2019 concerning Criminal Investigation and Regulation of the Chief of Police Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice, at the prosecution level there is Regulation of the Attorney General Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and at the court examination level the application of restorative justice is carried out in various Supreme Court decisions such as Supreme Court Decision Number 1600 K/Pid.2009 and Decree of the Director General of Badilum MA Number 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Restorative Justice Guidelines in the Scope of General Courts. The implementation of restorative justice has only just received a firm legal umbrella for all law enforcement officers in Law Number 11 of 2012 concerning the Child Criminal Regulation System in the form of an obligation to implement diversion efforts at all levels of criminal justice for crimes committed by children, namely the levels of investigation, prosecution and Examination in Court Hearings. The provisions in question were followed by the issuance of Supreme Court Regulation Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System.

The criminal law policy in an effort to overcome traffic accidents based on restorative justice in the New Criminal Code is in the form of the cessation of prosecution authority if the criminal case has been resolved outside the court process and the judge's forgiveness or rechterlijke pardon or judicial pardon or *dipensa de pena* is the idea of judge forgiveness and forgiveness. This concept gives the judge the authority to forgive and not impose criminal penalties or actions even though the crime and error have been proven. However, the New Criminal Code does not provide detailed regulations regarding the authority to apply restorative justice to investigators. The New Criminal Code only provides an opportunity for the settlement of criminal cases outside the court which can vacate the authority to prosecute. However, the New Criminal Code is a fundamental basis for the application of restorative justice in the legal system in Indonesia.

5. References

- Atmasasmita, R. 2012. Integrative Legal Theory: Reconstruction of Development Legal Theory and Progressive Legal Theory. Genta Publishing, Jakarta.
- Attorney General's Office of the Republic of Indonesia. (2021). Priority Work Program of the Attorney General's Office of the Republic of Indonesia in

2021. Attorney General's Office of the Republic of Indonesia.https://www.kejaksaan.go.id/agenda_kegiatan.php?id=695
- Barda Nawawi Arief. 2016. "The Never-ending Reform of the Criminal Code and Criminal Procedure Code: The Fate of the Draft Criminal Code and Draft Criminal Procedure Code". Mahupiki National Seminar.
- CT Lesmana, "Implementation of Penal Mediation in Handling Criminal Cases (Case Study at Satreskrim Polres Sukabumi City," *Rechten*, vol. 2, no. 2, 2020.
- Darji Darmodiharjoand Shidarta, 2008, *Principles of Philosophy Law: What and How is the Philosophy of Law Indonesia*, Gramedia Main Library, Jakarta
- E. Utrecht, 1962, *Introduction to Law Indonesia*, Ichtar Book Center, Jakarta.
- EY Kanterand SR Sianturi, 1982, *Principles-Legal Principles Criminal in Indonesia and its Implementation*, Alumni of AHM-PTHM, Jakarta.
- Farida, A. 2016. "Pancasila Legal Theory as a Synthesis of Convergence of Legal Theories in Indonesia". *Perspective Journal*, 11(1).
- H. Widodo and FP Disantara, "Problematics of Legal Certainty of Public Health Emergency During the COVID-19 Pandemic," *J. Suara Huk.*, vol. 3, no. 1, p. 197, Mar. 2021, doi: 10.26740/jsh.v3n1.
- Hariyanto, DRS, & S, PY 2019. "Penal Mediation in *Ius Constitutum* and *Ius Contituendum* in Indonesia". *Kertha Wicaksana Journal*, 13(1).
- Henny Saida Flora, "Restorative Justice in the New Criminal Code in Indonesia: A Prophetic Legal Study", *Rechtsidee Vol 10 No 2 (2022)*: December.
- Henny Saida Flora, "Restorative Justice in the New Criminal Code in Indonesia: A Prophetic Legal Study", *RECHTSIDE: Criminal Law*, Vol. X, No. 2, (2022), p. 10. DOI: <https://doi.org/10.21070/jjhr.v11i0.836>.
- Hiariej, EO 2015. *Principles of Criminal Law*. Cahaya Atma Pustaka, Jakarta.
- Muhammad Fatahillah Akbar, "Reform of Restorative Justice in the Indonesian Criminal Justice System", *Journal of Legal Issues*, Volume 51 No.2, April 2022.
- Purwadi Arianto. 2013. "Restorative Justice Approach in Law Enforcement Efforts by the Indonesian National Police (A Study in the Implementation of Criminal Law)" National Seminar of the Directorate of Criminal Investigation of the Central Java Regional Police. Semarang.
- Satjipto Rahardjo, 2009, *Law Progressive A Synthesis of Indonesian Law*, Genta Publishing, Yogyakarta
- Sudarto. 1979. *A Dilemma of Reforming the Indonesian Criminal System*. Faculty of Law, Diponegoro University. Semarang.
- Sudikno Mertokusumo, 1995, *Understanding Law: An Introduction*, Liberty, Yogyakarta.

T. Subarsyah Sumadikara, 2010, Law Enforcement (A Legal and Criminal Politics Approach), Kencana Utama, Bandung.

The Great Man, 2008, Restorative Justice(*An Introduction*), in Reflection of Legal Dynamics *Chain of Thoughts in the last decade*, State Printing Company Republic of Indonesia, Jakarta.

The Greatest Showman, "System *Criminalization in Law Criminal Restorative Based Justice*" paper presented in Focus Group Discussion (FGD) activity on "Politics of Formulating Criminal Threats in Laws Outside the Criminal Code", organized by the National Legal Development Planning Center Agency National Legal Development / BPHN Department of Law and Human Rights, in Jakarta, 21 October 2010

United Nations, 2006, Handbook on Restorative *Justice Programs*, United Nations Publications, New York.

Victimology, www.replaz.blogspot.com