

BHARATIYA NYAYA SANHITA AND THE CONSTITUTIONAL ASPIRATIONS OF INDIA: A CRITICAL ANALYSIS

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ABSTRACT

The Indian Criminal Law is intended to provide a secured and protective life for all citizens. Bharatiya Nyaya Sanhita is a humble attempt of the legislative organ of the government to open a gateway on the path of restorative justice. The object is basically towards securing justice rather than awarding hardcore punishments, as the core principle of the law is aimed at rescuing the victim and putting him or her in a position where he was prior to the occurrence of the crime. The main focus is towards achieving justice from all ends. The Preamble to the Constitution of India encapsulates a similar goal of justice, be it social, political or economic. In this context, it may be mentioned that the framers of the Constitution wanted to visualize a state with a strong edifice of humanitarian values and moral altruism. This paper is a humble attempt to bring home the underlying philosophy in BNS that glorifies the quest for justice in true sense of the term and thereby aligns to give the reflective thought process that imbibes in the morality rooted in our Constitution. The new Criminal law portrays the very fact that the accountability of the offender is not only restricted to suffering punishments. An empathetic attitude, encouraging the wrong doer to repair the harm is the focus of the law. The paper also dwells upon the significance of the humanitarian values and Constitutional ideals in sensitization of the stakeholders thereby initiating a community based approach which is a need of the hour. Further, it critically assesses whether the BNS has evolved to meet the changing needs and aspirations of the Indian society as envisioned in the Constitution.

Key Words: *Bharatiya Nyaya Sanhita, Constitution of India, Humanitarian values, Restorative justice, Community based approach*

Introduction

‘Punishment is not for revenge, but to lessen crime and reform the criminal’.- Elizabeth Fry India is a welfare state in the sense that the well being of the people is the topmost priority in the country. Right from the days of Gautam Budhha, humanistic principles were always emphasized and formed the core values in the universal idea of peace. The Bharatiya Nyaya Sanhita and the Constitution of India also shares similar foundational values as their primary focus is upon justice, human dignity and rule of law. The Constitution of India incorporates an elaborate version of fundamental rights that safeguards citizens from arbitrary state actions. The reflective thought process of the Constitutional makers finds a reference in the Bharatiya Nyaya Sanhita in the form of restorative justice that is expected to be promising in terms of safeguarding and securing the citizens thereby promote fair and just society.¹

The mantra ‘Dharma Chakra Pravartana’, finds mention in the Parliament of India. ‘Buddhatatva’ is the sense of ultimate responsibility. The IPC focused on punishment whereas the BNS intends to focus on the accountability and responsibility of the offender. Unless he is made responsible, he

¹ Lord Buddha inspiration for India’s Constitution, says PM Modi, The Hindu, Oct 20, 2021, retrieved from <https://www.thehindu.com>>

would never realize the deeply rooted struggles and sufferings of the victim as mere punishment would give him no sense of awareness. The increasing number of criminals despite the stricter provisions of punishments bears the testimony of this. This paper focuses on aims and the intention of the framers of BNS with the objective which aligns with the Constitutional hopes and aspirations of the people.

Objectives:

- To study the humanitarian principles incorporated in BNS that is rooted in Indian culture and Constitution.
- To highlight some of the vital provisions of BNS that promotes Constitutional goals and morality.
- To elucidate the ways and means of achieving restorative justice in the society.
- To vindicate that the BNS cultivates a sense of awareness among the offenders rather than focusing only on punitive approach.
- To sensitize the stakeholders for community participation in regard to taking a holistic approach.

Research Methodology:

The method adopted by the researcher is purely doctrinal. A couple of books, articles, newspaper reports and journals are referred for the purpose of the study. The primary as well as secondary sources are referred to add credibility and assertions made in the paper.

Bhartiya Nyaya Sanhita and the Constitutional morality

Bhartiya Nyaya Sanhita aims to replace the colonial origins of law by modernizing and simplifying the criminal laws with contemporary Indian values. This is aligned to the Constitutional values embedded in our rich heritage and culture. The laws should be aligned with the principles of justice, equality, liberty, dignity and secularism and in this context all the principles enshrined in the preamble put forwarded by the forefathers of our Constitution are aimed towards a justice oriented society free from any sort of atrocities and discrimination.

While BNS seeks to replace the sedition law, it includes provisions that deal with actions against the state. Constitutional morality requires these provisions to respect freedoms guaranteed by the Constitution like freedom of speech and expression and ensure that they are not used arbitrarily to suppress dissent. The reforms that deal with prioritizing victims' rights and restitution reflect a moral commitment to those affected by crimes aligning with constitutional values. The 'due process of law', 'fair trial' and 'protection from arbitrary arrest' also entails the principles of Constitutional morality and BNS, if aligned with these principles is a step towards a justice system that is modern, efficient and in tune with Indian values.

The Constitution is the supreme law of the land and as such all laws should be in tune with the mission and vision of the Constitutional makers of the country. Provisions on hate speech, communal violence, and hate crimes are revised in the BNS to better prevent social disharmony. The new criminal laws therefore, strive to meet the Constitutional goals and aspirations in order to maintain a well balanced society.

Bharatiya Nyaya Sanhita and the foundation of Restorative justice

The relevant provision of new laws is justice, equality and impartiality based on Indian culture and ethos and at the same time marking an inclination towards the Constitutional values. The BNS ensures equality before law by treating all equally irrespective of the artificial barriers aligning with Constitutional values. The use of gender neutral language ensures fairness in legal processes.

A shift from doctrine of punishment to doctrine of justice upholding the doctrine of rule of law ushers a new era of humanity and integrity. The BNS seeks to establish the principle of equity by prioritizing the dignity of both victims and offenders.²

The new criminal laws came into effect across the country as justice oriented rather than punishment and victim centric.³The very object of BNS is to put the victim in a position where he/she was prior to the commission of the crime and thereby aims at restoring justice for the affected individuals. Every crime is not only crime against society but affects the individuals at large. The theories of punishments be it retributive hinting at ‘an eye for an eye or a tooth for a tooth’ grounded on revenge or the deterrent theory serving as a warning for other offenders hardly served any purpose even in the Elizabethan era. Similarly, deportation of criminals was equally harmful as it led to introduction of a crime in the different city, which otherwise might be unacquainted for that particular locality.

The Bharatiya Nyaya Sanhita explores a distinct attitude towards the offenders and aims to make the offender realize by focusing or redressing the harm done to the victim through an opportunity to understand the impact of his criminal tendencies on the victim which otherwise could never ever been possible for the accused to gaze as he would have lived behind the bar and often there are chances of repetition of the same offence upon others. This marks a shift from the punitive approach which was the sole aim of the Indian Penal Code. The offender in BNS is however, made to take responsibility by accounting for the harm done to the victim thereby making him realize that harm once done cannot be undone and hence the victim suffers the worst which stands far apart from the way which the offender could ever imagine.

Recommendations of Malimath Committee

The Malimath Committee recommendations submitted a report of 158 recommendations to the Deputy Prime minister L.K Advnani. The committee favoured the implementation of the restorative model of justice.⁴ The Committee suggested that a Schedule to the Code be brought out in all regional languages so that the accused knows his or her rights as well as how to enforce and whom to approach where there is a denial of those rights. The Committee further made a series of recommendations to ensure justice to the victims.⁵ Some of the principal suggestions were as follows-⁶

- a. **Presumption of innocence-** The cardinal principle of criminal law is ‘beyond reasonable doubt’. However, the Malimath Committee opined that it was an unreasonable burden on the prosecution and hence a fact would be considered as proved if in the opinion of the Court, after analyzing all the matters before it are proved.
- b. **Justice to the victims-** The Committee emphasized on the victim compensation scheme and addressed the right of the victim to participate in the cases notwithstanding the fact that it is a serious crime. Further, the Committee suggested that in the event of death of the victim, the legal representative should be allowed to implead himself or herself in cases of

² <https://www.insightsonindia.com>> (last visited on 16.10.2024)

³ New Criminal Laws shifts punitive to reformatory justice; training and administrative burden a challenge, says legal expert, accessed from <https://legal.economictimes.indiatimes.com>> (last visited on 16.10.2024)

⁴ Riya Ranjan, Community Sentencing in India: remedies and reforms, retrieved from <https://blog.ipleaders.in>> (last visited on 16.10.2024)

⁵ <https://www.hindu.com>national> (visited on 16.10.2024)

⁶ id

- serious offences. The right to be defended by a legal practitioner was highlighted by the Committee which is also a Constitutional right according to Article 22 of the Constitution.
- c. **Concerns of the Committee**⁷- The two major problems of the Committee besieging the criminal justice system are huge pendency of criminal cases and the inordinate delay in disposal of criminal cases on the one hand and the very low rate of conviction in cases involving serious crimes on the other.
 - d. **Police Investigation**- Police Custody is limited to fifteen days as per the BNSS. The Committee suggested that that should be extended to thirty days and an additional time of ninety days be granted for the filling of chargesheet in case of serious crimes.⁸
 - e. **Witness Protection**⁹- Witness protection should be given utmost importance and the judge should step in to intervene if the witness is harassed during the cross examination. Further, the Committee recommended that the witness shall be given allowances on the same day and proper resting facility should be provided to him, thereby treating him with dignity.
 - f. **Enhancing Public Confidence**¹⁰- The prime objective was to enhance public trust and confidence in the criminal justice system by addressing its shortcomings and ensuring fairness for all stakeholders.
 - g. **Right to silence**¹¹- The Committee advocated for a change to Article 20 (3) of the Constitution which safeguards the accused from being forced to testify against themselves. The Committee recommended that the courts be granted the authority to interrogate the accused to get the information and to draw an unfavourable inference against him if he refuses to answer.
 - h. **Establishing a new mixed system**¹²- It replaces the adversarial system with elements of the inquisitorial system such as allowing the judges to actively participate in gathering evidence and questioning witnesses.

The modernization of the criminal code is more than just a change in the law. It also stands for a dedication to making justice responsive to shifting demands of the society.

The Concept of Community Service in light of the relevant provisions

Bharatiya Nyaya Sanhita is the new criminal law aimed at serving not only the needs of the victims but also towards imbuing a sense of accountability among the offenders. It is a shift towards restorative justice laying focus on rehabilitation and reintegration of offenders into society. Community Service fosters a sense of responsibility in the offender and it is in tuned with the principles of resocialisation and restorative justice. The Constitution of India also focuses on justice, be it in the form of Directive Principles or Fundamental rights as the ultimate aim of a welfare state is securing justice towards all.

⁷ Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Report Vol. 1, retrieved from <https://www.mha.gov.in/files> (visited on 16.10.2024)

⁸ Supra note 14

⁹ Supra note 16

¹⁰ Supra note 14

¹¹ Reforming Country's Criminal Justice System, retrieved from <https://www.drishtias.com> (visited on 16.10.2024)

¹² A case study of Bharatiya Nyaya Sanhita, Bharatoya Nagarik Suraksha Sanhita and Bharatiya Saksha Adhinyam, retrieved from, <https://themilusqraie.com>, (visited on 17.10.2024)

The Indian Penal Code prescribed five types of punishment- a) Death Penalty; b) Imprisonment for life; c) Imprisonment – simple or rigorous; d) Forfeiture of property and e) Fine. But, the BNS marks a contemporary change by inserting a sixth form of punishment – ‘Community Service’.¹³ This form of service aligns with the contemporary ideas of restorative justice. This serves as an effective alternative means to incarceration especially for non violent offenders. Section 4(f) of the BNS introduced community service with a aim of reducing recidivism rates as is evident from the instances of the United States where this form of service is used for minor offences, allowing offenders to contribute positively while avoiding the negative impacts of punishments.¹⁴

Community Service is not clearly defined but it aims to address minor offences through constructive engagements, more particularly in the form of social welfare initiatives. It is based on Gandhian philosophy of ‘abhor the crime not the criminal’. This approach has been successful in Spain and Singapore. In India, certain issues are addressed through the introduction of community sentencing, the first and the most important pertains to over-crowding of prisoners. The inhuman conditions in overburdened prisons can be harsh towards petty offenders rather than focusing on justice driven approach.¹⁵ The stigma of being a criminal also is attempted to be wiped out especially in case of first time offenders or who might have been provoked by the circumstances to commit a crime.

Though appropriate guidelines in this regard is still warranted but it is expected that it would serve as an important aid in a welfare state where the principles of humanism were always regarded in high form. Such type of punishments is introduced for the first time under this Act in 2023. This sentence incorporated in provisions of the Act states that offenders involved in minor offences can avoid traditional punishment by performing community service.¹⁶ The main object is to provide a means for the offenders to contribute in the society.

Provisions under BNS providing punishment for Community Service are stated as:

Section 202: Public Servant unlawfully engaging in trade.

Section 209: Non-appearance in response to a proclamation under Section 84 of BNSS, 2023.

Section 226: Attempt to commit suicide to compel a restrain exercise of lawful power.

Section 303(2) proviso: Theft where the value of the stolen property is less than five thousand rupees and a person is convicted for the first time and returns or restores the value of property.

Section 355: Misconduct in public by a drunken person.

Section 356 (2) Defamation

The Judicial organ of the government through the plethora of judicial pronouncements has recognized its importance as an instrument to redeem the wrong doer. In the case of *Gudikanti Narasimhulu v. Public Prosecutor, High Court of A.P*¹⁷, observed that-

‘All deprivation of liberty is validated by social defence and individual correction along anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimized. Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be

¹³ Anurag Mishra & Yash Raj, Community Service : A Progressive Shift Introduced by Bharatiya Nyaya Sanhita, last visited on 16.10.2024

¹⁴ id

¹⁵ Sentencing : A Positive Shift in the Indian Criminal Judicial System, retrieved from <https://ohrh.law.ox.ac.uk>> (visited on 16.10.2024)

¹⁶ Community Service under BNS, retrieved from <https://www.dristi.com> on Sept, 24, 2024.

¹⁷ *Gudikanti Narasimhulu v. Public Preosecutor, High Court of A.P*, AIR 1978

innovated'.¹⁸ In *Papu Khan v. the State of Rajasthan*¹⁹, the Court observed that the welfare state cannot afford a large non-productive prison population as it imposes a heavy burden on the state exchequer. In the *State of Gujarat v. Hon'ble High Court of Gujarat*²⁰, the court held that the reformation should be the main objective of the punishment and the punishment should be given in an effort to reform the offender and make a good human being out of a convicted prisoner. The inclusion of community service as a form of punishment in the BNS marks a progressive step towards a more balanced and rehabilitative criminal justice system in India.²¹ The Constitution of India strives towards achieving an egalitarian society and also makes a significant contribution in the justice oriented criminal legislation ushering the principle of rule of law on the country.

Bharatiya Nyaya Sanhita and the Constitutional Perspective

The BNS have addressed some of the vital issues related to Constitutional letter and spirit. The administration and legal professionals are seen to be highly vigilant in safeguarding fundamental freedom while navigating such laws. The suggestions of expert Committees too occupied a place of prominence to ensure equitable justice and uphold Constitutional principles. It is a renowned maxim that '*Justice delayed is justice denied*' which causes unimaginable distress and hindrances to the justice delivery system thereby threatening the rule of law of the country which is the core principle of our Constitution. The transformation of BNS from punitive to retributive approach, embracing restorative and rehabilitative practices would be underpinned by the foundation of human rights and dignity. In bolstering the Constitutional values and principles, the BNS seeks to repeal and replace the Indian Penal Code so that it could shift its focus to the victims rather than punishments and perpetrator.²²

The Constitutional provision of justice, equality and fraternity along with the democratic idealistic principles marks its place of prominence in the BNS. However, it suffers from the bottlenecks which need to be addressed immediately. It is criticized that extensive power is given to the state or police and it is a matter of concern whether the state would mark a shift back to pavilion of becoming a police state, from where it has risen long time back. There are some significant contradiction between the intent and the changes introduced in the BNS. While the provisions touching upon 'petty organized crimes', 'mob lynching', and 'terrorism' have been dealt at length but at the same time no specific provisions protecting the male victims from the offence of rape or the offence of marital rape is not paid heed to. This leads to grave injustice for a particular section of society as they are left with no redressal mechanism.²³

Lacunae in Gender Neutral Laws

The Constitution of India prevents the state from discriminating on the grounds of religion, race, caste, sex and place of birth. It also provides for social justice towards all the genders. But, it is pertinent to note that only women are identified as victim. The patriarchal and stereotypical mindset prevents men from coming out and speaking up about incidents of sexual offences against

ACTA SCIENTIAE, 08(1). 2025

¹⁸ Vishnu Sharma, Shifting Contours of Criminal Laws: Analysing the Viability of Community Service as a Punitive Measure in India, retrieved from <https://nualslawjournal.com>> (visited on 16.10. 2024)

¹⁹ *Papu Khan v. the State of Rajasthan*,

²⁰ *State of Gujarat v. Hon'ble High Court of Gujarat*,

²¹ supra note 7

²² Overview of major reforms in all Criminal Laws and Philosophy, retrived from <https://cdnbbsr.s3waas.gov.in>> (last visited on 16.10.2024)

²³ BNS not seen as establishing justice- oriented system: Legal expert, retrieved from <https://m.economictimes.com>> (last visited on 18.10.2024)

them. The Indian law on Section 64 BNS speaks of the only man as the perpetrator and woman as the victim. The same position is held by all laws regarding sexual offences except in the case of gang rape, which regards only a woman as victim but one or more persons as the perpetrator and Section 74 of BNS states that whoever assaults or uses criminal force to any woman, intending to outrage her modesty shall be punished with imprisonment for either description for a term which may extend to five years or fine or with both.²⁴

The offence of voyeurism, however has been expanded under Section 77 of the BNS, wherein the victim still is a 'woman' but the perpetrator has been made gender neutral from a 'man' under Section 354 C of IPC to 'whoever' under Section 77 of BNS. Therefore, a woman may be convicted for the offence of voyeurism but a man will never be able to complain about voyeuristic behavior²⁵. Moreover, Section 79 of the BNS being ad rem to Section 509 of the IPC to punish the offence of any word, gesture or act to insult the modesty or privacy of a woman still has the victim as 'woman' whereas the perpetrator being 'whoever' as gender-neutral.²⁶

The BNS has not acted upon various calls for decriminalization of offences, particularly those made by the Committee on Draft National Policy on Criminal Justice. Also, there is absence of provision for non-consensual sexual offence against male, female and transgender. In other words, offences dealing with unnatural offences are deleted under BNS. In *Navtej Singh Johar v. Union of India*²⁷, a five-judge bench of the Supreme Court unanimously held that Section 377 of IPC is in violation of Articles 14, 15, 19 and 21 of the Constitution of India.²⁸

Findings and Suggestions

- **Equality-** The Indian Constitution enshrined under Article 14, emphasizes all individuals to be equal before the eyes of law. The Supreme Court of India recently unveils new lady of justice without blindfold and sword replaced by the Constitution. This clearly portrays that Constitution is the supreme law of the land as was also echoed by Chief Justice Marshall of USA in the case of *Marbury v. Madison*²⁹. However, what is evident in the Bharatiya Nyaya Sanhita is that equality principle is not gender neutral. That marks a clear deviation from the Constitutional principles.
- **Liberty and Freedom of thought-** In this context, BNS is parallel to Constitutional values as both are concerned with fostering just and harmonious society. Collective welfare as well as individual welfare is taken into consideration in both. Article 21 of the Constitution guarantees the right to life and liberty which is similar to the goals of BNS as it seeks to safeguard the individuals from unjust imprisonment, ensuring that personal liberty is protected.

²⁴ Kerti Sharma and Shipra Tiwari, 'Should Sexual offences be Gender Neutral', retrieved from <https://www.sconline.com>> (last visited on 10.11.2024)

²⁵ Changes brought Forth by the Bharatiya Nyaya Sanhita, 2023, retrieved from <https://www.foxmandal.in>> (last visited on 10.11.2024)

²⁶ Gender Just, Gender Sensitive and NOT Gender Neutral Rape Laws, retrieved from <https://feministlawarchives.pldindia.org>> (last visited on 10.11.2024)

²⁷ *Navtej Singh Johar v. Union of India*, AIR 2018 INSC 790

²⁸ supra note 25

²⁹ *Malbury v. Madison*, 5 U.S. 137

- **Preventing misuse of power-** The Constitution ensures that checks and balance is maintained along with the doctrine of separation of power. BNS too promotes accountability, transparency and protects citizens from arbitrary arrests.
- **Abolition of Colonial Legacy-** The Constitution of India reflects a democratic pattern of society with the idea of self governance, free from colonial rule. It aligns to the BNS in the sense that it seeks to replace the old outdated colonial principles and marks a shift towards a contemporary society, embracing Indian values of democracy, justice and inclusiveness.
- **Ensuring Justice-** The Preamble to the Constitution promotes the slogan of justice for all, be it in the form of social, political and economic. BNS too sees that justice is served effectively and with transparency. Of course, non-discrimination and equality should have been the prime focus and the intent of the legislature.

The Constitution of India and Bharatiya Nyaya Sanhita are the significant and stepping stone towards establishing a democratic Independent India. Both are instrumental in building and shaping the nation towards the era of a zenith, a path ensuring progressive India.

As APJ Abdul Kalam said, 'Non-violence is the greatest force at the disposal of mankind. It is mightier than the mightiest weapon of destruction devised by the ingenuity of man.'