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DEPRIVATION OF LIBERTY OF CHILDREN IN CONFLICT WITH THE LAW: BRIDGING THE GAP BETWEEN EU STANDARDS AND CRIMINAL JUSTICE PRACTICE

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Abstract: *This paper examines the legal framework governing the deprivation of liberty of children in conflict with the law, with particular emphasis on the gap between established European Union standards and their implementation in criminal justice practice. The analysis is grounded in key international and regional instruments, notably the Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, which enshrine the principles of the best interests of the child and deprivation of liberty as a measure of last resort. Using a doctrinal and comparative legal methodology, the paper explores the extent to which these principles are effectively integrated into national criminal justice systems, with reference to relevant case law of the European Court of Human Rights. Particular attention is paid to the legal conditions for ordering detention, its duration, and the availability and application of alternative measures. The findings reveal persistent inconsistencies between normative standards and practical implementation, especially regarding proportionality, individualisation of sanctions, and the prioritisation of non-custodial measures. The paper argues that bridging this gap requires not only formal legal alignment with international and EU standards, but also a substantive shift in judicial and institutional practice. Strengthening safeguards for children and promoting alternatives to detention are identified as essential steps towards ensuring a child-centred approach within contemporary criminal justice systems.* ***Keywords:*** *European Union law, deprivation of liberty, children in conflict with the law, criminal justice practice, alternatives to detention.*

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Introduction

Children who come into contact with the criminal justice system are exposed to a range of complex and often interrelated challenges, making the effective protection of their human rights essential for preventing abuses of authority and ensuring fair justice outcomes (Maskiah & Abustan, 2021, pp. 128–129).

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The deprivation of liberty of children in conflict with the law remains one of the most sensitive and contested issues within contemporary criminal justice systems. Despite the existence of a comprehensive international and European legal framework, the use of detention measures against minors continues to raise serious concerns regarding their necessity, proportionality, and long-term impact on the development and reintegration of the child. At the normative level, a clear consensus has been established: deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time. This principle is firmly embedded in Article 37 of the Convention on the Rights of the Child (United Nations, 1989), which represents the cornerstone of the international system of juvenile justice.

Within the European context, these standards are further reinforced through the Charter of Fundamental Rights of the European Union (European Union, 2012), particularly in relation to the protection of children's rights and the right to liberty and security. In addition, the evolving case law of the European Court of Human Rights has played a crucial role in interpreting and operationalising these principles, particularly in cases concerning the lawfulness, duration, and conditions of detention of minors, where the Court has consistently emphasised the need for strict limitations on detention and robust procedural safeguards (Blokhin v. Russia, 2016; Bouamar v. Belgium, 1988). Particular concern has also been raised in relation to the duration of detention, which in practice often exceeds what would be considered strictly necessary and proportionate in light of international standards.

Numerous international reports and monitoring mechanisms have highlighted persistent discrepancies between formal legal standards and their implementation in practice, particularly regarding the continued reliance on detention measures and the insufficient use of alternatives (United Nations Office on Drugs and Crime, 2006; Council of Europe, 2008).

Such discrepancies are especially visible in the overuse of pre-trial detention, the limited availability of diversion measures, and the inadequate consideration of the specific needs and vulnerabilities of children within criminal proceedings. Recent global data further confirm the scale of the problem, indicating that deprivation of liberty of children remains widely used in practice, often in situations involving minor offences and first-time offenders, thereby raising serious concerns regarding its necessity and proportionality (United Nations, 2019; United Nations, 2025).

This trend is further confirmed by international analyses indicating that, despite clear legal standards, deprivation of liberty is still frequently used as a routine response rather than as a measure of last resort, particularly within rigid criminal justice systems (Penal Reform International, 2019).

Against this background, the central problem addressed in this paper is the existence of a structural gap between established legal standards and their practical enforcement in the context of deprivation of liberty of children. The aim of the paper is to critically examine the extent of this gap by analysing the relevant international and European legal framework alongside selected aspects of criminal justice practice. In doing so, the paper seeks to answer the following research question: to what extent do contemporary criminal justice systems comply with the requirement that deprivation of liberty of children be used only as a measure of last resort?

To address this question, the paper applies a doctrinal and comparative legal methodology, based on the analysis of relevant international and European legal instruments, as well as selected case law and institutional reports. This approach enables an assessment of both the normative framework and its practical implementation within criminal justice systems.

By addressing this question, the paper contributes to the broader debate on the protection of children's rights within criminal justice systems, while advancing a critical understanding of the structural limitations that hinder the effective implementation of established standards.

International Legal Framework on Deprivation of Liberty of Children

The international legal framework governing the deprivation of liberty of children in conflict with the law is primarily shaped by the Convention on the Rights of the Child, which establishes fundamental standards for the treatment of minors within justice systems. Article 37 of the Convention explicitly provides that deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time (United Nations, 1989). As consistently emphasised in the literature, the use of detention for children must be strictly limited and carefully justified in light of international standards (Kilkelly, 2008, pp. 188–189). This provision reflects a broader child-centred approach, requiring that all measures affecting children be guided by the principle of the best interests of the child and respect for their dignity and developmental needs (Kilkelly, 2008, pp. 188–189; Kilkelly, 2016, pp. 53–56; Liefaard, 2015, pp. 239–242). However, the extent to which these principles are effectively translated into practice remains contested, suggesting that the challenge lies not only in the existence of clear legal standards, but in their consistent operationalisation within diverse justice systems.

Recent scholarship further suggests that, despite the widespread recognition of detention as a measure of last resort, the concept itself remains insufficiently defined in practice, particularly with regard to the specific conditions under which deprivation of liberty is permissible (Meeler & Todres, 2024, pp. 2–4). This lack of conceptual clarity further complicates implementation, as it leaves considerable discretion to national authorities in determining when detention is justified.

In addition to the Convention, further guidance is provided by soft law instruments, particularly the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which elaborate on key principles such as proportionality, individualisation of measures, and the prioritisation of non-custodial responses to juvenile offending (United Nations, 1985). These rules emphasise that institutionalisation should be avoided wherever possible and that diversion measures should be actively promoted as alternatives to formal judicial proceedings (Liefaard, 2015, pp. 239–242). While these instruments significantly enrich the normative framework, their non-binding nature inevitably affects the degree to which they influence national legal practice.

A central feature of the international framework is the clear preference for alternatives to detention, including supervision, counselling, community-based programmes, and restorative justice approaches. Available research further indicates that the deprivation of liberty of children remains a widespread global phenomenon, with a significant proportion of minors being placed in detention within the criminal justice system, thereby reinforcing the need for the development of effective, rights-based alternatives to detention (Global Study on Children Deprived of Liberty, 2018). Such measures are considered essential components of a rights-based juvenile justice system, reflecting the understanding that detention may have harmful consequences for children, including stigmatisation, disruption of education, and increased risk of reoffending (United Nations Office on Drugs and Crime, 2006; Kilkelly, 2008, pp. 188–189). The persistence of high detention rates despite these standards indicates a structural disconnect between policy commitments and institutional practice.

Furthermore, international standards require that, where deprivation of liberty is unavoidable, it must be accompanied by strict procedural and substantive safeguards. These include the right to legal assistance, the right to challenge the legality of detention, and the obligation to ensure that children are treated in a manner consistent with their age and needs (Kilkelly, 2008, pp. 188–189; Liefaard, 2015, pp. 239–242). In this regard, international standards further emphasise that juvenile justice systems must ensure the protection of the rights and well-being of children, while strictly limiting the use of detention as a measure of last resort (United Nations, 1990). These safeguards therefore function not merely as formal guarantees, but as essential mechanisms for constraining the use of detention in practice.

These safeguards are intended not only to regulate detention, but also to mitigate its adverse effects and reinforce the child-centred orientation of juvenile justice systems. In this context, academic literature highlights the importance of a child rights-based approach that prioritises the best interests and development of the child within juvenile justice systems (Liefaard, 2015, pp. 239–242; Kilkelly, 2016, pp. 53–56**)**. Such an approach requires a shift from procedural compliance towards a more substantive understanding of children's rights in practice.

Taken together, these instruments establish a coherent normative framework that strongly limits the use of deprivation of liberty and promotes a rehabilitative and child-oriented approach to juvenile justice. However, the persistence of structural and institutional constraints across jurisdictions indicates that compliance with these standards often remains formal rather than substantive, thereby reinforcing the gap between legal norms and criminal justice practice. This suggests that the effectiveness of the framework ultimately depends less on the proliferation of standards and more on their consistent and context-sensitive implementation.

At the same time, this gap reflects not only practical shortcomings but also deeper tensions inherent in juvenile justice systems, where competing objectives—such as welfare, protection, and accountability—are not always easily reconciled. In this sense, the challenge is not merely to ensure compliance with existing norms, but to embed these principles more effectively within everyday decision-making processes and institutional cultures. Without such a shift, even the most comprehensive legal frameworks risk remaining aspirational rather than transformative.

European Standards on Protection of Children

The protection and promotion of children’s rights constitute a central priority within the European Union, firmly anchored in its foundational legal framework. This commitment is reflected in Article 3 of the Treaty on European Union, as well as in the Charter of Fundamental Rights of the European Union, which recognises the protection of children’s rights as a fundamental objective of the Union (European Union, 2012; European Union, 2016). Within this framework, children’s rights are not treated as a peripheral concern but as an integral component of the EU’s broader human rights architecture. However, the practical effectiveness of these commitments remains subject to significant variation across Member States.

The Charter, which became legally binding with the entry into force of the Treaty of Lisbon in 2009, codifies a comprehensive set of rights specific to children. These include, inter alia, the right to education and the right to protection and care, particularly in situations involving exploitation, violence, and discrimination. Crucially, the Charter affirms the principle that the best interests of the child must be a primary consideration in all actions concerning children, thereby establishing a normative benchmark for both legislative and policy measures within the Union. In practice, however, the extent to which this principle effectively constrains decision-making in criminal justice systems remains contested.

At the same time, the scope of EU intervention in this field is defined by the principle of subsidiarity, which limits Union action where Member States are able to effectively address issues at national, regional, or local levels. As a result, primary responsibility for social policy and the protection of children’s rights largely remains within national competence. Nevertheless, there is a growing recognition at the EU level of the need for more coordinated and integrated approaches, particularly in light of persistent disparities in the protection of children across Member States. This shift is reflected in recent strategic policy instruments, such as the EU Strategy on the Rights of the Child and the European Child Guarantee, which aim to strengthen coherence and enhance the practical implementation of children’s rights throughout the Union (European Union Agency for Fundamental Rights, 2024).

Within this framework, the protection of children in conflict with the law is shaped by a combination of binding European Union law and complementary standards developed within the Council of Europe system. A central legal instrument at the EU level is the Charter of Fundamental Rights of the European Union, which guarantees both the right to liberty and security and specific protections for children, including the obligation that the best interests of the child be a primary consideration in all actions relating to children (European Union, 2012). These provisions not only reinforce the broader human rights commitments of the Union but also establish a normative basis for limiting the use of deprivation of liberty in relation to minors.

At the policy level, the European Union has introduced the European Child Guarantee as a key instrument aimed at addressing child poverty and social exclusion. The initiative, initially articulated in the political guidelines of the European Commission, emphasised the need to ensure that all children, particularly those at risk of poverty or social exclusion, have effective access to essential services such as healthcare and education (European Commission, 2020; European Commission, 2021b). Following consultations with relevant stakeholders, the European Commission presented a proposal for a Council Recommendation in 2021, accompanied by a Staff Working Document (European Commission, 2021a, 2021d), which was subsequently adopted by the Council. However, the reliance on national implementation mechanisms raises concerns regarding the consistency and effectiveness of these measures across different legal systems.

The European Child Guarantee seeks to ensure effective access to key services for children in vulnerable situations, including early childhood education and care, general education supported by adequate nutrition, healthcare, and appropriate living conditions. While this framework represents a significant policy advancement, its effectiveness ultimately depends on the extent to which these commitments are implemented at the national level (European Commission, 2021a).

Beyond policy initiatives, the EU has also developed binding legal instruments aimed at strengthening procedural safeguards for children in criminal proceedings. Directive (EU) 2016/800 establishes minimum standards, including the right to legal assistance, individual assessment, and limitations on deprivation of liberty (European Parliament and Council, 2016). These provisions reinforce the principle that detention should be used only as a measure of last resort and for the shortest appropriate period of time. Nevertheless, empirical findings suggest that the practical application of these safeguards varies considerably across jurisdictions.

Recent EU policy developments further emphasise the need to ensure child-friendly justice systems. The EU Strategy on the Rights of the Child highlights the importance of adapting justice systems to children's needs, promoting non-custodial measures, and strengthening safeguards in cases involving deprivation of liberty (European Commission, 2021c). At the same time, academic literature underlines that the implementation of these standards remains uneven across jurisdictions (Kilkelly, 2008, pp. 188-189; Kilkelly, 2016, pp. 53-55). Despite these policy commitments, persistent structural challenges continue to limit their effective implementation in practice.

Within the Council of Europe system, standards are more detailed and operational. The European Rules for juvenile offenders subject to sanctions or measures emphasise rehabilitation, proportionality, and strict limitations on detention (Council of Europe, 2008). These rules require that deprivation of liberty be used only in exceptional circumstances and that conditions of detention respect the dignity and developmental needs of minors.

The jurisprudence of the European Court of Human Rights has further strengthened these standards by imposing strict requirements on the use of detention of minors. The Court has consistently held that states must demonstrate that no less restrictive measures were available and that detention must be proportionate and justified in each individual case (Blokhin v. Russia, 2016; Bouamar v. Belgium, 1988). These principles are further systematised in European legal scholarship and institutional

guidance, which emphasise the need for a child-centred approach and strict limitations on deprivation of liberty (European Union Agency for Fundamental Rights & Council of Europe, 2015).

Academic literature has additionally criticised the continued reliance on detention, highlighting its potentially harmful and counterproductive effects on children (Goldson, 2005, pp. 78-80).

Despite the existence of this comprehensive normative framework, significant challenges remain in ensuring its effective implementation. Differences in national legal systems, institutional capacities, and policy priorities contribute to uneven application of European standards. As a result, while European legal instruments formally align with international principles, their practical realisation often remains limited, reinforcing the gap between legal norms and criminal justice practice (Liefaard, 2015, pp. 239-241).

Taken together, the European legal and policy framework provides a robust and multilayered system of standards designed to safeguard the rights of children within criminal justice systems and to restrict the use of deprivation of liberty. The interplay between binding legal instruments, strategic policy initiatives, and judicial oversight reflects a clear normative orientation towards a child-centred approach grounded in proportionality, subsidiarity, and the best interests of the child.

Yet, the analysis also reveals that the strength of this framework lies primarily at the normative level. Its effectiveness in practice remains uneven, largely dependent on national implementation, where institutional capacity, legal traditions, and policy priorities continue to shape outcomes in divergent ways. In this regard, the gap between formal legal commitments and their practical realisation is not incidental, but structurally embedded within the multi-level governance system of the European Union. As a consequence, despite a high degree of alignment with international human rights standards, the actual protection afforded to children in conflict with the law remains inconsistent, thereby reinforcing the persistent disconnect between normative expectations and criminal justice practice.

Criminal Justice Practice: Persistent Challenges in the Application of Detention of Minors

Despite the existence of a comprehensive international and European legal framework that clearly limits the use of deprivation of liberty of children, criminal justice practice across many jurisdictions continues to reveal significant inconsistencies in its application. One of the most persistent challenges relates to the continued overreliance on detention, particularly in the pre-trial phase. Although international standards unequivocally require that detention be used only as a measure of last resort, empirical and institutional analyses indicate that pre-trial detention of minors is still frequently applied in situations where less restrictive alternatives would be both available and appropriate (European Union Agency for Fundamental Rights, 2024). This tendency has been widely criticised in the literature, which highlights the limited effectiveness and potentially harmful consequences of child detention (Goldson, 2005, pp. 78–80; Goldson, 2015, pp. 170–172). Taken together, these findings suggest that the persistence of detention is not merely incidental, but reflects entrenched practices within criminal justice systems that continue to prioritise control over rehabilitation.

A closely related issue concerns the insufficient development and use of alternative measures to detention. While international and European instruments strongly promote diversion, restorative justice, and community-based responses, such measures remain underutilised in many legal systems. The lack of adequate institutional frameworks, limited resources, and insufficient coordination between judicial and social services often hinder their effective implementation. As a result, detention continues to function as the default rather than an exceptional response, thereby undermining the rehabilitative orientation of juvenile justice systems (Kilkelly, 2008, pp. 188–189; Liefaard, 2015, pp. 239–242). This indicates that the challenge lies not only in the availability of alternatives, but in the structural conditions necessary for their consistent and credible application in practice.

Furthermore, structural deficiencies within criminal justice systems contribute to the persistence of this gap between legal standards and practice. These include the limited individualisation of decisions concerning minors, inadequate consideration of the child's specific circumstances and vulnerabilities, and insufficient reliance on expert assessments. Judicial reasoning in cases involving detention of minors frequently fails to provide a sufficiently rigorous examination of alternative measures, despite the clear requirements established in the case law of the European Court of Human Rights (Blokhin v. Russia, 2016; Bouamar v. Belgium, 1988). Such shortcomings suggest that, in practice, the principle of the best interests of the child is not consistently operationalised in decision-making processes. In this respect, the issue extends beyond formal compliance and points to deeper deficiencies in judicial reasoning and decision-making cultures.

In addition, disparities in institutional capacities across jurisdictions further complicate the effective implementation of established standards. Differences in legal traditions, availability of specialised juvenile courts, and the level of training of judicial and law enforcement actors all influence the manner in which detention is applied. Comparative research further demonstrates significant variation in juvenile justice models across jurisdictions, reflecting differing balances between welfare-oriented and punitive approaches (Dünkel, 2006, pp. 230–234). These variations highlight the extent to which national contexts continue to shape the practical meaning and application of shared international standards.

Taken together, these challenges illustrate that the gap between normative standards and criminal justice practice cannot be reduced to formal non-compliance, but reflects deeper structural and institutional constraints. Similar concerns have been identified in the literature, which emphasises both the potential and the limitations of international human rights standards in effectively constraining the use of child detention (Kilkelly & Goldson, 2013, pp. 350–353; Junger-Tas, 2006, pp. 510–513). Bridging this gap therefore requires more than legislative alignment; it necessitates a substantive transformation of judicial practice, strengthened institutional capacity, and a systematic shift towards child-centred approaches that prioritise alternatives to detention and the long-term well-being of the child. In this regard, the move away from custodial responses is increasingly recognised as a central requirement of modern juvenile justice systems (Goldson, 2015, pp. 170–174).

At the same time, this transformation cannot be achieved through legal reform alone, but requires a broader reorientation of institutional priorities and professional practices within criminal justice systems. Without such a shift, the reliance on detention risks remaining embedded as a routine response, despite clear normative commitments to its exceptional use.

More fundamentally, the persistence of these challenges points to an underlying tension within contemporary juvenile justice systems, where the formal commitment to child-centred principles coexists with institutional practices that continue to prioritise risk management, efficiency, and control. This tension is particularly visible in the continued reliance on detention as a precautionary measure, even in cases where less restrictive alternatives are available. As a result, the principle of deprivation of liberty as a measure of last resort risks being reinterpreted in practice as a flexible rather than a strictly limiting standard.

Addressing this disconnect therefore requires not only stronger safeguards and procedural guarantees, but also a shift in the underlying logic of decision-making, from reactive and security-oriented approaches towards more preventive, welfare-based, and development-oriented responses. In this context, the effective reduction of detention cannot be understood solely as a legal obligation, but as a broader indicator of the extent to which criminal justice systems are capable of integrating children's rights into their core functioning.

Conclusion

This paper has examined the extent to which contemporary criminal justice systems comply with the requirement that deprivation of liberty of children be used only as a measure of last resort. The analysis has shown that, at the normative level, both international and European legal frameworks establish a clear and coherent set of standards that strictly limit the use of detention and place the best interests of the child at the centre of decision-making. These standards are firmly grounded in key legal instruments and further reinforced through the jurisprudence of the European Court of Human Rights, which has consistently emphasised the exceptional nature of detention and the necessity of rigorous justification in each individual case.

At the same time, the findings of this paper indicate that the practical application of these principles remains uneven and, in many instances, only partial. Despite formal alignment with international and European requirements, criminal justice practice continues to reflect a persistent reliance on deprivation of liberty, particularly in the context of pre-trial detention. The limited use of alternative measures, together with insufficient individualisation of judicial decisions and a lack of consistent engagement with the specific circumstances and vulnerabilities of children, suggests that detention is still frequently applied beyond its intended role as a measure of last resort.

This discrepancy cannot be understood solely as a matter of non-compliance, but rather as a reflection of deeper structural and institutional constraints. Variations in national legal systems, disparities in institutional capacity, and the multi-level nature of European governance all contribute to an uneven translation of normative standards into practice. In this context, the principle of deprivation of liberty as a measure of last resort risks being interpreted flexibly, rather than functioning as a genuinely restrictive legal standard.

Bridging this gap therefore requires more than formal legal harmonisation. It calls for a substantive reorientation of criminal justice practice, including stronger reliance on non-custodial measures, more robust and individualised judicial reasoning, and improved coordination between judicial and social services. Equally important is the need to ensure that the best interests of the child are not treated as an abstract principle, but are meaningfully operationalised in everyday decision-making processes.

Ultimately, the effective realisation of the principle that deprivation of liberty should be used only as a last resort depends on the capacity of criminal justice systems to move beyond control-oriented approaches and to adopt genuinely child-centred models that prioritise rehabilitation, development, and the long-term well-being of the child. In this respect, the reduction of detention is not only a legal requirement, but also a key indicator of the extent to which children's rights are effectively embedded within contemporary systems of criminal justice.

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LIŠENJE SLOBODE DJECE U SUKOBU SA ZAKONOM: PREVAZILAŽENJE JAZA IZMEĐU STANDARDA EVROPSKE UNIJE I PRAKSE KRIVIČNOG PRAVOSUĐA

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Sažetak: *Ovaj rad analizira pravni okvir koji uređuje lišenje slobode djece u sukobu sa zakonom, s posebnim fokusom na jaz između uspostavljenih standarda Evropske unije i njihove primjene u praksi krivičnog pravosuđa. Analiza se zasniva na ključnim međunarodnim i regionalnim instrumentima, prije svega Konvenciji o pravima djeteta i Povelji o osnovnim pravima Evropske unije, koji afirmiraju principe najboljeg interesa djeteta i lišenja slobode kao krajnje mjere. Primjenom doktrinarne i komparativnopravne metodologije, rad ispituje u kojoj mjeri su ovi principi djelotvorno integrirani u nacionalne sisteme krivičnog pravosuđa, uz oslonac na relevantnu praksu Evropskog suda za ljudska prava. Posebna pažnja posvećena je pravnim uslovima za određivanje pritvora, njegovom trajanju, kao i dostupnosti i primjeni alternativnih mjera. Rezultati ukazuju na postojane nedosljednosti između normativnih standarda i njihove praktične implementacije, naročito u pogledu proporcionalnosti, individualizacije sankcija i davanja prednosti mjerama koje ne uključuju lišenje slobode. Rad zastupa stav da prevazilaženje ovog jaza zahtijeva ne samo formalno usklađivanje sa međunarodnim i evropskim standardima, već i suštinsku transformaciju sudske i institucionalne prakse. Jačanje procesnih i materijalnih garancija za djecu, kao i unapređenje primjene alternativnih mjera, identificirani su kao ključni koraci ka osiguravanju pristupa usmjerenog na dijete u savremenim sistemima krivičnog pravosuđa.*

Ključne riječi: *pravo Evropske unije, lišenje slobode, djeca u sukobu s zakonom, praksa krivičnog pravosuđa, alternative pritvoru.*