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THE ERITREAN CUSTOMARY LAWS: ‘OLD-MODERN’
TREASURES FOR AN EFFECTIVE SENTENCING REGIME –
THE JUST DESERT SYSTEM

Habteab Y. Ogubazghi and Senai W. Andemariam

Introduction

Contemporary penal codes have been suffering from and challenged for a number of factors.

Firstly, the preambles or introductory provisions of most, if not all, penal codes enumerate the ‘aims’ ‘objectives’ or ‘purposes’ of the codes.299

◊ A paper presented at the International Conference on Philosophy and the Law in Africa, organized by the Centre for African Legal Studies, in conjunction with the Department of Philosophy, University of Nigeria Nsukka, 11-14 June 2008).

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299 Article 1 of the Transitional Penal Code of Eritrea reads (and the 2005 Criminal Code of the Federal Democratic Republic of Ethiopia contains a very similar provision):

“The purpose of criminal law is to ensure order, peace and the security of the State and its inhabitants for the public good.

Articles 1 and 2 of the Chinese Criminal Law reads:

“Article 1
In order to punish crimes and protect the people, this Law is enacted on the basis of the Constitution and in the light of the concrete experiences and actual circumstances in China's fight against crimes.

Article 2
Scholars of contemporary criminal law have identified these purposes as carrying four basic elements:

- reformation (rehabilitation) of the convicted;
- deterrence of the convicted and/or potential criminals from committing further crimes in the future;
- disablement (incapacitation) of the convicted from engaging in criminal acts and thereby protecting the society; and
- retribution (revenge) for the crime committed against the victims and the society.

Reflected in any form or wording, these purposes of criminal law are usually kept together in the penal codes. The essence of keeping all (or some) of these purposes together (and very often in a single article) is that judges, in passing sentences after conviction, are required to keep these purposes in mind and that the sentences shall be carried out in a manner that embodies these purposes together.

A preliminary look at these purposes naturally leaves that impression that it is difficult to merge the balance of these interests in a single punishment. How can a given sentencing order provide for the reformation of the convicted and/or making an example of him to potential offenders and/or avenging the criminal act? Another factor complicating the sentencing system is that the precise meaning of these purposes is not clearly defined.

The aim of the Criminal Law of the People's Republic of China is to use criminal punishments to fight against all criminal acts in order to safeguard security of the State, to defend the State power of the people's democratic dictatorship and the socialist system, to protect property owned by the State, and property collectively owned by the working people and property privately owned by citizens, to protect citizens' rights of the person and their democratic and other rights, to maintain public and economic order, and to ensure the smooth progress of socialist construction.” Order of the President of the People's Republic of China No. 83, Criminal Law of the People's Republic of China, Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, Revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997, page 5.
Secondly, the range provided for the punishments for various offences is usually so wide\textsuperscript{300} that there is a high possibility for judges giving greatly differing punishments for similar offences (although the judges must take other factors in the sentencing process). This leads, and has so far led, to a non-uniform, unpredictable and inefficient sentencing regime.

Thirdly, penal codes suffer from the failure to provide for varying classes of severity for most of the crimes contained in the codes. An article punishing theft would not, for instance, provide for increasing punishments with the increase in the amount of property stolen or the manner the theft has been committed and a combination of the two. Same it is with corruption or the possession or sale of narcotics. The trend in many penal codes to contain articles that only allow setting the penalty according to the severity of the offences does not help secure a criminal justice system aspiring to produce a stable and predictable sentencing tradition.

Ameliorating, if not eliminating, the uncertainties of the criminal justice systems in many countries caused by a combination of the abovementioned characters in the penal codes has been the subject of intense debates and reform efforts in many countries and a challenge for scholars for many decades. A new concept of reform of sentencing policy termed ‘just desert’ has been a much favored alternative and has been in effect in some countries, especially the United States since the 1970s. This sentencing regime tries to tune the purpose of sentencing into a fair and just system whereby the integrity of the law abiding citizenry is served by the award of a sentence proportional to the specific severity of the offence in accordance with a system of classifying offences by the degree of their severity and by creating levels of severity for the offences requiring such leveling. Just desert is predictable, produces consistent sentencing, avoids excessive subjectivity on the part of the judges, warrants the award of a punishment that the society would want to be given to a specific sentence (since criminal law is part of the realm of public law), fair and properly distinguishes between varying classes of offenders.

\textsuperscript{300} See Annex I for a comparison of the range of punishment for select crimes in nine countries.
This system has promised to be so efficient that it is the principal guiding doctrine for sentencing in both federal and state criminal benches. The United States Congress, in mid-1970s, responded by establishing the United States Commission as an independent agency in the judicial branch of the US government to classify offences into varying classes and accordingly provided respective punishments for the classes of offences. In the Sentencing Reform Act of 1984 the US Congress stated that the basic objective of the Act was ‘to enhance the ability of the criminal justice system through an effective, fair sentencing system’ and that the Congress ‘sought to avoid the confusion and implicit deception that arose out of the pre-guidelines [the Federal Sentencing Guidelines] sentencing system which required the court to impose an indeterminate sentence of imprisonment…’ Moreover, the Congress sought ‘reasonable uniformity in sentencing by narrowing the wide range disparity in sentences imposed for similar criminal offences committed by similar offenders… Congress sought proportionality in sentencing through a system that imposes appropriately difference sentences for criminal conduct of differing category.’

A surprising finding by the authors of this article was that just desert sentencing system, contrary to a likely first impression that it is a novel, 20th century product of high-class intellectual endeavor, has been a concept at the heart of the understanding of crime and punishment in traditional societies – and in this article, in the Eritrean society as reflected in its various customary laws.

There is a general principle that laws, especially public laws like criminal law, should reflect the norms and traditions of the society for which they are enacted. A frequent experience with many penal codes of decolonized countries has been that since most of the laws (notably the fundamental codes – civil, penal, criminal, commercial) are copies or slight modifications of the laws of their ex-colonizers, they suffer from ‘rejection’ by the age-old norms and values of the inhabitants. Now that the developed world is realizing the ineffectiveness of its criminal justice system and that the just desert system has championed the reform process, discovery of a traditional criminal justice system developed in the

essences of just desert leads to the conclusion that a justice system despised by the developing world as archaic has reincarnated itself in the developed world as a breakthrough solution to a justice system inherently inefficient but regrettably sought after by the developing world. It can therefore be safely stated that the just desert system, at least for the Eritrean jurist, is an old-new concept in criminal law.

The just desert system has been tipped to create a stable and fair sentencing system – thus keeping the stability of the society. The research by the authors on the criminal provisions of a number of Eritrean customary laws showed that just desert is the rule and thus, added to other social, political, economic and religious factors, has contributed to the stability and peace within the various communities in the Eritrean society kept for centuries. The authors like to challenge the readers - especially Africans, to inquire into their respective societies and see whether their traditional criminal justice systems, if any, embody the just desert system. An affirmative finding will further the intent by the authors to propagate, through this article, a reform process of the sentencing systems of existing penal codes (such as the penal code reform process currently in progress in Eritrea) towards the just desert system because so doing would be ‘going back to the roots’ and developing a penal code after the heartbeats of the

302 The preface to the Hggi Adgna – Tegeleba (one of the many written Eritrean customary laws in the Christian community), with the latest revision in February 12, 1938, for instance, begins with a heading ‘atzn’u hzbye hgye’ (a Geez language phrase closely translated to ‘Keep My Laws O My People’ – a phrase adopted from the Old Testament). The preface then states that God, the creator of all creations and the provided of laws has ordered all creation to abide by the laws and orders appealing to their respective lives. An account of the history of the fall of Adam is copied from the Bible and the story continues to brief the history of the Law of Moses and the ‘Ftha Negest’ Law of Kings which the authors of Hggi Adgna – Tegeleba claim to have been issued by the order of King Constantine The Great. An amazing last sentence of the preface states that even though human kind lives in different countries with different languages and religions, all humanity is one under the law of nature. Estifanos, Z., Abraham, W., and Ghebre-Meskel, G., (compilers), Codes and Bylaws of Eritrean Regions and Counties, (publisher not known), 1990, pp. 7-9.

The law of Hggi Beni-Amr (one of the written Eritrean customary laws in the Moslem community), with the latest revision in February 12, 1958, also begins with the title ‘In The Name of The Most High God in whom we confide for our daily lives and await his justice at the Day of Judgment’. A brief introduction follows with a conclusion reading ‘we pray to God to lead us into happiness that benefits us and our people.’ Hggi Beni-Amer, (only a typewriter copy available with no author and publisher indicated), page 1.
society. A negative finding should likewise lead to an awakening to a new, just, fair, predictable and uniform sentencing regime - the just desert system.

1. The ABCs of Sentencing

Sentencing of convicted offenders has been, is, and will continue to be one of the most controversial issues of social policy. If can safely be stated that almost every conviction followed by a sentence raises concerns on either party (the prosecutor and/or the convicted). The very fact that an appeal right is given the party’s is an admission of the fact that one or both parties may not agree with the verdict.

Sentencing affects different categories of the society: the convicted, the victim and his/her family, the society, the state, etc. It involves moral, social, economic, political and ideological issues. Due to the involvement of all these interests, sentencing has been a challenge to every civilization which endeavored to establish a system of uncontested and blameless judicial verdicts and continues to be a challenge to penologists and social scientists in the present era. The intertwine of the various private and public interests involved in sentencing has always raised a discord against every attempt to reform sentencing policies in many countries.

It should go without saying that the principal function of criminal law is to preserve the peace and order of the society and that penal prescriptions are intended to ensure the continuity of such peace and order. The provision of such prescriptions (penalties), however, is preceded by the precondition that the state is obliged to give ‘due notice of the offences’ to inform its citizens on how they are expected to behave and calls their attention to the rules the infringement of which is deemed contrary to the general interest and attracts punishment. Punishment, therefore, is intended to ensure peace and order of the society through the respect of public law.

The paragraphs above should, therefore, provoke asking of the question: ‘what is sentencing?’

What is meant by the word 'sentence' in criminal law? A moment's reflection shows that defining the term is not as straightforward as it might initially appear. What may simply come to one’s mind is ‘the post-
conviction stage of the criminal justice process in which the defendant is 
brought before the court for imposition of sentence. In other words 
sentencing is the judgment the court or judges formally pronounce upon 
the defendant’s being convicted in a criminal prosecution and so imposing 
the punishment to be inflicted. In civil cases, the terms judgment, 
decisions, award, finding etc are used.

In criminal justice, therefore, sentencing is the beginning of a phase that 
follows conviction. In an ordinary criminal process, after the plea of 
conviction is passed or after the accused is found guilty of a crime and 
convicted, courts have the duty to pass a sentence which penalizes the 
convicted either against his/her liberty, life, property, profession, right or 
any other interest. Penalty, as various as its purposes are, sends many a 
message not only to the offender but also to the society at large.

304 *Ibid*, at 1222.
305 David Garland gives a comprehensive description of what a criminal sentence really 
encompasses as follows:

“Penalty [is not only] about crime and punishment, but also about 
power, authority, legitimacy, normality, morality, personhood, social 
relations and a host of other tangential matters. Penal signs and 
symbols are one part of an authoritative, institutional discourse which 
seeks to organize our moral and political understanding and to educate 
our sentiments and sensibilities. They provide a continuous, repetitive 
set of instructions as to how we should think about good and evil, 
normal and pathological, legitimate and illegitimate, order and disorder. 
Through their judgments, condemnations, and classifications they teach 
us (and persuade us) how to judge, what to condemn, and how to 
classify, and they supply a set of languages, idioms, and vocabularies ….
These signifying practices also tell us where to locate social 
authority, how to preserve order and community; where to look for 
social dangers, and how to feel about these matters, while the evocative 
effect of penal symbols sets off chains of reference and association in 
our minds, linking the business of punishment into questions of 
politics, morality, and social order. In short, the practices, institutions, 
and discourses of penalty all signify and the meanings which are 
conveyed thereby tend to outrun the immediacies of crime and 
punishment and 'speak of' broader and more extended issues. Penalty is 
thus a cultural text – or perhaps better, a cultural performance – which 
communicates with a variety of social audiences and conveys an 
extended range of meanings.” Garland, D., *Punishment and Modern 
Garland's description, kept in the footnote, of the sentencing regime shows that many issues are involved when a judge passes a sentence against the convicted. That is why the more man tries to articulate a sentencing policy option, the more complicated issues arise. The quest to find the root cause of crime and the appropriate response for crime has been an ongoing puzzle to those entrusted with keeping the peace and order of the society and the efforts to alternate, reduce or eliminate punishment have not been fully successful yet.

Scores of philosophers have analyzed the notion of crime and punishment. H.L.A Hart, in his *Punishment and Responsibility: Essays in the Philosophy of Law*, gives a comprehensive definition of what punishment means. For Hart, punishment consists of in terms of standard/central and sub-standard/secondary elements. The standard/central elements are that a punishment must:

- involve pain or other consequences normally unpleasant;
- be for an offence against legal rule;
- be administered on an actual or supposed offender for his offence;
- be intentionally administered by human beings other than the offender; and
- be imposed and administered by an authority constituted by the legal system against which the offence is committed.306

It has been stated earlier that penal codes are enacted to give due notice of the offences and inform the citizens of how they are expected to behave in accordance with the rules of the society that infringement of which attracts punishment. Punishment, therefore, is an expression of a society’s disapproval of the infringement of such rules and the magnitude of the punishment reflects the degree of disapproval. The award of a severe punishment for a serious crime and the display of a lenient to a minor crime, therefore, should be at the heart of every criminal justice system endeavoring to establish uniformity, fairness and efficiency.

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Some fundamental questions remain hanging in the midst of the jangle of the philosophy of sentencing. What does a state achieve by punishing the convicted through its criminal laws? What messages do judges want to communicate through their sentences? How should the interests of the victims be reflected in the sentences? What change is the punishment process intended to bring in the life of the convicted, potential offenders and the society at large? How should the convicted pay back the debt he/she owes the society?

These and related questions lead us to examine the fundamental objectives of criminal law and the objectives underlying penal codes.

2. *The Four Purposes of Sentencing*

Open any textbook on criminal law and the first pages ask: why do we need to punish those who breached criminal law. Although the purpose of enacting criminal law has been the subject of centuries-old debate and philosophical discourses, the following have always been identified as the fundamental purposes for the reigning of sentencing.

The purpose of this section of this article is not to narrate the story or give analysis of the four purposes of sentencing but to explain why their efficacy has been challenged and lay the foundation for the necessity to introduce the just desert system into contemporary criminal law as the best alternative purpose for sentencing.

2.1. *Rehabilitation (Reformation) of the Criminal*

The idea of rehabilitation, the most preeminent goal of sentencing purposes, denotes that through treatment and training the offender should be capable of returning to society and functioning as a law-abiding member of the community. This concept dominated penal philosophy since a century and half ago. According to von Hirsch, rehabilitation:

> “is part of the humanistic tradition which, in pressing for ever more individualization of justice, has demanded that we treat the criminal not the crime. It relies upon a medical

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and educative model, defining the criminal as, if not sick, less than evil; some how less “responsible” than he had previously been regarded. As a social malfunctioner, the criminal needs to be “treated” or to be reeducated, reformed, or rehabilitated…

Thus, the emphasis of the rehabilitative philosophy is not to look into the past- to the offence committed – but to the future needs of the offender. Von Hirsch has, thus, best defined rehabilitation as ‘any measure taken to change an offender’s character, habits, or behavior patterns so as to diminish his criminal propensities. Rehabilitation, then, is a particular mode of control – one that best seeks to alter the offender so he is less inclined to offend again.”

Rehabilitation, therefore, promises pay off to society by reforming the offender into a law-abiding and productive citizen who no longer desires to victimize the public. It is also, one way of controlling crime humanly, where the emphasis lies not on the nature of the crime the perpetrator committed but on the treatment of the offender. Rehabilitation, as a treatment, includes psychiatric therapy, counseling, vocational training and other behavior-modification techniques. The objective of rehabilitation, therefore, is to encourage the offender to abstain from criminal behavior in the future by providing him reformative incentives.

The efforts to make offenders law-abiding citizens have not, however, succeed as expected. After reaching its glorious period in the 1960’s, the rehabilitative model proved to be an illusion. In the 1960’s there was considerable enthusiasm for award of sentences that were reformative or rehabilitative. For many offenders, rehabilitation meant staying for a longer period in custody undergoing treatment or training and for others release on probation under some terms and conditions. But, beginning

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309 Ibid, at 11.
311 Von Hirsch, supra note 10, at 11.
312 Inns of Court School of Law, Criminal Litigation and Sentencing, Blackstone Press Limited, 1999, p. 244.
313 Crime and Punishment, supra note 9.
from the 1970’s, due to the exposure of the ineffectiveness of the rehabilitative model through well-researched studies, the concept of rehabilitation came under fierce criticism and it is no longer as widely accepted as had previously been.  

Whether the rehabilitation program proved successful could normally be measured by the study of recidivism, the results of which were not encouraging. The biggest blow to rehabilitation came from a research project conducted in America by the Blue Ribbon Committee, Robert Martinson and his colleagues, William Black and Joseph M. Weiler, and David Greenberg. A research conducted by Broady in England also unveiled similar disappointing result. Canada’s experience was also not different from its counterparts.

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Ibid.

A special committee called the Blue Ribbon Committee, was entrusted with examining corrections in the State of New York and the outcome of the research concluded that rehabilitation programs were the least likely to uncover positive effects. Duffee, D. E., Corrections: Practice and Policy, Random House, 1989, p. 14.

Andrew von Hirsch held that the experimental programs conducted between 1945 and 1967 concluded that, “within few and isolated exceptions, the rehabilitative efforts that have been reported so far had no appreciable effect on recidivism.” Von Hirsch, A., “Giving Criminals their Just Desert”, in Muncie et al., supra note 12, p. 315.

John L. Farris refers to a report prepared by William Black and Joseph M. Weiler in 1975 on the B.C. correctional institution which report stated that “all of the psychiatrists, criminal lawyers, inmates, law professors and even the employees of the correctional systems indicated to us that there was little or no rehabilitation taking place in the system” and that they were “of the view that considering the available facilities and in the light of recent criminological scholarship that the individualized treatment model and the theory that rehabilitation of the offender as the route to the protection of society is unsound in theory and potentially vicious and counterproductive in practice. Farris, J. L., “Sentencing”, Criminal Law Quarterly, Vol. 18, p. 425.


Honorable J. L. Farris, Chief Justice of British Colombia, in his address given to the county court judges’ conference in Vernon, British Colombia, said: “...the educational programs and other programs that are being conducted in our penal institutions have,
There are some people who are still optimistic, nevertheless. Authors Cullen and Gilbert among others defended rehabilitation and condemned to those who undermine its role. They asserted, “the misuses and limitations of treatment programs has perhaps blinded many current-day liberals to the important benefit that has been or can be derived from popular belief in the notion that offenders should be saved and not simply punished.321 Despite its decline as a means of crime prevention, Cullen and Gibbert hold, the justifications for rehabilitation remain as sacred and insist that the failure of many treatment programs in the past do not necessarily mean that all treatments are doomed to fail. Mark Findlay and his colleagues, in a conditional form, outline the justifications for the reigning of the rehabilitation doctrine as follows:322

- If successful, it is the ultimate form of individual deterrence;
- If successful, it provides another guarantee of individual protection and public safety;
- If successful, it refers the potential for social and medical science to overcome individual pathology;
- If successful, it works against social disorganization from individual’s perspective;
- If successful, it may invest the offender with the social skills necessary for perspective;
- Even if it is not successful, it has the consequence of widening the state’s involvement in, and potential for, social control.

Due to the discouraging results, penologists are, however, regretfully advocating waiver of such a sacred sentencing theory. Von Hirsch, among others, plainly stated that, if offenders cannot be cured of their criminal

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321 Cullen and Gibbert, supra note 12.
tendencies, they can at least be isolated – placed behind bars where they cannot prey on those outside.323

The wide acceptance of the desert theory undermined the role of rehabilitation and naturally provoked bitter criticism from the votaries of rehabilitation. Weihofen, among others, criticized and condemned the abandonment of rehabilitation as follows:

“The voices of ignorance and hate are loud, enough now to shout down almost every effort to improve criminal administration by substituting rational for irrational solution, a rehabilitative for a punitive approach.” 324

The efforts to reform criminals have failed to demonstrate tangible progress. The promised medical and psychological sciences failed to prove themselves. There is no guarantee that a criminal who undergoes medical and psychiatric treatment would refrain from committing another crime. Therefore, until such humanistic option comes with uncontested solution, nothing precludes us from choosing a lesser evil alternative- the ‘just desert’.

2.2. Deterrence of the Criminal and Potential Offenders

Bentham’s utilitarian philosophy should take the credit for inspiring this second purpose of sentencing. For Bentham, the governance of human

323 Muncie et al., supra note 18. Von Hirsch’s Committee for the Study of Incarceration, confronted with the dilemma, thought fully persuaded, that rehabilitation does not work, stated, “It is not easy to abandon the rehabilitative model, for it was a scheme born to optimism, and faith and humanism. It is viewed the evils in man as essentially correctable” and refraining itself from endorsing rehabilitation, albeit with sympathy, the Committee added: “And still we are not happy. Our solution is one of despair, not hope. We recognize that, in giving up the rehabilitative model, we abandoned not just our innocence but perhaps more.” Hailing the just desert system the Committee held:

“The concept of desert is intellectual and moralistic; in its devotion to principle, it turns back in such compromising considerations as generosity and charity, compassion and love. It emphasize justice, not mercy, by shifting the emphasis from the concern for the individual to devotion to the moral right, it could lead to an abandonment of the former (rehabilitation) altogether.” Von Hirsch, supra note 10, respectively at pp. xxxvii, xxxix.

beings is the product of the interplay of two concepts: pleasure and pain and the duty of a leader is to maximize pleasure and minimize pain in the society he rules over. For Bentham, sentencing is in and of itself evil since it inflicts pain on the convicted. Thus, is sentencing ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil since the objective of the law is to promote the total happiness of the society. Punishment, therefore, must be used to achieve a greater aggregate of pleasure and happiness and has no justification if its effect is simply to add still more units, or lots, of pain to the community.  

The deterrent objective of punishment, therefore, bases itself on the Benthamian approach of maximizing aggregate utility by increasing pleasure and avoiding pain. Deterrence is commonly known as a consequentialist or forward-looking type of punishment since its main objective is to see a better individual and society. The threat of punishment is argued to have a general and specific impact both on the

325 Under the utilitarian principle of utility, Bentham provides the rational grounds for inflicting punishment. According to him, calculation of moral arithmetic of pleasure and pain should administered in the following manner:

(a) The evil of the punishment must be made to exceed the advantage of the offence. The punishment thus must be great enough to outweigh the profit that the offender might get from the offence;

(b) The more deficient in certainty a punishment is, the severer it should be. That is if punishment is supposed to be administered with certainly, no person would choose to commit crime. So punishment should be inevitable and should give no room for a criminal to go scot-free. In Bentham’s view: “...the more the certainty of punishment can be augmented, the more it may be diminished in amount... for the same reason the punishment should be as near, in point of time, to the crime, as possible”;

(c) The greater the offence the more severe the punishment. If there is a situation where potential offender is determined to commit an offence but could choose the seriousness of the offence, the punishment for the greater offence must be sufficient to induce a man to prefer the less serious;

(d) Punishment should adapt to fit the particular circumstances. It should not exceed what the law requires. Applying greater punishments to small offences amounts to paying very dearly for the chance of escaping a slight evil; and

(e) The same punishment for the same offence ought not to be inflicted upon all offenders. It is necessary to take into consideration the circumstances, which affect sensibility. Age, sex, fortune, and many other circumstances, ought to modify the punishments for the same offence. Baxi, U., Bentham’s Theory of Legislation, N. Tripathpri.Ltd, 1979, pp. 201-202.
individual and the society. Once an offender tastes the unpleasant experience of punishment, he is supposed to be a law-abiding citizen in the future. Equally the pain of punishment is believed to carry a deterrent effect on potential offenders, those who come to know of an individual who has been punished for his crime. Therefore, according to this theory of punishment, if punishment is to be effective it must be inflicted in such a manner as to constitute a threat.\textsuperscript{326} Criminal law scholars have branched deterrence into two perspectives: general and individual deterrence.

\textbf{A. General Deterrence}

General deterrence may be defined as “the effect which threats of punishment will have in deterring non-offenders from becoming offenders.”\textsuperscript{327} By the same token, Andenaes general deterrence means the ability of criminal law and its enforcement to make citizens law-abiding.\textsuperscript{328} To accomplish this general deterrence depends on mere frightening, or the risk of discovery and punishment outweighing the temptation to commit crime.\textsuperscript{329} In other words, the objective of general deterrence is to preserve the public order not only through the harm that is caused to the offender, who is expected to behave in the future so as to avoid further harm of similar nature, but also through the fear it inspires on any one who witnessed the punishment of the wrong doer and who is consequently expected to become prudent.\textsuperscript{330} Therefore, the belief is that an example should be made of the offender by punishment, often brutal and horrible, to ensure that others would refrain from committing such an offence in the future. In the earlier of days, great emphasis was often placed on the physical exhibition of punishment as a deterrent influence, for example, by performing execution in public.\textsuperscript{331}

\begin{thebibliography}{99}
\bibitem{327} Crime and Punishment, \textit{supra} note 9.
\bibitem{329} Ibid.
\bibitem{330} Graven, P., \textit{Introduction to Ethiopian Penal Law}, The Faculty of Law, Haileslassie I University, 1965, pp. 6-7.
\end{thebibliography}
Andenaes, like Hart, bases his criticism of the deterrence theory by first dividing population into three classes:

(a) the law-abiding man, who does not need the threat of law to keep him on the right path;

(b) the potential criminal, who would have broken the law had it not been for the threat of punishment; and

(c) the criminals, who may well fear the law but not enough to keep him from breaking it.

This classification is contrary to the assumption that citizens do not break the law because they fear the consequences of being caught and punished since the justification for the deterrence theory is meant only to serve the intermediate group - the potential criminals. The law-abiding persons do not need threat through punishment of criminals because they feel the obligation to respect the law. Plato tells that Socrates, out of respect for the law, drank the cap of poison instead of following the offer of his friends to bribe his custodians so that he could escape. Law-abiding people like Socrates obey the law not because of fear of punishment but because of moral inhibitions or internalized norms. Finally, the third group is immune to the threat intended to be induced in the population through the publicizing of punishments. Ferris’ illustration of this idea reads: “The pick pocket who was sentenced to be hanged in the reign of Queen Elizabeth I had the satisfaction of knowing that his public hanging provided a great opportunity for his fellow pick-pockets to ply their trade.”

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334 Andnaes substantiates his argument by giving the following illustration. In his example, there is a city with a million male inhabitants who commit 100 rapes annually. Suppose that abolishing the crime of rape led to an increase in number of rape to 1000. Viewing this only, one might conclude that the legal measures were quite insignificant: 999,000 males do not commit rape even when the threat of penalty is absent. For Andnaes, it seems that moral sentiment shapes criminal law more than the threat of punishment does. *Ibid*.
335 Ferris, *supra* note 19, p. 421.
General deterrence has also been criticized for allowing the punishment of some innocent individuals. Deterrent justifications are forward looking in the sense that they are concerned with the consequences of punishment; their aim is to reduce further crimes by the threat or example of punishment.336 General deterrence if often bent on seeking to achieve its end at any price and in this process some innocent individuals may be sacrifice for the public threat’s sake. Thus, the emphasis on public welfare may often, under the guise of deterring the public, breach an individual’s liberty.337

B. Individual Deterrence

Unlike general deterrence, individual deterrence aims at the particular individual who is punished and the object is to teach him/her not to repeat similar behavior.338 According to the votaries of individual deterrence, punishment is inflicted in on an individual on the assumption that he/she is rational to face the consequences as his criminal behavior is considered as the result of innate badness or deliberate and willful wickedness. Individual deterrence, therefore, aims at teaching the offender a lesson so that he/she will be deterred from committing crime again. In other words, the unpleasant experience of punishment is expected to deter the individual from furthering his/her criminal character339 and through this the offender is rehabilitated by the time he/she joins the society back. At the best, individual deterrence is hoped to bring genuine moral improvement or in the acquisition of pro-social behavior.340

The greatest challenge to individual deterrence comes from studies on the follow-up of individuals who have gone through the punishment process. The higher the repetition of offences by these people, the less effective the deterrent theory becomes. Kirkpatrick concluded in her study that “the repeater rate indicates that about 75% of those who go to prison will return

337 Von Hirsch’s Committee succinctly cited John Rawls’ statement “Each person possesses an inviolability founded on justice that even the warfare of society as a whole cannot override….” Von Hirsch, supra note 10, pp. 50-51.
338 Crime and Punishment, supra note 9.
339 Hart, H.L.A, supra note 8, p. 32.
within five years”\textsuperscript{341} and the rate of repetition is higher in offences such as drug abuse which habit is relatively undeterred by either a threat or imposition of punishment.\textsuperscript{342}

Admittedly, however, individual deterrence is a difficult area to analyze and make conclusions on. Whether a person has been reformed because of fear of punishment or some other factors is not yet known. Moreover, the threat of the law alone is not sufficient to make a person conform to the parameters of laws. We cannot, however, take for granted that the experience of punishment always tends to strengthen the offender's fear of the law. Punishment may change the offender for better or worse quite apart from its deterrent or non-deterrent effects.

2.3. Incapacitation (Disablement)

Remove the criminal, permanently or temporarily, keep him away from the society and the society will be safe as the criminal will be unable (incapacitated) from engaging in criminal acts. This is the essence of the incapacitation philosophy.

Incapacitation is one of the traditional ways of punishment that have managed to survive down to our times. The idea simply is that the offender should be dealt with in a manner that will make it impossible for him to repeat his offence – by execution or banishment in earlier times, and in the more modern of days, by execution or lengthy period of incarceration.\textsuperscript{343} Protagonists of this theory believe that the danger to society is removed by keeping some high-risk offenders out of circulation by placing them under imprisonment, which most of the time is very long, or permanent incapacitation – death. The rationale is that such incapacitation can prevent criminally inclined individuals, at least during their confinement, from offending against ordinary, law abiding persons outside the prison fences.\textsuperscript{344}

As based on prediction of future behavior as it is, the incapacitation theory has been subjected to bitter criticisms. The critics believe that since

\textsuperscript{341} Kirkpatrick, supra note 33, p.308.
\textsuperscript{342} Andenaes, supra note 30, p. 84.
\textsuperscript{343} Crime and Punishment, supra note 9.
\textsuperscript{344} Von Hirsch, supra note 10, p. 20.
incapacitation is basically based on subjective evaluation that might have devastating consequences on the personal liberty of an individual (the ‘criminal’) in case it is found to be an erroneous prediction.

There are two types of prediction errors or risks that need to be avoided in incapacitation.

The first is commonly known as the “false positive prediction” or the “erroneous prediction”, i.e., that a person (the criminal) will commit another crime when in fact he or she would not.\textsuperscript{345} In such cases since the predictor predicts on the bases of the criminal’s past behavior, there are no grounds to ascertain that the past will determine future behavior.

Though it may be believed that few persons commit numerous crimes and therefore that incapacitation aims at such career criminals, studies, however, disclose that most expert predictions seem to be right only one out of three individuals.\textsuperscript{346} Despite the fact that such predictions are found to be inaccurate and while many predictions are controversial and unchecked, the criminal justice system, nevertheless, continues to incapacitate offenders. For von Hirsch and his team, the ability to predict dangerousness has not lived up to such hopes because of many reasons.\textsuperscript{347} One reason for error has been that predictors – be they judges, psychiatrists, or correctional officials – seldom have taken the trouble to follow up their forecasts and check their accuracy and thus learn from their mistakes.\textsuperscript{348}

Another criticism, linked to false positive prediction, forwarded against predictive incapacitation is that it is wrong in principle to punish a person for what he might do in the future. Moreover, incapacitation has been criticized for being contrary to the spirit of justice and fairness as one may question whether it is ever just to punish some one more severely for what he is expected to do even if the prediction proves to be correct.

\textsuperscript{345} Dufee, supra note 17, p. 12.
\textsuperscript{346} Inns of Court School of Law, supra note 14, p. 245, and Clarkson and Keating, supra note 38, p. 49.
\textsuperscript{347} Von Hirsch, supra note 10, p. 21.
\textsuperscript{348} Ibid.
The second prediction error is known as the “false negative prediction” or “mistaken prediction”, i.e., that a person will not commit another crime when in fact he or she would.\textsuperscript{349} In this regard, a criticism is waged against incapacitation in the sense that the prediction proved so weak that it failed to anticipate in preventing dangerous criminals from joining the society. Because of this weak prediction too many dangerous offenders are placed back in society rather than being kept behind bars where they could not prey on those outside. It is due to this erroneous prediction that incapacitation sentences are mainly criticized; every time the authorities release someone, that person might prove to have the potential of subsequent commission of a crime. Von Hirsch quotes California’s Attorney General Evelle Younger who said: “I would rather run the risk of keeping the wrong man in prison a little longer than let the wrong man out too soon.”\textsuperscript{350}

Incapacitation, one might conclude, is not a preferred option of punishment not only because it punishes those who might have really rehabilitated but also for its failure to identify those who would commit more crimes upon their release. It, moreover, is also unfriendly to the sacred principles of justice for making future predictions solely by reference to past behavior. Thus, there is no cogent reason to run the risk of unreliable predictions for the mere reason of achieving a negligible result.

2.4. Retribution (Revenge)

In modern criminal law system the term retribution has acquired various shades of meaning. However, the key principle that all theories of retribution share is that there should be correlation between the gravity of the crime and the severity of the punishment. All forms of retribution have three common elements:\textsuperscript{351}

1. Punishment is acceptable only against persons who have committed crimes;

\textsuperscript{349} Dufée, \textit{supra} note 47.
\textsuperscript{350} Muncie, \textit{supra} note 18, p. 317.
\textsuperscript{351} Duffée, \textit{supra} note 17, p. 10.
2. The degree of punishment must match the severity of the crime; the innocents should not be penalized;

3. The degree of punishment must be specified independent of the actual or predicted consequence.

Unlike the rehabilitation and deterrent theories, retribution theory looks back to the crime and punishes the offender because of the crime he committed and not to the consequence of punishment in his character. The following sections describe some of the forms or justifications for the retributive punishment.

A. Denunciation of Criminal Behavior

This form of punishment has some similarities with the theory of deterrent punishment, which uses the offender as a means of achieving a useful purpose. According to the votaries of this theory, punishing an offender symbolizes the ‘annulment’ or disapproval of his crime. To Nozick, for instance, punishing criminals is the only way of ‘connecting’ them to the community's values which they have flouted.352

Lord Denning also emphasized on the denunciatory aspect of retribution, when he had expressed his belief that the ultimate justification of any punishment was not that it was deterrent but that it was the emphatic denunciation by the community of the offence.353 The best way for

352 Referral to in Walker, N.l, Aggravation, Mitigation and Mercy in English Criminal Justice, Blackstone Press Limited, 1999, p. 7. Moreover, Sir James Stephen expresses the idea of denunciation as an expression of the moral sentiments of the community rather forcefully in the following words:

“...The infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is exerted by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which also sanctioned by criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminal punishments which press it...” Stephen, Sir J., “A History of Criminal Law of England”, 1883, in Clarkson and Keating, supra note 38, pp. 81-82.

353 “A Report to the Royal Commission on Capital Punishment”, (Memorandum submitted by Lord Denning on December 9, 1949), in Inns of Court School of Law, supra note 14, p. 5.
showing societal disapproval – that he flouted his community’s values – may well be to repay him what he did to his victim if that is possible and, if not, to do the nearest thing to it. An obvious example of this is death penalty for murder. This pattern conveys a message that retribution, in a sense of reprobation or denunciation, perhaps still has relevance in modern sentencing justice. Represented by its judicial organs, the society sends a message of the degree of its disapproval of the criminal behavior by the severity of the punishment given the criminals.

B. Debt Repayment or Expiation

Proponents of this principle hold that punishment is justified because it compels the offenders to compensate society for the ‘social harm’ they caused. Offenders who took unfair advantage or profits from their wrongdoing must be made to work off their guilt. Thus, the offenders must pay the ‘compensation’ they owe the society and only through punishment can one ‘wash away’ the dirt of crime and hence reconcile the offenders with the society. Thus, the expiation theory, in a nutshell, advocates point out that retribution means ‘repayment.’ However, there is a plausible argument against this asking whether incarceration of an individual actually compensates the society, although it might be accepted that the victims, through retribution, feel vindicated for the loss they suffered.

C. Vengeance

The element of vengeance in retributive punishment is the most condemned aspect of punishment for its ‘inhumane’ value. Vengeance originates at the heart of the victim or his/her family, moves on to relatives and the respective clan. As the modern nation state emerged, it officiated the desire for vengeance and control over vengeance passed into official hands.

Vengeance might have originated from religion from the concept that a sinner should be punished and deserves the response of divine wrath. The idea is that, the wounds in the murdered person's body cry out, like Abel’s

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354 Walker, supra note 54, p. 8.
blood against his brother Cain\textsuperscript{355} or Hamlet’s father, \textsuperscript{356} for vengeance. Vengeance relies on the imperative that only punishment can expunge the original crime and only retaliatory sanction can right the wrong done.\textsuperscript{357} The most cited argument with regard to vengeance is Sir Stephen’s argument. For him, punishment must not only be administered because the offender is dangerous to the society but also in order to gratify the feeling of hatred.\textsuperscript{358} He calls it revenge and a resentment in which the criminals’ grosser forms of vice raise the feeling of hatred and desire of vengeance.\textsuperscript{359} The insistent demands by victims and their sympathizers for vengeance against those who are believed to be responsible for the killing or act, echoes the ancient cry for vengeance. Therefore, the duty of the state in such cases is to satisfy this feeling by punishing the offender. Even Bentham goes further by equating the pleasure of vengeance as honey gathered from the carcass of the lion.\textsuperscript{360}

D. \textit{Kantian Retribution}

Like Bentham, Kant believes that men are rational. He believes that men have the capacity to understand and follow moral rules. To him individuals have the power to exercise their free will, and unlawful acts

\textsuperscript{355} “And he \[the Lord\] said ‘What has thou done? the voice of thy brother’s blood crieth unto me from the ground.’” Book of Genesis Chapter 4, Verse 10, Dake, F. J., Dake’s Annotated Reference Bible, Dake Bible Sales, Inc., 1991, p. 4.

\textsuperscript{356} Baxi, \textit{supra} note 27, p. 104.

\textsuperscript{357} \textit{Ibid}.


\textsuperscript{359} \textit{Ibid}.

\textsuperscript{360} Baxi, \textit{supra} note 27, p. 105. Furthermore, Professors Clarkson and Keating give two instances where vengeance could be justified:

\begin{enumerate}
\item Punishment satisfies the victims’ desire (or that of the victims’ relatives or friends) for vengeance and the state, in punishing the criminal, is merely exacting vengeance on their behalf. This saves society from anarchy and tyranny in which the aggrieved might take law into his hands.
\item It also satisfies the public need for vengeance. It is argued that there is an instinctive demand which is active in every human being to retaliate just as an animal strikes back with hate at those who attack it. Clarkson and Keating, \textit{supra} note 38, p. 27.
\end{enumerate}
occur only when individuals have calculated that those acts are advantageous to them. Individuals are autonomous, self-regulating, and morally responsible. This led Kant to conclude that this special human nature must be recognized by making people suffer punishment for their infractions of the criminal law voluntarily. For Kant, offenders are responsible for having freely chosen to engage in crime. He called this ‘treating them as ends in themselves.’ This is what many people believe that criminals ‘deserve’ to suffer loss or harm: a doctrine that led to the philosophy of ‘just desert.’ Kantian retribution holds that the state has a duty to punish all criminals. This attachment of value to human rationality might have led Kant, in his effort to show the state’s duty to punish a perpetrator lest it would be guilty of neglect of such duty, to argue that:

Even if a civil society were to dissolve itself by common agreement of all of its members (for example, if the people inhabiting an island decide to separate and dispense themselves around the world) the last murderer remaining in the prison must be executed, so that every body will duly receive what his actions are worth and so that the blood guilt there of will not be fixed on people because they failed to insist on carrying out the punishment to do that, they may be regarded as accomplices in this violation of legal justice.

E. Conclusion on the Retribution Theory

Unlike deterrent and rehabilitation, the retributive theory, therefore, looks back to the crime and punishes the offender only because of the harm caused by the crime and does not bother itself with the intended implications of the punishment or future behavior of the criminal. The basic premise is that an offender deserves punishment because he has committed a crime in the past.

361 Walker, supra note 54, p. 4.
362 Ibid, p. 5.
Retribution, however, has been subjected to various criticisms from different angles. The following section presents discussion of some of them.

Some challenge the power of the state to punish criminals on behalf of the victim. Saddique, for instance, questions retribution by arguing “if individuals have no moral right to exact retribution, how can a group of individuals in the society acquire such a moral right?”

The law of retaliation has also been criticized as a barbaric principle that serves as an excuse to unleash savage passion than its being a power given to the state to punish offenders. Prof. Rao, though recognizing that some sort of state retribution is necessary to satisfy the instinct wish to retaliate and save the society from individuals taking the law into their own hands, he criticizes its inhumane and brutal character as:

The community would be relegated to a primitive condition where the determination of the law to exact an eye for an eye and tooth for a tooth would cause immeasurable and intolerable cruelty in the name of evenhanded justice.

3. Serving the ‘Just Desert’

Introduction of the just desert theory should begin with the proviso that it is a relatively new, though brilliant, theory borne out of the labors for mending the inefficacies of the conventional four theories of punishment. It does not purport to be a displacement of the conventions four, but a better theory with its own defects, though manageable. A theory based on justice and fairness, just desert has evolved as a compromise of the other theories of punishment.

This theory is mainly an offspring of Kantian retribution. It is a form of punishment that has been modified by Andrew von Hirsch and his team and crafted to suit the general principles of justice and fairness and, as a

364 Ibid, p. 113.
newly modified and fashioned option, it is being found out to be the only and most accepted alternative not only because it attempts to rectify the flaws of other theories, but also because it provides a solution to the current problems for it indicates the extent to which an offender deserves to be punished.

Desert is a well praised option, because it is concerned with the techniques for identifying, classifying and managing groups of offences and offenders assorted by levels of dangerousness. It takes the commission of crime for granted and accepts deviance as normal. It recognizes that rehabilitation hardly works and deterrence is not a sufficient remedy. It doubts the wisdom of blanket retribution by classifying the level of punishment according to the gravity of offences committed. Thus, it has finally emerged as a compromising option, which harmonious with the principles of justice and fairness.

The basic argument of desert is that the offender should be ‘subjected to certain deprivations because he deserves it; and he deserves it because he has been engaged in a wrongful conduct –conduct that does or threatens injury and that is prohibited by law.’

Justice and fairness insist that all persons must bear the sacrifice of obeying the law equally. By committing a crime, offenders gain an unfair advantage over all others who have ‘toed the line’ and restrained themselves from committing crime. Criminals are ‘free riders’ who have failed to observe the moral constraints that others have accepted. Therefore, punishment is necessary to take away the benefits gained illegally. Offenders deserve punishment in order that the state be able to destroy their unfair advantages. This is believed to restore the equilibrium of benefits and burden by punishing those who violate the law and deserve to be punished.

To von Hirsch sentencing is not a means of crime prevention but a matter of justice and a commensurate desert served as a response to the actors’

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367 Clarkson and Keating, supra note 38, p. 28.
368 Ibid, p. 29.
370 Ibid.
Sentencing should ensure that the punishment should be imposed on those who commit offences having regard to the seriousness of the harm caused or risked by the offender and the degree of the offender's culpability. In other words, penalty must be scaled in accordance with the gravity of the offence, as the gravity of the crime diminishes, so should the severity of the punishment. For von Hirsch, justice, served through just desert, is when the punishment given offenders closely approximates the severity of their criminal act, when equally blameworthy individuals receive nearly similar sentences, and when criminal conducts of equal seriousness are punished equally.

However one may ask: how can a state or its legislative bodies determine what level of punishment is proportionate to the seriousness of a crime? This was one of the early criticisms which the theory of just desert faced. Von Hirsch, however, defended his principle of proportionality by resorting to his ordinal and cardinal magnitudes of punishment. The following paragraphs will show how just desert works.

Ordinal proportionality is concerned with how a crime should be punished compared to other crimes of a more or less serious nature. Thus, a legislator, in putting embodying just desert in the criminal statutes arranges offences into a given number of classes of severity and decides which offences should be kept in each class. Thus, ordinal proportionality is a horizontal proportionality among offences. By doing so, Prof. Rao note, ordinal proportionality will ensure that persons convicted of crimes of comparable gravity will receive punishments of comparable severity and those who are convicted of crimes of differing gravity will receive punishments correspondingly graded in their gravity. There still is a problem of how to identify which offences are similar and which are not. For Andrew Ashworth, political and moral judgments play a significant role in this regard.

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371 Muncie, supra note 18, p. 320.
373 Muncie, supra note 18, p. 322.
375 Rao, supra note 67, p. 159.
Cardinal proportionality is concerned with the amount of penalty that should be given to a particular offence and the other offences grouped with it in accordance with the formula for ordinal proportionality. It requires that the absolute level of the penalty scale, both maximum penalties and actual sentence ranges, be not disproportionate to the magnitude of the offending behavior. Therefore, cardinal proportionality is a vertical proportionality among penalties. Fixing a scale of penalty definitely depends on the socio-political evaluation of individual countries and may vary from one country to another.\(^{377}\)

Through ordinal and cardinal proportionality, therefore, the criminal justice system adjusts itself into a consistent and predictable system by:

- Clearly reflecting the understanding of the society on the seriousness of various categories of offences;

- Providing punishment proportional to the gravity of the offences; and

- Narrowing the range between the minimum and maximum penalties (by providing for a ‘presumptive sentence’).

After critically analyzing the objectives of a sentence, just desert comes out victoriously as the least evil and best suited sentencing option. Nevertheless, just desert is not free from criticism. Andrew Ashworth himself criticizes the concept of proportionality of just desert because it may fail to address the socio-economic root cause of crime. For Ashworth, proportionality or ‘just desert’ proportionate sentences merely reinforce the existing social inequalities, and this does not achieve justice so much as confirms to injustice.\(^{378}\)

Another criticism comes from Lewis as an advocate of the humanitarian version of punishment. He argues, “punishing a man because he deserved is a revenge, and therefore barbarous and immoral.”\(^{379}\) This group desires correspondence between relative seriousness of behavior and relative severity of sentence on which various moral and political judgments be brought to bear.”

\(^{377}\) Muncie, \textit{supra} note 18, pp. 43-46.

\(^{378}\) Andenaes, \textit{supra} note 30, p.17.

to remove the justification of punishing in the name of justice and advocates for mercy. Lewis asserts, “.... Start being ‘kind’ to people before you have considered their rights, and then force upon them supposed kindness which they in fact had a right to refuse, and finally kindness which no one but you will recognize as overshot mark. Mercy detached from justice, grows unmerciful.”380 The criticism is that anything that hinders justice from operation will finally progress to a merciless.

A final criticism of desert comes from Herman Schwartz, in his reservation recorded in von Hirsch’s book – Doing Justice. His reservation reads:

I don’t believe the deserts principle should serve as one of the principal treatment for a system of punishment. Can one really say someone deserves to be punished for breaking the law, when that person may have been hooked on heroin by the time he was a teenager, was confronted with racism or other prejudice, grew up in a broken home amid violence, filth, and brutality, was forced to go to substandard schools, and had no honest way to make a decent living? These conditions supply to a very high percentage of our criminal population. I would limit the deserts principle to serving as a guide to the distribution of punishment (only those who commit crime may be punished) and perhaps as a rough criterion for the level of punishment, e.g., no heavy punishment for minor offence or taken sanctions for major crimes.381

Nicola Licey in her book ‘State Punishment’ questions desert not only as a principle but also in its failure to give clear practical guidance. For her, the idea of desert cannot be distinguished from the principle of vengeance or

224, in Clarkson and Keating, supra note 38, p. 34.
380 Ibid.
381 Von Hirsch, supra note 10, p. 177.
the unappealing assertion that two wrongs some how make a right.\textsuperscript{382} Nicola Lacey, however, failed to forward a persuasive option that could override the most widely accepted principle of “just desert”.

May one, thus, conclude that despite the soft criticisms against it, ‘just desert’ will march on with relative ease because:

(a) to the extent the society is willing to grade crimes according to their severity, just desert will set proportional penalty; and

(b) above all just desert confirms justice and reduces unjustified sentencing disparity in that two offenders who commit the same crime will receive similar punishment with a complimentary consideration of their racial and socio-economic back ground?

Leslie T. Winkins, a member of von Hirsch’s team, statement of reservation on just desert would be worth to sum up the discussion with. He asserts, “I cannot do other than add my signature to this report… it seems that we have rediscovered “sin” in the absence of a better alternative!”\textsuperscript{383}

Let’s finish the analysis of the just desert system with a quote from Prof. Rao: “Needless to reaffirm that there is only one sentencing aim which can be justified in terms of both morality and justice viz., just desert”.\textsuperscript{384}

4. The Eritrean ‘Traditional Just Desert’ and its Potential Use as a Reference for the Legal Reform Process of Eritrean and African Criminal Law

4.1. The Eritrean Penal Code

The 1957 Penal Code of Ethiopia (as amended in 1991 by the Transitional Penal Code of Eritrea (T.P.C.E.)), is the highest penal statute in Eritrea. Like most criminal laws, the T.P.C.E. tries to accommodate the purposes

\textsuperscript{382} Licey, \textit{supra} note 28, pp. 24-25.

\textsuperscript{383} Von Hirsch, \textit{supra} note 10, pp.177 – 178.

\textsuperscript{384} Rao, \textit{supra} note 67, p. 160.
of criminal laws discussed above. Art. 1 of the T.P.C.E. (Object and Purpose) reads:

“The purpose of criminal law is to ensure order, peace and the security of the State and its inhabitants for the public good.

It aims at the prevention of offences by giving due notice of the offences and penalties prescribed by law and should this be ineffective by providing for the punishment (retribution) and reform of offenders (rehabilitation) and measures to prevent the commission of further offences (deterrence and incapacitation) (emphasis added).”

This mix of objectives should, therefore, be reflected in the judgments/punishments given by the criminal courts. Although there are various sections on the punishment sections of the code related to each of these objectives, the fact that these purposes are cumulatively kept as objectives in Art. 1 makes it very difficult for the courts to select the ‘lesson’ it needs to pass through the judgment.

Next, the offences contained in the T.P.C.E., like most other penal codes, have not been systematically arranged in such a way that one is easily able to understand which offence, in the opinion of the legislature, is deemed to be equal in seriousness as which other offence. The offences contained in the T.P.C.E. are ‘independent’ of the seriousness of other offences and are contained within themselves only; a ‘horizontal’ analysis (ordinal proportionality) is a difficult pattern to be identified in the Code. Thus, it becomes naturally for the courts to identify which offenders (having committed offences of similar severity) need what kind of similar treatment.

Furthermore, the range of punishment provided for fines and imprisonments is very wide. To begin, with fine can begin with 1 Nakfa, the Eritrean currency, and go as high as 10,000 Nakfas.\(^{385}\) Simple

\(^{385}\) Art. 88 of the T.P.C. E. reads:
imprisonment ranges from 10 days to three years (Art. 105) and rigorous imprisonment from 1 year to 25 years (Art. 107). By way of citation, for instance:

- Rape, in the worst case, is punishable with rigorous imprisonment of 1-15 years (Art. 589(2)(b);

- Grave willful injury, in the worst case, is punishable with rigorous imprisonment of 1-10 years;

- Robbery is punishable with rigorous imprisonment of 1-15 years (Art. 536); and

- Attempted first degree homicide is punishable with rigorous imprisonment of 5 years to life (Art. 27/522).

Such a wide range between the minimum and maximum penalties allowable for the respective offences naturally makes it difficult for the judge to arrive near to at the ideally just punishment deserving the offender. The equally cloudy set of aggravating and mitigating

“The fine, when paid, is forfeited to the State and, subject to any provision of the law to the contrary, may extend from one dollar to five thousand dollars. In fixing the amount of the fine the Court shall take into consideration the financial condition, the means, the family responsibilities, the occupation and earnings therefrom, the age and health of the offender. The amount of the fine shall be such as to make the loss to be sustained the offender correspond, as far as possible, to his degree of guilt.”

Art. 90 of the T.P.C. E. reads:

(1) Without prejudice to any special provision, of the law prescribing a higher maximum, where the offender has acted with a motive of gain or where the makes a business of crime in a way that he acquires or tries to acquire a gain whenever a favourable opportunity presents itself, and where it appears to the Court that, having regard to the financial condition of, and the profit made by, the offender, it expedient n to do, it may impose a fine which shall not exceed ten thousand dollars. The amount of the fine shall always be in addition to the confiscation of the profit made.

(2) Notwithstanding that no provision is specifically made in the Special Part of this Code, where although gain is not an essential element of an offence, the offender was motivated by gain in the commission of such offence, the Court, may impose a fine in addition to imprisonment or other punishment provided by law.
circumstances (Arts. 79 and 81 respectively), although they allow for adjustment within the wide range for punishment, can only assist to ameliorate the difficulty created by the range. Therefore, it is not easy in Eritrea, added to the subjective understanding of each judge on crime and punishment, to give uniform, consistent – thus fair – punishment to offences and offenders of similar classes.

Finally, the absence of a systematic classification of offences into classes of seriousness has lead to the possibility of ‘less serious offences’ punished more rigorously than ‘more serious offences’ because the minimum and maximum penalties, in most cases, coincide. In the above case for instance, there is a likelihood that a rapist may be punished less harshly than someone who has committed grave willful injury because the minimum for both punishments is one year rigorous punishment and the range coincides up to 10 years of punishment. Thus, the likelihood of distortion of the pattern of punishments caused by the nature of the sentencing range in a criminal law such as the T.P.C.E. can disturb the value of a society that deems a given offence (rape for instance) more serious than another offence (grave willful injury).

A deserving solution – and thus facilitating the search for criminal justice – would be classifying offences (by ordinal and cardinal proportionality) and providing for a narrow range of punishment for each class of offences, i.e., the just desert, so that the criminal judge would:

- Have an ease in identifying the proper sentence;
- Appropriately apply aggravating and mitigating circumstances without the trouble of utilizing them within a very wide range;
- Exercise minimum subjectivity – since one cannot avoid this – in the course of declaring his sentence;
- Have a reduced exposure to corruption since the influence of any one corruptly interested in the outcome of the sentence would, if any, have a slight impact on the actual sentence because the range of the sentence is narrower;
- Have a better opportunity to decide what kind of treatment should apply to the offender (retribution, rehabilitation, deterrence or
incapacitation) because the level of the gravity of the offence has objectively been identified by the society (through the parliament);

- Still face no breach of judicial discretion.\textsuperscript{386}

Let us now see if the introduction of a just desert system of sentencing into the criminal law of Eritrea, and by implication criminal laws in Africa of similar characters as that of the T.P.C.E., would fit into the values and understandings of the society because criminal laws should necessarily reflect and influence the given norms and values of the society.

4.2. The Eritrean Customary Laws

\textsuperscript{386} Judicial discretion is not and should not be construed, in criminal law, to mean the grant of a wide range of punishment to judges. It means and should mean the authority of the judge to freely decide the outcome of the case.

Lord Halsbury’s statement deserves to be quoted in this regard:

“Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to arbitrary, vague, and fanciful, but legal and not humor. It must be \textit{exercised within the limits}, to which honest man competent to the discharge of his office ought to confine him self (emphasis added). Lord Halsbury’s observation in \textit{Sharp v. Wakefield} (1891) AC 173 (179): (1886-90) All ER.651:39 WR 561, referred to in Takwani, C.K., Lectures on Administrative Law, Eastern Book Company, 1998, p. 242.

It is this ‘\textit{within the limits}’ that has created a problem and seen to be used, misused, and abused by our courts. The limit most of the time is unlimited. The wider the discretion given the more the judges can swim freely. Kimball’s explanation on the merits and qualities that a sentencing judge should posses reads as follows:

“The exercise of judicial discretion involves the personal values, education and life experience of the judge. It involves his legal skills, wisdom and philosophy and his sense of right and wrong and it includes his depth of understanding of the judicial role. Judicial discretion involves the degree of sensitivity of the judge to the plight of all those who appear in court and it involves the recognition of their rights and worth as human beings. The essence of judicial discretion is to achieve fairness and justice: its proper application in the measure of the judge to whom that duty is entrusted”.

For Kimball discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colorable glosses and pretences, and “\textit{not to do according to their wills and private affections}…” Kimball, R.E., “In the Matter of Judicial Discretion and Imposition of Default Orders”, \textit{Criminal Law Quarterly}, Vol. 32, 1989-90, p. 492.
We now enter the world of the Eritrean customary laws all of which, the authors have discovered, have embodied the understanding of their respective communities regarding crime and punishment. The Eritrean customary laws are among the very few customary laws in the world which had the lack of being put into writing. They early of Eritrean inhabitants had the wisdom of writing their customary laws and depositing them in monasteries. As is the practice with many customary laws, the Eritrean customary laws are dynamic and get amended by each generation which believed that the customary laws needed to adjust to new developments in the society.

Research revealed that a number of Eritrean customary laws have been put into writing. The preambles of most of these customary laws claim that the laws were originally enacted in as far back as the 15th century.\(^{387}\) The high level interactivity in the lives of the different communities constituting the Eritrean society is witnessed in the striking similarities in the substance and structure of these written customary laws. Thus, it may be concluded that the totality of the essence of the various customary laws in Eritrea is one and the same and may be cited as a single set of laws.

It is an anthropological principle that customary laws of a given society, more preferably written customary laws, are one of the most easily available and reliable sources in perceiving the understanding of that society. Thus, a reference to the written customary laws of Eritrea will enable one to understand how the Eritrean society understands a given legal concept if that concept is included in the customary law.

Relevant to this article is the sentencing system adopted by these customary laws. In a nutshell, the Eritrean customary laws had long

\(^{387}\) The preamble to the 1910 amendment to the customary law of Loggo Chwa, for instance, claims that the first version of the law was enacted in 1492 AD during the reign of Emperor Eskindir of Ethiopia; the second version in 1658 during the reign of Emperor Fasil of Ethiopia; the third version during the early days of the Italian occupation of Eritrea (1900) and the final version (a copy of which the authors had obtained) during the British Military Administration of Eritrea in 1943. Estifanos, Z., Abraham, W., and Ghebre-Meskel, G., *supra* note 4, p. 207.

Similarly in a September 1991 interview a certain Reverend Haile Hadera, an Orthodox Christian priest, one of the elders involved in amending the customary law of Adkeme Mlga’e, claimed that the Adkeme Mlga’e law was more than 800 years old (audio cassette copy of interview with authors).
utilized the just desert system. The striking detail of classes into which almost a majority of the frequently committed offences are categorized, the ease with which one can identify which offences are kept in the same category (by reference to the penalties), the wisdom of proportionally increasing the penalties with the increase in the gravity of the level of offences, the manner in which aggravating and mitigating circumstances etc are utilized show the mastery of the drafters of these customary laws and their understating of justice – now championed by erudite scholars like Andrew von Hirsch. For the modern criminologist, the Eritrean customary laws depict a just desert system. The details with which crimes and respective punishments are provided for in the customary laws lead to only one conclusion: an effort has been exerted to give every offender what he/she deserves, nothing more, nothing less – just desert. *(See Annex II for a sample of classification of types of physical injuries classified by their gravity and the respectively graduated punishments therefor in a sample of eight Eritrean customary laws.)*

Therefore, adopting the just desert system in the process of reforming the T.P.C.E. would not only be a well-grounded reflection of the criminal philosophy of the Eritrean society but also keeping in line with the modern sentencing systems being introduced in the developed world. This would be one of the very few developments that, in this area of globalization, could be sustainably incorporated into a national criminal legal system because, since just desert is an ‘old – modern’ philosophy, there is a reduced probability of ‘rejection’ of the ‘grafted’ system by the societal values and norms of the ‘importing’ system.

5. **Legal status of the Eritrean Customary Laws**

The status of customary laws in national legal arena and whether people can continue to apply their respective customary laws in criminal disputes are issues explicitly addressed neither in the 1957 (for the then Ethiopia which included Eritrea) nor in the 1991 T.P.C.E. (for the independent Eritrea). In a rather cloudy statement, the Emperor Haile Selassie I, in the preface to the 1957 Code stated:

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388 Unlike the Penal Code, the 1961 Ethiopian Civil Code (and the 1991 Transitional Civil Code of Eritrea), however, has a clear standing on the status and use of customary laws in matters covered by the Civil Code. Article 3347 reads: 
“We have ensured that their concepts [those of the Codification Commission] adopted as point of departure the venerable and well-established legal traditions of Our Empire as revealed in the Fetha Neguest and in subsequent legislation and practice, including those customs and usages which are common to all citizens.”

It is rather hard, however, to fathom how the ‘legal traditions as revealed in the Fetha Neguest’ have been reflected in the modernist, Continental penal code drafted by the famous Swiss jurist Jean Graven. At least for the Eritrean criminal customary tradition – which apparently could have been the only written customary law in the then Ethiopia – the 1957 Penal Code greatly departed from a legal tradition reigning in a given part of the then Ethiopia in the manner of classification of offences, the graduating of each offence according to the gravity of its commission and the highly stratified sentencing for each level of gravity. In a nutshell, the 1957 Code departed from the ‘just desert’ system prevailing in Eritrea.

More so, the 1991 amendments did not specifically address the issue of the status of customary laws. The substance of the amendments is simply to introduce the amendment necessary to update the 1957 Code. Thus, at least the text of the existing criminal statues is not clear on the issue.

In practice, however, people continue applying their customary laws ‘underground’. A survey conducted a few years ago in which one of the authors participated revealed that in distant villages cases as serious as murder continue to be handled by village elders according to their practices.

The authors do not argue that Eritrea needs to literally reactivate the customary laws back to the respective villages for doing so will have scores of problems in its pragmatic application in the 21st century. However, the authors do argue that the principles of punishment contained in the customary laws – just desert – need to be incorporated into the

“Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed.”

389 The Fetha Neguest was a legal-religious law of the Kings of Ethiopia which claims to have been inspired by the laws of Constantine the Great.
sentencing regime in the new draft code which has taken the stand that customary laws are to be repealed.

6. **Just Desert System for African Criminal Laws**

The authors believe that the penal codes of most African countries, copies of or highly influenced by western criminal laws as they are, need to be linked the respective societies within which they are intended to operate. The African continent is a boon of rich traditional systems which, *inter alia*, contain self-developed justice mechanisms, most notable of which is the systems of punishing offenders. African criminal law experts are, thus, invited to weigh the penal codes of their respective criminal laws in light of the analyses made above. A particular invitation is to find out if the traditional criminal justice system has elements of the just desert system and see how that system can be incorporated into the criminal laws in force in the states. Such a symbiosis would enliven the reform process by, on the one hand, ensuring that the laws in force do not lose track of the values of the society and, on the other hand, updating the laws in force to be in tune with the latest of philosophies on sentencing - the just desert system.

To that end, the offences contained in the criminal statutes need to be listed and, according to pre-selected criteria, be clustered into classes of seriousness. Each offence may also be divided into different levels of seriousness that can be distributed in the different classes of offences; thus, a less serious form of robbery may be grouped with a higher class of theft and a more serious form of robbery may be grouped with a less serious form of piracy. The various classes of offences so categorized, the next assignment would be setting punishment levels that increase with the increase in the seriousness of the different classes of offences. Thus, the grant of confusingly varied sentences for offences of relatively similar seriousness (according to the standards of the society) or the grant of confusingly similar punishments for offences of relatively varied seriousness (according to the standards of the society) could be avoided and a fair and consistent criminal justice system established.

7. **Conclusion**
The traditional purposes of sentencing have individually proved ineffective for various reasons, more ineffective if put together in a criminal statute as instructions for the judge. Criminal justice demands that fair sentence be given to the criminal and that the criminal be measured with the measure of the obstruction he caused to the harmony of the society. Punishments in criminal statues of a majority of states luck specificity. The wide range in the punishment, often wrongly understood to have given the judge a judicial discretion, could only lead to inconsistent sentences. Just desert, with its ordinal and cardinal proportionalities, has, in the last thirty years, emerged as a better alternative and as close to fair justice as criminal law experts could agree on.

Customary laws often are the best source to delve into the understanding of a society on the philosophy of sentencing. An ideal situation in the process of reform of criminal laws would be a finding of a just desert system in the customary laws of the nation reforming its laws. Such a situation would keep the criminal law abreast of the modern philosophy of just desert while at the same time not deviating from the traditions of the society – thus undertake a sustainable criminal law reform. The Eritrean criminal law finds itself in such a situation and has been presented with an electable opportunity to merge the ‘archaic’ with the ‘modern’ theories of punishment, both of which happen to share similar philosophies. The authors would like to seize this forum, the International Conference on Philosophy and the Law in Africa, to invite African reformers of criminal legal systems to see if the alternative presented by this article could be utilized in the reform process.
### Annex I - Comparison of the range of punishment for some select crimes in nine countries

<table>
<thead>
<tr>
<th>Type of offence</th>
<th>Punishment under the draft Eritrean Penal Code</th>
<th>Punishment under the Transitional Eritrean Penal Code</th>
<th>Punishment under the Penal Code of China</th>
<th>Punishment under the Penal Code of Singapore</th>
<th>Punishment under the Penal Code of India</th>
<th>Punishment under the Penal Code of Sri Lanka</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>High treason</strong></td>
<td>Death, life impr., or 10-20 yr. impr., ±1-50,000 Nfa.</td>
<td>Death, or rigor. impr. for 5 years – life.</td>
<td>Death, life impr., imp ≥ 10 yrs, impr. 3-10 yrs, impr. ≥ 5 yrs, impr. ≤ 5 yrs (depending on the nature of the offence and the degree of participation)</td>
<td>Death or life impr.</td>
<td>Death or life impr.</td>
<td>Life or 5 yrs life impr.</td>
</tr>
<tr>
<td><strong>Aggravated espionage</strong></td>
<td>Death, life impr., or 10-20 yr. impr., ±1-50,000 Nfa.</td>
<td>Death, rigor. impr. for life, or rigor. impr. ≤ 20 yrs.</td>
<td>Death, life impr., imp ≥ 10 yrs, impr. 5-10 yrs,</td>
<td>-</td>
<td>-</td>
<td>Life ≥ 2 yrs life impr.</td>
</tr>
<tr>
<td><strong>Aggravated sabotage</strong></td>
<td>Death, life impr., or 10-20 yr. impr., ±1-50,000 Nfa.</td>
<td>Death, rig. impr. 3yrs – life, rigor. impr. ≤ 10 yrs</td>
<td>Death, life impr., imp ≥ 10 yrs</td>
<td>-</td>
<td>-</td>
<td>Life ≥ 2 yrs life impr.</td>
</tr>
<tr>
<td><strong>Piracy</strong></td>
<td>Death, life impr., or 10-20 yr. impr.,</td>
<td>Death, Life impr., or 5-20 yrs. rigor. impr</td>
<td>Life impr., imp ≥ 10 yrs,</td>
<td>Death or life impr., ≤ 10 yrs. impr. (in other</td>
<td>-</td>
<td>Life or 5 yrs life impr. (gr hij)</td>
</tr>
<tr>
<td><strong>Categorization</strong></td>
<td><strong>Description</strong></td>
<td><strong>Rigo. impr.</strong></td>
<td><strong>Death, life impr., imp ≥ 10 yrs</strong></td>
<td><strong>Death or life impr.</strong></td>
<td><strong>Life yrs</strong></td>
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<tr>
<td><strong>Causing a catastrophe</strong></td>
<td>Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.</td>
<td>Rigo. impr. ≤ 10 yrs</td>
<td>Death, life impr., imp ≥ 10 yrs</td>
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<td>Lif yrs</td>
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<tr>
<td><strong>Aggravated murder</strong></td>
<td>Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.</td>
<td>Death, or rigor. impr. for life</td>
<td>Death, life impr., imp ≥ 10 yrs</td>
<td>Death or life impr.</td>
<td>Lif yrs</td>
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<tr>
<td><strong>Aggravated rape</strong></td>
<td>Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.</td>
<td>Rigo. impr. ≤ 15 yrs</td>
<td>Death, life impr., imp ≥ 10 yrs</td>
<td>Impr. ≤ 20 yrs</td>
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<tr>
<td><strong>Attacks upon the Head of State</strong></td>
<td>5-10 yrs impr, ±1-15,000 Nfa.</td>
<td>Death, rigo. impr.</td>
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<td></td>
<td>15 yrs-life, rigo. impr. 10-25 yrs, rigo. impr. 5-20 yrs (depends on the danger)</td>
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<tr>
<td><strong>Aggravated corruption</strong></td>
<td>5-10 yrs impr, ±1-15,000 Nfa.</td>
<td>Rigo. impr. ≤ 5 yrs + ≤ 10,000 Nfa.</td>
<td>Death, life impr., imp ≥ 10 yrs; impr. ≥ 5 yrs; impr. 1-7 yrs; impr. ≤ 2 yrs</td>
<td></td>
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<tr>
<td>Crime</td>
<td>Minimum Sentence</td>
<td>Maximum Sentence</td>
<td>Punishment and Sentence</td>
<td>Minimum Penalty</td>
<td>Maximum Penalty</td>
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<tr>
<td>Counterfeiting</td>
<td>5-10yrs impr, ±1-15,000 Nfa.</td>
<td>Rigo. impr. 5-20 yrs.</td>
<td>Death, life impr., imp ≥ 10 yrs; impr. 3-10 yrs</td>
<td>Life impr. or impr. ≤10 yrs</td>
<td>Impr. ≤ 7yrs</td>
<td>Impr. 4yrs</td>
</tr>
<tr>
<td>Murder</td>
<td>5-10yrs impr, ±1-15,000 Nfa.</td>
<td>Rigo. impr. 5-20 yrs.</td>
<td>impr. 3-10 yrs</td>
<td>Life impr., imp. ≤ 10 yrs</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Intentional serious bodily injury</td>
<td>5-10yrs impr, ±1-15,000 Nfa.</td>
<td>Rigo. impr. 1-10 yrs</td>
<td>impr. 3-10 yrs</td>
<td>-</td>
<td>-</td>
<td>Impr. yrs</td>
</tr>
<tr>
<td>Rape</td>
<td>5-10yrs impr, ±1-15,000 Nfa.</td>
<td>Rigo. impr. ≤ 10 yrs</td>
<td>Impr. 3-10 yrs</td>
<td>Impr. ≤ 20 yrs</td>
<td>Life impr., impr. ≤ 10yrs, impr. ≤ 10yrs,</td>
<td>Impr. yrs</td>
</tr>
<tr>
<td>Enslavement and abetting traffic</td>
<td>5-10yrs impr, ±1-15,000 Nfa.</td>
<td>Rigo. impr. 5-20 yrs + 20,000 Nfa.</td>
<td>Impr. ≤ 3yrs</td>
<td>impr. ≤ 7yrs</td>
<td>Impr. ≤ 7yrs</td>
<td>Impr. yrs</td>
</tr>
<tr>
<td>Aggravated traffic in women, infants and young persons</td>
<td>5-10yrs impr, ±1-15,000 Nfa.</td>
<td>Rigo. impr. 3-10 yrs</td>
<td>Death, life impr., imp ≥ 10 yrs, impr. 5-10 yrs</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Perjury</td>
<td>1-5yrs impr, ±1-10,000 Nfa.</td>
<td>Rigo. impr. ≤ 10 yrs</td>
<td>Impr. ≤ 3 yrs</td>
<td>Up to 3 yrs. Impr.</td>
<td>Death, impr. equal to the conviction thereby caused,</td>
<td>Impr. yrs</td>
</tr>
<tr>
<td>Offense</td>
<td>Term (Years) 1-5yrs impr, ±1-10,000 Nfa.</td>
<td>Term (Years) 1-5yrs impr, ±1-10,000 Nfa.</td>
<td>Term (Years) 1-5yrs impr, ±1-10,000 Nfa.</td>
<td>Term (Years) 1-5yrs impr, ±1-10,000 Nfa.</td>
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<tr>
<td>Negligent homicide</td>
<td>Simp. impr. ≤ 5yrs; simp. impr.</td>
<td>Impr. 3-7yrs; impr. ≤ 3yrs</td>
<td>Up to 2 yrs. Imp.</td>
<td>Impr. ≤ 3yrs</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Life impr., impr. ≤ 7 yrs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Falsification or misuse of official seals and marks</td>
<td>Rig. impr. ≤ 10yrs, ≤ 5yrs (seals); simp. impr. 3mon-5yrs (marks)</td>
<td>Impr. 3-10yrs; impr. ≤ 3 yrs (seal)</td>
<td>Up to 7 yrs. Imp.</td>
<td>Life impr., impr. ≤ 7 yrs</td>
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<td></td>
<td>Imp</td>
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</tr>
</tbody>
</table>
Annex II – Sample of a just desert for assault (physical injury) offences in select Eritrean customary laws.

<table>
<thead>
<tr>
<th>Type of instrument, weapon etc used in the offence</th>
<th>CUSTOMARY LAW(^{390}) USED FOR REFERENCE AND RESPECT PROVIDED THEREIN FOR ASSAULT AND INJURY</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Adgna Tegeleba</td>
</tr>
<tr>
<td>Injuring with hand grenade, rifle (pistol, gun), knife (pocketknife), spear (assegai, javelin, arrow), sword, dagger (bayonet), saber, double-edged knife, poison and the likes</td>
<td>250/125/62.5 Qrshi(^{392}) (depending on whether the act was intentional, negligent or a failed attempt)</td>
</tr>
<tr>
<td>Injuring with pickax, ax, machete, hammer,</td>
<td>250/125/110/55/48/24 Qrshi (depending on whether blood has been spilled or</td>
</tr>
</tbody>
</table>

\(^{390}\) The title of all the customary laws reads as “The Law of ----”; thus, the names used to identify the laws are the names of the respective groups of villages traditionally so known in Eritrea.

\(^{391}\) The amounts set forth as punishments are given to the victim as a compensation; thus, the customary laws viewed criminal punishment as a ‘civil’ matter by compensating the victim.

\(^{392}\) The currency in use at the time the latest amendment was introduced to these customary laws.

\(^{393}\) A traditionally woven cloth employed in compensating victims. One Fergi equaled 12 Qrshis.
<table>
<thead>
<tr>
<th>Offender</th>
</tr>
</thead>
<tbody>
<tr>
<td>sickle and the likes</td>
</tr>
<tr>
<td>paralyzing an organ)</td>
</tr>
<tr>
<td>offender runs after the victim holding these weapons)</td>
</tr>
<tr>
<td>drug toffenc stop h</td>
</tr>
<tr>
<td>8 Qrshi 8 Fergi 8 Fergi (even partie: come drug t offenc stop h</td>
</tr>
<tr>
<td>Injuring with an iron</td>
</tr>
<tr>
<td>-</td>
</tr>
<tr>
<td>8 Qrshi 8 Fergi (16 Qrshi)</td>
</tr>
<tr>
<td>8 Qrshi 8 Fergi</td>
</tr>
<tr>
<td>8 Fergi</td>
</tr>
<tr>
<td>8 Fergi</td>
</tr>
<tr>
<td>Injuring with a stick (rod), a stone, a whip (scorpion) or the likes</td>
</tr>
<tr>
<td>55/27.5/24/ 12 Qrshi</td>
</tr>
<tr>
<td>2 Qrshi (per bruise)</td>
</tr>
<tr>
<td>2 Fergi</td>
</tr>
<tr>
<td>According to the damage sustained</td>
</tr>
<tr>
<td>-----------------------------------</td>
</tr>
<tr>
<td>Destroying eyes, cutting the nose of the tongue, deafening the ears, paralyzing limbs or incapacitating other organs</td>
</tr>
<tr>
<td>Breaking bones</td>
</tr>
</tbody>
</table>

\(^{395}\) Compensation for loss of life and the amount differed from place to place.
<table>
<thead>
<tr>
<th></th>
<th>principal, helper)</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Breaking tooth</td>
<td>110/55 Qrshi (based on being the initiator or a helper)</td>
<td>-</td>
<td>30 Fergi (per tooth)</td>
<td>8 Qrshi</td>
<td>8 Fergi</td>
</tr>
<tr>
<td>Leaving bruises after assault</td>
<td>-</td>
<td>1 Hlqi(^{396}) + cost for cure</td>
<td>-</td>
<td>2 Qrshi (per bruise left by assault of a rod)</td>
<td>5 Fergi (for a bruise left by assault of the hand)</td>
</tr>
<tr>
<td>Assault on the head (with bruises left)</td>
<td>-</td>
<td>Not clear</td>
<td>30 Fergi (for heavy injury) / 10 Fergi (for heavy injury)</td>
<td>1 Hlqi + cost for cure</td>
<td>3 Fergi (per assault) + cost for cure (heavy wounds) / 1 Fergi (light wounds)</td>
</tr>
<tr>
<td>Assulting one’s wife</td>
<td>To be freely calculated according to the injury she has suffered</td>
<td>8 Qrshi (if she lost an organ above the neck) / 1 Hlqi + care for</td>
<td>40 or 10 Fergi [according to the gravity, if assaulted in times pending</td>
<td>30 Qrshi (if he assaults her in the field) / 1 Hlqi + female</td>
<td>-</td>
</tr>
</tbody>
</table>

\(^{396}\) A currency amounting to 12 Qrshi.

\(^{397}\) Traditional measure for cereals holding 10 kilos.
<table>
<thead>
<tr>
<th>Strangulation of the throat</th>
<th>-</th>
<th>-</th>
<th>8 Fergi</th>
<th>5 Qrshi</th>
<th>5 Fergi</th>
<th>5 Fergi</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biting</td>
<td>-</td>
<td>8 Qrshi</td>
<td>10 Fergi</td>
<td>-</td>
<td>8 Fergi</td>
<td>30 Fergi (per biting)</td>
</tr>
<tr>
<td>According to the manner</td>
<td>Adgna Tegeleba</td>
<td>Adkeme-M’Iga’e</td>
<td>Loggo-Chwa</td>
<td>Scharti, Lamza, Habslus-Gerekrstos</td>
<td>Karneshim</td>
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<td>of the commission of the offence</td>
<td>Weqerti</td>
<td>and Damba</td>
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</tr>
<tr>
<td>Assault after lying in wait or by surprise attack</td>
<td>55 Qrshi (if committed at the house of a 3rd person) + the assault to be punished according to the rules above</td>
<td>8 Qrshi</td>
<td>8 Qrshi</td>
<td>-</td>
<td>8 Qrshi</td>
<td></td>
</tr>
<tr>
<td></td>
<td>40 Fergi (for the lying in wait/surprise attack + the assault to be punished according to the rules above)</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Assault by use of the hand</td>
<td>24/12 Qrshi (based on being the initiator or a helper)</td>
<td>5 Qrshi</td>
<td>-</td>
<td>5 Qrshi</td>
<td>5 Fergi (if bruises are left)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>5 Fergi (if bruises are left)</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Assaulting by helping another assailant</td>
<td>Double the penalty due for the assault of the assailant</td>
<td>-</td>
<td>30 Fergi</td>
<td>-</td>
<td>5 Fergi (if prevented before he could help the assailant)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>15 Fergi</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Assaulting in the presence of a judge                  | - | - | 20 Fergi (for dishonoring) | 12 Fergi to the judge + the | 2 Hlqi to the judge + 30 Qrshi to
<table>
<thead>
<tr>
<th>the judge</th>
<th>+ the penalty due for the assault + 12 Fergi payable to the judge</th>
<th>penalty due for the assault</th>
<th>the victim</th>
</tr>
</thead>
</table>

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