



Ratio Legis of Settlement of Cases of Sexual Violence through Penal Mediation

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Abstract

Sexual violence is a form of crime that has a multidimensional impact, both for victims, perpetrators, and society. This crime not only hurts physically, but also psychologically, socially, and economically. In an effort to resolve cases of sexual violence through formal justice mechanisms, various obstacles are still faced. The long legal process, the complexity of evidence, and the social stigma attached to victims often hinder efforts to obtain justice. In this context, penal mediation appears as an alternative to resolving criminal cases that offers a restorative approach. Penal mediation emphasizes dialogue between the perpetrator and victim with the aim of reaching an agreement that restores the situation, both for the victim, the perpetrator, and the community. Therefore, it is important to examine more the ratio legis of penal mediation in resolving cases of sexual violence outside the courts.

The type of research used is normative legal research using a legislative approach and a conceptual approach.

The results of the study indicate that penal mediation in resolving sexual violence crimes has a ratio legis that is based on restorative efforts, not just retributive. The main goal is to provide comprehensive recovery for victims, create participatory justice, and reduce the burden on the formal criminal justice system.

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1. Introduction

Sexual violence is a form of crime that has a profound impact, both physically, psychologically, and socially on the victim. In Indonesia, cases of sexual violence tend to increase every year. Based on data from the Online Information System for the Protection of Women and Children (SIMFONI-PPA), it shows that by 2025, there will be 1,099 cases of violence reported, with 960 female victims and 254 male victims. This figure indicates that sexual violence is still a serious problem in Indonesia ^[1].

According to Barda Nawawi Arief, the crime of sexual violence is any form of action aimed at satisfying the perpetrator's sexual desires, which is carried out without the victim's consent or is carried out through abuse of power, threats or coercion ^[2].

Sexual violence is a form of crime that has multidimensional impacts, both for victims, perpetrators, and society. This crime not only hurts physically, but also psychologically, socially, and economically. In efforts to resolve cases of sexual violence through formal judicial mechanisms, various obstacles are still faced.

The lengthy legal process, the complexity of evidence, and the social stigma attached to victims often hinder efforts to obtain justice. The traditional approach through the formal criminal justice system is often considered inadequate, especially in providing restorative justice that focuses on victim recovery.

¹ SIMFONI-PPA, https://kekerasan.kempppa.go.id/ringkasan?utm_source=chatgpt.com, accessed January 22, 2025.

² Barda Nawawi Arief. (2008), *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*, Jakarta: Kencana, p. 67.

As a result, many victims are reluctant to report the sexual violence they have experienced.

In addition, the current condition of the number of prisoners and detainees in Indonesia has exceeded the capacity of the Correctional Institutions (LAPAS) and State Detention Centers (RUTAN). Based on data from the Directorate General of Corrections of the Ministry of Law and Human Rights of the Republic of Indonesia, as of December 31, 2024, the number of prisoners and detainees in 301 LAPAS and 161 RUTAN in Indonesia has reached 228,204 people from the capacity that should be 128,858 people, so there is an excess (over capacity) of 99,556 people or around 77%^[3]. If all criminal cases, including sexual violence crimes, must be resolved through the criminal justice process, then many perpetrators of criminal acts will have to serve prison sentences. This condition makes the Correctional Institution or State Detention Center vulnerable to over capacity.

In this context, penal mediation emerges as an alternative to resolving criminal cases that offers a restorative approach. Penal mediation emphasizes dialogue between the perpetrator and the victim with the aim of reaching an agreement that restores the situation, both for the victim, the perpetrator, and the community.

However, the application of penal mediation in cases of sexual violence raises challenges and controversies. On the one hand, penal mediation provides an opportunity for victims to receive direct recovery, either in the form of an apology, compensation, or psychological support. On the other hand, there are concerns about the potential for pressure on victims to accept mediation, the imbalance of power between the perpetrator and the victim, and the risk of minimal deterrent effects for the perpetrator. These issues are increasingly complex considering that cases of sexual violence often involve unequal relationships, whether in terms of gender, economy, or social status.

In Indonesia, the implementation of penal mediation in cases of sexual violence does not yet have a firm legal basis. Most of the existing legal regulations, such as the Criminal Code and Law Number 12 of 2022 concerning Sexual Violence, still focus on the retributive approach.

Therefore, it is important to examine the ratio legis of penal mediation to resolve cases of sexual violence outside the courts.

2. Research Methodology

This is a qualitative research employing normative legal-research variety. Normative legal-research is a procedure of scientific research in order to find the truth based on the logic of legal science, especially its normative side^[4]. Normative legal research is legal research that aims to analyze written legal norms and the legal system as a whole, including legal principles, legal concepts, and legal doctrines^[5].

In order to achieve the purpose of the research, this research employs statute approach and conceptual approach.

The legal materials used in this research include primary legal-material in forms Indonesian laws and regulations related to this research. In addition to that, there are secondary legal-materials and tertiary legal-materials. The three

collected materials are processed and analyzed by way of juridically qualitative method in order to answer the problems of the research.

3. Result of the Research and Discussion

Sexual violence is a form of crime against human dignity that has a wide impact, not only on the victim personally, but also on the social order as a whole. This crime reflects unequal power relations and oppression of the autonomy and bodily integrity of individuals, especially women and children as the most vulnerable groups. In many cases, victims not only experience physical and psychological injuries, but also face stigma, re-victimization, and structural barriers in obtaining justice through formal criminal justice mechanisms.

Historically, the conventional criminal justice system in Indonesia is still retributive, oriented towards punishing the perpetrator without always paying attention to the holistic recovery of the victim. In the context of sexual violence, this can backfire, where the protracted legal process, complicated evidence, and social pressure make victims choose to remain silent or withdraw their reports in order to avoid further trauma. On this basis, an alternative idea emerged in resolving criminal acts, including sexual violence, namely through a penal mediation approach.

Penal mediation is a form of restorative justice that seeks to bring together perpetrators and victims in a dialogue process facilitated by a neutral third party (mediator), with the main aim of restoring losses and social reconciliation, not merely punishment^[6]. The application of penal mediation in sexual violence crimes certainly raises debate, because on the one hand there is a spirit to restore the victim, but on the other hand there are concerns about ignoring the victim's rights and the potential for hidden intimidation. Therefore, it is important to examine the application of this penal mediation from three main aspects, namely philosophical, sociological, and legal foundations.

Legal philosophy cannot be separated from efforts to seek substantive justice for all parties. In this case, the concept of restorative justice is rooted in local wisdom values, such as deliberation, mutual cooperation, and peaceful dispute resolution, which have long been known in Indonesian legal culture. This concept firmly rejects the dichotomy of perpetrator vs. victim, and instead views that the resolution of social conflict must restore the balance of relations damaged by criminal acts^[7].

In the framework of sexual violence, the application of penal mediation is based on the view that justice is not always identical to severe punishment, but must also consider aspects of recovery), recognition of guilt, and behavioral change. This approach is in line with the philosophical thinking of figures such as John Braithwaite, who emphasizes that punishment without recovery will only prolong social suffering, while restorative allows for a healthier social transition for victims, perpetrators, and society^[8].

However, it should be noted that philosophically, penal mediation should not sacrifice basic moral principles, especially in cases of sexual violence. The decision to mediate must come from the victim's voluntary consent, not

³ Kemenkumham RI, Data Total Penghuni dan Kapasitas, <https://sada.kemenkumham.go.id/ditjenpas>, accessed January 9, 2025.

⁴ Johnny Ibrahim. (2010), *Teori dan Metodologi Penelitian Hukum Normatif*, Cetakan ketiga, Malang: Bayumedia Publishing, p. 57.

⁵ Peter Mahmud Marzuki. (2005), *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, p. 60.

⁶ Howaard Zehr. (2002), *The Little Book of Restorative Justice*. Good Books, p. 49.

⁷ Muladi. (2005), *Kapita Selekta Sistem Peradilan Pidana*, Semarang: Badan Penerbit UNDIP, p. 41.

⁸ John Braithwaite. (2002) *Restorative Justice and Responsive Regulation*, Oxford University Press, p. 33.

because of pressure, coercion, or economic and social reasons.

The resolution of sexual violence crimes through penal mediation is a topic that is full of debate both normatively and ethically. One of the basic normative arguments used to legitimize this approach is the philosophy of restorative justice. Restorative justice focuses efforts to resolve cases on restoring the social and psychological conditions of victims, acknowledging mistakes by the perpetrator, and active participation from the related community, as opposed to the retributive approach which emphasizes retaliation or punishment alone^[9].

The ratio legis of this approach is based on the view that the legal system should not only be a tool of punishment, but also a means to rebuild damaged social relations and provide substantive justice for victims. In this context, the philosophical approach through restorative justice is not only an alternative, but can also be seen as a correction to the failure of the conventional retributive system, especially in dealing with crimes that are personal and have emotional impacts, such as sexual violence.

Restorative justice was born as a critique of the modern criminal law system that places too much emphasis on the state as the victim, and punishing the perpetrator as the sole end goal of the judicial process. In this system, victims often become passive figures and merely legal evidence. The philosophy of restorative justice, as formulated by Howard Zehr, John Braithwaite, and a number of other progressive legal thinkers, puts forward a new paradigm that places victims, perpetrators, and society as the main subjects of the conflict resolution process^[10].

Within the framework of restorative justice, sexual violence is viewed not only as a violation of state law, but also as a violation of social relations, morality, and individual security. Therefore, the solution is not enough through punishment alone, but must include dialogue, understanding the impact, sincere apologies, and appropriate compensation for the victim. The recovery in question is not only material, but also includes psychological aspects, dignity, and the victim's social relations^[11].

Thus, the ratio legis of the use of penal mediation in cases of sexual violence rests on the view that:

1. The law must function to restore, not just punish,
2. Victims must have an active and respected role in the legal process, and
3. Perpetrators must be held morally and socially responsible, not just receive administrative punishment.

Penal mediation is a practical implementation of restorative justice in the context of criminal law. This process brings together the perpetrator and the victim in a space facilitated by a neutral party (mediator), aiming to build the perpetrator's awareness of the impact of his actions and provide an opportunity for the victim to voice his suffering directly^[12]. Herein lies its philosophical value: mediation is not merely an administrative procedure, but rather part of an ethical and moral process to achieve justice that is relational and personal.

The ratio legis of penal mediation in the context of sexual violence refers to the premise that:

- a. Many victims do not want formal legal processes that exacerbate trauma, such as abusive interrogations or open confrontations in the courtroom;
- b. Victims need validation of their experiences, an apology from the perpetrator, and assurances that the incident will not happen again rather than simply seeing the perpetrator punished severely;
- c. Formal systems tend to fail to capture the nuances of the social and cultural context of sexual violence crimes, especially in communities where social values are still patriarchal.

This philosophy also emphasizes the importance of admitting mistakes as a form of moral responsibility, not just a tactic to avoid punishment. Therefore, the implementation of penal mediation must ensure that the perpetrators do admit their mistakes sincerely and are willing to make restitution to the victim, not as a form of legal manipulation.

While the philosophy of restorative justice provides a strong rationale for the penal mediation approach, it is important to note that not all sexual violence crimes are worthy of mediation. This is where the ratio legis hits an ethical limit. If the violence is serious (e.g. rape, child sexual exploitation, or power-based violence), then penal mediation no longer reflects restorative justice, but instead has the potential to become a means of impunity^[13].

Thus, the precautionary principle is an integral part of this ratio legis. Penal mediation can only be carried out if:

1. The victim gives consent consciously and without pressure,
2. There is no power or domination relationship that causes an imbalance in position, and
3. The action does not result in serious physical and psychological injuries.

Within the framework of legal philosophy, penal mediation must continue to uphold the principle of non-maleficence and the moral autonomy of the victim. Justice cannot be upheld if the restorative process becomes a tool of compromise for serious human rights violations.

From a sociological perspective, the criminal justice system often fails to adequately respond to the needs of victims of sexual violence. Many victims actually experience re-victimization in the legal process, such as ignoring evidence, gender-biased interrogations, and stigmatization from law enforcement officers and the community. This shows that the formal system is often not inclusive and sensitive enough to the traumatic experiences of victims. In the midst of this situation, the penal mediation approach becomes an alternative space that can give victims a greater voice, facilitate emotional expression, and encourage perpetrators to understand the impact of their actions directly. In addition, in a society with strong communal values, such as Indonesia, restorative conflict resolution is considered more capable of rebuilding social harmony than formal punishment that is

⁹ Howaard Zehr, *Op.Cit.*, p. 57.

¹⁰ John Braithwaite, *Op. Cit.*, p. 37.

¹¹ Kathleen Daly. (2002), "Restorative Justice: The Real Story." *Punishment & Society* 4(1), p. 55–79.

¹² Suparman Marzuki. (2013), "Mediasi Penal dalam Penyelesaian Tindak Pidana", *Jurnal Hukum Ius Quia Iustum*, Vol. 20 No. 3, p. 357-378.

¹³ UN Women, (2021), *Restorative Justice for Gender-Based Violence: A Literature Review*. United Nations Entity for Gender Equality and the Empowerment of Women, p. 17.

intended to sever social relations ^[14].

However, from the perspective of legal sociology, penal mediation in cases of sexual violence must still be watched out for if it is used as a means of compromise by the social elite or the families of the perpetrators and victims. There is a risk that this process will be used to cover up the case, especially if the perpetrator has a dominant social, economic, or political position. Therefore, there needs to be a strict monitoring mechanism and explicit support for the victim in the mediation process ^[15].

Sexual violence is not only a crime against individuals, but also a form of disruption to the social structure and collective values of society. From a sociological perspective, the crime of sexual violence creates a rift in social relations, distrust between individuals, and gives rise to stigma and marginalization of victims ^[16]. Therefore, resolving cases of sexual violence through a penal mediation approach, which prioritizes the principle of restoring social relations, offers a dimension of justice that goes beyond formal legal aspects.

The ratio legis of this sociological approach is based on the assumption that justice can not only be measured by the criminal sanctions imposed, but also by the balance and social harmony that has been restored. Therefore, penal mediation is not just a way to resolve legal conflicts, but becomes a medium for reconstructing social relations damaged by criminal acts of sexual violence.

In the sociological approach, crime is seen as a product of social dysfunction that disrupts social harmony ^[17]. Sexual violence, in particular, creates an imbalance of power, reinforces gender dominance, and causes collective trauma, especially in social environments close to the perpetrator and victim.

Damaged social relations do not only occur between victims and perpetrators, but also between victims and their communities. Victims often experience denial, exclusion, and moral judgment, especially in societies that are still patriarchal or uphold "family honor". Therefore, the recovery process is not sufficient through punishment mechanisms alone, but requires an approach that touches on social, cultural, and relational aspects.

Penal mediation in this context is designed as a recovery forum that places victims, perpetrators, and communities as the main actors. The goal is not only to resolve the case, but also to restore disturbed social relations. In this framework, the ratio legis of penal mediation covers ^[18].

1. Restoration of social relationships between victims and perpetrators, where possible, through a professionally facilitated process of open communication;
2. Social reintegration of perpetrators by ensuring they understand the impact of their actions and are willing to take moral responsibility;
3. Reconstruction of social trust in the affected community by restoring a sense of justice that is acceptable to the community;
4. Reduction of stigma against victims through official recognition and social support during the mediation process.

In this way, penal mediation is seen not merely as a forum for compromise, but as a sociological instrument for rebuilding the social networks that are the foundation of social stability ^[19]. One of the important principles in the sociological approach to restorative justice is the involvement of the community as an actor in resolving cases. The community has a strategic role in the penal mediation process, both as a balancer, social witness, and party that helps the reintegration process of victims and perpetrators ^[20].

In Indonesian society, especially in rural areas or indigenous communities, the practice of conflict resolution through deliberation and customary forums has long been known. This indicates the existence of strong social capital in the form of collectivity, tolerance, and consensus values. The penal mediation approach becomes relevant if it is adjusted to the prevailing social relation patterns in the community.

However, the ratio legis of community involvement must be based on the principle of non-discrimination and victim-centeredness. Many cases of sexual violence actually end with pressure on the victim to "forgive" the perpetrator in order to maintain the good name of the family or community. Therefore, the role of a professional facilitator or mediator is very important to keep the process running within the framework of true social justice.

Penal mediation is not only curative, but also has transformative potential. In a sociological context, mediation can be a social education medium that changes public perception of sexual violence. In a mediation forum, perpetrators can admit their mistakes openly, and the public can understand the real impact of the crime, so that a collective awareness is born to prevent the recurrence of similar cases.

Thus, the ratio legis of this approach lies in the contribution of penal mediation in:

- a. Building an anti-violence culture based on social awareness,
- b. Cultivating empathy and shared responsibility,
- c. Mobilizing communities to be proactive in protecting victims, and
- d. Eroding the dominance of patriarchal values in responding to sexual violence.
- e. In this sense, penal mediation becomes more than just a case resolution, it becomes part of a broader social and cultural change agenda.

The ratio legis of penal mediation in a sociological perspective rests on the assumption that crime is not merely a violation of state law, but a violation of social values and social relations. Thus, its resolution must also target the restoration of disturbed social structures.

From a positive legal perspective, penal mediation has not been explicitly regulated in the Law as the main mechanism for resolving crimes of sexual violence.

The Sexual Violence Crime Law itself does not explicitly mention penal mediation as a form of resolution, but opens up the opportunity for the application of restorative justice with strict conditions, especially for crimes that do not

¹⁴Achmad Ali. (2012), *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence)*, Jakarta: Kencana, p. 36.

¹⁵ Suparman Marzuki. *Loc.Cit.*

¹⁶ Johan Galtung. (1969), "Violence, Peace, and Peace Research". *Journal of Peace Research*, vol. 4 (2), p. 67.

¹⁷ Emile Durkheim. (1997), *The Division of Labor in Society*. New York: Free Press, p. 27.

¹⁸ Suparman Marzuki, *Loc.Cit.*

¹⁹ Howard Zehr, *Op.Cit.*, p. 56.

²⁰ John Braithwaite, *Op.Cit.*, p. 32.

contain elements of serious physical violence or unequal power relations. In other words, penal mediation can only be considered within certain limits, for example in cases of verbal abuse or light physical contact that does not have a permanent impact, and still with strict consideration from law enforcement officers and assistance to the victim ^[21].

In addition, the application of penal mediation in cases of sexual violence must pay attention to the principle of non-derogable rights, namely rights that cannot be reduced under any circumstances, such as the right to feel safe and free from torture. This means that not all cases can be reconciled through mediation. The state remains obliged to take firm action against the perpetrators, especially if there are elements of serious violence, the victim is a child, or the perpetrator is an influential figure.

Modern criminal law has evolved from a purely retributive system to a system that accommodates restorative, rehabilitative, and corrective values. One manifestation of this development is the use of penal mediation in resolving criminal cases, including in cases of sexual violence, by considering the principles of victim protection, legal effectiveness, and comprehensive criminal law reform. The ratio legis of the legal approach in this case departs from the adjustment of positive law to the needs of modern society that demands more contextual, humane, and recovery-oriented justice.

Traditional criminal law is based on the principles of lex talionis and ultimum remedium, where the main focus is on retribution for unlawful acts. However, as legal thought develops, this approach is seen as not always able to resolve legal conflicts substantially, especially in cases that touch on the personal and relational realms, such as sexual violence ^[22]. In modern criminal law, new paradigms have emerged such as restorative justice as an alternative approach to resolving legal conflicts, diversion in the juvenile criminal justice system, and non-penal policy which prioritizes prevention and rehabilitation.

This development is a legal basis for the integration of penal mediation as a legal instrument to resolve criminal cases in a more adaptive, humane and substantive justice-based manner ^[23]. In the Indonesian legal system, regulations regarding penal mediation have begun to gain ground along with the implementation of the concept of restorative justice in various laws and legal policies. Explicitly, penal mediation or forms of settlement outside the courts are regulated in several important regulations, including:

1. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which introduces a diversion mechanism through a restorative approach.
2. Regulation of the Republic of Indonesia National Police Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice, which is the legal basis for the implementation of penal mediation at the investigation level.
3. Regulation of the Attorney General Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.

Although sexual violence is not included in cases that can automatically be resolved through this mechanism because it is classified as a serious crime, the regulations still provide room for conditional exceptions based on the interests of the victim and the principle of justice ^[24].

The legal approach to the use of penal mediation in cases of sexual violence has several ratio legis bases, including:

1. Flexibility of the modern criminal law system.

Within the modern legal framework, the justice system is no longer rigid and hierarchical, but rather opens up space for flexibility through alternative dispute resolution in certain criminal cases. This is supported by the principles of depenalization and decriminalization as part of a dynamic criminal policy.

2. Restoration of the rights and dignity of victims as the center of the legal system.

In cases of sexual violence, the legal orientation should not only be on punishing the perpetrator, but should prioritize the physical, psychological, and social recovery of the victim. Penal mediation is one of the legal instruments that can accommodate apologies, restitution, or compensation directly to the victim, which is often not obtained from the formal justice process ^[25].

3. Efficiency and effectiveness of law enforcement.

Many cases of sexual violence, especially in remote communities or with close relationships between perpetrators and victims, are difficult to uncover or resolve through the courts for social, cultural, or economic reasons. In such situations, penal mediation is an effective and efficient legal solution, as long as it refers to the principle of non-discrimination and protection of victims' rights ^[26].

4. Adjustment to international legal principles.

Modern criminal law is inseparable from the influence of international legal standards and principles, such as the Bangkok Rules, Beijing Rules, and the UN Basic Principles on the Use of Restorative Justice. All of these documents emphasize the importance of alternative approaches that place victims at the center of attention and promote voluntary reconciliation and equal rights ^[27].

The ratio legis of the legal approach to the use of penal mediation in sexual violence cases is rooted in the development of modern criminal law that places substantive justice, victim recovery, and the effectiveness of law enforcement as the main objectives. With an adequate legal basis in various national regulations and international principles, penal mediation offers an alternative to resolving criminal cases that is contextual, responsive, and more humane.

However, penal mediation cannot be applied carelessly and must remain subject to the principle of caution, protection of human rights, and professional supervision to avoid abuse of the law and revictimization of victims. With the right approach, penal mediation can become an important part of Indonesia's modern, progressive, and justice-oriented legal system for all parties.

²¹ LPSK. (2022), *Pedoman Perlindungan Korban Kekerasan Seksual*. Jakarta: LPSK, p. 37.

²² Muladi. *Op.Cit.*, p. 37.

²³ Barda Nawawi Arief. (2007), *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana*, Jakarta: Kencana, p. 49.

²⁴ LPSK, *Op.Cit.*, p. 23.

²⁵ Howard Zehr, *Loc.Cit.*

²⁶ Suparman Marzuki, *Loc.Cit.*

²⁷ United Nations, *Loc.Cit.*

4. Conclusion

That penal mediation in resolving sexual violence crimes has a ratio legis that is based on restorative efforts, not just retributive. The main goal is to provide comprehensive recovery for victims, create participatory justice, and reduce the burden on the formal criminal justice system. The resolution of sexual violence crimes through penal mediation has three main foundations. Philosophically, penal mediation reflects the value of restorative justice that emphasizes recovery for victims and the responsibility of perpetrators. From a sociological aspect, this approach is expected to be able to rebuild social harmony, especially in a society that upholds the value of deliberation. While legally, penal mediation can be applied in a limited manner in accordance with the principles of progressive criminal law, while still guaranteeing the protection of victims' rights and not conflicting with applicable laws and regulations.

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