

# DIVERSION OF RECIDIVIST CHILDREN ACCORDING TO UTILITARIANISM ASPECTS

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**Abstract:** In an act against legal norms, especially criminal law, children must be treated differently from adults. This is because children are a group of naturally weak people children who commit crimes should be lighter than those adults through what is known as restorative justice and Diversion (Indonesian law says it “Diversi”). However, then, Article 7 paragraph (2) of the Juvenile Criminal Justice System Law (Indonesian: UU SPPA), basically states that Diversi is only carried out if the criminal penalty for the act is less than 7 (seven) years and is not a repetition of a crime. Utilitarianism or Utilism puts benefit as the main goal of Benefit here is defined as happiness. So, good or bad or fair or not a law depends on whether the law gives happiness to humans or not. Through a normative juridical study that emphasizes the review of laws and literature studies, the authors find that a utilitarian review of Diversi to recidivist children is very likely to produce broad benefits for many people and has the potential to close the possibility of recidivist children committing criminal acts again. This is because, in Diversi, the benefits of overcoming the consequences of children's actions can be felt by both the perpetrator's child, the victim, and their respective families through mutual agreement. In line with that, the principles of implementing the SPPA Law confirm that children must be addressed especially for the protection of their growth and development and to eliminate discrimination that differentiates the process between one child and another. It is hoped that with this literature review, legal products regarding juvenile justice can participate in guaranteeing the rights of recidivism children in Diversi as a method of overcoming crime by children.

**Keywords:** Child, Recidivist, Diversi, Utilitarianism.

## I. INTRODUCTION

The forerunners of the Republic of Indonesia have always sought Indonesia as a state based on the law (*rechtstaat*) (Aulia & Al-Fatih, 2017), therefore the constitution was born as a noble agreement that contained the affirmation of the Indonesian state as a state of the law as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia; "Indonesia is a state of law". Thus, everything that is carried out as a state and social life should also be within the legal corridor (Usman, 2015). In social life, Law exists to regulate the order of life in society, nation and state (Hariyanto, 2019).

Criminal law as a law that enforces public norms is mainly related to; first, determining which actions should not be carried out, which are prohibited, accompanied by threats or sanctions in the form of certain crimes for anyone who violates the prohibition. Second, to determine when and in what cases those who have violated the prohibitions can be imposed or

sentenced to a criminal sentence as has been threatened. Third, determine how the crime can be carried out if there are people who are suspected of having violated the prohibition (Moeljatno, 2008). All people in Indonesia without exception are bound by this law, including children who are the nation's successors, it is also possible that they will be associated with criminal law, both as victims and perpetrators. What is meant as a child by Indonesian law is a child who is not yet 18 (eighteen) years old as written in Article 1 number 1 of Law No. 35 of 2014 concerning Child Protection. In this case, talking about crime, the child referred to in conflict with the law specifically is a child who is 12 (twelve) years old but not yet 18 (eighteen) years old as written in Article 1 point 3 of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System.

In an act against legal norms, especially criminal law, children must be treated differently from adults (Aji, 2019). This is because children are the next generation and the future of the nation and are a group of naturally weak people (Muchsin, 2011). Child protection needs to be carried out at the same time to realize the welfare of children by providing guarantees for the fulfillment of all rights and recognition without any discrimination (May, Osmond, & Billick, 2014). Legal protection for children in Indonesia has its justice system, namely the juvenile criminal justice system, which prioritizes the protection and rehabilitation of child offenders as people who still have several limitations compared to adults. Children need protection from the state and society in the long future.

Children in conflict with the law need legal protection and community support to protect them separately from adults, due to their situation, limited physical and intellectual capacities (Lubis & Putra, 2021). This has given birth to a new paradigm in Indonesian criminal law, which was initially positioned as a criminal as usual, but through the Juvenile Justice System Law, juvenile justice is different from that of adults (Erdianti & Al-Fatih, 2019a). Children who commit crimes are only considered lost (bad children) so they need to be rehabilitated. According to (Rismanto, 2021), in the case of children who violate the law, the priority must be on using the restorative justice method in accordance with Article 5 paragraph 1 of Law Number 11 of 2012. The punishment for children who commit crimes should be lighter than those of adults through what is known as restorative justice and *Diversi* (Hernawarman & Santiago, 2022). In short, the concept of restorative justice that is pursued through *Diversi* in juvenile justice is an effort to provide legal protection to children who are facing legal problems (Satria, 2018). The legal protection in question is the settlement of children's cases from the criminal justice process, to the process outside the criminal justice system as referred to in Article 1 point 7 of the Child Criminal Justice System Law (Indonesian: UU SPPA) (Erdianti & Al-Fatih, 2019b).

However, later, when examined again, it can be seen that the process of restorative justice in the form of *Diversi* in children also has limitations or qualifications so that only a few cases of children dealing with the law are processed by *Diversi*. This right is confirmed by Article 7 paragraph (2) of the SPPA Law, which essentially states that *Diversi* is only carried out if the criminal penalty for the act is less than 7 (seven) years and is not a repetition of a crime. On the one hand, there is a specificity in the protection of children who conflict with the law, but on the other hand, there is an affirmation that children must also comply with the order of the community, which if the criminal compliance is not carried out repeatedly or is threatened with

a criminal offense for 7 years, the verification will be removed (Komariah & Cahyani, 2016). This is a dilemma for Indonesian law enforcers.

The goal of advancing the nation's successor is questioned again for its consistency. Children between the ages of 12 (twelve) – 18 (eighteen) years who repeat the crime cannot be resolved by *Diversi*, as a result, the child has to face the law in litigation and has the potential to end up in the Child Special Penitentiary (in Indonesian: LPKA). Although the correctional institutions provided are specifically for children with different guidance from inmates and adults, institutional prisons are still a paradigm of retaliation or retributive. Cragg in his theory reveals that retaliation is less successful in suppressing crime. Worse yet, unable to repair the loss suffered by the victim (Cragg, 2003).

Eliminating *Diversi* in children not only solves the problem of crime, furthermore, children in their development only grow with a worse effect, because if a child offender is placed in a correctional institution, the impact is also more dangerous, and the child can become more aware of the crime he committed. learn in correctional institutions with their peers because the nature of children who always want to know makes the perpetrators of their children have a sense of desire to learn about crime (Dwijayanti, 2017). In other words, the benefits of *Diversi* for children even though they have committed a crime or *Diversi* are felt to be very felt, although, on the other hand, enforcement of existing written rules is also important to implement. Therefore, this research was conducted to see how the aspect of utility (utilitarianism) is referred to from Jeremy Bentham's view as a well-known shop from the utilitarian school of thought in seeing the *Diversi* given to children who are repeat criminals or recidivists.

## **II. RESEARCH METHOD**

The method used in this paper is a type of normative juridical research by conducting a literature study, namely collecting primary data in the form of relevant laws and regulations, as well as secondary data in the form of literature from books, and the internet, and papers (Abeth, 2017).

## **III. RESULTS AND DISCUSSION**

### **Utilitarianism Against Giving “*Diversi*” to Children**

Utilitarianism or Utilism is a school that puts benefit as the main goal of the law. According to (Buchanan & Mathieu, 1986), utility is defined as pleasure, satisfaction, happiness, or as the fulfillment of preferences, the latter being expressed through individual choices. So, good or bad or fair or not a law depends on whether the law gives happiness to humans or not (Darmodiharjo, 1995). This happiness should be felt by every individual. But if it is impossible to achieve (and certainly not possible), it is strived for that happiness to be enjoyed by as many individuals as possible in the society (the nation), the greatest happiness for the greatest number of people (Muhadar and Firend's, 2013).

In line with that, the process of resolving criminal disputes between children must also look at the benefits, because the orientation of *Diversi* procurement is directed at recovering children from the bad impact on justice and placement in institutions. *Diversi* is also carried out by the formulators of the Law to avoid the stigma that will be attached to the child. Children's crimes, nowadays in terms of quantity and quality, tend to increase compared to other criminal acts,

almost all crimes committed by adults are also committed by children. This is due to several factors, among others, the unfavorable socio-economic conditions, the influence of globalization in the fields of communication and information, entertainment, scientific developments, and lifestyle changes. In addition, the problem is also caused by internal family factors such as lack of attention, affection, and supervision from parents, guardians, or foster parents for children so that they are easily influenced by negative associations in the community.

The factors mentioned above have a strong influence on children so children do not have adequate self-awareness and have an impact on actions both intentionally and to behave that can harm themselves and/or the community. It is because of these factors that children who commit crimes should not be viewed as criminal acts committed by adults. The attitude towards it must also be adjusted so that children as the nation's successors can grow well. Diversion in children is intended to resolve cases of children with the law through the SPPA Law which emphasizes solving problems with restorative justice (DIPA RUDIANA & RAI SETIABUDHI, 2021). According to (Setyowati, 2020), the concept of restorative justice is one solution to realize legal justice in the context of fulfilling one's rights and obligations. *Diversi* as restorative justice is not justice that emphasizes procedure (procedural justice) but is substantive. People want substantive justice to be the basis of the state because our country is a state of law and should be a country that makes its people happy, for that we chose the concept of restorative justice, which is none other than substantive justice. Therefore, in term of restorative justice, it is a very different concept of justice from what is known in the current Indonesian criminal justice system which is retributive (Soetojode, 2007).

*Diversi* is the transfer of the settlement of child cases from the criminal justice process to processes outside the criminal justice system as stated in article 1 number 7) of the Juvenile Criminal Justice System Law. Provisions regarding *Diversi* are regulated in Chapter II, articles 6 to 15. Article 6 reads: *Diversi aims to: a) achieve peace between victims and children; b) resolve cases of children outside the judicial process; c) prevent children from deprivation of liberty; d) encourage the community to participate, and e) instill a sense of responsibility to the Child.* The most basic substance in this Law is a strict regulation regarding Restorative Justice and *Diversi* which is intended to avoid and keep children away from the judicial process to avoid stigmatization of children who are in conflict with the law and it is hoped that children can return to the social environment naturally. Therefore, the participation of all parties is needed to make this happen. The process must aim at creating Restorative Justice, both for children and victims.

It is seen that *Diversi* has no benefits not only for the child of the perpetrator, but also for the victim, and each of the families of both parties. This is in harmony with the concept of utilitarianism, which is conceptualized as a useful law, and its usefulness is interpreted as the happiness of many people. Bentham collaborates on law and punishment. The principle of utility it offers: the greatest happiness of the greatest number can be achieved only if we obey the law. Laws are used to increasing the overall happiness of the community, and this must be done by weakening actions that produce negative consequences (children commit crimes). But how to maximize happiness? Sanctions are justice. Sanctions are what bind the force to the law,

and the four sanctions include the physical, the political, the moral, and the religious. Bentham put it this way:

“a man’s good, or his person, is consumed, by fire. If this happened to him by what is called an accident, it was calamity; if by reason of his imprudence (for instance, from his neglecting to put his candle out), it may be styled a punishment of the physical sanction; if it happened to him by the sentence of the political magistrate, a punishment belonging to political sanction; that is, what is commonly called a punishment, if for want of any assistance which his neighbour withheld from him out of some dislike to his moral character, a punishment of the moral sanction; if by an immediate act of God’s displeasure, manifested on account of some sin committed by him a punishment of the religious sanction” (Bentham, 1984).

Thus, sanctions are needed to give punishment to the perpetrators, and in the end, have a good effect in terms of benefiting the wider community. In a further vision, sanctions against children must be such that their development does not lead to greater damage to society in the future. Seeing from the point of view of this long-term benefit, *Diversi* as a process of resolving juvenile criminal cases is necessary (and very necessary) to provide benefits not only to children who are guaranteed a good future in behavior but also further and more broadly to provide benefits to the community, especially as well. for victims and their respective families, so that the agreed settlement agreement can be a benchmark of happiness as a factor in the success of the law by utilitarianism.

### **"Diversi" to Recidivist Children According to Aspects of Utilitarianism**

The *Diversi* regulated in Article 1 number 7 of the SPPA Law is a transfer of the settlement of children's cases from the criminal justice process to a process outside of criminal justice. *Diversi* is the transfer of handling cases of children, who are suspected of having committed a crime, from the formal process (judicial process) with or without the condition of the process of paying attention to children (non-formal process). This has a major impact on the development of children in particular and society at large, the benefits felt are quite large. However, there are qualifications to be able to process children who commit criminal acts with a *Diversi* mechanism. Article 7 paragraph (2) of the SPPA Law, essentially states that *Diversi* is only carried out if the criminal penalty for the act is less than 7 (seven) years and is not a repetition of a crime. On the one hand, there is a specificity in the protection of children who conflict with the law, but on the other hand, there is an affirmation that children must also comply with the order of the community, which if the criminal compliance is not carried out repeatedly or is threatened with a criminal offense for 7 years, the verification will be removed.

Recidivists are one of the impacts of the powerlessness of a former child convict to socialize again in society as a responsible teenager amid society's negative view of him. According to Seiter and Kadela, the main thing to note about the existence of ex-convicts is the supervision of the community in the form of stability, support, and special social services provided to them in the form of programs or activities that allow ex-convicts not to become recidivist (Seiter & Kadela, 2003). This is in line with the focus of fostering in juvenile correctional institutions based on the concept of correctional facilities to prepare correctional students to be accepted back into social life (Jatnika, Mulyana, & Raharjo, 2016), However, it



is important to understand that placing a child in a coaching institute is not a wise decision. This is also confirmed by the SPPA Law which provides *Diversi* as a way to save one of the children from prison.

Recidivist children should be given better attention not through prisons but through informal ways to improve themselves. *Diversi* is very possible to achieve this improvement, as the benefits can be seen as follows (Rosidah, 2012):

1. help children learn from their mistakes through intervention as soon as possible
2. to repair the wounds caused by the incident, to the families, victims, and the community
3. cooperation with parents, and caregivers and given daily life advice.
4. equip and awaken children to make decisions to be responsible.
5. seeks to raise funds for restitution to victims.
6. give the child responsibility for his actions, and provide lessons about opportunities to observe the consequences and effects of the case.
7. provide options for perpetrators to have the opportunity to keep clean of criminal records.
8. reduce the burden on the judiciary and prison institutions.
9. child/adolescent crime control.

From the things mentioned above, the benefits of *Diversi* are not only affected by the perpetrator's children but all parties including victims, families of perpetrators, and victims, to the state as an enforcer of the law. Utilitarians, which focus on benefiting the people, are strongly relevant to *Diversi* policies, which also have the same orientation.

Juridically, the implementation of *Diversi* in recidivist children has a more principal basis, as stated in Article 2 of the SPPA Law, which reads;

The juvenile criminal justice system is implemented based on the following principles:

- a) Protection. What is meant by "protection" includes activities that are direct and indirect from actions that harm the Child physically and/or psychologically.
- b) Justice. What is meant by "fairness" is that every settlement of a child's case must reflect a sense of justice for the child.
- c) Non-discrimination. What is meant by "non-discrimination" is the absence of different treatment based on ethnicity, religion, race, class, gender, ethnicity, culture and language, the legal status of the child, birth order of the child, as well as physical and/or mental condition.
- d) The best interests of the child. What is meant by "the best interests of the Child" is that all decision-making must always consider the survival and growth and development of the Child.
- e) Respect for children's opinions. What is meant by "appreciation of the opinion of the child" is the respect for the right of the child to participate and express his opinion in decision making, especially when it comes to matters that affect the child's life.
- f) Survival and development of children. What is meant by "survival and growth and development of children" is the most basic human rights for children that are protected by the state, government, community, family, and parents.
- g) Guidance and guidance of children. What is meant by "coaching" is an activity to improve the quality, piety to God Almighty, intellectual, attitude and behavior, skills training, professional, as well as physical and spiritual health of children both inside and outside the

criminal justice process. What is meant by "guidance" is the provision of guidance to improve the quality of piety to God Almighty, intellectual, attitude and behavior, skills training, professional, as well as physical and spiritual health of correctional clients.

- h) Proportional. What is meant by "proportionate" is that all treatment of a child must take into account the limits of the child's needs, age, and condition?
- i) Deprivation of liberty and punishment as a last resort. What is meant by "deprivation of liberty is the last resort" is basically that children cannot be deprived of their liberty unless forced to in the interest of settling cases.
- j) Avoidance of retaliation. What is meant by "avoidance of retaliation" is the principle of avoiding retaliation in the criminal justice process.

It can be seen that the principles of implementing the juvenile justice system above place children who are perpetrators of crimes as parties who do not necessarily have to be punished for their actions, but the emphasis is placed on guiding and teaching children so that they can be directed to become more responsible individuals. This also applies to recidivist children, who, even though they have made mistakes more than once, do not respect their legal standing as children who must be treated differently. The repetition of a crime by a child should not be addressed by giving the child a greater chance of being imprisoned and the consequences are potentially more damaging by eliminating *Diversi* in the child. "Non-discrimination", for example, also explicitly confirms that the process of administering the settlement of criminal cases by children to children does not discriminate, meaning that even if a child is a resident, wisely, he is still given the right to get *Diversi* benefits for himself as other child offenders.

The purpose of the legislation is to produce happiness for the community (BURNS, 2005; Christians, 2007). For this reason, legislation must strive to achieve four goals, namely to provide a living, to provide abundant food, to provide protection, and to achieve equality. The third and fourth objectives are to provide equal protection and opportunity for recidivist children to be processed by *Diversi*, not negate it and delegate it to formal justice. Legislators in drafting laws must involve finding the means to realize goodness. The legislator must consider the fact that the actions he wants to prevent are evil or evil. A law can only be accepted as law if the law aims to achieve the goals: abundance, protection of status and ownership, and minimizing injustice (Ali, 2009).

Therefore, it is appropriate that *Diversi* as a process that is beneficial to all parties in juvenile criminal cases can also be given to children who repeat criminal acts or are recidivists. The law that was formulated wisely did not heed the rights of recidivist children as children who become the nation's successors. In the end, the development of children in line with the ideals of the Indonesian people can only work well if the legal products developed place children on the side who must be guided and directed to a good path, not too formal punishment.

#### **IV. CONCLUSION**

Children are future generations who will carry the burden of trust in achieving the love of the Indonesian nation, it is appropriate to remember that the position and mental and physical condition of children in their development are given their specialties, including children who are perpetrators of criminal acts. This last child does not only do this act but by several factors, namely: socio-economic conditions that are less conducive, the influence of globalization in the

fields of communication and information, entertainment, development of science, and lifestyle changes. In addition, the problem is also caused by internal family factors such as lack of attention, affection, and supervision from parents, guardians, or foster parents for children so that they are easily influenced by negative associations in the community. And therefore the Indonesian legal system applies restorative justice in the form of Diversi which is expected to provide justice and benefit to the parties involved, especially children.

However, children who repeat criminal acts or are recidivists are not allowed to be processed by Diversi. This is of course contrary to the principles of the juvenile justice system, which in essence does not discriminate against children and is oriented towards directing and guiding children in the right direction. From the utilitarian point of view of Diversi to recidivist children, it can be seen that it is very possible to get broad benefits to many people and has great potential to close the possibility of recidivist children committing criminal acts again. This is because, in Diversi, the benefits of overcoming the consequences of children's actions can be felt by both the perpetrator's child, the victim, and their respective families through mutual agreement. This indicates that the benchmark of the benefits felt by many parties is an indicator of happiness according to Jeremy Bentham which means that a legal policy has achieved goodness in his utilitarian theory.

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