
2ND AMITY NATIONAL MOOT COURT COMPETITION, 2017

BEFORE THE HON'BLE SUPREME COURT OF INDIA

SPECIAL LEAVE PETITION

S.P.L. NO. ___/2017

IN THE MATTER OF ARTICLES 14, 15, 19, 21, 25, 26 AND 44 OF THE CONSTITUTION OF INDIA

ABBEY.....PETITIONER NO. 1

ALL INDIA MUSLIM PERSONAL LAW BOARD.....PETITIONER NO. 2

v.

UNION OF INDIA.....RESPONDENT NO.1

BEFORE SUBMISSION TO HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUSTICES OF

THE HON'BLE SUPREME COURT OF INDIA

MEMORIAL ON BEHALF OF THE PETITIONERS

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LIST OF ABBREVIATIONS

ABBREVIATIONS	FULL FORM
¶	<i>Paragraph</i>
¶¶	<i>Paragraphs</i>
&	<i>And</i>
AIR	<i>All India Reporter</i>
All	<i>Allahabad</i>
Anr	<i>Another</i>
Art.	<i>Article</i>
ATR	<i>Administrative Tribunal Reporter</i>
ATC	<i>Administrative Tribunal Cases</i>
Bom	<i>Bombay</i>
Bom LR	<i>Bombay Law Reporter</i>
Cal	<i>Calcutta</i>
CAD	<i>Constitutional Assembly Debates</i>
Co.	<i>Company</i>
Ed.	<i>Edition</i>
HC	<i>High Court</i>
ILR	<i>Indian Law Reporter</i>
IPC	<i>Indian Penal Code</i>
J&K	<i>Jammu and Kashmir</i>
JT	<i>Judgement Today</i>
No.	<i>Number</i>
Ori	<i>Orissa</i>
Ors	<i>Others</i>
p.	<i>Page Number</i>
Sec.	<i>Section</i>
SC	<i>Supreme Court</i>
SCC	<i>Supreme Court Cases</i>
SCR	<i>Supreme Court Reporter</i>

Supp	<i>Supplementary</i>
u/a	<i>Under Article</i>
u/s	<i>Under Section</i>
UCC	<i>Uniform Civil Code</i>
UOI	<i>Union of India</i>
UP	<i>Uttar Pradesh</i>
v.	<i>Versus</i>
Vol	<i>Volume</i>
w.e.f.	<i>With Effect From</i>

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STATEMENT OF JURISDICTION

The Hon'ble Supreme Court of India has jurisdiction to hear the instant matter under Article 136 of the Constitution of India.

Article 136 of the Constitution reads as follows:

“136. Special leave to appeal by the Supreme Court-

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.”

STATEMENT OF FACTS

INTRODUCTION

The Democratic Republic of Indica is a secular country in the sub continent of South Central Asia. The population consists of people belonging to Hinduism, Islam, Christianity and others. It is a secular nation that gives to its people the freedom of religion. All religions are governed by their personal laws.

WRIT PETITIONS IN THE HON'BLE HIGH COURT OF JANAKPUR

Three major cases come to our knowledge, namely:

1. Aslam Khan was married to Nazia Yusuf in October 1987 and they had two children out of this wedlock, besides multiple miscarriages. After 16 years of marriage, Aslam Khan married Noor Rizvi in January 2003. In 2013, Nazia was driven out of her matrimonial home by her husband without any reason. She filed a writ petition against Aslam u/s 125 of CrPC in the Court of Chief Judicial Magistrate, Kasol asking for a maintenance @Rs. 8000 per month. In December 2016, Aslam divorced Nazia by an irrevocable *talaq*. In January 2017, the Chief Judicial Magistrate directed Aslam to pay Rs. 6000 p.m. Aggrieved by the decision, Nazia filed a writ petition in the High Court of Janakpur with the help of an NGO named '*Jan Kalyan*'.
2. Sunita Mehra and Ranvijay Kapoor (now Rahim Khan) were lawfully wedded and a daughter was born out of this wedlock. In early 2014, the husband solemnised a second marriage with Nureen Saeed after his conversion from Hindu to Islam. Sunita Mehra joined NGO '*Jan kalyan*' who had filed a writ petition in the Hon'ble High Court regarding whether a Hindu husband, married under Hindu law, can solemnize a second marriage by embracing Islam, claiming it circumvented provision of Sec 44 of IPC.
3. Abbey and Aldo are a Christian homosexual couple in a live-in relationship since 2005. In 2013, out of their desire to start a family, they identified a surrogacy Agency based in New Delhi. They signed an agreement with the aforementioned Agency for conducting traditional surrogacy, with Abbey being the genetic father and the woman being the genetic mother. The parties agreed and signed a document for a sum of Rs. 10 lakh. The surrogate mother, Radhika Ghosh, gave birth to a healthy baby boy on

20th November, 2016 and an appreciation reward of Rs. 1,50,000 was given to her. Subsequently, she refused to give custody of the child on grounds of emotional attachment.

SURROGACY ACT, 2016

On 14th December 2016, the Parliament passed The Surrogacy Act, 2016 with the following pertinent points:

1. It seeks a ban on homosexuals and live-in couples from opting for surrogacy.
2. It bans commercial surrogacy.

Aggrieved by the provisions of this Act, Abbey filed a writ petition in front of the High Court of Janakpur for custody of the child and constitutional validity of the Surrogacy Act, 2016.

DECISION OF THE HON'BLE HIGH COURT OF JANAKPUR

The Hon'ble High Court of Janakpur clubbed the matters on 15/02/2017 and, after perusal of the matter, put forth the following points in its judgement on 05/02/2017 as under:

- i) Homosexuality is an offence u/s 377 of IPC. Commercial surrogacy should not be allowed and homosexuals taking help of surrogacy do not have any right over the child born.
- ii) Directed the Parliament that Uniform Civil Code needs to be drafted and implemented.
- iii) Notwithstanding the separate Muslim Personal Law system, Nazia Yusuf is entitled to maintenance u/s 125 of CrPC.
- iv) The second marriage of Rahim Khan (previously Ranvijay Kapoor) with Nureen Saeed is void.

SPECIAL LEAVE TO APPEAL PETITION

Aggrieved by the decision of the High Court, a special leave to appeal petition has been filed by both Abbey on 15/02/2017 as well by the All India Muslim Personal Law Board (AIMPLB) representing the entire Muslim community on 17/02/2017.

Both the SLPs have been admitted and clubbed as these issues were previously dealt with together in the Hon'ble High Court and the matters are now pending in front of the Hon'ble Supreme Court of India.

ARGUMENTS PRESENTED

~ ISSUE I ~

WHETHER SECTION 377 OF IPC IS CONSTITUTIONAL

[I.A] Section 377 Violates Right To Equality U/A 14 And 15 Of The Constitution

[I.B.] Section 377 Violates Right To Life U/A 21 Of The Constitution

~ ISSUE II ~

**WHETHER THE SURROGACY (REGULATION) ACT, 2016 IS
CONSTITUTIONALLY VALID.**

[II.A] The Surrogacy Act, 2016 Violates Article 14 Of The Constitution

[II.B] The Surrogacy Act, 2016 Violates Article 21 Of The Constitution

[II.C] The Surrogacy Act, 2016 Cannot Be Applied Retrospectively

~ ISSUE III ~

**WHETHER THE DIRECTION OF THE HIGH COURT REGARDING DRAFTING
AND IMPLEMENTATION OF UNIFORM CIVIL CODE SHOULD BE UPHELD.**

[III.A] Implementation Of UCC Shall Be Unconstitutional

[III.B] The Direction Given By High Court Is Not Valid In The Present Case

SUMMARY OF ARGUMENTS

ISSUE I: WHETHER SECTION 377 OF IPC IS CONSTITUTIONALLY VALID

It is contended that Section 377 of the IPC is constitutionally invalid as it violates the Fundamental Rights of the citizens of India. Articles 14 and 15 prohibit any form of discrimination among citizens based on certain grounds. The classification of sexual activities into procreative and non-procreative sex brought forth by Section 377 has not been founded on an intelligible differentia, nor does it have any rational nexus with the objective sought by the legislation. Further, sexual orientation is contended to be a ground analogous to grounds specified u/a 15 and Section 377 discriminates against individuals based on their sexual orientation without satisfying the compelling state interest. Section 377 encroaches upon one's Right to Life and Personal liberty since it does not prescribe any procedure that is reasonable or just. It further violates one's Right to Privacy, which is an implicit right u/a 21 of the Constitution. Lastly, it violates one's Right to Health by affecting the psychological well-being of homosexuals and posing as an impediment to successful public health interventions.

ISSUE II: WHETHER THE SURROGACY (REGULATION) ACT, 2016 IS CONSTITUTIONALLY VALID

It is contended that The Surrogacy (Regulation) Act, 2016 is constitutionally invalid as it violates Articles 14 and 21 of the Constitution. It does not have a classification founded on an intelligible differentia and the classification does not have any nexus with the objective sought by the legislation. Further, it violates Article 21 of the Constitution since it violates one's Right to liberty without a just, reasonable procedure as well as one's Right to 'Reproductive autonomy' which is an implicit right under Right to Privacy. The Act cannot be applied retrospectively since it is in violation of Article 20(1) of the Constitution which prevents individuals from the effects of an *ex-post facto* law. Based on this, it is contended that the decision of the Hon'ble High Court regarding custody of the surrogate child to

Petitioner no.1 should not be upheld and the homosexual couple must get custody of the child.

**ISSUE III: WHETHER THE DIRECTION GIVEN BY HIGH COURT REGARDING
DRAFTING OF UNIFORM CIVIL CODE SHOULD BE UPHELD OR NOT**

It is contended that the direction given by the Hon'ble High Court of Janakpur regarding drafting and implementation of a Uniform Civil Code should not be upheld as implementation of UCC will violate one's Right to Freedom of Religion provided for u/a 25 and 26 of the Constitution. Article 29(1) gives personal laws immunity from amendment or abrogation by the state and implementation of UCC will have an overriding effect on personal laws of various religious communities. Secularism is a basic principle our Constitution is based on and a secular state should not interfere with the personal laws of the people. The Uniform Civil Code, if implemented, will contravene the basic doctrine of secularism. Further, it is also contended that the direction given by the Hon'ble High Court is not valid in the present matter since it violates the 'doctrine of separation of powers', wherein it is provided that courts cannot compel the Union Government to initiate or implement legislation, and judicial scrutiny of the matter amounts to injustice.

ARGUMENTS ADVANCED

ISSUE I: WHETHER SECTION 377 OF IPC IS CONSTITUTIONALLY VALID.

It is contended that Section 377 of the I.P.C. is not constitutionally valid as [I.A] Section 377 violates Right to Equality u/a 14 and 15 of the Constitution, and [I.B.] Section 377 violates Right to Life u/a 21 of the Constitution.

[I.A] SECTION 377 VIOLATES RIGHT TO EQUALITY U/A 14 AND 15 OF THE CONSTITUTION.

It is humbly contended that Section 377 of the IPC is discriminatory and arbitrary as [I.A.i] it violates Article 14 of the Constitution, and [I.A.ii] it violates Article 15 of the Constitution.

[I.A.i] It Violates Article 14 of The Constitution.

In the celebrated case of *Anuj Garg v. Hotel Association of India*¹, the Hon'ble Supreme Court of India held that there is no 'presumption of constitutionality of a colonial legislation'. The judgement in *John Vallamatom v. Union of India*² further propagates the idea that the constitutionality of a provision will have to be judged keeping in mind the interpretative changes of the statute affected by the passage of time. The law, although may be constitutional when enacted, but with passage of time the same may be held to be unconstitutional in view of the changed situation.

Having brought Section 377 under the scrutiny of Article 14, it is contended that Section 377 violates Article 14 of the Constitution. Though Article 14 allows permissible classification, it is imperative that two conditions must be fulfilled in such a situation, namely: the classification must be founded on an intelligible differentia and the differentia must have a rational nexus to the objective sought to be achieved by the statute.³

It is humbly contended that the classification made via Section 377 does not satisfy either conditions and hence Section 377 violates Article 14 since:

¹ *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663.

² *John Vallamatom v. Union of India*, AIR 2003 SC 2902.

³ *K. Thimmappa v. Chairman, Central Board of Directors*, AIR 2001 SC 467; *Union of India v. M.V. Valliappan*, (1996) 6 SCC 259.

[I.A.i.a] The Classification Has Not Been Founded On An Intelligible Differentia

“Intelligible differentia” means difference that is capable of being understood.⁴ The Supreme Court has observed recently in *K. Thimmappa v. Chairman, Central Board of Directors*⁵ that mere differentiation does not *per se* amount to discrimination and to attract the operation of the equal protection clause, it is necessary to show that the selection is unreasonable or arbitrary.

Section 377 classifies acts based on whether they are in consonance with or against the order of nature. It is contended that Section 377 is based upon traditional Jeudo-Christian moral and ethical standards⁶, which conceive of sex in purely functional terms i.e., for the purpose of procreation and thus creates a classification between procreative and non-procreative sex.⁷ Considering any non-procreative sexual activity as being “against the order of nature” is outdated, has no place in the modern society and most importantly, has no scientific basis.⁸

It is contended that Section 377 targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people.⁹ Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification u/a 14.¹⁰ Thus, the classification based on procreative and non-procreative sex has no intelligible differentia.

[I.A.i.b] There Is No Rational Nexus Between Classification And Objective Sought.

It is contended that Section 377’s legislative objective of penalizing “unnatural sexual offences” has no rational nexus to the classification created. It was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness.¹¹ The stated object of Section 377 IPC is to ‘protect women and children, prevent the spread of HIV/AIDS and enforce societal morality against homosexuality.’¹²

⁴Oxford Dictionary.

⁵Supra note 3.

⁶Samuel H. Dresner, *Homosexuality and the Order of Creation*, Judaism 40 (1991): 309.

⁷Sholeh I. Miresghi & David Matsumoto; *Perceived Cultural Attitudes Toward Homosexuality and Their Effects on Iranian and Ameircan Sexual Minorities, Cultural Diversity and Ethnic Minority Psychology* 2008 Vol. 14, No.4, 372-376.

⁸Naz Foundation v. Government of NCT of Delhi, 2010 Cri LJ 94.

⁹Ibid.

¹⁰Supra note 8.

¹¹Richard M. Davidson, *Flame of Yahweh: Sexuality in the Old Testament*, (Peabody, MA: Hendrickson Publishers, 2007), 91–105.

¹²Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

It is contended that firstly, the legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults in private. The second legislative of purporting public health by preventing the spread of HIV/AIDS is in contrast to the results and Section 377 in fact hampers HIV/AIDS prevention efforts. As will be discussed in a later section, the presence of Section 377 in fact poses as a deterrent in public health initiative schemes. Lastly, it is not within the constitutional competence of the State to invade the privacy of citizens or regulate conduct solely on the basis of public moral disapproval when there is no harm to cause any hurt.¹³

The criminalisation of private sexual relations between consenting adults without any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. It is thus contended that there is no rational nexus between classification and objective sought in the case of Section 377.

[I.A.ii] It Violates Article 15 Of The Constitution.

Article 15(1) specifically bars the state from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth or any of them.¹⁴ Thus, when a particular statute seeks to differentiate among individuals based on any one of these grounds; to adjudge the validity of a legislation, a distinction has to be drawn between the object underlying the impugned Act and the mode and manner adopted therein to achieve that object. The object underlying the Act may be good or laudable but its validity has to be judged by the method of its operation and its effect on the fundamental rights involved.¹⁵

Based on this, it is contended that Section 377 violates Article 15 of the Constitution as [I.A.ii.a] Article 15 prevents discrimination on the basis of sexual orientation, [I.A.ii.a] Section 377 disproportionate and discriminatory in its impact, and [I.A.ii.c] Section 377 does not satisfy the compelling state interest.

[I.A.ii.a] Article 15 Prevents Discrimination On The Basis Of Sexual Orientation.

Article 15 prohibits discrimination on several enumerated grounds, which include 'sex'. It is contended that the expression "sex" as used in Article 15 cannot be read restrictive to gender

¹³Naz Foundation v. Government of NCT of Delhi and Others, 2010 Cri LJ 94; Lawrence v. Texas, 539 U.S. 558 (2003).

¹⁴Constitution of India is para materia to the Constitution of India.

¹⁵M P JAIN, INDIAN CONSTITUTIONAL LAW (LexisNexis 7th ed. 2014).

but also includes “sexual orientation” and thus equality on the basis of sexual orientation is implied in the said fundamental right against discrimination.

In *Toonen v. Australia*¹⁶, the Human Rights Committee held that the reference to ‘sex’ u/a 2 is to be taken as including ‘sexual orientation’. Further, the Canadian Supreme Court has held that sexual orientation is a ground analogous to those listed in Section 15(1) such as race, colour, religion, sex, etc.¹⁷ and on the basis of historical, social, political and economic disadvantage suffered by homosexuals, sexual orientation must be seen as one of these grounds.¹⁸

Thus, it is contended sexual orientation is a ground analogous to ‘sex’ mentioned in Section 15 of the Constitution and discrimination on the basis of sexual orientation is not permitted u/a 15.¹⁹

[I.A.ii.b] Section 377 Is Disproportionate And Discriminatory In Its Impact.

In determining the constitutionality of the statute, the Court must take into consideration not the motives of the Legislature but the real effect of the statute.²⁰ It is the effect of the impugned legislation that is to be considered and if its effect is to discriminate on any of the prohibited grounds, it is bad.²¹

It is contended that discrimination can be direct or indirect.²² Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.²³ It is contended that in determining what the Legislature has really done, the Court should not look at the mere form or appearance of the legislation but must look at the substance or nature of the legislation.²⁴

¹⁶*Toonen v. Australia*, CCPR/C/WG/44/D/488/1992.

¹⁷*Corbiere v. Canada* (1999) 2 SCR 203.

¹⁸*Vriend v. Alberta*, [1998] 1 SCR 493.

¹⁹*Naz Foundation v. Government of NCT of Delhi*, 2010 Cri LJ 94.

²⁰ *Sakal Papers v. Union of India*, 1962 SC 305; *Bennett Coleman v. Union of India*, 1973 SC 106.

²¹ M P JAIN, *INDIAN CONSTITUTIONAL LAW* (LexisNexis 7th ed. 2014).

²² Declaration of Principles on Equality 2009-The Equal Rights Trust.

²³ *Ibid.*

²⁴ *Smith v. Allwright*, (1944) 321 US 649.

It is contended that Section 377, by criminalising consensual same-sex acts between two males, is indirectly discriminatory against a particular section of the society i.e., men who have sex with men(MSM). Although it might seem facially neutral and it apparently targets certain sexual acts instead of sexual identity of a person, but in its operation it does end up unfairly targeting a particular community since these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals.²⁵Hence, it is contended that Section 377, by virtue of its discriminatory effect, marks the whole gay and lesbian community with deviance and perversity.

[I.A.ii.c] Section 377 Does Not Satisfy The Compelling State Interest Test

It was held in *Gobind v. State of M.P.*²⁶ that privacy claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior, or where a compelling state interest is shown. A law infringing a fundamental privacy right must satisfy the compelling state interest test i.e., whether the state interest is of such paramount interest as would justify an infringement of the right.²⁷ Further, when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefore would be on the State.²⁸

A measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.²⁹ Heightened level of scrutiny is the normative threshold for judicial review in cases where personal freedom is questioned. The test to review such a Protective Discrimination statute would entail a two-prolonged scrutiny:

- a) The legislative interference should be justified in principle,
- b) The same should be proportionate in measure

The state interest must be legitimate and relevant for a legislation to be non-arbitrary and must be proportionate to achieve the state's interest. A bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.³⁰

²⁵The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, 1999 (1) SA 6.

²⁶*Gobind v. State of M.P.*, 1975 AIR 1378.

²⁷*Ibid.*

²⁸*Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663.

²⁹*John Vallamattom v. Union of India*, AIR 2003 SC 2902.

³⁰*Romer v. Evans* (1996) 517 U.S. 620.

The nature of the provision of Section 377 and its purpose is to criminalise private conduct of consenting adults which causes no harm to anybody else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.³¹ Enforcement of public morality does not amount to “compelling state interest” to justify the act of two adults engaged in consensual sex in private.³² Section 377, by criminalising consensual same-sex relations among adults, is thus arbitrary and based on archaic moral and religious notions of sex. It is contended that it does not serve any beneficial public purpose or legitimate state interest.

[I.B] IT VIOLATES RIGHT TO LIFE U/A 21 OF THE CONSTITUTION

It is contended that Section 377 of IPC violates Right to Life u/a 21 of the Constitution as **[I.B.i]** it is against the Right to Personal Liberty of an individual, **[I.B.ii]** it violates Right to Privacy and dignity of an individual, and **[I.B.iii]** it violates one’s Right to Health.

[I.B.i] It Is Against The Right To Personal Liberty Of An Individual

The Hon’ble Supreme Court has held that the expression “personal liberty” in Article 21 is of the widest amplitude and it covers a variety of rights.³³ Any law interfering with personal liberty of a person must satisfy a triple test:³⁴

- i) it must prescribe a procedure;
- ii) the procedure must withstand a test of one or more of the fundamental rights conferred u/a 19 which may be applicable in a given situation; and
- iii) it must also be liable to be tested with reference to Article 14

It is contended that Section 377, on being violative of Articles 14 and 15 as has been submitted in the preceding sections as well as Article 19, violates the Right to personal liberty of an individual. Along with serving as the weapon for police abuse, detaining and questioning, extortion, harassment, forced sex, payment of hush money, Section 377 perpetuates negative and discriminatory beliefs towards the same-sex relations and sexuality minorities by viewing all gay men as criminals. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalised and turned in on

³¹Naz Foundation v. Government of NCT of Delhi and others, 2010 Cri LJ 94.

³²Ibid.

³³Maneka Gandhi v. Union of India, 1978 AIR 597; M.H. Hoskot v. State of Maharashtra, 1978 AIR 1548; Hussainara Khatoon and others v. Home Secretary State of Bihar, 1979 AIR 1369; Prem Shankar Shukla v. Delhi Admn. 1980 AIR 1535.

³⁴Maneka Gandhi v. Union of India, 1978 AIR 597.

itself.³⁵ It is hence contended that Section 377 does not satisfy the test of substantive due process and is violative of one's Right to life and personal liberty.

[I.B.ii] It Violates An Individual's Right To Privacy And Dignity

It is contended that **[I.B.ii.a]** Right to Privacy and dignity is an implicit right u/a 21 of the Constitution, and **[I.B.ii.a]** Section 377 violates one's Right to Privacy and dignity.

[I.B.ii.a] Right to Privacy and dignity is an implicit right u/a 21 of the Constitution of India

The Hon'ble Court has spelt out an individual's Right to Privacy from Article 21 and Article 19(1)(d)³⁶. This is in consonance with Article 12 of *the Universal Declaration of Human Rights*, Article 17 of the *International Covenant on Civil and Political Rights, 1966* as well as *The European Convention on Human Rights*. In *Kharak Singh v. The State of UP*³⁷, the Supreme Court referred to *Munn v. Illionis*³⁸ and held that although our Constitution did not specifically refer to the Right of Privacy in an express manner, it can still be traced from the right to 'life' in Article 21. Referring to *Griswold v. Conneticut*³⁹ and *Jane Roe v. Henry Wade*⁴⁰, it was held in *Gobind v. State of MP*⁴¹ that "*the makers of our Constitution must be deemed to have conferred upon the individual as against the Government a sphere where he should be let alone*". Similarly, in *R. Rajgopal v. State of Tamil Nadu*⁴², it was held that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens u/a 21.

The Right to Privacy is the right to be left alone.⁴³ A citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing, and education among many other matters.⁴⁴ Similarly, our Constitution recognises a person as a free being who develops his or her body and mind as he or she sees fit. The expression

³⁵The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, 1999 (1) SA 6.

³⁶District Registrar and Collector, Hyderabad and another v. Canara Bank and Anr., 1997 (4) ALT 118; People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568; Sharda v. Dharampal, AIR 2003 SC 3450.

³⁷Kharak Singh v. State of U.P., AIR 1963 SC 1295.

³⁸Munn v. Illionis, 94 U.S. 113 (1877).

³⁹Griswold v. Conneticut, 381 U.S. 479 (1965).

⁴⁰Jane Roe v. Henry Wade, 410 U.S. 113 (1973).

⁴¹Gobind v. State of M.P., 1975 AIR 1378.

⁴²R. Rajgopal v. State of Tamil Nadu, 1995 AIR 264.

⁴³Ibid.

⁴⁴Naz Foundation v. Government of NCT of Delhi and others, 2010 Cri LJ 94.

“dignity of an individual” finds specific mention in the Preamble to the Constitution and thus the guarantee of human dignity forms part of our constitutional culture.⁴⁵

[I.B.ii.b] Section 377 violates ‘Right to privacy and dignity’ of an individual

The Supreme Court held in *Gobind v. State of M.P.*⁴⁶, that “Privacy, or the right to be let alone, is an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests.”⁴⁷ One’s right to privacy should not be seen as simply a negative right to occupy a private space free from government intrusion, but as a right to get on with one’s life, one’s personality and make fundamental decisions about intimate relations without penalisation.⁴⁸

It is contended that the way in which one gives expression to one’s sexuality is at the core of this area of private intimacy. If, in expressing one’s sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.⁴⁹

Section 377 denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. It denies a gay person a right to full personhood which is implicit in notion of life u/a 21 of the Constitution.⁵⁰ Thus, it is contended that Section 377, by failing to make a distinction between consensual-non consensual sex and public and private sex, intrudes upon the Right to Privacy of an individual.

[I.B.iii] It Is In Violation Of One’s Right To Health

The Hon’ble Supreme Court, while interpreting Article 21 of the Constitution in light of Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, held that the Right to Health was an integral component of one’s Right to life.⁵¹ The right to health contains both freedom and entitlements. The freedoms include the right to control one’s health and body, including sexual reproductive freedom.⁵²

⁴⁵Prem Shankar Shukla v. Delhi Admn., 1980 AIR 1535.

⁴⁶Supra note 42.

⁴⁷Ibid.

⁴⁸ Bowers, Attorney General of Georgia v. Hardwick et al (1986) 478 US 186.

⁴⁹ The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, 1999 (1) SA 6.

⁵⁰Naz Foundation v. Government of NCT of Delhi and others, 2010 Cri LJ 94.

⁵¹Paschim Banga Khet Mazdoor Samity v. State of West Bengal, AIR 1996 SC 2426.

⁵²General Comment No. 14 (2000) [E/C.12/2000/4; 11 August 2000].

It is contended that Section 377 affects the individual's Right to Health as [I.B.iii.a]it affects the psychological well-being of homosexual individuals in a negative manner, and [I.B.iii.b] it acts as a serious impediment to successful public health interventions.

[I.B.iii.a]It Affects The Psychological Well-Being Of Homosexual Individuals In A Negative Manner

It is contended that criminalisation of Section 377 impacts homosexual men at a deep level and restricts their right to dignity, personhood and identity, privacy and equality by criminalising all forms of sexual intercourse homosexual men can indulge in.⁵³ While the privacy of heterosexual relations, especially marriage is clothed in legitimacy, homosexual relations are subjected to societal disapproval and scrutiny.⁵⁴

It is contended that sexual intimacy is a core aspect of human experience and is important too mental health, psychological well-being and social adjustment. By creating a culture of silence and intolerance, Section 377 denies homosexuals thee fundamental human experience that they are entitled to.

[I.B.iii.b] It acts as a serious impediment to successful public health interventions

Stigma, discrimination and criminalisation faced by men who have sex with men are major barriers to the movement for universal access to HIV prevention, treatment, care and support.⁵⁵ The criminalisation of homosexual practices cannot be considered as a reasonable means or proportionate measure to achieve the spread of AIDS/HIV since no link has been shown between the continued criminalisation and the effective control of the spread of the HIV/AIDS virus.”⁵⁶

Sexual practices of the MSM and gay community are hidden because they are subject to criminal sanction. This acts as an impediment to successful public health interventions in two major ways. Firstly, those in the High Risk Group are mostly reluctant to reveal same-sex behaviour due to fear to law enforcement agencies. This keeps a large section invisible and unreachable, making it difficult for public health workers to access them. Secondly, it creates strong tendencies within the community whereby MSM behaviour is denied. Since many

⁵³Sholeh I. Miresghi & David Matsumoto; *Perceived Cultural Attitudes Toward Homosexuality and Their Effects on Iranian and Ameircan Sexual Minorities, Cultural Diversity and Ethnic Minority Psychology* 2008 Vol. 14, No.4, 372-376.

⁵⁴Govindrajulu, in Re, (1886) 1 Weir.

⁵⁵United Nations A/6-/737 Assessment by UNAIDS, March 24, 2006; Delhi Declaration of Collaboration, 26th September 2006.

⁵⁶Toonen v. State of Australia, CCPR/C/WG/44/D/488/1992.

MSM are married or indulge in sexual relations with women, their female sexual partners are consequently also at risk for HIV/ infection.

A Report of the National Conference on Human Rights thus concluded that *“In terms of preventing HIV/AIDS among men who have sex with men, it would be most useful to make Section 377 IPC obsolete, and instead review the legislation.”*⁵⁷ It remains our humble contention that Section 377 violates Right to Life u/a 21 of individuals.

Hence, it is submitted that Section 377 of the IPC violates the Fundamental Rights of the citizens of India and hence, is unconstitutional.

ISSUE II: WHETHER THE SURROGACY (REGULATION) ACT, 2016 IS CONSTITUTIONALLY VALID.

It is contended that The Surrogacy (Regulation) Act, 2016 (hereinafter referred to as The Surrogacy Act) is constitutionally invalid as **[II.A]** it violates Article 14 of the Constitution, **[II.B]** it violates Article 21 of the Constitution, and **[II.C]** the Surrogacy Act cannot be applied retrospectively.

[II.A] THE SURROGACY ACT VIOLATES ARTICLE 14 OF THE CONSTITUTION

The right to equality is also recognized as one of the basic features of the Constitution.⁵⁸ Article 14 prohibits class legislation and in cases of classification, the classification to be reasonable should fulfil two tests i.e., it should be founded on an intelligible differentia and there must be reasonable nexus with the object sought to be achieved by the statute in question.⁵⁹

It is contended before this Hon’ble Court that The Surrogacy Act violates Article 14 of the Constitution as **[II.A.i]** the classification is not founded on an intelligible differentia, and **[II.A.ii]** there is no rational nexus between classification and objective sought.

[II.A.i] The Classification Is Not Founded On An Intelligible Differentia

If the government fails to support its action of classification on the touchstone of the principal whether the classification is reasonable having an intelligible differentia and a rational nexus to the purpose, the classification has to be held arbitrary and discriminatory.⁶⁰

⁵⁷Report of the National Conference on Human Rights & HIV/AIDS, http://nhrc.nic.in/Publications/report_hivaids.htm

⁵⁸ Indra Sawhney v. Union of India, (2000) 1 SCC 168.

⁵⁹State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75.

⁶⁰Sube Singh v. State of Haryana, (2001) 7 SCC 545.

In the present case, Section 2(g) of the Act⁶¹ defines ‘couple’ as “the legally married Indian man and woman above the age of 21 and 18 years respectively.” ‘Intending couples’ are defined under Section 2(r) of the Act as “a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy.” Thus, the Act classifies persons on the basis of their marital status, nationality and sexual orientation⁶². Secondly, the Act specifies the categories of women who can act as the surrogate mother.⁶³ Lastly, it differentiates between altruistic and commercial surrogacy.⁶⁴

The Human Fertilisation and Embryology Act, 2008 in the United Kingdom allows unmarried and same sex couples to apply for parental orders.⁶⁵ Similarly, California heads the way in terms of acceptability of surrogacy treatments and upholds that Lesbian, Gay, Bisexual and Transgender (LGBT) individuals can also opt for a surrogacy treatment by interpreting several cases⁶⁶ in the light of the state’s Uniform Parentage Act, 2000. Before the Surrogacy Act came into force, the 228th Law Commission Report provided that even a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement and cited the case of Japanese baby Manji Yamada⁶⁷ and an Israel gay couple’s case who fathered the child in India as clear examples which established that this is possible.⁶⁸ Further the Supreme Court held in the case of *Baby Manji Yamada v. Union Of India*⁶⁹ that surrogacy arrangements can be in regard to fulfil the parental needs of same sex couple. It is contended that restricting altruistic surrogacy to only married Indian couples and disqualifying others on the grounds of nationality, marital status, sexual orientation is arbitrary and the classification is unreasonable as there is discrimination among human beings who share the same status as intending couples facing the same issues of infertility and biological necessity of having a child genetically related to either of the couple.

⁶¹The Surrogacy (Regulation) Act, 2016.

⁶²Section 2(g) of The Surrogacy (Regulation) Act, 2016.

⁶³Section 4(iii)(b)(II) of The Surrogacy Act (Regulation), 2016.

⁶⁴Section 3(ii) of The Surrogacy Act, 2016.

⁶⁵Section 54 of the Human Fertilisation and Embryology Act, 2008.

⁶⁶*Elisa B. v. Superior Court*, 117 P.3d 660(2005); *Kristine H. v. Lisa R.*, 117P.3d 690(2005); *K.M.. v. E.G.*, 117 P.3d 673(2005).

⁶⁷*Baby Manji Yamada v. Union of India*, JT 2008 (11) SC 150.

⁶⁸ Law Commission of India, *Report No. 228 on the Need for Legislation to Regulate Assisted Reproductive Technology Clinic as well as Rights and Obligations of Parties to a Surrogacy*, (August 2009).

⁶⁹Supra note 67.

[II.A.ii] There Is No Nexus Between Classification And Objective Sought

The objectives of the Act are to regulate surrogacy services to curb unethical practices, to prohibit commercial surrogacy including sale and purchase of human embryo and gametes, to prohibit potential exploitation of surrogate mothers and protect the rights of children born through surrogacy.⁷⁰ It is contended that disqualifying members of the society on the basis of their sexual orientation, nationality, marital status, as has been done by the Act, does not establish any rational nexus with the objective sought to be achieved by the Act.

Estimates indicate that between 6 and 14 million children have at least one gay or lesbian parent.⁷¹ A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social and sexual functioning as do children whose parents are heterosexual.⁷² Thus, gay and lesbian individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents.⁷³ Researchers have also concluded that there were no major differences in children raised by single mothers compared to the children raised in other household types.⁷⁴

It is contended that the criteria put forth by the Act are merely meant to exclude a whole section of individuals and thus The Surrogacy Act reeks of bias. By defining limiting eligibility criteria, the Act seeks to deny a host of perfectly suitable individuals who are well within their rights to demand access to surrogacy services.

[II.B] IT VIOLATES ARTICLE 21 OF THE CONSTITUTION

It is contended before this Hon'ble Court that the Surrogacy Act, 2016 violates Article 21 as **[II.A.i]** it violates one's Right to life and liberty, and **[II.A.ii]** it violates one's Right to Privacy.

⁷⁰Statement of Objects and Reasons of The Surrogacy (Regulation) Act, 2016.

⁷¹ Johnson, Suzanne, M. and O'Connor, Elizabeth. (2002). The Gay Baby Boom. New York: New York University Press, 1.

⁷²Perrin, Ellen C., MD, and the Committee on Psychosocial Aspects of Child and Family Health. (2002, Feb.). "Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents." Pediatrics. 109(2): 341-344.

⁷³ American Psychoanalytic Association. (2002). "Position Statement on Gay and Lesbian Parenting." New York: Author; <http://www.apsa-co.org/ctf/cgli/parenting.htm>.

⁷⁴ Lansford, J.E., Ceballo, R., Abbey, A. and Stewart, A.J. (2001) "Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather and Stepmother Households." Journal of Marriage and Family. 63: 840-851.

[[III.A.i] It Violates One's Right To Life And Liberty

The Supreme Court in *Maneka Gandhi v. Union of India*⁷⁵ gave the expression 'personal liberty' an expansive interpretation and held that Article 21 would no longer mean that law could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. The procedure must satisfy requisites in the sense of being fair, reasonable and just.⁷⁶

In *Kartar Singh v. State of Punjab*⁷⁷, the Supreme Court ruled that liberty aims at freedom not only from arbitrary restraint but also a right to secure such conditions which are essential for full development of personality.⁷⁸ Universal Declaration of Human Rights 1948 says, *inter alia*, that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family".⁷⁹ It further recognises the right to benefit from scientific progress.⁸⁰ Right to Procreation, Right to Found a Family, Right to reproduction and the Right to make reproductive choices are also being increasingly seen as a vital component of personal autonomy.⁸¹

Principle 24 of the *Yogyakarta Principles* deals with the right to found a family⁸² and states that, all States should take necessary legislative, administrative and other measures to ensure the right to found a family, including through access of adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity. As it has been held in *National Legal Services Authority v. Union of India*⁸³, non recognition of gender identity is violative of Article 14 and 21 of the Constitution. The Surrogacy Act, 2016 bans homosexuals from opting for surrogacy⁸⁴ which infringes their right to live with dignity as having a child is a basic necessity of every individual irrespective of their sexual orientation. In the case of *Suchita Srivastva & Anr. v. Chandigarh Administration*⁸⁵, the Supreme Court held that held "a women's right to make reproductive choices" a dimension of "personal liberty" as understood u/a 21 of the Constitution. The

⁷⁵Maneka Gandhi v. Union of India, AIR 1978 SC 597.

⁷⁶Ibid.

⁷⁷Kartar Singh v. State of Punjab, (1994) SCC 3 569; Budhadev Karmaskar v. State of West Bengal, AIR 2011 SC 2636; Francis Coralie v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.

⁷⁸Kartar Singh v. State of Punjab, (1994) SCC 3 569.

⁷⁹Article 16(1), The Universal Declaration of Human Rights, <https://www.un.org/en/documents/udhr/>.

⁸⁰Article 15, The Universal Declaration of Human Rights, <https://www.un.org/en/documents/udhr/>.

⁸¹Carey v. Population Services International, 431 U.S. 678 (1977).

⁸²The Yogyakarta Principles, Principle 24: The Right to Found a Family, https://www.yogyakartaprinciples.org/principles_en.pdf.

⁸³National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

⁸⁴Section 2(g) of The Surrogacy (Regulation) Act, 2016.

⁸⁵Suchita Srivastva & Anr. v. Chandigarh Administration, (2009) 9 SCC 1.

crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. The Surrogacy Act specifies the categories of women who can act as the surrogate mother⁸⁶ and by restricting it to women who are genetically related to one of the individuals among the intending couple, violates the 'Right to make reproductive choice' of other women who may want to be surrogate mothers. Based on prior contentions, it is evident that The Surrogacy Act is arbitrary, unreasonable and unjust and thus violates one's Right to Life and Personal Liberty.

[II.A.ii]It Violates One's Right To Privacy

Right to privacy is a cherished constitutional value⁸⁷ and is implicit in the right to life and personal liberty guaranteed u/a 21.⁸⁸ A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.⁸⁹

Right to privacy has several aspects one of which is 'right to reproductive autonomy'. It has been held by United States of Supreme Court that 'right to reproduce' is one of the basic civil rights of man.⁹⁰ The United States Supreme Court has found the rights of marriage, procreation, contraception, family relationships, child-rearing and education to be infeasible fragments of the substantive right to privacy.⁹¹ Any right to privacy must encompass and protect intimacies of the home, the family, marriage, motherhood, procreation and child rearing.⁹² The Judiciary in India has recognized the reproductive right of humans as a basic right as well. For instance, in *B. K. Parthasarthi v. Government of Andhra Pradesh*⁹³, the Andhra Pradesh High Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy" and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*⁹⁴, which characterised the right to reproduce as "one of the basic civil rights of man". Even in *Javed v. State of Haryana*⁹⁵, the Hon'ble Supreme Court upheld the 'two living children norm' to debar a person from contesting a *Panchayati Raj* election and refrained from stating that the right to procreation is not a basic human right.

⁸⁶Section 2(ze) of The Surrogacy (Regulation) Act.

⁸⁷Ram Jethmalani v. Union of India, (2011) 8 SCC 1.

⁸⁸Kharak Singh v. State of U.P., AIR 1963 SC 1295.

⁸⁹R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

⁹⁰Skinner v. Olkhama, (1941)316 U.S. 535.

⁹¹Roe v. Wade, 410 U.S. 113 (1973).

⁹²Govind v. State of M.P., (1975) 2 SCC 148.

⁹³B. K. Parthasarthi v. Government of Andhra Pradesh, AIR 2000 A. P. 156.

⁹⁴Supra note 88.

⁹⁵Javed v. State of Haryana, (2003) 8 SCC 369.

It is contended that by banning homosexuals, live-in couples and single individuals from opting for surrogacy, the Act is violative of their ‘Right to Reproductive Autonomy’ provided under Right to Privacy u/a 21. Further, by preventing women who are not genetically related to the intending couple from acting as the surrogate mother, the Act violates their Right to Reproductive Autonomy as well. Thus, Right to privacy is violated as method of procreation and parenthood lies outside the domain of the state, and any interference in this choice will lead to infringement of the basic fundamental right guaranteed under the constitution.

[II.C] THE SURROGACY ACT CANNOT BE APPLIED RETROSPECTIVELY

It is contended The Surrogacy Act cannot be applied retrospectively as [II.C.i] it violates Article 20(1) of the Constitution, and thus [II.C.ii] the decision of the Hon’ble High Court regarding custody of the surrogate child should not be upheld.

[II.C.i] It Violates Article 20(1) Of The Constitution

Article 20(1) of the Constitution of India⁹⁶ provides that, “*No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence.*”

“Offence” is defined as ‘any act or omission made punishable by any law for the time being in force’.⁹⁷ The immunity extends only against punishment by courts for a criminal offence under an ex-post facto law. It is only retrospective criminal legislation that is prohibited that is if the statute fixes criminal liability for contravention of a prohibition or command which is made applicable to transactions which took place before the date of its enactment, the provisions of Article 20(1) is attracted.⁹⁸ Sections 37 and 38 of The Surrogacy Act clearly contain provisions for punishment in the form of fines and imprisonment for the offence of seeking the aid of or assisting another for commercial surrogacy procedures.⁹⁹ Thus, the nature of offence is criminal as well as civil in the following case.¹⁰⁰

Secondly, an ex-post-facto law is a law which imposes penalties retroactively, i.e, upon acts already done, or which increases the penalty for the past acts.¹⁰¹ A person is to be convicted for violating a law in force when the act charged is committed and an act is not an offence on

⁹⁶Constitution of India is paramateria to Constitution of India.

⁹⁷Section 3(38) of General Clauses Act, 1897.

⁹⁸Hathising Mfg. Co. Ltd. v. Union of India, AIR 1960 SC 923.

⁹⁹The Surrogacy (Regulation) Act, 2016.

¹⁰⁰Section 37 and 38 of The Surrogacy Act, 2016.

¹⁰¹CORWIN, THE CONSTITUTION AND WHAT IT MEANS TO-DAY, 78(1958).

the date of its commission, a law enacted in future cannot make it so.¹⁰² It is contended that The Surrogacy Act was passed on 14th December, 2016¹⁰³ and its application before the same date will amount to retrospective application of the law, which is violative of Article 20(1)¹⁰⁴.

[II.C.ii] The Decision Of The Hon'ble High Court Regarding Custody Of The Surrogate Child Should Not Be Upheld

A law enacted later, making an act done earlier as an offence, will not make the person liable for being convicted under it.¹⁰⁵ In a case where the rule made applicable from 1-7-1961 was published in the Gazette of 7-7-1961, it was held that the rule could not be applicable in respect of acts committed before 7-7-1961.¹⁰⁶

In the present matter, Abbey and Aldo are a homosexual couple in a live-in relation for 5 years. Due to incapability of conceiving a child, they entered into an agreement with an Agency in Delhi who offered surrogacy to homosexual couples on 10th January, 2016.¹⁰⁷ A traditional surrogacy was carried out in the month of February, 2016 out of which a boy was born on 20th November, 2016. In the meantime, the Surrogate mother refused to give the custody of the child as she had become emotionally attached to the child.¹⁰⁸ Petitioner no.1 filed a petition in the Hon'ble High Court claiming custody of the child.¹⁰⁹ However, the High Court turned down his request by holding that surrogacy done by homosexuals is invalid and such a homosexual parent does not have any right over the child born.¹¹⁰

It is contended that the decision of the High Court regarding custody of the child results in retrospective application of the Surrogacy Act in the present matter. Thus, it is submitted that it should not be upheld by virtue of being violative of Article 20(1) of the Constitution.

ISSUE III: WHETHER THE DIRECTION GIVEN BY HIGH COURT REGARDING DRAFTING OF UNIFORM CIVIL CODE SHOULD BE UPHELD

It is contended that the direction given by the Janakpur High Court to draft a Uniform Civil Code (hereinafter referred to as 'UCC') should not be upheld as **[III.A]** implementation of UCC shall be unconstitutional, and **[III.B]** the direction given by High Court is not valid in the present case.

¹⁰²Soni Devrajbhai Babubhai v. State of Gujrat, AIR 1991 SC 2173: (1991) 4 SCC 298.

¹⁰³Moot proposition, ¶7.

¹⁰⁴ Constitution of India is para materia to the Constitution of India, 1950.

¹⁰⁵ Kannaivalal v. Indumati, AIR 1958 SCR 1394.

¹⁰⁶Govind Pillai v. Padmanabhai Pillai, AIR 1965 Ker 123.

¹⁰⁷Moot Proposition, ¶5.

¹⁰⁸ Moot Proposition, ¶6.

¹⁰⁹ Moot Proposition, ¶7.

¹¹⁰ Moot Proposition, ¶10.

[III.A] IMPLEMENTATION OF UCC SHALL BE UNCONSTITUTIONAL

It is contended that implementation of UCC shall be unconstitutional as, [III.A.i] It will have an overriding effect on Personal laws, [III.A.ii] It violates one's Right to Religion u/a 25 and 25 of the Constitution and [III.A.iii] UCC is violative of Secularism.

[III.A.i] It Will Have An Overriding Effect On Personal Laws

Article 44 of the Constitution of India provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”¹¹¹ Article 25 of the Constitution of India grants the Freedom of Conscience and profession, practice and propagation of one's religion. The freedom guaranteed u/a 25 and the cultural rights enshrined in Article 29(1) give personal laws immunity from amendment or abrogation by the State.¹¹²

It is contended that enacting of UCC will have an overriding effect on the provisions of personal laws, especially of the Muslims. In a writ petition¹¹³ u/a 32, the Supreme Court enforced the customary religious rights of the *Shia* community on a piece of land and said that the State could not interfere with the established customary rights to perform their religious ceremonies and functions. The *Quran* is the supreme law for Muslims.¹¹⁴ It does not specify any matrimonial offences¹¹⁵ and The Prophet of *Islam* laid down no bars to matrimonial relief.¹¹⁶ The law giver of *Islam* did not want the matter to be taken to the court at all, unless it became unavoidable for a wife due to the age-old predominance of man.¹¹⁷ The Supreme Court cannot supersede *Quran* but only follow the laid down therein as is evident from judgments like *Danial Latifi & Anr. v. Union of India*¹¹⁸ and *Mohd. Ahmed Khan v. Shah Bano Begum*.¹¹⁹

It is contended that if a Uniform Civil Code is implemented, it would supersede the *Quran* as Muslim spouses shall have to take recourse to judicial process in matrimonial matters and this contravenes Article 29(1) of the Constitution.

¹¹¹H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY (4th ed. 1991).

¹¹²M P JAIN, INDIAN CONSTITUTIONAL LAW (LexisNexis 7th ed. 2014).

¹¹³Gulam Abbaz v. State of Uttar Pradesh, AIR 1981 SC 2198.

¹¹⁴AQIL AHMAD, MOHAMMEDAN LAW (Central Law Agency 25TH ED. 2013).

¹¹⁵PARAS DIWAN, FAMILY LAW (Allahabad Law Agency 10TH ED. 2013).

¹¹⁶SUBBA RAO, G.C.V., FAMILY LAW IN INDIA(Narendra Gogia & Company 10TH ED. 2016).

¹¹⁷AQIL AHMAD, MOHAMMEDAN LAW (Central Law Agency 25TH ED. 2013).

¹¹⁸Danial Latifi v. Union of India, AIR 2001 SC 3958.

¹¹⁹Mohd. Ahmed Khan v. Shah Bano Begum, 1985 SCR 3 (844).

III.A.i] It Violates one's Right to Religion u/a 25 And 26 Of The Constitution

Article 26(b) of the Constitution states that every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion. The word 'religion' in this context is not confined to religious belief but includes the practices which are regarded by the community as part of it religion.¹²⁰ The protection u/a 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion¹²¹ and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion.¹²²

It is contended that matters such as 'Marriage' and 'divorce' fall under the rituals and ceremonies as mentioned, and they are integral parts of a religion. For example, *talaq-ul-biddat* is a recognised form of pronouncement of divorce under Muslim Personal Law. Marriage, dissolution of marriage, including *talaq*, etc. come under the Muslim Personal Law (Shariat).¹²³ A uniform code, by interfering in matters such as marriage, divorce, succession, etc. which are integral part of one's religion will override the Personal Laws meant to regulate the individuals in such a religion and will thus violate one's Right to Religion u/a 25 and 26 of the Constitution of India.

III.B.iii] UCCIs Violative of Secularism

In 1976, through the 42nd Amendment of the Constitution, the concept of secularism was made explicit by amending the Preamble.¹²⁴ In a Constitutional Assembly debate, Naziruddin Ahmed pleaded that the abrogation of a personal law should not be treated as a regulation of secular affairs surrounding a religion or as a measure of social welfare and reform.¹²⁵

It was observed in *State of Bombay v. Narasu Appa Mali*¹²⁶ that both Hindus as well as Muslims in India have their own personal laws which are based upon their religious texts and embody their own distinctive evolution and background. It is not effectively possible to streamline all personal laws into a widely accepted Uniform Civil Code.

Polygamy and *talaq-ud-biddat* are essential religious practices and to disregard them is a blatant violation of the fundamental rights of Muslims. Each religious denomination or

¹²⁰Sarup v. State of Punjab AIR 1959 SC 860 (866).

¹²¹Jagannath Ramanuj Das v. State of Orissa AIR 1954 SC 400.

¹²²N. Adithyan v. Travancore Devaswom Board, (2002) 8 SCC 106.

¹²³Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937.

¹²⁴S.R. Bommai v. Union of India, AIR 1994 SC 1918.

¹²⁵VII Constitutional Assembly Debates, 540-41 (1948).

¹²⁶State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold.¹²⁷

It is thus contended that implementation of UCC will violate religious freedom guaranteed u/a 25 and contravene the basic doctrine of 'secularism'.

III.B] THE DIRECTION GIVEN BY HIGH COURT IS NOT VALID IN THE PRESENT CASE

It is contended that the direction given by the Hon'ble High Court is not valid in the present cases [III.B.i] it violates the doctrine of separation of powers, and [III.B.ii] judicial scrutiny of the matter amounts to injustice in the light of the constitutional assembly debates.

III.A.i]The Direction Violates The Doctrine Of Separation Of Powers

There are three main organs of the Government in State i.e. Legislature, Executive and Judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government.¹²⁸ Although the concept of separation of powers is not followed in India in rigidity as in the U.S.A.¹²⁹, courts have time and again held that this doctrine is a part of the basic structure of the Constitution.¹³⁰ In *Mool Chand Kucheria v. Union of India*¹³¹, a petition was filed seeking a direction to the Govt. of India, to implement in a time bound manner the suggestion contained in the judgment of the Supreme Court in *Sarla Mudgal v. Union of India*¹³² to secure for the citizens a Uniform Civil Code throughout the territory of India. The court dismissed the petition for being frivolous as the Court does not have the power to issue directions to the Government. The Supreme Court in *A.K. Roy v. Union of India*¹³³ held that it is not for the Courts to censure the Executive nor is it for the Courts to take over the function of the Parliament, otherwise, there will be chaos with each organ of the State overstepping its jurisdiction and interfering with the functions of another organ of the State. In *State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla*¹³⁴, it was held that the direction of the High Court amounts to compelling the Government to initiate legislation and which the Court was not entitled to do when it is entirely a matter for the executive branch of the Government to decide whether or not to

¹²⁷Sarup v. State of Punjab, AIR 1959 SC 860 (866).

¹²⁸C.K.Takwani, Lectures on Administrative Law 31 (2008).

¹²⁹U.S. CONST. art I, sec 8.

¹³⁰Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.

¹³¹Mool Chand Kucheria v. Union of India, W.P.(C) 3604/2014.

¹³²Sarla Mudgal v. Union of India, (1995) 3 SCC 635.

¹³³A.K. Roy v. Union of India, (1982) 1 SCC 271.

¹³⁴State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla, (1985) 3 SCC 169.

introduce a particular legislation and is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution.

Thus, courts cannot create rights where none exist nor they can go on making orders which are incapable of enforcement or direct legislation or proclaim that they are playing the role of a law maker, merely for an exhibition of judicial valour.¹³⁵ Courts have a very limited role and in exercise of that, it is not open to have judicial legislation.¹³⁶ The issue raised being a matter of policy, it was for the Legislature to take effective steps as the Court cannot legislate¹³⁷. Thus, it is contended that such an issue of direction goes against the rule of law enshrined in the Constitution and undermines the concept of separation of powers enshrined in the Constitution.

[[III.B.ii] Judicial Scrutiny Of The Matter Amounts To Injustice In The Light Of The Constitutional Assembly Debates

The Constituent Assembly Debates on Article 44 indicate that concerns were raised on behalf of the representatives of the Muslim community among other minorities that any attempt to create a Uniform Civil Code would end up enforcing a Hindu Code on the entire population. Responding to these concerns, Dr. B.R. Ambedkar, clarified that Article 44 should not be taken to suggest that a Uniform Civil Code would be made enforceable immediately and that any attempt to create such a code would be contingent on the views of the minorities.

The enactment of a uniform law shall be counter-productive to unity and integrity of a nation. There is no obligation on the State under Article 44 to carry out reforms at one go.¹³⁸ Hence, it is humbly submitted that the implementation of a Uniform Civil Code shall amount to violating the basic feature of secularism as well as the Fundamental Right to Religion of the citizens of India. The direction of the High Court in this case violates the basic structure of separation of powers and thus should not be upheld.

¹³⁵Common Cause (A Regd. Society) v. Union of India, (2008) 5 SCC 511.

¹³⁶V.K. Naswa v. Home Secretary, Union of India, (2012) 2 SCC 542.

¹³⁷Maharshi Avadesh v. Union of India, 1994 SCC, Supl. (1) 713.

¹³⁸State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

PRAYER

Wherefore, in light of the issues raised, arguments advanced, and authorities cited, may this Hon'ble Court be pleased to:

1. **SET ASIDE** the order of the High Court and declare that Section 377 of the Indian Penal Code is unconstitutional.
2. **SET ASIDE** the order of the High Court and declare that The Surrogacy (Regulation) Act, 2016 is unconstitutional and direct Ms. Radhika Ghosh to hand over custody of the child to Petitioner no. 1.
3. **SET ASIDE** the order of the High Court and declare that drafting and implementation of UCC u/a 44 is invalid.

AND/OR

Pass any other Order, Direction, or Relief that this Hon'ble Court may deem fit in the interests of justice, equity and good conscience.

For this act of Kindness, the Petitioners, as in duty bound, shall humbly pray.

Place:

Date:

Sd/-

(Counsel for the Petitioners)