



PHILOSOPHICAL FOUNDATION OF BHARTIYA NYAYA SANHITA 2023

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Abstract

The criminal law undergoes sea changes with the passage of time. The old criminal laws were based on the philosophy of Dharma, Tradition and Customary Practices. During the British period it was based on will and whim of British philosophy to suppress and punish the people. The provisions under Indian Penal Code, 1860 (hereinafter IPC) inclined more towards punishment rather than reformation. With the introduction of various international convention on Human Rights and constitutional provisions these laws undergone rapid change. In 2023 new law was introduced as *Bhartiya Nyaya Sanhita, 2023* (hereinafter BNS). The new philosophical journey is started from punishment to *Nyaya*. The modern changes in BNS significantly shape the new philosophy of criminal law. The main focus of BNS is on the restorative justice. In other words, one can say it is paradigm shift from punishment to *Nyaya*. The emphasis on social justice, proportionality, fairness, and human rights characterizes the modern criminal law doctrine. It aims to develop a criminal justice system that is more egalitarian and just while taking into account the problems of the 21st century. The concept behind criminal law will surely continue to change and adapt as society does in order to suit the ever-changing demands of both individuals and communities. In this article the researcher will discuss the principles of restorative justice models that prioritize rehabilitation of offender and victim instead of punishment. Secondly, the major changes and challenges occur due to introduction of this new laws.

Keywords: Philosophy of Criminal Law, BNS, IPC, Nyaya, criminal justice system, Punishment

Introduction

Criminal laws are made for the security of the society. From ancient time the criminal law is developed with aim to protect the interest of society and protect the people from criminal behaviors. In every legal system the laws are based and developed on the basis of Human Idea, Attitude, Behavior and political will and same is sharp by interpretation by the judiciary. The judicial wisdom makes the laws workable and benefitted for the

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society. The laws undergo by this process. While judges applied their judicial mind according to given circumstance and law then that principle is become workable for the society at large. The criminal law always applied, interpreted and implemented as per constitutional ethos and spirit². At various juncture the court raised the concern about the necessary changes in existing criminal law due to its non-efficiency to mitigate the new and contemporary challenges.

Initially, when the law is passed it was based on contemporary situation and challenges. As the society progress it requires more changes to mitigate and overcome the challenges. Due to the advancement in science and technology new and emerging challenges are come on records. The old laws are not enough to protect and secure the interest of society. The traditional and outdated provisions shall be expected to change as per the social change, innovation and progress in society to bridge the gap between justice and law.

Considering the title of the BNS it signifies the journey end from the punishment approach towards Nyaya. The new law is designed and drafted with aim to secure and provide justice to all. The modification in all three laws³ shows intention of legislature. The ancient law was religion centric where as in the colonial period the criminal law mainly concerns to control the activities of individual against government and exploitation of people who act against the British government. But in the modern era the concern of law is justice centric. In the welfare state the laws are made for the progress of the society.

Considering the nature and modes operandi of the criminal laws in colonial period which was based on particular traditional line i.e. after commission of crime the agencies will make investigate then trial will be initiate and finally the accused send behind bar. The court or government agencies are no way concern to consider the reformation in investigation, application of science and technology, need of people etc. but in the BNS these drawbacks are overcome by providing new method of investigation, use of scientific tools, involvement of forensic science experts, community service etc. the progress in new criminal law will make criminal justice system more transparent, quick and effective for the common people. The philosophy behind the new changes is to make investigation effective, trial must be fair and quick and transparent and reformation of the accused by awarding the new reformatory punishment.

The scheme of new provisions under the BNS sanitizing the various provision as per the requirement of the society. The new terminology used in the BNS, *Bharatiya Nagarik Suraksha Sanhita*, 2023 (hereinafter BNSS) and *Bharatiya Sakshya Adhiniyam*, 2023 (hereinafter BSA) shows intention of legislature to tackle the challenges in the society. The insertion of new definition of child, gender, bail and bail bond etc. shows the legislature try to overcome the confusion in the mind of common people. By introducing these changes the new criminal law is more inclined towards the rehabilitative justice which provides platform to get justice not only victim but also to the accused.

² Government of NCT of Delhi Vs Union of India & Another, C. A. No. 2357 of 2017

³ *Bharatiya Nyaya Sanhita*, 2023 replace old Indian Penal Code, 1860, *Bharatiya Nagarik Suraksha Sanhita*, 2023 replaced Code of Criminal Procedure Code, 1973 and *Bharatiya Sakshya Adhiniyam*, 2023 replaces the Indian Evidence Act, 1872

New key changes

The BNS provide comprehensive provisions on the new and emerging offence. Earlier promise to marry⁴ was not included under the criminal law but now if any one falsely promises to marry and cause any physical or emotional injury to person then the person is held liable under the BNS. In addition to this, the new offence of mob lynching⁵, organized crime⁶, terrorism,⁷ petty organized crime⁸ etc. made punishable under the new law. Moreover, the outdated concept like section 377 of IPC⁹, adultery¹⁰, thug¹¹ etc. are removed from the BNS. The philosophy behind the insertion of these new offence inclined towards to mitigate and address new emerging crime in the society. For the smooth function and implementation of these offence the new procedure is also introduced under the BNSS. The provision of arrest is change with view to protect the person from illegal arrest and detention. The discretionary power is given to the Superintendent of Police to book the person for terrorism either under BNS or UAPA¹². To strengthen and smooth function of police officer in investigation the new provision of involvement of forensic expert during investigation¹³ add a feather for effective and scientific investigation.

In addition to the above the new BNS provides comprehensive provisions for the protection of every class of people. The provisions under BNS are criminal justice centric. The use of technological tools and methods make the new criminal law more modern and effective in terms of justice to all. To provide restorative justice the

⁴ Section 69 of BNS. Whoever, by deceitful means or by making promise to marry to a woman without any intention of fulfilling the same, has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Explanation.—“deceitful means” shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity

⁵ Section 103 (2) of BNS: When a group of five or more persons acting in concert commits murder on the ground of race, caste or community, sex, place of birth, language, personal belief or any other similar ground each member of such group shall be punished with death or with imprisonment for life, and shall also be liable to fine.

⁶ Section 111. (1) of BNS: Any continuing unlawful activity including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offence, cyber-crimes, trafficking of persons, drugs, weapons or illicit goods or services, human trafficking for prostitution or ransom, by any person or a group of persons acting in concert, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means to obtain direct or indirect material benefit including a financial benefit, shall constitute organised crime.

⁷ Section 113 (1) of BNS: Whoever does any act with the intent to threaten or likely to threaten the unity, integrity, sovereignty, security, or economic security of India or with the intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,-

⁸ Section 112. (1) of BNS: Whoever, being a member of a group or gang, either singly or jointly, commits any act of theft, snatching, cheating, unauthorised selling of tickets, unauthorised betting or gambling, selling of public examination question papers or any other similar criminal act, is said to commit petty organised crime

⁹ Unnatural offences, On 6 September 2018, the Supreme Court ruled unanimously in Navtej Singh Johar v. Union of India, 2018 INSC 790 that Section 377 was declared unconstitutional

¹⁰ See section 497 of Indian Penal Code, 1860

¹¹ See section 310 of Indian Penal Code, 1860

¹² The Unlawful Activities (Prevention) Act, 1967

¹³ Section 173 (3) of BNSS: On receipt of every information relating to the commission of an offence which is made punishable for seven years or more, the officer in charge of a police station shall, from such date, as may be notified within a period of five years by the State Government in this regard, cause the forensic expert to visit the crime scene to collect forensic evidence in the offence and also cause videography of the process on mobile phone or any other electronic device: Provided that where forensic facility is not available in respect of any such offence, the State Government shall, until the facility in respect of that matter is developed or made in the State, notify the utilisation of such facility of any other State.

new form of punishment¹⁴ is included under the BNS. The scheme of Chapterization is changed according to the priority of person. Earlier the IPC start with the chapter on offence against state where as in BNS the priority is given to protection to women and children's. The language is people friendly and lucid. The new definition like child¹⁵, gender¹⁶, terrorism¹⁷, cruelty¹⁸ etc. make it very effective for its implementation. The punishment for hit and run¹⁹, sexual intercourse by deceitful means²⁰, use of handcuffing²¹ in certain offence cast some sense of responsibility on the law protector as well as on the common people.

To make BNS more clear and elaborative the legislature added 20 new offence as per the social change. At 19 places old and outdated word and provision is deleted. In 33 offence the punishment is increased. Earlier the quantum of punishment was prescribed and same was based on the nature of offence but in BNS these quantum of punishment is increased considering the effect on the society and victim. The increase in quantum of punishment creates deterrence in the mind of offender and give assurance and sense of protection to common people. On the other hand in 83 offence the quantum of punishment is increased in terms of amount of fine and imprisonment. In IPC legislature did not provided minimum punishment in certain offence the punishment was with the discretion of the court but in BNS the minimum mandatory punishment²² is prescribed where the accused is liable for certain amount of punishment. Earlier the community services was not prescribed under IPC but in BNS in 6 offence community service is prescribed as part of punishment. In less serious offence community services²³ a new form of punishment is prescribed. The power of community service is given to the Judicial

¹⁴ See section 4 (f) of BNS, earlier only five categories of punishment is provided under the IPC, 1860 the new form of punishment 'Community service' is prescribed under clause (f) of section 4 of BNS

¹⁵ See section 2 (3) of BNS, 2023

¹⁶ See section 2 (10) of BNS, 2023

¹⁷ See section 113 of BNS, 2023

¹⁸ Section 86 of BNS, 2023 "cruelty" means— (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

¹⁹ Section 106 (2) of BNS, 2023, Whoever causes death of any person by rash and negligent driving of vehicle not amounting to culpable homicide, and escapes without reporting it to a police officer or a Magistrate soon after the incident, shall be punished with imprisonment of either description of a term which may extend to ten years, and shall also be liable to fine.

²⁰ Section 69 of BNS: Whoever, by deceitful means or by making promise to marry to a woman without any intention of fulfilling the same, has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Explanation.— "deceitful means" shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity.

²¹ Section 43 (3) of BNSS: The police officer may, keeping in view the nature and gravity of the offence, use handcuff while making the arrest of a person or while producing such person before the court who is a habitual or repeat offender, or who escaped from custody, or who has committed offence of organised crime, terrorist act, drug related crime, or illegal possession of arms and ammunition, murder, rape, acid attack, counterfeiting of coins and currency-notes, human trafficking, sexual offence against children, or offence against the State.

²² See sections 99, 105, 111 (2)(b), 111 (3)(4)(5)(6) (7), 112(2), 113 (2)(b), 113 (3)(4)(6), 117 (3), 118 (2), 121 (2), 139 (1) (2), 204, 303 (2), 310 (3), 314, and 320 of BNS, 2023

²³ The community service punishment is prescribed in six offence under BNS, 2023 see sections 202, 209, 226, 303 (2), 355 and 356

Magistrate First Class²⁴ and Judicial Magistrate Second Class²⁵ earlier these magistrate has no power to pass the punishment of community service.

Considering the new method and manner of commission of offence against the property the legislature expand the scope of term movable property²⁶. The nature of offence of attempt to commit suicide is change. The new offence of attempt to commit suicide is included under the BNS²⁷. The new offence beggary is form of exploitation for trafficking²⁸ is introduced which provide protection in trafficking offence to the victim.

Due to the incremental improvement and development in medical science the period of grievous hurt reduce to 15 days²⁹. If any person admit in hospital for grievous hurt for 15 days then the person is liable for the offence earlier the period of hospital admission was 20 days. In addition to this the word child is uniformly used under all offence of BNS. Earlier the age of child is different in different offence.

The new BNS is decode it title. The old section of IPC, 1860 (Section1-5) is merged together. Earlier the general explanation or definition was given under section 6 to 52 A. these exhaustive part is merged together and provided under section 2 of the BNS.

Features of BNS

The BNS is comprehensive code which provides modern method and modern definition of the new and emerging crime. The Supreme Court of India raised this concern about the insertion of new offence and terminology. Considering the concern raised by the Supreme Court of India the various provision under BNS are included. Not only this, in BNS, BNSS and BSA the fundamental principle of human rights and constitutional provision are included and same is influenced. The new code is gender³⁰ sensitive and gender centric. The all people irrespective of their gender given priority and protection under the BNS. The whole scheme of BNS is based and emphasis on the concept of *mens rea* though this term is not specifically defined under the BNS. More focus is given on the new and emerging issues and challenges in India. The attempt is made to provide some reformatory provisions based on the social needs. Though the nature of BNS is more reformatory in nature but at the same time the code provides deterrence to the accused. The scheme of BNS is blend of various international convention and protocol adopted time to time.

²⁴ See section 23 (2) of BNSS, 2023

²⁵ See section 23 (3) of BNSS, 2023

²⁶ See section 2 (21) of BNS "movable property" includes property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth;

²⁷ Earlier under section 309 of IPC the person who attempt to commit suicide is liable for punishment but under the BNS this offence was replaced in section 226: Whoever attempts to commit suicide with the intent to compel or restrain any public servant from discharging his official duty shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both, or with community service

²⁸ See section 143, Explanation 1 of BNS, 2023

²⁹ See section 116 (h) any hurt which endangers life or which causes the sufferer to be during the space of fifteen days in severe bodily pain, or unable to follow his ordinary pursuits.

³⁰ See section 2 (10) "gender".—The pronoun "he" and its derivatives are used of any person, whether male, female or transgender. Explanation.— "transgender" shall have the meaning assigned to it in clause (k) of section 2 of the Transgender Persons (Protection of Rights) Act, 2019;

Challenges to BNS

Reorganization of chapters: the chapters of BNS is reorganized. In reorganization of chapter the section and offence are restructure and for the reason it is difficult to remember all section and offence by the professionals, judges and law students

Reorganization of sections: all the old section are replaced and reorganized as per the new offences. The old section are replaced with new section and it is quite difficult to remember the same in the court practices

Increase the power of Police: in BNS and BNSS the power of police officers is changed. More discretionary power³¹ is given to the police officers. These discretionary power may be misused by the police officers.

Logistic constrains: the new laws adopted new technological tools in investigation and trial but in reality in India there is lack of experts. Secondly the infrastructure is not sufficient to adopt the same.

Applicability of Judgement: due to changes in terminology and definition there is lack of judicial presidents and the available president is quite difficult to apply in the given case. More time is required for the new interpretation of these terminology and offence by the court of law.

Teaching and Learning: the students who already completed their degree course in law for them it is quite difficult to understand and learn new provisions within short period of time. The teaching learning process may hamper due to sudden major changes in the criminal law

Overlapping provision with special law: some provision are overlapping and inconsistent with the special law. The conflict may arise about its application.

Conclusion

Instead of various difficulties the BNS provides comprehensive provisions to mitigate the new and emerging challenges. The BNS is modern criminal law based on the various scientific and contemporary inclusion with widened scope for interpretation to the judiciary. Time shows its fruitfulness.

³¹ Explanation of section 113 of BNS *Explanation*.—For the removal of doubts, it is hereby declared that the officer not below the rank of Superintendent of Police shall decide whether to register the case under this section or under the Unlawful Activities (Prevention) Act, 1967.