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MADRAS RECORD OFFICE.

Government of Madras.

JUDICIAL DEPARTMENT.

G.O. No. 441-42

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6TH MARCH 1891, No. 441, JUDICIAL.

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

READ—the following papers:—

From the District and Sessions Judge, Chingleput, to the Chief Secretary to Government, dated Chingleput, 28th January 1891, No. 141.

With reference to G.O., dated 20th instant, No. 124, Judicial, I have the honor to state that, in my opinion, the proposed alteration in the law is very desirable. The only question is whether the raising of the age of consent to 12 years is sufficient. As appears from the letter of Surgeon-Major B. Gupta printed at page 46 of the Supplement to the *Gazette of India*, dated 17th instant, the percentage of girls in this country who menstruate before the age of 12 years is under 40; and as stated by Dr. Joubert in his examination as a witness in the case of *Queen-Empress versus Harree Mohun Moytree*, I.L.R. 18 Calcutta 45 (at page 56), commencement of menstruation is only one of the early steps towards the attainment of puberty, which "is not generally attained upon menstruation, but subsequently," and even though the female may have then become capable of conception and child-bearing, some years more must elapse before she becomes sexually mature and fully fit to become a mother. Such is, I believe, the opinion of men qualified to give an opinion on the subject. It is, however, hopeless in the present state of civilization in this country to do all that may be desirable to benefit the community. All that can, and doubtless should, be done is to see that young and helpless girls are not tortured and put to premature and unnecessary suffering in violation of the people's own shastras—*vide* Manu, Chapter XI, 59 and 171—and as, from all accounts, the great majority of girls in this country do not first menstruate till between the ages of 12 and 13, the latter should, I think, be the lowest age of consent in any case, while in cases in which the catamenia have not commenced before the age of 13, I would fix the date of consent at the date of first menstruation and make sexual intercourse prior to that date penal.

2. The subject is not one of any special delicacy in this country, where the "flowering" (as it is called) of girls is published to relations and friends, who are invited to entertainments in honor of the occasion.

(Signed) J. W. BEST,
District and Sessions Judge.

From the District Judge, Coimbatore, to the Chief Secretary to Government, dated Coimbatore, 2nd February 1891, No. 123.

As requested in G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to express my opinion upon the Bill referred to therein.

2. There seems to be room for doubt whether such legislation is required for this Presidency; indeed, I am assured that there is already on foot a social movement among educated natives which will tend to reform from within the evil, which is admitted to exist, although to a much less extent than has been proved in Bengal.

3. These reformers, however, ought to recognize the fact that the legislation contemplated by this Bill must materially assist their efforts.

4. That such a measure is urgently necessary for Bengal, no one who has read the information collected by Sir Stuart Bayley can for a moment doubt. The only question is whether the age fixed in the Bill should not have been at least 13, instead of 12, but, at any rate, it is a step in the right direction.

5. That there will be many prosecutions under the new Act, I do not for a moment suppose. Experience (*actual*, I mean, and not merely on paper) as a District officer teaches that such matters very rarely come before the courts. It is well known that rape is a frequent element in so-called dacoities, but has seldom do we find any evidence of such violence put forward at the trial.

6. The great advantage of such a measure as the Bill under consideration is that it strengthens the hands of those who wish to fight against so terrible an evil in their own families, against those members thereof who are in favor of perpetuating it; and, as the education of girls proceeds, it will arm the hitherto defenceless child-wife against a brutal and cowardly husband. I should hope that teachers in girls' schools will not fail to put this weapon into the hands of their pupils.

7. The legislature has undoubtedly removed one possible objection to the proposed measure by making the offence "non-cognizable." It has been suggested to me that another safe-guard might be found in providing that the complaint must in the first instance always be laid before the District (or Divisional) Magistrate, whose sanction should be a necessary preliminary to its entertainment. Such a suggestion, no doubt, argues a distrust of the native Sub-Magistracy. I may, therefore, mention that it came from a native gentleman, and was quite spontaneous.

(Signed) G. D. IRVINE,
District Judge.

From M.R.Ry. P. CHENTSAL RAO, C.I.E., to the Chief Secretary to Government, dated Mysore, 2nd February 1891.

In reply to G.O., dated 20th January 1891, No. 124, I have the honor to state that the proposed Bill on the age of consent has my hearty approval, and may be passed into law with a slight modification which I shall notice further on.

2. Although the necessity for the law proposed is not very great in this Presidency, since consummation of marriage does not generally take place here before the girl is 12 years old, it cannot be said that there are no cases whatever in which consummation takes place earlier, and the evils of it are so great that it is only right that the law should interfere and stop it.

3. I do not think that the proposed law can be regarded as an interference with our religion, for, whatever might be the interpretation that could be put on the texts of the ancient Hindu law on the subject, it is certain that, in practice, the consummation of marriage at any particular age or period is not regarded as compulsory. I am aware that, even in the most orthodox Brahman families, consummation is often put off for 2, 3 and even 4 years after the girl attains her puberty, if the bridegroom happens to be of tender years, or there are other reasons to recommend the step, and no exception is taken to this by the society on the score of religion or custom.

4. But, I must admit that the general public opinion is against the Bill. Most of the men whom I have consulted on the subject have expressed their disapproval of the Bill, not because they consider that it interferes with their religion, but because they apprehend that over-zealous reformers or mischievous neighbours might needlessly drag members of respectable families before Law Courts and cause them annoyance. I think their apprehensions are well founded. It is not unfrequently that our young girls visit the houses of their husbands even before they attain their puberty and before their marriage is consummated, and their innocent visits might give a handle for prosecution. Moreover, the limit of age which the proposed Bill fixes borders so closely upon the age at which consummation generally takes place, that it would be possible for any one to dispute the age, especially as the general appearance of our girls up to a certain period of their life is such that they almost invariably appear to be much younger than they really are.

5. Under these circumstances, I think it to be desirable that the law should provide some safe-guard against needless prosecutions, and this end can be attained by making the permission of the District Magistrate or some other competent officer appointed by the Government on that behalf a condition precedent for prosecution. While such a safe-guard can in no way defeat the object of the Bill, will allay the fears of the public, and render the law more acceptable than it would otherwise be.

(Signed) P. CHENTSAL RAO.

From the District Judge, Bellary, to the Chief Secretary to Government, dated Bellary, 2nd February 1891, No. 1.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to state that no facts have ever come within my own experience of such an offence as is guarded against by the proposed alteration of the law.

2. It will certainly not constitute an interference with any religious practice. But if such a practice did exist, I should say that, religious or not religious, it should be suppressed without hesitation, as deserving even less consideration than the practice of sati.

3. Since this discussion has arisen, I have been but a short time in India, and have had but small means of ascertaining practices of different classes. I am not therefore in a position to say that it will, or will not, materially affect the existing practice of any castes. What I have generally heard is that it is not called for in this country, because such practices do not generally exist. But I am aware that girls are sent to their husbands' houses at a very early age in many cases, and that girls do certainly require this protection in Southern India.

4. After this amendment is made—if it be made—I do not expect that cases will come into court, or, if they do, it will be but rarely; such matters can generally be hushed up. But it will certainly put a check on the tendency to hurry on consummation by attaching a certain risk to those concerned in it, and will tend to establish a more healthy opinion and practice.

5. I have, I think, stated my experience in the first paragraph too broadly. I mean that I have not known cases of death or serious injury. I do not mean to say that girls are not taken to their husbands when quite immature and unfit for marriage. That is the case. Girls should be protected from such constitutional injuries as much as from any others.

(Signed) H. T. KNOX,
District Judge.

From the Session Judge of Madura, to the Chief Secretary to Government, dated Madura, 2nd February 1891, No. 58.

Referring to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to state that, beyond expressing approval of the proposed alteration in the law, I have no opinion to offer on the provisions of the Code.

(Signed) T. WEIR,
Session Judge.

From the Acting District Magistrate, Tanjore, to the Chief Secretary to Government, dated Tanjore, 4th February 1891, No. 25-C—Mag.

I have the honor to reply to G.O., Judicial Department, of 20th January 1891, No. 124, asking my opinion on the provisions of the Bill to amend the Indian Penal Code and Code of Criminal Procedure (1892).

2. My own opinion is—as may be supposed—that even 12 years is much too low an age for a woman, married or not, and consenting or not consenting, to commence sexual intercourse.

3. As regards local public opinion, the time allowed to answer the reference is far too short for me to arrive at any understanding regarding it. The three Deputy Collectors were consulted demi-officially. Mr. Khadir Navaz Khan is “strongly in favor,” considering that, even when puberty arrives earlier than 12 years, the advantages of waiting far outweigh the inconveniences. Mr. Krishnasami Aiyar would substitute puberty in section 375 as the age under which intercourse would become rape, instead of a distinct year term, believing this would serve the “laudable” purpose of Government and would not affect the religious feelings and customs of the Hindus. Mr. Pattabirama Pillai is of opinion that, “in the cause of humanity,” Government should interfere in this matter, as it has done with *Sati*, but acknowledges that orthodox public opinion is strongly against the Bill. He is also afraid that, if the Bill is passed, it will either be not enforced or become mischievous in the hands of evil-disposed and low-paid officials, unless and until birth registers are made reliable; and proposes the Bill should state who is to prosecute on behalf of a child-wife, that provision should be made for compounding the offence, and that the maximum term of punishment should be three years’ rigorous imprisonment. He also states that the subjecting a woman to medical examination is most abhorrent to a native in the case of any prosecution for rape.

4. It seems to me also that there should be distinct provision made as to who is to take proceedings. If confined to Magistrates of the first class, they might be trusted to act on apparently reliable information, from duly-qualified medical men or from other sources. If action or inquiry occurs otherwise, much trouble may be unnecessarily caused to families.

(Signed) J. THOMSON,
Acting District Magistrate.

From the Hon. MIR HUMAYUN JAH, Bahadur, C.I.E., Madras, to the Chief Secretary to Government, dated South Adyar, Madras, 5th February 1891.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, furnishing copy of a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, I have the honor to submit that there is not the slightest doubt of the immense good the raising of age from ten to twelve years will afford among a large number of people who happen to be away from the influences of civilization and enlightenment, and among whom any amelioration in the matter, however desirable, is not likely to take place without legislation.

2. An appreciable modification of the present law will be effected, as it is now proposed to take out of the hands of the Police the offence described in the first direction will be to make the above-described offence punishable, not as for rape, but as for hurt or grievous hurt only. If this be agreed upon, I am of opinion it will obviate to a very great extent all objections and opposition raised against the Bill on the ground of its interference in religious rights and social customs of the people.

(Signed) MIR HUMAYUN JAH.

From M.R.Ry. A. SASHIAH SASTRI, C.S.I., to the Chief Secretary to Government, dated Kumbakonam, 5th February 1891.

I have the honor to acknowledge the receipt of G.O., dated 20th January 1891, No. 124, Judicial, and in compliance with it to submit the following observations.

2. I concur in the object of the proposed amendment of the law and the provisions by which it is proposed to attain it, with one modification, viz., that in

the proposed exception in section 375 of the Code, I would add after the words “the wife not being under twelve years of age” the words “or the wife having attained puberty before that age.”

3. On mature thought, I cannot help coming to the conclusion that the raising of the age to 12 without making an exception in the case of girls attaining puberty before that age would amount to serious interference with customs, rules and practices which unfortunately are so closely interwoven with religious rites and beliefs of the Hindu nation in the matter of marriage institutions that it is impossible to deal with them separately without doing violence to widely-spread notions or deeply-felt feelings, however unreasonable or even irrational they may seem in the eyes of Englishmen brought up in beliefs, notions and feelings, the effect of a different education and of the teachings of a different religion and in some measure the resultants of a different climate.

4. The leading idea of the Hindu legislators—at least the majority and the most accepted of them—seems to have been that no girl should be detained or withheld from her betrothed husband a day after nature has proclaimed her physically qualified for maternity. It is a notorious fact that in the tropics, puberty is attained very often at the very early age of 10 and more frequently still between that age and 12. So it becomes a paramount religious duty of the parents to deliver up the girl at the earliest possible date after she attains woman’s estate. The parents are thenceforward absolved from all responsibility of guarding the purity of the girl, and they, as well as those on the husband’s side, most eagerly look forward to the birth of a grandchild, the sight of which gives them both a step in heavenly bliss, to say nothing of the spiritual blessing of a child at the earliest opportunity to the husband, who might be deprived of it if, perchance, he dies in the interval between the dates of his wife’s puberty and the attainment of her twelfth year. This reason, which underlies the whole question, will account, if I have expressed myself clearly, for the great opposition which is manifesting itself all over the country, as interference with the religious customs and practices non-interference with which has been guaranteed to them by the Queen’s proclamation.

Note.—Most probably the framers of the code who fixed the age at 10 must have followed the generally accepted dictum which is contained in the text:—

“Ashta varsha, bhavet kaniya
Nava varshatu rohini
Dasa varsha bhavet gauri
A ta urdham rajasevala.”

which, translated roughly, means a girl becomes a kaniya at 8, a rohini at 9, a gauri at 10, after that she becomes a rajasevala or possessor of the signs of puberty or menses.

5. The argument *per contra* that the substitution of 12 years for 10 is a very simple matter which ought not to provoke so much opposition from the people at large who never showed any such signs of opposition at the passing of the Code which fixed the age at 10, is scarcely to the point, for very few girls even in Bengal attained maturity at that age, and the law practically had thus no operation and consequently elicited no opposition. The case is entirely different now, and the threatened danger of interference is real and serious.

6. In the Statement of Objects and Reasons it is stated that the evil of the existing law arises from the circumstance of its favoring the premature consummation of marriages by adult husbands with children who have not reached the age of puberty. I take this statement as entirely conceding my point, and fully justifying the modification which I suggest. I feel confident that, if it is adopted, the opponents of the measure will be entirely disarmed.

7. I think the law so amended could be worked with very much less friction, for I believe that the fact of puberty can be much more satisfactorily proved than the fact of age. There are so many feasts and ceremonies by which the attainment of puberty is celebrated among all classes and castes all over India that abundant and reliable evidence of the fact would be always available, while as to the fact of age such evidence must be often most unsatisfactory, inconclusive and often involving medical examination, which is so harrowing to the popular feelings of the nation.

(Signed)

SASHIAH SASTRI.

From Rai Bahadur V. KRISHNAMA CHARI, to the Chief Secretary to Government, dated Madras, 5th February 1891.

I have the honor to acknowledge the receipt of G.O., No. 124, of the 20th ultimo, with a copy of the Bill to amend the Penal Code and the Code of Criminal Procedure, and to submit my opinion as follows on the proposal to raise the age of consent of a girl-wife from 10 to 12 years.

2. Early betrothal or marriage is no new institution in Hindu society. According to the Shastras, a girl is bound to marry before a certain age, and the marriage is of the nature of a sacrament; but the consummation of that marriage with one's wife before she has arrived at womanhood is forbidden, and as a rule, a girl is not allowed to go and live in her husband's family by her parents or guardians until puberty is attained or rarely till a year or two after, or until she is considered fit to discharge the duties of a wife and householder. The criminal records of the Madras Presidency do not appear, so far as I am aware, to furnish any examples of the occurrence of such an offence as that which the proposed Bill is intended to prevent and punish. As Secretary to the Victoria Hospital for Caste and Gosha Women in Madras, I have searched in vain the registers of patients treated during the past five years for a single instance of the occurrence of such an act of cruelty to any child-wife; and the lady doctor in charge of this hospital tells me that no such case has ever come to her notice.

I regret, therefore, that I cannot support the assertion of the overzealous and impatient reformers that the Hindu and Muhammadan families of this part of India feel the necessity for the proposed legislation.

3. If, however, the cruel and disgusting practice referred to in the Statement of Objects and Reasons annexed to the Bill prevails largely in some other parts of India, no Hindu who has learnt to exercise his reason freely can question the right of the legislature to provide against the practice, if possible, wherever it exists, and where grievous suffering or permanent injury to health is found to be the result.

4. But the question is whether the proposal to fix 12 years as the age of consent unconditionally is at all a suitable remedy for the practical evils complained of in the Statement of Objects and Reasons. The Government has, it is true, repudiated all intention of interfering with the religious customs of the people, such as the right of betrothal or marriage before a girl is 12 years old, and has withdrawn the offence of premature consummation with one's wife from the cognizance of the ever meddling policeman; but I am not at all sure that fixing the age of consent at 12 as the average age for matrimonial intercourse is any protection to the poor girls who have not attained puberty, though they have completed that age, and who form the bulk of the child-wives. The object of the Government being, I believe, to prevent the consummation of marriage before *puberty* and not merely before the hard-and-fast limit of the 12th year of a girl's age, the course of legislation now proposed will not, I apprehend, reach the evil to the extent designed by the Bill.

5. Then again I fear, in common with others consulted by me, that 12 years is a very dubious age to fix by law, and is unfortunately too low a limit to prevent an inquiry inquisitorial in its character and the abuse of the law by malicious persons and hungry policeman. The proposed age is unlike the limit of 10 years in the existing penal law when a girl looks a mere child, or of 14 years when puberty will have been reached and evidence of maturity will be visible. It is just the age when a malicious neighbour or mischievously-disposed person can easily raise the suspicion at that stage of a girl's life that she is under 12 years of age and lead the policeman to distrust the girl's or husband's friends, though they might swear that she is just over 12 years. False evidence will easily be produced, seeing that horoscopes are not believed now-a-days; and I fail to see how the policeman and the magistrate who have no birth registers or other reliable evidence of age to go upon could refuse to take cognizance of the complaint preferred, and how the mischievous attempt, to annoy an innocent neighbour and compel the appearance of his wife and daughters and daughters-in-law at the police-station or before a magistrate on the very day appointed

for the nuptial marriage—an act most dreaded by the femalehood of India—is to be provided against, or how unjust convictions or unfair acquittals are to be avoided, or how bribery and corruption are to be checked.

The age of 12 is just the period of a girl's life open to doubt and dispute as to maturity; and to fix the age of consent at so low a figure will, I fear, open the door to that vexatious and dangerous interference of the penal law and police with the peace and domestic concerns of respectable families which the Government wish to prevent. It is superfluous to add that such interference with the personal liberty of the young people will irritate their parents and friends and raise suspicions which it will be afterwards difficult to allay. When the common people of a village or street in a town are excited by the exposure of an innocent girl and her husband or the miscarriage of justice, nobody can tell what an ignorant crowd of easily-excitabile people may do. I beg that I may not be considered an alarmist if I say that it is not impossible for an excited mob in India to do something like what Wat Tyler, Hob Carter and Tom Miller of English history did five centuries ago in connexion with this very question of a girl's age.

6. Such being the position and the possible consequences of the proposed legislation to interfere in the domestic concerns of the conservative millions of India, it seems expedient to alter somewhat the course of legislation in order to attain the benevolent object of Government to prevent the consummation of marriage before puberty and injury to health.

I beg respectfully to suggest for consideration whether this declared object of Government might not be attained—

(1) by fixing the age of consent at 14 years as the most approximate age of puberty in this country involving little inquisitorial enquiry and less chance of a doubt at the first look;

(2) by introducing at the same time a saving clause with respect to wives who grow up and attain that condition before that age; and

(3) by providing a system of enforcing accurate registration of births in every town and village and even the date of arrival of a girl at womanhood, which is regarded by the Hindus as the girl's second birth and which they celebrate as a festive occasion. The production of extracts from public registers of such domestic events will serve as the best evidence of age when any doubt should arise at the time of consummation, superseding the necessity of the appearance of women before the police and the magistracy; and I am strongly inclined to think that a Bill based on these lines will generally be welcomed, instead of being regarded, like the present Bill, as "a piece of hasty legislation" involving vexatious and dangerous interference with the religious and domestic concerns and the privacy of native families all over the country.

(Signed) V. KRISHNAMA CHARI,

From the Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 6th February 1891, No. 355.

With reference to G.O., dated the 20th ultimo, No. 124, Judicial, forwarding, for the opinion of the Honorable the Judges, a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, I am directed to forward transcripts of minutes recorded by the Honorable Justices Parker, Wilkinson and Handley. The Honorable Mr. Justice Shephard has not made any remarks.

2. Any minutes that may be recorded by the Honorable the Chief Justice and Mr. Justice Muttusami Aiyar will be duly submitted.

(Signed) H. W. FOSTER,
Registrar.

ENCLOSURE.

Minutes.

Mr. Justice Parker.—I would point out that if the clause marked "fifthly" is amended by the substitution of the word "twelve" for the word "ten," the clause itself becomes unnecessary, since by section 90, Indian Penal Code, a consent by a person under twelve years of age is not such a consent as is intended by any section of the Penal Code, and therefore the clause "secondly" (without her consent) will cover the case.

As to the second amendment—the substitution of the word "twelve" for the word "ten" in the exception to section 375—I observe from the Statement of Objects and Reasons that the intention of the proposed alteration in the law is to prevent the premature consummation by adult husbands of marriage with children who have not reached the age of puberty. That object is in itself desirable, but inasmuch as there are many cases in which girls in this country attain the age of puberty before twelve years of age, the effect of the alteration will be to make punishable acts of intercourse to which there is no objection on the ground stated. I would therefore amend the exception—when "twelve" has been substituted for "ten" in the fifth clause of the definition—by enacting that "sexual intercourse by a man with his own wife is not rape provided that the wife has attained puberty." Under section 221 of the Criminal Procedure Code the burden of proof would fall upon the husband. I approve of the proposed amendment to the Criminal Procedure Code.

If the law were so amended, the effect would be that sexual intercourse by any man with a girl under 12 years of age would be rape unless the man were the husband of the girl and able to prove that the girl had attained puberty. If the intercourse took place after the girl attained the age of 12 years, but before attaining puberty, the husband might still be punishable if grievous hurt were caused thereby—*vide* I.L.R. XVI, Calcutta, 49.

In giving this opinion I have assumed that the object of the Legislature is limited to that described in the Statement of Objects and Reasons, viz., the prevention of premature consummation of marriage with wives who have not attained puberty, and the alteration I have suggested is designed to prevent the imposition of penalties upon innocent persons while effecting this object. The question of fixing a legal age for marriage is a different one, but however desirable the discouragement of early marriages may be, it is no part of the avowed object of this Bill. I do not therefore discuss the question as to how far the proposed alteration in the law is a legitimate or proper means of attaining that end.

Mr. Justice Wilkinson.—I see no objection. I only wish the Government of India had been able to raise the age of consent, as it is called, to 15. But the alteration brings the law as to rape into accordance with section 90.

Mr. Justice Handley.—The alteration in the law is eminently desirable, and the Bill seems to carry it out in the simplest manner possible. I have no other observations to offer on the Bill.

From M.R.Ry. S. SUBRAMANIAM IYER, to the Chief Secretary to Government, dated 7th February 1891.

In submitting my opinion on the Bill for the amendment of the Penal and Criminal Procedure Codes, I do not think I need dwell at length on the question as to whether it is desirable or expedient to introduce the changes proposed in the existing law. The Bill has been considered from every standpoint of view, and almost everything that could be said for and against the measure has been advanced either from the platform or through the Press. On the one hand, exception has been taken to the Bill from social, political, and religious points of view, and on the other, it has been condemned as not going far enough and as not being calculated to root out altogether the existing evil. But amidst such diversity of opinion, it is rather significant that, except in a half-hearted way, the existence of the vicious practice so severely and so justly condemned by medical authorities is not denied. It must be conceded that the practice exists in more or less degrees throughout India, though in Bengal it has attracted greater attention. It may be that the grosser form of the practice—intercourse with the girls before any of the signs of puberty has appeared—does not exist in this part of India to any very appreciable extent; but I do not think it will be possible to contend that intercourse with girls under 12, who have begun to menstruate, is not common everywhere. A recent set of statistics, speaking roughly, at least, about 25 per cent. of the girls in this country menstruate before they are 12 years of age.

I have heard or read nothing up to now in regard to this question to make me hesitate to say that some change in the law is imperatively called for. On that point, I entertain not the slightest doubt, though I am not so clear as to what changes ought to be made, and more so as to how they are to be worked. The consideration of the question is complicated by the social habits and customs of the Hindus and the great facilities that exist among them for a close association of the husband and the wife before the latter is fit for cohabitation. The people have never up to now been taught to regard intercourse by a husband with his wife, though she is under 12, as premature; but, on the other hand, circumstances have tended to foster a contrary notion. Therefore, it is not surprising that the proposed change in the law in so far as it affects the husband should be viewed with disfavor by the people. If with this it is remembered that the proposed change will have the effect of placing the husband in the same category with a stranger who wantonly ravishes a girl under similar circumstances, the opposition to the Bill will become perfectly intelligible. There has been, beyond doubt, some misapprehension as to the true scope and object of the Bill, which probably may account for the opposition to it in certain quarters; but, as I understand it, the real objection lies in the fact that the legislature has not taken sufficient note of the peculiar social condition of the people and the almost fatal facilities that exist in a native household for the commission by the husband of an act which till now is not only not an offence of any sort, but which has also not been regarded as anything improper. This act hereafter will, however, be no less an offence than "rape," with its appalling sentence of transportation for life or rigorous imprisonment for ten years. However desirable it may be, in the general interests of the community, to visit even the husband, when he happens to be the transgressor, with a severe and deterrent punishment, it is extremely doubtful whether it is at all expedient or justifiable to introduce so great a change as that proposed, and for which, by their past history and associations, the people are utterly unprepared. The time may come—perhaps it is not far distant—when a more thoroughgoing measure might be introduced without arousing any feeling of alarm in the country; but till such time comes, it behoves the legislature to make only such changes as are not likely to cause so severe a shock to the feelings or even the prejudices of the people. I feel confident that, if provision be made for treating the transgression by the husband not as rape, but as a less heinous offence with a less severe punishment, much of the opposition to the Bill will cease. It should not be forgotten that the consequence of the incarceration of the husband in jail is more far reaching in this country than in any other, owing to the peculiar relation existing here between man and wife, and that the punishment of the husband is nearly as much a punishment on the wife.

The inquisitorial nature of the enquiries, which would necessarily be required to be made in bringing the offence to light, and the apprehension that they may be misused, have, of course, influenced the opponents of the Bill to exaggerate some of the evils that are likely to flow from the rigorous working of the law. I am not prepared to say that these apprehensions are altogether unfounded and it would be well to provide sufficient check against a too zealous working of the law. It is, no doubt, provided that the offence is a non-cognizable one, but does that go far enough? I think that something more should be done to check indiscriminate and hasty prosecutions, ill-advised and ill-considered enquiries and examinations, if the provisions of the Bill are to be worked with benefit to the people; otherwise the object of the legislature would be defeated, and, instead of the people loyally co-operating with the authorities to enforce the law, they would have recourse to every possible makeshift to evade enquiries, suppress facts and otherwise elude justice. It is far better to pass a mild law and work it effectively, than to pass a stringent one which could not be worked at all. These are the real and substantial objections to the Bill as it stands. Some stress is, no doubt, laid on the religious injunction that marriage should be consummated on the fourth day after the first menstruation, and it is contended that any rule of law to the contrary will have the effect of virtually forcing the people to violate the Shastras. Upon a full consideration of the point, I am constrained to observe that there is not much in the objection. The rule is more honored in the breach than in the observance, and, except in rare instances, marriage is not consummated till 3, 4 or 6 months after the period.

As to the objection that, as long as the sentiments and usages of the natives of this country continue what they are, the law would be a dead letter, it is sufficient answer to say that, even if the law is likely to be abortive otherwise, it would undoubtedly strengthen the hands of parents and guardians that wish to do their duty by their daughters and female wards, but who are now entirely powerless. This will not be considered as an imaginary and intangible benefit by any one who is acquainted in any degree with the power exercised by sons-in-law in Hindu families and how on occasions they insist upon their girl-wives being sent to them directly they come to know of the first appearance of menstruation. I am fully persuaded that the law will have the further effect of deterring most people from consummating the marriage till after the girls are well over 12 years old, rather than subject themselves to the risk of a possible prosecution and its many attendant unpleasant consequences to all the parties concerned.

To conclude, I would say that the principle of the Bill is unobjectionable, the necessity for it is imperative, but that it is defective, firstly, because it does not sufficiently recognize the difference between the husband of a girl and a stranger who has intercourse with a girl under 12, and, secondly, because it does not provide sufficient check against indiscriminate and ill-advised prosecutions. The former can be a distinct offence from "rape" with a maximum punishment of two years' imprisonment, or fine or both; and the latter, by making the offence triable by a Court of Session or a first-class magistrate and making it obligatory on the complainant to obtain the sanction or certificate of a responsible officer, whom the Government may appoint in this behalf before the complaint is proceeded with. It is only right to observe that, simultaneously with the passing of the law, it is not improbable there would come into existence Associations and Sabhas under the auspices of social reformation for the purpose of initiating prosecutions and otherwise enforcing the law with vigour. It would be necessary, in some measure, to moderate the action of such bodies. That may not be necessary in the metropolis and other favorably-situated places; but it is not difficult to foresee that in certain localities without some restriction on the point, the law might be easily converted into an engine of oppression. I admit that it is not easy to lay down by law general rules on the point (so as to make them applicable throughout India) in order that practical effect may be given to the suggestion that the sanction or certificate of some officer of Government should be made a condition precedent to the prosecution of the complaint. I think, however, that the law may well reserve power to the Government to frame rules in the matter, should the necessity for the issue of any such regulations arise at any time in their opinion.

MADRAS,
7th February 1891.

(Signed) S. SUBRAMANIAM.

From ERNEST BARCLAY, Esq., Government Solicitor, Madras, dated 7th February 1891, No. 55.

ABSTRACT.—Forwarding the following opinion of the Advocate-General, dated 6th February 1891:—

[In the matter of the Bill to amend section 375 of the Indian Penal Code and the Code of Criminal Procedure, Schedule II, so far as it relates thereto.]

OPINION.

1. The proposed alteration deals only with the age of consummation and does not affect any religious principle or precept relating to the age of marriage. The religion of no section of the public can seriously be stated to be interfered with by raising the age of consent from 10 to 12 years.

2. There is great danger, however, that such a provision may be used for vexatious and grossly improper purposes. The working of it therefore must be entrusted only to those in whom the

public feel confidence. By withdrawing the offence now created from the cognizance of the police the Bill reduces the chance of improper interference with the domestic concerns of the people to a minimum.

3. I am in favor of the change and think that the safeguard provided by the Bill is sufficient for all practical purposes.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

From the Honorable V. BHASHYAM IYENGAR, B.A., B.L., Rai Bahadur, to the Chief Secretary to Government, dated Madras, 7th February 1891.

I have the honor to acknowledge receipt of G.O., dated 20th January 1891, No. 124, Judicial, and to express my opinion on the provisions of the Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, which accompanied the same.

The evil pointed out in the Statement of Object and Reasons does not, as far as my experience goes, exist in any appreciable degree in most parts of this Presidency. But if the evil is prevalent in other parts of India to an extent which calls for remedial measures, I see no valid objection to legislative interference in the matter by a suitable amendment of the law. I do not propose, and I think it needless to discuss the question, whether or not the existing provision of the law and, *a fortiori*, the proposed raising of the age of consent contravenes any precept of Hindu religion. Assuming, for the sake of argument, the existence of such a precept of Hindu religion, it is certainly one scarcely followed in practice. I very much doubt if instances will be found in which, as would seem to be enjoined by the alleged precept, marriages are consummated on the third day after the first menstruation. Such consummation seldom takes place before the lapse of at least six months after the said event, and, in the majority of cases, it is deferred for more than a year. It seems therefore unreasonable that any opposition should be raised to the proposed measure on the ground that it is an interference with the Hindu religion and opposed to the Proclamation of 1858. If the proposed measure were such, the existing provision of law on the subject is equally so in principle. And the same objection can be advanced, in some instances with much greater force, to a number of other provisions of the Indian Penal Code, the Code of Criminal Procedure and several other enactments of the British legislature.

If the age of consent under section 375 be raised to 12, the effect of it will only be that that section, like most other sections in which the absence of consent is an ingredient of the offence, will be governed by the general provision contained in section 90. There really seems to be no valid reason why an exception should be made in the case of sexual intercourse with a woman under any of the circumstances mentioned in section 375 by reducing the age of consent to 10. If a girl under the age of 12 cannot consent to part with her property without the recipient thereof becoming guilty of theft notwithstanding such consent, it does seem anomalous that she may nevertheless consent to the perpetration of an act probably far more injurious to her without the perpetrator thereof becoming amenable to the criminal law. While I fully approve legislative interference in view to deter person from having sexual intercourse with their wives when they are below a certain age—whether with or without their consent—I am nevertheless of opinion that the law ought not to treat such intercourse as rape and punishable as such. The principal ingredient of the offence of rape is the absence of consent on the part of the woman; and if she be below a certain age, her consent in fact is, in the eye of law, no consent at all. Under English law sexual intercourse with one's own wife is under no circumstances rape; and the exception to the section defining rape in the Indian Penal Code as originally drafted was in accordance therewith. The exception was subsequently limited to cases in which the wife is over 10 years of age. The result of this change, which was effected by an amendment of the exception clause, is that sexual intercourse with one's own wife, even against her will or without her consent, is no rape if she be over 10 years

of age, but that it is rape if she is under 10 years of age. Such a distinction, resting as it does not upon the presence or absence of consent, which, as already stated, is the essential ingredient of the offence of rape, but simply upon the age of the wife, is, so far as the definition of the offence is concerned, anomalous and illogical. If the act of sexual intercourse with one's own wife when she is under a certain age ought, for purposes of punishment, to be dealt with as rape and visited with transportation for life, or imprisonment of either description for a period which may extend to ten years, an anomaly or want of scientific precision in the definition of the offence may be overlooked. But in my opinion such punishment is not only too severe and uncalled for, but also undesirable when it is borne in mind that, among Hindus in particular, it will practically operate as a punishment upon the wife herself for whose protection principally the provision of the law is intended. Public sentiment will naturally be strong against the infliction upon an erring husband of a sentence so severe and at the same time so prejudicial to the interests of the wife herself. The result will be a strong disinclination on the part of the relations and neighbours of the parties concerned to give any information or evidence which would lead to the detection and successful prosecution of the crime. This will more or less be the case even if the severity of the sentence be considerably reduced. Though the age of consent be raised, the law, so far as regards husband and wife, will practically remain a dead letter if the offence were punishable as rape, especially as the changes proposed in the schedule to the Code of Criminal Procedure will render the offence in such a case a non-cognisable one. The severity of the sentence is also uncalled for, because in cases where the husband has several intercourse with his wife under circumstances which would make him guilty of culpable homicide or of causing grievous hurt or of causing death or grievous hurt by a rash or negligent act, he would be liable to the punishment prescribed therefor (see *Queen-Empress versus Hurree Mohun Mythee*, I.L.R., Cal., vol. XVIII, page 49). Where the offence is committed by sexual intercourse with one's own wife, the offender is likely, in most cases, to have repeated it; and as each such intercourse will constitute a separate and distinct offence, he might, in cases where severity of sentence is called for, be proceeded against under section 35 of the Code of Criminal Procedure and visited with imprisonment which may extend to 14 years. The object of the law will be equally, if not more effectively, attained by constituting the offence in question a distinct one from rape and annexing a punishment of imprisonment of either description for a term not exceeding two years or fine, or both. Liability to rigorous imprisonment for 2 years will be a sufficient deterrent as far as punishment can be a deterrent against the commission of a crime of this nature. If such punishment be not a sufficient deterrent, neither will the severer punishment of transportation for life or imprisonment for 10 years be a sufficient deterrent. The proposal which I make to constitute the offence a distinct one from rape and prescribe a comparatively moderate punishment therefor will, I believe, if adopted, considerably minimise the opposition to the measure as proposed, which exists in many quarters and which certainly cannot be characterised as unreasonable. The object aimed at by the legislature is also likely to be better attained by the suggested change than by the amendment of section 375 as proposed by the Bill. The elimination from the definition of rape of sexual intercourse with one's own wife is a proposal which I also advocate as based on sound principles of criminal law; and the salutary and necessary changes proposed by the Bill in the schedule to the Code of Criminal Procedure by which the offence in question would become non-cognisable and bailable, and one for which summons shall ordinarily issue in the first instance, would be more in accordance with the reduced punishment above suggested than with the severe punishment retained by the Bill. I would, however, retain the Court of Sessions as the Court by which the offence is exclusively triable.

Section 1 of the Bill proposes to substitute the word "twelve" for the word "ten" in the clause marked "fifthly" in section 375. Having regard to the admirable precision which characterises the drafting of the Code and to the provisions contained in section 90 thereof, there is no object in retaining the said clause at all when the legislature resolves not to restrict the application to section 375 of the general provision as to the age of consent contained in section 90. I would also amend the exception by expunging from it the words "the wife not being under 10 years of age." Thus amended, the

exception will be as it existed in the original draft Code. I would propose the insertion of a new section to the following effect next after section 376:—

"Of unlawful sexual intercourse" with one's own wife.

376-A. Whoever voluntarily has sexual intercourse with his own wife, the wife being under 12 years of age, shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine which may extend to 1,000 rupees, or with both.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence described in this section.

Under section 375 as it now exists and as it is proposed to be amended by the Bill, the onus of proving that the wife is over the age of 10 years or 12 years, as the case may be, will be on the husband (accused) in cases in which he is not in a position to plead or establish consent in fact on the part of his wife though if there were such consent in fact the onus will be upon the prosecution to establish that the wife was below the said limit of age and that therefore there was no consent in law (section 105, Indian Evidence Act). If the offence in question be dealt with as a distinct offence in a separate section as above proposed, the onus of establishing the age of the wife will be, as it ought to be, on the prosecution, whether the husband had or had not the consent of the wife. It is true there is nothing novel in the principle of the Bill and that the principle involved in it was affirmed—and rightly affirmed—years ago in the Indian Penal Code by reason of the general practice obtaining in this country of marrying girls when they are children. The change now proposed is no doubt only to raise the age of consent in section 375 from 10 to 12 or rather to remove the exception which, for the purposes of that section, was engrafted on the general age of consent fixed by section 90 by lowering it from 12 to 10. But, for practical purposes, the change is momentous, because it considerably widens the sphere of operation of the principle—a sphere which is now extremely narrow. It is therefore necessary that the rigor of the law should be softened in the manner indicated above, and that the legislature should also provide special safeguards against vexatious prosecutions and frivolous proceedings, as the matter is one which so materially bears upon the relationship of husband and wife—a relationship which, among Hindus, is regarded not as the result of a contract, but of a sacrament. The changes proposed in the schedule to the Criminal Procedure Code afford in a great measure such safeguards. But it will be desirable that an additional safeguard be also provided in respect of the offence in question shall be instituted in the territories or any part thereof subject to such Government without the previous sanction of such Government or any officer empowered in that behalf by such Government.

If in the working of the proposed law it should be found that in particular local areas a general feeling of insecurity or alarm is caused by vexatious and frivolous prosecutions or the formation of private and voluntary agencies or associations for instituting and conducting prosecutions, such a provision will enable the Government concerned to check such prosecutions and allay such feelings by exercising the power conferred by it. I am not to be understood as deprecating the formation of such agencies and association in the cause of social reform. But any over-zeal, which is not unlikely to characterise their proceedings, will be counteracted and checked if they have to obtain the sanction of some responsible official authority before instituting proceedings.

From the Honorable C. SANKARAN NAIR, B.A., B.L., to the Chief Secretary to Government, dated 10th February 1891.

It appears to be clear that premature consummation of marriages is "productive of grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they belong."

Though not extensively practised, early marriage and premature consummation take place to an extent that requires the interference of the legislature. When the Government see that some of their subjects are thus liable to grievous suffering and physical injury, it appears to be their plain duty to take steps to protect them from

that injury. Abstention in such circumstances is abdication of the functions of Government. A Government that declare their inability for *any* reason to protect *any* subject from physical violence or to punish those guilty of such violence are only declaring their own unfitness for their legitimate task.

The Proclamation does not stand in their way. The protection of minors is a duty which the Government cannot renounce, nor do I regard this piece of legislation as a departure from the principles of religious neutrality observed by the Government. Every man is entitled to follow his own religion, but he is not entitled, under the sanction of religion, to interfere with the rights of another, whether with or without consent, when such other individual is a minor so long as such interference is "productive of grievous suffering and permanent injury."

The practice of early marriage is followed more by Brahmins than any other caste, and I believe I am right in saying that early marriage is not regarded generally by the non-Brahmins as compulsory according to the Hindu religion, and in this Presidency all the Brahmins are not agreed that early marriage is necessary. The text of Manu that requires a man to wait, if needs be till death, has still the force of living law among Nambudiri Brahmins who not only do not consider early marriage necessary, but often allow their females die unmarried. In these circumstances, it appears to me to be incorrect to say that early marriage is a part of Hindu religion as proved by custom. The preponderance of authority also is in favor of that view.

I have also to point out that the alteration in the Criminal Procedure Code withdrawing the offence when committed by a *husband* on his *wife* is not likely to have any application to the Nairs of Malabar among whom the customary ceremonies, though followed by cohabitation, have not been recognised as constituting a valid marriage in a court of law, but, I do not think any alteration in the Bill on that account is necessary.

In conclusion, I have to add that I am not satisfied with the reasons for raising the age of consent to 12. If the medical authorities may be followed—and their opinion ought to be followed in this matter—14 would seem to be the proper age.

From the Collector of Kistna, to the Chief Secretary to Government, dated Camp, Jaggayapet, 9th February 1891, No. 10—Extra.

In reply to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to express my opinion that the proposed alteration of the law is a useful step in the direction of a most necessary reform.

2. The raising of the age of consent to 12 in the case of married girls is perhaps as great a change in the law as it is wise to make at present, but we should, I think, of consent should be raised in the case of married girls to the age of 14, when puberty, and not merely menstruation, has been reached.

3. It is generally agreed that the desire to consummate marriage with immature girl-wives is due, not so much to the desire of the husband, as to the persuasions and suggestions of the old women of the family, who are both averse from change and anxious to see children of the next generation. The effect of the proposed change in the law will, in all probability, be to enable the men to check the initiative of these mischievous members of the family by significant warning. The removal of offences against the altered law from the cognizance of the police is desirable.

4. It is recognized by educated natives that premature consummation of marriage is not unfrequently the cause of the mother's death or serious injury at first confinement, while the sterility of women is attributed to the same cause. It must be added, however, that the consummation of marriage before puberty is said to be the exception rather than the rule in this district.

5. I fully agree with the view that has been urged on me by several educated native gentlemen that, although 12 years may be fixed as the age of consent as regards man and wife, it is quite unnecessary to retain this limit in other cases. Fourteen should be the limit of the age of consent in all cases save that of a man and

his wife. There is neither religious nor social prejudice to be consulted here, and the State may unhesitatingly interpose to prohibit sexual intercourse until the age of 14 is reached when it is almost certain that the female has attained puberty.

(Signed) A. T. ARUNDEL,
Collector.

From M.R.Ry. A. SABAPATHY MUDALIAR, Rao Bahadur, to the Chief Secretary to Government, dated Bellary, 13th February 1891.

I have the honor to acknowledge the receipt of G.O., dated the 20th January 1891, No. 124, Judicial, and beg to state my views as follows:—

1. I agree entirely with the principle of the Bill.

2. As far as I believe and know, it does not interfere with the religious beliefs and customs of the people of this part of India to any appreciable extent. The benefits accruing from the proposed alteration in the law will far, I am strongly convinced, outweigh any inconveniences that may arise from the religious considerations so strongly and vehemently put forward by a number of people.

3. In this part of India, in the vast majority of cases, consummation of marriages does not take place before the girl is 12 years old. Among Brahmins and those who follow them in marriage customs, when a girl attains puberty before the age of 12, consummation is postponed for a year or more for the girl to be in a fit condition to enter the marital state, and in no case to my knowledge has there been any objection on the score of religion or caste, nor have the parties been subjected to any social or religious ostracism.

4. I very much regret that the age is not proposed to be raised to 14, and have all the opposition for, a more substantial reform, for, as it is now, the age of 12 is quite insufficient to fully attain the intended object among an ill-fed and ill-brought-up people like those of India.

5. I have read of suggestions from certain quarters that in the proposed alteration sexual intercourse should be permissible in the case of the husband if the girl, though under the age of 12, had attained puberty. The attainment of puberty at such an early age is a sure indication that the girl is physically weak, and such girls are the more entitled to be protected by the legislature.

Another objection against the above suggestion is to be found in the practical working of the law, for medical examination of the girl, which is so much abhorred, will become a necessity.

6. In regard to the punishment in the case of the husband, it must in my opinion be almost nominal. It should not far exceed a year's simple imprisonment with an alternative of fine. The present punishment is disproportionately and shockingly heavy, considering the current opinions among the people of this country.

(Signed) A. SABAPATHY MUDALIAR.

From the Honorable V. BHASHYAM IYENGAR, to the Chief Secretary to Government, dated Madras, 16th February 1891.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to submit the following in continuation of my letter dated the 7th instant. In the *Hindu* of the 9th idem a letter appeared in which attention was drawn to the prejudicial consequences that might result from the operation of the proposed law, in cases in which a wife may give birth to a child when she is between 12 and 13 years of age. I think the matter is one which well deserves the consideration of the legislature.

Instances in which girls become mothers at such an early age may no doubt be few, and when the proposed measure becomes law it may reasonably be hoped that they will become fewer still, and that the apprehension of this very contingency

happening would act as a deterrent against the husband committing the crime. But prosecutions in such cases, though few and far between, are sure to create great and widespread sensation by reason of their attendant circumstances. When a girl whose age is not more than 12 years and 6 months gives birth to a child, it is of course a certainty that the offence in question has been committed by some one — either the husband or somebody else. And as a general rule the prosecution will naturally be instituted against the husband, especially when, as is not unusual, the married couple are, even before the consummation of their marriage, brought up in the same family — either that of the wife or that of the husband. Apart from section 112 of the Indian Evidence Act, which I shall more particularly refer to later on, there can hardly be any doubt that even in such cases the onus will be, not on the husband to establish that he had no sexual access to his wife, but on the prosecution to establish that the husband had such access when she was under 12 years of age. (*Vide Bosville versus The Attorney-General*, Law Reports, Probate Division, Vol. XII, p. 177). The first step, therefore, which the prosecution will take in order to discharge its onus will be to cite the wife herself as the principal or the only witness in support of the prosecution. And certainly she is the most competent and in some cases probably the only available witness.

But one can hardly imagine a case in which a lady witness will be placed in a more embarrassing or distressing situation. If the truth were — as it probably would be in most cases of the kind — that it was the husband that had the sexual intercourse, she has to testify to it, with the almost certain knowledge of the husband being convicted on her evidence and subjected to severe punishment. But if it were otherwise and she makes up her mind to speak the truth, she will have to confess that her chastity was violated by a stranger or that she was unfaithful to her husband, one of the legal consequences of which will be forfeiture of her right of inheritance to her husband's estate. In the first case, there will be a strong temptation to save the husband by denying that he had any sexual intercourse with her and thereby bastardizing her child. And if she yields to this temptation, she has to account for the stern fact of her having a child, and cannot decline to answer the question as to who had sexual intercourse with her, if not the husband. It can hardly be denied that it will be simply cruel to place a tender girl on the horns of such a dilemma.

In such a case, even the position of the husband is, no doubt, one of great perplexity and embarrassment and one which may strongly tempt him to impute unchastity to his wife and bastardize the child. But this, of course, is unavoidable, and the husband is himself solely responsible for the situation in which he finds himself placed. At any rate, he, being the accused, has under law this decided advantage over the wife, viz., that he cannot be compelled to account for the birth of the child or answer any questions concerning the offence. Under the Indian Evidence Act, a witness is not excused from answering questions the answers to which may tend to criminate the witness or expose him or her to a penalty or forfeiture of any kind. And even in criminal proceedings against a person, the husband or wife of such person is a competent and compellable witness. The English law is in these as in several other respects more tolerant of human frailties than the Indian law. I would not, however, disqualify the wife from giving evidence in a prosecution instituted against the husband for the offence in question. It may be that the prosecution is instituted by herself or by some one on her behalf and she should certainly be a competent witness. I would therefore only suggest that she should not be a compellable witness, either for the prosecution or for the defence, in any case in which the husband is prosecuted for the offence in question. Even in cases in which the awkward circumstance of the wife having become a mother does not exist, she will often be placed in a delicate and embarrassing position when compelled to give evidence in a prosecution of the husband for the offence in question.

If this suggestion be approved, effect may be given to it by adding a proviso to section 120 of the Indian Evidence Act to the effect that the wife shall not be compellable to give evidence in any proceeding against the husband under section 375-A of the Indian Penal Code. I suggest section 375-A instead of section 375 of the Indian Penal Code with reference to the suggestion made in my previous letter that it would be desirable to constitute the offence in question a separate offence under a new section.

Section 112 of the Indian Evidence Act also presents a difficulty in connection with the case in question. The object of the section is of course obvious, and that is to raise a presumption in favor of the legitimacy of the issue, and certainly it was not intended to raise any presumption of the commission of an offence by the husband. And the principle of English law embodied in that section will have no such operation in England, because sexual intercourse with one's own wife is in no case *per se* criminal under English law. Though under the Indian Penal Code it is an offence under section 375 when the wife is under 10 years of age, section 112, even if otherwise applicable, is practically inoperative in a prosecution of the husband under that section, for the simple reason that hardly a single instance has occurred of a girl becoming a mother between her 10th and 11th year. There does not, however, seem to be anything in the language of the section rendering it inapplicable to a criminal case, and it may be difficult to contend successfully that that section does not throw the onus on the husband to disprove that he had sexual intercourse with his wife before she was of the age of 12 years, if a child is born to her in wedlock when she is under the age of 12 years and 6 months, and a prosecution is instituted against him thereafter for the offence in question. It will be, therefore, extremely desirable to amend section 112 by providing clearly that it should be inapplicable to a criminal prosecution of the kind under consideration. The said section is, perhaps, also faulty in other respects as pointed out by Mr. Whitely Stokes, and the sense in which the word "access" is used in the proviso is by no means clear; and certainly it is far from being in accordance with the English law as expounded with admirable clearness in the recent case of *Bosville versus The Attorney-General* (Law Reports, Probate Division, Volume XII, page 177).

As there is now a Bill before the Supreme Legislative Council to amend the Indian Evidence Act, the above suggestions, if approved, may be given effect to in that Bill.

(Signed) V. BHASHYAM IYENGAR.

From the Acting Agent to the Governor, Vizagapatam District, to the Chief Secretary to Government, dated Ranguvada, 10th February 1891, No. 19-T.

In reply to G.O., No. 124, Judicial, dated 20th January 1891, asking my opinion on the Bill to amend the Indian Penal Code and Criminal Procedure Code with reference to what is called the age of consent, I regret to say that the subject is one to which I have not paid any attention hitherto, and as I am now in the most remote part of Jeypore, I am unable to obtain any information which would allow of my expressing an opinion of any value. All I am able to say consequently is that I have not personally come across any instance of the present law having proved inadequate or of injury having been caused to child-wives by the limit of age now fixed. It seems probable to me that the question is one in which the peculiarities of the life-history of races concerned may be an important element.

W. A. WILLOCK,
Agent to the Governor.

From H. W. FOSTER, Esq., Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 19th February 1891, No. 500.

In continuation of my letter, dated 6th instant, No. 355, I am directed to forward a transcript of the minutes recorded by the Honorable the Chief Justice and Mr. Justice Muttusami Aiyar on the Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882.

MINUTES.

The Chief Justice.—I am inclined to think that if any alteration is to be made in section 375, Indian Penal Code, clause "fifthly," the age of consent should be raised to fourteen years. A very large number of children of 12 years of age must be manifestly unfit to give consent to sexual intercourse, and the proposed alteration will only in some degree mitigate, and not cure, the evil complained of. If it is thought wise to interfere with the relations of man and wife, the same remarks apply to the exception to section 375.

The amendment to schedule II, Criminal Procedure Code, will render a conviction for rape by a husband on his child-wife very difficult, if not impossible, to obtain.

Mr. Justice Muttasami Aiyar.—Having regard to the object of the proposed legislation, I consider that it is sound in principle.

So far as the Bill relates to persons other than husbands, there is not the slightest objection to raising the age of consent to 12 years. Any legislation in the direction of a nearer approach to the age of discretion is, in their case, in perfect accordance both with Hindu religion and with social usage.

Neither is it open to objection even so far as it relates to husbands, though in form and in certain matters of detail it requires to be amended. There can hardly be any doubt that consummation of marriages with girls who have not attained their maturity is an evil, and that it is the duty of every father to protect his daughter from such evil. This being so, I see no objection to the State stepping forward to afford such protection to girls from whom it is withheld.

As far as I am aware, neither Hindu Law nor Hindu religion nor usage in this Presidency sanctions a premature consummation of marriage. The general practice in Southern India is to allow a child-wife to remain with her father or mother until she attains maturity and her marriage is consummated in proper season. It is in conformity to the teaching of the commentator on the Apastamba Sutra who says that whether the text relating to the Garbhadanom ceremony is or is not repeated as part of the marriage ritual, cohabitation must be deferred until the girl attains her maturity. Judging from my experience in this Presidency and from my view of the general Hindu Law, I think that legislation to protect girls against injury from premature sexual intercourse is not in conflict either with Hindu religion or with the recognized usage of this Presidency or with reason.

As to the objection that the Hindu marriage must be consummated on the fourth day after menstruation, the correct view is that cohabitation is then permitted and not enjoined as a matter of imperative duty. There is hardly a case in which the marriage is consummated in this Presidency on the fourth day after the first menstruation, whilst in many orthodox and respectable families consummation is deferred for 6 or 12 months, and even for a longer period. According to strict Hindu Law, a girl may choose a husband for herself after she menstruates, if her father has failed in his duty to select one for her at an earlier period, and some texts allow even a period of three years for her to make a proper choice in case of extreme necessity. Whilst I am of opinion that cohabitation is permitted by Smritis from the fourth day after menstruation, I also think that it may be, and is often deferred without any injury to the religious or caste status of the wife.

The real point for consideration is what form protective legislation, such as the one under consideration, ought to assume as against husbands and how its practical operation may be best safeguarded.

It does not appear to me to be correct to say that sexual intercourse with the husband is rape. The injury to the purity of the woman, and the degradation and misery thereby entailed on her is an ingredient in the conception of the offence of rape, and it is wanting in the case of premature intercourse with the husband. Again, the avowed object of the proposed legislation is to afford protection to the child-wife, but a sentence of transportation for life or for a term of seven or ten years, or even a sentence of imprisonment would, when passed upon her husband, operate to degrade her, though indirectly, in society, and in the present state of the marriage law in this country, inflict upon her in effect a kind of permanent or temporary widowhood according to the nature of the punishment. It may at times happen that the offender is a boy under 18 years of age and his imprisonment and degradation as one belonging to a class of ruffians would be regarded no less as a calamity to the girl than to the boy. It is no doubt true that, according to the law as it stands at present, sexual intercourse with a girl under ten years of age is rape even when the girl is the offender's wife, but it seems to me that the inclusion of the husband, and of persons who violate a woman, and who are ordinarily classed with felons, is incomplete. The age mentioned in the section is so low that a girl never attains her maturity before she has been perfectly innocuous, and, so far as I know, no generation the provision has hitherto been a single conviction in this Presidency under the fifth clause of section 375. The fact is that a girl never attains her maturity before her 10th year, whereas some girls

attain their maturity, a few in their 11th year and several in their 12th year. I would therefore amend the Bill by constituting premature sexual intercourse by the husband with his wife when she is under 12 years of age into a distinct offence punishable as ordinary criminal force or hurt and add an explanation to it that if grievous hurt or a more serious injury is caused, the offender is liable to punishment for such offence under the appropriate section of the Indian Penal Code.

There is another matter in respect of which the Bill is open to amendment. In the Statement of Objects and Reasons it is stated that the object of the Bill is to prevent premature consummation of marriages by adult husbands with children who have not reached the age of puberty, but the Bill goes beyond it by prescribing 12 years of age as the minimum age of consent. I would suggest that 12 years be prescribed as the age which is to be presumed as the age of puberty unless the husband shows that the wife has previously attained her maturity and I would thereby recognize proof of maturity by the husband as a valid defence. This would not only bring the Bill into strict conformity with its declared object but also bring it into conformity with Hindu Law. When a girl attains her maturity in Hindu families, it is considered to be an occasion of rejoicing and of festivity, to which ladies who are related to the family or live in the neighbourhood are usually invited. Looking at the Bill from this stand-point, there is reason to think that the fact of puberty may be more easily proved than the fact of age.

Again, it is very necessary, as observed in the Statement of Objects and Reasons, to prevent the possibility of vexatious and unjustifiable interference with the domestic concerns of respectable people under the proposed law. To secure this object, it is, I venture to think, not enough simply to make the offence non-cognizable and to declare it bailable. I would submit that it is desirable to go further and to provide that no prosecution shall be instituted unless it is initiated by the father or the mother or the guardian for the time being of the girl or leave to prosecute is first obtained from the District Magistrate or Divisional Magistrate, such leave being required to be granted after notice to the father or other guardian of the girl and a preliminary inquiry and an appeal being allowed to the High Court from the order sanctioning the prosecution. I would also insert a provision as a matter of precaution that in no case a girl shall be subjected to medical examination, except with her guardian's consent and by a lady-doctor or midwife.

In conclusion, there is one other matter which I desire to mention in connection with the proposed legislation. There is a strong prejudice among the uneducated classes, and even among some of the educated men in this Presidency, against State interference, without adequate necessity, with the domestic concerns of the people. It is not denied that when the father ignores his duty to his child, legislation is proper; but it is said that in this Presidency there has been no case in which any girl-wife has ever suffered from injury caused by premature sexual intercourse, that such intercourse is not permitted to any appreciable extent, that the domestic arrangements of a respectable family are such as ordinarily preclude it and that the area of State interference should be continuous with the area of the evil. It is also considered that the suggestion that where the evil does not exist, the new law will cause no practical mischief, is more plausible than sound, because what is dreaded is not so much the actual conviction as the vexation and annoyance and social scandal consequent on a public inquiry into matters the very mention of which is forbidden in polite society by a feeling of delicacy, an inquiry which may be initiated in villages where there are factions by a spiteful inner and which may necessitate the examination and cross-examination before a public tribunal of respectable women accustomed to a quiet life of privacy, touching domestic incidents over which they usually throw a veil of decency. The Bill is framed apparently on the view that, for the purposes of protective legislation, all India may be treated as one country, howmuchsoever conditions of domestic life and domestic arrangements in joint Hindu families in the mofussil may vary in different parts of it. Though I also believe that a mere local law would not meet all possible cases of premature cohabitation and prove as effectual as a general scheme of protective legislation in checking the evil, yet I think that the jurisdiction to try ordinary cases of premature sexual intercourse, unattended with serious injury, should not vest, if it is constituted into a new offence as proposed by me, in any tribunal below that of a First-class Magistrate. I further venture to submit that it would in no small measure conciliate popular prejudice to modify the form and safeguard the practical operation of the new law in the manner already mentioned, whilst it would at the same time secure the protection which it is intended to afford to minors in cases in which they may really need it.

ORDER—dated 6th March 1891, No. 441, Judicial.

The Government of India will be addressed.

(Here enter Letter No. 441, dated 6th March 1891.)

Chief Secretary.

Exd. P. L. Perera.

Gobt. of {1891} Madras.
JUDICIAL.

Issued

Recd.

Encl.

G.O., 6th March 1891, No. 441.

MARCH.

Bills—Legislative.

Ordered that the Government of India be addressed regarding the Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882.

6TH MARCH

JUDICIAL.

JUDICIAL.

TMENT.

LETTER—from

THE CHIEF SECRETARY

To

THE SECRETARY TO THE

SIR,

With reference to your letter of 27th January 1891, forwarding copies of a Bill to amend the Code of Criminal Procedure, and asking the opinion of the Court and certain selected Proceedings of this Government from the various persons and of

2. The intended legislation of His Excellency in Council, but grave objections, and the following opinion of this Government, should

(i) The offence against a distinct one and should not be regarded as a

(ii) Jurisdiction to inquire into or try the offence should be restricted to First-class Magistrates and the Court of Sessions;

(iii) Cognizance should be taken of the offence only upon the complaint of the father, mother or natural guardian of the girl; if the charge be preferred by others, the accused should be called upon in the first instance to show cause why action should not be taken.

(iv) If the husband can show that his wife had attained puberty before 12 years of age, he should be entitled to acquittal.

(v) The punishment for the offence should not exceed 3 years' imprisonment and fine.

(vi) Provision should be made for medical examination by lady doctors or midwives only.

(vii) The fifth clause of section 375 of the Penal Code and the exception should be omitted.

3. The following are the d
Gazette:—

In English
" Tamil, Telugu and Can
" Hindustani
" Malayalam

GOVERNMENT OF
FORT ST. GEORGE,

GOVERNMENT OF INDIA,
LEGISLATIVE DEPARTMENT.

January 1891, No. 95, forwarding copies of a Bill to amend the Code of Criminal Procedure, and asking the opinion of the Court and certain selected Proceedings of this Government from the various persons and of

I am to say, with the approval of the proposed measure seems open to contain the principles which, in the

action is directed should be made a

the offence should be restricted to First-class Magistrates and the Court of Sessions;

Cognizance should be taken of the offence only upon the complaint of the father, mother or natural guardian of the girl; if the charge be preferred by others, the accused should be called upon in the first instance to show cause why action should not be taken.

If the husband can show that his wife had attained puberty before 12 years of age, he should be entitled to acquittal.

The punishment for the offence should not exceed 3 years' imprisonment and fine.

Provision should be made for medical examination by lady doctors or midwives only.

The fifth clause of section 375 of the Penal Code and the exception should be omitted.

The following are the d
Gazette:—

In English
" Tamil, Telugu and Can
" Hindustani
" Malayalam

to be,

bedient servant,

J. F. PRICE,
Chief Secretary.

FORT ST. GEORGE,
6th March 1891.

Encl. A. Baill.

1891.

JUDICIAL DEPARTMENT.

From the Government of
Fort St. George.

Issued

Recd.

Encl.

Letter, 6th March 1891, No. 442.

MARCH.

Bills--Legislative.

Forwarding, with remarks, to the
of India, opinions on the Bill to amend
Penal Code and the Code of Criminal
1892.

No.

Judicial No 46.
District & Session Court, CHINGLEPUT,
January 1891.

FROM

The J. W. Best Esquire
District & Session JUDGE,

Chingleput,

TO

The Honorable J. J. Price

CHIEF SECRETARY TO GOVERNMENT,

Judicial Department.

Fort St. George.

SIR,

With reference to G. O. dated 20th Instant
No 124, Judicial, I have the honor to state that, in
my opinion, the proposed alteration in the Law is very
desirable. The only question is whether the raising of
the age of Consent to 12 years is sufficient. As
appears from the letter of Surgeon Major B. Gupta
printed at page 46 of the Supplement to the Gazette
of India dated 17th Instant, the percentage of
girls in this Country who marry before
the age of 12 years is under 40; and as stated
by Doctor Jouliet in his examination as a
witness in the case of Queen Empress Versus
Harun Mohun Broytast, L. R. 18 Calcutta 45.

(at page 56) Commencement of menstruation is only one of the early steps towards the attainment of puberty, which "is not generally attained upon menstruation, but subsequently," and even though the female may have then become capable of conception and child bearing, some years more must elapse before she becomes sexually mature and fully fit to become a mother. Such is, I believe, the opinion of men qualified to give an opinion on the subject. It is, however, hopeless in the present state of civilization in this country to do all that may be desirable to benefit the community. All that can and doubtless should be done is to see that young and helpless girls are not tortured and put to premature and unnecessary suffering in violation of the people's own Shastras. Uide Manu, Chapter XI, 59 and 171; and as, from all accounts, the great majority of girls in this country do not first menstruate till between the ages of 12 and 13, the latter should, I think, be the lowest age of consent in any

12 P
Case; while in cases in which the catamenia have not commenced before the age of 13, I would fix the date of consent at the date of first menstruation and make sexual intercourse prior to that date penal.

2 The subject is not one of any special delicacy in this country where the "flowering" (as it is called) of girls is published to relations and friends, who are invited to entertainments in honor of the occasion.

I have the honor to be,

Sir,
Your most Obedt. Servant,

Wm. West
District Session Judge.

W. West

Journal No 464

1881.

JUDICIAL DEPARTMENT.

FROM

THE DISTRICT JUDGE,
CHINGLEPUT.

Dated 23

Despatched

Received

SECRET
No. 124
23 JAN 91

MENTIC
9 January 1891.

No.

ENCLOSURE:—

Subject.

Sanction to his opinion
as to the raising of the
age of Consent.

Please find these
currents, recently
taken will follow & brief.

Ch.
1891.

No.

District Court, Combrato

2nd February, 1891.

From,

J. Duncan Irvine Esq.
District Judge,
Combrato

To,

The Honorable J. J. Lries,
Chief Secretary,
to Government
Madras

Sir,

As requested in G.O. dated
20th January 1891, No. 124. Subj. as above,
I have the honor to express my
opinion upon the Bill referred
to therein.

2. There seems to be room for
doubt whether such legislation
is required for this Presidency
indeed. I am assured that there
is already on foot a social
movement among educated
natives which will tend to
reform from within the evil,
which is admitted to exist
although to a much less extent
than has been proved in Be.

These reformers, however, ought to recognize the fact that the legislation contemplated by this bill must materially assist their efforts.

That such a measure is urgently necessary for Bengal, no one who has read the information collected by Sir Stuart Bayley can for a moment doubt. The only question is whether the age fixed in the bill should not have been at least thirteen, instead of twelve, but, at any rate, it is a step in the right direction.

That there will be many prosecutions under the new act, I do not for a moment suppose. Experience (Actual, I mean, and not merely on paper) as a District Officer teaches that such matters very rarely come before the Courts. It is well known that Rape is a frequent element in so-called dacoities, but how seldom do we find any evidence of such violence put forward at the trial.

48
6. The great advantage of such a measure as the bill under consideration is that it strengthens the hands of those who wish to fight against so terrible an evil in their own families against the members thereof who are in favor of perpetuating it. And, as the education of girls proceeds, it will arm the hitherto defenceless childwife against a brutal and cowardly husband. I should hope that teachers in girls' schools will not fail to put this weapon into the hands of their pupils.

7. The legislature has undoubtedly removed one possible objection to the proposed measure by making the offence "non-cognizable". It has been suggested to me that another safeguard might be found in providing that the complaint must in the first instance always be laid before the District (or Divisional) Magistrate, whose sanction should be a necessary preliminary to its

entertainment.

entertainment. Such a suggestion
no doubt argues a distrust
of the Native Submagistrate.
I may therefore mention that
it came from a Native Gentleman,
and was quite spontaneous.

I have the honor to be,
Sir,

Your most obedt servant,

Wm. L.

District Judge.

— 1891. —
Judicial Department.

No. 536

From,
The Distt. Judge.
Combratore.

To,
The Chief Secretary
to Government,
Madras.

Dated.
Recd. } 1891.

No. 536
Enclosure.

Subject

Submits his opinions
on the provisions of the
Bill to amend the Indian
Penal Code and the
Code of Criminal Pro-
cedure, 1882.

No. 537
The Grove
Mylapore
Madras
2^d Feb 1891

To,
The Chief Secretary to Government
Madras

Sir,

In reply to G. O. dated
20th January 1891 No 124, I have the honor
to state that the proposed Bill on the subject
of Consent has my hearty approval
and may be passed into Law with a
slight modification which I shall
notice further on.

2. Although the necessity
for the Law proposed is not very great
in this Presidency, since Consummation
of marriage does not generally take
place here, the girl is 12 years
old, it cannot be said that there are

no cases whatever in which Consummation takes place earlier, and the evils of it are so great that it is only right that the Legislature should interfere and stop it.

3. I do not think that the proposed Law can be regarded as an interference with our religion, for whatever might be the interpretation that could be put on the texts of the ancient Hindu Law on the subject, it is certain that in practice, the Consummation of marriage at any particular age or period is not regarded as compulsory. I am aware that even in the most orthodox Brahman families Consummation is often put off for 2, 3 or even 4 years after the girl attains her puberty, if the bride-room

61
happens to be of tender years, or there are other reasons to recommend the step, and no exception is taken to this by the Society on the score of religion or custom.

4. But, I must admit that the general Public opinion is against the Bill. Most of the men whom I have consulted on the subject have expressed their disapproval of the Bill, not because they consider that it interferes with their religion, but because they apprehend that over-zealous reformers or mischievous neighbours might needlessly drag members of respectable families before Law-courts and cause them annoyance. I think their apprehensions are well founded. It is not infrequently that

our young girls visit the houses of
their husbands even before they attain
their puberty and before their marriage is
consummated, and their innocent
visits might give ^{an} handle for
prosecution. Moreover, the limit of age
which the proposed Bill fixes borders
so closely upon the age at which con-
summation generally takes place,
that
it would be possible for anyone
to dispute the age, especially, as the general
appearance of our girls up to a certain
period of their life is such that they
almost invariably appear to be much
younger than what they really are.

5 Under these circumstances,
I think it to be desirable that the Law
should provide some safe guard

76
against needless prosecutions and
this end can be attained by making
39
the permission of the District Magis-
trate or some other competent officer
appointed by the Government on
that behalf, a condition precedent
for prosecution. While such a
safe guard can in ^{no} way defeat
the object of the Bill, will allay the
fears of the Public and render the
Law more acceptable than it
would otherwise be.

I have the honor to be
Sir,

Your most obedt servant
P. Cheutahoo

Judicial Dept

Co. 537

From H. R. R. R.
P. Chandra Rao C. E.

Mylapur



53

12 } Feb. '91
30 }

Specimen on the top of
present Bill.

No. 1.

District Court, Bellary.

Dated 2nd February 1891.

From

H. J. Knox Esquire,

The District Judge, Bellary.

To,

The Chief Secretary to Government
Madras.

Sir,

With reference to G.O. dated 20th
January 1891, No. 124 Judicial, I have the
honor to state that no facts have ever come
within my own experience of such an of-
-fence as is guarded against by the pro-
-posed alteration of the law.

2. It will certainly not constitute an
interference with any religious practice.
But if such a practice did exist I should
say that religious or not religious it should
be suppressed without hesitation - as de-
-serving even less consideration than the
practice of Sati.

3. Since this discussion has arisen I
have been but a short time in India, and
have had but small means of ascertain-
-ing practices of different classes. I am
not

not therefore in a position to say that it will or will not materially affect the existing practice of any Castes. What I have generally heard is that it is not called for in this country because such practices do not generally exist. But I am aware that girls are sent to their husbands' houses at a very early age in many cases and that girls do certainly require this protection in Southern India.

4. After this amendment is made, if it be made, I do not expect that cases will come into Court, or if they do it will be but rarely, such matters can generally be hushed up. But it will certainly put a check on the tendency to hurry on consummation by attaching a certain risk to those concerned in it, and will tend to establish a more healthy opinion and practice.

5. I have, I think, stated my experience in

in the first para. too broadly. I mean that I have not known cases of death or serious injury. I do not mean to say that girls are not taken to their husbands when quite immature and unfit for marriage. That is the case. Girls should be protected from such constitutional injuries as much as from any others.

I have the honor to be,
Sir,

Your most obed^t servant,

H. J. Kirk

District Judge

Exd
H. J. Kirk
etc.

Mr ✓

Judicial (1891) Department.
From ^{Cuo. 566}
The District Judge
Bellary

To
The Chief Secretary,
to Government,
Madras.

Station Bellary.

Dated 2 February
Despd 3 - do
Recd 5 } 1891.

No 1

Submitting the opinion
called for in G.O. dated 20
January 1891 No 124, on
the provisions of the Bill
to amend the Indian
Penal Code and the Code
of Criminal Procedure.

No 58
1891

Madura Session Court
2 February 1891

From
J. Weir Esquire
The Session Judge of Madura

To
The Honorable J. F. Price
Chief Secretary to Government
Madras

Honorable Sir,

Referring to G.O. dated 20th January 1891
No 124 Judicial, I have the honor to state that beyond
expressing approval of the proposed alteration in the
law, I have no opinion to offer on the provisions of the
Code.

I have the honor to be

Honorable Sir

Your most obedient servant

[Signature]

Session Judge

1891
Judicial Department
Cuo 588

From *✓*
The Session Judge
of Madras
To
The Secy to Government
Madras

Dated 2 February
Recd 6 1891
No 58

Enclosure none

opinion on Bill - Legislative

Expressing approval of the
proposed alteration in the
Indian Penal Code and
the Code of Criminal Pro-
cedure, 1882.

110
Tanjore, District Magistrate's Office.
No. 25.C
FROM *Mag.*
CAMP, Tanjore Dated 4 February 1891.

J. Thomson Esquire,
Acting District Magistrate,
TANJORE.

To The Honorable Mr. J. F. Price
Chief Secretary to Government,
Judicial Department,
MADRAS.

SIR,

I have the honor to reply
to L. O., Judicial Department, of
20th January 1891 No. 124 asking my
opinion on the provisions of the Bill
to amend the Indian Penal Code and
Code of Criminal Procedure (1882).

2. My own opinion is, as may
be supposed, that even 12 years is much
too low an age for a woman, married
or not, and consenting or not consenting
to common sexual intercourse.

3. As regards local public opinion, the time allowed to answer the reference is far too short for me to arrive at any understanding regarding it. The three Deputy Collectors were consulted semi-officially. Mr. Khadir Nawaz Khan is "strongly in favor", considering that, even when puberty arrives earlier than 12 years, the advantages of waiting far outweigh the inconveniences. Mr. Kishore Chandra would substitute puberty in section 375 as the age under which intercourse would become rape instead of a distinct year term, believing this would serve the 'laudable' purpose of Government and would not shock religious feelings and customs of the community.

128
Pattabirama Pillai is of opinion that, 'in the Cause of humanity' Government should interfere in this matter, as it has done with Satti, but acknowledges that - Orthodox public opinion is strongly against the Bill. He is also afraid that, if the Bill is passed, it will either be not enforced or become mischievous in the hands of evil disposed and low paid officials unless and until Birth Registers are made reliable; and proposes the Bill should state who is to prosecute on behalf of a child wife and that provision should be made for Compounding the offence and that the maximum term of punishment should

Should be three years Rigorous
imprisonment. He also states
that the subjecting a woman
to medical examination is
most abhorrent to a Native
in the case of any prosecution
for rape.

It seems to me also
that there should be distinct
provision made as to who
is to take proceedings. If
confined to Magistrates of the
first class, they might be
trusted to act on apparently
reliable information from
duly qualified medical men

137
or otherwise. If action
Enquiry occurs otherwise, much
trouble may be unnecessarily
caused to families.

I have the honor to be,

Sir,

Your most obedient
Servant.

Acting District Magistrate

End

Cus. 587

From
The District Magistrate
of Tanjore

To
The Chief Secretary to Govt
Judicial Dept
Madras

Recd 4 } February 1891.

No. 25.C
Mag.
Sue: Nil

Subject

Reporting on the bills
to amend the Indian
Penal Code and Criminal
Procedure Code

140
From the Adyos, Madras
5th February 1891

To
The Honble J. L. Price
in in in
Chief Secretary to Government
Fort St. George

Sir

With reference to G. O. dated
20th January 1891 No 124. Judicial. For
receiving copy of a Bill to amend the
Indian Penal Code and the Code of Criminal
Procedure 1882. I have the honor to submit
that there is not the slightest doubt of the
immense good the raising of age from
ten to twelve years will afford among
a large number of people who happen
to be away from the influences of
civilization and enlightenment and
among whom any amelioration in
the matter however desirable is not
likely to take place without legislation.
An appreciable modification
of the present law will be effected as
it is now proposed to take out of

of the hands of the Police, the
offence described in the first
part of the schedule annexed to
the amending Bill. Another
desirable step in this direction
will be to make the above des-
cribed offence punishable not
as for rape but as for hurt or
gross hurt only. If this be agreed
upon I am of opinion it will
obviate to a very great extent
all objections and oppositions raised
against the Bill on the ground
of its interference in religious
rights and social customs of
the people.

I have the honor to be

Yours Most Obedt: Servt.

Wm. C. Cunningham

Cus 565

From
The Hon' Mir Humayun Jah B. C. R.
Madras

27.5.2.91

Print these two current
in continuation of those
already sent. V. H.
7/11/91

Opinion on the Age of
Consent Bill.

27/5/91

19/5/91

5728
C. P. S. D. con.
5th February 1891.

To
The Chief Secretary to Government
FORT SAINT GEORGE.

From
A. SASHIAH B. K. S. I., C. S. I.,
12,
12,
12,

I have the honor to acknowledge the receipt of G. O. 20th January 1891, No. 124, Judicial, and in compliance with it to submit the following observation:—

2. I concur in the main in the object of the proposed amendment of the Law and the provisions by which it is proposed to attain it, with one modification, viz, that in the proposed exception in section 375 of the Code, I would alter after the words "the wife not being under 12 years of age" the words "or the wife having attained puberty before that age".

3. On mature thought, I cannot help coming to the conclusion that the raising of the age to 12 without making an exception in the case of

girl.

girls attaining puberty before that age, would amount to serious interference with custom, rules and practices which unfortunately are so closely interwoven with religious rites and beliefs of the Hindhu Nation in the matter of marriage institutions that it is impossible to deal with them separately without doing violence to widely-spread notions or deeply-felt feelings however unreasonable or even irrational they may seem in the eyes of Englishmen brought up in beliefs notions and feelings, the effect of a different education and of the teachings of a different religion and in some measure the resultants of a different climate.

4. The leading idea of the Hindhu legislators - at least the majority and the most accepted of them - seems to have been that no girl should be detained or withheld from her betrothed husband at any after

Note:- Most probably the framers of the code who fixed the age at 10 must have followed the generally accepted dictum which is contained in the text:-

"Ashta varsha, bhavet kaniya
"Nava varshatu rohini
"Dasa varsha bhavet gauni
"A ta urdwam rajasevala.

very often at the very early age of ten and more frequently which translated roughly means a girl becomes

becomes a kaniya at 8, a rohini at 9, a gauni at 10 after that she becomes a rajasevala or possessor of the sign of puberty or menses.

frequently still between that age and 12. So it becomes a paramount religious duty of the parents to deliver up the girl at the earliest possible date after she attains woman's estate.

The parents are thenceforward absolved from all responsibility of guarding the purity of the girl and they, as well as those on the husband's side, most eagerly look forward to the birth of a grandchild the sight of which gives them both a step in heavenly bliss, to say nothing of the spiritual blessing ^{of a child} at the earliest opportunity to the husband who might be deprived of it if per chance he dies in the interval between the dates of his wife's puberty and the attainment of her twelfth year. This reason which underlies the whole question will account - if I have expressed myself clearly - for the great opposition which is manifesting itself all over the country, as interference with the religious custom and practices non-interference with which has been guaranteed to them by the Queen's Proclamation.

5. The argument per contra that the substitution of 12 years for 10, is a very simple matter which ought not to provoke so much opposi-

4.

opposition from the people at large who never showed any such signs of ^{opposition} ~~opposition~~ at the passing of the Code which fixed the age at 10, is scarcely to the point, for very few girls even in Bengal attained maturity at that age and the law practically had thus no operation, and consequently elicited no opposition. The case is entirely different now and the threatened danger of interference is real and serious.

6. In the statement of Objects and Reasons it is stated that the evil of the existing law arises from the circumstance of its favoring the premature consummation of marriages by adult husbands with children who have not reached the age of puberty. I take this statement as entirely conceding my point, and fully justifying the modification which I suggest. I feel confident that, if it is adopted the opponents of the measure will be entirely disarmed.

7. I think the law so amended could be worked with very much less friction, for I believe, that the fact of puberty can be much more satisfactorily proved than the fact of age. There are so many feasts and ceremonies by which the attainment of puberty is celebrated among all classes and castes all over India that abun-

dant

5.

abundant and reliable evidence of the fact would be always available, while as to the fact of age such evidence must be often most unsatisfactory inconclusive and often involving Medical Examination which is so harrowing to the popular feelings of the nation.

I have the honor to be

Sir,

Your most obedient servant.

Printed and signed A. Sashank Sastri

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To

MR. R.
A. Seshiah Sastri C.S.

Kumbakonam

D/5. 2. 91

Opinion on the Age of
Consent Bill.

Old College, Madras 5th February 1891

To

The Chief Secretary to Government.
Fort St. George

Honorable Sir,



I have the honor to acknowledge the receipt of G.O. No. 124 of the 20th ultimo with a copy of the Bill to amend the Penal Code and the Code of Criminal Procedure, and to submit my opinion as follows on the proposal to raise the age of Consent of a girl wife from 10 to 12 years.

2. Early betrothal or marriage is no new institution in Hindu Society. According to the Shastrias, a girl is bound to marry before a certain age, and the marriage is of the nature of a Sacrament; but the Consummation of that marriage with one's wife before she has arrived at womanhood is forbidden, and as a rule, a girl is not allowed to go and live in her husband's family by her parents or guardians until puberty is

is attained or rarely till a year or two after, or until she is considered fit to discharge the duties of a wife and householder. The Criminal records of the Madras Presidency do not appear, so far as I am aware, to furnish any examples of the occurrence of such an offence as that which the proposed Bill is intended to prevent and punish. As Secretary to the Victoria Hospital for Castles & Gocha women in Madras, I have searched in vain the registers of patients treated during the past 5 years for a single instance of the occurrence of such an act of cruelty to any child wife; and the Lady Doctor in charge of this Hospital tells me that no such case has ever come to her notice.

I regret therefore that I cannot support the assertion of the overzealous & impatient reformers that the Hindu and Mahomedan families of this part of India feel the necessity for the proposed legislation.

3 If, however, the cruel and disgusting practice referred to in the Statement of

6 P
of Objects and Reasons annexed to the Bill prevails largely in some other parts of India, no Hindu who has learnt to exercise his reason freely can question the right of the legislature to provide against the practice, if possible, wherever it exists and where grievous suffering or permanent injury to health would be the result.

4 But the question is whether the proposal to fix 12 years as the age of Consent unconditional is at all a suitable remedy for the practical evils complained of in the Statement of Objects & Reasons. The Government has, it is true, repudiated all intention of interfering with the religious customs of the people, such as the right of betrothal or marriage before a girl is 12 years old, and has withdrawn the offence of premature consummation with one's wife from the Cognizance of the ever-muddled policeman; but I am not at all sure that fixing the age of Consent at 12 as the average age for matrimonial intercourse is any protection to the poor girls who have not attained puberty though they have completed that age and who form the bulk of the child brides. The object of the Government being I believe

to prevent the Consummation of marriage before puberty and not merely before the hard and fast ~~and~~ limit of the 12th year of a girl's age ~~than~~ the Course of legislation now proposed will not, I apprehend, reach the evil to the extent designed by the Bill.

5 Then again I fear in common with others consulted by me, that 12 years is a very dubious age to fix by law - and is unfortunately too low a limit to prevent an enquiry inquisitorial in its character of the abuse of the law by malicious persons and hungry policemen.

The proposed age is unlike the limit of 10 years in the existing Penal law when a girl looks a mere child, or 14 years when puberty will have been reached & evidence of maturity will be visible. It is just the age when a malicious neighbor or mischievously disposed person can easily raise the suspicion at that stage of a girl's life that she is under 12 years of age, and lead the Policeman to distrust the girl's or husband's friends though they might swear that she is just over 12 years. False evidence will easily be produced, seeing that horoscopes are not believed nowadays, and I fail to see how the policeman and the Magistrate who have no Birth Registers or other reliable evidence of age to go upon could refuse to

69 7P
to take Cognizance of the Complaint preferred and how the mischievous attempt to annoy an innocent neighbor and compel the appearance of his wife and daughters and daughters-in-law at the Police station or before a Magistrate on the very day appointed for the nuptial marriage - an act much dreaded by the femalehood of India - is to be provided against, or how unjust Convictions or unfair acquittals are to be avoided or how bribery and Corruption are to be checked.

The age of 12 is just the period of a girl's life open to doubt and dispute as to maturity, and to fix the age of Consent at so low a figure will I fear open the door to that vexatious and dangerous interference of the penal law and police with the peace and domestic concerns of respectable families which the Government wish to prevent. It is superfluous to add that such interference with the personal liberty of the young people will irritate their parents and friends and raise suspicions which it will be afterwards difficult to allay. When the Common people of a village or street in a town are excited by the exposure of an innocent girl and her husband or the miscarriage of Justice, nobody can tell what an ignorant crowd of easily excitable people may do. I beg that I may not be considered an alarmist if I say, that it is not impossible for

for an excited mob in India to do something like what Wat Tyler, Rob Carter and John Miller of English history did five centuries ago in connexion with this very question of a girl's age.

6 Such being the position and the possible consequences of the proposed legislation to interfere in the domestic concerns of the Conservative Millions of India, it seems expedient to alter somewhat the course of legislation in order to attain the benevolent object of government to prevent the consummation of marriage before puberty and injury to health.

I beg respectfully to suggest for consideration whether this declared object of government might not be attained,

- (1) By fixing the age of Consent at 14 years as the most approximate age of puberty in this Country involving ~~little~~ ^{no} injurious and no chance of a doubt at the first look.
- (2) By introducing at the same time a saving clause with respect to wives who grow up and attain that condition before that age; and
- (3) By providing a system of enforcing accurate registration of births in every town and village and even the date of arrival of a girl at womanhood which is regarded by the Hindus as the girl's second birth which they celebrate as a festive occasion. The production of extracts of such domestic events will

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will serve as the best evidence of age when any doubt should arise at the time of Consummation, superseding the necessity of the appearance of women before the Police and the Magistrate; and I am strongly inclined to think that a Bill based on these lines will generally be welcomed instead of being regarded like the present Bill as a piece of "hasty legislation" involving vexations and dangerous interference with the religious and domestic concerns and the privacy of native families all over the Country -

I have the honor to be

Sir

Your most obedient servant

Yours truly

B. Kishanram

Cuo bro

From

Rai Bahadur V. Krishnamachari
Madras

D 5.2.91

Opinion on App of Criminal

Bill

N^o 355.

High Court of Judicature,
Madras, 6th February 1891.

13 Feb 91
Cuo. 619

From

H. W. Foster Esquire,
The Registrar of the
High Court of Judicature,
Appellate Side, Madras.

I

The Honorable J. F. Price,
Chief Secretary to Government,
Fort Saint George.

Sir,

With reference to G.O. dated the 2^d ultimo,
No 124 Judicial, forwarding for the opinion of the
Honorable the Judges a Bill to amend the Indian
Penal Code and the Code of Criminal Procedure
1882, I am directed to forward transcripts of
minutes recorded by the Honorable Justices Parker,
Wilkinson and Handley. The Honorable
Mr Justice Shephard has not made any
remarks.

2. Any minutes that may be recorded by
the Honorable the Chief Justice and Mr Justice
Muttusami Aiyar will be duly submitted.

I have the honor to be
Sir

Your most obedient servant

H. W. Foster

Registrar.

Mr. Justice Parker: — I would point out that if the clause marked "fifthly" is amended by the substitution of the word "twelve" for the word "ten" the clause itself becomes unnecessary since by section 90, J. P. Co. a consent by a person under twelve years of age is not such a consent. Age is intended by any section of the Penal Code and therefore the clause "secondly" (without her consent) will cover the case.

As to the second amendment, — the substitution of the word "twelve" for the word "ten" in the exception to section 375, I observe from the statement of objects and reasons that the intention of the proposed alteration in the law is to prevent the premature consummation by a dull husband of marriage with children who have not reached the age of puberty. That object is in itself desirable, but inasmuch as there are many cases in which girls in this country attain the age of puberty before 12 years of age, the effect of the alteration will be to make punishable acts of intercourse to which there is no objection on the ground stated. I would therefore amend the exception when "twelve" has been substituted for "ten" in the fifth clause of the definition, by enacting that sexual intercourse by a man with his own wife is not rape provided that the wife has attained puberty. Under section 221 of the Criminal Procedure Code the burden of proof would fall upon the husband. I approve of the proposed amendment to the Criminal

Procedure Code

If the law were so amended, the effect would be that sexual intercourse by any man with a girl under 12 years of age would be rape unless the man were the husband of the girl and able to prove that the girl had attained puberty. If the intercourse took place after the girl attained the age of 12 years but before attaining puberty, the husband might still be punishable if grievous hurt were caused thereby. vide I.L.R. XVIII, Calcutta, 49.

In giving this opinion, I have assumed that the object of the Legislature is limited to that described in the statement of objects and reasons, viz. the prevention of premature consummation of marriage with wives who have not attained puberty, and the alteration I have suggested is designed to prevent the imposition of penalties upon innocent persons while effecting this object. The question of fixing a legal age for marriage is a different one but however desirable the discouragement of early marriages may be, it is no part of the avowed object of this Bill. I do not therefore discuss the question as to how far the proposed alteration in the law is a legitimate or proper means of attaining that end.

Mr Justice MacKinnon — I see no objection. I only wish the Government of India had been able to raise the age of consent as it is called to 15. But the alteration brings the law as to rape in accordance with Sec. 90.
Mr Justice Handley — The alteration in the law is eminently desirable and the Bill seems to carry it.

it out in the simplest manner possible. I have no other observations to offer on the Bill. 11/8/24
(True Copy.)

Ch. J.

Registrar,
Appellate Side.

EDH

W
Enclosure /*enc*/ to the
High Court's letter dated
6th February 1891 No. 355 .

12/6/91

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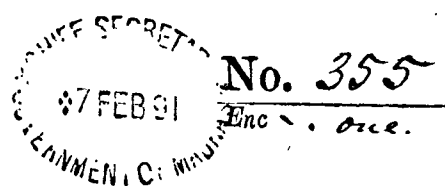
Judicial Cus 619
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Judicial {189/ } Department.

No.

FROM

THE REGISTRAR OF THE HIGH COURT
OF JUDICATURE AT MADRAS,
APPELLATE SIDE.

Dated *6th February* } 1891.
Received *7*



*Submitting transcripts
of minutes recorded by the
Honble Justices Parker, Wilkinson,
and Handley on the Bill to amend
the Indian Penal Code and the
Code of Criminal Procedure, 1882.*

*Cus. 619
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*These four
minutes in
continuation
of those already
sent in
9/11*

To

12/12
Honorable J. F. Price,
Chief Secretary,
to Government,
Fort St. George.

Sir,

In submitting my opinion on the Bill for the amendment of the Penal and Criminal Procedure Codes, I do not think I need dwell at length on the question as to whether it is desirable or expedient to introduce the changes proposed in the existing law. The Bill has been considered from every standpoint of view and almost everything that could be said for and against the measure has been advanced either from the platform or through the Press. On the one hand exception has been taken to the Bill from social, -
political

political and religious points of view and on the other it has been condemned as not going far enough and as not being calculated to root out altogether the existing evil. But amidst such diversity of opinion, it is rather significant, that except in a half hearted way, the existence of the vicious practice so severely and so justly condemned by medical authorities is not denied. It must be conceded that the practice exists in more or less degrees throughout India, though in Bengal it has attracted greater attention. It may be that the grosser form of the practice - intercourse with the girls before any of the signs of puberty has appeared - does not exist in this part of India to any very appreciable extent; but I do not think it will be possible to contend that intercourse with girls under 12, who have begun

13
begin to menstruate, is not common everywhere. According to the statistics, speaking roughly, at least about 25 per. cent. of the girls in this country menstruate before they are 12 years of age!

I have heard or read nothing up to now, in regard to this question, to make me hesitate to say that some change in the law is imperatively called for. On that point, I entertain not the slightest doubt, though, I am not so clear as to what changes ought to be made and, more so, as to how they are to be worked. The consideration of the question is complicated by the social habits and customs of the Hindus and the great facilities that exist among them for a close association of the husband and the wife, before the latter is fit for cohabitation. The people have, never up to now, been taught to regard intercourse by a husband with his wife, though she is under

perhaps it is not far distant, when a more thorough going measure might be introduced without arousing any feeling of alarm in the country; but till such time comes, it behoves the legislature to make only such changes as are not likely to cause so severe a shock to the feelings or even the prejudices of the people.

I feel confident that, if provision be made for treating the transgression by the husband not as rape, but as a less heinous offence with a less severe punishment, much of the opposition to the Bill will cease. It should not be forgotten that the consequence of the incarceration of the husband in jail is more far reaching in this country than in any other, owing to the peculiar relation existing here between man and wife, and that the punishment of the husband is nearly as much a punishment on the wife

15 P 89
wife.

The inquisitorial nature of the enquiries, which would necessarily be required to be made in bringing the offence to light, and the apprehension that they may be misused, have of course influenced the opponents of the Bill to exaggerate some of the evils that are likely to flow from the rigorous working of the law. I am not prepared to say that these apprehensions are altogether unfounded, and it would be well to provide sufficient check against a too zealous working of the law. It is no doubt provided that the offence is a non-cognizable one, but does that go far enough? I think that something more should be done to check indiscriminate and hasty prosecutions, illadvised and illconsidered enquiries and examinations, if the provisions of the Bill are to be worked

with

with benefit to the people; otherwise the object of the legislature would be defeated and, instead of the people loyally cooperating with the authorities to enforce the law, they would have recourse to every possible make shift to evade enquiries, suppress facts and otherwise elude justice. It is far better to pass a mild law and work it effectively, than to pass a stringent one, which could not be worked at all. These are the real and substantial objections to the Bill as it stands. Some stress is no doubt laid on the religious injunction that marriage should be consummated on the fourth day after the first menstruation and it is contended that any rule of law to the contrary will have the effect of virtually forcing the people to violate the shastras. Upon a full consideration of the point, I am constrained to observe

observe

16 P.

observe that there is not much in the objection: The rule is more honored in the breach than in the observance, and except in rare instances, marriage is not consummated till 3, 4 or 6 months after the period.

As to the objection that as long as the sentiments and usages of the natives of this country continue what are the law would be a dead letter, it is sufficient answer to say that even if the law is likely to be abortive otherwise, it would undoubtedly strengthen the hands of parents and guardians that wish to do their duty by their daughters and female wards, but who are now entirely powerless. This will not be considered as an imaginary and intangible benefit by any one, who is acquainted in any degree with the power exercised by sons-in-law in Hindu families and

and how on occasions they insist upon, their girl wives being sent to them directly they come to know of the first appearance of menstruation. I am fully persuaded that the law will have the further effect of deterring most people from consummating the marriage till after the girls are well over 12 years old, rather than subject themselves to the risk of a possible prosecution and its many attendant unpleasant consequences to all the parties concerned.

To conclude, I would say that the principle of the Bill is unobjectionable, the necessity for it is imperative, but that it is defective firstly, because it does not sufficiently recognize the difference between the husband of a girl and a stranger, who has intercourse with a girl under 12 and

178 23
and secondly, because it does not provide sufficient check against indiscriminate and illadvised prosecutions. The former can be cured by making the mere act of intercourse by a husband with his wife under 12 a distinct offence from 'rape' with a maximum punishment of 2 years imprisonment or fine or both, and the latter, by making the offence triable by a Court of Session or a first class Magistrate and making it obligatory on the complainant to obtain the sanction or certificate of a responsible officer - whom the Government may appoint in this behalf - before the complaint is proceeded with. It is only right to observe, that simultaneously with the passing of the law, it is not improbable there would come into existence associations and Sabhas under the auspices of social reformers for the purpose of initiating

initiating prosecutions and otherwise enforcing the law with vigour. It would be necessary, in some measure, to moderate the action of such bodies. That may not be necessary in the metropolis and other favourably situated places, but it is not difficult to foresee that in certain localities, without some restriction on the point, the law might be easily converted into an engine of oppression. I admit that it is not easy to lay down by law, general rules on the point (so as to make them applicable throughout India) in order that the practical effect may be given to the suggestion that the sanction or certificate of some officer of Government should be made a condition precedent to the prosecution of the complaint. I think however that the law may well reserve power to the Government to frame rules in

18 P
the matter, should the necessity for the issue of any such regulations arise at any time in their opinion.

Madras
7th February 1891,

I have the honor to be
Sir,

Your most obedient servant

S. Subramaniam

From

S. Subramania Iyer

To

The Honorable
J. F. Price
Chief Secretary,
to Government,
Port St George.

Date. 7th February 1891.

Opinion on the Bill to
amend the Penal and Criminal
Procedure Codes.



Enclosure

15 8

[In the matter of the Bill to amend Section 375 of the
Indian Penal Code and the Code of Criminal Procedure Schedule II so
far as it relates thereto.]

OPINION.) C a p s

1. The proposed alteration deals only with the age of
consummation, and does not affect any religious principle or precept
relating to the age of marriage. The religion of no section of the
public can seriously be stated to be interfered with by raising the
age of consent from 10 to 12 years.

2. There is great danger, however, that such a provision may
be used for vexatious and grossly improper purposes. The working of
it therefore, must be entrusted only to those in whom the public feel
confidence. By withdrawing the offence now created from the cogniz-
-ance of the police the Bill reduces the chance of improper inter-
ference with the domestic concerns of the people to a minimum.

3. I am in favor of the change and think that the safeguard
provided by the Bill is sufficient for all practical purposes.

Madras.

6th Feb 1891.

(Signed) J H Spring Branson.

Advocate General.

(True Copy)

Ernest Baulax
Government Solicitor.

62

Cuo 638 10
Annual (1891) Department

From
Ernest Barclay
Government Secretary
Madras

To
The Chief Secretary to Government
Madras

1055

Dated 7th February 1891
Recd &



Original forwarded to
Secretary to Government
Adm. & Est. Dept.

Forwarded with reference to
the Order of Government dated
20th January 1891. N° 124.
Encl. 1.

Ernest Barclay
Government Secretary

From Mr. J. H. Hastings

16 P

Madras 1891
7th February 1891



To
The Honorable J. H. Hastings
Chief Secretary to the Government
of Madras
Fort Saint George.

I have the honor to acknowledge receipt
of L. O. dated 20th January 1891 N° 124
judicial and to express my opinion on the
provisions of the Bill to amend the
Indian Penal Code and the Code of
Criminal Procedure 1882, which accompanied
the same.

The evil pointed out in the statement
of object and reasons does not, as far as
my experience goes, exist in any appreciable
degree, in most parts of this Presidency.
But if the evil is prevalent in other parts
of India to an extent which calls for
remedial measures, I see no valid objection
to legislative interference in the matter by
a suitable amendment of the law. I do
not.

If the intended success were such, the existing
 tendency of law in the subject to grow, is in
 fact, that the same offense can be done, or
 it can be done with more force, it is
 summary of the provisions of the law in 1875
 for the sake of brevity, I cannot repeat
 the contents of the High Legislature.

At the age of 12, a girl is considered 175.
 In fact, to be what of it will only be that
 that section 175 is not other sections in which
 the absence of consent is an ingredient of the
 offense, he provided by the general provision
 contained in section 10. Therefore, we shall
 not find it necessary to repeat the whole of the
 law of sexual intercourse with a girl under
 the age of 17, but we shall find it
 necessary to repeat the age of 17, if it is 17.
 As a girl under the age of 12 cannot be married
 and with her father, without the consent of
 the court becoming quite of the age of 17, 18, 19,

[illegible]

Living

linked to cases in which the wife is concerned
 of age. The result of this change is the sex of
 intervenes with such an effect, etc. age is
 for all cases with the case is so important
 it is to be as to the change that it is
 a part of the law is a very old age. And
 it is not a part of the law of age. The
 law is not a part of the law, as the
 law is the essential function of the office
 of age. But caught up the age of the wife
 is so far as the definition of the office is
 concerned, unworkable and illogical. If the
 act of sexual intercourse with such a wife
 wife she is to be a part of the law
 with the purpose of the law is to be
 with the wife and with the husband
 for the purpose of the law is to be
 for the purpose of the law is to be
 an example of a part of scientific law

in the service of the office, and one
believed to be a spy, and furnished
is not yet his name, and is not yet, but also
a witness of the crime is known in fact that
amongst the other parties, it will be sufficient
to take as a precedent of the crime done,
for whose protection principally the provision of the
law is intended. Public sentiment is not established
to show against the infliction of a severe punishment
on a husband who seduces his own wife, and at the
same time is prejudicial to the interests of the
wife herself. The court will be a proper
determination on the facts of the case, and on
neighbors of the parties concerned to give us
information or evidence which would lead to
the detection and successful prosecution of
the crime. It will more or less be the case
even if the severity of the sentence be considerably
reduced. In the case of murder the law is
the

22 P
the law so far as regards husband and wife will
practically remain a dead letter if the offence
were punishable as rape, especially as the
changes proposed in the schedule to the Code
of Criminal Procedure will render the
offence in such a case a noncognisable one.
The severity of the sentence is also unequalled
for, because in cases where the husband
has sexual intercourse with his wife
under circumstances which would make
him guilty of culpable homicide or of causing
grievous hurt or of causing death or grievous
hurt by a rash or negligent act he would
be liable to the punishment prescribed therefor.
(See Queen Empress Versus Hurree Mohun
Meythee I.C.R. Cal. Vol. XVIII p. 47) Where
the offence is committed by sexual intercourse
with one's own wife, the offender is

likely in most cases to have repeated
and as each such intercourse will constitute a separate & distinct
it, he might, in cases where severity
of sentence is called for, be proceeded against
under Section 35 of the Code of Criminal
Procedure.

[illegible]

minimise the opposition to the Bill
 as proposed, which might be made in the
 case of a bill of this kind. It is
 characterised as a measure of the
 kind in the Legislature is also likely
 to be better received in the suggested change
 than in the amendment of section 275
 as proposed by the Bill. The elimination
 from the definition of Rape, of sexual intercourse
 with a woman who is a girl of 16 years of age
 also characterised as being a measure of principle
 of the kind of law, and the suggested
 necessary changes proposed by the Bill is
 likely to be the best of the kind of law
 by which the offence is made
 more or less recognisable and better
 as for which the law is the best
 is in the public interest and the
 Bill will be the best

15 121
above suggested than with the severe punishment retained by the Bill. I would however retain the Court of sessions as the Court by which the offence is exclusively triable.

Section 1 of the Bill proposes to substitute the word 12 for the word 10 in the Clause marked 'Fifthly' in section 375. Having regard to ^{the} admirable precision which characterises the drafting of the Code and to the provisions contained in section 90, thereof, there is no object in retaining the said Clause at all when the legislature resolves not to restrict the application to section 375 of the general provision as to the age of Consent contained in section 90. I would also amend the exception by expunging from it the words "the wife not being under 10 years of age" thus amended the exception will be as it existed in the original draft Code. I would propose the insertion of a new section to the following effect next after section 376.

" of unlawful sexual intercourse."
with ones own wife

Whorever

26 P
123

376 A. Whoever voluntarily has sexual intercourse with his own wife the wife being under 12 years of age shall be punished with imprisonment of either description for term which may extend to 2 years or with fine which may extend to 1000 Rs. or with both.

Explanation

Explanation:- Penetration is sufficient to constitute the sexual intercourse necessary to the offence described in this Section.

Under Section 375 as it now exists and as it is proposed to be amended by the Bill the onus of proving that the wife is over the age of 10 years or 12 years as the case may be will be on the husband (accused) in cases in which he is not in a position to plead or establish consent in fact on the part of his wife - though if there were such consent in fact the onus will be upon the prosecution to

Establish

27

whether the girl was below the age
of age and that therefore there was
no ground in law. (Section 375 Indian
Penal Code) If the offence in question
be dealt with as a distinct offence in an
independent section as above proposed the means
of ascertaining the age of the girl will be
left open to the discretion of the court, whether
the girl is below or above the age of
12 years. It is true there is nothing novel
in the principle of the Bill and that the
principle involved in it was affirmed and
rightly affirmed years ago in the Indian
Penal Code by reason of the general
practice obtaining in this country of marrying
girls when they are children. The change
now proposed is no doubt only to raise
the age of consent in Section 375 from
10 to 12 or rather to remove the exception
which

which for the purposes of that section was engrafted on the general age of consent fixed by section 90. by lowering it from 12 to 10. But for practical purposes the change is momentous. because it considerably widens the sphere of operation of the principle a - sphere which is now extremely narrow. It is therefore necessary that the rigour of the law should be softened in the manner indicated above and that the legislature should also provide special safeguards against vexatious prosecutions and frivolous proceedings, as the matter is one which so materially bears upon the relationship of husband and wife - a relationship which among Hindus is regarded not as the result of a contract, but of a sacrament. The changes proposed in the

24 137
the schedule to the Criminal Procedure Code afford in a great measure such safeguards. But it will be desirable that an additional safeguard be also provided by empowering the local government to declare by notification that no prosecution in respect of the offence ^{shall be instituted} in question, in the territories or any part thereof subject to such government, without the previous sanction of such government or any officer empowered in that behalf by such government.

If in the working of the proposed law it should be found that in particular local areas a general feeling of insecurity or alarm is caused by vexatious and frivolous prosecutions or the formation of private and voluntary agencies or associations for instituting and conducting prosecutions, such a provision will enable the government concerned to check such prosecutions and allay such feelings by exercising the power conferred by it.

30 P.
131

I am not to be understood as depreciating the formation of such agencies and associations in the cause of social reform. But any overzeal which is not unlikely to characterise their proceedings will be counter-acted and checked if they have to obtain the sanction of some responsible official authority before instituting proceedings.

I have the honor to be

Sir

Yours most obedient servant.
Wm. W. Chapman

Cuo 622

7/2

From

The Hon. V. Bhaskyam Iyer
Madras

D 7. 2. 91

please find
these in our
minutes of
those in this
of wife

Opinion on the Age of
Consent Bill.

No. ^{Extra}
10
102.91

Judicial C No 717

OFFICE

OF THE

COLLECTOR & MAGISTRATE,

MASULIPATAM,

KISTNA DISTRICT.

Camp Jaggaipet 1891.
17th February

FROM,

A. J. Arundel Esquire
The Collector

Kistna

TO,

The Chief Secretary
to the Government of Madras

SIR,

In reply to G. O. No. 124 Judicial dated
20th January 1891 I have the honor to ex-
press my opinion that the proposed
alteration of the law is a useful step
in the direction of a most necessary refo.
2. The raising of the age of consent
12 in the case of married girls is
perhaps as great a change in the law
as it is wise to make at present, but
we should I think look forward to
a further change in the course of a
few more years, by which the age of
Consent should be raised in the case
of married girls to the age of 14 when
puberty & not merely menstruation

has been reached.

3. It is generally agreed that the desire to consummate marriage with immature girl-wives is due not so much to the desire of the husband as to the persuasions & suggestions of the old women of the family who are both averse from change and anxious to see children of the next generation. The effect of the proposed change in the law will in all probability be to enable the men check the initiative of these mischievous members of the family by significant warning. The removal of offences against the altered law from the cognizance of the Police is desirable.

4. It is recognized by educated natives that premature consummation of marriage is not infrequently the cause of the mother's death or serious injury at first confinements while the sterility of women is attributed to the same cause. It must be added however that the consummation of marriage before puberty is said to be the exception rather than the rule in this district. I fully agree with the view that

has been urged on me by several educated native gentlemen that although 12 years may be fixed as the age of consent as regards man and wife, it is quite unnecessary to retain this limit in other cases. Fourteen should be the limit of the age of consent in all cases except that of a man and his wife. There is neither religious nor social prejudice to be consulted here, and the state may unhesitatingly interpose to prohibit sexual intercourse until the age of 14 is reached when it is almost certain that the female has attained puberty.

I have the honor to be
Sir,

Your most obedient
Servant

KV
10-2-91

1275.

Lucian

1891

From
The Collector,
Tirutina

To The Chief Secretary to the
Government of Madras

Dated 9th }
Despatches 10th } February 1891

Received

Enclosure

No

Subject



In reply to G.O. No 124 Judicial
dated 20th January, 91, expressing
his opinion that the proposed
alteration of the law is a fearful
step in the direction of a most necessary
reform and that the raising of the
age of consent to 12 in the case of
married girls is perhaps as great
a change in the law as it is wise
to make at present.

208

Opinion on the age of Consent Bill

It appears to be clear that
premature consummation of marriage
is "productive of grievous suffering
and permanent injury to child wives
and of physical deterioration in
the community to which they belong"

Though not extensively
practised, early marriage and
premature consummation take place
to an extent that requires the
interference of the legislature. When
the Government see that some of their
subjects are thus liable to grievous
suffering and physical injury, it
appears to be their plain duty to
take steps to protect them from
that injury - Abstinence in such
circumstances

circumstances is abdication of the functions of government. A government that declare their inability for any reason to protect any subject from physical violence or to punish those guilty of such violence are only declaring their own impotency for their legitimate task.

The proclamation does not stand in their way - The protection of minors is a duty which the government cannot renounce - nor do I regard this piece of legislation as a departure from the principles of religious neutrality observed by the government - Every man is entitled to follow his own religion but he is not entitled under the sanction of religion to interfere with the rights of another, whether with or without consent when such

Such other individual is a minor
So long as such interference is
"productive of frievous suffering
and permanent injury"-

The practice of early marriage
is followed more by Brahmins
than any other caste. and I believe
I am right in saying that early
marriage is not regarded generally
by the non-Brahmins as compulsory
according to the Hindu religion -
and in this Presidency all the Brahmins
are not agreed that early marriage
is necessary - The best of laws that
requires a man to wait, if needs
be till death, has still the force
of living law among Nambudiri
Brahmins who not only do not
consider early marriage necessary
but often allow their females to die
unmarried. In these circumstances
it appears to me to be incorrect
to

259
to say that early marriage is a part of Hindu religion as proved by Custom. The preponderance of authority also is in favor of that view.

I have also to point out that the alteration in the Criminal Procedure Code withdrawing the offence when committed by a husband on his wife is not likely to have any application to the Nairs of Malabar among whom the customary ceremonies though followed by co-habitation have not been recognized as constituting a valid marriage in a Court of Law. But, I do not think any alteration in the Bill on that account is necessary.

In conclusion I have to add that I am not satisfied with the reasons for raising the age of consent to 12. If the medical authorities may be

be followed and their opinion ought
to be followed in this matter 14 would
seem to be the proper age -

Sankarai Nair
Nair

10⁹

June 659/81

4.

CURRENT No.

659

[9]

Judicial DEPARTMENT.

From Amble C. Sankaranthai

No.

Dated 10th } Feb 1891
Received 10th

Enclosures One

SUBJECT.

Opinion on life of
Consent Bill.

No. 19
J

Jud. Cuo 835

VIZAGAPATAM GOVERNOR'S AGENT'S OFFICE.

Dated 10th February 1891

Camp Rangunada

From

W. A. WILLOCK Esq^r.

Ag. Agent to the Governor.

Vizagapatam District.

To The Honorable J. F. Price

CHIEF SECRETARY TO GOVERNMENT,

MADRAS.

SIR,

In reply to G.O. No. 124 Judicial dated
20th January 1891 asking my opinion on the Bill to
amend the Indian Penal Code and Criminal Proce-
-dure code with reference to what is called the age
of consent I regret to say that the subject is one
to which I have not paid any attention hitherto
and as I am now in the most remote part of
Cyprus I am unable to obtain any information
on the subject which would allow of my expressing
an opinion of any value. All I am able to say
consequently is that I have not personally come
across any instance of the present law having
proved inadequate or of injury having been caused
to child wives by the limit of age now fixed. It seems
probable to me that the question is one in which
the peculiarities of the life history of races concerned
may be an important element.

I have the honor to be
Sir

Your most obedient servant
W. A. Willock
Agent to the Governor

Cuo 835

JUDICIAL DEPARTMENT.

From

THE AGENT TO THE GOVERNOR
VIZAGAPATAM.

To

THE CHIEF SECRETARY TO
GOVERNMENT,
MAURAS.

20.2.91

Dated 10th February
Despatched 20
Received 1891

No. 19-V.

ENCLOSURES. none

Subject.

Forwarding opinion on the bill
to amend the Indian Penal
code and Criminal Procedure
code regarding the raising of
the age of consent

Print in continuation
please. H. M. R.

Judl. Cas. 726.

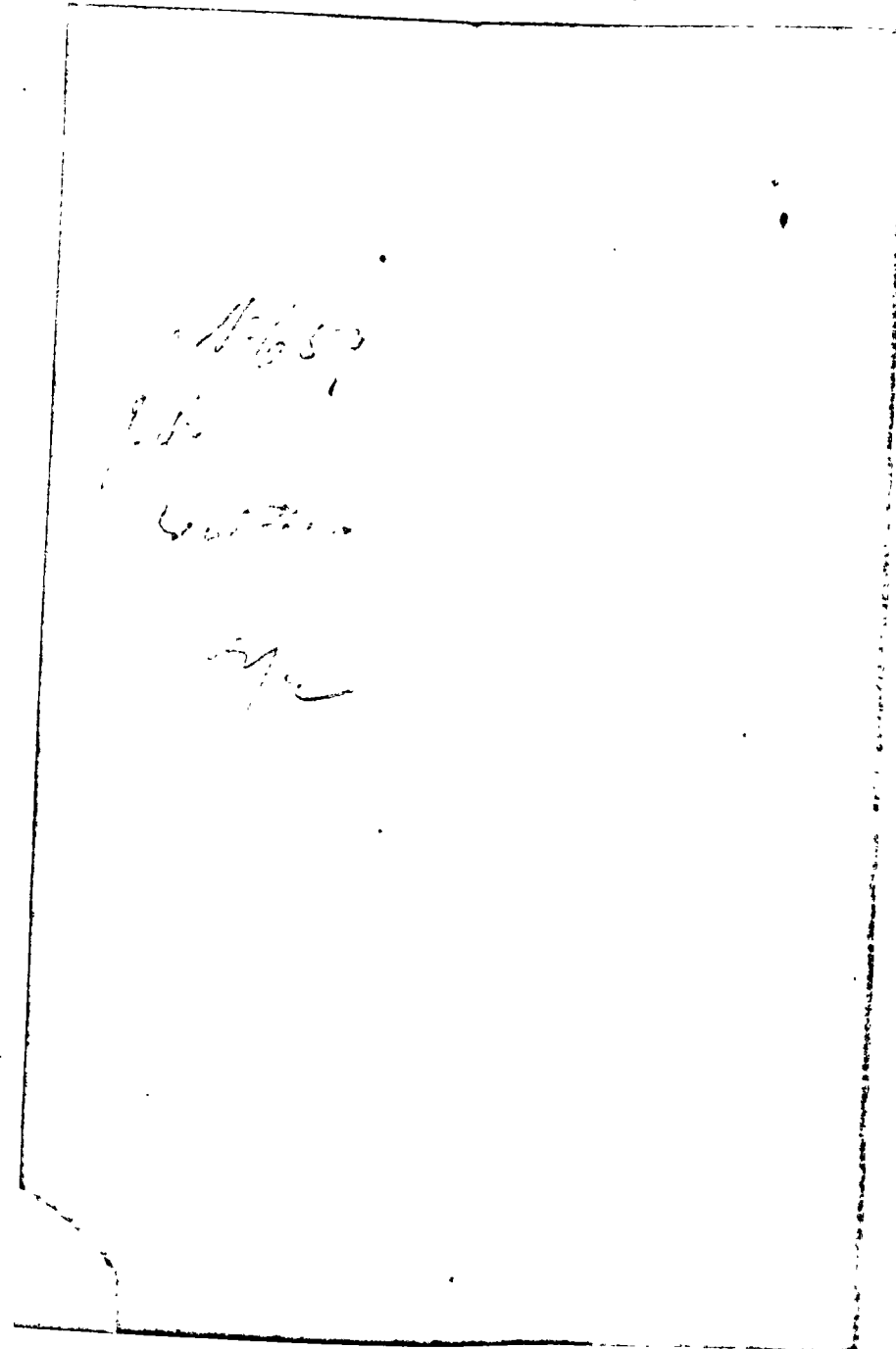
10. Feb. 91.
Equine

CHIEF SECRETARY
10 FEB 91
MURRAY

I beg to forward
herewith a few remarks on
the Age of Consent Bill forwarded
to me with the G.O. dated
20 Jan. 90. No. 124. Judicial.

Yours obt. Servant
Chakravarthi

proposed alterations to the law
will far. I am strongly convinced
outweigh any inconveniences.



Print in center
please Mr

Ind. No. 726.

Bellary, 13 Feb 1891
Rao Bahadur A. Sabapathy Mudaliar
Bellary.
The Chief Secretary to the Government of Madras.
Sir, to receive a letter is signed
and has been forwarded to the
Minister for the receipt of G.O.
dated the 10th January 1891
No. 124, Judicial, and the
State my drafts and follow:
the principles of the Bill.
and in the future, I believe in
Rao, it does not interfere with
the religious belief and
the people of this part of
India to any appreciable extent.
The benefits accruing from the
proposed alteration in the law
will far outweigh any inconveniences.

that may arise from the religious considerations so strongly and vehemently put forward by a number of people.

3 In this part of India, in the vast majority of cases, ~~corruption~~ of ~~infringed~~ does not take place before the girl is twelve years old. Among Brahmins and those who follow them in marriage customs, when a girl attains puberty before the age of 12, her marriage is postponed for a year or more for the girl to be a better condition. In the rest of the states and in no marriage is it known to be postponed. There is no objection on the score of religion or caste and now that the parties have been subjected to every social or religious ostracism.

4 I very much regret that the age is not proposed to be raised to 14 and have all the opposition for a more substantial reform, for as it is now the age of 12 is quite insufficient to fully attain the intended object among an ill fed and ill brought up people like those of India.

5 I have read of suggestions from certain quarters that in the proposed alteration sexual intercourse should be permissible in the case of the husband of the girl though under the age of 12 had attained puberty. The attainment of puberty at such an early age is a sure indication that the girl is physically weak, and such girls are the more entitled to be protected by the legislature.

Another objection against

The above suggestion is to be found in the practical working of the law, for medical examination of the girl which is so much abhorred will become a necessity.

In regard to the punishment in the case of the husband it must in my opinion be almost nominal. It should not far exceed a year's simple imprisonment with an alternative of fine.

The present punishment is disproportionately and shockingly heavy considering the current opinions among the people of this country.

I have the honor to be
Your most obedient servant
W. A. P. [Signature]

W. A. P. [Signature]

C. No. 726

15/1/91

Submitting opinions on
the provisions of the Bill
to amend the Indian Penal
Code & the Code of Criminal
Procedure, 1884.

From
Rao Bahadur
J. Subramanyam
to
The Chief Secretary
to the Govt. of Madras
Madras.

15 FEB 91

Opinion on the Age
of Consent Bill

Code
Class.

OP

INDIAN TELEGRAPHS.

Monthly
Number.

165
05479

To
(Office)

Madras

From
(Office)

Bellary

Words.

18

Days

13

Hours

1

Minutes

15

Instructions

Refd.

To
(Person)

Chief Secretary
to Govt.

From
(Person)

H. Sabapathy
Madras

CHIEF SECRETARY
13 FEB 91

Consent

my

Support

Bill

opinion

age
posting

64 Word Form.

Recd. from

LN.

Sent to

LN.

At

Here

Mts. by

At

Here

Mts. by

To

MADRAS 13-2-91

G. W. Allen and Co., No. 179T-8-2-90-20,000,000.

CURRENT No.

406

[9]

Judicial

DEPARTMENT.

Tel.

From Rai Bahadur
A. Lakshminarayana

No.

Dated 13th

Received 13th

Enclosures

Feb 13/91

SUBJECT.

Supporting the Bill
of Consent Bill.

To be made

received

to be made

Mythapuram
14th Feb 1891

16 FEB 91
SECRETARY

My dear Sir

In my letter dated
7th instant giving my
opinion on the Age of
Consent Bill I observed
a clerical error which
I wish to rectify if
it be not too late

exception clause

remain
guaranteed
Wholesale and Retail

To be made
received and
+ interest
at 20% per annum

and I shall feel ob-
liged by your directing
the correction noted
below inserted in the
letter.

Instead of the result
of this change which
was effected by an
amendment of the law
substitute the result
of this change which
was effected by an
amendment of the

18
Madras
1st Feb - February 1871

Ne. Ne. arab. 3. 5. 7. 10.

Believe me to be, Dear Sir,

16 FEB 91
GOVERNMENT C-10

[illegible]

It was in what gets less and less
and out in our eyes more and more different
and the High Priest leaves - here -
it is necessary to be that the rest of

distressing situation. If the truth were as it
probably would be in most cases of the
kind, that it was the husband that had
the sexual intercourse, she has to testify to
it with the almost certain knowledge of the
husband being convicted on her evidence,
and subjected to severe punishment. But
if it were otherwise and she makes up
her mind to speak the truth, she will
have to confess that her chastity was violated
by a stranger or that she was unfaithful
to her husband, one of the legal consequences
of which will be forfeiture of her right
of inheritance to her husband's estate. In
the 1st case, there will be a strong temptation
to save the husband by denying that he had
any sexual intercourse with her and thereby
bastardizing her child. And if she yields
to this temptation, she has to account for the
stern

3P
stern fact of her having a child and cannot
decline to answer the question as to who had
sexual intercourse with her, if not the
husband. It can hardly be denied that
it will be simply cruel to place a tender girl
on the horns of such a dilemma.

In such a case even the position of
the husband is no doubt one of great
perplexity and embarrassment and one
which may strongly tempt him to impute
unchastity to his wife and bastardize the
child. But this of course is unavoidable
and the husband is himself solely
responsible for the situation in which he
finds himself placed. At any rate he, being
the accused, has under law this decided
advantage over the wife viz that he cannot
be compelled to account for the birth of the
child or answer any questions concerning
the

the offence. Under the Indian Evidence Act
a witness is not excused from answering
questions the answers to which may tend
to criminate the witness or expose him or
her to a penalty or forfeiture of any kind.
And even in criminal proceedings against
a person the husband or wife of such person
is a competent and compellable witness. The
English law is in these as in several other
respects more tolerant of human frailties
than the Indian law. I would not however
disqualify the wife from giving evidence in
a prosecution instituted against the husband
for the offence in question. It may be that
the prosecution is instituted by herself or by
someone on her behalf and she should certainly
be a competent witness. I would therefore
only suggest that she should not be a
compellable witness either for the prosecution.

48
or for the defence; in any case in which the
husband is prosecuted for the offence in question.
Even in cases in which the awkward
circumstance of the wife having become a
mother, does not exist, she will often be
placed in a delicate and embarrassing
position when compelled to give evidence
in a prosecution of the husband for the
offence in question.

If this suggestion be approved, effect
may be given to it by adding a proviso to
Section 120 of the Indian Evidence Act
to the effect that the wife shall not be
compellable to give evidence in any proceeding
against the husband under Section 375 et
of the Indian Penal Code. I say s. 375 et
instead of s. 375 if the Indian Penal Code
with reference to the suggestion made in my
previous letter that it would be desirable
to constitute the offence in question a

separate

separate offence under a new section.

Section 112 of the Indian Evidence Act also presents a difficulty in connection with the case in question. The object of the section is of course obvious and that is to raise a presumption in favour of the legitimacy of the issue and certainly it was not intended to raise any presumption of the commission of an offence by the husband. And the principle of English law embodied in that Section will have no such operation in England because sexual intercourse with one's own wife is in no case *per se* Criminal under English law. Though under the Indian Penal Code it is an offence under Section 375 when the wife is under 10 years of age Section 112 even if otherwise applicable is practically inoperative in a prosecution of the husband under that Section for the simple

5 P
simple reason that hardly a single instance has occurred of a girl becoming a mother between her 10th and 11th year. There does not however seem to be anything in the language of the Section rendering it inapplicable to a Criminal case and it may be difficult to contend successfully that that section does not throw the onus on the husband to disprove that he had sexual intercourse with his wife before she was of the age of 12 years; if a child is born to her in wedlock when she is under the age of 12 years and 6 months and a prosecution is instituted against him therefor for the offence in question. It will be therefore extremely desirable to amend Section 112 by providing clearly that it shall be inapplicable to a Criminal prosecution of the kind under consideration.

163
Consideration. The said Section is perhaps
also faulty in other respects as pointed out by
Mr. Whitley Stokes and the sense in which
the word "access" is used in the proviso is
by no means clear; and certainly it is far
from being in accordance with the English
law as expounded with admirable clearness
in the recent case of Baile v. The
Attorney General, (Law Reports, Probate
Division Vol. XII p. 177.)

As there is now a bill before the
Supreme legislative Council to amend the
Indian Evidence Act, the above suggestions
if approved may be given effect to in that
bill.

I have the honor to be

Sir

Your most obedient servant.

Abhashyam Duggar

Judcl. C. No. 755.

16/2

From
Honble V. Basu & Jeyaraj

By 16-Feb } 91
16-u }

Justices opinion re
Ap of Consent Bill

Post. Cno. 830 371
INDIAN TELEGRAPH
Station
Madras Mount Road. Calcutta.
20/2 15 17 10 55/2.
Madras Legislative
May no 95 12/1
Ultimo age of
Consent bill please
exparte. opinion x
9
10
11
12
13
14
RECD. FROM L. N. SENT TO L. N.
At Hrs. Mts. By At Hrs. Mts. By
MOUNT ROAD 20-2-91
Date Postma. ter.

CURRENT No. 830
Judl. DEPARTMENT.

[91]

Telegram
From
Legislative Deptt
Calcutta

No.

Dated 18-2

Received 20-2 } 91

Enclosures

SUBJECT.

Requesting to expedite opinion
on age of Consent bill

Judl. No. 858 High Court of Judicature,
Madras, 19th February 1891.

No. 588.
From

1 AP 1891

A. W. Foster Esquire,
Registrar of the High Court of Judicature,
Appellate Side, Madras.

To

The Honorable J. F. Price,
Chief Secretary to Government,
Fort Saint George.

Sir,

In continuation of my letter dated
the 6th instant, No. 355, I am directed to
forward a transcript of the minutes
recorded by the Honorable the Chief Justice
and Mr. Justice Muttusami Aiyar
on the Bill to amend the Indian Penal
Code and the Code of Criminal Procedure,
1882.

I have the honor to be,
Sir,
Your most obedient servant,



Registrar

The Chief Justice :- I am inclined to think that if any alteration is to be made in Section 375, I.P.C. clause "fifthly", the age of consent should be raised to fourteen years. A very large number of children of 12 years of age must be manifestly unfit to give consent to sexual intercourse and the proposed alteration will only in some degree mitigate and not cure the evil complained of. If it is thought wise to interfere with the relations of man and wife, the same remarks apply to the exception to Section 375.

The amendment to Schedule II, Criminal Procedure Code, will render a conviction for rape by a husband on his child-wife very difficult if not impossible to obtain.

Mr. Justice Muttusami Aiyar :- Having regard to the objects of the proposed legislation, I consider that it is sound in principle.

So far as the Bill relates to persons other than husbands, there is not the slightest objection to raising the age of consent to 12 years. Any legislation in the direction of a nearer approach to the age of discretion is, in their case, in perfect accordance both with Hindu

religion and with social usage.

Neither is it open to objection even so far as it relates to husbands, though in form and in certain matters of detail it requires to be amended. There can hardly be any doubt that consummation of marriages with girls who have not attained their maturity is an evil and that it is the duty of every father to protect his daughter from such evil. This being so, I see no objection to the State stepping forward to afford such protection to girls from whom it is withheld.

As far as I am aware, neither Hindu Law nor Hindu religion nor usage in this Presidency sanctions a premature consummation of marriage. The general practice in Southern India is to allow a child-wife to remain with her father or mother until she attains maturity and her marriage is consummated in proper season. It is in conformity to the teaching of the commentator on the Apastamba Sutra who says that whether the text relating to the Garbhadaana ceremony is or is not repeated as part of the marriage ritual, cohabitation must be deferred until the girl attains her maturity. Judging from my experience in this Presidency

Presidency and from my view³ of the general Hindu Law, I think that legislation to protect girls against injury from premature sexual intercourse is not in conflict either with Hindu religion or with the recognized usage of this Presidency or with reason.

As to the objection that the Hindu marriage must be consummated on the fourth day after menstruation, the correct view is that cohabitation is then permitted and not enjoined as a matter of imperative duty. There is hardly a case in which the marriage is consummated in this Presidency on the fourth day after the first menstruation, whilst in many orthodox and respectable families consummation is deferred for 6 or 12 months and even for a longer period. According to strict Hindu Law, a girl may choose a husband for herself after she menstruates if her father has failed in his duty to select one for her at an earlier period, and some texts allow even a period of three years for her to make a proper choice in case of extreme necessity. Whilst I am of opinion that cohabitation is permitted by Smritis from the fourth day after menstruation, I also think that it may be and is often deferred.

deferred without any injury to the religious or caste status of the wife.

The real point for consideration is what form protective legislation such as the one under consideration ought to assume as against husbands and how its practical operation may be best safeguarded.

It does not appear to me to be correct to say that sexual intercourse with the husband is rape. The injury to the purity of the woman, and the degradation and misery thereby entailed in her is an ingredient in the conception of the offence of rape, and it is wanting in the case of premature intercourse with the husband. Again, the avowed object of the proposed legislation is to afford protection to the child-wife but a sentence of transportation for life or for a term of seven or ten years or even a sentence of a long term of imprisonment would, when passed upon her husband, operate to degrade her though indirectly in society and in the present state of the marriage-law in this country, inflict upon her in effect a kind of permanent or temporary widowhood according to the nature of the punishment. It may at times happen

that

that the offender is a boy under 18 years of age and his imprisonment and degradation as one belonging to a class of ruffians, would be regarded no less as a calamity to the girl than to the boy. It is no doubt true that according to the law as it stands at present, sexual intercourse with a girl under ten years of age is rape even when the girl is the offender's wife but it seems to me that the inclusion of the husband among offenders who violate a woman and who are ordinarily classed with felons is incompatible with the primary conception of the offence. But the age mentioned in the section is so low that in its practical operation, the provision has hitherto been perfectly innocuous, and so far as I am aware, there has not been a single conviction in this Presidency under the fifth clause of Section 375 as explained by the exception. The fact is that a girl never attains her maturity before she completes her 10th year, where as some girls attain their maturity a few in their 11th year, and several in their 12th year. I would therefore amend the Bill by constituting premature sexual intercourse by the husband with his wife when she is under

under 12 years of age into a distinct offence punishable as ordinary criminal force or hurt and add an explanation to it that if grievous hurt or a more serious injury is caused, the offender is liable to punishment for such offence under the appropriate section of the Indian Penal Code.

There is another matter in respect of which the Bill is open to amendment. In the statement of objects and reasons it is stated that the object of the Bill is to prevent premature consummation of marriages by adult husbands with children who have not reached the age of puberty, but the Bill goes beyond it by prescribing 12 years of age as the minimum age of consent. I would suggest that 12 years be prescribed as the age which is to be presumed as the age of puberty unless the husband shows that the wife has previously attained her maturity and would thereby recognize proof of maturity by the husband as a valid defence. This would not only bring the Bill into strict conformity with its declared object but also bring it into conformity with Hindu Law. When a girl attains her maturity in Hindu families, it is considered to be

an occasion of rejoicing and of festivity to which ladies who are related to the family or live in the neighbourhood are usually invited. Looking at the Bill from this standpoint, there is reason to think that the fact of puberty may be more easily proved than the fact of age.

Again, it is very necessary as observed in the statement of objects and reasons to prevent the possibility of vexatious and unjustifiable interference with the domestic concerns of respectable people under the proposed law. To secure this object, it is, I venture to think, not enough simply to make the offence non-cognizable and to declare it bailable. I would submit that it is desirable to go further and to provide that no prosecution shall be instituted unless it is initiated by the father or the mother or the guardian for the time being of the girl or leave to prosecute is first obtained from the District Magistrate or Divisional Magistrate, such leave being required to be granted after notice to the father or other guardian of the girl and a preliminary enquiry and an appeal being allowed to the High Court from the order

order sanctioning the prosecution. I would also insert a provision as a matter of precaution that in no case a girl shall be subjected to medical examination, except with her guardian's consent and by a lady doctor or midwife.

In conclusion there is one other matter which I desire to mention in connection with the proposed legislation. There is a strong prejudice among the uneducated classes and even among some of the educated men in this Presidency against State interference without adequate necessity with the domestic concerns of the people. It is not denied that when the father ignores his duty to his child, legislation is proper but it is said that in this Presidency there has been no case in which any girl-wife has ever suffered from injury caused by premature sexual intercourse; that such intercourse is not permitted to any appreciable extent; that the domestic arrangements of a respectable family are such as ordinarily preclude it and that the area of State interference should be continuous with the area of the evil. It is also considered

that the suggestion that where the evil does not exist, the new law will cause no practical mischief, is more plausible than sound, because what is dreaded is not so much the actual conviction as the vexation and annoyance and social scandal consequent on a public enquiry into matters the very mention of which is forbidden in polite society by a feeling of delicacy, an enquiry which may be initiated in villages where there are factions by a spiteful informer and which may necessitate the examination and cross-examination before a public tribunal of respectable women accustomed to a quiet life of privacy touching domestic incidents over which they usually throw a veil of decency. The Bill is framed apparently on the view that for the purposes of protective legislation, all India may be treated as one country, however muchsoever conditions of domestic life and domestic arrangements in joint Hindu families in the mofussil may vary in different parts of it. Though I also believe that a more local law would not meet all possible cases of premature cohabitation and prove as effectual as a general

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general scheme of protective legisla-
tion in checking the evil, yet I think
that the jurisdiction to try ordinary
cases of premature sexual intercourse,
unattended with serious injury, should not
rest, if it is constituted into a new
offence as proposed by me, in any tri-
bunal below that of a First Class
Magistrate. I further venture to submit
that it would in no small measure con-
ciliate popular prejudice to modify the form
and safeguard the practical operation of
the new law in the manner already
mentioned whilst it would at the
same time secure the protection which
it is intended to afford to minors
in cases in which they may really
need it.

(True Copy)

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No.

FROM

THE REGISTRAR OF THE HIGH COURT
OF JUDICATURE AT MADRAS,
APPELLATE SIDE.

21 FEB 91

Dated

19 February 1891.

Received

No. 500.

Enc. one.

Submitting a transcript
of the minutes recorded
by the Hon'ble the Chief
Justice and Mr. Justice
Meetharam Aiyar on the
Bill to amend the Indian
Penal Code and the Code of
criminal Procedure, 1882.

FEBRUARY 1891, No. JUDICIAL.

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

READ—the following papers:—

From the District and Sessions Judge, Chingleput, to the Chief Secretary to Government, dated Chingleput, January 1891.

With reference to G.O., dated 20th instant, No. 124, Judicial, I have the honor to state that, in my opinion, the proposed alteration in the law is very desirable. The only question is whether the raising of the age of consent to 12 years is sufficient. As appears from the letter of Surgeon-Major B. Gupta printed at page 46 of the Supplement to the *Gazette of India*, dated 17th instant, the percentage of girls in this country who menstruate before the age of 12 years is under 40; and as stated by Dr. Joubert in his examination as a witness in the case of *Queen-Empress versus Harree Mohun Moytree*, I.L.R. 18 Calcutta 45 (at page 56), commencement of menstruation is only one of the early steps towards the attainment of puberty, which "is not generally attained upon menstruation, but subsequently," and even though the female may have then become capable of conception and fully fit to become a mother. Such is, I believe, the opinion of men qualified to give an opinion on the subject. It is, however, hopeless in the present state of civilization in this country to do all that may be desirable to benefit the community. All that can, and doubtless should, be done is to see that young and helpless girls are not tortured and put to premature and unnecessary suffering in violation of the people's own shastras—*vide* Manu, Chapter XI, 59 and 171—and as, from all accounts, the great majority of girls in this country do not first menstruate till between the ages of 12 and 13, the latter should, I think, be the lowest age of consent in any case, while in cases in which the catamenia have not commenced before the age of 13, I would fix the date of consent at the date of first menstruation and make sexual intercourse prior to that date penal.

2. The subject is not one of any special delicacy in this country, where the "flowering" (as it is called) of girls is published to relations and friends, who are invited to entertainments in honor of the occasion.

(Signed) J. W. BEST,
District and Sessions Judge.

From the District Judge, Coimbatore, to the Chief Secretary to Government, dated Coimbatore, 2nd February 1891, No. 123.

As requested in G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to express my opinion upon the Bill referred to therein.

2. There seems to be room for doubt whether such legislation is required for this Presidency; indeed, I am assured that there is already on foot a social movement among educated natives which will tend to reform from within the evil, which is admitted to exist, although to a much less extent than has been proved in Bengal.

3. These reformers, however, ought to recognize the fact that the legislation contemplated by this Bill must materially assist their efforts.

4. That such a measure is urgently necessary for Bengal, no one who has read the information collected by Sir Stuart Bayley can for a moment doubt. The only question is whether the age fixed in the Bill should not have been at least 13, instead of 12, but, at any rate, it is a step in the right direction.

5. That there will be many prosecutions under the new Act, I do not for a moment suppose. Experience (*actual*, I mean, and not merely on paper) as a District officer teaches that such matters very rarely come before the courts. It is well known that rape is a frequent element in so-called dacoities, but has seldom do we find any evidence of such violence put forward at the trial.

6. The great advantage of such a measure as the Bill under consideration is that it strengthens the hands of those who wish to fight against so terrible an evil in their own families, against those members thereof who are in favor of perpetuating it; and, as the education of girls proceeds, it will arm the hitherto defenceless child-wife against a brutal and cowardly husband. I should hope that teachers in girls' schools will not fail to put this weapon into the hands of their pupils.

7. The legislature has undoubtedly removed one possible objection to the proposed measure by making the offence "non-cognizable." It has been suggested to me that another safe-guard might be found in providing that the complaint must in the first instance always be laid before the District (or Divisional) Magistrate, whose sanction should be a necessary preliminary to its entertainment. Such a suggestion, no doubt, argues a distrust of the native Sub-Magistracy. I may, therefore, mention that it came from a native gentleman, and was quite spontaneous.

(Signed) G. D. IRVINE,
District Judge.

From M.R. Ry. P. CHENTSAL RAO, C.I.E., to the Chief Secretary to Government, dated Mylapore, 2nd February 1891.

In reply to G.O., dated 20th January 1891, No. 124, I have the honor to state that the proposed Bill on the age of consent has my hearty approval, and may be passed into law with a slight modification which I shall notice further on.

2. Although the necessity for the law proposed is not very great in this Presidency, since consummation of marriage does not generally take place here before the girl is 12 years old, it cannot be said that there are no cases whatever in which consummation takes place earlier, and the evils of it are so great that it is only right that the law should interfere and stop it.

3. I do not think that the proposed law can be regarded as an interference with our religion, for, whatever might be the interpretation that could be put on the texts of the ancient Hindu law on the subject, it is certain that, in practice, the consummation of marriage at any particular age or period is not regarded as compulsory. I am aware that, even in the most orthodox Brahman families, consummation is often put off for 2, 3 and even 4 years after the girl attains her puberty, if the bridegroom happens to be of tender years, or there are other reasons to recommend the step, and no exception is taken to this by the society on the score of religion or custom.

4. But, I must admit that the general public opinion is against the Bill. Most of the men whom I have consulted on the subject have expressed their disapproval of the Bill, not because they consider that it interferes with their religion, but because they apprehend that over-zealous reformers or mischievous neighbours might needlessly drag members of respectable families before Law Courts and cause them annoyance. I think their apprehensions are well founded. It is not unfrequently that our young girls visit the houses of their husbands even before they attain their puberty and before their marriage is consummated, and their innocent visits might give a handle for prosecution. Moreover, the limit of age which the proposed Bill fixes borders so closely upon the age at which consummation generally takes place, that it would be possible for any one to dispute the age, especially as the general appearance of our girls up to a certain period of their life is such that they almost invariably appear to be much younger than what they really are.

5. Under these circumstances, I think it to be desirable that the law should provide some safe-guard against needless prosecutions, and this end can be attained by making the permission of the District Magistrate or some other competent officer appointed by the Government on that behalf a condition precedent for prosecution. While such a safe-guard can in no way defeat the object of the Bill, will allay the fears of the public, and render the law more acceptable than it would otherwise be.

(Signed) P. CHENTSAL RAO.

From the District Judge, Bellary, to the Chief Secretary to Government, dated Bellary, 2nd February 1891, No. 1.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to state that no facts have ever come within my own experience of such an offence as is guarded against by the proposed alteration of the law.

2. It will certainly not constitute an interference with any religious practice. But if such a practice did exist, I should say that, religious or not religious, it should be suppressed without hesitation, as deserving even less consideration than the practice of sati.

3. Since this discussion has arisen, I have been but a short time in India, and have had but small means of ascertaining practices of different classes. I am not therefore in a position to say that it will, or will not, materially affect the existing practice of any castes. What I have generally heard is that it is not called for in this country, because such practices do not generally exist. But I am aware that girls are sent to their husbands' houses at a very early age in many cases, and that girls do certainly require this protection in Southern India.

4. After this amendment is made—if it be made—I do not expect that cases will come into court, or, if they do, it will be but rarely; such matters can generally be hushed up. But it will certainly put a check on the tendency to hurry on consummation by attaching a certain risk to those concerned in it, and will tend to establish a more healthy opinion and practice.

5. I have, I think, stated my experience in the first paragraph too broadly. I mean that I have not known cases of death or serious injury. I do not mean to say that girls are not taken to their husbands when quite immature and unfit for marriage. That is the case. Girls should be protected from such constitutional injuries as much as from any others.

(Signed) H. T. KNOX,
District Judge.

From the Session Judge of Madura, to the Chief Secretary to Government, dated Madura, 2nd February 1891, No. 58.

Referring to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to state that, beyond expressing approval of the proposed alteration in the law, I have no opinion to offer on the provisions of the Code.

(Signed) T. WEIR,
Session Judge.

From the Acting District Magistrate, Tanjore, to the Chief Secretary to Government, dated Tanjore, 4th February 1891, No. 25-C—Mag.

I have the honor to reply to G.O., Judicial Department, of 20th January 1891, No. 124, asking my opinion on the provisions of the Bill to amend the Indian Penal Code and Code of Criminal Procedure (1882).

2. My own opinion is—as may be supposed—that even 12 years is much too low an age for a woman, married or not, and consenting or not consenting, to commence sexual intercourse.

3. As regards local public opinion, the time allowed to answer the reference is far too short for me to arrive at any understanding regarding it. The three Deputy Collectors were consulted demi-officially. Mr. Khadir Navaz Khan is “strongly in favor,” considering that, even when puberty arrives earlier than 12 years, the advantages of waiting far outweigh the inconveniences. Mr. Krishnasami Aiyar would substitute puberty in section 375 as the age under which intercourse would become rape, instead of a distinct year term, believing this would serve the “laudable” purpose of Government and would not affect the religious feelings and customs of the Hindus. Mr. Pattabirama Pillai is of opinion that, “in the cause of humanity,” Government should interfere in this matter, as it has done with *Sati*, but acknowledges that orthodox public opinion is strongly against the Bill. He is also afraid that, if the Bill is passed, it will either be not enforced or become mischievous in the hands of evil-disposed and low-paid officials, unless and until birth registers are made reliable; and proposes the Bill should state who is to prosecute on behalf of a child-wife, that provision should be made for compounding the offence, and that the maximum term of punishment should be three years’ rigorous imprisonment. He also states that the subjecting a woman to medical examination is most abhorrent to a native in the case of any prosecution for rape.

4. It seems to me also that there should be distinct provision made as to who is to take proceedings. If confined to Magistrates of the first class, they might be trusted to act on apparently reliable information, from duly-qualified medical men or from other sources. If action or inquiry occurs otherwise, much trouble may be unnecessarily caused to families.

(Signed) J. THOMSON,
Acting District Magistrate.

From the Hon. MIR HUMAYUN JAH, Bahadur, C.I.E., Madras, to the Chief Secretary to Government, dated South Adyar, Madras, 5th February 1891.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, furnishing copy of a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, I have the honor to submit that there is not the slightest doubt of the immense good the raising of age from ten to twelve years will afford among a large number of people who happen to be away from the influences of civilization and enlightenment, and among whom any amelioration in the matter, however desirable, is not likely to take place without legislation.

2. An appreciable modification of the present law will be effected, as it is now proposed to take out of the hands of the Police the offence described in the first part of the schedule annexed to the amending Bill. Another desirable step in this direction will be to make the above-described offence punishable, not as for rape, but as for hurt or grievous hurt only. If this be agreed upon, I am of opinion it will obviate to a very great extent all objections and opposition raised against the Bill on the ground of its interference in religious rights and social customs of the people.

(Signed) MIR HUMAYUN JAH.

From M.R.Ry. A. SASHIAH SASTRI, C.S.I., to the Chief Secretary to Government, dated Kumbakonam, 5th February 1891.

I have the honor to acknowledge the receipt of G.O., dated 20th January 1891, No. 124, Judicial, and in compliance with it to submit the following observations.

2. I concur in the main in the object of the proposed amendment of the law and the provisions by which it is proposed to attain it, with one modification, viz., that in

the proposed exception in section 375 of the Code, I would add after the words “the wife not being under twelve years of age” the words “or the wife having attained puberty before that age.”

3. On mature thought, I cannot help coming to the conclusion that the raising of the age to 12 without making an exception in the case of girls attaining puberty before that age would amount to serious interference with customs, rules and practices which unfortunately are so closely interwoven with religious rites and beliefs of the Hindu nation in the matter of marriage institutions that it is impossible to deal with them separately without doing violence to widely-spread notions or deeply-felt feelings, however unreasonable or even irrational they may seem in the eyes of Englishmen brought up in beliefs, notions and feelings, the effect of a different education and of the teachings of a different religion and in some measure the resultants of a different climate.

4. The leading idea of the Hindu legislators—at least the majority and the most accepted of them—seems to have been that no girl should be detained or withheld from her betrothed husband a day after nature has proclaimed her physically qualified for maternity. It is a notorious fact that in the tropics, puberty is attained very often at the very early age of 10 and more frequently still between that age and 12. So it becomes a paramount religious duty of the parents to deliver up the girl at the earliest possible date after she attains woman’s estate. The parents are thenceforward absolved from all responsibility of guarding the purity of the girl, and they, as well as those on the husband’s side, most eagerly look forward to the birth of a grandchild, the sight of which gives them both a step in heavenly bliss, to say nothing of the spiritual blessing of a child at the earliest opportunity to the husband, who might be deprived of it if, perchance, he dies in the interval between the dates of his wife’s puberty and the attainment of her twelfth year. This reason, which underlies the whole question, will account, if I have expressed myself clearly, for the great opposition which is manifesting itself all over the country, as interference with the religious customs and practices non-interference with which has been guaranteed to them by the Queen’s proclamation.

Note.—Most probably the framers of the code who fixed the age at 10 must have followed the generally accepted dictum which is contained in the text:—

“Ashta varsha, bhavet kaniya
Nava varshatu rohini
Dasa varasha bhavet gauri
A ta urdwam rajasevala.”

which, translated roughly, means a girl becomes a kaniya at 8, a rohini at 9, a gauri at 10, after that she becomes a rajasevala or possessor of the signs of puberty or menses.

5. The argument *per contra* that the substitution of 12 years for 10 is a very simple matter which ought not to provoke so much opposition from the people at large who never showed any such signs of opposition at the passing of the Code which fixed the age at 10, is scarcely to the point, for very few girls even in Bengal attained maturity at that age, and the law practically had thus no operation and consequently elicited no opposition. The case is entirely different now, and the threatened danger of interference is real and serious.

6. In the Statement of Objects and Reasons it is stated that the evil of the existing law arises from the circumstance of its favoring the premature consummation of marriage by adult husbands with children who have not reached the age of puberty. I take this statement as entirely conceding my point, and fully justifying the modification which I suggest. I feel confident that, if it is adopted, the opponents of the measure will be entirely disarmed.

7. I think the law so amended could be worked with very much less friction, for I believe that the fact of puberty can be much more satisfactorily proved than the fact of age. There are so many feasts and ceremonies by which the attainment of puberty is celebrated among all classes and castes all over India that abundant and reliable evidence of the fact would be always available, while as to the fact of age such evidence must be often most unsatisfactory, inconclusive and often involving medical examination, which is so harrowing to the popular feelings of the nation.

(Signed) A. SASHIAH SASTRI.

From Rai Bahadur V. KRISHNAMA CHARI, to the Chief Secretary to Government, dated Madras, 5th February 1891.

I have the honor to acknowledge the receipt of G.O., No. 124, of the 20th ultimo, with a copy of the Bill to amend the Penal Code and the Code of Criminal Procedure, and to submit my opinion as follows on the proposal to raise the age of consent of a girl-wife from 10 to 12 years.

2. Early betrothal or marriage is no new institution in Hindu society. According to the Shastras, a girl is bound to marry before a certain age, and the marriage is of the nature of a sacrament; but the consummation of that marriage with one's wife before she has arrived at womanhood is forbidden, and as a rule, a girl is not allowed to go and live in her husband's family by her parents or guardians until puberty is attained or rarely till a year or two after, or until she is considered fit to discharge the duties of a wife and householder. The criminal records of the Madras Presidency do not appear, so far as I am aware, to furnish any examples of the occurrence of such an offence as that which the proposed Bill is intended to prevent and punish. As Secretary to the Victoria Hospital for Caste and Goshu Women in Madras, I have searched in vain the registers of patients treated during the past five years for a single instance of the occurrence of such an act of cruelty to any child-wife; and the lady doctor in charge of this hospital tells me that no such case has ever come to her notice.

I regret, therefore, that I cannot support the assertion of the overzealous and impatient reformers that the Hindu and Muhammadan families of this part of India feel the necessity for the proposed legislation.

3. If, however, the cruel and disgusting practice referred to in the Statement of Objects and Reasons annexed to the Bill prevails largely in some other parts of India, no Hindu who has learnt to exercise his reason freely can question the right of the legislature to provide against the practice, if possible, wherever it exists, and where grievous suffering or permanent injury to health is found to be the result.

4. But the question is whether the proposal to fix 12 years as the age of consent unconditionally is at all a suitable remedy for the practical evils complained of in the Statement of Objects and Reasons. The Government has, it is true, repudiated all intention of interfering with the religious customs of the people, such as the right of betrothal or marriage before a girl is 12 years old, and has withdrawn the offence of premature consummation with one's wife from the cognizance of the ever meddling policeman; but I am not at all sure that fixing the age of consent at 12 as the average age for matrimonial intercourse is any protection to the poor girls who have not attained puberty, though they have completed that age, and who form the bulk of the child-wives. The object of the Government being, I believe, to prevent the consummation of marriage before *puberty* and not merely before the hard-and-fast limit of the 12th year of a girl's age, the course of legislation now proposed will not, I apprehend, reach the evil to the extent designed by the Bill.

5. Then again I fear, in common with others consulted by me, that 12 years is a very dubious age to fix by law, and is unfortunately too low a limit to prevent an inquiry inquisitorial in its character and the abuse of the law by malicious persons and hungry policeman. The proposed age is unlike the limit of 10 years in the existing penal law when a girl looks a mere child, or of 14 years when puberty will have been reached and evidence of maturity will be visible. It is just the age when a malicious neighbour or mischievously-disposed person can easily raise the suspicion at that stage of a girl's life that she is under 12 years of age and lead the policeman to distrust the girl's or husband's friends, though they might swear that she is just over 12 years. False evidence will easily be produced, seeing that horoscopes are not believed now-a-days; and I fail to see how the policeman and the magistrate who have no birth registers or other reliable evidence of age to go upon could refuse to take cognizance of the complaint preferred, and how the mischievous attempt, to annoy an innocent neighbour and compel the appearance of his wife and daughters and daughters-in-law at the police-station or before a magistrate on the very day appointed

for the nuptial marriage—an act most dreaded by the femalehood of India—is to be provided against, or how unjust convictions or unfair acquittals are to be avoided, or how bribery and corruption are to be checked.

The age of 12 is just the period of a girl's life open to doubt and dispute as to maturity; and to fix the age of consent at so low a figure will, I fear, open the door to that vexatious and dangerous interference of the penal law and police with the peace and domestic concerns of respectable families which the Government wish to prevent. It is superfluous to add that such interference with the personal liberty of the young people will irritate their parents and friends and raise suspicions which it will be afterwards difficult to allay. When the common people of a village or street in a town are excited by the exposure of an innocent girl and her husband or the miscarriage of justice, nobody can tell what an ignorant crowd of easily-excitable people may do. I beg that I may not be considered an alarmist if I say that it is not impossible for an excited mob in India to do something like what Wat Tyler, Hob Carter and Tom Miller of English history did five centuries ago in connexion with this very question of a girl's age.

6. Such being the position and the possible consequences of the proposed legislation to interfere in the domestic concerns of the conservative millions of India, it seems expedient to alter somewhat the course of legislation in order to attain the benevolent object of Government to prevent the consummation of marriage before puberty and injury to health.

I beg respectfully to suggest for consideration whether this declared object of Government might not be attained—

(1) by fixing the age of consent at 14 years as the most approximate age of puberty in this country involving little inquisitorial enquiry and less chance of a doubt at the first look;

(2) by introducing at the same time a saving clause with respect to wives who grow up and attain that condition before that age; and

(3) by providing a system of enforcing accurate registration of births in every town and village and even the date of arrival of a girl at womanhood, which is regarded by the Hindus as the girl's second birth and which they celebrate as a festive occasion. The production of extracts from public registers of such domestic events will serve as the best evidence of age when any doubt should arise at the time of consummation, superseding the necessity of the appearance of women before the police and the magistracy; and I am strongly inclined to think that a Bill based on these lines will generally be welcomed, instead of being regarded, like the present Bill, as "a piece of hasty legislation" involving vexatious and dangerous interference with the religious and domestic concerns and the privacy of native families all over the country.

(Signed) V. KRISHNAMA CHARI.

From the Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 6th February 1891, No. 355.

With reference to G.O., dated the 20th ultimo, No. 124, Judicial, forwarding, for the opinion of the Honorable the Judges, a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, I am directed to forward transcripts of minutes recorded by the Honorable Justices Parker, Wilkinson and Handley. The Honorable Mr. Justice Shephard has not made any remarks.

2. Any minutes that may be recorded by the Honorable the Chief Justice and Mr. Justice Muttusami Aiyar will be duly submitted.

(Signed) H. W. FOSTER,
Registrar.

ENCLOSURE.

Minutes.

Mr. Justice Parker.—I would point out that if the clause marked "fifthly" is amended by the substitution of the word "twelve" for the word "ten," the clause itself becomes unnecessary, since by section 90, Indian Penal Code, a consent by a person under twelve years of age is not such a consent as is intended by any section of the Penal Code, and therefore the clause "secondly" (without her consent) will cover the case.

As to the second amendment—the substitution of the word "twelve" for the word "ten" in the exception to section 375—I observe from the Statement of Objects and Reasons that the intention of the proposed alteration in the law is to prevent the premature consummation by adult husbands of marriage with children who have not reached the age of puberty. That object is in itself desirable, but inasmuch as there are many cases in which girls in this country attain the age of puberty before twelve years of age, the effect of the alteration will be to make punishable acts of intercourse to which there is no objection on the ground stated. I would therefore amend the exception—when "twelve" has been substituted for "ten" in the fifth clause of the definition—by enacting that "sexual intercourse by a man with his own wife is not rape provided that the wife has attained puberty." Under section 221 of the Criminal Procedure Code the burden of proof would fall upon the husband. I approve of the proposed amendment to the Criminal Procedure Code.

If the law were so amended, the effect would be that sexual intercourse by any man with a girl under 12 years of age would be rape unless the man were the husband of the girl and able to prove that the girl had attained puberty. If the intercourse took place after the girl attained the age of 12 years, but before attaining puberty, the husband might still be punishable if grievous hurt were caused thereby—*vide* I.L.R. XVIII, Calcutta, 49.

In giving this opinion I have assumed that the object of the Legislature is limited to that described in the Statement of Objects and Reasons, viz., the prevention of premature consummation of marriage with wives who have not attained puberty, and the alteration I have suggested is designed to prevent the imposition of penalties upon innocent persons while effecting this object. The question of fixing a legal age for marriage is a different one, but however desirable the discouragement of early marriages may be, it is no part of the avowed object of this Bill. I do not therefore discuss the question as to how far the proposed alteration in the law is a legitimate or proper means of attaining that end.

Mr. Justice Wilkinson.—I see no objection. I only wish the Government of India had been able to raise the age of consent, as it is called, to 15. But the alteration brings the law as to rape into accordance with section 90.

Mr. Justice Handley.—The alteration in the law is eminently desirable, and the Bill seems to carry it out in the simplest manner possible. I have no other observations to offer on the Bill.

From M.R.Ry. S. SUBRAMANIAM IYER, to the Chief Secretary to Government, dated 7th February 1891.

In submitting my opinion on the Bill for the amendment of the Penal and Criminal Procedure Codes, I do not think I need dwell at length on the question as to whether it is desirable or expedient to introduce the changes proposed in the existing law. The Bill has been considered from every standpoint of view, and almost everything that could be said for and against the measure has been advanced either from the platform or through the Press. On the one hand, exception has been taken to the Bill from social, political, and religious points of view, and on the other, it has been condemned as not going far enough and as not being calculated to root out altogether the existing evil. But amidst such diversity of opinion, it is rather significant that, except in a half-hearted way, the existence of the vicious practice so severely and so justly condemned by medical authorities is not denied. It must be conceded that the practice exists in more or less degrees throughout India, though in Bengal it has attracted greater attention. It may be that the grosser form of the practice—intercourse with the girls before any of the signs of puberty has appeared—does not exist in this part of India to any very appreciable extent; but I do not think it will be possible to contend that intercourse with girls under 12, who have begun to menstruate, is not common everywhere. According to the statistics, speaking roughly, at least about 25 per cent. of the girls in this country menstruate before they are 12 years of age.

I have heard or read nothing up to now in regard to this question to make me hesitate to say that some change in the law is imperatively called for. On that point, I entertain not the slightest doubt, though I am not so clear as to what changes ought to be made, and more so as to how they are to be worked. The consideration of the question is complicated by the social habits and customs of the Hindus and the great facilities that exist among them for a close association of the husband and the wife before the latter is fit for cohabitation. The people have never up to now been taught to regard intercourse by a husband with his wife, though she is under 12, as premature; but, on the other hand, circumstances have tended to foster a contrary notion. Therefore, it is not surprising that the proposed change in the law in so far as it affects the husband should be viewed with disfavor by the people. If with this it is remembered that the proposed change will have the effect of placing the husband in the same category with a stranger who wantonly ravishes a girl under similar circumstances, the opposition to the Bill will become perfectly intelligible. There has been, beyond doubt, some misapprehension as to the true scope and object of the Bill, which probably may account for the opposition to it in certain quarters; but, as I understand it, the real objection lies in the fact that the legislature has not taken sufficient note of the peculiar social condition of the people and the almost fatal facilities that exist in a native household for the commission by the husband of an act which till now is not only not an offence of any sort, but which has also not been regarded as anything improper. This act hereafter will, however, be no less an offence than "rape," with its appalling sentence of transportation for life or rigorous imprisonment for ten years. However desirable it may be, in the general interests of the community, to visit even the husband, when he happens to be the transgressor, with a severe and deterrent punishment, it is extremely doubtful whether it is at all expedient or justifiable to introduce so great a change as that proposed, and for which, by their past history and associations, the people are utterly unprepared. The time may come—perhaps it is not far distant—when a more thoroughgoing measure might be introduced without arousing any feeling of alarm in the country; but till such time comes, it behoves the legislature to make only such changes as are not likely to cause so severe a shock to the feelings or even the prejudices of the people. I feel confident that, if provision be made for treating the transgression by the husband not as rape, but as a less heinous offence with a less severe punishment, much of the opposition to the Bill will cease. It should not be forgotten that the consequence of the incarceration of the husband in jail is more far reaching in this country than in any other, owing to the peculiar relation existing here between man and wife, and that the punishment of the husband is nearly as much a punishment on the wife.

The inquisitorial nature of the enquiries, which would necessarily be required to be made in bringing the offence to light, and the apprehension that they may be misused, have, of course, influenced the opponents of the Bill to exaggerate some of the evils that are likely to flow from the rigorous working of the law. I am not prepared to say that these apprehensions are altogether unfounded and it would be well to provide sufficient check against a too zealous working of the law. It is, no doubt, provided that the offence is a non-cognizable one, but does that go far enough? I think that something more should be done to check indiscriminate and hasty prosecutions, ill-advised and ill-considered enquiries and examinations, if the object of the legislature are to be worked with benefit to the people; otherwise the object of the legislature would be defeated, and, instead of the people loyally co-operating with the authorities to enforce the law, they would have recourse to every possible makeshift to evade enquiries, suppress facts and otherwise elude justice. It is far better to pass a mild law and work it effectively, than to pass a stringent one which could not be worked at all. These are the real and substantial objections to the Bill as it stands. Some stress is, no doubt, laid on the religious injunction that marriage should be consummated on the fourth day after the first menstruation, and it is contended that any rule of law to the contrary will have the effect of virtually forcing the people to violate the Shastras. Upon a full consideration of the point, I am constrained to observe that there is not much in the objection. The rule is more honored in the breach than in the observance, and, except in rare instances, marriage is not consummated till 3, 4 or 6 months after the period.

As to the objection that, as long as the sentiments and usages of the natives of this country continue what they are, the law would be a dead letter, it is sufficient answer to say that, even if the law is likely to be abortive otherwise, it would undoubtedly strengthen the hands of parents and guardians that wish to do their duty by their daughters and female wards, but who are now entirely powerless. This will not be considered as an imaginary and intangible benefit by any one who is acquainted in any degree with the power exercised by sons-in-law in Hindu families and how on occasions they insist upon their girl-wives being sent to them directly they come to know of the first appearance of menstruation. I am fully persuaded that the law will have the further effect of deterring most people from consummating the marriage till after the girls are well over 12 years old, rather than subject themselves to the risk of a possible prosecution and its many attendant unpleasant consequences to all the parties concerned.

To conclude, I would say that the principle of the Bill is unobjectionable, the necessity for it is imperative, but that it is defective, firstly, because it does not sufficiently recognize the difference between the husband of a girl and a stranger who has intercourse with a girl under 12, and, secondly, because it does not provide sufficient check against indiscriminate and ill-advised prosecutions. The former can be cured by making the mere act of intercourse by a husband with his wife under 12 a distinct offence from "rape" with a maximum punishment of two years' imprisonment, or fine or both; and the latter, by making the offence triable by a Court of Session or a first-class magistrate and making it obligatory on the complainant to obtain the sanction or certificate of a responsible officer, whom the Government may appoint in this behalf before the complaint is proceeded with. It is only right to observe that, simultaneously with the passing of the law, it is not improbable there would come into existence Associations and Sabhas under the auspices of social reformers for the purpose of initiating prosecutions and otherwise enforcing the law with vigour. It would be necessary, in some measure, to moderate the action of such bodies. That may not be necessary in the metropolis and other favorably-situated places; but it is not difficult to foresee that in certain localities without some restriction on the point, the law might be easily converted into an engine of oppression. I admit that it is not easy to lay down by law general rules on the point (so as to make them applicable throughout India) in order that practical effect may be given to the suggestion that the sanction or certificate of some officer of Government should be made a condition precedent to the prosecution of the complaint. I think, however, that the law may well reserve power to the Government to frame rules in the matter, should the necessity for the issue of any such regulations arise at any time in their opinion.

MADRAS,
7th February 1891.

(Signed) S. SUBRAMANIAM.

From ERNEST BARCLAY, Esq., Government Solicitor, Madras, dated 7th February 1891, No. 55.

ABSTRACT.—Forwarding the following opinion of the Advocate-General, dated 6th February 1891 :—

[In the matter of the Bill to amend section 375 of the Indian Penal Code and the Code of Criminal Procedure, Schedule II, so far as it relates thereto.]

OPINION.

1. The proposed alteration deals only with the age of consummation and does not affect any religious principle or precept relating to the age of marriage. The religion of no section of the public can seriously be stated to be interfered with by raising the age of consent from 10 to 12 years.
2. There is great danger, however, that such a provision may be used for vexatious and grossly improper purposes. The working of it therefore must be entrusted only to those in whom the

public feel confidence. By withdrawing the offence now created from the cognizance of the police the Bill reduces the chance of improper interference with the domestic concerns of the people to a minimum.

3. I am in favor of the change and think that the safeguard provided by the Bill is sufficient for all practical purposes.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

From the Honorable V. BHASHYAM IYENGAR, B.A., B.L., Rai Bahadur, to the Chief Secretary to Government, dated Madras, 7th February 1891.

I have the honor to acknowledge receipt of G.O., dated 20th January 1891, No. 124, Judicial, and to express my opinion on the provisions of the Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, which accompanied the same.

The evil pointed out in the Statement of Object and Reasons does not, as far as my experience goes, exist in any appreciable degree in most parts of this Presidency. But if the evil is prevalent in other parts of India to an extent which calls for remedial measures, I see no valid objection to legislative interference in the matter by a suitable amendment of the law. I do not propose, and I think it needless to discuss the question, whether or not the existing provision of the law and, *a fortiori*, the proposed raising of the age of consent contravenes any precept of Hindu religion. Assuming, for the sake of argument, the existence of such a precept of Hindu religion, it is certainly one scarcely followed in practice. I very much doubt if instances will be found in which, as would seem to be enjoined by the alleged precept, marriages are consummated on the third day after the first menstruation. Such consummation seldom takes place before the lapse of at least six months after the said event, and, in the majority of cases, it is deferred for more than a year. It seems therefore unreasonable that any opposition should be raised to the proposed measure on the ground that it is an interference with the Hindu religion and opposed to the Proclamation of 1858. If the proposed measure were such, the existing provision of law on the subject is equally so in principle. And the same objection can be advanced, in some instances with much greater force, to a number of other provisions of the Indian Penal Code, the Code of Criminal Procedure and several other enactments of the British legislature.

If the age of consent under section 375 be raised to 12, the effect of it will only be that that section, like most other sections in which the absence of consent is an ingredient of the offence, will be governed by the general provision contained in section 90. There really seems to be no valid reason why an exception should be made in the case of sexual intercourse with a woman under any of the circumstances mentioned in section 375 by reducing the age of consent to 10. If a girl under the age of 12 cannot consent to part with her property without the recipient thereof becoming guilty of theft notwithstanding such consent, it does seem anomalous that she may nevertheless consent to the perpetration of an act probably far more injurious to her without the perpetrator thereof becoming amenable to the criminal law. While I fully approve legislative interference in view to deter person from having sexual intercourse with their wives when they are below a certain age—whether with or without their consent—I am nevertheless of opinion that the law ought not to treat such intercourse as rape and punishable as such. The principal ingredient of the offence of rape is the absence of consent on the part of the woman; and if she be below a certain age, her consent in fact is, in the eye of law, no consent at all. Under English law sexual intercourse with one's own wife is under no circumstances rape; and the exception to the section defining rape in the Indian Penal Code as originally drafted was in accordance therewith. The exception was subsequently limited to cases in which the wife is over 10 years of age. The result of this change, which was effected by an amendment of the exception clause, is that sexual intercourse with one's own wife, even against her will or without her consent, is no rape if she be over 10 years

of age, but that it is rape if she is under 10 years of age. Such a distinction, resting as it does not upon the presence or absence of consent, which, as already stated, is the essential ingredient of the offence of rape, but simply upon the age of the wife, is, so far as the definition of the offence is concerned, anomalous and illogical. If the act of sexual intercourse with one's own wife when she is under a certain age ought, for purposes of punishment, to be dealt with as rape and visited with transportation for life, or imprisonment of either description for a period which may extend to ten years, an anomaly or want of scientific precision in the definition of the offence may be overlooked. But in my opinion such punishment is not only too severe and uncalled for, but also undesirable when it is borne in mind that, among Hindus in particular, it will practically operate as a punishment upon the wife herself for whose protection principally the provision of the law is intended. Public sentiment will naturally be strong against the infliction upon an erring husband of a sentence so severe and at the same time so prejudicial to the interests of the wife herself. The result will be a strong disinclination on the part of the relations and neighbours of the parties concerned to give any information or evidence which would lead to the detection and successful prosecution of the crime. This will more or less be the case even if the severity of the sentence be considerably reduced. Though the age of consent be raised, the law, so far as regards husband and wife, will practically remain a dead letter if the offence were punishable as rape, especially as the changes proposed in the schedule to the Code of Criminal Procedure will render the offence in such a case a non-cognisable one. The severity of the sentence is also uncalled for, because in cases where the husband has several intercourse with his wife under circumstances which would make him guilty of culpable homicide or of causing grievous hurt or of causing death or grievous hurt by a rash or negligent act, he would be liable to the punishment prescribed therefor (see *Queen-Empress versus Hurre Mohun Mythee*, I.L.R., Cal., vol. XVIII, page 49). Where the offence is committed by sexual intercourse with one's own wife, the offender is likely, in most cases, to have repeated it; and as each such intercourse will constitute a separate and distinct offence, he might, in cases where severity of sentence is called for, be proceeded against under section 35 of the Code of Criminal Procedure and visited with imprisonment which may extend to 14 years. The object of the law will be equally, if not more effectively, attained by constituting the offence in question a distinct one from rape and annexing a punishment of imprisonment of either description for a term not exceeding two years or fine, or both. Liability to rigorous imprisonment for 2 years will be a sufficient deterrent as far as punishment can be a deterrent against the commission of a crime of this nature. If such punishment be not a sufficient deterrent, neither will the severer punishment of transportation for life or imprisonment for 10 years be a sufficient deterrent. The proposal which I make to constitute the offence a distinct one from rape and prescribe a comparatively moderate punishment therefor will, I believe, if adopted, considerably minimise the opposition to the measure as proposed, which exists in many quarters and which certainly cannot be characterised as unreasonable. The object aimed at by the legislature is also likely to be better attained by the suggested change than by the amendment of section 375 as proposed by the Bill. The elimination from the definition of rape of sexual intercourse with one's own wife is a proposal which I also advocate as based on sound principles of criminal law; and the salutary and necessary changes proposed by the Bill in the schedule to the Code of Criminal Procedure by which the offence in question would become non-cognisable and bailable, and one for which summons shall ordinarily issue in the first instance, would be more in accordance with the reduced punishment above suggested than with the severe punishment retained by the Bill. I would, however, retain the Court of Sessions as the Court by which the offence is exclusively triable.

Section 1 of the Bill proposes to substitute the word "twelve" for the word "ten" in the clause marked "fifthly" in section 375. Having regard to the admirable precision which characterises the drafting of the Code and to the provisions contained in section 90 thereof, there is no object in retaining the said clause at all when the legislature resolves not to restrict the application to section 375 of the general provision as to the age of consent contained in section 90. I would also amend the exception by expunging from it the words "the wife not being under 10 years of age." Thus amended, the

exception will be as it existed in the original draft Code. I would propose the insertion of a new section to the following effect next after section 376:—

"Of unlawful sexual intercourse" with one's own wife.

376-A. Whoever voluntarily has sexual intercourse with his own wife, the wife being under 12 years of age, shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine which may extend to 1,000 rupees, or with both.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence described in this section.

Under section 375 as it now exists and as it is proposed to be amended by the Bill, the *onus* of proving that the wife is over the age of 10 years or 12 years, as the case may be, will be on the husband (accused) in cases in which he is not in a position to plead or establish consent *in fact* on the part of his wife though if there were such consent in fact the *onus* will be upon the prosecution to establish that the wife was below the said limit of age and that therefore there was no consent in law (section 105, Indian Evidence Act). If the offence in question be dealt with as a distinct offence in a separate section as above proposed, the *onus* of establishing the age of the wife will be, as it ought to be, on the prosecution, whether the husband had or had not the consent of the wife. It is true there is nothing novel in the principle of the Bill and that the principle involved in it was affirmed—and rightly affirmed—years ago in the Indian Penal Code by reason of the general practice obtaining in this country of marrying girls when they are children. The change now proposed is no doubt only to raise the age of consent in section 375 from 10 to 12 or rather to remove the exception which, for the purposes of that section, was engrafted on the general age of consent fixed by section 90 by lowering it from 12 to 10. But, for practical purposes, the change is momentous, because it considerably widens the sphere of operation of the principle—a sphere which is now extremely narrow. It is therefore necessary that the rigor of the law should be softened in the manner indicated above, and that the legislature should also provide special safeguards against vexatious prosecutions and frivolous proceedings, as the matter is one which so materially bears upon the relationship of husband and wife—a relationship which, among Hindus, is regarded not as the result of a contract, but of a sacrament. The changes proposed in the schedule to the Criminal Procedure Code afford in a great measure such safeguards. But it will be desirable that an additional safeguard be also provided by empowering the Local Government to declare by notification that no prosecution in respect of the offence in question shall be instituted in the territories or any part thereof subject to such Government without the previous sanction of such Government or any officer empowered in that behalf by such Government.

If in the working of the proposed law it should be found that in particular local areas a general feeling of insecurity or alarm is caused by vexatious and frivolous prosecutions or the formation of private and voluntary agencies or associations for instituting and conducting prosecutions, such a provision will enable the Government concerned to check such prosecutions and allay such feelings by exercising the power conferred by it. I am not to be understood as deprecating the formation of such agencies and association in the cause of social reform. But any over-zeal, which is not unlikely to characterise their proceedings, will be counteracted and checked if they have to obtain the sanction of some responsible official authority before instituting proceedings.

From the Honorable C. SANKARAN NAIR, B.A., B.L., to the Chief Secretary to Government, dated 10th February 1891.

It appears to be clear that premature consummation of marriages is "productive of grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they belong."

Though not extensively practised, early marriage and premature consummation take place to an extent that requires the interference of the legislature. When the Government see that some of their subjects are thus liable to grievous suffering and physical injury, it appears to be their plain duty to take steps to protect them from

that injury. Abstention in such circumstances is abdication of the functions of Government. A Government that declare their inability for *any* reason to protect *any* subject from physical violence or to punish those guilty of such violence are only declaring their own unfitness for their legitimate task.

The Proclamation does not stand in their way. The protection of minors is a duty which the Government cannot renounce, nor do I regard this piece of legislation as a departure from the principles of religious neutrality observed by the Government. Every man is entitled to follow his own religion, but he is not entitled, under the sanction of religion, to interfere with the rights of another, whether with or without consent, when such other individual is a minor so long as such interference is "productive of grievous suffering and permanent injury."

The practice of early marriage is followed more by Brahmins than any other caste, and I believe I am right in saying that early marriage is not regarded generally by the non-Brahmins as compulsory according to the Hindu religion, and in this Presidency all the Brahmins are not agreed that early marriage is necessary. The text of Manu that requires a man to wait, if needs be till death, has still the force of living law among Nambudiri Brahmins who not only do not consider early marriage necessary, but often allow their females die unmarried. In these circumstances, it appears to me to be incorrect to say that early marriage is a part of Hindu religion as proved by custom. The preponderance of authority also is in favor of that view.

I have also to point out that the alteration in the Criminal Procedure Code withdrawing the offence when committed by a *husband* on his *wife* is not likely to have any application to the Nairs of Malabar among whom the customary ceremonies, though followed by cohabitation, have not been recognised as constituting a valid marriage in a court of law, but, I do not think any alteration in the Bill on that account is necessary.

In conclusion, I have to add that I am not satisfied with the reasons for raising the age of consent to 12. If the medical authorities may be followed—and their opinion ought to be followed in this matter—14 would seem to be the proper age.

From the Collector of Kistna, to the Chief Secretary to Government, dated Camp, Jaggayapet, 9th February 1891, No. 10—Extra.

In reply to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to express my opinion that the proposed alteration of the law is a useful step in the direction of a most necessary reform.

2. The raising of the age of consent to 12 in the case of married girls is perhaps as great a change in the law as it is wise to make at present, but we should, I think, look forward to a further change in the course of a few more years by which the age of consent should be raised in the case of married girls to the age of 14, when puberty, and not merely menstruation, has been reached.

3. It is generally agreed that the desire to consummate marriage with immature girl-wives is due, not so much to the desire of the husband, as to the persuasions and suggestions of the old women of the family, who are both averse from change and anxious to see children of the next generation. The effect of the proposed change in the law will, in all probability, be to enable the men to check the initiative of these mischievous members of the family by significant warning. The removal of offences against the altered law from the cognizance of the police is desirable.

4. It is recognized by educated natives that premature consummation of marriage is not unfrequently the cause of the mother's death or serious injury at first confinements, while the sterility of women is attributed to the same cause. It must be added, however, that the consummation of marriage before puberty is said to be the exception rather than the rule in this district.

5. I fully agree with the view that has been urged on me by several educated native gentlemen that, although 12 years may be fixed as the age of consent as regards man and wife, it is quite unnecessary to retain this limit in other cases. Fourteen should be the limit of the age of consent in all cases save that of a man and

his wife. There is neither religious nor social prejudice to be consulted here, and the State may unhesitatingly interpose to prohibit sexual intercourse until the age of 14 is reached when it is almost certain that the female has attained puberty.

(Signed) A. T. ARUNDEL,
Collector.

From M.R.Ry. A. SABAPATHY MUDALIAR, Rao Bahadur, to the Chief Secretary to Government, dated Bellary, 13th February 1891.

I have the honor to acknowledge the receipt of G.O., dated the 20th January 1891, No. 124, Judicial, and beg to state my views as follows:—

1. I agree entirely with the principle of the Bill.

2. As far as I believe and know, it does not interfere with the religious beliefs and customs of the people of this part of India to any appreciable extent. The benefits accruing from the proposed alteration in the law will far, I am strongly convinced, outweigh any inconveniences that may arise from the religious considerations so strongly and vehemently put forward by a number of people.

3. In this part of India, in the vast majority of cases, consummation of marriages does not take place before the girl is 12 years old. Among Brahmins and those who follow them in marriage customs, when a girl attains puberty before the age of 12, consummation is postponed for a year or more for the girl to be in a fit condition to enter the marital state, and in no case to my knowledge has there been any objection on the score of religion or caste, nor have the parties been subjected to any social or religious ostracism.

4. I very much regret that the age is not proposed to be raised to 14, and have all the opposition for, a more substantial reform, for, as it is now, the age of 12 is quite insufficient to fully attain the intended object among an ill-fed and ill-brought-up people like those of India.

5. I have read of suggestions from certain quarters that in the proposed alteration sexual intercourse should be permissible in the case of the husband if the girl, though under the age of 12, had attained puberty. The attainment of puberty at such an early age is a sure indication that the girl is physically weak, and such girls are the more entitled to be protected by the legislature.

Another objection against the above suggestion is to be found in the practical working of the law, for medical examination of the girl, which is so much abhorred, will become a necessity.

6. In regard to the punishment in the case of the husband, it must in my opinion be almost nominal. It should not far exceed a year's simple imprisonment with an alternative of fine. The present punishment is disproportionately and shockingly heavy, considering the current opinions among the people of this country.

(Signed) A. SABAPATHY MUDALIAR.

From the Honorable V. BHASHYAM IYENGAR, to the Chief Secretary to Government, dated Madras, 16th February 1891.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to submit the following in continuation of my letter dated the 7th instant. In the *Hindu* of the 9th idem a letter appeared in which attention was drawn to the prejudicial consequences that might result from the operation of the proposed law, in cases in which a wife may give birth to a child when she is between 12 and 13 years of age. I think the matter is one which well deserves the consideration of the legislature.

Instances in which girls become mothers at such an early age may no doubt be few, and when the proposed measure becomes law it may reasonably be hoped that they will become fewer still, and that the apprehension of this very contingency

happening would act as a deterrent against the husband committing the crime. But prosecutions in such cases, though few and far between, are sure to create great and widespread sensation by reason of their attendant circumstances. When a girl whose age is not more than 12 years and 6 months gives birth to a child, it is of course a certainty that the offence in question has been committed by some one — either the husband or somebody else. And as a general rule the prosecution will naturally be instituted against the husband, especially when, as is not unusual, the married couple are, even before the consummation of their marriage, brought up in the same family — either that of the wife or that of the husband. Apart from section 112 of the Indian Evidence Act, which I shall more particularly refer to later on, there can hardly be any doubt that even in such cases the onus will be, not on the husband to establish that he had no sexual access to his wife, but on the prosecution to establish that the husband had such access when she was under 12 years of age. (Vide *Bosville* versus *The Attorney-General*, Law Reports, Probate Division, Vol. XII, p. 177). The first step, therefore, which the prosecution will take in order to discharge its onus will be to cite the wife herself as the principal or the only witness in support of the prosecution. And certainly she is the most competent and in some cases probably the only available witness.

But one can hardly imagine a case in which a lady witness will be placed in a more embarrassing or distressing situation. If the truth were — as it probably would be in most cases of the kind — that it was the husband that had the sexual intercourse, she has to testify to it, with the almost certain knowledge of the husband being convicted on her evidence and subjected to severe punishment. But if it were otherwise and she makes up her mind to speak the truth, she will have to confess that her chastity was violated by a stranger or that she was unfaithful to her husband, one of the legal consequences of which will be forfeiture of her right of inheritance to her husband's estate. In the first case, there will be a strong temptation to save the husband by denying that he had any sexual intercourse with her and thereby bastardizing her child. And if she yields to this temptation, she has to account for the stern fact of her having a child, and cannot decline to answer the question as to who had sexual intercourse with her, if not the husband. It can hardly be denied that it will be simply cruel to place a tender girl on the horns of such a dilemma.

In such a case, even the position of the husband is, no doubt, one of great perplexity and embarrassment and one which may strongly tempt him to impute unchastity to his wife and bastardize the child. But this, of course, is unavoidable, and the husband is himself solely responsible for the situation in which he finds himself placed. At any rate, he, being the accused, has under law this decided advantage over the wife, viz., that he cannot be compelled to account for the birth of the child or answer any questions concerning the offence. Under the Indian Evidence Act, a witness is not excused from answering questions the answers to which may tend to criminate the witness or expose him or her to a penalty or forfeiture of any kind. And even in criminal proceedings against a person, the husband or wife of such person is a competent and compellable witness. The English law is in these as in several other respects more tolerant of human frailties than the Indian law. I would not, however, disqualify the wife from giving evidence in a prosecution instituted against the husband for the offence in question. It may be that the prosecution is instituted by herself or by some one on her behalf and she should certainly be a competent witness. I would therefore only suggest that she should not be a compellable witness, either for the prosecution or for the defence, in any case in which the husband is prosecuted for the offence in question. Even in cases in which the awkward circumstance of the wife having become a mother does not exist, she will often be placed in a delicate and embarrassing position when compelled to give evidence in a prosecution of the husband for the offence in question.

If this suggestion be approved, effect may be given to it by adding a proviso to section 120 of the Indian Evidence Act to the effect that the wife shall not be compellable to give evidence in any proceeding against the husband under section 375-A of the Indian Penal Code. I say section 375-A instead of section 375 of the Indian Penal Code with reference to the suggestion made in my previous letter that it would be desirable to constitute the offence in question a separate offence under a new section.

Section 112 of the Indian Evidence Act also presents a difficulty in connection with the case in question. The object of the section is of course obvious, and that is to raise a presumption in favor of the legitimacy of the issue, and certainly it was not intended to raise any presumption of the commission of an offence by the husband. And the principle of English law embodied in that section will have no such operation in England, because sexual intercourse with one's own wife is in no case *per se* criminal under English law. Though under the Indian Penal Code it is an offence under section 375 when the wife is under 10 years of age, section 112, even if otherwise applicable, is practically inoperative in a prosecution of the husband under that section, for the simple reason that hardly a single instance has occurred of a girl becoming a mother between her 10th and 11th year. There does not, however, seem to be anything in the language of the section rendering it inapplicable to a criminal case, and it may be difficult to contend successfully that that section does not throw the onus on the husband to disprove that he had sexual intercourse with his wife before she was of the age of 12 years, if a child is born to her in wedlock when she is under the age of 12 years and 6 months, and a prosecution is instituted against him thereafter for the offence in question. It will be, therefore, extremely desirable to amend section 112 by providing clearly that it should be inapplicable to a criminal prosecution of the kind under consideration. The said section is, perhaps, also faulty in other respects as pointed out by Mr. Whitely Stokes, and the sense in which the word "access" is used in the proviso is by no means clear; and certainly it is far from being in accordance with the English law as expounded with admirable clearness in the recent case of *Bosville* versus *The Attorney-General* (Law Reports, Probate Division, Volume XII, page 177).

As there is now a Bill before the Supreme Legislative Council to amend the Indian Evidence Act, the above suggestions, if approved, may be given effect to in that Bill.

(Signed) V. BHASHYAM IYENGAR.

From the Acting Agent to the Governor, Vizagapatam District, to the Chief Secretary to Government, dated Ranguvada, 10th February 1891, No. 19-T.

In reply to G.O., No. 124, Judicial, dated 20th January 1891, asking my opinion on the Bill to amend the Indian Penal Code and Criminal Procedure Code with reference to what is called the age of consent, I regret to say that the subject is one to which I have not paid any attention hitherto, and as I am now in the most remote part of Jeypore, I am unable to obtain any information which would allow of my expressing an opinion of any value. All I am able to say consequently is that I have not personally come across any instance of the present law having proved inadequate or of injury having been caused to child-wives by the limit of age now fixed. It seems probable to me that the question is one in which the peculiarities of the life-history of races concerned may be an important element.

W. A. WILLOCK,
Agent to the Governor.

From H. W. FOSTER, Esq., Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 19th February 1891, No. 500.

In continuation of my letter, dated the 6th instant, No. 355, I am directed to forward a transcript of the minutes recorded by the Honorable the Chief Justice and Mr. Justice Muttusami Aiyar on the Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882.

MINUTES.

The Chief Justice.—I am inclined to think that if any alteration is to be made in section 375, Indian Penal Code, clause "fifthly," the age of consent should be raised to fourteen years. A very large number of children of 12 years of age must be manifestly unfit to give consent to sexual intercourse, and the proposed alteration will only in some degree mitigate, and not cure, the evil complained of. If it is thought wise to interfere with the relations of man and wife, the same remarks apply to the exception to section 375.

The amendment to schedule II, Criminal Procedure Code, will render a conviction for rape by a husband on his child-wife very difficult, if not impossible, to obtain.

Mr. Justice Muttusami Aiyar.—Having regard to the object of the proposed legislation, I consider that it is sound in principle.

So far as the Bill relates to persons other than husbands, there is not the slightest objection to raising the age of consent to 12 years. Any legislation in the direction of a nearer approach to the age of discretion is, in their case, in perfect accordance both with Hindu religion and with social usage.

Neither is it open to objection even so far as it relates to husbands, though in form and in certain matters of detail it requires to be amended. There can hardly be any doubt that consummation of marriages with girls who have not attained their maturity is an evil, and that it is the duty of every father to protect his daughter from such evil. This being so, I see no objection to the State stepping forward to afford such protection to girls from whom it is withheld.

As far as I am aware, neither Hindu Law nor Hindu religion nor usage in this Presidency sanctions a premature consummation of marriage. The general practice in Southern India is to allow a child-wife to remain with her father or mother until she attains maturity and her marriage is consummated in proper season. It is in conformity to the teaching of the commentary on the Apastamba Sutra who says that whether the text relating to the Garbhadanom ceremony is or is not repeated as part of the marriage ritual, cohabitation must be deferred until the girl attains her maturity. Judging from my experience in this Presidency and from my view of the general Hindu Law, I think that legislation to protect girls against injury from premature sexual intercourse is not in conflict either with Hindu religion or with the recognized usage of this Presidency or with reason.

As to the objection that the Hindu marriage must be consummated on the fourth day after menstruation, the correct view is that cohabitation is then permitted and *not* enjoined as a matter of imperative duty. There is hardly a case in which the marriage is consummated in this Presidency on the fourth day after the first menstruation, whilst in many orthodox and respectable families consummation is deferred for 6 or 12 months, and even for a longer period. According to strict Hindu Law, a girl may choose a husband for herself after she menstruates, if her father has failed in his duty to select one for her at an earlier period, and some texts allow even a period of three years for her to make a proper choice in case of extreme necessity. Whilst I am of opinion that cohabitation is permitted by Smritis from the fourth day after menstruation, I also think that it may be, and is often deferred without any injury to the religious or caste status of the wife.

The real point for consideration is what form protective legislation, such as the one under consideration, ought to assume as against husbands and how its practical operation may be best safeguarded.

It does not appear to me to be correct to say that sexual intercourse with the husband is rape. The injury to the purity of the woman, and the degradation and misery thereby entailed on her is an ingredient in the conception of the offence of rape, and it is wanting in the case of premature intercourse with the husband. Again, the avowed object of the proposed legislation is to afford protection to the child-wife, but a sentence of transportation for life or for a term of seven or ten years, or even a sentence of a long term of imprisonment would, when passed upon her husband, operate to degrade her, though indirectly, in society, and in the present state of the marriage law in this country, inflict upon her in effect a kind of permanent or temporary widowhood according to the nature of the punishment. It may at times happen that the offender is a boy under 18 years of age and his imprisonment and degradation as one belonging to a class of ruffians would be regarded no less as a calamity to the girl than to the boy. It is no doubt true that, according to the law as it stands at present, sexual intercourse with a girl under ten years of age is rape even when the girl is the offender's wife, but it seems to me that the inclusion of the husband, among offenders who violate a woman, and who are ordinarily classed with felons, is incompatible with the primary conception of the offence. But the age mentioned in the section is so low that in its practical operation the provision has hitherto been perfectly innocuous, and, so far as I am aware, there has not been a single conviction in this Presidency under the fifth clause of section 375 as explained by the exception. The fact is that a girl never attains her maturity before she completes her 10th year, whereas some girls attain their maturity, a few in their 11th year and several in their 12th year. I would therefore

amend the Bill by constituting premature sexual intercourse by the husband with his wife when she is under 12 years of age into a distinct offence punishable as ordinary criminal force or hurt and add an explanation to it that if grievous hurt or a more serious injury is caused, the offender is liable to punishment for such offence under the appropriate section of the Indian Penal Code.

There is another matter in respect of which the Bill is open to amendment. In the Statement of Objects and Reasons it is stated that the object of the Bill is to prevent premature consummation of marriages by adult husbands with children who have not reached the age of puberty, but the Bill goes beyond it by prescribing 12 years of age as the minimum age of consent. I would suggest that 12 years be prescribed as the age which is to be presumed as the age of puberty unless the husband shows that the wife has previously attained her maturity and I would thereby recognize proof of maturity by the husband as a valid defence. This would not only bring the Bill into strict conformity with its declared object but also bring it into conformity with Hindu Law. When a girl attains her maturity in Hindu families, it is considered to be an occasion of rejoicing and of festivity, to which ladies who are related to the family or live in the neighbourhood are usually invited. Looking at the Bill from this stand-point, there is reason to think that the fact of puberty may be more easily proved than the fact of age.

Again, it is very necessary, as observed in the Statement of Objects and Reasons, to prevent the possibility of vexatious and unjustifiable interference with the domestic concerns of respectable people under the proposed law. To secure this object, it is, I venture to think, not enough simply to make the offence non-cognizable and to declare it bailable. I would submit that it is desirable to go further and to provide that no prosecution shall be instituted unless it is initiated by the father or the mother or the guardian for the time being of the girl or leave to prosecute is first obtained from the District Magistrate or Divisional Magistrate, such leave being required to be granted after notice to the father or other guardian of the girl and a preliminary inquiry and an appeal being allowed to the High Court from the order sanctioning the prosecution. I would also insert a provision as a matter of precaution that in no case a girl shall be subjected to medical examination, except with her guardian's consent and by a lady-doctor or midwife.

In conclusion, there is one other matter which I desire to mention in connection with the proposed legislation. There is a strong prejudice among the uneducated classes, and even among some of the educated men in this Presidency, against State interference, without adequate necessity, with the domestic concerns of the people. It is not denied that when the father ignores his duty to his child, legislation is proper; but it is said that in this Presidency there has been no case in which any girl-wife has ever suffered from injury caused by premature sexual intercourse, that such intercourse is not permitted to any appreciable extent, that the domestic arrangements of a respectable family are such as ordinarily preclude it and that the area of State interference should be coextensive with the area of the evil. It is also considered that the suggestion that where the evil does not exist, the new law will cause no practical mischief, is more plausible than sound, because what is dreaded is not so much the actual conviction as the vexation and annoyance and social scandal consequent on a public inquiry into matters the very mention of which is forbidden in polite society by a feeling of delicacy, an inquiry which may be initiated in villages where there are factions by a spiteful informer and which may necessitate the examination and cross-examination before a public tribunal of respectable women accustomed to a quiet life of privacy, touching domestic incidents over which they usually throw a veil of decency. The Bill is framed apparently on the view that, for the purposes of protective legislation, all India may be treated as one country, howmuchsoever conditions of domestic life and domestic arrangements in joint Hindu families in the mofussil may vary in different parts of it. Though I also believe that a mere local law would not meet all possible cases of premature cohabitation and prove as effectual as a general scheme of protective legislation in checking the evil, yet I think that the jurisdiction to try ordinary cases of premature sexual intercourse, unattended with serious injury, should not vest, if it is constituted into a new offence as proposed by me, in any tribunal below that of a First-class Magistrate. I further venture to submit that it would in no small measure conciliate popular prejudice to modify the form and safeguard the practical operation of the new law in the manner already mentioned, whilst it would at the same time secure the protection which it is intended to afford to minors in cases in which they may really need it.

End. P. L. Pereira.

Prof 26/2

FEBRUARY 1891, No. , JUDICIAL.

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

READ—the following papers:—

From the District and Sessions Judge, Chingleput, to the Chief Secretary to Government, dated Chingleput, — January 1891.

With reference to G.O., dated 20th instant, No. 124, Judicial, I have the honor to state that, in my opinion, the proposed alteration in the law is very desirable. The only question is whether the raising of the age of consent to 12 years is sufficient. As appears from the letter of Surgeon-Major B. Gupta printed at page 46 of the Supplement to the *Gazette of India*, dated 17th instant, the percentage of girls in this country who menstruate before the age of 12 years is under 40; and as stated by Dr. Joubert in his examination as a witness in the case of Queen-Empress *versus* Harree Mohun Moytree, I.L.R. 18 Calcutta 45 (at page 56), commencement of menstruation is only one of the early steps towards the attainment of puberty, which "is not generally attained upon menstruation, but subsequently," and even though the female may have then become capable of conception and child-bearing, some years more must elapse before she becomes sexually mature and fully fit to become a mother. Such is, I believe, the opinion of men qualified to give an opinion on the subject. It is, however, hopeless in the present state of civilization in this country to do all that may be desirable to benefit the community. All that can, and doubtless should, be done is to see that young and helpless girls are not tortured and put to premature and unnecessary suffering in violation of the people's own shastras—*vide* Manu, Chapter XI, 59 and 171—and as, from all accounts, the great majority of girls in this country do not first menstruate till between the ages of 12 and 13, the latter should, I think, be the lowest age of consent in any case, while in cases in which the catamenia have not commenced before the age of 13, I would fix the date of consent at the date of first menstruation and make sexual intercourse prior to that date penal.

2. The subject is not one of any special delicacy in this country, where the "flowering" (as it is called) of girls is published to relations and friends, who are invited to entertainments in honor of the occasion.

(Signed) J. W. BEST,
District and Sessions Judge.

From the District Judge, Coimbatore, to the Chief Secretary to Government, dated Coimbatore, 2nd February 1891, No. 123.

As requested in G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to express my opinion upon the Bill referred to therein.

2. There seems to be room for doubt whether such legislation is required for this Presidency; indeed, I am assured that there is already on foot a social movement among educated natives which will tend to reform from within the evil, which is admitted to exist, although to a much less extent than has been proved in Bengal.

3. These reformers, however, ought to recognize the fact that the legislation contemplated by this Bill must materially assist their efforts.

4. That such a measure is urgently necessary for Bengal, no one who has read the information collected by Sir Stuart Bayley can for a moment doubt. The only question is whether the age fixed in the Bill should not have been at least 13, instead of 12, but, at any rate, it is a step in the right direction.

5. That there will be many prosecutions under the new Act, I do not for a moment suppose. Experience (*actual*, I mean, and not merely on paper) as a District officer teaches that such matters very rarely come before the courts. It is well known that rape is a frequent element in so-called dacoities, but has seldom do we find any evidence of such violence put forward at the trial.

6. The great advantage of such a measure as the Bill under consideration is that it strengthens the hands of those who wish to fight against so terrible an evil in their own families, against those members thereof who are in favor of perpetuating it; and, as the education of girls proceeds, it will arm the hitherto defenceless child-wife against a brutal and cowardly husband. I should hope that teachers in girls' schools will not fail to put this weapon into the hands of their pupils.

7. The legislature has undoubtedly removed one possible objection to the proposed measure by making the offence "non-cognizable." It has been suggested to me that another safe-guard might be found in providing that the complaint must in the first instance always be laid before the District (or Divisional) Magistrate, whose sanction should be a necessary preliminary to its entertainment. Such a suggestion, no doubt, argues a distrust of the native Sub-Magistracy. I may, therefore, mention that it came from a native gentleman, and was quite spontaneous.

(Signed) G. D. IRVINE,
District Judge.

From M.R. Ry. P. CHENTSAL RAO, C.I.E., to the Chief Secretary to Government, dated Mylapore, 2nd February 1891.

In reply to G.O., dated 20th January 1891, No. 124, I have the honor to state that the proposed Bill on the age of consent has my hearty approval, and may be passed into law with a slight modification which I shall notice further on.

2. Although the necessity for the law proposed is not very great in this Presidency, since consummation of marriage does not generally take place here before the girl is 12 years old, it cannot be said that there are no cases whatever in which consummation takes place earlier, and the evils of it are so great that it is only right that the law should interfere and stop it.

3. I do not think that the proposed law can be regarded as an interference with our religion, for, whatever might be the interpretation that could be put on the texts of the ancient Hindu law on the subject, it is certain that, in practice, the consummation of marriage at any particular age or period is not regarded as compulsory. I am aware that, even in the most orthodox Brahman families, consummation is often put off for 2, 3 and even 4 years after the girl attains her puberty, if the bridegroom happens to be of tender years, or there are other reasons to recommend the step, and no exception is taken to this by the society on the score of religion or custom.

4. But, I must admit that the general public opinion is against the Bill. Most of the men whom I have consulted on the subject have expressed their disapproval of the Bill, not because they consider that it interferes with their religion, but because they apprehend that over-zealous reformers or mischievous neighbours might needlessly drag members of respectable families before Law Courts and cause them annoyance. I think their apprehensions are well founded. It is not unfrequently that our young girls visit the houses of their husbands even before they attain their puberty and before their marriage is consummated, and their innocent visits might give a handle for prosecution. Moreover, the limit of age which the proposed Bill fixes borders so closely upon the age at which consummation generally takes place, that it would be possible for any one to dispute the age, especially as the general appearance of our girls up to a certain period of their life is such that they almost invariably appear to be much younger than what they really are.

5. Under these circumstances, I think it to be desirable that the law should provide some safe-guard against needless prosecutions, and this end can be attained by making the permission of the District Magistrate or some other competent officer appointed by the Government on that behalf a condition precedent for prosecution. While such a safe-guard can in no way defeat the object of the Bill, will allay the fears of the public, and render the law more acceptable than it would otherwise be.

(Signed) P. CHENTSAL RAO.

From the District Judge, Bellary, to the Chief Secretary to Government, dated Bellary, 2nd February 1891, No. 1.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to state that no facts have ever come within my own experience of such an offence as is guarded against by the proposed alteration of the law.

2. It will certainly not constitute an interference with any religious practice. But if such a practice did exist, I should say that, religious or not religious, it should be suppressed without hesitation, as deserving even less consideration than the practice of sati.

3. Since this discussion has arisen, I have been but a short time in India, and have had but small means of ascertaining practices of different classes. I am not therefore in a position to say that it will, or will not, materially affect the existing practice of any castes. What I have generally heard is that it is not called for in this country, because such practices do not generally exist. But I am aware that girls are sent to their husbands' houses at a very early age in many cases, and that girls do certainly require this protection in Southern India.

4. After this amendment is made—if it be made—I do not expect that cases will come into court, or, if they do, it will be but rarely; such matters can generally be hushed up. But it will certainly put a check on the tendency to hurry on consummation by attaching a certain risk to those concerned in it, and will tend to establish a more healthy opinion and practice.

5. I have, I think, stated my experience in the first paragraph too broadly. I mean that I have not known cases of death or serious injury. I do not mean to say that girls are not taken to their husbands when quite immature and unfit for marriage. That is the case. Girls should be protected from such constitutional injuries as much as from any others.

(Signed) H. T. KNOX,
District Judge.

From the Session Judge of Madura, to the Chief Secretary to Government, dated Madura, 2nd February 1891, No. 58.

Referring to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to state that, beyond expressing approval of the proposed alteration in the law, I have no opinion to offer on the provisions of the Code.

(Signed) T. WEIR,
Session Judge.

From the Acting District Magistrate, Tanjore, to the Chief Secretary to Government, dated Tanjore, 4th February 1891, No. 25-C—Mag.

I have the honor to reply to G.O., Judicial Department, of 20th January 1891, No. 124, asking my opinion on the provisions of the Bill to amend the Indian Penal Code and Code of Criminal Procedure (1882).

2. My own opinion is—as may be supposed—that even 12 years is much too low an age for a woman, married or not, and consenting or not consenting, to commence sexual intercourse.

3. As regards local public opinion, the time allowed to answer the reference is far too short for me to arrive at any understanding regarding it. The three Deputy Collectors were consulted demi-officially. Mr. Khadir Navaz Khan is “strongly in favor,” considering that, even when puberty arrives earlier than 12 years, the advantages of waiting far outweigh the inconveniences. Mr. Krishnasami Aiyar would substitute puberty in section 375 as the age under which intercourse would become rape, instead of a distinct year term, believing this would serve the “laudable” purpose of Government and would not affect the religious feelings and customs of the Hindus. Mr. Pattabirama Pillai is of opinion that, “in the cause of humanity,” Government should interfere in this matter, as it has done with *Sati*, but acknowledges that orthodox public opinion is strongly against the Bill. He is also afraid that, if the Bill is passed, it will either be not enforced or become mischievous in the hands of evil-disposed and low-paid officials, unless and until birth registers are made reliable; and proposes the Bill should state who is to prosecute on behalf of a child-wife, that provision should be made for compounding the offence, and that the maximum term of punishment should be three years’ rigorous imprisonment. He also states that the subjecting a woman to medical examination is most abhorrent to a native in the case of any prosecution for rape.

4. It seems to me also that there should be distinct provision made as to who is to take proceedings. If confined to Magistrates of the first class, they might be trusted to act on apparently reliable information, from duly-qualified medical men or from other sources. If action or inquiry occurs otherwise, much trouble may be unnecessarily caused to families.

(Signed) J. THOMSON,
Acting District Magistrate.

From the Hon. MIR HUMAYUN JAH, Bahadur, C.I.E., Madras, to the Chief Secretary to Government, dated South Adyar, Madras, 5th February 1891.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, furnishing copy of a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, I have the honor to submit that there is not the slightest doubt of the immense good the raising of age from ten to twelve years will afford among a large number of people who happen to be away from the influences of civilization and enlightenment, and among whom any amelioration in the matter, however desirable, is not likely to take place without legislation.

2. An appreciable modification of the present law will be effected, as it is now proposed to take out of the hands of the Police the offence described in the first part of the schedule annexed to the amending Bill. Another desirable step in this direction will be to make the above-described offence punishable, not as for rape, but as for hurt or grievous hurt only. If this be agreed upon, I am of opinion it will obviate to a very great extent all objections and opposition raised against the Bill on the ground of its interference in religious rights and social customs of the people.

(Signed) MIR HUMAYUN JAH.

From M.R.Ry. A. SASHIAH SASTRI, C.S.I., to the Chief Secretary to Government, dated Kumbakonam, 5th February 1891.

I have the honor to acknowledge the receipt of G.O., dated 20th January 1891, No. 124, Judicial, and in compliance with it to submit the following observations.

2. I concur in the main in the object of the proposed amendment of the law and the provisions by which it is proposed to attain it, with one modification, viz., that in

the proposed exception in section 375 of the Code, I would add after the words “the wife not being under twelve years of age” the words “or the wife having attained puberty before that age.”

3. On mature thought, I cannot help coming to the conclusion that the raising of the age to 12 without making an exception in the case of girls attaining puberty before that age would amount to serious interference with customs, rules and practices which unfortunately are so closely interwoven with religious rites and beliefs of the Hindu nation in the matter of marriage institutions that it is impossible to deal with them separately without doing violence to widely-spread notions or deeply-felt feelings, however unreasonable or even irrational they may seem in the eyes of Englishmen brought up in beliefs, notions and feelings, the effect of a different education and of the teachings of a different religion and in some measure the resultants of a different climate.

4. The leading idea of the Hindu legislators—at least the majority and the most accepted of them—seems to have been that no girl should be detained or withheld from her betrothed husband a day after nature has proclaimed her physically qualified for maternity. It is a notorious fact that in the tropics, puberty is attained very often at the very early age of 10 and more frequently still between that age and 12. So it becomes a paramount religious duty of the parents to deliver up the girl at the earliest possible date after she attains woman’s estate. The parents are thenceforward absolved from all responsibility of guarding the purity of the girl, and they, as well as those on the husband’s side, most eagerly look forward to the birth of a grandchild, the sight of which gives them both a step in heavenly bliss, to say nothing of the spiritual blessing of a child at the earliest opportunity to the husband, who might be deprived of it if, perchance, he dies in the interval between the dates of his wife’s puberty and the attainment of her twelfth year. This reason, which underlies the whole question, will account, if I have expressed myself clearly, for the great opposition which is manifesting itself all over the country, as interference with the religious customs and practices non-interference with which has been guaranteed to them by the Queen’s proclamation.

Note.—Most probably the framers of the code who fixed the age at 10 must have followed the generally accepted dictum which is contained in the text:—

“Ashta varsha, bhavet kaniya
Nava varshatu rohini
Dasa varasha bhavet gauri
A ta urdwam rajasevala.”

which, translated roughly, means a girl becomes a kaniya at 8, a rohini at 9, a gauri at 10, after that she becomes a rajasevala or possessor of the signs of puberty or menses.

5. The argument *per contra* that the substitution of 12 years for 10 is a very simple matter which ought not to provoke so much opposition from the people at large who never showed any such signs of opposition at the passing of the Code which fixed the age at 10, is scarcely to the point, for very few girls even in Bengal attained maturity at that age, and the law practically had thus no operation and consequently elicited no opposition. The case is entirely different now, and the threatened danger of interference is real and serious.

6. In the Statement of Objects and Reasons it is stated that the evil of the existing law arises from the circumstance of its favoring the premature consummation of marriages by adult husbands with children who have not reached the age of puberty. I take this statement as entirely conceding my point, and fully justifying the modification which I suggest. I feel confident that, if it is adopted, the opponents of the measure will be entirely disarmed.

7. I think the law so amended could be worked with very much less friction, for I believe that the fact of puberty can be much more satisfactorily proved than the fact of age. There are so many feasts and ceremonies by which the attainment of puberty is celebrated among all classes and castes all over India that abundant and reliable evidence of the fact would be always available, while as to the fact of age such evidence must be often most unsatisfactory, inconclusive and often involving medical examination, which is so harrowing to the popular feelings of the nation.

(Signed) A. SASHIAH SASTRI.

From Rai Bahadur V. KRISHNAMA CHARI, to the Chief Secretary to Government, dated Madras, 5th February 1891.

I have the honor to acknowledge the receipt of G.O., No. 124, of the 20th ultimo, with a copy of the Bill to amend the Penal Code and the Code of Criminal Procedure, and to submit my opinion as follows on the proposal to raise the age of consent of a girl-wife from 10 to 12 years.

2. Early betrothal or marriage is no new institution in Hindu society. According to the Shastras, a girl is bound to marry before a certain age, and the marriage is of the nature of a sacrament; but the consummation of that marriage with one's wife before she has arrived at womanhood is forbidden, and as a rule, a girl is not allowed to go and live in her husband's family by her parents or guardians until puberty is attained or rarely till a year or two after, or until she is considered fit to discharge the duties of a wife and householder. The criminal records of the Madras Presidency do not appear, so far as I am aware, to furnish any examples of the occurrence of such an offence as that which the proposed Bill is intended to prevent and punish. As Secretary to the Victoria Hospital for Caste and Gosha Women in Madras, I have searched in vain the registers of patients treated during the past five years for a single instance of the occurrence of such an act of cruelty to any child-wife; and the lady-doctor in charge of this hospital tells me that no such case has ever come to her notice.

I regret, therefore, that I cannot support the assertion of the overzealous and impatient reformers that the Hindu and Muhammadan families of this part of India feel the necessity for the proposed legislation.

3. If, however, the cruel and disgusting practice referred to in the Statement of Objects and Reasons annexed to the Bill prevails largely in some other parts of India, no Hindu who has learnt to exercise his reason freely can question the right of the legislature to provide against the practice, if possible, wherever it exists, and where grievous suffering or permanent injury to health is found to be the result.

4. But the question is whether the proposal to fix 12 years as the age of consent unconditionally is at all a suitable remedy for the practical evils complained of in the Statement of Objects and Reasons. The Government has, it is true, repudiated all intention of interfering with the religious customs of the people, such as the right of betrothal or marriage before a girl is 12 years old, and has withdrawn the offence of premature consummation with one's wife from the cognizance of the ever meddling policeman; but I am not at all sure that fixing the age of consent at 12 as the average age for matrimonial intercourse is any protection to the poor girls who have not attained puberty, though they have completed that age, and who form the bulk of the child-wives. The object of the Government being, I believe, to prevent the consummation of marriage before puberty and not merely before the hard-and-fast limit of the 12th year of a girl's age, the course of legislation now proposed will not, I apprehend, reach the evil to the extent designed by the Bill.

5. Then again I fear, in common with others consulted by me, that 12 years is a very dubious age to fix by law, and is unfortunately too low a limit to prevent an inquiry inquisitorial in its character and the abuse of the law by malicious persons and hungry policeman. The proposed age is unlike the limit of 10 years in the existing penal law when a girl looks a mere child, or of 14 years when puberty will have been reached and evidence of maturity will be visible. It is just the age when a malicious neighbour or mischievously-disposed person can easily raise the suspicion at that stage of a girl's life that she is under 12 years of age and lead the policeman to distrust the girl's or husband's friends, though they might swear that she is just over 12 years. False evidence will easily be produced, seeing that horoscopes are not believed now-a-days; and I fail to see how the policeman and the magistrate who have no birth registers or other reliable evidence of age to go upon could refuse to take cognizance of the complaint preferred, and how the mischievous attempt, to annoy an innocent neighbour and compel the appearance of his wife and daughters and daughters-in-law at the police-station or before a magistrate on the very day appointed

for the nuptial marriage—an act most dreaded by the femalehood of India—is to be provided against, or how unjust convictions or unfair acquittals are to be avoided, or how bribery and corruption are to be checked.

The age of 12 is just the period of a girl's life open to doubt and dispute as to maturity; and to fix the age of consent at so low a figure will, I fear, open the door to that vexatious and dangerous interference of the penal law and police with the peace and domestic concerns of respectable families which the Government wish to prevent. It is superfluous to add that such interference with the personal liberty of the young people will irritate their parents and friends and raise suspicions which it will be afterwards difficult to allay. When the common people of a village or street in a town are excited by the exposure of an innocent girl and her husband or the miscarriage of justice, nobody can tell what an ignorant crowd of easily-excitabile people may do. I beg that I may not be considered an alarmist if I say that it is not impossible for an excited mob in India to do something like what Wat Tyler, Hob Carter and Tom Miller of English history did five centuries ago in connexion with this very question of a girl's age.

6. Such being the position and the possible consequences of the proposed legislation to interfere in the domestic concerns of the conservative millions of India, it seems expedient to alter somewhat the course of legislation in order to attain the benevolent object of Government to prevent the consummation of marriage before puberty and injury to health.

I beg respectfully to suggest for consideration whether this declared object of Government might not be attained—

(1) by fixing the age of consent at 14 years as the most approximate age of puberty in this country involving little inquisitorial enquiry and less chance of a doubt at the first look;

(2) by introducing at the same time a saving clause with respect to wives who grow up and attain that condition before that age; and

(3) by providing a system of enforcing accurate registration of births in every town and village and even the date of arrival of a girl at womanhood, which is regarded by the Hindus as the girl's second birth and which they celebrate as a festive occasion. The production of extracts from public registers of such domestic events will serve as the best evidence of age when any doubt should arise at the time of consummation, superseding the necessity of the appearance of women before the police and the magistracy; and I am strongly inclined to think that a Bill based on these lines will generally be welcomed, instead of being regarded, like the present Bill, as "a piece of hasty legislation" involving vexatious and dangerous interference with the religious and domestic concerns and the privacy of native families all over the country.

(Signed) V. KRISHNAMA CHARI.

From the Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 6th February 1891, No. 355.

With reference to G.O., dated the 20th ultimo, No. 124, Judicial, forwarding, for the opinion of the Honorable the Judges, a Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, I am directed to forward transcripts of minutes recorded by the Honorable Justices Parker, Wilkinson and Handley. The Honorable Mr. Justice Shephard has not made any remarks.

2. Any minutes that may be recorded by the Honorable the Chief Justice and Mr. Justice Muttusami Aiyar will be duly submitted.

(Signed) H. W. FOSTER,
Registrar.

ENCLOSURE.

Minutes.

Mr. Justice Parker.—I would point out that if the clause marked "fifthly" is amended by the substitution of the word "twelve" for the word "ten," the clause itself becomes unnecessary, since by section 90, Indian Penal Code, a consent by a person under twelve years of age is not such a consent as is intended by any section of the Penal Code, and therefore the clause "secondly" (without her consent) will cover the case.

As to the second amendment—the substitution of the word "twelve" for the word "ten" in the exception to section 375—I observe from the Statement of Objects and Reasons that the intention of the proposed alteration in the law is to prevent the premature consummation by adult husbands of marriage with children who have not reached the age of puberty. That object is in itself desirable, but inasmuch as there are many cases in which girls in this country attain the age of puberty before twelve years of age, the effect of the alteration will be to make punishable acts of intercourse to which there is no objection on the ground stated. I would therefore amend the exception—when "twelve" has been substituted for "ten" in the fifth clause of the definition—by enacting that "sexual intercourse by a man with his own wife is not rape provided that the wife has attained puberty." Under section 221 of the Criminal Procedure Code the burden of proof would fall upon the husband. I approve of the proposed amendment to the Criminal Procedure Code.

If the law were so amended, the effect would be that sexual intercourse by any man with a girl under 12 years of age would be rape unless the man were the husband of the girl and able to prove that the girl had attained puberty. If the intercourse took place after the girl attained the age of 12 years, but before attaining puberty, the husband might still be punishable if grievous hurt were caused thereby—*vide* I.L.R. XVIII, Calcutta, 49.

In giving this opinion I have assumed that the object of the Legislature is limited to that described in the Statement of Objects and Reasons, viz., the prevention of premature consummation of marriage with wives who have not attained puberty, and the alteration I have suggested is designed to prevent the imposition of penalties upon innocent persons while effecting this object. The question of fixing a legal age for marriage is a different one, but however desirable the discouragement of early marriages may be, it is no part of the avowed object of this Bill. I do not therefore discuss the question as to how far the proposed alteration in the law is a legitimate or proper means of attaining that end.

Mr. Justice Wilkinson.—I see no objection. I only wish the Government of India had been able to raise the age of consent, as it is called, to 15. But the alteration brings the law as to rape into accordance with section 90.

Mr. Justice Handley.—The alteration in the law is eminently desirable, and the Bill seems to carry it out in the simplest manner possible. I have no other observations to offer on the Bill.

From M.R.Ry. S. SUBRAMANIAM IYER, to the Chief Secretary to Government, dated 7th February 1891.

In submitting my opinion on the Bill for the amendment of the Penal and Criminal Procedure Codes, I do not think I need dwell at length on the question as to whether it is desirable or expedient to introduce the changes proposed in the existing law. The Bill has been considered from every standpoint of view, and almost everything that could be said for and against the measure has been advanced either from the platform or through the Press. On the one hand, exception has been taken to the Bill from social, political, and religious points of view, and on the other, it has been condemned as not going far enough and as not being calculated to root out altogether the existing evil. But amidst such diversity of opinion, it is rather significant that, except in a half-hearted way, the existence of the vicious practice so severely and so justly condemned by medical authorities is not denied. It must be conceded that the practice exists in more or less degrees throughout India, though in Bengal it has attracted greater attention. It may be that the grosser form of the practice—intercourse with the girls before any of the signs of puberty has appeared—does not exist in this part of India to any very appreciable extent; but I do not think it will be possible to contend that intercourse with girls under 12, who have begun to menstruate, is not common everywhere. According to the statistics, speaking roughly, at least about 25 per cent. of the girls in this country menstruate before they are 12 years of age.

I have heard or read nothing up to now in regard to this question to make me hesitate to say that some change in the law is imperatively called for. On that point, I entertain not the slightest doubt, though I am not so clear as to what changes ought to be made, and more so as to how they are to be worked. The consideration of the question is complicated by the social habits and customs of the Hindus and the great facilities that exist among them for a close association of the husband and the wife before the latter is fit for cohabitation. The people have never up to now been taught to regard intercourse by a husband with his wife, though she is under 12, as premature; but, on the other hand, circumstances have tended to foster a contrary notion. Therefore, it is not surprising that the proposed change in the law in so far as it affects the husband should be viewed with disfavor by the people. If with this it is remembered that the proposed change will have the effect of placing the husband in the same category with a stranger who wantonly ravishes a girl under similar circumstances, the opposition to the Bill will become perfectly intelligible. There has been, beyond doubt, some misapprehension as to the true scope and object of the Bill, which probably may account for the opposition to it in certain quarters; but, as I understand it, the real objection lies in the fact that the legislature has not taken sufficient note of the peculiar social condition of the people and the almost fatal facilities that exist in a native household for the commission by the husband of an act which till now is not only not an offence of any sort, but which has also not been regarded as anything improper. This act hereafter will, however, be no less an offence than "rape," with its appalling sentence of transportation for life or rigorous imprisonment for ten years. However desirable it may be, in the general interests of the community, to visit even the husband, when he happens to be the transgressor, with a severe and deterrent punishment, it is extremely doubtful whether it is at all expedient or justifiable to introduce so great a change as that proposed, and for which, by their past history and associations, the people are utterly unprepared. The time may come—perhaps it is not far distant—when a more thoroughgoing measure might be introduced without arousing any feeling of alarm in the country; but till such time comes, it behoves the legislature to make only such changes as are not likely to cause so severe a shock to the feelings or even the prejudices of the people. I feel confident that, if provision be made for treating the transgression by the husband not as rape, but as a less heinous offence with a less severe punishment, much of the opposition to the Bill will cease. It should not be forgotten that the consequence of the incarceration of the husband in jail is more far reaching in this country than in any other, owing to the peculiar relation existing here between man and wife, and that the punishment of the husband is nearly as much a punishment on the wife.

The inquisitorial nature of the enquiries, which would necessarily be required to be made in bringing the offence to light, and the apprehension that they may be misused, have, of course, influenced the opponents of the Bill to exaggerate some of the evils that are likely to flow from the rigorous working of the law. I am not prepared to say that these apprehensions are altogether unfounded and it would be well to provide sufficient check against a too zealous working of the law. It is, no doubt, provided that the offence is a non-cognizable one, but does that go far enough? I think that something more should be done to check indiscriminate and hasty prosecutions, ill-advised and ill-considered enquiries and examinations, if the provisions of the Bill are to be worked with benefit to the people; otherwise the object of the legislature would be defeated, and, instead of the people loyally co-operating with the authorities to enforce the law, they would have recourse to every possible makeshift to evade enquiries, suppress facts and otherwise elude justice. It is far better to pass a mild law and work it effectively, than to pass a stringent one which could not be worked at all. These are the real and substantial objections to the Bill as it stands. Some stress is, no doubt, laid on the religious injunction that marriage should be consummated on the fourth day after the first menstruation, and it is contended that any rule of law to the contrary will have the effect of virtually forcing the people to violate the Shastras. Upon a full consideration of the point, I am constrained to observe that there is not much in the objection. The rule is more honored in the breach than in the observance, and, except in rare instances, marriage is not consummated till 3, 4 or 6 months after the period.

As to the objection that, as long as the sentiments and usages of the natives of this country continue what they are, the law would be a dead letter, it is sufficient answer to say that, even if the law is likely to be abortive otherwise, it would undoubtedly strengthen the hands of parents and guardians that wish to do their duty by their daughters and female wards, but who are now entirely powerless. This will not be considered as an imaginary and intangible benefit by any one who is acquainted in any degree with the power exercised by sons-in-law in Hindu families and how on occasions they insist upon their girl-wives being sent to them directly they come to know of the first appearance of menstruation. I am fully persuaded that the law will have the further effect of deterring most people from consummating the marriage till after the girls are well over 12 years old, rather than subject themselves to the risk of a possible prosecution and its many attendant unpleasant consequences to all the parties concerned.

To conclude, I would say that the principle of the Bill is unobjectionable, the necessity for it is imperative, but that it is defective, firstly, because it does not sufficiently recognize the difference between the husband of a girl and a stranger who has intercourse with a girl under 12, and, secondly, because it does not provide sufficient check against indiscriminate and ill-advised prosecutions. The former can be cured by making the mere act of intercourse by a husband with his wife under 12 a distinct offence from "rape" with a maximum punishment of two years' imprisonment, or fine or both; and the latter, by making the offence triable by a Court of Session or a first-class magistrate and making it obligatory on the complainant to obtain the sanction or certificate of a responsible officer, whom the Government may appoint in this behalf before the complaint is proceeded with. It is only right to observe that, simultaneously with the passing of the law, it is not improbable there would come into existence Associations and Sabhas under the auspices of social reformers for the purpose of initiating prosecutions and otherwise enforcing the law with vigour. It would be necessary, in some measure, to moderate the action of such bodies. That may not be necessary in the metropolis and other favorably-situated places; but it is not difficult to foresee that in certain localities without some restriction on the point, the law might be easily converted into an engine of oppression. I admit that it is not easy to lay down by law general rules on the point (so as to make them applicable throughout India) in order that practical effect may be given to the suggestion that the sanction or certificate of some officer of Government should be made a condition precedent to the prosecution of the complaint. I think, however, that the law may well reserve power to the Government to frame rules in the matter, should the necessity for the issue of any such regulations arise at any time in their opinion.

MADRAS,
7th February 1891.

(Signed) S. SUBRAMANIAM.

From ERNEST BARCLAY, Esq., Government Solicitor, Madras, dated 7th February 1891, No. 55.

ABSTRACT.—Forwarding the following opinion of the Advocate-General, dated 6th February 1891:—

[In the matter of the Bill to amend section 375 of the Indian Penal Code and the Code of Criminal Procedure, Schedule II, so far as it relates thereto.]

OPINION.

1. The proposed alteration deals only with the age of consummation and does not affect any religious principle or precept relating to the age of marriage. The religion of no section of the public can seriously be stated to be interfered with by raising the age of consent from 10 to 12 years.
2. There is great danger, however, that such a provision may be used for vexatious and grossly improper purposes. The working of it therefore must be entrusted only to those in whom the

public feel confidence. By withdrawing the offence now created from the cognizance of the police the Bill reduces the chance of improper interference with the domestic concerns of the people to a minimum.

3. I am in favor of the change and think that the safeguard provided by the Bill is sufficient for all practical purposes.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

From the Honorable V. BHASHYAM IYENGAR, B.A., B.L., Rai Bahadur, to the Chief Secretary to Government, dated Madras, 7th February 1891.

I have the honor to acknowledge receipt of G.O., dated 20th January 1891, No. 124, Judicial, and to express my opinion on the provisions of the Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882, which accompanied the same.

The evil pointed out in the Statement of Object and Reasons does not, as far as my experience goes, exist in any appreciable degree in most parts of this Presidency. But if the evil is prevalent in other parts of India to an extent which calls for remedial measures, I see no valid objection to legislative interference in the matter by a suitable amendment of the law. I do not propose, and I think it needless to discuss the question, whether or not the existing provision of the law and, *a fortiori*, the proposed raising of the age of consent contravenes any precept of Hindu religion. Assuming, for the sake of argument, the existence of such a precept of Hindu religion, it is certainly one scarcely followed in practice. I very much doubt if instances will be found in which, as would seem to be enjoined by the alleged precept, marriages are consummated on the third day after the first menstruation. Such consummation seldom takes place before the lapse of at least six months after the said event, and, in the majority of cases, it is deferred for more than a year. It seems therefore unreasonable that any opposition should be raised to the proposed measure on the ground that it is an interference with the Hindu religion and opposed to the Proclamation of 1858. If the proposed measure were such, the existing provision of law on the subject is equally so in principle. And the same objection can be advanced, in some instances with much greater force, to a number of other provisions of the Indian Penal Code, the Code of Criminal Procedure and several other enactments of the British legislature.

If the age of consent under section 375 be raised to 12, the effect of it will only be that that section, like most other sections in which the absence of consent is an ingredient of the offence, will be governed by the general provision contained in section 90. There really seems to be no valid reason why an exception should be made in the case of sexual intercourse with a woman under any of the circumstances mentioned in section 375 by reducing the age of consent to 10. If a girl under the age of 12 cannot consent to part with her property without the recipient thereof becoming guilty of theft notwithstanding such consent, it does seem anomalous that she may nevertheless consent to the perpetration of an act probably far more injurious to her without the perpetrator thereof becoming amenable to the criminal law. While I fully approve legislative interference in view to deter person from having sexual intercourse with their wives when they are below a certain age—whether with or without their consent—I am nevertheless of opinion that the law ought not to treat such intercourse as rape and punishable as such. The principal ingredient of the offence of rape is the absence of consent on the part of the woman; and if she be below a certain age, her consent in fact is, in the eye of law, no consent at all. Under English law sexual intercourse with one's own wife is under no circumstances rape; and the exception to the section defining rape in the Indian Penal Code as originally drafted was in accordance therewith. The exception was subsequently limited to cases in which the wife is over 10 years of age. The result of this change, which was effected by an amendment of the exception clause, is that sexual intercourse with one's own wife, even against her will or without her consent, is no rape if she be over 10 years

of age, but that it is rape if she is under 10 years of age. Such a distinction, resting as it does not upon the presence or absence of consent, which, as already stated, is the essential ingredient of the offence of rape, but simply upon the age of the wife, is, so far as the definition of the offence is concerned, anomalous and illogical. If the act of sexual intercourse with one's own wife when she is under a certain age ought, for purposes of punishment, to be dealt with as rape and visited with transportation for life, or imprisonment of either description for a period which may extend to ten years, an anomaly or want of scientific precision in the definition of the offence may be overlooked. But in my opinion such punishment is not only too severe and uncalled for, but also undesirable when it is borne in mind that, among Hindus in particular, it will practically operate as a punishment upon the wife herself for whose protection principally the provision of the law is intended. Public sentiment will naturally be strong against the infliction upon an erring husband of a sentence so severe and at the same time so prejudicial to the interests of the wife herself. The result will be a strong disinclination on the part of the relations and neighbours of the parties concerned to give any information or evidence which would lead to the detection and successful prosecution of the crime. This will more or less be the case even if the severity of the sentence be considerably reduced. Though the age of consent be raised, the law, so far as regards husband and wife, will practically remain a dead letter if the offence were punishable as rape, especially as the changes proposed in the schedule to the Code of Criminal Procedure will render the offence in such a case a non-cognisable one. The severity of the sentence is also uncalled for, because in cases where the husband has ~~several~~ intercourse with his wife under circumstances which would make him guilty of culpable homicide or of causing grievous hurt or of causing death or grievous hurt by a rash or negligent act, he would be liable to the punishment prescribed therefor (see *Queen-Empress versus Hurre Mohun Mythee*, I.L.R., Cal., vol. XVIII, page 49). Where the offence is committed by sexual intercourse with one's own wife, the offender is likely, in most cases, to have repeated it; and as each such intercourse will constitute a separate and distinct offence, he might, in cases where severity of sentence is called for, be proceeded against under section 35 of the Code of Criminal Procedure and visited with imprisonment which may extend to 14 years. The object of the law will be equally, if not more effectively, attained by constituting the offence in question a distinct one from rape and annexing a punishment of imprisonment of either description for a term not exceeding two years or fine, or both. Liability to rigorous imprisonment for 2 years will be a sufficient deterrent as far as punishment can be a deterrent against the commission of a crime of this nature. If such punishment be not a sufficient deterrent, neither will the severer punishment of transportation for life or imprisonment for 10 years be a sufficient deterrent. The proposal which I make to constitute the offence a distinct one from rape and prescribe a comparatively moderate punishment therefor will, I believe, if adopted, considerably minimise the opposition to the measure as proposed, which exists in many quarters and which certainly cannot be characterised as unreasonable. The object aimed at by the legislature is also likely to be better attained by the suggested change than by the amendment of section 375 as proposed by the Bill. The elimination from the definition of rape of sexual intercourse with one's own wife is a proposal which I also advocate as based on sound principles of criminal law; and the salutary and necessary changes proposed by the Bill in the schedule to the Code of Criminal Procedure by which the offence in question would become non-cognisable and bailable, and one for which summons shall ordinarily issue in the first instance, would be more in accordance with the reduced punishment above suggested than with the severe punishment retained by the Bill. I would, however, retain the Court of Sessions as the Court by which the offence is exclusively triable.

Section 1 of the Bill proposes to substitute the word "twelve" for the word "ten" in the clause marked "fifthly" in section 375. Having regard to the admirable precision which characterises the drafting of the Code and to the provisions contained in section 90 thereof, there is no object in retaining the said clause at all when the legislature resolves not to restrict the application to section 375 of the general provision as to the age of consent contained in section 90. I would also amend the exception by expunging from it the words "the wife not being under 10 years of age." Thus amended, the

exception will be as it existed in the original draft Code. I would propose the insertion of a new section to the following effect next after section 376:—

"Of unlawful sexual intercourse" with one's own wife.

376-A. Whoever voluntarily has sexual intercourse with his own wife, the wife being under 12 years of age, shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine which may extend to 1,000 rupees, or with both.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence described in this section.

Under section 375 as it now exists and as it is proposed to be amended by the Bill, the *onus* of proving that the wife is over the age of 10 years or 12 years, as the case may be, will be on the husband (accused) in cases in which he is not in a position to plead or establish consent *in fact* on the part of his wife though if there were such consent in fact the *onus* will be upon the prosecution to establish that the wife was below the said limit of age and that therefore there was no consent in law (section 105, Indian Evidence Act). If the offence in question be dealt with as a distinct offence in a separate section as above proposed, the *onus* of establishing the age of the wife will be, as it ought to be, on the prosecution, whether the husband had or had not the consent of the wife. It is true there is nothing novel in the principle of the Bill and that the principle involved in it was affirmed—and rightly affirmed—years ago in the Indian Penal Code by reason of the general practice obtaining in this country of marrying girls when they are children. The change now proposed is no doubt only to raise the age of consent in section 375 from 10 to 12 or rather to remove the exception which, for the purposes of that section, was engrafted on to remove the exception fixed by section 90 by lowering it from 12 to 10. But, the general age of consent fixed by section 90 by lowering it from 12 to 10. But, for practical purposes, the change is momentous, because it considerably widens the sphere of operation of the principle—a sphere which is now extremely narrow. It is therefore necessary that the rigor of the law should be softened in the manner indicated above, and that the legislature should also provide special safeguards against vexatious prosecutions and frivolous proceedings, as the matter is one which so materially bears upon the relationship of husband and wife—a relationship which, among Hindus, is regarded not as the result of a contract, but of a sacrament. The changes proposed in the schedule to the Criminal Procedure Code afford in a great measure such safeguards. But it will be desirable that an additional safeguard be also provided by empowering the Local Government to declare by notification that no prosecution in respect of the offence in question shall be instituted in the territories or any part thereof subject to such Government without the previous sanction of such Government or any officer empowered in that behalf by such Government.

If in the working of the proposed law it should be found that in particular local areas a general feeling of insecurity or alarm is caused by vexatious and frivolous prosecutions or the formation of private and voluntary agencies or associations for instituting and conducting prosecutions, such a provision will enable the Government concerned to check such prosecutions and allay such feelings by exercising the power conferred by it. I am not to be understood as deprecating the formation of such agencies and association in the cause of social reform. But any over-zeal, which is not unlikely to characterise their proceedings, will be counteracted and checked if they have to obtain the sanction of some responsible official authority before instituting proceedings.

From the Honorable C. SANKARAN NAIR, B.A., B.L., to the Chief Secretary to Government, dated 10th February 1891.

It appears to be clear that premature consummation of marriages is "productive of grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they belong."

Though not extensively practised, early marriage and premature consummation take place to an extent that requires the interference of the legislature. When the Government see that some of their subjects are thus liable to grievous suffering and physical injury, it appears to be their plain duty to take steps to protect them from

that injury. Abstention in such circumstances is abdication of the functions of Government. A Government that declare their inability for *any* reason to protect *any* subject from physical violence or to punish those guilty of such violence are only declaring their own unfitness for their legitimate task.

The Proclamation does not stand in their way. The protection of minors is a duty which the Government cannot renounce, nor do I regard this piece of legislation as a departure from the principles of religious neutrality observed by the Government. Every man is entitled to follow his own religion, but he is not entitled, under the sanction of religion, to interfere with the rights of another, whether with or without consent, when such other individual is a minor so long as such interference is "productive of grievous suffering and permanent injury."

The practice of early marriage is followed more by Brahmins than any other caste, and I believe I am right in saying that early marriage is not regarded generally by the non-Brahmins as compulsory according to the Hindu religion, and in this Presidency all the Brahmins are not agreed that early marriage is necessary. The text of Manu that requires a man to wait, if needs be till death, has still the force of living law among Nambudiri Brahmins who not only do not consider early marriage necessary, but often allow their females die unmarried. In these circumstances, it appears to me to be incorrect to say that early marriage is a part of Hindu religion as proved by custom. The preponderance of authority also is in favor of that view.

I have also to point out that the alteration in the Criminal Procedure Code withdrawing the offence when committed by a *husband* on his *wife* is not likely to have any application to the Nairs of Malabar among whom the customary ceremonies, though followed by cohabitation, have not been recognised as constituting a valid marriage in a court of law, but, I do not think any alteration in the Bill on that account is necessary.

In conclusion, I have to add that I am not satisfied with the reasons for raising the age of consent to 12. If the medical authorities may be followed—and their opinion ought to be followed in this matter—14 would seem to be the proper age.

From the Collector of Kistna, to the Chief Secretary to Government, dated Camp, Jaggayapet, 9th February 1891, No. 10—Extra.

In reply to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to express my opinion that the proposed alteration of the law is a useful step in the direction of a most necessary reform.

2. The raising of the age of consent to 12 in the case of married girls is perhaps as great a change in the law as it is wise to make at present, but we should, I think, look forward to a further change in the course of a few more years by which the age of consent should be raised in the case of married girls to the age of 14, when puberty, and not merely menstruation, has been reached.

3. It is generally agreed that the desire to consummate marriage with immature girl-wives is due, not so much to the desire of the husband, as to the persuasions and suggestions of the old women of the family, who are both averse from change and anxious to see children of the next generation. The effect of the proposed change in the law will, in all probability, be to enable the men to check the initiative of these mischievous members of the family by significant warning. The removal of offences against the altered law from the cognizance of the police is desirable.

4. It is recognized by educated natives that premature consummation of marriage is not unfrequently the cause of the mother's death or serious injury at first confinement, while the sterility of women is attributed to the same cause. It must be added, however, that the consummation of marriage before puberty is said to be the exception rather than the rule in this district.

5. I fully agree with the view that has been urged on me by several educated native gentlemen that, although 12 years may be fixed as the age of consent as regards man and wife, it is quite unnecessary to retain this limit in other cases. Fourteen should be the limit of the age of consent in all cases save that of a man and

his wife. There is neither religious nor social prejudice to be consulted here, and the State may unhesitatingly interpose to prohibit sexual intercourse until the age of 14 is reached when it is almost certain that the female has attained puberty.

(Signed) A. T. ARUNDEL,
Collector.

From M.R.Ry. A. SABAPATHY MUDALIAR, Rao Bahadur, to the Chief Secretary to Government, dated Bellary, 13th February 1891.

I have the honor to acknowledge the receipt of G.O., dated the 20th January 1891, No. 124, Judicial, and beg to state my views as follows:—

1. I agree entirely with the principle of the Bill.
2. As far as I believe and know, it does not interfere with the religious beliefs and customs of the people of this part of India to any appreciable extent. The benefits accruing from the proposed alteration in the law will far, I am strongly convinced, outweigh any inconveniences that may arise from the religious considerations so strongly and vehemently put forward by a number of people.
3. In this part of India, in the vast majority of cases, consummation of marriages does not take place before the girl is 12 years old. Among Brahmins and those who follow them in marriage customs, when a girl attains puberty before the age of 12, consummation is postponed for a year or more for the girl to be in a fit condition to enter the marital state, and in no case to my knowledge has there been any objection on the score of religion or caste, nor have the parties been subjected to any social or religious ostracism.
4. I very much regret that the age is not proposed to be raised to 14, and have all the opposition for, a more substantial reform, for, as it is now, the age of 12 is quite insufficient to fully attain the intended object among an ill-fed and ill-brought-up people like those of India.

5. I have read of suggestions from certain quarters that in the proposed alteration sexual intercourse should be permissible in the case of the husband if the girl, though under the age of 12, had attained puberty. The attainment of puberty at such an early age is a sure indication that the girl is physically weak, and such girls are the more entitled to be protected by the legislature.

Another objection against the above suggestion is to be found in the practical working of the law, for medical examination of the girl, which is so much abhorred, will become a necessity.

6. In regard to the punishment in the case of the husband, it must in my opinion be almost nominal. It should not far exceed a year's simple imprisonment with an alternative of fine. The present punishment is disproportionately and shockingly heavy, considering the current opinions among the people of this country.

(Signed) A. SABAPATHY MUDALIAR.

From the Honorable V. BHASHYAM IYENGAR, to the Chief Secretary to Government, dated Madras, 16th February 1891.

With reference to G.O., dated 20th January 1891, No. 124, Judicial, I have the honor to submit the following in continuation of my letter dated the 7th instant. In the *Hindu* of the 9th idem a letter appeared in which attention was drawn to the prejudicial consequences that might result from the operation of the proposed law, in cases in which a wife may give birth to a child when she is between 12 and 13 years of age. I think the matter is one which well deserves the consideration of the legislature.

Instances in which girls become mothers at such an early age may no doubt be few, and when the proposed measure becomes law it may reasonably be hoped that they will become fewer still, and that the apprehension of this very contingency

happening would act as a deterrent against the husband committing the crime. But prosecutions in such cases, though few and far between, are sure to create great and widespread sensation by reason of their attendant circumstances. When a girl whose age is not more than 12 years and 6 months gives birth to a child, it is of course a certainty that the offence in question has been committed by some one — either the husband or somebody else. And as a general rule the prosecution will naturally be instituted against the husband, especially when, as is not unusual, the married couple are, even before the consummation of their marriage, brought up in the same family — either that of the wife or that of the husband. Apart from section 112 of the Indian Evidence Act, which I shall more particularly refer to later on, there can hardly be any doubt that even in such cases the onus will be, not on the husband to establish that he had no sexual access to his wife, but on the prosecution to establish that the husband had such access when she was under 12 years of age. (*Vide Bosville versus The Attorney-General*, Law Reports, Probate Division, Vol. XII, p. 177). The first step, therefore, which the prosecution will take in order to discharge its onus will be to cite the wife herself as the principal or the only witness in support of the prosecution. And certainly she is the most competent and in some cases probably the only available witness.

But one can hardly imagine a case in which a lady witness will be placed in a more embarrassing or distressing situation. If the truth were — as it probably would be in most cases of the kind — that it was the husband that had the sexual intercourse, she has to testify to it, with the almost certain knowledge of the husband being convicted on her evidence and subjected to severe punishment. But if it were otherwise and she makes up her mind to speak the truth, she will have to confess that her chastity was violated by a stranger or that she was unfaithful to her husband, one of the legal consequences of which will be forfeiture of her right of inheritance to her husband's estate. In the first case, there will be a strong temptation to save the husband by denying that he had any sexual intercourse with her and thereby bastardizing her child. And if she yields to this temptation, she has to account for the stern fact of her having a child, and cannot decline to answer the question as to who had sexual intercourse with her, if not the husband. It can hardly be denied that it will be simply cruel to place a tender girl on the horns of such a dilemma.

In such a case, even the position of the husband is, no doubt, one of great perplexity and embarrassment and one which may strongly tempt him to impute unchastity to his wife and bastardize the child. But this, of course, is unavoidable, and the husband is himself solely responsible for the situation in which he finds himself placed. At any rate, he, being the accused, has under law this decided advantage over the wife, viz., that he cannot be compelled to account for the birth of the child or answer any questions concerning the offence. Under the Indian Evidence Act, a witness is not excused from answering questions the answers to which may tend to criminate the witness or expose him or her to a penalty or forfeiture of any kind. And even in criminal proceedings against a person, the husband or wife of such person is a competent and compellable witness. The English law is in these as in several other respects more tolerant of human frailties than the Indian law. I would not, however, disqualify the wife from giving evidence in a prosecution instituted against the husband for the offence in question. It may be that the prosecution is instituted by herself or by some one on her behalf and she should certainly be a competent witness. I would therefore only suggest that she should not be a compellable witness, either for the prosecution or for the defence, in any case in which the husband is prosecuted for the offence in question. Even in cases in which the awkward circumstance of the wife having become a mother does not exist, she will often be placed in a delicate and embarrassing position when compelled to give evidence in a prosecution of the husband for the offence in question.

If this suggestion be approved, effect may be given to it by adding a proviso to section 120 of the Indian Evidence Act to the effect that the wife shall not be compellable to give evidence in any proceeding against the husband under section 375-A of the Indian Penal Code. I say section 375-A instead of section 375 of the Indian Penal Code with reference to the suggestion made in my previous letter that it would be desirable to constitute the offence in question a separate offence under a new section.

Section 112 of the Indian Evidence Act also presents a difficulty in connection with the case in question. The object of the section is of course obvious, and that is to raise a presumption in favor of the legitimacy of the issue, and certainly it was not intended to raise any presumption of the commission of an offence by the husband. And the principle of English law embodied in that section will have no such operation in England, because sexual intercourse with one's own wife is in no case *per se* criminal under English law. Though under the Indian Penal Code it is an offence under section 375 when the wife is under 10 years of age, section 112, even if otherwise applicable, is practically inoperative in a prosecution of the husband under that section, for the simple reason that hardly a single instance has occurred of a girl becoming a mother between her 10th and 11th year. There does not, however, seem to be anything in the language of the section rendering it inapplicable to a criminal case, and it may be difficult to contend successfully that that section does not throw the onus on the husband to disprove that he had sexual intercourse with his wife before she was of the age of 12 years, if a child is born to her in wedlock when she is under the age of 12 years and 6 months, and a prosecution is instituted against him thereafter for the offence in question. It will be, therefore, extremely desirable to amend section 112 by providing clearly that it should be inapplicable to a criminal prosecution of the kind under consideration. The said section is, perhaps, also faulty in other respects as pointed out by Mr. Whitely Stokes, and the sense in which the word "access" is used in the proviso is by no means clear; and certainly it is far from being in accordance with the English law as expounded with admirable clearness in the recent case of *Bosville versus The Attorney-General* (Law Reports, Probate Division, Volume XII, page 177).

As there is now a Bill before the Supreme Legislative Council to amend the Indian Evidence Act, the above suggestions, if approved, may be given effect to in that Bill.

(Signed) V. BHASHYAM IYENGAR.

From the Acting Agent to the Governor, Vizagapatam District, to the Chief Secretary to Government, dated Ranguvada, 10th February 1891, No. 19-T.

In reply to G.O., No. 124, Judicial, dated 20th January 1891, asking my opinion on the Bill to amend the Indian Penal Code and Criminal Procedure Code with reference to what is called the age of consent, I regret to say that the subject is one to which I have not paid any attention hitherto, and as I am now in the most remote part of Jeypore, I am unable to obtain any information which would allow of my expressing an opinion of any value. All I am able to say consequently is that I have not personally come across any instance of the present law having proved inadequate or of injury having been caused to child-wives by the limit of age now fixed. It seems probable to me that the question is one in which the peculiarities of the life-history of races concerned may be an important element.

W. A. WILLOCK,
Agent to the Governor.

From H. W. FOSTER, Esq., Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 19th February 1891, No. 500.

In continuation of my letter, dated the 6th instant, No. 355, I am directed to forward a transcript of the minutes recorded by the Honorable the Chief Justice and Mr. Justice Muttusami Aiyar on the Bill to amend the Indian Penal Code and the Code of Criminal Procedure, 1882.

MINUTES.

The Chief Justice.—I am inclined to think that if any alteration is to be made in section 375, Indian Penal Code, clause "fifthly," the age of consent should be raised to fourteen years. A very large number of children of 12 years of age must be manifestly unfit to give consent to sexual intercourse, and the proposed alteration will only in some degree mitigate, and not cure, the evil complained of. If it is thought wise to interfere with the relations of man and wife, the same remarks apply to the exception to section 375.

The amendment to schedule II, Criminal Procedure Code, will render a conviction for rape by a husband on his child-wife very difficult, if not impossible, to obtain.

Mr. Justice Muttusami Aiyar.—Having regard to the object of the proposed legislation, I consider that it is sound in principle.

So far as the Bill relates to persons other than husbands, there is not the slightest objection to raising the age of consent to 12 years. Any legislation in the direction of a nearer approach to the age of discretion is, in their case, in perfect accordance both with Hindu religion and with social usage.

Neither is it open to objection even so far as it relates to husbands, though in form and in certain matters of detail it requires to be amended. There can hardly be any doubt that consummation of marriages with girls who have not attained their maturity is an evil, and that it is the duty of every father to protect his daughter from such evil. This being so, I see no objection to the State stepping forward to afford such protection to girls from whom it is withheld.

As far as I am aware, neither Hindu Law nor Hindu religion nor usage in this Presidency sanctions a premature consummation of marriage. The general practice in Southern India is to allow a child-wife to remain with her father or mother until she attains maturity and her marriage is consummated in proper season. It is in conformity to the teaching of the commentator on the Apastamba Sutra who says that whether the text relating to the Garbhadanom ceremony is or is not repeated as part of the marriage ritual, cohabitation must be deferred until the girl attains her maturity. Judging from my experience in this Presidency and from my view of the general Hindu Law, I think that legislation to protect girls against injury from premature sexual intercourse is not in conflict either with Hindu religion or with the recognized usage of this Presidency or with reason.

As to the objection that the Hindu marriage must be consummated on the fourth day after menstruation, the correct view is that cohabitation is then permitted and not enjoined as a matter of imperative duty. There is hardly a case in which the marriage is consummated in this Presidency on the fourth day after the first menstruation, whilst in many orthodox and respectable families consummation is deferred for 6 or 12 months, and even for a longer period. According to strict Hindu Law, a girl may choose a husband for herself after she menstruates, if her father has failed in his duty to select one for her at an earlier period, and some texts allow even a period of three years for her to make a proper choice in case of extreme necessity. Whilst I am of opinion that cohabitation is permitted by Smritis from the fourth day after menstruation, I also think that it may be, and is often deferred without any injury to the religious or caste status of the wife.

The real point for consideration is what form protective legislation, such as the one under consideration, ought to assume as against husbands and how its practical operation may be best safeguarded.

It does not appear to me to be correct to say that sexual intercourse with the husband is rape. The injury to the purity of the woman, and the degradation and misery thereby entailed on her is an ingredient in the conception of the offence of rape, and it is wanting in the case of premature intercourse with the husband. Again, the avowed object of the proposed legislation is to afford protection to the child-wife, but a sentence of transportation for life or for a term of seven or ten years, or even a sentence of a long term of imprisonment would, when passed upon her husband, operate to degrade her, though indirectly, in society, and in the present state of the marriage law in this country, inflict upon her in effect a kind of permanent or temporary widowhood according to the nature of the punishment. It may at times happen that the offender is a boy under 18 years of age and his imprisonment and degradation as one belonging to a class of ruffians would be regarded no less as a calamity to the girl than to the boy. It is no doubt true that, according to the law as it stands at present, sexual intercourse with a girl under ten years of age is rape even when the girl is the offender's wife, but it seems to me that the inclusion of the husband, among offenders who violate a woman, and who are ordinarily classed with felons, is incompatible with the primary conception of the offence. But the age mentioned in the section is so low that in its practical operation the provision has hitherto been perfectly innocuous, and, so far as I am aware, there has not been a single conviction in this Presidency under the fifth clause of section 375 as explained by the exception. The fact is that a girl never attains her maturity before she completes her 10th year, whereas some girls attain their maturity, a few in their 11th year and several in their 12th year. I would therefore

amend the Bill by constituting premature sexual intercourse by the husband with his wife when she is under 12 years of age into a distinct offence punishable as ordinary criminal force or hurt and add an explanation to it that if grievous hurt or a more serious injury is caused, the offender is liable to punishment for such offence under the appropriate section of the Indian Penal Code.

There is another matter in respect of which the Bill is open to amendment. In the Statement of Objects and Reasons it is stated that the object of the Bill is to prevent premature consummation of marriages by adult husbands with children who have not reached the age of puberty, but the Bill goes beyond it by prescribing 12 years of age as the minimum age of consent. I would suggest that 12 years be prescribed as the age which is to be presumed as the age of puberty unless the husband shows that the wife has previously attained her maturity and I would thereby recognize proof of maturity by the husband as a valid defence. This would not only bring the Bill into strict conformity with its declared object but also bring it into conformity with Hindu Law. When a girl attains her maturity in Hindu families, it is considered to be an occasion of rejoicing and of festivity, to which ladies who are related to the family or live in the neighbourhood are usually invited. Looking at the Bill from this stand-point, there is reason to think that the fact of puberty may be more easily proved than the fact of age.

Again, it is very necessary, as observed in the Statement of Objects and Reasons, to prevent the possibility of vexatious and unjustifiable interference with the domestic concerns of respectable people under the proposed law. To secure this object, it is, I venture to think, not enough simply to make the offence non-cognizable and to declare it bailable. I would submit that it is desirable to go further and to provide that no prosecution shall be instituted unless it is initiated by the father or the mother or the guardian for the time being of the girl or leave to prosecute is first obtained from the District Magistrate or Divisional Magistrate, such leave being required to be granted after notice to the father or other guardian of the girl and a preliminary inquiry and an appeal being allowed to the High Court from the order sanctioning the prosecution. I would also insert a provision as a matter of precaution that in no case a girl shall be subjected to medical examination, except with her guardian's consent and by a lady-doctor or midwife.

In conclusion, there is one other matter which I desire to mention in connection with the proposed legislation. There is a strong prejudice among the uneducated classes, and even among some of the educated men in this Presidency, against State interference, without adequate necessity, with the domestic concerns of the people. It is not denied that when the father ignores his duty to his child, legislation is proper; but it is said that in this Presidency there has been no case in which any girl-wife has ever suffered from injury caused by premature sexual intercourse, that such intercourse is not permitted to any appreciable extent, that the domestic arrangements of a respectable family are such as ordinarily preclude it and that the area of State interference should be continuous with the area of the evil. It is also considered that the suggestion that where the evil does not exist, the new law will cause no practical mischief, is more plausible than sound, because what is dreaded is not so much the actual conviction as the vexation and annoyance and social scandal consequent on a public inquiry into matters the very mention of which is forbidden in polite society by a feeling of delicacy, an inquiry which may be initiated in villages where there are factions by a spiteful informer and which may necessitate the examination and cross-examination before a public tribunal of respectable women accustomed to a quiet life of privacy, touching domestic incidents over which they usually throw a veil of decency. The Bill is framed apparently on the view that, for the purposes of protective legislation, all India may be treated as one country, howmuchsoever conditions of domestic life and domestic arrangements in joint Hindu families in the mofussil may vary in different parts of it. Though I also believe that a mere local law would not meet all possible cases of premature cohabitation and prove as effectual as a general scheme of protective legislation in checking the evil, yet I think that the jurisdiction to try ordinary cases of premature sexual intercourse, unattended with serious injury, should not vest, if it is constituted into a new offence as proposed by me, in any tribunal below that of a First-class Magistrate. I further venture to submit that it would in no small measure conciliate popular prejudice to modify the form and safeguard the practical operation of the new law in the manner already mentioned, whilst it would at the same time secure the protection which it is intended to afford to minors in cases in which they may really need it.

Exd. P. L. Pereira.

NOTE FOR THE UNDER SECRETARY.

Reference: Chief Secy's query on the Census

Replies are due from Messrs.
Willson, Nicholson & Cunningham
Raghuvaran. The rest
are in the Press.

ETC

20/2

Submitted to the Chief
Secretary

he

20/2

Papers to be read in Proceedings:—

Again G.O., dated

18 , No.

Again G.O., dated

18 , No.

Current No.

of 18 , dated from

Current No.

of 18 , dated from

order The following telegram will

be despatched to Messrs

Nicholson & Co. (London)Report ~~at once~~ at once on
age of Consent Billby
20/2

Handwritten notes on the left margin, mostly illegible.

Ind. CMO. 9/14

F C				INDIAN TELEGRAPH.		Local No.
Class				From		
To				(Station)		
Words				Day	Hour	Minute
11				25	11	13
To (Person)				From (Person)		
Madras				Collector		

OFFICIAL INSTRUCTIONS.
25 FEB 1914

Regret I cannot submit reply on age of consent bill

- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15

RECD. FROM		L. N.		SENT TO		L. N.	
AT	Hrs.	Mts.	By	AT	Hrs.	Mts.	By

MADRAS FORT 25-2-01
Telegraph Master.

CURRENT No. 914

[9]

Judl.

DEPARTMENT.

253

~~Telegram~~

From

The Collector, Tinnivelly, Dt.

From Tinticorin

No. 299

Dated 25-2-91

Received 25-2-91

Enclosures

SUBJECT.

Informing that he cannot
submit a reply on the age of
sent Bill

7-14
S
To
The Collector, Tinnivelly Dt.
18-2-91
The Collector, Tinnivelly Dt.
My telegram of
of 18 opinion
on age of
Consent bill
respectfully required

RECD. FROM L. N. S. P. 1
At Hrs. M. S. P. 1
At Hrs. M. S. P. 1

MOUNT ROAD 28-2-91

CURRENT No. 1031

[9] *Indl.* DEPARTMENT.

Very urgent

Telegram

From Govt. of India
Leg. Dept.

Submitted in continuation
of the papers on the subject now
on file may the reply of this
Govt. be telegraphed?

4/3 *St. Paul*

The telegram was received at my residence
latter in amongst my private papers
and was marked.

I sent the papers in some days
ago, and I think they will
now with the Government.
The present of my attention should
be to the same.

4/3/91

SUBJECT.

Urgently requiring opinions on
the Age of Consent Bill.

No. 595-

Dated 28-2 }
Received 28-2 } 91
Registered 4-3-91
Enclosures

Just END-1006

00909

Code
Class.

INDIAN TELEGRAPHS. Monthly Number.

To Madras

From Vizianagaram

116.8 | 2 | 18 | 42

To The Secretary to the Govt
of Madras. legislative
department.

From Secretary anand
= avarthani
Sabha

At today's meeting of anandavarthani
Sabha presided by Sri Bhahadur
U Jagannatharao pundulu garu and
consisting of many learned orthodox
pandits and educated gentlemen the
age of consent bill approved
with following modifications firstly
girls wives of consent to
be limited to 12 others
14 Secondly No prosecution unless
injured girl or next friend

Recd. from LN. Sent to LN.
At Hrs. Mts. by At Hrs. Mts. by

MADRAS 3-3-91

Fre

D
R
A
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014 4/3 C4/3

Code
Class.

INDIAN



TELEGRAPHS.

Monthly
Number.

To

(Office)

From

(Office)

Words.

Day.

Hour.

Minute.

Official
Instructions.

To

(Person)

From

(Person)

Complains thirdly of offence of husbands
to be classed separately with
two years imprisonment or fine
fourthly offence compoundable with Court
permission unless death ensues and
liable also by first class
magistrate memorial follows.

64 Word Form.

F.C.2.

Recd. from

LN.

Sent to

LN.

At

Hrs.

Mts. by

At

Hrs.

Mts. by

Telegraph Master.

G. W. Allen and Co. - No. 179 T-8-2 90-20,00,000.

MADRAS 3-3-91

Concursing -

In the last - I agree with
L. H. W. W. in items
I, II, III, V & VI of his opinion.

I consider that the medical
society's opinion regarding
the case would justify the
view I take - especially the
fact that it is essential to
the common practice that
the woman not be married for
several months after the removal
has been made -

1/3/21 S. H. J.

FOR ORDERS.

*Ag. of Cons. &
Kidd*

*Am. Cons. & H. &
K. & C. & C.*

(For orders)

NOTE FOR THE CHIEF SECRETARY.

*For the result of the inquiry
into the delay please
see the attached office
note - ship.*

*The delay must have
been with the Hon. Mr.
Farquhar's person. The Hon.
member himself noted in the
current on 1st inst. but the
person apparently did not take
the file from his house & got
home till the 4th.
The office does not appear
to have been in any way
blame. Ex 18/3.*

*c.26/2
c.26/3*

FOR ORDERS.

Ag. of Cms
Hull

1873
The ...
...
...

1873
...
...
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c26/c
Pa
c-0/3

FOR ORDERS

Ag. of C. n.
16/11

Note for Under Secretary

The file was sent
in circulation in a cover ad-
dressed

1. The Hon. W. Stokes, C.S.I.

2. The Hon. W. J. J. J. J., C.S.I.

3. The Right Hon. The Governor

on the 26th Ultimo, & returned

to the office on the 6th Instant.

Thus it will be seen that the

circulation was entrusted to

the H. Ms. themselves & the red

header to the cover showed that

it was urgent.

16/3/13

S. Desikaphari

Circulation
clerk

226/2
226/3

Fort St George
March 21st 1891.

My dear Rees

With reference to the
P. S of the Note of H. E. on the
enclosed I write to explain that
the officer is in no way to blame.

All papers marked for
circulation as this one does do
not come back to the Secretariat
until they have been to the
H. M. to whom they are last
marked.

The only exception to this
is where an H. M. does what
is called "breaks the circulation"
which is effected by striking out
the names of the Hons ^{below} his

The papers then return to
from the H. M. doing this - H. M.
send circulation papers on their
their own forms and we have
nothing to do with the matter.

The persons responsible in this case for the delay between the 1st and 4th are Mr Harstins' persons over whom I have no control.

I may mention that the letter to India went out on the 7th

Yours sincerely

12/7/91 J. F. Price

[Faint, mostly illegible handwritten text in the left margin]

J. D. Price Esq C I E } dupd
into for Mr. Price 11/3

[5]

25 DEPARTMENT.

Papers to be read in Proceedings:—

4827

Again G.O., dated 18 , No.
Again G.O., dated 18 , No.
Current No. of 18 , dated from

Current No. of 18 , dated from

Order 6 March 91 No. 441.
The Govt. of India will be addressed
(from orders)
6 Mar.

Drafted with 75
12/7/91
7-3-91

800 copies in
each of the 9 sets
12/3/91

Letter No. 442.
To the Secy of the Govt.
Leg. Dept.

Sir,
With reference to your letter dated the 12th Jan. 1891 and 95 forwarding copies of a Bill to amend the Indian Penal Code & the Code of Criminal Procedure & asking the opinion of the Govt., the Hon. the Judges of the High Court & certain selected persons thereon, I am directed to forward a copy of the Proceedings of the Govt. of this date together with copies of the letters received from the various persons consulted.

12/7/91
12/3/91

2. The ^{intended} proposed legislation meets generally, I am to say, with the approval of H.C. but the form of the proposed measure seems open to grave objections & the following seven clauses contain the principles which in the opinion of this Govt. should be adopted:—

(i) The offence against which the legislation is directed should be made a distinct one & should not be regarded as rape.

(ii) Jurisdiction to enquire into or try the offence should be restricted to First Class Magistrates & the Court of Sessions.

(iii) Cognizance should be taken of the offence only upon the Complaint of the father, mother or natural guardian of the girl; & if the charge ~~is~~ ^{is} preferred by others the person ~~accused~~ ^{accused} should be allowed, ^{called upon in the first instance} to show cause why action should not be taken.

(iv) If the husband can show that his wife had a previous history before 12 years of age he shall be entitled to acquittal.

(v) The punishment for the offence shall not exceed 3 years imprisonment & fine.

(vi) Provision shall be made for the conduct of medical examⁿ by lady doctors or midwives only.

(vii) The 5th clause of sec. 375 of the I.P.C. & the exception should be omitted.

3. The following are the dates of publication of the Bill in the Govt. Gazette

in English on the 27. January '91
in Tamil, Telugu & Canarese on the 3. Feb '91
in Hindustani — — — 10. Feb '91
in Malayalam — — — 17. Feb '91

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442

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[Dated 11-3-91]

Bills Legislation

Whereas that the Govt
of India be addressed
regarding the bill to
amend the Indian
Code and the Code of
Criminal Procedure.

Whereas, with
reference to the
opinion of the
Attorney General
to amend the
Indian Penal Code and
the Code of Criminal
Procedure 1872.