

## **Eritrean Customary Laws: ‘Old-Modern’ Treasures For Introducing an Effective Sentencing Regime – the “Just Desert” System**

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### **ABSTRACT**

Modern criminal justice has often been criticized for the lack of uniformity in sentencing caused principally by the lack of easily identifiable categorization of offences by the degree of their severity and wide range in the sentences set for offences. The ‘Just Desert’ sentencing system has recently been favored as a workable solution. It is acclaimed to guarantee the establishment of fair, proportional, uniform, predictable and efficient criminal justice system. The authors identified elements of just desert in the Eritrean customary laws that just desert can be a sentencing choice fitting to the values and norms of the Eritrean people. This article will show why and how incorporating the just desert in the Eritrean customary laws can transform Eritrea’s criminal law and possibly serve as a model for other countries.

Key words: criminal law, sentencing, just desert, customary law, Eritrea

### **Introduction**

The classification of offences and the appropriation of respective penalties of the criminal laws of a number of countries are being challenged for a number of reasons. First, it has become cumbersome to merge the various purposes of criminal law (reformation or incapacitation of the offender, retribution, deterrence etc.) in a single sentencing order. How can a judge simultaneously provide for reformation and incapacitation of the convicted, for deterrence of potential offenders and for avenging the criminal act?

Secondly, in many countries the punishment range provided for various offences is usually very wide (see Table 3) that judges can give greatly differing punishments for similar offences or similar punishments for different offences. This can cause a non-uniform, unpredictable and inefficient sentencing regime.

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Thirdly, it has been difficult to identify the varying classes of severity of offences in most penal codes because the penalty ranges of most offences usually merge

Ameliorating, if not eliminating, the uncertainties of the criminal justice systems in many countries caused by a combination of the abovementioned reasons 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 citizen is served by the award of a sentence proportional to the severity of the offence in accordance with a system of classifying offences by the degree of their severity and identifying the offences that have to be grouped into the respective classes. 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), is fair and properly distinguishes varying classes of offenders.

At a national level it can be said that just desert was first tested in the United States. The United States Congress, in the mid-1970s, established the United States Sentencing Commission as an independent agency in the judicial branch to classify offences into varying classes and provide for respective punishments for the classes of offences. In the Sentencing Reform Act of 1984 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.'<sup>1</sup>

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, twentieth century product of high-class intellectual endeavor, has been a concept at the heart of the understanding of crime and punishment in traditional societies. This article will explain that just desert has been the basic component of the punishment regime of the age-old customary laws

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<sup>1</sup> United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, 1995 Edition, West Publishing Co. 1995, 3

of various Eritrean communities and how this finding was employed in revising the sentencing regime of the draft penal code of Eritrea.

There is a general principle that laws, especially public laws like criminal law, should reflect the norms, values and traditions of the society for which they are enacted. The experience with many penal codes of decolonized countries has been that since most of the laws (notably the basic laws such as civil, penal, criminal, commercial as well as civil and criminal procedure laws) are copies or slight modifications of the laws of their ex-colonizers, they usually collide with the indigenous norms and values of the inhabitants. Now that the developed world is realizing the ineffectiveness, in part, of its criminal justice system and that the just desert system has championed the reform process, discovery of a traditional, just desert criminal justice system leads to the conclusion that the developing world does not necessarily have to look up to the developed world to improve the sentencing regime because the solution may be found in the indigenous criminal justice system.

The just desert system contributes in creating a stable and fair sentencing system and thereby maintains 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<sup>2</sup> factors, has contributed to the stability and peace within the various communities in the Eritrean society. The authors like to challenge the readers, especially African scholars, to search their respective societies and see whether their traditional criminal justice systems embody the just desert system. An affirmative finding can further the intent of 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 law after the heartbeats of the society. A negative finding can likewise inspire search for a new, just, fair, predictable and uniform sentencing regime – the just desert system.

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<sup>2</sup> For instance, the preface to the *Hggi Adgna – Tegeleba* (one of the many written Eritrean customary laws in the Christian community), last revised in February 12, 1938 begins with the heading *atzn 'u hzbye hgye* (a Geez language phrase closely translated as '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 provider of laws, has ordered all creation to abide by the laws and orders of their respective lives. An account of the history of the fall of Adam is then copied from the Bible and briefly narrates the story of the Law of Moses and that of the *Ftha Negest* (translated as the 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 humans live in different countries with different languages and religions, all humanity is one under the law of nature. Z. ESTIFANOS, W. ABRAHAM & G. GHEBRE-MESKEL (compilers), *CODES AND BYLAWS OF ERITREAN REGIONS AND COUNTIES 7-9* (1990).

The law of *Hggi Beni-Amr* (one of the written Eritrean customary laws in the Moslem community), last revised 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 then 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) 1.

## **The Four Purposes of Sentencing**

Why do we need to punish criminals? Although the purpose of criminal law has been the subject of many debates and philosophical discourses, the following four have always been identified as the fundamental purposes of criminal punishment.

### *A. Rehabilitation (Reformation)*

Rehabilitation, the most famous of the sentencing purposes, denotes that through treatment and training the offender will be capable of returning to society and function as a law-abiding member thereof.<sup>3</sup> This concept dominated penology since a century-and-a-half ago.

For 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 and educative model, defining the criminal as, if not sick, less than evil; somehow 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...<sup>4</sup>

The emphasis of the rehabilitative philosophy is not to look into the past, i.e., to the offence committed, but to the future needs of the offender. Von Hirsch, thus, defines 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".<sup>5</sup>

Rehabilitation promises pay off to society by reforming the offender into a productive citizen who no longer desires to victimize the public.<sup>6</sup> It is also one way of controlling crime humanly because the emphasis lies not on the nature of the crime the perpetrator committed but on the treatment of the offender. Rehabilitation includes psychiatric therapy, counseling, vocational training and other behavior-modification techniques;<sup>7</sup> therefore, its objective is to encourage the offender to abstain from criminal behavior in the future by providing him reformatory incentives.

However, rehabilitation has not succeeded as expected. After reaching its glorious period in the 1960s, when there was considerable enthusiasm for award of sentences that were reformatory or rehabilitative, the rehabilitative model proved to be an

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<sup>3</sup> 'Crime and Punishment', *The New Encyclopedia Britannica*, Encyclopedia Inc., 808 (1991).

<sup>4</sup> A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS, REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION XXIX* (1974).

<sup>5</sup> *Id.*, at 11.

<sup>6</sup> F. T. CULLEN and K. E. GIBBERT, "The Value of Rehabilitation", in J. MUNCIE, et. al., *CRIMINAL PERSPECTIVES* 325 (1996).

<sup>7</sup> VON HIRSCH, *supra* note 4, at 11.

illusion.<sup>8</sup> For many offenders, rehabilitation meant staying longer in custody while undergoing treatment or training and for others release on probation under some terms and conditions.<sup>9</sup> But, beginning from the 1970s when its ineffectiveness was exposed by well-researched studies, rehabilitation came under fierce criticism and it is no longer as widely accepted as it used to be.<sup>10</sup> Whether rehabilitation proved successful was to be normally measured by studying recidivism and the results were not encouraging. The biggest blow to rehabilitation came from a research project conducted in the United States by the Blue Ribbon Committee,<sup>11</sup> Robert Martinson and his colleagues,<sup>12</sup> William Black and Joseph M. Weiler<sup>13</sup> as well as David Greenberg.<sup>14</sup> In England also Broady<sup>15</sup> unveiled disappointing results and a similar research in Canada proved the same.<sup>16</sup>

Due to the discouraging results, a number of penologists have been advocating waiver of rehabilitation. Von Hirsch, among others, plainly states that, if offenders cannot be cured of their criminal tendencies, they can at least be isolated where they cannot prey on those outside.<sup>17</sup>

Efforts to reform criminals have failed to demonstrate tangible progress. The promised medical and psychological sciences failed to prove themselves and could not guarantee that criminals who undergo rehabilitative treatment would refrain from committing other crimes. Therefore, until such humanistic option comes with uncontested results, we should not be precluded from choosing an alternative system that challenges the results of the reformatory model – the just desert.

### *B. Deterrence*

Bentham's utilitarian philosophy takes the credit for inspiring the deterrence theory. For Bentham, governance of human beings is the product of the interplay of a leader's

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<sup>8</sup> INNS OF COURT SCHOOL OF LAW, *CRIMINAL LITIGATION AND SENTENCING* 244 (1999).

<sup>9</sup> *ENCYCLOPEDIA BRITANNICA*, *supra* note 3.

<sup>10</sup> *Id.*

<sup>11</sup> D. E. DUFFEE, *CORRECTIONS: PRACTICE AND POLICY* 14 (1989).

<sup>12</sup> Von Hirsch held that the experimental programs conducted in 1974 by Robert Martinson 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, *Giving Criminals their Just Desert*, quoted in MUNCIE, et. al., *supra* note 6, at 315.

<sup>13</sup> J. L. Farris, *Sentencing*, *Criminal Law Quarterly*, 18 (4), 425 (1976).

<sup>14</sup> Greenberg conducted a study for a committee led by Hirsch and his finding on the effectiveness of community-based rehabilitation was that such a treatment scored with few successes and was discouraging. D. F. GREENBERG, *MUCH ADO ABOUT LITTLE: THE CORRECTIONAL EFFECTS OF CORRECTIONS* 12-13, 17-22, 153 (unpublished) (1974), quoted in VON HIRSCH, *supra* note 4, at 14-15.

<sup>15</sup> Broady's study concluded in the pithy comment, 'Nothing works.' S. R. Broady, *The Effectiveness of Sentencing, Home Office Research Study*, No. 35 (HMSO, 1975), referred to in INNS OF COURT SCHOOL OF LAW, *supra* note 8.

<sup>16</sup> Honorable J. L. Farris, Chief Justice of British Columbia, in his address given to the county court judges' conference in Vernon, British Columbia, said: '...the educational programs and other programs that are being conducted in our penal institutions have, generally speaking, little effect in bringing about rehabilitation of offenders.' FARRIS, *supra* note 13.

<sup>17</sup> VON HIRSCH, *supra* note 4, at xxxvii and xxxix. See also in MUNCIE, et. al., *supra* note 6, at 315.

duty to maximize pleasure and to minimize pain of the society. Bentham holds that sentencing, in and of itself, is evil since it inflicts pain on the convicted and if sentencing should at all be admitted, it has to be admitted in so far as it promises to exclude some greater evil. Hence, punishment must be used to achieve a greater aggregate of pleasure and has no justification if its effect is simply to add still more units, or lots, of pain to the community.<sup>18</sup>

Deterrence bases itself on Bentham's approach of maximizing pleasure and avoiding pain and is commonly known as a consequentialist or forward-looking purpose 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 individual and the society. Once an offender tastes the unpleasant experience of punishment, he is expected to be a law-abiding citizen. Equally, the pain of punishment is believed to carry a deterrent effect on potential offenders if they know of an individual who has been punished for his crime. Therefore, deterrent theory holds, if punishment is to be effective it must be inflicted in such a manner as to constitute a threat.<sup>19</sup>

*Criminal law scholars divide deterrence into two: general and individual deterrence.*

### *1. General deterrence*

General deterrence is "the effect which threats of punishment will have in deterring non-offenders from becoming offenders".<sup>20</sup> For Andenaes,<sup>21</sup> general deterrence is the ability of criminal law and its enforcement to make citizens law-abiding and, to that end, depends on mere frightening by making the risk of discovery and its punishment outweigh the temptation to commit crime. In other words, the objective is to preserve public order not only through the harm caused to the offender 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.<sup>22</sup> The belief is that an example should be made of the offender by punishment, often brutal and horrible, to ensure that the offender himself and others would refrain from committing offences in the future. In the earlier of days, great emphasis was often placed on the physical exhibition of punishment as a deterrent influence by, for instance, performing execution in public.<sup>23</sup>

Andenaes,<sup>24</sup> like Hart,<sup>25</sup> criticizes deterrence by first dividing population into three classes:

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

<sup>18</sup> U. BAXI, *BENTHAM'S THEORY OF LEGISLATION* 201-202 (1979).

<sup>19</sup> N. LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 24-25 (1988).

<sup>20</sup> *ENCYCLOPEDIA BRITANNICA*, *supra* note 3.

<sup>21</sup> J. ANDENAES, *PUNISHMENT AND DETERRENCE* 7 (1984).

<sup>22</sup> P. GRAVEN, *INTRODUCTION TO ETHIOPIAN PENAL LAW* 6-7 (1965).

<sup>23</sup> A. M. KRIKPTRICK, *Their Second Punishment*, *Criminal Law Quarterly*, vol. 2 307 (1959-60).

<sup>24</sup> ANDENAES, *supra* note 21, at 111.

<sup>25</sup> H. L. A. Hart, *THE CONCEPT OF LAW* 90-91 (1997).

- (2) the potential criminal, who would have broken the law had it not been for the threat of punishment; and
- (3) the career criminal, who, despite the horror of punishments, cannot be kept from breaking the law.

Based on this classification, the deterrence theory can be effective only against potential criminals. Law-abiding persons do not need such threat because they feel the obligation to respect the law at all times. Law-abiding people like Socrates, who, out of respect for the law, drank the cup of poison instead of following the offer of his friends to bribe his custodians to escape, obey the law not because of fear of punishment but because of moral inhibitions or internalized norms.<sup>26</sup> The career criminal is, however, immune to the threat communicated by publicizing punishment. Farris' 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."<sup>27</sup>

General deterrence has also been criticized for allowing the punishment of some innocent individuals. Deterrent justifications are forward-looking as they are concerned with the consequences of punishment; their aim is to reduce further crimes by the threat or example of punishment.<sup>28</sup> General deterrence is often bent on seeking to achieve its end at any price and in this process some innocent individuals may be sacrificed for public threat's sake. Thus, the emphasis on public welfare may often, under the guise of deterrence, breach an individual's liberty.<sup>29</sup>

## *2. Individual deterrence*

Individual deterrence aims at the criminal and its objective is to teach him not to repeat similar behavior.<sup>30</sup> In other words, the unpleasant experience of punishment is expected to deter the individual from furthering his criminal character. At its best, individual deterrence, through the fear it instills on the criminal, is hoped to bring genuine moral improvement or a pro-social behavior.<sup>31</sup>

The greatest challenge to individual deterrence comes from studies on follow-up of individuals who have gone through 'detering' punishment. The higher the repetition of offences by these people the less effective the deterrent theory becomes. Kirkpatrick concluded: "the repeater rate indicates that about 75% of those who go to prison will return within five years"<sup>32</sup> and for Andenaes the rate of repetition is higher in offences like drug abuse in which habit is relatively undeterred either by threat or imposition of

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<sup>26</sup> ANDENAES, *supra* note 24.

<sup>27</sup> FARRIS, *supra* note 13, at 421.

<sup>28</sup> C. M. CLARKSON and H. M. KEATING, *CRIMINAL LAW* 36 (4<sup>th</sup> ed., 1998).

<sup>29</sup> VON HIRSCH, *supra* note 4, at 50–51.

<sup>30</sup> *ENCYCLOPEDIA BRITANNICA*, *supra* note 3.

<sup>31</sup> H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 4-5 (1965).

<sup>32</sup> KIRKPATRICK, *supra* note 23, at 308.

punishment.<sup>33</sup>

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 cannot be known. The threat of punishment alone is not sufficient to make a person conform to the law that we cannot assume that the experience of punishment always tends to strengthen the offender's fear of law. Punishment may, apart from its deterrent or non-deterrent effects, change the offender for better or worse.

### *C. Incapacitation (Disablement)*

Remove the criminal, permanently or temporarily, keep him away from society and society will be safe because the criminal will be incapacitated from engaging in criminal acts, claims the incapacitation philosophy.

Incapacitation claims that the offender should be handled in a manner making it impossible for him to repeat his offence – by execution or banishment or lengthy period of incarceration – and thereby remove the danger to society.<sup>34</sup> The rationale is that such incapacitation prevents criminally inclined individuals, at least during their confinement, from harming persons outside prison fences.<sup>35</sup>

The incapacitation theory has been bitterly criticized. Its critics believe that since incapacitation is basically based on subjective evaluation and behavior prediction, it might have devastating consequences on the personal liberty of the convict if the prediction is erroneous.

There are two types of prediction errors or risks that must be avoided in incapacitation. The first is commonly known as false positive prediction or erroneous prediction, i.e., the prediction that the criminal will commit another crime when in fact he or she would not.<sup>36</sup> 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 the criminal's future behavior.

False positive prediction is also criticized because it is wrong in principle to punish a person now for what he might do in the future. Moreover, incapacitation has been criticized for being contrary and unfriendly to the spirit of justice and fairness as one may question whether it is ever just to punish someone more severely for what he is expected to do even if the prediction proves to be correct.

The second prediction error is known as false negative prediction or mistaken prediction, i.e., that a person will not commit another crime when in fact he or she

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<sup>33</sup> ANDENAES, *supra* note 21, at 84.

<sup>34</sup> ENCYCLOPEDIA BRITANNICA, *supra* note 3.

<sup>35</sup> VON HIRSCH, *supra* note 4, at 20.

<sup>36</sup> DUFFEE, *supra* note 11, at 12.



would.<sup>37</sup> In this regard, incapacitation is criticized because the prediction proves so weak that it fails to prevent dangerous criminals from rejoining the society. Thus, too many dangerous offenders are placed back in society rather than being kept behind bars where they could not prey on those outside. For this, incapacitating sentences are criticized since every time the authorities release someone, that person might prove to have the potential of subsequent commission of a crime. Von Hirsch quotes former California Attorney General Evelle J. 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”.<sup>38</sup>

In conclusion, incapacitation has not been lauded as 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. Thus, there is no cogent reason to run the risk of unreliable predictions for the mere reason of achieving a negligible result.

#### *D. Retribution (Revenge)*

Retribution theory is based on the correlation between the gravity of the crime and the severity of the punishment. Unlike rehabilitation and deterrence, retribution looks back to the crime and punishes the offender because of the crime he committed; it does not look at the intended impact of punishment in the offender’s character. The following sections describe some justifications for the retributive punishment.

##### 1. Denunciation of criminal behavior

This justification shares some attributes of the deterrence theory for it holds that punishing an offender symbolizes the annulment or disapproval of his crime. For Nozick, punishment is the only way of connecting criminals to the community whose values they have flouted.<sup>39</sup> Lord Denning similarly emphasized the denunciatory aspect of retribution by expressing his belief that the ultimate justification of any punishment is not deterrence but the emphatic denunciation of the offence by the community.<sup>40</sup> The best way for showing societal disapproval of the crime may be to repay the criminal what he did to his victim, if that is possible, such as pronouncing the death penalty for murder, and, if not so possible, to do the nearest thing to it.

##### 2. Debt repayment or expiation

This justification holds that punishment is justified because it compels the offenders to compensate society for the social harm they have caused. Offenders must pay the compensation they owe the society and only through punishment can one wash away

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<sup>37</sup> *Id.*

<sup>38</sup> MUNCIE, et. al., *supra* note 6, at 317.

<sup>39</sup> Quoted in N. L. WALKER, *AGGRAVATION, MITIGATION AND MERCY IN ENGLISH CRIMINAL JUSTICE* 7 (1999).

<sup>40</sup> Memorandum by Lord Denning, *A Report to the Royal Commission on Capital Punishment*, referred to INNS OF COURT SCHOOL OF LAW, *supra* note 8, at 5.

the dirt of crime and reconcile the offenders with the society. Expiation theory advocates, in a nutshell, that retribution means repayment.<sup>41</sup>

### 3. Vengeance

The element of vengeance in retributive punishment is the most condemned aspect of punishment for its 'inhumane' value. 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 blood against his brother Cain,<sup>42</sup> or Hamlet's father,<sup>43</sup> for vengeance. Vengeance relies on the imperative that only retaliatory sanction can expunge the original crime and correct the wrong done.<sup>44</sup> The most cited argument with regard to vengeance is Sir Stephen's argument that punishment must not only be administered because the offender is dangerous to the society but also in order to gratify the feeling of hatred.<sup>45</sup>

### 4. Kantian retribution

Like Bentham, Kant believes that men are rational and have the capacity to understand and follow moral rules. To Kant, individuals have the power to exercise their free will and unlawful acts occur only when individuals have calculated that those acts are advantageous to them. Individuals are autonomous, self-regulating and morally responsible.<sup>46</sup> This led Kant to conclude that such human nature must be recognized by making people suffer punishment for their voluntary infractions of law for offenders are responsible for freely choosing to engage in crime. He called this "treating them as ends in themselves". This is why many people believe that criminals deserve to suffer loss or harm and this is a doctrine that significantly led to the just desert philosophy.<sup>47</sup>

Kantian retribution holds that the state has a duty to punish all criminals. This attachment of value to human rationality might have led Kant 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 disperse themselves around the world) the last murderer remaining in the prison must be executed so that everybody will duly receive what his actions are worth and so that the blood guilt thereof will not be fixed on people because they failed to insist on carrying out the punishment [lest] they may be regarded as accomplices in this violation of legal justice.<sup>48</sup>

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<sup>41</sup> Walker, *supra* note 39, at 8.

<sup>42</sup> "And he [the Lord] said 'What has thou done? the voice of thy brother's blood crieth unto me from the ground.'" Gen. 4: 10 (KJV), in F. J. DAKE, *DAKE'S ANNOTATED REFERENCE BIBLE* 4 (1991).

<sup>43</sup> BAXI, *supra* note 18, at 104.

<sup>44</sup> *Id.*

<sup>45</sup> Sir J. F. STEPHEN, *Liberty, Equality, Fraternity, 1874* 61–62, in INNS OF COURT SCHOOL OF LAW, *supra* note 8, at 4.

<sup>46</sup> WALKER, *supra* note 39, at 4.

<sup>47</sup> *Id.*, at 5.

<sup>48</sup> Referred to in A. SIDDIQUE, *CRIMINOLOGY: PROBLEMS & PERSPECTIVE* 112 (4<sup>th</sup> ed., 1997).

## 5. Final notes on retribution theory

Unlike deterrence and rehabilitation, the basic premise of retributive theory is that an offender deserves punishment because he has committed a crime in the past; it is not concerned with the impact of the punishment on the offender or on his future behavior.

Retribution, however, has been subjected to various criticisms. Some challenge the power of the state to punish criminals on behalf of the victim. Siddique, 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?”<sup>49</sup>

Retribution has also been criticized as a barbaric principle that serves as an excuse to unleash savage passion. Rao, though recognizing that some sort of state retribution is necessary to satisfy the instinct to retaliate and save the society from individuals taking the law into their own hands, criticizes the ‘inhumane and brutal character of retribution’ as: “The community would be relegated to a primitive condition where the determination of the law to exact an eye for an eye and a tooth for a tooth would cause immeasurable and intolerable cruelty in the name of evenhanded justice.”<sup>50</sup>

### I. The Just Desert

Introducing the just desert should begin with the proviso that it is a relatively new 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 conventional four but rather a better theory with its own, though manageable, defects. A theory based on justice and fairness, just desert has evolved as a compromise of the other theories of punishment.

Just desert is mainly an offspring of Kantian retribution. It is a form of punishment that has been amplified by Andrew von Hirsch and his team and crafted to suit the general principles of justice and fairness and, as a newly fashioned option, it is proving to be the most accepted alternative not only because it attempts to rectify the flaws of the other theories, but also because it provides a solution to the current problems by indicating the extent to which an offender deserves to be punished.

Just desert is a well praised option because it is concerned with the techniques for identifying, classifying and managing groups of offences and offenders by levels of dangerousness. It takes commission of crimes for granted and accepts deviance as normal. It recognizes that rehabilitation hardly works and deterrence is not a sufficient remedy. It challenges the wisdom of blanket retribution or mere disablement of criminals by classifying the level of punishments according to the gravity of offences.

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<sup>49</sup> *Id.*, at 113.

<sup>50</sup> S. V. J. RAO, *CURRENT ISSUES IN CRIMINAL JUSTICE AND MEDICAL LAW* 75-76, 157 (1999).

Just desert basically argues 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”.<sup>51</sup> Justice and fairness insist that all persons must bear the sacrifice of obeying the law equally.<sup>52</sup> By committing a crime, offenders gain an unfair advantage over all others who have “toed the line” and restrained themselves from committing crime.<sup>53</sup> Criminals, according to Morris, are free riders who have failed to observe the moral constraints that others have accepted. Therefore, punishment takes away the benefits gained illegally and that offenders deserve punishment so the state is able to destroy their unfair advantages.<sup>54</sup>

For von Hirsch, sentencing is not a crime prevention tool but a matter of justice and a commensurate desert served in response to the actors’ deeds.<sup>55</sup> Sentencing should ensure that punishment is imposed on those who commit offences having regard to the seriousness of the harm caused by offenders and the degree of their culpability.<sup>56</sup> In other words, penalty must be scaled to the gravity of the offence that as the gravity of the crime diminishes severity of the punishment should also diminish or vice versa. For von Hirsch, justice, served through just desert, is when the punishment given to 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 nearly equally.<sup>57</sup>

However, one may ask how a state or its legislative bodies can determine what level of punishment is proportionate to the seriousness of a crime? Just desert faced this criticism in its early days. Von Hirsch, however, defended his principle of proportionality by resorting to what he termed ordinal and cardinal magnitudes of punishment. Ordinal proportionality, according to von Hirsch, is concerned with how a crime, compared to other crimes of a more or less serious nature, should be punished.<sup>58</sup> A legislator arranges offences into classes of severity and decides which offences should be kept in each class. Ordinal proportionality identifies which offences of similar gravity should be grouped together. By so doing, Rao notes, ordinal proportionality ensures that persons convicted of crimes of differing gravity will receive punishments correspondingly graded to the respective gravities.<sup>59</sup> There still is a challenge in identifying which offences are similar and which are not. For Ashworth, political and moral judgments play a significant role in this regard.<sup>60</sup> In short, ordinal proportionality is the horizontal proportionality among crimes.

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<sup>51</sup> VON HIRSCH, *supra* note 4, at 51.

<sup>52</sup> CLARKSON and KEATING, *supra* note 28, at 28.

<sup>53</sup> *Id.*, at 29.

<sup>54</sup> H. MORRIS, *Persons and Punishment*, *THE MONIST*, vol. 52, 475 referred to in *Id.*

<sup>55</sup> As referred to in MUNCIE, et. al., *supra* note 6, at 320.

<sup>56</sup> M. W. EMMINSON, *ON SENTENCING* 48 (3<sup>rd</sup> ed., 1998).

<sup>57</sup> As referred to in MUNCIE, et. al., *supra* note 6, at 322.

<sup>58</sup> A. VON HIRSCH, *PAST OR FUTURE CRIMES* 40 (1985).

<sup>59</sup> RAO, *supra* note 50, at 159.

<sup>60</sup> A. ASHWORTH, *Criminal Justice and Deserted Sentence*, *Criminal Law Review* 342 (1989). Ashworth states that: “Ordinal proportionality is concerned with preserving a correspondence between relative seriousness of behavior and relative severity of sentence on which various moral and political judgments be brought to bear.”

Cardinal proportionality is concerned with the extent of penalty due to offences clustered by ordinal proportionality. It requires that the level of the penalty scale be proportionate to the magnitude of the offending behavior. 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.<sup>61</sup>

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

- (1) clearly reflecting the understanding of the society on the seriousness of various categories of offences;
- (2) providing punishment proportional to the gravity of offences; and
- (3) narrowing the range between the minimum and maximum penalties by providing for a presumptive sentence for each category of offences.

Compared to the other purposes of punishment just desert comes out victoriously as the least evil and best suited option. Nevertheless, it is not immune to criticism. Ashworth, an authority on just desert, himself cautions of the risk that just desert proportionality may fail to reflect the socio-economic causes of crimes. He adds that just desert sentences can reinforce existing social inequalities and may not achieve justice.<sup>62</sup>

Lacey questions just 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 the unappealing assertion that two wrongs somehow make a right.<sup>63</sup> She, however, fails to forward a persuasive option that could override just desert.

A statement of reservation on just desert from Winkins, a member of von Hirsch's team, is also worth reciting: "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!"<sup>64</sup> Rao wraps up: "Needless to reaffirm that there is only one sentencing aim which can be justified in terms of both morality and justice viz., just desert."<sup>65</sup>

## II. The Eritrean Traditional Just Desert and Its Potential Use as Reference for Reform of Eritrean and Other Penal Codes

### A. The Eritrean Penal Code

The 1991 Transitional Penal Code of Eritrea (TPCE), which basically adopted the 1957 Penal Code of Ethiopia, is the principal penal statute in Eritrea. Like most penal codes,

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<sup>61</sup> Muncie, et. al., *supra* note 6, at 43-46.

<sup>62</sup> Cited in ANDENAES, *supra* note 21, at 17.

<sup>63</sup> LACEY, *supra* note 19.

<sup>64</sup> VON HIRSCH, *supra* note 4, at 177-178.

<sup>65</sup> RAO, *supra* note 50, at 160.

the TPCE tries to accommodate the purposes of punishment discussed above. Article 1 of the TPCE 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*).

The following observations may be made on Article 1 of the TPCE. First, this mix of objectives is expected to be reflected in the sentences of Eritrean courts. The fact that these purposes are cumulatively kept together as purposes of the Code in a single article makes it difficult for the courts to select the lesson they need to pass through their sentences.

Secondly, the offences contained in the TPCE have not been systematically arranged to easily understand which offences are deemed equally severe. The TPCE offences are “independent” of the seriousness of other offences as they are contained within their respective paragraphs. For instance:

- (1) theft is punishable with rigorous imprisonment not exceeding five years (Article 630);
- (2) corrupt practices is punishable with rigorous imprisonment not exceeding five years (Article 425(2));
- (3) grave willful injury is punishable with rigorous imprisonment of one–10 years (Article 538);
- (4) rape is punishable with rigorous imprisonment of one–15 years (Article 589(2)(b)); and
- (5) espionage is punishable with rigorous imprisonment not exceeding 20 years (Article 265(1)).

Since all the punishments of the TCPE are joined either at the minimum or at the maximum, the above listed offences carry the same weight for the first five years and the absence of sentencing guidelines in Eritrea creates the possibility that a judge may give proximate sentences to these five offences up to five years. There is also possibility for the last three offences in the list to be given proximate sentences between five and ten years etc. It may, therefore, happen that theft may be equated in punishment to rape and grave willful injury can be equated in punishment to espionage. In short, as it stands, the sentencing regime of the TCPE makes it difficult to identify which offences are considered less or more serious than which others.

Thirdly, the range of punishment provided for the offences is wide, often very wide. Fine begins with one Nakfa, the Eritrean currency (one USD = 15 Nakfas), and can go up to 10,000 Nakfas (Articles 88 and 90). Simple imprisonment ranges from 10 days to three years (Article 105) and rigorous imprisonment ranges from one year to 25 years (Article

107). By way of elaboration, for instance, look at the range for the following offences:

- (1) rape, rigorous imprisonment of one–15 years (Article 589(2)(b));
- (2) grave willful injury, rigorous imprisonment of one–10 years (Article 538);
- (3) robbery, rigorous imprisonment of one–15 years (Article 536); and
- (4) attempted first degree murder, rigorous imprisonment of five years to life (Articles 27/522).

Such wide range between the minimum and maximum penalties for offences naturally makes it difficult for the judge to give the punishment that the offender deserves. The equally cloudy set of aggravating and mitigating circumstances (Articles 79 and 81 respectively), although they allow for adjustment within the range, do not assist in ameliorating the difficulty created by the range. In 2005, one of the authors supervised a senior thesis by one of his students who studied the sentences given by different benches to attempted first degree murder and grave willful injury. The result showed observable variations. Extreme examples showed that an offender who hit and took out a tooth from the victim was given three years of imprisonment by one bench while another offender with similar backgrounds who took out five teeth went away with one year of imprisonment. On the contrary, almost all offenders who were convicted for attempted first degree murder were punished with the minimum penalty of five years despite differences in their backgrounds and the injuries caused to the victims.

Compounded with the subjective understanding of each judge on crime and punishment, it has not been easy in Eritrea to give uniform and predictable – thus fair – punishment to offences and offenders of similar classes.

Finally, the absence of systematic classification of offences into classes of seriousness in Eritrea can lead to the possibility of less serious offences being punished more rigorously than more serious offences because the penalties of most offences greatly coincide. In the above list, for instance, there is a likelihood that a rapist may be punished less harshly than the one guilty of grave willful injury because the minimum for both punishments is one year rigorous punishment and the range coincides up to the first 10 years of punishment. Thus, the likelihood of award of unfair punishments caused by the nature of the sentencing ranges in penal codes such as the TPCE can disturb the values of a society that deems a given offence (rape, for instance) more serious than another offence (grave willful injury, for instance).

A working solution would be to classify offences by ordinal and cardinal proportionality, provide for a narrow range of punishment for each class of offences, and then give respective values to each aggravating and mitigating circumstance. In short, the Eritrean sentencing regime needs to introduce just desert so that a judge can:

- (1) easily identify the seriousness of each offence and its respective sentence;
- (2) appropriately weigh aggravating and mitigating circumstances;
- (3) exercise minimum subjectivity in sentencing;
- (4) have reduced exposure to corruption or any such influence since the impact of

- anyone interested in affecting the outcome of the sentence is negligible because the range of punishment is narrower; and
- (5) 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 graduated;
  - (6) continue to enjoy judicial discretion;<sup>66</sup> and
  - (7) be able to give similar punishments to similar offences committed by offenders of similar backgrounds – i.e., just desert.

Let us now see if the introduction of the just desert into the Eritrean as well as other penal codes would fit into the values and understandings of the respective societies because criminal laws must reflect and influence the norms and values of the society.

## B. The Eritrean Customary Laws

We now enter the world of the Eritrean customary laws which are among the very few customary laws put into writing. For they believed law is a tool that divinity endows to establish peace in society, Eritrean ancestors had the wisdom of writing and depositing customary laws in monasteries and other holy places. Some of these customary laws date back to the fourteenth century,<sup>67</sup> but they retained dynamism and were amended

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<sup>66</sup> In criminal law, judicial discretion is not and should not be construed to mean the grant of a wide range of punishment to judges. 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 **exercised within the limits**, to which honest man competent to the discharge of his office ought to confine himself (*emphasis added*). Lord Halsbury's observation in *Sharp v. Wakefield* (1891) AC 173 (179), (1886-90) All ER.651:39 WR 561, *referred to* in C. K. TAKWANI, *LECTURES ON ADMINISTRATIVE LAW* 242 (1998).

It is this '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 possess 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 "*not to do according to their wills and private affections...*" R. E. KIMBALL, *In the Matter of Judicial Discretion and Imposition of Default Orders*, *Criminal Law Quarterly*, vol. 32 470 (1989-90).

<sup>67</sup> The oldest of the written customary laws, that of the *Loggo Sarda* district, claims to have been first written in 1386. The preamble to the 1910 amendment to the customary law of *Loggo Chwa*, 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. See ESTIFANOS et. al., *supra* note 2, at 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).



by each generation as and when needed.

The high level of interactivity in the lives of the different communities constituting the Eritrean society is witnessed by the similarities in the substance and structure of most of the written customary laws. Thus, 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.

Customary laws, more preferably those written, are reliable sources in perceiving the understanding of a society. A reference to the written customary laws of Eritrea enables one to comprehend how the Eritrean society understands a given legal concept if that concept is embodied in the customary law. Relevant to this article is the sentencing system adopted by these customary laws.

A close scrutiny of the list of offences and the respective penalties contained in the Eritrean customary shows a just desert system. The detail of classes into which almost a majority of 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 offences, the manner in which aggravating and mitigating circumstances are utilized ... show the mastery of the drafters of these customary laws and how the sentencing system now known to the modern jurist as the just desert easily came to them. The details with which crimes and respective punishments are provided for in the customary laws show that an effort has been exerted to give every offender what he actually deserves. In fact, Eritrean customary laws give a fixed penalty for each offence. (see Table 4).

By way of an example, the authors studied customary law of *Dembezan* on how it punishes insults. There are over ninety types of insults contained in the law of *Dembezan* each carrying its own fixed monetary and/or other penalty with the penalties often varying according to the existence of aggravating or mitigating circumstances.<sup>68</sup> Fifteen insults carry penalty of 500 *qrshi*;<sup>69</sup> two insults carry penalty of 230 *qrshi*; one insult carries penalty of 140 *qrshi*; two insults carry penalty of 120 *qrshi*; two insults carry penalty of 100 *qrshi*; eight insults carry penalty of 60 *qrshi* etc. all the way down to insults that carry 4 *qrshi* and insults for which the offender is ordered only to make public apology. It is easy to see ordinal (horizontal) and cardinal (vertical) proportionality in this list of over ninety types of insults. The same may be said of the amazing categorization and punishment of offences related to bodily injury (see Table 4) which model was copied almost verbatim into the final version of the draft penal code (see Table 5).

Therefore, any attempt to reform the criminal laws of Eritrea and their sentencing

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<sup>68</sup> The concept of aggravating or mitigating circumstances is not strange to the Eritrean customary laws which often make extensive use of aggravating or mitigating circumstances to create degrees of severity – thus varying levels of penalties – for offences such as murder, bodily injury and insult.

<sup>69</sup> *Qrshi* is the Tigrinya name for paper money. The various amounts of *Qrshis* mentioned in this article are the amounts at the time the latest amendments were introduced to most Eritrean customary laws between the 1930s and 1970s.

regimes must, as much as possible, reflect the just desert which is extant in the Eritrean customary laws.

### C. Just Desert System for Rejuvenating Eritrean and Other Criminal Laws

The authors believe that the penal codes, like any other law, need to be linked with the respective societies within which they operate. Most developing countries have traditional systems which, among others, contain self-developed justice mechanisms most notable of which is the system of punishing offenders. Criminal law experts are, thus, invited to weigh the penal codes of their respective criminal laws in light of the analyses made in previous sections. A particular invitation is to find out if the traditional criminal justice system has elements of the just desert and see how that system can be incorporated into the criminal laws in force. Such symbiosis would activate reform process by ensuring, on the one hand, that the laws in force do not lose track of the values of the society and updating, on the other hand, the laws in force to be in tune with the latest of philosophies on sentencing – the just desert. For instance, as narrated in Section V, the authors, after studying, among others, written Eritrean customary laws in an assignment to review a draft penal code for Eritrea, prepared and recommended a new sentencing system embodying the just desert.

To introduce just desert, offences contained in criminal statutes need to be listed and, according to pre-selected criteria tuned to the values of the society, be clustered into groups of gravity, i.e., undertake ordinal proportionality. With various classes of similar 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, i.e., undertake cardinal proportionality. Thus, the grant of confusingly varied sentences for offences of relatively similar seriousness or the grant of confusingly similar punishments for offences of relatively varied seriousness could be avoided and a fair and consistent criminal justice system established.

### III. How the Just Desert was Incorporated into the Draft Penal Code of Eritrea

We have seen in Section IV that the TCPE, a continuation of a penal code enacted in the late 1950s in Ethiopia, did not adopt the modern sentencing regime we now know as the just desert. Introducing just desert for the Eritrean draft penal code is appropriate not only because it can mend the basic defects in the categorization of the close-to-300 offences contained in the draft and the respective sentences allocated for each one of them but also because it can reflect the just desert-like understanding of the Eritrean communities on criminal justice. And this is what the authors and a few colleagues of theirs did when the Eritrean Minister of Justice assigned them to review the sentencing regime initially proposed for the draft penal code.

<b>Class of offence</b>	<b>Penalty</b>	<b>No. of</b>
Class One Serious	10-20 years of imprisonment, life or death ±	11
Class Two Serious	five-10 years of imprisonment, ± one-15,000	29
Class Three Serious	One-five years of imprisonment, ± one-10,000	55

Class One Petty	Up to one year of imprisonment and/or one-	84
Class Two Petty	Up to six months of imprisonment and/or one-	93
Class Three Petty	Up to 500 Nakfas	30

Table 1. Categorization of offences in the initial draft penal code.

Although the idea of categorizing the offences into six classes was an appreciable effort towards a just desert sentencing system – at least because it reflected vertical and horizontal proportionalities and all the ranges had minimums and maximums – the initial draft had a number of deficiencies in light of just desert. Firstly, large numbers of offences were categorized in each class that some offences which are considered more severe than others may be given equal or less punishment than the less severe offences placed under the same class. Secondly, the range between the minimum and maximum in each class was still wide making it difficult to give more specific and consistent sentences. In these aspects, the initial draft looked more like the TCPE. Finally, there was a need to give respective values to each aggravating and mitigating circumstance so that the judge, beginning the sentence from a presumed halfway in the range, can value each aggravating circumstance all the way up to the maximum penalty in the range or value each mitigating circumstance all the way down to the minimum penalty in the range. (See Tables 6 and 7). By solving these problems, predictable and uniform penalties can be given and similar offences committed by similar offenders under similar circumstances can be punished similarly.

<b>Class</b>	<b>of</b>	<b>Penalty</b>	<b>No.</b>	<b>of</b>
Class	One	23-27 years of imprisonment, life or death (range of	9	
Class	Two	19-23 years of imprisonment, life or death (range of	5	
Class	Three	16-19 years of imprisonment (range of three years)	10	
Class	Four	13-16 years of imprisonment (range of three years)	18	
Class	Five	10-13 years of imprisonment (range of three years)	28	
Class	Six	7-10 years of imprisonment (range of three years)	42	
Class	Seven	5-7 years of imprisonment (range of two years)	39	
Class	Eight	3-5 years of imprisonment (range of two years)	48	
Class	Nine	1-3 years of imprisonment (range of two years)	44	
Class One Petty		Six months-one year of imprisonment or a fine of 20,001 – 50,000 Nakfa, in intervals of 2,500 Nakfa	66	
Class Two Petty		One-six months of imprisonment or a fine of 5,001 – 20,000 Nakfa, in intervals of 1,000 Nakfa	62	
Class Three Petty		Up to one month of imprisonment or a fine of 500 - 5,000 Nakfa, in intervals of 100 Nakfa	29	

Table 2. Categorization of offences in the final version of the draft penal code.

#### IV. Conclusion

The conventional purposes of sentencing have individually proved ineffective for various reasons. Criminal justice demands that fair sentences be given to criminals and that criminals be measured with the measure of the obstruction they caused to the harmony of the society. Punishments in criminal statutes of a majority of countries lack specificity. The wide range for punishment, often misperceived as having given judges a judicial discretion, could only lead to inconsistent sentences. Just desert, with its varied proportionalities, has recently emerged as a better alternative and as close to fair justice as penologists 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 system similar to just desert in the customary laws of the nation reforming its laws. This 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, in the current reform process, been presented with ineluctable opportunity to merge the “archaic” with the “modern” theories of punishment, both of which happen to share similar philosophies – hence the description “old-modern treasures” given to Eritrean customary laws. The authors would like to seize this publication as the opportunity to invite reformers of criminal legal systems to see if the alternative presented by this article could be utilized in the reform process.

Table 3. Comparison of the range of punishment for some select crimes in nine countries

Type of offence	Punishment under the draft Eritrean Penal Code	Punishment under the Transitional Penal Code of Eritrea	Punishment under the Penal Code of China	Punishment under the Penal Code of Singapore	Punishment under the Penal Code of India	Punishment under the Penal Code of Sweden	Punishment under the Penal Code of Germany	Punishment under the 2004 Criminal Code of Ethiopia	Punishment under the US Federal Laws
<b>High treason</b>	Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.	Death, or rigor. impr for 5 years – life.	Death, life impr., imp ≥ 10 yrs, impr. 3-10 yrs, impr. ≥ 5 yrs, impr. ≤ 5 yrs ( <i>depending on the nature of the offence and the degree of participation</i> )	Death or life impr.	Death or life impr.	Life impr., 10 yr. imp., or 4-10 yr. imp. (if danger was slight)	Life impr., imp ≥ 10 yrs, or 1-10 yr. imp (in less serious cases)	Death, Life impr., or 5-25 yr. rigor. impr.	Life impr.
<b>Aggravated espionage</b>	Death, Life impr., or 10-20 yr.	Death, rigor. impr. for life, or	Death, life impr., imp ≥ 10 yrs, impr. 5-10	-	-	Life impr. or 4-10 yr.	Life impr., or imp ≥ 5 yrs	Death, rigor. impr. for life, or	360 months (30 yrs) – life

	impr., ±1-50,000 Nfa.	rigo. impr. ≤ 20 yrs.	yrs,			impr.		rigo. impr. ≤ 20 yrs.	impr.,
<b>Aggravated sabotage</b>	Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.	Death, rig. Impr. 3yrs – life, rigo. impr. ≤ 10 yrs	Death, life impr., imp ≥ 10 yrs	-	-	Life impr. or 2-10 yr. impr.	Impr. 1-10 yrs	Death, rig. Impr. 5 – 25 yrs, rigo. impr. ≤ 10 yrs	121-151 months (10yr, 1mon. – 12yr, 7mo) impr.
<b>Piracy</b>	Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.	Death, Life impr., or 5-20 yrs. rigor. impr	Life impr., imp ≥ 10 yrs,	Death or life impr., ≤ 10 yrs. impr. (in other cases)	-	Life impr. or 2-10 yr. impr. (gross hijacki ng)	-	-	51-63 months (4yr, 3mon. – 5yr, 3mo) impr.
<b>Causing a catastrophe</b>	Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.	Rigo. impr. ≤ 10 yrs	Death, life impr., imp ≥ 10 yrs	-	-	Life impr. or 6-10 yr. impr. (gross hijacki ng)	-	Rigo. impr. ≤ 15 yrs	???????
<b>Aggravated murder</b>	Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.	Death, or rigor. impr for life	Death, life impr., imp ≥ 10 yrs	Death or life impr.	Death or life impr.	Life or 10 yrs impr.	Life impr.	Death, or rigor. impr for life	Life impr.

<b>Aggravate d rape</b>	Death, Life impr., or 10-20 yr. impr., ±1-50,000 Nfa.	Rigo. impr. ≤ 15 yrs	Death, life impr., imp ≥ 10 yrs	Impr. ≤ 20 yrs	Rigo. impr. for life or ≥ 10 yrs (or Rigo. impr. for ≤ 10 yrs	4-10 yrs impr.	Impr., ≥ 1, 2, 3, or 5 yrs	5-25 yr. rigor. impr.	108-135 months (9yr – 11yr, 3mo) impr.
<b>Attacks upon the Head of State</b>	5-10yrs impr, ±1- 15,000 Nfa.	Death, rigo. impr. 15 yrs-life, rigo. impr. 10- 25 yrs, rigo. impr. 5- 20 yrs (depends on the danger)	-	-	-	Impr. ≤ 6yrs or impr. ≤ 4yrs	??????	Rigo. impr. ≤ 10 yrs	-
<b>Aggravate d corruption</b>	5-10yrs impr, ±1- 15,000 Nfa.	Rigo. impr. ≤ 5 yrs + ≤ 10,000 Nfa.	Death, life impr., imp ≥ 10 yrs; imp ≥ 5 yrs; impr. 1-7 yrs; imp ≤ 2 yrs (depends on the amount )	-	-	Impr. ≤ 6yrs	Impr. 1-10 years, impr. ≤ 5yrs, impr. ≤ 3yrs (depends on how and by whom the benefit was	Rigo. impr. 10- 25 yrs + ≤ 100,000 Birr.	-

							taken)		
<b>Counterfeiting</b>	5-10yrs impr, ±1-15,000 Nfa.	Rigo. impr. 5-20 yrs.	Death, life impr., imp ≥ 10 yrs; impr. 3-10 yrs	Life impr. or impr. ≤10 yrs	Impr. ≤ 7yrs	Impr. ≤ 4yrs	Impr. ≥ 1yr. (money) / Impr. ≤ 5yrs (stamps)	Rigo. impr. ≥ 5yrs.	51-63 mon. (4yr, 3mon. – 5yr, 3mon) impr.
<b>Murder</b>	5-10yrs impr, ±1-15,000 Nfa.	Rigo. impr. 5-20 yrs.	impr. 3-10 yrs	Life imp., imp. ≤ 10 yrs	-	-	Imp. ≥ 5yrs (????)	Rigo. impr. 5-20 yrs	135-168 mon. (11yr, 3mon. – 14yr) impr.
<b>Intentional serious bodily injury</b>	5-10yrs impr, ±1-15,000 Nfa.	Rigo. impr. 1-10 yrs	impr. 3-10 yrs	-	-	Impr. 1-10 yrs	-	Rigo. impr. 1-15 yrs	18-24 mon. (1yr, 6mon. – 2yr) impr.
<b>Rape</b>	5-10yrs impr, ±1-15,000 Nfa.	Rigo. impr. ≤ 10 yrs	Impr. 3-10 yrs	Impr. ≤ 20 yrs	Life impr., impr. . ≤ 10yrs, impr. ≤ 10yrs,	Impr. 2-6 yrs	Impr. ≥ 1yr.	Rigo. impr. 5-15 yrs	70-87 mon. (5yr, 10mon. 7yr, 3mon) impr.
<b>Enslavement and abetting traffic</b>	5-10yrs impr, ±1-15,000 Nfa.	Rigo. impr. 5-20 yrs + 20,000 Nfa.	Impr. ≤ 3yrs	impr. ≤ 7yrs	Impr. ≤ 7yrs	Impr. 1-10 yrs	Impr. ≤ 5yrs	Rigo. impr. 5-20 yrs + 50,000 Birr	-



<b>Aggravate d traffic in women, infants and young persons</b>	5-10yrs impr, ±1- 15,000 Nfa.	Rigo. impr. 3- 10 yrs	Death, life impr., imp ≥ 10 yrs, impr. 5- 10 yrs	-	-	-	Impr. 1-10 yrs	Rigo. impr. 3- 10 yrs	33-41 mon (2yr, 9mon. 3yr, 5mon) impr.
<b>Perjury</b>	1-5yrs impr, ±1-10,000 Nfa.	Rig. impr. ≤ 10 yrs	Impr. ≤ 3 yrs	Up to 3 yrs. Imp.	Death, impr. equal to the conviction thereby caused, impr. ≤7yrs, impr. ≤ 3 yrs	Impr. ≤ 4 yrs	Impr. ≥ 1 yr	Rig. impr. ≤ 10 yrs, impr. equal to the convictio n thereby caused	10-16 months impr.
<b>Negligent homicide</b>	1-5yrs impr, ±1-10,000 Nfa.	Simp. impr. ≤ 5yrs; simp. impr.	Impr. 3- 7yrs; impr. ≤ 3yrs	Up to 2 yrs. Imp.	Impr. ≤ 2yrs	Impr. 6- 10yrs	Impr. 1- 10yrs	Rir. impr. 5-15yrs; simp. impr. 1- 5yrs; simp. imp. 6mon- 3yrs +fine for all	6-12 months

<b>Falsificati on or misuse of official seals and marks</b>	1-5yrs impr, ±1-10,000 Nfa.	Rig. impr. ≤ 10yrs, ≤5yrs (seals); simp. impr. 3mon- 5yrs (marks)	Impr. 3- 10yrs; impr. ≤3 yrs (seal)	Up to 7 yrs. Imp.	Life impr., impr. ≤7 yrs	Impr. ≤ 4yrs	-	Rig. impr. 3- 10yrs, ≤5y rs (seals); simp. impr. 3mon- 5yrs (marks)	-
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Table 4. Sample of a just desert for assault (physical injury) offences in select Eritrean customary laws

Description of the offence	CUSTOMARY LAW <sup>70</sup> USED FOR REFERENCE AND RESPECTIVE PUNISHMENT <sup>71</sup> PROVIDED THEREIN FOR ASSAULT AND INJURY OFFENCES							
	The Law of Adgna Tegeleba	The Law of Adke me-M'lga'e	The Law of Loggo-Chwa	The Law of Seharti, Lamza, Weqerti and Damba	The Law of Habslus-Gerekrstos	The Law of Karnes him	The Law of Shew'ate Anseba	The Law of Beni-Amr
<b>ACCORDING TO THE TYPE OF INSTRUMENT, WEAPON ETC USED IN THE OFFENCE</b>								
Injuring with hand grenade, rifle (pistol, gun), knife (pocketknife), spear (assegai, javelin, arrow), sword,	250/125/62.5 Qrshi (depending on whether the act was intentional, negligent or a failed	-	120 Fergi <sup>72</sup>	-	8 Fergi (if the offender runs after the victim holding these weapons)	8 Fergi (even if third parties come and drug the offender to stop	-	-
Injuring with pickax, ax, machete, hammer, sickle and the	250/125/110/55/48/24 Qrshi (depending on whether		120 Fergi	-	8 Fergi (equals 16 Qrshi) (if the offender	8 Fergi (even if 3rd parties come and	-	150 Qrshi + 1 goat + 2 liters of butter +

<sup>70</sup> 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.

<sup>71</sup> 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.

<sup>72</sup> A traditionally woven cloth employed in compensating victims. One *Fergi* equaled 12 *Qrshis*.

likes	blood has been spilled or paralyzing an organ)				runs after the victim holding these weapons)	drug the offender to stop him)		12 mesfers <sup>73</sup> of sorghum)
Injuring with an iron	-	8 Qrshi	8 Fergi (16 Qrshi)	8 Qrshi	8 Fergi	8 Fergi (even if 3 <sup>rd</sup> parties come and drug the offender to stop him)	30 Qrshi	-
Injuring with a stick (rod), a stone, a whip (scorpion) or the likes	55/27.5/24/12 Qrshi (according to the type of offender and the level of spill of blood)	-	-	2 Qrshi (per bruise)	2 Fergi	-	14/3/1 Fergi (according to the width of the rod and the body organ bruised)	-
<b>ACCORDING TO THE DAMAGE SUSTAINED</b>								
Destroying eyes, cutting the nose of the tongue, deafening the ears, paralyzing limbs or	-	-	Half of gar <sup>74</sup> (500 Qrshi) [for destroying eyes], 240 Qrshi (for cutting	125 Qrshi	8 Qrshi	8 Fergi (16 Qrshi)	5 oxen (per organ damaged)	Half of gar (1,305 Qrshi) + 2 liters of butter + 12 mesfers of sorghum

<sup>73</sup> A traditional container for measuring cereals.

<sup>74</sup> Compensation for loss of life and the amount differ from place to place.

Breaking bones	110/55 Qrshi (according to the nature of the offender, i.e., principal, helper)	8 Qrshi	8 Fergi	-	1 Fergi (2 Qrshi) (per fracture)	-	-	300 Qrshi + 1 goat + 2 liters of butter 12 mesfers of sorghum
Breaking tooth	110/55 Qrshi (based on being the initiator or a helper)	-	30 Fergi (per tooth)	8 Qrshi	8 Fergi	-	10 Fergi (per tooth) or 5 oxen (if 3 or more teeth are lost)	Tenth of gar (130.5 Qrshi)
Leaving bruises after assault	-	1 Hlqi <sup>75</sup> + cost for cure	-	2 Qrshi (per bruise left by assault of a rod)	5 Fergi (for a bruise left by assault of the hand)	2 Fergi (for a bruise on the waist)	14/3/1 Fergi (According to the width of the rod and the organ marked by the bruise)	-
Assault on the head (with bruises left)	-	Not clear	30 Fergi (for heavy injury) / 10 Fergi (for heavy injury)	1 Hlqi + cost for cure	3 Fergi (per assault) + cost for cure (heavy wounds)/ 1 Fergi (light wounds)	3 Fergi (per assault) + cost for cure (heavy wounds)/ 1 Fergi (light wounds)	10 Fergi (per wound) + a cup of butter + 1 gebeta <sup>76</sup> ripe corn	50 Qrshi +1 goat + 2 liters of butter + 6 mesfers of sorghum

<sup>75</sup> A currency amounting to 12 *Qrshi*.

<sup>76</sup> Traditional measure for cereals holding 10 kilos.

Assaulting one's wife	To be freely calculated according to the injury she has suffered	8 Qrshi (if she lost an organ above the neck) / 1 Hlqi + care for cure (if he has spilled her blood)	40 or 10 Fergi [according to the gravity, if assaulted in times pending divorce]/ 6 Fergi (if he wounds her head)	30 Qrshi (if he assaults her in the field)/ 1 Hlqi + female goat (if he wounds her head) / 1 Hlqi (if he removes hair from her head) / a cow which has lost two teeth (if he assaults her in times pending divorce)/ 10 Fergi (if he assaults her at night)	-	2 Fergi (if he assaults her in the field) / 1 Hlqi (if he assaults her above her neck or removes hair from her head)	30 Qrshi (if he assaults her in the field) / 1 Hlqi (if he assaults her below her neck) / compensation (if he assaults her above her neck)	-
Strangulation of the throat	-	-	8 Fergi	5 Qrshi	5 Fergi	5 Fergi	5 Fergi	-
Biting	-	8 Qrshi	10 Fergi	-	8 Fergi	30 Fergi (per biting)	1 Hlqi	50 Qrs + 1 goat + 2 ltr. of butter + 6 mesfers of sorghum

ACCORDING TO THE MANNER OF THE COMMISSION OF THE OFFENCE								
Assault after lying in wait or by surprise attack	55 Qrshi (if committed at the house of a 3 <sup>rd</sup> person ) + the assault to be punished according to the rules above	8 Qrshi	8 Qrshi	-	8 Qrshi	40 Fergi (for the lying in wait/surprise attack + the assault to be punished according to the rules above	30 Fergi (for lying in wait/surprise attack) + the assault to be punished according to the rules above	-
Assault by use of the hand	24/12 Qrshi (based on being the initiator or a helper)	5 Qrshi (per slap)	-	5 Qrshi	5 Fergi (if bruises are left)	5 Fergi (if bruises are left)	5 Fergi	-
assaulting by helping another assailant	Double the penalty due for the assault of the assailant	-	30 Fergi	-	5 Fergi (if prevented before he could help the assailant)	15 Fergi	30 Fergi	The penalty due for the assault + 50 Qrshi (for each helper)
Assaulting in the presence of a judge	-	-	20 Fergi (for dishonoring the judge) + the penalty	-	12 Fergi to the judge + the penalty due for the assault	2 Hlqi to the judge + 30 Qrshi to the victim	30 Qrshi to the judge + the penalty due for the assault	-

			due for the assault + 12 Fergi payable to the judge					
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Table 5. Graduated classes for bodily injury and assault offences (inspired by the Eritrean customary laws and now contained in the draft penal code)

S/N	TYPE OF INSTRUMENT, WEAPON etc USED IN THE OFFENCE	TYPE OF INJURY SUSTAINED	CIRCUMSTANCES UNDER WHICH THE OFFENCE WAS COMMITTED
1	hand grenade, rifle (pistol, gun), knife (pocketknife), spear (assegai, javelin, arrow), sword, dagger (bayonet), saber, double-edged knife, poison and the likes <i>(the offence shall be considered as an attempted first degree murder in two</i>	cutting both hands or legs, loss of both eyes, paralysis, cutting of the nose, both ears or the tongue, damage to reproductive organs leading to inability to bear children, and the likes <b><i>(Raises a class by three levels)</i></b>	when the offence was committed against a handicap, pregnant women, hospitalized patients, or other persons incapable of defending themselves; or against a person for whom the offender has an obligation to give a special care <b><i>(Raises a class by one</i></b>
2	pickax, ax, sickle, blade (razor), machete, hammer, and the likes <b><i>(Class 9 Serious Offence)</i></b>	slashing of the nose or ears, loss of one eye, cutting of one hand or leg, severe and permanent disfigurement of the face or posture <b><i>(Raises a class by two levels)</i></b>	When the offence was committed in places where there were no other people, in religious places, or in Courts, public assemblies, or government offices on duty;
3	thick and heavy stick, blunt metals, boulder and the likes <b><i>(Class 1 Petty Offence)</i></b>	Bone fracture, loss of tooth (teeth), cutting of fingers or toes, knock or blow causing heavy loss of blood, laceration (gash), heavy internal pain and the likes	Committing the offence the victim by lying in wait, taking him by surprise, or at night <b><i>(Raises a class by one level)</i></b>
4	rod, stone, whip, scorpion, scourge, thin branch (not a bough which shall fall in the category above), small stick and the likes	swelling, bruises (contusion), wound or a similar pain, and the rest of simple injuries <b><i>(use only for aggravation within the range of the class)</i></b>	committing the offence in places where people gather like weddings, bars/cafes, markets, sporting places, schools etc <b><i>(use only for aggravation</i></b>

5	Hands, legs, other human body parts, or any other materials naturally not dangerous <b>(Class 3 Petty Offence)</b>	hit and beatings, shoving, applying force on another (but all these not leading to any one of the injuries listed above) <b>(use only for aggravation within the range of the class)</b>	
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	<b>AGGRAVATING CIRCUMSTANCE</b>	<b>WEIGHT DUE IN EACH OF THE RESPECTIVE CATEGORY OF CLASSES<sup>77</sup></b>
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Table 6. – Aggravating circumstances chart in the final draft penal code

		<b>Classes 1 and 2 Serious</b>	<b>Classes 3, 4, 5 and 6 Serious</b>	<b>Classes 7, 8 and 9 Serious</b>	<b>Petty</b>
1	the offender acted together with others in pursuance of a criminal agreement, or as a member of a gang organized to commit offences, and especially where the offender acted as	2-6 months	1-5 months	1-3 months	The Court's Discretion
2	the offender knew or reasonably should have known that the victim of the offence was vulnerable or incapable of resistance by reason of age, health, disability, or for any other reason or <del>where the offender's exhibited lack of remorse or concern for</del>	1-4 months	up to 4 months	up to 2 months	The Court's Discretion
3	the offender was motivated by bias, prejudice or hate based on religion, national or ethnic origin, language, sex, or race, or otherwise acted out of a base or evil motive	1-4 months	1-3 months	up to 2 months	The Court's Discretion
4	the offender was in an official position or other position of trust and abused his powers or authority	up to 4 months	up to 3 months	up to 2 months	The Court's Discretion
5	the offender committed the criminal activity through minors or mentally deficient or through persons who did not know the criminal nature of the act at the time of its commission	1-2 months	up to 1 month	up to 1 month	The Court's Discretion
6	the offender intentionally obstructed or impeded the investigation, gathering of evidence or prosecution of the <del>offence</del>	up to 2 months	up to 1 month	up to 1 month	The Court's Discretion
7	the offender has a substantial history of prior criminal convictions	up to 2 months	up to 1 month	up to 1 month	The Court's Discretion
8	other aggravating circumstances which the court may consider pursuant to Article 67(2) of the draft penal code	The Court's Discretion	The Court's Discretion	The Court's Discretion	The Court's Discretion

<sup>77</sup> See that if the court were to give the maximum penalty for all seven aggravating circumstances for each group of classes of serious offences and add them, the total equals to the range between the presumptive middle of the range of penalty for the classes and the maximum so that the worst offenders who have all aggravating circumstances proven against them and given the maximum for each aggravating circumstance get the maximum penalty in the range.

	<b>MITIGATING CIRCUMSTANCE</b>	<b>WEIGHT DUE IN EACH OF THE RESPECTIVE CATEGORY OF CLASSES<sup>78</sup></b>
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Table 7. Mitigating circumstances chart in the final draft penal code

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<sup>78</sup> See that if the court were to give the maximum value for all seven mitigating circumstances for each group of classes of serious offences and add them, the total equals to the range between the presumptive middle of the range of penalty for the classes and the minimum so that the least dangerous offenders who have can prove all mitigating circumstances in their favor and given the maximum reward for each mitigating circumstance get the minimum penalty in the range. In short, if we set off the total of the maximums of all aggravating and mitigating circumstances for each class, we arrive at the presumptive mid-point in the range.

		<b>Classes 1 and 2</b>	<b>Classes 3, 4, 5 and 6</b>	<b>Classes 7, 8 and 9</b>	<b>Petty</b>
1	the offender has manifested sincere repentance for the criminal activity, especially by seeking to aid the victim, surrendering to the authorities, voluntarily assisting the authorities in investigating the offence and apprehending other offenders, or	2-6 months	1-5 months	1-3 months	The Court's Discretion
2	the offender committed the offence under some degree of mental impairment, provocation, necessity, defence of self or another, or coercion, although insufficient to constitute a	1-4 months	up to 4 months	up to 2 months	The Court's Discretion
3	the offender acted under the influence of another person or played only a minor role in the offence	1-4 months	1-3 months	up to 2 months	The Court's Discretion
4	the offender acted in great distress or under apprehension of grave threat or justified fear, or under influence of a person to whom he owes obedience or upon whom he depends	up to 4 months	up to 3 months	up to 2 months	The Court's Discretion
5	the offender acted contrary to law for the purpose of not exposing a relative or a person under his care to a criminal	1-2 months	up to 1 month	up to 1 month	The Court's Discretion
6	the offender's participation in the criminal activity was due to youthfulness, lack of intelligence, mistake of fact, ignorance of law, ignorance or simplicity of mind, or that the offender's acts	up to 2 months	up to 1 month	up to 1 month	The Court's Discretion
7	the offender has no history of prior criminal convictions	up to 2 months	up to 1 month	up to 1 month	The Court's Discretion
8	other mitigating circumstances which the court may consider pursuant to Article 68(2) of the draft penal code	The Court's Discretion	The Court's Discretion	The Court's Discretion	The Court's Discretion