



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

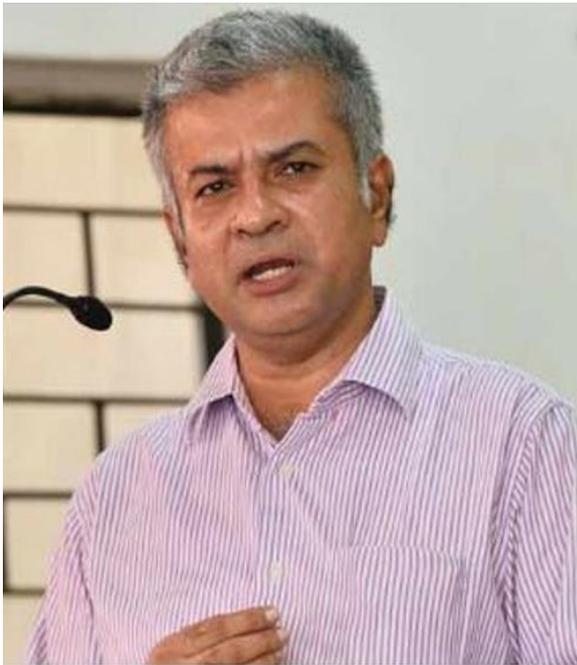
DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL **TEAM**

Raju Narayana Swamy (IAS) Indian Administrative Service **officer**



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru

and a professional diploma in Public Procurement from the World Bank.

diploma in Public

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

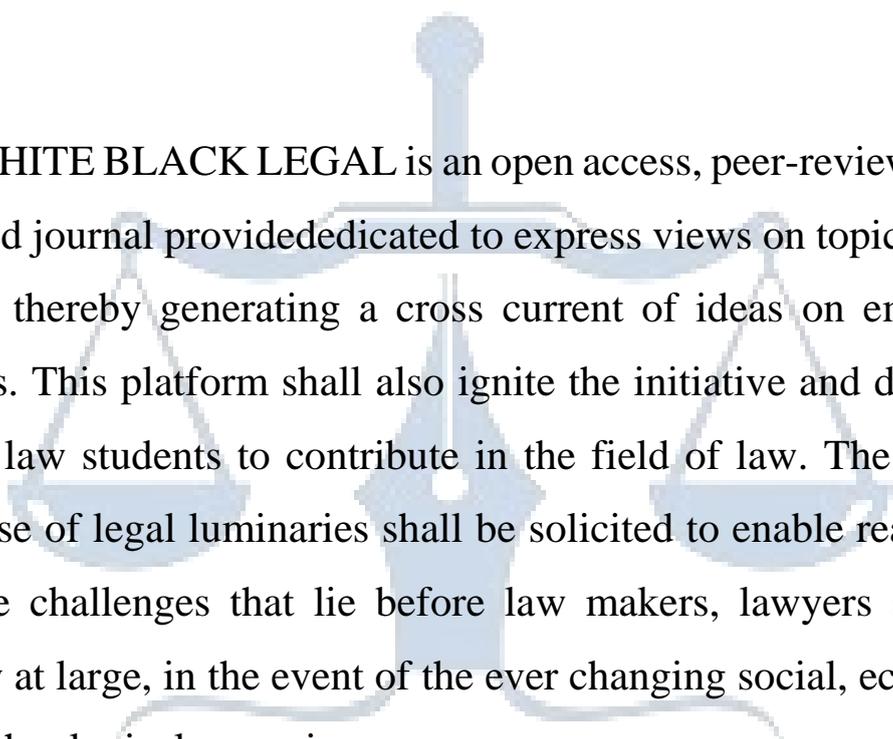


Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



CRITICALLY ANALYSING THE APPLICATION OF HART'S IDEA ON SANCTIONS IN BACHAN SINGH VS THE STATE OF PUNJAB

AUTHORED BY - SARVANSHI NIGAM

LLB (Hons), Jindal Global Law School, Sonapat, Haryana

ABSTRACT

Hart's idea, "however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."¹ is one of the foundational pillars on which this piece rests. This essay delves to analyse H.L.A. Hart's theory of sanctions in light of the theories advanced by legal positivists such as Austin and the implementation of the theory in the contemporary legal system through the analysis of the *Bachchan Singh v. State of Punjab case*. This essay is structured into three sections, Austin's concept of penalties is covered in the first section. The paper's second section addresses Hart's criticism of Austin's theory, and its final section addresses how Hart's theory of sanctions is applied to instances in the contemporary legal system.

The Formulation of a civil society by the Government is based on the basic idea to regulate it by its wants, desires, and Fears. To regulate the society, one came up with the idea of giving the reins in one hand, a superior Power be established whose commands and rules are obeyed by all.² According to Sir William Blackstone, laws are the standards of behaviour or action that subordinate powers impose on their people. Jurists such as John Austin, Hobbes, and Bentham developed a new theory as a result of the Natural law's gradual application. The Presumption that no human law cannot supersede over the Divine laws, and if they do, then it's not binding or obligatory for the people of the society to abide by the same. Later, Austin was astounded to learn that there were morally righteous requirements that weren't mandated by the law but were also favoured by the public on pure basis of morality. In order to resolve this non ending

¹ H.L.A Hart, 'goodreads' (celebrate Asian American & Pacific Islander Heritage Month) <https://www.goodreads.com/author/quotes/318543.H_L_A_Hart> accessed on 5 th may 2024.

² Sir William Blackstone, 'Commentaries on the law of England, Introduction, Section 2' (*Blackstone's definition of law*) <https://www.laits.utexas.edu/poltheory/sidgwick/elemopol/elemopol.c02.xr03.title.html> accessed on 3 rd may2024.

dilemma he put forward the clear separation of law and Morals,³ with this effort of bifurcation Austin absolved the idea of morality strongly embedded in the definition of law which was discussed at great lengths by the advocators of Natural law. Austin had the opinion that some laws are simply obeyed by people regardless of their morality. For instance, the requirement that vehicles drive on the right side of the road is a law even though it has no moral justification. The word "sanction" comes from the Roman legal code. Originally, the section of the act that set a penalty or included additional measures for its enforcement was known as the sanction. It may also serve as a catalyst or a source of inspiration for improved performance and legal implementation. The positivists' concept of the Sovereign as the ultimate authority and the law being backed by sanctions was one of the crucial elements to ensure the implementation of law in the society.

Commands are different from requests and wishes and disobeying the sovereign's orders will result in consequences for the offender. According to positivist ideology, Sanction is considered to be an 'evil' which is inflicted on people who do not follow the commands of the sovereign, These sanctions can not only be punishments but can also be damages or fines. In Criminal cases, sanctions could mean Punishments whereas in civil or tortious cases it can lead to damages as a remedy. The sanctions that might be inflicted on an individual differs from a case to case basis, On one hand where the Indian Penal Code is a substantive law, the sanctions for the same are mentioned in the Criminal Code of Procedure which is the Procedural law. What sanction will be inflicted is dependent on factual circumstances of a case. According to Austin's argument, in a modern society, if a law is not supported by a sanction, there is a very high likelihood that the general public will not follow it, which will cause it to lose its essential qualities as a law in the legal system. Utilitarian philosopher Jeremy Bentham claimed that laws are supported by both rewards and penalties for those who follow them. However, this idea of rewards is ineffective in the current legal system because it gives people more freedom to choose whether or not to abide by the rules that have been established.

Professor Herbert Lionel Adolphus Hart deeply criticised the work of Austin in defining law. Hart believed that Austin's work lacked in defining law as just commands and sanctions. As per hart, law is a combination of primary and secondary rules. Rules that tend to create a sense

³ Samuel E. Stumpf, 'Austin's Theory of the separation of Laws and Morals' (1960) *Vol 14 Vanderbilt Law Review* <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=3938&context=vlr> accessed on 4 th may,2024.

of obligation in the mind of an individual are called Primary Rules. They may require certain legal permissions, or they may impose specific responsibilities on the state's citizens to behave in a particular manner. Primary rules are portrayed by Hart as "fundamental rules." They advise the resident on what they should and shouldn't do in accordance with the law. They impose duties. These regulations deal with real-world problems. For instance, rules that are laid down in criminal law that prevent thefts and rapes etc. Secondary rules are those that enable people to introduce new rules of the primary type or modify existing ones by taking specific actions. They enable individuals (private persons or governmental entities) to propose or amend the primary type of regulation. Secondary norms do not impose obligations. Hart refers to them as power-presenting rules. Auxiliary rules are the ones that uphold legal authority such as Delegated Legislation, Contract, Marriage, and Wills etc.⁴

Hart publicly challenges the notion of threats and punishments, calling it the "Gunman's Theory." He argues that individuals should obey the law not just as a matter of social duty but also because it is a coercive tool.⁵ A contract is entered into with the consent of all parties involved and is binding on them to abide by its terms, which include both primary and secondary rules. However, Hart neglects to mention that breaching the terms of the contract may result in additional sanctions, such as the need to pay fines and damages. Consider the following scenario: if a person drafts a will prior to passing away in a way that does not meet the requirements for a valid will, the court will invalidate it, so imposing a sanction.⁶

Hart notes that while laws exist to keep the sovereign in a position to uphold the obligation itself, nullity in a transaction is a consequence applied when one of the parties fails to uphold the idea of obligation; it cannot be viewed as a punishment or an evil inflicted upon individuals. Hart talks on how people should respect rules as a duty towards obligation, which he claims is a basic motivator. However, no matter how ethically acceptable his theory may appear, its implications become hazy in the context of the current legal system. For instance, when a juvenile commits a crime such as theft for instead of being sent to jail, he is sent to a rehabilitation centre; this may not be regarded as a direct sanction, but rather more of an indirect one. Hart restricts the scope of his analysis to extremely basic moral systems, or those made up

⁴ Thorsten J Gorny, 'Primary and Secondary Sanctions explained' (2022) <https://www.sanctions.io/blog/primary-and-secondary-sanctions-explained> accessed on 5 th may 2024.

⁵ Frederick Schauer, *Was Austin Right after All? On the Role of Sanctions in a Theory of Law*, 23 Ratio Juris 1–21 (2010).

⁶ Rusell Hardin, *Sanctions And Obligation* (1985) Vol. 68, No. 3, *The Concept of Law*, pp. 403-418 (16 pages).

only of fundamental laws, a rule based on morality may be acceptable by one of the groups of the community to obligate but not for the other communities present. This hence brings forth a situation in a complexed community, where it becomes crucial to use sanctions as a manner to make it acceptable by people with different notions and ideas of the society. Hart's Theory also discusses a flaw in the Command theory that it presumes that the sanctions is within the ambit of the person its imposed on, monetary compensation in cases of liability on a person who is penniless will lead to judicial intervention to reduce the compensation in order to make it feasible for the person with liability.

Law is unique as a concept in regards to any other form of social control because of its feature of sanctions. Let's try to understand in depth the application of H.L.A Hart's Theory on sanctions when it comes down to Rare of the rarest cases like *Bachan Singh Vs. The state of Punjab*.⁷ This section of the paper explores Hart's theory's challenging positions in relation to punishments. I will address both the aspects of the theory that I find compelling and the aspects that raise doubts in my mind.

The facts of the case concerns a man who, after serving a 14-year sentence for the murder of his wife, moved in with his cousin Hukum Singh and his family after being freed. His choice wasn't well received by his family, and they didn't want him to live with them. On 4 th July, 1977 Bachan Singh committed a very atrocious act by killing three out of four children with an axe when the family was out for some event. For this reason, the Sessions Court found Bachan Singh guilty of killing Desa Singh, Durga Bai, and Veeran Bai. In accordance with Section 302 of the IPC, he received the death penalty. He filed an appeal with the High Court, but it was denied, and the death penalty was maintained. After that, he filed an appeal with the Supreme Court, raising the issue of whether the case's facts would qualify as "special reasons" under Section 354(3) of the CrPC, 1973. The Counsel in this case contended that the death sentence is an effective deterrent, keeping people from committing horrible crimes and making would-be offenders afraid. Additionally, they maintained that judges have the authority to impose any punishment in order to further justice, based on the particular facts and circumstances of each case. At last Supreme Court held that the mitigating circumstances that judges must take into account when deciding whether to execute a guilty person, underlining the need of giving each component equal weight is crucial. This also widens up the ambit of

⁷ Bachan Singh Vs state of Punjab (1980) 3 SCC 24 *para* 23-26.

judicial discretion and judicial interpretation as discussed by Dworkin in his theory. It was decided that Articles 14, 19, and 21 of the Indian Constitution were not violated by Section 302 of the IPC, 1860, or Section 354(3) of the CrPC.

In Cases like these where the crime is of such a higher degree or we might use the term “Hard Cases”, which struck the cords of the public at large and are fit to be discussed under *The doctrine of The Rarest of Rare*,⁸ It becomes pretty complex to apply the Hart’s idea of moral Obligation.

Punishments exists because of the existence of morally wrong acts in the society, *Hart* believed that criminal responsibility depends on moral Culpability of an individual. According to his interpretation of the concept of *Mens Rea* in crimes, a person who commits a crime while under the influence of alcohol or while not acting with mental capacity will not be punished to the same extent as a person who would have committed the same crime under reasonable suspicion.

These Conditions serve as an excuse to the imposition of sanctions since moral responsibility arises only when an individual is conscious of their actions and their consequences and only when they are acting in a sane manner.

How exactly do we incorporate Hart's theory of sanctions into cases in the modern legal system, such as *Bachan Singh v. State of Punjab*, where the offence is so heinous that the death penalty seems like the most sensible course of action?. In the case above discussed we can see clear intention and violation of his moral obligation which results in the death of three other innocent children. Hart’s idea on sanctions sounds well but its implementation seems to be vague in the real world.

As Per Hart, the primary aim is to have a Criminal legal System is to let the society know of the acts that the law system denounces and discourages but not to punish or put sanctions on the offenders. If we analyse the same, the system of punishment is so closely related to the criminal system to ensure compliance with the criminal law's requirements and prohibitions. According to Hart, the primary goal of making murder a criminal act is to send a message to

⁸ Rajkumari, ‘ The Doctrine of Rarest of Rare: A Critical Analysis’ (2005) *Indian Journal of Integrated Research In Law* (Page 5-6).

everyone in the community that murder is not something that should be done. He continues, that "The primary goal of punishing murderers is to deter future murders by threatening to apply harsh punishment."

Lets say if try the reformative approach rather than punishing individuals then in cases like Bachan Singh, such ideas will collapse as he did commit murder even after coming back from his punishment, hence in order to protect society as a whole, capital punishment must be used to deter future offenders. In his theory hart talks about punishments as 'threats', but they are not just threats but actual consequences that will fall into the course of action in case one fails to comply with law. According to this argument, punishment is a means of persuading those with the ability to control their behaviour to control it so that it complies with legal requirements. It might turn out that Hart's own defence is more vulnerable to this kind of attack than he realises if there are issues with social control systems as such.

At Last, the soundness of Austin's theory on sanctions does make a point when it come to ensure justice and to create a balance and also Hart's demand that we be informed that a society that insisted on treating all of its offenders would run a very real risk of being oppressively paternalistic and callously manipulative.

The case of Bachan Singh vs. The state of Punjab is not just about Punishing him but also about social welfare. Even though he was aware of his moral commitment and the implications of it after being freed for 14 years, he nevertheless made the decision to break it. In situations like this, sanctions and punishments are essential to preventing a similar incident.