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**DIVERSION FOR CHILDREN FROM THE CRIMINAL JUSTICE SYSTEM:
A COMPARATIVE STUDY OF MALAYSIA AND INDONESIA**

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ABSTRACT

Children's rights in the criminal justice system are now legally recognised, as the Convention on the Rights of the Child (CRC) 1989 provides. Since Malaysia and Indonesia acceded to the CRC, both jurisdictions must provide legal safeguards to all children in the criminal justice system. However, whether these children are adequately protected at every stage of the criminal proceedings remains questionable. Consequently, exposure to the criminal justice system might have detrimental effects on the psychological, cognitive, and emotional development and well-being of children. To overcome these adverse effects, diversion is an alternative measure that can be implemented to protect children better. Thus, this research aims to meet the following objectives: a) to analyse the adequacy of the national laws governing diversion when dealing with children in Malaysia and Indonesia, (b) to examine the international instruments governing the implementation of diversion, and (c) to propose for the implementation of effective diversion for children in both jurisdictions. A doctrinal study was employed to achieve the objectives, and extensive doctrinal research on diversion was conducted. This research demonstrates that sound and informed laws and policies are crucial in improving the legal framework governing diversion, which can positively impact the well-being of children and facilitate their reintegration process. The results of this study are pivotal to stakeholders in both jurisdictions in ensuring children are afforded better legal protection, which aligns with national policies and the international legal framework.

Keywords: Diversion, criminal justice system, CRC 1989, Malaysia, Indonesia.

INTRODUCTION

Across the globe, it is estimated that yearly, around 410,000 children are deprived of liberty and placed in remand centres and prisons. Additionally, it is reported that approximately 1 million children are subjected to detention in police custody annually. However, it is worrying that daily, around 160,000–250,000 children are detained in remand centres and prisons worldwide (United Nations, 2019). More recently, the Global Prison Trends 2023 highlighted that in 2020, an estimated 261,200 children were detained in institutions globally for committing crimes (Penal Reform International & Thailand Institute of Justice, 2023). A child in conflict with the law has been defined as a child who is alleged as, accused of, or recognised to have infringed the criminal law (United Nations Office on Drugs and Crime, 2013). For this paper, the term ‘children’ or ‘children in conflict with the law’ would refer to a child who comes into contact with the criminal justice system.

Similar to the adult population in prisons, children who are detained in the institutions are vulnerable to violence, corruption and organised crime due to factors such as overcrowded space, lack of access to necessities, inadequate number of staff, deteriorating healthcare system and lack of good governance in the institutions (Penal Reform International & Thailand Institute of Justice, 2023). Due to the detrimental effects of coming into contact with the criminal justice system and detention, countries worldwide have adopted and implemented diversions as an alternative to detention for children (Penal Reform International, 2022a). Diversion is a measure that can be employed when children who committed a crime are referred away from the criminal justice system at any stage of the criminal proceedings (diversion can include measures such as counselling, rehabilitation, community service work, and others), thereby avoiding the adverse effects of formal proceedings and a criminal record (United Nations Committee on the Rights of the Child, 2019).

Locally, many children come into contact with the criminal justice system in Malaysia for committing crimes. However, the statistics for the past three years show a decreasing trend of children committing crimes (Department of Statistics Malaysia, 2022). Table 1 shows the number of children involved in crime according to gender from 2020 to 2022 in Malaysia.

Table 1

Number and Gender of Children in Conflict with the Law in Malaysia

Year	Male	Female	Total
2020	4833	509	5342
2021	3171	286	3457
2022	2838	175	3013
Total	10,842	970	11,812

Source. Department of Statistics Malaysia (2022).

However, despite the decreasing trends of children’s involvement in crime, many children are still placed in institutions across Malaysia for the crimes they committed. Due to the imposition of an order made by the court, approximately 268 children are serving their sentences in institutions across Malaysia, 412 cases involving children are pending trial, and 118 children are subjected to temporary detention (Department of Statistics Malaysia, 2022). In Indonesia, the data demonstrate that in 2020, 6,509 children had committed crimes (n = 6,379 males and n = 130 females) and had undertaken

criminal proceedings at the District Court, High Court, and Supreme Court (Ginting, 2022). In connection with statistics obtained from both countries, the number of children who committed crimes in Malaysia and Indonesia suggests that more male child offenders committed crimes compared to female child offenders.

Past research reported a myriad of negative consequences facing children who come into contact with the criminal justice system, beginning from the pre-trial process to the trial and post-trial processes in Malaysia (Ahmad, 2011, 2012; Ahmad et al., 2016b; Dusuki, 2009; Mustafa, 2016; United Nations Children's Fund & Ministry of Women, Family and Community Development, 2013). Similarly, a past study in Indonesia has shown that sending child offenders to institutions as one of the forms of punishment will subject them to maltreatment as well as physical and psychological violence. Additionally, placing children behind bars often made them feel stigmatised (Faquais, 2021; Lambie & Randell, 2013). Subsequently, to overcome the issues faced by children who commit crimes, the Committee on the Convention on the Rights of the Child (CRC) has proposed that Malaysia and Indonesia implement diversion so that both countries can provide better legal safeguards for children, corresponding with the international standards (UNCRC, 2007, 2014).

Children in contact with the criminal justice system may feel traumatised and stigmatised throughout the criminal justice process. Hence, implementing alternative measures such as diversion can prevent children from being subjected to the adverse effects of coming into contact with the criminal justice system (Gunawan et al., 2024). While Indonesia has legislated laws governing diversion in the criminal justice system, Malaysia has yet to incorporate specific provisions governing diversion for children in the Child Act 2001 (hereinafter referred to as the 2001 Act). Even though Law Number 11 of 2012 regulates diversion in Indonesia, it is questionable whether the diversion agreement concluded between all interested parties upholds the child's best interest and conforms with the principles of international law. Incorporating diversion into the legal framework in Malaysia and improving the implementation of diversion in Indonesia will help reduce the number of children placed in institutions in both countries and reduce recidivism rates among children following their release from the institutions.

However, a gap exists in the research concerning the viability of the implementation of diversion in Malaysia, the effectiveness of the diversion agreements in Indonesia and whether the implementation of diversion will adequately afford better legal protection for children in accordance with the Convention on the Rights of the Child (CRC) 1989 and other international standards. Moreover, there is even less research that examines and compares the implementation of diversion between Malaysia and Indonesia. Hence, this study aims to (a) analyse the adequacy of the national laws governing diversion when dealing with children in Malaysia and Indonesia, (b) examine the international instruments governing the implementation of diversion, and (c) propose the implementation of effective diversion for children in both jurisdictions. Therefore, this article is crucial in examining the legal framework governing diversion in Malaysia's and Indonesia's obligations to ensure that children who commit crimes are legally protected in the criminal justice system.

LITERATURE REVIEW

The international legal framework recognised that all children, including children in conflict with the law, must be legally protected. The CRC, in particular, emphasised the importance of protecting children at every stage of the criminal proceeding, and they need to be treated differently from adult offenders. State Parties have the obligation to provide an alternative system under Article 40 (3) (b) of

the CRC when dealing with children who have committed a crime, without the need for children to undergo judicial proceedings, commonly referred to as “diversion.” The Committee on the CRC defined diversion as “measures for referring children away from the judicial system, at any time prior to or during the relevant proceeding” (UNCRC, 2019, p.3). Hence, diversion allows children who have committed crimes to be diverted from the court system. Criminal cases can be resolved by employing alternatives, such as warning or referring children to other interventions (such as counselling, rehabilitation, and community service work). Consequently, diversion can help prevent children from being affected by the harmful effects of the adversarial criminal justice system and having a criminal record.

Diversion should be made a viable option for children at the earliest opportunity after they come into contact with the criminal justice system. However, diversion can also be implemented throughout the different stages of the criminal justice system. The implementation of diversion obliges Member States to uphold the legal rights and provide human rights protection to children who have committed crimes throughout the diversion process, in accordance with Article 40 (3) (b) of the CRC (UNCRC, 2019). Past studies have demonstrated that diversion is one of the most effective strategies to reduce reoffending among children. Additionally, through the diversion process, children are taught to be accountable for their past criminal actions, help mend broken relationships with family members and others, and help with reintegration (McAra & McVie, 2007; McLaren, 2010; Penal Reform International, 2023).

Past studies have also demonstrated the significance of diversion in making children accountable for their crimes and improving their well-being (McLaren, 2010; Polglase & Lambie, 2024). One of the fundamental principles underlying the CRC is to protect children from being subjected to detention. Detaining children must only be used when no other option is available and for the shortest time (UN, 1985; UNCRC, 1989). Other international legal frameworks also enshrined this fundamental principle (Economic and Social Council Resolution [ECOSOC], 1997; Human Rights Council, 2009; UN, 1985, 2001, 2008). Hence, diversion is a measure that can protect children who have committed crimes by channelling them away from the criminal justice system, thereby preventing them from experiencing the adverse effects of formal proceedings (UNCRC, 2019).

A diversion can be implemented in various ways for children, notably: (a) offering an apology to the victim, (b) writing an essay on the impacts of the crime committed, (c) complying with a curfew, (d) returning stolen property, (e) repairing the damage done, (f) paying compensation to the victim(s) for incurring losses, (g) performing specified hours of community service work, (h) participating in a peer education or mentoring program, (i) completing a life skills or self-enhancement program, and (j) completing treatment for substance abuse. If the child undertakes the diversion program and has completed it within a stipulated time, criminal proceedings will not commence, or if the criminal proceedings have commenced, charges pressed against the child will be withdrawn. However, if the diversion plan program is not completed, criminal charges will be pressed against the child offender (Casey, 2013). The use of diversionary measures to channel a child away from the criminal justice system may or may not include a restorative justice component. Restorative justice is “a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible” (Zehr, 2002, p. 37). For instance, implementing a diversion that excludes the restorative justice process would involve police cautioning, life skills, and treatment (McLaren, 2010).

On the other hand, examples of diversionary measures that include restorative justice components are family group conferencing, victim-offender mediation, and circles (Zehr, 2002; Van Ness et al., 2001; Umbreit & Armour, 2011; Gaffney et al., 2024). Other examples of the restorative justice process include requiring the offenders to offer apologies and restitution to the victims, undertaking community work, participating in conferencing and victim-offender meetings, and undergoing police alternative actions (McLaren, 2010). The efficacy of restorative justice practices in reducing the rate of recidivism among children or young offenders is recognised by various countries, such as New Zealand, Australia, and the United States (Latimer et al., 2005; Nugent et al., 2004; Rodriguez, 2007). McLaren (2010) opines that diversionary measures or alternative actions, including the restorative justice process, seem more effective than the traditional justice system that imposes sanctions, such as fines, probation, or detention, when dealing with children and young persons. Thus, the restorative justice process that operates outside the criminal justice system appears to be ten times more effective in reducing reoffending and can provide a true alternative compared to the restorative justice process imposed by justice officials (McLaren, 2010).

Recognising the importance of protecting children who come into contact with the juvenile justice system, Malaysia and Indonesia have taken steps to improve their juvenile justice systems, respectively. However, compared to Malaysia, Indonesia has made considerable progress when statutory recognition was given for the implementation of diversion through Law Number 11 of 2012 for children who commit crimes (Yulia et al., 2024; Hutapea et al., 2023). The implementation of diversion not only recognised the rights of the child to participate but also helped in reducing recidivism cases among children (Tobing, 2024). Additionally, diversion can be seen as an effective tool in helping children with social reintegration, promoting sustainable social development and inclusive justice in Indonesia (Wahyudi & Sopyono, 2024).

Since the implementation of diversion in Indonesia, comparative studies have been made to examine how the diversion process in Indonesia is undertaken compared to other countries. However, the following studies draw broad comparisons when examining the diversion system in Indonesia and other countries; (a) comparing the practice of mediation as one of the practices rooted in the customary law in Indonesia with countries such as the United States, Germany, Poland and Switzerland (Gunawan et al., 2024); (b) distinguishing the implementation of the juvenile justice system in Indonesia and the state of California in the United States (Nathania, 2024); and (c) examining the differences between the juvenile justice systems in Indonesia with Australia and Malaysia but does not highlight the implementation of diversion in these three countries (Gemici et al., 2024).

While the above comparative studies between Indonesia and other countries are broad in nature, Surachman et al. (2024) specifically highlighted the viability of implementing diversion for children who commit traffic offences in Indonesia and Malaysia, as both countries have a high number of children committing road traffic offences. However, the study undertaken by Surachman et al. (2024) only highlighted the importance of implementing diversion in traffic offences. It did not highlight the significance of diversion in other criminal offences, including the diversion agreement, which is central to implementing diversion for children. Hence, this paper aims to address the gaps in past studies by discussing the following vital areas: (a) to examine the adequacy of the national laws governing diversion when dealing with children who committed crimes in Malaysia and Indonesia; (b) to examine the international instruments governing the implementation of diversion; and (c) to propose for the implementation of effective diversion for children in both jurisdictions.

METHODOLOGY

This study adopted a doctrinal study to analyse in greater detail the legal concepts and principles governing diversion in Malaysia and Indonesia. Doctrinal research is fundamental in extracting, analysing, and understanding the relevant legal doctrines and principles. Mainly, doctrinal study allows researchers to examine how legal doctrines have been formulated, interpreted, and applied in a relevant research area. Hence, in conducting a doctrinal study, the researchers have the opportunity to explore the benefits of diversion in preventing the adverse effects of coming into contact with the juvenile justice system on children in Malaysia and Indonesia. Doctrinal research commonly involves undertaking the following steps: (a) analysing the development of legal doctrines and their applications; (b) examining courts' judgements, legal theories and various legal materials; (c) undertaking background reading with reference to crucial sources such as legal dictionaries, encyclopedias, textbooks, statutes, international treaties and journals; (d) utilising of extensive use of citation checking through footnotes to support the legal framework discussed; and (e) aims to address the legal gaps by addressing specific legal issues (Bhagyamma, 2023). Doctrinal research was employed to analyse the significance of diversion in greater detail, and the research process involved identifying, analysing, and synthesising the contents of the legal framework governing diversion (Hutchinson, 2017). The two fundamental stages involved in undertaking doctrinal research are locating the relevant sources and interpreting and analysing the legal framework relevant to diversion. In completing this study, library-based research was performed to analyse primary and secondary sources in Malaysia and Indonesia. The first stage of library-based research involved examining primary sources, including legislation, policies, and court cases, to determine the extent of legal protection afforded to children who committed crimes in both jurisdictions. Subsequently, it is crucial to undertake a literature review search from online databases such as Lexis Nexis, Hein Online, SAGE, and others, as they form part of the secondary sources.

Secondly, content analysis examines the primary and secondary resources that define the nature of the laws and parameters (Hutchinson & Duncan, 2012). Hence, this study examined and made a comparative analysis of the juvenile justice laws in Malaysia and Indonesia, as well as analysing the legal framework governing diversion in international instruments generally and the CRC, in particular.

RESULTS

This section examines the legal protection afforded to children who commit crimes from the perspective of the international legal framework. Subsequently, the legal frameworks governing the diversion in Malaysia and Indonesia will be analysed. The discussion will also examine whether the legal framework governing diversion in both jurisdictions corresponds with international diversion instruments.

International Legal Framework Governing Diversion

The significance of protecting children who come into contact with the criminal justice system is recognised by international instruments. Thus, this section seeks to explore in greater depth the importance of relevant international laws in promoting diversion for children who have committed crimes. Malaysia acceded to the CRC on 17 February 1995, and Indonesia ratified the CRC on 5 September 1990. Therefore, both countries are obligated to implement the provisions of the CRC, which align with Article 4 of the CRC (UNCRC, 2003). Article 4 of the CRC obligates State Parties to implement the legal rights of children in the CRC by ensuring that the domestic framework is

compatible with the provisions in the CRC (Committee on the CRC General Comment No. 5 [2003] on General Measures of Implementation of the Convention on the Rights of the Child [Articles 4, 42, and 44 para 6]). Underpinning the importance of protecting children are the four central human rights pillars entrenched in the CRC, which are that no children should be discriminated against (Article 2 of the CRC), the best interests of the child must always be upheld (Article 3 of the CRC), every child must be supported for his or her survival and development (Article 6 of the CRC), and every child has the right to participate (Article 12 of the CRC). However, Article 37 and Article 40 of the CRC explicitly protect the legal rights of children in the juvenile justice system. Article 37 of the CRC specifically provides that children who come into contact with the criminal justice system must be protected and treated humanely.

Additionally, Article 40 (2) of the CRC obliges State Parties to provide a minimum guarantee that children will be treated justly and receive a fair trial (UNCRC, 2019). The importance of the CRC in protecting children who committed crimes is further strengthened by the provisions in the United Nations Standard Minimum Rules for The Administration of Criminal Justice (1985) (The Beijing Rules) and the United Nations Rules for the Protection of Criminals Deprived of their Liberty (1990) (The Havana Rules). Hence, Malaysia and Indonesia need to ensure that their existing legal frameworks also meet the international standards prescribed in the Beijing Rules and the Havana Rules (Chong et al., 2024).

In addition to the CRC, other international instruments seek to protect and promote the implementation of diversion for children. Table 2 elucidates the relevant international legal framework, highlighting the importance of implementing diversion in the criminal justice system.

Table 2

International Legal Framework and Implementation of Diversion for Child Offenders

International Legal Framework	Implementation of Diversion
Convention on the Rights of the Child (CRC) 1989 (UNCRC, 1989)	- Children should be dealt with without resorting to judicial proceedings, and their human rights and legal safeguards must be fully respected. [Article 40 (3)(b)] - Various alternative measures should be provided to children (such as care, guidance, supervision orders, counselling, probation, foster care, education, and vocational training programs) to protect their well-being and proportionate both their circumstances and the offence. [Article 40 (4)]
United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules; UN, 1990b)	- Engaging with the community when dealing with children is crucial. - Subjecting children to formal proceedings or trial by a court must be conducted in accordance with the law and, as far as possible, avoided. [Para 2.5]
United Nations Rules for the Protection of Criminals Deprived of their Liberty (The Havana Rules; UN, 1990a)	- Deprivation of liberty for children should be a measure of last resort and for the minimum necessary period, and it should be limited to exceptional cases. [Para 2]

(continued)

International Legal Framework	Implementation of Diversion
United Nations Standard Minimum Rules for The Administration of Criminal Justice (The Beijing Rules; UN, 1985)	<ul style="list-style-type: none"> - The police, the prosecution or other agencies dealing with children shall have the discretionary powers to dispose of the criminal cases without resorting to judicial proceedings. [Para 11.1] - Consent must be obtained from the child, parents, or guardians when implementing diversion. [Para 11.2] - Community programs, such as temporary supervision and guidance, restitution, and compensation for victims, should be considered when implementing diversion for children. [Para 11.3]
Lima Declaration (Child Rights International Network, 2009)	<ul style="list-style-type: none"> - Adequate and ongoing training should be provided for all stakeholders in the administration of criminal justice and the implementation of restorative criminal justice programs. Engaging multidisciplinary teams and using multidisciplinary approaches in implementing diversion is crucial to meeting the child's and the victim's needs. [Para 8]
World Congress on Criminal Justice Geneva Declaration 2015 (The Swiss Government & Terre Des Hommes Foundation, 2015)	<ul style="list-style-type: none"> - Alternatives to institutional care should be made available to children (such as care, guidance and supervision orders, counselling, probation, foster care, and educational and vocational training programs). Children should be dealt with appropriately, according to their well-being, circumstances, and committed offences. Measures incorporating restorative justice should be considered in all stages of the criminal justice proceedings. [Para 9]
World Congress on Justice for Children Paris Declaration 2018 (United Nations Educational, Scientific and Cultural Organization [UNESCO], 2018)	<ul style="list-style-type: none"> - Diversion should be adopted since it helps reduce reoffending and helps children reintegrate. Implementation of diversion through inter-agency cooperation and using multidisciplinary approaches is highly encouraged. [Para 12]
Global Declaration on Justice with Children 2021 (Penal Reform International, 2021a)	<ul style="list-style-type: none"> - Criminal justice systems should promote rehabilitation and restoration of peace instead of punishment. [Para 11(d)] - Children coming into contact with the criminal justice system (a) need to be treated humanely, and their rights need to be respected [Para 14(e)]; (b) need to be given the opportunities to learn and participate in the restorative processes. [Para 14(g)]; (c) need to be given the opportunities to have access to community-based services and non-custodial measures; [Para 25]; and (d) need to be given access to non-custodial measures such as restorative justice, diversion, rehabilitation, and reintegration through comprehensive, coordinated, and tailored case management approaches (instead of isolated and generalised interventions) [Para 35]
Kyoto Pledge (Penal Reform International, 2021b)	<ul style="list-style-type: none"> - States should undertake to review and reform the criminal justice legislation, policy, and practice in order to ensure national legislations are in line with UNCRC (2019) on Children's Rights in the Child Justice System, CRC/C/GC/24, issued by the Committee on the Rights of the Child.
Cape Declaration (2022). (Penal Reform International, 2022b)	<ul style="list-style-type: none"> - States should adopt measures that address contributing factors to the commission of crime, including efforts to reduce poverty, strengthening laws governing rights to work, health, education, housing, culture, social security, food, water and sanitation, and family, as well as addressing mental health issues and substance use. [Para 1]

Legal Position in Malaysia

This section examines the legal framework governing the criminal justice system in Malaysia. Moreover, this section also highlights the issues faced by children who committed crimes and how diversion can be a viable alternative to prevent child offenders from experiencing the adverse effects of coming into contact with the criminal justice system.

The criminal justice system in Malaysia is governed by *Part X* of the 2001 Act, which outlines the trial procedures in the Court for Children. Although *Part X* of the 2001 Act governs the criminal procedural laws in the Court for Children, reliance on the Criminal Procedure Code (Act 593) has to be made in the absence of any specific provisions relating to offences tried under the Penal Code (Act 574). According to Section 2 of the 2001 Act, a child is defined as a person under 18 years, similar to the definition of a child highlighted in Article 1 of the CRC. However, in Malaysia, a child can only be made criminally responsible at ten years of age. Furthermore, the arrest, detention, or trial of a child who committed a crime is governed by Section 83 of the 2001 Act. Since Malaysia acceded to the CRC, Malaysia has a duty to implement domestic laws in accordance with the provisions of the CRC to protect children in general and children in conflict with the law, particularly (Hamid, 2019). However, an international treaty cannot be enforced in Malaysia without any enabling statute passed by the Parliament.

Nevertheless, Malaysia may still embrace and accept customary international laws as long as they are consistent with national laws and policies (Hamid, 2019). Regardless, the courts in Malaysia have recognised the CRC and have made a specific reference to Article 37 of the CRC when deciding the most appropriate order for two children who have committed a crime and have caused the death of one six-year-old child, in the case of *Pendakwa Raya Iwn Pesalah Kanak-Kanak 1 dan Satu Lagi [2023] MLJU 476*. Drawing on the spirit of CRC and considering the public interest that requires children to be rehabilitated and become good and responsible individuals, the court decided that sending both children to the Henry Gurney School would help reform them.

Past studies highlighted a multitude of harmful effects compromising children who committed crimes in the criminal justice system in Malaysia. During the pre-trial process, issues arising include problems surrounding the arrest, the manner and conduct of the arrest, and children not being informed of the grounds of arrest (Ahmad & Kiprawi, 2012). An examination of past studies has identified the following among the pressing issues experienced by children at the pre-trial stage: (a) lack of access to legal representation and children not informed about their rights to have access to legal assistance (Ahmad & Kiprawi, 2012, pp. 28–29), (b) children are not informed of the grounds of arrest by enforcement officers (Ahmad & Kiprawi, 2012, p. 23), (c) children are subjected to the use of handcuffs and the improper manner in which the handcuff is used against them (Ahmad & Kiprawi, 2012, pp. 26–27), (d) lack of access to communicate with a relative or friend and to have a consultation with a legal practitioner upon arrest and before the investigation took place (Ahmad & Kiprawi, 2012, p. 29), (e) children are not aware and not informed of their rights to have access to legal assistance from the Legal Aid Department and the Legal Aid Center (Ahmad & Kiprawi, 2012, p.31), (f) no separation between children and adult offenders during the remand/detention period and while waiting to be transported to and from the court (Ahmad & Kiprawi, 2012, pp. 33, 41), and (g) children are detained since the courts are not releasing them on bail for 24 hours following an arrest (Ahmad & Kiprawi, 2012, p. 38).

Issues faced by children who committed crimes are compounded when some children also expressed how force was inflicted upon them by enforcement officers upon arrest (Ahmad, 2017). Similarly,

children also reported that they were subjected to force during the investigation process (Ahmad, 2017). Moreover, children are detained for an extended period at the pre-trial stage, even before any charges are pressed against them, resulting in them suffering from great distress, especially when they are not legally represented.

Additionally, feeling fearful is prevalent among children when they are not separated from adult offenders and when they are vulnerable to mistreatment by enforcement officers (Ahmad et al., 2016b). Due to the pressing issues children face during the pre-trial process, Section 83 A of the 2001 Act is a new provision incorporated in the 2001 Act to provide better legal protection to children, in line with Article 40 of the CRC. Section 83 A (1) of the 2001 Act prohibits a child from being handcuffed unless the child has committed a grave crime and the child forcibly resists the attempts to arrest him or her or attempts to evade the arrest.

Additionally, Section 83A (2) of the 2001 Act now provides that a child offender must first be informed of the grounds of arrest. Following the arrest and before any form of questioning or recording of statement takes place, the new amendment obligates the police to undertake the following: (a) inform the parent or guardian or relative of the child and the probation officer concerning the whereabouts of the child, (b) inform the grounds for arresting a child, and (c) inform the child about his or her right to a legal practitioner.

Moreover, news concerning children committing crimes was also often reported during the trial process, resulting in the child's identification. Consequently, as a result of a lack of privacy, a child may suffer from stigmatisation when they return to the community. Furthermore, due to the court's limited sittings, not all children appear before the Court for Children, which is established specifically to try criminal cases for children (Dusuki, 2009). Past studies also show that it is not uncommon for children to appear before court proceedings during the trial process in the absence of a defence counsel (Ahmad, 2017; Dusuki, 2009). It is also reported that children often express how uncomfortable they feel with the court's formal environment when they appear before the court (Ahmad, 2017).

Following the court's order to send a child to the institutions at the post-trial/disposal stage, children face a myriad of other issues while serving sentences in the institutions at the said stage. Among the chief primary concerns expressed by officers in the institutions is the lack of counsellors and counselling facilities that can meet children's needs when serving sentences in the institutions (Ahmad, 2017). Moreover, there is a lack of formal educational and vocational programmes offered to children in the institutions, and these programmes are only made available to children serving sentences in the institutions, but not to children detained during the pre-trial process and pending trial (Ahmad, 2017).

In light of the challenges facing children in the criminal justice system in Malaysia discussed earlier, the implementation of diversion can help prevent children from experiencing the detrimental effects of the formal justice system as soon as they come into contact with the criminal justice system. Unlike Indonesia, Malaysia does not currently have a specific provision in the 2001 Act or a legal framework governing the diversion of children in conflict with the law, despite Malaysia being a State Party to the CRC (Ahmad, 2017). However, although there is no specific legal framework to govern diversion, the Criminal Procedure Code vested powers in the enforcement officers to exercise discretion and not to proceed with cases involving children in minor cases, such as traffic violations, minor shoplifting, or fighting between children. Hence, the adoption of diversionary measures indicates Malaysia's commitment to meeting the provisions of the CRC and affording better legal protection to children who come into contact with the criminal justice system in Malaysia (Ahmad, 2012). It is submitted that since

Malaysia acceded to the CRC and has not made any expressed reservations to Article 40 of the CRC, the government is obliged to implement diversion as an alternative measure in dealing with children without resorting to judicial proceedings (Ahmad, 2011).

Additionally, serving sentences in institutions does not have any positive impact on children, and diversion has been proven to be an effective tool in making children accountable for their actions while reducing the rate of reoffending among them. Hence, implementing diversion in Malaysia can be a viable alternative to the current criminal justice system (Ahmad et al., 2016a; Mustafa, 2016). Drawing from other jurisdictions such as New Zealand, United Kingdom, Canada, Scotland, and Finland, which have adopted diversionary measures when dealing with children who committed a crime, it is timely for Malaysia to incorporate diversion in the national legal framework since to date, there is no specific statutory recognition that provides for diversion, particularly in the 2001 Act (Mazlan & Mustafa, 2022).

Legal Position in Indonesia

The current laws governing the criminal justice system in Indonesia provide that a child can only be criminally responsible if they are 12 years old and above, but below the age of 18 (Law Number 11, 2012). Before diversion was implemented in Indonesia, the criminal justice system's laws were governed by Law Number 3 of 1997, which sought to protect children who committed crimes. However, the law does not seem to respond to the changing needs of society, and it is questionable whether it can afford adequate legal protection for children who commit crimes (Sudaryono, 2012). Hence, the government of Indonesia has taken significant steps to depart from the formal legal system and introduced diversion in the criminal legal system as an alternative to handling children who have committed crimes (Rahman, 2019). Consequently, the legal framework governing diversion in Indonesia is encapsulated in the following laws: (a) Law Number 11 of 2012 concerning the Criminal Justice System Law (SPPA), hereinafter referred to as Law Number 11 of 2012; (b) The Supreme Court Regulation (PERMA) Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Criminal Justice System; and (c) Government Regulation Number 65 of 2015 concerning Guidelines Implementation of Diversion and Handling of Children Who Are Not Yet 12 (twelve) years of age (hereinafter referred to as Government Regulation Number 65 of 2015). PERMA acted as an essential guideline for judges to implement diversion first for children and contained procedures governing diversion. The law provides guidelines and regulates the procedural aspects and coordination for implementing diversion from the investigation stage to the examination stage in court involving stakeholders such as investigators, public prosecutors, judges, children, parents, and guardians (Hutapea et al., 2023).

The definition of diversion is elucidated in Article 1 (7) of Law Number 11 of 2012, which provides diversion as the transfer of criminal cases from the criminal justice process to a process outside of criminal justice. Article 6 of Law Number 11 of 2012 provides the following as underpinning purposes for carrying out diversion: (a) to ensure that peace is achieved between victims and children who committed a crime, (b) resolving children's cases outside the judicial process, (c) preventing children from being deprived of liberty; (d) encouraging the participation from the public, and (e) instilling a sense of responsibility in children. However, not all children who commit a crime can undertake the diversion programme in Indonesia. Article 7 (2) of Law Number 11 of 2012 further highlights that a child can only be subjected to diversion if the offence committed is punishable with imprisonment of less than seven years and the child is not a repeated offender. Article 5 to Article 14, Article 29, and Articles 42 and 52 (2)-(6) of Law Number 11 of 2012 provide for the court to adopt the restorative

justice approach in implementing diversion, and diversion must be pursued at the level of investigation, prosecution and examination of children's cases in court.

Since the introduction of diversion in the criminal justice system in Indonesia, the 2020 Annual Report on the Implementation of the Criminal Justice System provides that the implementation of diversion for children, beginning from the investigation stage, has been effective. It is reported that from 2017 to 2020, 4,162 cases concerning children were diverted from the criminal justice system. However, since the implementation of diversion, it is questionable whether the diversion agreement concluded between the child, victim, and relevant parties is beneficial for all interested parties. Drawing on the courts' decisions, scholars have highlighted the weaknesses in the diversion agreements in ensuring that the child can fully undergo rehabilitation and reformation (Wangga et al., 2023). Table 3 illustrates the types of crime, the diversion agreements, and the issues identified in the diversion agreements.

Table 3

Type of Crime, Diversion Agreements, and Issues in the Diversion Agreement

Case number and type of crime	Diversion agreements	Issues in the Diversion Agreement (DA)
<i>Decisions No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat Type of crime-Theft</i>	<ul style="list-style-type: none"> -The stolen property was returned to the victim. -The child would be placed under his guardian's care and continue schooling. -The child would recite the holy book and to avoid bad company. -The victim is compensated for the monetary loss. 	The DA does not require the child to offer apologies for the crime committed, and the length of the guidance programme is not specified. The community counsellor is also not required to supervise the child's participation in reciting the holy book.
<i>Decisions No.2/Pen.Div/2021/PN Rta jo Number 5/Pid.Sus-Anak/2021/PN Rta Type of crime-Theft</i>	<ul style="list-style-type: none"> -The child has offered an apology and was accepted by the victim. The child's guardian also promised to apologise to the victim and to supervise the child better. -The child is assisted in continuing with his education. -The child will work weekly for two (2) days under the supervision of the Public Prosecutor and representatives from the police officers. 	DA does not explicitly state the length/duration for the child to complete the social service work.
<i>Decisions No.12/pen.Div/2020/PN Kisaran Type of crime-Narcotic crime</i>	<ul style="list-style-type: none"> -The child admitted to the crime committed and regretted his criminal act. -The child will undertake job training and be placed under job supervision for three (3) months. 	DA does not provide for the child offender to receive medical or social rehabilitation programmes.

(continued)

Case number and type of crime	Diversion agreements	Issues in the Diversion Agreement (DA)
<i>Decisions No/Pen.Div/20/20/PN Bbu in conjunction with No/Pid.Sus Anak/20/20/PN Blambangan Umpu Type of crime-Narcotic crime</i>	The child agreed to return to his parents and be placed under the supervision of the Community Counsellor at the Correctional Center for six (6) months.	DA does not provide the child with medical or social rehabilitation programmes.
<i>Decisions No.26/Pid.Sus-Anak/2016/PN Denpasar Type of crime-Narcotic crime</i>	-The child admitted his criminal act and promised not to reoffend. -The child would return and be placed under his parents' guidance.	The child was detained, and the DA does not provide for the child offender to receive medical or social rehabilitation programmes.
<i>Determination No.3/Pid.Sus-Anak/2020/PN.Tenggaron Type of crime-Narcotic crime</i>	-The child admitted his criminal act and promised not to reoffend. -The child is detained at the investigation, prosecution, and court examination levels. -The child is to undergo medical and social rehabilitation.	The child was detained, and the DA does not provide the duration of time for the child to receive medical or social rehabilitation programmes. There was also no supervision by the Community Counsellor at the Correctional Center.
<i>Determination No.111/Pid.Sus-Anak/2014/PN.Surabaya Type of crime-Narcotic crime</i>	-The child regretted his criminal act and promised not to reoffend. -The child will undergo medical and social rehabilitation for four (4) months. -The child will be placed under the supervision of the Community Counsellor at the Correctional Center.	The child was detained, but the detention period is not specified. The DA also does not provide the duration for the child to receive medical or social rehabilitation programmes. The community Counsellor at the Correctional Center did not supervise the child.

In line with Articles 40 (3) and (4) of the CRC, the Indonesian government has demonstrated a serious commitment to implementing diversion for children who committed crimes in the legal framework. Additionally, implementing diversion meets the principles highlighted in the Beijing Rules 1985, Paris Declaration 2018, and the Global Declaration on Justice with Children 2021, as outlined in Table 2. Underpinning the implementation of diversion in Indonesia is the adoption of the restorative justice approach contained in the diversion agreements, following the conclusion of the discussion between the child, victims, and interested parties.

Table 3 highlights the restorative justice approach observed when cases engaged the participation of key stakeholders, such as the child, victims, and the community. Adopting the restorative justice approach aligns with the international legal framework mentioned in the Lima Declaration 2005, the Geneva Declaration 2015, the Paris Declaration 2018, and the Global Declaration on Justice with

Children 2021, as highlighted in Table 2. Unlike the formal justice system, offering an apology and compensation to the victims placed the victim at the centre stage of the diversion system in the criminal justice system in Indonesia. Conversely, one of the goals of restorative justice is achieved when the child feels remorse and apologises to the victim. Engaging the participation of the community by adopting a multidisciplinary approach is also crucial in meeting the child's different needs, in line with the Tokyo Rules 1990, Beijing Rules 1985, Paris Declaration 2018, and the Global Declaration on Justice with Children 2021, as emphasised in Table 2. Notably, the implementation of diversion in Indonesia has also considered the religious background of the child offender, as one of the terms in the Diversion Agreement promotes learning about the holy book, thereby strengthening the religious knowledge of the child (Decisions No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat, 2014).

Despite the milestones and achievements in implementing diversion for child offenders in Indonesia, it remains questionable whether the results of the concluded diversion agreements meet the objectives of diversion and can reform the child who committed a crime. Some inconsistencies were reported in the diversion agreements that were concluded concerning theft committed by children. For instance, one child was detained for committing theft in one case (Decisions No.12/Pid.Sus-Anak/2014/PN.Rantau Prapat, 2014), but in another case, the child was not subjected to detention (No. 2/Pen.Div/2021/PN Rta jo Number 5/Pid.Sus-Anak/2021/PN Rta, 2021). Furthermore, it is also questionable whether the concluded diversion agreements facilitate the reformation of the children. For example, diversion agreements are concluded in cases concerning narcotic crimes highlighted in Table 3. However, no provision exists in the agreements requiring the child to undergo medical rehabilitation or social rehabilitation programs, as mandated by Law Number 35 of 2009 concerning narcotic crimes. Hence, the purpose of diversion may be defeated when the child's involvement with substance abuse is not treated and, therefore, not in line with Article 6 of the CRC, which obliges State Parties to ensure the survival and development of the child. In a similar vein, not providing children access to treatment and rehabilitation also does not meet the requirements of Article 28 of the CRC.

In the preceding paragraphs, it is highlighted that Law Number 11 of 2012 regulates the implementation of diversion from the stage of investigation and prosecution until the court examination is completed for child offenders. If diversion fails to be conducted at the investigation stage, it can still be implemented at the prosecution stage, up until the court hearing. Despite the laws providing for the implementation of diversion, Law Number 11 of 2012 also provides that a child who committed a serious crime can be detained at the investigation stage for 15 days [Article 33 (1 & 2) of Law Number 11 of 2012], at the prosecution stage for 10 days [Article 34 (1 & 2) of Law Number 11 of 2012], and at the court examination/is this trial proceedings stage for 25 days [Article 35 (1 & 2) of Law Number 11 2012]. Even though the legal basis for detaining a child is due to the severe crime the child has committed, it is submitted that this legal position is not in line with Article 37 (a) of the CRC. Hence, diversion must occur at the prosecution or court examination stage if a child offender has been detained at the investigation stage. It is submitted that to overcome this weakness in the law, the child or the legal representative should make a pre-trial application to determine the validity of the arrest or detention and to obtain pre-trial legal remedies (Article 77 of the Indonesian Criminal Procedure Code).

DISCUSSION

Legal Position in Malaysia

This study highlights several key findings crucial in improving the juvenile justice system in Malaysia and Indonesia. The key finding from this study revealed that, unlike Indonesia, there is a lacuna in the juvenile justice system in Malaysia since there *are* currently no specific provisions in the 2001 Act or legal framework that permit children who committed crimes to be diverted from the juvenile justice system, even though Malaysia is a State Party to the CRC (Ahmad, 2017).

Due to the various negative issues faced by children who commit crimes in Malaysia, as highlighted in the preceding paragraphs, the international community has called for the government to prioritise and ensure that the physical and emotional safety and welfare of the children are always safeguarded (Human Rights Council, 2019). Another key finding from this study demonstrates that even though Malaysia has yet to meet the requirements of the international legal framework highlighted in Table 2, since no law governs diversion, significant steps have been undertaken by the government to develop a diversion pilot program and provide training to the relevant staff (UNCRC, 2024). However, the pilot diversion program is still in the course of implementation, and the full implications of its implementation are yet to be seen.

The introduction of the diversion pilot program signals the government's ongoing commitment to reduce the number of children coming into contact with the criminal justice system in Malaysia, which aligns with the international legal framework highlighted in Table 2. Additionally, the diversion pilot program helps overcome the adverse effects of coming into contact with the juvenile justice system for children who have committed crimes. The purpose of the diversion pilot program is to promote the rehabilitation of children who have committed crimes and to reduce the recidivism rate among children. Hence, the key findings from this study are integral in benefiting the policymakers in the following ways: (a) provide the policymakers with an opportunity to evaluate the effectiveness of the program and to improve the legal framework governing diversion; (b) provide the policymakers with an excellent platform to review the existing guidelines governing key actors in implementing the pilot diversion programs; and (c) provides a platform to create inter-agency cooperation that can better meet the needs of children and can provide more substantial support to key actors when implementing the diversion pilot program.

Legal Position in Indonesia

The implementation of diversion for children who committed crimes in Indonesia is part of the major milestone in improving the overall legal framework of the juvenile justice system in Indonesia. Additionally, Indonesia has made considerable progress in implementing diversion in its juvenile justice system compared to Malaysia. However, one of the key findings derived from this study highlights that, although Indonesia has advanced in the juvenile justice system, the implementation of diversion can still be improved in many ways, especially in implementing diversion agreements. Therefore, this study is significant for policymakers in Indonesia to explore and strengthen further the existing diversion system in the following ways; (a) improving the coordinated efforts undertaken by the government to conduct a comprehensive evaluation of the implementation of diversion for child offenders; (b) creating better awareness among law enforcers to help apply the principle of the best interest of the child when dealing with children; (c) developing better community engagement and inter-agency cooperation to ensure that children who need rehabilitation and treatment, particularly in narcotic cases, are given the

necessary treatment; and (d) strengthening the cooperation among all the stakeholders involved in implementing diversion, to ensure an adequate number of Community Counselors will oversee and support the child during the diversion process, in line with Lima Declaration 2009. Additionally, multi-agency cooperation is necessary to provide comprehensive support and services, ensuring children have access to education, training, skills-building programmes, and mental health services (Wahyudi & Soponyono, 2024). The findings of this study are also crucial for the Indonesian Police Force to increase the supervision process in the diversion programs and strengthen the implementation of the diversion agreements concluded by the parties (UNCRC, 2023).

Although this study is significant and one of the few studies that examine and compare the legal position governing diversion in Indonesia and Malaysia, it also has limitations. The findings in Table 3 analyse a small number of cases decided by several district courts in different provinces in Indonesia where diversion was successfully carried out from 2014 to 2021. However, an analysis of the diversion agreements involving child offenders in other parts and districts of Indonesia has not been made in order to determine the approach adopted by other courts. Despite the limitations, this study may still be significant since it is the first study to analyse the diversion agreements decided by the courts in Indonesia. Similarly, the full impact of the diversion pilot program in Malaysia is yet to be seen and therefore, drawing lessons from Indonesia, many aspects of the implementation of diversion can be improved, especially in ensuring that diversion agreements can meet the needs of the children, in line with the CRC and the international legal framework. Additionally, diversion can also be implemented by taking into account the unique socio-cultural and religious background of the children who committed crimes.

CONCLUSION

This paper highlights various negative consequences faced by children in conflict with the law when they come into contact with the criminal justice system. Therefore, it is crucial that diversion is implemented to ensure that children are legally protected at every stage of the criminal justice process. The discussion above has highlighted the key findings of this study and its implications in ensuring that the findings of this study can inform policymakers in Indonesia and Malaysia to ensure further improvements can be made to the diversion system. Moreover, each diversion agreement needs to be formulated and implemented according to the needs of the child. Drawing lessons from Indonesia, socio-cultural and religious backgrounds are key factors forming part of the diversion agreements that can help reform child offenders. However, in implementing diversion, Malaysia and Indonesia must ensure that the legal and human rights protection afforded to children in conflict with the law is upheld, in line with the CRC and the various international instruments discussed in this paper.

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