

Diversion and Restorative Justice for Children Facing the Law

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ARTICLE INFO	ABSTRACT
Keywords: <i>Diversion, Restorative, Children in Conflict with the Law</i> <i>Send feedback</i>	<i>This research analyzes the implementation of diversion through a restorative justice approach in the handling of children facing the law (ABH) in the jurisdiction of the Bali Police. Using normative legal research methods with a qualitative approach, this study examines the effectiveness of the diversion mechanism based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. The results of the study show that the implementation of diversion in the Bali Police has succeeded in reducing the burden of cases in court while creating a more humane settlement. However, several obstacles were found such as limited understanding of the apparatus, inadequate support facilities, and public resistance to the concept of diversion. This study also identifies opportunities for the integration of Balinese local wisdom values in the mediation process. The implications of this study include three main aspects: (1) policy - the need to improve the technical guidelines of diversion, (2) practice - the importance of building the capacity of mediators, and (3) academic - contribution to the development of diversion models based on local culture. The findings of this study are expected to be a reference for the development of a more effective and fair juvenile criminal justice system.</i>

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INTRODUCTION

In various ways, efforts to foster and protect children are faced with problems and challenges in society, and sometimes behavioral deviations are found among children. More than that, there are even children who commit unlawful acts, regardless of their social and economic status. In addition, there are also children who, for one reason or another, do not have the opportunity to receive adequate physical, mental, or social attention (Beckman, Jewett, Gaçad, & Borowsky, 2024). This inadequate state—whether intentional or unintentional—often leads children to commit actions that can harm themselves and/or society (Rodriguez, 2014).

Deviant behavior as an unlawful act committed by children is caused by various factors, including the negative impacts of rapid development, the flow of globalization in communication and information, advances in science and technology, and changes in the lifestyle and ways of life of some parents (Payne & Welch, 2018). These changes have brought about fundamental social shifts in people's lives, significantly affecting children's values and behaviors (Marsh & Walsh, 2014). Furthermore, children who lack, or do not receive, affection, nurturing, guidance, and coaching in the development of attitudes, behaviors, self-adjustment,

and parental supervision—whether from parents, guardians, or foster parents—are more easily drawn into unhealthy environments detrimental to their personal development (McGarrell & Hipple, 2017).

The Constitution of the Republic of Indonesia, in Article 18B paragraph (2) of the 1945 Constitution, mandates that: *"Every child has the right to survive, grow, and develop, and to be protected from violence and discrimination."* Furthermore, at a more concrete legal level, Article 20 of Law (UU) Number 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2016, which is the Second Amendment to Law Number 23 of 2002 concerning Child Protection, stipulates these protections into law. In line with this, Law Number 11 of 2012 concerning the Child Criminal Justice System not only regulates children who are in conflict with the law, but also children who are victims of criminal acts and children who are witnesses to criminal acts—collectively referred to as *anak yang berhadapan dengan hukum (ABH)*.

The handling of children who are in conflict with the law must be based on the best interests of the child. The meaning of “best for children” is related to the nature of children—physically, psychologically, and socially—so that the interests of children are prioritized above all. Handling children in conflict with the law does not always require penal measures (criminal law) or non-penal measures (for example, diversion). Both approaches can be applied in sequence, prioritizing diversion where it meets the requirements, and resorting to the criminal justice system if diversion efforts fail (Latimer, Dowden, & Muise, 2015).

Regarding restorative justice, the *SPPA* Law regulates diversion. Diversion is defined as the transfer of the settlement of children’s cases from the criminal justice process to a process outside the criminal court (De Mesmaecker, 2014). If these two concepts are linked, restorative justice is the goal to be achieved, while diversion is one of the processes to achieve it. Restorative justice can be achieved either through diversion or through non-diversion measures, meaning the resolution of cases through the criminal justice system while still pursuing restorative outcomes. For example, this may involve imposing a penalty or sanction that meets the needs of both the perpetrator and the victim (Gal & Moyal, 2011).

Restorative justice is an idea and movement that prioritizes justice from the perspective of the perpetrator and their family, the victim and their family, the community, and relevant stakeholders, with the aim of restoring conditions to their original state (Braithwaite & Drahos, 2019). Restorative justice responds to criminal behavior by balancing the needs of the community, the victim, and the perpetrator (Choi, Bazemore, & Gilbert, 2012). Although this concept continues to develop and may be subject to various interpretations, in reality, the protection of children—especially those facing the law—has not yet been optimally realized (Bergseth & Bouffard, 2014). Article 1 number 6 of Law No. 11 of 2012 concerning the Child Criminal Justice System (*SPPA* Law) stipulates that: *“Restorative justice is the settlement of criminal cases involving the perpetrator, the victim, the perpetrator’s family/victim’s family, and other parties who jointly seek a fair resolution to restore the original condition, and not as retaliation.”* Article 1 number 7 of the *SPPA* Law provides: *“Diversion is the transfer of the settlement of children’s cases from criminal justice to non-criminal justice.”* The *SPPA* Law also regulates the obligation of law enforcement officers to seek diversion at all stages of the legal process.

Based on these provisions, settlement must be carried out outside the criminal justice system through deliberation involving the perpetrator, the victim, and other relevant parties to find a fair solution that restores the original condition without retaliation, and which prioritizes the interests of the child. The settlement of cases through restorative justice is also regulated under Indonesian Police Regulation Number 8 of 2021 concerning the Handling of Crimes through Restorative Justice (*Perpol* No. 8 of 2021).

Several previous studies, such as those conducted by Marlina (2009) and Setya Wahyudi (2011), have examined the concepts of diversion and restorative justice, but remain limited to theoretical and normative aspects. Some important aspects that have not been sufficiently explored in these studies include: how the diversion process can be adapted to local Balinese wisdom, the effectiveness of mediation in resolving *ABH* cases, and the long-term impact of diversion on children's psychosocial development. This research aims to address these gaps through a more comprehensive approach, integrating positive legal perspectives with local cultural values.

Based on the background described above, the formulation of the problem in this study is as follows: (1) How is diversion applied to children in conflict with the law through a restorative justice approach? and (2) What are the implications of diversion for children through a restorative justice approach?

This research offers novelty in several aspects. First, it conducts an in-depth analysis of the implementation of diversion at the Bali Regional Police (*Polda*) by incorporating values of local wisdom present in the community. Second, it provides a comprehensive evaluation of diversion outcomes, not only from the legal standpoint but also from the psychological and social perspectives of the child. Third, it develops an evaluation model that can objectively measure the success of the diversion process.

The objectives of this study are to examine and analyze the application of diversion through a restorative justice approach and to assess the implications of this application for criminal acts committed by children within the jurisdiction of *Polda* Bali. In terms of benefits, this research is expected to make a tangible contribution at the policy level by improving the implementation of the *SPPA* Law, at the practical level by strengthening the capacity of law enforcement officials, and at the academic level by enriching the body of knowledge on restorative justice. With a holistic, evidence-based approach, this research is expected to provide concrete solutions to optimize the juvenile criminal justice system in Indonesia, especially in the context of diversion and restorative justice. The findings are expected to contribute not only to the development of juvenile criminal law theory but also to serve as a reference for formulating more effective and fair policies and practices for handling *ABH*.

RESEARCH METHODS

The research method used in this study is a *normative* legal research method, which employs various types of primary legal materials in the form of laws and regulations, as well as secondary legal materials in the form of literature related to *diversion* and *restorative justice*.

Johnny Ibrahim argues that *normative* legal research is a form of scientific study aimed at finding the truth based on the logic of legal science, reviewed from the *normative* perspective, or as an effort to discover law applicable to a particular case. The sources of legal materials obtained are then analyzed descriptively, systematically, evaluatively,

and argumentatively, and presented in a qualitative manner using sentences that are orderly, sequential, logical, non-overlapping, and effective, so as to facilitate the interpretation of legal materials and the understanding of the results of comprehensive analysis.

RESULTS AND DISCUSSION

The Application of Diversion to Child Crimes Through a Restorative Justice Approach

In the development of criminal law, there has been a paradigm shift, initially using the retributive justice approach, then changing to rehabilitation, and now to restorative justice.²¹ The concept of the restorative approach is a relatively new concept in Indonesia. This concept emphasizes on restoration to its original state before the occurrence of a criminal act.

The application of diversion through a restorative justice approach is in line with the soul of the Indonesian nation, namely Pancasila, especially the 4th Precept of Pancasila. The essence of the meaning of the 4th Precept of Pancasila above in relation to diversion is the adherence to the principle of consensus deliberation in every decision-making in the context of resolving criminal cases committed by children. Consensus deliberation is the process of discussing issues in a sitting manner by involving related parties in order to reach a mutual agreement. Consensus deliberation is carried out as a way to get a decision that is mutually beneficial to both parties so that neither party is harmed

The application of the principle of restorative justice and the diversion process as an effort to resolve criminal acts committed by children even though juridically formally has been regulated clearly and firmly in Law Number 11 of 2012, but formally problems arise related to the time of enactment of the law which in Article 108 states: "This Law comes into force after 2 (two) years from the date of promulgation" which means that the law is new effective in July 2014, this will certainly raise problems for the resolution of criminal acts involving children, in addition to the readiness of all law enforcement officials, public understanding, and facilities and facilities are supporting factors that cannot be ruled out in supporting the enactment of the law. When these supporting factors are inadequate, it will cause problems again and of course will have an impact on children both directly and indirectly.

Bagir Manan, in his writing, described the substance of "restorative justice" which contains principles, including: "Building joint participation between perpetrators, victims, and community groups to resolve an event or criminal act. Placing the perpetrators, victims, and the community as "stakeholders" who work together and directly try to find a solution that is seen as fair for all parties (win-win solutions)".

The application of diversion through restorative justice is the process of resolving acts of violation of the law outside the court, carried out by bringing the victim and the perpetrator (suspect) together to sit in one meeting to talk together, in that meeting the mediator provides an opportunity to the perpetrator to provide the clearest picture of the actions that have been taken.

The perpetrator who made the presentation really hopes that the victim will be able to accept and understand the conditions and causes why the perpetrator committed a criminal act that caused the victim to suffer losses. Then the perpetrator also explained his responsibility for the actions he had done. Then it was responded to by the victim, besides that the community was also present as a party who was harmed in general.

In principle, through Law Number 11 of 2012, it has prioritized the restorative justice approach and diversion process as an effort to resolve criminal acts committed by children, so that the application of restorative justice will offer answers to important issues in the settlement of criminal cases, namely:

First, criticism of the criminal justice system that does not provide special opportunities for victims (criminal justice system that disempowers individuals); second, eliminating conflicts, especially between perpetrators and victims and the community (taking away the conflict from them); Third, the fact that the feeling of helplessness experienced as a result of a criminal act must be overcome in order to achieve reparation.

The restorative justice approach offers the settlement of criminal cases involving children, it is enough to be resolved through mediation between the perpetrator, the victim and the community as the victim as well as the party who must take responsibility for the behavior committed by the child as a perpetrator of the crime, because basically it is the community or parents who should be the party most responsible for the deviation of the child's behavior.

The restorative justice process is basically carried out through diversion, this is an effort to divert from the criminal justice process out to the formal process to be resolved familial. Therefore, according to the researcher, the application of diversion through a restorative justice approach in juvenile criminal cases is a settlement that prioritizes consensus deliberation outside the court. Or in other terms it is known as ADR (Alternative Dispute Resolution). Settlement through deliberation is actually not new for the Indonesian people. Before the Dutch occupation, our nation already had its own law, namely customary law. Customary law does not distinguish between the settlement of criminal cases and civil cases, all cases can be resolved through deliberation with the aim of obtaining balance or restoration of the situation.

Implications of Diversion through a Restorative Justice Approach as an Effort to Provide Justice for Perpetrators and Victims

The implications that can be caused by the application of diversion through a restorative justice approach in resolving children's cases that conflict with the law in juvenile criminal justice are:

1. Reduce the burden of cases in court.

With the settlement of cases outside the court, this will have the impact of reducing the burden of cases or the accumulation of cases in court. As is well known that so far the court has been overloaded with cases, this is because every criminal act is resolved in court without any alternative to resolve criminal cases outside the court. So it is hoped that with the diversion, it will slightly reduce the burden of cases that must be resolved in court.

2. It reflects more of the settlement of cases that are in accordance with the spirit of Indonesia, namely Pancasila

The settlement of cases in accordance with the spirit of Pancasila is a deliberative settlement for consensus. Basically, the culture of resolving through deliberation or conciliation is a value that is widely embraced by people in Indonesia. Conflict resolution through deliberation is directed at harmonization or harmony in society and does not escalate the situation, while maintaining an atmosphere of peace as much as possible. This is certainly in line with several principles inherent in the concept of diversion, for example:

- a. The concept of diversion aims to create peace between the perpetrator and the victim by providing compensation or by apologizing and it is considered that there is no more conflict, as well as the request for remorse and the perpetrator will not repeat his evil deeds;
- b. Diversion programs can be in the form of; it is enough to give warnings, skill building, guidance or counseling (giving advice);
- c. Cases carried out by diversion are usually cases that are not severe and do not endanger the community, and there is a close relationship between the perpetrator and the victim.

Meanwhile, according to Setya Wahyudi, based on the opinion of Arif Gosita, stated that the application of diversion in the juvenile criminal justice system is in accordance with the moral values of Pancasila in relation to the protection of children. The five moral values contained in Pancasila that provide protection for children contained in diversion are as follows:

1) Divine values.

It is the values of devotion to God Almighty which is in accordance with the provisions on the obligation to provide child protection (both child protection in general and protection for children in special conditions) is the responsibility of parents, families, society and the government and state.

2) Humanitarian Values.

The moral value of humanity, according to Setya Wahyudi, is in accordance with the characteristics in the implementation of child protection in Indonesia. In Indonesia, the implementation of child protection is kept away from the implementation of commercial protection, because the implementation of child protection is an implementation to realize children's rights and is the obligation of the state, government, family/parents in its implementation, as outlined in the Child Protection Law.

3) The Value of Unity.

The moral value of unity, in accordance with the values implied in the provisions of the obligation to provide child protection. The existence of a will that requires the implementation of child protection, in which it shows a willingness to be willing to sacrifice for the implementation of child protection. Thus, the obligation to implement child protection is a manifestation of the value of Indonesian unity.

4) The value of deliberation.

The moral value of deliberation to reach consensus is also applied in the protection of children, because in the aspect of protecting children's rights there is a recognition of children's rights about respect for children's opinions is that children's opinions, especially when it comes to matters that affect their lives, need to be considered in every decision-making. In the context of the implementation of the idea of diversion, respect for children needs to be considered, because the principle in the implementation of the idea of diversion, always requires the will of the delinquent child, the will of the parents of the delinquent child and even the consent of the victim. Without the will or agreement, the diversion program cannot be implemented. The value of prioritizing deliberation to reach consensus and in an atmosphere of family spirit in the context of the implementation of child protection, then in protecting children in accordance with the wishes of the protected child and not imposing the will of the party who will protect the child.

5) Social Justice Values.

The moral value of social justice must animate in every implementation of child protection, which is the development of a fair attitude in the fulfillment of children's rights.

Such an assumption is that diversion in the juvenile criminal justice system is very appropriate and does not contradict the moral values of the Pancasila philosophy of the Indonesian nation.

1. Removing negative stigmas for children.

The implications of the application of diversion through the restorative justice approach are intended to avoid and remove children from the judicial process so as to avoid stigmatization of children who face the law as criminals. And also aims to make the child expected to return to the social environment in a reasonable manner. This is as mentioned in the explanation of the SPPA Law which states that: the most basic substance in this law is the explicit regulation of restorative justice and diversion intended to avoid and keep children away from the judicial process so as to avoid stigmatization of children who are facing the law and it is expected that children can return to the social environment in a reasonable manner. Therefore, the participation of all parties is very necessary in order to realize this. The process must aim at the creation of restorative justice, both for children and for victims.

Assuming that diversion is very important to consider in handling children who are in conflict with the law because diversion can prevent children from the stigmatization process that usually occurs in the juvenile criminal justice process through the juvenile criminal justice system. If we look at the provisions contained in UN Resolution 40/33 and the tendency to regulate the juvenile criminal process in various countries (the United States, the United Kingdom, the Netherlands, Australia, New Zealand and Japan), all of them regulate diversion in the handling of child offenders. In terms of protecting the best interests of children, the existence of this diversion is very necessary, because through diversion, the possibility of criminal prosecution is lost, the child's record as a former defendant does not exist, and by itself stigmatization of children as a criminal did not happen.

2. Punishment that educates children.

In the diversion, the punishment of child offenders is directed or aimed at educating. In the sense that the punishment imposed on the child is a punishment that gives responsibility to the perpetrator, not a punishment that aims to retaliate for the child perpetrator. Because if the punishment aims for revenge, it is feared that it will affect the psychology of the children. The forms of accountability given in restorative justice for children are material compensation, social work, education and training that are useful for children. This is as stipulated in Article 11 of Law No. 11/2012 which stipulates that the results of the Diversion agreement can take the form of, among others:

- a. peace with or without compensation;
- b. handover back to parents/guardians;
- c. participation in education or training at educational institutions or LPKS for a maximum of 3 (three) months; or
- d. community service.

3. Provide Justice for The Perpetrators and Victims.

The purpose of diversion is to provide a sense of justice for the perpetrator and the victim because the settlement of diversion is a case resolution that prioritizes a win-win

solution or consensus deliberation. So that the settlement in diversion is a settlement that results in an agreement between the perpetrator and the victim. Thus, it will provide a sense of justice for both victims and perpetrators.

4. Provide prevention or prevention of subsequent crimes.

The implications of the application of diversion with the restorative justice approach itself are to contain full participation and consensus, seek to heal the damage or losses that exist due to the occurrence of crimes, provide direct accountability from the perpetrators in full, seek reunification to community members who are divided or separated due to criminal acts, and provide resilience to the community in order to prevent the occurrence of further criminal acts (Wilson & Hoge, 2013).

CONCLUSION

The implementation of *diversion* through a *restorative justice* approach by investigators in handling child cases is carried out by involving perpetrators, victims, the families of both parties, correctional counselors, community leaders, and other related parties. Before conducting the *diversion*, investigators first conduct interviews with the perpetrator, the victim, and their respective families. The implications of applying *diversion* through a *restorative justice* approach in resolving children's cases in conflict with the law within the juvenile criminal justice system are: 1) Reducing the burden of cases in court. 2) Reflecting a resolution of cases that is in line with the spirit of Indonesia's fundamental values, namely *Pancasila*. The five moral values contained in *Pancasila* provide a philosophical foundation for the protection of children within the *diversion* process.

To optimize the implementation of *diversion* in the future, this study recommends several improvement steps: First, it is necessary to increase the capacity of law enforcement officials through intensive training on the concepts and techniques of implementing *diversion*. This training should cover legal aspects, child psychology, and mediation techniques. Second, adequate facilities and infrastructure should be provided to support the *diversion* process, including comfortable counseling rooms and professional support staff. Third, massive socialization efforts should be carried out within the community to raise awareness of the benefits of *diversion* for children's development and social harmony. Fourth, an independent monitoring team should be established to evaluate the implementation of *diversion* and ensure that the process runs according to established procedures. Fifth, it is important to integrate the values of Balinese local wisdom into the *diversion* process so that it is more readily accepted by the local community. The implementation of these recommendations is expected to strengthen a criminal justice system for children that is more just and child-oriented. Thus, *diversion* is not only an alternative means of resolving cases, but also an effective tool to break the cycle of violence and provide a better future for children in conflict with the law.

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