



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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FROM RETRIBUTION TO REFORM: PURPOSES OF PUNISHMENT AND SENTENCING PRACTICE UNDER THE BHARATIYA NYAYA SANHITA, 2023

~ *Kanishq Jaiswal*

Abstract. Punishment is the most severe power a State exercises over its citizens, and its justification cannot be assumed. This paper examines the purposes of punishment in Indian criminal law after the enforcement of the Bharatiya Nyaya Sanhita, 2023 (BNS) and the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). Using a doctrinal method, it traces the historical development of punishment in India, connects the classical and modern theories of punishment to the statutory text, and tests the scheme against the Supreme Court's sentencing jurisprudence and against comparative practice. It argues that the BNS makes a limited move towards reformatory and restorative ideas, mainly through community service (s. 23), but that it also widens capital punishment and introduces life imprisonment defined as the remainder of natural life. These choices raise questions of proportionality, remission and uniformity that the Sanhita does not resolve. The paper ends with six recommendations, including statutory sentencing guidelines, mandatory pre-sentence reports and wider use of non-custodial measures.

Keywords: punishment; sentencing; Bharatiya Nyaya Sanhita; death penalty; reformation; restorative justice; proportionality; community service

1. Introduction

Every criminal sanction restricts liberty, and some end life. For this reason punishment needs a moral and legal reason that goes beyond the fact that a law allows it. In India that requirement has a constitutional basis. Article 21 permits deprivation of life or personal

liberty only by a procedure that is fair, just and reasonable, and Article 20(1) bars a penalty greater than the one in force when the offence was committed.

The BNS came into force on 1 July 2024 and replaced the Indian Penal Code, 1860 (IPC). The BNSS replaced the Code of Criminal Procedure, 1973 (CrPC). Official statements described the new codes as moving the system from punishment towards justice. Whether the text supports that description is a question worth testing, because a change of name does not by itself change the purpose a penalty serves.

This paper asks three questions. (i) Which theories of punishment can be identified in the BNS and BNSS? (ii) How has the Supreme Court shaped the principles that guide sentencing? (iii) What gaps remain between those principles and the statutory scheme? The working proposition is that the new codes change the vocabulary of punishment more than its structure, with one real addition (community service) and several increases in severity.

2. Research Methodology and Scope

The study is doctrinal. Primary sources are the Constitution, the BNS, the BNSS and their predecessor enactments, together with decisions of the Supreme Court, chiefly Constitution Bench judgments. Secondary sources are Law Commission and committee reports and standard works on penal theory. The paper does not use empirical data of its own; where it refers to practice, it relies on observations recorded in judgments and official reports.

The scope is limited to the general purposes of punishment and to sentencing for serious offences. It does not examine juvenile justice in depth, nor the substantive definitions of individual offences. Section numbers of the new codes are given with their corresponding provisions in the IPC and CrPC, and should be checked against the official text before they are cited.

3. Historical Evolution of Punishment in India

Ancient and classical traditions. Classical Indian legal thought gave punishment (*danda*) a central place in maintaining social order. The Dharmashastra literature, including the Manusmriti, and the Arthashastra of Kautilya treat *danda* as necessary for order but also insist, in different ways, that it be graded according to the offence and the offender. The idea that punishment must be proportionate and not arbitrary is therefore not foreign to the Indian tradition.

Colonial codification. The IPC was drafted by the First Law Commission under the chairmanship of Macaulay, submitted in 1837 and enacted in 1860. It listed death, transportation for life, imprisonment, forfeiture of property and fine as punishments (s. 53). Transportation was replaced by imprisonment for life in 1955. The Code's approach to punishment was largely retributive and deterrent, which suited a colonial administration concerned with control.

Post-independence developments. Three changes mark the period after 1947. First, the Probation of Offenders Act, 1958 introduced a statutory route to release offenders without sentence in suitable cases. Second, the 35th Report of the Law Commission (1967) examined capital punishment and recommended its retention, after which *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20 upheld the penalty. Third, the CrPC of 1973 reversed the earlier position: whereas the older Code required reasons when death was *not* imposed, s. 354(3) CrPC required "special reasons" when it *was* imposed, making life imprisonment the normal punishment for murder. The Malimath Committee (2003) and the draft National Policy on Criminal Justice of the Madhava Menon Committee (2007) continued the reform discussion, particularly on sentencing guidelines, but without legislative result until the BNS.

4. Theoretical Foundations of Punishment

Writing on punishment is usually organised around two families of justification: those looking backward to the wrong done, and those looking forward to the consequences of punishing.

Table 1: Principal theories of punishment

Theory	Central idea	Representative sources
Retributive	The offender deserves punishment because of the wrong committed; desert also limits the amount of punishment.	Kant (1996); von Hirsch (1976)
Deterrent	Punishment discourages the offender (specific) and others (general) from offending.	Beccaria (1764); Bentham (1789)

Preventive / incapacitative	Dangerous offenders are removed from society for a period.	Packer (1968)
Reformative	Punishment should aim at the rehabilitation and reintegration of the offender.	Modern penology; Indian case law (Section 7)
Restorative	The harm to victim and community should be repaired, with the offender taking responsibility.	Zehr (1990); Braithwaite (1989)
Communicative	Punishment is a way of communicating moral censure to the offender and calling for repentance.	Duff (2001)

Hart (1968) made a distinction that is especially useful for sentencing law. The *general justifying aim* of punishment (why the institution exists) is a different question from the *distribution* of punishment (who may be punished, and how much). A system can accept deterrence as its general aim and still insist that only the guilty be punished and that the penalty be proportionate. Von Hirsch (1976) developed the desert-based view that the severity of punishment should correspond to the seriousness of the offence, while Duff (2001) argued that punishment should be understood as a message addressed to a moral agent. Braithwaite (1989) distinguished stigmatising punishment from reintegrative shaming and argued that the latter lowers reoffending. Garland (1990) adds that punishment is also a social institution, shaped by politics and culture, and not only an instrument for controlling crime.

No modern system relies on one theory. The practical task is to decide which purpose governs at which stage: the legislature prescribing a range, the court choosing a sentence, and the executive considering remission. The analysis in this paper uses that three-stage view.

5. The Constitutional Framework

Four constitutional provisions frame the law of punishment. **Article 14** forbids arbitrary classification and supports the demand for consistency in sentencing. **Article 20(1)** prohibits retrospective enhancement of penalty. **Article 21** requires that any sentence affecting life or liberty follow a procedure that is just and fair. **Articles 72 and 161** give the President and

Governors the power to grant pardons, reprieves, remissions and commutations, which stands outside the statutory remission power in the BNSS.

The Supreme Court has read Article 21 to protect prisoners as well. In *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494, the Court held that a convict does not lose fundamental rights on entering prison, except those that are necessarily taken away by the sentence. This sets a floor of dignity beneath every punishment, and it is the basis on which solitary confinement (ss. 11-12 BNS) and delay in execution have been reviewed.

6. Punishment under the BNS and BNSS

6.1 The catalogue of punishments

Section 4 BNS lists the punishments, as s. 53 IPC did: death; imprisonment for life; imprisonment, rigorous or simple; forfeiture of property; fine; and, as a new addition, community service. Section 23 defines community service as work ordered by the court as punishment that benefits the community, for which the convict receives no remuneration. It is prescribed for six offences of a minor or regulatory kind, including theft of low value by a first-time offender who returns the property (s. 303(2)), misconduct in public by a drunken person (s. 355) and defamation (s. 356(2)). Section 5 BNS, read with s. 474 BNSS, allows the appropriate Government to commute a sentence without the offender's consent.

The main provisions relevant to the purposes of punishment are compared below.

Table 2: Comparative statutory provisions on punishment (verify against official text)

Subject	Earlier law	Present law	Observation
List of punishments	s. 53 IPC	s. 4 BNS	Community service added
Life imprisonment in fractions	s. 57 IPC (20 years)	s. 6 BNS	20 years used only to compute fractions
Solitary confinement	ss. 73-74 IPC	ss. 11-12 BNS	Limits retained
Murder	s. 302 IPC	s. 103(1) BNS	Death or life; fine

Murder by life convict	s. 303 IPC (mandatory death, struck down in <i>Mithu</i>)	s. 104 BNS	Death or life (natural life); discretion restored
Sentencing hearing	s. 235(2) CrPC	s. 258(2) BNSS	Separate hearing on sentence after conviction
Special reasons for death	s. 354(3) CrPC	s. 393(3) BNSS	Reasons for death sentence required
Confirmation of death sentence	s. 366 CrPC	s. 407 BNSS	High Court confirmation
Remission / commutation	ss. 432-433 CrPC	ss. 473-474 BNSS	Executive power, along with Arts. 72, 161
Minimum term before remission	s. 433A CrPC	s. 475 BNSS	Fourteen years where offence carries death
Probation / admonition	s. 360 CrPC; Probation of Offenders Act 1958	s. 401 BNSS; same Act	Non-custodial route retained
Compounding	s. 320 CrPC	s. 359 BNSS	Settlement route for listed offences
Victim compensation	s. 357 CrPC	s. 395 BNSS	Compensation as part of sentence

6.2 Capital and natural-life sentences

The BNS keeps the death penalty for murder and adds or retains it for several other offences. These include murder by a group of five or more on grounds such as race, caste, community, sex, language or personal belief (s. 103(2)), rape of a woman under twelve years (s. 65(2)), rape causing death or a persistent vegetative state (s. 66), gang rape of a woman under eighteen (s. 70(2)), repeat rape offenders (s. 71), organised crime resulting in death (s. 111(2)(a)) and terrorist acts resulting in death (s. 113). In several of these provisions (for

example ss. 65(2), 70(2), 71 and 104) Parliament states that life imprisonment means imprisonment for the remainder of the person's natural life.

The removal of the mandatory death sentence for a life convict who commits murder (s. 104, replacing s. 303 IPC) aligns the statute with *Mithu v. State of Punjab* (1983) 2 SCC 277, which held that a mandatory death sentence denies the court any chance to consider the circumstances of the offender and the offence.

6.3 Procedural safeguards

Three procedural features connect the statute to the idea of individualised punishment. Section 258(2) BNSS requires the court to hear the accused on the question of sentence after conviction. Section 393(3) BNSS requires special reasons for a death sentence. Section 407 BNSS makes a death sentence subject to confirmation by the High Court. Section 472 BNSS now sets out a procedure for mercy petitions in death cases, which bears on the delay concerns raised in *Shatrughan Chauhan*. These safeguards are only as effective as the material the court has before it at the time of sentence, a point taken up in Section 9.

6.4 Mapping theories to provisions

Table 3: Theories of punishment mapped to BNS and BNSS provisions

Theory	Illustrative provisions	Assessment
Retributive	ss. 103, 104, 65(2), 70(2) BNS	Strongest influence for grave offences
Deterrent / preventive	ss. 103(2), 111, 113 BNS; natural-life terms in ss. 71, 104	Rests on assumption; limited evidence
Reformative	s. 258(2), s. 401 BNSS; Probation of Offenders Act, 1958	Present but under-used
Restorative	s. 23 BNS; ss. 359, 395 BNSS	New but narrow in scope

7. Judicial Development of Sentencing Principles

7.1 The death penalty

In *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, a Constitution Bench upheld the death penalty by a majority but confined it to the "rarest of rare" cases, and required courts to give

special reasons and to weigh aggravating and mitigating circumstances. *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 later attempted to classify cases that might qualify, and *Ramnaresh v. State of Chhattisgarh* (2012) 4 SCC 257 listed factors on both sides. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498, the Court criticised earlier decisions for focusing mainly on the crime and giving too little weight to the offender, and acknowledged that the rarest-of-rare test had been applied inconsistently. *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546 repeated this concern. More recently, *Manoj v. State of M.P.* (2023) 2 SCC 353 directed that courts obtain material on the accused's psychological condition, family background and conduct in prison before deciding whether the death sentence is appropriate.

The Court has also recognised that the manner of carrying out the sentence matters. *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1 held that unexplained and inordinate delay in deciding a mercy petition can be a ground for commuting a death sentence.

7.2 Life imprisonment and the remission power

Maru Ram v. Union of India (1981) 1 SCC 107 treated life imprisonment as imprisonment for the whole of the convict's life, subject to the power of remission. *Swamy Shraddhananda (2) v. State of Karnataka* (2008) 13 SCC 767 recognised a middle category, a fixed term beyond fourteen years but short of death, to be served without remission. A Constitution Bench in *Union of India v. V. Sriharan* (2016) 7 SCC 1 affirmed that such special sentences are permissible, but that they may be imposed only by the High Courts and the Supreme Court and not by trial courts.

7.3 Reformatory and proportional sentencing

A reformatory approach has long been present in Indian judgments. *Ediga Anamma v. State of A.P.* (1974) 4 SCC 443 and *Mohd. Giasuddin v. State of A.P.* (1977) 3 SCC 287 stressed that a sentence should consider the offender's social and psychological background and the possibility of reform. On proportionality, *Alister Anthony Pereira v. State of Maharashtra* (2012) 2 SCC 648 stated that a sentence must reflect the gravity of the offence and the circumstances of the offender, and *Soman v. State of Kerala* (2013) 11 SCC 382 noted the need for a more structured approach to sentencing. On the other side, *Dhananjay Chatterjee v. State of W.B.* (1994) 2 SCC 220 relied on the need to respond to public outrage and to deter, showing that retributive and deterrent reasoning has remained influential.

8. Comparative Perspective

Two common-law systems show different ways of structuring discretion. In England and Wales, the Sentencing Council, created under the Coroners and Justice Act 2009, issues guidelines that courts must follow unless the interests of justice require otherwise. The guidelines set out offence categories, starting points and ranges. In the United States, the Federal Sentencing Guidelines were created under the Sentencing Reform Act 1984 to reduce disparity, but became advisory after *United States v. Booker*, 543 US 220 (2005), partly because rigid grids were found to limit individualised sentencing (Ashworth 2015).

The lesson for India is not that either model should be copied. It is that structured guidance is compatible with judicial independence, provided it leaves room for reasoned departure. Indian courts have said that sentencing should be reasoned and consistent, but the statute gives them no framework within which to do so. The Malimath Committee and the Madhava Menon Committee both identified this gap, and it has remained open for decades.

9. Critical Analysis

9.1 Retribution remains the dominant purpose for serious offences

The additions to the capital list and the use of natural-life sentences indicate that, for grave offences, Parliament has chosen severity as its main response. This is a legitimate policy choice, but it is not supported by evidence on deterrence. The Law Commission of India's 262nd Report (2015) found no convincing data that the death penalty deters crime more effectively than life imprisonment, and recommended abolition for all offences other than terrorism-related ones. The 2023 Sanhita moved in the opposite direction on several offences without a published empirical basis.

9.2 Natural-life sentences and the remission power

When Parliament fixes life imprisonment as the remainder of natural life, the sentence appears to leave little room for the earlier idea that a life sentence may be shortened by remission. Articles 72 and 161 remain available, and ss. 473-475 BNSS remain in the Code. How these provisions interact with natural-life language has not been settled by the Supreme Court in the context of the BNS. If remission is effectively closed, the reformatory purpose is weakened for the most serious offenders. If it remains open, the statutory language adds little. Courts will have to choose an interpretation that is consistent with Article 21 and with the reasoning in *Sriharan*.

9.3 Community service: a modest but real step

Community service is the clearest statutory expression of a restorative aim. Its scope, however, is narrow: it applies to six minor offences. The Sanhita does not itself specify the kind of work, the number of hours or how compliance is supervised; these matters must be settled by rules and by orders of courts. Without such detail, there is a risk that the provision will be used rarely. Experience in other jurisdictions suggests that community sentences work best when supported by probation officers and a clear framework for supervision.

9.4 Discretion without structure

India has no statutory sentencing guidelines. Courts have to balance aggravating and mitigating factors case by case, and the Supreme Court itself has accepted in *Bariyar* that results have been uneven. The BNS provides punishments with wide ranges (for instance, life or death, or a minimum term with a maximum of life) but gives no guidance on how to choose within a range. A hearing on sentence under s. 258(2) BNSS is available, but it is only as good as the material placed before the court. The direction in *Manoj* to collect mitigation material deals with this in capital cases, but there is no equivalent obligation for other serious offences.

9.5 Non-custodial alternatives are under-used

The Probation of Offenders Act, 1958 allows release after admonition (s. 3) or on probation of good conduct (s. 4), and s. 6 restricts imprisonment of offenders under twenty-one years except for recorded reasons. Section 401 BNSS preserves the parallel power in the procedural code. Commentators have long observed that these provisions are not used as widely as the law allows. Official prison statistics regularly record occupancy above capacity and a large share of undertrial prisoners, which adds to the case for alternatives to imprisonment for low-risk offenders.

9.6 The victim's place in sentencing

A purely offender-focused debate leaves out the person harmed. Sections 395 and 396 BNSS allow compensation to victims, and s. 359 BNSS keeps a route for settlement of certain offences. These provisions reflect restorative ideas, but compensation is often considered separately from the sentence and is not routinely recorded in sentencing reasons. A more coherent approach would treat compensation and reparation as part of the sentencing decision itself.

10. Findings

1. The BNS retains a retributive and deterrent core, and widens its use through additions to the capital offences and natural-life sentences.
2. The only new punishment is community service, which is restorative in aim but confined to six minor offences and lacking operational detail in the statute.
3. The Supreme Court has built a body of sentencing principles (individualisation, proportionality, mitigation, dignity) that the statute does not codify.
4. The relation between natural-life sentences and remission under ss. 473-475 BNSS and Articles 72 and 161 is unsettled.
5. Sentencing discretion remains unstructured, and the Court has itself recorded inconsistent outcomes.

11. Recommendations

1. **Statutory sentencing guidelines.** Parliament should enact a framework listing aggravating and mitigating factors and sentencing ranges, as the Malimath Committee recommended, preferably through an independent sentencing council.
2. **Mandatory pre-sentence reports.** Courts should receive a social investigation or probation report before sentencing in offences carrying ten years or more, extending the approach in *Manoj* beyond capital cases.
3. **Clarity on natural-life sentences.** The law should state clearly how remission under ss. 473-475 BNSS and the constitutional powers apply to natural-life sentences, so that offenders and courts know the position.
4. **Operational rules for community service.** Central or State rules should fix categories of work, maximum hours, supervising authority and consequences of non-compliance, and the list of eligible offences should be reviewed after a few years of experience.
5. **Greater use of probation and compensation.** Courts should record reasons when they decline to consider probation for eligible offenders, and should routinely consider victim compensation under s. 395 BNSS at the sentencing stage.

6. Evidence-based review of capital offences. Any further extension of the death penalty should be accompanied by published empirical justification, with periodic review by the Law Commission.

12. Conclusion

The BNS preserves the retributive and deterrent core of Indian criminal law and adds a small reformatory and restorative element in the form of community service. At the same time, by widening capital punishment and fixing natural-life sentences, it places more weight on severity for serious offences. The Supreme Court's decisions from *Bachan Singh* to *Manoj* show a steady effort to make sentencing individualised and reasoned, but they also show how far the practice is from consistency. The Constitution's requirement of fair, just and reasonable procedure is best served when the purpose of punishment is stated openly and applied through structured, reviewable decisions. Legislative guidelines, better sentencing information and workable alternatives to imprisonment would do more for that aim than any further increase in the severity of penalties.

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