

**PARADIGM OF CRIMINAL JUSTICE SYSTEM CHILDREN IN INDONESIA**  
**(Study to the Law No.11 of 2012 on the Child Criminal Justice System)**

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Abstract

Diversion is a new paradigm in solving child crimes stipulated in the Law of the Republic of Indonesia No.11 of 2012 on the Criminal Justice System Children. Diversion mechanism is possible in every stage of the judicial process. Diversion carried out in terms of criminal offenses committed: punishable by imprisonment under the 7 (seven) years and not a repetition of criminal acts. Diversion is done through a process of consultation involving the child and parent/guardian, the victim and/or parent/guardian, Supervisor Community, and Professional Social Worker based Restorative Justice approach.

Keywords: Paradigm, the Law of the Republic of Indonesia No.. 11 of 2012 on the Criminal Justice system Child

**A.PRELIMINARY**

Thomas S. Kuhn (in Yesmil Anwar and Adang, 2008: 18-19), stating paradigm is an awareness that arises from the existence of an anomaly, a deviation from the normal state that was built by the old paradigm. Kuhn used the term paradigm in two different meanings. On the one hand, it means that the entire constellation of beliefs, values, techniques and so on shared by members of a particular community, on the other hand, suggests a paradigm similar elements in that constellation, solving a real puzzle, which if used as a model or examples can replace explicit rules as a basis for solving the puzzles of normal science is still lagging.

Paradigm is what is held in common by members of a scientific society, and vice versa science community consists of people who have a common paradigm. According to Thomas Kuhn, the growth and development of science occurs through a revolution, not through the accumulation. The paradigm described by Kuhn that science at any given time is dominated by a particular

paradigm, which is a fundamental view of what the subject matter (subject matter) of a branch of science. Normal science is an accumulation period of science, in which scientists work and develop a paradigm that is being affected. But scientists can not evade conflict with the deviations that occurred (anomalies), due to the inability of the old paradigm to explain adequately to the problems that arise. When deviations peaked, a crisis will arise, and that paradigm began to doubt the validity or validity. When the crisis is so serious, then a revolution will happen, and will emerge as a new paradigm that is able to resolve the problems faced by the previous paradigm. In the period of the revolution that occurred a major shift in science. The old paradigm influence began to decline, replaced by a new paradigm that is more dominant (George Ritzer, 1985: 3-5). Paradigm can mean also a worldview / perspective, a model of an object in a particular view. Thus the term paradigm / model does not refer to something that seems real / physical nature but rather the value system of a building.

## **B. WRITING METHODS**

The approach taken in this paper is normative juridical approach that is by examining secondary data (Soerjono Soekanto, 1986: 50-51). Secondary data needed include primary legal materials and secondary legal materials ie various legislations in the field of juvenile justice system. Besides, it also tertiary legal materials such as dictionaries and encyclopedias legal law. The data have been collected and processed subsequently performed classification using the method of interpretation and construction of laws is commonly used in the science of law and further qualitative juridical dinalisis (Soerjono Soekanto, 1986: 205-236).

## **C. COMPARATIVE STUDY OF LAW ABOUT DIVERSION**

In fact approach to the criminal justice system is still the dominant choice in solving child crimes. Only in a small part ways settlement outside the criminal justice system through diversion. Diversion is the diversion of offenders from the formal mechanisms of the criminal justice system in order to avoid any adverse stigma is concerned. Comparative study of penal procedure in Namibia, gained an understanding of this diversion as suggested by Stefan Schulz (1998: 73) as follows:

*Diversion is understood as the “channelling of prima facie cases away from the criminal justice system on certain conditions”. Under the current Namibian system, no specific provision for diversion and no guidelines ensuring uniformity of diversion in Namibia exist. Although, the General Prosecutor as dominus litis in terms of section 6 of the Criminal Procedure Act is given permission for diversion in October 1997, a lack of uniformity in the way children are assessed in preparation for decisions concerning diversion led in the past to a situation where not all children in Namibia receive the same treatment, and where available, diversion options, as the case may be, were not recognised.*

Diversion goal is to make choices relating to children aged 10 years or older who were suspected of committing a crime in order to distract the children from the justice system pidana. Adapun purpose of diversion is listed in Section 47:

*“Purposes of Diversion*

*The purposes of diversion under this Part are to –*

*(a) ...*

*(h) facilitate dealing with unlawful behaviour of a child within the community and without government intervention or criminal proceedings.”*

In Indonesia before the Law No.11 of 2012 on the Criminal Justice System was passed and enforced effectively, the completion of child offenses under Law No.. 3 of 1997 on Juvenile Justice and legislation other related criminal. Normative study results show that the versioned yet get a clear legal basis and explicit. While the completion of a crime themselves morally child continues to be encouraged to empower the restorative justice approach. Various attempts were made to address the issue of children in conflict with the law through a restorative justice approach.

By Tina S. Ikpa (2007: 301-303) restorative justice is not an easy concept to define. Stated that:

*Restorative justice is not easily defined, which is why efforts to educate the public about it and its benefits require strategic planning. Howard Zehr, one of the premier scholars of restorative justice, has offered one definition: “Restorative justice is a process to involve, to the extent*

*possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.” In order for that definition to provide any illumination on the subject it is necessary to understand the underlying principles of restorative justice. The many implications and nuances of restorative justice are complex, but Zehr’s attempted explanation is a first step toward framing the values that govern restorative justice. Restorative justice has a place in all forms of human interaction in which people feel as though they have been wronged, but this Note is concerned with criminal justice. Restorative justice is needed in the United States today because restorative justice is not the normal course of action in America. While it is most certainly not a panacea for all that ails the current criminal justice system, there is essentially something for everyone along the path of restorative justice. Victims have the chance to see their offenders, to tell them what effect the offense has had on the victim’s well-being, to receive an apology for what has happened, and to exact some kind of reparation for the harm that they have suffered.*

Implementation of diversion background desire to avoid negative effects on the lives and development of children by his involvement in the criminal justice system. Implementation of diversion by law enforcement officers based on the authority of law enforcement officers called discretion. Furthermore, in the development of child protection is also developing the concept of restorative justice is a concept of conflict resolution with stakeholders involved with the crime occurred (the victim, the perpetrator, the victim's family, the perpetrator's family, masyarakat and mediator). Deliberations are conducted is important to determine the appropriate action or penalty against the offender. Actions or penalties were beneficial for the offender, the victim and the community feel the loss and the atmosphere is not balanced and orderly environment is recovered with the sentence that has been imposed.

This diversion comes from the discretionary authority of law enforcement officers who handle criminal cases to take action to stop the continuing case or cases, take certain actions in accordance with its policies (Lorraine Gelsthorpe and Nicola Padfield, 2003: 3), or if according to the Oxford English Dictionary is described as follows:

*According to the Oxford English Dictionary, discretion involves a liberty or power of deciding according to the one’s own judgment or discernment. In the context of our work, the concern is with the way in which individuals and/or groups of officials use their own judgement within a given*

*situation, to take action or not. At simplest then, discretion refers to the freedom, power, authority, decision or leeway of an official, organisation or individual to decide, discern or determine to make a judgement, choice or decision about alternative courses of action or inaction'*

History of discretion itself actually stems from a study conducted in the United States and Europe. Analysis of discretion that first performed in 1969 in the book, namely Kenneth Culp Davis, Discretionary Justice. Research carried out by conducting exploration in the United States and Europe in 1976. In the United States obtained the fact that the Americans failed to resolve a variety of problems with implementing discretion, but in European countries such as Germany, France, Italy, Denmark and the Netherlands look more successful implementation of discretion. Law enforcement officers in carrying discretion to enforce the law is still a controversial part because of the nature of policy making judgment following one's personal policy. Discretion to allow a distinction action against the criminal case by the culprit, which can cause problems in terms of fairness to the community.

In general, the implementation of an action that ordinary discretion and implemented long ago by the decision makers because discretion is unavoidable in law enforcement due to two reasons (Wesley Cragg, 1992:127-137) :

1) Application of the rules in the actual case in reality certainly requires thoughtful nature of an officer . A crime can be applied the same rule in other conditions but can not because of the reasons that existed at that time . Rules in principle be applied subjectively by penegaknya . Varies depending on the subject's ability implementing its response to violations that occur . For instance, in a case in which a breach action will be considered by the imposition of the will of an officer but the officer will consider other factors in determining whether the perpetrator was forced to defend his rights or because of negligence or intentional or due to negligence and others are not the same as the first officer to give consideration.

2) The existence , importance and application of discretion to give the impression that law enforcement does not give a limit to investigate and examine the error when it was found Law enforcement remains secured to the general public and is not determined by a single person.

The factors that affect the law enforcement officers in particular the police in conducting discretion , according to Clemens Bartollas as follows :

- 1) . The nature of the seriousness of the offense that made the child the sense of violation against the dangers thereof;
- 2) The response of the people or society or offense against the perpetrators made. If people really want kids forwarded to the court , then the police would be difficult to release it back into the community and forward it to the court;
- 3) The gender of female offenders prefer the police returned to the parents than boys . This is because the consideration of the protection of girls that are difficult if processed in court or jail . Girls are forwarded to the court for cases such as prostitution , disobedience to parents and run away from home;
- 4) Racial minorities more often forwarded to the court than the majority group;
- 5) the level of economic and social factors . According to police the consideration of economic and social level high enables the child to be addressed and treated if returned to the house because of the ability of the parents;
- 6) The condition of the individual actors themselves into consideration discretion by police as the child's age , child's history of violations are made , relationships , family situations and relationships with parents . If the environmental conditions and their families do not support the improvement of the child then the police will forward the case to court;
- 7) Regarding the interaction between the police and the child actors while handling the case . children are polite and work well together would be preferable to be returned to the home than children who are not polite . The last factor comes from the pressure outside the police and children such as the mass media and the police department or part of a deal with the child .

Discretion gives law enforcement an opportunity for freedom in making decisions according to one's personal sense of justice by the authority having power. Context of the discussion more attention to how an individual officer or group that has the authority to handle a case for the use of its own policy in a situation that happened to be doing or not doing. Simply put discretionary

power to show the freedom to make decisions by personal considerations and a concern for justice for all parties in order to find an alternative that is not criminal.

In the UK as stated by Nigel Walker (1999: 5) considerations for discretion are:

1. For forgiveness and acknowledgment of error and period actors in conveying the request (plea of guilty and the timeliness of the plea) (contained in the powers of the criminal courts (Sentencing) Act 2000 (PCC (S) A s.152);
2. The totality principle (PCC (S) A 2000 s. 158 (2) b) is to ensure that the penalty does not exceed a given inmate's ability to see a variety of special causes environmental exceptions such as a physical or mental condition of the offender. PCC (S) A 2000s. 118) contains an unwritten other considerations such as motivation, temptation, conscience, ignorance, incompetence, pressure / force, regret, the nature of the good or service previously done before. Officers who commit acts of discretion must consider three factors, namely:
  - a) legal factors (legal factors) that the seriousness of offenses committed by the offender and prior criminal record. In the research and experience of crime index offense related to the court's decision to convict. The number of criminal offenses in court indicated the rating indicates the seriousness of the offense the offense. So the policy of the offenses with a high rating needs to be considered.
  - b) factors other than law (extra-legal factors) that factors relating to the determination of guilt, it is like employment status, marital, financial condition, national origin, race, ethnicity, environment and other actors;
  - c) Factors associated with the decision-makers (factors associated with the decision-makers). Justice is something that is personal, describing temperament, personality, education, environment and self carriage of policy makers.

In Latin America in an effort to avoid the detention of children in police stations, the Child Protection Act Dominican Republic determined that the child is picked up by the police should be brought immediately to the office of the child's legal representative, submitted to the court within 24 hours and released, except when exposed to charges of serious crimes. Other Act provides

specific guidance on police duty juveniles arrested for bringing to the agency or facility for proper teenager, often set a deadline to do so and in some cases, establish penalties for those who do not.

Legislation adopted by some state lawmakers also establish procedures that allow diversion of less serious cases to be handled without a formal adjudication. On the other hand law allows prosecutors to determine whether the case should proceed to trial or not, in exchange for the approval of the youth to participate in community-based programs that are not supervised court.

Analysis of the criminal justice system prevailing in China, that under Chinese law, police have the discretion to decide without trial, to send someone to Laodong Guyue (or Laojiao) to do "re-education by working" for a maximum of 3 years. According to sources of employment in 1997 some 230,000 people were employed in the Chinese camp. This is as stated by Ira Belkin 2000: 6) that:

Under Chinese law, the police have the discretion to decide, without any judicial proceedings, to send a person to Laodong Guyue (or Laojiao) for "reeducation through labor" for up to three years. According to official sources, in 1997, some 230,000 such people were held in labor camps throughout China.

Legislation adopted by some states provide conciliation before the court was held between the defendant and the victim. If they reach an agreement, the judicial process is stopped. If the agreement executed within the stipulated time, the termination of permanent nature. Other laws stipulate that the competent authority may hinder the process of the court on the grounds that the nature of the injury suffered by the victim, the efforts made by the adolescent to repair the damage or the fact that the perpetrator and victim are members of the same family (Dan O'Donnell, 2006: 125).



Based on the above it is seen that how much space discretion will determine how the mobilization of criminal law implemented by law enforcement officers (police), as stated by Donald Black (1980: 41-63) that the mobilization of criminal law by the police is influenced by variables:

- 1). Law Intelligence is the ability to detect the occurrence of the case law of the law within its jurisdiction;
- 2). The availability of rule of law is how much is available, easily accessible and up to the people;
- 3). Discretion is how much space do the discretion of freedom, and
- 4). Changes in the law and changes in the legal sense of the moral standards of the people.

In the context of the child's handling of crime in the level of investigation by the police, this is in line with the paradigm shift in the reform of the police after the emergence of the paradigm of community policing (community policing). In the opinion of Hesta Groenewald and Gordon Peake (2004) the basic principles of community-based policing is:

1. Policing by consent, not coercion.
2. The police as part of the community, not apart from it.
3. The police and community working together to find out what communities needs are.
4. The police, the public and other agencies working together in partnership.
5. Tailoring the business of policing to meet community needs.

#### **D. APPROACHES IN HANDLING CHILD CRIME**

The above has described about the diversion and little mention of restorative justice. Diversion in some countries attached to the law enforcement authorities in the form of discretion. In Indonesia as well as listed in the Act 2 of 2002 on the Police of the Republic of Indonesia. However, in relation to the completion of child crime, such authority is not owned by the prosecutors and the courts. Resolution mechanisms criminal child protection-oriented human dignity and should be integrated in the juvenile justice in all levels of the judicial process. Moreover, Indonesia has set realistic about the obligations and responsibilities of the Government and other State institutions to provide special protection to children in emergency situations, children in conflict with law, children from minority groups and isolated, economically exploited children and / or sexual, child traded, children who are victims of drug abuse, alcohol, psychotropic drugs, and other addictive substances (drugs), child abduction, sale and trafficking, child victims of physical and / or mental disabilities meyandang child, and child victims of abuse and neglect .

National instruments generally provide protection for children including the Child Protection Act (Law no. 23 of 2002) which is expected to provide protection to children in general are more adequate. Particularly regarding the special protection for children in conflict with the law is carried out through humane treatment of children's rights in accordance, providing special escort officer early on, the provision of special facilities and infrastructure, appropriate sanctions for the best interests of the child, monitoring and continuous recording to the development of children in conflict with the law, guarantees to maintain relationships with parents or family and the protection of the media / labeling.

Article 64 paragraph (2) of Act 23 of 2002 states: Special protection for children in conflict with the law is carried out through:

- a) The treatment of children humanely in accordance with the dignity and rights of the child;
- b) Provision of special escort officer since early childhood;
- c) Provision of special facilities and infrastructure;
- d) The imposition of appropriate sanctions for the best interests of the child;
- e) Monitoring and recording continuously on the development of children in conflict with the law;

- f) Provision of guarantees to maintain relationships with parents or family;
- g) Protection of identity through the news media and to avoid labeling.

Now, after the enactment of Law No.. 11 of 2012 on the Criminal Justice System Children, the provisions of Law No.. 23 of 2002 that the implementation should be integrated into the juvenile justice mechanisms are laid out based on Law No. 11 In 2012 the. Similarly, other laws relating to the protection of the dignity of the child. As an illustration that is based on Law No.. 39 Year 1999 on Human Rights, a child is entitled to: Rights protection of the law (Article 58 paragraph (1)); rights not to be subjected to persecution, torture, or inhuman sentencing in which the death penalty or life imprisonment can not be imposed to the child (Article 66 paragraph (1), (2)); right not to be unlawfully deprived of their liberty (Article 66 paragraph (3)). Right of arrest, detention, or imprisonment only as a last resort (Article 66 paragraph (4)); Rights humane treatment for children who are deprived of their liberty and are separated from adults (Article 66 paragraph (5)); Rights legal aid and other assistance effectively for children deprived of their liberty (Article 66 paragraph (6)); rights to defend themselves and obtain justice for child deprived of liberty before a court in an objective, impartial and the trial closed to the public.

## **E. PARADIGM OF CHILD CRIMINAL JUSTICE SYSTEM IN INDONESIA**

Law No. 11 of 2012 on the Child Criminal Justice System contains a clear legal basis on versioned at all levels of the judicial process. So there is a new paradigm in the mechanisms of criminal penyelesaian children. In this law clearly and expressly set about diversion. Diversion regulated in Chapter II Article 6 of Law Child Criminal Justice System of the child which determined that diversion aims to: achieve peace between the victim and the child; resolve child cases outside the judicial process; prevent children from deprivation of liberty; encourage people to participate, and instill a sense of responsibility to the child . Article 7 of Law Criminal Justice System of the Child states at the level of investigation, prosecution, and examination of children in the state court case mandatory sought Diversion. Diversion is carried out in terms of criminal offenses committed: punishable by imprisonment under the 7 (seven) years, and not a repetition of criminal acts. Based on the foregoing there are restrictions on the diversion is only for offenses punishable by imprisonment of 7 (seven) years and not a repetition of criminal acts.

Diversion is done through a process of consultation involving the child and parent / guardian, the victim and / or parent / guardian, Supervisor Community, and Professional Social Worker based Restorative Justice approach. If necessary, meetings can involve Social Welfare, and / or community. Diversion process shall take into account:

- a. interests of the victim;
- b. Child welfare and responsibility;
- c. avoidance of negative stigma;
- d. avoidance of retaliation;
- e. harmonious society, and
- f. propriety, decency and public order.

Some things should be considered by investigators, prosecutors and judges in conducting diversion is as follows:

- a. category of crime;
- b. Children age;
- c. results of social research BAPAS;
- d. support family and community environment.

Diversion decisions must be approved by the willingness of victims and their families and children and his family, except for :

- a. offense the violation;
- b. misdemeanor;
- c. crime without a victim, or
- d. value of casualty losses not more than the value of the local provincial minimum wage.

Diversion agreement may take the form:

- a. returns, losses in case there were any casualties;
- b. medical and psychosocial rehabilitation;
- c. submission back to the parent / guardian;

d. keikutsertaan in education or training at an institution or Agency of Social Welfare Institutions (LPKS) and 3 (three) months, or

e. community service and 3 (three) months.

Results Diversion agreement may take the form, among others:

a. peace with or without compensation;

b. submission back to the parent / guardian;

c. participation in education or training at an institution or LPKS later than 3 (three) months, or

d. community service.

Result of an agreement in the form of an agreement Diversion. Diversion agreement results delivered by the immediate supervisor responsible officials at every level of scrutiny to the district court within its jurisdiction within a period of 3 (three) days after an agreement was reached to acquire determination. Determination made within a period of 3 (three) days from the receipt of Diversion agreement. Determination submitted to the Community Advisor, Investigator, prosecutor, or judge within a period of 3 (three) days after enactment. After receiving confirmation, investigators issued a determination of termination of the investigation or prosecution prosecution issued a determination of termination. While the juvenile justice process it is possible to proceed, that is if :

a. Diversion process does not result in an agreement, or

b. Diversion agreements are not implemented.

Normatively Law. 11 The year 2012 has determined the general principles which should guide the child in solving crime. Investigator, prosecutor, and the judge should give special protection for children investigated for criminal acts done in an emergency situation. The definition of "emergency situation" among other refugee situations, riots, natural disasters and armed conflicts. Special protection through the imposition of sanctions implemented without weighting.

In handling cases Children, Child Victims, and / or the Child Witness, Community Advisor, Professional Social Workers and Social Welfare, Investigator, prosecutor, judge, and Advocates or other legal aid providers shall take into account the best interests of the child and the family atmosphere remains commercialize maintained. Identity of Children, Child Victims and / or witnesses child must be kept confidential in the news in print or electronic media. The identity includes the name of the Son, the name of Victims, Child Witnesses name, parent's name, address, face, and other things that may reveal the identity of Children, Child Victims, and / or the Child Witness.

In terms of criminal acts performed by children before even the age of 18 (eighteen) years and put on trial after a concerned child beyond the age of 18 (eighteen) years, but has not reached the age of 21 (twenty one) years of age, children still filed to hearing children.

In case the child has not been aged 12 (twelve) years of committing or suspected of committing a crime, Investigator, Supervisor Community, and Professional Social Workers took the decision to: a. handed back to the parents / guardian, or b. mengikutsertakannya in educational programs, coaching, and mentoring in LPKS in government agencies or agency dealing with social welfare, both at central and local levels, more than 6 (six) months. Minimum age 12 (twelve) years for the child to be brought to trial based on the consideration of children sociological, psychological, and pedagogical that a child who has not attained the age of 12 (twelve) years can not be considered to account for his actions. Inspection process conducted by the investigators of the Children carried out within the framework of the criminal justice process, but rather used as a basis for decision-making by the Investigator, Supervisor Community, and Professional Social Workers.

In this provision, consideration of a Community Advisor reports that the research community is a mandatory requirement before Investigator, Supervisor Community, and Professional Social Workers make decisions. The decision was then submitted to the court to set in the period of 3 (three) days. BAPAS required to evaluate the implementation of education programs, coaching, and mentoring to children. In terms of the evaluation assessed Kids still need education, coaching, and mentoring continued, years of education, coaching, and mentoring can be extended more than 6 (six) months. LPKS government agencies and shall submit a report to the child's development Bapas regularly every month. Further provisions regarding the requirements

and procedures of decision making as well as educational programs, coaching, and mentoring is regulated by the Government.

Investigator, prosecutor, judge, Community Advisor, advocate or other legal aid providers, and other officers to investigate the case in the Children, Child Victims, and / or Children's Witnesses do not wear robes or official attributes. In each level of examination, Children must be given legal assistance and was accompanied by a Supervising Social or other companion in accordance with the provisions of the legislation. In each level of examination, Children or Child Victim Witness shall be accompanied by a parent and / or child who is trusted by the victim and / or the Child Witness, or Social Worker. In case the parents as suspects or defendants whose cases were examined, the provision does not apply to parents. Case Register Children and Children Victims must be made exclusively by the agency that handles child case. Further provisions concerning guideline registers case the child is regulated by the Government.

## **F. CLOSING**

Diversion is regulated in Law 11 of 2012 is a new paradigm in child crime resolution mechanisms. The versioned implementation be done with restorative justice approach. Diversion is a diversion settlement child of the criminal justice process to the outside of the criminal justice process. Restorative justice is the completion of criminal cases involving perpetrators, victims, families perpetrator / victim, and other relevant parties to work together to find a fair settlement with the emphasis on restoring back to the original condition, and not revenge. Based on the principles, approaches and mechanisms, it is expected criminal child will be free from stigma which is very detrimental to him.

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