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Petty Crimes and Community Service: A Socio-Legal Critique of The Bharatiya Nyaya Sanhita

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ABSTRACT

“The mood and temper of the public in regard to the treatment of crimes and criminals is one of the most unfailing tests of the civilization of any country.” - Sir Winston Churchill addressing the House of Commons

It is trite in law that the sin must be punished and not the sinner. It is the reflection of the ancient philosophy of India and the various older civilisations of the world, the wiser and the more experienced, including the scriptures of all spiritual practices and the realizations of the great souls that it is the soul that matters and not the body. The soul and the metaphysical existence of the individuals matters and not the matter that is visible to the eye. Even Mahatma Gandhi and Nelson Mandela used to say and their sayings are the guiding light of this unenlightened world, that the punishment, although should be detrimental and extraordinarily harsh when it is a serious offence, but whereby the crime or the offence is petty- it should be such a punishment that does not feel like revenge, but does feel like a reformatory exercise. These thoughts have been reiterated by many legal academicians, social reformer, criminal law advocates, judges, and experienced legal scholars. Keeping in mind the same, the Indian governance system apparatus has recently, through the new criminal codes, namely Bhartiya Nyaya Sanhita 2023, has introduced the punishment of community service on the conviction of petty organised and petty crimes. The present short article manuscript will attempt to define community service which has not been defined, as such, and seek a better clarification on the operation of the same, while analyzing the socio-legal consequences of the same.

Keywords: *Petty crimes; Bhartiya Nyaya Sanhita; Socio-legal critique; community service; Punishment.*

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I. INTRODUCTION

“Hate the sin, not the sinner.” -Mahatma Gandhi

The society is formed of interdependent relationships between the individuals who are the part of the society. The interconnected web of relationships and affection between the human beings, is a precursor to understanding the if an aggravated level of negative action, is taken against an individual, then that is decried by the whole society. This loathing of a particular action by the society is only against the individual who does such a wrong. Society decides what is right and what is wrong. This is basically done on the basis of ethical and moral principles. Although, the society is driven by ethical and moral principles, the law is not driven by such considerations. Salmond, and many other philosophers have tried to always establish that the ambit of legally offensive actions is always narrower than the societal considerations. This is because of the fact that every person has their own set of rights and wrongs that must be satisfied. If this level of satisfaction is meant to be fulfilled, the society will be in utter chaos. That is why it is said that law is the reflection of the society, but it also must be understood that law must not be as wide as the society's opinions. Law is the combination of common sensical reasoning and the logic that is legally applied on circumstances that come to fore.

Offence is narrower than crime because crime can be determined by the society, but offence is always determined by the law. Under the Indian Penal Code, 1860³, offence is determined via the explanation given under Section 40 of Chapter II (General Explanations), whereas punishments (excluding the community service sentence) are given under Section 53 (Chapter III). However, under the Bhartiya Nyaya Sanhita 2023⁴, section 2(24) defines offence and Section 4 gives out various types of punishments that can be accorded to a person. For better understanding of the word offence, section 2(24)- Chapter I is reproduced: “(24) “offence”.— *Except in the Chapters and sections mentioned in sub-clauses (a) and (b) the word “offence” means an act made punishable by this Sanhita, but— (a) in Chapter III and in the following sections, namely, sub-sections (2), (3), (4) and (5) of section 8, sections 10, 46, 47, 48, 51, 53, 54, 55, 56, 57, 61, 113, 114, 117, sub-sections (7) and (8) of section 125, 217, 224, 225, 234, 242, 244, 245, 253, 254, 255, 256, 257, sub-sections (6) and (7) of section 306 and clause (b) of section 324, the word “offence” means a thing punishable under this Sanhita, or under any special law or local law; and (b) in sections 183, 205, 206, 232, 233, 243, 247 and 323 the word “offence” shall have the same meaning when the act punishable under the special law*

³ Indian Penal Code 1860 (India).

⁴ Bhartiya Nyaya Sanhita (BNS) 2023 (India).

or local law is punishable under such law with imprisonment for a term of six months or more, whether with or without fine.”⁵ Under Section 4 (Chapter II), punishments are defined and the same is reproduced below, for better understanding: “4. *The punishments for which the offenders are liable under the provisions of this Sanhita are— (a) Death; (b) Imprisonment for life, that is to say, imprisonment for remainder of a person’s natural life; (c) Imprisonment, which is of two descriptions, namely: — (1) Rigorous, that is, with hard labour; (2) Simple; (d) Forfeiture of property; (e) Fine; (f) Community Service.*”⁶

II. COMMUNITY SERVICE: DEFINITION AND HISTORICAL BACKGROUND

However, the definition of community service is not given and the same is going to be defined by jurisprudential discourse, in the coming future; but till then the commonly accepted definition of the same must be kept in mind for better understanding of the provisions given. Community service constitute an apologetic reparation that the person is now required to make to the community what he has wronged.

Community service is a form of sentence and the research therefore tries to highlight it as an ‘alternate to incarceration’. It is an order of the Court under which an offender is required to perform unpaid work of benefit to the community under the supervision of the Probation Officer, who shall also provide rehabilitative counselling and appropriate guidance to the offender.⁷ Community service orders are directed to place the offender in the society where he/she belongs and make an attempt to reform him/her at the same time make them contribute something for the betterment of the same community to which they have harmed. It is defined as a non-custodial punishment awarded by the Court after conviction where the offender is required to render unpaid service to the benefit of the community.⁸ Such a sentence provides for dealing with the offenders who would otherwise end up in prisons even for minor offences/nonviolent offences/offences for which imprisonment would not be feasible/offences for which alternate sanctions would meet the ends of justice. Therefore, in whichever jurisdictions it is preferred, the grave offences and heinous offences have been excluded from its application. Kenneth D. Miller defines it to be a form of symbolic restitution where the participant gives of himself and his time for the betterment of the community.⁹ This form of

⁵ Bhartiya Nyaya Sanhita 2023 (India), sec. 2(24).

⁶ Bhartiya Nyaya Sanhita 2023 (India) sec. 4.

⁷ Udit Raj Sharma & Nidhi, ‘Community Service Sentence as an Alternative Mode of Punishment in India- Analysis and Feasibility’, KALA SAROVAR, Vol. 24, [http://dr.ddn.upes.ac.in:8080/jspui/bitstreampdf; L. JAYASHREE, COMMUNITY SERVICE: AN ALTERNATIVE TO PUNISHMENT \(2005\).](http://dr.ddn.upes.ac.in:8080/jspui/bitstreampdf; L. JAYASHREE, COMMUNITY SERVICE: AN ALTERNATIVE TO PUNISHMENT (2005).)

⁸ Andhra Pradesh Community Service for Offenders Bill, 2010 (India).

⁹ *Ibid*: James L. Hurd and Kenneth D. Miller, “*Community Service: What, Why, and How*” 45 Federal Probation 39 (1981).

punishment owes its origin to the reformatory approach of criminal law. Conceptually, community service as a reformatory measure is quite alike to that of Probation. Both are sentences which are generally brought into effect post-conviction or post determination of guilt (through trial or the plea of guilt). Both act as alternatives to incarceration and both suggest that instead of sending the accused behind the four walls, an opportunity be afforded to the person convicted to get reformed and rehabilitated as a member of the society. Both the sentences try not to interfere with the normal social life of the convict and enable him/her to lead normal social life while undergoing the sentence. Both the sentences are generally believed to be appropriate for the non-violent or less grave offences and heinous offences are generally excluded from being awarded these forms of sentences. The difference lies in the method of enforcement only since under probation, the convict is only supervised to abide by the conditions of the probation and under community service, along with maintaining the good conduct, the convict has to undertake the specified work for the specified number of hours as directed through the order. The order aims to be both punitive and rehabilitative. There is no logical reasoning why a particular sentence cannot be punitive, reparative, and rehabilitative in equal measure; however, there are concerns whether community service addresses all the approaches with equal force. Community service sentences are operational in number of jurisdictions, namely, England, Russia, Canada, and USA.¹⁰

The Indian Penal Code (IPC, hereinafter) was enacted in 1860 by virtue of the classic legal draftsmanship of Lord Macaulay. If there would have been a concept of community service prevalent at that time, there would have been no need to urge the inclusion of the same in the Indian Penal Code. The inclusion of community service in The Juvenile Justice (Care and Protection of Children) Act, 2000 (Section 15) is an example of using community service as a form of reformation. Community service is defined as an order that requires an offender (who must consent and be aged at least 16) to perform unpaid work for between 40 and 240 hours under the supervision of a probation officer. Formerly known as a Community Service Order, it can also be defined as, '*a community order which requires the offender to do unpaid work in the community under the supervision of a probation officer.*' Moreover, the work that the offender is required to undertake has some obvious relation to the nature of offence.¹¹ The first

¹⁰ Udit Raj Sharma & Nidhi, 'Community Service Sentence as an Alternative Mode of Punishment in India- Analysis and Feasibility', KALA SAROVAR, Vol. 24, <http://dr.ddn.upes.ac.in:8080/jspui/bitstream.pdf>.

¹¹ *Community Service as a form of Punishment under the Indian Penal Code*, THE LAWYER OF JURISTS, <https://www.lawyersnjurists.com/article/community-service-as-punishment-under-the-ipc/>; C.K. TAKWANI, INDIAN PENAL CODE (2022); K.N. CHANDRASEKHARAN PILLAI, CRIMINAL LAW: THE GENERAL PRINCIPLES AND PRACTICE (2024); RATANLAL AND DHIRAJLAL, THE INDIAN PENAL CODE (2019); PROFESSOR K.D. GAUR, THE TEXTBOOK ON INDIAN PENAL CODE (2023); K.A. PANDEY, THE INDIAN PENAL CODE (2023); PROFESSOR N,V PARANJPEE, INDIAN PENAL CODE (2023); S.N.

organized community service program meant systematically to be used in place of short prison sentences were established in ad-hoc basis in California in the 1960's. Thus, community service was indirect alternative to imprisonment. In the United Kingdom, Parliament enacted legislation in the early 1970's giving the courts specific powers to order community service as a sentencing sanction. In the early 1980's after a series of private pilot projects the Dutch implemented community service nationwide and evaluators made comparable findings. It was Lenin who also stressed on the importance of community service.¹²

Community service serves the goals of punishment, reparation, restitution and even rehabilitation. It is beneficial to the offenders, the community, the victim and even to the courts. So, community service has both the social and the cognitive benefits. It also serves as an alternative to imprisonment (India has 32 prisoners per 1000 of population. There are 11094, 25 lakhs prisoners in India as on 31 December 2005) which is morally reprehensible and indefensible. Moreover, Prisons have proved ineffective in their object of reforming the criminals. Research indicates that about half of all prison inmates are likely to be rearrested and returned to prison, many soon after their release from an institution. Contamination is the gist of prison life. Prisons are dens of criminality. The unsophisticated offender is compelled to associate with the hardened professional criminals and thereby he learns not only the techniques of committing the crime but also the specific drives, rationalization, and attitudes of crime. The Community Service Program is intended to add some refinement by requiring the offender to put back into society through performing a job for the community. Not only do offenders need to be addressed as active participants rather than as passive recipient of punishment or treatment, but they also need to be positively motivated to engage in the process of change to law-abiding lives. Performing work for the community, as well as requiring offenders to pay back to the society helped them realize that they had contribution to make to the society.¹³ Therefore, the systematic apparatus of community service is beneficial for a country like India and must be incorporated in full swing of effective implementation. In the *Bhartiya Nyaya Sanhita*, community service is prescribed as an alternative punishment for six major offences such as- theft of less than Rs. 5000, attempt to commit suicide to compel or restraint exercise of lawful power; appearing in place of public importance in state of intoxication, defamation against president, vice president, governors, ministers and others,

MISHRA, THE INDIAN PENAL CODE (2023); P.S.A PILLAI, THE CRIMINAL LAW 9(023).

¹² *Ibid.*

¹³ *Community Service as a form of Punishment under the Indian Penal Code*, THE LAWYER OF JURISTS, <https://www.lawyersjurists.com/article/community-service-as-punishment-under-the-ipc/>; C.K. TAKWANI, INDIAN PENAL CODE (2022); K.N. CHANDRASEKHARAN PILLAI, CRIMINAL LAW: THE GENERAL PRINCIPLES AND PRACTICE (2024).

public servant unlawfully engaging in trade, and non-appearance in court. It must be noted that community service is an alternative punishment, and it is discretionary upon the judicial officer to give or not to give the punishment, as it will be based on facts and circumstances of the particular case.

III. CONCLUSION AND WAY FORWARD

Community service as a punishment is given under the new laws, and is commendable as a reformatory measure for the criminal justice system, which has a room for improvement. However, the whole exercise is dependent on the effective implementation of the same. At present, states and officer of the police bureaucracy are at a fix, because no nodal officer has been appointed to handle the cases of community service, if and when such a punishment is accorded. The clarification in the definition of community service and the implementation of the same, is of utmost importance. Thus, a truly commendable step when juxtaposed with mindful exercise of power, will definitely lead India to path of greater reformatory exercise, and the path of qualitative progress and development.
