The paper aims to explore the debate surrounding the age of consummation of girls in nineteenth century colonial India and posit it in the context of the dominant colonial ideology of the time-span to analyse the degree it conformed to the same. The objective is to trace the trajectory followed in the framing of the Age of Consent Act in 1891 that legalised twelve as the legal age of consummation for married and unmarried girls. The existing historiography has taken a somewhat myopic view of a complex and a nuanced issue by glossing over the very fact that the 1891 act was not a flash in the pan but has a background history of relentless persuasion of the British administrators aided and assisted by a section of enlightened gentlemen of the native society. The other major finding of the study is that it negates the contention of Thomas R. Metcalf that the post-1857 period witnessed a perceptible shift in colonial practices in the socio-legal sphere directly impinging on the personal space of the native population. In the years following the tumultuous events of 1857, Metcalf states that the British “…carefully dissociated themselves from comprehensive schemes of social reform...Indian religious belief, and the social customs bound up with it, were to be left strictly alone.” Denis Judd corroborates Metcalf, “Fearful to set in motion an Indian reaction similar to the one that had precipitated the great uprising of 1857, the Government avoided drastic political and social change.” However, if one traces the journey of the debate from 1837, when the draft Indian Penal Code was submitted, to 1891, the year in which the Age of Consent Act finally came to fruition, one could trace the unmistakable thread of continuity being woven into the pattern of British administration so far as forays into the personal domain is concerned.

The historiography of colonial law is heavily tilted in favour of the criminal side of the law. Till the early years of the 2000s, the thrust was essentially on the study of the pre-1860 era. The literature on the evolution of the legal and judicial system till 1860, is quite rich and exhaustive—how the different ‘levers of control’ evolved over a period of nearly a century, from the reign of Warren Hastings till the promulgation of Indian Penal Code (Ranjan

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2 Metcalf, op. cit., pp. 107-108

Unfortunately, the litany of literature on colonial law at this stage, stopped short of discussing at length the socio-legal reforms undertaken by the government, post-Revolt, the only exception being the Age of Consent of 1891. Given the complex dynamics and the interplay of various factors in the backdrop of growing nationalist sentiment of the 1880s and early 1890s, more so because of visibility of women for the first time in having their own say, the Act engaged the attention of historians, sociologists and above all cutting across discipline that of the feminists. The studied silence on the legal scenario between 1860 and 1891 is indeed intriguing and baffling. Does this mean that the colonial administration turned its face away from social reforms since these proved to be their undoing as the outbreak of 1857 attests? Or can one trace elements of continuity between pre-1857 and post-1857 when it came to interference in personal domain or more specifically in the genre of personal laws? Rina Verma Williams (*Postcolonial Politics and Personal Laws: Colonial Legacies and the Indian State*, Oxford 2006) studies the continuity theory in the context of personal laws stretching from the 1920s down to the NDA government’s tenure till 2004 to argue that “the personal laws are a prime example of continuity between the colonial and postcolonial Indian state, in which the colonial state’s legacy loomed large.” However, her study by taking off from 1920, gives the impression that the colonial state’s dabbling in personal law was a twentieth century affair. In this study I refute such chronological straitjacketing, “A considerable amount of legislative activity surrounding both Hindu and Muslim personal laws occurred in the late colonial period.” Nancy Gardener Cassels (*Social Legislation of the East India Company: Public Justice versus Public Instruction*, New Delhi 2010), argues that “In general legislation for issues which were determined to be too closely entwined with caste and custom or veiled in Hindu or Muslim households were deferred with a preference for an educational approach. Such issues were

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6 Verma Williams, op. cit., p. 67
usually subject to civil law which the Company had regarded as sacrosanct..." Social legislation, she tries to prove, was earmarked for criminal law only (burning of Hindu widows, infanticide, thugee). Lauren Benton explains this distant concern with personal laws being ingrained in the very structure of rule in the colonial territories, “contests over cultural and religious boundaries and their representations in law become struggles over the nature and the structure of political authority.” Thus colonial regimes were more concerned with land, labour and criminal laws rather than riveting attention to laws relating to family and social life which were “seen as less directly relevant to colonial purposes...noninterference in these areas of law could be construed as reflecting the colonizers’ desire to save effort and expense on a field of law not perceived to be critical to their interests...” Incursions into the civil domain was, hence, treated as ‘exceptional forays.’ Cassels identifies the 1850 Lex Loci Act and 1856 Widow Remarriage Act as the two decisive intrusions of the Company in civil matters, implying that the Company feared to tread in the private space of the natives, setting these apart as sacred and inviolable. I wish to question this very premise.

II

In the first half of the nineteenth century, with political conquests helping the East India Company to cement the foundation of their rule in India, the British justified their subjugation by coining the ideology that they have the white man’s burden to civilise barbaric India. The lynchpin of this philosophy was based on India’s ‘difference’ from Britain. Under the influence of the ideals of Evangelicalism and Utilitarianism, the British identified themselves as a civilised and modern people and decisively set the non-European world as the ‘other.’ To describe oneself as ‘enlightened’ implied that someone else had to be shown as ‘savage.’ As the British endeavoured to define themselves as ‘British’ and thus as ‘not Indian’, they had to make of Indian whatever they chose not to make of themselves. This process had as its outcome, an array of polarities that shaped much of the ideology of the Raj during the first half of the nineteenth century.

To amplify the inferiority of the Indians the British took recourse to language, race and history. Partha Chatterjee argues that race was the single most defining marker of the colonial

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7 Nancy Gardner Cassels, Social Legislation of the East India Company: Public Justice versus Public Instruction (New Delhi, 2010), p. 398
9 Verma Williams, op. cit., p. 43
10 Cassels, op. cit., p. 399
11 The jurisdiction of the Company extended over the three Presidencies of Madras, Bengal and Bombay and the newly-created province of North-Western Provinces. With the exception of the Indus delta, the whole coastline of India was in British possession, while thanks to Lord Wellesley’s Subsidiary Alliance, the native states (states ruled by native rulers, like Hyderabad), too, bowed down to British subservience.
The Aryan theory was exploited to project the difference between Indians and the English. It has been postulated that both the Indians and British originated from the common stock—the Aryans. But if that is so, how could the Indian people be marked out as inferior which would help the British in justifying their rule? Thus they coined the myth that while the European branch of the Aryans triumphed over other races, those Aryans who migrated to India lost their purity of race by inter-mingling with the aboriginal races (Dravidian). As men of the stronger race took to themselves the women of the weaker, the amount of Aryan blood flowing through the veins of Indian people became very less until by the colonial period, it had become ‘infinitesimally small.’ Thus the racial theory proved England’s ‘progress’ in relation to India’s ‘decline.’ Thus the British saw India as a land ruled by womanly men, who ran away from battles and hence deserved British subjugation. Robert Montgomery Martin boastfully claimed, “There can be no doubt, that if the happiness of the great mass of the people be considered as paramount, the acquisition of the Indian provinces by Britain must be looked on as a most fortunate circumstances, for peace, the indispensable prelude to civilization...” James Fitzjames Stephen, an ex-civil servant, wrote that the British were the representative of a ‘belligerent civilisation’ whose rule over India found its justification in the superiority of the conquering mass. Sir George Campbell credited the British for bringing peace to a country decimated by internecine conflicts. Acting as a catalyst of modernisation—building bridges, roads, railways, harbours—the colonial regime would pull out India from the depths of despair. To the Evangelicals, the hand of God was nowhere more visible than in the miraculous subjugation of India by a handful of English. Utilitarianism, the ultimate goal of which was to turn every individual into a free autonomous agent capable of making choices, sought to liberate individuals from the shackles of slavery and custom. The colonial masters had this strong conviction that it was they who would usher in India’s modernisation by introducing modern institutions and ideas and rescue India from being immersed in tradition and morass. Thus as Stephen wrote, the British looked upon their rule in India as a vast bridge over which the multitude of human beings would pass from a dreary land of cruel wars, ghastly superstitions, wasting plague and famine on their way to a country orderly, peaceful and industrious.

Driven by such ideology, the colonial administrators, thus, embarked on the project of civilising mission by adopting measures to eradicate practices ‘repugnant to the best feelings

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14 George Campbell, Modern India: A Sketch of the System of Civil Government with Some Accounts of the Natives and Native Institutions (London, 1853)
that Providence has planted in the human breast.’ One of the major thrust areas of this discourse was the emancipation of native women of India. The British believed that more ‘ennobled’ the position of women in a society the ‘higher’ would be the civilisation. By this measure, not surprisingly India lagged far behind Britain. India’s women were not ‘ennobled’ by their men but instead ‘degraded’—“India is unhappily an example to prove how manifold are the ramifications of evil spreading out of a demoralised and degraded state of domestic relations. Bigamy, polygamy, adultery, prostitution, abortion, infanticide, incest, fraud, robbery, violence, and all kinds of murder are the melancholy results...for the proper regulation of domestic society in India, remarriage of widows must be allowed, marriage of infants must be abolished, females must be educated, and restraints must be placed on marriage...”

As Indian men did not perform their duty of uplifting the pitiable condition of women, the British were determined to act as the protector of India’s women by which they could proclaim their ‘masculine’ chivalrous character and moral superiority over the Indian male. In fact Job Charnock’s rescuing of a widow from the funeral pyre and his subsequent ‘marriage’ to her in late seventeenth century, has often been used as a classic example of how British humanitarian benevolent masculinity was pitted against a barbaric, despotic one.

Charles Grant, who was elected member of the East India Company’s Board of Trade by Lord Cornwallis and subsequently in 1805 rose to be its chairman, argued strongly in favour of evangelizing India since, “…we cannot avoid recognizing in the people of Hindostan, a race of men lamentably degenerate and base; retaining but a feeble sense of moral obligation...governed by malevolent and licentious passions, strongly exemplifying the effects produced on society by great and general corruption of manners, and sunk in misery by their vices...” It was in this context that the colonial rulers set about the task of fixing the age of consent for native women.

III

Indian girls were married at the tender age of four-five years often with men twenty-thirty years senior. Polygamy was wide-spread with men often marrying even when they were on the wrong side of the eighties with girls young enough to be their grand-daughters and great grand-daughters. These child-brides were subjected to severe sexual abuse to satisfy the carnal desires of their husbands and they often succumbed to the excessive bleeding. This was statistically proved by the findings of Dr Allan Webb, Professor of Military Surgery in the College of Medicine in Calcutta. The data collected from Calcutta showed girls ‘menstruating’ at the age

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15 The Bombay Quarterly Review, Vol. IV July and October 1856 (Bombay, 1856), p. 388
17 Charles Grant, Observations on the State of Society among the Asiatic Subjects of Great Britain, particularly with respect to Morals and on the Means of Improving it (no date), p. 71
of eight, nine or ten. The bleeding, Webb concluded, should not be correlated with the onset of puberty, but was due to rupturing of hymen because of premature sexual intercourse.  

Dr Norman Chevers, Secretary to the Medical Board, Government of Fort William, portrayed the untold misery and pain that a young girl was subjected to, in the name of marriage, “In a large proportion of cases of the younger children, it was very clearly proved that rather severe injury had been received. It is mentioned in several of the recorded cases that the vagina was lacerated. In a case of death of a girl of twelve, the Civil Surgeon deposed that there was a rupture of the lower part of the vagina to the extent of half an inch.”

Given the devastating effects, thus although the 1833 Charter Act, which provided the guideline for subsequent legal reforms, specifically laid down that due regard should be accorded to the “…Rights, Feelings and peculiar Usages of the People…” and the government, too, acknowledged that “…it is essential to the comfort and welfare of the inhabitants of Hindostan, that the law of marriage should be established on safe principles, adapted to the condition of the population of that country” and that the law of marriage should be ‘local and general, or personal’, in reality, the administration could not turn its face away from ameliorating the plight of child-wives. The roadmap of nineteenth century colonial administration in India, in so much as law and the personal space is concerned, is thus a saga of ploughing into the interiors of the personal sphere of the natives to overhaul the pitiable condition of infant and child-wives and rescuing them from the morass they were steeped in, in active collusion with the enlightened and educated members of the indigenous society. The process was flagged off with the passing of the anti-Sati Regulation Act in December 1829, deemed as the first decisive intrusion into the private sacred domain of the natives and this pattern, when it comes to making laws within the personal space, continued unabated throughout the nineteenth century.

IV

The first significant signpost was the draft Indian Penal Code submitted in 1837. A major digression in the Penal Code, so far as the policy of respecting the peculiar customs and

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18 Alan Webb, *Pathologia Indica or the Anatomy of Indian Diseases* (London, 1848)
19 Norman Chevers, *A Manual of Medical Jurisprudence for Bengal and the North-Western Provinces* (Calcutta, 1856), p. 468
22 The Indian Law Commission, formed in 1834 with four members, was entrusted with the task of codification of the criminal law of India with the intent of placing the natives as also the British on the same foothold. The draft version of this Code was submitted in 1837 to the Governor-General and it was subsequently passes into law in 1860.
the rights, usages of the natives is concerned, is the fixing of the age of consent, i.e., the age in which a girl was legally declared fit to consummate her marriage with her partner. As regards the marriageable age of a female, leading Hindu theologists like Manu, Vrihaspati, Vasistha, Kasyapa and Vyasa, strictly enjoin that a girl must be given in marriage before puberty. The lower limit of age is not exactly defined. Ordinarily the lowest age for marriage is eight years, but Manu allows a girl to be married even before the proper age if a suitable match is found. Minors are not only eligible for marriage but they are considered the fittest to be taken in marriage. As per Statute 9 Geo. IV s. 74, which governed the criminal justice of Her Majesty’s Courts in India, sexual intercourse with a girl under the age of eight was a crime of the same degree as rape. The draft penal code raised this age from eight to nine. Rape was defined in Chapter XVIII—Of Offences Relating to Human Body. While outlining the circumstances that would constitute rape, the last of the five circumstances outlined intercourse “with or without her consent when she is under nine years of age.” Even in case of consensual sex, if the girl was under nine years of age, the intercourse would amount to rape. Exception was made in case of “sexual intercourse by a man with his own wife...” implying that a husband had the right to exercise his marital rights and force himself upon his wife, irrespective of her age. No explanation was appended to the clause since the law-makers felt that “The provisions which we propose on the subject of rape do not appear to require any remark.”

The draft Penal Code was circulated amongst different local Governments and to all the high legal functionaries in the country for their opinions on its provisions, “for obtaining the opinions...not only as to whether Provision is made in the Code for the different Offences which are prevalent in India, but also as to the Necessity of the proposed Enactments, and the Adaptation of the proposed Penalties with reference to all the Circumstances of the Country, and to the Habits and Feelings of the large and various Population which will be affected by them.” This reference produced many returns, some of which expressed their strongest objections to many parts of the Code. Objections to the exception to the rape clause were raised by three Judges of the Sudder Court at Bombay, Mr Thomas, Mr W. Hudleston and Mr A. D. Campbell. Mr Thomas expressed his doubt at the propriety of this exception, “The early age at which children are married and in the eye of the law become wives, makes it necessary that protection should be given to them by the law till they are of age to reside with their

25 Ibid
26 Indian Law Commission, op. cit., p. 69
27 *Parliamentary Paper 263: House of Lords pursuant to an Order dated 11th June 1852, and Ordered to be printed in Session 1852, Relative to the Affairs of the East India Company*, (hereafter referred to as PP 263), p. 7. Apart from the legal experts of the Presidencies, the draft code was also sent to Mr. W.H. Macnaughten, Mr. H.T. Prinsep, General Fraser, Major Sleeman and Colonel Sutherland for their valued opinions
husbands.” C.W. Fagan suggested the fixing of the age of marriage at no less than sixteen to avert any untoward incident. The Law Commissioners in their report concurred with the objections raised by the Bombay trio and admitted that marriage among Muhammedans and Hindus were contracted at an age when the bride had not reached puberty. Hindu sages Atri and Kashyapa state that if an unmarried girl discharged her first menstrual fluid at her father’s house, the father incurred the guilt of destroying the foetus and the daughter became a Brisalee or degraded in rank and would have to remain unmarried for the rest of her life. Menstruation means the loss of ovum or the loss of foetus and thus allowing the ovum to pass unimpregnated was equivalent to child-murder. To escape this sin, girls were married of at the age of eight, nine or ten. Although the practiced norm was for the bride to stay with her parents till she was fit to consummate the marriage, which essentially meant the time she started to menstruate, custom varied from one part of Bengal to another. In lower Bengal, it was customary to send the girl to her husband even before she experienced her first period since consummation not taking place before menarche was considered a sin. With the devastating effects of such practice being evident from the medical reports, the judges suggested that “...the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely; to meet such cases it may be advisable to exclude from exception cases in which the wife is under nine years of age.”

After several rounds of discussions, debates, modifications and alterations with the draft code shuttling between the home government in London and the colonial government in India, the code was at last passed into law on 6 October 1860. In the final Penal Code that was adopted in 1860, Section 375 laid down the rape clause and identified five circumstances which constituted rape. Of these, the last mentions, “With or without her consent when she is under ten years of age.” “Sexual intercourse by a man with his wife, the wife being under ten years of age” would also amount to rape. The logic offered was the same as was forwarded by Mr Thomas. Not only was the clause retained, the cohabitation age was further raised a year to ten.

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29 “C.W. Fagan, Esq., to H.B. Harrington Esq.” in PP 263, p. 431. “Every Man who induces any Woman under Sixteen Years of Age to marry him, without the Consent of her Father, or if her Father be dead without the Consent of her Guardian, or if there be no Guardian, without the Consent of her Mother, shall be punished with Imprisonment for a Term which may extend to Three Years, and shall also be liable to Fine.” Ibid
30 John Roberton, Essays and Notes on the Physiology and Diseases of Women and on Practical Midwifery (London, 1851)
31 Special Reports, p. 78
33 Morgan et al, op cit., p. 324
This age-raise assumes significance in light of the fact that the journey of the Penal Code from its inception in 1837 to its final enactment in 1860 encompasses the tumultuous Revolt of 1857, often regarded as the first major challenge to British rule in India. Asa Briggs points out “no single event more powerfully affected the mind of that generation than the ‘Indian Mutiny’ in 1857.” The conviction that “the natives will not rise against us...there will be no reaction...” was severely dented by the turn of events in 1857. The dominant memory for the rulers, post-1857, was arguably one of an elemental fear caused by as yet the most comprehensive challenge to its legitimacy—“a calamity unexampled in the history of British India.” The participation of the civil population in the Revolt was explained in terms of an inbuilt resistance of a tradition-bound oriental culture against the forces of westernisation and modernisation. Although John Seeley explained the cause of the ‘mutiny’ in terms of military grievances and “not by any disaffection caused by the feeling of our Government as foreign,” Benjamin Disraeli saw the causes of the uprising as not being the ‘conduct of men who were...the exponents of general discontent’ amongst the Bengal army. For him the root cause was the overall administration by the government, which he regarded as having ‘alienated or alarmed almost every influential class in the country.’ Assessing the causes that sparked off the Revolt, the government pleader of Madras, John Bruce Norton, lamented, “In our vanity and assumed superiority we utterly deceive ourselves. We assert that the Natives esteem us, and regard the change from Native to European as a blessing.” In 1858, John Stuart Mill undertook a survey

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36 John Stuart Mill, “Memorandum of the Improvements in the Administration of India during the Last Thirty Years” in John M. Robson, Martin Moir and Zawahir Moir ed. *John Stuart Mill: Writings on India* (Toronto, 1990), p. 93  
37 Although colonial administrators like John Seeley categorized the Revolt as merely an uprising of the Sepoys concluding that it “began in the army and was regarded passively by the people,” recent studies have clearly brought out the mass character of the Revolt. In not a very few cases the rebels enjoyed the covert support of the civil population. The linkages established by them with the Zamindars of Bengal, the kookies, with Manipur princes, Chera chiefs, the Bhutias, and also in the Santhal Pergunnahs to name a few, are indicative of a wider network. In Purulia, one of the most prominent instances of the wider connection between the mutinous sepoys and the civil population can be found. In the month of November it was reported that the Rajah of Pachete, Nilmani Singh (Neelmoney Sing Deo), was suspected to be a privy to the ‘rebel’ bands who scoured the country and blocked the road to Raguinathpur, the sub-divisional town of Purulia. The Rajah had not only refused assistance to the Government to suppress the disorder, he was in fact trying to instigate the ‘rebel’ sepoys and was having a large amount of gunpowder and other ammunitions. Subsequently, the Government issued orders to arrest the Rajah. However, when the Company army reached Raguinathpur to arrest him, they had to face resistance from the local populace. E.H. Lushington, the officiating Commissioner, and Colonel Forster with a wing of the Shekawattee battalion was able to arrest the Rajah from a camp near Raguinathpur only when the latter realized that he had no other option but to give up. His house was later searched and military stores and arms of various descriptions were found. *Special Narrative Number 20, Government of Bengal, Judicial Department* 29th August 1857, pp. 188-189. Neeladri Chatterjee, *The Revolt in the Periphery: Bengal in 1857* (Paper read at the Annual Conference of the British Association of South Asian Studies, Edinburgh, 2009).  
of the measures in the sphere of revenue administration, judicature and legislation, public works, education, adopted for the improvement of the ‘internal government of the country, and the physical and mental condition of its inhabitants’ and summarised that “…few governments, even under far more favourable circumstances, have attempted so much for the good of their subjects, or carried so many of their attempts to a successful and beneficial issue.”\(^{40}\) Although he praised the government for trying their level best, Mill felt that, unfortunately, the Indians failed to lift the veneer of these well-meaning gestures and measures to appreciate the true flavour of the reformist ardour of the administrators.

This led to a serious rethinking in the official circle on the nature of administration and revisiting the policies and practices pursued so far. The Revolt, which produced a crisis of the Raj, saw a new ideology now taking over—India’s unreformable difference manifested in the irrational behaviour of Indian peasants and soldiers during the Revolt. It was in this context that political ideology during this period was devoid of its reformist commitment. The avowed policy of the British Government at this stage was the policy of non-interference. They realised through the hard way the price of their reformist zeal. The Proclamation of 1858 thus specifically sounded, “We disclaim…the Right and Desire to impose our Convictions to any of Our Subjects.”\(^{41}\) Colonial administrators were seldom willing to embark upon extensive programmes of social and political reform—“the security of the Empire demanded a policy of caution and conciliation.”\(^{42}\) James Stephen issued a note of warning not to tamper with the social or religious customs of the indigenous people—“I would not touch a single one of them…”\(^{43}\)

This ‘conservative temper’ finds echo in the writings of Sir Henry Sumner Maine whom Metcalf calls the ‘ideal representative’ of this school. His writings were crucial “...both in terms of providing a methodological foundation for...better ethnographic knowledge of traditional India...”\(^{44}\) Maine pointed out that the Indians were inherently conservative, clinging tenaciously to their traditional ways, “the natives of India are so wedded to their usages that they are not ready to surrender them for any tangible advantage.”\(^{45}\) In fact they “detest that which in the language of the West would be called reform.”\(^{46}\) Propelled by this new ideology which called for extreme caution and diligence, Metcalf shows that the years following the Revolt witnessed

\(^{40}\) Robson et al, *John Stuart Mill*, p. 155  
\(^{41}\) Parliamentary Paper 324: *Copies of the Proclamation of the King, Emperor of India, to the Princes and Peoples of India, of the 2\textsuperscript{nd} day of November 1858, to the Princes, Chiefs, and People of India*, (hereafter referred to as *PP 324*), p. 2  
\(^{42}\) Metcalf, op. cit, p. 321  
\(^{45}\) Sir Henry Sumner Maine, *Village Communities in the East and the West* (New York, 1889), p. 39  
\(^{46}\) Metcalf, op. cit., p. 321
the British Government refraining from enacting measures that directly interfered with Hindu social customs—the only exception, being the prohibition in 1865 of banning hook-swinging during Charak festival and that too only after the Government had convinced itself that such a legislation posed no threat to the Hindu religion. In fact, *Sumachar Chandrika*, one of the leading Bengali newspapers of that period, opined that there was no necessity of the Lieutenant Governor’s passing a law to stop the practice of swinging at the Charak festival “since the people and Zeminders seem not to care much for it, and since they have in many places given up the practice, there can be no doubt but that in a short time it will cease everywhere.”

Probably, the best illustration of this distancing from religious and social affairs was the passing of The Religious Endowments Act in 1863 by which the government handed over the superintendence of the Hindu temples and their endowments to local communities headed by the natives. That the policy of non-interference was strictly adhered to is attested

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47 *Sumachar Chandrika*, 31 March 1864, *Report on Native Papers For the Week Ending 2nd April 1864*. That the government was not very keen in the implementation of the said prohibition is borne out by the following report published in *Som Prakash* on 3 May 1869, “There is between the Pergunnahs of Bhograi and Kakrachore, in the district of Balasore, and the subdivision of Khati respectively, a temple known as Hooghly Chundunasur and dedicated to Seeb. At this spot the Churruck festival is annually celebrated notwithstanding the injunction placed by the authorities against it...On the last occasion two men...submitted to the operation of boring their backs and swung. This was witnessed by a large concourse of people, amongst whom Nundulall Singh and three other Constables, from the Rugunathpore Thannah and Muheshpore Outpost, were the most conspicuous in their enjoyment of the festivities of the occasion.” *Report on Native Papers for the Week Ending 8th May, 1869*.

The Kusthia correspondent of *Sungbad Prabhakar* of 1869 mentions several deaths and severe injuries done by the breaking of the Churruck pole in that locality. *Report on Native Newspapers for the Week ending 22nd May, 1869*.

48 Appended at the end, the statement of the objects and reasons underlined the philosophy of the Act, “It has long been the avowed policy of the Government of India to divest itself of all direct concern with the management of religious endowments, but the obligations imposed on its officers by Law in the Presidencies of Bengal and Madras present difficulties which have hitherto, as far as regards those Presidencies, prevented the full accomplishment of this purpose. The subject has given rise to much correspondence to which it is not necessary more particularly to advert. It may suffice to state that the Secretary of State in his Despatch, dated the 16th July, 1860, reviewing the more recent proceedings of the Government of India relative to the repeal of those provisions of the Bengal and Madras Codes by which the General superintendence of the endowments for the support of Mosques and Temples is vested in the Revenue Officers of Government,” expressed an opinion” that all that is requisite is an Act on the principle of Act No. X of 1840 in regard to the Temple of Juggernath, repealing the existing enactments on the subject, and transferring the entire superintendence of the institutions to their respective Trustees, provision being made for an appeal by suit in the ordinary way to the established Courts of Justice in all disputes relating to the appointment and succession to the management of Hindoo and Mahomedan religious institutions, and to the control and application of their funds”. Previous to this expression of opinion by the Secretary of State, a Bill had been brought into the Legislative Council early in 1860; simply repealing Regulation XIX. 1810 of the Bengal Code, and Regulation VII, 1817 of the Madras Code, and reserving the jurisdiction now exercised, or which but for those Regulations might have been exercised, by Courts of Justice, in enforcing the due execution or administration of any trust or endowment, and in securing the due appointment or succession to the management thereof. To this proposed measure two objections have been made. First, that by the repeal of the Regulations above cited, the Government is relieved of all concern in the managements not only of all religious endowments, but also of other trusts not of a religious character, which those Regulations impose on it, and which it is not desirable that it should be relieved of. Second, that a sudden and abrupt relinquishment by Government of the guardianship of the property of religious and charitable endowments which it has so long
by two other measures which were under contemplation during the pre-Mutiny period but were put into the backburner following the Revolt—the practice of taking sick people to the riverside to die and the suppression of polygamy. Local administrators in fact warned the Lieutenant Governor of Bengal, against the petition of the Maharaja of Burdwan and ‘other Hindus’ to legislate against the practice of polygamy. The refusal to tread the reformist path was instrumental in the government’s backtracking on the issue of the abolition of polygamy. From mid-1850s, upper class Hindu society increasingly became polarised on the question of government’s role in abolishing polygamy. The Hindu Intelligencer reports in 1855, “We observe that the presentation of the petition for the abolition of Koolin Polygamy...has produced some sensation among the Brahmans. Some of the more influential members...held two preliminary meetings...to concoct measure...to petition the Legislative Council soliciting them not to interfere with their domestic concerns.”

The government refused to toe the reformist line so far as polygamy was concerned, since Hindu public opinion was divided on the issue. As John Kaye warned, “We must be very careful not to give to the Natives of India any reason to believe that we are about to attack their religious feelings and prejudices...” Maine justified this non-involvement on the ground “…a part of the community came forward to allege that they were the most enlightened members of it, and call on us to forbid a practice which their advanced ideas lead them to think injurious to their civilization...both as regards themselves and as regards their less informed co-religionists who do not agree with them.”

The zeal with which Bentinck steadfastly clung to his mission of rooting out social evils, was subsumed within the British ideology of non-interference, post-1857.

V

But was this picture of non-interference the reality? Was the administration really shaken to the core to that extent that it did a volte-face so far as its attitude towards India was concerned? Was there a gap between what they preached and what they practised? In this section, I would attempt to demonstrate that after the nightmarish experience of 1857, though the government specifically sounded, “We disclaim...the Right and Desire to impose our

managed on behalf of the public, without making due provision for their future management, would be unjust. Concurring in these objections, I have endeavoured to frame this Bill so as to carry out the object proposed by the Secretary of State, without interfering with the provisions of the existing law so far as they define the duty of Government and its officers in respect to public property not connected with religious endowments, and at the same time to provide for the due supervision of religious endowments which are now managed by the Government and its Officers, but from which they will henceforth be disconnected.”

49 Hindu Intelligencer, 6 August 1855

50 Speech of 1 August 1859, Hansard, CLV, p. 781. Quoted in Metcalf, op. cit., p. 93

51 Legislative Department: Other Series of Records, Papers Relating to Act III of 1872, National Archives of India (hereafter referred to as NAI)
Convictions to any of Our Subjects\textsuperscript{52} and knelt down on certain issues as elucidated by Metcalf, if one scratches the surface of this non-interventionist attitude of the British and makes an in-depth analysis of some of the major legal reforms carried out in late nineteenth century, one can question the validity of Metcalf’s argument. The debate and discourse over the age of consummation would show that it would be erroneous to take a sweeping view of the matter to conclude that the administration recast itself in a new mould, post-Revolt.

The age-raise in the Indian Penal Code, passed in 1860, is a pointer to this effect. It is true that fear of backlash was minimum in raising the age of consent from eight to ten. Hindu scripture demanded that once a girl experienced her first menstrual cycle, a ceremony called \textit{garbhadhana} was performed after which she was considered fit to perform her wifely duties.\textsuperscript{53} As long as the government-dictated age of consent did not overstep the menstruating age of a Hindu girl, native condemnation was not expected. John Roberton, after a careful analysis of data collected from the Presidencies of Bengal and Bombay concluded that vis-à-vis menarche, no mean average age could be fixed on a pan-India scale. The coming of age for girls varied from one region to another. His study shows that in the Bengal case, the average age was 12 years 6 months, while in the Deccan region (which included Bangalore and Bombay) it was 13 years 4 months.\textsuperscript{54} Thus by fixing the age at ten, the government was not crossing the \textit{lakshmanrekha} per se. But even then, the very fact that the government not only retained the clause, but modified upon it, is an indicator of the deviant mood of the administration and perhaps of their future designs on the issue. They were testing waters before taking the final

\textsuperscript{52} PP 324, p. 2
\textsuperscript{53} The \textit{garbhadhana} ceremony, essentially symbolizes placing the seed in the womb, once the wife starts to menstruate. But before the conception, one had to observe various vows according to the desire of possessing different types of sons – Brahma, Srotiya (one who has read on sakha), Anuchana (who has read only the Vedangas), Rikalpa (who has read the kalpas), Bhrauna (who has read the sutras and the Pravachanas), Rsi (who has read the four vedas), and Deva (who is superior to the above). At the end of the vow, cooked food was offered to the fire, after this, the pair was prepared for cohabitation. The wife was decked up in finery, and the husband recited Vedic verses containing similes of natural creation and invocations to gods for helping the woman in conception. This was followed by chanting of verses containing metaphors of joint action of male and female forces. Symbolic conception took place with prayers to god Pusan and an indication to scattering semen. The husband, then, touched the heart of the wife, reclining over her right shoulder with the verse, “O thou whose hair is well parted. Thy heart that dwells in heaven, in the moon, that I know; may it know me. May we see a hundred autumns.” Noted Indian author, Kamala Das recalls the elaborate ceremony that accompanied the coming of age ceremony of her great-grandmother in South India, “When a Nair girl menstruated for the first time she was made to sit on a black rug covered with white mull for three days in strict segregation. She was allowed to wear all the jewellery she possessed and given gleaming glass mirror to hold before her face. On the fourth day she was taken out of the house to walk with others in a possession to a pond where amidst loud ululations and laughter she was given a ceremonial bath. Afterwards the women blackened her eyes with collyrium, decorated her brow with sandalwood paste, her cheeks with raw turmeric and her lips with betel. A feast was given to all in the village where the women danced the Kaikottikkali and the young men had a chance to see the girl now turned eligible for marriage. On the seventh day she was taken to a faraway temple.” Kamala Das, \textit{My Story} (New Delhi, 2009), p. 134
\textsuperscript{54} Roberton, op. cit.
plunge. In fact, the post-1857 period saw a slew of acts being passed which specifically dealt with issues pertaining to the domestic sphere, more precisely with marriage, cohabitation, divorce, maintenance.

One of the principal actors at this stage, was Sir Henry Maine, Law Commissioner from 1862-1869 whose tenure, Karuna Mantena says, signalled the end of liberal imperialism. In 1868, Keshab Chandra Sen submitted a petition to the Viceroy, pleading for government intervention in passing a ‘measure of relief’ sanctioning what they termed as ‘Brahmo Marriage’ as legal, thereby freeing them from the fetters of ‘idolatrous, superstitious or immoral’ Hindu marital practices. The Brahmos had derived customs and rites in accordance with their own idea of reason and religion. Sen was keen to ascribe a separate identity to the Brahmos, distinct from the Hindu religion and reform of marital practices remained his main agenda. Back in 1865, a petition was addressed to the advocate general soliciting his opinion on the validity of Brahmo marriages being defined as “...a holy union between persons professing the Brahmo religion...solemnized with the worship of the One God and with such rites as are not idolatrous.” His ruling was that “Brahmo marriages not having been celebrated with Hindu or Mahometan rites of orthodox regularity, and not conforming to the usages of any recognized religion were invalid and the offspring of them illegitimate.” After a meeting on 5 July 1868, a decision was taken to file a petition urging for official recognition of the Brahmo form of marriage.

Accordingly, a bill was introduced in August 1868, which aimed to legalize marriages between ‘Natives of British India not professing Christianity’ if the marriage was solemnised in the presence of at least three witnesses, if the persons were unmarried and the husband had completed eighteen years of age and the wife fourteen years, if the parties were not related to each other as parents or children or ancestors or descendants of any degree and if the marriage solemnized be certified by a government-appointed Registrar. So long, non-Christian marriages,

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55 The Brahmos are a breakaway sect of the Hindus, who abhorred Brahminical domination over Hindu religion and strived to restore Hinduism to its pristine glory. Started by Rammohun Roy in the late 1820s, the movement essentially tried to do away with elaborate customs and rituals, idolatory that had ‘seeped’ into Hindu religion at the instigation of the priestly class. Gradually there was schism within the movement on the issue of remaining within the fold of the Hindu religion and waging on the struggle or breaking away from the Hindu religion. Keshub Chandra Sen was in favour of the latter and he effected a break-up in 1866, when he along with his followers walked out of the Brahmo Samaj to found the Brahmo Samaj of India who submitted the above-mentioned petition to the Viceroy.

56 Petition from Baboo Keshub Chunder Sen and Others, Legislative Department: Other Series of Records, Papers Relating to Act III of 1872, NAI


58 For a detailed background of what necessitated such petition and the fallout of Act III of 1872 on the Brahmo movement, see Rochona Majumdar, op. cit.
unless held as per Hinduism, Muhammedanism or some other religion recognized by law were treated as illegal and children of such persons were deemed illegitimate and deprived of their property rights. In other words, Brahmo marriages were not endorsed by law. The Bill sought to rectify this lacuna by taking a broader view of the subject.

While introducing the Bill, Maine argued strongly in favour of such relief to be granted to the Brahmos because “it was not the policy of the Queen’s Government in India to refuse the power of marriage to any of Her Majesty’s subjects...” But at the same time, true to the official policy, he was convinced that in matters pertaining to religion, when any relief was sought it would be judicious to confine the limit to the particular sect or body making the application, instead of taking a sweeping view of the matter. However, in reality when it came to the Native Marriage Bill, he deviated from the said principle. The reason cited was the difficulty in defining a Brahmo. Hence arose the necessity of ‘some degree of generality’ and thus it was stated that the Bill would legalise marriages between Natives of India not professing the Christian religion and objecting to be married under Hindu, Muhammedan, Buddhist, Parsi or Jewish religion.

The Bill relieved from all civil disabilities, persons excommunicated from any recognised native religion and treated marriage as a civil contract. The other issue that the Bill touched upon was the age of consent. The Penal Code fixed the age at ten, the Native Marriage Bill sought to raise the age-bar by a few more notches at fourteen. Here Maine was trying to replicate the English model, because in England, fourteen years was held to be the mean age of menstruation and it was considered felony to have sexual intercourse with a girl below that age. Another landmark provision of the Bill was making bigamy a punishable offence, “Every person married under this Act who during the lifetime of his wife or husband, contracts any marriage without having been lawfully divorced from such wife or husband, shall be subjected to the penalties provided in Section 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife.”

While introducing the Bill, Maine argued that the proposed Bill was basically an extension of the Lex Loci Act (Act XXI) of 1850, also known as the Liberty of Conscience Act. In essence the 1850 Act meant to relieve from all civil disabilities, dissidents from native religions. That Act, in turn, was an extension of Lord Bentinck’s Regulation VII of 1832 passed for Bengal, by which the civil disability consequent on the renunciation of Brahminism was ended. The Native Marriage Bill was seen as a logical extension of the Lex Loci Act and was designed to fill-

60 Ibid
in this gap and introduce civil marriage in India—‘an universal institution of the Western World.’ The importance of precedence in law-making has been time and again stressed by Maine, “…all real reforms in law grow out of the roots of past legislation and are but continued and developed shoots of it.”

Maine, in fact, questioned the validity of the protection offered by the government to native religions, “…there is some sort of…protection to Native religions given by this state of the law of marriage in the existing condition of the Native society. Now, can we continue this protection? I think we cannot.” Although acknowledging that the government is bound to refrain from interfering in native religious opinions on the ground that “…those opinions are simply not ours…”, Maine passionately argued that by “…trampling on the rights of conscience”, the government, in fact was protecting the interests of the sincere believers and for the advantage of native religions.

It is true that the structure was provided in the petition forwarded by Keshub Sen and the 1868 Bill was framed more or less in consonance with the concessions demanded by him. However, Keshub Sen’s demand was limited to the Brahma sect. But on the pretext of the ambiguity in defining the term ‘Brahmo’ the government seized the opportunity to broaden the radius of the Bill to cover persons of all religious denominations, sans Christianity. Maine’s argument in favour of the Bill reflects the continuity notion vis-à-vis traditional customs and usages. As his biographer Grant Duff points out, Maine did not endorse the interpretation that the Queen’s Proclamation granted the natives, immunity in practising their customs and rituals unhindered. In fact he considered this power of intervention as “the sole moral justification of our being in the country.” The existence of an undercurrent of civilizing mission is testified by

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61 Henry Sumner Maine, “Ancient Law” The Crayon, Vol. 8, No. 4, April 1861, p. 77
63 Ibid
64 Along with the petition, Keshub Sen submitted a draft bill, whereby he demanded the following pre-conditions be fulfilled: 1. The age of the man intending to be married shall exceed 18 years, and the age of the woman intending to be married shall exceed 14 years. In case the woman is a minor, the consent of the father or guardian shall be obtained. 2. The man and the woman shall not stand to each other within the prohibited degree of Consanguinity or affinity. 3. Neither of the persons intending to be married shall have a wife or husband still living. The marriage shall be solemnized with the worship of the One True God in the presence of at least five credible witnesses. The 1868 Bill submitted for discussion and debate in the Legislative Council laid down the following pre-conditions: Every marriage between Natives of British India not professing the Christian religion shall be valid—if the parties are unmarried, and the husband has completed his age of eighteen years, and the wife has completed her age of fourteen years; if, in case the woman has not completed the age of fourteen years, the consent of her father or guardian has previously been given to the marriage; and if the parties are not related to each other as parents and children or ancestors and descendants of any degree, or as brothers and sister of the half as well as the whole blood, whether the relationship is legitimate or illegitimate, or whether it is one of consanguinity or affinity.
65 Sir M.E. Grant Duff, op. cit., p. 229
Maine’s vociferous support of advocating civil marriage in India. Maine ardently believed that India was a backward civilisation, because its inhabitants had not moved from status (ascribed position) to contract (voluntary stipulation). The movement of progressive societies had been uniform in one respect, i.e., moving towards a phase of social order in which all relations arise from the free agreement of the individuals. He condemned the Code of Manu governing Hindu society as being a system of law ‘of suspicious authenticity.’ Through this Bill, Maine proposed to remodel marital practices by giving individuals free hands in forming associations with persons of their choice. What Maine envisaged was “...the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family.” 66 By freeing marriage from being imprisoned by meaningless religious diktat, Maine was trying to facilitate the elevation of native society towards “…a phase of social order in which all...relations arise from the free agreement of Individuals.” 67 This would help improve India’s position in the ‘scale of civilisation.’ 68

Understandably, the Bill elicited criticism from various sections of the native population—from the Parsi community, the Hindus as also a section of the Brahmos—all of which submitted several petitions disparaging the Government for barging into their age-old religious practice. 69 The main bone of contention was that the Bill introduced “…disturbing element to unsettle the customs and usages recognized by law of the whole body of the people.” 70 The proposed law, the British Indian Association alleged, would practically encourage people to dispense of with the sanction of religion while forming a marriage contract. It gave an individual the freedom to choose one’s life-partner in the widest sense since a person could marry outside his caste, creed, or religion. Social organisation would be torn asunder, once the

66 Maine, Village Communities, pp. 149-150
67 Ibid
68 James Mill in his seminal work titled History of British India analysed various aspects of the Indian society and assessed its place in the ‘scale of civilization.’ Deriding Sir William Jones for exalting Hindu civilization by digging out its past glory, Mill commented, “It is not from one feature, or two, that a just conclusion can be drawn...It is from a joint view of all great circumstances taken together, that their progress can be ascertained; and it is from an accurate comparison, grounded on these general views, that a scale of civilization can be formed, on which the relative position of nations may be accurately marked.” James Mill, History of British India, Vol. I (London, 1817), p. 431. The yardsticks for Mill, in judging a nation’s position in the scale of civilization, are form of taxation, form of law and form of government.
69 Petitions were submitted by the British Indian Association, Adi Brahmoo Samaj, Parsi community of Bombay, Members of the Allahabad Institute, Hindu community of Bombay, Legislative Department: Other Series of Records, Papers Relating to Act III of 1872, NAI
70 “Memorial of the Parsees of Bombay against the Native Marriage Bill,” Legislative Department: Other Series of Records, Papers Relating to Act III of 1872, NAI
Bill came into operation, since, “...a Mahomedan woman will be introduced into a Hindoo family under the protection of the proposed law.”

The Bill ultimately had to be pared down in the face of furore raised within the native circle and the rising number of signatories opposing it because of its direct bearing on the marriage practices of the native society as also for encouraging ‘immoral practices.’ The Select Committee, to which the Bill was referred, was somewhat guarded, “It is the unanimous opinion of the Local Governments that the Bill as introduced should not be passed...the Bill would be unobjectionable if confined to the Brahma Somaj, for whose benefit it was originally designed.” The second draft of the Bill, thus was renamed the “Brahma Marriage Bill.” It took four long years for the Bill to finally become an Act in 1872. The preamble was amended to read that the Act would be applicable to persons, not professing the Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh or Jaina religion, ostensibly referring that it should be limited to the Brahmos only. By toning down the Bill, the Government no doubt adhered to its ‘play it safe’ policy, but the very fact that the Law Commissioner’s arguments were laced with allusions to interference and civilizing mission as regards native customs, affirm that remodelling of native society was very much a part of the scheme of things. In fact, the Act, by making bigamy under such marriages a punishable offence under the provisions of the Indian Penal Code, was trying to fulfil one long-standing agenda of the British—banning of polygamy.

The next major marker of intervention in the domestic sphere, which too dealt with among other things the consent issue, was the Indian Limitation Act of 1871 which was replaced by the Indian Limitation Act of 1877. The professed aim of the Act was to fix a period of time after which no suit could be brought. Among other things, the Act provided for the restitution of conjugal right, the limitation period of which was fixed at two years and the period would start from the time when restitution was demanded and refused by the husband or the wife being of full age and sound mind (Article 35 of Act XV of 1877, emphasis mine).

The basic premise of Article 35 of the Bill, i.e. restitution of conjugal rights, is borrowed from the law of Manu. Manu says that a husband must be constantly revered as a god. Under exceptional circumstances can a wife desert her husband, which is degradation and loss of caste on part of the husband. Occasions which would entail loss of caste, as identified by Manu, include drinking of liquor, killing a Brahmin, false boasting of high tribe, malignant boasting in front of a king. However, most of these offences were expiable by penance and after expiation a sinner was allowed to mix in the society and could claim restitution of conjugal rights. Thus all

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71 “Memorial of the Members of the Allahabad Institute,” Legislative Department: Other Series of Records, Papers Relating to Act III of 1872, NAI
72 “Report of the Select Committee” Legislative Department: Other Series of Records, Papers Relating to Act III of 1872, NAI
said and done, so long as a man was not excommunicated from society, he would be entitled to claim conjugal society of his wife. And since excommunication is revocable, a man’s claim to his marital rights, too, remains constant. While at the outset this schedule might seem to be a reinforcement of personal law, it simultaneously provided the necessary counter-balance to offset the whims of the husbands. Any arbitrary demand of a husband could be thwarted since restitution of conjugal rights equipped a wife, after attaining adulthood, to refuse such demands.

The most significant addition to Schedule 42 of Act IX of 1871, in 1877, was the phrase ‘of full age and sound mind.’ The term ‘full age’ was subject to debate. Schedule 15 of the new Bill, defined a minor as a person who had not completed eighteen years of age. Thus after she attained eighteen years of age, a girl would herself take the decision as to whether she would go over to stay with her husband or not. The previous act had established that unless the wife reached puberty she would not be deemed fit to go over to her husband’s home. In 1874, the court in Suntosh Ram Doss v Geru Pattuck case dismissed the plea of the former on the ground that though the marriage was valid according to personal law, the wife should remain away from her husband ‘until a certain event had occurred.’ Since no such ‘contingency’ had happened the court refused to order the wife to go to her husband.

In the 1877 Act, the government wanted to be more specific and zero in on the age. What it was trying to do was to keep the bride at bay till the age of eighteen from the physical onslaught of her husband and consequent pregnancy and child-birth which often resulted in death of the mother or birth of stillborn or deformed children. Dr Goodeve, Professor of Midwifery at the Medical College in Calcutta, after a survey of 265 women of Calcutta, Bangalore and Bombay, calculated the mean age of motherhood of Hindu women in Calcutta to be of 14 years 8 months, in Bombay to be a little short of seventeen, while in Bangalore the age was 16 years 5 months. The mean age of India was taken at 15 years 6 months. The average age at which girls reached puberty was 14 years on an all-India scale, while in Bengal the age stood at 12 years 6 months. Physiologists identify factors like climate, constitution and mode of living as the major determinants of pubertal age. In warmer climates, girls usually have their first menstrual secretion at the age of nine or ten, while in temperate climates it occurs around the age of thirteen or fourteen, while in the arctic regions studies show that the cycle

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73 As per Article 41 of the Limitation Act of 1871, the time would be counted from “when possession is demanded and refused.”
74 B.D. Bose, A Digest of Indian Cases: Containing High Court Reports of Appeals from India, 1836-1909 (Calcutta, 1912), p. 10773
75 Roberton, op. cit., p. 118
commences not before nineteenth or the twentieth year.\footnote{Roberton, “An Inquiry into the Natural History of the Menstrual Function” \textit{The Edinburgh Medical and Surgical Journal}, Vol. 38, 1832} Roberton, however, begs to differ. After a comparative study of the menstrual pattern of girls in England and India, he concluded that the reason behind a comparative lower age in India, especially in Bengal, was not so much guided by climate, but by traditions and customs—“I attribute so curious a physiological phenomenon, to the practice of infantile marriage that for thousands of years has existed in Hindustan, and which has gradually in the lapse of time, produced the change.”\footnote{Roberton, “On the Period of Puberty”, p. 61} By specifically defining the term ‘minor’, the government was cocooning the child-bride, since even when she had her menarche, her organs were not developed to bear the brunt of intercourse as was proved by medico-legal reports. The report for the year 1868-69 submitted by Dr. Kenneth McLeod included 48 cases of rape, in which about half of the victims were under ten years of age, whereas in 17 cases between six and ten. What was gory was that in two of the cases the children defiled were five years of age.\footnote{“Letter from the Honorary Secretary, Public Health Society of Calcutta to the Chief Secretary to the Government of Bengal, Calcutta” \textit{Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code}, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI} The reports for the years 1870, 1871 and 1872, prepared by Dr. Robert Harvey painted a similar picture. Nearly 51 per cent of the raped girls were under ten years of age, including a child of two, whereas 89 per cent were under fifteen.\footnote{Ibid} Hence the implication of fixing the age at eighteen was that by that time the wife would become a ‘major’ and would be physically matured to consummate the marriage and be prepared for subsequent motherhood.

Hindu law recognises that a girl, given in marriage as an infant, should be allowed to remain in her natal home. But it also stipulates that the time when she would leave for her husband’s home with the intention of staying there, was to be determined by the husband or his guardian. Usually, after the child-bride had her menarche, she stepped into her in-law’s household to take up the position of a dutiful daughter-in-law and wife. It is this reference that B. P. Thumboo Chetty, Assistant Secretary to the Chief Commissioner of Mysore, cited when he urged that the newly-added phrase, ‘when possession is demanded and refused’ should be read as ‘when, after the woman has attained puberty, possession is demanded and refused.’\footnote{Memorundum by B.P. Thumboo Chetty, Assistant Secretary to Chief Commissioner, Mysore (dated 25\textsuperscript{th} May 1877), \textit{Papers Relating to Act XV of 1877, Legislative Department: Other Series of Records}, NAI} The implication is that once a girl has her first menstruation, which was well below the age of eighteen, her husband could demand to exercise his marital rights and refusal, under such circumstances, would enable him to file a case.
Definition of the term ‘minor’ became the crux, since it caused confusion within the official circle also. Section 3 of the Indian Majority Act, which came into force on 3 June 1875, specified that every minor of whose person or property a guardian had been appointed by any Court of Justice and every minor under the jurisdiction of a Court of Wards shall be deemed to have attained majority on the completion of twenty-one years of age. Every other person domiciled in British India, whether native or foreigner, would be deemed to be a major on attaining eighteen years of age. The problem that arose was that in certain cases a person of eighteen, nineteen or twenty was not allowed to institute a suit, though limitation would be calculated as soon as that person completed eighteen. The guardian may not have filed a suit on behalf of the minor when the clock started ticking after the person had attained the age of eighteen the result being that by the time the concerned person completed twenty-one, the specified time limit of two years was over. The Select Committee, to which the 1877 Bill was referred, suggested the deletion of the definition of minor, which was ultimately heeded to.

Because of the minor-major controversy the term ‘full age’ could not be quantified by this Act, as a result of which the term remained open-ended and when it came to implementation was subject to interpretation by the court as per the circumstances specific to the concerned case. If accepted it would have raised the age of consent to eighteen. One of the landmark cases that stirred late nineteenth century society was the case of Rukhmabai. Rukhmabai was married to Dadaji Bhikaji in 1873, when she was eleven and he nineteen. As per custom, she was living in her natal home. But after ‘coming of age’, she refused to live with him because of his wavering lifestyle. In 1884, Dadaji filed a petition in Bombay High Court claiming ‘restitution of conjugal rights’ under Act XV of 1877. Dadaji’s petition was dismissed in 1885. He appealed against the judgement and in March 1886, two appellate judges ordered that the suit be remanded for a decision. The verdict went against Rukhmabai. She was ordered to go and live with Dadaji or face six months’ imprisonment. An appeal was filed against the judgement and Rukhmabai was determined to present her case before the Privy Council in England, if the need arose. Dadaji, finally, agreed to relinquish his claims in July 1888, in lieu of a payment of Rs 200. In this context, from the timing of the filing of the case, it would seem that limitation period commenced when Rukhmabai was around 18-19 years of age.  

What becomes evident is that, time and again the government under some pretext or the other, be it defining rape (Indian Penal Code), be it regulating marital practices (Native Marriage Bill), be it fixing the time-frame of filing a suit (Indian Limitation Bill), was relentlessly trying to push forth the consummation age of girls. It seems that fixing the age of consent

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82 For details see Antoinette Burton “From Child Bride to ‘Hindoo Lady’: Rukhmabai and the Debate on Sexual Respectability in Imperial Britain” American Historical Association 103(4) October 1998; Sudhir Chandra, Enslaved Daughters: Colonialism, Law and Women’s Rights (New Delhi, 1998)
became the fixation of the government, who refused to bow down even after their efforts were being frustrated. Colonial government was determined to penetrate into the innermost sanctum of husband-wife relationship. Aided by reports from medical practitioners, who systematically collated data from different parts of the country to expose the gruesome consequences of pre-pubertal consummation, the government’s determination to root out the practice steeled by the day. However, the experience of the Special Marriage Act taught them the necessity of altering the game-plan to rope in the widest possible segment of the native society, without which their design was bound to falter. A piecemeal support, as was the case in 1872, would not help them sail through.

VI

From the mid-1870s, gauging the mood of the indigenous people, the government kept a hawk-eye on the situation. Following the Revolt of 1857, when colonial government was trying to rework its strategies and policies vis-à-vis India, the native society, too, was undergoing a process of churning, “...a modern sector of politics gradually evolved in India, through rapid spread of education, development of communication system, such as the railways and telegraph, and the emergence of a new public space...” It was this western-educated elite class which took a hard look at their own culture and it is to them that the government turned to as collaborators in their legal reform projects and it was they who now took up the cudgels on behalf of their fellow brethren.

One can have a sense of déjà vu once the situation is compared to the early half of the nineteenth century when the government of Lord William Bentinck working in tandem with Raja Rammohun Roy in abolishing the heinous practice of Sati (the burning of a Hindu widow on the funeral pyre of her husband), adopted the same road-map to plough into the interiors of the native society. The first decisive thrust came in the form of Raja Rammohan Roy’s tract on widow-burning published in 1818—“Translation of a Conference between an Advocate for and an Opponent of the Practice of het Burning Widows Alive” emboldened the government of native support. Basing his argument on the sacred texts, namely, Manusmriti, commentaries by Yajnavalkya, the nucleus of Rammohun’s argument was centred on trying to answer the question, “...whether or not the practice of burning widows alive on the pile and with the

83 Sekhar Bandyopadhyay, From Plassey to Partition: A History of Modern India (New Delhi, 2004), p. 206
84 Initially bred as collaborators, it is this class which were the forerunners in the growth of Indian nationalism in late nineteenth century, “If this education was designed to colonise the mind of the Indian intelligentsia and breed in them a sense of loyalty, the latter also selectively appropriated and manipulated that knowledge of domination to craft their own critique of colonialism.” Bandyopadhyay, op. cit., p. 210. Collaborators, thus eventually, became competitors of the colonial regime. For details, see Anil Seal, The Emergence of Indian Nationalism: Competition and Collaboration in the Later Nineteenth Century (Cambridge, 1968)
corpse of their husband’s, is imperatively enjoined by Hindu religion?" His emphatic reply was, “Manu in plain terms enjoins a widow to continue till death forgiving all injuries…” Another pamphlet by Rammohun written in 1820, too, debated the scriptural backing of the practice. This bolstered Lord Bentinck to prepare a blueprint to eliminate the practice from the face of Bengal. The support emanating from Rammohun and other like-minded forward-thinking natives, coupled with Bentinck’s caution approach of carefully weighing the pros and cons, led to the passing of the anti-Sati regulation in 1829 in Bengal. Bentinck’s chosen field was Bengal since after a careful assessment he came to the conclusion, “...in a population of so many millions of people as the Calcutta Division includes, and the same may be said of all the Lower Provinces, so great is the want of courage and of vigour of character, and such the habitual submission of centuries, that insurrection or hostile opposition to the will of the ruling power may be affirmed to be an impossible danger.” Moreover, the Permanent Settlement having created an entire class of rich landed proprietors deeply interested in the continuance of British rule and commanding respect from the mass of the people, Bentinck deduced, would offset the initial shock that would emanate from the native society. On a more practical level, Bentinck’s homework showed the declining graph of the practice in Jessore (one of the districts of the Calcutta Division) that could be attributed to the stern but humane measures of the magistrate Mr. Pigou against which there was no public remonstrance. The practice not so widely prevalent in the upper parts of Bengal, fear of backlash from that area was minimal. Having ensured that “from the native population nothing of extensive combination, or even of partial opposition, may be expected from the abolition,” Bentinck was careful to avoid a replay of the Vellore fiasco by ruffling the feathers of the army in Bengal Presidency. To him, it was

86 Ibid
87 Barbara Harlow and Mia Carter ed., Archives of Empire, Vol. I: From the East India Company to the Suez Canal (Durham, 2003), p. 354. Bengal, Bihar and Orissa were together termed as the Lower Provinces of the Presidency of Fort William. Of the 463 cases of sati occurring in the Presidency of Fort William, 420 took place in the Lower Provinces with 287 in the Calcutta Division alone.
88 In 1824 there were 30 cases of Sati in Jessore, followed by 16 in 1825, 3 in 1826, and none in 1827 and 1828. Harlow et al, op. cit., p. 356
89 Harlow et al, op. cit., p. 357. The mutiny broke out in 1806 among the soldiers of the Vellore cantonment in response to a military regulation passed in the same year. The tenth paragraph of the 11th section of the Military Code, stated, “it is ordered by the Regulations, that a Native soldier shall not mark his face to denote his Cast, or wear ear-rings when dressed in uniform; and it is further directed, that at all parades, and upon all duties, every soldier of the battalion shall be clean shaved on the chin. It is directed also, that uniformity shall, as far as it is practicable, be preserved in regard to the quantity and shape of the hair upon the upper lip.” Lord William Cavendish Bentinck, Memorial Addressed to the Honourable Court of Directors by Lord William Cavendish Bentinck Containing an Account of the Mutiny at Vellore with the Causes and Consequences of that Event (London, 1810). Following the mutiny, Bentinck was summarily removed from his post. The entire experience left a bitter taste in his mouth and informed him of the dire consequences of meddling with the religious affairs of the natives, considered sacred and inviolable, “When Governor of Madras I saw in the mutiny of Vellore the dreadful
of supreme importance, “how far the feelings of the native army might take alarm...”90 To fathom the receptiveness of the measure within the Bengal Army, a circular was addressed to 49 officers of the Bengal army. Twenty-four of the officers favoured “total immediate and public suppression of the practice.”91 Even those who were averse to such a ban did not apprehend any fear of immediate danger. Having received the green signal from the army as also from the native masses and backed by a section of the enlightened segment of the indigenous society, Bentinck proceeded to pass the regulation banning Sati in the Presidency of Bengal, in December 1829. Instead of gate-crashing, it was the policy of carefully tiptoeing in that won the day for Bentinck.

In carrying forth its venture of raising the age of consent, the government reverted to measures, strongly reminiscent of the Sati days. Indigenous public opinion had been steadily crystallising in favour of an age-raise and the government very sagaciously decided to sit at a distance and observe the situation and wait for the opportune moment to butt in. In 1878, the reformist newspaper Bharat Mihir appealed to the government not to lose time in passing a law to this effect, “we consider the raising of the question of the early marriages to be very opportune at the present time. Its evil effects, both physical and mental are everywhere discernible...so strong is our feeling against early marriages, that we could earnestly pray the Government to put a stop to them.”92 The Rukhmabai case and the decision of the High Court favouring her husband fuelled the fire. Protesting against the High Court judgement, Raghunath Rao wrote, “...her marriage contracted in infancy and without her knowledge, was no marriage at all.”93 The Burdwan Sanjivani thundered, “Modern Indian society wants that child-marriage should be abolished, and will the Government decline to grant what modern Indian society asks for?”94

Behramji Malabari, a Parsi social reformer, in his tract, "Infant marriage and Enforced Widowhood in India" submitted to the government in 1884, passionately argued on the social evils of child marriage and demanded legislative intervention to prevent it.95 Upon receiving the

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90 “Bentinck’s Minute on Sati, 8 November 1829” in Harlow et al, op. cit., p. 351
91 Ibid
92 Five were averse to any form of interference, twelve favoured abolition but was opposed to absolute and direct prohibition under the authority of the government, eight favoured abolition to be effected by the indirect interference of the magistrate and other public functionaries. Harlow et al, op. cit., p. 358
93 Bharat Mihir 15 June 1878
94 Quoted in V.S. Apte, The Law for the Restitution of Conjugal Rights: As it Stands and Should be Amended (Poona, 1887), p. 13
95 Burdwan Sanjivani 26 April 1887
96 In line with proposals already suggested by Mr Garrett, Malabari, too, suggested indirect measures of disapproval, namely, the educational authorities might rule that no married student should be eligible to appear for university examinations for five years. The heads of the departments might be encouraged to prefer the
petition, the government lost no time in forwarding copies of the tract to local governments for their opinions, since “the subject was one of great importance to the social well-being of the people...” with the instruction to consult such official and non-official persons as were deemed fit to be well-acquainted with native feelings. However, the returns received from the local officials of the respective provinces, namely, Bengal, Bombay, Madras, Coorg, N-W Frontier Provinces, Assam, British Burma, Punjab, Central Provinces, Berar spoke strongly in unison against any legislation on the proposed subject. That the apex government, too, was sceptic, after several thwarted attempts, becomes apparent, when quoting exclusively from census data of 1881, it tried to prove that the scenario was not as bleak as Malabari had tried to project, “only one percent, or something over three quarters of a million of Hindu females, marry in infancy or early girlhood...it is not nearly so bad a state as Mr Malabari would lead one to infer...early marriage customs prevail more largely among the Native Christian community than even among Hindus...” A.P. MacDonnell, Officiating Secretary to the Government of India, put in black and white the official stand vis-a-vis enforcing laws in the personal sphere, “When caste or custom lays down a rule which deals with such matters as are usually left to the option of citizens, and which does not need the aid of Civil or Criminal Courts for its enforcement, State interference is not considered either desirable or expedient.” He thus concludes, “...the policy

unmarried candidates to the married, all other qualifications being equal. The money received from the bridegroom might be deposited in the name of the bride and for her exclusive use.

96 Home Public, A Proceedings, 131—138E Infant Marriage and Enforced Widowhood among Hindus in India, November 1886, NAI

97 Madras—“Madras Government does not view with approval any interference of the kind suggested by Mr Malabari...the orthodox element which would be opposed to such interference as is suggested represents 99 per cent of the Native community...” Bombay—“...it would be inexpedient for Government to exercise any direct or indirect interference, than there is at present.” Bengal—“more evil than good would be likely to result at the present time from any interference by Government in the socio-religious questions under consideration. Legislative interference for the prevention of child marriage in this country is at present undesirable...” Home Public, A Proceedings, 131—138E Infant Marriage and Enforced Widowhood among Hindus in India, November 1886, NAI

98 Home Public, A Proceedings, 131—138E Infant Marriage and Enforced Widowhood among Hindus in India, November 1886, NAI

In the territories directly administered by the Governments of Bombay, Madras, Bengal, North-Western Provinces and Oudh, Punjab and Central Provinces, status of Hindu girls (including Sikhs and Jains), as per the Census are as follows:

<table>
<thead>
<tr>
<th>Girls</th>
<th>Under ten years of age</th>
<th>Between ten and fifteen</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td>17,902,743</td>
<td>3,210,647</td>
</tr>
<tr>
<td>Married</td>
<td>1,588,656</td>
<td>3,746,477</td>
</tr>
<tr>
<td>Widows</td>
<td>54,579</td>
<td>146,109</td>
</tr>
</tbody>
</table>

Source: Home Public, A Proceedings, 131—138E Infant Marriage and Enforced Widowhood among Hindus in India, November 1886, NAI.

99 “Resolution” Home Public, A Proceedings, 131—138E Infant Marriage and Enforced Widowhood among Hindus in India, November 1886, NAI.
of non-intervention universally recommended by all Governments, is that which the Government of India should undoubtedly pursue in this matter...”

The strategy adopted was to wait and watch. Previous experiences had taught the government not to act hastily, but allow public opinion to build gradually that would allow them to step in and justify their interventionist stance. Once the structure was provided by native support, it would be easier to build on the super-structure by the government. Thus C.P. Ilbert, legal adviser to the Viceroy’s Council, very prudently advised, “It is quite obvious that an alien Government cannot at present day hope to introduce a reform into the most cherished social and religious customs of the Hindus by action whether legislative or executive till public opinion has pretty decisively expressed itself in favour of such reforms.”

The underlying principle was that “…in the competition of influence between legislation and caste or custom, the condition of success on part of the former is that the legislature should keep within its natural boundaries, and should not, by overstepping those boundaries disclose the limits set to its powers, and at the same time place itself in direct antagonism to social opinion.”

Throughout 1888, petitions poured in from ecclesiastical organisations, namely the Baptist Missionary Society, Lucknow United Missionary Conference, Christian women, World’s Women’s Christian Temperance Union. The government however, could not be lured, “These expressions of opinion were of foreign origin, and did not indicate that a sense of the necessity of reform had been awakened in native society.” Closely monitoring the situation, the government refused to accede to the demands of missionary organisations, lest it incurred the wrath of the Hindus. After politely acknowledging the receipts of these petitions the rejoinder was, “While His Excellency in Council is in sympathy with the objects which the memorialists have in view, he considers that, it is not desirable at the present time to give effect to these suggestions.”

The game-plan to bide time ultimately paid off. What was amiss so long was that one defining moment. Just as the Enfield rifle episode added the much-needed spark to ignite the fire of the revolt in 1857, the death of eleven year old Phulmonee due to excessive bleeding because of forced intercourse by her thirty-five year old husband Hari Mohan Maiti in 1890, acted as the catalyst in upping the ante. Phulmonee was born in 1879 and married off at the age of eleven, on 11 May 1890. She stayed back in her natal home, where Hari Maiti paid a visit

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100 Ibid
101 Ibid
102 Ibid
103 The Age of Consent under section 375 of the Indian Penal Code. Substitution for the word “ten the word “twelve” in section 375 of the Indian Penal Code Home Judicial October 1890 Nos. 210-213 A Proceedings, NAI
104 Home Judicial Department, A Proceedings May 1888, Memorial from certain members of the Lucknow United Missionary Conference praying for certain changes in the Indian Marriage Law as regards Infant Marriages, NAI
on 15 June. As was customary in any typical Hindu household where the son-in-law was fussed and feted, Phulmonee’s mother, Radhamonee, too left no stone unturned to take special care. Hari Maiti was provided with a separate room with a bed, while Phulmonee, along with her three sisters, slept in the verandah. Her mother retired for the night around 11 pm, in another room. At around midnight, she was jolted out of her sleep by Phulmonee’s heart-rending cries coming out of Hari Maiti’s room. Rushing in, she found her daughter lying in a pool of blood, with her husband standing besides her. Phulmonee breathed her last at around 3 pm the next day.105 Hari Maiti was charged under Section 304, 304A, 325 and 338 of the Indian Penal Code.106 The case was heard by a single judge of the Calcutta High Court in its original jurisdiction. Maiti was ultimately acquitted of all charges, except 338 and was awarded a sentence of one year imprisonment. He could not be prosecuted of rape since Phulmonee had attained the legally determined age of consummation. The judge regretted that, “It by no means follows that because the law of rape does not apply between husband and wife if the wife has attained the age of ten years, that the law regards a wife over ten years of an age as a thing made over to her husband, or as a person outside the protection of law.”107

The society was set in a tizzy. The incident pressed the panic button of the native society. So long socio-legal reform was confined to a tussle between the upper echelons of the Hindu society and the government. The tragic death of Phulmonee and Hari Maiti’s trial, brought to the fore different dynamics, with the lower castes, the upper-class Hindus, the Muslims—all pitching in vocally with their respective viewpoints. Jotirao Phule in his response to Malabari’s tract, not only supported the cause but came up with his own suggestions for alleviating the plight of the child brides which would serve the twin purpose of uplifting the condition of women as also bolster the condition of the lower castes, “I suggest that Government should rule that boys under nineteen years of age, and girls under eleven, should

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105 The Post-mortem conducted revealed the following, “Body well nourished; mucous membrane pale; no hair on pubes; breasts beginning to be prominent, but not yet developed. No external mark of injury. No abrasions or marks about the genital organs. Internal organs healthy, with the exception of oedema at the base of the left lung; they were bloodless. A clot measuring 3 inches by 1 ½ inches in the vagina. Vagina smooth and dilated; no hymen or fourchette, and no ruga A longitudinal tear 1 ¾ inches in the vagina to right of os uteri. A haematoxia 3 inches in diameter in the cellular tissue of the pelvis. Vagina, uterus and ovaries small and undeveloped. No sign of ovulation.” The Age of Consent under section 375 of the Indian Penal Code. Substitution for the word “ten the word “twelve” in section 375 of the Indian Penal Code Home Judicial October 1890 Nos. 210-213 A Proceedings, NAI.

106 Section 304—Punishment of Culpable Homicide not amounting to Murder. Section 325—Whoever, except in the case provided by Section 335, voluntarily causes grievous hurt shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine. Section 338—Whoever voluntarily causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand Rupees, or with both.

not be allowed to marry. In case they do, some reasonable tax may be levied on the parents of the parties married, and the money thus obtained should be used in the education of the middle and lower classes of Hindus.”¹⁰⁸ The Muslim society of Calcutta welcomed such a move, “...such a course will be highly beneficial to members of the community, inasmuch as it will show to them distinctly what action on the part of a Mahomedan husband towards his young wife has been made a heinous criminal offence of no less enormity than the offence of rape...”¹⁰⁹ The Hindu Social Reform Association of Sindh, the Hindus of Meerut petitioned, “All thoughtful men in India are now agreed that infant marriage is a great evil which, in the interest of the country, ought to be removed without delay.”¹¹⁰

Standing at the threshold of the 1890s, the voices campaigning for change, was growing in number so much so that while forwarding a petition from Gopal Hari Deshmukh, M.G. Ranade, C.N. Bhat and V.M. Bhide calling for raising the age to at least twelve, Sir R. West, Secretary to the Government of Bombay, Judicial Department in his Minute accompanying the memorial, gave the government the green signal, “I think the age of twelve years could now be substituted for ten years in Section 375 of the Indian Penal Code.”¹¹¹ The Bombay reformist lobby, led by K.T. Telang, egged on the government to shed its non-committal stance “The policy of general non-interference was deliberately re-affirmed by the Government of India in 1885...we accept this final declaration of the views of the Government of India as a statement of the general rule, but we venture to submit that the present proposal clearly constitutes an exception to that rule. What is now sought is not an interference with matters not hitherto regulated by express law, but an amendment of the existing law...”¹¹² Citing extensively from sacred scriptures they demanded the age to be fixed at twelve. In Madras, Dewan Bahadur R Raghunath Row, quoting extensively from Susrata, stated in his tract, “...it is distinctly laid down that some considerable time should pass after menstruation before Garbhadhan or conception ceremony should take place and that it should not take place before the bride is 16 years of age.”¹¹³ Bengal, however, proved to be a problem ground. The custom was widely prevalent in

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¹⁰⁸ Berhamji M. Malabari, *Infant Marriage and Enforced Widowhood in India* (Bombay, 1887), p. 4
¹¹¹ “Minute by the Honourable Sir R West, dated the 10th October 1890” *Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code*, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI
¹¹² “Report of the third National Social Conference held in Bombay on 29th December 1889”, *Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code*, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI
¹¹³ Dewan Bahadur R. Raghunath Row, *The Hindu Shastric Aspect of the Question of the Age of Consent* (Madras, 1891), p. 4
Bengal especially over eastern and central Bengal. Hence no clean-chit was given. With no convictions of rape under the present Penal Code provision, Sir Steuart Bayley, Lt. Governor of Bengal, felt that this would “confirm the opinion that the age of 10 is suitable for the commencement of cohabitation.”  

D. R. Lyall, Commissioner of the Chittagong Division of Bengal, adducing to the rampant prevalence of the practice feared, “I do not think the age of consent can be raised without really interfering with the Hindu religion....to make it an offence for a husband to cohabit with such would be flying straight in the face of the dictates of the Hindu faith.”

Magistrate of Noakhalie in Bengal, C. G. Allen, seconded Lyall, “I believe there is every reason to apprehend that a change in the law, by which the age of consent under section 375, Indian Penal Code, was raised, would meet with very strong opposition from the whole body of conservative Hindoos.”

Though there might be some stiff opposition, C. C. Stevens, Officiating Secretary to the Government of Bengal, in his letter to the Secretary, Government of India, expressed the hope that “if the enforcement of the husband’s rights upon a girl below 12 years of age were stigmatised by the law as rape, the hands of the reformers would be strengthened, and it would be publicly recognized that anyone abetting such assaults was committing a crime.”

He ended the letter on an optimistic note that “legislation would be welcomed by the great majority of the educated and really patriotic throughout the country.”

The Hindu reformist press systematically collated and published accounts highlighting the pitiable condition of the child-bride. Sahachar, Sanjivani, Sakti, Dacca Gazette from Bengal, Hindu from Madras, Rust Goftar, Indian Spectator, Indu Prakash roared in protest. The medical fraternity, too, threw in their weight behind the pro-changers. The September issue of the Indian Medical Gazette contained an article Child-Wives, where opinions of native doctors based in the three Presidencies and also in far-flung areas like Burma.

114 “Letter from C. C. Stevens, Esq., Offg. Secretary to the Government of Bengal to the Secretary to the Government of India dated 8th November 1890” Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI

115 “Demi-official from D. R. Lyall, Esq, Commissioner of the Chittagong Division to the Chief Secretary to the Government of Bengal, dated the 25th September 1890” Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI

116 “Demi-official from C. G. Allen, Esq, Magistrate of Noakhalie to the Commissioner of the Chittagong Division, dated the 21st September 1890” Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI

117 “Letter from C. C. Stevens, Esq., Offg. Secretary to the Government of Bengal to the Secretary to the Government of India dated 8th November 1890” Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI

118 Ibid

119 In his letter to Secretary of State for India Viscount Cross, Lord Lansdowne, the Viceroy appended extracts from vernacular and anglo-vernacular newspapers from the three presidencies of Bengal, Madras and Bombay together with two newspapers from Punjab and Sindh, which highlighted the plight of child-wives and advocated for stern legal sanction. The Age of Consent under section 375 of the Indian Penal Code. Substitution for the word “ten the word “twelve” in section 375 of the Indian Penal Code. Home Judicial October 1890 Nos. 210-213 A Proceedings, NAI
were aired.\textsuperscript{120} At the ninth meeting of the Calcutta Medical Society, held in October 1890, collective opinions of medical men, both European and Indian, prescribed that the range should be from 14 years-20 years.\textsuperscript{121} The Public Health Society of Calcutta exhorted the government, “…the Government would do well to avail themselves of the present opportunity, and to take that step now which, having regard to the backward state of all public opinion in this country in 1860, would have been perhaps inadmissible.”\textsuperscript{122}

With the situation reached a crescendo by 1891, the government, preying for an opportune moment to pounce on, lost no time in seizing the chance, “The time has now come

\begin{table}[h!]
\centering
\begin{tabular}{|l|l|l|}
\hline
Names & Minimum Marriageable Age & Proper Age \\
\hline
Dr Chunder Coomar Dey & 14 years & ... \\
Dr Charles & 14 years & ...

Baboo Nobin Krishna Bose & 15 years & 18

Dr A. V. White & 15 or 16 years & 18

Dr Mohendro Lal Sircar & 16 years & ...

Tumeezkahn Bahadoor & 16 years & ...

Dr Norman Chevers & 16 years & 18

Dr D.B. Smith & 16 years & 18 or 19

Dr Ewart & 16 years & 18 or 19

Dr J. Frayer & 16 years & 18 or 20

Dr S.C.G. Chuckerbutty & 16 years & 21

Atmarang Pandurang & 20 years & ...
\hline
\end{tabular}
\caption{Minimum Marriageable Age and Proper Age for the doctors.}
\end{table}

\textsuperscript{120} The doctors were Dr Rammay Roy, Dr Behari Lall Chuckerbutty, Dr Devendra Nath Roy, Dr Zahirroodeen Ahmed, Dr Kailas Chunder Bose. \textit{The Age of Consent under section 375 of the Indian Penal Code. Substitution for the word “ten the word “twelve” in section 375 of the Indian Penal Code Home Judicial October 1890 Nos. 210-213 A Proceedings, NAI}

\textsuperscript{121} “Transactions of Medical Societies, October 1890” \textit{The Age of Consent under section 375 of the Indian Penal Code. Substitution for the word “ten the word “twelve” in section 375 of the Indian Penal Code Home Judicial October 1890 Nos. 210-213 A Proceedings, NAI}

\textsuperscript{122} “Letter from the Honorary Secretary, Public Health Society of Calcutta to the Chief Secretary to the Government of Bengal, Calcutta” \textit{Amendment of the Law for the purpose of raising the age of consent under Section 375, Indian Penal Code, Home Judicial, A Proceedings Nos. 1-42, January 1891, NAI}
when, in our opinion, the circumstances are favourable to a change in the law.”

Riding high on native support and having satisfied itself of the viability of introducing such a measure, in December 1890, the legislative department was instructed to prepare a Bill. The result—The Age of Consent Bill. No longer hidden in veiled references or caught in the vortex of larger issues, the Bill was a direct assault on cohabitation. After several failed attempts to raise the age-bar from ten, this bill fixed the lower limit at, what was believed to be, a more acceptable twelve. The abortive attempt to raise the age to fourteen, which was the medically acceptable age, informed the administrators of a more practical approach, “…to adopt this limit (age of fourteen) would involve too abrupt a fundamental revolution in the social life of India.” Thus a seemingly more acceptable age of twelve was fixed which would conform to social norms, “…the age of twelve years approximately may be a considered as the average age for consummation of marriage, both according to law and custom, on the one hand, and, on the other, as the lowest safe age as regards physical fitness…”

On behalf of the government, Sir Andrew Scoble introduced the Bill titled, “Indian Penal Code and Code of Criminal Procedure 1882, Amendment Bill” in the Legislative Council on 9 January 1891 with the expressed objective of protecting female children from ‘immature prostitution’ and from ‘premature cohabitation.’ An echo of Maine’s argument during the Native Marriage Bill justifying the need for colonial intervention, becomes evident, when Scoble too, at the very introductory stage of the Bill reiterated, “I do not suppose that any one will question the right and duty of the State to interfere, for the protection of any class of its subjects, where a proved necessity exists for such interference…” In a direct reference to the non-interference clause, Scoble strived to explain the true meaning of the Proclamation words, “…abstain from all interference with the Religious Belief or Worship of any of Our Subjects…” Although apparently, the words meant that the natives would be left in peace so far as their convictions were concerned, Scoble’s interpretation was “There is no such undertaking of absolute non-interference…” Alluding to the Indian Councils’ Act 1861, Lord Lansdowne, too, sought to clarify, “We cannot accept this view that the Proclamation of 1858, can be considered as absolutely precluding us from interference…” At the same time not to give the idea that the bill was not a radical step, both Scoble and Lansdowne clamoured to prove that it was not

123 “Letter to The Right Honourable Viscount Cross, Her Majesty’s Secretary of State for India” Home (Judicial), The Age of Consent under section 375 of the Indian Penal Code A Proceedings, NAI
125 Abstract
126 Abstract
127 Abstract
128 PP 324, p. 2
129 Abstract. Emphasis mine.
130 Abstract, p 19
meant to revolutionise the law of marriage nor in conflict with the teachings of the Sastras. Wrong interpretations of the sacred texts had robbed Hindu religion of its true self, “if modern practice, under the guise of religious observance, disregards and violates those teachings, it cannot be allowed to invoke them to justify its own disobedience to their commands.” In a bid to soothe frayed nerves, Lord Lansdowne, emphasised that the government was acting on the demands emanating from the native society, “The proposals are to be found in a series of Resolutions lately submitted to the Government of India...the first of these Resolutions is in favour of raising the age of consent to twelve...that is the proposal embodied in our Bill... That the government was not stepping outside its jurisdiction was, the Viceroy tried to prove, confirmed by the fact that there had been other resolutions calling for ratification of infant marriages ‘within a reasonable time of the proper age’ with the rider that marriages not ratified within a specific time-frame should be declared null and void. Such a ‘radical’ measure would “revolutionise the social system of the Hindus...to enact that such a contract should subsequently be made revocable, would involve an interference with the domestic institutions of the people of India, which neither my colleagues, nor I am prepared to admit.” Thus the government was trying to project its humane face, “Our object is simply to afford protection to those who cannot protect themselves, protection from a form of physical ill-usage which I believe to be reprobated by the most thoughtful section of the community.” Amongst the native members of the Council, Rao Bahadur Krishnaji Lakshman Nulkar, Nawab Ahsan-ulla, supported the motion.

No longer couched in rhetoric, the frontal attack on the sacred domestic sphere led the conservatives to bare their fangs and launch a scathing attack. Bal Gangadhar Tilak opposed the Bill for interfering in the age-old customs of the Hindus. British Indian Association with the view to protest against the Bill formed a committee composed of the Maharaja of Durhanga, Maharaja Jotindra Mohan, Maharaja Narendra Krishna, Raja Rajendralala, Raja Peary Mohan, Raja Sasisekhareswar, Kumar Sarat Chandra Sinha, and Baboo Jadunath Mullick. On 24 February, Sir Maharaja Jotindra Mohan Tagore, Sir Romesh Chunder Mitter, and Ray Bahadur Raj Kumar Sarvadhikari met Sir Andrew Scoble, with the object of learning whether the government was willing to make any allowance to the feelings of the people. But they were told

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131 Scoble quoted Pundit Sasadhar Tarkachuramani, “It is true that we advocate early marriage (but not before the eighth year), but we condemn the custom of cohabiting with a wife before she has attained puberty. We do not support early marriage of boys. We believe it to be a great sin to cohabit with a girl before her puberty, and we believe it to be the terrible cause of our degeneration. We know that Hindu society does not believe this custom to be a great sin, and hence the degradation of the Hindus.” Abstract

132 Abstract

133 Abstract, pp.20-21

134 Abstract, pp. 21-22

135 Abstract, p. 27
that the age of consent as fixed in the Bill would not be altered.\textsuperscript{136} Realising that the point of no return had been reached, a protest meeting was convened at the Calcutta maidan on 25 February, where slogans like “We do not want the Bill” rendered the air. Although there was no definite estimate regarding the attendance, as per one newspaper report, “the whole space from the Esplanade to the Race Course was one sea of heads.”\textsuperscript{137} At dusk the congregation moved towards Government House and surrounded it with cries of appeal to Her Majesty for the withdrawal of the Bill. A section of the Bengali press, namely, \textit{Bangabashi, Dainik O Samachar Chandrika} too, sided with the opponents. Dissenting voices were heard on the floor of the Legislative Council also, with the former Chief Justice of Bengal and a member of the Legislative Council Sir Ramesh Chandra Mitra after registering his protest against the Bill during his speech on 9 January, chose to remain absent for the rest of the proceedings on the pretext of indisposition. He felt that the proposed law was superfluous as “child-wives are now sufficiently protected by the provisions of the existing criminal law” and hence the Bill is a testifier to the ulterior designs of the government.\textsuperscript{138} If the Code had not contained such provisions, Hari Maiti would not have been punished. He slashed through Scoble’s argument of misinterpretation of sacred texts, by quoting extensively from Raghunandan’s \textit{Sanscar Tawtwa} that the proper period of consummation of marriage is reached when the wife attained the age at which menstruation occurs and the husband would be a sinner if no consummation takes place, “the proposed measure would interfere with the religious rites and duties of the Hindus in certain cases.”\textsuperscript{139}

The tug of war hinged on the issue of marital rape. The yardstick of being ‘civilised’ was pegged on the legal recognition of marital rape, “A law so bad as that which makes the cohabitation of a husband with his wife rape is not to be found in any country... A law which will peep into a married couple’s bedroom and make holes and openings in the windows in order to enable the Magistrate to look into it, is possible only in this country.”\textsuperscript{140} How could husbands, venerated as gods according to ancient texts, be prosecuted of marital rape? How can “in any civilized country a husband be held guilty of rape upon his own wife?”\textsuperscript{141} Scoble countered that, in treating the issue, the offence should be seen in the light of a wife, “not as wife, but as a human creature...”\textsuperscript{142} Oppositions notwithstanding, backed by a solid chunk of indigenous support, the law was signed on 19 March 1891 by the government of Lord Lansdowne raising the age of consent for consummation from ten to twelve years. The Indian Penal Code and the

\textsuperscript{136} \textit{Sanjivani} 28 February 1891  
\textsuperscript{137} \textit{Sudhakar} 27 February 1891  
\textsuperscript{138} Abstract  
\textsuperscript{139} Abstract  
\textsuperscript{140} \textit{Banganiwasi} 6 February 1891  
\textsuperscript{141} Abstract  
\textsuperscript{142} Abstract, p. 86
Code of Criminal Procedure were accordingly amended to incorporate the modification, thereby making sexual intercourse with girls, either married or unmarried, below twelve years rape and punishable by ten years’ imprisonment or transportation for life.

The methodology applied to arrive at a socially acceptable age and prevent ‘a fundamental revolution’ reminds one of the days of Bentinck and the Sati Regulation, when he, too, undertook a similar mission soliciting opinions from cross-section of the native society and conducting surveys to ascertain the viability of banning the act. In case of the Age of Consent Act, too, the shove came from the native society and the government acted upon it. While justifying intrusion in ancient customs and usages, Scoble himself drew parallel with the Sati scenario, “The prohibition of Sati was denounced on almost the identical grounds on which this Bill has been attacked.” He quoted in verbatim the lengthy explanation that the Court of Directors offered, when faced with barrage of criticisms on Sati Regulation from the native society, to defend intervention. Whereas, in case of Sati, Bentinck calculated Bengal to be least problematic, tables were turned in case of the consent bill issue—Bengal proved to be the Achilles heel. But the government was unflinching, “It can hardly be contended that a doctrine which is non-essential elsewhere becomes essential because it is held in Bengal.” Scoble’s argument, “those practices...are not countenanced by the teachings of the early law-givers who are generally accepted expositors of Hindu theology” is strongly reminiscent of what Lata Mani terms in case of sati prohibitory Regulation, being marked by “official insistence on its scriptural status.” The official discourse on Sati, as Lata Mani shows, was ‘developed within the ambit of religion.’ Civilising mission was carefully cloaked in a religious garb. Scriptural interpretations were pitted against each other—both the anti-abolitionists and the pro-abolitionists resorted to religious texts to fortify their arguments. The official argument was that Brahminical hegemony had robbed the Hindu religion of its pristine glory and hence “the civilizing mission of colonization was seen to lie in protecting the ‘weak’ against the ‘artful’, in giving back to the natives the truths of their own little read and less understood Shaster.”

143 Abstract, p. 81  
144 The Court of Directors answered, “The power of making laws is vested in the Governor General in Council, which power is recognized and confirmed by the British Legislature; that in exercising this power the Government of India has at all times manifested a just attention to the religious opinions and customs of the Natives, so far as is compatible with the paramount claims of humanity and justice; and that a discriminating regard for those religious opinions is not incompatible with the suppression of practices repugnant to the first principles of civil society, and to the dictates of natural reason.” Abstract, p. 82  
145 Abstract, p. 83  
146 Ibid  
148 Mani, op. cit., p. 95  
149 Ibid
Walter Ewer, superintendent of police in the lower provinces of Bengal, pointed out that Manu, revered by the Hindus as the father of Hindu jurisprudence, did not mention Sati but glorified ascetic widowhood. Drawing a leaf out of it, Scoble, too argued, “...the teachings of the sacred books of the Hindus are not in conflict with the proposals of the Bill...” After dissecting the official discourses on Sati, Lata Mani concludes that officials were more driven by the fact that “such action was in fact consistent with upholding indigenous tradition.” Thus if the dots are joined from 1829 down to 1891, what becomes apparent is that civilising mission was carefully dovetailed with the upholding of indigenous tradition, of protecting the weak, “…it would be intolerable to allow the reprobate who had ravished her (the woman) to escape well-merited punishment...” Thus viewed from the legal prism, non-intervention remained a lip-service, as is amply demonstrated. Government officials, themselves, nuanced the term ‘non-intervention’ to distinguish between absolute non-interference and interference (emphasis mine).

VII

The foregoing paragraphs outline the journey that led to the legalisation of the age of consummation. Debated from the medical as also the scriptural point of view, the discourse, against the backdrop of legal history, is a pointer to the effect that in the colonial government’s meddling with the personal sphere the leitmotif of continuity remains the continuous refrain throughout nineteenth century, which led to passing of laws aimed at bringing about seminal changes, at least on paper, in the most intimate of man-woman relationship. By undertaking an analysis of the laws passed during the course of the nineteenth century, my hypothesis is that the issues that pre-occupied the colonial mind post-1857, namely, marriage, bigamy, age of consent, have their genesis in the ideological trappings of the first half of the nineteenth century. The House of Lords passed a Bill in July 1858, for the better government of India, which amongst other things, exhorted the Secretary of State in Council, to submit “…a Statement prepared from detailed Reports from each Presidency and District in India in such Forms as shall best exhibit the moral and material Progress and Condition of India in each such Presidency.” The concept was borrowed from Lord Dalhousie, who in 1856 prepared a Minute wherein he narrated the measures undertaken under various heads during his eight year tenure in India (1848-1856). It was during Dalhousie’s reign that a resolution was passed that “…henceforth from the Government of every Presidency, from each Lieutenant-Governor, and from the chief

150 Abstract, p. 10
151 Mani, op. cit., p. 29
152 Abstract, p. 9
officer of every province, an annual report, narrating the incidents that may have occurred during the year within their several jurisdictions, and stating the progress that may have been made...in each principal department of the civil and military administration.”¹⁵⁴ Not only was Dalhousie’s idea executed, the fact that such a report was required to be submitted annually and titled, *Statement Showing the Material and Moral Progress of India* attests that somewhere down the line, the administration was trying to project itself as the keeper of native morality and hence was keeping its fingertip on the pulse of the ‘moral progress of India.’ Robert Montgomery Martin, while analysing the post-Mutiny scenario in 1862, spoke of the “...humanizing influences of a higher civilization than has yet been experienced in the East...” thereby clearly outlining the underlying presumption of the policies of late nineteenth century.¹⁵⁵

The whole process demonstrates a continuous loop of intervention—sometimes approached with caution, sometimes without. Whereas from Bentinck till Dalhousie, there was a distinct strand of caution as attested by Sati and the framing and passing of the Indian Penal Code, Dalhousie’s approach was somewhat more ruthless and on the face as a result of which his Widow Remarriage Act passed in 1856, stirred a hornet’s rest in attracting a barrage of criticisms from the native society. Post-Revolt there was a declared reversion to caution and respect for customs and usages, but to equate caution with non-interference would be a travesty of truth. It is true that in treading into the domestic sphere, post-Revolt, the government did pay heed to the native voice and pruned many of its proposed measures so as not to incur the wrath of the indigenous people. But the very fact that they showed the temerity of delving into issues, considered sensitive to the natives, in the years following the Revolt invalidates the non-interventionist argument.

Around 1772, the then governor of Bengal Harry Verelst, raised a very relevant question, “Shall we disregard the condition of a wife, incapable of governing herself?”¹⁵⁶ There was no clinical break from this approach. Even at a time when the watch and wait policy was adopted in the 1880s, legal adviser to the Viceroy’s Council, C.P. Ilbert, declared, “The British Government of India has, by its Regulations, Acts, and Codes, set up a standard of morality independent of, and in some material respects differing from the standard set up by caste; and

¹⁵⁴ *The Sessional Papers of the House of Lords for the Session 1856*, Vol. XIII, “Minute by the Marquis of Dalhousie, dated the 28th day of February 1856, reviewing the Administration in India, From January 1848 to March 1856”, p. 45
¹⁵⁵ Montgomery Martin, op. cit., p. 293
the former standard is slowly but gradually tending to supersede the latter.”¹⁵⁷ Thus an assessment of some of the landmark acts passed during the given period proves a reification of ideological underpinnings of the first half of the nineteenth century and herein one can trace the continuity factor embedded in the legal history of nineteenth century colonial India.

¹⁵⁷ Home Public, A Proceedings, 131—138E “Infant Marriage and Enforced Widowhood among Hindus in India”, November 1886, NAI
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