VALIDITY OF NAZI LAW

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Introduction

In 1945, the world celebrated the end of one of the two most historically important wars it had ever seen. However, the international legal community was faced with a problem of a kind it had never encountered before: that of awarding retrospective punishment for acts that had been legal under the Third Reich. The legal system that prevailed in Hitler's authoritarian regime of the Third Reich permitted (and even mandated) the performance of certain acts that modern law would classify as atrocities. Two infamous examples are *first*, the persecution of Jews: their elimination, torture, enslavement and detention by Nazi authorities; *second*, the utilisation of oppressive Nazi law by the German citizenry to further its own interests. The international community dealt with both these issues in the Nuremberg Trials and the Grudge Informer cases respectively. The first part of this Paper focuses on a study of the Nuremberg Trials and how a decision was reached therein.

The primary bone of contention that these quandaries are based on is the validity of Nazi law, i.e. should the statutory rules enacted by Nazi authorities, because of the fact that they permitted the commission of the aforementioned acts that the modern world considered abhorrent, be considered invalid? Legal scholars have reached no consensus on this issue. In the second part of this Paper, I discuss the opinions of eminent German jurists, Gustav Radbruch and Hans Kelsen, both of whom experienced the totalitarian regime of the Third Reich. While Radbruch presents a formula that renders Nazi laws invalid, Kelsen's 'pure' theory of the law dictates that these statutes are perfectly valid legal formulae, even though they may be unjust.

Finally, the scope of the debate is widened to include the larger question underlying this entire issue – the separation of law and morality. While one school of jurisprudence believes that law is a positivistic science which must not be diluted by extraneous considerations, the opposing view is that law properly so called must fulfil the conditions of internal morality. Here, I present the diverging views of the two most influential legal writers on the topic, H.L.A. Hart and Lon

Fuller, describing and analysing their viewpoints, and finally attempting to arrive at a holistic conception of law.

Chapter One: The Nuremberg Trials and Their Impact

After the Second World War, laws that had been enacted and implemented in pre-war Nazi Germany were caught in an intellectual crossfire. As will be discussed through the course of this Paper, strong arguments were presented both in favour of and in contravention of the validity of Nazi law. What spurred the debate on was the conduction of the famous Nuremberg Trials at Bavaria, Germany at the Palace of Justice.[1] The Nuremberg Trials reflect some of the most significant repercussions of the Second World War. This Chapter discusses the Trials themselves, and their ramifications in the global political context; subsequent Chapters focus upon the opinions of legal scholars.

The Nuremberg Trials of 1945-1946, wherein the Allied Forces prosecuted the Nazi leadership for their crimes against humanity, are important because they dealt directly with the issue of the validity of Nazi law. Twenty-two Nazi leaders were presented with a notice of their indictment on October 18, 1945. The significance of these Trials is reflected in one-time Solicitor General and Attorney General, Justice Jackson's profound statement that his involvement in the Nuremberg Trials was "*the most important, enduring, and constructive work of my life*."[2] Justice Jackson's contribution to the success of the Trials was immense. In his position as Representative and Chief of Counsel of the United States, he was responsible for formulating the war crimes performed by Nazi leaders in the garb of legal wrongs.[3]

In the wake of the Second World War, it came to be widely accepted that "aggressive war" was a crime against the international community as a whole, and was in opposition to the basic tenets of international law (such as the upkeep of peace).[4] Accordingly, seventeen victorious States, i.e. the Allied Forces, formed the United Nations War Crimes Commission. In order to ensure that judgments pronounced on the basis of these war crimes not be construed as "*victor's*

[1] Max Radin, *Justice at Nuremberg*, 24(3) FOREIGN AFFAIRS, 369 (April, 1946).
[2] Harris, TYRANNY ON TRIAL, xxxvii (1st edn., 1954).
[3] Telford Taylor, *The Nuremberg Trials*, 55(4) COLUMBIA LAW REVIEW, 488 (April, 1955).
[4] Salman Kazmi, *Is Victor's Justice in Nuremberg Trial Justified or not?*, *available at* http://www.qlc.edu.pk/publications/pdf/Salman%20Kazmi.pdf (Last visited on November 26, 2011).

justice",[5] issues of procedure were given huge importance. Interestingly, initially there was much controversy over whether members of the prominent Nazi leadership should merely be arrested and shot, without the conduction of any trial.[6] However, the inherent injustice of this idea was soon recognized, and the need for an independent international tribunal was expressed.

This was rooted in the post-war belief that "*the worst settlement of international disputes by adjudication or arbitration is likely to be less disastrous to the loser and certainly less destructive to the world than no way of settlement except war*."[7] Further, if such a tribunal were independent and intellectually sound, a just decision would be reached.

When the Allied Forces decided to act as provisional governments in Germany, the first issue they faced was selecting which body of law to apply: their own national laws, German national law or an entirely novel legal system.[8] Their so-called imposition in the social order of Germany created apprehensions of victors' justice. It was argued *first*, that the purpose of the Nuremberg Trials was merely to enforce the ideals of the victor nations upon the losing nations; *secondly*, that the presentation of facts and evidence by the prosecution, i.e. the Allied Forces, was biased and partial.[9]

Such objections cannot stand. It was essential to punish the Nazi leadership for the atrocities that had been committed by them. By virtue of its four-year long political instability following the war, Germany was in no position to perform this function. Therefore, the burden to prosecute war criminals lay upon the victorious Allied Forces. Moreover, the Nuremberg Trials were conducted "*with more fairness and legal scruple than any of the defendants expected, or indeed had a right to expect, given their own conduct towards captured enemies*."[10]

As an example, I present the trial of Hermann Göring (alternatively spelled as Goering), a leader of the Nazi Party, who was one of the most highly placed Nazi official to be tried at Nuremberg. He was indicted on four different counts: *first*, conspiracy; *second*, participation

[5] *Id.*
[6] *Supra* note 3, at 493.
[7] Robert Jackson, *The Rule of Law Among Nations*, *31 AMERICAN BAR ASSOCIATION JOURNAL 290-94 (June 1945.*
[8] Trevor Heath, *Crime in Retrospect – Nuremberg*, 18(3) THE AUSTRALIAN QUARTERLY, 77 (Sep., 1946).
[9] Anthony Nicholls, *The Nuremberg Trials: Victors' Justice or a Categorical Imperative?, available at* http://www.sant.ox.ac.uk/events/lecturesarchive/nicholls.html (Last visited on November 19, 2011).
[10] *Id.*

in what the United Nations termed "*an aggressive war*"; *third*, war crimes, such as damaging German property; and *fourth*, crimes against humanity (including, most importantly, the murder of almost fifty-seven lakh Jewish persons).[11] At the end of a 218-day long trial, the tribunal finally declared Göring guilty on all counts, labelling him an "*active agent of Hitler*."[12] He was sentenced to death. In an especially incisive pronouncement, it was held that:

> "Goering was often, indeed almost always, the moving force, second only to his leader. He was the leading war aggressor, both as political and as military leader; he was the director of the slave labour programme and the creator of the oppressive programme against the Jews and other races, at home and abroad… His guilt is unique in its enormity."[13]

It is imperative here to note that the crimes for which Göring was prosecuted and convicted were not criminal acts at the time of their performance by him. In Nazi Germany, all acts and omissions for which the Nuremberg tribunal held him guilty had been perfectly permissible, legal acts. Now, had the Allied Forces been applying their own national laws to the situation in post-war Germany, they would have had to enact a statute in each of their nations, proclaiming that a person could be convicted retrospectively for crimes against humanity, *inter alia*. This would have rendered laws criminalizing such offences *ex post facto*.[14] However, this was not done. The Allied Forces were in fact not administering their own national laws, but were utilizing an independent legal system, which had perhaps been concocted for the very purpose of the Nuremberg Trials. Critics of the Nuremberg judgments contend that this is problematic, because in the absence of a statute conferring *ex post facto* status upon these offences, the perpetrators cannot be held liable retroactively. Prior to the Second World War, in fact, a State's treatment of its own citizenry was excluded from the purview of international law. Therefore, Nazi oppression of Jews was actually *legal* before 1945. Accordingly, anti-Nurembergians argue that since these crimes against humanity were committed at a time when

[11] The United States Of America, The French Republic, The United Kingdom Of Great Britain And Northern Ireland, And The Union Of Soviet Socialist Republics v. Hermann Wilhelm Göring and others, International Military Tribunal (October 1, 1946).
[12] *Id.*
[13] *Supra* note 11.
[14] *Supra* note 8, at 78.

the perpetrators were unaware that their actions were criminal, it would be grossly unjust to convict them for the same.[15]

However, in my view, given the extraordinary circumstances of the case at hand, it was absolutely imperative to create *ex post facto* crimes. The crimes committed at Germany fall within the ambit of *jus gentium*, or the law of all peoples.[16] Therefore, acts as abhorrent as genocide are offences against the international community at large whether or not a statute criminalizing them expressly is in existence and whether or not there exists a law conferring *ex post facto* status. In other words, they are criminal acts and attract sanction, regardless of the presence of any law which provides so. Accordingly, although the Allied Forces were unable to prevent Nazi leadership from committing these heinous crimes, it is now a moral duty upon them to subject the perpetrators to retributive justice. Essentially, "*surely the moral need to deal with the offenders is greater than the moral need to uphold some vague ethical principle.*"[17]

An argument commonly adopted by the defendants in the Trials was that their actions had been mandated by the Fuhrer [the superior-order defence]. The tribunal rejected this argument on the principle that military efficiency cannot be the sole consideration. This issue has been ably tackled by several legal scholars. Wyzanski explains that self-preservation is not the highest value of mankind. Therefore, while it is eminently possible that Nazi officials persecuted Jews not out of their own free will but solely because they had been so commanded by their superiors, this does not absolve them of their liability. He presents two illustrations to buttress his point: *first*, consider a situation in which three men, A, B and C are stranded on an island. They do not have a single source of food. To ensure that he and B do not starve to death, A murders C. *Second*, consider a situation wherein it is impossible for a soldier to escape the death penalty for disobedience if he does not shoot an innocent priest. To protect himself, he shoots the priest. It is settled law that A in the first scenario, and the soldier in the second scenario, shall be guilty of murder *even though they were acting under compulsion*. Similarly, the German Nazi leadership is guilty even though the offences committed by them might have been performed on command. This doctrine is important; allowing the defence of superior

[15] *Nuremberg Was Not a Fair Trial, available at* http://www.spectacle.org/596/nurem.html (Last visited on November 19, 2011).
[16] *Supra* note 8, at 79.
[17] *Supra* note 8, at 79.

order would not only "*leave the structure of society at the mercy of criminals of sufficient ruthlessness, but also would place the cornerstone of justice on the quicksand of self-interest.*"[18]

Chapter Two: Radbruch and Kelsen

The significance of the Nuremberg Trials lies in the fact that the Nazi leadership was tried and convicted for having upheld and followed Nazi law, i.e. the systematic persecution of Jews. Therefore, the larger question in the debate regarding the Nuremberg Trials is that of the validity of Nazi law. Were Nazi laws valid? Did the people of Nazi Germany have an obligation to adhere to Nazi law? More broadly, does the blatant unfairness of a law erode its validity? This Chapter seeks to address these questions, by placing special emphasis on the opinions of two eminent German scholars, Radbruch and Kelsen, both of whom have written extensively and illuminatingly about Nazi law.

Renowned German jurist Gustav Radbruch propounded the famous Radbruchian formula, which stipulates that a statutory rule ceases to enjoy the status of law when it reaches such a level of extreme injustice that the opposition between justice and positive law becomes intolerable.[19] It is generally supposed that Radbruch was a strict legal positivist prior to the advent of Nazism, after which he reformulated his stance and incorporated ethical elements therein.[20] However, in my view, Radbruch believed in according importance to values even before the Second World War. In Rechtsphilosophie, his treatise on law, he wrote that "*can only be defined as the reality striving towards 'the idea of law' which is justice*."[21]

After the war, however, Radbruch, increasingly disillusioned by the German exploitation of the positivist doctrine of 'law is law' or *Gesetz als Gesetz*, expressly challenges a starkly positivist notion of the validity of law. He observed that strict subservience to law had prevented German scholars from protesting against the injustice of the Nazi regime. Eminent formalistic jurists, such as Kelsen (whose views shall be discussed subsequently) had

[18] C.E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, ATLANTIC MAGAZINE (April, 1946), *available at http://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/2/* (Last visited on November 20, 2011).
[19] Frank Haldemann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, 18(2) RATIO JURIS, 163 (June 2005).
[20] Paul Weismann, *A Question of Morals? Gustav Radbruch's Approach towards Law*, STUDENT JOURNAL OF LAW.
[21] *Supra* note 19, at 165.

formulated 'pure' theories of law, which provided that an analysis of law must disregard all non-legal aspects, including moral or ethical values. Therefore, as per Kelsen, all orders issued by the Nazi leadership were law, simply because they were formulated in the garb of legal commands. By insisting upon an ideal of basic justice, Radbruch contested this one-dimensional view of the law.[22]

However, the importance of Radbruch's analysis lies in its uniqueness. Unlike legal positivists who accorded paramountcy to authoritative command, and natural law theorists who subscribed to a content-specific view of the law, Radbruch created a much-required middle path. While stating vociferously that "*Positivism, with its credo 'a law is a law,' has in fact rendered the German legal profession defenceless against laws of arbitrary and criminal content*"[23], he also eschewed the complete disposal of legal certainty. In fact, he maintained that law was incomplete without purposiveness (Zweckmässigkeit) and legal certainty (Rechtssicherheit). Purposiveness is that component of legalism which demarcates the values that a particular statutory provision seeks to achieve, while legal certainty, i.e. legal positivism is essential for a legal system to be both predictable and consistent in its application.[24]

Therefore, Radbruch in his formula incorporates both justice and legal certainty. When there is a conflict between the achievement of justice and the preservation of legal certainty, the latter must take precedence *unless* such conflict is so intense that it has reached an intolerable level. In this scenario, the achievement of justice must take precedence, and the law may be disregarded. In other words, such a law ceases to be law. This can be interpreted in two broad, overlapping ways: *first*, when the impugned law is so unjust that it is intolerable; *second*, when the impugned law does not even *attempt* to achieve justice. When the achievement of justice is *deliberately disavowed*, i.e. when there seems to be a commitment to inequality, unfairness and prejudice rather than to equality, fairness and tolerance, the law cannot be termed an 'incorrect law.' In fact, it is not a law at all, because for Radbruch, law is "*an order and legislation whose very meaning is to serve justice*."[25] Hence, because laws in the Nazi regime were so grossly

[22] Thomas Mertens, *Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice*, 14 LAW AND CRITIQUE, 273.
[23] *Supra* note 19, at 165.
[24] *Supra* note 19, at 165.
[25] G. Radbruch, *Legal Injustice and Legal Right*, SOUTH GERMAN LAWYERS NEWSPAPER, 107 (1946).

unjust in their concerted commitment to discrimination against Jews, they must not be regarded as laws at all.

Hans Kelsen, on the other hand, subscribes to a somewhat different viewpoint. In his conception of the law, a statutory rule may enjoy legal validity in spite of being morally repugnant. Accordingly to his positivist stance, a law is a law not because of its content or purpose, but because it is an authoritative issuance clothed in legal form. Kelsen uses the theory of moral relativism to demonstrate that while moral notions and ethical values may vary from person to person, legal certainty remains constant and can be objectively ascertained. Therefore, a subjective idea such as morality cannot be a component of an objective science such as law.[26] This was in consonance with Kelsen's formulation of the law as a 'pure' science, i.e. "*a legal theory purified of all political ideology and every element of natural sciences*."[27] Therefore, extraneous disciplines such as psychology, sociology, ethics and political theory[28] must not be included in legal theory, because their entanglement with law was bound to reduce the study of law to the study of each of these disciplines, which was, in his mind, undesirable and fruitless. Accordingly, ideals like justice must not be a consideration while deciding the validity of a particular law. Further, ethical assertions such as 'A person must not be persecuted merely because he is not a Christian' are psychological beliefs at best. It is impossible to empirically verify the truth of such claims. Hence, the fact that a statute is considered law is not contingent upon its content, but merely upon its promulgation as a law. It follows that a Nazi law must be considered a law irrespective of its unjust content, simply because it was issued by a governmental authority. Ironically, Kelsen maintained this formalistic viewpoint in spite of being a Jew who had to flee Nazi Germany because of its discriminatory laws.[29]

Controversially, however, Kelsen seeks to depart from the logical but abhorrent conclusion of his theory, that the German citizenry had an obligation to uphold Nazi law. He states that while the content-neutral formalistic theory of law does establish that Nazi laws were perfectly valid, it does not impose upon anybody the *obligation to obey*, because a legal ought is not equivalent to a moral ought.[30] While everyone ought to obey the law as a matter of *legal obligation*, the

[26] *Supra* note 19, at 168.
[27] H. Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, 1 (1st edn., 1934).
[28] *Supra* note 19, at 167.
[29] A.P. Morriss, *Why Classical Liberals Care about the Rule of Law*, *available at* http://www.fee.org/the_freeman/detail/why-classical-liberals-care-about-the-rule-of-law-and-hardly-anyone-else-does/#ixzz2Cn8NY0DJ (Last visited on November 20, 2011).
[30] *Supra* note 19, at 169.

question of *moral obligation* is entirely different. Because ideas of morality cannot be universally determined, it is for each individual to decide for himself whether a particular law is morally praiseworthy or morally blameworthy, and to accordingly decide whether or not to obey it. Therefore, a person can be legally bound to obey a law, but his moral obligation to disobey it may override. In this manner, Kelsen attempted to circumvent the condemnable conclusion that Nazi laws could not be disobeyed.

Kelsen's theory seems to waver when he discusses the Nuremberg Trials. In Kelsen's words, despite the widespread disapproval regarding *ex post facto* law, "*Justice required the punishment of [the Nazi leaders], in spite of the fact that under positive law they were not punishable at the time they per-formed the acts made punishable with retroactive force*."[31]

In my view, not only does Kelsen's 'pure' theory of law overcomplicate the problem of validity of Nazi law, but it also suffers from practical inconsistency. The position that unjust statutes like Nazi rules are valid law, but each individual can choose whether to accept or reject them on a moral basis, is fraught with difficulties. Granting each person the opportunity to decide for himself whether the Nazi persecution of Jews was morally appealing or repugnant allows them the freedom to *accept* the abhorrent tenet that Hitler propagated: that Jews must be systematically eliminated. I believe that individuals must *not* be given the choice to determine for themselves whether genocide is desirable or undesirable. In every society, there needs to be an objective standard by which it can be ascertained whether a particular statutory provision is a law or not, whether it needs to be followed or not. This standard must also be *universal*. No one individual should have the choice to follow, implement or be governed by an unjust law. Accordingly, I invoke Radbruch's formula: because Nazi statutes deliberately disavowed the achievement of justice in their discrimination against Jewish people, they must not be considered law at all. Therefore, the Nuremberg conviction of the German defendants who upheld unjust rules that were not in fact law, was proper.

Chapter Three: Hart and Fuller

The diverging opinions of Radbruch and Kelsen give rise to a further question: that of the intersection between morality and law. While Radbruch opposed Kelsen's content-neutral theory of the law and posited that a statute which does not strive toward the achievement of

[31] H. Kelsen, *Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?*, THE INTERNATIONAL LAW QUARTERLY, 165.

justice is not a law, Kelsen took a positivist stance and argued that morals had no place within the objective phenomenon that is law. Two of history's most eminent jurists, Lon Fuller and H.L.A. Hart, offered widely differing perspectives on the relationship between law and morality.

The focus of their debate was whether unjust Nazi laws mandated adherence. The argument arose from controversy surrounding 'Grudge Informer' cases, wherein German citizens maliciously reported trivial offences committed by persons against whom they held a grudge, knowing that Nazi Germany meted out grave punishments even for minor crimes.[32] Post the Nazi defeat, the arbitrary statutes that governed these offences earned an enormous amount of flak for their disproportionate sanctioning mechanism. There was an ever-growing school of legal thought which sought to penalize Grudge Informers for taking advantage of an unfair law. Accordingly, the debate seemed largely to centre upon the validity of Nazi law.

The most famously reported Grudge Informer cases include wives reporting their husbands for having committed slight transgressions of Nazi law. For instance, in the Third Reich, a woman reported her husband, an army man, for expressing his disenchantment with Nazism. Under the pre-war Nazi regime, it was a crime to criticize the Fuhrer or the Nazi regime. Accordingly, Nazi authorities transferred the woman's husband to the Russian Front, where it was believed he would perish. Contrarily, he returned to Germany after the war and filed a case against his wife for having turned him in under a grossly unjust law; he accused her of being a Grudge Informer, having unlawfully deprived him of his liberty under the German Criminal Code of 1871.[33]

Jurists who believed that the wife's actions were not illegal wrote that the statute under which she had brought her husband to Court had been validly enacted by the appropriate authority at the time, i.e. the Nazis. On the other hand, a large number of legal scholars were of the opinion that the statute in question was so blatantly unjust that it did not deserve the status of law, and any action brought under it must fail; any person who sought to spitefully prosecute someone under this statute must be punished for having availed of an unfair legal provision. Of the first disposition was Hart; of the second, Fuller.

[32] M. Sanson *et al*, CONNECTING WITH LAW, 148-149, (2nd edn., 2012).
[33] Judgment of July 27, I949, Oberlandesgericht, Bamberg, 5 STDDEUTSCHE JURISTEN-ZEITUNG 207 (Germany I950), 64 HARVARD LAW REVIEW I005 (I95I).

Hart's primary conviction was a strict separation between 'what is' and 'what ought to be'. Relying upon the work of eminent positivists such as Bentham and Austin, Hart believed that the positive [what the statutory rule states] must not be corrupted by the normative [what the statutory law *should* state].[34] A law retains its legal validity regardless of whether its content is fair or unfair. His reasoning for this was rooted in the belief that ascertaining the *fairness* of a law is essentially a *moral judgment*. It involves *normative logic*. Therefore, it must be excluded from the study of legal validity. In essence, Hart's idea of the law, borrowed from Austin, was that:

> "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, Fuller believed that Nazi German laws were not truly laws. He argued that there were some basic norms that every law must fulfil, failing which it loses its credence as a law."[35]

In fact, Austin went as far as to say that jurists who were of the opinion that State-made law conflicting with human law (or *morals*) was not law were speaking "*stark nonsense*."[36] Agreeing with him to a large extent, Hart attempts to bolster his positivist notion of law by attacking Radbruch's formula. While he appreciates Radbruch's insistence on a need for a moral conscience among the German citizenry while evaluating law, he states that the presupposition that it was positivism, and the belief that 'law is law' which contributed to the Nazi insensitiveness to moral requirements reeks of illogicality.[37] Hart correctly points to nations other than Germany, where a positivist notion of the law had prevailed but no authoritarian regime had succeeded. The choice while awarding retrospective punishment, Hart explains, is between two evils: "*the evil of retrospective punishment and the evil of leaving unpunished the person who had committed an outrageously immoral act*."[38] Radbruch's formula conflates the two issues by refusing to grant the status of law to immoral statutes. This equivalence of *immorality* with *illegality* is what Hart seeks to explode. Once it is understood

[34] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71(4) HARVARD LAW REVIEW, 593 (February, 1958).
[35] Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED, I84-185 (1954).
[36] *Id.*
[37] *Supra* note 34, at 618.
[38] *Supra* note 19, at 171.

that a certain statute is *legal* even though it is *immoral*, this choice becomes easier to make, by rendering it clear that a particular provision, such as a Nazi decree, may be a law which is too evil to require obedience.

What Hart did consider as a prerequisite for a statute to be considered a law was that it should contain "*clearly recognisable rules with recognisable consequences and discernable mechanisms for changing rules.*"[39] Since Nazi law fulfilled these conditions, it was valid, despite its condemnable content. In my opinion, Hart's conception of law seems to dictate that *first,* Nazi law is not rendered invalid or void *ab initio* merely because it transgressed certain moral standards; and *second*, no moral dicta can be treated as law prior to any corresponding legislation. Morals cannot replace Nazi statutes.[40]

At the other end of the spectrum is Lon Fuller. Fuller believes that the creation of law must involve some consideration for what he terms the 'internal morality' of the law.[41] In his view, law is an "*object of human striving [and not a] datum projecting itself into human experience*,"[42] i.e. contrary to the Austinian belief that human notions, such as morality and ethics, do not find a place in law, Fuller argues that such notions are *integral* to the formulation of law. Nazi statutes fail to fulfil certain basic norms based on natural law, that constitute the internal morality of law. Without this internal morality, a statute falls one step short of being categorized as a genuine law.[43]

As a logical outcome of this theory, a statutory rule for which there exist strong moral reasons for disobedience must not be enforced, because it has ceased to be a law.

I strongly agree with Fuller's view on the matter, acknowledging that while it is true that Nazi statutes were indeed enacted in accordance with the legislative procedures of the time, and are clothed in flawless legal garb, it is also indisputable that the degree of injustice and inequality of the atrocities that these statutes facilitated is so extreme that it deprives them of their legal validity. Combining the views of Radbruch and Fuller, it is evident that an attempt to uphold and follow a statute that does not meet the requirement of internal morality is a contravention

[39] *Supra* note 32.
[40] *Supra* note 34, at 599.
[41] Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Supra note 34, at* 71(4) HARVARD LAW REVIEW, 631 (February, 1958).
[42] *Supra* note 41, at 647.
[43] *Supra* note 19, at 171.

of natural law itself. Therefore, it is right and proper to convict both, Grudge Informers for invoking unfair Nazi statutes to advantage themselves, *and* the Nuremberg defendants for persecuting Jews in accordance with Nazi law.

Conclusion

Post the defeat of Nazism, it was both possible and essential to make explicit and tackle the unjustness of Nazi law. Accordingly, German Courts were faced with a unique problem. The invalidation of certain products of the Third Reich was imperative in order to assemble a new socio-legal system that would remedy the ill-effects of Hitler's authoritarianism. However, in the interest of political stability, German authorities were barred from rendering each and every enactment of the twelve-year Nazi era void. Equally, neither could they permit the wholesale permeation of Nazism into post-war Germany.

If the latter approach were followed, citizens of Nazi Germany who had perpetrated atrocities in the name of law would have been absolved of all criminal liability. The effects of this, obviously, would have been disastrous for a country nearly destroyed by the injustice that had been meted out to its population over the course of the Second World War. Retributive justice was something post-Nazi Germany not only desired, but also required. Accordingly, I believe that Radbruch's formula must be invoked: only those statutes must be treated as void and valid, which reached such a gross level of unfairness that the conflict between law and justice was unbearable. It is indisputable that certain Nazi laws, such as those in regard to which the Nuremberg defendants and the Grudge Informers were convicted, explicitly disavowed the achievement of justice. On a holistic view of the law, these statutes must not be regarded as law at all.

In conclusion, I believe that it is Fuller's following words that make clear why Nazi laws are indeed invalid:

> "To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints

imposed by the pretence of legality - when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law."[44]

[44] *Supra* note 41, at 660.