• HART-FULLER DEBATE AND ITS SIGNIFICANCE IN INDIA – A JURISPRUDENTIAL ANALYSIS

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Abstract

The twentieth century is an age of unrest, uncertainty, of changing values, contradictions and controversies. From 1914 to 1945, two world wars were seen. With the race of political upheaval and changes in values, it has observed a decline of faith in the positivist approach, revival of natural law, in reaction to which 'Pure Theory of Law' came into existence, which after the Nazi regime was again followed by a fresh reposition of faith in natural law theories. Within two decades (1950-70) it has noticed Radbruch-Hart debate, the Hart-Fuller debate and the Hart-Devlin debate. In all these three debates, Prof. Hart is the common figure. The object of this article is to examine the following – the views of Prof. Hart and Prof. Fuller in jurisprudence; the contents of their views; how they contradict each other; what is the bone of contention; is there any real controversy and relevance of such controversy in India. An attempt has also been made to offer some suggestions for a positivist-natural law approachment and lessons there from to India.

Key words-

positivism, natural law, morality, inner morality, legal realism

Introduction

Prof. H.L.A Hart is one of the significant spokesmen for a modernized form of analytical positivism[1]. One of the most indispensable and vital writings of analytical jurisprudence written in the English language since Austin's "The Province of Jurisprudence Determined" is "The Concept of Law.[2]" Prof. Hart's argument is not merely a restatement of Bentham, Austin, Gray and Holmes. He criticises old positivists for their too much adherence on sanction by calling that "*gun man situation writ large*", and American and Scandinavian realists for producing paradoxes about the nature of law[3].

Their perspectives gained new dimensions and understanding from his explanation, both of which are truly his own[4]. Prof. H.L.A. Hart's "The concept of law" (1961) is not merely a comprehensive reformulation of analytical positivism based on the theories of Austin and Kelsen, but in certain important respects, it also modifies the theories propounded by the said jurists. According to W. Friedmann, "two aspects of Hart's analysis of the concept of law are of special importance. In the first place, he bridges the age-old conflict between the theories of law emphasizing recognition and social

[1] Positive Analysis of Law means man made law

[2] H.L.A. Hart, "Positivism and the Separation of Law and Morals" 71 Harvard Law Review 593 (1958)

[3] H.L.A. Hart, The Concept of Law 6 (Clarendon Press, Oxford, 2nd Edn.)

[4] Lon. L. Fuller, "Positivism and Fidelity to Law - A reply to Prof. Hart" 71 Harvard Law Review 630 (1958)

obedience as essential characteristics of legal norm and those that see the distinctive characteristic of law in the co-related elements of authority, command and sanction"[5]. Prof. Hart's primary and secondary rules cover the both. He condemns naturalists for their claiming superiority of natural law over man-made law as higher law. He prefers positivist approach to law for the sake of clarity in law.

Professor Lon L. Fuller is a modern natural law jurist. He has turned a critical search light on both juridical positivism and legal realism. His main argument revolves around the '*sine quibus non*' circumstances that must exist for laws to be effective. According to him, law "is the enterprise of subjecting human conduct to the governance of rules"[6]. According to Fuller, "there are eight typical ideals or formal virtues to which a legal system should strive viz., generality, promulgation, absence of retroactive legislation and certainly no abuse of retrospective legislation, no contradictory rules, congruence between rules as announced and their actual administration, clarity, avoidance of frequent changes and the absence of laws requiring the impossible. These principles of legality are not basic conditions which every system necessarily fulfils, but constant pole stars guiding his progress. The greater its success, the more fully legal such a system is"[7]. He levelled the same criticism at Realist School supporters because they make the error of presuming that a strict division between is and ought, of positive law and morality, is both feasible and beneficial,[8] that is whether this distinction merely "is" in Hart's perspective or whether it "ought to be."[9] He is also thankful for Hart's efforts because they have rekindled the positivists vs. natural law thinkers' discussion, which had become merely an argument over perceptions with little else in common[10].

On the other hand, he criticizes naturalists for their attempt to formulate beforehand a timeless, immutable law of nature. He disagrees with the idea that natural law is an accumulation of trustworthy 'higher law' principles that human actions must be judged by. He contends that the pursuit of the fundamentals of a living law has to be free and unrestricted. Fuller suggests renaming an established phenomenon "*eunomics*" due to the widespread connection of the expression "natural law" with dogmatic and fundamentalist ideologies of ethics and law. He defines it as "the theory of the study of good order and workable arrangements"[11].

Views and propositions of Prof. H.L.A. Hart

Contrary, Hart preferred law as union of primary and secondary rules. According to Hart, "the primary rules are prescription of behaviour (duties) and secondary rules relate to the identification, creation, change and application of the former (powers)"[12]. He further stated that "the union of primary and secondary rules provides the key to the science of jurisprudence. Legal system is a complex union of primary and secondary rules"[13]. He also expressed that "two minimum conditions are necessary for the existence of any

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[5] W. Friedmann, Legal Theory 287 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, Fifth Edition, 2002)
[6] Gokulesh Sharma, An Introduction to Legal Theories 225 (Deep & Deep Publications Pvt. Ltd. New Delhi, 2008)
[7] V.D. Mahajan, Jurisprudence & Legal Theory 725 (Eastern Book Company, Lucknow, 5th Edn., 2001)
[8] Supra note 4, at 630-631
[9] Ibid.
[10] Ibid.
[11] Lon L Fuller, "American Legal Philosophy at Mid-Century" 6 Journal of Legal Education 457 at p. 473 (1954)
[12] Supra note 3, at Chapter V
[13] Id. at 111

legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials"[14]. Not only this, two other requirements are necessary for the existence of a legal system. First, the minimal content of natural law, shared by both law and moral must be present in every legal system. Secondly every legal system must have the four features of morality,[15] i.e. Importance of moral rules, resistance to intentional change, the voluntary nature of moral transgressions, and the nature of moral pressure because these attributes set it apart from the law, customs, etiquette and other kinds of systems of social rules.

What is essential for law? To Austin habitual obedience, to Kelsen effectiveness, to Holland enforceability, to Salmond justiceability, to Holmes predictibility but to Prof. Hart it is the rules of recognition which are essential for law. In his own words -

"*To say that a given rule is valid, is to recognise it as passing all the tests provided by the rule of recognition and so as a rule of system*[16] *Rule of recognition exists as matter of fact. The validity of other rules is determined by conformity with rule of recognition but there can be no question concerning the validity of the rule of recognition itself*."[17]

On the one hand, his theory advances the ideas of Austin and Kelson, but on the other, it makes significant changes. Hart bridges the long-standing divide between (1) legal theories emphasising recognition and social compliance as a necessary quality of a legal norm and (2) those who see the law as the related elements of authority, command, and sanction. The significance of these two parts of Hart's examination of the concept of law cannot be overstated. Savigny, Ehrlich, are the proponents of the first approach. The latter is by Kelson, Austin, and a number of their students and successors.

According to Hart, a system of law can only survive if at least two conditions are fulfilled. We must follow both the system's rules of recognition, which outline the criteria of validity, as well as its rules of change and adjudication, if they are valid in accordance with the system's ultimate standards of validity. Private Citizens are only need to meet the first requirement. The system's administrators must also meet the second requirement. They must view these as accepted norms of professional conduct and critically evaluate them.

Idea and contention of Prof. Fuller

Prof. Lon L. Fuller's "The Morality of law" is an enduring contribution to American Moral philosophy. It throws a new light on the relationship between morality and law and promotes a theory of law which has broad realistic connection in today's society. He has

[14]Id. at 113
[15]Id. at 169-176
[16]Id. at100
[17]Id. at107

written many articles[18] and book reviews,[19] but "The morality of law" is only his second book on legal philosophy, the first being "The law in Quest of itself'".

Professor Fuller's theory of 'The Two Moralities' is the real contribution to juridical and moral philosophy. In his opening paragraphs of "The Morality of Law" He expresses disappointment about the literature that already exists on the relationship between Law and Morality. He thinks that legal philosophies have failed to clarify the meaning of morality itself[20] and thus tries to clarify the meaning of morality himself. His approach is to "emphasize a distinction between........ the morality of aspiration and the Morality of duty". According to him "the morality of aspiration is the morality of good life, of excellence, of the fullest realization of human powers"[21]. He further expresses that "the morality of duty lays down the basic rules without which an ordered society is impossible or without which an ordered society directed towards certain specific goals must fail of its mark".

Unlike, Prof. Hart's Union of primary and secondary rules, Prof. Fuller defines law as "enterprise of subjecting human con- duct to governance of rules". "Unlike most of modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort.[22]" For him legal system is not composed of "a net work of explicit bargains, but that it is held by a pervasive bond of reciprocity.[23]" In a legal system the internal and external moralities of law interact. According to Prof. Fuller a legal system must establish "some minimum efficacy in practical affairs.[24]" For proper legal system the inner morality of law must necessarily be observed. Unlike, Prof. Hart's rule of recognition, the validity of law according to Prof. Fuller depends, upon its conformity with "the inner morality of law." It is the morality of aspiration which Prof. Fuller has divided into internal and external moralities[25]. The first made up of ideals and exists what is called "substantive natural law". The latter is called 'the morality that makes the law possible'. It is a 'basic lower law' or 'procedural natural law'. It is this procedural natural law which gives validity to law.

Fuller pointedly observes that nature does not present us with 'is' and 'ought' in a neatly presented parcels as so many positivist assume. Fuller traces the minimum weakness of legal positivism and its inherent weakness of the law's quest for some exclusive command where it may start free from ethics and philosophy. Fuller says it is a futile exercise to separate is from ought and the law from morality solely to promote clear thinking in the law. He criticizes those who divorce ethics and morality from law. He

[18]Lon L Fuller, "Legal Fictions" 25 Illinois Law Review 363-99 (1930-31); Lon. L. Fuller, "Positivism and Fidelity to Law - A reply to Prof. Hart" 71 Harvard Law Review 630 (1958); Lon L Fuller, "American Legal Realism" 82 U. Pa. L. Rev. 429 (1934); Lon L Fuller, "Reason and Fiat in Case Law" 59 Harvard Law Review 376 (1946)

[19]C. K. Ogden, "Bentham's Theory of Fiction" 47 Harvard Law Review 367 (1933); Roscoe Pound, "Formative Era of American Law" Harvard Law Review 341 (1939); John Walter Jones, Historical Introduction to Theory of Law 55 Harvard Law Review 826 (1946); G.W. Paton, "A Text Book of Jurisprudence" 59 Harvard Law Review 383 (1948)

[20]Lon L Fuller (Lon Luvois), The Morality of Law 151 (Yale University Press, New Haven, 1964)

[21]Id. at.17

[22]Id. at.106

[23]Id. at.20

[24]Id. at 110

[25]R.W.M. Dias, Book Review "The Morality of Law" by Lon L Fuller, Cambridge Law Journal 157 (1965)

asserts that legal community should not waste time and effort in separating the 'is' and 'ought' and give full support to a system permitting reforms and progress and supplement legal positivism with natural law concepts.

Prof. Fuller does not argue that a legal system's rules must adhere to any moral or other external standard's substantive criteria. He continues to insist that laws must adhere to "internal morality". Beginning with morality of obligation and morality of aspiration, he makes a contrast between the two. The former is consistent with a legal external morality. It consists of the fundamental laws that society needs to function. Law, in his opinion, is a "purposive activity." The morality of aspiration makes a valiant effort to convince humanity to pursue ideals in a Platonic manner. He extrapolates eight criteria for the "inner morality" of the law from the structure of the legal order. These eight guidelines are not intended to serve as tenets of actual natural law. They are viewed as a sort of "procedural natural law" instead. The eight criteria are as follows - (1) generality; (2) promulgation; (3) lack of retroactive legislation and no abuse of retrospective legislation; (4) comprehensibility and clarity; (5) avoidance of inconsistencies. (6) Avoiding demands that are unreasonable (7) The law's consistency over time, or the avoidance of frequent changes, and (8) the consistency between how the law is announced and how it is actually applied. These law concepts serve as constant pole stars for his advancement rather than being fundamental requirements that every system must meet. A system like this is more totally legal the more successful it is.

Hart vs. Fuller

There is an age-old controversy as to the fact whether the legitimacy of legislation depends exclusively on formal standards or also on some moral standards. The positivists contend that a formal criterion that has been acknowledged as a law constituent in a particular order solely decides the legal status of a rule. In Britain, this comprises statute, precedent, and ancient custom, albeit it is not always agreed upon. A statement contained in one or both of these is considered to be "law," regardless of its righteousness or evilness. Contrary, the naturalists claim that a rule does not become law by fulfilling the formal requirements alone; in order to get the name and quality of law it has also to fulfil some moral criterion and an unjust or immoral precept cannot be called law merely because it has fulfilled the formal requirements[26].

Prof. Hart chooses the former way of thinking about law whereas Prof. Fuller adopts the latter. There is nothing new in the Hart-Fuller controversy. The old wine has been put into a new bottle. The whole controversy veers round their way off thinking about law. An idea of controversy can be found in these works "Positivism and the Separation of Law and Morals,[27]" "Positivism and Fidelity to Law - A Reply to Prof. Hart"[28]; "The Concept of Law"[29], "The Morality of Law"[30] and a book review of "The Morality of Law."[31]

In his celebrated essay,[32] Prof. Hart opposes positivist school of Jurisprudence from many

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[26]R.W.M. Dias, "Temporal approach towards a new natural law" 28(1) Cambridge Law Journal 72 (1970)
[27]Supra note 2, at 593
[28]Supra note 4, at 630
[29]Supra note 3
[30]Supra note 20
[31]H.L.A Hart, Book Review of "The Morality of Law" by Lon L. Fuller, 78 Harvard Law Review 1281, 1296 (1965)
[32]Supra note 2, at 593

of the appraisals (that "there is a point of intersection between law and morals"[33] or that "what is and what ought to be are somehow indissolubly fused or inseparable"[34]) which have been focused against the emphasis on differentiating between the law as it is and the law that *ought* to be[35]. The charges levelled against positivism are the following -

(i) Separation between is and ought is erroneous and shallow because it prevents people from seeing the fundamental nature of law and how it is rooted in social life;

(ii) It is corrosive in practice in addition to being intellectually erroneous, because it has the effect of weakening resistance to the worst form of state tyranny or absolutism[36]

(iii) By ignoring penumbra, there is error of 'formalism' or 'liberalism'. German thinkers regard it as hell created on earth by men for other men.

After critically examining all the charges, Prof. Hart refutes them one by one. He insists that critics have confused the difference between law as it is and law as ought to be with a moral theory. According to moral theory statements of what is the case (statement of fact) belong to a category or type radically different from statements of what ought to be (value statements). Prof. Hart quotes an example from Wittgenstein which is cited in Fuller's "Human purpose and Natural Law"[37] and condemns it as a moral argument. Not only this, by giving historical account of is and *ought* separation tendency, he gives emphasis on merits and ingenuity of it.

Prof. Fuller, in his reply to Prof. Hart, contradicts it. Rephrasing the question of 'Law and Morals' in terms of 'order and good order', he criticises Hart for ignoring "The internal morality of order" necessary to creation of all law[38]. In view of Prof. Fuller, Prof. Hart's essay contains a significant internal inconsistency. At one place Prof. Hart says that "the distinction between law and morality is something that exists, and will continue to exist"; contrary, He appeared to be cautioning that "fidelity to law" is a "precious moral idea" that is in risk of being lost and that the actuality of differentiation is itself at risk[39]. Prof. Fuller throughout his reply-essay, emphasizes how positivism has discredited 'fidelity to law' which is equally important for positivists and naturalists. There are some criticisms against Prof. Hart.

First, as to definition of law Prof. Hart accepts diversity among Bentham, Austin, Gray and Holmes as to 'what law is'; but in his defence he ignores it. Prof. Fuller regards that law as command of highest legislative power and law as interpretation given by court and consequently crisis in constitutional position of Supreme Court lacks fidelity to law. On the other hand, lack of unanimity between Benthamite and Austinian views on constitutional limitation on the power of sovereign also causes lack of fidelity to law in cases of constitutional crisis[40].

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[33]A.P. D'Entreves, Natural Law, An Introduction To Legal Philosophy 116 (1952)
[34]Lon L Fuller, The Law in Quest of Itself 12 (Foundation Press, Chicago,1940)
[35]Arnold Brecht, "The Myth of Is and Ought", 54 Harvard Law Review 811 (1941); Lon L. Fuller, "Human Purpose and Natural Law" , 53 Journal of Philosophy 697 (1953)
[36]G. Radbruch, "Die Erneuerung des Rechts" 2 Die Wandlung 8, 10 (1947)
[37]Supra note 35 at 700
[38]Supra note 4
[39]Id., at 630-631
[40]U.S. Constitution, Article V, "Amending Power can never be used to deprive any state without its consent of its equal representation in the senate."

Second, Prof. Fuller criticizes positivists, claiming that their main goal is to uphold the rule of law and seek precise definition of law but what they plan to exclude from the definition of law is not clear[41].

Third, Positivist adherence to coercive power as the foundation of legal system also fails to realize the ideal of Fidelity to law[42].

Fourth, Prof. Fuller maintains distinction between order and good order i.e. One could argue that law indicates simplicity, and that law that upholds the needs of justice, morality, or human ideals of what law should be is what constitutes good order. In the life of nations the internal and external morality reciprocally influences each other. Fuller criticises Prof. Hart along with other positivists for their neglect of inner morality of law[43].

Fifth, Prof. Fuller criticizes Prof. Hart about his approach against purposive interpretation of law and legal institutions. He points out that "fidelity to law becomes impossible, if we don't accept the broader responsibilities that go with a purposive interpretation of law"[44].

Sixth, Prof. Fuller condemns rule of recognition as a criterion of validity. As Prof. Hart regards legal system as a continuing phenomenon, he also accepts that with reference to continuum morality is an indispensable factor, not only in genesis, but also in continuation of laws. But he excludes morality by shifting his ground and taking refuge in the present time frame[45].

Seventh, In particular, Fuller criticizes Hart's key distinction between rules conferring powers and rules imposing duties on the ground that it is to ensure foundation for a theory. He uses instances to illustrate how a rule can result in the formation of duties as well as the grant of power[46]. More intriguingly, a rule that grants a power may also allow for its extinction under specific circumstances. If this is the case, a regulation recognising the authority of some formal agency (such as the legislature) to establish "law" may very well include a moral restriction on that authority. Prof. Fuller also attacks Hart, (i) on his rescue of concept of law from gunman's situation writ large, as there is distinction, between face to face situation and indirect communication between law giver and the subject[47]. (ii) application of the rule of recognition to a complex

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[41]About Hart's warning against "infusion of more morality into law", Prof. Fuller points out six possible suggestions (1) It should not be assumed that evil aims might have as much coherence and inner logic as good ones (2) If weakening of partition between law and morality would permit in infusion of 'immoral morality', what is the most effective protection against this danger? No positivist has touched this issue (3) Judges have to balance between this objective and letter of statutes (4) The rules are justiciable (5) Through juridicial process danger of an infusion immoral morality does not present real issue and (6) Duty of judges does not raise grave issue.

[42]To this Prof. Hart also agree that foundation of legal system is not in coercive power but certain fundamental specifying the essential law making procedure, Supra note 2 at 603

[43]Supra note 4; Supra note 20

[44]Supra note 4

[45]Supra note 20 at 137-139

[46]Fuller gives examples of (i) Trustee paying of his pocket has right to reimburse himself out of property in his charge without enforcing beneficiary duty, for details see Lon L. Fuller, The Morality of Law 145 (Yale University Press, New Haven and London, 1964) (ii) he cites examples of rule concerning mitigation of damages, Lon L. Fuller, The Morality of Law 149 (Yale University Press, New Haven and London, 1964).

[47]Supra note 20 at 154

constitutional democracy[48]. (iii) The use of rule of recognition to explain how and when a primitive society makes its "step from the pre-legal into legal world"[49]. Pre-legal society representing rule of obligation or duty imposing rule and legal world power conferring rule are not convincing (iv) revival of old law in new set up after revolution.

On the other hand Prof. H.L.A. Hart reflects a critic search light on Fuller's. 'The Morality of Law' and tries to defend some of inefficiencies pointed out by Prof. Fuller. In his book review,[50] Hart criticizes Fuller for his definition of law as purposive enterprise which includes "rules of clubs, churches, schools and hundred and one forms of human associations". Thus the external borderline of law cannot be determined[51]. Secondly there are difficulties in making distinction between morality of duty and morality of aspiration[52].

Prot Hart defends (i) rule of recognition as complex and open textured[53]. (ii) A revival of old law after revolution, he makes it clear that "legislation of past legislator is accepted as law because, it is identified as such by presently accepted rule of recognition"[54]. Prof. Hart wittingly points out that principle of legality in terms of 'inner morality of law' is not new. It was urged by Bentham in name of utility; (iii) without dignifying the title of morality positivists also set values in the name of happiness and other substantive moral aims.

Divergent opinion on Law of Nazi Regime by Hart and Fuller

The controversy between Hart and Fuller veers most strikingly round the laws of Nazi Regime. There is unanimity of opinion between Professor Hart and Fuller as regards the desirability of punishment in such case is concerned. But they tackle the case differently. Prof. Hart condemns the view taken by German courts. Following Austinian way of thinking,[55] he argues that "the only proper procedure in this case would have been to make criminal legislation and punishment retrospective"[56]. It would have been clear that in choosing to punish the woman, one had to choose between two terrible outcomes: either leaving the lady unpunished or surrendering a priceless moral ideal upheld by many of the legal systems[57]. Prof. Hart argues that in acceptance of assertion of German court i.e. certain rules cannot be law because of their moral iniquity; there is confusion of the most powerful forms of moral criticism. Prof Hart clarifies two rival concepts of law;[58] *first*, the broader idea that encompasses all laws that pass the formal requirements of a system of primary and secondary rules, even if some of them violate morals; *second*, the narrower which excludes from "law" morally offensive rules. The

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[48]Id., at 155
[49]Supra note 3 at 41
[50]Supra note 31
[51]Ibid.
[52]Id., at 1285
[53]Id., at 1293
[54]Id., at 1295
[55]H. L. A. Hart (ed.), The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence 185 (Weidenfeld and Nicolson, London, 1954)
[56]Hart argues choice between two evils that of leaving her unpunished and sacrificing a very precious principle of morality endorsed by most legal systems. He prefers punishment, Supra note 2 at 619
[57]Supra note 2 at 619
[58]Supra note 3 at 205-206

wider of these two rival concepts includes the narrower. He prefers the wider concept and instead of declaring morally iniquitous rules; "this is in no sense law" he prefers to say "this is law but too iniquitous to obey or apply"[59]. In a nut shell, the only solution of iniquitous law is retrospective enactment.

On the other hand, Prof. Fuller, preferring Radbruch's view argues that a law, in order to be valid must have an inner-morality. Prof. Fuller condemns Hart's assertion about persistence of law under Nazi system without making any inquiry[60]. Prof. Fuller also disagrees with Prof. Hart that courts ran away from the problem they should have faced by saying; "when a statute is sufficiently evil it ceases to be law." Prof. Fuller defends attitude adopted by German courts. He argues that matters, certainly would not have been helped if instead of saying, "This is not law", they had said "This is law but it is so evil we still refuse to apply it." Surely moral confusion reaches its height when a court refuses to apply something it admits to be law. According to Prof. Fuller, it would have not been wise for courts in those circumstances to allow to the people to take law in their hands, as might have been occurred while the courts were waiting for a statute.

Summing up, the whole controversy veers round the problem; that for Fuller morally iniquitous law is not law whereas Professor Hart concedes that morally iniquitous law is still law.

Where is the real controversy?

Hart-Fuller controversy regarding laws of Nazi regime is more verbal than real. This controversy may be resolved by adopting time frame approach. For Fuller, the essence of law lies in time frame of continuum and for Hart in the time frame of the present. Prof. Fuller argues that eight desiderates known as "the inner morality of law" is essential to the continued functioning of laws. Prof. Hart begins by equating "law" with the legal system, which is an ongoing incidence; nonetheless, he grounds his argument for positivism on the necessity for a simple means of determining law at any given time[61]. Elsewhere he had alluded to the acceptable proposition that some shared morality is important to the existence of any society[62]. Now the 'existence' can only mean 'continued existence' but he does not consider the morality as a pre-requisite of continuity which one would have thought, are implicit in his concept of legal system. It would seem, therefore, that Prof. Hart has revealed a greater separation between his concept of law and his positivism than between law and morality[63]. Prof. Hart has nowhere maintained difference between continued existence of society and continued existence of social system. Thus it becomes obvious that for continued existence of law, for both, morality is indispensable. It may be either in the name of "inner morality" of laws;[64] or "some shared morality"[65].

As regards validity of unjust law there seems to be only temporary controversy between Hart and Fuller. Any concept that considers the implications of continuity has a

[59]Id., at 207
[60]Supra note 4
[61]Supra note 2; Supra note 3 at 203
[62]H. L. A. Hart, Law, liberty and morality 51 (Stanford University Press, Stanford, 1963)
[63]Supra note 26 at 74
[64]Supra note 20
[65]Supra note 62

connection between morality and law internally. For notwithstanding that an immoral precept is "Law" at a time, it will not continue to be "Law" indefinitely. Neither Austin, nor Kelsen nor Hart has concerned himself with the conditions of continuance. Morality is a factor that governs the health and continued life of law.

The debate between Hart and fuller regarding relationship between law and morality is also not serious. The dispute relates to the extent to which laws should be used to uphold morality, because neither Hart nor Fuller denies that some laws are shaped by moral considerations. The main fear of Hart in this regard is "infusion of more morality" or "immoral morality". To this, it requires clarification that "ought" is not synonym of morality. In other words "ought" is not exclusively moral "ought".

Fuller himself reduces the high voltage of natural law in acceptable minimum. It is evident that his conviction of "inner morality of law" is not the morality of religion. It is secularised form of morality that is essential for law. On the other hand Prof. Hart also accepts the essentiality of "minimal morality" for law As he points but that what has been achieved by Prof. Fuller in name of "inner morality of law" that has been valued by positivists in the name of happiness or other substantive moral aims of the law without dignifying with the title of morality[66]. Prof. Hart also equates the "inner morality of law" with Benthamite Principle of Utility[67]. Thus if one conceives ought in secularised form of morality, he cannot find any conflict between Prof. Hart's minimal morality or "some shared morality" on the one hand and Prof. Fuller's "the inner morality of law".

Significance of Hart-Fuller Debate in India

The famous Hart-Fuller debate and its subsequent development make it sufficiently clear that present is the age neither fully of positivist assertion nor of natural law precepts. It is an age of both i.e. positivist-natural law rapprochements. India has emerged as an independent nation in the mid-twentieth century. It may take very valuable lessons from jural developments in other parts of the world. Prof. Hart and Prof. Fuller represent the modified and socially acceptable versions of the positivist and natural schools. India may evolve its jural postulates in the light of positivist-natural law interdependence and co-operation.

The idea of natural law served as the foundation for the Indian Constitution. The Constitution of India, in Kelsonian terminology is the "Grundnorm" to which all state made law is to conform. It is the fundamental law of country. The Indian Constitution is regarded by Indian courts, especially the Supreme Court, as the "Grundnorm" to which all statutes must adhere and by which the legality of all legislative and executive actions must be determined. The first case was *State of Madras v. Smt. Champakam Dorairajan*,[68] wherein the Madras G.O. governing admission to an educational institution supported by the state was overturned by the Supreme Court. The Supreme Court guided by legal positivism and observed that "since there was a conflict between Fundamental Rights and Directive Principles of State Policy and since the latter were non-enforceable the order should be declared void". This led to the Constitution (First

[66] Supra note at 1291
[67] Id.
[68] AIR 1951 SC 226

Amendment) Act, 1951. We also can found the concept of "Grundnorm" in the case of *Srimati Indira Gandhi v. Raj Narain and Ors*[69].

The positivist tendencies are to be found in the modified form. The legislatures have plenary power to make laws vide Articles 245 and 246 read with the three lists given in the seventh schedule of the Constitution.

The natural law principles have been accepted and incorporated in the Constitution itself. They have formed the basis of positive laws. Activities opposed to decency or morality are prohibited[70]. The Supreme Court of India upheld a prosecution for keeping an obscene book as it was injurious to decency or morality[71]. Similarly the freedom of prostitute could be curtailed in order to check demoralising influence on public[72]. The legislature cannot enact criminal law retrospectively[73]. The procedural morality or inner morality of law, propounded by Prof. Fuller seems to find appropriate place in Indian Constitutional Jurisprudence. Retrospective criminal law has been declared bad as being highly inequitable and unjust[74]. As to prospectively, the Supreme Court pointed out that the Constitution has prospective effect only[75]. The principle of generality found full adherence in *Satish Chandra v. Union of India*,[76] where the Supreme Court observed that, "law should be general, persons and things similarly circumstanced are to be treated alike, both in privileges conferred and liabilities imposed." In *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar*,[77] while interpreting Article 14 of the Constitution, the Supreme Court pointed out that, "classification under Article 14 must be based on intelligible differentia." The natural law principle has also been fused into the concepts of quasi-contract; reasonableness of restrictions, reasonableness of opportunity and courts power to strike down the order of administrative authorities on ground of violation of the principle of natural justice. These and similar instances are the example of specific formulation of natural law into the positive enactments. This tendency to incorporate natural law in positive enactments is supported by Prof. Hart also. He only differs as to application of these principles by courts. One of the important lessons for India in this respect is the need of positivist natural law rapprochement in India.

The task of making law alive can be entrusted either to the legislatures or to the judiciary. In Indian federation, the Parliament and the State Legislatures enjoy plenary power to make laws but those laws are subject to what ought to be or criterion formulated by the Constitution. The judiciary has to determine whether a law enacted by legislature is valid law?

In India, the positivist thinkers ask the court not to look behind what law 'ought to be'. The courts should interpret the law as enacted by the Legislature. They give much

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[69]AIR 1977 SC 69; See also A.K. Gopalan v. State of Madras , Maneka Gandhi v. Union of India , A.D.M. Jabalpur v. Shivakant Shukla

[70]Constitution of India, arts 19(2), 19 (4)

[71]Ranjit D. Udeshi v. State of Maharashtra, AIR 1963 SC 390 at p. 398

[72]State of U.P v. Kaushailiya, AIR 1964 SC 416

[73]Constitution of India, art. 20(1)

[74]Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1953 SC 394, at p. 398

[75]Sri Jagadguru Kari Basavarajendraswami of Gavimutt v. Commissioner of Hindu Religious Charitable Endowments, AIR 1965 SC 502

[76]AIR 1953 SC 250, at p. 252

[77]AIR 1958 SC 538

emphasis on the Parliamentary supremacy. It is advisable and desirable that task of making law alive can be best entrusted to judiciary, which sits continuously and Interprets law without fear and favour. The judiciary in India has to play an important role. According to Mr. Gajendragadkar, the former, Honourable Chief Justice of India, "the High Courts and the Supreme Court are required to function in a two-fold character. The Courts act as laboratories where the validity of the laws and executive action is tested in the light of the relevant Constitutional provisions. In another sense, courts act as perpetual watch-towers and keep an unceasing vigil to protect the fundamental rights of the citizens and to insist upon the observance of the constitutional provisions by the legislature and executive.[78]"

It is now sufficiently clear that the judiciary is not only mere interpreter of law as it is enacted by the Parliament. It is required and takes oath to adjudge what law "ought to be". For India law is neither fully what it "is" nor what it "ought" to be but the mixture of both. The lesson of positivist-natural law rapprochement is equally persuasive and valuable for the judiciary and the legislature. At this stage it is convenient to discuss how far the judiciary and the legislature have failed or succeeded in appreciating positivist natural law rapprochement in India.

Legislative and Judicial Appreciation of the Positivist Natural Law Approach in India

The Constitution of India is foremost a social document. It is a peculiar mixture of what law is and what law ought to be. The judiciary however started with most positivist or literal approach without appreciating the 'inner morality of law, The Supreme Court put literal construction on the Constitution and interpreting Constitution as it was at that time, held that the expression "Compensation" under Article 31(2) meant "Just and equivalent compensation." The judiciary, it is submitted with respect, failed to appreciate the real function of law in society. The Parliament appreciated what law ought to be or what significant role Constitution has to play in bringing socio- economic revolution in India. It nullified the effect of *Bela Banerjee Case*[79] by enacting the Constitution (Fourth) Amendment Act, 1955 which made the adequacy of compensation non-justiciable. However, the court did not change its outlook and gave most literal and non-progressive interpretation to expression "Compensation" in its judicial pronouncements. The climax of judicial positivist and conservative approach is to be seen in *R.C. Cooper v. Union of India*[80] and *H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior v. Union of India*,[81] by which the court frustrated the governmental efforts in furtherance of socio-economic development. It is pertinent to mention here that the former decision was pronounced by 10:1 and the latter by 9:2 majority votes of the court. The effects of these two decisions were annihilated by the Constitution 25th and 26th Amendment Acts. Thus the legislature from time to time corrected the judicial approach by reminding that Constitution is not to be deemed as it is but what function it has to play in society or what 'ought to be'.

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[78]P.B. Gajendragadkar, The Indian Parliament and the Fundamental Rights (Tagore Law lectures) 194 (Eastern Law House, Calcutta, 1972)

[79]State of West Bengal v. Bela Banerjee, AIR 1954 SC 170

[80]AIR 1969 SC 634

[81]AIR 1971 SC 530

The Second round of controversy between "is" and "ought" started from the historic decision of *Golaknath v. State of Punjab*[82]. The highest court of land in this case declared that Indian Parliament was incapable of making a constitutional amendment so as to curtail or remove fundamental rights enshrined in the Constitution. The majority headed by Chief Justice, Subba Rao, gave more emphasis on Article 13 (2) as it was. From this angle the court gave main emphasis on positivist and literal approach. From another point of view, the learned judges paid more consideration to natural law theory, which prevailed before or during the 17th and 18th centuries by recognizing inalienability[83] and immutability[84] of fundamental rights. In this respect, it is humbly submitted that the learned Chief Justice speaking for him- self and four other judges and Mr. Justice Hidayatullah could not pay attention towards modernized natural law theory[85]. Had they realized so, the *Golaknath* controversy could have been avoided. An extremely modified form of natural law is reflected best in the exposition of Prof. Lon L. Fuller. Fuller opposes the idea that natural law is a set of supreme, "higher law" principles that must be used as a standard for evaluating human actions.

The rigour of Golaknath thunder-bolt was reduced by the Constitution 24th Amendment Act by which Parliament reasserted its power to amend any part of the Constitution including Part III as was conceded previously by the Supreme Court itself in *Shankari Prasad Singh Deo v. Union of India*[86] and *Sajjan Singh v. State of Rajasthan*[87]. In the former case, the Parliamentary power to amend any part of the Constitution was conceded by unanimous court where as in latter by a majority of 3: 2. The validity of the Constitution 24th Amendment Act along with others was challenged before the largest bench of the Supreme Court in *Keshavananda Bharti v. State of Kerala*[88]. Now the table was turned and extreme positivist approach was pleaded by Government giving emphasis on Article 368 as it was. The Government pleaded for unfettered and unbridgeable power of Parliament subject to only limitation put by Article 368 itself. Out of 13 judges bench six learned judges conceded the unlimited power of Parliament to amend any part of the Constitution. On the other hand, the majority was not persuaded by this positivist approach. The majority of seven judges adopted the positivist natural law rapprochement. It took a reconciling attitude between what Article 368 provides (is) and what would be the output of exercise of that power. It conceded the power of Parliament to amend any part of the Constitution putting a limitation on constituent power that Parliament in exercise of constituent power cannot destroy the "basic-structure" of the Constitution. In this way the majority of the court took a reconciliatory approach between what article 368 was and what its output ought to be. Mr. Gajendragadkar, the former, Chief Justice of India disagrees[89] with victim of "basic

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[82]AIR 1967 SC 1643
[83]Id., at 1698
[84]Id., at 1656
[85]P.K..Tripathi, Some Insights into Fundamental Rights 32 (University of Bombay, Bombay, 1972)
[86]AIR 1951 SC 458
[87]AIR 1965 SC 845
[88]AIR 1973 SC 1461
[89]P.B. Gajendragadkar, Indian Democracy: Its Major Imperatives (B.I. Publications, Bombay, 1975)

structure" adumbrated in *Kesavananda Bharati case*. Dr. Harichand regards it a 'chronic-disease'[90]. Dr. P K. Tripathi finds judiciary more effective than any opposition[91].

It can be said that these and similar opinions mark the one sided approach i.e. positivist approach as to the Parliamentary supremacy. The Constitution 39th Amendment Act requires rethinking by those who assert the positivist approach to amending power. The constitutional validity of 39th Amendment Act was challenged before 5 judges constitutional bench of the Supreme Court. It is interesting to note that barring justice Khanna, all the remaining four judges had upheld the unlimited amending power of Parliament in *Keshavananda Bharati case. In Smt. Indira Nehru Gandhi v. Raj Narain*[92] most of them found 39th Amendment Act as declaratory judgment not a law,[93] militating against checks and balances,[94] against rule of law and separation of powers[95]. In this way the observation of the Supreme Court in this case marks an excellent example that formal criterion is not enough for a valid constitutional amendment, but it is also essential that what is content and output of the exercise of power. The dissolution of the full bench (13 judges bench) of the Supreme Court, constituted with a view to review *Keshavananda* case further strengthens the judicial appreciation, of positivist-natural law rapprochement adopted by the highest court of land in the above mentioned case.

The Supreme Court adopted the positivist-natural law rapprochement while construing the amending power of the Parliament, however it failed to appreciate the same positivist-natural law rapprochement in *A.D.M. Jabalpur v. Shivkant Shukla*[96] dealing with the executive power during the proclamation of Emergency. By 4:1 majority the court gave the executive blanket power to play with the life and liberty of the people. The positivist approach of the court was that if there is power that can be exercised irrespective of consequences. In this way, it failed to appreciate even the modified version of positivist approach as pleaded by Professor H.L.A. Hart i.e. some shared morality is important for existence of law. The positivist-natural law rapprochement required that while endorsing the absolute nature of the powers vested in executive. It is matter of satisfaction, however, that in his strong, forceful and persuasive dissent, Mr. Justice Khanna appreciated the positivist-natural rapprochement. The learned judge warned against startling consequences "if the contention that consequent upon the issue of the Presidential order no one can seek relief from courts during the period of emergency against deprivation of life and personal liberty, is accepted". According to him "the state has got no power to deprive a person of his life or personal liberty without the authority of law. It is the essential postulate and basic assumption of the rule of law in every civilized society"[97]. The dissent of Justice Khanna is much persuasive. The court

[90]Dr. Harichand, "A critique of the 'Basic-Features' Theory" 3(4) Journal of the Bar Council of India 426 at 441 (1974)
[91]P.K. Tripathi, "Rule of Law, Democracy and the Frontiers of Judicial Activism" 9 Journal of Indian Law Institute 36 (1972)
[92]AIR 1975 SC 2299
[93]Ibid.
[94]Ibid.
[95]Ibid.
[96]AIR 1976 SC 1207
[97]Id., at 1276

should appreciate the view that Constitution (Article 359) is for the people and not people for the Constitution and consequently it should change its extreme positivist approach.

Conclusion

After the *Keshavananda* case, Parliament enacted the Constitution, 42nd Amendment Act, 1976 which makes the Parliament's amending power unfettered, unbridgeable and omnipotent. After that the Constitution Amendment Act cannot be challenged even on the ground of procedural defects. So, it is extreme positivist approach to parliamentary, omnipotence. In the earnest submission of the writer the Parliament ought to consider the desirability of such an amendment to Article 368 keeping in view the written federal Constitution of India. The three organs of the government should not be over enthusiastic. The legislature, the executive and the judiciary should take positivist-natural law rapprochement and without asserting superiority over each other, they should act with due deference, mutual confidence and self-restraint.