Deprivation of Liberty of Children in the Ethiopian Child Justice System: A Legal Analysis and Evidence from Practice

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Abstract

The international child rights standards provide that deprivation of liberty of children shall be a measure of last resort and for the shortest period of time. This article, thus, aims to examine the legal and practical framework of deprivation of liberty of children in the Ethiopian child justice system in light of these standards. The study found out that the principles of 'deprivation of liberty as a measure of last resort' and 'for the shortest appropriate period' are not provided in the Ethiopian justice system. On the contrary, the Criminal Code makes deprivation of liberty of children after conviction a measure of first resort. This is the case for home arrest and corrective detention. Further, although imprisonment can be imposed after the failure of the measures, courts impose it on children who committed a crime for the first time. The duration of corrective detention and imprisonment in Ethiopia can normatively be considered 'shortest'. In practice, however, courts sentence children to corrective detention for a period exceeding the maximum provided in the law. There is also a risk of prolonged curative detention. Hence, the Ethiopian child justice system needs normative revision and practical reconsideration to enforce the rights of children as enshrined in the international child rights standards.

Keywords: *deprivation of liberty, child justice, last resort, Ethiopia*

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Introduction

At the center of the child justice system is deprivation of liberty of children who committed crimes. Going beyond the criminal justice system that prohibits arbitrary arrest and detention under Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR),[168] the Convention on the Rights of the Child (CRC)[169] provides two specific guarantees. It reiterates that children should not be deprived of their liberty arbitrarily, and provides that arrest, detention, or imprisonment shall be a measure of last resort and for the shortest appropriate period (Article 37(b)). This has also been recognized in Rule 17.1(b) and (c) of the UN Standard Minimum Rules for the administration of Juvenile Justice (Beijing Rules).[170] These are the guiding principles of the child justice system, which are not found in the adult criminal justice system (Schabas and Helmut 2006:81-82). The purpose of this article is, therefore, to assess the Ethiopian child justice system in light of these principles; the legal frameworks of the Ethiopian child justice system relating to deprivation of liberty of children[171] need critical examination and practical scrutiny for its compliance with the guiding principles.

The study[172] purposively focused on Addis Ababa, Arba Minch, Hawassa, Bahir Dar, Debre Markos, and Finote Selam, where there is a relatively advanced system of administration of child justice,

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168 Adopted December 16, 1966, entered into force March 23, 1976, 999 UNTS 171.

169 Adopted November 20, 1989, entered into force September 2, 1990, 1577 UNTS 3.

170 Adopted November 29, 1985, UNGA Res.40/33.

171 The term 'children' used in this article refers to those aged from nine to fifteen years of age. This is because the special procedural rules (Article 172 (1) and (4)) only apply to this group of children (Criminal Procedure Code of Ethiopia 1961, Proclamation No.185, Negarit Gazeta Extra Ordinary, Year 21st, No. 7, art 3) and the special measures and penalties of the Criminal Code are principally applicable to them (see Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414, Federal Negarit Gazeta, arts 157, 176 and 177). Therefore, the term 'child' or 'children' refers to this group unless the context provides otherwise.

172 This article is extracted from data collected for a PhD thesis (from January 11, 2022 to May 30, 2022) which is underway. Therefore, the reach of the study area, the number of respondents and court cases analysed should be seen in light of this fact.

have diversion centers[173] and for convenience purposes. In these selected areas, data was obtained through interviews with police officers, judges, guardians and children, and analysis of court decisions involving children below the age of 15.

Defining Deprivation of Liberty, Arrest, and Detention

Definitions for the terms 'deprivation of liberty', 'arrest' and 'detention' are not provided neither in CRC and ICCPR nor in the works of the CRC Committee. Rather definitions of these terms are found in the Havana Rules and the Human Rights Committee (HRC). The Havana Rules define deprivation of liberty as

> *any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative, or other public authority.*[174]

Similarly, the HRC defines it as a more severe restriction of motion within a narrower space than mere interference with the liberty of movement and includes police custody, remand detention, and imprisonment.[175] The Committee also defines arrest as "any apprehension of a person that commences a deprivation of liberty" and detention as "the deprivation of liberty that begins with the arrest and continues in time from apprehension until release".[176]

The Guiding Principles

The general principle of the child justice system is provided under Article 40(1) of the CRC. According to this provision, treatment of every child alleged, accused, or recognized as having infringed the penal law shall be

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173 At present, the centers are not functional. The researcher observed that the center in Arba Minch is used for another purpose. The center in Hawassa is alleged to be active but it has not received children in recent years and is not known by justice actors.

174 United Nations Rules for the Protection of Children Deprived of their Liberty (the Havana Rules) (adopted December 14, 1990 UNGA Res. 45/113), Rule 11(b).

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

176 Ibid, para 13.

> *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 and which takes 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.*[177]

To reinforce this grand principle, the following principles are entrenched so far as deprivation of liberty of children is concerned.

Prohibition of Arbitrary or Unlawful Arrest and Deprivation of Liberty

Prohibition of arbitrary or unlawful deprivation of liberty is not unique to child rights standards. It is contained in the Universal Declaration of Human Rights (UDHR), ICCPR, and other regional human rights standards. This prohibition is also reiterated under Article 37 of the CRC. Article 37(b) provides that a child shall not be deprived of his/her liberty unlawfully or arbitrarily.

Unlawful detention and arbitrary deprivation of liberty are two overlapping concepts.[178] Unlawful detention is deprivation of liberty that is not imposed on such grounds and in accordance with such procedures as established by law.[179] The reference to 'law' is not confined to domestic law. According to the HRC, unlawful detention is detention that violates domestic law and is incompatible with the requirements of Article 9 or any other relevant provision of the Covenant.[180] Thus, detention in conformity with the law requires not only that the domestic law permits detention (formal element) under particular circumstances, but also conforms to the national and international human rights safeguards (substantive element) (Tobin and Hobbs 2019:1471). When it comes to arbitrary detention, there is no clear definition in international law. The Working Group on Arbitrary Detention has defined it as detention that is contrary

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177 The same stipulation is made under the African Charter on the Rights and Welfare of the Child (adopted July 1, 1990, entered into force November 29, 1999), art 17(1) and (3).

178 HRC, General Comment No. 35, para 11.

179 Ibid.

180 Ibid, para 44.

to human rights provisions of major international human rights instruments.[181] In this regard, the HRC noted that detention may be authorized by domestic law and nonetheless be arbitrary. It added,

> *[…] arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality (para 12).*[182]

Deprivation of Liberty as a Measure of Last Resort

Article 37(b) of the CRC provides that arrest, detention, or imprisonment of children shall only be used as a measure of last resort. The CRC Committee on its part recommends that no child shall be deprived of his/her liberty unless there is a genuine threat against public safety. It also encourages state parties to fix an age limit below which children may not be deprived of their liberty.[183] Pretrial detention should not be used except in the most serious cases and only after community placement has been carefully considered.[184] The grounds of pretrial detention should also be specified in the law, which is primarily for ensuring appearance at court proceedings and if the child poses an immediate danger to others.[185] The Beijing Rules on their part provide that restrictions on the personal liberty of a child shall be imposed only after careful consideration and shall be limited to the minimum (Rule 17.1(b)).[186] The same rule also provides that children should not be deprived of their liberty (as a penalty) unless they are guilty of committing a violent crime against a person or have been involved

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181 Commission on Human Rights (199), Report of the Working Group on Arbitrary Detention, U.N.Doc. E/CN.4/1997/4, para. 87, citing E/CN.4/1992/20, Annex 1.

182 see also Nowak (2005: 225); Schabas and Sax (2006:76)

183 Committee on the Rights of the Child, General Comment No.24, Children's Rights in Child Justice System (September 18, 2019) CRC/C/GC/24, para 89 (CRC Committee, General Comment No. 24). See also Havana Rules, Rule 11 (a).

184 CRC Committee, General Comment No. 24, para 86.

185 Ibid, para 87.

186 See also Beijing Rules, Rule 19; the Havana Rules (Rules 1 and 2) and Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) (Recommended by ECOSOC Res 1997/30), para 18.

in persistent serious offense 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 (Liefaard 2019:331). In other words, a custodial sentence should not be imposed on a child for the reason that there is no other suitable placement (Hamilton 2011:91-92; UNODC 2013:109). Thus, non-custodial measures should be the norm, with detention only being used where they are not considered appropriate or effective (Kilkelly 2011:21). This is one of the most fundamental principles underpinning a rights-compliant child justice system (Kilkelly, Forde and Malone 2016:13).

This principle is informed by the negative effect of detention and removal of a child from his/her family (OHCHR 2003:420; Kilkelly, Forde, and Malone 2016:13; Nowak 2019:130 ff).[187] The negative effects of deprivation of liberty on children have been the subject of scholarly comments (Goldson 2005; Fagan and Kupchik 2011; Lambie and Randell 2013; Cilingiri 2015; Nowak 2019) and have led scholars such as Goldson and Kilkelly (2013:370-71) to call for abolition of child imprisonment altogether for the reasons that imprisonment is, (1) dangerous to the safety of children, (2) ineffective in reducing recidivism, (3) unnecessary (many in detention pose minimal risk to the public), (4) obsolete (there are other effective treatment options), and (5) wasteful of state resources and inadequate (detention centers are ill-equipped to address the needs of children). In this regard, Penal Reform International (2012:1) stated that:

> *[t]he removal of children from their family and community networks as well as from educational and vocational opportunities at critical and formative periods in their lives, can compound social and economic disadvantage and marginali[z]ation.*

Studies also show that detaining children makes them more likely to commit further crimes (Goldson 2005:82; Lambie and Randell 2013; Cilingiri 2015). This is because,

[187] See also CRC Committee, General Comment No.24, para 77.

> *[C]hildren detained in prisons are more likely to be damaged in the short term through the trauma of the experience and in the long term will find it more difficult to return to school or obtain employment or vocational training and are therefore more likely to be a burden on the economy and society at large, rather than being able to contribute to its advancement and healing in times of economic crisis. (Moore 2013:9)*

Deprivation of Liberty for the Shortest Period

When arrest, detention, or imprisonment of children is inevitable, it must be for the shortest appropriate period.[188] According to Tobin and Hobbs (2019:1472), 'appropriate period' replaced the term 'possible period' after a fierce debate during the drafting of the Convention as some delegations argued that rehabilitation could/ should take some time. Hence, for imprisonment, what constitutes the shortest appropriate period directly links with the length of time considered to be appropriate to reintegrate the child and help him/ her assume a constructive role in society (Hamilton 2011:93; Manco 2015:63; Liefaard 2019:332).

Further, Liefaard (2019:332) argues that "state parties are compelled to limit the duration of deprivation of liberty as much as possible and that appropriateness should also be understood in the light of the impact of deprivation of liberty on children, including the level of security." In this regard, the CRC Committee recommends that the duration of pretrial detention shall be stipulated in the law[189] and should not be more than 30 days.[190] Moreover, legal provisions providing that a sentence for a child shall be half of that of an adult do not fulfil this purpose. In all cases, legislation should oblige a court to determine the period needed to provide the child with the required intervention (Hamilton 2011:93). Nonetheless, a maximum penalty for children that reflects the principle of the 'shortest

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188 CRC, Article 37(b); Beijing Rules, Rule 17.1 (b) and (c) and 19; Havana Rules, Rules 1 and 2; Vienna Guidelines, para 18.

189 CRC Committee, General Comment No. 24, para 87.

190 Ibid, para 90.

appropriate period' as contained in Article 37(b) of the CRC must be provided in the law.[191]

This principle, by implication, prohibits the imposition of life imprisonment on children without parole. This prohibition is unique to the CRC (Tobin and Hobbs 2019:1463). According to the OHCHR (2003:229), life imprisonment would ipso facto be contrary to the rule of detention for the shortest appropriate period and denies the child a chance of reintegration. The period to be served before consideration of parole "should be *substantially* shorter than that for adults and should be realistic and the possibility of release should be regularly reconsidered."[192]

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 laws. The Beijing Rules explicitly recognizes early release of children from detention centers and it shall be granted at the earliest possible time (Rule 28.1)[193] upon evidence of satisfactory progress towards rehabilitation. This applies also to 'offenders who had been deemed dangerous at the time of their institutionalization'.[194] As this phrase indicates, the nature or seriousness of the offense is not relevant to consider release of a child.

The CRC does not mention conditional release in its Articles (37 and 40). The Committee briefly mentions it under the heading 'deprivation of liberty including post-trial incarceration'. Though captioned in this way, the explanatory paragraphs talk much about pretrial detention.[195] The Committee obliges states to provide regular opportunities to permit early release from custody[196] without further delving into what should be the period to be served before release or the interval of time for review.

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191 Ibid, para 77.

192 Ibid, para 81; Emphasis added.

193 See also United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) (adopted 14 December 1990 UNGA Res.45/110), Rule 9.4.

194 Commentary to Rule 28.1 of the Beijing Rules; Emphasis added.

195 CRC Committee, General Comment No. 24, paras 82-88.

196 Ibid, para 88.

Deprivation of Liberty of Children in the Ethiopian Child Justice System

Prohibition of Arbitrary or Unlawful Arrest and Deprivation of Liberty

Unlike the CRC and the ICCPR, the term 'arbitrary' is not used in the Ethiopian child justice system. Instead, the FDRE Constitution states that no one shall be deprived of his/her liberty except on grounds and in accordance with procedures as established by law (Article 17(1)). Though the provision uses the term 'arbitrary' in sub-article 2, the Amharic version provides that no one can be arrested except in accordance with the law. In other words, the Constitution prohibits only unlawful deprivation or arrest of a person. Therefore, what makes the deprivation legal or arbitrary is the presence or absence of a domestic law to that effect.

However, as indicated above, arbitrary deprivation of liberty is detention that is contrary to the major international human rights standards. Thus, the presence of national law that allows the arrest or detention of a person will not save the deprivation from being arbitrary. This interpretation is in line with the provisions of the CRC and ICCPR that first prohibit arbitrary deprivation of liberty and then enjoin deprivation to be made on such grounds and procedures as established by law.[197] As discussed above, deprivation of liberty must be appropriate, predictable, reasonable, necessary, and proportionate. Hence, measured against these elements, deprivation of liberty of a child in the Ethiopian child justice system is arbitrary as corrective detention[198] and house arrest[199] are measures of first resort, which is contrary to the CRC.

Furthermore, under the Criminal Procedure Code (CPC) the arrest of children has an element of arbitrariness and fails the test of appropriateness or reasonableness as complainants are allowed

197 See CRC, art 37 (b) and ICCPR, art 9 (1).
198 Criminal Code, art 162.
199 Ibid, art 161.

to arrest a child (Article 172(1)).[200] The same authorization seems to exclude an arrest warrant as it is unlikely for these persons to ask court warrant as they may not have legal knowledge. The absence of cross-reference to the adult provision also seems to exonerate police from securing authorization (arrest warrant) from the court. Nonetheless, if the arrest is necessary, it shall be with an arrest warrant in warrantable cases. Otherwise, there will be few limitations to interfere in the liberty of children (Fisher 1970:132). It is also difficult to envision any advantage that these deviations from similar adult procedures could bring to the child. All judges interviewed said that there were no instances where police asked arrest warrant and courts issued it. This is a violation of the rights of the child and discriminatory treatment. Police officers attributed this to the fact that children are less dangerous and easily accessible (they do not hide).[201] These, however, are not the considerations provided in the law. Under the CPC, arrest warrant is a rule while arrest without a warrant is an exception (Article 49). This makes arrest in the Ethiopian child justice system arbitrary as it violates the accepted international standards; appropriateness and reasonableness.[202]

Deprivation of Liberty as a Measure of Last Resort

According to Article 37(b) of the CRC, arrest or detention of children shall be a measure of last resort. Further, Article 40(4) of the Convention requires states to make available a wide variety of non-institutional dispositions for children found guilty of a crime. The Ethiopian child justice system does not explicitly restate these principles. The arrest of a child is not the last resort in Ethiopia as Article 172(1) of the CPC provides that children must be immediately taken to the nearest *woreda* (district) court by the police, public prosecutor, parent or guardian, or complainant. This act of taking

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200 It seems for this reason that the draft Criminal Procedure and Evidence Code (2021) has omitted complainants from the list of authorized persons (art 373 (1)).

201 Interview with Sergeant Woinshet Habtam, Investigating Officer, Women and Children Unit, Arba Minch City Police Department (January 11, 2022); Interview with Investigating Officer, Lideta Sub City Police Department (April 20, 2022).

202 HRC, General Comment No.35, para12.

the child to the nearest court amounts to arrest (Fisher 1970:132). Moreover, the provision seems to exclude summoning the child as it gives the power to arrest for a complainant and prosecutor. Therefore, this provision of the Code is not in line with the rule that the arrest of a child shall be a measure of last resort as enshrined under Article 37(b) of the CRC and Rule 17 of the Beijing Rules. Police should use summons to avoid stigmatizing effect of arrest (Fisher 1970:132). It could also avoid the potential physical and psychological harm that may ensue from effecting the arrest (Fisher 1966:471). This, however, is rarely practiced as noted by some police officers interviewed; all children and/or parents interviewed have also revealed that their cases were initiated with arrest by the police or local security forces (*Militias*).

Regarding pretrial detention, the Ethiopian child justice system is more protective than the international and regional standards by indirectly prohibiting pretrial detention. Article 172(4) of the CPC provides that where the case requires adjournment or transfer to the higher court, a child shall be handed over to the care of his/her parents, guardian, or relative and in default to a reliable person who shall be responsible for ensuring his/her attendance at the trial. Further, a child arrested must be brought to court immediately. These mean a child should not be confined in police stations or detained pending trial.

The Draft Criminal Procedure and Evidence Code has, however, incorporated exceptions relating to the seriousness of the crime, the possibility of hindering the process, and the potential for joining other criminals (Article 373(6) and 376(2)). These exceptions, however, are negative developments and will make the system fail to comply with the principle that detention shall be a measure of last resort. The practice also recognizes the risk of revenge as a ground for pretrial detention[203] in addition to grounds such as safety

[203] Interview with Selamawit Anesa, Defense Counsel, Hawassa City High Court (March 16, 2022).

of the victim,[204] absence of parents,[205] and character of the child or parents[206] whereby all except the first are not compliant with the principle of detention as a last resort.

Despite the allegation that children with parents will not be detained, the study found that such children ended up in pretrial detention by the police[207] or the court including remand to prison without any justification. According to police officers, detention in a police station occurs when a child with no parent is arrested over the weekend, on holidays, or in the evening. Another ground of detention is when the case arises on a day other than the trial date; courts in Addis Ababa have fixed days assigned for child justice cases. Although police claimed that they brought children to the court on a day other than the trial date,[208] analysis of court cases shows that the first court appearance are mostly on the date of the trial. This implies children have been in detention until the date of trial (first appearance).

The Addis Ababa Rehabilitation and Remand Center hosts children as a pretrial detention center. As observed from the record of the Center, majority of the children are on remand including those who have parents/relatives in Addis Ababa; some courts ordered remand to the Center although the children have relatives and without any justification to that effect.[209] In some cases, this order

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204 Phone interview with Leuleselassie Liben, Judge, Child Justice Bench, Federal First Instance Court (FFIC), Lideta Division (July 20, 2022).

205 Interview with Degitu Asfaw, Judge, Children Bench, Bahir Dar City Woreda Court (February 2, 2022); Birkie Tilahun, Judge, Bahir Dar Zuria Woreda Court (February 4, 2022). This is also confirmed by a number of court files analyzed.

206 Interview with Leuleselassie Liben, Note 38. He mentioned one particular case that the child does not consider the act as a crime and the parents were using and still wants to use the child as a source of income through his begging.

207 Interview with Aman, a Child suspected of theft, FFIC, Yeka Division (May 17, 2022); Tamir Mengistu, Parent, FFIC, Lideta Division (July 7, 2022).

208 Interview with Deputy Inspector Zebenay Adane, Women and Children (cases) Investigation Team Leader, Gulele Sub City Police Department (April 29, 2022); Ermias Gacheno, Women and Children (cases) Investigation Officer, Bole Sub City Police Department (April 29, 2022).

209 Rahel vs Police, FFIC, Arda Division, File No.196604 (January 14, 2021); Natnael vs Prosecutor, FFIC, Lideta Division, File No.282849 (September 7, 2020) ; Esayas vs Police, FFCI, Bole Division, File No.137714 (April 8, 2022); Abebe vs Police, FFIC, Nifas Silk Lafto Sub City Division, File No.179422 (April 26, 2022).

is made by revoking the previous order of handing the child to parents or relatives for their failure to bring children on the date adjourned,[210] which can be ensured by giving warning to parents or guardians or as a last resort by making them criminally liable.[211]

Children were also remanded to prison by courts pending their case though they have parents or guardians. These were mostly in homicide cases[212] where the pretrial issues are the jurisdiction of first instance courts. By considering the seriousness of the crime and ignorance of the provision of Article 172(4) of the CPC, children were remanded to prison where segregation from adults is not practicable.

The measures envisaged in the Criminal Code that could be imposed on a child found guilty of a crime do not also comply with this principle. This is particularly the case for home arrest. Home arrest is a measure of first resort in the Ethiopian child justice system.[213] It applies to crimes of small gravity,[214] including petty offenses.[215] According to the HRC, house arrest is one instance of deprivation[216] that should be a measure of last resort as per Article 37(b) of the CRC.

The measure of admission to a corrective center (corrective detention) seems to satisfy the test by requiring bad character or antecedent of a child as a condition in addition to the seriousness

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210 Minyahil vs Prosecutor, FFIC, Lideta Division, File No.288247 (June 24, 2021); Aytenew vs Addis Ketema Sub City Police, FFIC, Lideta Division, File No.290056 (April 29, 2021); Sisay vs Prosecutor, FFIC, Lideta Division, File No.257967 (June 17, 2018). In the latter two cases, the reason is not mentioned.

211 Failure to produce an accused person, in this case the child, that the parents took under the obligation to bring him during trial, is a criminal act under Article 448 of the Criminal Code.

212 Interview with Kidane, a Child accused in East Gojjam Zone High Court (Debre Markos, February 28, 2022); Belete, a Child accused in the West Gojjam Zone High Court (March 11, 2022); Misikir and Zinabu vs Prosecutor, East Gojjam High Court, File No.0223322 (February 11, 2020). In one case that involved theft, the child was in prison until the final judgement although he has a sister (Yihenew and others vs Prosecutor, Jabi Tehnan Woreda Court, File No.0202889 (August 9, 2019).

213 Criminal Code, arts 157 with 161.

214 Ibid, art 161, para 1.

215 Ibid, art 750 (2).

216 General Comment No.35, para 5.

of the crime.[217] That means it will not be imposed on a child who commits a crime for the first time irrespective of the seriousness of the crime if he/she has no bad character or antecedent. However, 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 if he/she commits a serious crime for the first time. Interpreting the term 'antecedent' as implying prior conviction will not make corrective detention a measure of last resort, but instead, a second resort. Despite the requirement, judges that sentenced children to corrective detention have never mentioned in their judgment that children have bad character or antecedents. This makes the first resort nature of corrective detention clearer.

Further, though the imposition of corrective detention is not mandatory under Article 162 of the Criminal Code, it is not clear what measure could the court, wishing to exercise this discretion, impose on a child. The only measure that remotely relates to corrective detention is supervised education as it can be imposed for serious crimes[218] and the character of the child is a determining factor. However, the condition of the child differs. In the case of Article 159, the child is exposed to corruption, (i.e., developing a bad character (explicit in the Amharic version)) while in the case of Article 162, the child has already developed that character. The other measures (reprimand and home or school arrest) cannot apply as they are applicable for only minor crimes or crimes of small gravity[219] and curative detention applies to children in need of medical treatment.[220] Courts in the exercise of this discretion may suspend a sentence as a measure of first resort instead of sending a child to corrective centers. However, it is not clear in the law when to impose corrective detention and when to suspend imprisonment so far as the gravity of the crime is concerned.

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217 Criminal Code, art 162.

218 Ibid, art 159. The provision does not make any qualification as to the nature of the crime. What matters for the imposition a measure of supervised education is the personal characteristics of the child. Hence, it can be argued that this measure can apply for serious crimes.

219 Criminal Code, arts 160 and 161 respectively.

220 Ibid, art 158.

Therefore, failure of the laws to expressly state the last resort nature of deprivation of liberty together with the exhaustive list of mutually exclusive measures under the Criminal Code and the lack of clear demarcation between scenarios for corrective detention and suspension of a sentence would make the measure to fail the test as courts do not have other measures in their hands than corrective detention. This could make corrective detention a measure of first resort. Examination of court cases also affirmed that corrective detention is imposed on children who committed crime for the first time[221] and suspension of imprisonment is the rarest measure.[222] In practice, children were sent to corrective centers for a crime that does not warrant admission to corrective detention such as theft.[223] Moreover, admission to a rehabilitation center is a measure of first resort when the person, including a child, is found guilty of vagrancy.[224]

Imprisonment of children (one form of deprivation of liberty) on the other hand is a measure of 'last resort' though not explicitly stated. Article 166 of the Criminal Code provides that courts may impose penalties including imprisonment after the measures provided under Articles 158-162 have been applied and failed. Therefore, the plural term '*measures'* and the phrase '*have been applied and faile*d' indicate that imprisonment is a measure of last resort. That means, the court should try all available measures before imposing imprisonment on the child irrespective of the seriousness of the crime (Fisher 1970:122). Further effort in making imprisonment a measure of last resort is provided under Article 168 in that imprisonment applies

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221 Minyahil vs Prosecutor, Note 44; Yabibal vs Addis Ketema Sub City Police, File No. 282686 (February 1, 2021); Abebe vs Police, Note 43; Esayas vs Police, Note 43.

222 The researcher found only three cases. Article 171 of the Criminal Code is the most unknown provision among judges next to Article 166. When asked whether they have suspended a penalty, most judges refer to the adult provisions (arts 190-200) while few others believe that probation should not apply to children.

223 Asmare vs Police, FFIC, Bole Division, File No.137714 (March 18, 2022). Abebe vs Police, Note 43; Esayas vs Police, Note 43. The researcher also observed similar cases from the record of the Addis Ababa Rehabilitation Center.

224 Vagrancy Control Proclamation, 2004, Proclamation No.384, Federal Negarit Gazeta, 10th Year, No.19, art 10 (2). The researcher, however, did not find a case involving vagrancy.

only when the crime is serious, which is punishable with rigorous imprisonment of ten or more years or with death. Not only that the crime should be serious, but the child must also be "incorrigible and is likely to be a cause of trouble, insecurity or corruption to others." This condition further pushes imprisonment toward the principle. This is the first scenario where imprisonment shall be imposed. In practice, however, courts impose imprisonment on children who committed crime for the first time.[225]

The last resort nature of imprisonment is not known by judges. More tellingly, a judge noted that 'sentencing a child to imprisonment or not for serious crimes is personal to judges as there is no corrective center' and implied there are children below the age of 15 in prisons.[226] One judge mentioned that she sent children to prison in exceptional (serious) cases.[227] Another judge reinforced this and noted "since the other measures like supervised education and home arrest are not effective, we send children to adult prisons."[228]

Judges at the highest judicial hierarchy (the appellate and cassation division) at both the regional and federal levels are not immune from this knowledge gap. In two practical cases involving children who committed crime for the first time,[229] the regional appellate courts and the regional cassation bench in one of the cases confirmed the decision of the lower courts and only reduced the duration of the imprisonment. The Federal Supreme Court Cassation Bench[230]

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225 Fisiha vs Prosecutor, Gamo Zone High Court, Appellate File No.40765 (May 14, 2021); Abeba vs Prosecutor, Hawassa City High Court, File No.28731 (October 28, 2020); Gedefaw vs Prosecutor, Hawassa City High Court, File No.28727 (September 29, 2020); Interview with Gizachew Admassu, Judge, Gamo Zone High Court (January 15, 2022); Mekonen Balew, Judge, East Gojjam High Court (February 14, 2022); Limenih Mihretie, Defense Counsel, East Gojjam High Court (February 22, 2022); Yeshiwas Abere, Prosecutor, South Gondar Zone (August 5, 2022).

226 Interview with Bayeh Embiale, Judge, Bahir Dar and its Surrounding High Court (February 11, 2022).

227 Interview with Birkie Tilahun, Note 39.

228 Interview with Sera Chalachew , Judge, Bahir Dar Zuria *Woreda* Court (February 4, 2022).

229 Fisiha vs Prosecutor, SNNPR Supreme Court, Appellate File No.36008 (August 6, 2021); Addisu vs ANRS Prosecutor (see Addisu vs ANRS Prosecutor, Federal Supreme Court Cassation Division, File No.118130 (December 9, 2016).

230 Addisu vs ANRS Prosecutor, ibid.

then suspended the imprisonment relying on the best interest of the child, the absence of a corrective center in the region concerned, and a rule that mandates segregation of children from adults. It did not recall the last resort nature of imprisonment as enshrined under Articles 166 and 168 of the Criminal Code.

The other potential contributing factor to the breach of the principle that 'imprisonment shall be a measure of last resort' is the absence of corrective centers in the regions; Rehabilitation Center is established only in Addis Ababa. If judges comprehend the last resort nature of imprisonment and want to impose an alternative measure, corrective detention is the possible measure as it applies to serious crimes. However, the absence of such centers would force judges to imprison children. In those above-mentioned cases where children were sentenced to imprisonment, judges have never justified the imprisonment of children with the absence of corrective centers. On the contrary, the presence of corrective center on the implementation of the principle is evidenced from cases entertained in Addis Ababa. Children in Addis Ababa who committed serious crimes as defined under article 168 of the Criminal Code were sent to the rehabilitation center, not to prison.

The second scenario for imposing imprisonment, transferring a child from corrective detention to prison where his/her conduct or the danger he/she constitutes renders it necessary,[231] diminishes the last resort nature of imprisonment for two reasons. First, the transfer seems the case even before the child has served 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.

Arrest, Detention, or Imprisonment for the Shortest Period

Regarding arrest and pretrial detention, the Ethiopian child justice system provides better protection as a child arrested should be brought immediately to court[232] and there is no pretrial detention.[233]

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231 Criminal Code, art 168 (2), para 2.
232 CPC, art 172 (1).
233 Ibid, art 172 (4).

In practice, however, children spend days, weeks, and even months in police stations[234] or on remand.[235] Most judges interviewed said that police do not bring children to court on the same day of arrest.[236] In this regard, one judge said that "when we ask children, they told us that they were detained in a police station for days despite the allegation of the police that they arrested them on the same day of court appearance."[237] This fact is also affirmed by children that were detained in stations for about a month.[238] Analysis of court files also shows that police brought children to court on the same day of the crime only in two cases.[239] In the rest of the cases, children were detained in the police station for one day to a couple of months before they appear in court.[240]

Further, the vagrancy control proclamation no. 384/2004 allows police to detain a person for up to 48 hours (Article 6(2)) and that a vagrant has no right to bail (Article 6(3)) as the proclamation overrides other laws including the CPC on matters covered by it (Article 14). This is exacerbated by the broad list of activities that constitutes vagrancy; many of them are related to streetism,[241] which is a typical situation for many children who committed crime in Ethiopia. The period of pretrial detention for vagrant cases, as a rule, is 38 days (28 days for investigation and 10 days for prosecution)

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234 For instance, in the case between Fitih and Akaki Kaliti Police, FFIC, Akaki Kaliti Division, File No.102046, the child was in pretrial detention for seven months (excluding Pagume) while in the case between Abinu and Prosecutor, Arba Minch City First Instance Court, File No.30419 and Ayele and Prosecutor, Gamo Zone High Court, File No.40547, the children were in detention for five and six months respectively excluding Pagume.

235 Interview with Kidane, Note 46 and Belete, Note 46 where Kidane was on remand for four months while Belete was for nine months.

236 Emphasis added and the practice is gauged against this parameter instead of the literal meaning of the term could imply.

237 Interview with Bayeh Embiale, Note 60.

238 Interview with Addis, a Child suspected of theft, Federal First Instance Court, Yeka Division (May 17, 2022); Tamir, Parent, Federal First Instance Court, Lideta Division (July 7, 2022).

239 Biruk vs Yeka Sub City Police, FFIC, Yeka Division, File No.176877 (2022); Rahel vs Police, FFIC, Note 43.

240 The cases analyzed arose in the cities and, hence, remoteness of the area cannot be a justification.

241 See for instance Article 4 (4), (6), (8), (10).

(Article 7(1) and 8(1) respectively). This fails to comply with the 30 days recommended by the CRC Committee.[242]

A measure for the treatment (admission to a curative institution) shall for such time as is deemed necessary by the medical authority and may continue until the child attains 18 years old.[243] The justification is the inability of the court to fix the duration as the measure is dependent on the personal circumstances of the child such as mental state and addictions. The court cannot reasonably forecast when the measures will address the root causes of criminality. The measure shall continue until the authority deems it achieved its purpose and apply to the court for variation[244] or until the child attains 18 years of age. This will subject a child to unsupervised prolonged detention. This is because the code does not entrust the court with the power to supervise the enforcement of the measures or review them except that it authorizes the same to vary the orders upon the recommendation of the management of the institutions.[245] 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 these measures by, for instance, requiring the supervising authorities to report regularly the status of the child under their mandate.

The duration of corrective detention shall not be less than 1 and exceed 5 years.[246] Hence, the maximum period to be served in corrective detention is 5 years unless the child is released conditionally[247] or varied and reduced by the court under Article 163 of the Criminal Code and/or Article 180 of the CPC. Given that this measure applies to 'serious crimes' (Amharic version) including those stated

242 CRC Committee, General Comment No.24, para 90.
243 Criminal Code, art 163 (1).
244 This is more explicit in the Amharic version of Article 164 (1), para 2.
245 Ibid, art 164.
246 Ibid, art 163 (2).
247 Ibid, para 3.

under Article 168 of the Criminal Code,[248] the period of corrective detention can be considered the 'shortest' period and complies with the principle as enshrined under the CRC. Nonetheless, in reality, the duration extends beyond the maximum length stated in the Code.[249]

Article 161 of the Criminal Code requires the court to determine the duration of the restraint in a manner appropriate to the circumstances of the case and the degree of gravity of the crime committed. It is difficult to envision why the law failed to fix the duration while it does so for corrective detention. Nonetheless, at least home arrest shall be for the shortest period as it deprives a child of his/her liberty. Hence, as this measure applies to 'crimes of small gravity', and the maximum duration of corrective detention is 5 years, it is possible to argue that the maximum duration of home arrest shall be lower than 5 years. Regardless, leaving the duration open will invite variation in terms of the time fixed by the court and may fail the test of the 'shortest period'. In one case where a child is sentenced to this measure for a crime punishable with simple imprisonment of up to 5 years, the court fixed the duration to 4 years,[250] while another court fixed it to 1 year for a crime punishable up to 10 years of rigorous imprisonment.[251] Apart from the discrepancy and stark contrast, 4 years of home arrest is not the shortest period.

The period of imprisonment under Article 168(2) of the Criminal Code shall not be for less than 1 year and may extend to 10 years. This complies with the principle of 'imprisonment for the shortest period'. Full compliance with this principle requires courts to proportionately convert the actual penalty stated under Article 168(1) to the one provided under Article 168(2). That is, 1 year imprisonment shall be imposed for crimes punishable with 10 years

248 Though the Code does not define the seriousness of the crime, this author argues that the seriousness shall include the ones stated under Article 168 as corrective detention deprives the liberty of the child and, at least, it must apply for serious crime to allay its being a measure of first resort.

249 The author observed duration up to 17 years from the record of the Addis Ababa Rehabilitation Center.

250 Kibrom vs Prosecutor, Hawassa City High Court, File No.31809 (February 10, 2022).

251 Abdu vs Bole Police, FFIC, Bole Division, File No 134712 (March 16, 2022).

of rigorous imprisonment and the duration shall increase when the penalty increases and the maximum period of 10 years shall be for crimes punishable with death. The article was not able to gauge the practice in light of this caveat as almost all judges that sentenced children to imprisonment did not do that based on Article 168; they fix the duration as per the provision violated.[252] The one judge that relied on Article 168 did not first determine the actual penalty (after taking aggravating and mitigating circumstances) and convert it accordingly. He rather, relied on the penalty stated under the provision violated, which is from 13 years to 25 years and sentenced the child to 10 years imprisonment.[253]

Another effort towards this principle is the recognition of the conditional release of detained or imprisoned children. A child serving a measure of corrective detention[254] or a penalty of imprisonment[255] can be released conditionally if the requirements of the law are fulfilled. Thus, a child may be released after he/she has served one year of corrective detention.[256] The precondition of serving one year is favorable to children in some respect compared to adult cases where two-thirds of the imprisonment must be served.[257] On the other side, fixing minimum period of 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.

Regarding conditional release from prison, Article 168(3) of the Criminal Code 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 his/her behavior significantly improve and warrants that he/she will be of good conduct when released.

252 Abeba vs Prosecutor, Note 59; Gedefaw vs Prosecutor, Note 59.
253 Fisiha vs Prosecutor, Note 59.
254 Criminal Code, art163 (2).
255 Ibid, art168 (3).
256 Ibid, art 163 (2), para 3.
257 Ibid, art 202.

This position can be challenged by virtue of the principle of 'imprisonment for the shortest period' and the negative effect of imprisonment on children.

Conclusion

Examination of the Ethiopian child justice system shows that arrest of a child is not a measure of last resort and is also arbitrary as every complainant is allowed to arrest a child and is made without warrant in warrantable cases. The principle 'deprivation of liberty as a measure of last resort' is not stated in the Ethiopian child justice system. Further, police custody and pretrial detention are not allowed in the Ethiopian child justice system for non-vagrant cases. The practice is not in line with the CPC and children were detained in police stations and remand homes/prisons for days to months pending the disposition of their cases. Deprivation of liberty as a punishment is not also a measure of last resort as home arrest and corrective detention are measures of first resort. Imprisonment on the other hand is a measure of last resort in the law, which shall be imposed after the failure of the measures but not in practice.

Deprivation of liberty in the Ethiopian child justice system is not fully compliant with the principle of 'shortest period'. This is because curative detention is enforced without court supervision and will cease if the management of the curative center believes that it attains its goal. This will subject the child to unsupervised prolonged detention. The fact that the duration of home or school arrest is not fixed in the Code invited prolonged detention of a child as a result of the lack of a uniform standard to determine the duration. Though the duration of corrective detention may be normatively compliant with the principle, in practice, courts sentence children to a lengthy period beyond the maximum period provided in the law. The same is true about imprisonment. Though the maximum duration of imprisonment is 10 years, in practice a child is sentenced to 20 years.[258] A special (lower) threshold of served sentence is not accorded to children for conditional release from prison. Hence, the Ethiopian child justice system needs normative revision and

[258] Gedefaw vs Prosecutor, Note 59.

practical reconsideration to ensure that deprivation of liberty of a child is a measure of last resort and for the shortest period.

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