The fall and rise of Natural Law (Nazi legality problem)

In the 20th century it was almost impossible to find natural law thinkers and jurists. Legal positivism became in particular in the 19th and the early 20th century, a real **paradigm**: it was the only approach. All the law students training (mainly in south europe) had to follow this approach. Still today the training of law students is mainly organised on the principles of legal positivism. But from the middle of the 20th century something started to change in legal theories for several reasons. In Europe in these years: II w.w. > crimes against humanity have been committed, before and during the conflict (jews exterminated, apartheid, racial laws). This historical period was very important for the theoretical approach to law. Were racial laws, concentration camps, the persecution of minorities legally valid? All these terrible crimes committed before and during the II w.w., have been committed by applying the law, not violating it. Thos laws, applied by judges, administrators (concentration camps were organised in a bureaucratic way), and soldiers. All of this was organised on the basis of rational law, a law that actually went against human rights. Should those who applied these laws, obeying them, be sentenced? The long-term effects of the war included the heightened awareness in the Western world of the need to protect individual human rights in the future. On the immediate agenda, the problems were twofold. First, the need to reconstruct a large industrial nation at the heart of Europe, a major power that had been all but destroyed. Secondly, the practical problems arising from the termination of the Nazi legal system were almost incalculable. Bringing to justice the Nazi leaders and other perpetrators of some of the worst crimes seen in modern times was regarded by the Allied governments as a priority. The Declaration of Human Rights was developed and enacted in 1948: in those years it was difficult to consider human rights without referring to a natural law approach. The solution found by the Allies was what it is called the **Nuremberg Trials**: set up by the International Military Tribunal. 3 options: to do nothing and let all the atrocities go unpunished; to put all the perpetrators to death > option disliked by Churchill and Roosevelt. Third option was chosen: trial > but how could someone be punished from another sovereign country for a crime that was not considered as such in the country. The Court, presided over by judges from each of the leading Allied nations, charged twenty-four defendants with crimes against peace (launching a war of aggression), numerous war crimes and crimes against humanity. The last relatively new charge was defined as ‘murder, extermination, enslavement, deportation … or persecutions on political, racial, or religious grounds’.

There was a very keen awareness that the Tribunal’s proceedings should have the authority of law, and that the rulings and verdicts had to be based on sound legal arguments. This was difficult because many saw their authority to sit in judgement at all as at best paper-thin, at worst non-existent, flowing as it did from military victory. It was also a question of whose law was being applied. The rules governing the procedures of the trials were a careful combination of Anglo-American common law and European-style judicial principles, but this was seen by critics as makeshift window-dressing. The Nuremberg trials faced many criticisms from various legal quarters, but the crucial point for our purposes was that the judges and prosecutors on this tribunal, like those of the West German courts that followed in the late 1940s, found themselves compelled to refer to what sounded very much like natural law to justify the prosecutions of people who had committed their offences under a jurisdiction that had sanctioned or even ordered their actions. In the legal academic world, this prompted a long renewed debate on the respective merits of legal positivism and its natural law critics. The main thing we need to look at carefully here is the natural law charge that

positivism was at least partly responsible for the rise of Nazism, and that the whole experience of this tyranny exposed the theoretical shortcomings of positivism as a legal theory. In other words, it was not just a practical failure to encourage resistance from the legal profession or the population at large, but primarily a philosophical failure to grasp the real meaning of 'law'.

Problem of the possible **tyranny of law**: discussion about the limits in the power of law. Law can be a tool used in order to protect people but history showed us that law can also be a tool adopted to commit crimes and violence. Which limits can we find in the use of law? Which are the limits that law cannot overrule, which are the limits in the power of legislation? These problems were introduced by the atrocities committed in II w.w. These problems were faced after the conflict, introducing different declarations of human rights. After the war, problems arose about the validity of the Nazi laws and the legitimacy of a criminal trial that decided to punish people that had applied these laws.
Was the Nazi law a genuine/real law? Was it valid? Was its legal system a real one?

- If we consider Austin's view (he developed his theory centuries before the war), there was a recognised power (Hitler) and the great majority of the population had the habit to obey the rules enacted by the sovereign. Therefore the main features of a real and vali legal systems were present in the Nazi legal system,
- In Kelsen's pure theory of law (alive during the war, he escaped from Austria and moved to America), there was a basic norm, and the system of the pyramid of law was respected. The systemic order of the legal system was respected. And so the legal system was formally valid and it means that laws should have been applied
- Hart introduces a possible solution: we should divide the formal and the social povs. In a formal pov, the Nazi legal system was a real and valid one, but on a social pov this legal system was too **wicked** for any person of conscience to obey. We have to separate the formal validity of the legal system from the moral due to obey it. This regime did not respect the minimum content of law. The court in the Nurimberg trial adopted a similar position to Hart's one.

> The Nuremberg War Trials (1945-46) were very important in regenerating the natural law ideals. The judges applied the principle that certain acts constitute 'crimes against humanity' even if they did not violate provisions of positive law. Although judges did not appeal explicitly to the natural law theory, the judgement represents a recognition of the principle that the law is not necessarily the sole determinant of what is right. In particular, the Court stated that the defendants were guilty because the Nazi legal system was 'contrary to the sound conscience and justice of all decent human beings'.
The defendants tried to recall one of the main principles of criminal justice: I cannot be sentenced for a crime that was not considered a crime by the national criminal code at the time I committed the crime. These crimes: crimes against humanity, did not exist before the trial. This is what was claimed by the defendants, but the Court stated that they needed to create a first case in history where people were sentenced for these crimes, otherwise it wouldn't have been possible to do so in the future.
The Nuremberg trial states that there is not a strong connection between what is right and what is wrong: judges did not refer to natural law explicitly but they recall some principles of natural theories: for example by saying that the formal validity of law does not guarantee that it is a right law. From this point, a discussion about the validity of legal positivism, since a

radical legal positivist approach was considered as one of the causes of what happened. The decision of the court introduced a discussion about legal theories.

Textbook: **THE PROBLEM OF NAZI LEGALITY**

The case of Nazi Germany and its legal system moved to centre stage in this dispute partly because of the meticulous attention that the Nazi leaders paid. The special attention is merited because this particular modern tyranny was in a class of its own in terms of its abuse of the law, which amounted to a violation on a grand scale of so many principles of natural justice. Their statutes and court rulings laid down and enforced laws that would be regarded as deeply unconscionable in any civilised country. As we have seen, it was this legal dimension of Nazism that initiated the fresh collision between natural law and positivist jurisprudence, with each of these schools of thought responding differently. Let us return to these questions. Was Nazi law genuine law? The problem was that despite the horrors it had perpetrated, their laws had every appearance of belonging to a genuine legal system and there were numerous lawyers of high rank close to the centre of government. In Austinian terms, there was a clearly identifiable determinate sovereign in the person of Hitler, who answered to nobody else of higher status, and to whom the officials and the majority of the populace were very soon in the habit of at least showing outward signs of obedience. In Kelsen's terms, there was a basic norm at the apex of a logically connected system of coercive norms which legally speaking were binding. To anticipate Hart (who had yet to develop his own empiricist theory of law), the system did indeed constitute a network of primary and secondary rules, and one could easily interpret the fundamental rule of recognition – as Hart said himself – as something like the rule that the Führer's word was final. It should be stressed that this was a morally neutral description of the facts of the matter. As Hart was to say, the positivists at this time thought nothing was to be gained by distorting these facts and denying that there was real law in Germany at the time. It was indeed real law, but too wicked for any person of conscience to obey. The second question that this runs straight into is that of authority and obligation. Were any of the officials or soldiers carrying out the commands of their superiors under an obligation to obey them, and if so, what kind of obligation? Were citizens acting in a way that would be seen as grossly wrong under another jurisdiction protected by the law that sanctioned their actions, or by the defence that they were only following official orders or merely that they were acting in accordance with the law of the day? In other words, how guilty were they? The reasoning by the Nuremberg judges and later by the federal courts was complex. The essential point is that, although there was no explicit reference to the higher law of natural law theory, the authority of standards of conscience independent of existing positive law at the time was seen as indispensable. At the Court of Appeal in 1949, one defendant was found guilty of an offence because the (Nazi) statute that sanctioned it was deemed 'contrary to the sound conscience and sense of justice of all decent human beings'. Making such reference to independent standards seemed to be the only way in which either the 'following orders' defence could plausibly be rejected, or those who took private advantage of the Nazi statutes for their own vindictive ends, denouncing 'enemies of the state' to the authorities, could be prosecuted for these acts, which were protected by Nazi law. *

A debate between legal positivism and natural law spread out again. Many jurists declared their **conversion** to the natural law position. Many lawyers that before had accepted the legal positivist approach, after the II w.w., moved to a natural law position.
Different position in the legal theories after the war:

- The legal positivist approach became less radical. The most influential philosopher of law of this period (**Hart**), has introduced a sociological version of legal positivism. He accepted that the formal legal validity of a legal system does not imply moral legitimacy of the legal system. Legal validity concerns only the identification of formal criteria. Kelsen too stated that formal criteria do not affect morality, but Kelsen also stated that it is not the task of jurists to consider the morality of law. On the contrary, Hart admitted that jurists should consider morality, they do not have to apply laws 'too wicked'. > REDEFINITION of THE LEGAL POSITIVIST APPROACH

- NEW DISCOVER OF THE NATURAL LAW APPROACH:

Gustave Radbruch.

He accused Kelsen and his theories of being one of the causes of what happened. He did not accuse him for the crimes committed themselves, but he stated that those crimes were committed because judges applied the law not considering the problem of morality, following Kelsen's theory. Radbruch states there is a limit: when the conflict between law and justice is so intolerable: when law reaches this limit, law becomes a false law (*Unrichtiges Recht)*. Consequently, the false law could be legitimately overridden. If judges apply this law, they commit a crime. New natural law approach: a limit that, when reached, makes a law not a law anymore. But is this limit objective? And where can we find this limit? How and when is the limit reached? The Nazi legal system was so unjust and terrible that we can agree that in that specific situation the limit was reached, but what about other situations? After the war there have been many other situations in which human rights were not respected and in all of these situations we can state that the limit is reached. Which criteria can we use to define when the limit is reached. What are the practical consequences of the thesis as false law must yield to justice? When can we find that the judge has the right to not apply a law? It is very difficult to admit that this can happen. In the following years, many other times other judges decided not to apply the law, but it is very difficult to define criteria that must be reached in order for this to be possible > main problems of his position.

Radbruch vs Kelsen: There has been no shortage of critics of Kelsen, arguing that as the strongest exponent of the positivist separation thesis, he – or his work – must carry a lot of responsibility for the success of Nazism. In fact, it should not be surprising to hear that nothing could have been further from his intentions than that any such political disaster should follow from the theory. The whole point of his theoretical enterprise of purification was to prevent or discourage the politicisation of the law, whether from the left or the right. His intention was the opposite – to protect the law from political control and corruption. The criticisms, however, are directed at the actual implications of his strong version of the separation thesis, rather than on anything that he in fact intended. If law and the moral questions about justice have absolutely nothing to do with one another, as Kelsen seems to be saying, then at least on the face of it, there does seem to be some truth in the criticism of his work that at the very least it did nothing to develop the kind of legal culture that might have been less congenial to the success of Nazism. In the post-war years, the worry was that the continuation of the dominance of Kelsen's positivist thought would present an obstacle to the development of a legal theory which would have been more conducive to an engaged and critical response to whatever dangers lay ahead. There could be no greater contrast than that between the jurisprudence of Kelsen and Gustav Radbruch (1878–1949). As a liberal with leftist leanings, who had been a Minister of Justice in the government of the Weimar Republic, Radbruch had been removed from his professorship in law at Heidelberg as soon as

the Nazis came to power in 1933, and had subsequently survived internal exile until his reinstatement to the same post in 1945. The following year, Radbruch published a famous article in Germany, in which he announced his conversion from the positivism he had accepted in the 1930s to a natural law position. He argued for this in two ways. First, he explained the **'intolerability' thesis**: *"Preference is given to the positive law, ... , unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, Unrichtiges Recht (false law) and must therefore yield to justice"*. This formulation has had an attractive appeal for post-war legal theory, but Radbruch was not the first to have proposed something like this. At the height of the early twentieth-century formalist period in the USA, similar accounts of the natural law perspective are to be found. The idea is that judges should follow the law to the letter, formalist style, in the normal run of things, but in cases where there is a really glaring injustice they are entitled to intervene with an appeal to the higher law, to overrule it. When Radbruch calls such injustices 'false law', or translated more literally, **unrighteous law**, he means that it is prima facie law, but that it can be overridden in the name of natural justice by authorised judges. The idea is that there is a threshold or 'ceiling of injustice', and any law that breaks through it becomes intolerable. What this formula amounts to is an attenuated version of natural law, as compared with the full-blown Thomistic versions at the time Radbruch was writing, such as that of the French Catholic Jacques Maritain, one of the moving spirits behind the United Nations Declaration of Human Rights in 1948. It is nevertheless a strong anti-positivist statement insisting that when the law does go through this ceiling, it can legitimately be overridden. This idea does have considerable appeal, but as a general proposal it has been criticised as arbitrary, ad hoc and overdependent on an individual judge's moral intuitions, especially on the question of when this ceiling is reached. With hindsight it is easy enough to apply it to Nazi statutes, but in a wider context it is not so easy to defend, because of the uncertainty at the time about whether this limit has been breached. This does not mean it is false. It was attacked by Hart and at least implicitly by Kelsen, both of whom thought that it was better to be open and honest about recognising the legal validity of the Nazi statutes, then deal with the problem by adopting the lesser evil of retrospective legislation in order to secure justice for the victims. On the other hand, many have argued against this positivist stance in defence of Radbruch's position, on the grounds that the evil of these statutes must be the main focus when deciding on their inherent legality. The second way in which Radbruch argued for natural law was through a 'betrayal' thesis: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely Unrichtiges Recht, it lacks completely the very nature of law. This quite clearly goes beyond the intolerability thesis. 'To completely lack the very nature of law' is a very striking phrase. This is not a mere injustice or breach of conventional morality, but a completely contemptuous disregard for justice in its basic meaning, as displayed by the Nazi statutes. These, of course, were what the thesis was specifically aimed at. Radbruch's position here is in alignment with the strongest interpretations of the classic natural lawyers from Cicero to Aquinas when they declared the 'laws' of tyrants to be classed with those of brigands, and to be regarded as 'no law at all.' (lex iniusta non est lex). Radbruch's position is more radical, since he has experienced the horrors of the law. In the face of such injustice under the Nazis, Radbruch argued, positivists in Germany had let everyone down by accepting the legality of their statutes, while quietly deploring their immorality, because 'with its credo "a law is a law" [positivism] has in fact rendered the German legal profession defenceless against laws of arbitrary and criminal content'. This undoubtedly commendable legal thesis faces a number of problems. The first is how to distinguish it from the intolerability thesis. When does the

intolerable become something even worse, a fundamental betrayal of everything the law is supposed to stand for? Secondly, what are the practical consequences of this second thesis that go beyond the first thesis, according to which 'false law' must yield to justice? Either thesis would seem to deliver the same desired result, the retrospective invalidation of the Nazi statute in question. A third problem is how to set the limits to how widely this can be applied to abuses of the law around the world since 1945. The deliberate betrayal – or at least denial – of equality can be interpreted in any number of ways, and is certainly not confined to the Nazis' stripping Jews and other minorities of their fundamental human rights. This is a problem that has not been resolved by contemporary jurisprudence.

* We have seen how Radbruch argued from a natural law position that the kind of extreme injustice suffered at the hands of the law under such a regime should not be regarded as law at all. Lawyers were duty-bound to take a stand against it, to give the lead to citizens who might thus be more inclined to disobey. Many other natural law philosophers after the war followed Radbruch's line and developed the argument. It is often thought that the practices of these post-war courts in West Germany, tacitly conceding that the content of rules and orders was – contra the positivist view – in some sense and to some extent relevant to legal validity, were a significant concession to the natural law world view. The belief was growing, especially in Germany but also elsewhere, that positivism had been discredited on the grounds that there are laws, the content of which is so foreign to any concept of justice that they do in fact lose their status as law. The Austinian precept, that the law is one thing, its merits and demerits another, was believed to be confounded by this unprecedented departure from the ideal of the rule of law in the Nazi legal system, the 'demerits' of which had become central to assessing the regime's claims to validity. This line of argument against positivism, however, has never become universal; it has been seen more as a worry than as a decisive argument that would allow natural law standards to assume a central place in the contemporary understanding of law. For one thing, the systematic abuse of power on this scale is seen as a special case, and it is argued that only in such extreme cases can the natural law perspective be seen as convincing. This response is unsatisfactory. Serious institutional injustice sponsored or sanctioned by various legal systems is a matter of degree, and there are few if any jurisdictions in the world that have been or are completely free of them. The second, more significant positivist response is the basic one that the argument confuses legal validity with justification. The stamp of legal validity, according to Hart and others, does nothing to confer moral legitimacy on a legal system, a particular rule of law or an order, a commercial transaction or anything else. Legal validity concerns only the identification of formal criteria, and as such is morally neutral.

The dispute over the legality of Nazi statutes and courts has continued until the present day, and there is no consensus on its outcome. While some see it as more of a verbal than a substantive dispute, the responses to arguments laid out in this chapter should show that it is a very real one, not only because of its political importance, but because of its implications for the more central disputes in contemporary jurisprudence about the meaning of law and the question of how it relates to morality and justice.