



## A Review of John Rawls' Theory of Justice on the Implementation of Restorative Justice Through Penal Mediation in Indonesia

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**Abstracts:** This study examines the implementation of restorative justice through the mechanism of penal mediation within Indonesia's criminal justice system, using John Rawls' theory of justice as a theoretical framework. The research is grounded in the need for a more humane, participatory, and efficient alternative for resolving minor criminal offenses, as opposed to the conventional retributive justice system. This is a normative legal study employing both statutory and conceptual approaches. The data sources consist of primary and secondary legal materials obtained through literature review. The findings reveal that penal mediation has been applied in cases such as petty theft, defamation, and domestic violence, involving offenders, victims, families, and the community in the restorative process. This implementation reflects Rawls' principles of justice particularly the equal basic liberties and the difference principle—in protecting vulnerable groups such as juvenile offenders and first-time offenders. In conclusion, penal mediation aligns not only with restorative justice values and the Islamic legal concept of *maslahah*, but also embodies a substantive model of justice that is inclusive and responsive to local values. Therefore, this approach deserves to be formally institutionalized within the national criminal law system.

**Keywords:** Penal mediation, restorative justice, John Rawls' theory of justice, Indonesian criminal law, non-litigation resolution.

**Abstrak :** Penelitian ini mengkaji penerapan keadilan restoratif melalui mekanisme mediasi penal dalam sistem peradilan pidana Indonesia, dengan menggunakan perspektif teori keadilan John Rawls. Latar belakang penelitian ini berangkat dari kebutuhan untuk menghadirkan alternatif penyelesaian perkara pidana ringan yang lebih manusiawi, partisipatif, dan efisien dibandingkan sistem peradilan konvensional yang cenderung retributif. Penelitian ini merupakan studi hukum normatif dengan pendekatan perundang-undangan dan pendekatan konseptual. Sumber data diperoleh dari bahan hukum primer dan sekunder melalui studi kepustakaan. Hasil penelitian menunjukkan bahwa mediasi penal telah diterapkan dalam sejumlah kasus seperti pencurian ringan, penghinaan, dan kekerasan rumah tangga, dengan melibatkan pelaku, korban, keluarga, dan masyarakat dalam proses pemulihan. Implementasi ini mencerminkan prinsip keadilan Rawls, yaitu kebebasan dasar yang setara dan prinsip perbedaan, khususnya dalam melindungi pelaku dari kelompok rentan seperti anak dan pelaku pertama. Kesimpulannya, mediasi penal bukan hanya sejalan dengan nilai-nilai keadilan restoratif dan *maslahah* dalam hukum Islam, tetapi juga mencerminkan prinsip keadilan substantif yang inklusif dan adaptif terhadap nilai lokal. Oleh karena itu, pendekatan ini layak untuk dilembagakan secara normatif dalam sistem hukum pidana nasional.

**Kata kunci:** Mediasi penal, keadilan restoratif, teori keadilan John Rawls, hukum pidana Indonesia, penyelesaian non-litigasi.



## Introduction

One of the reform efforts in Indonesia's criminal law is the implementation of penal mediation. Penal mediation is a method of resolving criminal cases outside the court system.<sup>1</sup> "This step opens up broad opportunities for the growth of societal values and provides flexibility within the criminal justice system, essentially reaffirming the role of criminal law as a last resort. The success of penal mediation implementation largely depends on the values that have developed within Indonesian society, given the diverse life values that serve as references in conflict resolution. When penal mediation is grounded in these evolving societal values, it becomes a viable alternative to be further developed, aligning with the community's needs in resolving disputes.<sup>2</sup>

"Research conducted by Syahrin states that the principle of restorative justice is the restoration of a good relationship between the offender and the victim, so that there is no longer any resentment between them. The study reveals that restorative justice is understood as the restoration of justice for both the offender and the victim. Both perspectives share the common understanding that restorative justice involves the recovery of the relationship between the victim and the offender.<sup>3</sup>

Syahrin's research focuses on the integrated criminal justice system, whereas this study centers on penal mediation within the framework of John Rawls' theory of justice in the Indonesian context.

The principle of restorative justice emphasizes the importance of the judicial process in sharpening legal analysis and strengthening the instinct for justice, based on human consciousness and moral values.<sup>4</sup> "The judiciary is expected to serve as an institution that facilitates the fair distribution of justice by providing individuals with adequate opportunities to recognize and attain the form of justice they need. The criminal justice process is envisioned as a 'laboratory of common sense,' where the truth of legal facts is examined through the parameters of law and the deepest human consciousness. In this way, the process is expected to deliver justice and truth to both victims and offenders, while also fulfilling the broader sense of justice within society.<sup>5</sup> "A mediator must possess the ability to ensure that the interests of the disputing parties are safeguarded fairly and equally. This is essential for

<sup>1</sup> Teguh Hariyono, "Mediasi Penal sebagai Alternatif Upaya Penyelesaian Perkara Pidana di Luar Pengadilan," *Jurnal Penegakan Hukum dan Keadilan* 2, no. 1 (April 27, 2021): 3, accessed May 8, 2024, <https://journal.umy.ac.id/index.php/jphk/article/view/8731>.

<sup>2</sup> Kristiyadi Kristiyadi and Vincentius Setyawan, "Mediasi Penal Dalam Tindak Pidana Ringan Untuk Mewujudkan Keadilan Restoratif," *Jurnal Kepastian Hukum dan Keadilan* 4 (June 22, 2022): 18.

<sup>3</sup> M. Alvi Syahrin, "Penerapan Prinsip Keadilan Restoratif Dalam Sistem Peradilan Pidana Terpadu," *Majalah Hukum Nasional* 48, no. 1 (July 18, 2018): 98, accessed May 8, 2024,

<https://mhn.bphn.go.id/index.php/MHN/article/view/114>.

<sup>4</sup> Guntur Rambey, "Peniadaan Pidana Dalam Perspektif Restoratif Justice," *Iuris Studia: Jurnal Kajian Hukum* 4, no. 1 (September 19, 2023): 29, accessed May 8, 2024, <https://jurnal.bundamedia grup.co.id/index.php/iuris/article/view/333>.

<sup>5</sup> CSA Teddy Lesmana, "Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Pidana Dalam Perspektif Pembaharuan Sistem Peradilan Pidana Indonesia," *Jurnal Rechten: Riset Hukum dan Hak Asasi Manusia* 1, no. 1 (June 25, 2019): 9, accessed May 8, 2024, <https://rechten.nusaputra.ac.id/article/view/1>.

building trust among all parties involved in the conflict.<sup>6</sup>

"Mediation in Indonesia is regulated under Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court, which applies exclusively to civil disputes. However, issues arise regarding police discretion aimed at achieving restorative justice, as it may lead to ambiguity in law enforcement for minor cases or offenses. Relying solely on the discretionary authority of the police can create inconsistencies; therefore, the implementation of penal mediation at the police level must be supported by clear legal regulations to ensure that the concept of restorative justice can be effectively realized.<sup>7</sup> Mediation in criminal cases, also known as penal mediation, represents a significant shift within the framework of the criminal justice system. In this context, the present study focuses on penal mediation through the analytical lens of John Rawls' theory of justice.

### Problem Statement

1. How is restorative justice implemented in Indonesia?
2. How does John Rawls' theory of justice analyze the application of restorative justice through penal mediation in Indonesia?

### Research Objectives

1. To examine the implementation of restorative justice in Indonesia.
2. To analyze John Rawls' theory of justice in relation to the application of restorative justice through penal mediation in Indonesia.

### Research Methods

This study employs a normative legal research method, focusing its analysis on statutory regulations and the observation of legal theories, concepts, and principles. The research approach involves both a statutory approach and a conceptual approach to gain a deeper understanding of the subject matter.<sup>8</sup> This study utilizes several types of legal materials, namely primary legal materials, which include statutory regulations such as the Indonesian Criminal Procedure Code (KUHAP), and secondary legal materials, which include relevant literature such as books, legal expert opinions from journals, and online sources. The collection of legal materials is conducted through a literature study technique by examining books, statutory regulations, and other instruments to analyze data from valid sources.<sup>9</sup>

### Discussion and Research Results

#### *The Implementation of Restorative Justice in Indonesia*

Etymologically, the term 'mediation' originates from the Latin word *mediare*, which means 'to be in the middle.' The role of the mediator is to act as a third party who intervenes to help resolve disputes between the conflicting parties. The concept of 'being in the middle' also implies that the mediator must remain neutral and impartial throughout the resolution process. The word 'mediation' also has its roots in the English language, referring to a dispute resolution process involving a mediator as an intermediary. The mediator seeks to find a peaceful solution that benefits all parties,

<sup>6</sup> Syahrizal Abbas, *Mediasi Dalam Perspektif Hukum Syariah, Hukum Adat Dan Hukum Nasional* (Jakarta: Kencana, 2011), 2.

<sup>7</sup> Budi Heriyanto, "Alternatif Penyelesaian Perkara Pidana Menggunakan Mediasi Penal Dalam Diskursus Diskresi Kepolisian," *Transparansi Hukum* 5, no. 2 (July 31, 2022): 38–39, accessed May 8, 2024, <https://ojs.unik->

[kediri.ac.id/index.php/transparansihukum/article/view/3055](https://kediri.ac.id/index.php/transparansihukum/article/view/3055).

<sup>8</sup> Amiruddin Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2006), 89.

<sup>9</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media Group, 2021), 79.



commonly referred to as a 'win-win solution'.<sup>10</sup>

The term 'restorative justice' is a foreign terminology that began to gain recognition in Indonesia around the 1960s.<sup>11</sup> In several developed countries, the concept of restorative justice is not merely a discourse among criminal law scholars. In countries such as Australia, North America, and several European nations, restorative justice has already been applied at various stages of the criminal justice process, starting from investigation, prosecution, and trial, to the execution of sentences.<sup>12</sup>

Historically, penal mediation has long been recognized as part of Indonesia's local wisdom, deeply rooted in customary law and based on religious thought. This practice can be found in various regions such as West Sumatra, Aceh, Lampung, and other areas, although it is referred to by different names and carried out in diverse forms. Furthermore, Indonesia has contemporary criminal justice institutions that not only focus on imposing punishments but also emphasize the resolution of social conflicts and acknowledge the mystical elements present within society, one example being

the Institution of Forgiveness (Lembaga Pemberian Maaf).<sup>13</sup>

Literally, restorative justice can be understood as the restoration of justice to both the offender and the victim,<sup>14</sup> "However, this understanding has evolved further as the perspective of restorative justice is integrated into the judicial system. In the context of the justice system, restorative justice represents a systematic approach to case resolution. This process emphasizes the restoration of harm experienced by the victim and/or the community as a result of the offender's actions, and it directly involves both the victim and the offender in the resolution process."<sup>15</sup>

Mediation has been officially recognized in Indonesia since the issuance of Supreme Court Regulation Number 2 of 2003 concerning Mediation Procedures in Court, which was later revoked and replaced by Supreme Court Regulation Number 1 of 2008, and subsequently by Supreme Court Regulation Number 1 of 2016. These regulations specifically govern mediation in civil cases and do not apply to criminal cases.<sup>16</sup>

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<sup>10</sup> Rachmadi Usman, *Pilihan Penyelesaian Sengketa diluar Pengadilan* (Bandung: Citra Aditya Bakti, 2013), 95.

<sup>11</sup> Sony Rizky Anugrah and Ahmad Sudiro, "Penyelesaian Tindak Pidana Penghinaan/Pencemaran Nama Baik Melalui Media Sosial Berbasis Restorative Justice Di Kepolisian Daerah Kalimantan Tengah," *Morality: Jurnal Ilmu Hukum* 9, no. 2 (December 26, 2023): 294, accessed May 9, 2024, <https://jurnal.upgriplk.ac.id/index.php/morality/article/view/485>.

<sup>12</sup> Eriyantouw Wahid, *Keadilan Restoratif Dan Peradilan Konvensional Dalam Hukum Pidana* (Jakarta: Universitas Trisakti, 2009), 9.

<sup>13</sup> Lesmana, "Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Pidana Dalam Perspektif Pembaharuan Sistem Peradilan Pidana Indonesia," 11–12.

<sup>14</sup> Henny Saida Flora et al., "Keadilan Restoratif dalam Melindungi Hak

Korban Tindak Pidana Cyber: Manifestasi dan Implementasi," *Jurnal Ius Constituendum* 8, no. 2 (June 8, 2023): 176, accessed May 9, 2024, <https://journals.usm.ac.id/index.php/jic/article/view/6365>.

<sup>15</sup> Ridwan Mansyur, "Tindak Pidana Kekerasan Dalam Rumah Tangga Menurut Sistem Peradilan Pidana Dalam Perspektif Restorative Justice," *Jurnal Hukum dan Peradilan* 5, no. 3 (November 30, 2016): 431, accessed May 9, 2024, <https://jurnalhukumdanperadilan.org/index.php/jurnalhukumperadilan/article/view/31>.

<sup>16</sup> Nurul Widhanita Y. Badilla dkk., "Implementasi Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Di Kepolisian Resort Merauke," *Hermeneutika : Jurnal Ilmu Hukum* 6, no. 1 (28 Februari 2022): 93, <https://doi.org/10.33603/hermeneutika.v6i1.6760>.





"The distributive justice system within Indonesia's criminal justice framework is not designed to address the social issues associated with crime. The enforcement of this system by law enforcement agencies has led to public dissatisfaction, as there is a prevailing belief that justice should not be based solely on legal certainty, but should also take into account the well-being of the victim, the offender, and the broader community. As a result, the emphasis on distributive justice has shifted from the incarceration of guilty individuals to the implementation of restorative justice practices.<sup>17</sup>

Burt Galaway and Joe Hudson argue that the definition of restorative justice encompasses several key elements,<sup>18</sup> First, crime is viewed as a conflict between individuals that may cause harm to the victim, society, or even the offender themselves. Second, the goal of the criminal justice process should be to establish peace within the community, involving multiple parties and addressing the harm caused by the conflict. Third, the criminal justice process should facilitate the active participation of the offender, the victim, and the community in seeking a resolution to the dispute.

The core principle of the restorative justice concept lies in the process of bringing together the offender and the victim or community to actively participate in resolving the criminal case. Restorative justice is based on an integrative approach

that offers solutions in which all parties are involved in dispute resolution through deliberation. The outcomes of restorative justice implementation can be identified by:<sup>19</sup>

- 1) Mediation between the offender and the victim (victim-offender mediation).
- 2) Conferences involving all relevant parties (conferencing).
- 3) Support group meetings (circles).
- 4) Assistance for crime victims (victim assistance).
- 5) Provision of compensation or restoration (restitution).
- 6) Community service.

The objective of penal mediation as a restorative justice approach is to address conflicts arising from criminal acts in a fair manner, as a response to efforts aimed at reducing the retaliatory approach rooted in retributive justice. This approach deserves serious attention.<sup>20</sup> "The practice of the restorative justice concept reflects its objectives by addressing criminal acts through the identification of harm and the implementation of measures to repair it, involving all relevant stakeholders, and transforming the traditional approaches of both society and the government in responding to crime.<sup>21</sup>

Restorative justice, as an effort to achieve peaceful conflict resolution outside the courtroom, still faces challenges in its implementation. The idea of restorative justice emerged as a critique of the

<sup>17</sup> I. Putu Asti Hermawan Santosa, "Mediasi Penal sebagai Alternatif Penyelesaian Perkara Pidana bagi Perwujudan Keadilan Restoratif," *Jurnal Hukum Positum* 4, no. 1 (June 10, 2019): 59, accessed May 8, 2024, <https://journal.unsika.ac.id/index.php/positum/article/view/3007>.

<sup>18</sup> Emilia Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara Pidana Berbasis Kearifan Lokal* (Lampung: Pustaka Ali Imron, 2021), 24–25.

<sup>19</sup> Gendut Supriyanto, "Restorative Justice Perkara Tindak Pidana Lalu Lintas Dan

Korban Meninggal Dunia," *Prosiding Mewujudkan Sistem Hukum Nasional Berbasis Pancasila* 1, no. 1 (January 26, 2024): 110.

<sup>20</sup> Krismiarsari Krismiarsari, "Rekonstruksi Kebijakan Mediasi Penal Dalam Penyelesaian Perkara Kecelakaan Lalu Lintas Jalan Raya," *Spektrum Hukum* 17, no. 2 (31 Oktober 2020): 6, <https://doi.org/10.35973/sh.v17i2.1939>.

<sup>21</sup> Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara Pidana Berbasis Kearifan Lokal*, 27–28.



effectiveness of the criminal justice system, which tends to rely on imprisonment as the primary solution for resolving social conflict. One of the main obstacles to the application of restorative justice is the lack of involvement of all disputing parties in the resolution process.<sup>22</sup>

The main issue in implementing the restorative justice approach within the legal system, particularly in the criminal justice system, lies in the differing resolution mechanisms offered by restorative justice compared to those currently employed in the existing criminal justice system.<sup>23</sup> "The differences inherent in restorative justice remain difficult to accept and implement on a broad scale. This is due to the fact that the mechanisms offered by the restorative justice approach place greater emphasis on the concepts of mediation and reconciliation. In this approach, the offender, the victim, law enforcement officials, and the community are directly involved in the resolution of criminal cases. This stands in contrast even in opposition to the traditional criminal justice system that has been long established and is currently in force.<sup>24</sup>

Due to the regulation of the criminal justice system under the Indonesian Criminal Procedure Code (KUHAP), the role of individuals in the resolution of criminal cases in Indonesia has diminished perhaps even disappeared. In criminal cases, the pursuit of justice relies on a pattern involving the courts, the prosecution, the police, and

correctional institutions. Although Law Number 18 of 2003 on Advocates was intended to expand the role of individuals by providing legal assistance to victims and encouraging efforts outside the courtroom, it has failed to change the rigid characteristics of Indonesia's criminal justice system.<sup>25</sup>

The assessment of an advocate's or lawyer's ability to seek justice is generally based solely on their performance in courtroom proceedings. Efforts carried out outside the court, such as mediation, lack legal standing to be considered in judicial decisions.<sup>26</sup> The application of restorative justice strategies within the criminal justice system has proven beneficial in resolving criminal charges through the use of penal mediation agreements. However, the use of mediation in criminal case resolution is often entrusted to law enforcement officials due to the absence of specific legal norms regulating such arrangements in Indonesia's legislative framework.<sup>27</sup> The current imprisonment practices carried out by law enforcement reflect a shift from restorative justice to retributive justice. It is clear that stricter regulations are needed in this domain to ensure fair and impartial implementation of the various stages involved in penal

<sup>22</sup> Ahmad Wildan Rofrofil Akmal, "Eksistensi Penerapan Keadilan Restoratif Melalui Mediasi Penal Perspektif Masalah Mursalah di Indonesia," *Yurispruden* 7, 2 (June 2024): 200–222.

<sup>23</sup> Hanifah Febriani, Carissa Maharani, and Sadida Amalia Izzatul Haq, "Pengaturan Mediasi Penal Pasca Regulasi Keadilan Restoratif Di Kepolisian, Kejaksaan, Dan Mahkamah Agung," *Media Keadilan: Jurnal Ilmu Hukum* 14, no. 1 (April 30, 2023): 154–155, accessed May 9, 2024, <http://journal.ummat.ac.id/index.php/JMK/article/view/15101>.

<sup>24</sup> Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara Pidana Berbasis Kearifan Lokal*, 53–54.

<sup>25</sup> Akmal, "Eksistensi Penerapan Keadilan Restoratif Melalui Mediasi Penal Perspektif Masalah Mursalah di Indonesia."

<sup>26</sup> Lesmana, "Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Pidana Dalam Perspektif Pembaharuan Sistem Peradilan Pidana Indonesia," 4.

<sup>27</sup> Ilham Fauzi Prakoso, "Penyelesaian Tindak Pidana Pencurian Melalui Mediasi Penal (Studi Kasus Di Polres Batu)," *Dinamika* 26, no. 11 (August 10, 2020): 1354.

mediation by law enforcement agencies when handling criminal cases.<sup>28</sup>

In Indonesia, the concept of restorative justice is reflected in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. According to Article 1 of this law, restorative justice is defined as the resolution of criminal cases by involving the victim, the offender, the families of both, and other related parties to collectively seek a fair solution, with an emphasis on restoring the original condition rather than imposing retribution. Restorative justice in Indonesia has been applied in various criminal cases, including:

- 1) An important element of the Indonesian National Police Letter No. Pol: B/3022/XXI/2009/SDEOPS, concerning the Handling of Cases through Alternative Dispute Resolution (ADR), is:
  - a) The primary focus is on criminal cases involving minor material losses.
  - b) The ADR process must be agreed upon by all parties involved in the case.
  - c) The ADR principle is based on deliberation and consensus, and must be recognized by the surrounding community.
  - d) Respect for social/customary legal norms and principles of justice must be upheld in the ADR process.
  - e) Case resolution through ADR should bring an end to further legal proceedings.
- 2) Minor offenses that are only punishable by peace settlements or fines can be found in Article 82 of the Indonesian Criminal Code (KUHP).

3) Criminal offenses committed by children under the age of 18 are regulated under Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. This law mandates the use of diversion for children who have committed criminal acts below a certain age threshold. The minimum age for a child offender to be brought before a court is 12 years old and under 18 years old.

4) The authority granted to the National Commission on Human Rights (Komnas HAM) under Law Number 39 of 1999 on Human Rights includes conducting mediation in cases of human rights violations. This is stipulated in Article 1 Paragraph 7, Article 76 Paragraph 1, Article 89 Paragraph 4, and Article 96. National Commission on Human Rights (Komnas HAM), which was established under Presidential Decree Number 50 of 1993, has the authority to carry out mediation as part of handling human rights violation cases.<sup>29</sup>

In addition to utilizing penal mediation, the Public Prosecutor's Office also applies the principle of restorative justice through the model of prosecution termination.<sup>30</sup> This is regulated under Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice. If certain conditions are met, the regulation allows for the termination of prosecution in minor criminal offenses. In accordance with Article 5 of the regulation, a case may be discontinued if the suspect is a first-time offender and the crime carries a maximum

<sup>28</sup> Hariyono, "Mediasi Penal sebagai Alternatif Upaya Penyelesaian Perkara Pidana di Luar Pengadilan," 3.

<sup>29</sup> Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara Pidana Berbasis Kearifan Lokal*, 67–68.

<sup>30</sup> Muhammad Naufal Hibatullah, Elis Rusmiati, and Agus Takariawan, "Akibat Hukum Penerapan Restorative Justice Oleh Kejaksaan Pada Perkara Tindak Pidana Penyalahgunaan Narkotika," *Yurispruden: Jurnal Fakultas Hukum Universitas Islam Malang* 7, no. 1 (150 131AD): 135.



penalty of either a fine or imprisonment of up to five years.<sup>31</sup>

Regulatory oversight of the restorative justice process falls under the jurisdiction of the Supreme Court, an institution entrusted with the dual responsibility of adjudicating and supervising the criminal justice system. The regulatory framework concerning the implementation of restorative justice is outlined in Decree No. 1691/DJU/DK/PS.00/12/2020, issued on December 22, 2020. This decree outlines the fundamental principles of restorative justice, particularly in cases involving offenses that result in financial losses of up to IDR 2,500,000 (two million five hundred thousand rupiahs), as regulated under Articles 364, 373, 379, 384, 407, and 802 of the Indonesian Criminal Code (KUHP).<sup>32</sup>

The resolution of criminal cases outside the courtroom through a restorative justice approach represents a legal mechanism or system that offers numerous advantages, making it worthy of implementation within Indonesia's criminal justice system. As a system, the effectiveness of resolving criminal cases outside the court through restorative justice is heavily influenced by the elements that constitute the system itself. Consequently, the application of this system can be affected by various factors, similar to those that influence other efforts in law enforcement. According to Soerjono Soekanto, there are five factors that influence the effectiveness of law enforcement efforts, namely:

1) Legal Factor: This includes the laws and regulations that are in effect within a legal system.

- 2) Law Enforcement Factor: This refers to the individuals and institutions responsible for formulating and enforcing the law in practice.
- 3) Facilities or Infrastructure Factor: This encompasses all equipment, facilities, and infrastructure required to support the enforcement of the law.
- 4) Societal Factor: This involves the social and cultural environment in which the law operates, including norms, values, and practices present within the community.
- 5) Cultural Factor: This refers to the products of human creativity, thought, and emotion that underpin everyday human interactions.<sup>33</sup>

These five factors are interrelated and constitute an integrated part of the legal enforcement system. They also serve as a benchmark for assessing the effectiveness of a legal enforcement system.

Criminal cases that are commonly resolved through non-litigation (out-of-court) channels using a restorative justice approach include:

- 1) Article 310 of the Indonesian Criminal Code (KUHP): defamation or insult.
- 2) Article 311 KUHP: slander.
- 3) Article 352 KUHP: minor assault.
- 4) Article 359 KUHP: negligent acts resulting in the death of another person.
- 5) Article 372 KUHP: embezzlement.
- 6) Article 378 KUHP: fraud.
- 7) Article 332 KUHP: abducting a minor girl.
- 8) Article 367 paragraph (2) KUHP: theft committed by a family member.

<sup>31</sup> Muhammad Solikhin Fery, "Pendekatan Keadilan Restoratif Dalam Penegakan Hukum Tindak Pidana Siber Di Polda Jatim," *Jurnal Kawruh Abiyasa* 2, no. 2 (December 28, 2022): 166, accessed May 8, 2024, <https://jurnalkawruh.id/index.php/kwa/article/view/48>.

<sup>32</sup> Nurcahyo Edi, John Pieris, and Nelson Simanjuntak, "Analisa Hukum Penerapan Restorative Justice Dalam Upaya Mereformasi

Sistem Peradilan Umum Di Indonesia," *Jurnal Cahaya Mandalika ISSN 2721-4796 (online)* 4, no. 3 (August 19, 2023): 1095, accessed May 9, 2024, <https://ojs.cahayamandalika.com/index.php/jcm/article/view/1764>.

<sup>33</sup> Soekanto Soerjono and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2000), 8.





9) Trademark counterfeiting (based on Law No. 15 of 2001 on Trademarks).<sup>34</sup>

The existence of the restorative justice process as an alternative method for resolving criminal cases heavily depends on the awareness and understanding of society, including law enforcement officers. A judicial perspective that solely emphasizes the enforcement of regulations, determination of the offender's guilt, and imposition of punishment will not be able to embrace this concept. In this context, justice is viewed as the state's authority to impose penalties on its citizens who violate the law.<sup>35</sup>

Penal mediation in Indonesia's criminal justice system has indeed been recognized, albeit only partially. The concept of penal mediation has been implemented in handling juvenile cases through a special effort known as diversion. Diversion refers to the process of shifting the resolution of a criminal case from the formal court system to an out-of-court mechanism. The main objective of diversion is to find the best possible solution for juvenile offenders, which essentially shares the same spirit as the implementation of penal mediation.<sup>36</sup> The difference lies in the fact that diversion is only applicable to juvenile offenders.

In the practice of criminal law enforcement, penal mediation is often implemented by law enforcement officials such as investigators, public prosecutors, and judges. It is applied to the resolution of

certain criminal cases, although it still lacks a strong legal foundation in national legislation. Criminal cases frequently resolved through penal mediation include traffic violations that result in injury or death. Additionally, penal mediation is also applied in cases of Domestic Violence (KDRT), even though domestic violence is regulated under Law Number 23 of 2004 concerning the Elimination of Domestic Violence. Penal mediation is also implemented in several other complaint-based offenses (delik aduan).<sup>37</sup>

There are several additional limitations beyond those inherent in the Criminal Justice System. The current conditions indicate that law enforcement in Indonesia faces challenges in effectively delivering justice for all, especially for individuals from lower socio-economic backgrounds. Various critical perspectives express disappointment, skepticism, and pessimism toward the justice and law enforcement systems in Indonesia. In 2015, Ni Komang Kanten, a 55 year old woman, was charged with stealing firewood in Jembrana, Bali. Similarly, in a 2009 report, Minah, a 55 year old grandmother, faced prosecution for stealing three cacao pods in Central Java.<sup>38</sup>

### **A Review of John Rawls' Theory of Justice on the Implementation of Penal Mediation in Indonesia**

<sup>34</sup> Emy Rosnawati et al., "Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Kekerasan Dalam Rumah Tangga," *De Jure: Jurnal Hukum dan Syariah* 10, no. 2 (December 30, 2018): 65, accessed May 8, 2024, <https://ejournal.uin-malang.ac.id/index.php/syariah/article/view/4888>.

<sup>35</sup> Yana Kusnadi Srijadi and Ari Wibowo, "Peranan Kepolisian Dalam Penyelesaian Perkara Pidana Melalui Mekanisme Restorative Justice," *Wacana Paramarta* 22, no. 2 (April 30, 2023): 20.

<sup>36</sup> Mahendra Ridwanul Ghoni and Pujiyono Pujiyono, "Perlindungan Hukum

Terhadap Anak yang Berhadapan dengan Hukum Melalui Implementasi Diversi di Indonesia," *Jurnal Pembangunan Hukum Indonesia* 2, no. 3 (August 28, 2020): 332, accessed May 9, 2024, <https://ejournal2.undip.ac.id/index.php/jphi/article/view/8802>.

<sup>37</sup> Akmal, "Eksistensi Penerapan Keadilan Restoratif Melalui Mediasi Penal Perspektif Masalah Mursalah di Indonesia."

<sup>38</sup> Diah Ratna Sari Hariyanto dan Pande Yogantara S, "Mediasi Penal Dalam Ius Constitutum dan Ius Constituendum Di Indonesia," *Kertha Wicaksana* 13, no. 1 (5 Maret 2019): 27, <https://doi.org/10.22225/kw.13.1.2019.26-37>.



One of the most relevant theoretical approaches for analyzing the implementation of penal mediation in Indonesia's criminal justice system is the theory of justice developed by John Rawls. In his seminal work *A Theory of Justice*, Rawls formulates the principle of justice as fairness, which emphasizes the equitable distribution of rights and obligations as well as the recognition of individual dignity within the basic structure of society.<sup>39</sup>

The concept of restorative justice, which underpins penal mediation in Indonesia, can be critically analyzed through the lens of John Rawls' theory of justice, particularly within the framework of justice as fairness. Rawls proposes two main principles of justice: first, equal basic liberties for all individuals; and second, the difference principle, which permits social and economic inequalities only if they benefit the least advantaged members of society.<sup>40</sup>

In the context of Indonesia's criminal justice system, the application of penal mediation aligns with Rawlsian principles as it seeks to strike a balance between the protection of individual rights and substantive justice. Penal mediation offers a participatory space for both the offender and the victim to resolve cases in a peaceful, swift, and humane manner, particularly in minor criminal cases. This reflects the principle of equal liberty, as all parties are given the same opportunity to achieve justice without having to undergo a lengthy and burdensome court process.

Rawls's second principle, the difference principle, is also relevant to the practice of penal mediation in Indonesia. The emphasis on vulnerable groups—such as

children, individuals from economically disadvantaged backgrounds, or first-time offenders—demonstrates a commitment to those who are socially in less favorable positions. This is evident in the application of diversion for juvenile offenders involved in minor crimes, as regulated under Law No. 11 of 2012 on the Juvenile Criminal Justice System, where case resolution takes place outside the courtroom in consideration of the child's future.<sup>41</sup>

Rawls presents two principles of justice that form the core of his thought. First is the principle of equal basic liberties for all individuals. Second is the difference principle, which states that social and economic inequalities are only acceptable if they benefit the least advantaged members of society and are accompanied by fair equality of opportunity for everyone.<sup>42</sup> In this context, the application of penal mediation, which emphasizes restoration and dialogue between the offender and the victim while avoiding repressive imprisonment, can be seen as a manifestation of Rawlsian principles

### 1. Penal Mediation and the Principle of Fairness

Penal mediation is a mechanism for resolving criminal cases peacefully outside the court by involving the offender, the victim, and the community. In this approach, the offender is required to take direct responsibility for their actions and is encouraged to restore the harm caused to the victim. This model provides a dialogical and participatory space while avoiding the negative effects of the formal justice system,

<sup>39</sup> John Rawls, *Teori Keadilan: dasar-dasar filsafat politik untuk mewujudkan kesejahteraan sosial dalam negara* (Yogyakarta: Pustaka Pelajar, 2019).

<sup>40</sup> Rawls, *Teori Keadilan: dasar-dasar filsafat politik untuk mewujudkan kesejahteraan sosial dalam negara*.

<sup>41</sup> Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak, Lembaran Negara Republik Indonesia Tahun 2012 Nomor 153.

<sup>42</sup> Rawls, *Teori Keadilan: dasar-dasar filsafat politik untuk mewujudkan kesejahteraan sosial dalam negara*.



such as high costs, lengthy procedures, and the potential for structural injustice.<sup>43</sup>

Rawls' principle of equal liberty is reflected in the penal mediation process, as all parties are granted equal rights to express their arguments and aspirations. Meanwhile, the difference principle is evident in the protection afforded to offenders from vulnerable groups (such as children, the poor, or first-time offenders), who would be further marginalized if processed through conventional judicial mechanisms.<sup>44</sup>

In the context of Indonesia, this is highly relevant considering that the existing legal system often fails to respond to the socio-economic conditions of both offenders and victims. Penal mediation, on the other hand, offers a greater opportunity for achieving substantive justice, rather than merely adhering to formalistic procedural justice.

## 2. Penal Mediation and Distributive Justice

The retributive justice system, which has long dominated Indonesia's criminal law, tends to focus on punishing offenders while neglecting the recovery of victims. This model does not always provide a comprehensive sense of justice. Rawls himself rejects a system that focuses solely on punishment without considering the redistribution of burdens and benefits to those most affected.

<sup>43</sup> Akmal, "Eksistensi Penerapan Keadilan Restoratif Melalui Mediasi Penal Perspektif Masalah Mursalah di Indonesia."

<sup>44</sup> Ghoni and Pujiyono, "Perlindungan Hukum Terhadap Anak yang Berhadapan dengan Hukum Melalui Implementasi Diversi di Indonesia."

<sup>45</sup> Hariyono, "Mediasi Penal sebagai Alternatif Upaya Penyelesaian Perkara Pidana di Luar Pengadilan."

<sup>46</sup> Rawls, *Teori Keadilan: dasar-dasar filsafat politik untuk mewujudkan kesejahteraan sosial dalam negara*.

In Hariyono's research, it is explained that penal mediation enables the practical realization of distributive justice, as the process allows for the victim's recovery and the constructive reintegration of the offender into society.<sup>45</sup> This process aligns with Rawlsian principles of justice, which aim to create a fair society for all parties involved.

Lebih jauh lagi, mediasi penal mendukung partisipasi masyarakat dalam menyelesaikan konflik sosial dan menciptakan perdamaian. Hal ini mencerminkan apa yang disebut Rawls sebagai *overlapping consensus*, yaitu kesepakatan sosial antar kelompok dengan latar nilai yang berbeda untuk mendukung prinsip keadilan bersama.<sup>46</sup>

## 3. Relation to Local Values and Masalah Mursalah

The author of the article affirms that the implementation of penal mediation also fulfills the principle of masalah mursalah hajjiah in Islamic law, which refers to a secondary level of public interest aimed at preventing societal hardship.<sup>47</sup> When this principle is combined with Rawls' concept of justice, a hybrid model emerges one that integrates modern notions of justice with the spiritual and communal values of local society. The application of this model is further reinforced by restorative approaches that are also found in customary (adat) law and the Islamic concept of sulh (reconciliation).<sup>48</sup>

<sup>47</sup> Muhammad Huzaifi Muslim, "Kedudukan Masalah Mursalah Menurut Imam Al-Ghazali," *Jurnal Al-Nadhair* 2, no. 1 (June 23, 2023): 35–53, accessed May 9, 2024, <https://jurnal.mahadalymudi.ac.id/index.php/Al-Nadhair/article/view/24>.

<sup>48</sup> Mira Maulidar, "Korelasi Filosofis Antara Restorative Justice Dan Diyat Dalam Sistem Hukum Pidana Islam," *At-Tasyri': Jurnal Ilmiah Prodi Muamalah* 13, no. 2 (2021): 143–155, accessed May 9, 2024, <https://ejournal.staindirundeng.ac.id/index.php/Tasyri/article/view/856>.



Thus, penal mediation is not only philosophically valid based on Rawls' principles of justice, but also relevant within the normative framework of Islam and Indonesian culture. Justice is no longer understood as retribution, but rather as restoration that actively and equally involves all parties.

The implementation of penal mediation in Indonesia aligns with John Rawls' principles of justice, as it offers a fair, participatory approach that prioritizes the protection of vulnerable groups. Through the principles of equal liberty and the difference principle, penal mediation holds significant potential to reform Indonesia's criminal justice system, which has long been criticized for being slow and unresponsive to the needs of marginalized communities. Within Indonesia's social and religious context, penal mediation can serve as a means to realize justice that is not only legalistic but also humane and rooted in public welfare (*maslahah*). Therefore, this approach deserves to be formally recognized and institutionalized as a model for resolving minor criminal cases within the national justice system.

## Conclusion

Based on the discussion, it can be concluded that the implementation of restorative justice through the mechanism of penal mediation in Indonesia represents an alternative approach to resolving minor criminal offenses that is more humane, participatory, and efficient. Penal mediation directly involves offenders, victims, families, and the community in the recovery process, thereby fostering substantive justice that prioritizes not only punishment but also the restoration of social relationships. This practice has been applied in various cases, such as petty theft, defamation, domestic violence, and other complaint-based offenses. However, its implementation still faces regulatory challenges due to the

absence of a strong and comprehensive legal foundation within the national criminal justice system.

From the perspective of John Rawls' theory of justice, the application of penal mediation in Indonesia aligns with his two main principles: the principle of equal basic liberties and the difference principle. The principle of equal liberty is reflected in the equal participation of all parties in the mediation process, while the difference principle is manifested in the protection of vulnerable groups such as children, first-time offenders, and marginalized communities who benefit from non-litigation resolutions. Penal mediation also incorporates the Islamic legal value of *maslahah* as well as the principle of distributive justice, which is closely aligned with Indonesia's socio-cultural context.

Therefore, it can be affirmed that penal mediation is not only consistent with restorative justice and Islamic legal values, but also reflects the Rawlsian notion of justice that is inclusive and responsive to societal needs. As such, this approach deserves to be normatively institutionalized within the national criminal justice system as a strategic step toward a more just and socially restorative legal reform.

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