

RIGHTS OF CHILDREN LIVING WITH THEIR IMPRISONED MOTHERS IN KALITY FEDERAL WOMEN PRISON: PROSPECTS AND CHALLENGES

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RIGHTS OF CHILDREN LIVING WITH THEIR IMPRISONED MOTHERS IN KALITY FEDERAL WOMEN PRISON: PROSPECTS AND CHALLENGES

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DECLARATION

I, the undersigned, declare that the thesis entitled “Rights of Children Living with their Imprisoned Mothers in Kality Federal Women Prison: Prospects and Challenges” is my original work. I have properly acknowledged and referenced all materials used in this work.

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LIST OF ABBREVATION

ACRWC	African Carter on the Rights of the Child
CRC	Convention on the Rights of Children
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Governmental Organization
UDHR	Universal Declaration of Human Rights
VERA	Vital Events Registration Agency
UN	United Nations

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ABSTRACT

Children as member of human being and due to their vulnerability nature, many legal instruments include wide package of rights concerning children in their provisions. Various legal instruments designed with different package of rights for children.

Ethiopia as signatory for Convention on the Rights of Child (hereinafter called CRC) and African Charter on the Rights and Welfare of the Child (hereinafter called ACRWC) is taking different measures for the protection and realization of the rights of children. Federal Prison Proclamation No. 1174/2019 includes treatments that should be given for children live in prison with their imprisoned mothers. It is important to evaluate its sufficiency in light of the principles of child rights. The procedures taken by court in rendering order to about the entry of children to prison with their convicted mothers and the facilities provided for children in prison should be seen in light of the rights of children.

Chapter One

1. Introduction

1.1 Background

International and regional instruments have guaranteed children rights in specific legal instruments. The CRC in Art 9(3) recognizes special safeguard for children by reason of physical and mental immaturity. ACRWC in its Preamble recognizes that children should grow in family environment in an atmosphere of happiness, love and understanding. ACRWC mentioned about the accused or convicted pregnant women and mother and it stated that special treatment should be given for such persons.[1] These two instruments listed various rights for children.

Ethiopia is expected to comply its duty for the realization of the rights of children provided in CRC and ACRWC. All legal instruments applicable in Ethiopia, decisions rendered by court and actions taken by any stakeholders are expected to see their actions in light of the protection and full realization of the rights of children including children who live with their imprisoned mothers.

Art. 1-4 of the Civil Code of Ethiopia provides that human person including merely conceived child who born and survive 48 hours have different rights that they can enjoy till there death. Thus, all children are eligible to enjoy every human rights. All procedures and measures are expected to consider the full realization of the rights of children.

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) (herein after called the Constitution) prohibits arbitrary arrest and detention without conviction.[2] In this respect, nobody shall be detained or arrested without the existence of good cause that the person might have committed or participated in criminal action. The FDRE Criminal Code of Ethiopia (herein after called the Criminal Code) complement the Constitution by listing criminal acts and the penalty rendered upon commission of such act. A person will be detained and convicted when he/she commit criminal acts listed either in the Criminal Code or other relevant laws that are applicable in Ethiopia. Thus, making children to live in prison due to criminal acts of their mothers is against the intention of both the Constitution and the

[1] African Charter on the Rights and Welfare of the Child adopted 01 July 1990 entered into force 29 November 1999, (hereinafter referred to as ACRWC) Art. 30

[2] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation 1/1995, Federal Negarit Gazeta year 1, no 1, 21 August 1995, (hereinafter referred to as The Constitution of the FDRE) Art. 17

code. Even courts don't have legal and formal procedures that they used for making decision to send children to prison with their convicted mothers.

Federal Prison Proclamation No 1174/2019 in Art. 53(4) provides that children can stay with their imprisoned mothers until they attain 24 months. The proclamation promotes child-to-mother bonding in prison. However, it is silent about the fate of the child after he or she attain the age of 2 years. There need to be another option by which a child can enjoy his or her rights including the right to live with his or her parents. These rights shouldn't be violated with the criminal act of the mothers.

1.2 Statement of Problem

The human rights of children become at risk when they are obliged to spend their precious childhood life time in prison due to their mother's incarceration. Keeping innocent children in prison by itself is violating their liberty. Inadequate service and treatment are also other additional violation against their right. The process of finding the root for this problem leads to the criminal law of Ethiopia. Though labor service is provided under some circumstances, imprisonment and fine are the only penalties that are provided under the Criminal Code. Among these penalties, imprisonment takes the lion share. This increases the probability of children to join prison with their convicted mothers. The absence of clear consideration of the rights children when their mothers convicted of committing criminal act is taken as one gap of the criminal law of Ethiopia. Though the Federal Prison Proclamation No 1174/2019 provides some treatments for children who live in prison with their imprisoned mothers it didn't address for full realization all rights of children. There still a need to find out other available option for full realization of rights of children of convicted mothers.

1.3 Research Questions

In addressing the problem, pertinent questions that may asked at this juncture are:

1. Is there adequate legal framework to ensure the protection of the rights of children living with their imprisoned mothers?
2. Are the rights of children living with their imprisoned mothers adequately protected in Kality Federal Women Prison?
3. Does making children to live with their imprisoned mothers violate the rights of children?

4. Is there a better option for the full realization of the rights of children living with their imprisoned mothers in Kality Federal Women Prison?

1.4 Research Objective

By focusing both applicable laws in Ethiopia and the practice, the study picks legal gaps and identify actions that are being taken to narrow the gaps. Moreover, the ultimate objective of the research is: -

- To find out available legal framework for the protection of the rights of children living with their imprisoned mothers;
- To evaluate the adequacy of treatments provided by Kality Federal Women Prison for children living with their imprisoned mothers in light of relevant laws;
- To assess and list out violated rights of children when they are obliged to live in prison with their imprisoned mothers;
- To find out option for the full realization of the rights of children living with their imprisoned mothers.

1.5 Scope of the study

The study limits its scope to children who live with their imprisoned mothers. Though children might be primarily cared by different family members or other persons, the study focus on only children living with their imprisoned mothers. This is due to the fact that practically only convicted mothers are allowed to bring their children to prison to live with them. Subsequently, the study concern on Kality Federal women Prison where convicted mothers with children are imprisoned.

The study analysis both the legal framework and practice that govern the rights of children living with their imprisoned mothers in Kality Federal women Prison. Accordingly, different international, regional and national human rights instruments are used as parameter for evaluating the adequacy of treatments that are provided in Kality Federal women Prison. The study assesses the adequacy of special treatments that are given for children in Kality Federal women Prison in light of the rights of child. Court decisions are also referred for finding option for the problem.

1.6 Research Methodology

The study follows mixed approach by which both doctrinal and empirical methodologies are applied. In addition to legal instruments, it consults books, reports and other relevant publications. Thus, it has doctrinal aspect of legal research methodology. The study is also supported by interviews with judges, public prosecutors, imprisoned mothers with children and officer from Federal Prison Commission who works on women affair division to understand the practical situation. This refers the empirical nature of the study. The research employed qualitative methods to assess the conditions of children living with imprisoned mothers and the study employed both primary and secondary data as a source.

1.7 Method of Data Collection

Primarily, interview is conducted with Federal First Instance Court judges and federal attorneys, officer Federal Prison Commission and prisoner mothers to evaluate and analysis the practical implementation. The selection made based on the bench that the judges are working on. This helps to know the way by which courts render decision towards the living condition of the children. Birth place of the baby, age, marriage and job status of mother prisoners take as ground for the selection prisoner mothers for interview. Secondly, existing international, regional and national laws, national policy, publications, studies and reports are used for identifying the rights of children living with their imprisoned mothers. By analyzing the collected data, it is tried to understand the efforts taken for the full realization of the rights of children live with their imprisoned mothers. Therefore, both primary and secondary sources are used in this study.

1.8 Significance of the Study

The study shows legal gaps for the realization of the rights of children of convicted mothers. It identifies challenges by which children living with their imprisoned mothers are facing in light of different legal instruments. The study also searches out the possible options that should be incorporated in the legal instruments for full realization of the rights of children of convicted mothers. It will insight another dimension for legislators and bodies in justice sector to look forward for better protection of the rights of children of convicted mothers.

1.9 Limitation of the Study

It has been almost two years since the Federal Prison Proclamation No 1174/2019 came into effect and researching the practice so far might have significance in understanding the framework. Nevertheless, for reasons of absence of subsequent regulation for the implementation of the proclamation, this study is limited to analyzing the proclamation with the practice. The analysis overviews the applicable rule and directive that was enacted for execution of previous Federal Prisons Commission Establishment Proclamation No 365/2003. The inaccessibility of organized relevant documents in the concerned government institutions has hindered the quality of this study.

1.10 Literature Review

The most comprehensive and updated material on the subject matter available is the United Nations Global Study on children deprived of liberty.[3] The study touches on circumstance of children incarcerated with their primary caregivers in general. According to the study, children co-residing in prisons with their primary caregiver are not deprived of their liberty as a consequence of their behavior, rather it happens due to the failure of criminal justice system and low attention for these children as right holder from the government side.[4] Besides this separating a child from its primary caregivers in early childhood will result to risk of problem.[5] The risk might be expressed with less physical, mental or psychological development. This is because of that the child will miss his/her parents and they might get less attention than they get from their family. Accordingly, allowing the child to stay in prison or separate the child from the parent by giving for foster care has an impact on the child and violates his/her rights.

By consulting different legislations, in the study the best interest of the child, non-discrimination, child survival and development and child participation are taken as guiding principle for deciding on the children fate when their mothers as the primary caregivers are imprisoned. The study finds out that different countries apply non-custodial measures by considering children of suspects/convicted persons. It also mentions that some countries take having underage child as one condition to grant bail. It also incorporates some issues that are raised besides this concept like what if the primary caregiver is not sole caregiver (if there is

[3] Manfred Nowak, the United Nations Global Study on Children Deprived of Liberty, (November 2019), p. 346

[4] Ibid, p.346

[5] Ibid, p.351

other caregiver) and it might require other legal procedure by which the court to refer before judgment.[6]

Similarly, a National Study on Children Living with their Imprisoned Mothers or Primary Caregivers in Ethiopia by African Child Policy Forum provide overview on the situation of children live with their imprisoned mothers.[7] The study assesses different international regional and national legal instruments. The study explains basic principles on the rights of children. In the study it is provided that neither the Criminal Code nor the Revised Sentencing Guidelines (2/2013) explicitly requires courts to consider the impact of sentencing on children of the convicted parent or primary caregiver. It also expounds to treatments given for children living with their imprisoned mothers and caregivers in Ethiopia.

Kahsay Zerabruck's graduate thesis about protection of the rights of children living with imprisoned mothers at the Ethiopian federal prisons did also provide a detailed discussion of the international, regional and national legal framework.[8] The thesis examines the Federal Prisons Commission Establishment Proclamation No 365/2003 which is currently repealed by Proclamation no 1174/2019. The main theme of the thesis is on assessing the adequacy of facilities that are provided in the Federal prisons.

Most of the literatures on the rights of children living with their imprisoned mothers give detail about rights that are guaranteed for children through different legal instruments. The Global Study pick experiences of different countries regarding to non-custodial approach. This can serve as a spring board but further efforts are needed to bring it for the current situation of Ethiopia. The national study made regarding to children living with their imprisoned mothers or primary caregivers in Ethiopia brings the picture about the living condition of children in Ethiopia who lives in prison with their imprisoned mothers. But still there are parts that are not touched by the study. The significance of incorporating non-custodial approach might go further than being mechanism by which children will live outside of prison rather it helps to protect their right to live with both parents. Kahsay Zerabruck's thesis undertaken before the promulgation of Federal Prison Proclamation No.

[6] Manfred Nowak (n 3) p.379-385

[7] African Child Policy Forum (ACPF), A National Study on Children Living with their Imprisoned Mothers or Primary Caregivers in Ethiopia, (June 2020)

[8] Kahsay Zerabruck, 'Protection of the Rights of Children Living with Imprisoned Mothers at the Ethiopian Federal prisons' (School of Law, Addis Ababa University June 2018)

1174/2019 and was made in 2018. Since the thesis made before more than 10 years ago it is important to see updates that are happen on the matter.

In general, there still needs to be a comprehensive and in-depth analysis of new legislations including court decisions and draft regulations for further reference by courts, attorneys, lawyers, and other stakeholders concerned the victims, and the government itself.

1.11 Thesis Organization

This study is structured with five chapters. Chapter one takes the introductory part. Chapter two delivers international and regional legal frameworks that has been applicable to the rights of children and treatment of prisoners in light of children living with their imprisoned mothers. Chapter three deals about national legal framework by which the rights of children living with their imprisoned mothers are protected. This chapter also focus on non-custodial approach and analyzed it with the criminal law of Ethiopia. Under chapter four treatments given for children living with their imprisoned mothers in Kality Federal Women Prison is analyzed in accordance with the laws and the practice. The final chapter concludes the study and provides recommendations that should be taken in to account for the realization of the rights children living with their imprisoned mothers.

Chapter Two

2. Overview of International and Regional Frameworks in the Protection of Rights of Children Living With their Imprisoned Mothers

2.1 The Convention on the Rights of Child

CRC is the convention that incorporate different rights of child. It tries to address the need for special treatments for children due to their vulnerability nature. Under its Preamble, the CRC recognizes that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.[9] The Convention sets out guiding principles and package of rights that every child can enjoy it.

The Convention doesn't have a specific provision pertaining to incarceration of children with imprisoned mothers but it embodies provisions that have bearing on the protection of children with detained or imprisoned mothers.[10] Although it does not provide special section for children living with imprisoned mothers, all rights in the Convention are for all children disregarding to their living circumstance. Being a child by itself makes eligible to utilize those rights provided in the Convention.

One implication to show that the Convention is concerned about children living with their incarcerated mothers is that, the Committee on the Rights of the Child (CRC Committee) takes the issue of "children of incarcerated parents" for discussion on the Day of General Discussion in 2011.[11] Introductory statement of Mr. Jean Zermatten, Chair of the Committee, highlighted several key areas of concern such as family issues, including the right of the child to be raised by his or her two parents; the right of the child to have his or her view taken into account and his or her right to development and non-discrimination.[12] The right to be raised by his or her both parents requires that the two parents to live together. It is difficult to realize this right while the mother is in prison. While emphasising the importance of considering legislative frameworks that could be put in place to ensure that the rights of children in such situations are respected, it was underscored that the inherent dignity of children and their best

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[9] Convention on the Rights of the Child (adopted 20 November 1989, entered to force 2 September 1990) (herein after referred as CRC)

[10] ACPF (n) 2

[11] CRC- Committee, Report and Recommendations of the Day of General Discussion on 'Children of Incarcerated Parents', 30 September 2011 (herein after CRC-Committee DGD)

[12] Ibid p 1

interests had to be the primary consideration.[13] In the discussion, Mr. Abdullah Khoso emphasised the need for a legislative framework that would address including procedures and rules for their protection during the arrest procedure as well as on all issues arising there from.[14] The need to incorporate detail procedures for incarceration of parents were one of point of discussion. The legal framework is expected to include details about all procedural measures that are taken when the parent is incarcerated. The availability of detail procedure by which a mother can follow to facilitate the residence of her child while she is on proceeding will help to protect the rights of children whose mothers are convicted of committing crime.

2.2 Guiding rules for treatment of prisoners: in particular for Children live with their imprisoned mothers

Besides human right instruments with package of rights, there are rules by which the rights of prisoners are protected. The living condition of prisoners has different characteristic by which it requires specific legal instruments in order to attain the full realization of protection of human rights. The Standard Minimum Rules for the Treatment of Prisoners, The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures and United Nation Standard Minimum Rules for the Treatment of Prisoners are the mentioned one. These rules touch specific parts of the rights of prisoners and incorporate rights of children who live with their imprisoned mothers. Though these rules are not clearly incorporated in the domestic legal frameworks of Ethiopia they will give insight for the issue at hand.

2.2.1 The Standard Minimum Rules for the Treatment of Prisoners (1955)

The Standard Minimum Rules for the Treatment of Prisoners is the first which devoted specifically to protect the rights of persons under any form of detention.[15] The need to have specific enforcing mechanism to sustain the protection of the rights of prisoners is a pushing factor that brought this instrument. It gives detail about treatments that should be provided for prisoners. Rule 23 is specifically related to women prisoners who are either pregnant or with

[13] CRC-Committee DGD (n 11) p 1

[14] Ibid p 1

[15] United Nations Congress, Standard Minimum Rules of the Treatment of Prisoners 1955, Resolutions 663 C (XXIV) (July 31, 1957), Kahsay Zerabruck (n 8) p.10

their infant children. It provides that pregnant women are entitled to special treatments like health care due to their natural condition. It also offers that; infant children should be provided with nursery care they need whenever their mothers are not on place to take care of them.

2.2.2 The Nelson Mandela Rules (2015)

United Nation Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), are not entirely new, but an updated version of the 1955 Standard Minimum Rules for the Treatment of Prisoners.[16] Rule 28 and 29 of the Nelson Mandela Rules states that Provision needs to be made for the pre- and post-natal care, childcare facilities and healthcare services for children and also decision on whether children are accommodated in prison with their parent should be based on the best interests of the child. In this rule the best interest of the child is given priority. Accordingly, order is given for staying of child in prison only if it suffices the best interest of the child.

2.2.3 The Bangkok Rules 2010

The United Nations General Assembly adopted the United Nations Rules for the Treatment of Women Prisoners and Non Custodial Measures (Resolution A/RES/65/229), also known as the Bangkok Rules, developed out of recognition of the different needs and characteristics of women in the criminal justice system.[17] They provide comprehensive provisions concerning, amongst others, the rights of children incarcerated with their mothers.[18] The Bangkok Rules under article 49 protect children who are in prison with their mothers from being treated as prisoner. The mere fact children found in the compound of the prison and living with their prisoner mothers does not make children prisoner and their rights should be seen separately. So long as they are not prisoners, they do have equal rights like children out of prison.

[16]UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (2016)

[17]UN General Assembly, United Nations Rules for the Treatment of Women Prisoners and Non Custodial Measures for Women Offenders (the Bangkok Rules) (Resolution A/RES/65/229) (21 December 2010)

[18] Kahsay Zerabruck (n 8) p.10

2.3 African Charter on the Rights and Welfare of the Child (ACRWC)

Coming to African regional instrument, ACRWC is said to be most advanced regional binding instrument that devotes on the rights of children of imprisoned mothers.[19] It is the only binding human rights treaty devoting a specific provision on children live with their incarcerated mothers. It requires states parties to undertake to provide special treatment for expectant mothers and to mothers of infant and young children who have been accused or found guilty of infringing the penal law.[20] The charter gives due attention for children imprisoned with their mothers and set assignment for states to think about the matter and frame their special way of treatment for such mothers by which the treatment will help the children to enjoy those rights provided under ACRWC. Special treatment for expectant mothers and to mothers of infant and young children can be expressed by ensuring non-custodial sentence, by promoting measures alternative to institutional confinement and by taking the essential aim of penitentiary system which is reformation, the integration of the mother to the family and social rehabilitation.[21]

2.4 General Principles of Child Rights

Staring from their Preambles, all provisions of CRC and ACRWC are dealing with the rights of children which are also workable for those children living with their imprisoned mothers. These conventions founded on four principles, which build the foundation for all children's rights. These are non-discrimination, the best interest of the child, the right to life, survival, and development and respect the view of child.

Though children as general are entitled to rights recognized by different laws, there are different conditions that hamper the enjoyment of such rights properly. Among these conditions the situation which children are obliged to live in prison with their imprisoned mothers is the one. It took time for the world to notice the violation of children rights in such circumstance. Though every rights of children will be at risk whenever they kept in prison with their convicted mothers, here the rights of children living with their mothers are presented in accordance with the following principles:

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[19] ACRWC (n 1)

[20] Ibid Art. 30

[21] CRC-Committee DGD (n 11) P.3-4

2.4.1 The Principle of Non-Discrimination

The word "discrimination" is defined as any distinction, exclusion, restriction or preference which is based on any ground and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise all rights and freedoms.[22] No child may be discriminated on the basis of their identity such as:- race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and all children are entitled for the rights enshrined in those conventions.[23] Children who live in different situations and circumstance are entitled to enjoy those rights without any discrimination from anyone. Their rights are not subject to compromise for the acts of their mothers. Accordingly, the principle of non-discrimination implies the obligation to safeguard children born and raised in prison from discrimination, stigma social rejection and shame, which the generally encounter within the community.[24]

Article 2/2 of CRC entails an obligation to safeguard children born and raised in prison from discrimination, stigma, social rejection and shame which they generally face within their community.[25] Article 3 of ACRWC provides for the equal enjoyment of the rights and freedoms of the African Children's Charter to all children within the jurisdiction of States parties. In this context, the concept of discrimination encompasses any distinction, exclusion or preference. Children whose parents are involved with the criminal justice system have equal rights to all other children and these rights should not be affected because of the status of their parent. In order to prevent discrimination, States Parties should put measures in place to provide children imprisoned with their parents with the equivalent services that children who are not imprisoned would receive.[26] In particular the general comment on article 30 of ACRWC, States Parties are urged to undertake measures to prevent and eliminate discrimination against children whose parents or primary care givers are incarcerated. In recognition of the risk of discrimination that may occur against children born in remand or prison facilities, States Parties should undertake the following measures:

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[22] United Nation Human Right Committee, International Covenant on Civil and Political Report, General Comment No 18, Non-Discrimination, 1989

[23] CRC (n 9) Art.2 & ACRWC (n 1) Art. 3

[24] Global Study (n 3) p.356

[25] Ibid p.356

[26] Kahsay Zerabruck (8) p.11

(a) where expectant mothers are facing criminal charges or have been condemned to custodial sentence, arrangement for temporary release, parole or suspended sentence (for minor or casual offences) should be made to enable expectant accused or prisoners to deliver outside the remand or prison facilities;

(b) where birth occurs in remand or prison facilities, States Parties should ensure that they shall be registered in the local birth registration office; and

(c) there should be no mention of remand or prison as place of birth on a child's birth records. Only the locality shall be mentioned in the child's birth records.[27]

Though both the CRC and ACRWC guaranty the equal enjoyment of rights by every child, the circumstance where children imprisoned with their mothers would imbalance such enjoyment of rights. This is either due to the economical barrier of states to create the outside world in prison for children or the nature of prison by itself limit children to enjoy some rights. States may take different measures to create suitable environment for children within the prison but some rights still be violated and affect the wellbeing of the child in different dimensions. To raise simple example when a child live with his or her imprisoned mother by default he or she will be separated from his or her father which violate his or her right to live with both parents.

2.4.2 The Doctrine of the Best Interest of the Child

Whenever decisions are being taken which may have an impact on children, the best interest of the child has to be taken into account at all stages. [28] This applies for all matters concerned with the child and all decisions made on him/her by either the family or state action.

There are three important aspects of this principle that should be upheld. Firstly, it says that "in all actions" in Convention on the Rights of Children (CRC) and "always act" in African Charter on the Rights and Welfare of the child (ACRWC) concerning the child. This is not limited to certain actions only. Therefore, States Parties are expected to respect, protect and fulfil the best interest of children in all actions concerning children. Secondly, it says that any person or authority should fulfil the best interests of children. This places a requirement on all officials or persons that might come into contact with a child or deal with a matter in which a child is involved. Therefore, prison officials, police officials and justice officials would fall

[27] Kahsay Zerabruck (n 8) p 11

[28] CRC-Committee DGD (11) 30, CRC (n 9) Art. 3 & ACRWC (n 1) Art. 20

within the ambit of this provision. Lastly, it requires that the best interests of the child be the primary consideration in matters involving children. Therefore persons dealing with matters involving children, within the ambit the conventions should ensure the best interest of the child as the final outcome.[29] The best interests of the child must be the primary consideration in relation to all actions that may affect children whose parents are in conflict with the law, whether directly or indirectly. States should create and implement laws/policies to ensure this at all stage of judicial and administrative decision-making during the criminal justice process, including arrest, pre-trial measures, trial and sentencing, imprisonment, release and reintegration into the family and community.[30]

Almost in all laws which concerned on the right of children the best interest of the child is at priority. In the case at hand, I argue that the best interest of the child can't be ensured in prison. Sending the child with his or her convicted or sentenced mothers should be the last to choose not be option to list. Compromising the best interest of the child and its rights in order to execute the criminal law shouldn't be accepted.

In this regard the experience of South Africa might be helpful by which In September 2007 the South African Constitutional Court ruled that the 'best interests of the child' must be taken into account when sentencing a parent with day-to-day caring responsibilities for children.[31] It presents here in below: -

The case was started in First Instance Court and subject to appeal by the applicant Ms. M attorney as to the due consideration of whether to impose imprisonment on the primary care giver of young children. Particularly the applicant was supported her appeal claiming the best interest of the child should be considered while the lower court sentenced her with fine and five years' imprisonment. The appellant Ms. M argued that as the lower court didn't take in to account the national constitutional principle and CRC in which the state has been party to the convention. The applicant raised that as she has three children and totally dependent to her. But the high court reject her appeal.[32]

[29] Kahsay Zerabruck (n 8) p.12-13

[30] Ibid p.13

[31] South African Constitutional Court, S v M (CCT 53/06) [2007] ZACC 18 (26 September 2007)

[32] Ibid

The appellant further contested the decision at the Supreme Court. The court refused the application which she further contested arguing that the supreme court of appeal had given no reason for refusing to her oral argument.[33]

Then, she enrolls her application for the chief justice of the state. The direction by the chief justice required the parties to deal with: -

- What are the duties of the court in line with state constitution, legislation when the person being sentenced is the primary care giver of minor children?
- Were the duties observed in the case? And
- If the duties weren't observed what order should the court make if any?

The court directed the above three pointed out directions to the ministry of social development and the ministry of justice and constitutional development to bring report.

Applicant's advocate Mr. Paschke was produced a comprehensive report supported by a report compiled by a social worker, Ms Cawood. The center for child law of the University of Pretoria was admitted as amicus curial and Ms. Skelton made wide -ranging written and oral submissions on the constitutional, statutory and social context by which the court was expected to decide.[34]

Finally, the chief justice of the state based on the curator and amicus report, recommends that the court need to consider the impact of custodial sentence in respect to primary care giver with minor child before decision. [35]

In this case it is argued that the due consideration of the interest of M's children is required and an appropriate and stringent correctional supervision order should be imposed regarding custodial sentence on primary care giver of child.[36] The Court decided house arrest, community service and suspended the prison sentence of the appellant who was a mother a sole caregiver of three minor children (aged 8, 12 and 16). Taking into account the impact of her imprisonment on child development including loss of home and community, disruption in school routines and transportation, and potential separation from their siblings.[37]

[33] S v M (n 31)

[34] Ibid

[35] Ibid

[36] Ibid

[37] Global Study (n 3) p 372

2.4.3 The Right to Life, Survival and Development

Every children have the right to life and right to education to develop their personality, talent, mental and physical abilities to their fullest potential.[38] The protection of the right to life requires not only negative duties but also positive duties. For children, negative duties or duties of omission implied by the right to life include prohibiting and preventing penalties like the death penalty or imprisonment form being imposed on their mothers.[39] Every State has to ensure, to the maximum extent possible, the survival and development of the child by providing access to health care and education, and by protecting the child from economic and social exploitation. Stakeholders have duty to take part on building the future of children by contributing on their development.

The child's rights to development entails a comprehensive process of realising children's rights in order to allow them grow up in a healthy and protected manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.[40] Both living in prison with a primary caregiver and being separated from an imprisoned caregiver can violate the right of the child to life, survival and development.[41] Both the living condition in prison and the separation of a children from their mothers due to incarceration of the mothers have adverse effect on the development of the child. Rather there need to be another mechanism by which the children can live with their mothers outside prison. This will lead to find out non-custodial sentencing mechanism.

2.4.4 Respect for the View of the Child

The view and opinion of the child should be respected and given priority for decision made regarding matters affecting him/her.[42] The provisions requires that views of every child be given due weight based on their age and maturity, but doesn't impose any age limits for the

[38] CRC (n 9) Art.6, ACRWC (n 1) Art.11

[39] Rachel Hodgkin and Peter Newell, Implementation Handbook for the Convention on the Rights of Child (3rd ed. Geneva 2007), P. 84

[40] Nowak, M., The Right to Life, Survival and Development Leiden: Martin Nijhoff, (2005), p. 2, Tomkin, J., Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned – A Legal Analysis Geneva: Quaker United Nations Office,(2009), p. 13

[41] Global Study, (n 3) p. 57

[42] CRC (n 9) Art. 12, ACRWC (n 1) Art. 4

exercise of the principle of respect for the views of the child.[43] Children have right to express his/her opinion before decision made by anybody including states. At least children who are capable of expressing their opinion and those who can choose their interest should be given a chance to be heard.

According to UN Committee on the Rights of the Child, General Comment No 12 (2009) state parties are expected to make presumption that a child is capable of forming his or her own autonomous opinion which means that the child is not required to prove his or her capability of forming opinion. Besides, it is important to note that expression of child's opinion might not be verbal always rather it might be through nonverbal methods like body language, facial expression, drawing or painting.

Therefore, it is important that state bodies to include experts that can understand and interpret the opinion of the child before rendering decisions. Most detention center are prepared or equip themselves with conditions regarding to accused and criminal persons who stay for a given period of time. In the meantime, the interest and safety of child living with his or her mother was disregarded or given little space. Children are treated by the framework already set out mostly based on the budgetary capacity of the detention center. In decision regarding to sentence on mother of the child the opinion of the child should be given place.

2.5 General Comment No 1

Within deep consideration of the matter The African Committee of Experts adopt General Comment Number 1 for clear understanding of Art 30 of the ACRWC. By taking the principle of the best interest of the child it gives options for protecting the rights of children living with their imprisoned sole parents or primary caregivers which include mothers. An individualized, qualitative approach is required when reading Article 30 with Article 4 of the ACRWC.[44] Accordingly, states are expected to frame mechanism by which courts will give decision case by case by giving priority for the best interest of the child. Since the way by which the best interest of each child will be satisfied is different, there need to be individualized assessment for each criminal mother with child. The best interest of the child

[43] United Nations Committee on The Rights of the Child, General Comment on The Right of the Child to be heard No 12 (2009)

[44] African committee on the Rights and Welfare of the Child (ACERWC), General comment No.1 (on Article 30 of the African charter on the Rights and Welfare of Child), (ACERWC/GC/01 (2013)), (08 November, 2013) (hereinafter referred as ACERWC, General Comment No. 1) p 15

will be assessed before decision is rendered. This is helpful even to pick which type of non-custodial sentence would be suitable for protecting the best interest of the child. For example, if the court punish mother of the child with fine and if her financial capacity is low then this might have impact on the child by which the best interest of the child will be at stake due to the incapability the mother to address other interests of her child. Consequently, the court might take individualized assessment and punish her with other types of non-custodial sentence. This approach implies the need for data gathering by States Parties about the affected children so as to develop effective policies and practices. Moreover, it also implies that professionals such as teachers and social workers are trained to provide the necessary support to the affected children.

2.6 Rights of Children Living with their Imprisoned Mothers

Among the vulnerable groups of people children takes the main part because they are in less position for defending about their rights. Children who live with their imprisoned mothers are in position of seeking double standard of protection by which first they are part of vulnerable group of society and second, they are deprive of their rights due to criminal acts of their mothers. Since the law stands for both the victim, the criminal person and the children there should be arrangement for protecting the rights of these three groups of society. This starts from recognizing their rights. For the purpose of this study, it is important to look in detail the rights of children living with their imprisoned mothers.

All children rights that are provided with different legal instruments are entitled for all children notwithstanding to their living condition. Children who live with their imprisoned mothers are also entitled to these rights. Among wide packages of rights here are some selected rights by which they are at risk due to the living condition of children with their imprisoned mothers.

The Right to Life: -

Article 6 of CRC provide that state parties should recognize the inherent rights of children and the maximum extent possible the survival and development of the child. Article 5 of ACRWC also states that a child has a right to live. The FDRE Constitution also provide that children have the right to life.[45] Domestic policy and other domestic instruments are base themselves with the above provisions and guaranteed the protection of the right to live.

[45] The Constitution of the FDRE (n 2) Art. 36 (1) (a)

The right to life laid maximum obligation on stakeholders to ensure the survival of the child. It is important to make sure that all labors are taken to make sure the maximum effort for the child to be alive. The protection of this right might be expressed by creating conducive environment for children by avoiding things that make their life at stake. This starts from protecting and caring pregnant mothers. Prisons are also expected to comply this duty as a stakeholder as far as they receive children when the mothers are incarcerated.

The Right to get Sufficient Health Care

CRC provide State parties to recognize the right of the child to get highest attainable standard of health and to facilities for treatment of illness and rehabilitation of health.[46] This right also recognized by ACRWC that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.[47] Both physical, mental and spiritual health of a child is expected to be well treated for the realization of this right.

Children should grow with the environment that is suitable for their health. For adequate development of children there is a need to take action towards their physical, mental and spiritual health. This may include the neatness of the environment, access for nutrient based food, well behaved or good-mannered social group and close follow up from their families. Missing one or more of them will result to hamper either their physical, mental or spiritual health. But most prisons fail to comply this.

Record-keeping and birth registration

Article 7 of CRC and article 6 of ACRWC provided that every child has rights to be named and registered.[48] The former convention mention that state parties shall ensure the implementation of these rights in accordance to their national aw and other relevant international instruments. Ethiopia also explicitly provides that child has rights to be named and has nationality.[49] In Article 11, sub-Article 7 of the Council of Ministers Regulation No. 138/2007, on the treatment of federal prisoners clearly states that if the child is born in detention center, such fact may not be mentioned in the birth certificate of the child. As members to the society and citizens of the country children have right to be registered.

[46] CRC (n 9) Art. 6, 24(1)

[47] ACRWC (n 1) Art. 5, 14

[48] CRC (n 9) Art. 7, ACRWC (n 1) Art. 6

[49] The Constitution of the FDRE (n 2) Art. 36(1)

Though the laws protect children from mentioning their birthplace as prison center there should be strict mechanism by children will not born in prison. If children are born in prison, then the reality is that they are born in prison and other efforts after that is just lying. It is important to avoid the probability that children might born in prison by providing other option like non-custodial sentence.

Rights related to children development

Article 6 sub 2 of CRC provide that states parties shall ensure to the maximum extent possible the survival and development of the child and Article 14 of ACRWC states that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. In this section it is important to raise two factors that can bring full development of children.

The first one is access for balanced diet. Children are part of the society who need special attention in every aspect since they are on natural process of developing themselves. Food takes part in this process. That's why ACRWC in the above-mentioned provision list out the need to have nutritious food and safe drinking water explicitly. The second one is environmental situation for behavioral development of the children. Full development of children pre requires the comfort ability of the environment where the children spent most of their time.

The Right to Live with Parents

Children have right to live with both parents as much as possible. Art. 7 of CRC says that child has the right to know and be card by his or her parents. Art. 18 of ACRWC gives unique place for family and guarantee special treatment. The proceeding provision, Art. 19 also provides whenever possible children should live with their parents. The instruments allow separation of children from their parents only in stringent circumstances. The same right is protected by FDRE Constitution by stating that child has the right to know and be cared by his or her parents.[50] The best interest of the child is the parameter for deciding on the matter of separation as provided under the same provisions mentioned above. Authorities should consider the best interest of the child before separating them. Separation is allowed only when the best interest of the child is satisfied.

[50] The Constitution of the FDRE (n 2) Art. 36/1/c

The Right to Education

Art. 28 (1) of CRC provides that states should recognize the right of the child to get education. Art. 11 of ACRWC states that every child has the right to an education. Both provisions give attention for equal access for every child. Since education is foundation for building up the future of the child, the limited access given for children living with their imprisoned mother will have impact on their life by determining their computational capacity compared to those children who raised outside prison.

Right to Play

Art. 31(1) of the CRC provides that states should recognize the right of child to engage to play and recreational activities. Art. 12 of ACRWC also mentioned that children have right to play and participate fully in cultural and artistic life. Reading of these provisions together refer that, children should be provided with adequate environment that makes them to play and recreate. Besides these ACRWC is also concerned on activities relating to culture and art which have multidimensional impact on children. Mostly prisons are not structured and arranged by considering this issue. In the absence of these facilities children living with their imprisoned mothers are deprived of their right.

Chapter Three

3. Domestic Legal and National Policy Framework and Non-Custodial Approach in the Protection of the Rights of Children Living with Their Imprisoned Mothers

3.1 Domestic Legal Framework

As a member of both United Nations and African Union, Ethiopia has prepared and applies different legislations that focus on the rights of children. In this regard the country incorporates the rights of children in the Constitution and establish different stakeholders at different level. There are legal and institutional framework to ensure the rights of children. But it is difficult to find out such framework on the specific matter of rights of children living with their imprisoned mothers. Here below some legal and institutional arrangements are presented.

3.1.1 Constitutional Protection for the Rights of Children Living with their Imprisoned Mothers.

The Constitution as the supreme law of the country, guaranty different rights for every person including children. Chapter three of the Constitution listed different rights. Beside the general lists of rights, Art. 36 of the Constitution ensure the rights of children specifically. This shows that children are among those whose rights are given due attention and provided specifically in the Constitution. This provision provides some core rights for the children and reflect the best interest of the child to be taken to consideration for all actions undertaken by public and private institutions, courts of law, administrative authorities and legislative bodies. From this it is possible to understand that courts should take in to account the best interest of the child in every decision they made. Decisions of the court should not affect the rights of children. Most of the time the court asses the best interest of the child on family matters of custody or maintenance where the parents file to divorce. But I believe that, the law should not limit itself to only this matter rather all issues that raise the question of the rights of children should be answered in light of the best interest of the child.

Further the Constitution make itself comfortable for human rights issues by incorporating different international laws as part of the Constitution. The principles of Universal Declaration on Human Right (UDHR), international covenants on human rights and

international instruments adopted by Ethiopia will serve as instruments to interpret the rights enshrined in chapter three of the constitution.[51] Therefore, in working on the rights of children international legal instruments are functional and have effect as the Constitution in the boundary of Ethiopia. Thus, the rights of children living with their imprisoned mothers should be see in accordance with both the international and domestic legal instruments.

3.1.2 FDRE National Children's Policy

FDRE National Children's Policy put three fundamental pillars for the protection of the rights of child. These are: - children's development and growth, prevention and protection of children from social, economic and political hardship and providing rehabilitation, care and support for children in difficult circumstances.[52] These fundamental pillars require interrelated activities of different stakeholders and also deep interpretation and understanding of the government especially on the matter at hand.

The policy with the vision of attaining the protection of the rights and welfares of all Ethiopian children incorporate the four principles for the rights of child.[53] The policy take family as the most suitable and irreplaceable natural home for children. The policy guarantees different rights which includes guarantee speedy trial for case that children are involved and availability of child friendly justice system.[54] The policy also provide access to quality and timely social and economic service for children in difficult circumstance.[55] Though the policy did not clearly mention children living with their imprisoned mothers the rights provided in the policy are expected to be protected for them. The justice should consider children by creating environment that the children explain their view and the best interest of the child given priority. Accessibility of socio-economic service is also required for children living with their imprisoned mothers to face difficult living condition in the prison.

3.1.3 Federal Prison Proclamation No. 1174/2019

The Federal Prison Proclamation No.1174/2019 which replaces the Proclamation No. 365/2003, comes with some adjustment comparing to the previous proclamation. For

[51]The Constitution of the FDRE (n 2) Art. 13

[52] National Children's Policy of the FDRE (April 2017) sec. 1-2

[53] Ibid sec. 2.3

[54] Ibid sec. 3.1/G

[55] Ibid sec3.6

instance, the previous replaced Proclamation in its Art.28 provides 18 months of age limits for children to stay in prison with their mothers. Whereas, the new Proclamation under Art. 53(4) extends the age limits to 24 months. In this provision, children below 2 years and who need close attention of their mothers shall stay with their mothers. The child above the age of 2 years may stay in prison with his or her mother based on court decision.[56]

According to the Proclamation the need to have "close attention" is the only requirement for the child to stay in prison. It is obvious that every child under the age of 2 years need their mothers' close attention. Though court order is required, this provision implies that if an imprisoned mother has child below the age of two then by default, the child will live with her in prison. Taking the need to have close attention as a parameter to decide the staying of children in prison does not suffice the principle of the best interest of the child. The subjective standards of individualized approach is the missing element in this Proclamation. Each case should be seen separately and the best interest of the child should be incorporated.

The Proclamation also provides that specific budget will be allocated to children who stay in prison with their mothers.[57] The budget is for the growth and health of the children. The growth and health of the children is expressed with the wellbeing of their mental, physical and spiritual development. In this sense the allocation of the budget should be sufficient enough to realize full development of children living in prison with their imprisoned mothers.

3.1.4 The Council of Ministers Regulation on the Treatment of Federal Prisoners Regulation No. 138/2007

This Regulation provides arrangements by which pregnant women and imprisoned mothers with their children will be treated. In Art. 112(3) of the Regulation, stated that if the condition of the prison has adverse physical or psychological impact on the children who lives with their imprisoned mothers then children shall be handed over to close relative. Physical or psychological adverse impact is assessed individually. Therefore, this regulation can fill the legal vacuum of Proclamation No.1174/2019 so long as it accommodates individualized approach. Nonetheless, it is still exposed to gap by which when the children are handed over for relative it violates their right to live with their parents. As a result, the option provided by

[56] Federal Prison Proclamation, Proclamation 1174/2019, Federal Negarit Gazeta year 26, no 14, (17 February 2020) Art. 53(5)

[57] Ibid Art. 53(4)

the regulation only answer the questions about the unconducive situations of prison not their right to live and care by with their parents or mothers in particular.

3.1.5 Federal Prison Administration Directive No.2/2017

The Federal Prison Administration Directive No. 2/2017 provides the way how the prison administers criminal suspects and offenders that are brought there with court order. Within this directive there is the part that shows how women suspect and prisoners are treated. It provides that it accepts children below 18 months and with court order children up to 3 years.[58] The directive allows specific treatments both for pregnant women who gave birth in custody or an imprisoned mother of a newly born child grant access with a court order. It allows specific kind of foods and materials items to enter only for prisoner mother with infant child. Pregnant women or imprison mother with her child are allowed to have only 500 birrs at hand per month, an amount that is even 100 birrs less than that allowed for foreigner woman prisoner.[59] The mother of newly born child or a mother imprisoned with her child will pass many problems due to poor legal arrangement. Let alone those mothers who have financial incapacity even those who have financial capacity to raise their children are restricted due to the legislation of the prison administration that limit the amount of money and types of items that are allowed to enter to the prison. Though the main task of the administration is to execute court order by imprisoning persons according to the order of the court, the situation of children who entered to prison without their criminal acts need to be taken into account.

3.2 Non-Custodial Approach for the Protection of the Rights of Children living with their Imprisoned Mothers

3.2.1 Non-Custodial Approach

Implementation of Article 30 of ACRWC requires States parties to review their sentencing procedure and reform it accordingly. By doing so courts need to consider five points before deciding on such cases; these are:- whether the convicted person is primary caregiver or not, the effect of sentence on the child, when the sentence is custodial then availability of options for the child till the caregiver is imprisoned and when there is option for non-custodial sentence then choose by considering the best interest of the child and finally, if there is a

[58] FDRE ministry of federal affairs federal prison administration directive no 2/2017 Art 25(6), 7

[59] Ibid Art. 13(4)

range of appropriate sentence, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose.[60]

Children living in prison with their parents often experience serious violations of their right to survival, protection and development arising from their living conditions; they may not be registered at birth nor have access to education or health facilities.[61] In relation to children not imprisoned with their parents, the right to survival and development is also subject to limitation as the primary person entrusted with realizing this right is absent.[62] If children stay in prison with their mothers, then they are exposed to inadequate facilities that put them in risk. Imprison the mothers and left the children outside the prison also put their right at risk by making them to have no one to take care of them.

In order to ensure that children's right to survival, protection and development is protected and realized, States Parties should implement the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). [63]

As a general rule, States Parties should ensure the availability of alternatives to custodial sentences for expectant prisoners or those convicted mothers with children. In this regard, States Parties should undertake both legislative and administrative measures to ensure they give priority consideration to non-custodial measures when courts sentence or decide on pre-trial measures for a child's sole or primary carer, subject to the need to protect the public and the child and bearing in mind the gravity of the offence.[64]

The Committee emphasises that in sentencing parent(s), noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).[65]

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[60] Kahsay Zerabruck (n 8) p.15

[61] Kahsay Zerabruck (n 8) p.15

[62] Ibid

[63] Ibid

[64] Ibid

[65] CRC-Committee DGD (n 11)

Article 30 should not be interpreted as allowing for convicted parents to evade accountability for their offences. Taking children's best interests into account does not mean that parents cannot be detained or imprisoned. Such an approach would render systems of criminal law unworkable, to the detriment of society as well as the interests of children, who benefit along with everyone else from the prevention of crime. States Parties must ensure that judicial officers are equipped to be able to weigh the best interests of the child versus the gravity of the offence and public security when considering the incarceration of a mother/ parent.[66]

3.2.2 Domestic Legal Arrangement for Non- Custodial Approach

Guaranteeing criminal liability of criminal person was the success of the law previously. Then development comes in different aspects and protecting the rights of such criminal person takes place to be considered. Things goes changed and rights also become wider and deeper through time. I think now it is the time to see the rights of children besides criminal liability of the mother. Ethiopia tries to amend laws of the country in taking to account the above fact. Different laws are promulgated regarding to human rights. In this section the Criminal Code is assessed in light of rights of children living with their imprisoned mother.

The current Ethiopia's criminal justice system is governed by the Criminal Code which was promulgated in 2004. The previous Penal Code revised due to different factors. Since the Penal Code enacted long time ago, there were change in the development of the society and types and ways of committing crime. This results to prepare new system for governing criminal acts. In order to accompany concepts like avoidance of collective punishment, mutilation of human body as punishment, inclusion of presumption of innocence, rules applicable for young offenders, inclusion of probation and suspension of sentence and other basic elements of the Penal Code was revised and the current Criminal Code is operational.[67]

There are various theories concerned with the purpose of punishment ranging from retribution, through prevention, deterrence, reformation and education to rehabilitation. These issues have been considered as the specific purposes of punishment in almost all criminal laws. [68] In the process of punishing the criminal for his or her act aimed to teach the person to not to do such act again and to rehabilitee him or her from such behavior in one

[66] CRC-Committee DGD (n 11), Kahsay Zerabruck (8) p.19

[67] Mrs. Glory Nirmala K. and Ato Serkaddis Zegeye, Criminal Law I Teaching Material, Justice and Legal System Research Institute (2009) p 37-39

[68] Mrs. Glory Nirmala. K & Mr. Amha Mekonnen, Criminal Law II Teaching Material, Justice and Legal System Research Institute **(**2009) p 101

side and it is also to teach others what will happen to them if they engaged in similar criminal act.

The Criminal Code also aims at preventing the commission of crime by noticing which acts can be taken as criminal act in the country and what will be the outcome of the commission of such acts by providing penalties. The Code also designed to deter the person from committing other crimes and make others learn. It is also reared to rehabilitee criminals from their behavior.[69] So various types of punishment could be provided by laws since they can meet these goals of punishment.

The Criminal Code list down criminal acts and their punishment specifically. The Criminal Code simply classifies crimes into various titles on the basis of content (type) rather than on the scale of punishment. Although an explicit distinction is not made between crimes, the range of punishment implies the gravity of crimes. Crimes of very grave nature are punishable with rigorous imprisonment for a period of one to twenty five years. A crime of simple nature may subject to special provisions that may face simple imprisonment for a term of ten days to three years subject to Special provisions that may extend the period beyond three years. Petty offences on the other hand, are punishable with fine or arrest for a relatively shorter period of one day to three months subject to certain aggravating exceptions.[70]

The Criminal Code provides various types of punishment. Punishments laid down in the code might be categorized in to two categories. The first category contains pecuniary penalties, compulsory labor, punishment restricting or depriving of liberty (imprisonment) and death penalty.[71] The second category of punishment may impose on criminal in addition to punishments that are listed above. This may include caution, reprimand, admonishment and deprivation of rights.[72] From the first category the court may punish criminal either both fine and imprisonment together or only one of them. Compulsory labor imposed either to substitute for fine or to substitute simple imprisonment.[73]

Having these all-in minds, it is important to see the Criminal Code in light of non-custodial approach by which criminal person will get his or her punishment for his or her criminal act

[69] Criminal code art 1 par 2

[70] Mrs. Glory Nirmala K. and Ato Serkaddis Zegeye (n 67) p 49 & 50

[71] Revised Criminal Code (Proclamation No. 414/2004) (herein after referred as Criminal Code) Art.122- 123

[72] Criminal Code Art. (n 71) Art. 122-123

[73] Criminal Code Art. (n 71) Art. 103(1)

outside the prison. The basic method of punishment by which the code ensure for the application of non-custodial approach is by providing pecuniary penalty or compulsory labor to punish criminals. Though the procedures will be taken if the criminal is incapable of paying the money is respected, pecuniary penalty which is fine as provided in the Criminal Code is the way by which the criminal pays money for his criminal act and released. In most parts of the code fine is set as option for simple imprisonment and in some areas, fine is set as additional punishment for criminal acts that are punishable with rigorous imprisonment. This show that criminals may subject to punishment with fine instead of imprisonment in case when they commit crime that can be punished with simple imprisonment. This will help criminals to serve their punishment outside the custody. Here it is important to insight the case of criminal mothers with children to the eyes of the Criminal Code that need to give attention and include in the legal framework.

The other legal arrangement for non- custodial imprisonment set out in the Criminal Code is that the condition by which punishment of simple imprisonment is substituted by compulsory labor work. “Wherever by reason of local administrative difficulties, the execution of a sentence of simple imprisonment is not possible or the carrying out of such sentence is not conducive to the reform or the rehabilitation of the criminal, the court may, in respect of crimes for which the special part of this Code provides for a term of simple imprisonment not exceeding six months, inflict a sentence of compulsory labour instead of the sentence of simple imprisonment."[74] The code provide two reasons by which punishment with simple imprisonment could be changed in to compulsory work. The first one is when local administrative which refers prison administrations are under condition where they can’t execute the punishment as ordered by the court. Secondly if the court believes that the sentencing will not meet one of the aims of criminal punishment which is reform or rehabilitation of the criminal.

Generally, it is possible to say that the Criminal Code gives little space for non-custodial approach of punishment. Criminals including those women who have children are not capable of enjoying this option of punishment due to narrow room given to it by the Code. However, this approach is suitable and appropriate especially for those children who are deprived of their rights without any contribution to do so. The rights of children of imprisoned mothers are given no space in the Criminal Code. Though having family

[74] Criminal Code (n 71) Art. 107

dependent on the criminal person might be one acceptable mitigating circumstance by which the criminal can raise to mitigate his or her punishment it is not sufficient enough for the protection of the rights of the children. The full realization of the rights of children will happen when they are capable of living outside the prison with their parents by imposing noncustodial sentence on their mothers.

3.2.3 The Customization of Non-Custodial Approach under Federal Cassation Division Bench Decision

The study finds out one court decision which more likely similar case to the issue at hand. Though in this case the criminal is the father but it is important and give more stress for the study, that the best interest of the child is wide concept that it needed to be assessed individually. The need to have individual assessment before decision can be more elaborated with the following case: Federal Cassation Division Bench under Volume 24, with in File no. 177216 passed a final decision on the case which has been appeared before it.

The Case has been started first in the Federal High Court between the plaintiff Federal Public Prosecutor and the defendant Mr. Gebriel paratory Antoniyo.[75]

The defendant prosecuted under Art. 598(2) of the Criminal Code by unlawful sending of Ethiopians for work abroad. Following the proceeding, the defendant was requested the mitigating circumstance before the court. The defendant generally raised four mitigating conditions to minimize the sentences. The first one is he mentioned that: as he has children and the care giver to them, Secondly, he explained as his wife is a cancer patient and he is also having a blood pressure, thirdly he mentioned that, as he has never been participated and convicted in a crime before and fourthly, he explained that he was participated in so many charities activity. Finally, the Court considered that the mitigattionconditions claimed by the defendant as result the court punished the defendant within 3 years and 7-month imprisonment, 500 fine punishment.

The defendant disappointed by the Federal High Court Decision and make an appeal for the Federal Supreme Court though the Supreme Court confirmed the High Court decision in accordance with Art. 195(2) of the Criminal Procedure Code and rejects an appeal on the ground of no error of law and facts was found on the High Court decision.

[75] Public prosecutor Vs. Mr. Gebriel Paratorry Antoniyo, FDRE Supreme Court Cassation Division Court, Vol 24 (177216), (10 November 2019)

The defendant attorney had been appealed to the Federal Cassation Division Bench justified that, as the relevant law wasn't entertained in all lower court and that conditions did not enable the defendant to benefit from the four mitigated conditions. Depending up on the statement of appeal the cassation passed its decisions as follows: -

Cassation Division's Final Decision and Justifications:-

Beside other facts the cassation division customizes the concepts of article 36(1) of the FDRE Constitution; regarding to children rights as, every child has the right to know and be cared for by his or her parents or legal guardians. The cassation justified that as Ethiopia had been a member state to the convention on the rights of children and approved this convention by the Proclamation No.10/1984. In addition to this the court under its decision critically analyzed the Resolution No.44/25 that had been passed by the CRC in 1989 provides and put an obligation on the member state as a legislator and other policy makers has to take in to account the best interest of the children in any social, economic and other activates that the interest of the child is affected. The cassation in line with those justification amended the lower court's decision in to 3years of suspension and with 3,000 fine punishment.

The decision of the cassation division bench has been one of the indicators for the non-custodial punishment mechanism in which the best interest of the child is satisfied. The court takes in to account the living condition of children. As the case indicates the wife of the defendant is fighting cancer and incapable of take care the children, the best interest of the child can be satisfied if the defendant punished with sentence out of prison. The court follows non-custodial approach by which the defendant punished with suspension and fine. The inclusion of non-custodial sentences in the criminal law will help court to follow structured procedure for similar cases.

3.3 Access to Justice Vs. the Rights of Children Living with their Imprisoned Mothers

Criminal responsibility is not only about deterring and rehabilitating the criminal from his or her criminal act rather it is also to satisfy the rights of victims for accesses to justice. For the victim the punishment of the criminal is one implication that he or she use the fruit of justice. But the point is that what kind of punishment may get the status of punishment in the eyes of the victim. In the society that consider the absence of justice when the criminal released from prison by using pardon, it might require to work on the awareness of the society.

If a possible imprisonment of the parent would be detrimental to the child, then a court is obliged to give due consideration to look towards possibilities for a non-custodial sentence,

while noting that the severity of the offence committed by the parent would be a further determining factor.[76] Such reasoning when it comes to sentencing also values the principle of restorative justice and can help balance the rights of all parties involved, including the children and society at large.[77]

The inclusion of non-custodial sentencing options help to have structured legal procedure to be followed by the court. This will make decision of court credible by the society including the victim. Availability of clear legal instrument balance the gap by which the interest of the child will be taken into account with the decision of the court.

[76] Committee on the Rights of Child, (n 10), p. 2

[77] Ibid, p. 2

Chapter Four

4. Treatment of Children Living with their Imprisoned Mothers in Kality Federal Prison

4.1 Assessment and Authorization process

The Federal Prison Proclamation does not define the word 'mother'. Thus, it is not clear whether the word 'mother' includes only biological mothers, adoptive mothers, step-mothers or other legal guardians.[78] Though there is no deep mechanism by which the court identify whether the mother is the real biological mother of the child, the word 'mother' is construed narrowly so as to mean biological mothers only.[79]

The Federal Prison Proclamation No. 1174/2019 set the maximum age limit and the need to have close attention as requirement for children to stay with their imprisoned mothers. The Proclamation does not make specific and explicit reference to the principle of the best interests of the child as the overarching principle or preeminent consideration to inform decisions regarding the authorization of mothers to keep their children in prison with them.[80] The Proclamation does not explicitly require for assessment of what is the best interest of the child in line with the FDRE Constitution.[81] Decision has to be made by a court following the request of the mother to be allowed to keep her child with her in prison. In practice, it appears that there is no a specific application forms that the mother is required to complete to this effect.[82] On the occasion of sentencing, the court mostly give authorization for the mother to keep her child with her in prison after entertaining her request to do so.[83] The court decides that the child should stay in prison upon the consent of the mother and if there is no other person caring for child. In the study it is revealed that there are no clear rules, regulations and mechanism as regards the assessment required to be made for authorizing the stay of the child in prison with the mother. The best interest of the child and the right of the child to live with his or her both parents are undermined.

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[78] ACPF (n 7) p.17

[79] Interview with Judges and Public Prosecutors, Kolfe Kerano and Nifas Silk Bench, Federal First Instance Court, (12 – 17 July 2021) (herein after referred as Interview with Judges and Public Prosecutors)

[80] ACPF (n 7) p 15

[81] Ibid p 15

[82] Interview with Judges and Public Prosecutors, ACPF (n 7) p 16

[83] Ibid

There is no room for individualized assessment which requires reports compiled by social workers or child care specialist and child psychologists by way of a pre-sentence report. The necessity to have this report helps the court to make order by considering the best interest of the child and the eligibility of the mother for the authorization. It is not also clear the extent to which information regarding prior maternal contact, length of sentence, availability of appropriate prison facilities, parenting abilities of the mother, the child's behavioral, medical and mental health history as some of the considerations to be taken into account in the course of the assessmenton.[84]

The Proclamation is silent on whether or not a mother who is convicted of a crime involving a child is eligible for this authorization.[85] The Proclamation does not provide for the need for a psychiatric assessment of the mother to ascertain that she does not present a danger to the child.[86] The study revealed that there are some instances where the Federal Prison Commission present application to court when the imprisoned mother has mental problem or abusive behavior and incapable of take care of her child.[87] In such cases the court may order to handover the child for close relatives if there any or to Non-Governmental Organizations (NGOs) who are works on childcare.[88] Currently the Federal Prison Commission is working with Abebech Gobena Childcare Center, Kibebe Tshehay Childcare Center and Hanna Orphans for receiving and taking care of children whose mothers are imprisoned and are not able to take care of them. The absence of prior assessment for the eligibility of the mother for authorization results to bring back the case again to court and the child to face problem for the time being in his or her staying in prison. The need to have individualized assessment mechanism have solution by taking all individualized assessments before rendering order by court.

[84] ACPF (n 7) p.17

[85] Ibid (n 7) p.18

[86] Ibid (n 70, p.18

[87] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[88] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

4.2 Prevalence of the practice

Female prisoners constitute a small proportion of the prison population in Kality Federal women Prison.[89] It is evident that conduct of prohibited act on the part of the mother of the child is the immediate cause for the deprivation of liberty of the child even if this is also partly attributed to the policies and practices pursued by the state. The study revealed that women are the ones with whom children are detained in Kality Federal women Prison for the obvious reason that the law does not allow fathers or other primary caregivers to keep children with them in prison. The data that shows the prevalence of number of children entering to Kality Federal women Prison is presented as follows: -

Number of Children Entering Justice Sector Detention with their Parents in Federal Kality Women Prison

Gender	2015	2016	2017	2018	2019	2020 (On February 18,2020)
Male	17	18	17	18	8	11
Female	6	6	8	12	9	7
Total	23	24	25	30	17	18

This data shows children of both suspected and convicted mothers.[90] On March 20,2020 imprisoned mothers with children were released due to the global pandemic Covid-19.[91] After few months Kality Federal Women Prison starts to receive both suspected and convicted mothers with children with following Covid-19 preventive mechanisms.[92] This incidence is an alarming bell for the justice sector to review its laws and setout variety of punishments including non-custodial sentencings. The inclusion of such sentencing mechanism will make no one to escape from penalty for his or her criminal act in any

[89] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[90] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[91] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[92] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

situation. Otherwise, the mere fact that having child living in prison with incarcerated mother will be an excuse and decrease the credibility of the justice system.

4.3 Children's Admission/Entry into Prison with a Convicted Mother

Some countries take in to account a variety of considerations in making order about the entry of a child into prison with convicted mother apart from the wishes of the parents and child's age as primary consideration.[93] These include indicators such as breastfeeding needs, the lack of alternative child-care solutions, the suitability of prison accommodation for the child's development, the child's health, the protection of the child's safety, the full parental responsibility, the abilities to exercise parenthood, the length of the sentence, the parent-child relationship and attitude before entering the prison.[94] Unlike the practice in other countries whereby the request of the mother is for the child to stay with her is granted only upon authorization by a judicial/social/prison authorities, the Federal Prison Proclamation No 1174/2019 does not provide a judicial procedure regarding the legal guardianship of the child while the mother is in prison.[95] The court gives order without consulting further steps. The concept of "close attention" in the Federal Prison Proclamation No. 1174/2019 is general and open for interpretation. It is fact that every child needs close attention of his or her parents. The parameter for the degree of the need of close attention is not clear. From the age limit provided in the Federal Prison Proclamation No. 1174/2019 it seems that close attention is taken as cares that the mother can give to her infant child. However, the Proclamation fails to consider all attentions that a child needed to have for well development throughout his or her childhood. The study revealed that the request by imprisoned mother to stay her child with her is the only procedure that the court takes into account for a child to enter to prison with his or her mother.

4.4 Record-Keeping and Birth Registration

In the study half of the mothers interviewed suggested that their children were born in prison while they were serving their sentences.[96] There is no viable arrangement for birth registration of children born in prison by Vital Events Registration Agency (VERA).

[93] Manfred Nowak (n 12) 388

[94] Manfred Nowak (n 12) 388

[95] ACPF (n 7) p.26

[96] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020)

Relevant details of the child including name, age and sex are recorded upon admission only by prisoner officer for internal documentation.[97] The study revealed that, though the children living with their imprisoned mothers are provided with certificates of birth when they are born in a hospital there is no arrangement to make sure that they are provided with birth registration certificate and well documented by VERA. One positive aspect lies in the fact that they make sure that the place of birth is not indicated in the certificate issued to child.[98] This saves the child from social stigma in his or her entire social life. Since joining prison have negative implication in the society having recorded document that show the child was born in prison might affect the life of the child.

4.5 The Conditions of Children Living with Imprisoned Mothers

Food and Nutrition

Article 54(4) of the Federal Prison Proclamation No. 1174/2019 provides that the Commission shall allocate the budget necessary for the growth and health of the child. Children are allocated a monthly allowance of 450.00 Ethiopian Birr.[99] Based on the budget children are provided a standard ration of one can of powder milk, one carton of cerifam, two bags of spaghetti, one liter vegetable oil, half a kilo of salt, and tomato paste.[100] Prisoner mothers are provided with cooking facilities so that they can purchase the necessary ingredients and cook for their children.[101] The facilities provided by the Federal Prison Commission is not sufficient and consider the age of the children by which the facilities provided for newly born child and children above the age of 2 years old is the same.[102] Thus, the study has revealed that pregnant mothers, nursing mothers and children are not provided

[97] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[98] ACPF (n 7) p.27, Interview Commander Wesenyelesh Yehualeshet, Director, Children and Women Affairs Directorate, Federal Prison Administration (January 28, 2020)

[99] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[100] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[101] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[102] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020)

with nutritious and balanced diet as required by the law. This is due to low budget allocation. Federal Prison Commission have been making efforts to alleviate the problem through lobbying and advocating governmental offices and NGOs to allocate more funds which provide support for the children.[103] Though food is essential for children, the budget allocation face deficiency and is not able to feed children with balanced diet they need to have.

Health and Hygiene

In the study, provision of sufficient health care is seen from two perspectives. The first one is preventive measure against conditions that may result children for illness. And secondly post medical treatments. Though mothers with children are live in separated room from other prisoners, the room's lack hygiene.[104] All pregnant women, mothers and their children live in one room and cook there which creates sophistication.[105] The food package is not adequate enough and doesn't take into account the age of the children.[106] Children get vaccination in due time especially at their infant stage.[107] Regarding to post medical treatments, the study revealed that the health care service available for the children is exactly the same to those provided for other the inmates.[108] Thus, the study revealed that the living room of children lack hygiene. There is no nutritious and balanced diet which increase the immunity of children to protect their health. General medical treatments are lack of fullness as general and the problem will be high for such mother. Due to these children are exposed to health problem and are not get treatment in proper time.

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[103] Children and Women Affairs Directorate, 2013 Annual Report, Federal Prison Commission (2020), Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[104] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[105] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020)

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[107] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[108] ACPF (n 7) p.31

Safety and Security of Children

The findings of the study revealed that there are issues relating to safety, security and well-being of children in prison. The study revealed that children living with their imprisoned mothers are subject to physical and psychological violence from other inmates and their own parents.[109] The children are also at the risk of crime contamination and risk behaviors which they emulate from the other inmates.[110] The abusive language in the prison affects the psychological development of the children. Living with group of people engage in different criminal acts affect the behavior of children and influence their character.

There is a practice that if the Federal Prison Commission believed that the mother is abusive for her child or incapable of taking care of her child due to her mental health condition then it brings petition for the court for the removal of authorization.[111] Upon the request the court may order to handover the child for temporary custody in childcare institution. The study revealed that the living environment of children in prison is not secured and safe. Children are at risk for physical, mental and spiritual abuse which might have effect for their entire life. They are living in the place where they can hear more about crime and detention than other thing that hampers their internal safety.

Separate Accommodation

The children do not have access to child-friendly living and sleeping areas separate from other prisoners. There are no staffed nurseries for the care and assistance of infants or young children with the necessary infrastructures and equipment.[112] The study revealed that the child sleeps with the mother on the same single mattress provided for the mother and children

[109] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[110] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[111] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[112] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

are not provided with additional single mattress.[113] Accommodation related to infant children are provided only with the occasional donation from charity organization.[114] The study revealed that children in the prison facilities generally live in the same habitat as their imprisoned mothers without special facilities. The physical conditions of detention are very inadequate and there are no arrangements conducive to the early development and growth of children in the prison facilities.

Currently, the Federal Prison Commission tries to construct building for nursery and daycare for both children of employee of the commission and imprisoned mothers.[115] The commission is searching for fund to construct the building while donation was got for the equipment needed after the construction. [116] Some problems relation to accommodation might be solved if the construction of daycare realized. Till then the study revealed that children are not accommodated with proper facilities they need. Most accommodations are not child centered.

Leisure and Play

The findings imply that children are deprived of their right to play and participate in cultural and artistic life. There is no separated place equipped with toys and other materials that can help them to have fun and recreate themselves. Either the children played with one another or just hung around their mothers or the premises of the prison in the female sector of the correctional facility.[117] There is no use of audio-visual aids to help children understand the outside world and television is the most frequented form of entertainment in the common rooms in some of the prison facilities.[118] The study revealed that there is no facility for indoor

[113] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020)

[114] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[115] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[116] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[117]Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[118]Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

and outdoor playing. Children have no access to proper equipment that they can play with. The construction of daycare might mitigate the problem.

Daycare and Education

Many of the children imprisoned with their mothers are not yet at a school-going age. Regardless, pre-school education is not available for the children living with their imprisoned mothers apart from a lack of daycare and nursery facilities.[119] The surroundings in the prison facilities do not support proper learning for the children.[120] The living condition of children in prison is full of hazard by which it is hard to storm their brain when they are reaching school age. The study revealed the absence of preschool facilities that develop the capacity of children to join school in proper age. Even it will be difficult for children to competent with other children outside prison since they are not familiar with the outside world.

Contact with the Outside World

The living condition in prison is far reaching to the outside world and even some children are not aware of it.[121] Social interaction and other system that the world is experiencing are out of the eyes of children living with their imprisoned mothers. study revealed that encounters of the child outside of the penitentiary are limited. The visiting condition of the prison is not conducive. This situation prevents children living with their imprisoned mothers from being visited by the other parent and by other relatives.[122] The study revealed that children have less contact with the outside world and this will have influence on their future life. There is no effort regarding to helping children to develop themselves in friendly manner with the outside world.

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[119] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020)

[120] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[121] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[122] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020), Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

4.6. Monitoring the Situation of Children with Imprisoned Mothers

The Ministry of Women, Children and Youth Affairs (MoWCYA) bears responsibility to ensure monitoring, coordinating implementation of matters relating to children living with their imprisoned mothers.[123] The Federal Attorney General also assume responsibility to ensure the well-being of children living with their imprisoned mothers in Ethiopian prisons.[124] MoWCYA occasionally gives different donation for the prison.[125] Thus, assisting with donation is not suffice rather there should be structured mechanism by which the ministry can work with the prison to enhance the protection of rights of children.

The private sector can also play significant role by, among others, by supporting the provision of amenities for the children in collaboration with prison administrations. Civil society actors serve important roles helping children and their mothers to claim their rights, holding governments to account and direct provision of life saving and child protection services.[126]

4.7 Impact of Imprisonment of the Mothers on Children

Children of imprisoned mothers face different problems that are not supposed to happen on them. Imprisonment of mothers will limit the chance that they can work and generate income for their children.[127] Imprisonment of the mother by default change her to financial dependent person. The needs of children will be under question due to the financial incapacity of the mothers. The right of child to live with parents also touched when the child stays in prison with his or her mother. Since a child has the right to live with both parents the separation of the child from the father due to the incarceration of the mother. There need to be the incorporation non-custodial sentencing mechanism by individualized assessment of the interest of the child. Generally, the imprisonment of mothers has effect on the well-being of children. The living condition in the prison is problematic for both the mothers and children. Inadequate hygiene in the prison affects the health of children. Children are also exposed for behavioral and psychological problem.

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[123] ACPF (n 7) p.40

[124] ACPF (n 7) p.40

[125] Interview with Commander Wesenyelesh Yehualaeshet, Director, Children and Women Affairs Directorate, Federal Prison Commission (10 August 2021)

[126] ACPF (n 7) p.41

[127] Interview with prisoner mothers with children in Kality Federal Women Prison (18 February 2020)

Chapter Five

Conclusion and Recommendations

5.1 Conclusion

International legal arrangements provide wide range of rights for children. States are in different stage of applying such instruments. Due to different circumstances children face special challenges and need specific legal arrangements that fit with their condition is necessary. Among these conditions children living with their imprisoned mothers is the one that is in need of special treatment.

Recognizing the rights of children by law is one step that any country should take. After recognition of such rights states are expected to go forward for the implementation of such laws which enable peoples to enjoy the rights. Ethiopia accepts different international human rights instruments and even give space by which they can go equal level of the supreme law of the land, the Constitution. The Constitution also provide and recognize the rights of children specifically. Different laws, policies and directives are also considered rights of children. But in my opinion the criminal law of Ethiopia has some gaps in considering the rights of children specifically in relation to those who lives with their imprisoned mothers. Except orders that allow children to live with their mothers in prison or send them to their close relatives or to foster cares it didn't dig dipper for better alternatives like non-custodial options. So due attention should be given for the realization of the rights of children.

The study indicates that there are gaps in realization of full protection of the rights of children living with their imprisoned mothers in Kality Federal Women Prison. Yet these children are entitled to every right provided for other children who are living outside the custody, they are deprived of many rights due to some gaps of the law, less budget of Federal Prison Commission and the acts of their mothers. The rights of children compromised in high range to implement and ensure other laws that concerned basically criminal liability. Their right to life, the right to get adequate health care, right to live with their parents, the right to education and the right to play may be raised to mention some rights that are violated. These rights are basic and essential for children for their current and future life.

By the other side, non-custodial approach puts the way by which the criminal will receive punishment for his or her criminal act outside prison. This approach has double benefit by which it will punish the criminals so that no one left from liability and by the other side children whose mothers participate in crime will not be snatched their different rights.

Execution of such approach with due attention of responsible body will benefit all. By classifying criminal acts with different degree and incorporating punishments which fit with this approach it will be possible at least to reduce such violation of the rights of children. There should be individual assessment for identifying the way by which the best interest of the child will satisfy before deciding on it. In every decision of court, the principles of the rights of child should be taken in to account. Decisions of court should primarily address the best interest of the child. To identify the mechanism by which the best interest of the child is satisfied, the court may take individualized assessment supported by different professionals is also required.

5.2 Recommendations

Based on the findings the following recommendations are made: -

- There is a need to undertake legislative reform to incorporate the specific obligations stemming from General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "children of incarcerated imprisoned parents and primary caregivers'. There needs to be revised so as to inform ongoing criminal justice and prison reform and to bring the laws in conformity with international and regional standards.
- Courts should look at whether a convicted mother is a primary caregiver whenever there are indications that this might be the case during sentencing. Courts should establish a system that identifies whether a convicted mother in conflict with the law has child-care responsibilities. Courts should also confirm the implications of custodial sentence on the child in situations where the convicted mother is a primary caregiver.
- The best interests of the child must be taken into account in decisions about possible detention or imprisonment of mother during pre and post-trial phases.
- Laws and policies in favour of non-custodial solutions for parents of dependent children must be adopted.
- If imprisonment is unavoidable, an individualized assessment of the best interests of the child must inform any decision about whether and when a child should accompany a mother into prison or be separated from the mother.

- Federal Prison commission should give due consideration about the protection of children living with their imprisoned mothers. They should be capable of satisfying accommodation for these children. Therefore, it is important to allocate enough budget for Federal Prison Commission.
- Different international and national NGOs are better to give due attention for children who are imprisoned with their mothers. And work on supporting the full realization of the rights of these children.
- Researcher should forward the mechanism by which non-custodial options can be applied and forward different inputs for revising laws that violate the rights of children who are imprisoned with their mothers.
- Volunteers should participate and support prison administration with counseling and other service that the children of imprisoned mothers are lack. This will help children to develop in better manner and capacitate them to face the outside world.

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ANNEXES

Annex I

Addis Ababa University

School of Law

Interview to be administered to mothers imprisoned with their Children

This interview is to be administered to mothers imprisoned with their children in Addis Abeba prison center. The result of this questionnaire will provide valuable information about the conditions of children imprisoned with their mothers. This interview is anonymous. Please be assured that the information you share will not be used in any way to identify you.

1. How many children are with you in prison?
    a. I am currently pregnant
    b. 1
    c. 2
    d. 3
    e. 4
    f. 5
    g. 6 or more
2. How old are your children?

    _____

3. Was your child born while you were imprisoned?
    a. Yes
    b. No
4. How long has your child (or children) been in imprison with you?
    a. Less than 1 year
    b. 1-2 years
    c. 2-3 years
    d. 3-4 years

e. More than 4 years

5. Who made the decision to place your child (or children) with you while you are imprisoned?
   a. Me
   b. Spouse or Intimate Partner
   c. Other family member
   d. Government
   e. Other _____
6. If you were imprisoned while your child (or children) was an infant, were you allowed to breastfeed your child?
   a. Yes
   b. No
   c. Not applicable
7. Did you live in a place separated from other prisoners together with your child?

   A. Yes B. No
8. If your answer for question number 7 "Yes" please comment on the facilities of your separate place?

   _____

9. Have you got sufficient medical treatment for your children in the prison?

   A. Yes C. No

   If you say no then why?

   _____

10. Have you got sufficient food for your children in the prison?

    A. Yes C. No

    If you say no then why?

11. Have you got educational service for your children in the prison?

    A. Yes C. No

    10. If you say no then why?

    _____

12. Have you clean and comfortable place for your children in the prison?

    A. Yes C. No

    If you say no then why?

    13. Where does your child sleep?

    a. In my bed

b. In his or her own bed

c. In a bed with other children

14. is there separated place for your children to play in the prison?

A. Yes C. No

If you say no then why?

If you say yes then please indicate in which activities your child (or children) are allowed to participate:

a. Outdoor Play Center
b. Indoor play center
c. Use of Equipment – outdoor play equipment
d. Sports
e. Other activities?

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15. Are you provided with appropriate services in connection with pregnancy, confinement and post-natal period?

A. Yes B. No

If you say no then why?

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16. Are primary caregivers provided with adequate nutrition during pregnancy and lactation?

A. Yes B. No

If you say no then why?

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17. Did your children get birth certificate?

A. Yes B. No

18. Please state what, if anything, you would change to improve your child's living conditions or other problems you have experienced in prison:

Annex II
Addis Ababa University

School of Law

Interview to be administered to Federal First Instance judges and Public Prosecutors

This interview is to be administered to mothers imprisoned with their children in Addis Abeba prison center. The result of this questionnaire will provide valuable information about the conditions of children imprisoned with their mothers. This interview is anonymous. Please be assured that the information you share will not be used in any way to identify you.

1. Are there any specific sentencing guidelines for mother with child?
2. Is there a practice of giving specific consideration of the impact on the best interest of the child when sentencing a mother with child?
3. Is the impact of parental incarceration on the child a relevant consideration in sentencing in practice?
4. Are mothers eligible for suspended sentence, home detention, electronic monitoring, or other measures aimed at avoiding the accommodation of children in places of detention with their detained mothers?

A. Yes
B. No

5. If answer "yes" was chosen, please specify the type of an sentence recommended for parents who are caregivers:
    - Suspended or deferred sentence
    - Home detention
    - Open Prisons
    - verbal sanctions such as admonition, reprimand and warning
    - conditional discharge
    - economic sanctions and monetary penalties, such as fines and day-fines:
    - restitution to the victim or a compensation order
    - probation and judicial supervision
    - community service order

- house arrest
- any other mode of non-institutional treatment

6. If answered “other”, please provide details.

_____

7. Are the views of the child considered in the course of sentencing?
8. What are the challenges in the implementation of non-custodial sentencing approach?
9. What recommendations do you have regarding sentencing of mother of child?