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THE CORRELATION BETWEEN LAW AND BEHAVIOUR AS PILLARS OF HUMAN SOCIETY

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Introduction

Man by nature is a gregarious being both in his body and mind. In other words, he likes to live in a community.[1] This explains the hackneyed adage that no man is an island. Instead he is a victim of social inevitability as he must as a matter of necessity *willy nilly* live in a society with other human beings rather than in isolation. For any society to survive or even exist, it must inescapably anchor itself on law, which in turn governs the behavior of members of the society in question, as well as their relations, their rights and obligations. Law thus is a mandatory cause of conduct accepted by members of a given society as established by the legitimate authority of that society.[2] When we talk about law and society, we are undoubtedly referring to a group of individuals bound together under a political organization, whose very existence is dependent on the quality of the law which has enabled that association to come into existence in the first place. Members of the society normally have an inherent interest in the preservation of both their individual welfares and that of the association.

I am not trying to suggest that members of a society would robotically adhere to the laws in place. Far from that, the reverse is true. Just as the faces of all men are different, so are the members that constitute any human society. They each share varying behaviors ranging anywhere from submissiveness to delinquency. The main relevance of the law is to direct the society to behave in a particular way or face corresponding sanctions. The purpose of this paper therefore is to examine how human behavior is determined by law or relative to law, vis-à-vis the society, crime and punishment. It recognizes the enormous influence of any legal system on the behaviors of its citizenry, and asserts that law can through direct or indirect enforcement mechanisms either widen or contract the horizon of opportunities within which individuals can satisfy their sundry preferences.[3]

Inherent to the activities of any community, society or organization is a potential for order and disorder. When we are attempting to control something, we must acutely be conscious of what resists us.[4] No society in the world however beautifully designed can function in an atmosphere of perfect harmony. With every human society constituted of people with different behavioral patterns, there is bound to be an element of disharmony at various facets of societal intercourse, which in turn necessitates law to act as specific social barometer. This

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[1] See for instance, Gilbert Ryle & Daniel C. Dennett, *The concept of mind* (University of Chicago Press: london/New York, 2000) at 44.

[2] Tom R. Tyler & John M. Darley, Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law 28 *Hofstra Law Review* (1999-2000) 707-740.

[3] Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms 86 Virginia Law Review (2000) 1603-1648 at 1603.

[4] John Dewey, *Human nature and conduct* (Dover Publications: New York, 2002) at 1.

consists of bringing about "the desired social conduct of men through threat of a measure of coercion which is to be applied in case of contrary conduct."[5] Hans Kelsen has asserted that a state is defined as a political organization only because the "political" element consists in nothing but "the element of coercion."[6] Another writer has succinctly observed that for there to be an organization or a society, there should be interaction, for there to be interactions there should be encounters, and for there to be encounters there should be disorder.[7] In other words, order and disorder are effectively part and parcel of human society.

The Social Function of Law

Hans Kelsen has observed that the function of every social order is to "bring about certain mutual behavior of individuals; to induce them to certain positive or negative behavior, to certain action or abstention from action."[8] Going by the catchphrase maxim *ubi societas ibi ius*,[9] the purpose of law is to make social life possible. Naturally, there is a very close bond between the individual and his societal environment. Whoever believes in the existence of a social order believes in the existence of a legal order. Living together involves setting up rules and institutions that regulate this living together.[10] There is no other conceivable way by which large communities can be constituted other than through some coercive legal orders.

As observed in the introduction, law is the cultural force which has that important social function of imposing, conducting and/or controlling patterns of human behavior.[11] The sociology of law is aimed at studying human behavior in society as commonly recognized by ethno-legal norms. In other words, it is legal norms that guide, delimit or determine patterns of behavior in any human society.[12] How does this come about? Put differently, what is the conditions *sine qua non* for the effectiveness or non-effectiveness of legal norms vis-à-vis human behavior?

The specific reality of the law is not obvious in the actual behavior of the individuals who are subject to the legal order.[13] This is comprehensible given that legal norms are the creation of human will. The law as a norm "is an ideal and not a natural reality."[14] The behavior of individuals as a consequence may or may not be in conformity with the legal order in place. Despite this imbalance, law still both directly and indirectly functions as a specific social technique in adjusting human behavior towards a particular social pattern.[15] How does law do what it does?

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[5] Hans Kelsen, 'The Law As A Specific Social Technique' 9 *University Of Chicago Law Review* (1941-1942) 75-97 at 79.
[6] Kelsen, 'The Law As A Specific Social Technique' at 82.
[7] Ron Levy, 'Critical systems thinking: Edgar Morin and the French school of thought' 4 *Systemic Practice and Action Research* (1991) 89-99 at 97-98[*Emphasis added*].
[8] Kelsen, 'The Law As A Specific Social Technique' at 75.
[9] Where there is a society, there is law. Conversely, where there is no law, there is no society. See generally Hayek, *Co-ordination and Evolution: His legacy in philosophy, politics, economics, and the history of ideas*, ed. Jack birner & Rudy van Zijp, (Routledge: London/ New York, 1994) at 269.
[10] Kelsen, 'The Law As A Specific Social Technique' at 75.
[11] Nicolas S. Timasheff, 'What is "Sociology of Law"?' 43 *The American Journal of Sociology* (1937) 225-235 at 225.
[12] Ibid.
[13] Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Clark Lawbook Exchange: New Jersey, 2007) at XIV
[14] Hans Kelsen, 'The Pure Theory of Law. Its Methods and Fundamental Concepts' 50 *Law Quarterly Review* (1934) 474-498 at 481.
[15] See generally Kelsen, 'The Law As A Specific Social Technique'; Robert S. Summers, 'Technique Element in Law' 59 *California Law Review* (1971) 733-751.

Although very few legal philosophers have been interested in the question, Robert S. Summers has nonetheless pivot from a synthesis of the few available literature on the subject[16] that to achieve its aim, law breaks itself into elements such as legal authority and legal rules, moral aspects of law and law's coercive features.[17] This is clearly a much extensive way of approaching the issue. A more narrow and compelling response can be inferred from Hans Kelsen's assertion that law regulates societal behavior by oscillating the principles of reward and punishment, where applicable.[18] These two principles are fundamental for social living. For the sake of convenience, I would make a slight linguistic adjustment by re-qualifying these two values respectively as pleasures and pains, loosely borrowed from Jeremy Bentham's utility principle, because I believe these words best capture the functionality of law vis-à-vis societal behavior.[19] Bentham's theory of utilitarianism states that the aim of the individual and the legislator in the conduct of the society should be to achieve the greatest happiness for the masses.[20]

It is in the interest of the legal order that it strive for genuine justice in order to dissuade individuals from inducements to *contra bonos mores*[21]. When from a particular conduct, the benefits or advantages are more than the disadvantages or sufferings to an individual; that individual can certainly be expected to opt for compliance, because the benefits (pleasures) of compliance outweigh the disadvantages (pains) of violation. The reverse conduct would be true for a legal system which is prone to injustice, hardship and sufferings to some or most of its subjects, given that the latter beside their pains are not giving any motivation to abide to the legal order. In this case, the advantages of violation seem just as good if not better as of compliance. Law as such functions to shape not only positive behavior but prejudices as well.[22]

The efficacy of law depends on its ability to deter at every level of operation (prescription (legislating), functional courts and enforcement mechanisms). According to Kelsen, Law functions as a specific legal technique by applying the measures of coercion as decreed by the legal order.[23] I would return to this proposition in due course, given that it has been jettisoned in other academic circles. For now, suffices to state that it is the unpredictability of human nature that makes it necessary to establish a legal order as a coercive order. As noted before, history has presented man with a social condition of *ubi societas ibi ius*. It is obvious from the functionality of things that man has not been totally at ease with this condition. He has always demonstrated a preferential tendency for a society free from all coercion, "one in which there will no longer be any law, or what amounts to the same thing, any state."[24]

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[16] For instance: Nicholas S Timasheff, *An introduction to the sociology of law* (New Brunswick: New Jersey/ Cambridge, 2001); Hans Kelsen, 'The Pure Theory of Law. Its Methods and Fundamental Concepts' 50 *Law Quarterly Review* (1934) 474-498; W Schoenfeld, 'The "response" in behavior theory' *11 Integrative Psychological and Behavioral Science* (1976) 129-149; Max Rheinstein, *Max Weber on law in economy and society* (Havard University Press: Cambridge, 1969); Hans Rumpf, 'Physical aspects of comminution and new formulation of a law of comminution' 7 *Powder Technology* (1972) 145-159.

[17] Summers, 'Technique Element in Law' at 733.

[18] Kelsen, 'The Law As A Specific Social Technique' at 75.

[19] See also John Stuart Mill, Jeremy Bentham & Alan Ryan, *Utilitarianism : and other essays* (Penguin Books: London, 2004); Nathan D. Grundstein, 'Bentham's Introduction to the Principles of Morals and Legislation' 2 *Journal of Public Law* (1953) 344-369.

[20] Ibid.

[21] Contrary to good behavior (Morals).

[22] Kenneth G. Dau-Schmidt, 'An Economic Analysis of the Criminal Law as a Preference-Shaping Policy', *Duke Law Journal. 1*. (1990) 1-38.

[23] Kelsen, 'The Law As A Specific Social Technique' at 82.

[24] Kelsen, 'The Law As A Specific Social Technique' at 82.

Ethics (morality), Religion and Behavioral Patterns

Ethical (moral) and religious norms are strictly speaking not mandatory courses of action for any legal system. Theoretically, a social order or legal order on the one hand and a moral or religious order on the other hand can exist independently of one another. Meanwhile a high moral standard is customarily expected from every individual, a legal order on the one hand and a moral or religious order on the other hand "may be considered as two circles which cross each other. The overlapping section is law."[25] Law may legislate morality, in which case, moral norms would take a legal character.[26] There is no gainsaying that the sociology of law has to begin "by studying from the causal point of view, the phenomenon of ethics, to continue by studying from the same point of view, the phenomenon of power, and to conclude by an analysis of the complex phenomenon formed by the joint action of both."[27]

But moral or religious orders in many respects tend to function in very much the same way as legal orders. They all function to suppress evil and bring about socially desired behavior through the technique of punishment.[28]Any norm that does not prescribe behavior simply does not exist. Law, morality and religion all compel good conduct (behavior). To talk like one writer, they each have a character, content and condition of application.[29] It is also inferred that religious like moral ideologies always more or less accurately mirror social reality.[30] Indeed, these three orders all epitomize how social power can dominate over individuals both by means of law as well as outside the law.[31]

The similarities notwithstanding, their actual measure of authority and influence varies considerably. The case of murder is a very glaring example. All three orders categorically forbid murder. While under a moral order (for example: 'Thous shall not kill'), people would generally refrain from committing murder because a known murderer would certainly be ostracized by fellow men; still there is a great difference with a legal order, whose reaction consists of a précised measure of coercion enacted by the order.[32] Its efficacy thus rests on its coercive character. Under a legal order, a judge would be authorized to punish anyone who commits murder with either imprisonment from *n* years to life imprisonment, or in some jurisdictions, in the case of grievous murder with a death penalty.

A moral reaction to an immoral offence is neither prescribed by a moral order nor socially oriented.[33] Its efficacy rests on voluntary obedience. Religious norms like legal norms on their part threaten the murderer with punishment, however not in the murderer's lifetime but after death by a super-being. Meanwhile religious norms are apparently more effective than legal norms, despite no physical force involved, that efficacy principally presupposes a

[25] Timasheff, 'What is "Sociology of Law"? at 231.
[26] Kelsen has used the following hypothesis to illustrate the operation of moral versus legal norms: "The specific technique of the law-the technique of indirect motivation- consists in the very fact that it attaches to certain conditions certain coercive measures as consequences. Morality whose technique is direct motivation says, thou shall not still. The law says, if one steals, he shall be punished. The moral norm regulates the behavior of one individual; the legal norm, always that of at least two individuals, he whose behavior furnishes the condition of the sanction (the subject) and he whose duty it is to apply the sanction (the organ)…" (Kelsen, 'The Law As A Specific Social Technique' at 87).
[27] Timasheff, 'What is "Sociology of Law"? at 231.
[28] Kelsen, 'The Law As A Specific Social Technique' at 78.
[29] Henrik Georg Von Wright, Norm and Action: A Logical Enquiry (Routledge & Kegan Paul: London, 1963) at 70.
[30] Kelsen, 'The Law As A Specific Social Technique' at 78. (The institution of marriage is one good example of a contract that is regulated by all three orders. While under a moral order, it is based on voluntary compliance; under religious and legal orders, certain rules are actually in place to regulate the contract).
[31] Timasheff, 'What is "Sociology of Law"? at 231.
[32] Kelsen, 'The Law As A Specific Social Technique' at 80.
[33] Kelsen, 'The Law As A Specific Social Technique' at 80.

"belief in the existence of a superhuman authority."[34] Unlike a legal order which is determinate in nature thanks to its coercive character, any reliance on a moral or religious order ultimately boils down to a reliance on utopia, because human actions are anecdotal.[35] Irrespective of whatever form it takes, any adherence to law, whether willingly or involuntarily would naturally presuppose a sense of motivation and "coercion". While in the case of legal rules, such deterrence involves the fear of the application of force or coercive measure against the individual's will; in the case moral or ethical obedience, deterrence or loss of freedom takes the form of coercion in the psychological sense.[36] I would return to this comparison much later in the essay, but more with respect to the determination of appropriate sanctions for socially injurious behaviors. Suffice it to say at this point that law normally regulates its own creation, and by imposing a certain conduct seeks to induce the opposite behavior.[37]

Theorizing crime and behavior

Several theories and schools of thought have been expounded to relate crime and behavior (or crime and delinquency) since the 18th century following the birth of criminology as a science. Some of these include the classical, the neo-classical, the positivists, the sociological, Urbanization, differential opportunity, anomy, functionalist, cultural conflict, psychological, radical or critical, Austrian and cartographic schools of criminology. There has been as much colossal variation in orientation amongst these schools as there have been writers on the subject.

The conspicuous disparity amongst criminologists in one respect is a clear reminder that there could be hundreds of explanations out that as to why crime is committed or why a person may chose to behave in an anti-social manner. Even if these schools severally look at the incidence of crime from purely different perspectives, in one sense, I perceive it as demonstrative of their common enthusiastic quest on the relationship between law, crime, criminals and punishment. There is a common understanding amongst them to the effect that behind every offense there is a cause. Even if there is little disagreement on this principle, the reverse is true on what constitutes that "cause". Why do people commit crimes? What accounts for delinquent behavior? What is the main motivation? Is there any connecting link between criminals?

In the following section, I would attempt an answer to the above questions by evaluating the two most prominent though conflicting schools of thought on criminal behavior and law namely, the classical versus positivist schools of criminology.

Of Criminal Behavior and Law-making

[34] Kelsen, 'The Law As A Specific Social Technique' at 80. Kelsen has noted that voluntary obedience " is in itself a form of motivation, that is coercion, and hence is not freedom, but it is coercion in the psychological sense." (Kelsen, 'The Law As A Specific Social Technique' at 80).

[35] It is still argued in some circles that it would inappropriate to apportion hierarchical value to the various social orders based on their ability or inability to administer sanctions. Even Hans Kelsen has been conflicted on this issue. In one passage, he wrote thus: "From a realistic point of view the decisive difference is not between social orders whose efficacy rests on sanctions and those whose efficacy is not based on sanctions. Every social order is somehow sanctioned by the specific reaction of the community to conduct of its members corresponding to or at variance with the order. This is also true of highly developed moral systems, which most closely approach the type of direct motivation by sanctionless norms." (Kelsen, 'The Law As A Specific Social Technique' at 76.).

[36] Kelsen, 'The Law As A Specific Social Technique' at 79.

[37] Kelsen, 'The Law As A Specific Social Technique' at 87.

Kelsen's conception of reward and punishment which I have already highlighted is a clear pointer to the ultimate intent of any legal system, that is, to stimulate good behavior in the society. The social behavior of individuals, Kelsen observed, is always accompanied by a judgment of value, namely, the idea that conduct in accordance with the order is 'good' whereas the contrary to the order is 'bad'.[38] Put plainly, the law gives incentives to desirable behaviors and punishment to socially injurious conducts. Every social conduct inevitably produces a certain comparable legal effect. Members of the society are expected to be fully conscious of this fact. It is indeed that consciousness that guides their decisions in doing or not doing a thing. Cesare Beccaria (1738 – 1794) reportedly wrote that "In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws."[39]

The search for answers to criminal behavior is neither new nor easy. And this is certainly not for lack of trying. What is it that prompts some individuals into crimes while others do not? In order to answer the above question, it would be imperative to thoroughly evaluate the approaches of the two leading schools of thought on criminology and criminal behavior, to wit: the Classical versus the Positivist Schools of Criminology. The two schools are like two parallel streams that flow together but never meet, in that they are both as concerned on the correlation between society, law and human behavior though with very contrasting perceptions. While the classical school[40] has essentially focused on law-making, the positivist school[41] on its part has concentrated itself with the study of criminals. While the former's findings have been naturalistic, those of the latter have been largely spiritualistic.[42] As a result, the classical school has traced criminality to bad laws. The positivists have contradicted by linking it to bad people.

The Classical Doctrine

The classical school is the brain-box behind the idea of pleasures and pains or benefits and costs as Beccaria termed it. The school grew in the late 18th century in the aftermath of the French revolution. Most classical thinking ideas were a reformulation of the philosophies of the age of enlightenment, notably the earlier writings of John Locke (1632-1704), Jean-Jacques Rousseau (1712-1778), Charles Louis Montesquieu (1689-1755) and Thomas Hobbes (1588-1679). With English philosopher Jeremy Bentham (1748 – 1832) and Italian

[38] Kelsen, 'The Law As A Specific Social Technique' at 76.
[39] Cesare Beccaria, *Crimes and Punishments* (Trans. Henry Paolucci. Englewood: New Jersey/New York, 1963 at 99.
[40] For instance: Edward D Ingraham, *An essay on crimes and punishments* [Translated from the Italian of Cesare Beccaria; Commentary by marchese di Voltaire] (Philip H. Nicklin Walker, printer: Philadelphia, 1819); Jeremy Bentham, An introduction to the principles of morals and legislation (Clarendon Press: Oxford, 1970); Cesare Beccaria, *Crimes and Punishments* (Trans. Henry Paolucci. Englewood: New Jersey/New York, 1963).
[41] For instance: David Horn, *The Criminal Body: Lombroso and the Anatomy of Deviance* (Routledge: New York, 2003); Cesare Lombrosso, Crime [Translated by Henry P. Horton] (Reprinted, Montclair-Patterson Smith Reprint: New Jersey, 1968); Cesare Lombroso, *Criminal man* [translated by Mary Gibson & Nicole Hahn Rafter] (Duke University Press: Durham, 2006); Enrico Ferri, *Criminal Sociology* (Reprint, BiblioLife: New York, 2009) ; Raffaele Garofalo, *Criminology* (1914) [translated by Robert Wyness Millar, Introduction by E. Ray Stevens] (Reprint, Kessinger Publishing:Whitefish Montana, 2008).
[42] Ezzat A. Fattah, *Criminology: Past, Present and Future: A Critical Overview* (Palgrave Macmillan: London, 1997) at 207-214; George B. Vold, *Theoretical Criminology* (Oxford University Press: Oxford, 1979). Vold distinguished between the two concepts by observing that the naturalistic theory can be explained within the world of physical and material factors; which factors guides human behavior. The spiritualistic theory on the other hand postulates that humans are controlled by external objects or spirits, thus affecting our behaviors.

philosopher Cesare Beccaria (1738 – 1794) as its forerunners; the school sought to correct what it perceived to be a barbaric system of law prevailing in Europe before 1789. It based its focus not on criminals as later did the positivists but instead on law-making and law-processes. Many scholars across Europe at the time shared a general sense of disillusionment with the various legal systems; seen as prejudiced, snobby, discriminatory, tyrannical and elitist. For instance, prior to 1789, most judges across Europe enjoyed uninhibited power and paid allegiance to no other institution but the "crown".[43]They melted out inconsistent punishments to offenders irrespective of the severity of the offence; a practice sometimes described as dependent on what the "judge ate for breakfast"[44] At the time, both accused and convicted persons were detained at the same institutions. Conceiving criminal behavior to be as a result of cruel and excessive punishments, one of the main convictions of the classical was to the effect that criminality would be contained if the criminal justice system underwent a thorough reformation by providing fair and equal treatment to all accused offenders.[45]

The classical doctrine sought to correct this by emphasizing that both laws and punishments must be just, equitable and non-discriminatory.[46] Given that laws are designed to coordinate human activities, it goes without saying that they must themselves first exhibit a human character. The history of the world from the perspective of Social Contract theorists[47] can be divided into two clear periods to wit: the period before and the period after the state. In the first period, there is no government or law (state of nature). In the second, there is a contract between the subjects in nature (that is, the government and the people). According to John Locke, the raison-d'être of establishing a government was to move men away from a state of nature, given that men in the state of nature were too often judges in their own cases.[48] A civil society was vital to guarantee peace and a common judge to settle disputes for everyone.[49] The Classical school upheld this view that there was an unwritten social contract between every people and its rulers. Thomas Hobbes contended that the sovereigns were the beneficiaries of the "contractual authorization", while John Locke added that the nature of the relationship between the sovereign and the people was one of trust.[50]By entering into a social contract, people conceded that a peaceful society would be more beneficiary to their self interests. Criminal behavior on the other hand would be more costly because of the specific sanctions. The constitution and institutions of government are in place to ensure that individuals conform to the dictates of reason and justice since "the passions of men will not conform to the dictates of reason and justice, without constraint".[51]

The premise of the classical school was to the effect that humans were essentially rational creatures whose reasoning faculty placed them far above all other animals. Thus, criminal behavior could only be best understood and tackled through the application of reason and intelligence. Criminal behavior can be contained by simply applying the tenets of human

[43] Mainstream Europe was essentially monarchical, and this reflected in the criminal justice system as well.
[44] An old Common Law parlance denoting the abuses of Lord Chancellors as guarantors of equity in England. See generally, Brian Z. Tamanaha, 'The Realism of Judges Past and Present' *56 Cleveland State Law Review* (2008) 77-91.
[45] Ezzat A. Fattah, *Criminology: Past, Present and Future: A Critical Overview* (Palgrave Macmillan: London, 1997) at 189-191.
[46] Fattah, *Criminology: Past, Present and Future* at 192.
[47] The proponents of this theory include Thomas Hobbes, John Locke, Jean Jacques Rousseau and John Rawls.
[48] Steven R. Schlesinger, 'Civil Disobedience: The Problem of Selective Obedience to Law' 3 *Hastings Constitutional Law Quarterly* (1975-1976) 947-960 at 950-951.
[49] Schlesinger, 'Civil Disobedience' at 951.
[50] David Boucher & Paul Kelly (Eds.), *The Social Contract From Hobbes To Rawls* (Routledge: New York/ London/ Toronto, 1994) at 75.
[51] Schlesinger, 'Civil Disobedience' at 951.

nature shared by all of us. By portraying humans as hedonistic,[52] the classical school sought to illustrate that man's rationality without doubt enables him to consider which courses of action are really for his self-interests.

While Beccaria focused much on the law and its effects on humans, his fellow proponent, Bentham labored on devising a universal concept of just law called utilitarianism-the greatest happiness for the greatest number of people. Bentham's utilitarianism is so closely related to the modern concept of democracy: "government of the people, by the people and for the people."[53] Beccaria contended that man in his normal state was free and rational, basing his actions on costs and benefits. He posited that criminal behavior just like any other human behavior is a rational choice freely made by anyone based on "pains" and "pleasures". It is the duty of the law to equitably match crimes with corresponding punishments. Both Beccaria and Bentham were convinced that punishment would deter criminality only if it was certain and swift, rather through long trials.

If society increased or reduced the costs or benefits, that individual would also act accordingly. The individual would for instance choose legitimate options over illegitimate alternatives where the benefits of compliance outpaced the costs of violation.

All things being equal, Beccaria contended, people would naturally follow their self-interests, if they were left on their own. Moreover, individuals would not engage in crimes unless they are convinced that the proceeds from the crime far outweigh the resulting punishment.[54] Beccaria was impelled to this position as a reaction to the system of law and justice that was prevalent in the 18th century across Europe. He came to believe that most criminal justice agencies and the laws in place encouraged abusive practices caused by the enjoyment of too much freedom in dealing with criminals.[55]As a remedy, he advocated for a routine control of governmental establishments, justice and equality before the law and most importantly, popular participation in the shaping of institutions.

Beccaria's objection of the status quo earned him an enviable recognition as one of the most distinguished philosophers of the Age of Enlightenment, and its intellectual development. He forcefully posited that it was crucial for punishment not to exceed the barest minimum required to guarantee public peace and order.[56]Accordingly, he saw capital punishment, secret trials and torture as immoral and unjustifiable, arguing that not only were they stupid and ineffective but savage as well.[57]

Bentham was moved by Beccaria's proposition to the extent that he made a slight linguistic adjustment to his costs and benefits concepts opting for more subtle-sounding adjectives namely, pleasures and pains. He also solicited for the implementation of Beccaria's ideas in England in 1780, which at the time had at least 300 different offenses warranting the death penalty.[58] Like Beccaria, Bentham believed that no one needed to be killed for a serious sin. Instead, the law should be reformed to prevent irrational behaviors. His Utilitarian theory as afore-noted is grounded on the idea that the aim of the individual and the legislator in the conduct of the society should be to achieve the greatest happiness for the

[52] The philosophical idea that people are driven by their own self-interests (pains and pleasures (or costs and benefits) in doing or not doing a thing).

[53] Abraham Lincoln, *The Gettysburg Address*, Michael McCurdy (Illustrator) (Sandpiper: New York, 1998) 1-36 at 2.

[54] Beccaria, *Crimes and Punishments* at 25, 71,93-96, 106.

[55] Beccaria, *Crimes and Punishments*, at 5-9.

[56] Beccaria, *Crimes and Punishments*, at 8.

[57] Ibid.

[58] John D. Bessler, Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement, 4 Northwestern Journal of Law and Social Policy (2009) 195-328 at 199, 205, 206, 248.

masses.[59]Individuals, he contended are naturally prone to the probabilities of present and future pains and pleasures. In other words, they weigh all odds and decide on whether or not to commit crimes. Consequently, punishment should be made to surpass the pleasures of gain from a criminal act.[60]

The Positivist Doctrine

As afore-stated, criminal behavior could only be properly dealt with if it was well understood.[61] But considering the diversity in opinion, it is fair to say that such an understanding can only rest in the eyes of the beholder. In fact, the classical theorists proposed one way of looking at criminal behavior, and the positivists suggested another. Developed around the 1820s, the positivist school quite contrary to the classical theorists focused wholly on the criminal rather than legal issues and crime prevention. The school was heavily inspired by Charles Darwin's evolution theory.[62]Darwin perceived humans as belonging to the same specie with other animals except that humans had a higher level of development.[63] The behavior of humans could be explained through biological and cultural evolution "rather than as self-determining beings who were free to do what they wanted."[64] In other words, the positivist did not conceive humans as having a free will of their own. Instead, their behaviors were determined by a correlation of various biological, sociological and psychological factors. This presupposes that one is not supposed to be criminally responsible; since according to this interpretation, criminality evolves out of one's biological or psychological atavism. Erdson H. Sutherland, one of the fervent followers of this doctrine has advanced the following biological explanation:

> One of the theories presented as an explanation of the the age ratios in crime is that they are due directly to biological traits such as physical strength and vigour: crimes are committed frequently by persons who are strong and active and infrequently by persons who are weak and passive. Another biological theory is that crimes are concentrated in three periods, ages three to six, fourteen to sixteen, and forty-two to forty-five, and that these periods are products of libidinal tides due to changes in the instincts of sex and aggression and to changes in the ego strength. A third biological theory is that inheritance is the direct cause.[65]

Instead, attention has to be placed on those factors that are believed to be at the root causes of criminality. The school also rejected the concept of *Nulla Poena Sine Lege*[66] in favour of a proposition that punishment must fit the individual criminal rather than the crime.[67]The treatment of criminals must go along scientific methods. The scientific study of criminal behavior, the school upholds would uncover the root causes of such behavior. As to why

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[59] Nathan D. Grundstein, 'Bentham's Introduction to the Principles of Morals and Legislation' 2 *Journal of Public Law* (1953) 344-369 at 352; Jock W. Gunn, 'Jeremy Bentham and the Public Interest' *1 Canadian Journal of Political Science / Revue canadienne de science politique* (1968) 398-413 at 405.

[60] Beccaria, *Crimes and Punishments*, at 3.

[61] Lombroso, *Criminal man* at 9, 11, 408; David T Wasserman & Robert Samuel Wachbroit, *Genetics and criminal behavior* (Cambridge University Press: Cambridge/ New York, 2001) at 141.

[62] See for instance, Stephen Jay Gould , 'Darwinism and the expansion of evolutionary theory' 216 *Science Magazine* (1982) 380-387.

[63] See generally Gould , 'Darwinism and the expansion of evolutionary theory'; For more detailed historical discussion on the positivist school of criminology, see Fattah, *Criminology: Past, Present and Future* at 207-214.

[64] George B. Vold, *Theoretical Criminology* (Oxford University Press: Oxford, 1979) at 36.

[65] Erdson. H. Sunderland, *Principles of Criminology*. (Lippinincott Co.: Philadelphia, 1939) at 90-91.

[66] No punishment without Law.

[67] John Hagan, 'Ceremonial Justice: Crime and Punishment in a Loosely Coupled System', 58 *Social Forces* (1979-1980) 506-527 at 506.

people commit crimes, the school led by its founding father, Italian born Cesare Lombroso (1835-1909) took an unqualified stand that some people are by nature born criminals.[68] Criminality is thus hereditary.

To Lombroso, most criminals were biologically defective hence inferior and unexpected to be law abiding.[69] Having established that the "criminal man" was a subhuman type, a modern savage with physical features similar to those of lower primates such as apes, Lombroso subsequently stated that the behavior of such a biological atavist would inevitably be contrary to the rules and standards expected in a civilized society.[70] Criminal types, he continued, could be identified by the shape of their skulls which clearly confirmed them as atavistic or savage. In his book, *Criminal Man*[71], Lombroso elaborated his rather controversial thesis at length based on his personal scientific findings and experiments. While working at a mental facility and various prisons as a psychiatrist, he purportedly observed some similarities in the physiques of the various prisoners. His sample included inmates, patients and delinquent soldiers. Upon observing and analyzing their skulls, he came to the conclusion that some of them had inherited their criminal tendencies. He also observed that there were three broad categories of criminals namely: the born criminal, the insane criminal and the criminaloids.[72]

The methods of Lombroso were as weird as his findings. Performing a post mortem on the skull of a notorious criminal called Villella; Lombroso claimed to have diagnosed the roots of criminality. It is as a result of a biological abnormality inborn in some people. Upon opening Villella's skull, he claimed to have noticed a depression in the cerebellum which he determined was an abnormal atavism.[73] The middle lobe of the cerebellum was enlarged. The significance of this atavism, he asserted was demonstrative of the tendency by some human beings to return to their distant type, which is a throwback to a more primitive human being.[74]

Lombroso clinical research method was however far from being an isolated incident. A fellow positivist, Baron Raffaele Garofalo (1851-1934) in his book *Criminology*, distinguished between "natural crimes"(to which he attached great importance) and police crimes (a residual category of lesser importance), before settling down on a newfound concept called "danger", whereupon he emphasized that society needed to be protected from dangerous elements.[75] Natural crimes are those "which violate two basic altruistic sentiments, pity (revulsion against the voluntary infliction of suffering on others) and property (respect for the property rights of others). Police crimes on the other hand are "behaviours which do not offend these altruistic sentiments but are nonetheless called criminal by law."[76] The notion of dangerousness itself was built around mental health legislation and criminal justice administration. It essentially meant people who are considered to be of moral high risks to themselves or the society at large. So, it clearly targeted offenders and not the law.[77] Natural crimes, Morrison has pointed out are particularly important for at least two reasons. Not only are they more serious but also provide a more unifying principle which connects criminal law

[68] Lombroso, *Criminal man* at 4, 10, 29.
[69] Nicole Hahn Rafter, *The criminal brain : understanding biological theories of crime* (New York University Press: New York, 2008) at 9, 70, 156.
[70] Lombroso, *Criminal man* at 11, 48, 91, 173, 305, 308.
[71] [Original Italian= *L'Uomo Delinquente*]. Some translations have it as "*Delinquent Man"*.
[72] Lombroso, *Criminal man* at 12, 39.
[73] Lombroso, *Criminal man* at 22, 48, 151, 376.
[74] Lombroso, *Criminal man* at 22, 48, 151, 376.
[75] Raffaele Garofalo, *Criminology* [1885, English translation 1914] (Little Brown and Company: Boston, 1914) at 294-303; Wayne Morrison, *Theoretical Criminology: From Modernity to Post-modernity* (Cavendish Publishing Limited: London/ Sydney, 1995) at 126; Jack P. Gibbs, 'Conceptions of Deviant Behavior: The Old and the New' 9 *The Pacific Sociological Review* (1966) 9-14.
[76] Wayne Morrison, *Theoretical Criminology* at 126.
[77] Jean Floud, Dangerousness and Criminal Justice, *22 The British Journal of Criminology* (1982) 213-228.

with natural social processes.[78] Garofalo asserted that in order to understand the society and social phenomenon, we must seek application in natural sciences. He demonstrated for instance that suicides and self injury were directly connected to peoples' lack of connection to their social groupings.[79]

Appraisal

The Classical and the Positivist schools of criminology each present us with an extreme position. The irony in it all is that both concepts vibrantly reflect that intellectual revolution in criminal justice thinking since the age of enlightenment. While the classical doctrine is heavily based on hedonism, the positivist orientation suggests an unconventional scientific (clinical) examination of criminals. Whichever way we appreciate either doctrine, there can be no denying the fact that both positions are tainted with noticeable loopholes.

The classical school is obviously so inclined to law based on its idea of self interests. In real life, things are not as simplistic as the school tends to have it. For instance, it is not a very easy task for humans to adjust pains and pleasures in order to arrive at comfortable doses necessarily to influence their doing or not doing a thing. The supposition that everybody is literally equal before the law is either flawed, misguided or both, because such an assumption not only disregards individual differences but their circumstantial realities as well.

There is ambiguity as well in the positivists' linking of biological traits to the criminality. Lombrosso's exclusive utilization of criminals in his clinical examination leaves a cloud of doubt whether he would have reached a different scientific outcome had he included non-criminals in his experiment.

Despite the above discrepancies both doctrines have nonetheless stirred remarkable changes in traditional thinking about society and human nature. They have both signaled the necessity for society to set legitimate goals for its constituents. With one firm on the proposition that learned (classical) and another that it is rather earned (positivists), it remains even in present times to connect the two doctrines. There can be a gist of truth in either hypothesis, except that in actual fact, both assertions are no more than gross overstatements.

Both doctrines fail to answer one very important question. Which is leaned or earned more: is it delinquent or non-delinquent behavior? Does earning prevent one from learning criminal behavior and vice-versa? If indeed all normal humans are created equal, it goes without saying that they all possess similar potentials to adjust (whether by earning or learning) to law and order. The difference may therefore rather lie in other societal factors such as environmental, cultural, economic, political, etc. It is common sense that a poor upbringing and exposure to crime is a breeding ground par excellence. Given the complexities of humans and society, it is fair to say that the categories of crime can never be closed.

In-between the discrepancies between the two doctrines, one particular group of critics, notably adherents of anomie[80] (normlessness) have observed that beyond theory, both the classical and the positivists' postulations are inadequate in explaining the realities of social order.

While it is necessary for society to set legitimate goals (social coexistence, government, rule of law,…), such goals are only important if they are matched with legitimate means (education, finance, justice, politics, handwork), to facilitate their realization. However, societal goals always come with barriers, thus propelling the way for reactive behavior by

[78] Wayne Morrison, *Theoretical Criminology* at 126.
[79] Wayne Morrison, *Theoretical Criminology* at 59, 60, 87, 129.
[80] The word was coined by Emile Dukeim in 1893 to epitomize the breakdown of social norms and values.

those people who do not see a leeway of attaining their self interests. Proponents of anomie have identified at least four ways that an individual faced between means and barriers can react, to wit: he can either learn to live with his handicap situation or simply retreat, or innovate by seeking ways to break the law (that is, finds deviant outlets), he can ritualize (for example, trusting his demise to prayers), or at the very worse, he can rebel.

Conclusion

Administering Sanction: General Public and public Official

The debate so far has been centered on theoretical precepts explaining the correlation between behavior and law as pillars of human sociology. I have also established that law is a coercive normative order. I now intend to conclude by moving the discussion further by deconstructing why and how agents of the legal system (public officials) apply the measures of coercion (sanctions) decreed by the legal order. I have already pointed out that every social order is tailored to function as specific response to the pragmatism of a given community. Thus, the individual enforcing the punishment in effect acts as an agent of the social community.[81] The legal sanction is interpreted as "an act of the legal community; the transcendental sanction-the sickness or death of the sinner-is an act of the superhuman authority of the deceased ancestors, of God."[82]For the purpose of specificity, discussion in this section would however exclude non-legal social orders (religion and morality), since law is the primary normative order that stipulates sanctions, and moreover because state officials are primarily mandated to enforce legal instruments and not moral or religious ordinances.

An examination of the role of the official is important because a legal instrument in itself is nothing but a piece of paper used as a medium for expressing law. A typical dynamic of the law is that positive law not only has to be created. It has to be applied.[83]The public official's presence not only facilitates the enforcement process but transforms the purpose of the law into reality.

As noted earlier, while in the case of murder, the law strictly forbids the killing of another human being, punishment is incumbent on the judge who by the same text is authorized to levy an imprisonment penalty or a death sentence in the worse scenario on anyone found guilty of that offense. The text can thus be read from two angles thus: first, the prohibition clause that 'one ought not kill another', then the consequential 'if-clause' of the rule, which clearly is an invitation to the public official (judge) to apply the analogous sanction whenever there is murder.[84]The violation of the primary legal obligation triggers criminal proceedings in view of applying the consequential sanctions.

The coercive character of the law signifies law's function in controlling human behavior specifically by prescribing punishment. This seems to have been the starting point for Kelsen. To him, every legal system is made up of laws (coercive norms) which boils down to instructions to state officials to apply force (sanctions).[85]Every law in its raw state, Kelsen noted, obligates the society to observe a particular behavior under certain circumstances.[86]But left to themselves, individual members of the society would certainly not robotically adhere

[81] Kelsen, 'The Law As A Specific Social Technique' at 80.
[82] Kelsen, 'The Law As A Specific Social Technique' at 80.
[83] Kelsen, 'The Law As A Specific Social Technique' at 87.
[84] Herbert L.A. Hart , *The concept of law* , 2nd Ed. (Clarendon Press: Oxford, 1961) at 35-36.
[85] Kelsen, *General Theory of Law and State* at 29, 60, 63.
[86] Kelsen, *General Theory of Law and State* at 3.

to legal caveats. It is only through the authoritative intervention of public officials who apply sanctions for all violations that law gets its intended meaning. Indeed, Kelsen's contention is that not only do all legal norms prescribe sanctions but every legal norm by default mandates the public official to apply the sanction.[87]

Kelsen's conception of the legal system and the public official has been criticized by some scholars for being too rigid. His main critic, Herbert Hart has pointed out that Kelsen's theory is a disservice to the social function of law, for as he puts it, law is primarily addressed to the society at large and not just the public official.[88] Hart's main fear is that too much focus on the public official would blur whose behavior constitutes the main target of the law, which to Hart, is that of the general public.[89] Some other writers are of the opinion that there are actually two separate norms for the general public and the public officials.

Jeremy Bentham for instance has observed that "the law which converts an act into an offense, and the law which directs the punishment of that offense, are, properly speaking, neither the same law nor parts of the same law."[90] Thus why Kelsen's theory sees the same norm as directed to regulate two different behaviors (general public and public official), Hart and Bentham provide that a legal norm can address only one person (behavior) at a time.[91]Hart has equally rejected Kelsen's insistence on sanctions to violations, arguing in return that "law without sanctions is perfectly conceivable."[92]Such is the case with non-binding legislations (soft laws) and prostitution.[93]

All the aforementioned hypothesis, irrespective of whether they conceive a legal norm as applying to one person (behavior) at a time or two separate behaviors, apparently presuppose the existence of legal personality for all members of the society. My observation is that it is only by stretch, notably the laying of too much emphasis on the public official[94]that Kelsen, Hart and Bentham formulated their various theses. The problem is that they all overlook the fact that legal personality in practical sense is not acquired by default. Instead, it is the legal system that arbitrarily decides who to give or deny legal personality. For instance, most slaves were generally accepted as belonging to the human race, but for the most part, they were regarded as lacking legal personality. There has also been an ongoing debate on the status of Guantanamo detainees. The US government has been deliberately vague on their legal status. Until the US government comes out clean, it can be said that these detainees in effect lack legal personality.

[87] Kelsen, *General Theory of Law and State* at 38.
[88] Hart , *The concept of law* at 41.
[89] Hart , *The concept of law* at 38-40.
[90] Jeremy Bentham, 'A General view of a Compete Code of Laws' 3 *The Works of Jeremy Bentham (William Tait: Edinburgh, 1843)* 155-210 at 160.
[91] Kelsen, *General Theory of Law and State* at 42-43; Hart , *The concept of law* at 40; Bentham, 'A General view' at 162.
[92] Hart , *The concept of law* at 38.
[93] The offense of prostitution is generally overlooked in most jurisdictions the world-over.
[94] For instance, Kelsen has provided that it is impossible to separate a person as an entity (public official) from his rights and obligations as a natural person. (Kelsen, *General Theory of Law and State* at 172).