

# Rethinking diversion programs in Indonesia: A critical analysis through the lens of social and cultural context

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**Abstract:** This research aims to critique how diversion programs have been implemented in Indonesia from the point of view of the social and cultural environment. The gathered information will be subjected to a qualitative analysis that uses inductive and deductive reasoning techniques. According to the findings, at least three aspects are deficient: legal substance, which refers to the concordance of underlying regulations and guidelines for its implementation; legal structure; and cultural factors, which play a role in its implementation internally and externally (within law enforcement). In addition, the study highlights the necessity for additional research on the success rate of adopting diversion and building a new legal culture in society that promotes diversion as a method for resolving criminal cases involving children. This is a necessity brought to light by the study's findings. This research may provide valuable insights into the advantages and disadvantages of the system already in place.

**Keywords:** Diversion Programs. Juvenile Justice System. Pancasila Justice. Legal Culture.

**Summary:** Introduction – Research methods – Diversion: Safeguarding children's rights and well-being within the framework of Pancasila Justice – Unveiling the reality of diversion implementation in Indonesia – Social & cultural dimensions of diversion: A critical analysis – Conclusion – References

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## Introduction

In the sociocultural component, criminal behavior is questioned because it is seen as a disruption to social order,<sup>1</sup> which is equated with a deviation from the values and morals that society adheres to or, at the very least, believes in. How crimes (acts of criminality) are dealt with is strongly associated with criminal law enforcement, which is carried out according to particular patterns related to

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<sup>1</sup> Jonathan Jackson, "Experience and Expression: Social and Cultural Significance in the Fear of Crime", *The British Journal of Criminology* 44, no. 6 (May 2004): 946–66, <https://doi.org/10.1093/bjc/azh048>.

policies that lawmakers choose to be given to law enforcers (criminal law policies). In this framework, criminal activity needs to be acknowledged as a threat to values, order, and security; moreover, from the point of view of the laws governing criminal law, its management (eradication) contributes more toward the achievement of the goal of social protection and the promotion of social welfare. Without a doubt, the settlement of criminal offenses is invariably carried out by referring to the applicable criminal law and its policies as defined in the legislation.<sup>2</sup>

The resolution of criminal crimes, also known as the enforcement of criminal law, which refers to the policies of criminal law, offers several different potential solutions, namely through both penal and non-penal measures.<sup>3</sup> When enforcing criminal law using means other than imprisonment, it is important to prioritize restoring the victim's rights. However, it is also important to consider the rights of the person who committed the crime. However, resolving a criminal act through means other than imprisonment is only open for consideration in particular circumstances, such as certain offenses or age groups (children). Diversion is resolving criminal acts through non-penal means with certain limitations stipulated by the law.<sup>4</sup> It can only be applied to criminal acts punishable by less than seven years of imprisonment and committed by non-recidivist offenders. It only applies to age groups under 18 years old. Additionally, it can only be applied to crimes punishable by less than seven years of imprisonment. The "agreement" between the victim (or the victim's family) and the offender (or the perpetrator's family) is extremely important to the successful operation of the diversion program, which is strongly dependent on this "agreement".<sup>5</sup>

The application of diversion in handling criminal acts involving children as perpetrators is determined when a child is designated as a suspect, referring to Law Number 11 of 2012 concerning the Juvenile Justice System as an improvement from the weaknesses of handling children in conflict with the law that was previously regulated in Law Number 3 of 1997 concerning Juvenile Courts.<sup>6</sup> Diversion in handling criminal acts involving children as perpetrators is determined when a child is designated as a suspect. In addition, and this is related to the earlier description of the conditions for the operation of the diversion program, the investigator is

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<sup>2</sup> Henry M. Hart, "The Aims of the Criminal Law", *Law and Contemporary Problems* 23, no. 3 (1958): 401–41, <https://doi.org/10.2307/1190221>.

<sup>3</sup> Anggita Anggraeni, "Penal Mediation as Alternative Dispute Resolution: A Criminal Law Reform in Indonesia", *Journal of Law and Legal Reform* 1, no. 2 (January 26, 2020): 369–80, <https://doi.org/10.15294/jllr.v1i2.35409>.

<sup>4</sup> Dyah Listyarini, "Juvenile Justice System Through Diversion and Restorative Justice Policy", *Diponegoro Law Review* 2, no. 1 (April 28, 2017): 168, <https://doi.org/10.14710/dilrev.2.1.2017.168-184>.

<sup>5</sup> John Braithwaite and Stephen Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders", in *Restorative Justice* (Routledge, 2017), 3–35.

<sup>6</sup> Lafri Prasetyono, "The Problem of Diversion in Children Perpetrators of Traffic Violations in Indonesia", *Jembura Law Review* 4, no. 1 (2022): 38–51, <https://doi.org/10.33756/jlr.v4i1.11419>.

the only person with the authority to decide whether or not the diversion program should be implemented.<sup>7</sup> This can become a problem that extends to the practical level since it implicates violations of the right to legal help for children, particularly with making the greatest possible efforts to divert the child from a potentially harmful path to protect the child's best interests.

Because the adoption of diversion is geared toward the welfare of children, it finally resulted in forming a juvenile justice system that accommodates law enforcement activities based on restorative justice values through the implementation of diversion.<sup>8</sup> This was done so that children could have a better chance at a successful future. Although, in theory, diversion seems like an ideal effort that can restore the rights of victims whose rights were violated by "child offenders" while protecting the interests of the offenders, who are still children and are believed to have a long way to go and lack the mental maturity of their adult counterparts, diversion is not always as effective as it may sound.<sup>9</sup> In addition, in the Law on the Juvenile Justice System, the term "diversion" refers to the process of diverting child cases from the process of a criminal court to an alternative process that is outside of the criminal justice system.<sup>10</sup> This is done to achieve peace between the victim and the child, resolving child cases outside of the judicial process, avoiding the deprivation of liberty for children, encouraging community participation in efforts to resolve crime, and instilling a sense of According to this point of view, the application of traditional punishment to children who have been in trouble with the law not only breaches the rights of such children, but it also leaves open questions regarding the rights of the victims.<sup>11</sup>

A "dialogue" or "consultation and consensus" process involving the child and their parent or guardian, the victim and their parent or guardian, probation officers, professional social workers, representatives, and other parties involved is required for the implementation of diversion by the regulations that are currently in place, as stated in the Supreme Court Regulation of the Republic of Indonesia No. 4 of 2014. This regulation was issued in 2014. This law includes a provision requiring consultation, which is meant to convey the idea that the procedure for

<sup>7</sup> Beniharmoni Harefa, *Kapita Selekta Perlindungan Hukum Bagi Anak* (Yogyakarta: Deepublish, 2019).

<sup>8</sup> Mustakim Mahmud, "The Rights of Diversion in the Children's Criminal Jurisdiction System as the Intent of Legal Protection", *Indonesia Prime* 5, no. 1 (2020): 51–67, <https://doi.org/10.29209/id.v5i1.105>.

<sup>9</sup> Yunan Prasetyo Kurniawan et al., "Restorative Justice (Diversi): A Harmonization Effort of Legal Protection Against Child Criminal as Offender and Victim", in *Proceedings of the International Conference on Law, Economics and Health (ICLEH 2020)* (International Conference on Law, Economics and Health (ICLEH 2020), Semarang, Indonesia: Atlantis Press, 2020), <https://doi.org/10.2991/aebmr.k.200513.135>.

<sup>10</sup> Hafrida - Hafrida, "Restorative Justice In Juvenile Justice To Formulate Integrated Child Criminal Court", *Jurnal Hukum Dan Peradilan* 8, no. 3 (December 12, 2019): 439–57, <https://doi.org/10.25216/JHP.8.3.2019.439-457>.

<sup>11</sup> Alison Diduck, Noam Peleg, and Helen Reece, *Law in Society: Reflections on Children, Family, Culture and Philosophy: Essays in Honour of Michael Freeman* (Brill, 2015).

putting a diversion into effect is intricately connected to the norms and values that already exist in society. This provides evidence for the proposition that “law reflects society” while at the same time implying that the operation of the legal system in a society is always in interaction with the social and cultural facets of legal systems. In addition, legal culture will play a significant role in determining the success of implementing diversion in Indonesia. This will be determined by the degree to which diversion coincides with the legal culture or even with the more general values and norms upheld by society.<sup>12</sup>

The connection between the practice of diversion and the background of society’s values and norms also alludes to the fundamental principle of justice, which is the major source of law enforcement. This is because justice is the end goal of law enforcement. Because the execution of diversion is never too far removed from the pursuit of justice through the use of pre-existing legal instruments (both within and outside of the formal court process). This is made possible by placing punishment as a last resort (*ultimum remedium*) and using informal channels without rigid guidelines in its implementation. As a result, the presence of a “facilitator” is an essential component in achieving resolution through diversion in a manner congruent with society’s pre-existing morals and standards. In this scenario, the term “facilitator” refers to members of law enforcement, namely those who are active participants in the process of pretrial inquiry.<sup>13</sup>

Some people are concerned that the introduction of diversion would lead to an increase in criminal behavior.<sup>14</sup> Even though this problem has been addressed in the standards for implementing diversion, there is still the worry that mild sanctions will not deter children, leaving the possibility for them to repeat the criminal activity wide open. Although this concern has been addressed in the requirements for implementing diversion, there is still the worry that lenient sanctions will not deter children. The application of diversion should be seen as an effort to advocate for the rights of minors (as offenders) and for the public good rather than as a means of “mitigating sanctions”, as this would be a better way to frame the discussion. Even though diversion may not be as effective in practice as it is in theory, Scott and Steinberg<sup>15</sup> content that children who are punished through the formal process

<sup>12</sup> Wikan Sinatrio Aji, “The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia”, *Journal of Indonesian Legal Studies* 4, no. 1 (April 23, 2019): 73–88, <https://doi.org/10.15294/jils.v4i01.23339>.

<sup>13</sup> Dani Muhtada and Ridwan Arifin, “Penal Policy and the Complexity of Criminal Law Enforcement: Introducing JILS 4(1) May 2019 Edition”, *Journal of Indonesian Legal Studies* 4, no. 1 (May 7, 2019): 1–6, <https://doi.org/10.15294/jils.v4i01.30189>.

<sup>14</sup> Kelly Richards, “Blurred Lines: Reconsidering the Concept of ‘Diversion’ in Youth Justice Systems in Australia”, *Youth Justice* 14, no. 2 (August 1, 2014): 122–39, <https://doi.org/10.1177/1473225414526799>.

<sup>15</sup> Elizabeth S. Scott and Laurence Steinberg, “Adolescent Development and the Regulation of Youth Crime”, *The Future of Children* 18, no. 2 (2008): 15–33, <https://doi.org/10.1353/foc.0.0011>.

of the criminal justice system are more likely to continue their criminal behavior into adulthood when compared to juvenile offenders who are punished outside of the formal process.

In actual use, Diversion continues to throw up several problems, most notably with protecting public interests (security), which leads to the conclusion that it could be more effective. For instance, if a youngster becomes a drug courier in Indonesia, diversion is not applied to the child even though they are “just” a courier, and the quantity of drug disseminated is on the lower end of the spectrum. This is the case even though the threat to public safety and interests is significant. In addition, it is possible to ensure that they operate under the direction of adults at all times. When juvenile misbehavior has resulted in victims, the victims or their families frequently perceive attempts at alternative settlement as an opportunity to act in their best interests. This is particularly common in circumstances where the victim is a child. This is because diversion may only be carried out if the victim or their family gives their permission to do so.<sup>16</sup>

Supposing that diversion is used in a particular instance and that the follow-up to such diversion is deemed insufficient in fulfilling the interests of helping the offender transition into expected adulthood, then the diversion itself is regarded as insufficient.<sup>17</sup> It is commonly accepted that “youth delinquency” results from the child’s immaturity, which is then expressed as anti-social behavior. Diversion based on this school of thought is nevertheless subject to criticism. This criticism focuses on whether diversion can truly accommodate the protection of children’s rights and the execution of justice or, at the very least, protecting public interests. The research findings critique the implementation of diversion in Indonesia from the perspective of the social and cultural context that already exists in society. This critique is then evaluated based on the core principles of Pancasila justice.

When put into reality, diversion, which refers to alternative forms of conflict resolution for juvenile offenders, has several obstacles, particularly when public concerns like safety are considered. As a direct consequence, the efficiency of its implementation has been reduced. For instance, in Indonesia, if a kid is involved in drug trafficking, diversion is not applied to the child because of the perceived harm to public safety and interests. This is the case even if the child is acting as a courier and the number of drugs involved is on the lower end of the spectrum. In addition, it is possible to determine that the adult is giving the youngster instructions on behaving in situations where juvenile misbehavior results in victims. The victim or

<sup>16</sup> Katherine van Wormer, “Restorative Justice”, *Journal of Religion & Spirituality in Social Work: Social Thought* 23, no. 4 (November 29, 2004): 103–20, [https://doi.org/10.1300/J377v23n04\\_07](https://doi.org/10.1300/J377v23n04_07).

<sup>17</sup> Simon B Little, “Impact of Police Diversion on Re-Offending by Young People” (PhD Thesis, School of Criminology and Criminal Justice Arts, Education and Law Griffith University, 2015), <https://research-repository.griffith.edu.au/handle/10072/367597>.

the victim's family will frequently look to alternative resolutions as an opportunity to behave in a manner that is most beneficial to themselves. This is because diversion can only be prosecuted if the victim or their family gives their permission to do so.<sup>18</sup>

Suppose diversion is used in a given instance. In that case, the subsequent steps taken are frequently regarded as insufficient in addressing the interests of guiding the offender through their transition into responsible adulthood. This is because diversion is designed to satisfy the court's interests rather than the offender's. It is commonly believed that juvenile delinquency results from a child's immaturity, which is then expressed through anti-social behavior. The application of diversion, based on this fundamental premise, is nevertheless subject to criticism, notably regarding its capacity to legitimately accommodate the protection of children's rights and the pursuit of justice, or at the very least, to safeguard public interests. The research serves as a critique of the implementation of diversion in Indonesia from the perspective of the social and cultural framework within which it exists. This critique is evaluated based on the fundamental principles of Pancasila justice.

## Research methods

By taking a critical approach grounded in the Pancasila Justice framework, this investigation intends to rekindle research on alternative sentencing in the juvenile justice system. An improvement in applied research is required to realize this objective. In this situation, it is essential to select the appropriate paradigma,<sup>19</sup> and it is important to remember that the selected paradigm will affect the development of research techniques.

An interpretive paradigm is an approach that can be taken into consideration. The author plans to conduct a socio-legal study analysis and is critical of the system used for diverting criminals in Indonesia. Thus, the author chose this technique. Within the framework of the interpretive paradigm, the research employs a library research design by way of doing a review of laws and regulations that are associated with diversion.

In addition to this, a qualitative approach was taken to the investigation. This method was chosen because it is consistent with the interpretative paradigm, and both of these approaches share commonalities in taking a holistic perspective, which involves considering the phenomenon as a whole within the context of its

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<sup>18</sup> Detlev Frehsee, "Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications", *Buffalo Criminal Law Review* 3, no. 1 (1999): 235–59, <https://doi.org/10.1525/nclr.1999.3.1.235>.

<sup>19</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions*, [2d ed., enl, International Encyclopedia of Unified Science. Foundations of the Unity of Science, v. 2, No. 2 (Chicago: University of Chicago Press, 1970).

surroundings. In addition, the qualitative method emphasizes acknowledging the truth that others have to offer. In addition, an analytical technique will be utilized in this research project to investigate the legal diversion standards applicable in Indonesia.

To carry out this study, the writers will collect data from various sources, such as applicable laws, rules, policies, and published literature. The data that was collected will undergo a qualitative analysis that makes use of both inductive and deductive methods. During the analysis process, you will be tasked with locating patterns, coming to conclusions about overarching themes, and providing detailed interpretations of the data acquired.

In addition, knowledgeable participants from the juvenile justice system, including judges, corrections officers, social workers, and young offenders who have been diverted from their original sentence, will participate in this study project. To ensure that a wide variety of viewpoints are considered during this research, participants will be chosen using a method known as purposive sampling.

In addition, the privacy and confidentiality of participants' information and their informed consent will be maintained throughout this study. In addition to that, the use of ethical guidelines in human research will be investigated as part of this project.

## Diversion: safeguarding children's rights and well-being within the framework of Pancasila Justice

The concept of "diversion" in the context of the negotiation and resolution of criminal cases is strongly related to the connotation of the word "diversion", which refers to a change in direction or course.<sup>20</sup> Historically speaking, the idea of diversion was first presented in a study on the application of juvenile justice written in 1960 in the United States by the President of the Australian Crime Commission.<sup>21</sup> This report was presented in the United States. The major goal was to protect children from adverse impacts linked with the criminal justice system, especially the stigma commonly attached to it. This research emphasized the necessity of finding new ways to treat children's situations and directing them away from the regular channels that are currently in place.<sup>22</sup>

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<sup>20</sup> D.S. Dewi and Fatahillah A. Syukur, *Mediasi Penal: Penerapan Restorative Justice Di Pengadilan Anak Indonesia* (Indie Pub., 2011).

<sup>21</sup> Gordon Bazemore, Joe Hudson, and Mara Schiff, *Juvenile Justice Reform and Restorative Justice* (Willan, 2013).

<sup>22</sup> Robert Agnew and Timothy Brezina, *Juvenile Delinquency: Causes and Control* (New York: Oxford University Press, 2012).



Despite this, our conceptualization of diversion in everyday life has progressed beyond the literal sense of the term. Diversion is interpreted as giving law enforcement officials the authority to take appropriate measures to resolve criminal cases involving children through alternative means outside of formal channels, according to The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).<sup>23 24</sup> Among these measures are the cessation of the criminal justice process for children, the return of the children to the community, and the children's participation in activities related to social service. The first emphasis was placed on the investigation stage; nevertheless, it is noted that diversion can be used throughout law enforcement to lessen the harmful impact of conflict with the law on children.

Children who do unlawful conduct have rights that should take precedence over the legal punishment process. The protection and promotion of the rights of children should be a top priority.<sup>25</sup> In her work on juvenile criminal justice in Indonesia, Marlina<sup>26</sup> believes that removing cases from the official channels of the justice system protects minors from the possibility of growing up to commit crimes as adults. As detailed by Nasir Djamil in his book "Children Not to Be Punished",<sup>27</sup> the most important aspect of implementing diversion for children in dispute with the law recognizes that children are ill-suited and unable to traverse formal law enforcement processes. This is the essence of implementing diversion for children who conflict with the law. A diversion is a form of alternative dispute resolution that prioritizes the peaceful resolution of criminal cases involving juvenile offenders.<sup>28</sup> The overarching goal of diversion is to harmonize the interests of the victims and the children involved. This necessitates the participation of a third-party facilitator, such as the community, Child Community Advisors, law enforcement, prosecutors, and judges, to aid in reconciling the parties involved.<sup>29</sup>

<sup>23</sup> Vivi Nurqalbi, "Analysis of Diversion Arrangements in the Beijing Rules and the Juvenile Criminal Justice System in Indonesia", *European Journal of Law and Political Science* 2, no. 1 (February 26, 2023): 52–55, <https://doi.org/10.24018/ejpolitics.2023.2.1.53>.

<sup>24</sup> Katherine Hunt Federle, "Making Meaningful the Right to Appeal under the Convention on the Rights of the Child", *The International Journal of Children's Rights* 25, no. 1 (June 20, 2017): 3–23, <https://doi.org/10.1163/15718182-02501001>.

<sup>25</sup> Syamsuddin Muchtar, "The System of Sanctions for the Child and Its Implementation (Studies in Child Protection Perspective)", *Journal of Humanity* 2, no. 1 (July 1, 2014): 122–39, <https://doi.org/10.14724/02.09>.

<sup>26</sup> Marlina, *Peradilan Pidana Anak Di Indonesia: Pengembangan Konsep Diversi Dan Restorative Justice* (Bandung: Refika Aditama, 2009).

<sup>27</sup> Nasar Djamil, *Anak Bukan Untuk Dihukum: Catatan Pembahasan UU Sistem Peradilan Anak (UU-SSPA)* (Jakarta: Sinar Grafika, 2013).

<sup>28</sup> Sriwiyanti Sriwiyanti, Wahyu Saefudin, and Siti Aminah, "Restorative Justice for Juvenile Offenders in Indonesia: A Study of Psychological Perspective and Islamic Law", *JIL: Journal of Islamic Law* 2, no. 2 (August 4, 2021): 168–96, <https://doi.org/10.24260/jil.v2i2.335>.

<sup>29</sup> I Wayan Aryana, "The Reformulation of Restitution Concept in Juvenile Cases (A Comparative Study with Philippines and Thailand)", *Padjadjaran: Jurnal Ilmu Hukum (Journal of Law)* 7, no. 3 (January 2021): 400–420, <https://doi.org/10.22304/pjih.v7n3.a6>.



Protecting children's human rights and restoring rights for victims whose rights have been violated by child offenders are the driving forces behind efforts to find a middle ground between these two competing goals.<sup>30</sup> It is essential to acknowledge that children in trouble with the law may commit crimes with a level of understanding comparable to that of an adult; nevertheless, it is also necessary to consider the influence of environmental variables. Children are often thought to lack the emotional maturity necessary to appreciate the repercussions of their actions fully, and this belief is supported by research. Charles M. Borduin et al.<sup>31</sup> has pointed out that juvenile delinquency or criminal activities perpetrated by children, especially those under 18, are frequently the result of their psychological state, which is the outcome of anti-social conduct. This is particularly true for those who are younger than 18 years old. Borduin<sup>32</sup> has identified several elements that contribute to developing anti-social behavior in youngsters, which can ultimately lead to delinquency or criminal acts by those children. The individual traits of the kid, the dynamics of the family, the impacts of the child's peers, the educational aspects, and the social milieu in which the child grows and develops are all included in these factors.

**Table 1 – Factors Triggering Children's Anti-Social Behavior According to Borduin**

(Continua)

No.	Source	Factor
1.	Individual Children	Low level of verbal intelligence (Verbal IQ)
		Immature moral reasoning
		Cognitive bias to associate hostile intentions with others
		Children's tendency to prefer anti-social behaviors/traits
2.	Family Characteristics	Low affection and cohesion
		High level of conflict and hostility in the family
		Loose and ineffective application of discipline by parents
		Poor supervision from parents
		Parents abuse illegal drugs, have bad psychiatric conditions, and are criminal offenders.

<sup>30</sup> Syukron Salam, "Perkembangan Doktrin Perbuatan Melawan Hukum Penguasa", *Nurani Hukum* 1, no. 1 (December 1, 2018): 33–44, <https://doi.org/10.51825/nhk.v1i1.4818>.

<sup>31</sup> Charles M. Borduin et al., "Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence.", *Journal of Consulting and Clinical Psychology* 63, no. 4 (1995): 569–78, <https://doi.org/10.1037/0022-006X.63.4.569>.

<sup>32</sup> Ibid.

**Table 1** – Factors Triggering Children’s Anti-Social Behavior According to Borduin

(Conclusão)

No.	Source	Factor
3.	Friendship Environment	Be familiar with friends who commit behavioral deviations.
		Poor social skills
		Not getting along with pro-social friends.
4.	Education/School	Poor academic performance
		Expelled from school
		Low commitment to Education
		Poor school quality and weak school environment structure
5.	Social Environment	Have a criminal subculture (being in an environment of drug trafficking, prostitution, etc.)
		Inactive community organizations
		Low social support from the environment around the child
		High community mobility

The idea that even while children engage in mischief or criminal acts, these activities are not necessarily carried out with full knowledge justifies the description of elements influencing anti-social attitudes in children.<sup>33</sup> These views are justified by children engaging in mischief or criminal acts. Both the people in their families and their communities impact their behavior. In addition, children lack the mental maturity to analyze the results of their activities or the effects of specific behaviors on themselves or others. According to this point of view, it is feasible for youngsters to get into mischief or commit criminal acts due to outside influences, whether direct (such as instructions) or indirect (such as the internalization of deviant values and standards). Consequently, it is inappropriate to respond to a kid who has committed criminal conduct in the same manner as an adult who has committed the same crime.

At its core, the purpose of the law is to control everyday life in society and make it possible for individuals to grow to their highest potential.<sup>34</sup> The same

<sup>33</sup> Mimi Fitriana and Nur Hamizah Ramli, “Psychosocial Determinants of Antisocial Behavior among Young Adults in Kuala Lumpur”, in *Proceedings of the 2nd International Conference on Intervention and Applied Psychology (ICIAP 2018)* (Proceedings of the 2nd International Conference on Intervention and Applied Psychology (ICIAP 2018), Depok, Indonesia: Atlantis Press, 2019), <https://doi.org/10.2991/iciap-18.2019.8>.

<sup>34</sup> Jessica T. Mathews, “Power Shift”, *Foreign Affairs* 76, no. 1 (1997): 50–66, <https://doi.org/10.2307/20047909>.

applies to youngsters; the law should not hinder their maturation into well-rounded individuals as they grow older. It is made abundantly clear in the laws of Indonesia, more specifically in Law Number 4 of 1979 concerning Child Welfare; that children have the right to protection and care from the moment, they are still developing inside of their mothers' wombs.<sup>35</sup> This provision can be found in Law Number 4 of 1979. In addition, children have the right to be protected against potentially harmful or restrictive environments that could stunt their physical or mental development. In particular, Article 2 of Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection establishes that child protection encompasses all aspects related to the fundamental rights of children. This enables children to live, grow, develop, and participate optimally with human dignity while also being protected from all forms of violence and discrimination. In addition, the law ensures that children are shielded from any form of abuse.<sup>36</sup>

The notion that children cannot advocate for themselves freely (given their level of dependency), the child's best interests, continuity, and cross-sectoral principles are the foundations upon which the principles of defending children's rights are built. According to Human Rights Law Number 39 of 1999, which states that every child has the right to protection from their parents, family, society, and the state, protecting children's rights is founded on the larger protection of human rights.<sup>37</sup> This is because the protection of children's rights is a subset of the protection of human rights. The law recognizes and protects children's rights, starting with the prenatal period and continuing until the kid reaches the age of 18 and is considered responsible for themselves. Children's rights are referred to as human rights in that law, and their purpose is to defend children's rights, which are recognized and protected by the law.<sup>38</sup>

The fundamental tenets of safeguarding human rights, including safeguarding children, are applicable everywhere. It is generally agreed upon that the traditional criminal justice system, which emphasizes finding solutions involving punishment, stunts children's growth and development and prevents them from reaching their full potential. Nevertheless, how are these kinds of exceptions allowed? Unlike adult offenders who have already reached their full physical and mental potential, children are still undergoing the maturation process. The idea that adult offenders

<sup>35</sup> Ulya Sofiana, "Komparasi Hukum Islam Dengan UU No. 4 Tahun 1979 Tentang Hak Anak", *Jurnal Hukum Islam* 12, no. 1 (2013): 49.

<sup>36</sup> M Nur Rasyid, "The Realization of Legislative Measure of the Rights of the Child Post-Second Amendment of the Constitution", *Yustisia* 7, no. 1 (2018): 44–57.

<sup>37</sup> Alan Djaini, Fence M. Wantu, and Lusiana Margareth Tijow, "Legal Protection of Child Adoption without Trial by Human Rights Perspective", *Damhil Law Journal* 1, no. 1 (May 26, 2021): 20–30, <https://doi.org/10.56591/dlj.v1i1.627>.

<sup>38</sup> Winsherry Tan, "Child Marriage within the Sea Tribe of Kelumu Island: Issues and Problems", *Jurnal Media Hukum* 29, no. 2 (December 15, 2022): 120–30, <https://doi.org/10.18196/jmh.v29i2.14027>.

should have their rights protected stems from the belief that adults are held to a higher standard of individual accountability for their behavior than juveniles are. Given these factors, children are entitled to special treatment or exceptions, especially when they conflict with the law. This is especially true when the kid has restrictions that prevent them from complying with the law.

In its most basic form, diversion is an alternative method of resolving criminal cases that emphasizes restorative justice. Its primary goal is to ensure that the rights of victims, offenders, and the community (public interest) are fairly and adequately protected. The evaluation of justice that has been presented through criminal law instruments has, up until this point, been limited to formal justice values (at the very least, fairness based on applicable rules). Incorporating restorative justice values into criminal case resolution acknowledges and amplifies the public interest and substantive justice. Within this formal justice framework, there is frequent neglect of the rights of victims and the public interest (at least in terms of the judge's verdict). This is because formal resolution primarily focuses on punishing the offender, with the expectation that it serves as a lesson for the offender (to prevent recurrence) or for the general public to understand that such criminal actions have implications that can result in criminal sanctions. Therefore, restorative justice is conducted to restore a sense of safety to the victim, their dignity, and their sense of self-worth, as well as to inculcate a sense of responsibility in the offender so that they can realize the consequences of their prior activities. This is done so that the offender can comprehend the implications of their past actions. In the end, the goals of both points of view are the same: to reassert a sense of control over the desired outcomes of the dispute resolution process (particularly in situations involving criminal activity), with the ultimate goal of realizing substantive justice principles. In the end, restorative justice promotes cultural relativism and sensitivity rather than imposing one culture's norms and values on others through the legal system.

On the other hand, diversion can also be regarded as an endeavor to defend human rights, notably children's rights legally. This is especially important when dealing with juvenile offenders. This type of legal protection needs to comply with the Convention on the Rights of the Child, ratified by Presidential Decree No. 36 of 1990, respecting the Ratification of the Convention on the Rights of the Child in Indonesia.<sup>39</sup> The Law Governing the Juvenile Justice System contains the legal policy formulation for implementing diversion, which the Convention on the Rights of the Child recommends. You may find this policy formulation in the law. According to

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<sup>39</sup> Nurini Aprilianda, Mufatikhatul Farikhah, and Liza Agnesta Krisna, "Critical Review Selecting a Proper Law to Resolve Sexual Violence Against Children", *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (December 31, 2022): 954–72, <https://doi.org/10.22373/sjhk.v6i2.9050>.

the law, a child is defined as someone who is 12 years old but has not yet reached the age of 18, and a child in conflict with the law refers to the age, as mentioned, an earlier group that is suspected of committing a criminal offense by Article 1, paragraph 3 of the Law on the Juvenile Justice System. The primary focus of the implementation of diversion programs is on children who are in this age group and who are in conflict with the law.<sup>40</sup> It is not explicitly stated, but the Law on the Juvenile Justice System gives the impression that the legal protection of children's rights is contingent on age restrictions. The restricted nature portrayed in these laws is essentially by what is stated in the Convention on the Rights of the Child, which can also be regarded as an effort to establish legal control over society. These regulations were created to ensure that children have the protections they are entitled to under international law.

Other restrictions can be placed on the investigation depending on the categories or kinds of criminal acts believed to have been carried out by youngsters. These include offenses classified as violations, offenses considered small, offenses that do not involve victims, and situations in which the victim's loss does not surpass the value of the local minimum wage. The application of diversion in the resolution of criminal cases involving children who conflict with the law is restricted by the Law on the Juvenile Justice System, which states that criminal offenses carrying a maximum penalty of one year should be prioritized for resolution through diversion. This fundamental reference limits diversion to resolve criminal cases involving children who conflict with the law. Diversion may or may not be an option for offenses carrying penalties of more than one year and up to five years in prison. Except for situations in which the victim suffers emotional or physical harm as a result of the theft, all cases of theft should be tried to be handled by the application of diversion. When deciding whether or not to adopt diversion, age limits are considered. The younger the criminal, the greater the sense of urgency for diversion. Suppose a study carried out by correctional facilities demonstrates that extrinsic circumstances contribute to transgression beyond the child's control. In that case, the need for diversion becomes more pressing. The need for a diversion becomes more pressing when the damage that has been done is predominantly one of a material nature rather than one that is directly tied to the loss of life or bodily harm. Diversion is also considered in light of the public's worry or disturbance. The victim or a member of the victim's family must give their permission before any diversionary tactics can be implemented. Diversion can only be carried out under certain conditions if such permission is acquired and the offender or the offender's

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<sup>40</sup> Brian Septiadi Daud and Irma Cahyaningtyas, "Criminal Justice System Toward Children With Legal Conflict Seen In Justice Restorative Prespective", *Jurnal Hukum Prasada* 7, no. 1 (April 7, 2020): 14–26, <https://doi.org/10.22225/jhp.7.1.1223.14-26>.

family is willing to participate in the diversion program. If the offense was committed with an adult, the adult must still go through the official criminal proceedings as prescribed by the rules and regulations that are in effect at the time.<sup>41</sup>

In addition, according to the Law on the Juvenile Justice System, other constraints stipulate that alternative pathways can only be explored if the maximum jail sentence for the crime done by the child does not exceed seven years and the offense has not been committed previously. These restrictions act as a kind of control and are an important part of the law's overall goal.

One thing that may be called into question is whether or not youngsters genuinely lack the maturity to make their own decisions or at least have things to think about before doing something. In the end, the funding of research becomes significant as a form of justification for implementing diversion programs for children who are in confrontation with the law. When a child conflicts with the law and formal law enforcement processes are carried out, a practical approach can help bridge this issue by addressing the child's future well-being.<sup>42</sup> This is especially true when the child is in disagreement with the law. This strategy aims to answer how to punish without too punishing. As a result, it proposes separating the resolution of "childish behaviour" from formal law enforcement (criminal justice), which is referred to as diversion.

Moffitt highlights in her research on teenage delinquency that, even if they commit significant crimes, delinquent children still have limitations as "children" who are forced to acquire mental maturity via their anti-social behavior. Even though Moffitt acknowledges that delinquent children must achieve mental maturity through their anti-social behavior, suppose intervention in the form of rehabilitation is carried out that encourages the youngster to continue engaging in criminal activities. In that case, the concerns that they would grow up to become "criminals" can be disproved. However, this intervention should be avoided. In other words, social variables play a key role in preventing recidivism, particularly in the context of children who confront the law during the formal process of the criminal justice system. The criminal law policy should not ignore a child's future, and punishments should be designed to encourage them to transition from childhood to adulthood. These punishments typically address the interests of society and the offender.

The resolution of criminal cases involving children through the implementation of diversion is viewed as a step that upholds and argues for society's interests,

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<sup>41</sup> Darmini Darmini, "Pelaksanaan Diversi Pada Sistem Peradilan Anak", *QAWWAM* 13, no. 1 (2019): 43–63.

<sup>42</sup> Alexander Bagattini, "Child Well-Being: A Philosophical Perspective", in *Handbook of Child Well-Being: Theories, Methods, and Policies in Global Perspective*, ed. Asher Ben-Arieh et al. (Dordrecht: Springer Netherlands, 2014), 163–86, [https://doi.org/10.1007/978-90-481-9063-8\\_8](https://doi.org/10.1007/978-90-481-9063-8_8).

particularly in decreasing crime recurrence or recidivism. This is because diversion is seen as a step that upholds and advocates for society's interests in reducing crime recurrence. Formal procedures culminating in minors' custody can potentially prolong or repeat illegal behavior. This is especially true when one considers that the social environment is one of the most important factors in successfully addressing crime. On the other hand, in the specific context of children who have gotten into trouble with the law, intense support focused on resolving the child's anti-social conduct is considered a more successful option for minimizing recidivism, particularly among children. Therefore, based on this argument, programs that emphasize providing psychological support for children become a superior approach to resolving criminal issues compared to punishment measures, and diversion serves as an ideal starting point.

When children who are in confrontation with the law are processed through official settlements, particularly when they wind up being incarcerated, the subject of child welfare becomes increasingly essential. In the name of justice, based on what is stated in legislation (in terms of formal resolution), the chances children normally have for their personal development are forcibly restricted while serving time in prison. This can be seen as a form of formal resolution. In addition, even once these children are finally freed, there is no guarantee that they will immediately be provided equal opportunities for personal development. The stigma will probably continue, and there is a risk that these "former inmates", still youngsters, may be marginalized even further. At this point, the evidence supporting the importance of social variables in efforts to control crime, particularly concerning crimes done by children, becomes clear. This is particularly the case when it comes to crimes committed by children.

It is inappropriate to link separating the areas where children and adults are incarcerated with separating the criminal resolution process for children and adults. Scott and Steinberg have shown that putting children who have broken the law in detention centers does not give them the essential support for their transition into adulthood, and they stress the fact that this increases the risk that these children will become criminals in the future. Again, the concern about recidivism that occurs when diversion is applied to all instances involving young offenders reflects the anticipation that public safety would be compromised, which can be understood (in terms of normalization). Specifically, the apprehension that public safety will be compromised is due to the fear that normalization will occur. Not only for the sake of the rights and welfare of the children but also for the interests and safety of the general public, it is important to prioritize the resolution of criminal cases involving children through diversion or alternative measures outside of the formal system.



This is important not only for the sake of the rights and welfare of the children but also for the interests and safety of the general public.<sup>43</sup>

When resolving criminal cases through diversion, justice should fundamentally refer to human justice and social justice that is fair and civilized for all people of Indonesia if it is to do justice to the values of Pancasila, which should be reflected in that justice. The preservation of children's rights and the promotion of their well-being are key components of both of these values, as is the promotion of the general well-being of society as a whole. Adopting diversion is also meant to defend the child's right to fair treatment and eliminate any hurdles that may hamper the resources necessary for their personal development. This is especially important compared to jail, which invariably limits one's freedom and access to resources. In addition, formal conflict resolution systems may have unintended consequences for the growth and development of children. Because children's "wrong" behavior reflects highly influenced anti-social behavior that stems from social causes, as was previously mentioned, diversion should be extended further to support children as they transition into adulthood. In this approach, the suppression of anti-social behavior meant to be attained can be realized, and concerns about future occurrences of the behavior or the inability of law enforcement to fulfill their aims can be eliminated.

## Unveiling the reality of diversion implementation in Indonesia

Indonesia places a definite emphasis on the endeavor to resolve criminal cases involving minors through diversion. This effort has been increased by developing the Juvenile Criminal Justice System, established by Law Number 11 of 2012 governing the Juvenile Criminal Justice System. In addition to this, there are rules for its execution that can be found in Supreme Court Regulation Number 4 of 2014, which is titled Rules for Implementing Diversion in the Juvenile Justice System. As a result of these restrictions, it is possible to comprehend that the objective of the diversion is not limited to the provision of leniency for children; rather, it strives to preserve the rights of children who have committed offenses. In Barda Nawawi Arief's<sup>44</sup> comparing a kid who commits a crime with an adult who conducts an act comparable to the crime is impossible. As a result, it is inappropriate to classify a child as a criminal in that setting because of the circumstances. Instead, we should regard a child who has committed a crime as needing assistance, compassion, and affection. This shift in viewpoint will allow us to better respond to these young people.

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<sup>43</sup> Malik AL-Ghazali, "Restorative Justice Approach on The Under Age (Minors) Violator of The Traffic Case Accident (Laka) That Lead to Death in Polres Majalengka", *Jurnal Daulat Hukum* 1, no. 3 (September 7, 2018): 705–12, <https://doi.org/10.30659/jdh.v1i3.3371>.

<sup>44</sup> Barda Nawawi Arief, *Perbandingan Hukum Pidana* (Jakarta: Rajawali Pers, 2011).

In addition, Barda Nawawi Arief<sup>45</sup> underlines that punitive measures are inadequate to satisfy children's requirements for aid, understanding, and affection. Therefore, an approach with more persuasion is necessary. At the very least, distraction presents an opportunity to provide an answer to the demand for such an argumentative strategy. Nevertheless, implementing diversion in Indonesia elicits many concerns, questions, and objections. Is it possible that alternative sentencing could answer the goals of law enforcement within the context of promoting welfare and social security? Or is it just a particular treatment that is given to juvenile delinquents in the name of defending their rights?

The rise in the number of juvenile offenses (also known as "juvenile delinquency") is one factor that has contributed to the increased focus on diversion in Indonesia. It is possible to understand juvenile delinquency as a complex social and environmental phenomenon. These factors affect a child's inability to internalize the rules and values of society. Because of the myriad of stimuli that surround these children, it can be difficult for them to differentiate between appropriate and inappropriate behaviors. This tendency eventually develops as anti-social behaviors, usually considered by society or even by positive law as violating criminal statutes.<sup>46</sup>

Long before establishing a formalized criminal justice system, Indonesia had its methods of enforcing "law" by its social ideals, which place a premium on dialogue and reaching agreements via collective effort. During that period, the emphasis on consultation within the community was not dissimilar to what was sought through diversion. Mediation was carried out between the criminal, the victim, their families, and the community to address the disputes successfully. On the other hand, during that period, community leaders served as facilitators, in contrast to the system of juvenile justice, where law enforcement personnel were allowed to perform that function. In addition, the fact that there is a positive law that regulates diversion further strengthens the interest in promoting diversion as a means of resolving criminal cases that involve children.<sup>47</sup>

To put it another way, the compatibility of different social and cultural backgrounds should strengthen the implementation of distraction. However, this compatibility does not automatically produce an ideal scenario where every youngster engaging in criminal activities will be diverted. This is because of the limitations of the compatibility. Concerns have been raised regarding the possibility that youngsters

<sup>45</sup> Barda Nawawi Arief, *Beberapa Aspek Pengembangan Ilmu Hukum Pidana (Menyongsong Generasi Baru Hukum Pidana Indonesia)*, Pidato Pengukuhan Guru Besar Ilmu Hukum Pidana Fakultas Hukum Universitas Diponegoro (Semarang: Penerbit Pustaka Magister, 2011).

<sup>46</sup> Jason J. Washburn et al., "Development of Antisocial Personality Disorder in Detained Youths: The Predictive Value of Mental Disorders", *Journal of Consulting and Clinical Psychology* 75, no. 2 (2007): 221–31, <https://doi.org/10.1037/0022-006X.75.2.221>.

<sup>47</sup> Mahmud, "The Rights of Diversion in the Children's Criminal Jurisdiction System as the Intent of Legal Protection".

may not be instilled with the same level of deterrence through the implementation of diversion as they would be through the official criminal processes. Diversion has been put into practice in several different ways in Indonesia, which leads one to believe that there are significant problems with the regulations governing its use. For instance, the laws regarding when diversion may be used differ between the Law on the Juvenile Criminal Justice System and Supreme Court Regulation Number 4 of 2014, particularly concerning the prerequisites for when diversion can be carried out. These variations can be seen in the regulations regarding when diversion can be implemented. The difference in the standards for diversion between these two statutes makes the practice of diversion more difficult, particularly for some types of crimes that do not involve victims, such as drug offenses.

On the other hand, it is imperative that the victim's consent and the victim's family's consent to pursue diversion, which then opens up opportunities for practices that benefit one party, is acknowledged as a widespread phenomenon. This is because such consent opens the door for practices favoring one side. Any criticism should be directed to the consent letters the victim or the victim's guardian signed. The implementation of diversion is intended to support and restore the victim's rights in a criminal case; this is done with the awareness that the victim has experienced losses that cannot be fully restored through formal channels. However, this does not change the fact that the victim's rights are supported and restored through the implementation of diversion. The implementation of diversion does not govern the formulation of agreements or consent letters from the victim's party to proceed with diversion, even though it stipulates that the value of the losses sustained by the victim should not exceed the local Minimum Regional Wage.

Agreements naturally allude to a middle ground between the offender and the victim, but this does not mean there is a possibility that the offender will ultimately be obliged to accept the terms given by the victim to deviate from the official procedure of criminal law. In a circumstance like this, the offender is faced with specific considerations that lead them to meet those requirements, even though they may be difficult to accomplish. When both sets of conditions are "quantified", for instance, the offender can have the impression that the possible punishment that could be inflicted on the child quantitatively exceeds those suggested by the victim. The circumstances of this case make it clear that the offender, who is a child, possesses chances and a priceless future. Because of this, the offender should not be subjected to criminal prosecution; instead, diversion should be sought.

There is also the risk that the offender will deviate from the norm somehow. For instance, in the case of Judge's Decision No. 1/Pid.Sus-Anak/2017/PN. Cbn, it is stated that the first party, Dhewana Alnafis Han Bin Deni Rohmawan, as the offender, intended to pay compensation for a traffic accident case to the family

of the victim, the late Soniu Wijaya bin Muhidin, for IDR 85,000,000 (eighty-five million Indonesian Rupiah)

Both sides agreed that, in light of the compensation payment plan, Dhewana Alnafis Han Bin Deni Rohmawan would be sent back to his parents in his role as the offender. However, once the offender paid fifty million dollars, they refused to meet the second and third parts of the agreement, stating that the cash given had covered the compensation. This was even though the first point had already been fulfilled. This directly opposes the terms of the agreement that the offender and the victim came to. In this case, the perpetrator failed to uphold their half of the bargain, giving the excuse that they lacked the financial means necessary to carry out the terms of the agreement that they had previously signed.

The key focus is ensuring the constant implementation of diversion programs in situations involving children conflicted with the law. This is the fundamental issue that should be the primary concern. The observable facts that might be considered the fundamental issues with implementing the diversion are deviations from the anticipated practices. According to the legal system theory developed by Lawrence M. Friedman,<sup>48</sup> one aspect that is sometimes overlooked in the legal system is the cultural factor, even though it plays a crucial role, particularly in the implementation and enforcement process. In the context of the execution of diversion, the regulations already in place can be regarded as “sufficient” to sustain the core objectives of diversion, which include emphasizing the protection of children’s rights as both offenders and victims, as well as the community’s interests. In other words, the primary goal of diversion is to prioritize children’s rights. Friedman is the one who brought up the point that legal culture has a considerable impact on how the legal system works. As Friedman<sup>49</sup> defines it, legal culture may be regarded as the pre-existing values and norms in society, which, in the context of diversion, relate to how the society interprets “legal leniency” toward the offender (kid) and alternative resolutions of criminal cases. In simpler terms, legal culture can be viewed as society’s existing values and standards.

In addition, the execution of diversion from the perspective of law enforcement does not effectively reflect the protection of children’s rights, notably the guaranteeing of their well-being. This is evident in the differences in the threshold requirements for criminal sanctions in the Law on the Juvenile Justice System, where it is only stated that the threshold is for offenses with a maximum penalty of fewer than seven years, while in the Regulation of the Supreme Court of the Republic of Indonesia No. 4 of 2014, additional provisions in the form of subsidiary,

<sup>48</sup> L.M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975).

<sup>49</sup> Ibid.

alternative, cumulative, or combination charges are included, resulting in diverse treatment of child offenders. These differences in the threshold requirements for criminal sanctions in the Law on the Juvenile Justice System Every child who satisfies the standards set forth by the Law on the Juvenile Justice System has the right to seek diversion, whereas in this scenario, law enforcement officials, and particularly judges, have the legal capacity to refuse the implementation of diversion for children in certain situations; however, the right to pursue diversion is guaranteed to every kid. This creates a barrier to preserving children's rights, particularly their well-being. It directly contradicts the ideas of justice outlined in Pancasila, prioritizing justice and welfare for the child and society.

## Social & cultural dimensions of diversion: A critical analysis

The issue of diversion as a social phenomenon revolves around the persistent belief that law enforcement is synonymous with punishment. This is indicated by the imposition of severe sanctions aimed at instilling a sense of deterrence and serving as a lesson for both the offender and the community, thereby preventing future repetition of acts similar to those committed in the past.<sup>50</sup> The enforcement of criminal law is widely acknowledged to be inextricably linked to the achievement of the goal of social welfare, but just because this is the case does not imply that a "criminal" matter cannot be resolved by alternate means, such as diversion, and still accomplish the same goal. Even when its execution falls short of its intended purpose, deviating practices from the initial projection of diversion execution, such as transactional agreements between the victim and the offender, law enforcement authorities' failure to maximize the implementation of diversion, and the persistent tendency to opt for the criminal punishment of minors (juvenile offenders), indicate that at least one aspect has failed to be considered in the regulation and is therefore impermissible.

The implementation of the diversion can only proceed with the agreement of all of the relevant parties. The participation of the offender, the victim, community representatives, and law enforcement officers as facilitators is an unavoidable prerequisite for successfully implementing diversion.<sup>51</sup> On the other hand, the fact that the substance of the consent only accommodates the interests of some parties proportionally and instead tends to favor one party is evidence that there needs to be a missing piece. In this regard, we postulate that at least three aspects are

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<sup>50</sup> Du Preez Nicolien and Muthaphuli Phumudzo, "The Deterrent Value of Punishment on Crime Prevention Using Judicial Approaches", *Just Africa* 2019, no. 1 (December 1, 2019): 34–46, <https://doi.org/10.10520/EJC-1d6821df4d>.

<sup>51</sup> Hafrida, "Restorative Justice In Juvenile Justice To Formulate Integrated Child Criminal Court".

lacking: legal substance, which is related to the harmony of underlying regulations and guidelines for its implementation; legal structure, which is reflected in how law enforcement agencies have not sufficiently promoted or strived for diversion; and cultural factors, which both internally (within law enforcement) and externally (within society) play a role in the implementation of diversion within the legal system theory. In this regard, at least three aspects still need to be added.

In the context of Pancasila justice, which emphasizes fair and civilized treatment of humanity as well as social welfare for all Indonesian people, the concept of justice can be crystallized as an effort to treat others as they were created, which is as human beings with fundamental rights that need to be protected, with the ultimate goal of achieving social welfare not only for the individual but for the entire population without exception. Diversion inherently contains values congruent with the core principles of Pancasila justice, as seen from the earlier descriptions of such values. The purpose of diversion is to provide appropriate therapy for children who are thought to lack mental maturity and comprehension while recognizing that dominant causes from external sources may be driving the children's participation in criminal activities.<sup>52</sup> Diversion is designed to achieve this goal. How well does the current implementation of the diversion program correspond with the overarching purpose of protecting these particular individuals?

Given the common belief that the most severe penalty or criminal penalties represent the optimum form of law enforcement, it is nevertheless apparent that corrective sanctions bring satisfaction and a sense of security to the public (the interests of society). This view may persist, particularly when talking about children who have run afoul of the law due to the restricted availability of alternative sentencing options, particularly concerning the public's concern that diversion is not sufficient to provide "education" to the offenders (children), leading to an increasing concern about recidivism, studies focusing on the success rate of diversion implementation have not yet been found. A comprehensive assessment of the implementation of diversion in cases involving children as perpetrators or victims is not readily available. In addition, studies focusing on the success rate of diversion implementation have yet to be found.<sup>53</sup>

Recidivism, the key worry in implementing diversion, offers a new challenge about the most effective strategy to decrease or eliminate recurrent criminal acts. This is because recidivism is the primary concern in diversion. The application of severe sanctions is regarded to have a proportional deterrent effect on the offender

<sup>52</sup> François Steyn, "Approaches to Diversion of Child Offenders in South Africa: A Comparative Analysis of Programme Theories" (PhD Thesis, Bloemfontein, University of the Free State, 2010).

<sup>53</sup> Anak Agung Putra Dwipayana, Jawade Hafidz, and Aryani Witasari, "The Implementation of Diversion in Handling of Criminal Actions Performed by Child", *Law Development Journal* 4, no. 2 (2022): 339–46, <https://doi.org/10.30659/ldj.4.2.339-346>.

when viewed from the point of view of individuals opposed to using non-formal procedures. This thinking may be valid when the offender is an adult. However, when it comes to children who exhibit anti-social conduct as a predominant prelude to criminal activity, this understanding is not applicable because environmental circumstances primarily influence children. This suggests that to reduce the likelihood of juveniles committing future offenses, it is necessary to place youngsters in trouble with the law in a setting that can have a “positive” impact on them. In this instance, “positive” corresponds with the significance of directing the child during the formative years leading up to adulthood. The findings of Scott and Steinberg strengthen this assertion,<sup>54</sup> who found that putting children in correctional institutions (even those designed specifically for children) will only give the offender a greater opportunity to develop highly potential anti-social behavior, which can lead to future criminal activities. The findings of Scott and Steinberg support this assertion. This opinion lends credence to Borduin’s<sup>55</sup> the contention is that addressing anti-social behavior in children will positively influence reducing the number of criminal behaviors by youngsters. This is especially true when one considers that the factors influencing behavior often have more than one dimension.

Adopting diversion in Indonesia has yet to significantly influence the development of a new legal culture inside society. It remains to be seen how society will view diversion as a strategy for resolving crimes involving children, which helps not only the child who committed the crime but also the victim and the community. Because the introduction of diversion has not been supported by ongoing support for the offender (kid) until this point, it is impossible to fault persons who believe that diversion is solely a “mitigation” attempt for the offender. In addition to this, the inconsistent implementation of diversion, in which not all law enforcement personnel agree to maximize efforts to implement diversion due to varying interpretations of the criteria for implementing diversion (Supreme Court Regulation of the Republic of Indonesia No. 4 of 2014).

It is suspected that the inconsistent application of diversion in this setting contributes to the perception that diversion is not a good or appropriate solution for resolving criminal cases involving children. However, in reality, diversion carries the value of protecting the rights and welfare of victims, offenders, and the larger community. This perception may have been formed due to the sporadic application of diversion in this setting. Inconsistency in diversion efforts might be perceived as unfairness for the parties involved from the perspective of the Pancasila justice model because the treatment by law enforcement can vary across various

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<sup>54</sup> Scott and Steinberg, “Adolescent Development and the Regulation of Youth Crime”.

<sup>55</sup> Borduin et al., “Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence”.



parties. The Pancasila justice model emphasizes equality and fairness for all parties involved. Given that cases of abuse, such as those stated in the second half, might still be identified, the consensus among the victim, the offender, and community members can also become counterproductive to the execution of diversion programs.

In essence, the existing implementation of diversion has not been able to successfully improve public faith in diversion as a method for resolving criminal cases, particularly those involving minors. As a new value that must be instilled in society, diversions must present evidence or examples demonstrating that diversion is the best step in resolving criminal cases involving children. This is because diversion aligns with the values of Pancasila justice, principles of protecting children's rights and welfare, and comprehensive social well-being. Diversions must present evidence or examples demonstrating that diversion is the best step in resolving criminal cases involving children.

## Conclusion

Diversion is an alternate case resolution form used in the juvenile justice system. It emphasizes restorative justice and protects the rights of victims, offenders, and the community. It is based on the principles of restorative justice and has as its primary objectives the re-establishment of the victim's sense of safety and the offender's sense of responsibility. When dealing with juvenile offenders, diversion can also function as legal protection for the children's rights. The implementation of diversion in Indonesia is limited by the Law on the Juvenile Justice System, which constrains the program. These limitations include age requirements for eligibility, restrictions on the sorts of criminal crimes that can be resolved through diversion, and restrictions on the types of criminal actions that can be handled through diversion. This study shows the need for more research on the success rate of implementing diversion and establishing a new legal culture that supports diversion as a strategy for resolving criminal cases involving children. Additionally, the research underlines the need to develop a new legal culture in society that supports diversion as a strategy.

Based on the constraints imposed by the existing implementation of diversion, recommendations can be made to improve the efficiency and coherence of diversion programs. To begin, there should be a thorough analysis of the effectiveness of such programs concerning the goals of lowering the reoffending rate and improving children's health and safety. Participants in this review should include victims, offenders, law enforcement officers, and community leaders. This evaluation should engage all relevant stakeholders. Second, to guarantee that the law governing the juvenile justice system and Regulation Number 4 2014 of the Supreme Court are consistently implemented, measures should be made to unify the threshold

conditions for diversion between the two pieces of legislation. Alternative sentencing should be maximized for qualified situations, and law enforcement officers should be given clear standards and procedures to follow. Thirdly, there should be an emphasis placed on promoting distraction to preserve children's rights and welfare, with particular attention paid to the alignment of this practice with the principles of Pancasila justice and the values of Indonesian society. This can be accomplished by conducting awareness campaigns and training programs for members of the general public, as well as for law enforcement personnel and judges. Last but not least, children who have been in trouble with the law should be offered ongoing support and resources to increase the likelihood of their effective reintegration into society and decrease the likelihood that they would engage in criminal activity in the future.

Researchers can carry out longitudinal studies to evaluate the effects of juvenile diversion programs on the lives of juveniles who have been in confrontation with the law for an extended period. This will allow for the continued development of this research in the future. This can assist in establishing how effective diversion is in reducing the likelihood of future criminal behavior among these youngsters and fostering positive outcomes for them. In addition, comparative studies can be carried out to investigate the use of the diversion strategy in other countries and locate exemplary policies and procedures that apply to the situation in Indonesia. In addition, qualitative research can be undertaken to investigate the viewpoints and experiences of victims, offenders, and other stakeholders participating in diversion programs. This research can provide useful insights into the benefits and drawbacks of the existing system. Overall, continuing research and development are needed to protect children's rights and well-being within the framework of Pancasila justice. This will allow for continual improvement of diversion programs and help ensure the children's well-being.

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#### **Repensando os programas de desvio na Indonésia: uma análise crítica sob a ótica do contexto social e cultural**

**Resumo:** Esta pesquisa tem como objetivo criticar a implementação dos programas de mediação no sistema de justiça juvenil da Indonésia sob a ótica do ambiente social e cultural. As informações coletadas serão submetidas a uma análise qualitativa, utilizando técnicas de raciocínio indutivo e dedutivo. De acordo com os resultados, pelo menos três aspectos apresentam deficiências: a substância jurídica, que se refere à conformidade entre os regulamentos subjacentes e as diretrizes para sua implementação; a estrutura legal; e os fatores culturais, que influenciam a implementação tanto interna quanto externamente (no âmbito da aplicação da lei). Além disso, o estudo destaca a necessidade de mais pesquisas sobre a taxa de sucesso da adoção da mediação e a construção de uma nova cultura jurídica na sociedade que promova a mediação como método para resolver casos criminais envolvendo crianças. Essa necessidade foi evidenciada pelos resultados do estudo. Esta pesquisa pode fornecer informações valiosas sobre as vantagens e desvantagens do sistema atualmente em vigor.

**Palavras-chave:** Programas de Desvio. Sistema de Justiça Juvenil. Justiça Pancasila. Cultura Jurídica.

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