

286. *Joseph Shine v UOI*, decided by Hon'ble Supreme Court of India.
287. *Dharma Reddy v State*, 1990 Cr LJ 1476 . (AP); *Director of Enforcement v MCT M Corporation Pvt Ltd*, AIR 1996 SC 1100 [LNIND 1996 SC 63] : (1996) 2 SCC 471 [LNIND 1996 SC 63] .
288. *Shreekantiah Ramayya Munipalli v State of Bombay*, AIR 1955 SC 287 [LNIND 1954 SC 180] : 1955 (1) SCR 1177 [LNIND 1954 SC 180] : 1955Cr LJ 857.
289. *Radhey Shyam Khemka v State of Bihar*, (1993) 3 SCC 54 [LNIND 1993 SC 276] : 1993 Cr LJ 2888 .
290. *Standard Chartered Bank v Directorate of Enforcement*, AIR 2006 SC 1301 [LNIND 2006 SC 145] : (2006) 4 SCC 278 [LNIND 2006 SC 145] .
291. *Naz Foundation v NCT Delhi*, 2010 Cr LJ 94 (Del).
292. *Naz Foundation v NCT Delhi*, 2010 Cr LJ 94 (Del).
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294. *Navtej Singh Johar v UOI*, 2018 (10) Scale 386 [LNIND 2018 SC 451] .
295. *Daulat Raghunath Derae v State of Maharashtra*, 1991 Cr LJ 817 (Bom).
296. *SEBI v Ajay Agarwal*, AIR 2010 SC 3466 [LNIND 2010 SC 203] : (2010) 3 SCC 765 [LNIND 2010 SC 203] .
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298. *Gangula Mohan Reddy v State of AP*, AIR 2010 SC 327 [LNIND 2010 SC 3] : (2010) 1 SCC 327 ; *Gian Kaur v State of Punjab*, 1996 (2) SCC 648 [LNIND 1996 SC 653] : AIR 1996 SC 946 [LNIND 1996 SC 653] .
299. The Constitution Bench in *Gian Kaur v State of Punjab*, 1996 (2) SCC 648 [LNIND 1996 SC 653] held that both euthanasia and assisted suicide are not lawful in India, overruling the two Judge Bench decision of the Supreme Court in *P Rathinam v UOI*, AIR 1994 SC 1844 [LNIND 1994 SC 1533] : 1994 (3) SCC 394 [LNIND 1994 SC 1533] . The Court held that the right to life under Article 21 of the Constitution does not include the right to die.
300. *Aruna Ramchandra Shanbaug v UOI*, (2011) 4 SCC 454 [LNIND 2011 SC 265] : AIR 2011 SC 1290 [LNIND 2011 SC 265] .
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302. *Manga @ Man Singh v State of Uttarakhand*, (2013) 7 SCC 629 [LNIND 2013 SC 529] : 2013 Cr LJ 3332 (SC).

# THE INDIAN PENAL CODE

## CHAPTER II GENERAL EXPLANATIONS

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained and the meanings thus, announced are steadily adhered to throughout the subsequent chapters.

**279.**[[s 40] "Offence".

Except in the **280.**[Chapters] and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, **281.**[Chapter VA] and in the following sections, namely, sections **282.**[64, 65, 66, **283.**[67], 71], 109, 110, 112, 114, 115, 116, 117, **284.**[118, 119, 120] 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.]

### COMMENT—

"Offence" means 'an act or instance of offending'; 'commit an illegal act' and illegal means, 'contrary to or forbidden by law'. "Offence" has to be read and understood in the context as it has been prescribed under the provisions of sub-section 40, 41 and 42 IPC, 1860 which cover the offences punishable under IPC, 1860 or under special or local law or as defined under section 2(n) Cr PC, 1973 or section 3(38) of the General Clauses Act 1897. There is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under section 497 IPC, 1860.<sup>285</sup> In *Joseph Shine v UOI*<sup>286</sup>, a five judge Constitution bench of the Supreme Court struck down section 497 of the Indian Penal Code as manifestly discriminatory and arbitrary. Section 2(n) of Cr PC, 1973 defines offence as any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be under section 20 of the Cattle Trespass Act 1871 (1 of 1871). Thus, the definition of 'offence' under section 2(n), Cr PC, 1973, is wider enough to enable the police to investigate into offences under other enactments also, apart from those under the IPC, 1860.<sup>287</sup> An offence seldom consists of a single act. It is usually composed of several elements and, as a rule; a whole series of acts must be proved before it can be established.<sup>288</sup> There is a basic difference between the offences under the Penal Code and acts and omissions which have been made punishable under different Acts and statutes which are in nature of social welfare legislations. For framing charges in respect of those acts and omissions, in many cases, *mens rea* is not an essential ingredient; the concerned statute imposes a duty on those who are in charge of the management, to follow the statutory provisions and once there is a breach or contravention, such persons become liable to be punished. But for framing a charge for an offence under the Penal Code, the

traditional rule of existence of *mens rea* is to be followed.<sup>289</sup> In the absence of a definition in a special act, the term 'offence' should be understood in the context of [section 40 of the Indian Penal Code](#) as an act that is criminally punishable and [section 3\(38\) of the General Clauses Act](#) as an act made punishable by any law and the essential ingredient is that it should be a [criminal act](#) as understood.<sup>290</sup> In *Naz Foundation v NCT Delhi*,<sup>291</sup> [section 377 of IPC, 1860](#) in so far it criminalised consensual sexual acts of adults in private, was held violative of [Article 21](#), [Article 14](#) and [Article 15 of the Constitution](#) by the Delhi High Court.<sup>292</sup> This judgement of the Delhi High Court was later overruled by the Supreme Court on 12 December 2013 in *Suresh Kumar Koushal* case.<sup>293</sup> Finally in *Navtej Singh Johar v UOI*,<sup>294</sup> a five-judge bench of the Supreme Court declared [section 377 of the Indian Penal Code](#) unconstitutional, insofar as it criminalises consensual sexual acts of adults of same sex in private. However, other parts of Section 377 relating to sex with minors and bestiality remain in force.

#### [s 40.1] **Offences under Special law.—**

A plain reading of this provision of law makes it crystal clear that the effect of clause (2) of section 40 is to make everything punishable under the special law as an offence within the meaning of the [Indian Penal Code](#). The offences under the [NDPS Act](#) thus, become offences under the [Indian Penal Code](#) as the term "offence" in certain cases is extended to the things made punishable under any special or local law.<sup>295</sup>

#### [s 40.2] **Article 20(1).—**

The word 'offence' under [Article 20](#) sub-clause (1) of the [Constitution](#) has not been defined under the [Constitution](#). But [Article 367 of the Constitution](#) states that unless the context otherwise requires, the [General Clauses Act 1897](#) shall apply for the interpretation of the [Constitution](#) as it does for the interpretation of an Act.<sup>296</sup>

#### [s 40.3] **Offence and breach of duty distinguished.—**

Offence generally implies infringement of public, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the [Evidence Act](#). Converse is the case of departmental enquiry. The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law.<sup>297</sup>

#### [s 40.4] **Suicide.—**

Suicide by itself is not an offence under either English or Indian Criminal Law, though at one time it was a felony in England.<sup>298</sup>

#### [s 40.5] **Euthanasia.—**

In India active euthanasia is illegal and a crime under section 302 or at least [section 304 IPC, 1860](#). Physician assisted suicide is a crime under [section 306 IPC, 1860](#) (abetment to suicide).<sup>299</sup> But in *Aruna Ramchandra Shanbaug v UOI*,<sup>300</sup> the Supreme Court held that passive euthanasia can be allowed under exceptional circumstances under the strict monitoring of the Court. In March 2018, a five-judge [Constitution Bench](#) of the Supreme Court gave legal sanction to passive euthanasia, permitting 'living will' by patients.<sup>301</sup>

#### [s 40.6] **Sections 40 and 141 IPC, 1860.—**

Section 40 specifically mentions as to how the term 'offence' will have to be construed. In the main clause of the said section it has been clearly set out that the word "offence" denotes a thing made punishable by this Code except the chapters and sections mentioned in clauses 2 and 3 of the said section. Therefore, going by the main clause of section 40, the word "offence" since denotes the thing made punishable under the Code, 'other offence' mentioned in section 141 'third', can only denote to offences, which are punishable under any of the provisions of the Code. Therefore, by applying the main clause of section 40, it can be straight away held that all offences referred to in any of the provisions of the Code for which the punishment is provided for would automatically fall within the expression "other offence", which has been used in section 141 'third'. Therefore, a conspectus reading of section 40 makes the position abundantly clear that for all offences punishable under the [Indian Penal Code](#), the main clause of section 40 would straight away apply in which event the expression "other offence" used in section 141 'third', will have to be construed as any offence for which punishment is prescribed under the Code. To put it differently, whosoever is proceeded against for any offence punishable under the provisions of the [Indian Penal Code](#), section 40 sub-clause 1 would straight away apply for the purpose of construing what the offence is and when it comes to the question of offence under any other special or local law, the aid of sub-clause 2 and 3 will have to be applied for the purpose of construing the offence for which the accused is proceeded against. Therefore, having regard to sub-clause 1 of section 40 of the Code read along with section 141 'third', the argument of learned senior counsel for the Appellants will have to be rejected. Only such a construction would be in tune with the purport and intent of the law makers while defining an unlawful assembly for commission of an offence with a common object, as specified under section 141 of the Code.<sup>302</sup>.

<sup>279</sup>. Subs. by Act 27 of 1870, section 1, for section 40.

<sup>280</sup>. Subs. by Act 8 of 1930, section 2 and Sch I, for "Chapter".

<sup>281</sup>. Ins. by Act 8 of 1913, section 2.

<sup>282</sup>. Ins. by Act 8 of 1882, section 1.

<sup>283</sup>. Ins. by Act 10 of 1886, section 21(1).

<sup>284</sup>. Ins. by Act 10 of 2009, section 51(b) (w.e.f. 27-10-2009).

<sup>285</sup>. *S Khushboo v Kanniammal*, (2010) 5 SCC 600 [LNIND 2010 SC 411] : AIR 2010 SC 3196 [LNIND 2010 SC 411] : (2010) 2 SCC (Cr) 1299; *VijaySingh v State of UP*, (2012) 5 SCC 242 [LNIND 2012 SC 1216] : AIR 2012 SC 2840 [LNINDORD 2012 SC 356] .

<sup>286</sup>. *Joseph Shine v UOI*, decided by Hon'ble Supreme Court of India.

<sup>287</sup>. *Dharma Reddy v State*, 1990 Cr LJ 1476 . (AP); *Director of Enforcement v MCT M Corporation PvtLtd*, AIR 1996 SC 1100 [LNIND 1996 SC 63] : (1996) 2 SCC 471 [LNIND 1996 SC 63] .

<sup>288</sup>. *Shreekantiah Ramayya Munipalli v State of Bombay*, AIR 1955 SC 287 [LNIND 1954 SC 180] : 1955 (1) SCR 1177 [LNIND 1954 SC 180] : 1955Cr LJ 857.

<sup>289</sup>. *Radhey Shyam Khemka v State of Bihar*, (1993) 3 SCC 54 [LNIND 1993 SC 276] : 1993 Cr LJ 2888 .

<sup>290</sup>. *Standard Chartered Bank v Directorate of Enforcement*, AIR 2006 SC 1301 [LNIND 2006 SC 145] : (2006) 4 SCC 278 [LNIND 2006 SC 145] .

<sup>291</sup>. *Naz Foundation v NCT Delhi*, 2010 Cr LJ 94 (Del).

<sup>292</sup>. *Naz Foundation v NCT Delhi*, 2010 Cr LJ 94 (Del).

293. *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1 [LNIND 2013 SC 1059] .
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# THE INDIAN PENAL CODE

## CHAPTER II GENERAL EXPLANATIONS

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**[s 41] "Special law".**

**A "special law" is a law applicable to a particular subject.**

### COMMENT—

Laws dealing with special subjects are called special laws. The special laws contemplated in section 40 and this section are only laws, such as the Excise, Opium, Cattle Trespass, Gambling and Railway Acts, creating fresh offences, that is, laws making punishable certain things which are not already punishable under the [Penal Code](#). [Negotiable Instruments Act](#) being a special statute has overriding effect over the provisions of [Cr PC, 1973](#).<sup>303</sup> Since nothing in [Factories Act](#) (Special Law) which prescribes punishment for rash and negligent act of occupier or manager of factory which resulted into death of any worker or any other person, the general Law, i.e., [IPC, 1860](#) will apply.<sup>304</sup>

<sup>303</sup>. *Rajan K Moorthy v M Vijayan*, [2008 Cr LJ 1254](#) (Mad).

<sup>304</sup>. *Ejas Ahmed v State of Jharkhand*, [2010 Cr LJ 1953](#) (Jha) also see the comments under [Section 5 of IPC, 1860](#).

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## CHAPTER II GENERAL EXPLANATIONS

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**[s 42] "Local law".**

A "local law" is a law applicable only to a particular part of <sup>305.</sup>~~[<sup>306.</sup>\*\*\*]~~<sup>307.</sup>[India]].

### COMMENT—

Laws applicable to a particular locality only are termed local laws, e.g., Port Trust Acts.

<sup>305.</sup> Subs. by the A.O. 1948, for "British India".

<sup>306.</sup> The words "the territories comprised in" omitted by Act 48 of 1952, section 3 and Sch II (w.e.f. 2-8-1952).

<sup>307.</sup> Subs. by Act 3 of 1951, section 3 and Sch, for "the States" (w.e.f. 3-4-1951). Earlier the words "the States" were substituted by the A.O. 1950, for "the Provinces".

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**[s 43] "Illegal." "Legally bound to do".**

**The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.**

### COMMENT—

The word 'illegal' in the section has been given a very wide meaning. It consists of three ingredients: (1) everything which is an offence; (2) everything which is prohibited by law and (3) everything which furnishes ground for civil action.<sup>308</sup> The words "legally bound" do not necessarily only mean the law made by the legislature or statutory law. [Section 43 IPC, 1860](#) contains a definition of a person being legally bound to do, that is, a person is stated to be legally bound to do whatever it is illegal in him to omit.<sup>309</sup>

The expression "legally bound to do" carries very wide meaning where any ground for civil action can be founded on the basis of any act or omission on the part of a person, his act may be held to be illegal or it may be held that he was legally bound to do an act which he had omitted to do. If a person breaches a departmental order, he may be held guilty as he was legally bound to act in terms of the order.<sup>310</sup>

Sexual contact between two persons with consent but out of marriage does not amount to an illegal act.<sup>311</sup>

**[s 43.1] "Ground for civil action."—**

In order to constitute a ground for a civil action there must be the right in a party which can be enforced. It may be breach of a contract or a claim for damages or any such similar right accruing under the law. There is no law which debars the Chief Minister from participating in a sale conducted by any Government Department or any of the corporation or any public sector undertaking affording a cause for civil action particularly when no fraud or illegal gain is involved. There was nothing in the charge to indicate, nor did the prosecution take a specific stand that the purchase of the property of the Government company furnished a ground for a civil action. The nature of the civil action should not be left to a guess work. The accused could not be expected to meet such a case at any subsequent stage.<sup>312</sup>

**[s 43.2] "Illegal" and "unlawful".—**



The expression "illegal" and "unlawful" are synonymous and convey the same idea in language - ordinary and legal. But when a statute employs an expression with intention of conveying a special meaning and with the said purpose defines the expression in such statute as the expression "illegal" is defined in [section 43 of the IPC, 1860](#), such meaning is to be ascertained for that expression specially and specifically for such a statute and for the purpose of such statute. Merely because two expressions mean the same ordinarily in language and law, both cannot be held to have the same meaning when one of them is specially and specifically defined and explained in one statute. So reckoned, it cannot be accepted that the definition of the expression "illegal" in [section 43 of the IPC, 1860](#) must straightaway be mechanically imported into [section 98 of the Cr PC, 1973](#) when we consider the ambit and play of the expression "unlawful" in [section 98 of the Cr PC, 1973](#).<sup>313</sup>.

<sup>308</sup>. *R Venkatakrishnan v Central Bureau of Investigation*, (2009) 11 SCC 737 [LNIND 2009 SC 1653] : AIR 2010 SC 1812 [LNIND 2009 SC 1653] : (2010) 1 SCC (Cr) 164.

<sup>309</sup>. *R Sai Bharathi v J Jayalalitha*, AIR 2004 SC 692 [LNIND 2003 SC 1023] : (2004) 2 SCC 9 [LNIND 2003 SC 1023] : JT 2003 (9) SC 343 [LNIND 2003 SC 1023] .

<sup>310</sup>. *Sudhir Shantilal Mehta v CBI*, (2009) 8 SCC 1 [LNIND 2009 SC 1652] : (2009) 3 SCC (Cr) 646 : AIR 2009 SC 480 [LNIND 2008 SC 2235] .

<sup>311</sup>. *S Khushboo v Kanniammal*, (2010) 5 SCC 600 [LNIND 2010 SC 411] : 2010 Cr LJ 2828 : AIR 2010 SC 3196 [LNIND 2010 SC 411] : (2010) 2 SCC(Cr) 1299; *Mailsami v State*, (1994) 2 Cr LJ 2238 (Mad).

<sup>312</sup>. *R Sai Bharathi v J Jayalalitha*, (2004) 2 SCC 9 [LNIND 2003 SC 1023] : AIR 2004 SC 692 [LNIND 2003 SC 1023] : 2004 Cr LJ 286 .

<sup>313</sup>. *Zeenath v Khadeeja*, 2007 Cr LJ 600 .

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**[s 44] "Injury".**

**The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.**

### COMMENT—

'Injury' is an act contrary to law.<sup>314</sup> It will include any tortious act.

A Magistrate imposed a fine in addition to a sentence of imprisonment on a conviction for the offence of causing death by a rash and negligent act and gave compensation to the widow of the deceased out of the fine imposed. It was held that compensation could not be given to her for she did not suffer any injury as here defined.<sup>315</sup> It may, however, be argued that nothing could be more harmful to the mind of a woman than the death of her husband, and the section speaks of harm to the mind as 'injury'. The former Chief Court of the Punjab held that loss of her husband's support affected a widow prejudicially in a legal right, and was therefore, an injury as defined in the [Penal Code](#).<sup>316</sup> The context of section 125(1)(c) does not require reference to the definition of 'injury' rendered in [section 44 IPC, 1860](#). The words "physical or mental abnormality" will prima facie take in congenital defects while 'injury' leading to inability to maintain itself can have reference, be at any point of time even after the attaining of majority. It may even be possible to take in all cases of physical or mental abnormality which need not necessarily be congenital.<sup>317</sup> As defined in [section 44 IPC, 1860](#), "injury" denotes any harm whatever illegally caused to any person in body, mind, reputation or property. Now, if a person wants to save himself from injury, such as conviction in a criminal case, it does not mean that he caused injury to another.<sup>318</sup> Harm caused to a reputation has been held to constitute an injury, within the purview of section 44.<sup>319</sup>

<sup>314</sup>. *Svami Nayudu v Subramania Mudali*, (1864) 2 MHC 158 .

<sup>315</sup>. *Yalla Gangulu v Mamidi Dali*, (1897) 21 Mad 74 (FB).

<sup>316</sup>. *Saif Ali v State*, (1989) PR No. 17 of 1898 (FB).

<sup>317</sup>. *TPSH Selva Saroja v TPHS Sasinathana*, 1989 Cr LJ 2032 (Mad).

<sup>318</sup>. *Prayag Das v State*, 1963 (1) Cr LJ 279 .

<sup>319</sup>. *Subramanian Swamy v UOI*, 2016 Cr LJ 3214 .