

Grudge Informer exercise

The below extract is from pages 148-9 in *Connecting with Law*. For the purpose of this exercise, footnotes have been omitted. Please refer to the book for the full text.

Post-Nazi Germany trials: tensions between positivist and natural law approaches

Lon Fuller and HLA Hart entered into a fiery debate over whether unfair Nazi laws should have been adhered to. The focus of the debate was on 'Grudge Informer' cases, which were a series of cases that concerned Nazi German citizens who would 'dob-in' people under a Nazi law that they had a grudge against. The alleged offences tended to be minor crimes against the state, but under an atmosphere of terror the Nazi state would punish miniscule transgressions. After the Second World War Nazi laws had been condemned politically, and there was pressure to punish grudge informers.

The Fuller–Hart debate arose specifically from cases where wives reported their husbands, whom they wanted to get rid of. One such wife told the Nazi authorities that her husband was unlawfully criticising the Nazi regime. He was subsequently sent to the Russian Front, which almost invariably was a death sentence. However, the husband survived. After the War, when the Nazi law had been repealed, the husband brought legal action against his wife for unlawful deprivation of his liberty under the German Criminal Code of 1871. Given that legislation at the time was validly enacted, could the law be described as so morally reprehensible that it is not law? Did Nazi law absolve the woman? Or was it so immoral that it could not be regarded as law and hence the woman could be convicted under the Criminal Code?

Lon Fuller (1902–78) sought to demonstrate that the Nazi German legal system was not a legal system because it failed to meet basic rules. These rules are morally internal to the legal system and based on natural law. Fuller does not embrace natural law in the religious sense, but treats its morality as on a par with international law. Therefore, any enforcement of Nazi laws was a breach of natural law and could lead to prosecutions and convictions. The reasoning of Fuller was that strong moral reasons to disobey the law can outweigh the morality of fidelity. Where law is immoral it loses its legitimacy and provides strong reasons for not enforcing it.

Fuller's notion of morality is linked to the technical law-making process. For laws to be legitimate, they must be made in accordance with 'natural law' principles such as being expressed in generality (not directed to individuals), transparent and consistent and operating prospectively. Nazi laws did not conform to these principles. As such, Fuller suggests that the laws under which grudge informers were operating are likely not to have been valid law in this moral sense. Therefore, it was not a system of law, but rather a system of terror.

By contrast, HLA Hart preferred to look to what existed in the legal system at the time. Whether the rules were unjust or irrational did not affect their legal status. Hart argued from a positivist position that moral issues should not be considered within a legal system. A law should not be invalidated on the basis of a moral judgement. However, Hart believed certain principles should underpin laws, including clearly recognisable rules with recognisable consequences and discernable mechanisms for changing rules. Hart observed that the Nazi law was legitimately enacted and enforced. Therefore, the wife could not be punished for following the law.

In the end, both Hart and Fuller endorsed retrospective legislation that allowed trials against grudge informers to proceed as an offence against the German Criminal Code of 1871. For Hart the retrospective legislation was enforced validly.

For Fuller, the retrospective legislation merely gave effect to the illegitimacy of the Nazi laws.

Questions for discussion

Was Nazi grudge informer policy 'law'?

What are the arguments of Fuller?

What are the opposing arguments of Hart?

What would Ronald Dworkin, Karl Marx or Robert Delgado say about the grudge informer policy?

After doing the exercise, read Andrew Altman, *Arguing About Law: An Introduction to Legal Philosophy*, Wadsworth Publishing Co, Belmont, CA (1996), to see how the debate applies to arguments in international law.