Law and Morality

The relationship between law and morality is related to the nature of law as sensed by Legal Positivism and Natural Law . Natural Law being 'valued laden' and concerned with the subject matter of law , argues in favour of maintaining a close relationship between law and morality while , legal positivism being concerned with the 'form' of law has maintained a strict sense of separation between law and morality . The Greek political system favoured an intrinsic relationship between law and morality and this became apparent in Plato's Theory of Justice where the virtuous Philosopher king became to be identified with Law itself . Aristotle too associated legal authority with the personal virtues of the ruler . Heinrich Rommen credits Epicureans as the 'first legal positivists' but Roman Law developed the base for legal positivism . Greek culture was closer to Natural law as the legal authority was identified with virtuous ruler whereas Roman Law was closer in its nature to legal positivism . In Roman Law , an action was authoritative if it could be traced through writing to a ground or source . This method was called *auctoritas*, which meant authority or prestige . It went to the issue of legitimacy . If one had *auctoritas* then an official was obeyed even if disagreed with the substantive content of the official 's utterance or conduct . Greeks maintained the relationship between law and morality and this became apparent in Aristotle's *Nicomachean Ethics* .

Legal Positivism can be traced back to the idea of *Nominalism* which stated that is capable of grasping only singular entities and anything resembling a grand design of universalism is beyond cognitivism . Debates about what is "good" , "bad" , "moral" , "immoral" can be solved tracing the meaning to the force of sovereign . According to *nominalism* , Reality can perceive particular objects . This thought leads to legal fragmentation . There are as many laws as there are wills to enforce it . Instead of having a single , integrated , universal system of law , law is atomized , multiplied and particularized.

Natural Law maintained its domination but Legal Positivism gained its ground along with Utilitarianism . If Epicureans sowed the seeds of Legal Positivism then in the modern era , it is Thomas Hobbes who unconsciously laid the foundation of individualism and Positivism . In spite of being studied under the Social Contract Tradition , Hobbes should be considered as a Positivist in disguise . After all , his understanding of Sovereignty paved the way for Austinian notion of sovereignty . Natural Law remained the leading theory of cognition of law in England

and reached its zenith under the leadership of William Blackstone . However , with the advent of individualism , empiricism , industrial revolution and State , Positivism gained momentum in England too . John Austin's methods and his views on Law and Sovereignty along with Bentham's disdain for natural law led to the phenomenal growth of Legal Positivism . This domination continued till 1945 , when , due to an epistemic change , Positivism took a backseat and the world saw the revival of Natural Law with the conclusion of Second World War and the rise of human rights , democracy , de colonization , Charter of United Nations . Legal Positivism needed a 'Reformation' and this happened in the ideas of H L A Hart and Kelsen . In England , it was the work of H L A Hart that resuscitated Legal Positivism . He was of the view that if legal positivism was to survive then Austin needed a revision . The idea was to 'internalize' Austin's Sovereign . Hart did it through his 'Rule of Recognition' and Kelsen achieved it through 'Grundnorm'. For the sake of this lecture and syllabus the concept of Law and Morality will cover the following :

(1) Hart- Fuller Debate.
(2) Hart- Devlin Debate .

(1) Hart – Fuller Debate : The famous Hart – Fuller is actually a forerunner of Austin's nineteenth century attack on Sir Willaim Blackstone . The actual debate starts with Hart's critique of the views of Gustav Radbruch in his famous article titled , '*Positivism and The Separation of Law , and Morals'* , published in Harvard Law Review (71 Harv . L. Rev. 593 (1958). Lon F . Fuller replied to this essay in *' Positivism and Fidelity to Law* – A reply to Professor Hart' (71 Harv . L . Rev . 630 , (1958) . Gustav Radbruch (1978-1949) was a prominent German Legal theorists who lamented his statement *Gesetz als Gesetz* (Law is Law) as it allowed the Nazis to twist the well intended doctrine of positivism to justify their regime . Radbruch though not belonging to the natural law tradition , argued in favour of *humanitarian morality* and *humanitarian judicial making* . According to him , if a rule violates human morality then the same shall not be applied by the judiciary . Radbruch wrote in *Statutory Lawlessness and Supra Statutory Law :*
" Where there is not even at attempt at justice , where equality , the core of justice is deliberately betrayed in the issuance of positive law then the statute is not merely flawed law , it lacks completely the very nature of law …"

Radbruch lamented his pre – War 'positivist stance' and said that Nazi laws were not laws at all . Hart in his Article expressed sympathies with the views of Radbruch but disagreed with the idea that Nazis did not have law at all . According to Hart , whether Law is law or not is a different question and whether there is a moral obligation on people to obey the law is a different question . According to Hart , Nazis did have law but people had no moral obligation to follow that law . Before going into the detail of Hart's article and Fuller's subsequent reply , let us understand as to laws were made in the Third Reich or the Nazi Regime . The Nazi regime called itself *Rechtsstaat (* a State ruled by law) . This was an alternate political structure to the Westminster Model of Parliamentary system . *Rechtsstaat* required that the exclusionary , that is , discriminatory , edicts of the State would be clearly defined – both legally and scientifically so that everyone knew whether they did or did not belong to the excluded group . The idea can be alluded to Carl Schmitt's notion of 'Friends and Enemies' of the State . Undoubtedly , Hitler's regime was a dictatorial one but it imposed its will through properly issued laws and administrative decrees. The earliest of these was promulgated under the *Emergency Decree of The Reich President for the Protection of Volk and State* , issued by Hindenburg on February 28 , 1933 . This emergency was regularized by the Enabling Act passed by the Reichstag (German Parliament) . This Enabling Act remained the foundation of the Nazi Government. It also centralized the government administration while retaining its federal structure . At Nuremberg , Hans Heinrich Lammers who served as a State Secretary in the Reich Chancellory testified about the procedure that was adopted for passing a law .

(1) A draft law was passed by the Reich Ministry and was circulated by the other interested ministries .(2)
(2) The ministers negoriated the final draft .(3)
(3) The final text had to be signed by all concerned ministers and was presented to the State Secretary to the Fuhrer who had to sign it .(4)
(4) After Hitler signed it had to be published in the *Reichgesetzblatt* (the official gazette ; otherwise it was not considered a proper law .

This system was not applicable for an administrative decree . They were to published only in the ministry's gazette . Sensitive decrees could be circulated

without publication . Some of the laws that were passed as a result of the above mentioned procedure :

(i) Law against Habitual Criminals and Measures of Security and Reforms . (Law related to castration and preventive arrest).

(ii) Law Concerning Perfidious Attacks Against the State and The Party (The institutes and representatives of the Nazi regime could not criticized in word or in deed) .

(iii) Racial legislation passed in the 1930s targeted the disabled , Jews and the Gypsies as they did not fit in Hitler's vision of Eugenics. Law for the Prevention of Offspring with Hereditary Diseases (Provided for compulsory sterilization of the disabled ; hereditary health courts were established which had a physician and a lawyer . Marriage Health Law (prohibited marraiges where one of the partners was disabled and a Fitness Certificate was issued by the local public health office) .

(iv) Law for the Restoration of the Professional Civil Service , 1933 (Political opponents were removed from Civil Services , Jew Civil Servants were also removed).

(v) Reich Citizenship Law and Law for the Protection of German Blood and German Honour (Exclusion of Jews from National Family and prohibition on physical relationship between Jews and Aryans).

(vi) Reich Citizenship Laws interestingly did not rob the Jews of their Citizenship . They were considered the citizens of lesser worth .

(vii) At no time was it legal to kill Jews or Gypsies . No law legalizing such killings were ever promulgated . The first killing operation – Operation T4 had no legal basis .It was unofficial and unauthorized .

Coming back to Hart's Article , it is important to note the structure and form of the paper . It is divided into 4 parts and it is only in the third part that we see the criticism of Radbruch's views. Fuller's article is a counter to this aspect of Hart's argument . In the first part of the Article Hart analyzes the three tenets of utilitarianism i.e. analytical , imperative and separation of law and morals . Further , he criticized the Austin's model of sovereignty as the

sovereign is someone who is outside the law . This is compared to a Gunman situation . But such cannot be the situation of a modern government system . Modern law making is based on objective criterion of Rules and not on habitual obedience . In the second part of the article , Hart raises multiple issues like the open texture of language , its indeterminate nature . According to Hart , Realists made us realize about the importance of human language and human thought . It were the American Realists who focused as to how judicial decisions shape the content of Law . Language of the Law has a core (settled /well defined) meaning and a penumbra (fringe / indeterminate) meaning . The penumbra meaning of a word (i.e. its vagueness and ambiguity) cannot be settled by the logical deduction methods of the Classical Legal Positivists . This is solved by judicial process which shows the aspect 'law as it ought to be' . It is only in the third part of the paper where he criticizes the stand taken by Radbruch . He cites the example of Nazi informer case . In 1944 , a woman wanting to get rid of her husband denounced him to the authorities for insulting remarks he had made about Hitler while on leave from the German Army . Although , what was said against the Fuhrer and the Party was against the Statute , the wife was under no legal duty to disclose it . The husband was arrested , prosecuted and sentenced to death but pursuant to Nazi statutes he was sent to the Russian front . He survived the war and got his wife prosecuted in an Allied led West German court in 1949 under the German Criminal Code of 1871 for the illegal deprivation of liberty . Wife argued that what she did was valid and was allowed under the Nazi Statute of 1934 . The Court was of the opinion who held the woman guilty as the statute was contrary to sound conscience and sense of justice . Hart criticized the judgment and said that instead of judging the moral content of the law , the court should have introduced a retrospective law but that did not happen . Nazi law was an evil law , but a law none then less .

Fuller , on the other hand , said that Nazis did not have laws at all . A law is not a law unless it completes eight principles of legality :

(a) Legal rules must be general and apply to all persons .

(b) Law must be promulgated (no secret laws) . The Nazis made extensive use of secret laws .

(c) Retroactive rulemaking and application must be minimized .

(d) Legal rules must be understandable .

(e) Legal Rules should not be contradictory .

(f) Legal rules should not be impossible to obey .

(g) Legal rules should be relatively constant .

(h) There should be congruence between legal rules as announced and applied .

Dworkin has added another dimension to the debate when he argues in *Law's Empire* and *Justice for Hedgehog* that no interpretive technique could provide any legitimacy to the Nazi law but the Nazis did have law in a historical sense because it had a legislature , executive and a judiciary and all the necessary legal ingredients which were present in its predecessor i.e. Roman Law .