

# Pure-Classical and Neo-Classical Schools of Criminology: Applicability Into the Present Context of Criminal Law in Sri Lanka

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There are several theories on the study in criminology. Among those theories, the Pure-Classical Theory of Criminology and the Neo-Classical Theory of Criminology are two major schools in criminological studies. These two schools of criminology try to explain the crime causation and the methods adopted to control them in their rationalization. This study focuses to discuss the historical evolution of the pure-classical and neo-classical approaches and their applicability on criminology into the modern criminal justice system with a special review on selected general defences of substantial criminal law in Sri Lanka.

*Keywords:* Classical School of Criminology, criminal justice, Neo-Classical School of Criminology

## Introduction

Criminology focuses on studying why people commit crimes and how they behave in such situations. By understanding why a person commits a crime, one can develop ways to control crime or rehabilitate the criminal. To study this scenario, there are many theories in criminology.

Theories are intellectual structures designed to help explain things within given domains of interest. According to Charles R. Tittle (2016), there are seven approaches in theories. These seven approaches include: (1) theoretical science; (2) problem solving; (3) analysis; (4) descriptive approaches; (5) critical work; (6) nihilistic thinking; and (7) amelioration. Theories, however, are intellectual accounts with no necessary connection to the real world they purport to explain.

The Pure-Classical School of Criminology was developed in the 17th century, where classical thinking emerged in response to the cruel forms of punishment that dominated at the time. Neo-classical criminology can be defined, simply, as a school of thought that assumes criminal behaviour as situationally dynamic and individually-determined. Neo-Classical Theory assumes that aggravating and mitigating circumstances should be taken into account for purpose of sentencing an offender (Tibbetts & Hemmens, 2014).

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## Pure-Classical Theory of Criminology

### History and Pioneer Theorists

The Classical Theory of Criminology was developed as a result of critique on Demonological Theory of Criminology. Demonology is one of the earliest theories in criminology. In ancient times, people believed that evil spirits or demons entered the human soul and made people commit sins. This was the earliest explanation given regarding crime and criminal behaviour. In the 17th century, criminologists and jurists were started to argue about the rationality of this idealistic Demonological Theory.

Classical criminology emerged at a time when the naturalistic approach of the social contract theorists was challenging the previously dominant spiritualist approach to explain crime and criminal behaviour. Thomas Hobbes (1588-1678) emphasized that it is the exercise of human “free will” that is the fundamental basis of a legitimate social contract (Burke, 2009). According to the Hobbes, compliance can be enforced by the fear of punishment, but only if entry into the contract and the promise to comply with it has been freely willed, given and subsequently broken (Burke, 2009). Hobbes claimed that in a “state of nature” the people would be “the barbarians” and life would tend to be “nasty, brutish and short”. Thus, he proposed that people should freely subject themselves to the power of an absolute ruler or institution which, as the result of a political-social contract would be legitimately empowered to enforce the contracts that subjects make between themselves (Hobbes, 1651). John Locke (1632-1704) had a different conception of “the state of nature” and argued that there is a natural law that constitutes and protects essential rights of life, liberty and property. Locke disagreed with Hobbes’ view that people should surrender themselves to the absolute rule of a ruler and argued that people gain their natural rights to life and liberty from the Christian God and hold them effectively in trust (Burke, 2009). Jean-Jacques Rousseau (1712-1778) emphasized that human beings had evolved from an animal-like state of nature. Rousseau developed the concept of the “general will”, observing that in addition to individual self-interest, citizens have a collective interest in the well-being of the community. He traced the foundations of the law and political society to this idea of the “general will” a citizen body, acting as a whole, and freely choosing to adopt laws that will apply equally to all citizens (Rousseau, 1762; Burke, 2009).

Cesare Beccaria (1738-1794), an Italian philosopher, was one of the key theorists of the Classical Theory of Criminology. Beccaria considered that criminals owe a “debt” to society and proposed that punishments should be fixed strictly in proportion to the seriousness of the crime (Beccaria, 1963). He was a very intimate supporter of “Social Contract” Theory with its emphasis on the notion that individuals can only be legitimately bound to society if they have given their consent to the societal arrangements. Beccaria considered torture as a useless method of the criminal investigation, as well as being barbaric. Moreover, the death penalty (capital punishment) was considered to be unnecessary with a life sentence of hard labour preferable, both as a punishment and deterrent (Burke, 2009). Beccaria’s theory of criminal behaviour is based on the concepts of free will and hedonism. He argued that punishments and all offences must be written into the law also not be open to the interpretation, or the discretion, of judges. The seriousness of the crime should be judged not by the intentions of the offender but by the harm that it does to society. Beccaria suggested that the punishment must be administered in proportion to the crime that has been committed and should be set on a scale. According to Beccaria, the law

must apply equally to all citizens. His arguments have had a profound effect on the establishment of the due process model of criminal justice.

Jeremy Bentham (1748-1832), the famous English philosopher who had developed the utilitarianism, also contributed to the development of the Classical Theory of Criminology. Bentham's ideas are very similar to the Beccaria's and his most famous principle, "the greatest happiness for the greatest number" is the fundamental axiom of all utilitarian philosophy (Burke, 2009, p. 29). Bentham argued that people are naturally rational creatures who will seek pleasure while trying to avoid pain. Therefore, punishment must outweigh any pleasure derived from criminal behaviour, but the law must not be as harsh and severe as to reduce the greatest happiness. He said that law should not be used to regulate morality but only to control acts harmful to society which reduce the happiness of the majority. Bentham agreed with Beccaria's argument of capital punishment. But Bentham argued that torture might be "necessary" and thus have utility (Burke, 2009). Among all philosophers and the theorists who had contributed for the development of the Classical School of Criminology, Beccaria and Bentham's arguments are more prominent.

### **Key Principles of Classical School of Criminology**

The Classical School has had a major and enduring influence on the contemporary criminal justice process epitomized by notions of "due process" and "just deserts". The Classical Theory of Criminology has built-up on a few main conceptual pillars.

The Classical School assumes that people have free will and that they choose to commit crimes. The free will in here means the sense, knowledge, or intention. The Classical Theory on Criminology suggests that individuals have the will and rationality to act according to their desires and individuals calculate the rationality of the crime based on the benefits of the crime versus the consequences of the crime. Therefore, classical criminology uses the idea of free will to explain that offenders choose to engage in crime and that the best way to control crime is to deter offenders and make it uncomfortable or unprofitable for them to offend.<sup>1</sup>

Classical criminologists argued that every person possesses rationality. Individuals have rational thought and decide to commit a crime based on the perceived risk of being punished. Social Control Theory assumes that humans are rational beings who simply try to maximize their pleasure and minimize their pain (Piquero, 2016). Individuals always make their decisions, based on the benefits versus the consequences by using rational knowledge.

Human beings always seek extreme pleasure instead of pain. This is called hedonism. The Rational Choice Theory of Criminology says that people make logical choices about under what circumstances to commit a crime. An important element of Rational Choice Theory is the idea that people will weigh the possible pleasure or benefit from committing the crime against the possible pain from punishment, and act accordingly. This is known as hedonistic calculus.<sup>2</sup>

The severity of the punishment should be determined by the severity of the crime. Classical theorists believe that punishment must be swift and appropriate to deter others and reduce crime. The severity of the punishment must be proportional to the crime itself (Roufa, 2011). Researchers suggest that Classical School has changed the

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<sup>1</sup> The classical school of criminological (Lawteacher.net, May 2020), accessed 6 May 2020.

<sup>2</sup> Dan Weijers, Hedonism, Victoria University of Wellington, New Zealand

scope and range of punishment. Before, criminal justice systems implemented punishment in the form of pain. However, as time progressed, the criminal justice systems have moved away from corporal punishments.

### **The limitations of Classical Theory of Criminology**

The classical theorists had deliberately and completely ignored differences between individuals (Burke, 2009). This is the most significant criticism on the Classical Theory of Criminology. Every perpetrator does not have the same mentality. According to Classical Theory, offenders and recidivists were treated the same way and solely based on the particular act that had been committed. Also, children and juvenile, the feeble-minded and the insane were all treated as if they were fully rational and competent.

Classical criminologists ignore the acceptance of the different mentalities of a crime. Based on the theory of rationality, they skip the recklessness, negligence, unsound mind, and different status of a guilty mind. According to the Classical Theory of Criminology, the rational intention would be the sole mental element of a crime. Also, Classical Theory does not consider a variety of criminal liability.

Under the classical perspective, judges should only impose punishment established by the law to preserve consistency and the certainty of punishment and the punishments should be decided by the legislature, not by the courts. Accordingly, the judiciary interpretations are on accepted by the classical theorists. The application of the Classical Theory prevents judges' discretionary power and confines judicial activism (Tibbetts & Hemmens, 2014).

According to the Classical Theory of Criminology, the severity of the punishment should be determined by the severity of the crime. But the same crime or offence could be done by different offenders who have different mentalities for different reasons. However, classical theorists avoid the mitigatory circumstances of punishment.

An important element of the Classical Theory of Criminology is the doctrine that people will weigh the possible pleasure from committing the crime versus the possible pain from punishment. Pleasure and pain can only be determined on a subjective basis. There is no general measurement to define the rationale spectrum of pleasure and pain.

These limitations and criticisms of the Pure-Classical Theory contributed to the emergence of the Neo-Classical Theory of Criminology.

### **Neo-Classical Theory of Criminology**

The main significant difference between the Neo-Classical School and Pure-Classical School is that the neo-classical takes into account contextual circumstances of the individual or situation that allow for increases or decreases the severity of punishment (Tibbetts & Hemmens, 2014). The Neo-Classical Theory admits sociological, psychological, and other mitigating circumstances as modifying conditions to classical doctrine (Tibbetts & Hemmens, 2014). This theory views the crime as influenced by criminal opportunities to commit crimes.

The Neo-Classical School of Criminology originally developed in the 18th century. Gabriel Tarde (1843-1904), René Garraud (1849-1930), and Henri Joly (1839-1925) modified the rigorous doctrines of Pure-Classical Theory by revising the doctrine of free will (Burke, 2009; Tibbetts & Hemmens, 2014). In this modified form of the rational actor model, ordinary sane adults were still considered fully responsible for their actions and all equally capable of either criminal or non-criminal behaviour. It was nevertheless now recognized

that children and, in some circumstances, the elderly were less capable of exercising free choice and they were less responsible for their actions. Moreover, the insane and feeble-minded persons might be even less responsible (Burke, 2009).

The Neo-Classical School approached the study of criminology by introducing more scientific methods. The neo-classical criminologists believed that certain external factors or mental disorders deprived a person's free will. The main argument of the neo-classical theorists' rests on the basis that while those who have control over their free will should be held responsible for their willed acts or omissions, and those individuals who have not such ability due to some external or internal factors should not be treated in the same manner.

The Neo-Classical School developed the argument that "crime is a result of many conditions that have ultimately influence on the perpetrators to commit it".<sup>3</sup> Therefore, for the first time of academic history in criminology, the neo-classical theorists put the foundation to the critical and scientific study on crime and criminal responsibility.

### **Key Principles of Neo-Classical School of Criminology**

Theory of Rational Choice is one of a major theory developed in Neo-Criminology School. The argument by rational choice theorists is not that individuals are purely rational in their decision-making but rather that they consider the costs and benefits (Tibbetts & Hemmens, 2014). Rational choice theorists admit that such behaviour is only partly rational but that most offenders know quite well about their act or omission. Many external factors may constrain rational choices, such as social factors, political factors, economic factors, and cultural factors. Neo-classical theorists argue for a crime specific approach to crime. According to them, the offender's characteristics are combining with offence type in shaping offender choices (Tibbetts & Hemmens, 2014). The Neo-classicists retained the central notion of free will as the basis of the rational choice, but with the modification and certain innovative circumstances to the exercise of free will.

The Neo-Classical School of Criminology suggests the concept of "just deserts" as a deterrence methodology. The just deserts concept assumes that individuals must pay for their wrongdoing and that they deserve it (Tibbetts & Hemmens, 2014). "Just deserts" philosophy is based on the notion of justice must be both done and seen to be done. This approach is closely linked with the traditional Classical School notion of "due process". Under the Neo-Classical Theory, punishment should be proportional not only to the severity of the crime but also to the psychological and physical condition of the offender. Neo-classicist for the first time recognized the need for variations in sentencing by judges depending on sex, age, mental conditions, of the offender. They asserted that certain categories of offenders, such as minors, idiots, insane, or incompetent had to be treated leniently in matters of punishment irrespective of similarity of their criminal acts because these persons were incapable of appreciating the difference between right and wrong (Thilakarathna, 2019). According to the *M'Naghten Rule* which is applicable in the English criminal law, a defendant is not guilty because of insanity if, at the time of the alleged criminal act, the defendant was so deranged that he did not know the nature or quality of his actions. This rule is mainly based on the light of the Neo-Classical Theory. The Neo-Classical School also endorses the idea of the social contract, due process rights, and rational being who are deterred by the certainty, swiftness and severity of punishment.

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<sup>3</sup> Neo-Classical Crime Theory—Theoretical criminology (crime-study.blogspot.com), accessed 10 May 2020.

## The Applications of the Pure-Classical and Neo-Classical Theories in the Sri Lankan Criminal Justice System

The basis of the Sri Lankan criminal justice system has mainly based on the English common law tradition. Sri Lanka has an “adversarial” system of justice.<sup>4</sup> Therefore, the influences of the Classical School had on the English common law would have been embedded in the Sri Lankan context as well.

The main substantial criminal law in Sri Lanka is the Penal Code of No. 02 of 1883 which was first enacted by British colonial rulers. The penal code embodies categories of offences, punishments, and defences. According to the Sri Lankan Criminal Law, the *Mens Rea* (the mental element of the crime) is an essential element to prove act or omission as a crime. However, there are some exceptional concepts where *Mens Rea* is not needed as an essential element to prove one act or omission as a crime. In the case of applying strict liability or vicarious liability, the prosecution does not need to prove the *Mens Rea* to impose liability on the person who has liable for the particular crime (Peiris, 1972). The Classical Theory only looks at the *Actus Reus* (the physical element of the crime) without acknowledging the *Mens Rea*. Classical School advocates that once an offence is committed, the offender is to face the consequences of his dues. However, in many instances envisaged in the Penal Code when the requisite *Mens Rea* is not present, it is not possible to convict an accused person (Thilakarathna, 2019).

According to Section 75 of the penal code which was amended by the Penal Code (Amendment) Act, No. 10 of 2018, nothing is an offence done by a child under twelve years old.<sup>5</sup> Also, under Section 76 of the Penal Code, nothing is an offence which is done by a child above 12 years of age and under 14 who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.<sup>6</sup> According to Section 77, nothing is an offence done by a person of unsound mind.<sup>7</sup> And, Section 78 states that nothing is an offence done by a person incapable of judgement because of intoxicated without his knowledge or against his will.<sup>8</sup> These are few examples for the application of the theory of Neo-Classical School which consider the contextual and mental circumstances of the individual.

However, according to Sections 79 of the Penal Code, in cases where an act was done is not an offence unless done with particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated unless the thing which intoxicated him was administered to him without his knowledge or against his will.<sup>9</sup> This is a primary example for the application of the Free Will Theory advanced by the Classical School where a person who is acting under his free will would be held accountable for his acts or omissions.

According to the Neo-Classical Theory which advanced the view that extenuating circumstances such as age, sex, mental condition, etc. should be considered in deciding on the culpability. The Evidence Ordinance provides some provisions which distinguished between the offenders. Section 114 of the Evidence Ordinance stipulates that there is a non-rebuttable presumption that a boy below the age of 12 cannot commit rape.<sup>10</sup>

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<sup>4</sup> *Kaluhath Ananda Sarath de Abrew v Chanaka Iddamalgodu* (SC FR 424: 2015), p. 10.

<sup>5</sup> Sec. 75 of the Penal code of Sri Lanka.

<sup>6</sup> Sec. 76, *ibid*.

<sup>7</sup> Sec. 77, *ibid*.

<sup>8</sup> Sec. 78, *ibid*.

<sup>9</sup> Sec. 79, *ibid*.

<sup>10</sup> Sec. 114 of the Evidence ordinance of Sri Lanka.

Automatism also considered as a state of mind under the penal law in Sri Lanka. In the case of *Gamini v. Attorney General*, the Court of Appeal stated that “the plea of automatism ... is, in effect, a plea that the act in question was involuntary”.<sup>11</sup>

The Classical School advocates that the severity of the punishment should be similar to the severity of the offence. The Penal Code and the Criminal Procedure Code of Sri Lanka adhere to this noting in recognizing a relationship between the gravity of the crime and the amount of the punishment.

Article 13(5)<sup>12</sup> of the Constitution of Sri Lanka provides that every person shall be presumed innocent until proven guilty. Therefore, any suspect or an accused would define as an innocence person until his or her guiltiness is proven before the court. However, the Free Will Theory advanced by the Classical School can be seen embodied in the Penal Code of the country which makes it a rule that unless the contrary is proven, a man is supposed to be in control of his faculties and therefore is action rationally knowing the consequences of the act or omission which he can be made accountable for. In the case *Nandasena v. A.G.*, the Court held that “every man is presumed to be responsible for his acts till the contrary is clearly shown”.<sup>13</sup>

### Conclusion

The classical approach to criminology emerged as a result of the critique of the irrationality of previous theories. The influences of the pure-classical and neo-classical approaches of criminology are explicit in the legal doctrines that emphasize the psychology of crime, sentencing principles and the structures of punishments.

Philosophically, the ideas of the Pure-Classical School are reflected in the contemporary “just deserts” approach to sentencing. The just deserts approach is based on four basic principles. First, only a person who found in guilty by a court of law can be punished for a crime. Second, anyone found to be guilty of a crime must be punished. Third, punishment must not be more than a degree commensurate to or proportional to the gravity of the offence and culpability of the offender. Fourth, punishment must not be less than the gravity of the offence and culpability of the perpetrator (Burke, 2009). These principles have clear foundations in the theoretical tradition established by Beccaria and Bentham.

Considering the psychological condition of the perpetrator is one of the key principles of the Neo-Classical Theory. This approach has widely developed the notion of the “*Mens Rea*” (mental element of a crime) in modern substantial criminal law. The classic approach on criminology has also contributed to the development of prison structures and detention systems. Famous prison model, called Panopticon suggested by Bentham,<sup>14</sup> was used as an exemplary prison model 19th and 20th centuries. This concept helped to the development of the modern prison conditions.

The pure- and neo- classical theories formed a foundation to the Packer’s due process model and crime control model in criminal justice. Herbert L. Packer (1968) observed that the whole contemporary criminal justice system is founded on a balance between the competing value systems of *due process* and *crime control*.

<sup>11</sup> *Gamini v. Attorney General* [1999] 1 Sri LR 321.

<sup>12</sup> Article 13(5) of the Constitution of Sri Lanka: *Every person shall be presumed innocent until he is proved guilty.*

<sup>13</sup> *Nandasena v. A. G* [2007] 1 Sri LR 237.

<sup>14</sup> In 1791 Bentham published his design for a new model prison called a Panopticon.

Therefore, these two criminological schools laid the foundations for the later analytical theories of crime causation, such as the positivist school of criminology.

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