The Relevance of Hobbesian Principles of Punishment in Today's World in Light of the Ethiopian Criminal System

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Abstract

Needless to tell that Thomas Hobbes is one of the greatest political philosophers ever. He is a 17thc political philosopher. In his book *Leviathan*, he discussed a number of issues among which criminal punishment is one. Here, he explained what punishment means, why we punish wrongdoers, who can punish (administer punishment), what condition is needed before a wrongdoer is punished, and the kinds of punishments to inflict on wrongdoers. At the moment, while some of these explanations are relevant, others have become defunct. In this article, I will explore which of these explanations are still relevant and which have become defunct, by emphasising the rationale for punishment and the types of punishments Hobbes advocated, by using the Ethiopian Criminal Code as a case in point for a modern criminal system. As far as its significance is concerned, this article will be helpful to anyone who wants to have a better understanding of criminal punishment. In particular, it will be relevant to students of criminal law and jurisprudence as it deals with important issues pertaining to the institution of punishment.

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I. Introduction to Punishment

The institution of criminal law is perhaps one of the few primordial institutions one can find in every society. This is so because criminal law, unlike some other laws, aims at the prevention of undesirable conducts and thus protects the various interests of the society.[1] Such undesirable conduct may be positive or negative. In other words, criminal law orders the performance of certain activities thereby preventing *inaction* or prohibits the doing of other activities thereby preventing *action*. If a person does not comply with such stipulations, he will be punished because by refusing to comply with the law, he will hinder the protection of the interests of the society. That is why, nowadays, it is generally argued that the use of *punishment* for non-compliance with criminal law is one of the more important mechanisms through which society attempts to achieve its societal goals.[2]

If punishment is important in helping the achievement of societal goals, then, the point worth considering becomes the meaning of *punishment* itself. To begin with, Hobbes defines punishment as *an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience.*[3] H. L. A. Hart also defines punishment as a measure that involves pain or other consequences normally

[1] Wayne R. LaFave and Austin W. Scott, *Handbook on Criminal Law*, St Paul, Minn, West Publishing CO, 1972, p 21.

[2] See John Hogarth, *Sentencing As A Human Process*, University of Toronto, Canada, 1972, p 3-4. Of course, there are some scholars who do not accept the use of punishment. For that matter, they view punishment as the survival of barbarism, bereft of rational foundation, supported only by inertia of the wish to have vengeance on criminals. See for example, Edmund L. Pincoffs, *The Rationale of Legal Punishment*, Humanities Press, New York, 1966, p 1.

[3] Thomas Hobbes, Leviathan, (edited by J.C.A. Gaskin), Oxford University Press, New York, 1996, p 205.

considered unpleasant and that is intentionally imposed by authority on actual or supposed offender for an offence against legal rules.[4] Although the two scholars do not seem to converge on the purpose of punishment, they both tell us that punishment is an unlikeable measure imposed on a person by an authority for the violation of law. So, the fact that Hart, as one of the contemporary political philosophers, shares some points on the definition of punishment with Hobbes conveys the message that some of the elements of Hobbes's definition are still relevant. In the Ethiopian criminal system, the concept *punishment* is not defined although its justifications, as we will consider later on, are mentioned.

Hobbes, after defining punishment, tells us that the right to punish emanates from one's act of giving away the right to punish a wrongdoer (save oneself) and voluntary assumption of the duty to assist in punishing such person.[5] Then, the government punishes a wrongdoer for the preservation of all the subjects.[6] According to John Locke, in a state of nature, everyone has by nature the right to punish those who violate the law of nature with a view to preserving the life, liberty, health, limbs or goods of his own or of another; but this right is given away when individuals form a society through their

[4] H.L.A Hart, *Punishment and Responsibility: Essays in the philosophy of Law*, 2nd ed, Oxford University Press, New York, 1968, p 4-5.

[5] At this juncture, it should be noted that Hobbes is of the opinion that a guilty person has the right to resist punishment. This recognition of Hobbes, it is argued, about the right of the guilty person to resist being punished by a lawful sovereign, who also has the right to punish, precipitates a crisis in his political theory because these two rights cannot co-exist within the same conceptual and political system. Thus, Hobbes needs to rescind his declaration of the right of a guilty person to resist punishment. For more on this issue, see THOMAS S. SCHROCK, *THE RIGHTS TO PUNISH AND RESIST PUNISHMENT IN HOBBES'SS LEVIATHAN,* The Western Political Quarterly, Vol. 44, No. 4, University of Utah, Dec., 1991, p 853-854.

[6] Thomas Hobbes, supra note 3, p 205-206.

consents.[7] Thus, similar to Hobbes, Locke's position is that the government's right to punish emanates from the agreement forging it (or, to be more specific, a society). In Ethiopia, although the source of the right to punish is not mentioned clearly, it is recognized that a crime is a wrong against the public and the ultimate goal of punishment is, therefore, the promotion and protection of public goods.[8]

Hobbes, even if he says there is a right to punish by the commonwealth (sovereign), places one fundamental limitation on the exercise of this right. He argues that punishment should follow public condemnation; that is, punishment should be preceded by public hearing and condemnation.[9] Thus, in the absence of public hearing and conviction, there will not be any acceptable punishment. In the case of Ethiopia, too, no one can be punished before he is convicted by an appropriate judicial organ.[10] Therefore, Hobbes's principle of *prior public condemnation to punish* is still relevant in the 21st century criminal system. For that matter, this principle is one of the fundamental principles that are embedded in international and regional human rights instruments.[11]

II. Rationales behind criminal punishment

Now, according to Hobbes, we know what punishment means, where the right to punish comes from, and the basic condition to punish. However, we still need to know why we punish an offender. The answer to this inquiry is

[7] See John Locke, *Second Treatise of Government*, Edited by C.B. Macpherson, Hackett Publishing Company, Indianapolis, Cambridge, 1980, Canada, p 9-14, 52-53.
[8] See for example, article 1 of the Criminal Code.
[9] Thomas Hobbes, supra note 3, p 206.
[10] See articles 15, 17(2), 19(5), 20 (1 and 2) of the FDRE Constitution.
[11] See for example, the stipulations of article 14 of the International Covenant on Civil and Political Rights (ICCPR) (1966), and article 7 of the African Charter on Human and Peoples' Rights (1981).

seemingly very easy because, as stated before, we punish an offender because punishment is designed to meet one or more of the basic goals of the criminal justice system. There is, however, disagreement on what these goals actually are, although, generally speaking, retribution, deterrence, incapacitation, and rehabilitation are mentioned as some of them. *Retribution*, one of the oldest goals of punishment, is an idea that the criminal must pay for the wrong he has done and punishment should fit the crime committed. *Deterrence* refers to the idea that punishment aims at preventing further crimes. *Incapacitation* refers to the idea that punishment prevents a criminal from committing another crime by denying him the chance to commit a crime. *Rehabilitation*, the latest and perhaps the loftiest goal of punishment, refers to the idea that a criminal can be reformed so that he can function in a civil society without resorting to a criminal behaviour.[12]

If we know some of the goals punishment is capable of serving, the question becomes: *which of them should be used as either a sole or a predominant justification to punish a particular criminal?* There is disagreement among political philosophers on the answer to this question and we will consider, in the following few paragraphs, the answers some of them offer.[13]

According to Hobbes, the purpose of punishment seems *deterrence*. Firstly, Hobbes argues that the aim of punishment is *terror*, not revenge.[14] Secondly,

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[12] See John Hogarth, supra note 2, p 3-4, and John M. Scheb and John M. Scheb II, *Criminal Law and Procedure*, 4th ed, Wadsworth, USA, Australia, Canada, and others, 2002, p 21, and Terance D. Miethe and Hong Lu, *Punishment: a comparative historical perspective*, 2005, p 15-24, available at http://books.google.com/books?id=o2ovr4ZzIXsC&printsec=frontcover, accessed on 22 June 2009.

[13] See, for example, the discussion by John M. Scheb and John M. Scheb II, supra note 12, p 21.

[14] Thomas Hobbes, supra note 3, p 207 (emphasis added).

when we see his stipulation on the extent of punishment, he says, punishment that is not enough to *deter* people from their wrongful acts is an 'invitement' to it because people naturally calculate the benefits of their injustice and the harms of their punishment and choose the one that appears best for themselves.[15] So, the two terms-*terror* and *deter*-clearly show that Hobbes believes that the primary purpose of punishment is deterrence.[16]

Nietzsche says that one of the primary achievements of punishment "is to breed an animal with the right to make promises", that is, to induce in us a sense of responsibility, a desire and an ability to take and properly discharge our responsibilities.[17] As we tried to see before, rehabilitation favours making a person responsible than threatening him to punishment if he commits another crime. So, according to Nietzsche, since punishment can

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[15] Id., p 195 (emphasis added).

[16] Indeed, some people say that Hobbes's definition of punishment shows that punishment is *preventive* and *reformatory* because he states that punishment is inflicted "to the end that the will of men may thereby the better be disposed to obedience". See Jacob Adler, *The Urgings of Conscience: A Theory of Punishment*, 1992, p 60, Available at http://books.google.com/books?id=OKvomqp1aL0C&pg=PA60&dq=hobbesian+principles+of+punishment, accessed on 22 June 2009. Cattaneo also argues that 'while Hobbes rejects the theory of retribution as an expression of one of the baser feelings, that of vainglory as the fruit of a desire for revenge, he accepts the theory of correction and the theory of prevention…' M. Cattaneo, *'Hobbes's Theory of Punishment' in Hobbes Studies* ed. K. C. Brown, Oxford: Blackwell, 1965, p 288-289 mentioned in Alan Norrie, *Thomas Hobbes and the Philosophy of Punishment, Law and Philosophy*, Vol. 3, No. 2, Springer, 1984, p 313. However, since Hobbes explicitly says that the aim of punishment is *terror*, it may be difficult to argue how we can *reform* criminals through terror than through curing. Moreover, he clear states that punishment should be capable of deterring a person from committing further crimes. Alan Norrie, advances a different line of argument in this regard by claiming that Hobbes's theory of punishment is hybrid: deterrence and retribution-the two great theories of punishment. For Norrie, retribution is justified not only on the basis of revenge, which Hobbes clearly rejects, but also on the basis of individual consent. See Alan Norrie, *Thomas Hobbes and the Philosophy of Punishment, Law and Philosophy*, Vol. 3, No. 2, Springer, 1984, p 314-316.

[17] See for example, Austin Sarat (Editor), *The Killing State: Capital Punishment in Law, Politics, and Culture*, Oxford: Oxford University Press, 1999), P 226 Available at http://books.google.com/books?id=GfuM5vu_4MUC&pg=PA226&dq=nietzsche+on+punishment, accessed on 10 July 2009.

provoke in people a sense of responsibility, a desire and an ability to take and properly discharge responsibilities, it can serve a rehabilitative goal.

Emmanuel Kant favours retribution, the oldest principle of punishment, as a supreme value of punishment. According to him, punishment is imposed on a criminal not to promote any good with regard to the criminal himself or the society but because he has committed a crime.[18] Kant has a convincing reason in his own right for holding his retributivist position. According to him, punishing a person not for the crime he committed but to serve a different purpose is not conformable to the sentence of pure and strict justice.[19] Therefore, for Kant, the only reason to punish a person is that he has committed a crime and the only acceptable punishment is that which is "equal" to the crime he has committed.[20] Hence, Kant rejects the outcomes of punishment and focuses only on the past. His firm position on retribution is clearly discernable from his example of the dissolving society where it has to kill the last killer before it disperses because the killer deserves it.[21]This means, unlike Nietzsche and Hobbes who are forward looking, Kant is backward looking; that is, he emphasizes what was done for the purpose of punishment than what should be done to avert further crimes. Moreover, unlike the two scholars who do not consider proportionality to guilt, Kant tenaciously holds that punishment should be equal to crime; that is, what a criminal deserves is what is proportional to what he did.[22]

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[18] Edmund L. Pincoffs, supra note 2, p 2-3.
[19] Id., p 3.
[20] Id., p 4.
[21] Id., p 4.
[22] Nevertheless, it has to be borne in mind that it is sometimes impossible to impose proportional punishment on a criminal. For example, how can a person who has committed genocide be given proportional punishment? How can a person who has taken three lives be killed three times? How can we cause harm to a person who has destroyed others' property if he does not have any property. Moreover, sometimes, Kant's proportionality principle

Like Kant, Hegel is also retributivist. According to him, punishment is justified because it is a means of showing a criminal that what he has done is wrong and he violated other's right which is binding on him. Hegel holds the position that a criminal should be punished because failure to do so would amount to validating his wrong deed, which is in conflict with justice. So, according to Hegel, punishment makes a person recognize the law he rejected and repent for the harm he has done, not frightened and cease to do it again.[23]

As opposed to the retributive theory of punishment, the utilitarian theory of punishment is still popular.[24] In this regard, scholars like William Paley and Bentham can be mentioned. According to William Paley, the proper end of human punishment is not the satisfaction of justice but the prevention of crimes. Thus, since the sole purpose of punishment is the prevention of crimes, punishment must be proportional to prevention, not to guilt.[25] Jeremy Bentham, who extends Paley's theory, holds that punishment is one of the tools in the hands of the legislator to augment the total happiness of the community. Thus, if punishment is not greater than the happiness it brings about, Bentham does not support its use because punishment by itself will be evil.[26]

In any case, for the utilitarian theorists, punishment has the purpose of preventing future crimes either by the criminal himself or by other members

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may lead us to unacceptable conclusion. For example, should a person who rapes a woman be raped? If so, by whom?

[23] Edmund L. Pincoffs, supra note 2, p 11.

[24] Ibid.

[25] Id., p 17-18.

[26] Id., p 20.

of the community.[27] Accordingly, they support that punishment should necessarily be proportional to prevention. Thus, their principle of proportionality is different from the principle of proportionality of retributivist scholars. For the latter, proportionality pertains to the crime committed (the guilt of a criminal) whereas for the former it pertains to the prevention of further crimes, which means, punishment which is greater or less than, as the case may be, the harm caused can be imposed. Note that, according to Utilitarians, if lenient punishment can effectively prevent the commission of further crime, it should be preferred to severe punishment as it will cause less hardship to the criminal and less cost to the society.[28]

At this juncture, it is important to note that Hobbes is one of the utilitarian theorists in relation to the theory of punishment because his formulation is that we punish people to deter them from committing further crimes and punishment should correspond to what is necessary to deter the commission of further crimes.[29] Incidentally, it should be raised that those theorists who support rehabilitation as a justification for punishment can also be utilitarian because they focus on the consequences of punishment than looking backward like retributivist theorists.

It should be noted, at this point in time, that the utilitarian theory of punishment is not free from criticism. It is argued that, at times, it may be

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[27] Id., p 21.

[28] For more on this, see generally, Milton Goldinger (Editor), Punishment and Human Rights, Schenkman Books Inc, Rochester, Vermont, 1991, p 3.

[29] Of course, some argue that Hobbes is a forerunner of later philosophers. For example, Cattaneo writes; 'Hobbes's conception contains in essence the basic principles of a utilitarian theory of punishment, principles that were later developed and elaborated by Beccaria and Bentham'. M. Cattaneo, *'Hobbes's Theory of Punishment' in Hobbes Studies* ed. K. C. Brown (Oxford: Blackwell, 1965), p. 289 mentioned in Alan Norrie, supra note 16, p. 299.

violative of the fundamental human rights. For instance, in as long as it is beneficial to the greater number, it may be possible for an authority to punish an innocent person (say sentencing him to death) by framing up evidence.[30] It should also be noted that such punishment is morally wrong. But, punishment based on evidence that is framed is not acceptable to people like Hobbes because when Hobbes requires prior public condemnation to punish a person, he means condemnation based on genuine evidence, not the one based on forged evidence.

Finally, regardless of the different justifications scholars offer to justify the use of punishment, reliance on any single principle is no more acceptable. For example, Hart argues that nowadays the old belief that there is just one supreme value or objective in terms of which all questions pertaining to the justification of punishment can be answered is no more acceptable; instead, what is acceptable is realizing that different principles can be used to justify punishment under different circumstances.[31] There are also other scholars who argue, in accord with Hart, that reducing *punishment* to a single meaning or purpose is not tenable.[32] What this, in effect, means is that what is acceptable in the current world as the best justification for punishment is joining these justifications; hence, the best theory of punishment becomes the *inclusive theory* although the inclusive theory may also suffer from the problem of which rationale should predominate in a particular case.[33]

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[30] For more on this, see generally, Milton Goldinger, supra note 28, p 3.

[31] See H.L.A Hart, supra note 4, p 2-3. Of course, one may argue that Hart's definition of punishment itself suggest that there is one supreme value; that is, retribution, punishment is meant to serve although he seems to criticizes the stands taken by scholars like Hobbes.

[32] See David Garland, *Punishment and Modern Society: A Study in Social Theory*, Clarendon Press, Oxford, North America, 1990, p 17.

[33] Wayne R. LaFave and Austin W. Scott, supra note 1, p 21-24.

Coming to Ethiopia, article 1 of the Criminal Code[34] provides for the following stipulations.

> It [criminal law] aims at the prevention of crimes by giving due notice of the crime and penalties prescribed by law and should this be ineffective *by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform…to prevent the commission of further crimes*.[35]

The italicized part of the article shows that punishment serves dual purposes: deterrence and reformation. Accordingly, by punishing a criminal, it is believed that both the criminal and other potential criminals will be deterred from committing crimes in the future. Moreover, it is believed that, to some criminals, punishment offers the chance to be rehabilitated and resume leading normal life in the society. Therefore, the Code, unlike the traditional belief that a single principle can justify the use of punishment, acknowledges that punishment should not be justified on a single principle. Accordingly, in the Ethiopian legal system, *deterrence* should be a justification for punishing a particular criminal, whenever it seems to make more sense. If, however, rehabilitative punishment is more warrantable under a given circumstance, say for under age offenders, then rehabilitation should be given predominance while administering punishment. Therefore, the Ethiopian Criminal System recognizes the *inclusive theory* by recognizing both the deterrence and rehabilitation principles to justify punishment. Therefore, Hobbes' stand that a single principle can justify the institution of punishment is no more relevant. The current stand, as some political philosophers and the Ethiopian Criminal Code advocate, is using eclectic principles to justify punishment.

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[34] The current Criminal Code of Ethiopia was enacted in 2004. Any article cited in this writing refers to the provision of this Code unless its context dictates otherwise.
[35] Emphasis added.

Nevertheless, Hobbes is not altogether irrelevant here. The fact that he recognized deterrence as a principle capable of justifying punishment and, as a matter of fact, the recognition of deterrence as one of the rationales behind the institution of punishment in modern world makes him still partly relevant. So, the problem with Hobbes is his reliance on a single principle. Otherwise, his *deterrence* principle is still relevant. For example, in the Ethiopian legal system, *deterrence* is recognized as a sole justification for penalties like capital punishment. In this regard, in paragraph eight, the Preamble to the Criminal Code states that "[a]lthough imprisonment and death are enforced in respect of certain crimes the main objective is temporarily or permanently *to prevent wrongdoers from committing further crimes against society.*"[36] [emphasis added]

Moreover, according to the Code, *rehabilitation* should be used, as stated above, as a justification to punish a criminal whenever reformative punishments are more sensible. Thus, for example, a criminal who is likely to be reformed through punishment should be given rehabilitative punishment. But, one should recognize the inherent problems the principle of reformation has. For example, Hart points out that reformation denies us the chance to influence people, through the punishment of offenders, who have not committed crimes, but who may, because it focuses on the criminal.[37] Moreover, Hart says, reformation may lower the efficacy and example of punishment because it does not allow punishment to be used as a threat to maintain conformity to the law but as a treatment to a criminal.[38] Indeed, we

[36] Emphasis added. This expression may also show that *incapacitation* is one of the reasons why death penalty is recognized in the Ethiopian legal system.
[37] H.L.A Hart, supra note 4, p 27.
[38] Ibid.

can also add some more drawbacks of reformative punishment. For example, reformation permits over-detention because the criminal will not be released until he is believed to have gotten rid of his criminal behaviours. Further, it does not tell us how to deal with some incorrigible criminals because it does not allow death penalty. For example, to think of people like members of the Al Qaeda to be reformed seems a wishful thinking. Leaving that as it may, one can safely argue that the problems posed by the principle of *reformation* do not arise in the Ethiopian criminal system because when *reformation* fails our judges can rely on *deterrence* to justify their most effective sentences. Thus, incorrigible criminals can be removed from the society through death penalty based on the principle of deterrence.

In any case, it is easily discernable that in the Ethiopian criminal system, unlike in the Hobbesian criminal system, the institution of punishment is based on the *inclusive theory* because the use of both *deterrence* and *reformation* to justify penalties, as the case may be, is authorized. As we have seen before, the underlying purpose of these two principles is the avoidance or minimization of crimes in the future: they focus on the result of punishment than on the harm caused. This, therefore, makes the Ethiopian criminal system a utilitarian system.

Nevertheless, the Ethiopian Code does not tell us which of the two principles it recognizes should prevail in case they conflict in a particular case. What it rather does is giving the judiciary the discretion to decide which principle to use to fix the sentence of a particular criminal. For example, article 87 of the Code states, "[t]he penalties and measures provided by this Code must be applied in accordance with the spirit of this Code and so as to achieve the purpose it has in view (Art. 1)."

This means, the penalties and measures should be applied in order to serve either the deterrent or reformative purposes of punishment and this does not tell us anything as to which principle should be preferred whenever the two conflict; instead, it implies that judges do have wider discretion to determine which principle to choose to fix sentences for different criminals.[39] Fortunately, a judge in Hobbesian criminal system does not face similar problem obviously because the system justifies punishment based on a single principle: *deterrence*. So, it could be concluded that Hobbes is now relevant, in relation to his justification for punishment, only to the extent that his *deterrence* principle is still relevant. Otherwise, his stand to justify punishment based on a single principle is no more acceptable.

III. Types of punishment

Whatever the purposes of punishment may be, different criminal systems respond to criminal activities by using punishments of different types. For instance, in some criminal systems, bank robbers may be given suspended penalties if they act politely and nicely while in other systems these same persons may be ordered to have their limbs amputated.[40] But, generally,

[39] In practice, however, the deterrence principle seems to predominate. Firstly, every summer, I teach criminal law to hundreds of judges coming from Oromia, one of the regional states in our federal arrangement, and they inform me that their primary consideration in determining sentence is deterrence, not rehabilitation. Secondly, whenever someone looks at the decisions of many of our courts in their sentencing part, they state that they have fixed certain penalties believing that they suffice to stop the criminal from committing further crime and also to be good lessons to others. Therefore, although the law does not seem to make it a predominant principle, it may be said that, *deterrence* is a *de facto* predominant principle of punishment in the Ethiopian system. Of course, this does not mean that our judges disregard rehabilitation all together. Usually, they rely on rehabilitative punishment when they deal with juvenile offenders because these offenders are susceptible to change.

[40] Shane Kilcommins, Ian, O'Donnell, Eoin O'Sullivan, and Barry Vaughan, *Crime, Punishment, and the Search for Order in the Ireland*, Institute of Public Administration, Ireland, 2004, p 1.

criminal laws, it is argued, provide for a variety of criminal punishments including monetary sanctions, incarceration, and death penalty.[41] In Hobbesian criminal system, for example, punishments such as corporal punishment, pecuniary punishment, ignominy, imprisonment, exile, and the mixture of any of them can be used.[42] In the Ethiopian criminal system, too, the Criminal Code has recognized different forms of penalties. Thus, we can use them, as may be appropriate, to serve the purposes the criminal law has in mind; that is, the protection of the society.

At this juncture, it should be noted that although most people agree about the propriety of punishing criminal behaviour, they disagree about the legality, morality and efficacy of certain modes of punishments such as death penalty.[43] We will consider some of these penalties which are no more functional, at least, in some modern criminal systems.

A. Corporal punishment

Corporal punishment refers to punishment that involves death or physical sufferings through the direct application of physical force on the human body.[44] Hobbes says it is a form of punishment that is inflicted on the body of a criminal directly to harm him[45] and it may include death, stripes, wound, chains, or other corporal pains such as castration, mutilations, and flogging.[46] Then, Hobbes endorses the use of these corporal punishments. This means, in Hobbesian criminal system, any corporal punishment could be inflicted on

[41] John M. Scheb and John M. Scheb II, supra note 12, p 552.
[42] Thomas Hobbes, supra note 3, p 208.
[43] John M. Scheb and John M. Scheb II, supra note 12, p 552.
[44] Terance D. Miethe and Hong Lu, supra note 12.
[45] Here, Hobbes is not alluding to retribution but terror as to stop (deter) the criminal from committing another crime.
[46] Thomas Hobbes, supra note 3, p 208.

a convicted criminal. Hereunder, we will see which of these corporal punishments are still in use and which have become defunct.

1. Death Penalty

The death penalty is the severest corporal punishment for the commission of a crime. As one court stated:

> Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights…It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs...[47]

In the past, this type of penalty was used for many crimes. Nowadays, however, its use is limited to very few crimes. For example, in the US, it is reserved for the most aggravated form of murder because it is believed that the penalty is deterrent.[48] In the Ethiopian legal system, the death penalty is the only corporal punishment that is recognized and it is relegated to an exceptional penalty by attaching extremely stringent conditions to its use.[49]

Note that the death penalty has remained the single most controversial issue in the realm of criminal punishment. As a result, the 20th century witnessed

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[47] *State v Makwanyane*, the Constitutional Court of the Republic of South Africa, Case No. CCT/3/94, paragraph 26.

[48] John M. Scheb and John M. Scheb II, supra note 12, p 21.

[49] These requirements are (1) the crime has to be *completed* and *grave*, (2) the criminal has to be *exceptionally dangerous*, (3) there should exist *no mitigating circumstance*, and (4) the criminal should be *above eighteen years of age*. Regardless of these requirements, however, sometime, judges erroneously sentence criminals to death. For instance, in *Public Prosecutor v Demisew Zerihun and et. el,* the Federal High Court, 3rd Criminal Division, sentenced Ato Demisew Zerihun to death for attempting to kill his girlfriend (Ms Kamilat Mehadin). In accordance with the Code, therefore, the imposition of death penalty on the criminal is wrong because the crime was not completed but attempted. The sentence was appealed against and the Federal Supreme Court rectified the blunder of the Federal High Court, though. But had it not been for the appeal, the criminal would have been executed erroneously. See *Public Prosecutor v Demisew Zerihun and Yacob Hailemariam*, Federal High Court, File No. 54027, Ethiopia, 2008.

its widespread abolition.[50] For example, many countries particularly European countries have abolished death penalty.[51] It is said that, at present, the USA is the only Western democracy that has retained death penalty.[52] In Africa, too, countries like the Republic of South Africa have declared the death penalty cruel, inhuman, and degrading and then abolished it from their criminal system.[53] At the regional level, the African Commission on Human and Peoples' Rights has been encouraging all African states to abolish death penalty, if possible, and minimize its use, if not.[54]

In any case, as far as death penalty is concerned, the stand of Hobbes is still accepted by some modern criminal systems such as that of the USA. In the Ethiopian criminal system, both the Constitution and the Criminal Code recognize death penalty although both of them attached conditions to its use.[55]

2. Other corporal punishments

As stated before, Hobbes allows the use of any kind of corporal punishment in as long as it can serve the purpose of punishment. For example, in the past, the Ethiopian criminal law allowed corporal punishments like flogging

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[50] John M. Scheb and John M. Scheb II, supra note 12, p 556.

[51] For example, see article 1 of the Second Protocol to the International Covenant on Civil and Political Rights which obliges states parties to abolished death penalty and the status of ratification of the Protocol.

[52] John M. Scheb and John M. Scheb II, supra note 12, p 556.

[53] The Constitutional Court of the Republic of South Africa stated:

> In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment... It is also an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity"...and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state. See *State v Makwanyane*, supra note 47, paragraphs 11, 26, and others.

[54] See the Resolution of the African Commission on Human and Peoples' Rights on Death Penalty, 1999.

[55] See article 15 of the FDRE Constitution, and article 117 of the Criminal Code.

and mutilations.[56] However, according to the Ethiopian criminal law, those corporal punishments or punishment such as wound, chains, stripes, branding, flogging, and mutilations are disallowed. These are archaic forms of criminal punishment and they are now considered cruel, inhuman, and degrading.[57] Thus, save on death penalty, the Ethiopian criminal system differs from Hobbes's criminal system on the use of corporal punishment. Indeed, other criminal systems have also abandoned corporal punishments. For example, the penal systems of Poland, Slovak Republic, Turkey, Bulgaria, Croatia, and Azerbaijan have outlawed the use corporal punishment at least in relation to children.[58] Therefore, Hobbes is now relevant in relation to corporal punishment only in respect of the death penalty.

B. Punishment Entailing Loss of Liberty

Penalty entailing loss of liberty refers to incarceration or incapacitative sanctions which confine individuals or limit their physical opportunities for unacceptable behaviour.[59] Hobbes defines it as any deprivation, by a public authority, of the liberty of a person who is judicially tried and declared guilty.[60] It is generally believed that incarceration or imprisonment is the only effective way to deal with violent offenders as it protects the society

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[56] Aberra Jemebere, *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*, Rotterdom, Erasmus University, Leiden, African Studies, 1998, p 193, 199.

[57] Article 18(1) of the FDRE Constitution, and article 87 of the Criminal Code. Ironically, however, we have maintained the cruellest, most inhuman and degrading punishment; that is, the death penalty. Of course, for death penalty, the argument is not based on denial of its being cruel, inhuman, and degrading but on its necessity, as one can understand from the Preamble of the Criminal Code, to deter the commission of further crimes particularly those entailing death penalty.

[58] *Eliminating corporal punishment: a human rights imperative for Europe's childrent*, by Council of Europe, 205, p 100, 103, 140, 149, and 159.

[59] Terance D. Miethe and Hong Lu, supra note 12, p 25-40.

[60] Thomas Hobbes, supra note 3, p 209.

against dangerous offenders because it incapacitates them although it is rarely rehabilitative.[61] Consequently, the penalty is recognised by all modern criminal systems. In Ethiopia, imprisonment is recognized as one of the principal penalties and it can be imposed as either rigorous or simple imprisonment. Imprisonment becomes *rigorous* when it is imposed for a very serious crime while it is *simple* when it is imposed for a crime of not serious nature.[62]

Hobbes does not classify imprisonment into *rigorous* and *simple*. However, he recognizes that it can take different forms. For example, he says that sanctions like home arrest and confinement to a given place qualify as imprisonment because they involve restraint on motion caused by external obstacle.[63] So, Hobbes recognizes that less serious deprivations of liberty can qualify as imprisonment. As a result, his stipulations on imprisonment are still relevant to the modern criminal system like in the Ethiopian criminal system.

C. **Pecuniary Punishment**

Pecuniary penalties refer to economic penalties that are imposed for wrongdoing.[64] Hobbes defines this punishment as the deprivation of money, land, or any other goods that have pecuniary value.[65] One of the pecuniary

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[61] John M. Scheb and John M. Scheb II, supra note12, p 553-554. Actually, the validity of this argument is questionable because; firstly, crimes can be committed in prisons such as against other inmates or prison wards, or prison properties; secondly, prisoners may escape form prisons and commit crimes against the society; and thirdly, in countries where death penalty is maintained, it is death penalty that is the only effective way of dealing with violent offenders thereby according reliable protection to the society against the dangers they pose.

[62] Articles 106 and 108, the Criminal Code.

[63] Thomas Hobbes, supra note 3, p 209.

[64] Terance D. Miethe and Hong Lu, supra note 12.

[65] Thomas Hobbes, supra note 3, p 208.

punishments is fine. Indeed, fine is the most common form of pecuniary punishment.[66] In the Ethiopian criminal system, pecuniary penalties are recognized as one of the principal penalties.[67] As a result, a number of crimes are made to entail fine as either a sole penalty or as an alternative or in addition to imprisonment.

Moreover, the Ethiopian Criminal Code recognizes the confiscation of legally owned property of a criminal when that is expressly provided as a punishment for the crime committed.[68] However, the Code recognizes some exception to this rule. For instance, it is not possible to confiscate domestic articles normally in use, instruments of trade or profession and agricultural instruments, necessary for the livelihood of the criminal and his family, such amount of foodstuff or money that is necessary to support the family of the criminal for at least six months, and goods forming part of a family inheritance which the criminal cannot freely dispose by gift, will or in any other manner. So, confiscation that is allowed is not sweeping; it is rather a qualified one and, more importantly, it is an exceptional one as it could be used only when the law-maker has expressly recognized its use for the crime committed.[69]

[66] John M. Scheb and John M. Scheb II, supra note 12, p 552.
[67] Articles 90 and the following, the Criminal Code.
[68] At this juncture, it is import to bear in mind that, in our legal system, land is owned by the state. So, what individuals have over land is possessory rights (the right to use the land they possess and its fruits), not the right of ownership. See article 40, FDRE Constitution. In any case, they will not be deprived of their possessory rights in the form of penalty. For that matter, even in relation to other pecuniary penalties, such as fine, criminals are allowed to retain the amount they need to subsist on. Hence, their properties cannot be taken away in their entirety. See article 98 of the Criminal Code. Note that our past criminal laws allowed the confiscation of land as a criminal punishment. Yet, in 1908, such type of punishment was disallowed. See Aberra Jemebere, supra note 56, p 191.
[69] For more information, see article 98, the Criminal Code.

Coming to Hobbes, he recognizes the use of all kinds of pecuniary penalties: money, land, or any other goods that have pecuniary value. Hence, unlike the Ethiopian criminal law, he recognizes no exceptions to it. That is, Hobbes advocates the use of any type of pecuniary punishment and all properties can be confiscated. This shows that although part of his pecuniary penalties is still relevant, his stand on the subject-matter is not accepted in the Ethiopian Criminal Code, and hence in modern criminal law, in its totality-only fine and the confiscation of some property is now relevant.

D. Ignominy

By *ignominy*, what Hobbes means is depriving a person of the honour he has obtained from the commonwealth such as degrading him of his badge, title, office or declaring him incapable of the same in the time to come.[70] Interestingly, in the Ethiopian criminal system, these penalties are recognized as *secondary penalties*. As a result, unlike in Hobbes's system, they cannot be imposed except together with the other principal penalties: imprisonment and pecuniary penalties.[71] If it is decided that the use of such penalty is necessary, then it may take the form of deprivation of rights such as the right to vote, the right to be elected, parental rights, the right to be a witness, the right to exercise a profession, and others, or reduction from a rank or dismissal from membership such as from defence force.[72]

Therefore, except for the status attached to them, the types of penalties both Hobbes and the Ethiopian criminal system recognize here are the same. Of course, the Criminal Code does not use the term *ignominy*; rather, it uses the term *secondary punishments* which include the first. The other difference lies

[70] Thomas Hobbes, supra note 3, p 209.
[71] Article 121, the Criminal Code.
[72] Articles 123,127, the Criminal Code.

in the purposes these penalties are meant to serve. For Hobbes, any punishment has deterrent purpose by creating terror. In the Code, however, secondary punishments are used for rehabilitative purposes.[73] So, the types of penalties Hobbes recognized under the designation *ignominy* is still relevant but their status and the purposes they are meant to serve have now changed.

E. **Exile or Banishment**

The other type of criminal punishment Hobbes recognizes is *exile* or *banishment*. He defines it as *the condemnation of a man, for his crime, to depart a dominion of a commonwealth or certain part thereof for some time or forever.* Then, he argues that such measure should be coupled with other punishments such as deprivation of land to qualify as punishment proper. If exile is not coupled with the other punishments, then, we cannot say the criminal is punished but simply made to change air and enjoy the benefit of his crime.[74]

In Ethiopia, the old criminal laws allowed exile to be used as a criminal punishment. However, the exile was only from one's birth place, not from a country.[75] Under the current criminal system, however, exile is not recognized as a form of criminal punishment at all. Thus, no one can be lawfully subjected to banishment, for committing a crime, as a sole or an alternative penalty or in addition to the other punishments. This means, Hobbes is no more relevant here.

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[73] Article 121 states. *[in] deciding the application of secondary penalties, the Court shall be guided by their aim and the result they would achieve on the safety and rehabilitation of the criminal.*

[74] Thomas Hobbes, supra note 3, p 209.

[75] See Aberra Jemebere, supra note 56, p 191, 193.

Nonetheless, the stand of Hobbes on the deprivation of the criminal of his property, in particular, the property he gained by committing a crime is still workable *albeit* his exile is not. In this regard, the Ethiopian criminal system requires ordering the confiscation of any property the criminal has acquired, directly or indirectly, by committing a crime for which he is convicted.[76] Thus, in line with Hobbes' desire, the Ethiopian criminal system does not allow anyone to enjoy the fruits of his wrongdoing.

G. Joint penalties

Finally, it is necessary to note that Hobbes recognizes the use of more than one penalty for a single crime if that is believed necessary to deter the criminal or potential criminals from committing future crimes. Of course, in most criminal systems including the Ethiopian criminal system, joining criminal punishments to serve the purpose of criminal law, whenever possible, is permissible. For example, fine is usually imposed in addition to imprisonment when the criminal has obtained financial benefits from his criminal activities. Moreover, secondary penalties are imposed in addition to principal penalties. Thus, any criminal may be subjected to more than one form of penalty in the interest of serving the purposes of the criminal law. This means, Hobbes's principle of joint penalties is still relevant.

VI. Extent of punishment

On the extent of punishment, Hobbes argues that punishment should not be less than the benefits or contentment that follow a crime since lesser punishment would not dispose a man to obey the law but encourage him to violate it.[77] So, according to Hobbes over-punishment or under-punishment,

[76] See article 98(2), the Criminal Code.
[77] Thomas Hobbes, supra note 3, p 207.

seen in light of the harm caused, is acceptable in as long as it is necessary to make a person obey the law. In other words, as stated before, Hobbes does not require punishment to be *proportional* to the harm caused but to prevention.[78]

In the Ethiopian Criminal Code, the punishment that may be imposed on a person may be either more or less than the benefits or contentment that follows a crime. The extent of penalty hinges upon the purpose the court wants to serve by using punishment. For example, if the purpose the court wishes to serve is rehabilitation, which is usually the case in relation to, say, juvenile offenders, the judge may impose punishment which is less than the benefit that follows a crime. If, on the other hand, the court wishes to achieve deterrence, which is usually the case in relation to habitual offenders, it normally imposes a severe punishment enough to make a person regret his wrongdoing and decide not to repeat it again.[79] Therefore, the Ethiopian Criminal Code, like Hobbes's Code, requires proportionality of punishment to prevention. This shows that Hobbes is still relevant in relation to what ought to guide the determination of the amount of punishment a criminal has to serve.

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[78] It is said that the principle of proportionality of punishment to the harm caused has been deeply rooted in the common-law jurisprudence since Magna Carta. According to the principle, in a just society punishment ought to be proportional to the crime committed. This means, punishment should 'fit' or 'match' the crime for which it is assigned. Of course, such principle may sometimes lead to lenient penalty whereas at times it may entail severe punishment than what is necessary in light of the principle of deterrence. See generally Allison Friedly, *Pragmatic and Conceptual Concerns Regarding Proportional Punishment*, Spring 2004, available at http://www.morris.umn.edu/academic/philosophy/friedly/defense.html, accessed on 1 August 2008, and Beccaria, *On Crime and Punishments, available at* http://www.crimetheory.com/ClasPos/proportion.htm accessed on 1 August 2008.

[79] Articles 1 and 87, Criminal Code.

V. Other principles pertaining to punishment

Hobbes favours the use of punishment that is capable of creating terror so as to discourage the commission of future crimes. Nevertheless, he opposes to any increment of punishment that is prescribed in the law after a crime is committed and calls the excess an act of hostility.[80] So, for him, what counts as punishment is what is attached to the law at the time of its violation and the retroactivity of severe penalty is unacceptable. In the Ethiopian legal system, such prohibition is recognized in the Constitution which stipulates that *heavier penalty shall not be imposed on any person than that is applicable at the time the crime was committed.*[81] According to Hobbes, the aim of punishment is terror, not revenge, and thus the use of greater punishment than the one attached to the law to create terror is unknown.[82] But, in the Ethiopian case, the reason why heavier penalty cannot be used is because it is contrary to human dignity; that is, no one can be condemned or severely condemned without being warned by the law preceding a conduct. The excess, that is, the increased punishment after a crime is committed becomes a risk the criminal did not assume while committing the crime.

Moreover, Hobbes argues that no one should be punished for an act that is performed before the law prohibiting it was issued. According to him, any evil inflicted for an act done before a law is issued does not qualify as punishment.[83] Of course, this is one of the cherished principles of modern criminal law. The Ethiopian Criminal Code also follows the same principle. Thus, no penalty can be imposed on any person for a conduct not done by transgressing a law. For that matter, according to the FDRE Constitution, any

[80] Thomas Hobbes, supra note 3, p 207.
[81] Article 22 of the FDRE Constitution.
[82] Thomas Hobbes, supra note 3, p 207.
[83] Ibid.

ex post facto law that provides for penalties or increase penalties is unconstitutional.[84] Therefore, once again, Hobbes's principle of *non-retroactivity* of criminal law is still applicable.

Lastly, Hobbes vehemently holds that the representatives of the *Commonwealth* (monarch or assembly) cannot be punished because it is not subject to any civil law for it is the one making the law itself.[85] In other words, Hobbes does not accept the rule of law or equality of all before the law. However, in the Ethiopian legal system, the representatives of the people (members of the parliament) can be punished. Indeed, the Ethiopian Criminal Code specifically stipulates that criminal law applies to all without discrimination.[86] Thus, unlike Hobbes's representatives who are not subject to his criminal law, the Ethiopian representatives are subject to the Ethiopian criminal law. Of course, the difference lies in the status of the two representatives. In the Ethiopian case, they are not sovereign (nations, nationalities, and peoples are) while Hobbes's representatives are sovereign.

VI. Execution of punishment

If punishment is to serve its intended purposes, it must be executed. The point worth discussing, then, becomes the manner of its execution. On this point, Hobbes is not clear. But we can understand that it can be execute in such a way that it can create terror. Thus, the issue of making execution of punishment *humane* does not seem part of his argument. For example, he argues that capital punishment can be used with or without torment.[87] This means, we can execute death penalty in a manner that is inhuman. Moreover,

[84] Article 22 of the FDRE Constitution.
[85] Thomas Hobbes, supra note 3, p 207, 215,218.
[86] Article 4, the Criminal Code.
[87] Thomas Hobbes, supra note 3, p 208.

he argues that a person can be deprived of all his property in the form of pecuniary penalty. But, depriving a person of everything he has by exposing him to, say, starvation, is now considered inhuman.

In many modern criminal systems, however, the execution of penalty has to be humane.[88] For example, in Ethiopia, it is expressly provided that penalties should be used with due regard for respect for human dignity.[89] With regard to the execution of death penalty, the Ethiopian Criminal Code is vivid and vehement about its stipulations. Firstly, it ordains that death penalty should be executed by a humane means. Second, it stipulates that it should not be executed in public (but in prison precinct) and by using inhuman means such as hanging. Thirdly, it orders the execution of the sentence without any cruelties, mutilations or other physical suffering.

Therefore, on the manner of execution of punishment, particularly capital punishment, the Ethiopian Criminal Code stands in stark contrast with Hobbes's Criminal law. For example, Hobbes's capital punishment with torment is what the Code obstinately proscribes. Of course, the stipulations in the Ethiopian Criminal Code are the result of the development of different human rights principles, an issue that was not topical during Hobbes's time. Thus, Hobbes is traditional in respect of the manner of enforcement of punishments while the Ethiopian Criminal Code has taken the modern path.

[88] Of course, there are controversies on what is *humane* and what is not. For example, in the USA, some states use lethal injection while others use electric chair. Thus, one may wonder whether both are *humane* or neither is or only one is *humane*. Of course, some countries still use hanging. For example, the ex-president of Iraq, Saddam Hussein, was hung.
[89] Article 87, the Criminal Code.

Conclusion

The 17th century political philosopher, Thomas Hobbes, discussed a number of issues in relation to criminal punishment. He recognized that criminal punishment can and should be used for the purpose of deterring the commission of further crimes either by the criminal himself or by the other members of the society. Then, he recognized the different types of punishment an authority can use to serve this purpose. He also discussed many other issues pertaining to the institution of punishment. Interestingly, while some of the principles he formulated or advocated or the explanations he provided for issues relating to criminal punishment have now become defunct, others are still applicable in the field of criminal law thereby making him still relevant. For example, while Hobbes' single justification of punishment, recognition of corporal punishments other than death punishment, and acceptance of the possibility of executing penalties by using cruel (inhuman) means are no more relevant at least in part, his definition of punishment, classification of penalties, guidance on how to determine the amount of penalty, the imposition of punishment by an authority, and non-retroactivity of criminal law are still applicable. That is why the Ethiopian Criminal Code stands in conformity with Hobbes on many principles. Thus, the Hobbesian principles of punishment have not yet become obsolete altogether as some of them are still operational.