RESTORATIVE JUSTICE IN THE BHARATIYA NYAYA SANHITA: IS COMMUNITY SERVICE THE BEGINNING OF A NEW SENTENCING PHILOSOPHY?

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ABSTRACT

The Bharatiya Nyaya Sanhita, 2023 (BNS) came into effect on 1 July 2024 and was described as a restorative reform, which was characterised by its sixth punishment, community service, which is recognised alongside the five punishment categories under the Indian Penal Code, 1860. This paper puts that to the test. It first looks at the statutory design: community service is mentioned in six provisions, all of which are in relation to relatively minor offences, in five of which it is an alternative with imprisonment and fine, and only in proviso to section 303(2) is it the stipulated sentence. The paper then compares the sanction to the restorative tradition of Howard Zehr, which sees crime as an injury to persons and relations, and asks the victim to be involved in the process of repair and re-integration. It claims that the BNS has elements of restitution, but it fails to include a voice for the victim, or a role for the victim to influence the work that is done; hence it is not really restorative, it is a non-custodial punishment. The paper then examines the theft proviso, the clause with the most restorative language, and three tensions that arise: the removal of judicial discretion with the use of the word "shall"; the reliance on the means of the offender determining whether or not restoration happens; and the use of "as a precondition" instead of "as a process". It also highlights structural failures of purpose, selection and operation which the minimum definition in the Bharatiya Nagarik Suraksha Sanhita, 2023 does not address and remarks that the courts have employed community service without guidance. The paper concludes on the note that the reform is a true opening, but is not yet a sentencing philosophy, and that it needs clarity on hours, on work and supervision, a clear aim, guidance on the preference for community service over custody, and a victim's role.

Key Words: - *Restorative Justice, Bharatiya Nyaya Sanhita, 2023, Community Service, Criminal Sentencing, Victim-Centred Justice.*

INTRODUCTION

Indian criminal law has always leaned toward a reformative approach, primarily functioning through imprisonment and fines.[1] The BNS, which came into effect on 1 July 2024, adds a sixth punishment to the five that were recognised under the Indian Penal Code: "community service".[2] This is a small addition in drafting but a big symbolic one: for the first time, unpaid work for the public is an explicit penalty in India's substantive penal code.

Often the reform is described as 'restorative'. This label needs to be looked at more closely. Howard Zehr's new way of viewing crime as a violation of people and relationships is the usual source of the tradition of restorative justice. On that view the response to crime should repair harm, involve those affected and reintegrate the offender.[3] It also claims the one compulsory clause (theft proviso) is more restrictive and more severe on its terms than it seems. The provision can best be understood as a reform which has not yet been fully realized, a statutory opening which is opened up by rules, principles and judicial practice and which can develop into a sentencing philosophy.

THE STATUTORY DESIGN

Community service appears in six provisions of the BNS. Each is set out below:

- **Section 202:***"Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, 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".*
- **Section 209:***"Whoever fails to appear at the specified place and the specified time*

[1] See *Mohd. Giasuddin v. State of A.P.*, (1977) 3 SCC 287; The Probation of Offenders Act, 1958 (Act 20 of 1958), ss. 3–4.
[2] The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s. 4(f); *cf.* The Indian Penal Code, 1860 (Act 45 of 1860), s. 53.
[3] See Howard Zehr, *The Little Book of Restorative Justice* (Good Books, Intercourse, 2002); John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989); Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2002/12, annex, para. 2 (July 24, 2002) [hereinafter Basic Principles].

as required by a proclamation published under sub-section (1) of section 84 of the Bharatiya Nagarik Suraksha Sanhita, 2023, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both, or with community service, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine".

- **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".*

- **Section 303(2), proviso:** *"Provided that in cases of theft where the value of the stolen property is less than five thousand rupees, and a person is convicted for the first time, shall upon return of the value of property or restoration of the stolen property, shall be punished with community service".*

- **Section 355:** *"Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to one thousand rupees, or with both or with community service".*

- **Section 356(2):** *"Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both, or with community service".*

Apart from section 209, which punishes the basic offence with up to three years' imprisonment, these are offences of low gravity. This seems to fit the apparent role of the sanction in minor things.

In five of the six provisions, community service is one option among several. Only the proviso to section 303(2) makes it the prescribed outcome. Elsewhere the Sanhita does

not say when a court should prefer community service over custody or a fine.

The BNS also fails to give any definition to community service. The only definition sits in an Explanation to section 23 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) which deals with "the work a court may order a convict to perform as punishment that benefits the community and for which the convict receives no remuneration".[4]The Parliamentary Standing Committee on Home Affairs, examining the Bill as first introduced, had noted that the term was left undefined and recommended that its term and nature be specified. The Explanation responds to that recommendation only minimally. It establishes that the work is unpaid and benefits the community, but not the type of work, its duration, its supervision or the consequences of non-compliance.

TESTING THE RESTORATIVE CLAIM

There are three features that aid a restorative reading. Community service helps minimize disruption of short custodial sentences and keep the offender in the community.[5] It calls the wrongdoer to do something back. In the theft proviso, it is activated by the restoration of the property or its value, thus making it a sanction triggered by restitution.

The case, however, does not hold up as well when compared to Zehr's model. None of these questions are asked by BNS, which gives no voice to victims and communities.[6] Not victims but a "community" is the beneficiary of the work. There is no consent to or involvement in any dialogue with or connection of the work to the harm of the victim. An offender who returns a stolen phone and then sweeps a municipal park is in compliance with the statute even though no one has asked if a victim's loss or sense of security has been addressed.

The analysis indicates that the sanction is more of a non-custodial punishment with 'restitutionary' elements than restorative justice. It's not a word-for-word difference.

[4] The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 23, Explanation [hereinafter BNSS].
[5] United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), G.A. Res. 45/110, annex, r. 1.5 (Dec. 14, 1990) [hereinafter Tokyo Rules].
[6] See Zehr, *The Little Book of Restorative Justice*, *supra* note 3; Basic Principles, *supra* note 3, annex, para. 7.

When you say 'restorative' you assume that there is a process that is victim centred, but there isn't.

There are other such restorative devices in India but they are not integrated with the new sanction, compounding of offences, a compensation order, a state victim compensation scheme, plea bargaining and release on probation or admonition. They are not synonymous with but are in addition to community service.[7]

THE THEFT PROVISO: MANDATORY BUT CONDITIONAL

This proviso of Section 303(2) is the one most often touted as substantiating a "restorative turn" and it does have the most restorative element within the Sanhita. *"Where stolen property is worth under five thousand rupees, the offender is a first-time convict, and the property or its value is returned, the offender "shall" be punished with community service"*.

Critically read, the proviso has three tensions. Firstly, the use of the "shall" word takes away judicial discretion, which will not be comfortable with individual sentences.[8] The Court has no explicit statutory latitude to make different decisions where it considers that a specific first-time offender is "unfit" for community service for health reasons, care giving obligations or employment requirements. Secondly, the right to the property/value is contingent on the ability of the offender to restore the property/value. An offender too poor to do so appears to fall back into the general penalty for theft, which allows imprisonment of up to three years. A provision that rewards restitution may therefore favour those with means. Thirdly, restoration here is a necessary condition, rather than a process in which the victim can participate. These are questions of interpretation which courts have yet to clarify but they demonstrate that no provision, no matter how well designed, is complete.

STRUCTURAL DEFICITS

[7] BNSS, *supra* note 4, ss. 359, 395, 396, 401 & ch. XXIII (ss. 289–300); Probation of Offenders Act, 1958, *supra* note 1; *see also Hari Singh v. Sukhbir Singh*, (1988) 4 SCC 551; *Ankush Shivaji Gaikwad v. State of Maharashtra*, (2013) 6 SCC 770.
[8] *Mithu v. State of Punjab*, (1983) 2 SCC 277.

A sentencing philosophy needs to be articulated, to have some options outlined that are chosen, and it needs to have some machinery to implement the order. The Sanhita does little to any of these. Certain structural deficits to it are as follows:

- **Purpose:** Both codes are silent on whether community service is a way to ease overcrowding in prisons, to punish proportionately, or to remedy the damage.[9]

- **Selection:** Five of the six provisions include community service in addition to imprisonment and fine without specifying any criteria, giving courts the latitude to consider it merely a residual option.[10] But commentators point out that this leaves custody as the primary option and makes community service a "softer" service.[11]

- **Operation:** There are no regulations regarding hours, categories of work or agencies that have to supervise, nor are there regulations regarding ill, disabled and employed offenders. These cases have been dealt with on an ad hoc basis by early order in the trial courts, thus resulting in unequal treatment of similar offenders and making it difficult to assess the sanction.[12]

The Indian courts have utilized community service without a statute. In the BMW hit-and-run case, the Supreme Court also rejected imposing an additional term of imprisonment, which was already served and instead ordered community service and a significant compensation payment for the victim of the road accident.[13] In *Mohd. Giasuddin v. State of Andhra Pradesh*, Justice Krishna Iyer treated rehabilitation and reintegration as legitimate aims of sentencing.[14] These precedents show that judges can improvise within a reformative tradition, but they also show the cost of improvisation. If no statute provides scaffolding, the outcome will rely on the

[9] See Department-related Parliamentary Standing Committee on Home Affairs, Rajya Sabha, 245th Report on Prison—Conditions, Infrastructure and Reforms (Sept. 2023); Tokyo Rules, *supra* note 5, r. 1.5.
[10] See *Alister Anthony Pareira v. State of Maharashtra*, (2012) 2 SCC 648; *Soman v. State of Kerala*, (2013) 11 SCC 382; Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System, Report, Vol. I (Mar. 2003) (recommending statutory sentencing guidelines).
[11] Niyati Bishnoi, "Community Service in India's Criminal Law: A Reform Without a Roadmap" *Square Circle Crim. L. Blog* (Feb. 10, 2026), available at: https://squarecircleblog.org/2026/02/10/community-service-in-indian-criminal-law (last visited on Oct. 12, 2026).
[12] *Ibid.*
[13] *State v. Sanjeev Nanda*, (2012) 8 SCC 450 (decided on Aug. 3, 2012) (directing two years' community service and payment of Rs. 50 lakh to the Central Government for use in compensating road accident victims).
[14] *Mohd. Giasuddin*, *supra* note 1.

discretion of the judge as to what is appropriate.

The deficit becomes clearer against international standards. Community service orders entered English sentencing through the Criminal Justice Act, 1972,[15] and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) list community service among the available non-custodial sanctions while requiring that their introduction, definition and application be prescribed by law. The UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters add that restorative processes require the free and voluntary consent of the victim and the offender. Measured against these benchmarks, the BNS partly meets the first, since it introduces the sanction but leaves its definition and application largely unregulated, and it does not meet the second at all, since it contains no process in which a victim could participate or consent. The Sanhita thus aligns with international practice on non-custodial sentencing, but not on restorative justice.

CONCLUSION

The BNS introduces community service, but does not, by itself, establish a comprehensive restorative sentencing framework. It uses one tool: unpaid work and couples it with six minor offences. The sanction is restricted to the theft proviso only, and even that takes away any discretion and relief depends on the offender's means. The BNSS definition is minimal, and the elements that define restorative justice, victim participation and a repair-oriented purpose, are absent. The reform remains a true opening, however. It creates an alternative to custodial sentence for minor offending, and introduces a 'reformative' notion into the code of punishment. It can become a philosophy if it is followed by clear rules about hours, work and supervision, a clear purpose, guidance on when community service should be used instead of custody, and a role for the victim. Until then, the provision is best understood as a reform awaiting its roadmap. The answer to the question posed in the title is therefore a qualified one. Community service is the beginning of a sentencing philosophy only in the sense that it has introduced a non-custodial, reparative idea into the penal vocabulary of the Sanhita. The question of whether that idea matures

[15] The Criminal Justice Act, 1972 (c. 71) (U.K.).

depends on choices that are still to be made: the purpose of the sanction must be explained, the rules for the calling of the Parliamentary Standing Committee must be laid down and the use of the sanction must not be like a forgotten instrument. Until those choices are made, ‘restorative’ describes an aspiration rather than the law.