

# THE CONFLICT OF POSITIVISM AND NATURAL LAW VIS-À-VIS THE NUREMBERG TRIAL

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## Abstract:

At Nuremberg, after the end of the second world war, the people within the government were tried for their accountability for their ‘crimes against humanity’ in the second world war. This post war period laid down the context for the Universal Declaration of Human Rights after the atrocities committed during the War. These historical trials were also important as they laid down the historical contexts for the future war trials in a fair manner.

As per the school of Legal Positivism, law is what it is and not what it ought to be. According to John Austin, Law is the command of the society, and as per this definition of Law, the nazi-laws should be laws, as they were legitimate and sanctioned by the sovereign (the Third Reich). But, will they be considered as laws, despite their inherent immorality. This question was discussed in a detailed manner in the Hart-fuller debate.

This article attempts to explore the jurisprudential legal order existent at the time of Nuremberg Trial, Nazi regime’s reliance on positivism and its fallouts and re-emergence of natural law theory post Nuremberg.

**Keywords:** Nuremberg Trial, Positivism, Hart Fuller Debate, Law and Morality, Natural Law.

## INTRODUCTION

*“The distinction between morals and law can be formulated very simply. Morality furnishes the criterion for the proper evaluation of our interests; law marks out of limits within which they ought to be confined.”*

- Korkunov

The end of World War II brought to the fore the need for the development of a new political order in the World, to be governed by International Law. The idea of the formation of the United Nations and the concept of Human Rights transcending all municipal laws reflected this sentiment of the new World Leaders.<sup>1</sup> Therefore a person living in a foreign state was entitled to have universal, objective human rights, regardless of the fact that the positive law of that foreign state protects such rights or not.<sup>2</sup> At least that was what the United States perceived Human Rights to mean, hence giving Human Rights a meaning akin to the principles of Natural law.

In June 1945, after Germany’s surrender, delegations from the four Allied powers—the United States, Great Britain, France, and the Soviet Union—met in London to write a charter. It established an international tribunal, or court, that would be responsible for conducting trials of Germany’s leaders. Article 6 of the charter described the jurisdiction, or authority, of the tribunal:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

<sup>1</sup> Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J., 429-430 (1996).

<sup>2</sup> Ibid.

➤ **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

➤ **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to - murder, ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

➤ **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes were responsible for all acts performed by any persons in execution of such plan.

Natural Law and Legal Positivism have been the most influential theories of Jurisprudence that shaped the development of Western legal tradition. Natural law principles refer to a higher moral law, whose precepts are knowable. Man-made law shall therefore adhere to those principles of morality in order to be just. Positivist principles as articulated by John Austin, basically holds that law and morality are fundamentally distinct and are separable from each other. Thus, according to them law is valid simply because it is the command of the Sovereign and it does not need to be put up on a moral pedestal to determine its validity.<sup>3</sup> It is preferable that law coincide with morality, but morality has nothing to do with providing validity to law.<sup>4</sup>

Hence these theories are at logger heads to each other and the prominence of one theory dismisses the existence of the other. The 20<sup>th</sup> century gave rise to new debates about law and morality especially in the backdrop of the two world wars that changed the dynamics of the world altogether. Lon Fuller, inspired by German Philosopher Gustav Radbruch, questioned Herbert Hart's theory and argued that law cannot be separated from morality.

Hart was of the view that it was not necessary that law and morality have a connection, but only contingent upon certain events. Thus, it was law that gave effect to morality, and not the other way round. We know something to be law not because it is moral in nature, but because it has been recognised as law according to established rules of recognition. Hence law could be immoral. Thus, it was Hart's view that instead of denying such laws societal recognition, we should try to follow them and, in the process, amend/correct it to bring it in conformity with our requirements of morality by passing of other laws with retrospective effect.<sup>5</sup>

Hence a person held for atrocities in war taking the plea that he was following lawful orders, and hence his actions are legitimate and lawful, would be a valid argument, and he would be declared innocent, **if not for morality**. It is morality that shapes the law, especially criminal jurisprudence, for example when the death penalty for rarest of rarest crimes is reasoned by taking recourse to the morality of revenge.

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<sup>3</sup> Altman, A. *Arguing about law: an introduction to legal philosophy* (2<sup>nd</sup> ed.). Belmont, CA: Wadsworth/Thomson Learning, p.74 (2001).

<sup>4</sup> Id. at p. 68

<sup>5</sup> Ratnapala, Suri. *Jurisprudence, Separation of Law and Morality*, Cambridge University Press, p. 164-165.

The elemental conflict between these two theories found the perfect stage in the Nuremberg Trials where the question of the validity of law gained utmost importance.

### THE NUREMBERG TRIAL: HART FULLER DEBATE

The National Socialist (Nazi) Party, which was democratically elected under Germany's Weimar Constitution, was marred with some fatal defects in it though it was democratic in character. The President had been entrusted with the power to suspend civil liberties of the people in Emergencies, and the Constitution could be amended by the legislature by 2/3rds majority, are examples of some blatant violation of a democratic rule based on the will of the people. These defects paved the way for the party to transform the Constitution from within, converting the liberal democratic German State to a tyrannical dominion of Hitler.<sup>6</sup>

The situation that prevailed in Germany at the height of Hitler's powers, gives us the perfect example of a society where there existed not only immoral laws but laws which did not have the consent of the people. Thus, the question arises that when we follow a law that is forced upon us, which doesn't have the legitimate consent of the people, and as a result our actions become lawful but immoral, are such actions punishable. Hence in such situations where retroactive laws punish the guiltless or excuses atrocities, there is enforcement of unpublished laws, verbal orders of Hitler becoming authority to exterminate thousands, there cannot be a legal system in force capable of making laws in a meaningful sense<sup>7</sup>.

The four victorious allies of the Second World War, the United States, Great Britain, France and the Soviet Union, were given the responsibility to oversee the trial, when the treaty of London was signed in 1945.<sup>8</sup> The treaty between the Allied powers concluded an 'agreement for the Prosecution and Punishment of Major War Criminals of the European Axis' which declared their aim to establish an International Military Tribunal for trying those criminals whose offenses transcend all geographical locations.<sup>9</sup> The Charter establishing the Tribunal granted them jurisdiction over the offenses of crimes against peace, war crimes, and crimes against humanity and over conspiracy to commit the crimes as defined in the Charter.<sup>10</sup>

Radbruch Doctrine, was most influential in most post-war trials and in German Courts and also in the Nuremberg Trial. Radbruch did not sought to invalidate every unjust law, for what is just and what is not is another matter of debate, so what the doctrine does is that it nullifies only those laws which result in injustice that is beyond any justification.<sup>11</sup> Radbruch, essentially, propounded that appropriately enacted and socially effective, norms lose their legal character or their legal validity when they are extremely unjust.<sup>12</sup>

To this Hart argued that Radbruch had confused the distinction between legal duty and moral duty. A person may be under a legal duty to obey an inhuman law, while at the same time he may have the

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<sup>6</sup> Facts taken from Judgements in Nuremberg Trials, USA v. Alstotter (The Justices Case) 3 TWC 1 (1948). Also see '*Positivism and fidelity of law: A reply to Professor Hart*' (1958) 71(4) Harvard Law Review, 648-57.

<sup>7</sup> Facts taken from Judgements in Nuremberg Trials, USA v. Alstotter (The Justices Case) 3 TWC 1 (1948). Also see '*Positivism and fidelity of law: A reply to Professor Hart*' (1958) 71(4) Harvard Law Review, 648-57.

<sup>8</sup> Washington, E. *The Nuremberg trials: Last tragedy of the holocaust.*, Lanham, University Press of America, p.17 (2008).

<sup>9</sup> Paulsen, S.L., Classical legal Positivism at Nuremberg, *Philosophy & Public Affairs*, 4(2), p.137 (1975)

<sup>10</sup> Id. at p. 138.

<sup>11</sup> Ratnapala, Suri. *Jurisprudence, Separation of Law and Morality*, Cambridge University Press, p. 163-165.

<sup>12</sup> SM, M., SM, M. and profile, V., n.d. *Radbruch Formula*. [online] Theoryofjurisprudence.blogspot.com.

Available at: <<http://theoryofjurisprudence.blogspot.com/2006/07/radbruch-formula.html#:~:text=According%20to%20Radbruch%3A,false%20law%20to%20justice.>>

overriding moral duty to disobey it. He is also of the view that we nullifying unjust laws would do more harm than good.<sup>13</sup>

### HLA HARTS' VIEW

Being a positivist, Hart essentially believed that there exists no connection between morality and law and law need not have a moral undertone compulsorily.

Although he acknowledges the fact “that there exists a close relationship between law and morality and that the development of the law has been immensely influenced by morality, he disagrees with the premise that law and morality are interdependent on each other.”<sup>14</sup>

He therefore, clearly states, that exists a distinction and “a line should be drawn between what law is and what law ought to be.”

He asserts that “the fact of the matter remains, that a law does not stop being law due to moral criticism of it. Officials should display truthfulness about the law by concentrating on what it says rather than focusing on what one desires it to say.”<sup>15</sup> Law consists of primary and secondary rules.”

Primary rules impose duties on the citizens and violation of these duties invite sanctions or punishments. On the other hand, secondary rules are those that confer power and describe how laws should be recognized, adjudicated or changed. Hart says “these rules form the heart of the legal system and the rule of recognition is the glue that binds the legal system as a whole. Hence, conformity to a certain moral standard is not required for a legal system to exist.”

Hart acknowledges that “law and morals are bound to intersect at some point, for instance where a case comes up where the wording of the relevant statute is not sufficient to give effect to the purpose of the law” (professor hart refers to these as problems of the penumbra), Hart says that “such cases can be solved by way of judicial interpretation. A decision can be made about what the law ought to be, and moral factors play a crucial role in deciding such hard cases.”<sup>16</sup>

### FULLERS' VIEW

Fuller is a naturalist, and he sees laws “as a way of achieving social order by regulating human behavior through laws.” He believes that “our legal systems are derived from the norms of justice which have a moral aspect.”<sup>17</sup>

He argues that for a law to be valid, it must conform to a certain moral function test.

These are the eight desiderata set out by Fuller. Hence, laws must have/contain the following:

- Rules
- Published
- Prospective
- Intelligible
- Not contradictory
- Possible to comply with
- Reasonably stable through time
- Followed by officials.<sup>18</sup>

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<sup>13</sup> Id.

<sup>14</sup> HLA Hart, *The Concept of Law*, Revised edition, Oxford University Press Publications, 2002 at p. 185-200.

<sup>15</sup> Ibid.

<sup>16</sup> HLA Hart, „Positivism and the separation of law and morals“ [1958] Vol 71, no. 4, *Harvard Law Review* at p. 593- 629.

<sup>17</sup> Lon Fuller, *The Morality of Law* (Yale University Press c 1964) 33 – 91.

<sup>18</sup> Ibid.

Fuller asserts that “law makers to take into consideration each of the above before determining whether a law is valid.” Fuller goes further to explain morality by categorizing it in two; “Morality of aspiration and morality of duty.”

“Morality of aspiration suggests a desired norm of human conduct that promotes his/her best interest. Morality of duty describes the standards people follow to ensure smooth functioning of society.” Other forms of morality discussed by Fuller are “Internal morality of law” and “External morality of law”. “The former is concerned with procedure of law making while the latter focuses more on substance rules of law which are applied in decision making.”<sup>19</sup> Fuller rejects the positivist approach to law and argues that “society’s goals can be achieved by other means rather than relying solely on law.”<sup>20</sup>

The Hart-Fuller "debate" illustrates the opposing points of view of positivism and natural law, particularly in the context of Nazi laws.

Upon examining both Hart and Fullers view on what the law is and how it relates to morality we find that “Fuller’s naturalist ideals offer the solutions to the problems in the modern-day legal system.” Hart says that we should identify what law is and but this still leaves us with the question, “Why should we obey laws as they are”? Is it because of the sanctions behind it? Or law is obeyed because it is the most convenient and just way of organizing our societies? All these questions will have a different answer depending on one’s philosophical point of view.

The researcher believes that we obey law because we believe that it is right or morally correct. This takes us to the question.

The question is “Are we obligated to obey the laws of a state even if we deem the state immoral?” Examples of these states are: the apartheid laws of South Africa or the Nazi laws of Germany. These were all legitimate laws as they were passed by their relevant Parliaments. But did those laws have moral authority? This could be answered by applying the Hart Fuller perspectives on the Nazi laws.

A good example at this point would be of the grudge informer case that was discussed in the Hart- Fuller Debate Published in the Harvard law review because it demonstrates the differing views of naturalism and positivism, particularly in the context of Nazi laws. Facts of the case are as follows:

“A German woman denounced her husband to the authorities in accordance with the anti-sedition laws of 1934 & 1938. He had made derogatory remarks about Hitler. The husband was prosecuted and convicted of slandering the Fuhrer, which carried the death penalty.

Although sentenced to death he was not executed but was sent as a soldier to the Eastern front. He survived the war and upon his return instituted legal proceedings against his wife. The wife argued that she had not committed a crime because a court had sentenced her husband in accordance with the relevant law of the time.

However, the wife was convicted of illegally depriving another of his freedom, a crime under the Penal Code, 1871, which had remained in force throughout the Nazi period. The court described the Nazi laws as contrary to the sound conscience and sense of justice of all decent human beings (1951).<sup>21</sup>

### **HARTS POSITIVIST APPROACH**

The decision did not find favour with Hart because the Court had been able to come to the conclusion that a validly enacted law, in fact did not carry the force of law.<sup>22</sup> According to Hart, “it would have been better

<sup>19</sup> Benjamin C Zipursky, „Practical Positivism versus Practical Perfectionism: The Hart Fuller Debate at fifty“, [2008] Vol 83, New York University Law Review at p.1170- 1212.

<sup>20</sup> Supra note 17.

<sup>21</sup> Lon Fuller, The Morality of Law (Yale University Press c 1964) 245 – 255.

<sup>22</sup> Id.

for the legislature to have passed a retrospective law as that would have at least acknowledged the fact that punishing the women required a choice to be made out of two evils, one, leaving her unpunished and the other, of sacrificing a very precious principle of morality endorsed by most legal systems.”<sup>23</sup> Hart believed that “it was necessary to resolve this moral dilemma between providing justice to the woman and observing the duty to obey the law by passing a new law to supersede the prior Nazi laws.”

### FULLERS NATURAL LAW ARGUMENT

Fuller was of the view that the case presented no such dilemma, and came to the conclusion that the Nazi statutes relied upon by the wife did not work as a valid defence simply because they did not have the quality of law. One of the statutes enacted in 1934 was applied too broadly and the other enacted in 1938 was described by Fuller to be a “legislative monstrosity” that permitted “uncontrolled administrative discretion”<sup>24</sup> The question whether an individual or a court is needed to adhere to certain laws just because they held the status of being law or it is right to do what they think is right and decent<sup>25</sup> does not present a dilemma to Fuller.

He concluded saying, “*I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law.*”<sup>26</sup>

### ANALYSIS AND COMPARISONS

If we follow Hart’s positivist views, the decision given by the Court was wrong, because Hart believes that no matter how heinous the Nazi laws were, they were in accordance with the Enabling Act passed by the Reichstag, and were valid. It satisfies Hart’s rule of recognition. The researcher finds this very disturbing for many reasons.

Fuller on the other hand recognized the Court’s decision because it created respect for law and morality, and by using his 8 desiderata Fuller states that all Nazi laws were illicit.

This justifies the courts overlooking of the earlier 1934 act and upholding the wife’s conviction. Without the courts applying a moral concept in the application of the law, the courts would have had to acquit the wife and agreed with Hart, a decision, the researcher feels would have been wrong.

According to Hart, “the Courts were left with only two options to preserve the integrity of the judicial decisions, either to let the wife go free because the statute protected her, or make a retrospective laws repealing the statute under which she claimed protection, and declaring the acts of the perpetrators of such atrocities as criminal.”<sup>27</sup> Even though Hart did not favor the retrospective application of criminal statutes, he argued that “the Nazi regime could have been considered an exceptional circumstance for the application of retrospective of laws, if the Courts were afraid that Hitler’s accomplices would be acquitted.” Hart was strongly against the Court’s decision to introduce a concept of morality and deciding the statute which protected the woman was no law at all.<sup>28</sup>

Fuller contended that “Hitler’s regime was so harmful to morality, that there was nothing in the system that could qualify to be called a law as they did not comply with his desiderata.” He stated that “the Nazi laws lacked the necessary internal morality required in the process of law making, which gives laws

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<sup>23</sup> Id.

<sup>24</sup> Fuller, *supra* note 7, at 652-54.

<sup>25</sup> Id. at 656.

<sup>26</sup> Id.

<sup>27</sup> HLA Hart, ‘Positivism and the Separation of Law and Morals’ [1958] 71(4) Harvard Law Review 619.

<sup>28</sup> Stephanie Patron, “The Inner morality of law- An analysis of Lon L Fuller’s Theory”, [2014], Glasgow University Law Society Law Review, available at <http://www.gulawreview.org/entries/legal-theory/the-inner-morality-of-law-an-analysis-of-lon-l-fuller-s-theory>.

respect and makes them obligatory to be followed by citizens.” Fuller believed that “unless the Nazi laws were treated as non-laws, the perpetrators of evils under the Nazi regime would go unpunished.”

The researcher agrees with Fuller and thinks that Hart is mistaken because Hart’s arguments fail on the grounds that “Hart himself becomes inconsistent when he concedes to the fact that his rule of recognition requires a minimum morality of law. Impartiality in application of a rule is a moral standard which is necessary in any legal system.”<sup>29</sup> Fuller believes that “Hart is aware of the internal morality of law, but refers to it justice in the administration of laws,” which in the researcher’s opinion indicates that there is indeed a connection between law and morality. To Hart’s credit “he tries to justify his position that morality is not always necessary in the application of the rule of law, Hart, presents us with a hypothetical illustration.”

“Supposing a law forbade the taking of a vehicle into a park, and is not specific as to which type of vehicle. An apparent meaning of the term ‘vehicle’ would imply that cars are prohibited from entering the park. However, in absence of any clear definition of the term vehicle, would toy cars or airplanes qualify as vehicles? And, would the rule of prohibition be equally applicable on them?” Hart emphasizes that “interconnection between what the law is and what the law ought to be in the penumbra does not depict how the law actually functions at the core.”<sup>30</sup> The researcher finds Hart’s arguments here to be weak because I believe that language does not determine the core of legal rules. This is because it is not possible to determine what the wording of a statute in this case the term ‘vehicle’ without first looking at the purpose behind the rule.

Fuller also argues that “it is not possible to determine if a rule applies to a given situation, without understanding the purpose that the rule was supposed to serve by referring to the objectives of entire provisions of law rather than seeking to find meaning of individual words.” He identifies the problem as one of interpretation of words and not an issue of core and penumbra as claimed by Hart. Fuller emphasizes that “fidelity to law can be only achieved if the law is in accordance with morals at all stages, be it at the time of making of the law or its application by the court. People will comply with the law only if they are convinced that the law is based on strong moral foundations enacted for their common good.”<sup>31</sup> Fuller further criticizes Hart’s definition of law which insists that law and morality needs to be separated. Fuller contends that there cannot be a specific definition of law. Likewise, “even morality cannot be defined accurately.” Therefore, Fuller argues that “because there is no precise definition for law and morality, it is pointless to argue that both of them are separate”<sup>32</sup> and the researcher believes that this offers a much more compelling argument than any of Hart’s positivist claims.

The issue with principles of morality is that “various societies will have different moral principles. So, in pluralistic societies such as ours, there will be conflicting ideas of what is, or not moral. For example, in Muslim countries it is considered immoral for a woman to walk outside without a hijab, whereas in the west this is not considered immoral. There is also the issue that morals tend to change over time, so what was deemed immoral 50 years ago may no longer be immoral.”

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<sup>29</sup> Steven Shavell, „Law versus morality as regulators of conduct“, [2002] Vol 4, no. 2, American Journal and Economics review at p. 227-257.

<sup>30</sup> Frederick Schauer, A critical guide to vehicles in the park“, [2008] Vol 83, New York University Law Review at p. 1109-1134.

<sup>31</sup> Tommaso Pavone, „A Critical adjudication of the Fuller- Hart debate“, available at [https://scholar.princeton.edu/sites/default/files/tpavone/files/fullerhart\\_debate\\_critical\\_review.pdf](https://scholar.princeton.edu/sites/default/files/tpavone/files/fullerhart_debate_critical_review.pdf).

<sup>32</sup> Supra note 17.

Same same-sex marriage was perceived immoral in the UK until the Marriage (Same Sex Couples) Act 2013<sup>33</sup> was passed by the UK Parliament and it became legal and somewhat morally acceptable in the UK. In **Forsythe v DPP and the AG of Jamaica** the courts said “That a law is valuable not because it is ‘the law’ but because there is ‘right’ in it and laws should be like clothes; the Laws should be tailored to fit the people they are meant to serve.”<sup>34</sup>

In conclusion, the researcher believes that **“there is a necessary connection between law and morality. Although some of the arguments by hart and the positivists is not without its merits but that is not sufficient to prove law and morality are not connected. Fullers arguments present the least amount issues on this topic therefore I believe law and morality are interdependent on each other.”**

### THE TRIAL AND POSITIVISM

The defence plea of the Nazi leaderships’ innocence was heavily built up on positivism, especially John Austin’ Command Theory. The defence attorney for the Nazis, attorney Hermann Jarheiss, a professor of law at Cologne<sup>35</sup> pioneered his arguments on the tenets of positivism. He took advantage of the Allies’ positivist notion of international law as he questioned whether the defendants as German citizens, can be tried by the Allies, (i.e., other sovereign nations) under a higher law called the international law. If that be the case then neither Germany nor any of the Allied states would be sovereign states in the Austinian sense of the word.<sup>36</sup> Thus he set the philosophical boundaries within which the trial was to take place.

Jarheiss took recourse to the “act of state” defence<sup>37</sup>. According to Austin’s logic, an act of state defence would hold that the laws made by the Fuhrer as the sovereign of Germany, put into action, laws that were legally posited and hence required to be obeyed. The ones carrying out the laws would be under the protection of the state and would be absolved of any moral responsibility. They have just been “following orders”. The objective behind such laws and military commands was to legitimise the systematic killing of Jews, Gypsies and other social undesirables. Hence, even after committing morally intolerable, heinous crimes, the officials could not be charged guilty because under positivism, morality was not a necessary component of law.

The Allies were not able to come up with a fully satisfactory response to Jarheiss’s use of Austin’s Command Theory, his “act of state” defence, or the question of jurisdiction of the Allies over German people. Paulson, the author of “Classical Legal Positivism at Nuremberg” notes in his book that the rejection of these primary defences by the Allies at the Trial could not be justified on either legal or philosophical grounds. Paulson refers to this arbitrary decision to dismiss Jarheiss’s arguments as “Allied Policy”.<sup>38</sup>

Now when we turn to the prosecution at the Trial, we realise that like most legal positivists, they would hold mass murder as wrong, as being outside the scope of posited law, yet they would have little basis for establishing reasons for it if the law itself sanctioned the acts and that is what was exactly the situation at Nuremberg. The only way by which the dedicated legal positivists of the prosecution could have condemned the actions of the Nazis was by appealing to a higher form of Human law. This would take the form of international law as enforced by the tribunal and the United Nations. However, unfortunately, the sovereignty of International Law over Hitler’s Germany was limited to a few vaguely worded treaties. The

<sup>33</sup> Marriage (Same Sex Couples) Act 2013.

<sup>34</sup> Forsythe v DPP and the AG of Jamaica.

<sup>35</sup> Washington, E, Nuremberg Trials: The death of the rule of law (in international Law). *Loyola Law Review*, 49, p.494. (2003).

<sup>36</sup> Id.

<sup>37</sup> Id. at p. 486.

<sup>38</sup> Id. at p.494.

prosecution faced the problem that these treaties made by the German regime with the third Reich lacked proper legal authority.

The chief prosecutor Robert Jackson based his arguments on the fact that Weimar Germany, prior to Nazi rule, had entered into several treaties with other nations setting rules for warfare, such as Kellogg-Briand pact which outlawed war.<sup>39</sup> His contention was that Nazi Germany despite a change of Regime was still obligated to respect and abide by those agreements, and wilful disregard of the same was the cause for legal action being taken by the Allied powers with whom the treaties were signed.<sup>40</sup>

Jackson pointed out to the Weimar Constitution's provision that "the generally accepted rules of international law are to be considered as binding integral parts of the law," and that the treaties signed were part of those "generally accepted rules"<sup>41</sup>

One of the more revealing passage on how the Allied powers perceived international law as having a higher claim than municipal law came from Robert Jackson's opening statement, where he set out his claim that the Tribunal was taking part in a new era of legal jurisprudence where law would be brought to rule upon the law less, that it was a new period in time when even the heads of the nations would be answerable to the laws of the international community. Thus, it was "mankind's desperate effort to apply the discipline of the law to statesmen." However, Jackson also noted how little regard the Nazis had for International law, and claimed that they cannot show that they had ever paid heed to international law in any state.<sup>42</sup>

#### **NUREMBERG TRIAL AND THE RE-EMERGENCE OF NATURAL LAW**

The principles of due process though not an absolute protection yet strongly opposes retroactive law making. Criminal punishments cannot be meted out to someone doing an act which at the time of doing of the Act is protected by the law itself or that which is neither illegal nor prohibited at the time of its occurrence. The fact that this issue arose itself gave proof of positivist principles. But in the post war period, this protection was made subject to the human rights principle that some rights exist independent of the state's laws, and that some actions are wrong in themselves, and shall be judged as such, even if that action/ conduct was not prohibited by the law.<sup>43</sup>

This issue of retrospective law making formed the heart of the debate between Professors Fuller and Hart<sup>44</sup> over positivism in the Harvard Law Review. The debate related the concept of positivism with the disagreement over judicial treatment of laws enacted and enforced by the Nazi Government while it stayed in power.<sup>45</sup> This debate though not related to the Nuremberg trial did parallel the retroactivity issue raised by the war crimes prosecution for retrospective invalidation of Nazi laws.

The validity of the laws enacted by the Nazi Government that sanctioned the actions of the Nazi officials who invoked those laws to perpetrate wrongful acts was questioned. In post-war Germany, Could the Courts let the litigants defend their actions under the garb of authorization provided to them to commit the acts by the Nazi laws? Post-war German cases took help of Natural law as the German Courts denied the litigants the protection under positive Nazi law, invalidating them in the process. In the Nuremberg Trial

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<sup>39</sup> Delahunty, R.J, Robert Jackson's opinion on the destroyer deal and the question of presidential prerogative. *Vermont Law Review*. 13(08), p. 76 (2013).

<sup>40</sup> Id. at p.77

<sup>41</sup> Adams, D.M., *Philosophical problems in the law* (3<sup>rd</sup> Ed.). Belmont, CA, Wadsworth/Thomson Learning, p.27 (2000).

<sup>42</sup> Id. at p.26.

<sup>43</sup> Id. at p. 431.

<sup>44</sup> Jerome Frank, *War Crimes: Punishment for Today-Precedent for Tomorrow*, COLLIER'S, Oct. 13, 1945, at 73.

<sup>45</sup> H.L.A Hart, *Positivism and the Separation of Law and Moral*, 71 HARV. L. REV. 593 (1958)

the prosecution effectively criminalized the conduct of the Nazi officials retroactively applying Natural law principles condemning them for acts that previously had not been illegal under international law. Natural law was cited in order to rationalize the prosecution and punishment meted out to individuals who had committed legally permissible yet morally intolerable crimes while the Nazi party was in power. Yet Hart denied any connection between positivism and Nazism.<sup>46</sup> Fuller argued that “if German jurisprudence had concerned itself more with the inner morality of law, it would not have been necessary” to deal with the question of retrospectively invalidating “the more outrageous Nazi statutes.”<sup>47</sup>

Hart acknowledged the fact that German thinkers like Gustav Redbruch were among the post-war critics of positivism, and that these same thinkers had shared the positivist doctrine until the Nazi tyranny, and specially resented to those views after the war. After the World War II, the dilemma that arose in Germany was that the accused persons were being prosecuted for their actions which previously had the authority of the laws enacted during Nazi regime, now those same laws were not able to come to their defence since those laws were immoral and therefore were being considered not to be valid<sup>48</sup>.

## CONCLUSION

Though even Fuller supported the making of new laws invalidating the earlier ones, he justified his choice on the reasoning that ushering in new laws would represent a new beginning, distinctly divide the new from the past and help usher in a new, lawful regime.<sup>49</sup> Though they did not discuss the Nuremberg Trial during their famous debate, Fullers arguments endorsed the Natural law justifications being taken recourse to in the Nuremberg trials.

It is worth noting the indication of the emergence of Natural Law and the corresponding decline of Positivism as Hart himself conceded that “under certain extreme circumstances, a law may be so immoral as to not require obedience.”<sup>50</sup> Hart admitting that the content of a law may be such as to justify disobedience to it weakened his point of argument in favour of positivism, which was a legal philosophy that championed adherence to law.

There is no doubt that towards the end of the second world war, “there was a huge outrage over the inhumane violence of the holocaust and the second world war, which led to the formation of the United Nations Organization and the call of the International Convention of Human Rights. There was no doubt that there was a revival of the natural law principles as an aftermath of the Holocaust which lasted for two decades. There was a huge cry for the inclusion of morality into the law. But what is morality? Was this religious morality? What about the bombings of Hiroshima and Nagasaki by the American forces? Whatever this morality was, it was highly subjective to the changing times. If the sterilization law was considered to be immoral, then so were the other countries, who practiced this law are to be guilty of this immorality, just as Hans Rolfe pointed out in his speech on the ‘World’s guilt’ on the raise of Hitler.” The Supreme Court in the 2013 Suresh Kumar Koushal judgment has categorically stated that the rights of minorities cannot be sacrificed under the veil of “greater good”. This is the same judgement that decriminalized homosexuality in India.

As per Rawls ‘Justice is fairness’, “so how is justice imposed when we still follow the utilitarian principle of ‘Greater Good’ permitting the rights of the minorities to be suppressed for the selfish benefit of the majority?” This question extends to present day contemporary societies as well and is a moot point in modern discourses.

<sup>46</sup> See Hart, *supra* note 5, at 617-18.

<sup>47</sup> Lon L. Fuller, *Positivism and Fidelity to Law- A Reply to Professor Hart*, 71 HARV. L. REV. 659-660 (1958)

<sup>48</sup> See Hart, *supra* note 5, at 616.

<sup>49</sup> *Id.* at 661.

<sup>50</sup> Hart, *supra* note 5, at 616-17.