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Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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Revisiting Indian Penal Code, 1860- The need of the hour?

Authored By- Gazal Gupta & Akshay Sharma

Abstract

After the construction of Indian Penal Code in 1834, the times have immensely changed. Therefore, more than 160 years later, the IPC needs to be restructured because crime does not always remain the same and amendments can only be made to an extent. The IPC needs to be restructured since many of its provisions have become obsolete as a result of changing state of the economy and technological developments.

The following research addresses the history of Indian Penal Code and how various amendments like the 2013 and the 2018 amendments have shaped our penal code. Further, it also throws light upon the criticisms of the amendments and how even the amendments fail to solve the current problems existing in the society. Hence, the need to revamp the code arises.

Additionally, focus is also placed on various sections and chapters like the Section 375, 376A, 124A, Section 294 and Chapter 3 that have failed to fulfill its purpose. Judicial decisions where the requirement to amend a section has been emphasized upon has also been highlighted.

Keywords: Penal, Amend, Judicial Decisions, Restructure

Introduction

The Indian Penal Code, as well as its subsidiary laws, the Indian Evidence Act and the Code of Criminal Procedure, were all adopted in the 1800s and 1900s, despite previous recommendations and suggestions, have never been comprehensively revised. The Indian Penal Code is the country's official criminal code (IPC). It is an all-encompassing code that seeks to address every aspect of criminal law. The code was based on the recommendations of India's first law commission, chaired by Lord Thomas Babington Macaulay and established in 1834 under the Charter Act of 1833.[1] As a result, a revision of the IPC is necessary to transfer authority from the leaders to the people. The IPC has to be restructured since many of its provisions have become obsolete as a result of changing state of the economy and technological developments. Some of the examples can be, firstly, the definition of rape under Section 375 of the Indian Penal Code encompasses all forms of sexual assault including nonconsensual contact with a woman ("IPC"). Exception 2 to Section 375, on the other hand, exempts unwilling sexual intercourse between a husband and a wife above the age of fifteen from Section 375's definition of "rape," and therefore shields such acts from prosecution. A woman is said to offer her husband an eternal commitment to have sex with her once they engage in marital intercourse. India is one of the thirty six countries where Marital rape is not a crime because unwanted sexual contact between a husband and a wife is illegal in almost every country on the planet.[2] Secondly, as pointed out by Justice VG Arun that there are no legal penalties for 'road rage' in India. This must be noted by legislators, with appropriate modifications should be made in this direction to close the gaping breach.[3] While it took 158 years for the courts to decriminalise homosexuality and adultery, now is the time to revisit the legislation, modernise it, and implement it in accordance with 21st-century standards.

[1] *Law commission of India*. Law Commission of India. (n.d.). Retrieved January 3, 2022, from https://lawcommissionofindia.nic.in/

[2] Desk, I. T. W. (2016, March 12). *Marital rape in India: 36 countries where marital rape is not a crime*. India Today. Retrieved January 3, 2022, from https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12

[3] Sunny Thomas vs Kerala Bail Appl..No.2319 OF 2021

Research Objective

An effort has been made in this paper to examine the Indian Penal Code, 1860, in light of 21st-century norms. The paper explores why the need to revisit the code emerges, with a focus on past amendments and its criticisms in this extensive code. This paper will also look at the various modifications that may be made to this code. The goal is to look into areas of the code that are currently unwelcome.

Research Methodology

This paper probes into the analysis of the changes that can be brought to the Indian Penal Code. The primary data have been taken from legitimate government sources. The Indian Penal Code and the Criminal Law amendments of 2013 and 2018 have been analyzed. The various judgments related to revamping of code have been taken from Manupatra and SCC. The secondary data have been taken from secondary sources like previous research, National and State commission reports, legal journals and newspapers. The statistics and detailed information has been taken from various newspaper sources like India Today and Tribune India.

History Of Crime And Indian Penal Code In India

Before Muslim monarchs conquered India, the nation was ruled by Hindu criminal law. Because there was no state during the Vedic Period, Dharma was the primary source of law, with Dharma (Sacred Law), History (Charitra), King's Edicts (Rajasasana), and Vyavahara as the four parts of law (Evidence). Manu, Yagnavalkya, and Brihaspati were the main sources of the law, as they all had a deep grasp of retribution and how to use it to punish criminals. Because there was no formal state creation and no rulers in the early stages, the victim would utilize vengeful ways to punish the perpetrator. After the Muslims came to India, Mohammedan Penal Law was in effect in most of the country, owing to Muslim rulers' conquest and imposition of their criminal law. The Quran was the Muslim rulers' major source of law, but the laws in it were insufficient to meet the demands of a vast civilised society, so they introduced the Sunna, or code of behaviour.

After the rule of Britishers, the Indian Penal Code was drafted by the First Law Commission, which was chaired by Thomas Babington Macaulay. The plan was based on a simple codification of English law, plus elements from the Napoleonic Code and the Louisiana Civil Code of 1825.

The first version of the Code was presented to the Governor-General in Council in 1837, but it took another two decades for it to be finalized. The whole code was finished in 1850 and presented to the Legislative Council in 1856. It took longer to be incorporated into British Indian law due to the Indian Revolt of 1857. The draft then underwent a very careful revision at the hands of Barnes Peacock, who later became the first Chief Justice of the Calcutta High Court, and the future judges of the Calcutta High Court, who were members of the Legislative Council, and was passed into law on 6 October 1860. The objective of this Act is to provide a general penal code for India.[4] Post independence, various conceptions of criminal law have been established by jurists and philosophers. According to Professor KD Gaur, there are four theories that have evolved in criminal law: the civil wrong theory, the social wrong theory, the moral wrong theory, and the group conflict theory. Till date, there have been amendments 77 times in the code. The very recent ones being The Criminal Law (Amendment) Act, 2013 and The Criminal Law (Amendment) Act, 2018.

Past Key Amendments To Indian Penal Code, 1860

- **Criminal Law (Amendment) Act, 2013**

The Criminal Law (Amendment) Act, 2013, which took effect on February 3, 2013, modified and added new provisions to the IPC relating to different sexual offences. Certain activities were specifically recognised as offenses under the new Act, which were previously dealt with under related legislation. The Indian Penal Code has been amended to include new offences such as acid attack, voyeurism, stalking and sexual harassment. The amendments made are:

- The amendment created a new section 376 A for rape that results in the victim's death or permanent vegetative condition.
- By adding an explanation to section 375, consent was defined as "unequivocal voluntary agreement" indicating the woman's desire to participate in the sexual act by "words, gestures, or any form of verbal or nonverbal signals." This definition makes it clear that a woman's silence or lack of a "no" cannot be interpreted as a "yes."
- The modification included a new section 166 A to penalise public employees who decline to file a FIR in situations of specific crimes against women, such as rape.

[4] *India code: Indian penal code, 1860*. (n.d.). Retrieved January 3, 2022, from https://www.indiacode.nic.in/handle/123456789/2263?locale=en

- Previously, section 376A (intercourse by a man with his wife) carried a penalty of imprisonment for a term up to two years. The penalty for sexual intercourse by a husband on his wife during separation without her permission (section 376B, replacing section 376A) was increased to seven years with the 2013 modification, with a minimum penalty of two years.
- In section 375, acts other than forcible peno-vaginal penetration or sexual intercourse were added to the definition of rape. Perforation of a woman's vagina, mouth, urethra, or anus by a man's penis, any part of his body, or any object, or forcing her to do so with him or anyone else; manipulation of any part of a woman's body to produce penetration into her vagina, urethra, or anus, or forcing her to do so with him or another person; and putting his penis, any part of his body, to a woman's vagina, urethra, or anus, or forcing her to do so with him or another person.
- Section 376 (2) was also amended to include rape of a woman under the age of 16 as an aggravated offence with a higher penalty.
- Under section 166 B, the amendment added a new proviso penalising individuals in charge of a public or private hospital who refuse to give free medical treatment to rape victims.
- The consent age has been raised from 16 to 18 years.
- The definition of Section 376 C was broadened to encompass the use of a position of power or a fiduciary connection by certain people to persuade or entice any woman in their custody or charge to have sexual relations with them.
- The amendment also introduced a section 376E for repeat offenders, which imposed harsher penalties on anyone convicted under it. The death sentence, as well as life without parole, were adopted as punishments in this section.
- The definition of rape perpetrated by a member of the armed forces deployed in an area by the Central or State Government was enlarged to include rape committed by a member of the armed forces deployed in that area by the Central or State Government.
- For the crime of gang rape, a special section 376 D was created with a harsher penalty. The section states that if a woman is raped by one or more people acting as a group or with a common goal, each of those people will be deemed to have committed rape and will be punished with rigorous imprisonment for a term of not less than twenty years, but which may extend to life, meaning they will be imprisoned for the rest of their lives.
- The amendment included the death sentence as a punishment for rape that results in a vegetative condition or death.

Criticism Of The Criminal Law (Amendment) Act, 2013

Although this amendment was a step forward, numerous procedural concerns that are important to making the criminal justice system effective in the event of rape and functioning as a deterrence to future crime were not addressed. Furthermore, the amendment act does not include certain recommendations made by the Verma Committee Report, such as criminalization of marital rape, politicians accused of sexual offences barred from running for office, lowering the age of consent, and amending the Armed Forces (Special Powers) Act to eliminate the need for a sanction to prosecute an armed force personnel accused of a crime against a woman. This amendment was partially successful, but it failed to address numerous key issues.

The Criminal Law (Amendment) Act, 2018

- Section 376(1): The punishment for rape of a woman should be a minimum of ten years in jail, with the possibility of life imprisonment. As a result, the minimum term of imprisonment was elevated from seven to ten years.
- Section 376(3): The amendment now includes a penalty for rape on a woman under the age of sixteen. In such situations, the punishment must be a least of twenty years in jail, with the possibility of life imprisonment.
- Section 376AB: The amendment also includes a penalty for rape on a woman under the age of twelve. In such situations, the sentence is set at a minimum of twenty years of rigorous imprisonment, with the possibility of life imprisonment. In such circumstances, the perpetrator may possibly face the death penalty.
- The amendment introduced sections 376DA and 376DB, which deal with the penalties for gang rape on a woman under the age of sixteen and twelve, respectively. In such situations, the sentence must always be life imprisonment. However, gang rape on a lady under the age of twelve can result in the death sentence.
- Section 376(2) (i) has been removed.

Criticism Of The Criminal Law (Amendment) Act, 2018

There have been several criticisms of this amendment act. Firstly, murder is punishable by death or life imprisonment under Section 302 of the Indian Penal Code. As a result, the penalties for rape on a minor girl and murder have practically become the same. As a result, the chances of the perpetrator ensuring the victim's death are now quite high. The Delhi High Court addressed this issue when a Bench consisting of Acting Chief Justice Gita Mittal and Justice C. Hari Shankar asked, "Have you considered the victim's consequences? How many criminals would let their victims to live now that rape and murder are both punishable by the same law?[5]" Secondly, The 2013 Criminal Law Amendment was aimed with the same goal, namely, to make the laws more harsh in order to establish a deterrence in the minds of criminals. However, data reveal that the strict regulations have had little impact on reducing crime rates.[6] Therefore, making laws harsh is not the answer to reduce crime. Thirdly, Prior to the change, the minimum sentence under Section 376 (1) was seven years in jail and ten years in prison under Section 376(2). This distinction was made because the crime became more severe. Nevertheless, following the amendment, the minimum penalty in both subsections is now ten years in jail, thus there is no difference. Lastly, The victim of rape of minors can be either male or female, according to the POCSO Act. Adults, on the other hand, can only be prosecuted with rape if the perpetrator is a man and the victim is a woman, according to the Indian Penal Code, 1860. The Indian Law Commission (2000)[7] and the Justice Verma Committee (2013)[8] have suggested that the definition of rape be changed to be gender-neutral and apply to both male and female victims. The Criminal Legislation (Amendment) Act of 2018 has made major modifications to the nation's criminal law. However, for overall successful results, these adjustments must be combined with other improvements in the criminal justice system.

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[5] Staff Reporter, *Was any study done before bringing out rape ordinance*, The Hindu, https://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/was-any-study-done-before-bringing-out-rape-ordinance/article23652406.ece

[6] Dutta, P. K. (2020, January 10). *NCRB 2018: Have Indians become less criminal, more civilised?* India Today. Retrieved January 3, 2022, from https://www.indiatoday.in/news-analysis/story/ncrb-2018-data-have-indians-become-less-criminal-more-civilised-1635601-2020-01-10

[7] Report No. 172: Review of Rape Laws, Law Commission of India, March 2000.

[8] Report of the Committee on Amendments to Criminal Law, 2013, January 23, 2013.

Why Is There A Need To Revisit Indian Penal Code?

The IPC is founded on the concepts of free choice, contractual foundations, and constitutional grounding.[9] The IPC's resilience necessitates significant modifications based on these principles. The initial premises and provisions of the IPC were orientated differently since the Constitution emerged considerably later than the code and, as a result, lacked its fundamental approach. The code's four goals were outlined by McCauley: One, the code should be more than a simple digest covering all provisions of the law; two, the code should suppress crime with the least level of pain and enable for the most effective finding of reality; three, the code should be unambiguous and precise; and four, uniformity in definition and procedure must be of vital importance. Consideration of an IPC modification project would be a recognition of the impact of non-legal elements on the code's functioning. The IPC was primarily a cultural artefact that reflected a European heritage that many indigenous colonial cultures found alienating. Macaulay was also limited in his grasp of the region's cultural subtleties.[10] Therefore, it is the need of the hour to revisit Indian Penal Code and form provisions as per the developments of 21st Century. Many changes have been made in the past to guarantee that the IPC evolves with time, although it has not been completely altered since its inception. Despite the fact that some modifications to the provisions of the IPC have been made, as evidenced by court rulings, it is time to revamp the whole act to ensure criminal justice for one and for all.

Amendments That Can Be Brought To The Indian Penal Code Are As Follows:

1. **Section 375:**

Exception under Section 375 needs to be deleted as Sexual intercourse without the consent of woman has very devasting effect on that woman whether intercourse done by her own husband or any other person. Marriage is a fiduciary relationship of husband and wife, and when a husband commits such an act it will definitely injure the woman who sacrificed everything for him. Definitely, in the conjugal context there is supposed to be a fiduciary relationship and the expectancy of respect for self-sufficiency of decision is supposed to be higher.

[9] Service, T. N. (n.d.). *Criminal law amendments need a direction*. Tribuneindia News Service. Retrieved January 3, 2022, from https://www.tribuneindia.com/news/archive/comment/criminal-law-amendments-need-a-direction-845417

[10] *Time to revisit IPC*. Deccan Herald. (2016, March 5). Retrieved January 3, 2022, from https://www.deccanherald.com/content/532874/time-revisit-ipc.html

The marital rape exemption is grounded in the ancient announcement by Hale in around 1676, which was published in around 1736 that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract"[11] This resulted in exemption of the marital rape in USA and UK from which India updated its laws.

With the growing of law and span of time US and UK understood that Marriage and consent are not same they are different and there is need to revamp the exemption of marital rape. A famous philosopher Lord Lane quantified that the marital exemption rule arranged by Hale did not serve any purpose in modern society. His saying is that "there always a time when the changes are really unexpected that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behavior". He lastly specified that the declaration by Hale was not law; that it was a common law fiction that had become repulsive and redundant in modern society.

Thus, it can be seen that the marital rape exemption was done away explicitly in the United Kingdom and in Scotland. But, the laws in India remain unchanged, even when the premise it was based on, has vanished. The foundation for the marital rape exemption in India is that wives are treated as the property of the husband and are assumed as under the legal personality of the husband. This is a legal fault that has long since been done away with.

2. Section 376 A:

Sexual intercourse by husband upon his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Suggestion:As in the above suggestion authors suggested that Exemption of Marital rape should be exempted then need of this provision also comes to end as an offence will not be affected by marital status of accused and victim.

[11] Quoted in History of the Pleas of the Crown (1736) vol. 1, ch. 58, at p. 629. Sourced from S.W. v. THE UNITED KINGDOM [1995] ECHR 52.

3. Section 124 A:

Section 124 A of the Indian Penal Code, 1860 was inserted by the Britishers in 1898 to control the revolts against them and to overpower the freedom movements. But, in the current situation this provision is usually misused by the government against those people who criticize the government.

Suggestion: Section 124 A of Indian Penal Code, 1860 gives ample power to the government to punish the person who speaks against the government. India is a democratic country and we the people of India choose the government by different ways of election. This provision should be amended in such a way that the arbitrariness of the government can be reduced. As our constitution of India provides us freedom of speech and expression and if someone uses that constitutional right and criticizes the government for any act of the same and then the government charges the person with sedition under section 124A of the Indian Penal Code, 1860. Here are some arguments against the provision of sedition defined under are as follows:

- Section 124A is an artifact of colonist inheritance and unsuitable in a democracy. It is a limit on the genuine use of Right of freedom of speech and expression provided by the constitution of India.
- Criticism of the government is an important element of healthy public discussion in an exciting democracy. Government should not construct it as a sedition. Right to question, criticize and change rulers is very fundamental to the idea of democracy and also given to us the citizens of India by the Constitution of India. Britishers introduced this provision to dominate over the Indians, they have even themselves stopped the law of sedition as given under section 124A of Indian Penal Code, 1860 in their own country. And hence there is no genuine reason which states that why should not India eradicate this provision of sedition given under Section 124A. The terms used under Section 124A of the Indian Penal Code, 1860 like 'disaffection' are ambiguous and subject to diverse interpretation to the whims and fancies of the examining officers. It is a well known fact which we all know or can see in the current scenario that the sedition law is being misused as a tool to prosecute for political dissent.

Also, Indian Penal Code, 1860 and Unlawful Activities Prevention Act have diverse provisions that penalizes disrupting the public order or overthrowing the government with violence and illegal

means which are adequate to protect the national integrity of the country and hence no requirement of Section 124A Indian Penal Code, 1860 to protect the National Integrity. Therefore, the provision of section 124A should be ejected from the Code.

4. Section 294 :

Under this provision, the act of annoying someone by performing any obscene act in public places is punishable. However, the word ‘obscene’ is nowhere defined under the Act and this is often misused.

Suggestion: The word Obscene is not defined in any provision of law and due to which it causes a huge discretionary power to the court and the police to consider what means obscenity. Usually we take reference of different sources to prove anything as obscene and hence according to Black's Law Dictionary obscenity means “character or quality of being obscene, conduct, tending to corrupt the public merely by its indecency or lewdness” while According to Webster's New International Dictionary, word 'obscene' means “disgusting to the senses, usually because of some filthy grotesque or unnatural quality, grossly repugnant to the generally accepted notions of what is appropriate.” And it is very difficult to reach a conclusion about what obscenity actually is? So, it should be defined under provision of law. It would reduce the ambiguity of its meaning and will also help to seek quick and fair justice.

5. Chapter 3:

The punishments provided under Chapter 3 of Indian Penal Code, 1860 are very traditional. It only provides for imprisonment or fine. There is no reference to community service or reforming the criminal in any way.

Suggestion: Chapter 3 of Indian Penal Code, 1860 talks about Punishment Imprisonment or fine which may or may not help in reformation of the criminal. The main and major objective of our law is to reduce the crime rate by reformation of the criminals. When we punish a criminal, we must have an implied interest in reforming the criminal.

The major object of this theory of punishment is to reform criminals. In State of Gujarat v. Hon'ble High court of Gujarat[12], It was held that Reformation should be the main objective of imprisonment and during incarceration there should be an intention to make a good human being out of convicted[13]. So, the Indian criminal justice system of modern time has adopted reformative theory while awarding punishment to criminals instead affecting their individual liberty in imprisonment. Community service by the convicted has been recognized in our criminal justice system. Hence, Community Service is not punishment in the actual term but the service to society which the convicted person owes. And as a result of this social service society will appreciate the person and also will give self- satisfaction and comfort to him, particularly in the case where because of his deeds and acts society suffered and someone lost life or injuries as the case may be.

Indian Penal Code (Amendment) Bill 1978 proposed to include community service as a way of punishment as given under chapter 3 of Indian Penal code, 1860, but this proposal was rejected by the Law Commission of India.

Community Service or corrective labor is a form of punishment in which the convict is not deprived of his liberty. This community service shall be served either at the workplace of the accused or in a special place of work as authorized by the courts. Although this form of punishment has not been incorporated in IPC, courts from time to time through judgements have held this punishment as the most suitable form of punishment instead of sending offenders to jail.

In case of State Tr. PS Lodhi Colony, New Delhi v Sanjeev Nanda[14], six humans lost their lives because of a hit and run case, held that community service as a form of punishment instead incarcerating the convict further in Jail. In R.K. Anand v Registrar High Court Delhi[15]The court decided that in place of sending the convict to jail, it will be fruitful if we keep him out and let him do the things that will be useful to society.

In solemn SK v State of West Bengal[16], court ordered to plant 100 trees within a year to the accused person who was found to be juvenile during the alleged offence of attempt to murder. The Court said that instead of referring the person to the juvenile justice board as a registered medical practitioner, he should perform community service. From this case discussion we can conclude that the judiciary is inclined towards community service orders instead of sentencing the accused person

[12] AIR 1998 SC 3164
[13] Mohammad Giasuddin v. State of Andhra Pradesh AIR 1977 SC 1926
[14] AIR 2012 SC 3104
[15] AIR 2013 SC 670
[16] MANU/SCOR/19904/2019

in prison. Hence there is an urgent requirement to mention community service or reforming the criminal in the Indian penal code, 1860.

Conclusion

Revisiting the Indian Penal Code, 1860 and revising its provisions is a crucial step toward modernizing the provisions of the Indian Penal Code, 1860, which forms the foundation of India's criminal justice system. As previously said, the British exploited the Indian Penal Code to their advantage and to silence anybody who attempted to speak out against them, hence it was entirely founded on the deterrence idea. However, it is past time to update certain clauses, such as those mentioned above, to reflect current needs. Amendments to the Indian Penal Legislation, 1860 would undoubtedly aid in providing justice to victims and those who have been wrongfully accused owing to gaps in the code. It will also ensure that certain provisions of the Indian Penal Code, 1860 that are no longer relevant are repealed or amended to reflect the current situation. While the legislature amended section 377 of the Indian Penal Code, 1860, there are many other provisions that need to be amended, some of which we discussed above. The changes to the code were ineffective as a whole. Amendments should not be made in order to satisfy political objectives.

The Indian Penal Code, 1860, may be summarized as a legislation in India that offers multiple classifications of offenses as well as varied punishments. It is a comprehensive code that aims to cover all aspects of criminal law. As is well known, the Indian Penal Code of 1860 was enacted in 1860, and now it is 2022, so the situation, their emotions, and circumstances have naturally changed. It cannot be compared to the current temporal environment.Revisiting the Indian Penal Code, 1860, does not imply that there were any flaws in its creation; rather, as the population grew, so did the need to amend certain provisions, which is also a main function of our legislature, which is to amend the law in response to public demand or to decide on any law in the public interest. There was a scenario at the time that matched the rules, and laws were formed in light of that period of circumstance, which did not always follow even after a century. This code has been in effect for more than 160 years, and it is past time to update important laws, as stated above, since it is urgent. This research paper was produced to call attention to the urgent need to reexamine the Indian Penal Code, 1860, and the preceding ideas are only meant to be used as a guideline for altering the provisions of the Indian Penal Code, 1860.

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