

## Peculiarities of the formation and application of the institute of diversion (diverting) of children from criminal justice in the Kyrgyz Republic

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**Abstract.** Ensuring the rights and interests of juveniles involved in criminal activities is one of the priority tasks of the criminal justice system, but deprivation of liberty continues to be the most common punishment for children. The purpose of the study presented in this article is to determine the specifics of diversion (diverting) of juveniles from criminal justice and to consider the peculiarities of this legal institution in the justice system of the Kyrgyz Republic. The research employed both general scientific and specific legal methodologies, including logical-semantic, dialectical, abstract-logical, system-functional, historical, system-structural, comparative legal, and information legal methods. The study included consideration of the concept of diversion (diverting) of children from criminal justice, its difference from similar institutions (probation). The factors that determine the need for the earliest possible diversion (diverting) of a child from criminal justice, due to his or her age-related psychophysiological characteristics, were identified. International standards in the field of protecting children, particularly those related to the practice of diverting children from the criminal justice system, are considered. The main aspects of implementing international law on diversion of children within Kyrgyzstan's legal framework are identified and analyzed, alongside an examination

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of relevant provisions in national legislation. Drawing from the experiences of countries like Poland and Georgia, which have successfully implemented this legal mechanism, areas for potential improvement in the regulatory framework are identified. These include defining characteristics of the diversion process such as applicable stages, eligible offenses and age criteria for offenders, as well as the integration of mediation alongside diversion practices. Based on the results of the study, amendments to the national legislation of Kyrgyzstan are proposed, which can be used in the process of drafting bills to improve national legislation on juvenile justice and justice for children

**Keywords:** juvenile delinquency; probation; crime prevention; juvenile justice; children's rights; educational measures; justice for children

## Introduction

The problem of respecting the rights of juvenile offenders is one of the most pressing issues in the field of child rights protection in general and is of a global nature. Diverting a child from the criminal justice system during the shortest time is one of the priority tasks of juvenile justice, as it not only promotes the child's best interests based on the age particular qualities, but also corresponds to the national interests of any country, reducing the risk of recidivism and contributing to a more successful reintegration of children into society. At the same time, however, the number of criminal sanctions imposed on children continues to be high, which not only does not meet international norms concerning children's rights, but also can increase crime rates. For example, data presented in the General Assembly report "United Nations Global Study on Children Deprived of Liberty" (2019) implies that the quantity of minors incarcerated in detention facilities and prisons each year is around 410,000.

Conducting a comprehensive study on diverting (diverting) children from criminal justice, M.R. Lubis and P.P. Siregar (2021) identified a number of factors that influence the possibility of applying this legal instrument. These include objective factors such as the admissibility of diversion (diverting) for a criminal offence under a specific article of the criminal law, the age of the person, the existence of a confession to the criminal offence, and the subjective factor of the child's attitude to the offence committed and remorse for his or her actions. The totality of these factors serves as a basis for the application of diversion (diverting) of the child from criminal justice, which is many times better for the child, whereas court proceedings should be considered only as a last resort when dealing with juvenile offenders. At the same time, it is noted that the diversion (diverting) of children from criminal justice should be seen as part of a complex system. Thus, R. Green *et al.* (2019) point to the need for a systemic approach, where the practice of using this mechanism is closely linked to general measures of prevention and social control, early detection of the possibility of delinquent behaviour of children and adolescents.

A number of studies in Kyrgyz legal science have been devoted to juvenile justice reform and ensuring children's rights. For example, A. Tashtanbek kyzy (2023), pointing to the vulnerability of children to the criminal justice system, said that the problem of children's interaction with the criminal justice system should be seen as a global issue requiring attention at both the national and international levels in order to clearly the limits of the impact of the criminal justice system on children. The study by S. Bakhtiarova and Kh. Bakhtiarova (2021) focuses on the characteristics of child offenders, determining the factors influencing child delinquency and recidivism. The study reveals the peculiarities of children's psyche, points out the problem of children's legal ignorance, the influence of the environment on

criminal behaviour and previous experience on the level of recidivism. Thus, the study reveals the issues of assessing the personality of a child offender, which must be taken into account when choosing measures of legal impact, which is of fundamental importance for the protection of children's rights and the organization of the work of the juvenile justice system.

The need to take into account the age of the offender during investigative actions and the negative impact on his or her psyche in connection with being in the criminal justice system is also mentioned in the study of I.K. Yusupaliyev (2020). The author points to a number of points of ensuring the rights and legitimate best interests of the child during interrogation, in particular – a special procedure for summoning the child to the investigator, ensuring the participation of the defence counsel. An important point is that the interests of the child may be contrary to those of his or her legal representatives, which also needs to be taken into account. The subject of diversion (diverting) is closely related to the issue of criminal justice reform for children (Yusupova, 2022). Thus, K.U. Kirimova (2021) points to the need to exclude sharp reactions to children's offences and minimize the use of measures related to their isolation from society. At the same time, the researcher draws attention to the need for a strategic vision of the problem of child crime prevention, which in general is a component of the reform of juvenile justice in Kazakhstan.

Attention should also be paid to the conclusions on the specificity of the principles of juvenile justice made by Kh. Abdurazakov *et al.* (2022), who, in addition to pointing to the need to build a juvenile justice system based on its protective orientation, point to the need to include informal elements in the basis of criminal proceedings against children and to take full account of the child's personality. The conclusions presented regarding development of the child justice system, the humanization of the criminal justice system and measures for the re-socialisation of convicted persons through the use of probation are important characteristics of the current state of protection of the juvenile offenders' rights. At the same time, they are more related to the problems arising from the involvement of children in the criminal justice system, while the issue of diverting (diverting) children from criminal justice, which is also related to the reform of juvenile justice, remains insufficiently researched today (Dmytrenko, 2023).

The Children's Code of the Kyrgyz Republic (2012) and the amendments made to criminal and criminal procedural legislation have made it possible to create a system of legal regulation of the institution of diversion (diverting) of children from criminal justice that meets international standards. The purpose of this study is to determine the specifics of the development of the institution of diversion (diverting)

of children from criminal justice in the Kyrgyz Republic. In order to achieve this goal, the following tasks were set: to consider the peculiarities of this legal institution in general and in the justice system of Kyrgyzstan, to analyse the legal regulation of this institution by national legislation, to identify contradictions and gaps in such regulation and to develop proposals for their elimination.

### Materials and methods

The choice of methods for this study was determined by its purpose and objectives. A combination of general scientific and special methods was used to solve individual tasks. When considering the concept of diversion (diverting) of children from criminal justice, the logical-semantic method was used, which became the basis for further study of this legal institution with the help of the dialectical method as a whole as a way to protect the rights of young offenders. With the help of the system-functional method, the peculiarities of application were studied, the legislative prerequisites determining the possibility of its application and guarantees of the rights of the child in the application of diversion (diverting) from criminal justice, the procedural consequences of the application of the relevant legislative norms, as well as the consequences of non-compliance with the conditions associated with the implementation of an individual programme of re-socialisation of the child were determined. This method was also used to identify areas for improving national legislation in the area under consideration.

The historical method was used to study some moments of the juvenile justice reform process and the formation of the institution of diversion (diverting) of children from criminal justice in the Kyrgyz Republic. Using statistical data, changes in the dynamics of sentences concerning children were shown. In combination with the formal-logical method, the legislative norms that became the basis for reforming juvenile justice in the Kyrgyz Republic and introducing the institution of diversion (diverting) of children from criminal justice were studied. With the help of the system-structural method the place of the institution of diversion (diverting) of children from criminal justice in the system of other alternative measures of influence on children in conflict with the law was studied. The comparative-legal method was used for conducting a study of the compliance of the norms governing the application of this legal institute in the legislation of the Kyrgyz Republic with international standards. This method was also used to study the relevant experience of other countries (the Republic of Poland and the Republic of Georgia). Based on the results obtained, the norms that could be borrowed to improve the national legislation were identified. The information-legal method and the methods of analysis and synthesis were used to study normative legal acts, statistical data, as well as studies in academic literature on the protection of the rights of children in conflict with the law and the institution of diverting children from criminal justice. On the basis of the information obtained, generalized conclusions were drawn on the specifics, effectiveness, and expediency of the use of this institution.

The information base for the study was statistical data on the state of child crime in the Kyrgyz Republic (National Statistical Committee of the Kyrgyz Republic, 2022), international legal instruments in the area of children's rights – Declaration of the Rights of the Child (1959), Convention of the Rights of the Child (1989), United Nations Standard

Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985), United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (1990), Guidelines for Action on Children in the Criminal Justice System (1997), legal and regulatory framework of the Kyrgyz Republic – State Programme for the Development of Justice for Children in the Kyrgyz Republic for 2014-2018 (2014), Children's Code of the Kyrgyz Republic (2012), Criminal Code of the Kyrgyz Republic (2021), Criminal Procedure Code of the Kyrgyz Republic (2021). The empirical basis of the study was the works of Kyrgyz and international legal scholars.

### Results

**Theoretical aspects of the appropriateness of diversion (diverting) children away from criminal justice.** The diversion (diverting) from criminal justice is seen as one of the ways to protect children who committed a crime and is an integral part of juvenile justice reform and a continuation of the development of alternative, non-punitive, ways of influencing young offenders behaviour, including compulsory educational measures (probation) and mediation. The essence of diversion (diverting) from criminal justice is to apply to children in conflict with the law alternative means of influence to criminal prosecution, aimed at forming legal awareness, preventing the commission of repeated offences, and not entailing negative legal consequences in the form of a criminal record.

The need to divert children away from the criminal justice system is determined not only by the humanistic aspirations of society, but also by the specifics of the child's mental development, the consideration of which is a necessary condition for the effectiveness of measures of influence in the application of criminal punishment, and also makes it possible to increase the efficiency of the criminal justice system by reducing the workload and thus allowing more resources to be allocated to solving problems associated with the commission of more serious offences. A child's contact with the criminal justice system is often associated with (and leads to) a restriction of liberty, which is why the modern approach to the use of criminal justice measures for children is based on the concept that the earliest possible removal of a child in conflict with the law from the criminal justice system is necessary (Diversion of Children..., 2022). Thus, international law (1989) states that deprivation of liberty should be used only as a last resort and as soon as possible. At the same time, according to UNICEF statistics, the use of deprivation of liberty for children continues to be high, with 261,200 children in detention worldwide in 2020, while in 18 of the 159 countries in the world, a child can be held criminally responsible from the age of seven, and the age of criminal responsibility below 14 years is set in 77 out of 159 countries (Estimating the number..., 2021). The failure of the law enforcement system to comply with international standards to minimize the child's contact with the criminal justice system in this way, to ensure that the case is dealt with as quickly as possible, has a range of negative consequences for both the child and society as a whole. Such consequences are related to age-related peculiarities that require special attention and consideration.

Child delinquency, especially in adolescence, is common and often does not require punitive measures to correct behaviour (Wilson *et al.*, 2018). Moreover, custodial

sentences often fail to produce the expected corrective outcome (Lambie & Randell, 2013). In addition to low educational effectiveness, due to the nature of the child's psyche, deprivation of liberty during the investigation of a case or as a method of punishment for criminal offences can have much more severe consequences for a child than for an adult, exacerbating existing and creating new physical, psychological, and emotional health problems, as well as influencing subsequent behaviour (Gordon, 2022). Research shows that the most frequently cited negative consequences of criminalization for adolescents are the inability to manage their time, loss of social connections and contacts, loss of dignity and self-esteem and, finally, complete loss of self (Sandoy, 2020). These consequences are not only related to the fact of incarceration, but can occur at all stages of the case. In addition to the general destabilization of the mental state, including the risk of suicidal ideation, depression and anxiety, there are also behavioural characteristics of children that may cast doubt on the reliability of the information on which the investigation's conclusions are based, thereby causing negative legal consequences for the child (Alfonso, 2022).

Under the pressure of law enforcement and uncertainty about their future, the child is more inclined to engage in ill-considered behaviours whose sole purpose is to seek to complete the criminal process as soon as possible, regardless of the consequences. Such behaviour is due to both physiological and psychological peculiarities affecting children's perception of time, as well as to their poor ability to predict the consequences of their actions due to a lack of necessary knowledge, including legal knowledge. On the other hand, the protracted nature of the investigation may have a negative impact on the child's perceptions of the seriousness of their misdemeanour towards its minimization, which significantly increases the likelihood of re-offending and serious negative consequences for their future life (Teeuwen, 2019). The likelihood of reoffending is largely due to the fact that being in the criminal justice system results in a child being more likely to continue to associate with delinquent peers, drop out of school, not learn to manage aggression, and have low self-esteem (Cauffman *et al.*, 2020). At the same time, the use of diversion (diverting) of children from criminal justice provides an opportunity to avoid the negative consequences of the official consideration of the case, in particular, those related to the fact of the presence of a criminal record (United Nations Standard..., 1985).

Thus, diversion (diverting) is part of an overall system of measures aimed at minimizing a child's contact with the criminal justice system. Its principal difference from such measures as the imposition by the court of a lighter sentence, the use of educational measures or the institution of probation is the complete removal of the child from the system, including in the legal sense. Thus, it is not only the absence of formal proceedings on the fact of the offence committed by the child, but also the absence of a criminal record, which is important for the child's return to society.

**International standards underpinning the diversion (diverting) of children from criminal justice.** International instruments relating to children's rights consistently uphold the principle of age-appropriate special care and protection for children. This is explicitly stated in the Declaration of the Rights of the Child (1959), which refers to the need for children to require special treatment and attention

to their rights, including legal protection, given their physical and mental immaturity. This general principle of treatment of children is reflected in more recent international agreements, including norms relating to children's interaction with the criminal justice system. Thus, the International Covenant on Civil and Political Rights (1966) contains not only general rules on the right to trial within a reasonable time or release and that detention should not be the general rule (art. 9, p. 3), the right to be tried without undue delay (art. 14, p. 3), but also a provision on the need to take account of age when dealing with children and the need to promote their re-education (art. 14, p. 4). The Convention on the Rights of the Child (1989), in article 3 (1), obliges all public authorities to act in the best interests of children, for which the necessary legislative framework must be in place (art. 4). It contains rules aimed at ensuring the rights of young offenders. In particular, human rights and other legal safeguards should be strictly respected when deciding on juvenile offenders bypassing the judicial system.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985) are a complementary tool for ensuring the rights of juvenile offenders. The Rules were the first international instrument to use the concept of diversion (diverting) of children from criminal justice and to propose measures and procedures for such diversion (Diversion of Children..., 2022). Key provisions of the Beijing Rules include the need to minimize legal intervention in addressing the problems arising from offences committed by adolescents, for which Member States should make maximum efforts to mobilize alternative sources of intervention. Diversion of children from criminal justice is addressed in paragraph 11 on "Diversion", according to which law enforcement agencies should make maximum use of opportunities to avoid formal proceedings for offences committed by children. To this end, the law should provide them with appropriate powers to do so. It is also stipulated that certain safeguards must be in place, in particular that the consent of the child himself or herself or his or her legal representatives is required for diversion (diverting) from criminal justice. The application of this provision is mandatory, as it ensures compliance with the Abolition of Forced Labour Convention (1957). Furthermore, the consent of the child or his or her legal representatives must be fully consistent with his or her internal will and not be the result of pressure, fear or other factors. The Rules also include the need to ensure that diversion (diverting) of children from criminal justice can be operationalized through community-based programmes. Importantly, the diversion (diverting) of children from criminal justice is possible at any stage of the criminal justice process and all competent authorities involved should have the necessary authority (United Nations Standard..., 1985).

Another supportive tool for ensuring the rights of juvenile offenders is the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (1990), which, in section VI on child justice, indicate the need for law enforcement officials to maximize the use of available opportunities and programmes to minimize children's exposure to the justice system. Also in the system of international instruments relating to the diversion (diverting) of children from the criminal justice system are the Guidelines for Action on Children in the Criminal Justice System (1997). The Vienna Guidelines indicate the need

to provide alternative methods to divert children from the criminal justice system at any stage of the process by resorting to informal means of conflict resolution, including mediation (p. 15). Isolation of children in closed institutions should be used only as a measure of last resort (p. 18).

Thus, the system of international standards in the area of diversion (diverting) of children from criminal justice is now an integral part of the international system for the protection of children's rights, and its implementation in the system of national legislation can be seen as a necessary action to fulfil the international obligations of the parties to the relevant conventions.

**Regulation of diversion (diverting) of children from criminal justice by the legislation of the Kyrgyz Republic.** Research shows that of the twelve post-Soviet countries, only Georgia and Kyrgyzstan have had some success in implementing diversion programmes for children from criminal justice (Muradyan *et al.*, 2020). Diversion (diverting) of a child from criminal justice is defined by the national legislation of the Kyrgyz Republic as a procedure for committing offences, an alternative to criminal prosecution, aimed at promoting the development, improving the legal culture and legal education of the child, and preventing the child from re-offending (Criminal Procedure Code..., 2021). In 1994, the Kyrgyz Republic ratified the Convention on the Rights of the Child (1989), which made the Convention part of Kyrgyzstan's national legal system. Fulfilment of the international obligations undertaken required the implementation of the norms of the relevant international standards into national legislation, the revision of approaches to the construction and functioning of the juvenile justice system, and the creation of a child-friendly criminal justice system.

The first legal act aimed at reforming the juvenile justice system in connection with the ratification of the Convention was the Children's Code of the Kyrgyz Republic (2012), which contains Chapter 11 "Specifics of the protection of children in conflict with the law". Article 86 of this chapter contains the concept of juvenile justice and indicates the need to take into account the gender, age, mental, physical and psychological development of children when applying measures related to their violation of the law. Article 87, paragraph 3, also points to the exceptional nature of the application of preventive measures and custodial sentences to

children, and the minimization of custodial sentences, both in terms of application and duration, is defined as one of the principles of the juvenile justice system (art. 90).

An important novelty of the Code is that, in addition to the general principles for the treatment of children in conflict with the law, article 96 of the Code provides for the possibility of applying a diversion programme. The conditions for the application of the programme are that the offender must be between 16 and 18 years of age; the offender must have committed a minor or less serious offence; the offender must admit his or her guilt; and the child offender or his or her legal representatives must consent to the programme. Thus, these legal provisions are fully in line with the Beijing Principles (United Nations Standard..., 1985). The application of the Programme is initiated by the territorial unit of the authorized child protection authority, and the decision itself is taken by the prosecutor or the court. If the child fails to comply with the programme, the territorial unit of the authorized child protection authority submits an application to the prosecutor, who decides whether to reopen the criminal case.

There is a different approach with regard to the types of offences in which the diversion (diverting) of children from criminal justice is allowed. The experience of other countries has examples of more lenient regulation than that provided for by the legislation of the Kyrgyz Republic. Thus, for example, the Code on Justice for Children (2015) of the Republic of Georgia, establishing such a way of diverting a child from criminal justice as persuasion, allows its application in the case of a child committing a less serious or serious crime, while the legislation of the Kyrgyz Republic establishes the possibility of applying a programme of diversion (diverting) from criminal justice for children who have committed a crime of minor gravity and less serious crimes (Children's Code of..., 2012).

It should be noted that no clear conclusion can be drawn as to the effectiveness of including serious offences in the list of offences for which diversion (diverting) from criminal justice is possible. For example, statistical data of the Ministry of Internal Affairs of Georgia (2024) regarding such type of offence as robbery (Table 1) show the absence of any persistent downward trend after the adoption of relevant legislative provisions.

**Table 1.** Statistics of registered criminal offenders under part 3 of Article 178 (robbery) according to the Ministry of Internal Affairs of the Republic of Georgia

2017	2018	2019	2020	2021	2022	2023
8	13	18	7	8	4	9

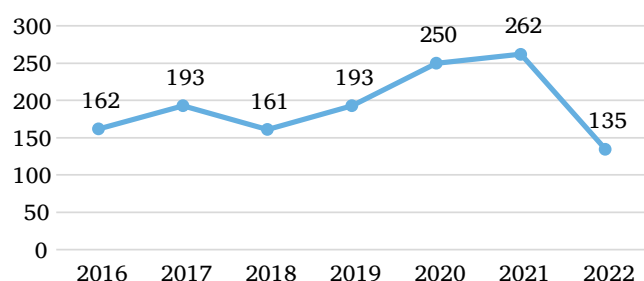
**Source:** Ministry of Internal Affairs of Georgia (2024)

It should also be noted that the institution of diversion (diverting) of children from criminal justice is often linked to the institution of mediation. For example, the Code on Justice for Children (2015) of Georgia refers to the possibility of using persuasion alone or together with mediation. Article 3-a of the Juvenile Justice Act (1982) of the Republic of Poland also refers to the possibility of referring a case at any stage of the proceedings to an institution or a trustworthy person. Since mediation and diversion (diverting) from criminal justice are considered as two main alternative procedures to court proceedings, their use in one process seems to be fully justified (Meurmishvili, 2023).

In 2014, the Kyrgyz Republic adopted the State Programme for the Development of Justice for Children in the Kyrgyz Republic for 2014-2018 (2014). The aim of the programme was to ensure the practical implementation of the provisions of the Children's Code and the fulfilment of the international obligations undertaken by the Kyrgyz Republic, including in the area of protecting the rights and interests of young offenders. The Programme reiterated the need to ensure the principle of using custodial sentences for children only as a last resort and to ensure the development of alternative measures to divert children in conflict with the law from the criminal justice system. A crucial stage in the

development of the institution of diverting children from the criminal justice system was the introduction of amendments to the criminal and criminal procedure legislation of the Kyrgyz Republic. Thus, the main points of the new Criminal Code of the Kyrgyz Republic (2021) are chapter 17, “Special features of the criminal liability of children”, namely article 97, which establishes the possibility of exempting a child aged 16 to 18 from criminal liability in connection with the application of measures to divert him or her from the criminal justice system. The provisions of article 97 of the Criminal Code are similar to those of article 96 of the Children’s Code, discussed above.

The procedural aspects of the procedure for removing (diverting) juvenile offenders from the official criminal proceeding are specified in the Criminal Procedure Code of the Kyrgyz Republic (2021). In particular, article 467, while granting the investigator the right to rely on the assumption that a child has committed a less serious offence for the first time, requires him or her to motivate his or her decision and to take into account a range of circumstances, including both the best interests of the child and the totality of other circumstances, including the nature and gravity of the act committed, age, degree of guilt, amount of damage and the child’s reaction to the offence. For example, two groups of factors are identified as causes of juvenile delinquency in the Kyrgyz Republic. The first includes external circumstances, such as economic problems and low levels of parental control. The second group of factors consists of the low level of legal education of adolescents, who, on the one hand, often do not assess their actions as illegal, and on the other hand, have a poor understanding of the possibility of protecting their rights (Otorbaev, 2018). Thus, the decision-making process requires a full and comprehensive study not only of the criminal offence committed by the child, but also of the circumstances preceding its commission, as well as the child’s own personality. It is also indicated that diversion (diverting) from criminal justice is carried out together with the application of probation supervision or the application of coercive norms of an educational nature. The Criminal Code of the Kyrgyz Republic (2021) defines the latter as placement under supervision with a warning and restriction of behaviour with a warning. These measures may be applied separately or simultaneously (art. 99).

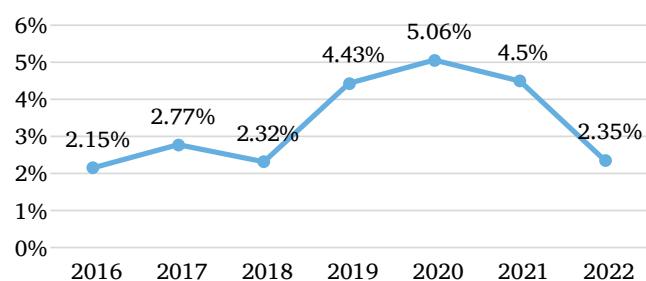


**Figure 1.** Dynamics of the number of convicts aged 14-17 for the period from 2016 to 2022

**Source:** compiled by the author based on the data of the National Statistical Committee of the Kyrgyz Republic (2022)

The criteria for determining the admissibility of measures applied to a child in connection with diversion (diverting) from criminal justice include their reasonableness and proportionality to the criminal act committed by the child, as well as the inadmissibility of measures that undermine the child’s honour and dignity, are harmful to the child’s physical or mental health, or have a negative impact on the child’s ability to participate in the educational process. In addition, the measures applied when diverting a child from criminal justice may not be more severe than the minimum penalty prescribed by criminal law for the act committed by the child (art. 470) (Criminal Procedure Code..., 2021). The investigator issues a ruling on the diversion (diverting) of a child from the criminal justice system, and a contract is signed between the investigator, the child, the child’s legal representatives, a lawyer and an official of the authorized State agency for the protection of children. The ruling and the agreement are subject to approval by the public prosecutor. The Act establishes the possibility of appealing against the refusal of an investigator or procurator to remove a child from criminal proceedings, as well as the possibility of appealing against the decision and the agreement by the victim.

An important provision on guarantees of the rights of the child during diversion (diverting) from the criminal justice system is not only the provision on the need for consent and the provision on the need to provide the child and his or her legal representatives with full information on the nature and procedure for diverting the child from the criminal justice system, but also the provision established in article 469 (3) of the Criminal Procedure Code of the Kyrgyz Republic (2021) on the inadmissibility of using against him or her in court the child’s confession of having committed an offence and the information gathered about him or her in the criminal proceedings. Thus, the national legislation of the Kyrgyz Republic establishes additional guarantees which, in addition to protecting the rights of the child, may also act as an incentive for the child’s active participation in the investigation. Statistics show a downward trend (except for a slight increase in 2020-2021) in the number of convicted persons aged 14-17 (Fig. 1). The same trend is observed with regard to the percentage of convicted children to those over 18 years of age (Fig. 2).



**Figure 2.** Dynamics of the number of convicts aged 14-17 for the period from 2016 to 2022 as a percentage of convicts over 18

**Source:** compiled by the author based on the data of the National Statistical Committee of the Kyrgyz Republic (2022)

While noting that the legal regulation of the institution of diversion (diverting) of a child from the criminal justice system in the Kyrgyz Republic can be assessed as being in line with international standards both in the area of protection of children's rights in general and with regard to the regulation of diversion (diverting) of children from the criminal justice system, it is also necessary to highlight some provisions of the legislation that require further improvement. For example, article 5 of the Criminal Procedure Code (2021) refers to specialized investigators, prosecutors, and judges for children and makes it mandatory for them to undergo specialized training. However, the current national legislation has a gap in regulating the procedure for such training, which makes this provision, firstly, more of a declaratory measure and, secondly, implies an arbitrary procedure for the training of specialists, which does not ensure the necessary quality of training. Supplementing this provision with legislation on determining the procedure for specialized training (with its subsequent development) would make it possible to regulate and improve the training of specialists in the field of juvenile justice.

The provision on the possibility of removing (diverting) children from criminal justice by the court with the use of compulsory educational measures or probation supervision; article 467(2) of the Criminal Procedure Code (2021) also requires clarification. This issue is broader than just the regulation of diversion (diverting) of children from criminal justice by Kyrgyz legislation, as it relates to the understanding of the institution of diversion (diverting) of children from criminal justice in general. On the one hand, for example, the Vienna Guidelines indicate that children can be diverted from the criminal justice system at any stage of the process, but on the other hand, at the stage of court proceedings, the child is already involved in the criminal justice system, which may lead to a certain confusion between diversion and probation (Guidelines for Action..., 1997).

Another important issue is the age at which the institution of diverting a child from criminal justice can be applied. The current legislation of the Kyrgyz Republic states that diversion (diverting) from criminal justice applies to children between the ages of 16 and 18, while the Criminal Code of the Kyrgyz Republic (2021) (art. 96, p. 2) provides for the possibility of imposing punishment, applying compulsory educational measures or establishing probation supervision on a child aged 14 or older. It should be noted that issues relating to the stage of criminal proceedings at which diversion (diverting) of children from criminal justice may be applied, the types of offences for which it may be applied, and age are among the general characteristics of the institution of diversion (diverting) of children from criminal justice, so that their unambiguous regulation by international standards and national legislation is essential to ensure the effective functioning of this legal institution.

### Discussion

As an integral part of international standards in the field of child rights, and being quite widespread in the world, the institution of diversion (diverting) of children from criminal justice continues to be the subject of debate. On the one hand, juvenile delinquency is recognized as a global phenomenon, while on the other hand, it is pointed out that the legislator's response to it is conditioned by a multitude of

factors. K. Neisse and S.S. Singer (2020), for example, point to the commonality of treating child offenders differently from adults, while the concept of juvenile delinquency and the justice system itself remain different. The study confirms this thesis, pointing to the existence of different approaches regarding the definition by the legislator of the types of offences in the commission of which the tools of the institution of diversion (diverting) of children from criminal justice can be applied, as well as age. Also speaking, for example, about the stages at which it is possible to talk about the diversion (diverting) of children from criminal justice, it should be noted that not always the earliest diversion (diverting) is assessed as an effective tool (Spytska, 2023a).

Thus, A.R. Hambali and Z. Zainuddin (2023), considering diversion (diverting) from criminal justice not only as a legal institution but also as a component of the police strategy to combat local crime and to shift the focus from punishing the offender to restoring the state that existed before the offence was committed, concluded that the effectiveness of this legal mechanism by the police was low. At the same time, this statement can hardly be considered a general rule for the institution of diversion (diverting) of children from criminal justice in general, but rather indicates the need to take into account local specifics (Shevchuk *et al.*, 2022; Vatral, 2023).

Also, relevant is the question of the limits of the use of diversion (diverting) of children from criminal proceedings. Thus, in the study presented by D.B. Wilson *et al.* (2018), the authors draw attention to the fact that inappropriate behaviour in adolescence should be considered rather as a variant of the norm, so law enforcement agencies should avoid involving children in the criminal justice system in case of minor offences, as such involvement may have the opposite effect, leading to the intensification of antisocial behaviour in the future. At the same time, researchers point to the need to establish an optimal level of response, as an overly lenient response can also have a negative effect.

L. Polglase and I. Lambie (2023) also point out that diversion (diverting) children away from the criminal justice process will have no effect if there is a propensity for persistent marginal behaviour and rule breaking. Thus, taking into account the child's personality not only from the point of view of child psychology, but also from the position of assessing the established behavioural habits, his motivation regarding the correction of the situation arising from the criminal offence committed by him will be of great importance when deciding on the expediency of diverting (diverting) the child from criminal proceedings. Moreover, P. Santiago *et al.* (2023) point out that understanding the circumstances that preceded a child's commission of an offence is an important prerequisite for the effectiveness of diversion measures.

L. Gittner *et al.* (2023) point to situations where diversion (diverting) from criminal justice is a necessary measure in the presence of developmental disabilities, thus creating an overlap between different disciplines within the same process. Taking these circumstances into account and being able to recognize them also requires specialized knowledge on the part of those involved, on the part of the law enforcement system. On the one hand, these factors are reflected in the national legislation of the Kyrgyz Republic, which establishes the need to take into account a number of circumstances (the best interests of the child, the nature, and gravity of the act committed by the child, age, degree of guilt, amount of

damage, and the child's reaction to the offence committed by the child) when making a decision to divert a child from criminal justice (Criminal Procedure Code..., 2021). On the other hand, taking into account these circumstances require not only legal knowledge, but also taking into account the peculiarities of child psychology, which confirms the conclusions made in the study of legal regulation of the institution of diversion (diverting) of a child from criminal justice in the Kyrgyz Republic about the need to improve the legal regulation of training specialists for juvenile justice. Thus, diversion (diverting) of children from criminal justice should be considered not only as a legal institution, but also as a set of strategies aimed at identifying the best way for the law enforcement system to respond to children's offences (Spytska, 2023b).

It should be noted that the main focus in considering issues related to the diversion (diverting) of children from criminal justice is on procedural issues. At the same time, the effectiveness of this institution is largely determined by how effective the diversion programme itself will also be. Thus, in researching the effectiveness of restorative justice and the institution of diversion (diverting) from criminal justice, in particular, J.S. Wong *et al.* (2016) point to the need to pay special attention to the programme component, including parental involvement, as well as taking into account in the definition of the programme all the same factors that are taken into account when deciding on the possibility of using diversion (diverting).

In the context of programme design, N. Maxwell and D. Ablitt (2022) also draw attention to the effectiveness of using a tool such as peer mentoring, which also includes experience of criminal offending. The researchers point out that peer mentoring is often a key mechanism in making a programme work, as peer mentors are more trusted and more easily perceived as role models than adults. They also demonstrate through their own experience the possibility of success, which is an important motivating factor for children starting the programme.

J. Connolly (2022) also points to the need for a standardized evaluation system for a programme, which would allow for standardized monitoring of outcomes to determine the success of the programme. For this purpose, a database should also be created for all programme participants, reflecting the main characteristics of the participants both before and during the programme.) In addition, the researcher points out that it should be possible to extend the duration of the programme at the initiative of the participants.

In general, one may agree with the position of B. Ozturk *et al.* (2022). that the diversion (diverting) programme has an interdisciplinary nature. Thus, the programme itself is an important component of the functioning of the institution of diversion (diverting) of children from criminal justice and should be considered as a subject of legal regulation, as its results may have legal consequences for children subject to diversion (diverting) (in particular, failure to comply with the programme may become a basis for the continuation of proceedings). At the same time, the study showed that the national legislation of the Kyrgyz Republic does not disclose approaches to the formation of diversion programmes for children. Moreover, these programmes have not yet been developed in practice.

## Conclusions

The diversion (diverting) of children from criminal justice is an important mechanism for law enforcement to act in the best interests of the child and to maximize respect for the child's rights. The need to divert children from criminal justice corresponds to their age, physical and psychological characteristics, avoiding negative consequences for both the child and society as a whole. An analysis of the provisions of international standards in the area of diversion (diverting) of children from criminal justice and the national legislation of Kyrgyzstan regulating this issue allows talking about several blocks that make up the content of this institution. Thus, the first block includes such formal conditions for the diversion (diverting) of a child from criminal justice as the stages of consideration of the case at which such diversion (diverting) is possible, age, and types of offences for which such diversion (diverting) is allowed. The second block includes guarantees of rights in the application of diversion (diverting), such as the consent of the child or his or her legal representatives and the rule that information obtained during diversion (diverting) proceedings cannot be used in court. The third block includes organizational and procedural issues related to the authority and training of persons empowered to make a decision on diversion (diverting) and the preparation of relevant programmes.

The national legislation of the Kyrgyz Republic generally meets the UN Standard Minimum Rules for the Administration of Justice for Children. At the same time, the issues of the types of offence for which diversion (diverting) may be applied, the need to lower the age of children to whom diversion (diverting) may be applied from 16 to 14 years of age, and the clarification of the stages of the process at which diversion (diverting) may be applied to remain debatable.

Diversion (diverting) of children from criminal justice, while generally a necessary tool for ensuring the rights of the child, requires at the same time the consideration of many factors in its application. Thus, in addition to its general characterization as a legal institution in the field of juvenile justice, diversion (diverting) of children from criminal justice is, from the point of view of practical application, a set of strategies for assessing the relevance of the application of this institution to the circumstances of the case and the child's personality. This area requires further research on diversion (diverting) as a set of strategies aimed at identifying the optimal law enforcement response to child offences, which should result in specific methodologies. In addition, it is necessary to develop amendments to the Code of Criminal Procedure and the Procedure for Interagency Cooperation between Participants in Criminal Proceedings during diversion (diverting), as well as to develop a mechanism for child-friendly procedures, which include specialization of participants and special rooms for investigators and children.

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## Conflict of interest

None.

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## Особливості становлення та застосування інституту виведення (відволікання) дітей від кримінального правосуддя в Киргизькій Республіці

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**Анотація.** Забезпечення прав та інтересів неповнолітніх, які перебувають у конфлікті із законом, є одним із пріоритетних завдань функціонування системи кримінальної юстиції, але позбавлення волі продовжує залишатися найпоширенішим заходом покарання щодо дітей. Метою представленої у статті дослідження є визначення специфіки виведення (відволікання) дітей від кримінального правосуддя та розгляд особливостей цього правового інституту в системі юстиції Киргизької Республіки. Під час дослідження було використано загальнонаукові та спеціально-правові методи, включно з логіко-семантичним, діалектичним, абстрактно-логічним, системно-функціональним, історичним, системно-структурним, порівняльно-правовим, інформаційно-правовим. Дослідження включало розгляд поняття виведення (відволікання) дітей від кримінального правосуддя, його відмінності від подібних інститутів (пробації). Було визначено чинники, що зумовлюють необхідність якомога швидшого виведення (відволікання) дитини від кримінального правосуддя, зумовлені її віковими психофізіологічними особливостями. Розглянуто міжнародні стандарти у сфері захисту дітей, зокрема ті, що стосуються практики виведення дітей із системи кримінального правосуддя. Визначено та проаналізовано основні аспекти імплементації міжнародного права щодо виведення дітей з-під варті в правовому полі Киргизстану, а також розглянуто відповідні положення національного законодавства. Спираючись на досвід таких країн, як Польща та Грузія, які успішно впровадили цей правовий механізм, визначено напрямки для потенційного вдосконалення нормативно-правової бази. До них відносяться визначення характеристик процесу перенаправлення, таких як застосовні етапи, відповідні правопорушення та вікові критерії для правопорушників, а також інтеграція медіації поряд із практикою перенаправлення. На основі результатів дослідження було запропоновано зміни до національного законодавства Киргизстану, що можуть бути використані в процесі законопроектної роботи у сфері вдосконалення національного законодавства щодо ювенальної юстиції та юстиції для дітей

**Ключові слова:** підліткова злочинність; пробація; профілактика злочинів; ювенальна юстиція; права дітей; заходи виховного характеру; юстиція для дітей