

Ethiopia's Criminal Justice System relating to Children in Conflict with the Law: Interrogating the Legal Framework on Measures and Penalties

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Abstract

This article critically examines the provisions of the Criminal Code governing measures and penalties relating to children in conflict with the law in light of the principles of 'detention or imprisonment as a measure of last resort' and 'for the shortest period'. The assessment shows that the Ethiopian criminal justice system does not adhere to the principle of 'detention as a measure of last resort' since corrective detention and home arrest are measures of first resort. Imprisonment on the other hand is a measure of last resort as it applies after the failure of the measures for the most serious crimes and if the child is incorrigible. The system is not designed to ensure full compliance with the principle of 'detention or imprisonment for the shortest appropriate period'. The article also identifies lack of clarity in the provisions of the Code which can exacerbate the preceding problems. Therefore, the Criminal Code provisions need revision to adhere to the principles and must clarify the existing provisions.

Key terms:

Ethiopia · Child Justice · Criminal Code · Measures · Detention · Imprisonment · Last Resort · Shortest Period

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1. Introduction

The aim of child justice is the rehabilitation of the child and making them assume a constructive role in society. Accordingly, the Convention on the Rights of the Child (CRC) considers custodial response as a measure of last resort (Art. 37(b)). Hence, a child justice system should provide a wide variety of dispositions that are non-custodial to be imposed on a child found guilty of a crime. Further, the imposition of certain forms of penalties on children –such as death penalty and life imprisonment without parole– are prohibited.

Ethiopia has ratified the CRC, and in effect, this standard constitutes an integral part of Ethiopian law by virtue of Article 9(4) of the FDRE

Constitution.¹ The implementing law, the Criminal Code, contains detailed rules regarding measures and penalties applicable for children aged from nine to fifteen years. The special measures and penalties provided in the Code (Arts.158-169) and suspension of sentence (Art.171) are principally applicable to this group of children.

This article focuses on the measures and penalties applicable for children aged from nine to fifteen years. Throughout the article, the words 'child' and 'children' refer to this group of children. The article is doctrinal and it critically examines these measures and penalties in light of the international and regional standards that govern child justice.² To this end, the article first highlights the guiding principles in sentencing children as enshrined in the CRC and other relevant standards.

2. Dispositions in the Child Justice System: Brief Overview of the Guiding Principles

According to the general principle of the child justice system provided under Article 40(1) of the CRC, the treatment of children in conflict with the law (CICWL) shall be 'in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others'. The same provision requires the treatment to take 'into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' In line with this grand principle, the following principles are applicable in sentencing children found guilty of the offence.

2.1 Detention or imprisonment as a measure of last resort

Article 37(b) of the CRC provides that imprisonment of children shall only be used as a measure of last resort. Similarly, Rule 17.1(b) of the Beijing Rules provides that restrictions on the personal liberty of a child shall be imposed only after careful consideration and shall be limited to the

Frequently used acronyms:

CICWL	Children in conflict with the law
CRC	The Convention on the Rights of the Child

¹ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, Federal Negarit Gazeta, Year 1st, No.1, Art.9 (4).

² The article focuses on doctrinal legal research and it can facilitate pursuits of future research that include empirical data to corroborate the arguments.

minimum.³ Thus, non-custodial measures should be the norm, and detention can only be used where they are not considered appropriate or effective.⁴

Rule 17.1(c) of the Beijing Rules provides that children should not be deprived of their liberty unless they are guilty of committing a violent offence against a person or have been involved in persistent serious offending and that there is no other appropriate response. The phrase ‘no other appropriate response’ should not be interpreted as an absence of alternative measures, but to situations where other measures are not suitable or beneficial to the child.⁵ In other words, a custodial sentence should not be imposed on a child just because there is no other suitable placement.⁶ Courts must give due consideration to whether a custodial sentence is the last resort.⁷ That means they must first consider all reasonable alternatives to detention.⁸ This is one of the most fundamental principles underpinning a rights-compliant child justice system.⁹ To give effect to this principle, a national child justice system should make available a wide variety of non-custodial measures (Art. 40, Sub-article 4 of the CRC and Rule 18 of the Beijing Rules).

³ United Nations Standard Minimum Rules for the Administration of Juveniles Justice (Beijing Rules), adopted on 29 November 1985, Resolution 40/33, Rule 19; See also United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), adopted on 14 December 1990, Resolution 45/113, Rules 1 & 2.

⁴ Ursula Kilkelly (2011), ‘Measures of Deprivation of Liberty for Young Offenders: how to enrich International Standards in Juvenile Justice and promote Alternatives to Detention in Europe?’ International Juvenile Justice Observatory Green Paper on Child-Friendly Justice, p. 21.

⁵ Ton Liefwaard (2019), ‘Deprivation of Liberty of Children’ in Ursula Kilkelly and Ton Liefwaard (eds) International Human Rights of Children, Springer Nature, p.331.

⁶ Carolyn Hamilton (2011), Guidance for Legislative Reform on Juvenile Justice, UNICEF, pp.91-92; United Nations Office on Drug and Crime (UNODC) (2013), Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary, United Nations (Model law on Juvenile Justice), p. 109.

⁷ UNODC, *ibid*.

⁸ John Tobin and Harry Hobbs (2019), ‘Article 37: Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty’ in John Tobin (ed), The UN Convention on the Rights of the Child: A Commentary, Oxford University Press, p. 1471.

⁹ Ursula Kilkelly, Louise Forde and Deirdre Malone (2016), Alternatives to Detention for Juvenile Offenders: Manual of Good Practices in Europe, International Juvenile Justice Observatory, p.13.

2.2 Detention or imprisonment for the shortest appropriate period

When detention or imprisonment of CICWL is inevitable, it must be for the shortest appropriate period.¹⁰ What constitutes the 'shortest appropriate period' has to be directly linked with the length of time considered to be appropriate to reintegrate the child and help him or her assume a constructive role in society.¹¹ Legal provisions providing that a sentence for a child shall be half of that of an adult or some other proportion do not fulfill this purpose. In all cases, legislation should require a court to determine the period needed to provide the child with the required intervention.¹²

Recognizing the harm caused to children by deprivation of liberty including its negative effects on their prospects for successful reintegration, the Committee on the Rights of the Child recommends states parties set a maximum penalty for CICWL that reflects the principle of the 'shortest appropriate period' as contained in Article 37 (b) of the CRC.¹³ Concerning the minimum sentence, the Committee considers mandatory minimum sentences as incompatible with the child justice principle of proportionality and with the requirement that detention shall be a measure of last resort and for the shortest appropriate period, and recommends that courts should start with a clean slate.

To ensure observance of the principle that detention or imprisonment should be for the shortest appropriate period, conditional release of children or parole needs to be entrenched in the national child justice system. The Beijing Rules explicitly recognize the early release of children from detention centers¹⁴ upon evidence of satisfactory progress towards rehabilitation. This applies also to a child who had been deemed dangerous

¹⁰ Convention on the Rights of the Child, adopted on 20 November 1989, entered into force 2 September 1990, resolution 44/25, Art. 37(b); Beijing Rules, Rule 17.1 (b) & (c) and 19; Havana Rules, Rules 1 and 2; Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) (Recommended by ECOSOC Res 1997/30), para. 18.

¹¹ Hamilton, *supra* note 6, p. 93; Eva Manco (2015), 'Detention of the Child in the Light of International Law- A Commentary on Article 37 of the United Nation Convention on the Rights of the Child', Amsterdam Law Forum, Vol.7, No. 1, p. 63; Liefwaard, *supra* note 5, p. 332.

¹² Hamilton, *supra* note 6, p. 93.

¹³ Committee on the Rights of the Child, General Comment No.24, Children's Rights in Child Justice System (18 September 2019) CRC/C/GC/24, para. 77.

¹⁴ Rule 28.1.

at the time of their institutionalization.¹⁵ The nature or seriousness of the offence is not the relevant consideration to release the child conditionally.

Although the CRC does not mention conditional release in its Articles 37 and 40, the Committee incidentally touched on this issue in its latest general comment under the rubric of ‘deprivation of liberty including post-trial incarceration’. In spite of its caption, the explanatory paragraphs talk much about pretrial detention.¹⁶ The Committee simply obliges states to provide regular opportunities to permit early release from custody¹⁷ without further delving into what should be the period to be served before release or the interval of time for review; the conditions that can be imposed while on probation; supervision and assistance to be provided for the child; and effects of breaches of the conditions.

3. Measures under the FDRE Criminal Code

3.1 Measures as first resort

After finding a child aged nine to fifteen years guilty of a crime, the court is required to order one of the measures incorporated in the Criminal Code depending on the circumstances of the child concerned and the nature of the crime. Article 157 of the Criminal Code provides that:

In all cases where a crime provided by the criminal law or the Law of Petty Offences has been committed by a [child] between the ages of nine and fifteen years (Art. 53), the Court shall order one of the following measures having regard to the general provisions defining the special purpose to be achieved (Art. 55) and after having ordered all necessary inquiries for its information and guidance (Art. 54).

The word ‘shall’ in this provision indicates that it is mandatory to impose one of the measures¹⁸ provided in the Code. This provision, when read together with Article 166 of the same Code, indicates that imposition of one of the measures is a measure of first resort irrespective of the gravity of the crime.

¹⁵ Commentary to Rule 28.1 of the Beijing Rules; emphasis added.

¹⁶ Committee on the Rights of the Child, General Comment No. 24, paras. 82-88.

¹⁷ *Id.*, para. 88.

¹⁸ Nonetheless, a combination of reprimand and other measures can be ordered. See Article 160 (2) of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proc. No. 414.

Unlike in the repealed 1957 Penal Code (Art. 161), the term 'law of petty offences' is omitted in the Amharic version which may send an impression that the measures only apply to ordinary crimes. This is not, however, the case because the Code of Petty Offences recognizes school or home arrest (Art. 750 (2)).¹⁹ In addition, the nature of some measures justifies their applicability to a child who commits petty offences. In this regard, it is possible to argue that reprimand and admission to curative institution can apply to a convicted child who committed petty offences. This is because it is proper to reprimand a child who transgresses the code of petty offences.

Admission to a curative institution is required when the condition of a child requires treatment due to his/her mental development, health, or addiction to drugs or other substances.²⁰ Therefore, there is no reason to exclude this measure where a child commits petty offences. I argue that the rest of the measures (corrective detention and supervised education) do not apply to petty offences because corrective detention is applicable for serious crimes (Art. 162, Amharic version), and supervised education results in the removal of the child from his/her family, which should be a measure of last resort²¹, and handed to a relative (Art.159 (1)), second alinea).

3.2 Admission to curative institution

This measure (of admission to a curative institution) in accordance with Article 158 of the Criminal Code applies to a child whose condition requires treatment and where s/he is feeble-minded, abnormally arrested in his development, suffering from a mental disease, epileptic or addicted to drink, abuse of narcotic and psychotropic substances or other plants with similar effect. The court shall order admission to a suitable institution where s/he shall receive the medical care required by his/her condition. This provision must be read together with Articles 48, 49, and Articles 129 and that follow it. That means, for a child to be subject to this measure, they²² must be responsible for their actions. In other words, the underlying conditions mentioned in Article 158 must not deprive of their faculty. The child must at least be partially responsible. This is because, according to Article 53(2) of

¹⁹ However, as argued below in this paper, in light of the principle that detention shall be a measure of last resort, home arrest shall not be a measure of first resort for ordinary crimes, let alone for petty offences.

²⁰ See Article 158 of the Criminal Code.

²¹ Beijing Rules, Rule 18.2.

²² Singular they/ their/ them etc. is used in this article to avoid repeated usage of his/her, etc.

the Criminal Code, the measures including this cannot be ordered unless the child is convicted.

3.3 Supervised education²³

If the child is morally abandoned or is in need of care and protection or is exposed to the danger of corruption or is corrupted, measures for their education under the supervision of their relatives, or any reliable person or organization shall be ordered. As the term 'shall' indicates, ordering such measures is mandatory. This indicates the protective and rehabilitative approach taken by the Ethiopian criminal justice system. It is the condition of the child that matters here. Thus, one may argue that this measure is applicable irrespective of the nature of the crime.

The measure does not necessarily entail requiring the child to attend regular education. This is because requiring the child to regularly attend school is one of the conditions that may be attendant to the original measure as provided under sub-article 2 of the same provision. If that is the case, the question is what kind of education or measure can be taken against a child found in the situations mentioned in the provision? I argue that the education that is envisaged is a kind of moral and ethical education under the supervision and care of the above-mentioned persons or institution. This can be inferred from the situation of the child in which s/he is found i.e. morally abandoned or not properly reared or exposed to moral corruption (corrupted).

That means if a child is in such situation, the proper response is to place them under the care and supervision of the supervisors and receive moral education, and be properly reared to address the causes of criminality. To that effect, as a condition, a child may be required to regularly attend a school or undergo apprenticeship pursuant to sub-article 2. This can be inferred from the Amharic version of sub-article 1 which includes 'proper upbringing' as an element of the measure and paragraph 3 of the same sub-article that obliges the supervisors to ensure the good behavior of the child.

Requiring the child to attend school regularly is possible if the child who was/is attending school fails to entirely or regularly do so. The term 'regularly' indicates that the child has had access to education previously. On the other hand, an order to undergo apprenticeship can work for those who have no access to education at all.

Another issue as regards the order of attending school or apprenticeship is who should cover the educational/apprenticeship expenses if the child had

²³ Id., Art. 159.

stopped the education/was out of school due to poverty. Is it the government or supervisors that are obliged cover the cost? As can be inferred from the obligation of the supervisors stated in the same provision they are required to undertake to see to the good behavior of the child. Though the provision also provides that if relatives are incapable, the child shall be entrusted to another person, the term 'incapable' refers to their legal capacity to discharge the above-stated obligation and not to any financial capacity. This can be inferred from the Amharic version, which does not mention incapability to ensure the child's education as used in the English version.

The child shall be entrusted either to relatives or if s/he has no relative/s or if the latter are proved to be incapable of ensuring the child's education²⁴, the child shall be entrusted to a person (guardian or protector), a reliable person, or organization for the education and protection of children.²⁵ The supervisors shall undertake in writing before the court that they will, under their responsibility, see to the good behavior of the child entrusted to them.²⁶ The local supervisory organization mentioned in Article 208 of the Criminal Code shall be responsible for the control of the measure.²⁷

Another relevant issue relates to why the provision deprives the child of family care without indicating the absence of parents or legal guardians of the child or their incapability or unworthiness to discharge the obligation of guardianship and care of the child. This is because; the fact that the child is morally abandoned or not properly brought up does not necessarily mean that the child has no parents or guardians. On the contrary, the term 'morally abandoned' or 'not properly brought up' indicates that the child has parents who have abandoned their child or fail to provide proper guidance towards proper upbringing. This is because the proper upbringing of a child is the primary duty of parents.

In line with this interpretation, the provision needs to indicate whether the child has parents and their incapability or unworthiness to continue in their guardianship and that it is necessary to deprive the child of his family environment after hearing his/her view. A step must be taken to entrust this obligation to parents under a court order and when it is in the best interest of the child, instead of placing the child under the supervision of outsiders.

²⁴ This term is omitted in the Amharic version and seems to refer to the incapability of ensuring the good behavior of the child, which is the principal obligation of the supervisors.

²⁵ Criminal Code, Art.159 (1), second alinea.

²⁶ Id., third alinea.

²⁷ Id., fourth alinea

Entrusting the child without these safeguards is against the principles and aims of child rights/justice standards. That is, a child should not be deprived of a family environment unless it is necessary for the interest of the child.²⁸

Furthermore, it is not clear whether these persons (relatives and other reliable persons) are duty-bound to take the responsibility of caring and supervising the child. It can be contended that other reliable persons cannot be obliged to do so as it is unlikely for the court to require them to take the responsibility of supervising the good behavior of the child whom such persons do not know. Relatives may on the other hand be obliged to take responsibility. Nonetheless, entrusting a child to unwilling relatives will, in the end, result in failure of the measure unless it is backed by a stringent liability for failing to do so.²⁹

3.4 Reprimand; Censure³⁰

This measure will be imposed where it seems appropriate and designed to produce good results having regard to the child's capacity of understanding and the non-serious nature of the crime or the circumstances of its commission. The measure requires the court to direct the attention of the child to the consequences of their act and appeal to their sense of duty and the determination to be of good behavior in the future. It may also be coupled with any other penalty or measure when the court considers it expedient to do so. By virtue of this provision, the Ethiopian criminal justice system recognizes the imposition of more than one measure, and measure and penalty. Therefore, if the court considers it expedient, a reprimand may be ordered together with a measure of supervised education, school or home arrest or with a measure of admission to a corrective institution.

This measure applies to crimes that are not serious in gravity. In other words, it is applicable for minor crimes (indicated in the Amharic version). Nonetheless, it is not clear what crimes constitute 'minor' for this purpose. In the face of such silence, reference can be made to Article 89 of the Criminal Code which defines minor crimes as those that entail simple imprisonment not exceeding three months or fine not exceeding One Thousand Birr. This provision is found in Book II of the Code that deals with the determination of punishments and measures, and in the section that

²⁸ Beijing Rules, Rule 18.2; Penal Reform International & Interagency Panel on Juvenile Justice (2012), Ten-Point Plan for Fair and Effective Criminal Justice for Children, p. 1; Commentary to the Model Law on Juvenile Justice pp.105-106.

²⁹ A recall or admonishment is the only measure that can be taken against the supervisors; see Art. 159 (3).

³⁰ Criminal Code, Art.160.

deals with general provisions applicable for both adult and child justice cases. The fact that the Code then deals with punishments for each group of the offender (adult and children) in separate sections supports this interpretation.

Nonetheless, applying the Article 89 parameter to children is not tenable for the following reasons. First, applying the same measurement for the gravity (or minor nature) of the crime to children and providing that crimes of the nature defined in Article 89 committed by children entails reprimand is redundant. This is because the punishment in both cases is a reprimand. In other words, stating the minor nature of the crime for children in view of the definition under Article 89 with the same punishment (and the absence of cross-reference to this Article) indicates that the gravity of the crime mentioned under Article 160 is different from the one in Article 89.

Second, since a child justice system is premised on the favorable treatment of children compared to adults in a similar situation, one can challenge this interpretation and recommend for courts to apply the measure to crimes of a nature higher in gravity than the ones mentioned under Article 89. For this reason and in the best interest of the child, I argue that courts shall use crimes that entail simple imprisonment as a benchmark.

3.5 School or home arrest³¹

In cases of crimes of small gravity and³² when the child seems likely to reform, the court shall³³ order that they be kept at school or in their home during free hours or holidays and perform a specific task adapted to their age and circumstances. In light of strict interpretation of criminal law, the conjunction 'or' excludes concurrent imposition of both school and home arrest. Further, imposing both at a time unduly intrudes on the liberty of the child.

The term 'holidays' seems to refer to public holidays. In the Amharic version, however, this word is translated as rest days, which refers to both weekends and holidays. According to this provision, a child sentenced to school arrest shall be kept at a school during free time. The term 'kept at a school' indicates requiring the child not to leave the compound of the school, and not requiring them to stay in the class during breaks. Hence, this measure only works for schools that allow their students to go out of the

³¹ Id., Art.161.

³² Emphasis added. The conjunction 'and' is used in the Amharic version.

³³ Indicated in the Amharic version.

compound and the word ‘compound’ applies to the entire area which includes all open spaces in addition to building premises.

According to the Amharic version, if the conditions are fulfilled, the court must order this measure. It is not, however, clear as to what type of crime committed under what circumstances would qualify as crimes of ‘small gravity’. Nonetheless, as mentioned above, it may include petty offences prohibited under Part of the Criminal Code that embodies the Code of Petty Offences. Moreover, one may invoke Article 89 of the Criminal Code. However, this can be challenged by virtue of the principle of equality and favorable treatment of children. This is because, while the penalty for minor crimes to be imposed on adults under Article 89 is reprimand, the measure is home or school arrest for children. Home or school arrest results in interference in the liberty of the child while reprimand does not, which is not compatible with the principles of the child justice system. Therefore, crimes of small gravity for home or school arrest shall include crimes higher in gravity than the ones mentioned under Article 89 of the Criminal Code.

As indicated in the case of reprimand, the court can use the definition of crimes that would entail simple imprisonment as a parameter. According to Article 106, simple imprisonment may extend from 10 days to three years, and in exceptional cases, to five years. Hence, courts shall use these Articles (89 and 106) together in that the minimum term of simple imprisonment for school or home arrest should not be lower than three months. For crimes punishable below this, the court may order reprimand, which is less intrusive than school or home arrest. This does not mean that reprimand should only be ordered for this degree of crime i.e. if the court deems that it would produce a good result; it may reprimand a child who committed a crime punishable with a term of imprisonment exceeding three months.

The other parameter that can be used to order school or home arrest, or reprimand is the personal circumstances of a child. It is to be noted that a measure of school or home arrest can be imposed for students or children who have homes. The stipulation that the child shall be arrested in the school during their free time supports this interpretation. However, the child who committed crimes of the nature defined above may not be a student nor have a home. In such a case, the court may reprimand the child if it thinks it would produce a good result. The fact that the child is out of school does not necessarily mean that s/he is corrupted or abandoned; the child may be doing life-supporting activities like shoe shining or selling chewing gum, biscuit, mobile cards, and so forth in the streets. Home arrest can thus be unproductive to such child’s survival, and hence reprimanding them would suffice.

Considering measures and penalties from the lightest to the most severe ones is the duty of courts as provided under Article 88(3) of the Criminal Code. Thus, having (or not having) a home should not be the only consideration in determining either of the two measures. These situations which children can be found in lead one to suggest for a provision to include the appropriateness of home arrest, instead of merely considering its rehabilitative capacity.

3.6 Admission to corrective institution³⁴

A child may be admitted to a special institution for correction and rehabilitation taking into account the bad character, antecedents or disposition of the child and the gravity of the crime and the circumstances under which it was committed.³⁵ The child shall there receive the general moral and vocational education, and other skills needed to adapt him/her to social life and the exercise of an honest activity.³⁶

The term 'may' implies that the imposition of this measure is not mandatory. The question then is what measure could a court, exercising this discretion, impose on a child under these conditions? This provision is distinct from the previous provisions. Unlike the provisions of Articles 160 and 161 which apply to minor crimes, it deals with serious crimes. Similarly, unlike Article 159 which deals with a child who is morally abandoned, in need of care and protection or exposed to corruption or corrupted, Article 162 applies to a child with a bad character or antecedent who has committed a serious crime. Hence, in the face of the presence of an exhaustive list of measures, it is not clear as to what measure could the court impose if it wants to exercise the discretion envisaged by the term 'may'.

This vagueness can be ameliorated by examining the status of the suspension of penalty under the Criminal Code. Suspension of penalty is provided under the 'common provisions' i.e. provisions common to measures and penalties. This can be interpreted as making suspension of penalty both a measure of first and last resort depending on the case.³⁷ The question again is when it should be a measure of first resort when pitted against this measure (corrective detention).

Its nature of first resort can be justified by taking the rule of the child justice system when it comes to dispositions. In the international child

³⁴ Id., Art.162.

³⁵ Emphasis added

³⁶ Emphasis added; and included in the Amharic version.

³⁷ For more, see *infra*, section 4.

justice system, detention or imprisonment shall be a measure of last resort. Therefore, suspension of imprisonment shall be ordered as a first measure instead of sentencing a child to corrective detention. In other words, as the provision of the Criminal Code stands, deprivation of liberty of the child in the form of corrective detention shall be confined to serious cases (Amharic version)³⁸, and in other cases, suspension can be ordered. It can be argued that the fact that the law sets a limit on the nature of a crime, the sentence of which can be suspended (Art. 171) –while not doing the same for a measure of corrective detention (Art. 162)– is informed by the difference in the effect of the measures on the liberty of the child. That means, if a measure would deprive a child of his/her liberty, no limit on the seriousness of the crime may be made while the contrary may be.

Then, the corollary issue is how serious the crime should be to entail admission to a corrective institution and what crimes would entail suspension of a sentence. The provision does not make any qualification as to the measurement of the seriousness of the crime for corrective detention. Hence, our recourse is Article 108 of the Criminal Code which deals with rigorous imprisonment and what sorts of crimes deserve it. According to this provision, rigorous imprisonment applies only to crimes of a very grave nature committed by criminals who are particularly dangerous to society. It extends from one to twenty five years, and in exceptional cases, to life imprisonment. Therefore, it can be argued that the court shall use this as a benchmark to sentence a child to corrective detention. In this regard, Rule 17.1(c) of the Beijing Rules provides that children should not be deprived of their liberty unless they are found guilty of a violent crime against a person.

However, the court needs to consult Article 171 of the Criminal Code to choose between corrective detention and suspension of sentence. This provision puts a limitation in that crimes punishable with rigorous imprisonment for ten or more or with death are not eligible for suspension. Hence, for choosing between corrective detention and suspension, the benchmark of seriousness should be the one provided under Article 171; and it is to be noted that for crimes that fall in this category, the court may impose a measure of corrective detention³⁹ and for those crimes punishable with rigorous imprisonment below the stated threshold, a suspended sentence could be ordered.

³⁸ By this interpretation, the author is not justifying the provision of the code that makes detention in corrective centers a measure of first resort.

³⁹ See Elias N. Stebek (2013), *Principles of Ethiopian Criminal Law* (Addis Ababa), p. 223.

3.7 Measures and the principle of 'Detention as a last resort'

According to Article 37(b) of the CRC, detention of a child shall be a measure of last resort. In furtherance of this rule, Article 40(4) of the same Convention requires states to make available a wide variety of non-institutional dispositions. The Criminal Code does not explicitly restate these principles. The term detention here is used to refer to other forms of deprivation other than imprisonment as used in the CRC.

The measures envisaged in the Code (particularly the measure of home arrest) do not comply with this principle. According to the human rights committee (HRC), deprivation of liberty involves a severe restriction of motion within a narrower space than mere interference with the liberty of movement and includes, *inter alia*, house arrest.⁴⁰ The measure of admission to a corrective institution seems to satisfy the test by requiring bad character or antecedent of the child as a condition in addition to the seriousness of the crime. That means it will not be imposed on a child who comes in conflict with the law for the first time irrespective of the seriousness of the crime, as s/he has no bad antecedent. However, the lack of precision on what constitutes bad character or antecedent would make the measure fail the test. It may not necessarily mean the presence of prior conviction. In that sense, a child with a history of bad character may face this measure even though s/he comes in conflict with the law for the first time by committing a serious crime.

As discussed above, the imposition of corrective detention is not mandatory. However, the type of measure that the court may impose is not clear in the Code. The only measure that relates to corrective detention is supervised education as it can be imposed for even serious crimes, and the character of the child is a determining factor. However, the condition of the child differs in the two cases. In the case of Article 159, the child is exposed to the risk of developing a bad character; while in the case of Article 162, the child has already developed that character. The other measures cannot apply as they apply for minor crimes or to a child in need of medical treatment.

As indicated earlier, courts in the exercise of their discretion may suspend a sentence as a measure of first resort instead of sending the child to a corrective institution. However, it is not clear in the law when to impose corrective detention and when to suspend imprisonment. Therefore, the

⁴⁰ Human Rights Committee, General Comment No.35, Article 9 (Liberty and Security of a Person) (16 December 2014), CCPR/C/GC/35, para. 5.

failure of the laws to expressly state the last resort nature of deprivation of liberty, the exhaustive list of measures under the Code, and the lack of clear demarcation between scenarios that would warrant corrective detention and suspension of sentence will not enable the measure to be a measure of last resort as courts wishing to exercise their discretion would not foresee any other measure than imposing corrective detention. This is the case when a child who is not under one of the conditions mentioned under Article 159 commits a crime punishable with ten or more years in which suspension is not allowed as provided under Article 171.

3.8 Duration of the measures and the principle of ‘Detention for the shortest appropriate period’

Measures for the treatment (admission to a curative institution) and supervised education shall ‘be applied for such time as is deemed necessary by the medical or supervisory authority’ and may continue in force until the child attains 18 years old. ‘They shall cease to be applied when, in the opinion of the responsible authority, they have achieved their purpose’ (Art.163 (1)). In other words, these measures are enforceable until they achieve their goal but not after the child attains majority. The justification here is the inability of the court to fix the duration as the measures are dependent on the personal circumstances of the child such as mental state, addiction, moral abandonment or exposure to a danger of corruption or being corrupted. The court cannot reasonably forecast when the measures will address the root causes of criminality.

This position of the law can adversely affect the liberty of the child unless a caveat is made. If, for example, a child aged ten is sentenced to a measure of curative detention, this period will continue until the authority deems appropriate towards achieving its purpose or until the child attains 18 years of age. Thus, the child may be in this institution for eight years, which is too long and would fail to fulfill the test of ‘shortest appropriate period’.

Moreover, the Code does not entrust the court with the power to supervise the enforcement of the measures or review them except that it is authorized to vary the orders upon the recommendation of the management of the institution (Art.164). Thus, the measure shall continue until the authority considers that it has achieved its purpose and apply to the court for variation⁴¹ or until the child reaches 18 years of age. This will subject children to unsupervised prolonged detention.

⁴¹ This is more explicit in the Amharic version of Article 164 (1), second alinea.

This risk can be eased to some extent by Article 180 of the CPC which allows the court to vary the order on its initiation. However, this provision is not a guarantee unless the law specifically mandates the court to supervise the enforcement of this measure by, for instance, requiring the supervising authorities to regularly report the status of the child under their mandate.

The duration of admission to a corrective institution, as a general rule, is from one to five years.⁴² The phrase 'as a general rule' signifies the possibility of releasing the child before serving the full length (conditional release) and review of the duration by the court through variation so that the duration may be reduced. This period shall in no case extend beyond the coming to age of the child. The question, here, is what does this mean? (i) Does it mean that the detention ends after the child attains majority irrespective of its result on the reformation of the child? Or, (ii) Does it mean that if the period extends beyond the coming to age of the child, the child will be transferred to penitentiary detention or fined if s/he is not completely reformed?

The maximum period to be served in corrective detention is five years unless the child is released conditionally⁴³ or unless the sentence is varied and reduced by the court under Article 163 of the Criminal Code and/or Article 180 of the Criminal Procedure Code. Given the interpretation of 'serious crimes' that this author gives for corrective detention, the period of corrective detention can be considered as the 'shortest period' and complies with the principle as enshrined under the CRC.

A child under corrective detention can be released conditionally after serving one year (Art. 163(2)). The precondition of serving one year of detention is favorable to children in some respect where the detention period is longer compared to adult cases where two-thirds of the imprisonment must be served (Art. 202). Fixing the minimum period to be served at one year may also have negative repercussions. For instance, a child sentenced to one-year detention may not be released conditionally although the requirements set down under Article 202 are fulfilled. This may be regrettable given the principle of 'detention for the shortest appropriate period' recognized under international standards governing child justice.

The duration of school or home arrest is not addressed in Article 164 of the Criminal Code; rather it is provided in Article 161. Accordingly, the Code requires the court to 'determine the duration of the restraint in a

⁴² Criminal Code, Art. 163(2).

⁴³ *Id.*, third alinea.

manner appropriate to the circumstances of the case and the degree of gravity of the crime committed'. However, one may ask why the Code makes it open for the court to determine while it fixes the duration of corrective measure.

School or home arrest deprives a child of his/her liberty and thus, it should be for the shortest appropriate period. It is not specified whether the duration should be fixed in days, months or hours. It is left to the discretion of the court to choose one. However, it must be noted that fixing the duration of home arrest in days is not appropriate for the reason that a child should not be required to stay the whole day in the home.⁴⁴

4. Penalties

4.1 The Principle: Penalties as measures of last resort

Article 166 of the Criminal Code provides that the court may sentence a child to one of the penalties (fine, corrective detention or imprisonment) where measures have been applied and have failed and after having ordered such inquiries to be made as may seem necessary. However, a child within the age of nine to fifteen years will not be subject to one of these penalties, irrespective of the seriousness of the crime⁴⁵, before s/he is first subjected to one of the measures and failed to reform.⁴⁶ The plural term 'measures' and the phrase 'have been applied and failed' indicate that penalties are measures of last resort. That means, the court shall try the available measures (one after the other in the same case or a different case, as a case may be) before imposing a penalty on a child.⁴⁷

What constitutes failure is imprecise. Does it include a break of conditions for instance attached to supervised education? Does it only refer to commission of a further crime while undergoing or after having undergone the measure? The Amharic version seems to include a breach of conditions or any other faults as it stipulates for the court to determine the degree of fault. Had the Code intended to confine 'failure of the measures' to the commission of a new crime, it would have explicitly done so. For instance, punishing a child who is undergoing measures (such as school or home arrest) for breach of conditions or even for breach of the measure itself or who has undergone one of the measures may invite the issue of double

⁴⁴ UNODC, *supra* note 6, p. 38.

⁴⁵ Stanley Z. Fisher (1970), 'Criminal Procedure for Juvenile Offenders in Ethiopia', *Journal of Ethiopian Law*, Vol.7, No.1, p. 122.

⁴⁶ See also Dejene Girma (2013), *A Handbook on the Criminal Code of Ethiopia*, p. 78.

⁴⁷ *Ibid.*

jeopardy. However, the stipulation that children sentenced to one of the measures are not considered as punished under the criminal law (Art. 165) may be used in defense of this position.

Fisher, on the other hand, argued that failure means the commission of a new crime and conviction for that crime.⁴⁸ This seems to exclude breach of conditions of measures or any other fault from being considered as an indication of the failure of the measure. However, it may be inconceivable not to punish a child if, s/he persists in the same behavior in spite of different measures to ensure that the child observes the measure imposed such as supervised education, increasing the duration of the measures, or changing one measure for the other (e.g. reprimand with home or school arrest supervised education to home arrest). In such a case, a court would punish a child by imprisonment or corrective detention, if the first crime falls under Article 168, or to fine for other cases. If such a course is not taken, the role of the child justice system will solely be confined to trying to reform the child by imposing one of the measures. But, it must use punishments as a measure of last resort to ensure the security of others as it should not ignore the security of the society.

Whether the failure is due to breach of conditions or commission of a new crime, one thing that must be clear from the principle of 'detention or imprisonment as a measure of last resort' and the provision of Article 166 is that the first failure of the measure should not necessarily result in the automatic imposition of a custodial sentence.⁴⁹ If a single failure to comply with the condition of the measures or commission of another crime leads to automatic imposition of custodial measures, detention is taken as a 'second resort', not as a last resort. It is for this reason that Article 166 of the Criminal Code (Amharic version) gives the court the power to assess the gravity of the fault. The fact that a child has committed a new crime while undergoing or after having undergone a measure or committed any other fault is not by itself an indication of the failure of the measure. This is because the circumstances under which each measure is imposed are different.

For instance, a child who committed a crime with a mental problem and is admitted to a curative institution may commit a crime after s/he recovers from the trauma. If after release the child becomes an addict, for instance, to

⁴⁸ Fisher, *supra* note 45, p. 121.

⁴⁹ See Model Law on Juvenile Justice, Art.54 (13); United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), adopted 14 December 1990, Resolution 45/110, Rule 14.3.

drink or other substances (Art. 158) s/he should be given another chance of being subjected to the same measure. Similarly, a child who served corrective detention or who served a measure of supervised education may later commit a crime and be in need of treatment due to addiction to a drink or other substances. In such cases, the child shall be admitted to a curative institution instead of being fined or imprisoned. In short, the circumstances under which s/he committed the first and the later crime shall be the same or at least similar. Even the seriousness of the crime is not a sole consideration to rule that the measure has failed. This is clearly indicated under the chapeau of Article 168(1), and 168(1)(b) in that for the child to be imprisoned for the commission of such serious crime, s/he must be incorrigible and a cause of insecurity to others.

Further, when a child who has been admitted to a corrective institution commits another crime of minor nature, it is difficult to conceive that the measure has failed to reform the child. This is because reformation may not necessarily mean that the child will never commit a crime in the future. The fact that the subsequent crime is of a minor nature may, on the contrary, be taken as a success of the first measure in reforming the child to some extent. In such a case, the court may try another measure instead of sending the child to penitentiary detention.

The most extreme effort to comply with the principle of ‘detention as a last resort’ may also require the court to give a second chance to a child by subjecting them to similar measures for the new crime. In this regard, Fisher also argued that the first conviction for the crime (after serving a measure or while undergoing it) will not result in the imposition of a penalty.⁵⁰ In such a case, a child may be subjected to similar measures with stringent conditions. This is typically the case for supervised education in that if the child was subject to lenient conditions, more stringent conditions may be attached if the court believes that the first measure with lenient conditions failed to reform the child.

In exercising the discretion given under Article 166 (as the term ‘*may*’ indicates), courts must take into account all these caveats/considerations to make imprisonment or detention a measure of last resort in the Ethiopian criminal justice system.

⁵⁰ *Supra* note 45, p.120.

4.2 Fine⁵¹

Fine is one of the penalties that can be imposed on CICWL based on the principle set under Article 166 of the Criminal Code. That means fine is a measure of last resort, which is difficult to justify. Given the fact that there are measures that deprive a child of his/her liberty and are measures of first resort such as corrective detention and home or school arrest, there is no foreseeable reason to make fine that does not have such effect a measure of last resort. Is there any justification to sentence a child to corrective detention for five years even though s/he is capable to pay the fine and will understand its imposition? Under international child rights/justice standards including the Tokyo Rules (Rule 8(2)(d)), fine is included as a non-custodial measure that states should make available in their child justice laws.

It may be imposed in cases where the child is capable of paying a fine and of realizing the reason for its imposition (Art. 167(1)). I argue that fine can be imposed on a child for a crime even though the Special Part of the Code does not provide fine as a penalty. If it shall be imposed on a child when the Special Part provides fine as a penalty, there is no special treatment accorded to a child according to the general tenet of the child justice system. It is to be noted that special treatment is accorded to children in case of imprisonment since the minimum duration is one year with regard to crime that is punishable with a minimum of ten years. Hence, similar special treatment concerning fine is expected.

An interpretation that fine can be imposed only when the special part provides so works against the child because fine is a penalty of first resort for adults. Hence, this author contends that the phrase 'keeping the rule that fine shall be paid when the special part provides so' is meant to say that the provision (Art 167) does not intend to maintain the rule that fine shall be provided as a penalty in the special part.

One may tend to counter argue by invoking the principle of legality in that courts shall not impose a penalty not provided by law (special part). However, the provisions of the Code from Articles 157-177 are special parts for children's cases. This is because, despite the violation of the special part provision that provides a specified penalty, we cannot impose it on a child; rather we impose one of the measures. Even for imprisonment, the duration is lower than what the crime could entail. The same can be said about fine in that Article 167 is a special provision and can be imposed even though fine is not provided as a penalty in the provision violated.

⁵¹ Criminal Code, Art.167.

Further support for this line of interpretation can be derived from the reading of paragraph 2 of Article 167(1) which provides that fine may be imposed in addition to other penalties. This sub-provision does not cross-refer to the adult counterpart provisions of Articles 91 and 92(2) that govern the situations where fine can be imposed in addition to imprisonment. This absence of cross-reference indicates that the rule is special to the child justice system. Had the intention been to confine the payment of fine only where the special part provides so, there would have been no need to provide that fine may be imposed in addition to other penalties –as there are many provisions in the special part of the Code that provide fine as an additional penalty to imprisonment.⁵²

Given the above argument, an issue arises regarding the crimes on which fine can be imposed. Article 167 does not indicate the nature of the crime for which a child may be fined. Thus, it is apparent to argue that fine can be imposed even for serious crimes. However, the Amharic version of Article 168 which makes the imposition of corrective detention or imprisonment mandatory may entail a qualified interpretation. Therefore, according to this version, fine may not be imposed for a crime punishable with ten or more years. Further support to this line of argument can be inferred from the reading of the same Article that does not provide fine as an alternative penalty where a child in corrective detention attains majority or s/he is not reformed (Art. 168(2), second alinea). The alternative in such a case is transfer to prison. This leads to an interpretation that this position of the provision is informed by the seriousness of the crime.

Fine may be imposed in addition to imprisonment, corrective detention, or probation as probation can be a measure of last resort because it falls in the section titled ‘common provisions’. However, cumulative imposition of fine and imprisonment can be criticized from the perspective of the principle of ‘minimum’ intervention. Combining non-custodial measures, however, is allowed under the Beijing Rules (Rule 18.1).

Given the above argument, the issue of when to impose fine with other penalties is worth mentioning. Unlike the adult counterpart which envisages that it is the special part that can provide for fine as an alternative to imprisonment (Art. 91) and 92 (2), Article 167(1) makes the possibility of fine open thereby leaving it to the discretion of the court which can create differential treatment. The provision does not provide guidance as to when the court would impose fine in addition to imprisonment except that the

⁵² See for instance, Arts. 350, 351, 353 (1), 366 (1), 371 (1), 384 (1), 385 (2), 391, 393, 447, 448 (2), 466 (1), 478 (1) & (2), 481(1), 488 (2), etc.

child is capable of paying and understands the reason for its imposition. In other words, unlike Articles 91 and 92(2) of the Criminal Code that governs the situation where fine may be imposed in addition to imprisonment, Art. 167(1) does not specify the circumstances under which it can be imposed with other penalties. Nor does it cross-refer to Articles 91 and 92 (2).

4.3 Admission to corrective institution

Article 168(1)(a) of the Criminal Code states that when the child “has committed a serious crime which is normally punishable with a term of rigorous imprisonment of ten years or more or with death, the Court [shall]⁵³ order him to be sent” to “a corrective institution (Art. 162) where special measure for safety, segregation or discipline can be applied to him in the general interest.” This is the second type of penalty available for children in the Ethiopian criminal justice system. Reading this provision with Article 166 and reference to Article 162 seems to imply that the child must not be subject to this measure earlier as there is no point to send the child back to the same institution which failed to reform them. However, although the same institution is referred to under this Article and Article 162, the manner of enforcement of the detention is different because under this Article a child can be subject to special measure for safety, discipline or segregation.

With regard to the length of this detention, an issue arises whether it shall be from one to five years as per Article 163(2), or from one to ten years as provided under Article 168(2). According to Article 168(2), ‘the court shall determine the period of detention [...]’ in which case the same term ‘detention’ is used to refer to penitentiary detention in its sub-article 1(b). This is more explicit in the Amharic version. Therefore, the duration mentioned in sub-article 2 does not apply to corrective detention, and the duration stated under Article 163(2) applies to it.

4.4 Imprisonment

4.4.1 Imprisonment as a last resort

Under the Ethiopian criminal justice system, imprisonment of a child can happen in two cases. First, when the crime is punishable with rigorous imprisonment of ten or more or with death and if the child is incorrigible and is likely to be a cause of trouble, insecurity or corruption to others (Art. 168(1)(b). This condition illuminates what constitutes ‘failure of a measure’ under Article 166. Thus, this provision, when read together with the principle set under 166, indicates that imprisonment is a measure of last

⁵³ Provided in the Amharic version.

resort. Article 168(1)(b) pushes the principle one step further by requiring that crime shall be serious. In other words, a child will not be imprisoned after the failure of the measures unless the crime is the one provided under this Article.

Other children must be sent to corrective detention, and will be transferred to penitentiary detention if their conduct or the danger they constitute renders such a measure necessary (Art. 168(2), second alinea). This is the second scenario to imprison a child. This provision clarifies the effort made by the Ethiopian criminal justice system to make imprisonment a measure of last resort. Accordingly, a child who has been subjected to one of the measures which failed to reform them will not face imprisonment before being sentenced to a corrective institution as per Article 168(1)(a). This effort is more visible when a child commits a crime defined under Article 168 and is sentenced to a corrective detention as a first resort while the child is not under one of the circumstances mentioned in Article 158 or 159. If this measure fails to reform the child, there are no other measures to try as the seriousness of the crime excludes them. Yet, the child must not be transferred to prison immediately before being subjected to the measure of discipline or segregation in the same center (Art. 168(1)(a)).

The transfer is mandatory as the word ‘shall’ indicates. This may be justified by the fact that the child has failed to be reformed at least for the second time. However, this may diminish the last resort nature of imprisonment for two reasons. First, the transfer is possible even before the child has served the detention period fixed by the court and without trying extension of the duration or imposing stringent conditions. Second, the criterion is too general and vague which is susceptible to misinterpretation.

The transfer is mandatory even upon the child’s attainment of majority and the period of detention extends beyond that period irrespective of the length of the time left. According to this provision, the result achieved is considered for the determination of the time to be served in prison, and not to decide whether the transfer is necessary. However, it is plausible to consider the result achieved in deciding whether a transfer is necessary if the child has shown good progress during their stay in the corrective center and if the time left is too short. Furthermore, if the time left is less than ten days, there is no need to transfer the child to prison as the minimum terms of simple imprisonment is ten days according to Article 106 of the Criminal Code.

4.4.2 Crimes that can entail imprisonment

The court shall⁵⁴ impose imprisonment when the child (as stated in Section 4.4.1) has committed a serious crime which is normally punishable with a rigorous imprisonment of ten years or more or with death, and if s/he is incorrigible and is likely to be a cause of trouble, insecurity or corruption to others (Art.168(1)(b)). In line with the interpretation of 'failure of measures' as including both a commission of a new crime and other faults, the crime which Article 168(1) refers to may be a new crime or the first crime to which a child was subjected to the measures that have failed. It does not include crimes that may be punishable by ten years or more like 'crimes punishable with rigorous imprisonment for not less than seven years'; 'not exceeding ten years'; 'not exceeding fifteen years'; and so forth. The terms of imprisonment shall be ten years or more.⁵⁵

To subject a child to corrective detention or imprisonment, the crime must be serious which is normally punishable with rigorous imprisonment for ten or more years, or with death. The question then is what course of action would be taken against a child who committed a lesser crime than those provided under Article 168(1). Depending on the case, fine and probation are the options. The other issue worth mentioning is when a child commits concurrent crimes both or all of which are punishable with a term of less than ten years. A question thus arises whether the punishment can be cumulated towards ten or more years (where two or more crimes punishable with less than ten years) are committed.

4.4.3 Imprisonment for the shortest appropriate period

The period of detention to be undergone under Article 168 shall be determined according to the gravity of the act committed and having regard to the age of the child at the time of the crime. It shall not be for less than one year and may extend to a period of ten years (Art. 168(2)). However, it is not clear whether the duration shall be kept the same irrespective of the number of crimes that the child has committed.

The crime is normally punishable by rigorous imprisonment of ten years or more or with death, and the Code, by fixing the minimum imprisonment to one year and a maximum to ten years, gives wide discretionary power to the court regarding the period of imprisonment. This helps in complying with the principle of 'detention for the shortest appropriate period'. Full

⁵⁴ According to the Amharic version.

⁵⁵ See, for example, Articles 240 (1) (b), 241, 247, 249 (2), 251, 252 (2), 269, 270, 275, 506 (5), 512 (1), 539 (1) & (2), 573 (3), 596 (3), 620 (3), 627 & 631 (1) (b).

compliance with this principle requires courts to equate the actual penalty stated under Article 168(1) to the one provided under Article 168(2). That is, one-year imprisonment shall be imposed for crimes punishable with ten years of rigorous imprisonment and the duration shall increase when the penalty increases and the maximum period of ten years shall be for crimes punishable with death.

Conditional release of a child is recognized under the Code (Art. 168(3)); and is a means to comply with the principle that imprisonment is for the shortest period. This provision simply cross-refers to Article 113 which again cross-refers to Article 202. This in other words means that there is no special privilege accorded to children and that the ordinary rules applicable to adults apply to children. For instance, a child has to serve two-thirds of the imprisonment before being conditionally released even though their behavior is significantly improved and warrants the assumption that s/he will be of good conduct when released. However, this position can be challenged by virtue of the principle of ‘detention for the shortest period’, and the negative effect of detention on children. For this reason, the law could have provided a different and lesser threshold of a served sentence for the child than Article 202.

In case of transfer from corrective detention, the period to be served in prison shall be determined by taking into account the time spent in the corrective institution and the results thereby obtained (Art. 168(2), third alinea). This is the case for both grounds of transfer, i.e., conduct of the child in question, and attainment of majority. The cumulative nature of these considerations indicates that the period to be served in prison may not always be equal to the time left at the time of the transfer. For instance, if the period of corrective detention left is one year, it does not mean that the period of imprisonment shall also be one year. It may be more or less than one year. This is because the provision requires courts to also consider the result achieved.

If the child’s pace of reform is fast during the corrective detention, the court may not order the child to serve the same period as left at the time of transfer due to attainment of majority. On the other hand, if the child was not reforming as expected during their stay in the corrective detention or if the child is acting in a way that warrants transfer to prison, the court may order the child to serve a period of imprisonment greater than what is left at the

time of transfer. In such a case, the length of period that the court can impose is not clear.⁵⁶

The difference in the regime under which corrective detention and imprisonment are undertaken is not provided as one consideration in determining the period to be served in prison after being transferred from corrective detention. As the name indicates, corrective centers are places where children are detained and re-educated to make them law-abiding citizens in the future. As such, they are not serving a punishment. On the other hand, prisons are places to enforce a sentence of imprisonment and it works in a way to achieve the purpose of criminal law by facilitating various purposes of punishment which include incapacitating convicted persons or making their punishment a lesson for others.

This does not, however, mean that reform and rehabilitation are not among the purposes of punishment. Yet, the core objective of corrective detention in the case of children in conflict with the law is different from the multi-tier purpose of punishment for other offenders. This difference in the condition of enforcement of the two detentions is particularly worth raising in case of transfer to prisons when a child attains majority. Therefore, consideration should have been paid to this difference without resort to equivalent conversion of the time left in corrective detention to a prison term.

5. Suspended Sentence (Probation)

Article 171 of the Criminal Code governs the suspension of sentences in child justice cases. It provides that:

The general rules regarding the suspension of the sentence or of its enforcement with submission for a specific time to a period of probation under supervision (Arts. 190-200) shall, as a general rule, remain applicable to [children] if the conditions for the success of such a measure seem to exist and subject to the rules concerning serious crimes as defined in Article 168.

The exception clause implies that crimes the sentence of which could not be suspended are those specified under Article 168 and the nature of crimes

⁵⁶ Nonetheless, increment of the period over the one left at the time of transfer is problematic when pitted against the principle of prohibition of double jeopardy, and given the difference in the regime of detention in corrective institution and prison.

indicated under Article 191 or 194 is not a parameter in this regard. This interpretation can be supported with two justifications. First, unless interpreted this way, the seriousness exception indicated under Article 171 would be redundant to the stipulation of Article 191 which provides that suspension is applicable for non-serious crimes. Second, the general rule – that children should be treated more favorably than adults– supports this interpretation and that a sentence of imprisonment for crimes not punishable with rigorous imprisonment for ten or more years or with death can be suspended provided that the other conditions are fulfilled.

By this, the Code makes a differential treatment for children by confining the exception –to this rule– to crimes of serious nature. However, when pitted against the rule of child justice that mandates the primacy of non-custodial measures (including probation) –irrespective of the nature of the crime– the Ethiopian criminal justice system fails this test by prohibiting the application of probation for all children and crimes as probation does not work for children who committed crimes punishable by rigorous imprisonment for ten years or more.

Nonetheless, it is not clear whether suspension of imprisonment in child cases is a measure of first or last resort in the Ethiopian criminal justice system.⁵⁷ The question is worth raising in the face of the dichotomy of ‘measures as first resort’ and ‘penalties as last resort’ as discussed above. To answer this question, let us first see the arrangement of the Code. Article 171 falls under the sub-heading, ‘common provisions’ that are common to both measures and penalties. This can be interpreted as making suspension both a measure of first resort and last resort depending on the circumstances. The question again is when it can be a measure of first resort when pitted against the measures and when can it be a last resort when pitted against imprisonment and fine.

Its first resort nature can be supported by the principle that detention shall be a measure of last resort which implies that suspending a sentence is more appropriate than ordering admission to a corrective center or home arrest. In other words, deprivation of liberty of the child (through home arrest, or corrective detention) should have been confined to serious cases⁵⁸, and in other cases, suspension can be ordered. Regrettably, however, home arrest applies for minor crimes in the Ethiopian criminal justice system.

⁵⁷ It is important to note that probation is one of the non-custodial measures in the Beijing and Tokyo Rules.

⁵⁸ By this interpretation, the author is not justifying the provision of the code that makes corrective detention as a measure of first resort.

It can be inferred from Article 171 that the provision excludes its applicability for serious crimes as defined under Article 168. In light of the absence of such limitation for the imposition of a measure of admission to a corrective institution (detention), this implies that the limitation is informed by this deference in effect on the liberty of the child (which again is informed by the principle of child justice), and not to indicate the secondary nature of the suspension. That means, if a measure would deprive a child of their liberty, no limit on the seriousness of the crime may be made while the contrary may be.

This article has briefly demarcated the scenarios that could warrant a measure of corrective detention *versus* suspension of penalty as a measure of first resort in the section that deals with the measure of corrective detention. We can further demarcate suspension *vis-à-vis* a measure of school or home arrest and reprimand.⁵⁹ It is stated that measures of school or home arrest and reprimand are applicable for a minor crime, which as has been argued above, extend up to five years of simple imprisonment under Article 106 of the Criminal Code and the need to accord children special protection over adults.

Likewise, it is argued that suspension of sentence shall apply to all crimes that fall below the threshold stated under Article 168 via Article 171. However, the Criminal Code provisions relating to suspension of a sentence should not apply to crimes that would entail a measure of school or home arrest or reprimand. In other words, suspension of a sentence shall not apply to crimes punishable by simple imprisonment, and this again means that it should be confined to crimes punishable with rigorous imprisonment which are below the threshold set under Article 171.

This interpretation can be supported by Article 88(3) of the Code that mandates courts to try from the light to the severe punishments because measures do not entail criminal conviction (Art. 165) while probation (suspension of enforcement of penalty) does so. This implies that measures are lighter than probation. This argument is made based on the Code's provision even though the author, as argued earlier, is critical on the Code's position that makes home arrest a measure of first resort and worse, for minor crimes which is against the principle that detention shall be a measure of last resort.

⁵⁹ On the other hand suspension of sentence has no point of conflating with supervised education as the latter is a personalized measure in that it applies for abandoned children or for children in need of care and protection.

As a measure of last or second resort, suspension of a sentence can be ordered where the measures of reprimand, school or home arrest or supervised education fail to reform the child (Art. 166).⁶⁰ However, this is not clearly stated under Articles 166 *ff* of the Code. The only expressly stated penalties of last resort are fine, imprisonment or admission to a corrective institution as a penalty. As indicated under Article 168, the crime must be serious for the court to order admission to a corrective institution (as a penalty) or imprisonment. The measure or penalty that would be taken against a child for less serious cases is not specified under the section of the Code that deals with penalties (Arts. 166-68). As discussed above, fine can be the option if the child has the means and is capable of understanding the reason for its imposition. The question again is what if one of the conditions is missing? Therefore, suspension of imprisonment can be an answer to this question. This helps the Ethiopian criminal justice system to conform to the principle of detention as a measure of last resort.

6. Conclusion

Ethiopia is a party to the Convention on the Rights of the Child. As a state party, it takes legislative measures to comply with its obligation to ensure the realization of children's rights in the criminal justice system. A principal legislation among these laws is the 2004 Criminal Code which has provisions on measures and penalties that can be imposed on children found guilty of the crime. The measures include measures of admission to a curative center, supervised education, reprimand, home or school arrest, admission to a corrective center, and as discussed in this article, probation. These measures should be considered before subjecting a child to imprisonment, a penalty of corrective detention or to fine. In other words, measures are the first resort while penalties including imprisonment are the last resorts. The duration of corrective detention and imprisonment is required to comply with the principle of 'shortest period' in accordance with the interpretation of 'serious crimes' discussed above because there is a need for caveat in this regard.

As discussed in the preceding sections, the Ethiopian criminal justice system has problems so far as measures and penalties for children are concerned. *First*, detention is a measure of first resort while fine is a

⁶⁰ Admission to a corrective center is omitted because as argued, it should be applicable for more serious crimes as defined under Article 168, and a child not reformed while in detention (while receiving education and instruction) will not likely be reformed by placing him/her under probation in which the supervision and control is loose.

measure of last resort. This is a case for corrective detention and home or arrest. Moreover, home arrest is applicable for minor crimes. The *second* problem relates to the lack of diversity of the measures. They are only five in number which may not as such help to practically ensure observance of the principle of detention or imprisonment as a last resort. A great miss in this regard includes community service and restorative justice measures including diversion.

The *third* problem identified in this article relates to the lack of clarity in the specific provisions dealing with each measure. For instance, the parameter for reprimanding the child or subjecting them to a measure of home or school arrest is the lower tier in response to the minor nature of the crime. On the other hand, admission to a corrective measure can be ordered by taking the gravity of the crime (serious crime). However, these qualifications are not clear and are susceptible to variation in interpretation by different judges which again can lead to discriminatory treatment. Finally, the duration of detention may fail the test of 'shortest period' in the case of curative detention as the court is not empowered to supervise the measure.

Therefore, the Ethiopian criminal justice system needs revision to meet the needs of children by adhering to the principles and making the existing provisions clear. The law should also demarcate the circumstances under which each measure (*vis-à-vis* others) could be applied. _____■

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