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# HOW THE STATE USES LAW TO MODEL INDIVIDUAL BEHAVIOUR

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## ABSTRACT

Ever since the conception of law as an effective social order instrument, there has been an unending debate on its relationship with morality. This paper centers around the theme of how the State uses the law to model individual behavior and impose obligations upon its citizens. Deriving jurisprudence on the obligations of law through the works of Lon L. Fuller, the critical question raised in his work "The Morality of Law" hovers around the link between laws and their morality. Extrapolating how the dialogical relationship between law and morality serves the purpose of the State in imposing a jurisprudential mentality while conforming to sanctions, I aim to propagate Fuller's eight moral criteria which make laws genuine and comply with the State in maintaining social order. Brief parts of my paper dwell into the much-renowned debate between HLA Hart and Lon Fuller on the essential components of legal positivism and natural law theory. Fuller's core position in delineating natural law theory reiterates the vital ingredient of morality as an obligatory element of the law that is kept in mind by the State in imposing sanctions and citizens in adhering to it. The author aims to relate Fuller's philosophical dialogue with laws relevant in contemporary times and how the State conforms to Fuller's jurisprudence of morality of law in formulating statutes.

**Keywords:** "The Morality of Law" Lon L. Fuller, rule of law, morality, State sanctions, principles of legality, legal positivism v. natural law

## I. PRELIMINARY

Classically, law is formulated to shape the conduct of individuals. The laws intend to regulate various activities, such as the possession of a weapon or a work break to watch after a sick family member or to recruit a minority employee. They aim to get people or institutions to substitute one activity for another, such as chewing tobacco instead of smoking, or using solar energy instead of conventional sources.<sup>1</sup> When the State formulates statutes, it portrays an inherent aim to develop stringent sanctions which morally bind individuals to obey them. While few jurists have contentions on how this relationship between law and morality is independent of each other, this paper seeks to establish the interdependency of law and morality through the intellectual labour of Lon L. Fuller's well-known publication "*The Morality of Law*"<sup>2</sup> (hereinafter "TML"). This paper focuses on statutes, whilst interpreting the Fuller's theory and applying rights to a multitude of subjects contemporary to modern society. The purpose of this approach is that the exasperation of morality and law will be explored in theory and practice.

Following World War II, during which mass killings were observed across Europe and Asia, the relationship between law and morality opened up extensive intellectual brainstorming. The allied powers established international tribunals in Nuremberg, Germany and Tokyo to convict officials of Nazi Germany and Imperial Japan who were charged with crimes against humanity and war crimes. The defence argued that these officials acted under lawful orders and punishing them for the same would violate the cardinal principle of justice that a person must be punished only if they commit crimes against the law. However, the trial severed for over a year and resulted in the conviction of Nazi officials. The decisions upheld in this trial marked a turning point between classical and contemporary international law. While it is not a shocker to regard the Nazi regime under Hitler as a barbaric state of lawlessness, seasoned with retroactive laws punishing the guiltless, a witness to this absolute abomination of tyranny made Lon L. Fuller question whether there can be a judicial framework capable of producing laws in a substantive sense? And if so, does the purpose of the State in law-making justify its inference from a standard sense of morality?

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<sup>1</sup> LAW, MORAL ATTITUDES, AND BEHAVIORAL CHANGE (KENWORTHEY BILZ AND JANICE NADLER )

<sup>2</sup> Lon Fuller, *The Morality of Law*, New Haven, CT: Yale University Press, 1964, 1969

## II. FULLER IN THE MORALITY OF LAW

The theme of this paper seeks to explore the use of law by the State in placing obligations and sanctions on individuals to model their behaviour. In doing so, I aim to extrapolate on the jurisprudential theory of Lon L. Fuller who investigates and envisages the legal system to be guided by a moral code of conduct. I propose, along Fullerian lines, that the legal system is conditional on the arrangement of political partnerships through a legal framework. This legal framework augments the presence of a moral obligation among citizens in being sanctioned by the rule of law.

In TML<sup>3</sup>, Fuller narrates the story of King Rex<sup>4</sup> and his failure to establish a legal system due to the dissatisfaction of certain criteria essential to identify with the rule of law. He lays down eight desiderata that, when not satisfied, lead to disaster for legal regulation and constituting the rule of law. Here are the ways failure can occur: (1) a failure to have rules at all; (2) a failure to publicize the rules; (3) the abuse of retroactive legislation; (4) a failure to make rules understandable; (5) the enactment of contradictory rules; (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; (8) a failure of congruence between the rules as announced and their actual administration<sup>5</sup>. The eight criteria of generality, publicity, non-retroactivity, clarity, non-contradiction, constancy, and congruity specify necessary conditions for the activities of lawmakers to count as *law-making*.<sup>6</sup>

To concur with these criteria, I wish to assert that congruence demands that legislators enact only regulations that are followed and that officials only implement what is necessary under the legislation. Judges are not to interpret them based on their preferences and police must apprehend anyone they suspect to have behaved unlawfully.

According to Fuller, law is “the enterprise of subjecting human conduct to the governance of rules”.<sup>7</sup> In as long as officials adopt simple, prospective, non-contradictory legislation, and execute these rules, individuals have grounds to adhere to the law even if they require a linear policy in which there is divergence amongst citizens. Citizens have a reason to abide by the

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<sup>3</sup> Ibid.

<sup>4</sup> See Fuller’s discussion on Rex pp. 33-38

<sup>5</sup> Ibid, pp. 39 and 96.

<sup>6</sup> Colleen Murphy, LON FULLER AND THE MORAL VALUE OF THE RULE OF LAW, *Law and Philosophy* (2005) 24: 239–262

<sup>7</sup> *Supra* note at 3, pg. 106.

law. This reason is the *inherent morality* and it is well provided for, in the way States guide their citizens to conform. This narrative by Fuller allows us to understand why the engagement of citizens in the systems set up by the legal system is appropriate for its people. His account also leads us to grasp how well the rule of law restricts the arbitration of authority, how officials can pass the laws and the measures officials can take legitimately, and how it limits everyone. The Fullerian rules give a new viewpoint about why some unethical conduct harm not only those involved, but the culture of trust and reciprocity underlying healthy diplomatic relationships. In the meantime, we are becoming more conscious of how citizens and officials engage in healthy political affairs and *why* their well-being depends on these acts.

To advance on this, I will attempt to correlate the Fullerian argument to present-day statutes in India. For example, Section 494<sup>8</sup> of The Indian Penal Code provides punishment for bigamy. It considers the second marriage of a Hindu man in the lifetime of a first spouse as void and entails punishment with imprisonment and a fine. To look at the underlying component of such a law, it can be averred that: (i) Since marriage in India is considered to be a sacred bond, both religiously and socially and (ii) moral religious scriptures like Rig Veda preach that a man and woman must be dutifully bound to each other morally and religiously, the basis for the formulation of law against bigamy extrapolates on the idea that morality takes precedence in determining the right from the wrong. To state this in Fullerian terms-- because bigamy in some religions is immoral behaviour that disrupts the moral sanctity of a marriage, the developing law-making around it restrict individuals from engaging in such conduct.

### **MORALITY OF ASPIRATION & MORALITY OF DUTY**

Additionally, Fuller divides the word morality into four separate classes conflated into two different normative sets each of the other two elements. One set includes “aspirational morality” and “departmental morality.” The elements of this division are somewhat similar to the approach of other scholars to differentiate religious and ethical concepts. They used the term ‘moral’ to describe norms that humans currently observe in a given place and time, while the word ‘ethical’ was used to describe the desired level of human behaviour, regardless of present human concern.

The *morality of aspiration*, for instance, is the realisation of human capacity in the way duties are to be fulfilled. Fuller recognized Plato and Aristotle’s interventions that a man may not be

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<sup>8</sup> The Indian Penal Code, 1860, S. 494, No. 45 (India).

able to realise their fullest powers. However, it still imposes upon citizens an obligation to do the moral right; for they may be shortcomings but not wrongdoings. In *Forsythe v DPP and the AG of Jamaica*<sup>9</sup>, the courts asserted that law is valuable not because it is 'the law' but because there is 'right' in it, a morally rational consistency in which the rules should be like suits and tailored to fit employees to work.

In contrast, the *morality of duty* spells out basic rules in terms of "though shalt not," and castigates men for "failing to respect the basic requirements of social living."<sup>10</sup> It is not unlike the "rules of grammar,"<sup>11</sup> the law itself<sup>12</sup>, namely a pragmatically discoverable and objective morality. Fuller spells out the mutually exclusive binary opposition between the two types of morality through the notion of a *moral scale*.<sup>13</sup> He tries to explain that on the spectrum of morality, the bottom of this scale entails the morality of duty, such that it prescribes the bare essentials of man's social existence. At the top of this scale is the morality of aspiration- which exhibits the dominion of human excellence. Our social comprehension of ethical phenomena focuses on the differences between the two. This is the ideological theme in the magnum opus of Philip Selznick, *The Moral Commonwealth*<sup>14</sup>. Selznick emphasizes repeatedly the importance of "differing our dependency from what we should aspire for". A professional morality must contain a morality of aspiration. However, it cannot be devoid of the morality of duty. The two should be balanced: "In the theory of social ordering , we should identify both what we can aspire to and what we must guard against."<sup>15</sup>

Thus, when States formulate and impose laws on its citizens, such laws create deterrence from the immoral, weighing from the basic socially desirable actions to aspiring to attain the highest human excellence. An example of the former includes laws against criminal actions, or inflicting injury upon others, or laws that prevent citizens from deceiving others. The latter would include an obligation and desire to facilitate social order, such as saving a person from drowning, or calling the police upon witnessing a suspicious activity. This distinction rest on an essential attribute that conforms and distinguish between moral and immoral conduct, the

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<sup>9</sup> Forsythe v Director of Public Prosecutions and Attorney General (1997 34 J.L.R. 512).

<sup>10</sup> Fuller, *The Morality of Law*, pgs. 5-6

<sup>11</sup> Ibid, pg. 6

<sup>12</sup> Ibid, pg. 15.

<sup>13</sup> Ibid, pg. 28-29.

<sup>14</sup> Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, University of California Press, 1992),

<sup>15</sup> Ibid, p. 146.

right from the wrong. Thus, one may justifiably conform to the Fullerian theory in linking law with morality.

### **EXTERNAL MORALITY OF LAW & INTERNAL MORALITY OF LAW**

Fuller's second set of moralities contains the "external morality of law" and the "internal morality of law." The "internal morality of law" is primarily concerned with the process of making law. It is the pedagogy used by lawmakers to decide which principle of substantive law should be applied to the particular case that he has been called upon to adjudicate. In applying this principle to the theme of this paper, one can contend with an example how States rely on the need for new laws or amendments to existing legislations when they deem them to be insufficient on grounds of moral incompetency. Consider Fundamental Rights in India. Article 23-24<sup>16</sup> of the Indian Constitution guarantees its citizens right against exploitation and prohibits all forms of forced labour, child labour, human trafficking, etc. The due process which allows the development of these provisions rests in the immorality of those specific acts which seem to hurt human rights, an essential component safeguarded to be upheld across the globe.

The "external morality of law" refers to the content of the substantive rules of law which are applied by the arbiter in arriving at his decision. At times, it is difficult to clearly distinguish between the adjective and substantive law, so too one may find Fuller's distinction between "external morality" and "internal morality" lacking the kind of specificity that might be desirable.

### **III. ENGAGING WITH THE FULLER-HART DEBATE**

In this section of my paper, I attempt to analyse the Fuller-Hart debate, which is possibly one of the most interesting academic debates in jurisprudence representing vicissitude opinions on the binding authority of laws. HLA Hart, a stringent flag-bearer of legal positivism, outrightly denies any correlation between law and morality. For Fuller, "substantive natural law" concerns "the proper ends to be sought through legal rules."<sup>17</sup> On the other hand, HLA Hart, in "Positivism and the Separation of Law and Morals"<sup>18</sup> captures his idea that "there is no necessary connection between law and morals or law as it is and law as it ought to be"<sup>19</sup>.

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<sup>16</sup> INDIAN CONST. art. 23, 24

<sup>17</sup> Fuller, *The Morality of Law*, p. 98.

<sup>18</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals," in his *Essays In Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), First published 71 *Harvard Law Review* 593(1957)

<sup>19</sup> Hart, "Positivism and the Separation of Law and Morals," 57. n.25

Upon inspecting both Hart and Fuller's views on 'what the law is' and 'how it relates to morality', I find that Fuller's theories offer precise elucidations to the shortcomings in the modern-day legal system. When Hart contends that we should recognise 'what law is' and 'what it should be, he still fails to inscribe, 'why do we obey the law?' Is it merely due to the imposition of sanctions it bestows upon individuals or is it because we solely accept it? Was Hart recommending that "law must be strictly severed from morality" or, if he wasn't, then why did Hart say it is *morally* better to retain a "broad" concept of law, one that applies even to wicked legal systems? And anyway, if he *wasn't* recommending separation, then what advice *was* he offering politicians who have to design constitutions or judges who have to decide cases? It looks like Hart's propositions lack clarity, and in fact, suffer from an intellectual disability.

For if we comply with Hart's theory, would we abstain from committing robbery if there was no penalty for the same? Or is law complied with because it is the most convenient and orderly way of organising our societies? In my confined capacity to comment on this, I believe that we abide by the law because we recognise that it is right or morally correct. This brings me to my next point: Are we obliged to obey the laws of a State if we deem them as immoral?

Let me elaborate on this by amplifying on the Nazi laws of Germany. These laws were legitimate and were passed legitimately by the then Parliament. However, the missing element was the 'moral authority. When I apply the views of Hart and Fuller to Nazi laws, I am compelled to side with Fuller and recapitulate why I believe there is a link between law and morality.

The anti-sedition laws of 1934 and 1938 in Germany led to a man being vilified by his German wife because he made offensive remarks about Hitler. When the husband returned from war, he instituted legal proceedings against his wife. In her defence, the wife presented that she complied with the laws and had not committed any crime and his sentence complied with relevant laws of the Nazi regime. However, the wife was pronounced guilty for 'illegally depriving another of his freedom', a crime under the Penal Code, 1871<sup>20</sup>, which was in operation during the Nazi regime. The Court characterized the Nazi laws as "contrary to all decent human beings' sound conscience and sense of justice."

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<sup>20</sup> Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844)

As erroneous as this particular example sounds, if we tread upon Hart's positivist views, the Court's decision was wrong, because for Hart, no matter how heinous the Nazi laws were, they observed the Enabling Act<sup>21</sup> passed by the Reichstag, and were valid. Hart was strongly against the Court's decision to introduce the element of morality and relying on the statute which protected the woman was no law at all<sup>22</sup>. Although it satisfies Hart's 'rule of recognition, it is a disturbing ratio indeed. Fuller, however, recognised the Court's decision because it created respect for law and morality, and by using his 8 desiderata, he stated that all Nazi laws were illicit. This justifies the court in overlooking the earlier 1934 act and upholding the wife's conviction. If the Courts avoided the moral application of the law, they would have had to acquit the wife and agreed with Hart. Such a judgement, in my opinion, would have been a miscarriage of justice.

I accede with Fuller and believe Hart is erroneous in his arguments because, in my view, his assertions becomes incompatible when he relinquishes to the fact that his rule of recognition requires a 'minimum morality of law'. Even in "Positivism and Fidelity to Law — A Reply to Professor Hart"<sup>23</sup>, Fuller believes that Hart is mindful of the internal normative nature of the law, but sticks to its law enforcement, which I believe shows that there is also a relationship between law and morality. It seems to me that his arguments not only lack basis but also reveal an internal contradiction of his thoughts. Impartiality in the application of a rule is a moral standard that is necessary for any legal system.<sup>24</sup>

#### IV. CONCLUSION

After analyzing the core positions of Fuller and Hart on the connection between law and morality and an extended excursus into how States use this relationship to impose sanctions, I have portrayed my favouritism in delineating the Fullerian principle when it comes to law-making with the latter. I feel the need to reassert that law and morality are two sides of the same normative system which regulate human behaviour in society. They bear individual autonomy and display a complementary relationship with one another. Any law that claims to regulate behavioural expectations must be in harmony with norms of moral conduct. Thus, it

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<sup>21</sup> Enabling Act (*Ermächtigungsgesetz*) (23 Mar. 1933) The adoption of the Act on 23 March 1933 enabled Adolf Hitler's government to enact laws without the consent of the Reichstag, which continued to exist, or of the Reichsrat and without the countersignature of the President of the *Reich*.

<sup>22</sup> Stephanie Patron, "The Inner morality of law- An analysis of Lon L Fuller's Theory", [2014], Glasgow University Law Society Law Review.

<sup>23</sup> Fuller, Lon L. (1958). "Positivism and Fidelity to Law — A Reply to Professor Hart". *Harvard Law Review*

<sup>24</sup> Steven Shavell, "Law versus Morality as regulators of conduct", [2002] Vol 4, no. 2, *American Journal and Economics Review* at p. 227-257



is only when we approach this relationship with this perspective, can we enact laws that secure the welfare and societal conduct of individuals involved. Any deviation from the Fullerian principles, thus, results in an immoral law in an erroneous legal system.