The Role of Mediators in Dispute Resolution Based on Progressive Law to Achieve Substantive Justice

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Abstract

This study aims to analyze the role of mediators in criminal dispute resolution within the framework of progressive legal theory to achieve substantive justice. It addresses the inconsistency between the ultimum remedium principle, which positions criminal punishment as a last resort, and the restrictive regulatory framework governing penal mediation in Indonesia. The study contributes a conceptual and critical evaluation of how restorative justice regulations limit mediators' authority and hinder the broader institutionalization of penal mediation within the criminal justice system. It proposes harmonizing restorative justice policies with progressive law to strengthen mediation as a humane and participatory mechanism. This research employs doctrinal legal research using statutory and conceptual approaches. The data were analyzed qualitatively through systematic and conceptual interpretation. The findings indicate that although restorative justice has been formally recognized, strict limitations on offense types, loss thresholds, non-recidivism, and victim consent significantly restrict penal mediation. Consequently, criminal case resolution remains predominantly formalistic and litigation-oriented. The study concludes that regulatory rigidity obstructs the realization of substantive justice. It recommends comprehensive legal reform to expand mediators' authority and integrate penal mediation more fully into Indonesia's criminal justice system in line with progressive legal principles.

Keywords: *Penal Mediation, Progressive Law, Substantive Justice, Dispute Resolution*

Introduction

Indonesia, as a state governed by the rule of law, fundamentally positions justice as a philosophical and moral foundation rooted in the values of Pancasila.[1] Social justice, as enshrined in the Preamble to the 1945 Constitution of the Republic of Indonesia, serves as the basis for every legal policy.[2] In the criminal

[1] Achmad Hariri and Basuki Babussalam, "Legal Pluralism: Concept, Theoretical Dialectics, and Its Existence in Indonesia," *Walisongo Law Review (Walrev)* 6, no. 2 (October 2024): 146–70, https://doi.org/10.21580/walrev.2024.6.2.25566.
[2] Suyahman Suyahman, Suud Sarim Karimullah, and Muh. Akbar Fhad Syahril, "Intersectionality in Social Justice: Unpacking the Complexity of Oppression," *Jambura Law Review* 7, no. 1 (January 2025): 275–308, https://doi.org/10.33756/jlr.v7i1.27828.

justice context, justice should not be understood solely in terms of legality, but also in terms of moral effectiveness and the system's capacity to realize humanitarian values.[3]

However, this ideal construction has not been fully internalized in law enforcement practice. A gap persists between the constitutional values that formally ground Indonesia's rule of law state and the empirical configuration of the legal system, which often remains formalistic and procedure-oriented. Legal certainty continues to be pursued primarily through legislation, rather than through consistent, justice-oriented adjudication by an independent judiciary or through law enforcement practices that substantively protect rights. As a result, law tends to be treated textually and positivistically, prioritizing formal justice while neglecting substantive justice, thereby reducing complex social realities into rigid black-and-white categories.[4]

From the perspective of responsive and progressive legal theory, law should be capable of adapting to social developments when existing rules fail to address new problems, so that justice and social utility can still be achieved.[5] In this vein, Nonet and Selznick argue that law must be functional, pragmatic, rational, and beneficial, with competence as a key benchmark for evaluating legal implementation.[6]

Responsive law thus requires that law enforcement be oriented toward justice and utility, positioning law as a means of responding to social norms and

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[3] Gde Made Swardhana, "Discover Crimes against Humanity as Gross Violations of Human Rights: International and Indonesia Perspectives," *Substantive Justice International Journal of Law* 4, no. 2 (December 2021): 115, https://doi.org/10.33096/substantivejustice.v4i2.133.

[4] Lukman Santoso and Ulvi Rohmatul Musyayyadah, "Challenging Legal Injustice against Children in Incest Cases: A Progressive and Islamic Human Rights Approach," *De Jure: Jurnal Hukum Dan Syar'iah* 17, no. 2 (December 2025): 675–96, https://doi.org/10.18860/j-fsh.v17i2.36277.

[5] Wulan Sari Gustriani et al., "Pembangunan Dan Perkembangan Hukum Indonesia Dalam Perspektif Teori Hukum Integratif," *Jurnal Sosial Dan Sains* 5, no. 10 (October 2025): 7278–89, https://doi.org/10.59188/jurnalsosains.v5i10.32488.

[6] Baginda Khalid Hidayat Jati et al., "Legal Culture, Environmental Non-Compliance, and the Persistence of Illegal Mining in Paningkaban," *IJCLS (Indonesian Journal of Criminal Law Studies)* 10, no. 1 (May 2025), https://doi.org/10.15294/ijcls.v10i1.24008.

public aspirations through openness, accommodation, and receptiveness to change.[7]

Ketut Sumedana similarly notes that injustice in the application of "law in books" is rooted in the very structure of criminal law, which historically served absolute power and retributive punishment, thereby framing criminal law as an inherently confrontational instrument.[8]

Against this theoretical backdrop, the central legal issue of this research concerns the inconsistency between the ultimum remedium principle and the restrictive regulatory framework governing penal mediation and restorative justice in Indonesia. Normatively, the ultimum remedium principle positions criminal law as a last resort after non-penal measures have been exhausted, and recent policies have introduced restorative justice as an alternative mechanism. The Indonesian National Police (Polri) reported that 21,063 cases were resolved through restorative justice in 2024, up from 18,175 in 2023. Although this upward trend indicates growing institutional willingness to employ non-penal mechanisms, the number of cases resolved through restorative justice still represents only a small fraction of the overall criminal caseload handled by law enforcement agencies each year. A similar pattern appears at the prosecution level, where the Attorney General's Office completed 1,985 cases through restorative justice in 2024, a figure that remains modest when compared to the total number of prosecutions.[9]

These statistics empirically support the argument that restorative justice and penal mediation have not yet become mainstream mechanisms in Indonesia's criminal justice system. The limited proportion of cases diverted to mediation

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[7] Joemarthine Chandra and Zainal Arifin Hoesein, "Penerapan Teori Hukum Responsif Dalam Pembentukan Regulasi Di Indonesia," *Judge : Jurnal Hukum* 5, no. 2025 (6AD), https://doi.org/doi.org/10.54209/judge.v6i05.1898.

[8] Ketut Sumedana, *Mediasi Penal Dalam Sistem Peradilan Berbasis Nilai-Nilai Pancasila* (Genta Publishing, 2020).

[9] Humas Polri, "Police Resolved 21,063 Cases through Restorative Justice in 2024," Humas Polri, 2024.

demonstrates that, despite formal regulatory recognition, strict eligibility criteria and a predominantly punitive legal culture continue to function as structural barriers to the broader institutionalization of penal mediation.

In practice, however, restorative justice is constrained by strict regulatory requirements, such as limitations on offense types, loss thresholds, non-recidivism, and mandatory victim consent, so that penal mediation remains marginal and criminal case resolution continues to be dominated by rigid, litigation-oriented procedures.[10]

Previous studies have examined restorative justice and the application of ultimum remedium in Indonesia, including analyses of Prosecutor Regulation No. 15 of 2020 and Police Regulation No. 8 of 2021, as well as empirical studies on penal mediation at the police level. However, these works generally focus either on the normative aspects of individual regulations or on implementation within a single institution, and have not systematically connected: (1) the ultimum remedium principle, (2) the cross-institutional regulatory design of penal mediation, and (3) the role of mediators within the framework of progressive legal theory. This is the *research gap* that the present article seeks to address. Accordingly,

This study aims: 1) To identify and analyze the normative and structural weaknesses of the regulatory framework on penal mediation and restorative justice in relation to the ultimum remedium principle; 2) To explain how limitations on mediators' authority and restrictive regulatory design hinder the institutionalization of penal mediation as an integral part of the criminal justice system; 3) To formulate a conceptual model that situates mediators and penal mediation within the progressive law paradigm in order to promote more substantive, humane, and participatory criminal case resolution.

[10] Siti Khumairoh Kusuma Arum and Khilmatin Maulidah, "Pembaruan Hukum Pidana Melalui Penerapan Prinsip Insignifikansi: Kajian Dalam KUHP Baru Indonesia," *Jurnal Hukum Ekualitas* 1, no. 1 (April 2025): 57–69, https://doi.org/10.56607/73krj443.

In terms of novelty, this article does not merely map existing regulations and practices of penal mediation; it offers a conceptual analysis that seeks to harmonize the ultimum remedium principle, restorative justice regulations, and the role of mediators within a progressive law framework, thereby strengthening the theoretical and practical foundations of penal mediation in Indonesia's criminal justice system. In terms of urgency, the research is relevant in light of the growing use of restorative justice mechanisms, which nonetheless account for only a very small proportion of the total number of criminal cases handled annually by the police and the prosecution service.

As for research limitations, this study focuses on: (1) the regulation of penal mediation and restorative justice under Police Regulation No. 8 of 2021, Attorney General Regulation No. 15 of 2020, relevant prosecutorial guidelines, Chief of Police Circular No. 8 of 2018, and Supreme Court Regulation No. 1 of 2016; (2) the role of mediators at the investigation and prosecution stages; and (3) normative-conceptual analysis within the framework of progressive and responsive legal theory. Within these boundaries, the article is expected to provide a focused contribution to policy and practice reforms in penal-mediation-based criminal case resolution in Indonesia.

Methods

This study employs a doctrinal legal research design, with both a conceptual and a statutory approach, to examine the relationship among the principle of *ultimum remedium*, penal mediation mechanisms, restorative justice regulations, and progressive legal theory. The primary legal materials used include Regulation of the Chief of the Indonesian National Police Number 8 of 2021, Regulation of the Attorney General Number 15 of 2020, Attorney General Guidelines Number 1 of 2021 and Number 18 of 2021, Circular Letter of the Chief of the Indonesian National

Police Number 8 of 2018, as well as Supreme Court Regulation (PERMA) Number 1 of 2016 as the basis for mediation in the civil law domain.[11]

Secondary legal materials include scholarly literature, legal journals, expert opinions, and prior research relevant to mediation, progressive law, and restorative justice. These materials were collected through document study and literature review to assess regulatory consistency and the positioning of mediators within the criminal case resolution system. The data were analyzed qualitatively using systematic, conceptual, and comparative legal interpretation, by (1) mapping the normative framework on restorative justice and penal mediation, (2) identifying inconsistencies between the ultimum remedium principle and existing regulations, and (3) evaluating how progressive legal principles can be operationalized to expand the role of mediators and achieve substantive justice beyond formal litigation mechanisms.[12]

Discussion

Restorative Justice and the Limits of Legal Formalism in Indonesian Criminal Law

The historical development of Indonesian criminal justice reflects a strong civil law orientation characterized by codification, textual supremacy, and procedural certainty.[13] This legal architecture prioritizes written norms as the primary source of legitimacy, thereby constructing justice as compliance with statutory provisions.[14] Within such a framework, legality is often equated with textual

[11] Eka Farman et al., "The Implementation of Restorative Justice in Cases Involving Corporate Perpetrators," *International Journal of Law, Crime and Justice* 2, no. 2 (July 2025): 276–93, https://doi.org/10.62951/ijlcj.v2i2.679.
[12] Rina Melati Sitompul and Andi Maysarah, "Ultimum Remedium Principles In Criminal Decisions In Creating Restorative Justice," *JCH (Jurnal Cendekia Hukum)* 7, no. 1 (September 2021): 32, https://doi.org/10.33760/jch.v7i1.324.
[13] Faisal et al., "Genuine Paradigm of Criminal Justice: Rethinking Penal Reform Within Indonesia's New Criminal Code," *Cogent Social Sciences* 10, no. 1 (December 2024), https://doi.org/10.1080/23311886.2023.2301634.
[14] Faisal Husen Ismail et al., "Customary and Islamic Practices in Inheritance Distribution: Insights from The Gampong Customary Court in Pidie," *Al-Risalah: Forum Kajian Hukum Dan Sosial*

conformity, and judicial actors function predominantly as rule applicators rather than normative interpreters.[15]

However, restorative justice challenges this epistemological foundation. It rejects the assumption that crime is solely a violation against the state and repositions it as a rupture in social relationships. In doing so, restorative justice exposes the ontological limitation of retributive legality: written norms cannot fully capture the relational, emotional, and moral dimensions of harm.[16]

The phenomenon of sentencing disparity and the over-reliance on incarceration in Indonesia reveal that legal certainty does not automatically produce substantive justice. Instead, it frequently generates what progressive legal scholars would describe as "procedural sufficiency without moral adequacy." In this sense, restorative justice emerges not merely as an alternative mechanism but as a critique of formalistic criminal law itself.[17]

From the standpoint of progressive legal theory, law must be understood as a dynamic instrument aimed at human welfare rather than as a self-referential system. Thus, restorative justice aligns with the progressive view that legal norms must serve lived social realities rather than dominate them. Indonesia is a state based on the rule of law and not merely on power. Law must serve as the supreme guiding principle in the administration of national and state life. In addition to providing legal certainty and justice, the law also promotes human welfare.

Kemasyarakatan 24, no. 2 (December 30, 2024): 1–16, https://doi.org/10.30631/alrisalah.v24i2.1544.

[15] Renita Kamil, "Legal Positivism Influence on Law Enforcement and Judicial Practice in Indonesia," *JUSTISI* 11, no. 2 (May 2025): 542–69, https://doi.org/10.33506/js.v11i2.4049.

[16] Moh. Riziq and Amri, "A Critical Analysis of Restorative Justice in Indonesia's Criminal Justice System: From Punishment to Restoration," *International Journal of Law Dynamics Review* 3, no. 1 (May 2025): 11–19, https://doi.org/10.62039/ijldr.v3i1.82.

[17] Carolina S. Martha, Angga Aldilla Gusman, and Ainurrafiqa Pelupessy, "The Shift of Sentencing Paradigm from Retributive to Restorative Justice in the Indonesian Criminal Justice System," *Journal of Strafvordering Indonesian* 2, no. 6 (January 2026): 1–8, https://doi.org/10.62872/8enjmf27.

Therefore, it can be said that engaging with law constitutes a field of human struggle and endeavor in the pursuit of happiness in life.[18]

In line with this view, Kusnu Goesniadhie argues that the concept of law is very broad, even though various formulations and writings have cited the opinions of scholars and philosophers who have attempted to provide definitions or frameworks for understanding law. In practice, misunderstandings and misinterpretations are not uncommon, and in some cases have even given rise to new interpretations of law itself. Furthermore, a good legal system is one that can accommodate and dispense justice to the people it governs. The close relationship between law and the socio-cultural values of society demonstrates that good law is law that reflects the values living within the community.[19] Historically, the Indonesian judicial system has been shaped by the civil law tradition, which places strong emphasis on legal certainty through the application of written norms. [20]

Restorative justice seeks to reveal the reality of criminal law by recognizing that crime is not solely related to acts that conform to written legal provisions. At times, there exists what is referred to as "sentencing disparity," a phenomenon in which norms contained in written law cannot be precisely qualified within the factual conditions of society. In this context, restorative justice is, among other things, necessary to maintain social harmony.[21] Restorative justice does not view criminal law merely as a set of commands and prohibitions imposed by the state, but rather as part of social reality that requires the fulfillment of balance within

[18] N.V. Fedina and M.V. Povalena, "Compliance with Principle the Rule of Law, as an Important Component of the Protection of Human Rights, in the Application of Legal Norms by State Authorities," *Analytical and Comparative Jurisprudence*, no. 2 (June 2023): 58–62, https://doi.org/10.24144/2788-6018.2023.02.9.
[19] M. Yasin Al Arif, "Penegakan Hukum Dalam Perspektif Hukum Progresif," *Undang: Jurnal Hukum* 2, no. 1 (October 2019): 169–92, https://doi.org/10.22437/ujh.2.1.169-192.
[20] Erwin Susilo, "Integrating Spinoza's Philosophy of Civil Law into Indonesian Judicial Reasoning: Toward a Justice-Oriented Legal Framework," *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 13, no. 2 (December 2024): 173–90, https://doi.org/10.14421/c4016524.
[21] Rena Yulia et al., "Conflict Resolution Patterns in Indigenous Communities of Indonesia: A Comprehensive Study of the Customary Laws of Baduy, Kajang, and Anak Dalam in Jambi," *Indonesia Private Law Review* 6, no. 2 (January 9, 2026): 159–76, https://doi.org/10.25041/iplr.v6i2.4671.

society. Essentially, restorative justice is oriented toward fostering social harmony. Moreover, its primary focus lies in safeguarding and protecting living legal values within society, as well as ensuring proportional relationships between victims and offenders.[22]

Restorative justice in Indonesia has been implemented by all law enforcement institutions as an alternative mechanism for resolving criminal cases.[23] On 17 October 2012, the Chief Justice of the Supreme Court, the Attorney General, the National Police, and the Minister of Law and Human Rights of the Republic of Indonesia signed a Joint Decree (Memorandum of Understanding) Number 131/KMS/SKB/X/2012, Number M-HH-07.HM.03.02 of 2012, Number KEP-06/E/EJP/10/2012, and Number B/39/X/2012 concerning the Application of Adjustments to the Thresholds for Minor Criminal Offenses, the Amount of Fines, Summary Examination Procedures, and the Implementation of Restorative Justice. Article 1 paragraph (2) of the agreement explains that restorative justice is a mechanism for resolving minor criminal offenses by investigators at the investigation stage or by judges from the outset of trial proceedings, involving victims, offenders, their families, and community leaders in order to seek fair solutions with an emphasis on restoring conditions to their original state.[24]

As a follow-up to the Joint Memorandum of Understanding, the Chief of the Indonesian National Police issued Circular Letter Number SE/8/VII/2018 on the Application of Restorative Justice in the Resolution of Criminal Cases. This Circular Letter emphasizes that restorative justice should not be understood merely as reconciliation, but rather as the fulfillment of a sense of justice for all parties

[22] Ahmad Arifulloh et al., "Legal Protection for Child Offenders in Bullying Cases: Challenges and Deviations in Restorative Justice Practice," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 12, no. 2 (November 2025): 727, https://doi.org/10.29300/mzn.v12i2.9425.
[23] Sukardi Sukardi and Hadi Rahmat Purnama, "Restorative Justice Principles in Law Enforcement and Democracy in Indonesia," *Journal of Indonesian Legal Studies* 7, no. 1 (June 2022): 155–90, https://doi.org/10.15294/jils.v7i1.53057.
[24] Abdul Fattaah, Sutrisno Sutrisno, and Jaka Susila, "Implementation of Restorative Justice in Surakarta District Court," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 13, no. 1 (June 2024): 85, https://doi.org/10.22373/legitimasi.v13i1.23451.

involved. Investigators may apply a restorative approach provided that both material and formal requirements are met, including that the act does not cause public unrest or social conflict, there is willingness among the relevant parties to raise no objection and to waive their right to pursue legal action, the offender is not a recidivist, the offense is relatively minor, and the case does not involve loss of life. These provisions were subsequently reinforced through Regulation of the Chief of the Indonesian National Police Number 6 of 2019 on Criminal Investigation.[25]

This study finds that the institutionalization of restorative justice (RJ) in Indonesia remains structurally embedded within a predominantly autonomous legal order.[26] Although restorative mechanisms are formally recognized through police, prosecutorial, and judicial regulations, their operationalization is narrowly confined by rigid eligibility criteria, monetary thresholds, and administrative discretion.[27]

These findings suggest that Indonesian criminal justice continues to reflect the characteristics described by Philippe Nonet and Philip Selznick in Law and Society in Transition: Toward Responsive Law, namely "autonomous law," in which procedural integrity and rule conformity dominate substantive social responsiveness.[28] Restorative justice is permitted only to the extent that it does not destabilize the primacy of retributive legality.[29]

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[25] Nur Shaleh Muslimin Daseng, "Law Enforcement by the State Police of the Republic of Indonesia Regarding Discretionary Actions," *Sovereign: International Journal of Law* 5, no. 1–2 (June 2023): 76–95, https://doi.org/10.37276/sijl.v5i1-2.40.

[26] Stavros Makris, "EU Competition Law as Responsive Law," *Cambridge Yearbook of European Legal Studies* 23 (December 2021): 228–68, https://doi.org/10.1017/cel.2021.9.

[27] Rakhmi Izharti, Erika Magdalena, and Rully Herdita Ramadhani, "The Urgency of Codifying and Unifying Restorative Justice Regulations in Criminal Procedure Code Reform," *Trunojoyo Law Review* 7, no. 2 (August 2025): 223–52, https://doi.org/10.21107/tlr.v7i2.30601.

[28] Hendro Widodo, "A Model for Preventing Domestic Violence Using an Early Warning System in Criminal Law Policy," *Nusantara: Journal of Law Studies* 5, no. 1 (March 13, 2026): 147–70, https://doi.org/10.66325/nusantaralaw.v5i1.184.

[29] Rochmadi Rochmadi and Zainal Arifin Hoesein, "Enhancing Justice Through Responsive Law in Indonesia," *International Journal of Law, Crime and Justice* 1, no. 4 (2024), https://doi.org/https://doi.org/10.62951/ijlcj.v1i4.203.

Rather than representing a paradigmatic shift, RJ in Indonesia functions as a conditional administrative accommodation. This explains the empirical pattern identified in this study: despite increasing regulatory references to restorative justice, incarceration remains the dominant penal response, and mediation is primarily applied to minor property offenses. The system thus maintains punitive orthodoxy while symbolically endorsing restoration.

Progressive Law as a Normative Foundation for Penal Mediation

Progressive legal theory, as articulated by Satjipto Rahardjo, fundamentally rejects "cold and mechanical law." It demands interpretive courage, moral imagination, and institutional willingness to prioritize substantive justice over rigid textualism.[30] Law is not an end; it is a tool for human dignity.[31] In this theoretical context, penal mediation becomes more than a procedural option. It represents an operationalization of progressive law in criminal justice. While conventional litigation reinforces vertical state-centered authority, mediation introduces horizontal dialogue and participatory justice.[32]

However, the Indonesian regulatory framework reveals a structural paradox. Although restorative justice is formally recognized through police and prosecutorial regulations, its application is confined to minor offenses, limited material losses, non-recidivist offenders, and mandatory victim consent. These restrictions suggest that mediation is treated as an administrative exception rather than a normative reorientation of punishment.[33]

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[30] Anis Mashdurohatun et al., "Contemporary Reassessment of Punishment in Islamic Sharia and Secular Law: A Comparative Study of Justice and Penal Philosophy," *MILRev: Metro Islamic Law Review* 5, no. 1 (January 1, 2026): 80–100, https://doi.org/10.32332/milrev.v5i1.11887.

[31] Achmad Muchtarom and Megawati Barthos, "Strategy for Strengthening the Implementation of Progressive Law in the Republic of Indonesia National Police," *International Journal of Social Service and Research* 5, no. 6 (June 2025): 588–95, https://doi.org/10.46799/ijssr.v5i6.1246.

[32] Emmanuel Arianto Waluyo Adi, "Penal Mediation as the Concept of Restorative Justice in the Draft Criminal Procedure Code," *Lex Scientia Law Review* 5, no. 1 (May 2021), https://doi.org/10.15294/lesrev.v5i1.46704.

[33] Ketut Sukewati Lanang Putra Perbawa and Paul Atagamen Aidonojie, "Restorative Justice as a Policy Approach to Traffic Crime Resolution in Indonesia," *Contrarius* 1, no. 1 (February 2025): 41–50, https://doi.org/10.53955/contrarius.v1i1.82.

From a progressive law perspective, this reflects institutional risk aversion and a persistent attachment to punitive orthodoxy. The system permits restorative justice only when it does not threaten the dominance of retributive legality. Consequently, the mediator's transformative potential is structurally constrained. Progressive law demands the opposite approach: expanding discretionary space guided by moral responsibility rather than shrinking it through bureaucratic caution.[34]

Theoretically, restorative justice (RJ) is understood as a paradigm of justice that shifts the focus from violations against the state to the reparation of harm suffered by victims, the restoration of social relationships, and community reconciliation. This paradigm emphasizes the active involvement of offenders, victims, and the community in a dialogical process, so that the outcome of case resolution is not merely a sanction, but a jointly constructed agreement for restoration. Zehr, for example, draws a sharp distinction between retributive justice, which highlights norm violation and retaliation, and restorative justice, which is oriented toward victims' needs, offenders' obligations, and the role of the community.[35]

Empirically, RJ has been tested through various practices, such as victim–offender mediation (VOM), restorative conferencing, and peacemaking circles. Latimer, Dowden, and Muise, through a meta-analysis of RJ programs across various jurisdictions, find that participation in RJ programs is generally associated with lower recidivism rates and higher levels of victim satisfaction compared to conventional court processes. These findings indicate that RJ is not merely a

[34] Januri Januri, Mirwansyah Mirwansyah, and Irwan Jaya Diwirya, "Application of Restorative Justice Principles in the Indonesian Criminal Justice System as an Alternative to Punishment," *Journal of Social Science and Humanities* 1, no. 1 (February 2026): 48–54, https://doi.org/10.54012/jssh.v1i1.677.

[35] Jeff Latimer, Craig Dowden, and Danielle Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis," *The Prison Journal* 85, no. 2 (June 2005): 127–44, https://doi.org/10.1177/0032885505276969.

normative discourse but has significant empirical performance in reducing reoffending and enhancing victims' perception of substantive justice.[36]

Umbreit, Coates, and Vos develop a practice theory of RJ dialogue that conceptualizes face-to-face encounters between victims and offenders as a multidimensional space: an emotional space for expressing anger and remorse, a cognitive space for understanding the impact of the offense, and a moral space for reaffirming social norms. Within this framework, the success of RJ is measured not only by the achievement of a compensation agreement but also by the transformation of relationships and the offender's shift in identity from an "offender" to a reintegrated member of the community. Articles in *Contemporary Justice Review* and *The Prison Journal* show that the quality of facilitated dialogue preparatory work, support for victims, and meeting structure are strongly correlated with the parties' satisfaction and the sustainability of offenders' commitment to comply with the agreement.[37]

Within penal mediation or VOM schemes, mediators play a central role as neutral facilitators who ensure that the process remains voluntary, safe, and balanced between victim and offender. The study by Lauwaert and Aertsen demonstrates that mediators do not merely act as procedural gatekeepers but as key actors who shape the communication dynamics, enabling victims to articulate their experience of victimization and offenders to express remorse in an authentic way. Mediators are responsible for preparing the parties prior to the meeting,

[36] Airlangga Surya Nagara, Elizabeth Ayu Puspita Adi, and Reza Ilham Maulana, "Dampak Penerapan Penghentian Penuntutan Berdasarkan Keadilan Restoratif Terhadap Korban Dan Pelaku," *Journal of Law, Society, and Islamic Civilization* 13, no. 2 (October 2025): 154, https://doi.org/10.20961/jolsic.v13i2.107070.

[37] Adebobola Omowon and Alaba Samson Kunlere, "Restorative Justice Practices: Bridging the Gap between Offenders and Victims Effectively," *World Journal of Advanced Research and Reviews* 24, no. 3 (December 2024): 2768–85, https://doi.org/10.30574/wjarr.2024.24.3.3978.

including explaining the purpose of mediation, the right to withdraw, and the possible forms of agreement, thereby reducing the risk of re-victimization.[38]

Umbreit and his colleagues find that the quality of pre-conference preparation carried out by mediators through individual meetings and assessment of the parties' emotional readiness is positively correlated with victim satisfaction and offenders' compliance with the agreement. In many cases, mediators help offenders "translate" abstract remorse into a concrete acknowledgment of the material and immaterial harm suffered by victims. Prescott specifically argues that expanding the mediator's role from a purely procedural facilitator to a "moral educator" can strengthen offenders' accountability and enhance the quality of restoration experienced by victims.[39]

However, the international literature also highlights normative dilemmas regarding the extent to which proactive mediators should be. On the one hand, a completely passive mediation approach risks leaving power imbalances—for instance, in domestic violence or hierarchical relationships—uncorrected. On the other hand, overly interventionist mediators may be seen as overstepping neutrality and exerting pressure on one of the parties. Consequently, several authors recommend professional standards requiring RJ-specific training for mediators in trauma awareness, power dynamics, and the ethics of facilitation, so that mediators can balance procedural neutrality with substantive sensitivity to victims' vulnerability.[40]

There is a fundamental lack of synchronization between the principle of *ultimum remedium* as the basic philosophy of criminal law and the normative reality

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[38] Lise-lotte Rytterbro, "Victim and Offender Viewed from the Perspective of Mediation," *Journal of Scandinavian Studies in Criminology and Crime Prevention* 4, no. 1 (July 2003): 101–22, https://doi.org/10.1080/14043850310011207.

[39] Doyeon Kim, "Expanding the Role of Victim-Offender Mediation in the Criminal Justice System: Mediating Cases of Involuntary Manslaughter," *Pepperdine Dispute Resolution Law Journal* 1, no. 24 (2024).

[40] Natia Chitashvili, "Safeguarding Self-Determination in Family Mediation: Ethical Challenges of Power Imbalance and Violence," *Journal of Law*, September 2025, https://doi.org/10.60131/jlaw.1.2025.9525.

of the limited application of penal mediation within the Indonesian legal system.[41] The principle of *ultimum remedium* theoretically positions punishment as a last resort, to be applied only when non-penal mechanisms are no longer effective.[42] However, normative studies of various regulations indicate that the scope for applying non-penal mechanisms such as restorative justice and penal mediation is in fact strictly constrained by internal rules of law enforcement agencies.[43]

Regulation of the Chief of the Indonesian National Police Number 8 of 2021 only opens the possibility of restorative justice for certain criminal offenses that meet specific requirements, such as minor loss, non-serious nature, and the offender not being a recidivist. At the prosecutorial level, Regulation of the Attorney General Number 15 of 2020 and Attorney General Guidelines Number 18 of 2021 further narrow these criteria by emphasizing minimal material loss and the full consent of victims and the community.[44] These provisions demonstrate that although penal mediation is normatively recognized, its application remains highly limited, thereby failing to provide sufficient space to maximize the function of mediation as an instrument of restoration in criminal cases.[45]

This normative limitation is reinforced by empirical findings that the resolution of criminal cases remains dominated by rigid, procedural formal

[41] Lies Sulistiani and Efa Fakhriah, "The Effect of Extra Judicial Settlement in Criminal Cases Based on the Principle of Ultimum Remedium," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 10, no. 3 (2023): 300–320, https://doi.org/10.22304/pjih.v10n3.a1.
[42] Chitashvili, "Safeguarding Self-Determination in Family Mediation: Ethical Challenges of Power Imbalance and Violence."
[43] Marisa Kurnianingsih, Daffa Rafif Dewanto, and Yoesoef Mustofa, "Penal Mediation : Synchronization of Restorative Justice and Reflective Justice," *Mulawarman Law Review*, December 2024, 46–58, https://doi.org/10.30872/mulrev.v9i1.1598.
[44] Naufal Nabiil Ridwansyah and Beniharmoni Harefa, "Criminal Justice System for Children Perpetrators of Murder Between Indonesia and Malaysia," *Rechtidee* 19, no. 2 (December 27, 2024): 304–26, https://doi.org/10.21107/ri.v19i2.28223.
[45] Alwi Nicholas Hutabalian, Alvi Syahrin, and Rafiqoh Lubis, "Harmonisasi Pengaturan Restorative Justice Dalam Peraturan Kejaksaan Nomor 15 Tahun 2020 Dengan Peraturan Kepolisian Nomor 8 Tahun 2021 Terhadap Perlindungan Korban," *Jurnal Mahupiki* 6, no. 2 (2025), https://doi.org/https://doi.org/10.51370/jhpk.v6i2.372.

litigation pathways.[46] Although there has been an increase in the use of restorative justice within the police and the prosecution service, these figures remain relatively small compared to the total number of criminal cases processed each year. This situation indicates that the dominance of a punitive approach continues to reflect a strong legal culture, making it difficult for alternative mechanisms, such as penal mediation, to gain broader implementation.[47] These findings further reveal a gap between the philosophical ideal of *ultimum remedium* and the actual practice of the criminal justice system, which continues to position punishment as the primary instrument.[48]

Jimly Asshiddiqie observes that law enforcement in Indonesia remains predominantly oriented toward punishment and retribution and has not yet fully served an educational function.[49] This can be seen from the fact that among former inmates who have completed their sentences, only around 30 percent do not reoffend.[50] Another 30 percent reportedly harbor resentment, while 40 percent commit even more crimes after being released from prison.[51]

According to Nonet and Selznick, such legal conditions reflect the characteristics of an autonomous legal order, in which procedural aspects become the core of the legal system. Within this framework, orderliness and fairness are

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[46] Anna Nylund, "Alternative Dispute Resolution and the Judiciary," in *Research Handbook on Judging and the Judiciary* (Cheltenham: Edward Elgar Publishing, 2025), 13–34, https://doi.org/10.4337/9781788978743.00007.

[47] Tolib Effendi, Dominikus Rato, and Bayu Dwi Anggono, "Termination of Prosecution Based on Restorative Justice as an Expansion of the Meaning of Case Waiver," *Rechtidee* 19, no. 2 (December 27, 2024): 265–84, https://doi.org/10.21107/ri.v19i2.27609.

[48] Rahmad Siregar, Azmiati Zuliah, and Andi Maysara, "Implementation of the Principle of Ultimum Remedium through a Restorative Justice Approach in Handling Minor Persecution in the North Sumatra Police," *Tasyri': Journal of Islamic Law* 5, no. 1 (January 2026): 367–78, https://doi.org/10.53038/tsyr.v5i1.488.

[49] Sukardi and Purnama, "Restorative Justice Principles in Law Enforcement and Democracy in Indonesia."

[50] Yanto Sufriadi, "The Progress of Indonesian Law Enforcement Reform After 25 Years of the Reform Movement," *Asian Affairs: An American Review* 51, no. 1 (January 2, 2024): 28–54, https://doi.org/10.1080/00927678.2023.2268491.

[51] Sheila Maulida Fitri, "Eksistensi Penerapan Ultimum Remedium Dalam Sistem Hukum Pidana Indonesia," *De Jure Jurnal Ilmiah Ilmu Hukum* 2, no. 1 (December 2020): 16, https://doi.org/10.33387/dejure.v2i1.2688.

regarded as the primary objectives and central competencies of the legal order, rather than substantive justice. Compliance with the law is therefore understood as full adherence to the rules of positive law in force.[52]

Criminal law essentially aims to regulate and protect the social order. Sudarto divides the objectives of criminal law into two categories.[53] First, in a general sense, criminal law functions to regulate social life or to maintain order within society. Second, in a specific sense, it serves to protect legal interests against acts that threaten to harm them (*rechtsgüterschutz*) through sanctions in the form of punishment, which are sharper in nature than those in other branches of law.[54] Within criminal sanctions, there is a tragic dimension, something inherently distressing, so that criminal law is often described as "cutting into its own flesh" or as a "double-edged sword." This means that while criminal law is intended to protect legal interests (such as life, property, liberty, and honor), any deviation in its application may instead violate the offender's legal rights. Therefore, the position of criminal law as an instrument of social control is subsidiary in nature,[55] meaning that it should only be employed when other measures prove inadequate (*ultimum remedium*).[56] In line with this view, Barda Nawawi classifies penal mediation into six models, as follows:[57]

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[52] Surahman Surahman et al., "Administrative Justice in the Perspective of Islamic Legal Philosophy: A Comparative Study of Ethical Legitimacy and Bureaucratic Rationality," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 12, no. 2 (November 2025): 751, https://doi.org/10.29300/mzn.v12i2.8269.

[53] Rendy Laputigar, Suhadi Suhadi, and Rodiyah Rodiyah, "Integrating Due Process Into The Enforcement Framework of Criminal Law Politics," *IJCLS (Indonesian Journal of Criminal Law Studies)* 9, no. 1 (May 2024): 139–62, https://doi.org/10.15294/ijcls.v9i1.36421.

[54] Armin Engländer, "The German Doctrine of the Protection of Legal Goods as the Task of Criminal Law: Critical Remarks on an Alleged Achievement of German Criminal Law Theory," *Criminal Law and Philosophy*, December 13, 2025, https://doi.org/10.1007/s11572-025-09778-3.

[55] Filippo Venturi, "Reconstructing Criminalisation. Regulatory Crimes and the Authoritarian Foundations of Modern Substantive Criminal Law," *Criminal Law and Philosophy*, December 3, 2025, https://doi.org/10.1007/s11572-025-09771-w.

[56] Fitri, "Eksistensi Penerapan Ultimum Remedium Dalam Sistem Hukum Pidana Indonesia."

[57] Yaris Adhial Fajrin and Ach. Faisol Triwijaya, "The Concept Of Penal Mediation For Defamation Delict In The Indonesia Ite Law As A Manifestation Of Restorative Justice," *Yustisia Jurnal Hukum* 9, no. 3 (December 2020): 363, https://doi.org/10.20961/yustisia.v9i3.36167.

Table 1. Classifies Penal Mediation Models

No.	Model	Core Characteristics	Main Actors Involved	Procedural Stage	Strengths
1	Informal Mediation	Conducted informally by criminal justice officials within their institutional discretion to settle disputes without formal prosecution.	Prosecutors, police officers, judges, social workers, probation officers, victims, offenders	Pre-trial, investigation, or judicial discretion stage	Flexible, fast, low cost, reduces court burden
2	Traditional Village or Tribal Moots	Community-based collective deliberation to resolve criminal conflicts among members, rooted in customary practices.	Community elders, victims, offenders, local leaders, community members	Outside formal system (customary/community forum)	Strong social legitimacy; restorative; culturally embedded
3	Victim–Offender Mediation (VOM)	Structured mediation process facilitated by a neutral mediator; adaptable to various offense types and procedural stages.	Mediator (official or independent), victim, offender, sometimes families	Diversion, police discretion, sentencing, or post-sentencing	High restorative impact; flexible application; adaptable model
4	Reparation Negotiation Programs	Focused solely on determining financial or material compensation during judicial proceedings.	Judge, prosecutor, offender, victim	During court proceedings	Clear measurable outcomes; structured enforcement

No.	Model	Core Characteristics	Main Actors Involved	Procedural Stage	Strengths
5	Community Panels or Courts	Diversion of cases to community-based forums that incorporate mediation or negotiation elements.	Community representatives, local authorities, victims, and offenders	Diversion from prosecution or trial	Enhances participation; reduces formal system overload
6	Family and Community Group Conference	Participatory conference model involving offender, victim, families, and community representatives to produce a comprehensive restorative agreement.	Victim, offender, family members, community members, police, juvenile judges	Diversion or pre-trial (commonly juvenile cases)	Strong reintegration effect; collective responsibility

***Source**: Yaris Adhial Fajrin and Ach. Faisol Triwijaya, "The Concept of Penal Mediation For Defamation Delict In The Indonesia Ite Law as a Manifestation of Restorative Justice".*

A central finding of this research is the disjunction between the philosophical commitment to *ultimum remedium* and the regulatory architecture governing penal mediation. While Indonesian criminal law formally recognizes punishment as a last resort, restorative mechanisms are normatively restricted to specific categories of cases with low material harm and first-time offenders.[58]

This regulatory design creates what may be termed a "paradox of subsidiarity": non-penal mechanisms are acknowledged in principle but structurally marginalized in practice. In contrast to European jurisdictions such as Germany and the Netherlands, where mediated settlements can lead to the dismissal of charges or

[58] Dahlia Kusuma Dewi et al., "The Functionalization of the Ultimum Remedium Principle Towards the Implementation of Criminal Actions Environmental License in the Perspective of Environmental Criminal Law in Indonesia," 2021, https://doi.org/10.2991/assehr.k.211020.091.

sentence mitigation under statutory frameworks, Indonesia relies predominantly on internal administrative instruments.[59]

The absence of codified procedural integration produces institutional hesitation. Law enforcement officials operate within risk-averse bureaucratic cultures that prioritize formal compliance over discretionary innovation. As a result, restorative justice remains fragile and unevenly applied.[60]

Responsive Law and the Transformation of Mediator Authority

Nonet and Selznick's typology of repressive, autonomous, and responsive law provides an analytical lens for evaluating Indonesia's penal mediation regime. The current framework largely reflects characteristics of autonomous law: procedural integrity is prioritized, legality is self-contained, and discretion is tightly managed to preserve institutional order.[61] Responsive law, by contrast, requires openness to social claims, participatory mechanisms, and value-oriented discretion. Within such a model, mediators are not passive facilitators but normative actors who help translate abstract justice into lived reconciliation.[62]

International restorative justice scholarship demonstrates that the effectiveness of victim–offender mediation depends significantly on the quality of mediators, particularly in pre-conference preparation, trauma sensitivity, power-balance management, and dialogical competence. Empirical studies show that restorative success correlates with mediator engagement, not mere neutrality.[63]

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[59] Ulfatul Hasanah and Tazkiatul Aulia, "Studi Komparasi: Restorative Justice Indonesia Dan Belanda Sebagai Alternatif Penyelesaian Perkara Pidana," *SAPIENTIA ET VIRTUS* 9, no. 2 (May 2024): 415–29, https://doi.org/10.37477/sev.v9i2.504.

[60] Riziq and Amri, "A Critical Analysis of Restorative Justice in Indonesia's Criminal Justice System: From Punishment to Restoration."

[61] Marnija and Zainal Arifin Hoesein, "The Dynamics of Criminal Law Reform in Indonesia: A Historical and Prospective Review From the Colonial Penal Code to the 2023 National Criminal Code," *Fox Justi : Jurnal Ilmu Hukum* 15, no. 3 (2025), https://doi.org/10.58471/justi.v15i03.

[62] Anis Mashdurohatun et al., "Contemporary Reassessment of Punishment in Islamic Sharia and Secular Law: A Comparative Study of Justice and Penal Philosophy."

[63] Rifqi Alif Darmawan et al., "Analysis of the Effectiveness of the Application of Restorative Justice in Criminal Cases in Indonesia," *Journal of World Science* 3, no. 5 (May 2024): 567–72, https://doi.org/10.58344/jws.v3i5.612.

This insight has profound theoretical implications. If mediators are reduced to procedural gatekeepers constrained by rigid eligibility criteria, the system remains autonomous rather than responsive. Conversely, empowering mediators with structured discretion, supported by ethical guidelines, moves the criminal justice system toward greater responsiveness. Thus, penal mediation must be reconceptualized not as diversionary relief, but as an institutional embodiment of responsive law.[64]

Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 on the Termination of Prosecution Based on Restorative Justice provides room for prosecutors to apply a restorative approach to suspects who commit a criminal offense for the first time, with a maximum statutory penalty of no more than five years' imprisonment and material losses not exceeding IDR 2,500,000.00. The approaches adopted in Circular Letter SE/8/VII/2018 and the Attorney General's Regulation are casuistic in nature, meaning that their application depends heavily on the subjective considerations of investigators and prosecutors, including assessments of the subject and object of the offense, the amount of loss, and the background of the criminal act.[65]

At the judicial level, restorative justice has also been formalized through the Decree of the Director General of the General Courts of the Supreme Court Number 1691/DJU/SK/PS.00/12/2020 on Guidelines for the Implementation of Restorative Justice. These guidelines emphasize that victim recovery is the primary principle and may be achieved through compensation, reconciliation, offender community service, or other forms of agreement. The guidelines apply to cases involving minor

[64] Kathy Douglas and Jennifer Hurley, "The Potential of Procedural Justice in Mediation: A Study into Mediators Understandings," *Bond Law Review* 29, no. 1 (January 2017), https://doi.org/10.53300/001c.5647.
[65] Gustab Mustofa Botutihe, "Restorative Justice Approach in the Termination of Prosecution: A Conceptual Study and Practical Implementation," *Philosophia Law Review:* 4, no. 1 (2024), https://doi.org/https://doi.org/10.56591/pilar.v4i1.11434.

criminal offenses, juvenile cases, narcotics offenses, and cases involving women in conflict with the law.[66]

Subsequently, on 19 February 2021, the Chief of the Indonesian National Police again issued Circular Letter Number SE/2/II/2021 on Ethical Cultural Awareness to Realize a Clean, Healthy, and Productive Indonesian Digital Space. This Circular Letter emerged in response to the dynamics surrounding the application of the Law on Electronic Information and Transactions, recommending that investigators coordinate with prosecutors to open avenues for mediation. The objective is to prioritize resolution through restorative justice as a manifestation of the application of the *ultimum remedium* principle.[67]

Another significant finding concerns the mediators' constrained authority. International restorative justice literature demonstrates that mediation effectiveness correlates strongly with facilitator competence, trauma awareness, and dialogical engagement, as evidenced in studies published in The Prison Journal and Contemporary Justice Review.[68] However, Indonesian regulations conceptualize mediators largely as procedural gatekeepers rather than normative actors. Their discretion is limited by eligibility filters, mandatory victim consent requirements, and strict material-loss ceilings. Consequently, mediation becomes compliance-driven rather than transformation-oriented.[69]

From a socio-legal perspective, this indicates a structural reluctance to transition toward what Nonet and Selznick conceptualize as responsive law. Responsive law requires not only discretion but institutionally supported discretion

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[66] Michael Deo Leorenzius Sihole, "Restorative Yet Incomplete: The Dilemma of Progressive Legal Reform in Indonesia," *Jurnal Ilmu Hukum Kyadiren.* 7, no. 2 (2026), https://doi.org/https://journal.stihbiak.ac.id/index.php/kyadiren/article/view/328.
[67] Masna Nuros Safitri and Eko Wahyudi, "Pendekatan Restorative Justice Dalam Tindak Pidana Pencemaran Nama Baik Melalui Media Sosial Sebagai Implementasi Asas Ultimum Remedium," *Esensi Hukum* 4, no. 1 (July 2022): 12–23, https://doi.org/10.35586/esh.v4i1.106.
[68] Inbal Peleg-Koriat and Dana Weimann-Saks, "Restorative Justice Behind Bars: People in Custody's Facilitators and Barriers to Participating in Restorative Justice," *Criminal Justice and Behavior* 51, no. 10 (October 2024): 1493–1510, https://doi.org/10.1177/00938548241257608.
[69] Aino Jauhiainen, "Gatekeeping or Gate-Pushing Restorative Justice?," *Nordic Journal of Studies in Policing* 12, no. 1 (June 2025): 1–22, https://doi.org/10.18261/njsp.12.1.4.

guided by ethical frameworks. Without expanding mediators' authority through formal legal recognition and professional standards, penal mediation cannot fulfill its restorative potential.[70]

Comparative Insights and the Institutionalization of Restorative Discretion

Comparative analysis with Germany and the Netherlands illustrates that restorative justice can coexist with legality when supported by explicit statutory recognition. In those jurisdictions, mediated agreements may lead to sentence mitigation or conditional dismissal. Mediation is integrated into the criminal process rather than treated as an external compromise.[71]

The critical distinction lies not in the existence of restorative mechanisms but in their normative status. In Indonesia, restorative justice is regulated through internal administrative instruments, which inherently lack the structural authority of statutory codification. As a result, mediators operate within a fragile discretionary environment vulnerable to institutional hesitation.[72] Progressive law would require a shift from administrative accommodation to doctrinal integration. Mediation outcomes must carry explicit legal consequences recognized within criminal procedure law. Without such structural embedding, restorative justice remains symbolically progressive yet institutionally marginal.[73]

In Europe, Germany and the Netherlands are often cited as examples of civil-law countries that have taken relatively advanced steps to integrate RJ mechanisms into their criminal justice systems. The stock-taking study compiled by Dünkel and colleagues shows that these two countries have developed VOM models

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[70] Teja Sukmana, "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo," *Peradaban Journal of Law and Society* 2, no. 1 (June 2023): 92–105, https://doi.org/10.59001/pjls.v2i1.82.

[71] Hasanah and Aulia, "Studi Komparasi: Restorative Justice Indonesia Dan Belanda Sebagai Alternatif Penyelesaian Perkara Pidana."

[72] Amrizal Amrizal and Rineke Sara, "Legal Position of Restorative Justice Enforcement in Indonesia," *Indonesian Journal of Multidisciplinary Science* 4, no. 9 (June 2025): 659–67, https://doi.org/10.55324/ijoms.v4i9.1144.

[73] Daryna Dzemish Abdulovna, "Advancing Criminal Justice Reform through Restorative Justice: A Narrative Review," *Sinergi International Journal of Law* 2, no. 4 (November 2024): 274–85, https://doi.org/10.61194/law.v2i4.719.

that are normatively recognized in positive law and applied at the stages of police investigation, prosecution, and even post-sentence for certain types of cases. In the German context, VOM is recognized in the *Strafprozessordnung* as one of the grounds for prosecutors or judges to reduce charges or sanctions, especially for minor to medium-level offenses and juvenile cases.[74]

In the Netherlands, Wolthuis and Claessen describe the evolution of RJ from local initiatives and pilot projects toward more systematic regulation in prosecutorial policies and procedural frameworks. Although there is no single, comprehensive codification, prosecutorial policy allows prosecutors to exercise discretion to offer mediation as an alternative or complement to prosecution in certain cases, particularly those involving young offenders or community-based conflicts. Mediation networks linked to law enforcement agencies perform a quasi-official function as RJ service providers, with funding partly borne by the state.[75]

Comparative analyses also highlight several constraints, including limited offense categories, heavy reliance on local actors' enthusiasm, and challenges in funding and inter-agency coordination. Nevertheless, in both Germany and the Netherlands, penal mediation is not positioned as a mechanism "outside the system" but as an integral part of the state's response to crime; mediated outcomes can be legally recognized as grounds for charge reduction or conditional case dismissal. These models illustrate how the principle of legality and due process can be reconciled with restorative discretion through sufficiently detailed regulation of eligible cases, mediator standards, and the legal consequences of mediated agreements.[76]

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[74] Eva P. Schmidt, Stephanie E. Rap, and Ton Liefaard, "Young Adults in the Justice System: The Interplay between Scientific Insights, Legal Reform and Implementation in Practice in The Netherlands," *Youth Justice* 21, no. 2 (August 2021): 172–91, https://doi.org/10.1177/1473225419897316.
[75] Annemieke Wolthuis et al., "Dutch Developments: Restorative Justice in Legislation and in Practice," *The International Journal of Restorative Justice* 2, no. 1 (April 2019): 118–34, https://doi.org/10.5553/IJRJ/258908912019002001007.
[76] Wolthuis et al.

In Germany, penal mediation began to be implemented in 1990 when the Offender–Victim Arrangement (OVA) was incorporated into the juvenile criminal justice system and subsequently developed into the *Täter-Opfer-Ausgleich* (TOA) scheme, which is expressly recognized in Article 46a of the German Criminal Code and supported by prosecutorial diversion powers under the Code of Criminal Procedure. This framework not only provides a clear legal basis for victim-offender mediation, but also grants prosecutors and judges explicit discretion to refer cases to mediation and to reduce or waive punishment when meaningful reparation has been made. In the Netherlands, Article 51h of the Dutch Code of Criminal Procedure and related policy frameworks similarly integrate penal mediation into the formal criminal process, enabling prosecutors and judges to facilitate mediation at various stages while maintaining judicial oversight and legal certainty.[77]

From the perspective of progressive legal theory, this lack of synchronization reflects the law's failure to serve society's substantive needs. Progressive law emphasizes that legal systems should be willing to move beyond formalistic rigidity to pursue substantive justice through humane, adaptive, and socially utilitarian approaches. In practice, however, implementing progressive law in Indonesia faces concrete obstacles, including a deeply entrenched punitive legal culture, risk-averse law enforcement officials who fear accusations of abusing discretion, and limited institutional incentives to prioritize mediation over conviction-oriented performance indicators. When fully optimized from a progressive perspective, penal mediation can serve as a dialogical space between offenders and victims, reinforce the offender's moral accountability, and restore social relationships within the community. Yet empirical evidence shows that restorative settlements remain predominantly confined to minor property offenses and neighborhood disputes, while cases involving more serious harm or complex power imbalances are rarely diverted to mediation, even when the parties are willing to engage. The existing

[77] Thomas Trenczek, "Victim-Offender Mediation in Germany – ADR Under the Shadow of the Criminal Law?," *Bond Law Review* 13, no. 2 (January 2001), https://doi.org/10.53300/001c.5377.

regulatory limitations thus not only constrain the formal scope of restorative justice, but also discourage mediators who should play a central role in the restorative process from exercising broader authority and creativity to craft substantive agreements between the parties.[78]

The development of an ethical framework for judicial reasoning has become an urgent necessity in contemporary judicial systems that face the complex challenge of balancing legal certainty with substantive justice.[79] This framework must be capable of bridging the gap between the demands of positive law and the moral imperatives that live within society. Its essence lies in developing a methodology that not only emphasizes legal-formal aspects but is also responsive to evolving social justice values.[80]

At the institutional level, it is necessary to establish adequate supporting mechanisms. The formation of an independent judicial ethics commission could serve as a forum for consultation and oversight of judicial reasoning practices. The development of guidelines for judicial reasoning that integrate ethical considerations should be promptly realized.[81]

The frameworks of progressive law and responsive law provide a theoretical lens for criticizing the limitations of criminal justice systems that are overly formalistic and litigation-centric. Nonet and Selznick, through their typology of repressive law, autonomous law, and responsive law, show that responsive law is characterized by openness to substantive justice claims, social participation, and the

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[78] Ismawansa et al., "Restorative Justice in Indonesian Criminal Law: Integrating Pancasila Values in Police Discretion Practices," *International Journal of Innovative Research and Scientific Studies* 8, no. 2 (March 2025): 1978–85, https://doi.org/10.53894/ijirss.v8i2.5589.

[79] Ending Solehudin et al., "Learning from Malaysia's Progresif Islamic Law Framework on Online Gambling: Insights for Indonesia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 20, no. 1 (May 11, 2025), https://doi.org/10.19105/al-lhkam.v20i1.14897.

[80] Slamet Haryadi et al., "Judicial Decision-Making and the Realization of Justice in the Indonesian Criminal Law," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 9, no. 3 (December 2025): 1706–27, https://doi.org/10.22373/sjhk.v9.i3.27478.

[81] Sukma Violetta, Bintan R Saragih, and Agus Budianto, "Recalibrating Judicial Oversight in Indonesia: The Binding Force of the Judicial Commission's Recommendations," *Journal of Cultural Analysis and Social Change*, January 2026, 482–89, https://doi.org/10.64753/jcasc.v11i1.3887.

use of discretion to achieve policy goals rather than mere procedural certainty. At the stage of responsive law, legal decision-making does not rely solely on normative text but also on empirical assessments of social impact, power relations, and restorative needs.[82]

Secondary studies of Nonet and Selznick's ideas emphasize that responsive law requires a shift in legal methodology: from normative positivism to more empirical and interdisciplinary approaches. Socio-legal articles that adopt the responsive law framework demonstrate that courts seeking to be responsive must develop participatory mechanisms, such as penal mediation and RJ, which give voice to victims and communities. In the Indonesian context, responsive law can be used to critique overly narrow regulations on penal mediation and to advocate for an expansion of mediators' authority and for legal recognition of restorative agreements as integral components of the criminal process.[83]

Progressive legal theory, as developed by Satjipto Rahardjo, is conceptually close to responsive law, particularly in its rejection of "cold and heartless law" and its emphasis on the need for legal officials to take bold steps toward substantive justice. International literature on progressive legal theory and critical legal studies likewise shows how courts and law-enforcement agencies can position themselves as agents of social change rather than mere implementers of rules. Within this framework, penal mediation and RJ can be understood as concrete instruments for operationalizing the demands of responsive/progressive law: expanding value-based discretion, strengthening victims' presence in the process, and shifting criminal sanctions from the sole response to one option among more humane mechanisms of restoration.

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[82] Philippe Nonet and Philip Selznick, *Law & Society in Transition* (Routledge, 2017), https://doi.org/10.4324/9780203787540.

[83] Shela Zulfa Syifaurrohmah, "Teori Hukum Era Robert Nonet Dan Philip Selznick Serta Relevansinya Terhadap Pembangunan Berkelanjutan Di Indonesia," *Desentralisasi : Jurnal Hukum, Kebijakan Publik, Dan Pemerintahan* 2, no. 4 (November 2025): 168–77, https://doi.org/10.62383/desentralisasi.v2i4.1287.

The findings also contribute theoretically by bridging restorative justice with progressive legal thought as articulated by Satjipto Rahardjo. Progressive law rejects mechanical legality and repositions law as an instrument of human dignity. This study demonstrates that penal mediation operationalizes progressive law when three conditions are met:[84] 1) Mediation outcomes carry formal procedural consequences; 2) Mediators are empowered with structured discretionary authority; 3) Restorative agreements are recognized as legitimate forms of justice rather than exceptional compromises.

Where these conditions are absent, restorative justice remains symbolically progressive but institutionally peripheral. Thus, the Indonesian case illustrates a transitional legal condition: rhetorically restorative yet structurally autonomous. This conceptual refinement contributes to socio-legal scholarship by demonstrating how restorative justice may coexist with punitive systems without fundamentally transforming them. [85]

Penal Mediation as the Operationalization of Substantive Justice

Criminal law carries a tragic dimension: while intended to protect legal interests, it can simultaneously produce new harms through stigmatization, incarceration, and social exclusion.[86] The principle of ultimum remedium reflects awareness of this danger by positioning punishment as a last resort.[87] Yet the Indonesian criminal justice system continues to treat incarceration as a primary response. This gap between philosophical principle and institutional practice reveals a crisis of coherence. Penal mediation, if conceptualized through progressive law, functions as a corrective mechanism that realigns criminal justice with its moral foundation. It transforms justice from retaliation into restoration, from vertical

[84] Sukmana, "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo."
[85] Sihole, "Restorative Yet Incomplete: The Dilemma of Progressive Legal Reform in Indonesia."
[86] Amata Aso Othuke, "The Proof of Criminal Allegation in Election Petitions: A Critique of the Traditional Approach," *Kampala International University Law Journal* 6, no. 2 (December 28, 2024): 141–51, https://doi.org/10.59568/KIULJ-2024-6-2-07.
[87] Joan Petersilia, *When Prisoners Come HomeParole and Prisoner Reentry* (Oxford University Press, 2009), https://doi.org/10.1093/acprof:oso/9780195160864.001.0001.

authority into dialogical accountability, and from procedural closure into relational healing. The mediator occupies a pivotal position in this transformation. When equipped with adequate discretion, ethical training, and institutional legitimacy, mediators become agents of normative recalibration bridging written law and lived justice.[88]

Mediation, as a dispute resolution mechanism that emphasizes reconciliation through the facilitation of a mediator, is fundamentally aligned with the ideas of progressive law, which place humans at the center of legal orientation and demand the courage to break through formalistic procedures to achieve substantive justice. The speed, simplicity, low cost, finality, and binding nature, as well as the confidentiality offered by mediation, demonstrate that this mechanism can effectively deliver resolutions more efficiently than litigation, especially when the goal is to restore social relationships rather than merely impose sanctions.[89]

The principle of substantive justice, which uses conscience as the measure of fairness, emphasizes that case resolution should not be constrained by rigid procedures. Consequently, penal mediation becomes a concrete instrument that accommodates the needs of both victims and offenders through dialogue, acknowledgment, apology, and restorative agreements. When restorative justice is implemented by empowering victims, offenders, their families, and the community through participatory deliberations, the process not only restores conditions to their original state but also strengthens the social function of law as a humane instrument of restoration. Thus, the integration of mediation principles, progressive law, and substantive justice demonstrates that resolving criminal cases through a restorative approach is not only feasible but also more closely aligned with the moral, social, and utilitarian objectives of law in society. [90]

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[88] Ismawansa et al., "Restorative Justice in Indonesian Criminal Law: Integrating Pancasila Values in Police Discretion Practices."
[89] Nonet and Selznick, *Law & Society in Transition*.
[90] Nabila Maulidiya, Indi Ulya Kamalin, and Jelita Yupitasari, "Exploration of Restorative Justice Approach to Reduce Recidivism Rates I Indonesia's Criminal Justice System," *Progressif Law Review* 7, no. 1 (2025), https://doi.org/https://doi.org/10.36448/prolev.v7i1.255.

Thus, the effectiveness of restorative justice depends heavily on the flexibility of regulations and the capacity of mediators to serve as neutral facilitators. In countries such as Germany and the Netherlands, the success of restorative justice relies on empowering mediators with broad discretionary authority to manage communication, explore victims' needs, and formulate appropriate forms of offender accountability. The findings of this study underscore that Indonesia still faces significant structural obstacles stemming from an overly restrictive regulatory framework that limits the creativity and authority of mediators. Therefore, there is an urgent need for legal reform to provide mediators with greater space to implement restorative principles substantively, rather than merely procedurally.[91]

In practice, mediation aligns closely with the character of progressive law because both are dynamic and adaptive, and view humans as the primary subjects to be served by the law, rather than the other way around. Mediation, as a humanistic and participatory dispute resolution mechanism, aligns with the concept of rule-breaking in progressive law, namely, the courage to move beyond rigid legal formulations to achieve more meaningful justice. The use of conscience, honesty, objectivity, and spiritual intelligence in the mediation process reflects the core values of progressive law, which place humanity and social concern above formal procedural interests.[92]

Moreover, mediation's orientation toward substantive justice, emphasizing fair outcomes, tangible restoration, the pursuit of true justice, and flexible resolutions not constrained by statutory limitations, demonstrates that mediation is not merely an alternative procedure but a concrete manifestation of the transformation of law toward a more responsive system. Thus, in criminal practice, mediation can be understood as a direct implementation of the progressive law

[91] Matthew Marcellinno Gunawan, Pujiyono Suwadi, and Muhammad Rustamaji, "Comparison of Restorative Justice Implementation in Indonesia, Usa, Germany, Poland and Switzerland," *Revista de Gestão Social e Ambiental* 18, no. 1 (February 2024): e04677, https://doi.org/10.24857/rgsa.v18n1-055.

[92] Sukmana, "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo."

paradigm, promoting case resolution grounded in empathy, dialogue, and restoration, while providing space for the realization of substantive justice that is more relevant to society's needs.[93]

If penal mediation is positioned not merely as a complementary tool but as an integral part of the criminal justice system, law enforcement officials can more freely avoid unnecessary criminalization. This would strengthen the commitment to substantive justice, reduce the burden on enforcement institutions, and return conflict resolution to the community as the primary stakeholder. Accordingly, the novelty of this study lies in its critical analysis of the need to harmonize the *ultimum remedium* principle, restorative justice regulations, and the role of mediators within the framework of progressive law to create a criminal justice system that is more humane, adaptive, and responsive to society's demands for justice.[94]

Comparative analysis indicates that the decisive variable is not merely the presence of mediation programs but their normative status within criminal procedure. In Germany and the Netherlands, restorative agreements are integrated into prosecutorial and judicial decision-making structures. This integration reconciles legality with restorative discretion.[95]

Indonesia, by contrast, regulates mediation primarily through circular letters and internal guidelines. Such instruments lack the hierarchical authority of statutory law, limiting their transformative capacity. The comparative insight, therefore, suggests that institutionalization requires doctrinal embedding. Codifying mediation within criminal procedure law would stabilize discretionary

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[93] Judy Marria Saimima et al., "Layered Hybrid Model in Criminal Resolution: Integrating Epkeret and State Law Under Legal Pluralism in Indonesia," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 26, no. 1 (March 2025): 1–15, https://doi.org/10.30631/alrisalah.v26i1.2180.

[94] Muhtar Hadi Wibowo, Ali Masyhar, and Anis Widyawati, "Progressionism Restorative Justice Policies in Achieving Rehabilitative Criminal Justice," *IJCLS (Indonesian Journal of Criminal Law Studies)* 9, no. 1 (May 2024): 117–38, https://doi.org/10.15294/ijcls.v9i1.36420.

[95] Robin Hofmann, "Formalism versus Pragmatism – A Comparative Legal and Empirical Analysis of the German and Dutch Criminal Justice Systems with Regard to Effectiveness and Efficiency," *Maastricht Journal of European and Comparative Law* 28, no. 4 (August 2021): 452–78, https://doi.org/10.1177/1023263X211005983.

space, reduce bureaucratic anxiety, and align penal policy with substantive justice principles.[96]

Theoretically, this study contributes to socio-legal scholarship by revealing how restorative justice in Indonesia operates within a structural environment that remains predominantly autonomous. It demonstrates that restorative rhetoric can coexist with, and even be constrained by, formalistic legal frameworks that prioritize procedural legality over substantive responsiveness. By situating these findings within the analytical framework developed by Philippe Nonet and Philip Selznick in Law and Society in Transition: Toward Responsive Law, this study refines the contemporary application of responsive law theory to penal mediation. At the same time, it integrates the progressive legal thought of Satjipto Rahardjo into comparative restorative justice analysis, thereby offering a conceptual bridge between global socio-legal theory and Indonesian criminal justice reform. Through this synthesis, the research not only interprets existing doctrinal arrangements but also deepens the theoretical understanding of how restorative justice may remain normatively recognized yet institutionally marginal.[97]

From a practical perspective, the findings underscore the structural reforms necessary to strengthen restorative justice within the criminal justice system. The study suggests that restorative mechanisms require formal statutory codification to ensure legal certainty and institutional stability, rather than reliance on internal administrative instruments. It further highlights the importance of establishing national standards and certification frameworks for mediators to ensure professionalism, ethical accountability, and procedural consistency. Expanding eligibility criteria beyond narrowly defined minor offenses would allow restorative justice to function as a genuine alternative rather than an exceptional remedy. In addition, institutional performance indicators should be recalibrated to recognize

[96] Gunawan, Suwadi, and Rustamaji, "Comparison of Restorative Justice Implementation in Indonesia, Usa, Germany, Poland and Switzerland."
[97] Sukmana, "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo."

restoration, reconciliation, and victim satisfaction alongside conventional metrics such as conviction rates.[98]

Importantly, this study does not argue for the abolition of punitive sanctions. Instead, it proposes recalibrating penal rationality, harmonizing retributive and restorative principles within a coherent legal framework. By repositioning punishment as one component within a broader spectrum of justice responses, the criminal justice system can move toward a more balanced, humane, and socially responsive model of legality.[99]

Conclusion

This study argues that the incorporation of penal mediation into the Indonesian criminal justice system remains a normative paradox. Although restorative justice has been formally introduced through various internal regulations, its operationalization is tightly confined within restrictive eligibility criteria and procedural safeguards that ultimately reaffirm the dominance of litigation-centered orthodoxy. Rather than representing a genuine paradigmatic shift, penal mediation functions as a peripheral corrective mechanism within a fundamentally retributive framework.

From the standpoint of progressive legal theory, such regulatory caution reveals a deeper structural hesitation: the state continues to privilege legal certainty in its formalistic sense over substantive justice grounded in social realities. Progressive law, however, demands that legal actors, particularly mediators, exercise interpretive courage to transcend rigid textualism and respond to lived injustice. In this respect, the mediator should not be reduced to a neutral procedural facilitator, but reconceptualized as an ethical agent of transformative justice whose role is to realign criminal law with its humanistic purpose.

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[98] Izharti, Magdalena, and Ramadhani, "The Urgency of Codifying and Unifying Restorative Justice Regulations in Criminal Procedure Code Reform."
[99] Wibowo, Masyhar, and Widyawati, "Progressionism Restorative Justice Policies in Achieving Rehabilitative Criminal Justice."

The persistence of strict offense classifications, loss thresholds, and recidivism exclusions illustrates how restorative justice is subordinated to bureaucratic risk management rather than embraced as a normative reorientation of punishment. This structural limitation undermines the emancipatory promise of progressive law and constrains the mediator's capacity to operationalize restorative principles in complex cases.

Accordingly, achieving substantive justice requires more than regulatory accommodation; it necessitates a reconceptualization of penal mediation as a co-equal mode of criminal justice, supported by coherent doctrinal integration and institutional empowerment of mediators. Without such transformation, restorative justice risks remaining symbolically progressive yet structurally conservative.

Future reforms must therefore move beyond procedural expansion toward epistemic reconfiguration, shifting the criminal justice system from punishment-centered legality to justice-centered legality rooted in human dignity, proportionality, and social restoration.

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