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"Section 25(3) of The Hindu Marriage Act, 1955: from a Constitutional lens"

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ABSTRACT

In order to reduce the ambiguousness in Hindu Personal laws, and to make it an engine for reform in the Hindu society so that it could get rid of its social evils, The Hindu Marriage Act, 1955 was passed. The provision of divorce, restitution and maintenance were made a qualified statutory right for the common Hindu, yet there are some elements of these provisions, that withhold reform rather than facilitate it. One such provision is that of permanent alimony in The Hindu Marriage Act, 1955 (HMA), according to which if a former spouse, after a decree of divorce and maintenance has been passed in their favour, has sexual intercourse with anyone, he or she can lose their alimony awarded, if filed for so, by the other party. If one may take the Constitutional Law into perspective, such a provision is clearly violative of one's right to life and dignity given under Article 21 of the Constitution. This section becomes a plank to the narrative, that if one is at the pay rolls of their spouse or former spouse, one has to now choose between whether they want a decent survival in life or fulfillment of one's basic and rudimentary biological needs i.e. need for sexual intimacy. Naturally, the worst sufferers of this become the women who are usually dependent on former spouses for maintenance. The question that would haunts a person in such a situation would be- Is my sexual urge more important or financial survival? Pitting one essential need against the other is like asking a person, whether they'd like to part with their left eye or the right one. This question must be approached with a conservative mindset as is prevalent in India, where sexual relations outside wedlock are highly stigmatized. This paper shall explore the various aspects of Indian Constitutional Law to analyze where this impugned law stands in relation to it.

INTRODUCTION

A Marriage under the Hindu Law is a holy sacrament or *sanskaar*. Unlike the Muslim Law, it rejects the notion of a conjugal arrangement being a contractual agreement. In English legal terms, that for modern jurists is more relatable, the essence of a Hindu marriage can be best explained loosely by the maxims of *"conjunctic martitet peminaeest de nature"* which means that to keep husband and wife together is the law of nature, and *"viretunor consentur in legeuna person"* which means that husband and wife are considered one in law. This completely dispels the assertion that Hindu marriages originally ever had any contractual elements to it. However, since in the modern and practical world will no longer be dictated the ambiguous writs of scriptures, the parliament passed the Hindu Marriage Act, 1955 in order to codify the customary Hindu laws and also in a subtle way modernize it. The provision of divorce, restitution and maintenance were made more accessible as a matter of right to the common Hindu, yet there are some elements of these provisions, that appear to be holding the conservative attitude of Hindu Law whilst its modernization. However, those elements in reality are, or with the due course of time have become, violative of our very basic gerundnorm i.e. The Constitution of India. One such provision is that of permanent alimony in The Hindu Marriage Act, 1955 (HMA). According to Section 25(3)[1] of The Hindu Marriage Act, 1955, if a former spouse, after a decree of divorce and maintenance has been passed in their favour, has sexual intercourse with anyone, he or she can lose their alimony awarded, if filed for so, by the other party. If one may take the Constitutional Law into the same frame, such a provision is clearly violative of it, when one realizes that: not only is a person's right to sex being violated, but also their right to lead a dignified life. This section becomes a plank to the narrative, that if you are at the pay rolls of your spouse or former spouse, you have to now choose between whether you want a decent survival in life or fulfillment of your basic and rudimentary biological needs i.e. need for sexual intimacy. Naturally, the worst sufferers of this become the women who in most cases are the ones who are awarded maintenance in India. The question that would haunts a person in such a situation would be- Is my sexual urge more important or financial survival? Pitting one essential need against the other is like asking a person, whether they'd like to part with their left eye or the right one. And this question must be approached with a conservative mindset as is prevalent in India. This paper shall explore the various aspects of Indian Constitutional Law to analyze where this impugned law stands in relation to it.

[1] The Hindu Marriage Act, 1955, § 25 (3), No. 25, Acts of Parliament, 1955 (India).

I. MAINTENANCE PROVISIONS: - INTENTION v. REALITY

Moving from the concept of marriage to divorce, the word divorce in simple words means a legal decree dissolving a marriage between two individuals. After a decree of divorce has been passed, the obligations that a husband and wife have towards one another come to an end. However, the one obligation that continues, is of maintaining the dependent spouse. The object behind providing such maintenance or alimony is that, in a marriage, usually one spouse is financially weaker than the other and is accordingly dependent for their comfortable survival on the other. If however, that maintenance is stopped after marriage, the spouse may have to go through an unfair and undesired financial distress which could have been avoided had that spouse not involved themselves completely into their conjugal obligations, and had otherwise involved themselves in skill development and finding a means of sustainable livelihood. Therefore, it would only be fair to give them maintenance in order to compensate them for the investment they made into the relationship, or for the loss they incurred because of it, whether material or non-material. One more reason for awarding such maintenance is to ensure that the financially weaker spouse continues to live a decent and dignified life, as they did before, and are not coerced to stay in a marriage just because of fear decent survival and fulfill the bare necessities of life, after divorce. The reasons for providing maintenance as explained here are not exhaustive, however the essence of each of such reasons and rationale is to have a decent life after divorce.

Unfortunately, it seems that the maintenance laws are doing exactly the opposite by technically restricting, the fulfillment of the bare necessities of human life. By application of Section 25(3) of the HMA, 1955, one person is made to choose between the bare necessities of life on the fear of losing maintenance. But are bare necessities of human life such that one should be forced to do an opportunity cost analysis of them. Shall, a welfare state allow it's law to force someone to draw an indifference curve between bare necessities of human life. The 'bare necessities' being discussed here are i) need for sexual intimacy and ii) need for finances to survive. Should a human being be driven to a point where he has to choose oneof the two?

Sexual autonomy an individual enjoys i.e. the right to choose his or her partner to a sexual act is of primary importance.[2]However, on the contrary our courts have opined that a divorcee loses their maintenance for not being chaste after divorce, and that they are bound to "remain

[2] T Sareetha v. T VenkataSubbaiah, AIR 1983 AP 356.

disciplined", in order to entitle them to maintenance.[3] If sex indeed is a bare necessity of human life, and autonomy to choose a partner of primary importance, can one's biological functions and natural urges be suppressed in the name of 'discipline' and more so on the fear of losing maintenance from their former spouse after divorce? Is the Right to Equality and the Right to Life given under the Constitution not being violated by our maintenance laws? When in the guise of creating equality by saving the former spouse from destitution, a law is actually becoming a means of dilution of their fundamental rights, the answer to the question is surely in the negative.

II. TEST OF RIGHT TO EQUALITY

The expression 'equality before law', in Article 14, has been best explained by Dr. Jennings as "*Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike*". A very common interpretation of this is that equals must be treated equally and un-equals unequally. The principles of this doctrine of reasonable classification as given by the Supreme Court of India stands as- (1) The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) The differentia must have a rational relation to the object sought to be achieved by the act.[4]

If Section 25(3) of HMA, is within the limits of Article 14, it must pass the test of reasonable classification. The *first essential* of it being that there must be an intelligible differentia between the people that are grouped and those left out. It is certainly an intelligible differentia, when the one giving maintenance and the one receiving maintenance are classified into two groups owing to their varied financial positions. However, section 25(3) is in a way classifying people in two groups of, firstly, those for whom having sex after divorce is rightful, and the second group of those for whom having sexual intercourse after divorce is being 'undisciplined' and therefore disentitling them from maintenance[5]. The *second essential,* of the test is that the differentia must have a rationale relation to the object sought to be achieved by such a provision. The object sought by this provision is to relieve charge on the former spouse's pocket, as the other spouse, can now maintain or seek maintenance from someone on whom they presently depend upon, by way of remarriage or cohabitation. However, the wordings of Section 25(3) of The HMA, 1955 use the words *'if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had*

[3]M. Chinna Karuppasamy v. Kanimozhi, 2015 SCC OnLine Mad 6845.
[4] K. Thimmappa v. Chairman, Central Board of Directors, SBI, AIR 2001 SC 467.
[5]M. CHINNA, *supra* note 3.

sexual intercourse with any woman outside wedlock'. This clearly means that mere copulation is sufficient to disentitle them from maintenance, and not cohabitation with someone other than their spouse.

III. CHANGING SOCIALUNDERSTANDING OF PRE-MARITAL AND POST-DIVORCE SEXUAL RELATIONSHIPS:-

In earlier times, if a woman made a sexual relationship with a man outside a wedlock, it would have meant that she has entered that man's *concubinage*, if not cohabitation. But in rapidly changing times, such a situation has risen, where socially men and women are on the trajectory of reaching a stage where both are considered equal in status, at least legally, traditional notions of such *concubinage* or cohabitation, if that term maybe used to explain such sexual relationships, have certainly ended. Therefore, reliance on someone financially for simply having a sexual relationship with them certainly seems to be an outdated, if not a repugnant concept. Therefore, when making a sexual relationship with someone does not obligate them to provide for their financial support, the object of section 25(3) of The HMA, 1955 to relieve the husband when the burden of maintenance has shifted to the new partner[6], is not sought, since in present social context, such a burden does not actually shift to the new partner, in all cases. Hence, this law in the guise of protecting the interests of the maintaining party, is in reality, curtailing and restricting the other's fundamental and essential right to make a physical relationship with someone of their choice.

IV. SECTION 25(3) OF THE HMA ONLY FACIALLY NEUTRAL: -

Even though the impugned section clearly states and clearly sought that men and women, both alike can lose their maintenance if they enter sexual relationships after their divorce, it is only the women which suffer largely because of this provision. This leads to indirect discrimination clearly in violation of Article 14 and 15 of the Constitution. Indirect Discrimination can be defined as: -

"where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."[7]

Therefore, this provision happens to be neutral only on the face of it, however, on the practical implementation and implication of it, only the women are targeted. This is simply because in the INDIAN social set up, it is only the women that are in almost all cases, the

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[6] *Id.*

[7] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

one's that are awarded maintenance owing to their lack of financial autonomy in Indian society, clubbed with lack opportunity of skill development which makes finding sustainable livelihood a herculean task for most women after divorce. Consequently, by the application of this law we have reached a stage where only a divorced woman is posed with the question of whether financial stability is more essential or fulfillment of her natural bodily urges. Hence, the Right to Equality of a woman comes under severe threat by application of this provision.

V. RIGHT TO LIFE-ARTICLE 21

Article 21 of the constitution declares that *'No person shall be deprived of his life or personal liberty except according to procedure established by law'.* It has been well settled that right to life and personal liberty is not just restricted to bodily movement, but means a life, wholesome and of spiritual significance and is also inclusive of the right to privacy of a person[8]. The right to privacy also includes a person's right to personal intimacies[9]. When an application u/s 25(3) is made, on the ground that the party being maintained is having sexual relations outside the wedlock, the court is asked upon to enter into the bedrooms of people and make an enquiry thereupon. This is completely in contravention of the right to privacy a person may have. Given the Indian context, this provision severely harms the sexual autonomy of divorced women since they already they face numerous social and financial challenges after being divorced. If she even loses her right to maintenance for exercising her sexual autonomy and fulfilling her natural urges, she not only has to bear the brunt of financial starvation, but also bear the scornful glance of the conservative Indian society, who look down upon such relationships being made outside the wedlock.

VI. PRIVACY AND SEXUAL AUTONOMY

Privacy is not just limited to a certain level of seclusion from society. It refers to a sphere of a person's life in which he or she can freely express their identity, by entering into relationships with others[10]. Right to privacy belongs to a person as an individual and is not lost by marital association[11]. When the right to privacy is not lost by way of a marital union, can it compromised with, after divorce, where marital obligations towards one come to an end. Simply because one party is maintaining the other, doesn't give them the right to peek into the their bedrooms. Right to privacy can only be denied when countervailing interest is

[8]Justice K. S. Puttaswamy (Retd.) and Anr. v. Union Of India And Ors, (2017) 10 SCC 1.
[9]Govind v. State of Madhya Pradesh, 1975 AIR 1378, 1975 SCR (3) 946.
[10]Coeriel, et al. v. The Netherlands, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991(1994).
[11]T SAREETHA, *supra* note 2.

superior[12]. However, as explained above, the object of the provision i.e. to relieve the charge from a party, when their former spouse has sexual intercourse with someone, is simply not served, because in the 21st century, simply having a physical relationship with someone doesn't shift the burden of maintenance and financial support.

In the revolutionary case of ***Navtej Singh Johar V. Union of India &Ors***[13]**,** the Hon'ble Court held that: *"*The sexual autonomy of an individual choose their sexual partner is an important pillar and insegragable facet of individual liberty. When the liberty of even a single person of the society is smothered despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.*"*

It is therefore submitted that life, without exercise of autonomy cannot be a wholesome life, and if certain natural bodily functions and urges, the fulfillment of which is completely legal and rightful, are condemned and restricted by our personal laws, simply because a person is divorced and receiving maintenance from someone else, does not only amount to violation of their right to life and personal liberty, but also subjugates their dignity and self-respect.

VII. CHANGING NOTIONS OF MARITAL ASSOCIATION

The judicial opinion taken in the case of ***Squire V. Squire and O. Callaghan***, might explain the social framework and environment within which laws like Section 25 of the HMA, 1955 were made. In that case it was held that *"*It is important that the *dum casta* (as long as she remains chaste) should be inserted. The wife should know and should be made to feel that her livelihood depends on her leading a chaste life in future*"*[14]. However, such a view is completely repugnant in the present day and age. The judiciary has made it amply clear on several occasions that a women is equal to a man. Marriage doesn't make her a servant, but an equal partner.[15] Marriage in modern times is quite different from its previous notion of *"viretunorconsentur in lege una person"* which means that husband and wife are considered one in law. The judgement in the case of ***Jane Roe v. Henry Wade[16]*****,** aptly describes the social notion of a modern marriage, where it is held that *"*the marital couple is not an independent entity with a mind and heart of its own but an association of 2 individuals each with a separate intellectual and emotional make up*"*.

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[12]1927-277 US 438.
[13]NAVTEJ, *supra* Note 7.
[14] 1905 P.4:74 L.J.P.
[15]Smt. Gurpreet Kaur v. Shri Rajeev Singh, AIR 2017 SCC 1024.
[16](1973) 35 L Ed 2d.

Focusing on the Indian context, marriages usually involve the dependence of one person on another financially. If after divorce, the person providing maintenance to their former spouse can have a sexual relationship with anyone of their choice, then why can't the other? Shall the other person be made to forgo of their natural wants and needs, simply because they are financially dependent? The answer to these questions if seen from the prism of Article 21 is certainly a big NO.

VIII. DENIAL OF SEX AMOUNTS TO CRUELTY

Sexual urges come naturally to every person irrespective of religion, race, caste, sex, economic status and marital status. LORD DENNING in one of his classic judgements also concludes that denial of sex for a long duration amounts to cruelty.[17]

In the case of *Luther v. Luther*[18], the Hon'ble Supreme Court of Nova Scotia, held that:

"The test of cruelty is in one sense a subjective one, namely, as has been said many times, is this conduct by this man to this woman, or vice versa, cruelty? But that does not mean that what one spouse may consider cruel is necessarily so. Cruelty must involve serious and weighty matters, which, reasonably considered, may cause physical or mental suffering. It must furthermore -- an important additional requirement -- be of such a nature and kind as to render such conduct intolerable to a reasonable person."

Sexual urges and financial survival are not two inter-changeable needs, that one can be alternatively chosen between the other, and yet the level of satisfaction of the person concerned remains the same. The Indifference Curve analysis, fails when understanding humans needs and to what extent such needs require fulfillment. When our laws declare that a person may lose their alimony based on their 'chastity' status as u/s 25(3) of The HMA, 1955, it amounts to taming a human mentally, to choose between equally essential needs or surrender one, on the fear of destitution.

The notion of cruelty was understood as a wrong against the marriage, which could be a ground to dissolve it. However, once the marriage is dissolved or any sort of civil or nuptial union comes to an end, the question of cruelty does not arise either socially or jurisprudentially. At best what the law considers, is post-divorce conduct of the parties, which does not completely envisage the concept of cruelty as is done, when the marriage is still subsisting. However, by the application of Section 25(3) of The HMA, cruelty spills over even after the marriage has come to end. Divorce dissolves the legal relationship between two spouses, and consequently the cause that troubled the marriage should ideally also come to

[17] Sheldon v. Sheldon, [1966] 2 E.R. 257.
[18](1978) 5 R.F.L. (2d) 285, 26 N.S.R. (2d) 232, 40 A.P.R.

end. But the impugned legislation, becomes a doorway to cruelty towards the spouse being maintained, by giving the unreasonable power to control their natural bodily functions, to the former spouse providing maintenance.

One may argue that, in practicality, divorce does not completely dissolve the marriage as there is an obligation to maintain the other, and when there is a duty to maintain, it comes with corresponding rights and vice versa. It is indeed true that some form relationship, legal or social in nature, survives in practical terms, even after a decree of divorce has been passed, but that does not give the power to control the life of the other, as Section 25(3) gives. It must be highlighted that denial of sex is cruelty, when the marriage is still subsisting. If a person has not been given the power to completely and absolutelycontrol the sex lives of theirspouse even when the marriage is still subsisting, how can the same be accorded when the marriage itself has been dissolved?

Even when seen from a conservative point of view, there is no precedent to show, that a person has the right to compel their spouse or former spouse in such a brute manner, as does Section 25(3) of The HMA. In the case of *Baijira v. Narsingh Lalbhai*[19], also the courts held that according to Old Hindu Law, it can be said that it is the implicit duty of the wife to obey her husband, but the law itself has laid down no sanction or procedure to make her do something against her will.

IX. ABSURD RESULTS OF THE APPLICATION OF SECTION 25(3)

It is settled law that denial of sex during marriage by either spouse is cruelty. Therefore, the collective jurisprudence and judicial conscience recognizes sexual intimacy to be an indispensible need of life, which one can neither be denied nor restrained to do, till the time it is with consent. It is also settled law that adultery is a valid ground for divorce[20]. The Hon'ble Kerela High Court also held that a wife guilty of matrimonial misconduct such as that of adultery is still entitled to bare maintenance. Your Lordships in the case held:

"the wife though unchaste, is entitled to a bare subsistence allowance or starving allowance. No doubt the learned Judge also states that if such a wife is earning a living and is not in a helpless position, her right to maintenance even of the bare subsistence disappears, because the learned Judge emphasises that the allowance is meant to prevent 'starvation'"[21]

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[19] ILR 1927 Bom 264.
[20] *Supra* Note 1 at §. 13(1)(i).
[21] Raja Gopalanv. Rajamma, AIR 1967 Ker 81.

In the case of *Sydenham v. Sydenham & Illingworth*[22], Lord Denning also made similar observations quoted in the case of *Patel Dharamshi Premji v. Bai Sakar Kanji*[23]

"There is nothing in the statute to say that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing in it about discretion being exercised in favour of one side for the other or about a compassionate allowance. All it says it that on a decree of divorce the Court may award maintenance to the wife. This includes a guilty wife as well as an innocent one."

It completely defies all logic and sense that, a wife guilty of matrimonial misconduct such as adultery can be given maintenance u/s 25 of The HMA, 1955, but a divorced wife not guilty of any matrimonial misconduct before divorce, can have her maintenance cancelled u/s 25(3) of the act, for having post-divorce physical relationships It might be possible, that the marriage may have ended due to the matrimonial misconduct of the spouse providing maintenance. It might also be possible that the marriage might have ended because of the adultery of the spouse giving maintenance, while the spouse being maintained after divorce, maybe completely faithful during the subsistence of the marriage, may now stand to lose their alimony.

X. LIMITATIONS OF LAWS PROTECTING MORALITY

It is not uncommon for laws to give expression to and protect the moral sensitivities of the society. Morality is an important facet of both law and society, as it helps maintain an order. Time and again it has been proven that 'Rule of law' is only supreme till the time it reflects in the '*Volkgeist*', without which they are just plain words with a sovereign's seal. Morality is the first and immediate regulator of human conduct in the society, and then comes the law. At times, even violation of Law may not be seen with the same contempt, as is violation of any Moral code or morally acceptable behavior. Moral Turpitude as defined by the Black's Law Dictionary means,

"The act of baseness vileness, or the depravity in private and social duties which man owes to his fellowmen or to society in general, contrary to accepted and customary rule of right and duty between man and man".

However, morality being codified as a law gives rise to a plethora of problems in a 21st century society that is transforming fast especially when it comes to protecting civil liberties. What was morally unacceptable earlier but finds social sanction now, is a phenomenon that is not uncommon, and finds numerous examples to quote, both in the Indian and Global

[22] (1949) 2 All ER 196.
[23] AIR 1968 Guj 50.

context. The nature of morality is such that is not absolute in any society and is extremely relative. However, such relativity and fluidity cannot and must not be attributed to law. Law has to be strictly *well defined* and *exact* without which there can be no penalty (*Nullapoene sine legestricta)*. When laws are based on morality of a society, this essential element of law and justice, is extremely jeopardized. Also in the Indian context, where social change is now extremely rapid, such a problem where fundamental rights are being regulated by outdated morality based laws, increases manifolds. In the case of *Sachindra Nath Biswas v. Smt. Banamala Biswas And Anr*[24]*.*,the Hon'ble Calcutta High Court held that –

"Unchastity on the part of a woman (and also sexual intercourse by a man with a woman, outside wedlock) are sins against the ethics of 'matrimonial morality' in this country. Moral law, it is true, is not the positive Civil law of a country, but there are many instances where law and morality meet. In our opinion, such a meeting place of law and morality is Section 25 of the Hindu Marriage Act"

When the morals on which the laws are based, are themselves in a state of constant flux, is it prudent to have a codified laws based on them curtailing personal liberties? Laws can be based on morality and be regularly amended to conform to changing notions of morality, but till what such time will that happen, when laws that are based on morality regulating the personal affairs of a human, suffer from its very foundation shifting every now and then, Section 25(3) being one example. Laws give expression to and protect our fundamental rights, or are based on restrictions to such fundamental rights, morality being one. If the notions of those restrictions, are extremely fluid and ever changing as that of one morality, it shall give rise to only abridgement of rights and perpetuation injustice, as it does in the case of section 25(3) of The HMA, 1955.

CONCLUSION: -

The India of today is much more conscious of its rights and duties than the India of yesterday, and the India of tomorrow will be a harbinger of socio-economic justice. In a rapidly modernizing society which is not obstructed, but complemented by a 5000 year old ancient civilization of rich socio-religious culture that has been threatened with the possibility erosion, it is but natural for a society and consequently the state, to be in a state of dilemma about, as to what extent rights have to be upheld and public sensitivities to be respected. However with, a significantly educated population, 72 years of democracy and an unfettered supremacy of the Constitution, complete socio-legal liberation of civil society in India is

[24]AIR 1960 Cal 575.

slowly seeing the dawn. It has been declared by our courts that fundamental rights cannot be waived and curtailed owing to lack of majoritarian sanction. Therefore when expression of one's natural right is dented, such a situation urges the conscience of the final constitutional arbiter to demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals.[25] It is therefore submitted that our lawmakers shall repeal the provision of section 25(3), as far as it takes away the maintenance of a former spouse on account of having sexual intercourse after divorce, understanding that it has been hit by *cessante ratione legis, cessat ipsa lex*, which means that when the reason of the law ceases, the law itself ceases. The social conditions and justifications because of which such law was made have ceased to exist or is fading at a fast pace, therefore the law also must follow suit. The collective judicial conscience this country must uphold the principle of *aequum et bonum est lex legum*, which means that which is equal and good is the law of laws i.e. law is that law which ensures equality and goodness. We must also bear in mind what Dr. BR Ambedkar once said, *"Slavery does not merely mean a legalized form of subjection. It means a state of society in which some (wo)men are forced to accept from others the purposes which control their conduct."*

[25] NAVTEJ, *supra* note 7.