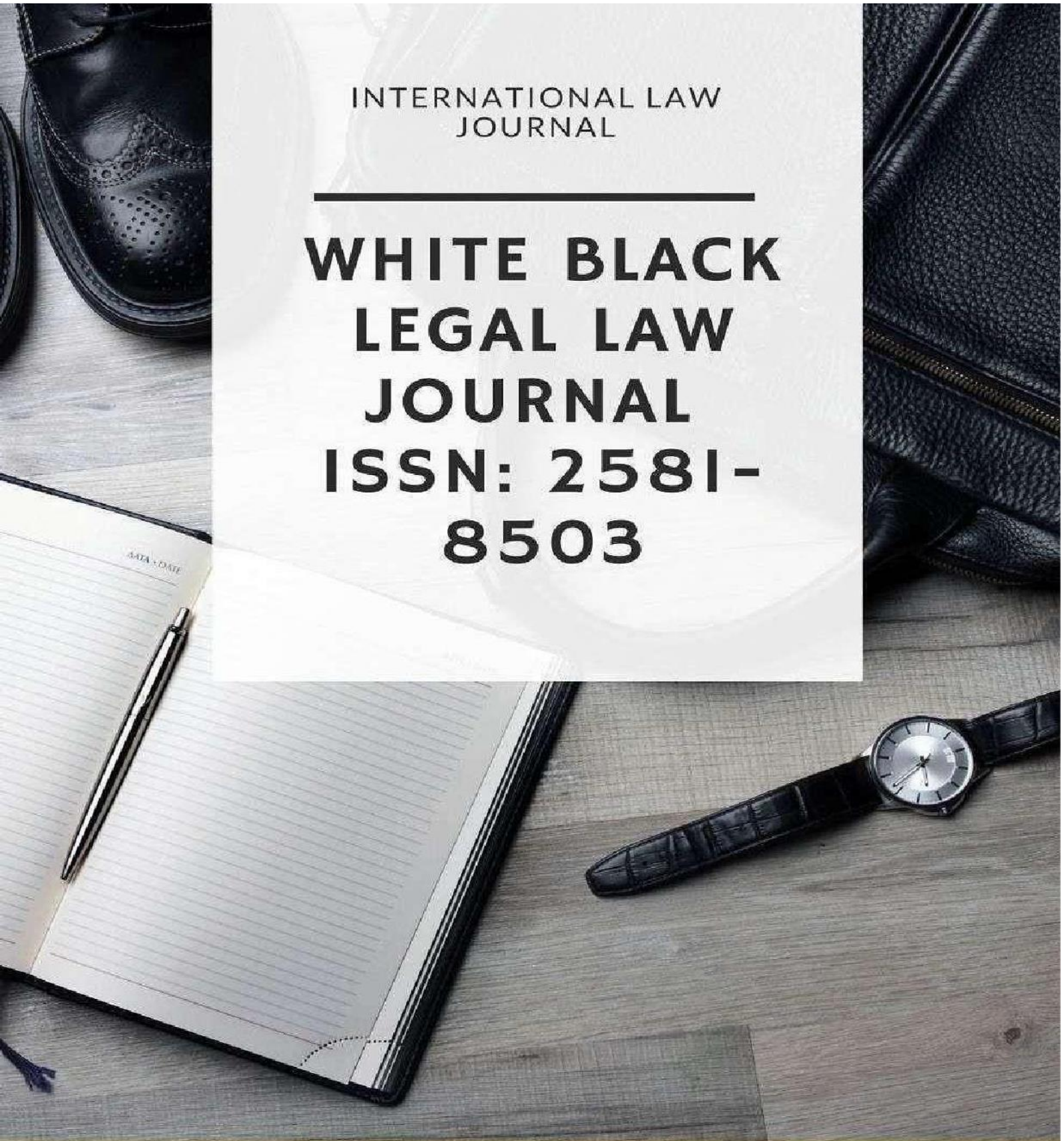




INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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BHARATIYA NYAYA SANHITA, 2023: A NEW PARADIGM OR A CONTINUATION OF THE PAST?

AUTHORED BY - DR. ANNAPOORNA SHET*

ABSTRACT:

The age-old colonial criminal law drafted by Lord Thomas Babington Macaulay and team which was enacted in the year 1860 during the reign of Britishers was considered as the strongest substantive Criminal law in India with certain amendments from time to time to address emerging legal issues and societal changes. Even after the Indian independence, the same criminal law was continued till the enactment of the new Statute, The Bharatiya Nyaya Sanhita, 2023 by the Indian government on July 1 2024 after being passed by the parliament in the year 2023 after 76 years of Indian independence. The new Act and the Indian Penal Code when compared, no much difference is found in the general principles of crime and the general exceptions. But there are certain new crimes added in the BNS whereas certain crimes which are not in existence is excluded in the new statute. The question arises as to the need of repealment of the code. Is it a new legislation which have replaced the provisions of IPC or just the name of the statute and the number of provisions are changed with minor alterations? Is it an old wine in a new bottle? The author gives a brief overview of the new legislation and makes a comparative analysis of the Indian Penal Code and The Bharatiya Nyaya Sanhita, 2023 in the paper by providing in- depth analysis of the new legislation.

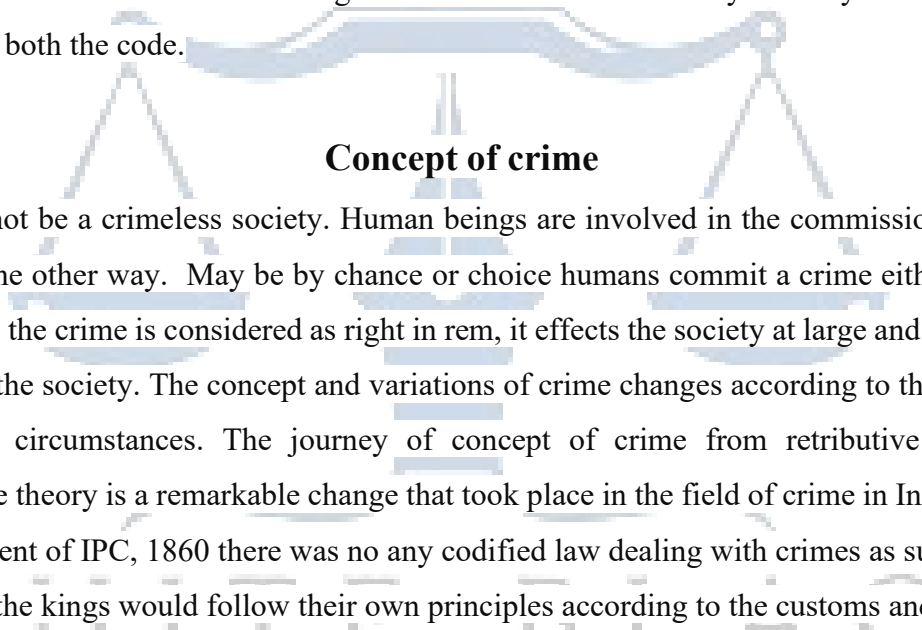
Key Words: Indian Penal Code, Bharatiya Nyaya Sanhita, mens rea, crime

Introduction

The Indian Penal Code, (IPC) 1860, until the enactment of the new criminal law, *The Bharatiya Nyaya Sanhita, (BNS) 2023* was the basic substantive criminal law in India to deal with various criminal offences and their corresponding penalties which was enacted in 1860 during the British colonial rule and has undergone several amendments to reflect the changing socio-legal landscape of the country. The IPC served as the foundation for substantive criminal law in

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India and provided a comprehensive framework for the prosecution and punishment of offences. The offences were neatly categorised and was included in the XXIII chapters and 511 sections under various headings to include all types of crime under the single code. It has gone through extensive amendments from time to time so as to include all types of crime under its purview. There are several exclusive laws which are enacted referring the provisions of IPC as a foundation. The maximum punishment prescribed for every offence was mentioned under the code. The age – old law enacted during the period of Britishers prevailed in India until the enactment of the new Act BNS,2023. But the basic concept of crime and criminal law and the general exceptions of crime was borrowed from the IPC to the new Act. What are the changes that are brought in the new code and what other alterations and additions made in the new Act is discussed in the paper. The new Act by the government of India is an old wine in a new bottle? Or there are substantial changes in the code is discussed by the way of comparative analysis of both the code.



Concept of crime

There cannot be a crimeless society. Human beings are involved in the commission of crime in one or the other way. May be by chance or choice humans commit a crime either petty or serious. As the crime is considered as right in rem, it effects the society at large and has a great impact on the society. The concept and variations of crime changes according to the changing needs and circumstances. The journey of concept of crime from retributive theory to reformatory theory is a remarkable change that took place in the field of crime in India. Before the enactment of IPC, 1860 there was no any codified law dealing with crimes as such and the rulers and the kings would follow their own principles according to the customs and traditions prevailing in their religion and society which was not uniform in nature. This created a lot of confusion among the people of those days. The religious and superstitious beliefs played an important role in awarding the punishment. There was no any logic or purpose in awarding punishment. Retributive and deterrent theory of punishment was followed those times in which the people suffered a lot and were punished in a cruel manner for the petty offences. It is a known fact that no man is a born criminal and it is the situation and circumstances will make them to commit a crime. There was no any logical formula to deal with the crime and criminals and was no uniformity in awarding punishment due to which there were so many disparities in dealing with the crime and criminals in an efficient manner. All these problems were put to an end after the enactment of IPC, 1860 which is a codified criminal law under the British rule.

The human beings, *mens rea*, *actus reus* and the injury being the four major elements of crime played an important role in awarding punishment to the culprit of the crime and reduce the criminal activity in a society.¹

Indian Penal Code, 1860

The Britishers entered India in the name of trade and commerce, but by witnessing the rich natural resources of India they wanted to conquer and acquire India and as a result they achieved their goal and ruled India over 200 years. The turmoil caused to the Indians during their reign in India is unimaginable and unforgettable. The struggle for Indian independence by the Indian freedom fighters is unimaginable during the British rule where many have sacrificed their lives for the nation. On the other side, they brought certain developments in our country not for the benefit of us but for their own administration purpose such as banks, setting up of railways, roadways, etc. They brought several codified laws to be made applicable in India for maintaining uniformity in the country. As a result, several enactments were passed by the Britishers during their rule in India and the Indian Penal code is a substantive criminal law passed by the Britishers to define various offences and to prescribe punishment for the same. Indian penal code was enacted in such a way where the crown was given much importance and the benefit was provided to the crown in every matter. The code was divided into XXIII chapters with 511 sections. After the Britishers left our country, the codified law of the Britishers was retained by the Indian government by making certain changes according to Indian needs. The criminal law is amended from time to time according to the need of the society to include all the new crimes committed in the society under the purview of the Indian Penal Code, 1860. There are some minor as well as major changes made by the State in order to regulate the crime and criminals in a society.²

Bharatiya Nyaya Sanhita, 2023:

It is the new statute enacted by the Indian government on 25th of December 2023 by replacing the age old colonial Indian Penal Code with the main motto of providing justice and not the punishment. The Act is made applicable to whole of India with effect from 1st of July 2024. The new Act gave priority to the women and children as well as weaker section of the society. The provisions which are repealed in the Indian Penal Code is not included in the new Act. The

¹ Ratanlal & Dhirajlal, *The Indian Penal Code* (35th edn. Gurgaon: Lexis Nexis 2018) 16

² *Ibid*

new type of punishment "Community service" is added in the new law along with other type of punishment mentioned under IPC, 1860. It is believed that these initiatives will help in providing justice to the people and not the punishment as the only motive which will help in the development of the country. The old practise of reformatory theory of punishment followed in the IPC, 1860 is also followed in the new Act. The number of sections is reduced to 358 from 511 as that of Indian penal code. The general explanation chapter in the new Act is removed and added in the introductory chapter under Section 2. Whereas the general exception which is considered as the soul of the criminal code is retained as it is without any kind of alterations. Sedition is removed which was present in the old legislation. The new types of crimes like mob lynching, terrorist activity, etc are added with the prime object to reduce such crimes from the society and to make a society free in terms of crime.

Object of repeal of any Statute:

Repeal means to revoke, abrogate or cancel particularly a statute. Any statute may be repealed in whole or in part, either expressly or impliedly by enacting matter contrary to and inconsistent with the prior legislation.

Under Section 6 of the General Clauses Act, 1897, "Repeal" connotes abrogation or obliteration of one statute by another, from the statute book as completely "as if it had never been passed." When an Act is repealed "it must be considered (except as to transactions past and closed) as if it had never existed." Just as the Legislature has the power to enact laws, similarly it has the power to repeal laws.

Consequently, the legislative power to repeal prior laws is not inhibited by any constitutional prohibitions, but exists as a necessary part and increment of the legislative power and function. No statute can make itself secure against repeal.³

The main purpose of enacting any law is for the smooth functioning of the society. when the law do not meet the requirements for what is enacted, the government should review the law and suggest any amendments that is required to refine the existing law. Under certain circumstances, when the amendment becomes illogical or there are many changes to be brought in the present statute, the repealing of the statute is carried on. As the repealing of any statute is not a simple process, it takes lot of time and energy to repeal the statute which will incur huge expenditure and man force for the same

³ Lok Sabha Secretariat No. 10/RN/Ref./February/2016 Available at: [repeal.pdf\(lokshadocs.nic.in\)](http://repeal.pdf(lokshadocs.nic.in)) (Accessed: 23 April 2026)

Comparative analysis of the old law vis a vis the new legislation:

The IPC contained 511 sections with various amended sections from time to time where the provisions are reduced to 358 in BNS. The general explanation chapter which consisted of section 6 to 52 A in the IPC is clubbed into a single section in new legislation under section 2. At present section 2 gives the definition and explanation of terms used in a statute in an alphabetical order except the omission of section 50 which defined the term 'Section' as it is of the opinion that there is no need to give any explanation to the word section because of its common usage in any statute.⁴

The new definition of child and transgender in the definition of 'gender' is added under section 2(3) and section 2(10) respectively. The month and year which is defined under section 49 was according to the British Calendar under IPC, 1860 which is now replaced by Gregorian Calendar under section 2(20) of BNS. Moveable property which included only corporeal property under section 22 of IPC is substituted by both corporeal as well as incorporeal which includes Intellectual Property Rights under section 2(21) of BNS. Public servant definition under section 21 of the IPC which has a reference to juryman is removed under the new act where all other definition of public servant remains the same under section 2(28) of BNS. The punishment section under 52 of IPC which is replaced by section 4 of BNS has added community services as a new form of punishment which is the least punishment after fine and also made several changes in the concept of punishment along with increase in the amount of fine in the present legislation. Section 103 of IPC dealt about right of private defence of the property extends to cause death included house breaking by night which is replaced with house breaking after sun set and before sunrise under the new Act of BNS under section 41 IPC.⁵

Section 48 of BNS deals with abetment outside India for offence in India which deals with abetment by a person outside India is an offence which allows prosecution of a person in a foreign country.

The concept of rape with a wife without her consent above the age of 15 years is not rape according to old law which is replaced by 18 years in new law. Few changes have been introduced in rape where a sexual intercourse caused due to deceitful means is also added as a new provision under section 69 of BNS. However marital rape is still silent in the new code. The offences against women which were implemented in the Criminal Amendment Act, 2013

⁴ S.N Mishra, *Indian Penal Code*. 21st edn. (Allahabad: Central Law Publications, 2018) 17

⁵ B.M. Gandhi, *Indian Penal Code*. (3rd edn. Lucknow: Eastern Book Company, 2010) 228

after the Nirbhaya rape case has been retained in the new law whereas only man was made liable under these crimes but under BNS it is replaced by term whoever which includes any gender. Offences against the child is given much importance and has been gathered from section 91 to section 97 of BNS which exclusively deals with the crime committed against child. The new crime mob lynching is added in section 103(1) which was not directly found in IPC. In few of the crimes there is a slight variation in the amount of punishment provided under both the codes. Section 111 of BNS deals with organised crime which is not found in the IPC. The terrorist act is added in the BNS under section 113. Sedition is removed keeping in mind the freedom of speech and expression whereas the section 124 A of IPC had certain exceptions for the offence of sedition so as to not tamper the freedom of speech and expression of any individual provided under Article 19(1) (a) the fundamental right of the Indian Constitution.

Is BNS an old wine in a new bottle?

By making a comparative analysis of both the provisions of IPC and BNS, it is very clear that there are no much changes that are made in the new Act when compared it with IPC. No doubt few of the new provisions are added and some have been deleted and altered, still there is no major changes that is found in the new code of BNS. The basics of criminal law have not been touched by the new drafting committee where they tried to retain all the basic explanations and general exceptions without major changes. The general explanation chapter under chapter II of the IPC which included from section 6 to 52 A is clubbed together under section 2 of the new act deleting all the provisions which were not in use in the present day. The concept of *mensrea*, good faith, benefit of doubt has the same meaning and content in the new Act.⁶ The general exceptions chapter which is mentioned under Chapter IV of IPC from section 76 to 106 have been completely retained except changes in the number of sections. No doubt few of the new provisions is added under the new BNS which is otherwise found either directly or indirectly in the old legislation of IPC with changed nomenclature. For example, under the concept of house breaking by night which is mentioned under IPC is replaced by house breaking after sunset and before sunrise whereas under Indian penal Code night is referred as the period between after sunset and sunrise.⁷ The concept of terrorism and terrorist activity is added in the new Act whereas it is already present under section 121 to 130 of IPC

⁶ Diyajain, 'Comparative Analysis Between Indian Penal Code, 1860 and Bharatiya Nyaya Sanhita, 2023'. Available at: <https://www.legalserviceindia.com/legal/article-13254-comparative-analysis-between-indian-penal-code-1860-and-bharatiya-nyaya-sanhita-2023.html> (Accessed: 26 April 2024)

⁷ *Ibid*

under chapter- Of offences against the State.

The reformatory theory of punishment followed under the IPC is also followed in the new BNS. The community service as a form of punishment which is claimed to be new is followed even in the old IPC where the inmates of prison are allowed to do certain community services inside the prison. Keeping in mind the increase in number of criminal cases, it is changed from inside the prison to outside the prison. Depending upon the value of money, the fine amount is increased in the new Act in par with old IPC. Even though the new legislation has stressed the importance to be given to offences against women and child, from time to time there are several exclusive legislations enacted for the protection of women and child apart from amendments made in the IPC for the protection of them. Laws like POSH, POCSO, and other legislations are enacted in order to protect the women and child against any offences, the amendments brought in IPC specifically stressed on the matter relating to child and women especially under the Criminal Amendment Act, 2013.⁸ With all these analysis it is clearly understood that only the name and the number of sections are changed in the new Act which clearly suggests that there was no any necessity to repeal the whole legislation and get the new one. When there is no basic provision that can be retained in the new act, the repeal is viable. But when the basic provision does not change and when the law permits to amend the clauses, it is better to do the amendment rather than repealing the age-old law.⁹ No doubt even though these laws are not of Indian origin, still for 163 years it has really regulated the criminal law in India in a best possible manner. So, repealing the basic laws would create lot of confusions among the stakeholders including the judges. Hence it is rightly said that BNS is an old wine in a new bottle. It is a continuation of the old Indian Penal code with certain amendments

Conclusion:

The BNS, 2023 is a new initiative taken by the Indian government to reform the criminal laws in India including other 2 criminal laws. Perhaps, there was a huge difference of opinion among the people about repealing of the 3 criminal laws are concerned. No doubt the BNS added various new offences under its statute which were not found in the old code. It is a strong truth that laws are not static and dynamic in nature and hence it should change according to the changing needs and circumstances. But the idea of repealing the whole law where there was

⁸ Taxmann, '*Comparative Study – Bharatiya Nyaya Sanhita 2023(BNS) & Indian Penal Code 1860 (IPC)*'. Available at: <https://www.taxmann.com/post/blog/comparative-study-bharatiya-nyaya-sanhita-bns-indian-penal-code-ipc> (Accessed: 25 April 2026)

⁹ *Ibid*

possible to refine the criminal law with certain amendments would be much greater step than the repealing of the whole Act by retaining all the basic provisions. India is a country which welcomes all the ideas, values, etc which would be better for the country to amend the laws as accordingly which is carried by the government from past 163 years. The main motto behind this is to reduce the crime in a society and make a society crime free. It is the wait and watch period for all of us to check the implications of the new law and to observe the positive impact of the new code with decreased crime rate in India. It is a sad truth that crime rate is not measured only by the effective criminal laws in a State rather it is governed through various external factors like influence, bribe, etc. It is a time for all of us to watch whether the new act will bring positive changes in a society and play an important role in the development of the society as such.

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