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Authors: Niharika Singh (Niharika Singh BA/LLB - 5th yr - Semester IX Student- Thakur Ramnarayan College of Law)

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GENDER- INCLUSIVE CRIMINAL PROCEDURE UNDER BNSS, 2023: AN ANALYSIS OF TRANSGENDER RIGHTS IN INDIA

AUTHOR - NIHARIKA SINGH, STUDENT AT THAKUR RAMNARAYAN COLLEGE OF LAW

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Abstract :-

The Bhartiya Nagarik Suraksha Sanhita (BNSS), 2023 also known earlier as Criminal Procedure Code (CrPC), 1973 which has shown significant Improvements in the country's criminal legal system. Its main purpose was to update the criminal procedure and overcome the challenges bridging the gap, but it still needs to critically examine Gender inclusive justice for Transgender persons under BNSS, 2023. Although the Transgender Community has already been acknowledged as the "Third Gender" in ***National Legal Service Authority (also known as NALSA) vs. Union of India (2014)***[1] and the Transgender Persons (Protection of Rights) Act, 2019 has also passed, but still in reality Transgender Community often experience Discrimination and Procedural difficulties in the Criminal Justice System.

This research paper critically examines the BNSS focusing mainly on Transgender Rights, specifically referring to procedural issues involving arrest, search, detention, medical examination, recording statement, bail, Custodial measures, and access to justice in reality.

This research paper focuses on the provisions of the Constitution, Acts of the Parliament, Case Laws, and case studies illustrating the experience of Transgender people in the criminal justice system. It establishes that there has been progress towards Gender inclusivity in the BNSS, but still there are some ambiguous procedures and implementation challenges in reality.

This Research paper makes recommendations for changes which includes Legislative Amendments, clear criminal procedure directions under BNSS and institutional reforms to ensure there is Equality, Dignity and Substantive Justice in the Criminal Justice System for Transgender persons.

KEYWORDS- Bhartiya Nagarik Suraksha Sangeeta 2023 BNSS, Transgender rights, Gender inclusive justice, Criminal Procedure, Third Gender, Arrest, Search and Seizure, custody, medical examination, Bail, access to justice, equality, dignity, Procedural Safeguard, Gender identity.

❖ Introduction :-

Criminal Procedure has always been an important component of the Criminal Justice Framework in India as it establishes the working of Criminal Law in reality. It controls the whole process of criminal cases, starting with the reporting of offences, investigation, arrest, search, custody, medical

examination, presenting the accused before the court, sentencing punishment and bail. The failure in even one of these producers would fail the justice system by impacting a person's basic fundamental rights such as liberty, body and dignity of individuals, therefore criminal procedure must ensure to safeguard the constitutional rights of persons who encounter such failure in criminal justice system rather than only the interests of the state and of the victims.

Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS) is the main legislation that provides guidance on how Criminal procedure will be followed in India. It superseded the Code of Criminal Procedure Code, 1973 and is applicable from 1st July, 2024.

Law has evolved for transgender community by introducing Transgender Persons (Protection of Rights) Act, 2019. The Act included provisions relating to the recognition of Transgender Identity, Welfare, Healthcare, Welfare and Rights. **The Transgender Persons (Protection of Rights) Rules, 2020** states that there are institutional provisions such as **Transgender Protection Cells. Rule 11(5)** mentions that "Every State Government should have a Transgender Protection Cell under the charge of the District Magistrate in each district and to be monitored by the Director General of Police in State by assuring speedy registration, investigation and Prosecution of offences against Transgender persons"[2]

In 2026, the Transgender Persons (Protection of Rights) Amendment Act, 2026 was passed by the Parliament in March 2026, it amended the act by removing the rights of self-identification of gender, replacing it with made medical board certification, narrowing the legal definition of Transgender persons which was widely criticized by civil society groups, activists and human

rights organizations that it is violating their constitutional right and it conflicts with Supreme Court's 2014 Landmark judgement ***NALSA v. Union of India***[3] which upheld self- determination of gender. That's why its Constitutional Validity is under challenge before the Supreme Court currently.

It is important to note that these constitutional and statutory safeguards do not guarantee a comprehensive framework in reality which includes a transgender inclusive procedural framework. The main concern is that the general level of procedural protection in the BNSS is not well understood and effective for transgender persons being ambiguous.

The present research paper therefore explores the issues of gender inclusivity in the criminal procedure mentioned in the BNSS, 2023 with respect to transgender. The intent of the research here is not to determine if the BNSS is 100 % inclusive or not. Rather, it aims to highlight where there is any protection through the existing case by case practice and where it might be better to provide more clarity, guidelines, or reform.

- **Under BNSS that deals with general procedural protections which lacks a specific and comprehensive framework for Transgender persons:-**

The BNSS covers various phases of criminal process such as arrest, search, medical examination, custody, investigation and recording statements but it does not have a specific chapter giving a detailed procedural framework with regard to Transgender persons.

The Constitution of India is the basic document for safeguarding transgender community. "The

equality before law and equal protection of the laws"[4] are guaranteed by **Article 14**. The Supreme Court has interpreted ***(NALSA v. Union of India)***[5] **Article 15**[6] also gives protection to Transgender persons, which bans "discrimination on certain grounds" and **Article 21** is also relevant to the right to life and personal liberty and as interpreted, "the right to live with dignity"[7]. These constitutional provisions are important while dealing in Criminal procedure.

Section 35[8] BNSS describes "when a police officer can arrest a person without a warrant". This provision is same for Transgender persons as for others, and must be interpreted and applied subject to statutory conditions of arrest.

Section 43[9] discusses "the process of arrest and has a specific section on the arrest of women" . It gives protection in respect of the way and timing of the arrest of women subject to the conditions under this section. But the BNSS does not specifically mention how these gender specific provisions will apply in the case of transgender persons, and the issue needs to be carefully interpreted.

Section 49[10] applies to "the search of a person arrested". **Section 49 (2)**[11] explicitly mentions that if the search of a female is required, then the search must be made by another female with "Strict regards to decency". So, there is a general protection given in the above provision about dignity in the search of the person. It doesn't establish or mention a new procedure for the search of transgender individuals. Transgender people therefore be taken into account when considering the use of this provision in the broader statutory framework as well as the constitutional requirement to respect dignity and personal liberty.

"Provision of medical examination is made in certain circumstances" mentioned in **Sections 51, 52 and 53**[12]. These sections are the legal rules on medical examination within the frame of criminal procedure under BNSS. However, they don't establish a specific comprehensive system for Transgender people.

"The security of the identification of a person arrested where an identification of a person is required for investigation" is mentioned in **Section 54**[13]. This section also doesn't provide for a separate procedure relating to Transgender identity.

Section 56[14] talks about "a person who has custody of an accused is under a duty to ensure the health and safety of the accused". **Section 57**[15] requires "the person arrested to be taken before the appropriate magistrate or proper officer without unnecessary delay". If a "person is arrested without a warrant, they can be detained for a period of more than twenty- four hours" in accordance with **section 58**[16], but with a statutory exception that may allow a Magistrate to extend the period of time they may be detained for. However, the BNSS doesn't provide any detail regarding the specific cell where an accused who is transgender can be detained. It thus does not establish a new statutory provision that a transgender person should be detained in the male cell or female cell as many police stations and prisons in India still don't have separate lockups, wards, and toilets for transgender people.

Section 180[17] is an "introduction to the concept of police examination of witnesses", **Section 181**[18] is an "introduction to the concept of statements to Police and their use", **Section 182**[19] is an "introduction to the concept of inducement amid" **section 183**[20] explains "the concept of recording

of confessions and statements by a magistrate". These provisions outline general procedures to be followed for making statements during investigation. They haven't established a separate procedure especially for Transgender individuals or a comprehensive.

Importantly, this does not imply that there is no protection for transgender persons in the BNSS. The general procedural safeguards provided to all persons under the BNSS are provided to Transgender persons. But BNSS itself does not contain a detailed transgender specific procedure but only a general procedure.

- **Gaps and Challenges in application of the BNSS, 2023 for Transgender persons:-**

The BNSS has provisions on arrest, search, medical examination, custody, identification, and investigation as discussed in the previous chapter. These however do not specify any procedures relating to specific situations that could occur where the person concerned is transgendered. The primary issue is not the lack of legal protection which is also important but rather the lack of clear and gender inclusive criminal procedures under BNSS. Which can lead to uncertainty in the implementation of the law. Questions may arise, such as which gender specific safeguard to use and how to take into account the person's gender identity by the police officer.

"The search of an arrested person is allowed" under **Section 49**, and there is a special protection given for the search of a female. But it does not create a separate detailed procedure for the search of transgender individuals. The lack of specific guidance could lead to variations in practice between police authorities. If search is not done with regards to the Transgender person's gender identity or personal situation as Personal search includes physical contact with another person's body and can therefore affect their dignity and privacy as it may be uncomfortable or unsafe for them. Hence, a clear and consistent procedure is needed to ensure that personal searches are conducted in a lawful, respectful, and minimally intrusive manner that does not impact dignity and privacy.

Section 51, 52 and 53 contains provisions for "medical examination under certain circumstances". These provisions provide the general law legal medical examination in criminal proceedings, including examination of an accused and examination of an arrested person. The BNSS does not make any detailed stat about the application of gender- specific safeguards in relation to medical examination of Transgender people. Nor does it provide specific transgender protocol for handling of sensitive personal or medical information collected during the course of the examination. Like during a medical examination, sensitive parts of the body may be examined and private medical information may be required. For Transgender individuals, it may bring up more issues about the Privacy, dignity, and respect to be had into their bodies. So, the issue here is not a lack of medical examination provisions. The difference is that there is no specific guidance for them on how to implement them in a transgender inclusive way.

The lack of specific transgender provisions is one of the most significant issues in practice, in the case of Custodial Placement. Under **Section 56**, it is a duty of the person having custody of an arrested person to exercise reasonable care of the person's health and safety. Further safeguards are set out in **Section 57 and Section 58** under BNSS, regarding presenting accused in front of

Magistrate and detention in excess of 24 hours.

While **Section 56** puts a duty to make reasonable efforts to ensure the health and safety of an accused, the BNSS does not specify the relevant criteria for deciding where a transgender person should be held. It does not specify on the basis of which gender identity one should be placed . It does not state whether or not placement should be determined by sex assigned at birth, legal gender, gender identity, Indy safety, or the preference of the individual. This poses a practical problem in that where the person is detained may have an impact on their physical safety, privacy, and dignity. For instance, an inappropriate placement might be a place where a transgender detainee is harmed, intimidated, or subjected to violence.

The procedures for identifying an arrested person when identification is required are mentioned in **Section 54** of the BNSS. The provision outlines a general identification process and not a specific one on transgender identity. This leaves a space between the need to identify a person for investigation and recording or acknowledging gender identity. There may arise practical problems where the name or gender on an older document does not match the name or gender by which a transgender person identifies. The BNSS does not offer specifics on how this information should be documented regularly by police and in investigation records.

Another issue is related to privacy and confidentiality in criminal procedures. Authorities may need to obtain personal information, identity documents, medical information and other sensitive materials during criminal investigations, information about gender identity, previous name or medical history may be especially personal to a transgender person and in many situations documents are not available with them. The BNSS does not provide for a detailed procedure specifically relating to the collection, recording, storage or disclosure of information and lack of appropriate documents about a person's transgender identity. This can lead to the risk of inappropriate disclosure, inaccurate recording of inappropriate handling of personal information. The question is then whether the general procedure is adequate to ensure the protection of sensitive identity related information.

The general procedure in relation to examination of witnesses by police, statements to police, prohibition of inducement and recording of confessions and statements by a Magistrate is set out in **sections 180 to 183** of the BNSS. The problem is that these provisions do not provide a specific process for recording the gender identity of a Tran person when taking or recording their statement. For instance, if the person's current name or gender identity is not the same as the information in an older document, the BNSS does not give detailed guidance on how the information should be represented in the investigation record. This may result in inconsistency between official records. It can also lead to the individual having to repeatedly identify themselves at various stages of the criminal process. A consistent and standardized process for documenting identity information may then minimize confusion and help to ensure that the person's information is documented accurately and respectfully.

There may be a risk of insensitive or disrespectful treatment during arrest, interrogation, medical examination, or custody, due to the absence of detailed procedural guidance. The BNSS does not

contain a detailed transgender specific procedure on how to address Transgender people, how to communicate with them, or the practical issue of interacting with transgender people. This does not imply that all interactions will be discriminatory, but it does not mean that the treatment of transgender persons will be dependent on the awareness and sensitivity of individual officials if there is no clear guidance. A consistent and respectful treatment would help to ensure that the use of criminal procedure powers does not unduly impact the dignity and privacy of transgender persons.

Another effect of the lack of detailed procedures is that there may be variations in practice from one location to another. The general provisions of the BNSS apply to the criminal justice system. But if the law doesn't explicitly answer a procedural issue related to Transgender, the authorities can take other approaches. For instance, there can be variations in the way authorities deal with the issue of custodial placement or personal search. These differences can leave authorities and transgender people in a state of confusion. A more transparent procedure would then facilitate the consistent treatment and protection of transgender persons by all police stations, custodial institutions and investigating authorities.

The intent of establishing clearer procedures should not be to establish a new criminal procedure system for Transgender people. Rather, the goal should be to ensure that the current protections in the BNSS are clear and effective for Transgender people.

- **Landmark Judicial Decisions and Judicial Approach towards Transgender Rights in India:-**

The Indian judiciary has been a step forward in affirming and expanding the rights of transgender community. Why the Constitution of India guarantees equality, freedom and personal liberty to all persons, transgender people have been socially discriminated against and excluded. So, the Supreme Court and High Court have thus far been important in clarifying the interpretation of the constitutional rights of the transgender people. The judgments are relevant to this study as the criminal procedure is the exercise of the State power upon the body, freedom, privacy, and dignity of an individual. Therefore, the judicial principles emerging from these judgments can guide interpretation and implementation of BNSS, 2023 even in cases whether the judgments are not explicit in their interpretation of the BNSS.

The most significant Landmark Judgment on transgender issues in India was the ***National Legal Services Authority v. Union of India (NALSA judgement) in 2014***[21] by the Supreme Court of India. The Supreme Court recognized transgender persons as a constitutionally, recognized gender category and upheld their right to determine their own gender identity. The NALSA (National Legal Services Authority) itself says the judgement is a landmark step which established the transgender community as the third gender and safeguarded their constitutional rights. The significance of NALSA is that the court did not consider gender merely to be a biological attribute. It acknowledged one's gender identity is a significant aspect of one's personality, dignity, and freedom. The decision in the case also recognized that the rights of transgender persons were guaranteed by the fundamental rights of equal protection of law guaranteed by the Constitution, under which they

cannot be denied equal protection simply because their gender identity does not match the one they were given at birth. The BNSS has some provisions that need gender specific language, such as in relation to arrest, search and medical examination, which is why NALSA is important. The BNSS has been passed since NALSA judgement and does not include a comprehensive procedure for transgender people. Hence, for the benefit of transgender persons, the constitutional principle set out in NALSA constitutes a good interpretive guide for such provisions. However, it is not appropriate to state that NALSA took decisions directly on any issues with the BNSS. The judgement precedes the BNSS and has been used in this research for its constitutional principles concerning gender identity, equality, and dignity

Another Landmark Judgement is of ***Justice K.S. Puttaswamy (Retd.) v. Union of India***[22], ***(2017)***. Here the Supreme Court in a unanimous decision declared that the Right to Privacy is a Fundamental Right according to the Constitution which is connected to dignity, liberty, autonomy, and the freedom of an individual to make their personal decisions. Privacy was thus not just the right to be left alone, but also related to the integrity of the body and personal autonomy. This Judgement tries to give special significance to Transgender persons as criminal procedures may deal with sensitive aspects of a person's life. A person's body and informational privacy is directly impacted through arrest, personal search, medical examination, and collection of personal information. This judgement establishes a constitutional guideline for the exercise of such power. The relevance of this case does not resolve an issue related to transgender people under the BNSS directly. It is important because privacy is a fundamental right in the Constitution. This principle along with NALSA Judgement offers greater safeguard for the privacy and dignity of transgender purchase when engaging with criminal justice proceedings.

Another important Supreme Court judgment is ***Jane Kaushik v. Union of India, 2025***[23]The Supreme Court looked at the outgoing challenges faced by Transgender individuals in accessing the benefits and protection available under the law. The Court observed that though the Transgender Persons (Protection of Rights) and the Transgender Persons (Protection of Rights) Rules, 2020 were enacted there were serious issues with their implementation. The Court stressed that legal rights must not be on paper and that it is the duty of governmental authorities to ensure that these rights are realized. This judgement has particular relevance to the present research paper as it illustrates that mere legislation is not enough. There should also be adequate administrative structures, qualified officials, and procedures to enforce legal rights. The Court itself recognized issues of confidentiality, reasonable accommodation, identity documents and safety and discrimination. It also recommended gender neutral or gender diverse facilities and emphasized the need for confidentiality about transgender identity. These principles can be transferred to police stations, detention facilities, medical examinations, and criminal courts. Its principles may inform the development of Transgender inclusive procedures under the BNSS, although the judgment itself is not a direct interpretation of the BNSS.

The above judicial decisions demonstrate that there are some basic principles that should guide the application of the BNSS in the case of transgender people. First, there must be dignity safeguard throughout the entire criminal process. No person shall be subjected to arrest, search, medical

examination, questioning or custody for the purpose of humiliation, harassment, or unnecessary exposure of a person's gender identity. Secondly, privacy needs to be respected. Information about the transgender persons, identity or medical history should not be shared in an unnecessary manner. Third, equality should be substantive, not merely formal. Treating every person in the same way may not always produce equal protection where a particular group still faces specific procedural difficulties. Fourth, the right to autonomy of individuals and gender identity should be respected. A transgender individual should not be subjected to a criminal procedure that ignores their legally recognized identity without a legitimate reason.

In light of the above judicial development and the gaps identified in the previous chapter, some changes are needed to make the application of BNSS transgender inclusive. The recommendations are for legal and administrative reform and should not be interpreted as mandatory provisions of the BNSS.

The first is to create clear procedure guidelines for police and other authorities that are transgender inclusive when implementing the BNSS. The BNSS is a general procedural law which does not offer detailed guidance in all situations relating to transgender people. An existing set of guidelines issued by the relevant authorities might clarify the application of existing provision and the context of arrest, search, medical examination, custody, identification, documentation, and recording of statements. These guidelines would help to minimize confusion and ensure consistency and practice.

The second suggestion is for personal searches. Section 49 of the BNSS sets out the general principles of search of an arrested person and makes it clear that it is necessary to search a female, she shall be searched by another female with due regards to decency. The provision, however, does not specifically address how this gender based provision should be applied to transgender people. Therefore, a clear procedure should be established to ensure that searches of transgender people are carried out in a way that respects dignity, body, privacy, and personal safety. The process should also avoid unnecessary physical contact and embarrassing treatment.

The third recommendation is regarding medical examination. The BNSS contains provisions regarding medical examination in certain situations in **section 51 to 53**. They do not have a comprehensive transgender inclusive protocol. Therefore, medical examination of a transgender person should only be done for a proper legal or investigative purpose. The individual should be treated with respect and sensitive medical information should be kept confidential unless required by law. There would also be less insensitivity or discriminatory treatment if medical staff involved in criminal proceedings received appropriate professional training.

Fourth recommendation is also one of the most unanswered questions regarding custodial placement and safety. Safeguards for the person's health and safety are contained in **section 56** of the BNSS, which requires a person in custody of an arrested person to take reasonable care of the person's health and safety and safeguards relating to production before a Magistrate and detention beyond the prescribed period are contained in **section 57 and 58** of the BNSS. However, it does not state what kind of cell the transgender person should be put in, male cell, female cell, or a separate

transgender cell. Therefore, it would be inappropriate to claim that the BNSS already provides a particular type of custodial placement. Rather, safety, dignity, individual circumstances, and gender identity should be the basis for appropriate custodial guidelines. The goal should be to avoid sexual violence, harassment, humiliation, and abuse, and to ensure the security of the custodial institution. Any placement decision should also not be made based on an unnecessary isolation of transgender individuals.

Fifth recommendation is to provide special training and sanitation to police officers, prison staff, medical staff, and other criminal justice officials. It is not only the law itself that can be effective but how it is enforced. Training to be provided includes transgender identity communicating with transgender people, arrest, search, medical examination, custody, confidentiality, and interaction with transgender victims, witnesses and accused persons. Real life scenarios would be better for Practical Training, then just giving out theory.

The sixth recommendation is to enhance Magisterial supervision of the treatment of transgender persons in custody. If an arrested person has been brought before a magistrate, any concern about safety, dignity, medical care, or treatment of the arrested person should be addressed. This does not necessitate the establishment of a new judicial process for transgender people. Instead, it would help to ensure that the current judicial protections are effectively implemented in situations where transgender individuals are at a specific risk.

The seventh recommendation is that there should be uniform standards in State and Union Territories. Criminal procedure should not be based on the knowledge of any individual police officer or custodial institution. Uniform guidelines would thus eliminate the lack of constancy and offer more clarity to authority and transgender individuals.

The eighth recommendation is to establish a transparent system for collecting gender specific data in Police and criminal procedure. Information should be recorded accurately on existing forms and systems, and without unnecessary confusion between identity documents, gender identity, and other personal information. Meanwhile, sensitive data should not be made available to individuals who do not have a legitimate need to access it. This recommendation follows the constitutional significance of privacy and dignity recognized in Puttaswamy case the Recognition of gender identity in NALSA.

These recommendations should also be coordinated with existing legal and administrative mechanisms to protect transgender people. The purpose should not be to create a completely separate criminal Justice system for transgender persons, rather the goal should be to clarify, make safer, more respectful, and more capable of handling situations, not explicitly addressed by the current provisions of the BNSS.

The judicial developments mentioned in this chapter, thus offered a solid constitutional foundation to enhance the implementation of the BNSS for transgender people. The Supreme Court has already held that transgender persons have the right to equality, dignity, privacy, autonomy, and equal protection of law. The final hurdle is to make these constitutional principles operational in the procedural practices at the police station, during investigation, medical examination, in custody

and before the court.

Therefore, a criminal procedure that is transgender inclusive does not need to discriminate in favor of transgender persons or establish a completely different procedure under the BNSS. It demands clarity in the absence of law, reasonable safeguards in the presence of specific risks and uniform application of constitutional rights. Clear guidelines, appropriate training, confidentiality protections, safe custodial practices, and effective judicial oversight can help to close the gap between the general safeguards provided by the BNSS and the needs of Transgender persons.

The general principle should thus see that criminal procedure safeguard the dignity of all persons involved in it as well as the administration of Justice. If constitutional values enshrined in NALSA, Puttaswamy and later decisions consistently applied to the criminal Justice system, and if adequate administrative and procedure guidelines are added, India can move to a more inclusive and responsive criminal Justice system for transgender persons.

❖ Conclusion:-

The Bhartiya Nagarik Suraksha Sanita 2023 sets out the general procedure safeguard for arrest, search, medical examination, custody, investigation, and other stages of criminal proceedings that is applicable to transgender persons in general as it is to other persons. The BNSS however, does not offer a specific comprehensive solution to the procedural challenges that transgender persons may encounter in particular areas such as personal search, medical examination, custodial placement, identification, recording of identity related information, confidentiality, and interaction with criminal Justice authorities while the Constitution and judgements like ***NALSA v. Union of India*** and ***Justice K.S. Puttaswamy v. The Union of India*** offers strong protection of equality, dignity, privacy, and personal liberty but still a gap remains between the principles and their application. The study therefore recommends for criminal justice officials to be sensitized and trained, have clear transgender inclusive procedural guidelines, have confidentiality safeguards, have appropriate search and medical procedure, have safe custodial practices, have appropriate recording of identity related information, and have effective judicial oversight. These do not establish a new criminal process for transgender people but will enhance the BNSS and ensure it is implemented effectively. Thus, in answer to the central research question, the BNSS provides General protection but does not offer an adequate and comprehensive gender inclusive procedure framework. Greater procedural clarity, institutional awareness, and consistent application of constitutional values are necessary to ensure that transgender persons receive equal, dignified, safe and substantive Justice throughout the criminal process.

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