harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provided—

Provisos.

First.—That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity; Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

ILLUSTRATION

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon. Knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

COMMENT.—

This section empowers the guardian of an infant under 12 years or an insane person to consent to the infliction of harm to the infant or the insane person, provided it is done in good faith and is done for his benefit. Persons above 12 years are considered to be capable of giving consent under section 88. The consent of the guardian of a sufferer, who is an infant or who is of unsound mind, shall have the same effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.

[s 89.1] Corporal punishment to children.—

Corporal punishment to child, in present days, is not recognized by law. It is an archaic notion that to maintain discipline, child can be punished physically by the teaching staff because of implied consent by the parents or guardian. Now it is recognized social principle that even parents of the child are made to understand the basic human rights of the child and instead of corporal punishment, correctional methods are recognized in law.[218.] But the applicability of sections 88 and 89, IPC, 1860 and administering of corporal punishments on students by the teachers for their benefit, came up for consideration in *M Natesan v State of Madras*.[219.] It was a case where a boy of 15 years was sent with the progress report to get the signature of his parents in it. But he returned it with a thumb impression of another person, stating that the said thumb impression was that of his mother, which was proved to be wrong. The teacher got agitated and he beat the boy on his right palm with a stick. He did not cry. He, therefore, beat him again, asking him why he did not cry. This resulted in causing three injuries, two superficial and one contusion. The Madras High Court held that:

> It cannot be denied that having regard to the peculiar position of a school teacher he must in the nature of things have authority to enforce discipline and correct a pupil put in his charge. To deny that authority would amount to a denial of all that is desirable and necessary for the welfare, discipline and education of the pupil concerned. It can therefore be assumed that when a parent entrusted a child to a teacher, he on his behalf impliedly consents for the teacher to exercise over the pupil such authority. Of course, the person of the pupil is certainly protected by the penal provisions of the Indian Penal Code. But the same code has recognised exceptions in the form of ss. 88 and 89. Where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of the exceptions. Whether he is entitled to the benefit of the exceptions or not in a given case will depend upon the particular nature, extent and severity of the punishment inflicted.

[220.] In *K A Abdul Vahid v State of Kerala*,[221.] the Kerala High Court considered the question when a school teacher, beats a student with a cane, who created commotion in the school or showed disobedience to the Rules, whether he could be proceeded against under the provisions of the IPC, 1860 and found that the teacher has acted within the exception conferred on him, under section 88 of IPC, 1860.

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1. *Shankar Narayan Bhadolkar v State of Maharashtra*, AIR 2004 SC 1966 [LNIND 2004 SC 1370] : 2004 Cr LJ 1778 : (2005) 9 SCC 71 [LNIND 2004 SC 1370] .
2. The Indian Evidence Act, I of 1872, section 105.
3. *Musammat Anandi*, (1923) 45 All 329 ; *Babulal*, 1960 Cr LJ 437 (All).
4. *A K Chaudhary v State of Gujarat*, 2006 Cr LJ 726 (Guj).
5. *A K Chaudhary v State of Gujarat*, 2006 Cr LJ 726 (Guj).

218. *Hasmukhbhai Gokaldas Shah v State of Gujarat*, 2009 Cr LJ 2919 (Guj).

219. *M Natesan v State of Madras*, AIR 1962 Madras 216 [LNIND 1961 MAD 136] : 1962 (1) Cr LJ 727 .

220. Also see *Ganesh Chandra Saha v. Jiw Raj Somani*, AIR 1965 Calcutta 32 : (1965 (1) Cr LJ 24) .

221. *K A Abdul Vahid v State of Kerala*, 2004 Cr LJ 2054 (Ker).

THE INDIAN PENAL CODE

CHAPTER IV GENERAL EXCEPTIONS

THIS chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations.

The word 'offence' in this chapter denotes a thing punishable under the Code or under any special or local law when it satisfied the conditions laid down in section 40 of the Code.

The "general exceptions" contained in sections 76–106 make an offence a non-offence. The "general exceptions" enacted by Indian Penal Code, 1860 (IPC, 1860) are of universal application and for the sake of brevity of expression, instead of repeating in every section that the definition is to be taken subject to the exceptions, the Legislature by section 6 IPC, 1860 enacted that all the definitions must be regarded as subject to the general exceptions. Therefore, general exceptions are part of definition of every offence contained in IPC, 1860, but the burden to prove their existence lied on the accused.[1.]

The following acts are exempted under the Code from criminal liability:—

1. Act of a person bound by law to do a certain thing (section 76).
2. Act of a Judge acting judicially (section 77).
3. Act done pursuant to an order or a judgment of a Court (section 78).
4. Act of a person justified, or believing himself justified, by law (section 79).
5. Act caused by accident (section 80).
6. Act likely to cause harm done without criminal intent to prevent other harm (section 81).
7. Act of a child under seven years (section 82).
8. Act of a child above seven and under 12 years, but of immature understanding (section 83).
9. Act of a person of unsound mind (section 84).
10. Act of an intoxicated person (section 85) and partially exempted (section 86).
11. Act not known to be likely to cause death or grievous hurt done by consent of the sufferer (section 87).
12. Act not intended to cause death done by consent of sufferer (section 88).
13. Act done in good faith for the benefit of a child or an insane person by or by the consent of guardian (section 89).
14. Act done in good faith for the benefit of a person without consent (section 92).
15. Communication made in good faith to a person for his benefit (section 93).
16. Act done under threat of death (section 94).
17. Act causing slight harm (section 95).

18. Act done in private defence (sections 96–106).

The above exceptions, strictly speaking, come within the following seven categories:—

1. Judicial acts (section. 77, 78).
2. Mistake of fact (sections 76, 79).
3. Accident (section 80).
4. Absence of criminal intent (sections 81–86, 92–94).
5. Consent (sections 87, 90).
6. Trifling acts (section 95).
7. Private defence (sections 96–106).

Onus of proving exception lies on accused.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.[2.]

Although the law lays down that the onus of proving circumstances which give the benefit of a general exception to an accused person lies on him, and in the absence of evidence the presumption is against the accused, this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to its satisfaction that the accused comes within the exception.[3.]

Applicability of General exceptions during investigation.—In considering that whether accusation made in the complaint makes out a case for commission of offence or not, the police while reaching the *prima facie* satisfaction of suspecting the commission of cognizable offence, cannot ignore the general exception as provided under IPC, 1860 as per Chapter IV of IPC, 1860. If on the basis of the allegation made in the complaint, the case is falling in general exceptions, it can be said that the action cannot be termed as an offence.[4.] Investigating officer is bound to investigate and confirm that despite what is contained in the "General Exceptions"; acts committed by accused shall constitute offence under IPC, 1860. This shall be done, by virtue of section 6 of IPC, 1860. In the light of section 6 of IPC, 1860, definition of every offence is to be understood subject to the "General Exceptions". Therefore, investigation shall not confine merely to the acts committed by a person. Depending on facts and circumstances of each case, many other relevant facts also have to be investigated into, in the light of the provisions contained in "General Exceptions". It is only then that an investigating officer will be able to confirm whether the act committed by a person is an offence or not, as defined in IPC, 1860 subject to what is contained in "General Exceptions". Further, the category of self-defence falling in general exception would fall in a different category than the general exceptions, which are provided in the very chapter for exercise of the statutory duty or lawful power either under the mistake of law or fact or mistaken belief of law or fact.[5.]

[s 90] Consent known to be given under fear or misconception.

A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, [1]

and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

COMMENT.—

This section does not define 'consent' but describes what not consent is.

This section says that consent is not a true consent if it is given—

(1) by a person under fear of injury;	and the person obtaining the consent knows or has reason to believe this.
(2) by a person under a misconception of fact;	
(3) by a person of unsound mind;	and who is unable to understand the nature
(4) by a person who is intoxicated;	and consequence of that to which he gives his consent.
(5) by a person under 12 years of age	

Consent is an act of reason, accompanied with deliberation, the mind weighing as in balance, the good and evil on each side.[222.] Consent means an active will in the mind of a person to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to consent to an act.[223.] An act of helplessness on the face of inevitable compulsions is not consent in law.[224.] It requires voluntary participation by victim not only after exercise of intelligence based on knowledge of significance and moral quality of act, but after having fully exercised the choice between resistance and assent.[225.] A mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be consent.[226.] The Supreme Court in a long line of cases has given wider meaning to the word 'consent' in the context of sexual offences as explained in various judicial dictionaries. In *Jowitt's Dictionary of English Law* (Second Edn), vol (1) 1977 at p 422 the word 'consent' has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things–a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.[227.] Section 90 cannot be considered as an exhaustive definition of consent for the purposes of IPC, 1860. The normal connotation and concept of consent is not intended to be excluded.[228.] For determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, no straitjacket formula can be laid down.[229.]

The factors set out in the first part are from the point of view of the victim. The second part enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has the knowledge or reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. The requirements of both the parts have to be cumulatively satisfied.[230.] Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.[231.] Consent can be obtained under various methods and always necessarily need not be a one which is given voluntarily. For example, if a victim is intoxicated without her knowledge or consent and if the rape is committed while the victim was intoxicated or drunken, it cannot be said that she had voluntarily given the consent. Therefore, such passive consent cannot be treated as a consent as contemplated by section 90 of IPC, 1860.[232.] Obtaining consent by exercising deceit cannot be legitimate defence to exculpate an accused.[233.]

[s 90.1] Submission to Rape.—

An act of submission does not involve consent- Consent cannot be equated to inability to resist or helplessness.[234.] Every consent involves a submission, but every submission is not consent and the mere fact that a woman had submitted to the promise of the accused does not necessarily indicate that her consent existed unless the evidence on record establishes that the sexual act, which the prosecutrix had allowed, was accompanied with deliberation after the mind had weighed, as in a balance, the good and the evil on each side with the existing capacity and power to withdraw the assent according to one's will or pleasure.[235.] Where, the accused had sexual intercourse with the prosecutrix by giving false assurance to her that he would marry her and when she became pregnant, he refused to do so, it was evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, therefore, the act of the accused fell squarely under the definition of rape as her consent was obtained under a misconception of fact.[236.]

1. 'Misconception of fact'.—The expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married... "thus... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person..." Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of section 90 IPC, 1860 is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.[237.] Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had *mala fide* motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the Court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and

consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was *mala fide*, and that he had clandestine motives.[238.] In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. If a fully grown-up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact and it was held that section 90 IPC, 1860 cannot be invoked unless the Court can be assured that from the inception the accused never intended to marry her. Therefore, it depends on case to case that what is the evidence led in the matter. If it is a fully grown-up girl who gave the consent then it is a different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, section 90 can be invoked.[239.] A promise to marry without anything more will not give rise to "misconception of fact" within the meaning of section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of section 375 clause second.[240.]

[s 90.2] CASES.—

The prosecutrix had sexual intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. It appears that the intention of the accused was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him.[241.] In *Uday v State of Karnataka*,[242.] the Court considered the following facts: (i) where a girl was of 19 years of age and had sufficient intelligence to understand the significance and moral quality of the act she was consenting to; (ii) she was conscious of the fact that her marriage was difficult on account of caste considerations; (iii) it was difficult to impute to the appellant, knowledge that the prosecutrix had consented in consequence of a misconception of the fact arising from his promise; and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix. On the basis of the above factors, Court held that it did not feel persuaded to hold that consent was obtained by misconception of facts on the part of the victim.

In a case, the prosecutrix had left her home voluntarily, of her own free will to get married to the accused. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the accused on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time,

and when he finally arrived she went with him to the Karna Lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to anyone. Thereafter, she also went to Kurukshetra with the accused, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at the Birla Mandir. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married. However, they were apprehended by the police. If the prosecutrix was in fact going to Ambala to marry the accused, as stands fully established from the evidence on record, the Supreme Court held it fails to understand on what basis the allegation of "false promise of marriage" has been raised by the prosecutrix.[243.]

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1. *Shankar Narayan Bhadolkar v State of Maharashtra*, AIR 2004 SC 1966 [LNIND 2004 SC 1370] : 2004 Cr LJ 1778 : (2005) 9 SCC 71 [LNIND 2004 SC 1370] .
2. The Indian Evidence Act, I of 1872, section 105.
3. *Musammat Anandi*, (1923) 45 All 329 ; *Babulal*, 1960 Cr LJ 437 (All).
4. *A K Chaudhary v State of Gujarat*, 2006 Cr LJ 726 (Guj).
5. *A K Chaudhary v State of Gujarat*, 2006 Cr LJ 726 (Guj).

222. Story, section 222.

223. *Lock*, (1872) LR 2 CCR 10, 11.

224. *Satpal Singh v State of Haryana*, 2010 AIR (SCW) 4951 : (2010) 8 SCC 714 [LNIND 2010 SC 666] : 2010 Cr LJ 4283 .

225. *Md. Jakir Ali v The State of Assam*, 2007 Cr LJ 1615 (Gau).

226. *Re*, (AIR 1960 Madras 308), *Gopi Shanker v State of Rajasthan*, (AIR 1967 Rajasthan 159), *Bhimrao v State of Maharashtra*, (1975 Mah. LJ 660) and *Vijayan Pillai v State of Kerala*, (1989 (2) KLJ 234) quoted from *R v Day*, (173 ER 1026) in 1841 **approved** in *Pradeep Kumar v State of Bihar*, AIR 2007 SC 3059 [LNIND 2007 SC 965] : (2007) 7 SCC 413 [LNIND 2007 SC 965] : 2007 Cr LJ 4333 : (2007) 3 SCC(Cr) 407.

227. *State of UP v Chhoteylal*, AIR 2011 SC 697 [LNIND 2011 SC 73] : (2011) 2 SCC 550 [LNIND 2011 SC 73] in this case, SC elaborately discussed the meaning of consent and quoted from various Indian and foreign authorities.

228. *Pradeep Kumar v State of Bihar*, AIR 2007 SC 3059 [LNIND 2007 SC 965] : (2007) 7 SCC 413 [LNIND 2007 SC 965] : 2007 Cr LJ 4333 : (2007) 3 SCC(Cr) 407.

229. *Uday v State of Karnataka* AIR 2003 SC 1639 [LNIND 2003 SC 228] : (2003) 4 SCC 46 [LNIND 2003 SC 228] : 2003 SCC (Cr) 775.

230. *Deelip Singh v State of Bihar*, (2005) 1 SCC 88 [LNIND 2004 SC 1123] : AIR 2005 SC 203 [LNIND 2004 SC 1123] .

231. *State of HP v Mango Ram*, (2000 (7) SCC 224 [LNIND 2000 SC 1144] : 2000 Cr LJ 4027 (SC).

232. *KCPeter v State of Kerala*, 2011 Cr LJ 3488 (Ker).

233. *Karthi @ Karthick v State*, 2013 Cr LJ 3765 (SC).

234. *Laddoo Singh Alias Harjit Singh v State of Punjab*, 2008 Cr LJ 2885 (PH).

235. *Bipul Medhi v State of Assam*, 2008 Cr LJ 1099 (Gau).

236. *State of UP v Naushad,* 2014 Cr LJ 540 .

237. *Pradeep Kumar v State of Bihar*, AIR 2007 SC 3059 [LNIND 2007 SC 965] : (2007) 7 SCC 413 [LNIND 2007 SC 965] : 2007 Cr LJ 4333 : (2007) 3 SCC(Cr) 407 **relied** on *N Jaladu, Re* (ILR (1913) 36 Madras 453 .

238. *Deepak Gulati v State of Haryana*, AIR 2013 SC 2071 [LNIND 2013 SC 533] : 2013 (7) Scale 383 [LNIND 2013 SC 533] .

239. *Jayanti Rani Panda v State of WB*, 1984 Cr LJ 1535 (Cal).

240. *Pradeep Kumar v State of Bihar*, AIR 2007 SC 3059 [LNIND 2007 SC 965] : (2007) 7 SCC 413 [LNIND 2007 SC 965] : 2007 Cr LJ 4333 : (2007) 3 SCC(Cr) 407 **relied** on *N Jaladu, Re* (ILR (1913) 36 Madras 453).

241. *Yedla Srinivasa Rao v State of AP*, (2006) 11 SCC 615 [LNIND 2006 SC 785] : (2007) 1 SCC(Cr) 557; *Bipul Medhi v State of Assam*, 2008 Cr LJ 1099 (Gau); *Abhoy Pradhan v State of WB*, 1999 Cr LJ 3534 (Cal).

242. *Uday v State of Karnataka,* AIR 2003 SC 1639 [LNIND 2003 SC 228] : (2003) 4 SCC 46 [LNIND 2003 SC 228] : 2003 SCC (Cr) 775.

243. *Deepak Gulati v State of Haryana*, AIR 2013 SC 2071 [LNIND 2013 SC 533] : 2013 (7) Scale 383 [LNIND 2013 SC 533] . See also *Swapan Chatterjee v State of WB*, 2009 Cr LJ 16 (Cal); *Karthi @ Karthick v State*, 2013 Cr LJ 3765 (SC); *Ravi v State*, 2010 Cr LJ 3493 (Mad); *Vinod Mangilal v State of MP*, 2009 Cr LJ 1204 (MP).

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