



## RECONSTRUCTING PENAL MEDIATION IN CRIMINAL CASE RESOLUTION BASED ON JUSTICE, UTILITY, AND LEGAL CERTAINTY

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**Abstract.** Penal mediation provides an alternative approach to addressing the challenges victims face in obtaining compensation, restitution, and assistance. This study aims to identify factors influencing the effectiveness of penal mediation in resolving criminal cases and proposes methods for its reconstruction. The research employs statutory and conceptual approaches, analyzing data through content analysis. The findings reveal that legal structure, substance, and culture are critical to the success of penal mediation. Key recommendations include shifting the legal culture to view penal mediation as a solution for complex cases, establishing competency standards for investigators and public prosecutors as mediators, and harmonizing restorative justice criteria at the investigation and prosecution levels. The study also suggests expanding the criteria for offenses eligible for mediation, with a focus on victim restoration over punishment. These reforms are essential to improving the effectiveness of penal mediation and ensuring that it fulfills the objectives of justice, utility, and legal certainty.

**Keywords:** justice, legal certainty, penal mediation, reconstruction, utility

### A. Introduction

An alternative approach to addressing the challenges faced by victims in obtaining compensation, restitution, and assistance is through the mechanism of penal mediation. However, Indonesia's positive criminal law fundamentally does not provide for the resolution of criminal cases outside the judicial process. Despite this, in practice, criminal cases are frequently resolved extrajudicially through customary institutions, mutual settlements between parties, and the discretionary actions of law enforcement officials.[1] The current situation implies that certain criminal cases are not pursued within the criminal justice system due to the achievement of reconciliation between the parties involved. In other instances, despite reconciliation, the case may still proceed but with the reconciliation serving as a mitigating factor in sentencing, it might contribute to issues of sentencing disparity. The ultimate outcome of the Criminal Justice System often results in new challenges, such as overpopulation in correctional facilities. These issues could be mitigated if space were provided for the resolution of criminal cases through Penal Mediation.[2]

Although the Indonesian Criminal Procedure Code (KUHP) has long refrained from recognizing the resolution of criminal cases through non-litigation means, the persistent use of non-litigation pathways for resolving criminal offenses demonstrates that this mechanism has gained acceptance among law enforcement officials. This further underscores the necessity for developing non-litigation resolutions of criminal cases, particularly in the form of Penal Mediation.[3] The core issue ultimately arises when the sense of justice is disturbed, particularly in situations where the law is rigorously enforced against minor offenders and



juvenile delinquents, creating a stark contrast with the enforcement of laws against serious crimes such as corruption, money laundering, terrorism, and others. In cases of complaint-based offenses, there seems to be no significant issue, as victims have the opportunity to withdraw their complaints based on reconciliation and compensation. However, for general offenses, the application of penal mediation is entirely dependent on the discretionary authority of law enforcement officials, which poses a threat to justice if such discretion is exercised arbitrarily. [3]

Penal mediation is essential as an intermediary in the resolution of criminal cases through reconciliation between the offender and the victim.[4] Penal mediation, commonly known as Alternative Dispute Resolution (ADR), is a form of out-of-court dispute resolution traditionally used in civil cases. It is also referred to as "Victim-Offender Mediation" or Offender-Victim Arrangement (OVA), as it primarily facilitates meetings between the perpetrator of a crime and the victim.[5] Consequently, penal mediation is closely linked to restorative justice. According to Eva Achjani, restorative justice involves resolving criminal cases by engaging the offender, the victim, their respective families, and other relevant parties in a collective effort to find a fair resolution, focusing on the restoration of the original state rather than retribution.[6] This concept gives rise to the terms ADR or Penal Mediation, which better meet the demands of justice and are relatively more efficient. Therefore, the role of the mediator in penal mediation is strategically significant in the resolution of criminal cases.[5]

Recognizing that the purpose of punishment extends beyond mere retribution to include the restoration of relationships between the offender and the victim, the concept of restorative justice, particularly in the form of diversion, gained legitimacy with the enactment of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System. This marked a significant step in the reform of criminal law, further evidenced by the signing of a Joint Agreement (Nokersber) in the same year between the Chief Justice of the Supreme Court, the Minister of Law and Human Rights, the Attorney General, and the Chief of the Indonesian National Police. This agreement addressed the implementation of guidelines on petty offenses, the imposition of fines, expedited examination procedures, and the application of Restorative Justice. The Nokersber was a follow-up to Supreme Court Regulation No. 2 of 2012 concerning the Adjustment of Thresholds for Petty Offenses and the Amount of Fines in the Criminal Procedure Code. Through these two provisions, restorative justice and penal mediation are recognized as valid non-litigation mechanisms for resolving criminal cases involving juvenile offenders and minor offenses.

It appears that the implementation of penal mediation is facing a second phase of challenges, as public perceptions of justice remain unsettled due to the limitations in the application of penal mediation and restorative justice, as well as the absence of clear mechanisms for their implementation during the investigation and prosecution stages. This situation led to the issuance of Indonesian Prosecutor's Regulation No. 15 of 2020 on the Termination of Prosecution Based on Restorative Justice and the Indonesian National Police Regulation No. 8 of 2021 on the Handling of Criminal Offenses Based on Restorative Justice.

However, the effectiveness of penal mediation, which is seen as a potential solution to the issues of compensation, restitution, and assistance for victims, is now encountering a third set of challenges. The existing regulations are criticized for not providing legal certainty regarding the enforcement of penal mediation agreements, creating overlaps in regulations at the investigation and prosecution levels, and failing to accommodate other types of offenses that could potentially be resolved through penal mediation. As a result, these shortcomings hinder the delivery of justice and utility for victims of other criminal offenses seeking compensation, and they also raise concerns about the credibility of mediators.



In light of the above, it is essential to conduct an in-depth examination of the "Reconstruction of Penal Mediation in Criminal Case Resolution Based on Justice, Utility, and Legal Certainty."

## **B. Methods**

The research employs multiple methodological approaches. First, a statutory approach is utilized to examine the legislation governing penal mediation, restorative justice, and criminal law reform. Second, a conceptual approach is adopted to understand the fundamental concepts of penal mediation and the reconstruction of penal mediation. The data is processed using techniques of reduction and categorization, and analyzed through the content analysis method, allowing for a comprehensive understanding of the data, which is then linked to relevant legal theories or concepts.

## **C. Discussion**

### **1. Factors Influencing the Effectiveness of Penal Mediation in Criminal Case Resolution in Indonesia)**

Stuart M. Widman defines penal mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." [7] Similarly, Mark William Baker describes penal mediation as "a process of bringing victims and offenders together to reach a mutual agreement regarding restitution, which would become the norm." [8]

The advantages of penal mediation include its ability to reduce victims' feelings of vengeance towards the offender and its procedural flexibility, as it does not require adherence to all processes mandated by the Criminal Justice System (SPP), resulting in lower costs and faster resolution compared to litigation. Additionally, this process benefits the victim by enabling them to obtain restitution from the offender, ultimately leading to the restoration of a harmonious relationship between the victim and the offender. [9]

Despite these advantages, the reality suggests otherwise, as penal mediation has not proven to be sufficiently effective in resolving criminal cases. This ineffectiveness is influenced by several factors, which will be analyzed using M. Friedman's theory. According to Friedman, an actual legal system operates as a complex organism where legal structure, substance, and culture interact. [10] Through this theoretical framework, the factors influencing the effectiveness of penal mediation in the resolution of criminal cases can be analyzed as follows:

#### **a. Legal Structure**

##### **1) Competence of Investigators and Public Prosecutors as Mediators in Penal Mediation**

The success of mediation largely depends on the mediator's competence in guiding the mediation process. Suyud Margono asserts that mediation is a dispute resolution effort in which parties reach an agreement with the assistance of a neutral mediator who does not make decisions or conclusions for the parties but merely facilitates dialogue between them to achieve consensus. Therefore, the primary role is played by the parties themselves, while the mediator acts as a facilitator to foster negotiation towards an agreement. [11] If one party appears dominant, aggressive, or there are indications of extortion or unreasonable demands, the mediator can intervene to balance the positions during the negotiation process.

According to Indonesian Supreme Court Regulation No. 1 of 2016, in civil case resolution, mediation can be conducted by a certified professional mediator or a judge who acts as a neutral intermediary to assist in negotiations aimed at reaching a peaceful settlement. [12] The duties and habitual practices of judges, such as listening to and considering evidence from both parties while maintaining independence in adjudication, naturally equip judges to adapt to the role of



a neutral and independent mediator. Moreover, when mediation in civil cases is conducted by a certified professional mediator, their competence is already legitimized, further ensuring the effectiveness of the mediation process.

In contrast, restorative justice and diversion in criminal cases lack established legitimacy and standardized qualifications for mediators. Typically, these roles are filled by the police[13] or prosecutors handling the case, who act as mediators in the restorative justice process.[14] However, the characteristics developed in investigators are primarily focused on uncovering criminal acts, and similarly, public prosecutors have traditionally positioned themselves as representatives of the victim's and the state's interests in prosecuting and charging offenders. Therefore, without the necessary knowledge and training in mediation principles, the ability of investigators and prosecutors to serve as mediators heavily depends on their individual knowledge and experience in non-litigation resolution.

Without a competency assessment, it cannot be assured that law enforcement officials—investigators and prosecutors in this context—are knowledgeable, understand, and apply mediation principles. There is no certainty that mediation has been conducted neutrally and independently; it is possible that mediation is merely offered to fulfill the legal requirement that restorative justice or diversion efforts have been attempted. The lack of competency among law enforcement officials as mediators can hinder effective communication between the parties, reducing the likelihood of achieving a peaceful resolution and compensation for the victim. Furthermore, insufficient mediator competence may lead to an inability to accurately assess the offender's capacity to pay compensation to the victim. This situation can result in the failure of the mediation process and the denial of compensation to the victim.

## 2) Lack of Involvement of Relevant Third Parties

The agreements reached between the victim and the offender in penal mediation tend to be of a private nature. This inclination often results in the limited involvement of community representatives in the mediation process, thereby restricting the focus of the agreement to the immediate needs of the victim without achieving the broader goal of social harmony, which is a more comprehensive objective of penal mediation. [15] It is not uncommon for local communities to qualify as indirect victims of a crime, particularly in cases such as environmental pollution, where the impact extends beyond the direct victim to the wider community.

### b. Legal Substance

#### 1) Lack of Regulation on the Implementation of Compensation in Peace Agreements

Neither the Juvenile Criminal Justice System Law nor the provisions on restorative justice in Prosecutor's Regulation No. 15 of 2020 and National Police Regulation No. 8 of 2021 specify whether the compensation agreed upon in a peace agreement must be paid in full or may be paid in installments. The lack of clarity regarding whether compensation must be paid in full or may be paid in installments leaves the terms of compensation undefined in the context of penal mediation. As a result, practices vary widely across police precincts and prosecutor's offices.

In practical terms, there is significant variation in how the implementation of such agreements is overseen. One contributing factor is the absence of a clear definition in National Police Regulation No. 8 of 2021 regarding what constitutes sufficient evidence of victim restoration, leading to interpretations that allow for gradual or installment-based compensation.[15]

This becomes problematic when the parties agree that compensation will be paid in installments over a certain period, as it often leads to instances where the offender defaults on the payment. Meanwhile, the investigation termination letter may have already been issued,



which make certain situation indirectly highlights the lack of legal certainty in the enforcement of penal mediation peace agreements.

## 2) Nature of the Peace Agreement (Final and Binding)

The fulfillment of a peace agreement in penal mediation leads to the issuance of an Order to Terminate Investigation (SP3) if mediation occurs during the investigation stage, or an Order to Terminate Prosecution (SKP2) if it occurs during the prosecution stage. However, there is no clear regulation within the Police Regulation or Prosecutor's Regulation regarding whether peace agreements in restorative justice, including diversion or penal mediation, are final and binding. This contrasts with arbitration decisions, which are inherently final and binding. The lack of such clarity results in legal uncertainty, particularly concerning whether SP3 and SKP2 can be revoked.

## 3) Restorative Justice Requirements Limit Penal Mediation for Aggravated Offenses

The requirements for restorative justice under Prosecutor's Regulation No. 15 of 2020 remain overly rigid. For instance, penal mediation cannot be applied in a case where a mother and her child jointly steal a mobile phone to support the child's schooling. According to Article 363 of the Indonesian Criminal Code (KUHP), theft with aggravating circumstances, committed by two or more people, carries a maximum sentence of seven years, which exceeds the five-year maximum sentence threshold specified for restorative justice. Moreover, if the stolen mobile phone is valued at over Rp 2,500,000 (Two Million Five Hundred Thousand Rupiah), the case would not meet the criteria for restorative justice. The inability to meet these requirements precludes the resolution of the criminal case through a restorative justice approach, contradicting the original purpose of restorative justice and penal mediation. Such limitations undermine the principles of justice and humanity that penal mediation seeks to uphold.

## 4) Discrepancies in Restorative Justice Requirements at the Investigation and Prosecution Levels

The analysis of the above provisions reveals a discrepancy in the application of restorative justice between the police and the prosecutor's office. The requirements for restorative justice under Police Regulation No. 8 of 2021 are more flexible, making penal mediation more likely to be implemented at the investigation stage, particularly given that the police serve as the frontline in law enforcement. In contrast, Prosecutor's Regulation No. 15 of 2020 imposes more detailed and stringent conditions, thereby limiting the scope of criminal case resolution through penal mediation at the prosecution level.

## 5) Restorative Justice Requirements Limit Penal Mediation for Other Criminal Offenses

The restrictive conditions for restorative justice set forth in Police Regulation No. 8 of 2021 and Prosecutor's Regulation No. 15 of 2020 prevent penal mediation from being applied to all criminal cases, whether at the investigation or prosecution stages. Even when both the victim and the offender prefer resolution through penal mediation, this may not be possible due to explicit exclusions for certain offenses under restorative justice provisions.

For instance, in environmental crimes, the Environmental Protection and Management Law (Law No. 32 of 2009) has not effectively safeguarded legal protection for affected victims. This is evident in Article 119 of the law, where corporate criminal liability does not prioritize restoration as a principal sanction but merely as an additional penalty. Moreover, the strict liability principle in the law is only applied to specific environmental crimes,[16] with penalties confined to cumulative imprisonment and fines,[17] while compensation for victims must be





sought through civil litigation. In 2023, Jakarta's air pollution ranked highest in Southeast Asia and tenth globally, highlighting the urgency of effective legal responses.[18]

However, Article 85(2) of the Environmental Protection and Management Law explicitly excludes out-of-court settlements for environmental crimes. Similarly, Prosecutor's Regulation No. 15 of 2020 unequivocally states that restorative justice does not apply to environmental offenses, reflecting a disregard for environmental sustainability, which should be a central concern.[19]

Beyond environmental crimes, other offenses could also be resolved through penal mediation, such as malpractice, fraud involving money laundering, and banking crimes that harm customers. In these cases, victims often prioritize compensation over the offender's punishment.

### c. Legal Culture

The rigid restrictions on the types of criminal offenses eligible for resolution through penal mediation stem from deeply entrenched thinking patterns among policymakers and law enforcement officials, who remain focused on retribution as the primary goal of punishment. This orientation limits the scope of mediation to relatively minor cases, primarily to avoid potential social backlash. As a result, it becomes challenging to introduce change and creativity in applying penal mediation to more complex cases, where victims may be in greater need of restoration and compensation than retributive justice.

Another factor contributing to the failure of peace agreements in penal mediation is the mindset of both victims and the broader community, who may reject reconciliation and instead demand that offenders be subjected to the full extent of legal prosecution, [4] often seeking the harshest possible penalties.

## 2. Reconstructing Penal Mediation in Criminal Case Resolution Based on Justice, Utility, and Legal Certainty

An alternative approach to addressing the challenges victims face in obtaining compensation, restitution, and assistance is through penal mediation. However, its effectiveness is often hindered by various factors. Therefore, reconstructing penal mediation in criminal case resolution with a focus on justice, utility, and legal certainty must begin with improving the legal culture. Legal culture plays a strategic role in shifting paradigms. A paradigm shift is necessary to ensure that penal mediation is not limited to minor offenses, juvenile offenders, or simple cases, but is also applied to complex cases where victims are in dire need of compensation without causing social unrest or conflict. This shift would foster a legal culture oriented toward justice and utility.

Additionally, reconstruction must address the legal structure, including the establishment of competency standards for investigators and public prosecutors as mediators. Consequently, investigators and prosecutors should undergo professional mediator training. Given that penal mediation is expected to become a viable solution for resolving complex cases, where victims require compensation more than mere punishment of the offender, it is essential to equip investigators and prosecutors with not only mediation skills but also a strong adherence to mediation principles throughout the penal mediation process. This ensures that the mediation process is conducted fairly. Moreover, investigators or prosecutors as mediators should adopt a proactive stance by involving community elements as relevant parties in penal mediation. This involvement is crucial for restoring the social harmony disrupted by the offender's actions.

Legal substance is a critical aspect in reconstructing penal mediation, particularly in establishing a criminal law reform that is both just and legally certain. Necessary reformulations include:



- a. To ensure legal certainty, there must be harmonization of restorative justice requirements at both the investigation and prosecution stages.
- b. To avoid inconsistent application across different institutions and to uphold legal certainty, regulations should mandate that compensation agreed upon in a peace settlement must be paid in full (in cash) before the issuance of the Order to Terminate Investigation (SP3) and the Order to Terminate Prosecution (SKP2).
- c. The legal implications of terminating an investigation or prosecution based on restorative justice should be considered final and binding, ensuring that the criminal case is no longer processed through the conventional criminal justice system.
- d. There is a need to expand the criteria for other criminal offenses that can be resolved through penal mediation, with a focus on justice and utility. The criteria for such offenses should include the following indicators:
  - 1) Forgiveness from the victim and/or the victim's family, agreed-upon compensation to the victim, the offender's acknowledgment of guilt, the goal of penal mediation being to relieve the offender's guilt, and the restoration of relationships between the victim, offender, and the community or other affected parties. This approach not only realizes justice but also provides benefits to the parties involved and fosters social harmony.
  - 2) Criminal cases that allow for a compromise between the victim and the offender through mutual agreement, provided that:
    - a) The offender is not a repeat offender;
    - b) The crime does not incite social conflict, unrest, fear, or community rejection;
    - c) The crime does not threaten national unity;
    - d) The crime does not involve state security;
    - e) The crime is not characterized by radicalism or separatism;
    - f) The crime is not related to terrorism;
    - g) The crime is not a significant corruption offense causing substantial state losses.
    - h) To achieve a fair and beneficial legal outcome for both the victim and the offender, penal mediation should also consider that victim restoration and compensation are more critical than punishment, especially when the offender has the potential to fulfill these needs. Examples include environmental crimes, investment fraud, banking crimes that harm customers, and aggravated offenses.

#### **D. Conclusion**

Penal mediation offers an alternative approach to addressing the challenges victims face in obtaining compensation, restitution, and assistance. However, its effectiveness is often hindered by several factors. From a legal structure perspective, the absence of standardized competencies for investigators and public prosecutors as mediators can undermine the success of penal mediation. Additionally, the limited involvement of relevant third parties hinders the achievement of social harmony. On the legal substance side, issues such as the lack of clear regulations specifying whether compensation in peace agreements must be paid in full or may be made in installments, uncertainty over whether peace agreements are final and binding, and restrictive restorative justice criteria further limit the application of penal mediation, especially in aggravated offenses. Significant discrepancies between the restorative justice requirements at the investigation and prosecution levels, along with rigid limitations on the types of offenses eligible for mediation, further exacerbate these challenges. Compounding these structural and substantive issues is the entrenched mindset among policymakers and law enforcement officials, who often prioritize retribution as the primary goal of punishment. This mindset is mirrored by victims and the public, who frequently demand the harshest penalties for offenders, further complicating the acceptance and application of penal mediation.

To reconstruct penal mediation effectively in criminal case resolution with a focus on justice, utility, and legal certainty, a cultural shift is essential. This shift involves changing the prevailing paradigm to recognize penal mediation as a viable solution for complex cases where victims are in urgent need of restoration and compensation. Legal structural reforms are also necessary, including the establishment of competency standards for investigators and public prosecutors acting as mediators, and fostering a proactive approach to involving community elements in the mediation process. Additionally, legal substance requires critical reformulations, such as harmonizing restorative justice requirements at both the investigation and prosecution stages, mandating the full payment of compensation before issuing orders to terminate investigations or prosecutions, and ensuring that the legal implications of terminating cases based on restorative justice are final and binding. Furthermore, expanding the criteria for other offenses eligible for penal mediation is crucial, focusing on justice and utility for both victims and offenders. This approach will help align penal mediation practices with the broader goals of justice, legal certainty, and societal harmony.

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