Introduction
It may seem odd that a thesis that purports to speak of rape laws and trials in colonial times goes also into questions of caste, class, and citizenship. But this is perhaps inevitable. Indeed, is it possible to restrict oneself to gender in writing a history of rape? Phenomena and subjects are situated within social contexts. Contexts are different and it is therefore impossible to speak of ‘rape’ or ‘woman’ as essential, biological or ‘natural’ categories that exist outside of social context or history. For a historian, the context is both time and space. Rape is discursively different at different periods of time due to the social, economic, political and legal processes of that time. Meanings of rape and consent are produced structurally within those processes. Therefore, for me to write of rape in the context of colonial India is also to write of race, of class and of the wider socio-historical context of colonialism and state-formation. It is also to write of the interface between 19th century British notions of rape and consent and their interface with the notions of rape and consent in colonial India.

Moreover, victims of rape are marked by the identifications / disadvantages — or histories — of caste, class, religion and community, in times of both peace and conflict. This is at odds with the ‘universality’ of the rape law. The rape law in colonial India applied equally to all women irrespective of caste, class or community. This law, and its site of the universal woman victim-subject, was inherited by the postcolonial Indian nation-state. This leads me into questions of citizenship, to ask whether all women can in fact equally invoke its universality. Or whether there is a gap between the letter of the law and its practice — between rape laws and trials. Since discourses of citizenship in postcolonial India are traced back to the colonial period and its anticolonial nationalism, the inquiry is also into colonialism and postcoloniality and the links between the two.

A comparison of 19th century British discourses of rape and their contemporary revisions will illustrate the point that I have made — that notions of rape and consent are specific to time and space, or produced within historical contexts. The nineteenth century in Britain was an era of much anxiety and contestation over matters of sexuality. Gayle Rubin suggests that there are periods in history when the realm of sexuality is more fraught than in others. She identifies the late nineteenth century in England as one of

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those historical periods when the domain of sexuality was highly disputed and politicized, and erotic life renegotiated. It was a period when “powerful social movements focused on “vices” of all sorts.” Educational and political campaigns attacked the vices of prostitution and masturbation, especially among the young, and encouraged chastity. “Morality crusaders attacked obscene literature, nude paintings, music halls, abortion, birth control information, and public dancing.”¹ What is termed “Victorian morality” was consolidated after a long period of struggle and enforced through legal, social and medical disciplinary apparatuses.

Much of this morality was transposed to the Indian colony and enforced through similar legal and medical apparatuses. The codification of the criminal law in British India reflected much of the turmoil and anxiety back home in Britain. The moral panic in 19th century Britain surrounding child sexuality, prostitution and homosexuality was written into the Indian Penal Code of 1860, in the “offences against the body” such as rape and unnatural offences. An examination of the laws on rape and “unnatural offences” enacted by the British in colonial India would illustrate how these laws reflected 19th century British moral anxieties, and discourses of who could be raped and by whom.

The Indian Penal Code enacted by the British Indian Government in 1860 defined rape as an offence by a man against a woman, committed under five circumstances, penetration being sufficient to constitute the offence of rape. A woman was said to be raped, if a man had intercourse with her (a) against her will, (b) without her consent, (c) with her consent, when her consent had been obtained by putting her in fear of death or of hurt, (d) with her consent, when her consent had been given because she believed the man to be her husband and the man knew that he was not, (e) with or without her consent, when she was under ten years of age. The exception to this section was intercourse by a man with his wife, unless the wife was below ten years of age. Penetration, the section said, was sufficient to constitute the offence of rape.²

This definition of rape raises several questions in the light of debates in contemporary feminist legal theory. Contemporary feminist debates in both Britain and India have
discussed the definitions of both the *mens rea* (i.e. the intentionality of the rapist and the consent of the woman) as well as the *actus reus* (i.e. the act that constitutes the offence) of rape in the law, in their particular contexts. These present discussions of the *actus reus* of rape diverge from 19th century legal parameters of rape in ways that I will examine shortly, due to historical reasons. Legal constructions of rape in the present as well as in the 19th century are produced through processes that are specific to each period. This leads to their divergence from each other and makes rape and consent historically produced discourses, rather than ahistorical or natural experiences.

The Indian Penal Code enacted by the British Indian Government in 1860 defined rape as an offence by a man against a woman, committed under five circumstances, penetration being sufficient to constitute the offence of rape. While this definition did not specify the nature of penetration of the woman, it may be assumed that penetration of the vagina by the penis was implied. Contemporary debates in both Britain and India have raised questions as to whether the *actus reus* of rape should be restricted to penile-vaginal penetration, or include penetration of the anus and the mouth of the victim. Also, should rape be restricted to penetration by the penis, or include penetration of the victim by other body parts and by objects? Feminists today have argued that that the definition of rape as penile-vaginal penetration is phallo-centric. They suggest that whether the man is penetrating the victim with his penis or his finger is significant from a male point of view; from the victim's point of view, it is not.

Penile-vaginal penetration is central to the definition of rape in the male economy because it may result in pregnancy in a female victim, thereby disrupting the paternal lineage and legitimate offspring. Yet, paradoxically, if penetration is sufficient to constitute the offence of rape, as the Section 375 said, then rape may be assumed to occur even if there is no ejaculation, and therefore, no risk of pregnancy. A further question is whether the *actus reus* of rape is complete once the initial penetration occurs, or does it continue until withdrawal (even without ejaculation)? In other words, is the initial penetration sufficient, or determining as the act that constitutes rape, or can rape occur at
any point during penetration until withdrawal? This question is pertinent in cases where
the victim consents to initial penetration, but subsequently withdraws consent. 5

If the actus reus of rape were to include anal or oral penetration of the victim, men as
well as children could be victims of rape, in addition to women. Female children are not
always penetrated vaginally (as indeed adult women are not). Male adults and children,
are likewise, not penetrated vaginally. Contemporary revisions in the law of rape, for
instance, in the Sexual Offences Act 2003 in England and Wales, define its actus reus as
anal, oral or vaginal penetration, and the victim as gender-neutral. 6

Did the Indian Penal Code, enacted by the British in India in 1860 put male adults and
children outside the purview of rape, and if so, why? What processes specific to 19th
century Britain produced the contours of the rape law that was enacted in the colony?

The notion of forms of intercourse other than penile-vaginal penetration was present in
the Penal Code enacted in 1860. Although assault through these forms of intercourse was
absent in the law of rape, these forms of intercourse were delimited in another Section of
the Code. Section 377, which followed the Section defining rape, criminalized all forms
of intercourse that did not involve penile-vaginal penetration. The Section said,
“Whoever voluntarily has intercourse against the order of nature with any man, woman or
animal shall be punished with transportation for life, or with imprisonment of either
description (i.e. simple or rigorous) for a term which may extend to ten years, and also be
liable to fine.” In this section again, penetration was considered to be sufficient to
constitute the carnal intercourse necessary to the offence described. 7 Under this section,
all sexual activity, which involved intercourse that was not the placement of the penis in
the vagina, was criminalized as an “unnatural offence”.

This sexual activity could be between a man and a woman, between a man and a man, or
between a man and an animal. Irrespective of the consent of the male or female partner
involved, such intercourse was a criminal offence and was punished with the same
penalties as rape. It is thus that the law of rape in the IPC 1860 did not recognize that rape
could occur through anal or oral penetration, or through penetration with other parts of the body and with objects. All these other forms of intercourse were criminalized already, as acts that went against the order of nature, irrespective of consent. The Section 377 did not distinguish between a male/ female victim of assault through such intercourse and a male/ female consenting partner to oral, anal or digital penetration. In either case, the man who voluntarily engaged in such penetration would be guilty of a criminal offence.

This brings me to the question: How were male and female subjects sexed and gendered in the criminal law that the colonial state enacted in India in 1860? Firstly, in the sections on rape and "unnatural offences", the criminal law produced a discourse of 'natural' sexuality that was (a) heterosexual and that (b) delimited what was acceptable sex even within heterosexuality. In this manner, the criminal law disciplined both homosexual subjects and heterosexual subjects, and outlawed any form of intercourse apart from penile-vaginal penetration. It thereby produced 'natural' heterosexual subjects, who only enacted the desire of placing the penis in the vagina. Subjects who enacted desires that deviated from this norm were liable to be penalized for committing unnatural offences.

My second observation concerns the gendering of subjects in the colonial criminal law. Since the *actus reus* of both rape and an 'unnatural offence' was penetration, only a man could commit either offence. A woman could, thus, not be guilty of rape against another woman, and arguably, against a man, or voluntary 'deviant' sexual acts with another woman or man. In the definitions of rape and unnatural offences, the female subject was thus produced as a passive victim. In the rape law, her agency was reduced to the right to say no to sexual intercourse under certain circumstances. In the law defining unnatural offences, her agency to say yes to 'deviant' sexual acts with a man was erased. Moreover, her agency to have consensual sex with another woman was not even deemed a possibility. Lesbianism was thus rendered invisible in the IPC 1860. While the female subject was thus gendered as a passive recipient of sexual intercourse, the male subject was constructed as an aggressor. Male and female subjects were thus sexed as having active/ passive sexual natures in the criminal law. In this manner, subjects were both
sexed as "natural" heterosexual subjects, and gendered as male and female aggressors/victims in the criminal law enacted in colonial India.

The legal discourses of rape and "natural" sexualities in colonial India reflected British anxieties about regulating sexuality, which were unique to the period of the late 19th century. This social situation in Britain produced legal discourses of rape and "natural" sexualities both at home and in the colony. Contemporary contestations of the law of rape and "unnatural offences" in India by feminist and queer groups reflect the dynamics of the present wherein these organized groups are re-negotiating the hetero-sexist and sexist ideologies of the 19th century codification of the "offences against the body".

This brings me to another question that I wish to raise: How did this codification of the criminal law of rape negotiate with existing notions of rape in colonial India? The main disruption that the colonial criminal law effected in native discourses of rape was to introduce a universal victim of rape — a Woman unmarked by caste, class, religion or community. In the colonial definition, rape was an offence committed by a man against a woman, penetration being sufficient to constitute the offence. In this natural, almost biological definition of rape, any woman was rapeable, and any man could rape. The exception was the case of a man and his wife, which I will address shortly. Neither the man nor the woman in this definition was marked by identifications other than gender.

In the native canonical discourse of rape, on the other hand, both the 'man' and the 'woman' involved in the offence were identified by their social location in caste, and the degree of the offence itself varied according to these identifications. The rape of an upper caste woman by a lower caste man was a greater offence than a lower caste woman's rape by an upper caste man. The Code of Manu prescribed punishment varying from a death-sentence to a fine for the offence of rape, depending on the relative status of the offender and the victim.

This introduction of the universal woman-subject in the rape law in 1860 leads me to examine its implications in the chapters. The site of the universal and its effects in a
context where subjects were differentiated unequally by caste lends itself to a rather tired reading: that of the emancipatory potential that Western universal discourses have in particular contexts. It could be read that the language of the universal is liberating for the subaltern subjects who face the oppressions of their coloured-cultural context. This reading feeds into a classic imperialist-racist argument — that the introduction of universalist discourses in coloured-cultural contexts was one of the benefits of colonization. Indeed, during British colonial rule in India the argument was often made that imperial rule was a blessing for India's downtrodden, i.e. women and low castes who, in particular, were oppressed by culture. Underlying this argument is the dichotomy of the transcendental universal, associated with the West, and the cultural, associated with the non-West. In this dichotomy, the West is, as Sherene Razack suggests, a space of values, of universal discourses, as opposed to the non-West, which is a space of culture. Moreover, the coloured-cultural context of the non-West is always-already oppressive, especially for the subaltern women, and the discourses of the West, the transcendental universal discourses of humanism and liberty, are empowering for women who face the oppressions of caste and gender in their particular cultural contexts.

By locating the 19th century British definition of rape in its social situation or context, I have tried to show that the 'universal' law of rape in colonial India was itself informed by British cultural discourses of who could be raped and by whom. The 'universal' British law of rape, which applied equally to all colonial subjects in India, inherently excluded homosexual subjects, even as it gendered masculine and feminine heterosexual subjects. It was, therefore, not a law written in a transcendental, neutral vacuum, but one embedded in its social situation in late 19th century Britain.

Also, it would be pertinent to ask, how did this legal discourse of the universal rape victim translate into practice when the criminal law was implemented in colonial India? How did the 'universal' subject of the criminal law negotiate with the 'cultural' subjects in colonial India, and how was the victim-subject of the rape-law thereby re-subjectivated during this period? This is a question I address in chapters 1 and 3. I consider two rape cases to examine this negotiation between the transcendental universal and the coloured-
cultural: the one, the case of Gungamma, which I visit in the first chapter, and the other, a contemporary rape case that has generated much controversy in recent times, that of Bhanwari Devi.

An examination of Bhanwari Devi’s case leads me to inquire into questions of citizenship in postcolonial India. For, the Indian Penal Code was inherited, with amendments, by the independent Indian nation post-1947 and therefore, so was the site of the universal victim-subject in Section 375. Questions of citizenship are thus central to my inquiry as the rape law envisions equal citizenship, applying, as it does, equally to all women in the postcolonial nation. My study therefore reviews postcolonial historiographies, which trace the genealogies of modern citizenship in India to the historical period of anti-colonial nationalism.

These historiographies make the same critiques of the site of universal citizenship in postcolonial India that post-structuralists make in Western contexts. The correspondence stems from the fact that the Indian state is seen as a liberal-democracy constructed on the Western model owing to the Enlightenment discourses derived from the colonial encounter. The agreement that India is a liberal democracy has split recent Subaltern Studies down the middle, with historians on either side of the debate approaching the colonial subaltern with this assumption.

In chapter 4, I challenge these dominant narratives of Indian state-formation by positing that the postcolonial Indian state is not a state constructed on the liberal-democratic model. And, therefore, that the site of universal citizenship within it is not analogous to that in the Western liberal state. I argue that the site of universal citizenship in postcolonial India derives from the history of the formation of the state itself, a history located in anti-colonial nationalism. Therefore, I re-visit the period of anti-colonial nationalism through the study of a legislation that was passed by the Indians in the Legislative Assembly and applied equally to all the subjects in the colonial state: the Child Marriage Restraint Act 1929.
While questions of universal citizenship are central to a study of the rape law in post/colonial India, how does the study of rape negotiate with child marriage? This question becomes relevant since I study the Child Marriage Restraint Act to ground the discussion of citizenship. I spoke before of the interface between 19th century British and Indian cultural discourses of rape: child marriage figures at this interface. The introduction of an age of consent in the rape law in 1860 impacted the practice of child marriage in colonial India, because it brought under-age wives under its provisions. This meant that consummation of child marriages— or intercourse—when the wife was under the age of consent (10 years in 1860) was rape. Thus, the category of rape within marriage, albeit with under-age wives, was introduced in colonial India, at the interface between 19th century British and Indian cultural discourses of rape. I examine this negotiation between British and Indian cultural discourses of childhood, child sexuality and consent in chapter 3. While chapter 3 locates the discussion in the 19th century, chapter 4 examines the contours of the child marriage debate in the 20th century. The focus of chapter 3 is the discursive understanding of child sexuality, consent and intra-marital rape in the contexts of Britain and India of the 19th century. The focus of chapter 4 is to engage with issues of universal citizenship that underlie a uniform law such as the rape law.

Recent scholarship in the UK sheds light on the changing discourse of age of consent and childhood. By mapping the shifts from the earliest age of consent legislation to present-day revisions, it actually reveals how notions of consent and rape are embedded in changing social and historical contexts. Anxieties about the proverbial Young Person were first engendered in the turbulent social context of Victorian England. For, nineteenth century Victorian society, for all its repressive sexual mores, was also a society in great and exciting flux, where boundaries and ideologies of both class and sexual domesticity were being destabilized and shaken up by the turbulence of social and economic change. Sajni Mukherjee speaks of how the poor, who had lost their rights to the land due to the enclosure movement, commercial expansion and the industrial revolution, were forced to migrate to the town in search of employment.

This “frightening new mobility” spawned its own sub-culture in the towns—a sub-culture of the poor that both heightened and disrupted boundaries of class. That brought,
in its wake, the harrowing threat of moral degradation to genteel society. It was, for instance, the sub-culture of 19th century London, so beautifully captured in the novels of Charles Dickens. London, the “throbbing metropolis” teeming with millions, was then the center of the “world’s commerce, business, shipping, trade”, a city where great wealth co-existed with stark poverty.

The city’s dark under-side bred vice and prostitution. This ‘social problem’ of prostitution is also reflected in the literature of the time. The figure of the ‘fallen woman’ is a preoccupation of Victorian novels. For example, in Dickens, she is, variously, Nancy and Oliver’s mother in Oliver Twist, Emily and Martha in David Copperfield, Alice Marwood in Dombey and Son, and Lilian Fern in The Chimes. Genteel Victorian society’s moral response to the problem of the “fallen woman” took on many hues. This response was informed by their imagination of the origin and eventual fate of the fallen woman. This upper/ middle class imagination is encapsulated in the literary fable of what Sajni Mukherjee calls the “harlot’s progress”. In the evolving version of this fable in Victorian literature, the fallen woman was always a seduced and betrayed woman who either (a) died of heartbreak, leaving behind an illegitimate child, who was later reconciled with his remorseful father, (b) sank to a life of sin on the streets, was further depraved by alcoholism and ill-health and finally died, (c) sank to a life of sin on the streets, was rescued by a benefactor and rehabilitated by a life of good work/ emigration or marriage.

This myth, especially in the second version of the fable, was meant to discourage promiscuity in the Victorian metropolis and simultaneously, uphold the model of “marriage, domesticity and male superiority”. Mayhew’s study of real-life prostitutes, however, turned this fable on its head. The fallen woman originated neither in seduction or betrayal, but in poverty. Mayhew discovered that a large number of needlewomen and slop-workers in London were prostitutes. They prostituted their bodies because they just did not earn enough by needle- or slop- work to hold body and soul together. For Mayhew, as Mukherji observes, “prostitution was part of the larger study of poverty, the sub-culture of the city of London.” Thus, while the philanthropists talked of sin and
salvation, and the political economists of excess labour, Mayhew talked of “wages and exploitation”, with statistics of “itemized accounts of earning and spending.” Mayhew’s study also suggested that

The “harlot’s progress” also exceeded the limits of the popular myth and she was not necessarily doomed to a profligate life on the streets. Some did take to alcohol, some died, but many also married, and rather well too. Through marriage, they entered the ranks of mainstream, genteel society and often became “excellent members of the community”. Of course, the prostitutes in Mayhew’s study were aware of the fable of the harlot’s progress, and of their supposed origins in seduction and betrayal. In fact, one prostitute called Swindling Sal told Mayhew that she was “a seduced milliner... anything you like.” They also knew of the avenues of redemption held out in the fable. They knew of the institutions of rehabilitation—the often poetically-named Homes and Refuges—and one prostitute who had been in one told Mayhew that, in them, “there wasn’t enough liberty, and too much preaching and that sort of thing.” About the parsons who preached of sin and salvation, this same prostitute said, “she didn’t have much idea of them, they were a carping lot.”

In such a social situation, the legal codification of an age of consent was a means to regulate child sexuality in general, and to check child prostitution in particular. In 1861, the Offences Against the Person Act laid down 12 as the age of consent “for all sexual behaviour between a male and a female”, in England, Ireland and Wales (emphasis added). This age was raised to 13 years by the Offences Against the Person Act, 1875. Eventually, the Criminal Amendment Act, 1885 raised the age of consent to sexual intercourse (i.e. penile-vaginal intercourse) to 16 throughout the U.K. However, forms of male/female sexual behaviour other than intercourse continued to be covered under the provisions of the previous Offences Against the Person Act. This meant that sexual acts such as oral sex and masturbation were still subject to a lower age of consent. Moreover, the original Offences Against the Person Act had allowed ‘consent’ as a defence to ‘indecent assault’, i.e. to sexual acts, other than intercourse, with an under-age girl. However, a further reform in 1922—the Criminal Law Amendment Act, 1922—removed ‘consent’ as a defence to ‘indecent assault.’ By this amendment, the age of
consent for all male/ female sexual behaviour involving physical contact was raised to 16. Buggery, of course, remained illegal throughout this period.

The increase in the age of consent from 12 to 16 for all male/ female sexual behaviour between 1861 and 1922 reflected the tightening of sexual regulation in the late Victorian period. It was a time when the Social Purity movement campaigned widely to raise the age of consent, voicing concerns over child prostitution. The sexual morality of such campaigns and the codification of the age of consent in the law were informed by a highly gendered discourse of heterosexuality. To quote Matthew Waites,

"The law assumed male desire and aggressive sexual agency, in contrast to female purity, lack of desire, passivity and submission... No minimum age was provided for boys to have sexual intercourse. The male, of any age, was assumed to be responsible and hence punishable for the offence of intercourse with any girl aged under 16. The female was assumed 'innocent', and therefore not guilty of any offence." 15

Waites observes that the age of consent legislation was informed by the prevailing 19th century British cultural understanding, that sexual intercourse was something “done to” passive women. Biomedical epistemologies, such as sexology, added their authority to this dominant cultural rationale by advancing models of female sexual subjectivity, “which emphasized an extended period of childhood sexual innocence for women blending into understandings of adult women as sexually passive and lacking desire”. Since both female children and adult women were seen as lacking desire, the age of consent was meant to protect female childhood innocence, rather than demarcate the age when women were regarded as acquiring decision-making competence. The age at which women achieved the ability to make their sexual decisions, indeed, to consent, was not a consideration in setting the boundary of age of consent in the law, since ‘adult’ women were seen as sexually passive as well. The law, therefore, fixed the boundary at an age “below which women were seen as requiring protection, rather than at an age when they achieved the ability to make their own decisions.” This is echoed in the fact that the British law did not recognize ‘adult’ women’s rights to consent to sex in marriage, after the age of 16. There was no rape- within- marriage law in 19th century Britain.

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This lack of reference to women's decision-making competence in sexual matters, in codifying the age of consent, reflected a larger 19th century British understanding of women as wanting in "strong rational capacities in adulthood".\textsuperscript{19} The infantilisation of women — of both 'adult' women and female children — i.e. the understanding that they lacked strong rational, decision-making capabilities, or maturity, together with a highly gendered discourse of heterosexuality, was the rationale underpinning the protectionism of age of consent legislation in 19th century Britain. This discourse of heterosexuality was also exclusionary of homosexual consent.

A reading of Jeffery Weeks, however, reveals that there was no such flat denial of women's sexuality in the 19th century. Although writers like William Acton did write that "The best mothers, wives and managers of households know little or nothing of sexual indulgence",\textsuperscript{20} this view was by no means a majority view. It was challenged by others, including medical practitioners. The \textit{London Medical Review}, Weeks observes, wrote in 1862 that: "there can be no doubt that both in the human subject and in the lower animals the female does participate fully in the sexual passion",\textsuperscript{21} while Jacob Bright MP, dismissed Acton as probably the most illogical man who ever put pen to paper.\textsuperscript{22} Also, women had greater access to birth control and therefore possibly to "less inhibited sexual pleasure"\textsuperscript{23} in the 19th century. Weeks cites from Banks, who argues that but for the incidence of one or two trials centred around birth-control in the 1890s, the law did not hinder birth-control propaganda at all after 1877.\textsuperscript{24} Thus, the 19th century in Britain was fraught with contradictions, with contending sexual mores and claims, there was no monolithic Victorian morality.

To come back to Matthew Waites' work on age of consent, he argues that an epistemological shift away from 19th century discourses has marked the review in the age of consent in Britain since then, which has produced the following effects. In 1967, male homosexuality was partially decriminalized in the British law and 21 years was fixed as the minimum age for sex between men.\textsuperscript{25} Later, in 1975, a Home Office Policy Advisory Committee on Sexual Offences was created, to carry out the first official review of age of consent laws since the 1920s.\textsuperscript{26}
The Committee proposed that the minimum age for sex between men should be reduced to 18, while it recommended retaining the minimum age for sexual intercourse with a female at 16. In support of its recommendation that the age of consent for sexual intercourse with a female should remain unchanged, the committee advanced epistemological arguments of the biological and psychological maturity of a girl to have sexual relations and be able to cope with the consequences — physiological and emotional — thereof. These arguments drew rather problematically upon medical and psychological knowledges to authorize their claims, as Waites observes. Yet, what is important is the discursive departure in the rationale informing these arguments. The age of 16 no longer represented the age at which the period of female childhood innocence came to an end, as it had in the 19th century; it represented, in the 1970's, the age at which young women attained the psychological maturity to enable decision-making competence.

The change in the rationale informing the age of consent in the 1970's, when compared to the late nineteenth century, was a reflection of the changes in the British social and cultural situation since the late Victorian period. Traditional Victorian “views of gender and childhood sexual innocence” had declined and there was a greater “tolerance of homosexuality following gay liberation”. This historically changing attitude to the age of consent in Britain, in which discourses of homosexual consent, female consent and children’s consent were defined and re-defined, indicates that consent and unconsent are indeed discursive categories that can be contextualized to their location in time and space, and not universal, ahistorical experiences. They further indicate that there was no transcendental Western “universal” discourse of rape, which was not informed by its own socio-historical context and its exclusions.

Contemporary revisions in the law of age of consent in Britain are likewise located within the socio-cultural situation of the present period, which is marked by its own dynamics. These revisions have further reduced the ‘gay age of consent’, so as to equalize it with the minimum age for hetero-sexual intercourse. The minimum age for both hetero- and
homosexual intercourse now stands at 16 in England, Wales and Northern Ireland. These legal revisions are embedded in the context of political, social and epistemological transformations in contemporary Britain—"the decline of traditional conservatism and the establishment of a broad center-left hegemony within the political mainstream, ... multiculturalist tolerance of cultural diversity and the individualization of sexual morality, as well as the commodification of sex in mass culture, ... and wider cultural transformations in attitudes towards homosexuality (that) have been advanced by lesbian, gay and bisexual movements", among others.

Yet, it is interesting that while these changes in policy are so situated in social context, they have been informed by discourses of agency, psychological competence and sexual identity that are quite detached from social structure. Waites observes that the reductive bio-medical rationales that had underpinned the recommendations of the Policy Advisory Committee have persisted in the debates surrounding the contemporary revisions of age of consent as well. For instance, 'equality at 16' (i.e. the equalization of homosexual and heterosexual ages of consent) has been advocated with the help of biomedical arguments that a young person's sexual identity is fixed by the age of 16. This, in a context where bio-medical knowledges have increasingly disclaimed their authority in the wake of a reflexivity, which is both internal to institutionalized medical knowledge-production, and an effect of the critiques brought externally by social movements such as feminism, gay liberation and sexual liberation. In addition to the other changes delineated above, the late modern period in Britain has, thus, also been informed by a social transformation of medical and other epistemologies.

Current debates in Britain have argued whether the age of consent should be reduced further. These debates have likewise discussed the issues of child sexuality and sexual agency, almost essentially, with little reference to social structure. For instance, Waites indicates that certain libertarian arguments have emphasized children's pleasure in sexual experience, in advocating a lower age consent. Also, arguments of psychological competence are founded on the individual subjectivity of the child, quite detached from the mediations of social structure and the law. For, these arguments tend to equate the age
of consent with an age at which a subject acquires competence to make sexual decisions. Or, an age at which “a subject acquires sufficient competence in assessing the pleasures and dangers in its environment, so as to be able to judge whether participation in sexual behaviour is wise or beneficial.”

Even when subjective competence is discussed sociologically, i.e. in relation to the law or society, it is argued that the legal age of consent should be reduced so as to allow the child-subject to develop the competence to make decisions. Thus, as Waites observes, there is a tendency to believe that “a sociologised conception of the subject’s competence implies that competence is highly susceptible to short-term transformation through agency.”

Waites’ point is that subjectivity and subject-agency has to be seen in relation to the social structure that mediates it. And that, within the social structure, there is a “disjuncture between the social forces generating the (average) subject’s competence and the social forces generating risks.” Or, that there are structural inequalities that place young people, notwithstanding their competence, in relations of disadvantage to adults, financially (in terms of economic resources), physically (in terms of material bodies) and institutionally (in terms of their location in schools, families, etc).

Of course, structures are different and, therefore, so are discourses of agency and political mobilization. In my own study of the British legislation of age of consent in colonial India, I situate the contours of consent, child sexuality and agency within the social structure, or context, of colonial India. And herein lies an important point about agency and subjectivity. Post-structuralist readings often locate ‘subjectivity’, ‘agency’ and ‘identities’ within language or discourse, without reference to the social structures that produce and mediate them, as Joanne Conaghan argues. There are similar decontextualized discussions of women’s agency, sexuality, pleasure and pain in certain feminist studies. Through such ahistorical discussions of agency and subjectivity, outside of social structure — or only within the structure, or matrix, of gender — such feminist studies tend to reify the essential category of Woman that they propose to deconstruct.
I examine recent feminist theorizations of gender and subjectivity, specifically in terms of dichotomies of sexual agency and victimization, in chapter 2. A fine example of how feminist discussions of agency and voluntarism can be conducted in a social vacuum is the recent espousal of the cause of prostitution by feminists. While these feminists have raised crucial questions about the right to livelihood of women in prostitution and their right to work without the harassment of the police and the law, their celebration of women’s agency in choosing ‘sex work’ as a means of livelihood is problematic. And this is where the reference to social structures comes in. “Free choice” or any choice is exercised within structural constraints. The structural inequalities, especially in the Third World, are those of class and gender. Women in prostitution are there because they are poor, have no other skills to sell in the market and because they are women. Class and gender intersect to make them sell their bodies, because the structural inequities of gender make them liable to be sexually exploited anyway, when they work as maids, construction workers or landless labourers.

Interestingly, other structural factors are the non-governmental organizations or NGOs, often funded by foreign capital, that are organizing women in prostitution with the identity of “sex workers”. Rohini makes this point among others, while also arguing that the same capitalist-globalizing drive that funds these NGOs also encourages sex tourism in the poverty-stricken Third World. 

While feminists must indeed seek to protect the rights of work and livelihood of women in prostitution or sex workers, isn’t it also necessary to participate in a class struggle, to make more choices of livelihood available to disadvantaged, uneducated women? To make working environs safe, not only for sex workers, but also for the numberless women who work in vulnerable positions as housemaids and construction workers? To provide reasonable shelter to women and little girls who are homeless or forced to flee unsafe homes, for to end up in the streets leaves them with no choice but to be raped. Or propositioned by the rich at traffic signals. We may argue that the women /girls may exercise the choice to take that proffered note and survive, and that to lament that choice is a reflection of our own bourgeois morality. Yet, it must be remembered that the choice
is exercised within circumstances or structures: While we may celebrate that choice, protect it and hold conferences about it, can we ever shrug off the need to engage with the structures of inequality itself?

If we can, then such a relativistic notion of choice and agency comes close to a questioning the need for a class politics, or any politics, itself. And indeed, many elite feminists in NGOs who have successfully managed to de-class themselves from their bourgeois moralities, have made few alliances with other narratives of resistance to structural inequalities — with class or caste struggles, say. Since all structural inequalities are questioned, even the operation of gender as a structural inequality is rethought and the need for something as 'sterile' as a sexual harassment committee is done away with, at some of these organizations. Such doubting of structures and inequalities / disadvantages therein comes close to a liberal position that treats subjects as always-already equal, all equally able to speak and not marked by disadvantage. It is, eventually, a highly apolitical position.

It is clear from the foregoing discussion of the Sexual Offences Act 2003 of the UK that the country which gave us our Consent Act has gone through a sea change in revising definitions of consent and rape: Homosexuality has been decriminalised, homosexual consent is recognized, the age of consent for both heterosexual and homosexual intercourse has been equalized, the rape-victim can be either male or female, and there is a debate on reducing the age of consent further. India, however, has retained the section 375 on rape almost intact, except for revisions in the age of consent, which has been raised to 18 years (for women). In addition to the rape law, other outdated concepts such as “outraging a woman’s modesty” (section 354, IPC) and “unnatural offences” (s. 377, IPC) are also retained unrevised. Many of these 19th century definitions of what we would today term sexual harassment hinge on the crucial notion of a woman’s modesty, and reflect 19th century British middle class dichotomies of domesticity, of wives and prostitutes.
It is more than high time these definitions were re-visited, and the rape law revised to include particularly vulnerable sections such as (a) low caste women: Dalit literature indicates that an overwhelming number of rapes are caste-based atrocities committed on the bodies of low caste women, (b) working class women: Women working as unskilled labourers — housemaids, construction workers, landless labourers — stand in relations of structural vulnerability to their employers, (c) children, who are also vulnerable due to structural constraints, (d) women in prostitution, who face gang rapes often. It often occurs that they acquiesce to sex with one customer, but are taken away to secluded spots where they are then raped by several men. This especially happens where sex workers do not have the safety of a red light area to operate from and bring customers to, leaving them to the uncertainties of finding a suitable place. When such rapes occur, the sex worker finds that she cannot lodge a complaint with the police because truth-claims about rape and harassment centre so greatly on the "modesty" of the complainant; and (e) sexual minorities such as eunuchs (hijras) and transgender individuals, who eke out a living on the margins of society as sex workers and do not enter mainstream discussions of rape at all, although they are habitually harassed and raped by the police who apprehend and arrest them for soliciting. These sexual minorities can have any right to bodily integrity only when homosexuality is decriminalized so that there may be a distinction between consensual and non-consensual homosexual relations. Sex workers in general, i.e. both women and third gender sex workers, can have a right to exercise their consent at all, only when their work is decriminalized, so as to protect them from indiscriminate abuse by customers, the police and random men.

The Domestic Violence Act 2006 has made some headway in protecting all women in domestic relations — wives, live-in partners, sisters, mothers — from different kinds of violence — sexual, physical, verbal, and financial. The rape law can add to this by recognizing rapes within the home: within marriage, by live-in partners, relatives, as also date rapes.

A close reading of this introduction would indicate that the chapters of the thesis negotiate a movement between the universal and the particular. Chapter 1 narrates a rape
case in Mysore and locates it in its particular context, or historicizes it. The second chapter then discusses both radical and post-structuralist feminist theorizations of subjectivity, agency, pleasure and pain. The third chapter questions whether we can see pleasure, pain, violence and consent as detached from context: it aims to study how these discourses were transformed in 19th century British India and Mysore through an examination of rape within marriage and child marriage. The Mysore Infant Marriages Prevention Regulation is studied here.

Chapter 4 takes forward the discussion of child marriage into the 20th century, where the focus is not as much on issues of intra-marital rape and premature consummation of child marriage, as on the legislation of a uniform marriage age. The universality of the Child Marriage Restraint Act (CMRA) 1929 becomes an entry point into studying larger questions of universal citizenship that the rape law, as part of the uniform criminal law inherited by postcolonial India, opens up.

Since discourses of state and citizenship in postcolonial India are seen as being constituted during the period of anti-colonial nationalism, I revisit this period and ask whether we can derive an alternative, i.e. non-liberal, discourse of universal citizenship from its history. The discussion of the CMRA 1929 helps to ground this alternative historical narrative, even as I locate the CMRA within a larger context of nationalism. The context is one where intersections and alliances were being forged between various narratives of resistance under Gandhi’s leadership: Women’s organizations, peasant struggles, labour unions, Dalit assertion under Ambedkar gave their agency to the mainstream national movement, even while bringing their own distinct agendas to it. Thus, the “mainstream national movement” was constantly challenged to re-articulate itself due to the imaginations that the subalterns brought to it. This history makes the site of universal citizenship in the postcolonial nation different from the corresponding site in the Western liberal state, in ways that I examine in this chapter.

From this alternative universalist discourse, I move, in the final chapter, to the particular case of princely Mysore. The CMRA was not applied to Mysore since it was a semi-
autonomous native state. Moreover, when the Mysore Congress made a demand that legislation on the lines of the British Indian CMRA be introduced in Mysore, the Mysore Government resisted the initiative. Do we therefore encounter a rupture in the narrative of anti-colonial alliances and intersections that I read as constructing the site of the universal in the CMRA and in anti-colonial nationalism? The history of the princely states is often seen to be at odds with mainstream nationalism of the Indian National Congress (INC) variety since the princes resisted inclusion in the Indian federation. However, the Mysore Congress made the same kinds of alliances with the people’s movements in Mysore—with the labour unions, with the non-brahmin organizations—as the INC did in British India. Therefore, I posit that the argument of mutual anti-colonial alliances among various narratives of resistance and the site of universal citizenship it engendered, does hold even in the context of Mysore.

NOTES:


2 Indian Penal Code 1860, Part IV — Criminal Law and Procedure, Chapter XVI — Of offences affecting the human body, Section 375 — Of Rape.


4 Ibid., p. 450.

5 Ibid., p. 395.


7 Indian Penal Code 1860, Part IV — Criminal Law and Procedure, Chapter XVI — Of offences affecting the human body, Section 375 — Of Unnatural Offences.
Sherene Razack made this point in a visitor talk at the Keele Law School in May 2005.


Ibid., p. 75.

Ibid., p. 77.

Ibid.

Ibid., p. 76.

Ibid.

Ibid.


Ibid.

Ibid.

Ibid.


Ibid., p. 41.

Ibid., p. 41.


26 Ibid.

27 Ibid., pp. 77 – 8.

28 Ibid., p. 79.

29 Ibid.

30 Ibid., p. 80.

31 Ibid., p. 81.

32 Ibid., p. 79.

33 Ibid., p. 83. Waites refers to P. Tatchell, “Is Fourteen too Young for Sex?”, *Gay Times*, June 1996, pp. 36 – 38 and says that such libertarian arguments have been advanced by the Sexual Law Reform Society and National Council for Civil Liberties in the 1970s, and more recently by Outrage.

34 Ibid., p. 86.

35 Ibid.

36 Ibid., p. 87.

37 Ibid.


41 I learnt of such rapes through my interviews with sex workers in Bangalore, while assisting in a research project on Sex Work, Trafficking and Migration that was co-ordinated by the Centre for Feminist Legal Research, New Delhi in collaboration with the Global Alliance Against Trafficking in Women (GAATW). The project sought to make distinctions between the oft-confused issues of sex work, trafficking and migration and also to re-locate the subjectivity of the sex worker at the centre of these discourses. My part consisted in establishing contact with female sex workers in Bangalore, through the network of non-governmental organizations working in these issues, and then interviewing the sex-workers to map their subjective experiences of trafficking/migration/sex work.

42 While working on the project mentioned in *supra* n. xli, I came into contact with *hijra* (transgender) sex workers too, as their political agendas overlap considerably with those of the organized female sex workers. Although the research project concerned female sex workers only, I learnt a great deal about the experiences of the *hijras*, and the ways in which they, like the female sex workers, are being organized through non-governmental organizations in Bangalore. I had the opportunity of visiting the *Hijra Habba* (literally, “Hijra Festival”), an event co-ordinated by the *hijra* organization in Bangalore, through which they attempted to bring their experiences on the margins on to a mainstream public platform.