

## **Criminal Limitations on Diversion of Children Against the Law Based on the Juvenile Criminal Justice System from a Comparative Perspective**

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### **Abstract**

This research explores the protection of children's rights within the criminal justice system, with a particular focus on the legal constraints surrounding the use of diversion for children in conflict with the law (ABH), as regulated by Law Number 11 of 2012 on the Juvenile Criminal Justice System (SPPA). While the Indonesian Constitution and international legal frameworks – such as the Convention on the Rights of the Child (CRC), ratified through Presidential Decree Number 36 of 1990 – guarantee these rights, challenges persist in their implementation, especially during legal proceedings. The study employs a normative legal method, incorporating comparative and conceptual approaches, by examining how Indonesia's diversion system compares with Finland's and Sweden's. The findings indicated that despite Indonesia's adoption of restorative justice principles in the *Sistem Peradilan Pidana Anak* (CJSC), the practical application of diversion remains hindered by several factors. These include a lack of understanding among legal practitioners, inadequate rehabilitation facilities, and limited victim involvement in resolving cases. Furthermore, the restriction of diversion to crimes carrying sentences of less than seven years fails to fully uphold the principle of prioritizing the child's best interests. While earlier research has analyzed diversion in terms of recidivism rates and law enforcement implementation, this study emphasizes the principle of non-discrimination within Indonesia's juvenile justice system. As a result, the study advocates for more comprehensive policy reforms to broaden the scope of diversion, better align with restorative justice principles, and ensure stronger protection for children entangled in legal conflicts.

**Keywords:** Children; Conflict; Diversion; Juvenile justice; Restorative

### **1. Introduction**

Children represent the future generation and are vital in shaping and advancing a nation's development [1]. As individuals who are still undergoing growth and development, children possess specific rights that the state must safeguard [2]. These rights encompass the right to life, access to education and health services, and protection from violence, exploitation, and discrimination broadly acknowledged within national and international legal frameworks [3]. In the Indonesian constitutional system, children's rights are guaranteed in Article 28B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD 1945), which states that:

*"Every child has the right to survival, growth, and development and the right to protection from violence and discrimination".*

At the global level, children's rights are also listed in various international legal instruments, including the 1989 Convention on the Rights of the Child (CRC) endorsed by the United Nations (UN). This convention was ratified by most countries, including Indonesia, through Presidential Decree Number 36 of 1990 [4]. Although various regulations recognize children's rights, implementation in the field still faces challenges in Indonesia and other countries [5]. Incidents of violence against children, child labor exploitation, and inadequate access to education and healthcare remain pressing issues that demand continued attention. The Juvenile Criminal Justice System, or referred to as *Sistem Peradilan Pidana Anak* (SPPA), offers specific protections for children in conflict with the law, or referred to as *Anak Berhadapan dengan Hukum* (ABH), which is in line with the responsibilities of the Indonesian government as outlined in the 1945 Constitution of the Republic of Indonesia (UUD 1945) [6]. The judicial framework in Indonesia is grounded in formal legal provisions. It involves authorized law enforcement bodies such as the police, prosecutors, courts, and correctional facilities performing their responsibilities through established legal procedures [7]. Formal law requires clear, written procedures encompassing every stage of the legal process, including investigation, prosecution, trial, and the enforcement of court rulings [8]. Therefore, this study centers on the legal restrictions surrounding the use of diversion for children in conflict with the law (ABH), as outlined in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

The research analyzes the legal provisions governing the requirements for implementing diversion for ABH. While numerous scholars have explored the concept of diversion for children in legal trouble, previous studies – such as those by Ani Triwati and Doddy Krisdasaksana – have primarily concentrated on the relationship between diversion and the recurrence of criminal behavior (*recidivism*) [9]. Then, A study by M. Hendri Agustawan, Pujiyono, and Umi Rozah discusses the age of criminal responsibility for children from a neurolaw perspective, highlighting the importance of brain development in legal accountability [10]. Thus, this study aims to interpret the right to non-discrimination as guaranteed by the Indonesian Constitution. It seeks to propose revisions to Law No. 11 of 2012 on the Juvenile Criminal Justice System (SPPA), as the current limitation on the application of diversion is seen as conflicting with a child's right to live freely and engage in learning experiences. Accordingly, it is essential to examine and clarify the principle of non-discrimination thoroughly. The ultimate objective is to ensure that children in conflict with the law can pursue outcomes that genuinely reflect their best interests.

## 2. Research Method

This study utilizes a normative legal research method, incorporating comparative and conceptual approaches to thoroughly explore the legal principles underpinning the protection of children's rights. The comparative approach investigates different legal systems and their mechanisms for safeguarding children's rights. In contrast, the conceptual approach emphasizes the analysis of the legal norm structures that shape child protection frameworks across various jurisdictions [11]. Furthermore, this study

adopts a comparative legal method by analyzing the Convention on the Rights of the Child (CRC) as an international benchmark alongside Indonesia's Law No. 11 of 2012 on the Juvenile Justice System as the national framework. To offer a broader perspective, the research also compares these two legal instruments with the juvenile justice systems in Finland and Sweden, aiming to highlight both the similarities and differences in legal strategies for child protection at national and international levels.

### **3. Result and Discussion**

#### **3.1. The concept of the best interest of children under the Indonesian Legal System**

Children have the same rights in various aspects of their lives. The children's best interest is written under Indonesian law [12]. Children are taught about tolerance towards others or their elders from an early age, especially in elementary school. This tolerance is important to build a harmonious society and support the creation of a just and prosperous country. A key legal basis that upholds the rights of every individual is Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This provision affirms that all individuals have the right to recognition, guarantees, protection, fair legal certainty, and equal treatment under the law [13]. In addition, the right of citizens to be free from all forms of discrimination is also guaranteed in Article 27, paragraph (1) of the 1945 Constitution. This article emphasizes that all citizens have equal standing before the law and government.

This principle applies universally, with no exceptions, meaning everyone must respect the prevailing laws and government. The concept of equality is further reinforced in Article 28D paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which guarantees all citizens equal opportunities in government affairs [12]. These constitutional provisions clearly show that the state upholds the principles of justice [14] and equality for all citizens without discrimination. These rights must be guaranteed and practiced in everyday life to create an inclusive and harmonious society where every individual can participate equally in various aspects of life, including government, law, and other civil rights.

The rights that are always attached to children are found in 2 laws that are currently used to enforce the law on children: Law No. 23/2002 on Child Protection, which is a material rule for children, and Law No. 11/2012 on the Juvenile Criminal Justice System, which is a formal rule in law enforcement for children [15]. Both of these adopt international rules from the United Nations (UN) with its Convention on the Rights of the Child (CRC) rules [16]. In this context, Indonesia has ratified the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990. Following this ratification, several related laws were enacted, including Law Number 3 of 1997 on Juvenile Courts, which was later replaced by Law Number 11 of 2012 on the Juvenile Criminal Justice System as part of Indonesia's commitment to implementing the UN CRC.

Article 3 (1) of the UN CRC states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary

consideration.” The state must act in the child’s best interests as listed in the UN CRC. In applying the rules in Indonesia, every regulation that protects children always includes the principle of the child’s best interests. However, what is interesting is that the diversion article has criminal restrictions that provide injustice to children.

Article 7 states that:

- 1) Diversion shall be sought at the investigation, prosecution, and examination of children’s cases in the district court.
- 2) Diversion, as referred to in paragraph (1), shall be implemented if the criminal offense is committed: a) punishable with imprisonment under 7 (seven) years; and b) is not a repetition of the criminal offense.

In the interpretation of Law No. 11/2012 on the Juvenile Criminal Justice System, the 7-year sentence refers to the existing Criminal Law in Indonesia. Based on the Criminal Code and other laws and regulations in Indonesia, a sentence of 7 years imprisonment can be applied to various criminal offenses [17]. In the category of crimes involving harm to life and bodily integrity, individuals who commit severe abuse resulting in serious injury, as outlined in Article 354 of the Criminal Code, may face a prison sentence of up to 8 years. However, the sentence may be limited to 7 years in specific circumstances. Similarly, indecent acts against minors involving violence or threats, as specified in Article 289 of the Criminal Code, can result in imprisonment for up to 7 years.

Regarding property-related crimes, theft involving violence that causes serious injury, as stated in Article 365 Paragraph (2) of the Criminal Code, carries a potential sentence of up to 9 years. However, under certain conditions, a 7-year sentence may be imposed. Regarding narcotics offenses, individuals found guilty of possessing, storing, or controlling Group I narcotics without proper authorization may be charged under Article 112 of Law Number 35 of 2009 on Narcotics, which prescribes a minimum sentence of 4 years and a maximum of 12 years, making a 7-year sentence possible in some cases. In corruption, abuse of authority that results in losses to the state, as stipulated in Article 3 of Law Number 31 Year 1999 jo. Law No. 20/2001 on the Eradication of Corruption carries a sentence ranging from 1 to 20 years, where, in some instances, the defendant can receive a sentence of 7 years. In addition, in cases of violence against children, sexual exploitation of children, as stated in Article 81 of Law No. 35/2014 on Child Protection, can carry a sentence of up to 15 years. However, under certain conditions, the sentence imposed can reach 7 years. Thus, a sentence of 7 years imprisonment can be imposed for various crimes, depending on the seriousness of the offense, available evidence, and legal considerations during the judicial process.

The child’s best interests principle is a fundamental concept in child protection, acknowledged nationally and internationally. This principle is clearly stated in Article 3 of the UN Convention on the Rights of the Child (UN CRC) and reinforced through Indonesia’s Law No. 35 of 2014 on Child Protection [18]. This principle emphasizes that every decision, policy, and action concerning children must consider their interests first. According to Muladi, in the context of juvenile criminal justice, an approach oriented

towards the best interests of the child should focus more on rehabilitation and social reintegration so that imprisonment is only used as a last resort [19]. Article 3 of the Child Criminal Justice System Law (CCJS Law) prioritizes the protection of children in the legal process. Meanwhile, Harkristuti Harkrisnowo argues that this principle is not only limited to law but should also be applied in social policies, such as protection from exploitation, access to proper education, and prohibition of early marriage, with the state playing an active role in guaranteeing children's rights, as stipulated in Article 28B Paragraph (2) of the 1945 Constitution and Article 4 of the Child Protection Law [20].

From a psychological perspective, Seto Mulyadi highlighted that children need a safe and violence-free environment, as pressure and unsupportive parenting can negatively impact their mental development [21]. Therefore, child protection policies must ensure they avoid trauma and receive good education and treatment, as affirmed in Article 6 of the Child Protection Law and Article 21 of the UN CRC [22]. In law enforcement, Abdul Fickar Hadjar emphasized the importance of diversion and restorative justice approaches so that children are not treated the same as adult offenders. He highlighted that legal officers must apply a child protection perspective, as stipulated in Article 7 of the SPPA Law and Article 40 of the UN CRC [23]. Therefore, the child's best interests must serve as the foundation for the legal system and broader social, educational, and child protection policies, emphasizing the child's well-being, rehabilitation, and holistic development.

While the application of diversion within Indonesia's juvenile justice system is intended to shield minors from the harmful effects of incarceration and support their rehabilitation, its practical implementation remains hindered by several challenges [24]. One of the main challenges is the uneven understanding and implementation of diversion among law enforcement officials, such as police, prosecutors, and judges, who tend to apply punitive rather than recovery-oriented approaches. In addition, diversion only applies to children with a sentence of less than 7 years [25]. It does not cover grave crimes, which in some cases hinder the opportunity for alternative solutions even though the child's condition allows it [26]. The lack of supporting facilities, such as rehabilitation centers, experts, and community-based coaching programs, is also a factor that hinders the effectiveness of diversion. Another difficulty is the lack of victim involvement in the diversion process, as not all victims or their families are willing to reconcile, so the restorative approach often fails. In addition, the social stigma against children caught up in legal cases is still an obstacle in the process of their reintegration into society [27]. Therefore, although diversion aims to be a more humane solution, these obstacles still make its implementation less than optimal.

Therefore, the implementation of diversion for children must take into account that punishment is the last resort. Diversion for children in conflict with the law must be evaluated by legislators [28], in this case, the House of Representatives of the Republic of Indonesia or referred to as Dewan Perwakilan Rakyat Republik Indonesia [29], and the President, to improve the diversion system, which protects children before entering the court.



### 3.2. Criminal Threshold Concept in Law No. 11/2012 on Juvenile Justice System

Criminal law in Indonesia is divided into general and special crimes, which differ in regulations, types of criminal offenses, and enforcement procedures [30]. General crimes include crimes that apply broadly to society and are regulated in the Criminal Code, such as murder, theft, fraud, and persecution. Case handling follows the procedures outlined in the Criminal and Criminal Procedure codes [31], allowing law enforcement officers to initiate investigations and prosecutions based on public complaints or their initiative. Meanwhile, special crimes refer to certain crimes with specific characteristics, both in terms of legal rules, investigation processes, and sanctions applied, and are regulated in separate laws outside the Criminal Code. Examples include crimes such as corruption, terrorism, narcotics, money laundering, and human trafficking, which specialized agencies like the Corruption Eradication Commission and the National Narcotics Agency often manage. In addition to the division of types of crimes, criminal law in Indonesia also recognizes punishment thresholds, which are the minimum and maximum limits of sanctions that can be imposed in a case. This threshold is categorized into minor crimes (sentences under 1 year, such as traffic violations), medium crimes (1 to 5 years, such as fraud and embezzlement), and serious crimes (more than 5 years, such as murder and other serious crimes) [32]. In addition, there are life sentences for severe cases, such as large-scale corruption, and the death penalty for certain crimes, such as terrorism and large-scale drug trafficking. In the juvenile criminal justice system, as stipulated in the Juvenile Criminal Justice System Law (Law of the Republic of Indonesia Number 11 of 2012 on the Juvenile Criminal Justice System), there is a threshold of 7 years, which is a factor in determining whether a child can obtain diversion, which is a settlement of cases outside the court [33]. If the punishment is less than 7 years, diversion can occur. However, if it is higher, legal provisions must still apply to the judicial process.

The issue of children in conflict with the law [34], whether as offenders or victims, is a recurring concern in society that demands serious attention from multiple stakeholders, including families, communities, and law enforcement authorities. In everyday life, many cases involve minors in criminal acts, both as victims and perpetrators. One of the most common cases is sexual harassment, where both the perpetrator and the victim are children [35]. This situation poses a legal dilemma because, on the one hand, children who commit offenses must be responsible for their actions. However, they also need protection and rehabilitation to avoid repeating the same actions [36]. Meanwhile, child victims must also receive special protection to prevent long-term psychological impacts and ensure that child protection principles fulfill their rights.

To address cases involving children, Indonesia implements a juvenile criminal justice system. This system differs from the general justice system because it focuses more on a restorative approach, where rehabilitation and child protection are prioritized over punishment alone [37]. Juvenile justice is a specialized legal system designed to handle criminal cases involving minors. Its goal is to safeguard their legal rights and ensure the fulfillment of their needs, whether they are victims or offenders [38]. The

Juvenile Criminal Justice System Law governs this system [39](Law No. 11 of 2012), which replaced the previous Juvenile Court Law (Law No. 3 of 1997) and introduced significant reforms in how children in conflict with the law are treated.

One key provision in the SPPA Law is the age range for children who may undergo legal proceedings—specifically, those aged 12 years or older but under 18 who are suspected of committing a criminal offense. Children within this age group can be brought before a juvenile court, which follows special procedures designed to safeguard their rights throughout the legal process [18]. Diversion serves as a key mechanism for resolving juvenile cases outside the formal court process, particularly for offenses carrying a sentence of less than seven years. Its main objective is to shield children from the adverse effects of the criminal justice system, such as psychological trauma from detention or social stigma, which could negatively impact their future [40].

However, if a child is involved in a criminal offense punishable by more than seven years, such as murder, rape, or trafficking large quantities of narcotics, in that case, diversion cannot be applied, and the child must undergo a judicial process according to applicable legal provisions. Nevertheless, the approach in juvenile justice still considers the child's best interests, so the sanctions emphasize guidance, education, and rehabilitation rather than retributive punishment. Moreover, children who become victims of criminal offenses must be given special consideration, including legal protection, psychological support, and the fulfillment of their rights, such as physical and emotional recovery.

A more comprehensive approach within the juvenile justice system seeks to ensure that cases involving children are addressed with greater humanity, fairness, and a strong focus on their future well-being, whether they are offenders or victims [41]. This principle aligns with the concept of child protection [42], which stresses that every child is entitled to safety, guidance, and the opportunity for self-improvement in an environment that supports their growth and development. When it comes to the punishment of minors, both national laws and international conventions affirm that children in conflict with the law must continue to receive protection and have their rights upheld throughout the legal process [43].

As stipulated in the Convention on the Rights of the Child (CRC), which was ratified through Presidential Decree No. 36 of 1990, the child's best interests must be the main consideration in any policy relating to children [44]. This provision covers policies implemented by various public and private institutions, judicial institutions, government institutions, and legislative bodies. Therefore, legal actions such as arrest, detention, and punishment should only be taken as a last resort (*ultima ratio*) if there is no other alternative for the child's interests. The juvenile justice system emphasizes a restorative approach, focusing on diversion, mediation, and rehabilitation instead of punitive measures [33].

Regarding national legislation, the Child Protection Law (Law No. 35 of 2014, which amends Law No. 23 of 2002) offers comprehensive protection for children, including those involved in legal conflicts. This law clearly states that children must not be treated like adults in legal proceedings and are entitled to special treatment, including

legal aid, social rehabilitation, and reintegration programs to help them return to society after completing the legal process [45]. The Juvenile Criminal Justice System Law (Law No. 11 of 2012) also establishes a more child-friendly legal process to safeguard children's rights and minimize the harmful effects of an excessively punitive justice system.

However, despite strong legal protections for children, challenges in practical implementation remain significant. Many children in conflict with the law still do not receive adequate protection. Common issues include the frequent use of detention before a court ruling, limited access to legal assistance for minors, and the underutilization of diversion as a resolution method. Furthermore, poor coordination among law enforcement agencies such as the police, prosecutors, courts, and social institutions often hinders the effective operation of a truly ideal juvenile justice system. Therefore, to ensure that the child's best interest is the main priority in the criminal justice system, a more substantial commitment is needed from all relevant parties, including law enforcement, social institutions, and the community. In addition, it is necessary to evaluate and strengthen the implementation of policies so that the principles of child protection regulated in legislation can be realized in absolute terms and not just become written rules. Thus, the juvenile criminal justice system can be carried out by its main objectives: providing protection, rehabilitation, and opportunities for children to improve themselves without sacrificing their future.

Within the juvenile justice system, punishment should be used as a last resort (*ultima ratio*) and only when other corrective measures, such as rehabilitation, mediation, or diversion, are no longer feasible or practical [46]. This principle is intended to protect children's rights and provide them with the opportunity for self-improvement without being subjected to the harmful effects of punitive sanctions [47]. Law on Juvenile Justice System (Law of the Republic of Indonesia Number 11 of 2012 on the Juvenile Criminal Justice System) stipulates that detention and punishment should only be carried out if there is no other alternative that is more suitable for the interests of the child and society. This concept also aligns with the Convention on the Rights of the Child (CRC) principle, which emphasizes that all actions related to children must be based on their child's best interests.

In comparison, some countries with more advanced juvenile justice systems, such as Finland and Sweden, prioritize rehabilitative approaches over repressive punishments [48]. In Finland, the legal system emphasizes social intervention rather than criminal punishment [49]. Children who commit offenses are not automatically sentenced to prison but receive rehabilitation programs, guidance, and counseling. In Finland, children under the age of 15 cannot be criminally prosecuted; instead, they are placed under social protection through child welfare services. Incarceration is reserved only for severe cases where the child is deemed a threat to public safety.

Similarly, Sweden implements a comparable approach in which children in conflict with the law are not directly subjected to imprisonment but are instead guided toward community-based rehabilitation [50], educational programs, and psychosocial therapy [51]. Prison sentences for children are rarely used, except in serious crimes.



Instead, the Swedish government prefers rehabilitation and reintegration programs so children can return to society better.

Compared to the Finnish and Swedish approaches, Indonesia still faces challenges implementing a more rehabilitation-oriented justice system [52]. Although the CCJS Law System has prioritized diversion and guidance, in practice, many children are still directly sentenced without going through an optimal rehabilitation mechanism. The main obstacles to implementing this policy include the lack of coordination between relevant institutions, adequate rehabilitation facilities, and law enforcement officers' lack of understanding of the restorative justice system.

Indonesia consistently enhances its juvenile justice system by emphasizing rehabilitation and guidance as the primary response, rather than resorting immediately to punitive measures. Inspired by the practices of countries like Finland and Sweden, Indonesia implements integrated approaches that involve social intervention, educational initiatives, and psychosocial rehabilitation programs aimed at children in conflict with the law. This approach enables these children to reintegrate into society as more responsible individuals while safeguarding their future from the adverse impacts of excessively harsh criminal penalties.

#### 4. Conclusion

Indonesia's Juvenile Justice System, established under Law No. 11 of 2012, incorporates restorative justice principles by prioritizing diversion to protect children in conflict with the law. Nevertheless, its application is still hindered by legal limitations, institutional weaknesses, and societal stigma. Challenges such as inadequate understanding by legal actors, insufficient support systems, and negative public perception remain significant. To truly uphold the child's best interests, it is necessary to broaden diversion criteria, enhance institutional support, and engage families and communities. The juvenile justice system can more effectively ensure legal protection and support children's reintegration through these combined efforts.

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