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**2<sup>ND</sup> AMITY NATIONAL MOOT COURT COMPETITION, 2017**

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**BEFORE THE HON'BLE SUPREME COURT OF INDIA**

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**SPECIAL LEAVE PETITION**

**S.P.L. NO. \_\_\_/2017**

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

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**ABBEY.....PETITIONER NO. 1**

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

**v.**

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

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**BEFORE SUBMISSION TO HON'BLE CHIEF JUSTICE OF INDIA**

**AND HIS COMPANION JUSTICES OF**

**THE HON'BLE SUPREME COURT OF INDIA**

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**MEMORIAL ON BEHALF OF THE RESPONDENT**

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

<b>SCR</b>	<i>Supreme Court Reporter</i>
<b>Supp</b>	<i>Supplementary</i>
<b>u/a</b>	<i>Under Article</i>
<b>u/s</b>	<i>Under Section</i>
<b>UCC</b>	<i>Uniform Civil Code</i>
<b>UOI</b>	<i>Union of India</i>
<b>UP</b>	<i>Uttar Pradesh</i>
<b>v.</b>	<i>Versus</i>
<b>Vol</b>	<i>Volume</i>
<b>w.e.f.</b>	<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

20<sup>th</sup> 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 14<sup>th</sup> 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 CONSTITUTIONALLY VALID.**

*[I.A] Section 377 Does Not Violate Right To Equality U/A 14 And 15*

*[I.B] Section 377 Does Not Violate Article 21*

*[I.C] Section 377 Does Not Violate Article 19 Of The Constitution*

~ ISSUE II ~

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

*[II.A] The Surrogacy Act Does Not Violate Article 14 Of The Constitution*

*[II.B] The Surrogacy Act Does Not Violate Article 21 Of The Constitution, Hence*

*[II.C] Petitioner no.1 Should Not Get Custody Of The Child Born Through Surrogacy*

~ ISSUE III ~

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

*[III.A] UCC Does Not Infringe The Basic Feature Of 'Secularism' Guaranteed By The  
Constitution*

*[III.B] The Courts Have Jurisdiction To Issue Directions To The Union Parliament  
Regarding Implementation Of UCC*

## **SUMMARY OF ARGUMENTS**

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### **ISSUE I: WHETHER SECTION 377 OF IPC IS CONSTITUTIONALLY VALID**

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It is contended that Section 377 is constitutionally valid it does not violate any Fundamental Rights of the citizens. The classification of sexual acts based on whether they are in consonance with the ordinary course of nature or not is founded on an intelligible differentia and there is rational nexus between such classification and objective sought by the legislation. Further, Section 377 is not arbitrary as mere possibility of abuse of power does not render a legislation arbitrary. The state has compelling and legitimate interest in the form of maintaining public health, decency and morality by enforcing the provisions of Section 377. Secondly, it is contended that Section 377 does not violate one's Freedom of speech and expression u/a 19 as Article 19(2) permits imposition of restrictions in the interest of decency and morality. Lastly, Section 377 does not violate Article 21 as it qualifies the test of substantive due process and is in the interest of public health. It is also contended that Right to Privacy u/a 21 is not absolute and it may be curtailed by following due process, rendering Section 377 constitutional.

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

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It is contended that The Surrogacy (Regulation) Act, 2016 is constitutionally valid as it does not violate any fundamental rights of the citizens. The Act is based on classification which has been founded on an intelligible differentia and there is rational nexus between classification and objective sought. It protects one's Right to Life and liberty and is imperative to maintain public health by protecting women and surrogate children from the complications faced in surrogacy procedures. Based on the aforementioned contentions, it is subsequently contended that Petitioner no.1 must not receive custody of the child born through surrogacy in the present matter since the contract subsequently becomes void due to 'doctrine of frustration' provided u/s 56 of The Indian Contract Act, 1872.

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

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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 be upheld as the courts have jurisdiction to issue directions to the Union Parliament regarding drafting and introduction of the same in the interest of protecting fundamental rights of the citizens. UCC does not infringe the basic feature of secularism guaranteed by the Constitution of India. There is no necessary relation between religion and personal law and matters of secular nature cannot be brought within the guarantee provided u/a 25. Rather, implementation of UCC is essential to promote secularism in a nation like India where it is crucial for various religious groups to reside in a harmonious environment and absence of a unified code leads to numerous instances of violation of fundamental rights of the citizens.

## ARGUMENTS ADVANCED

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

It is contended that Section 377 of the Indian Penal Code<sup>1</sup> is constitutionally valid as [I.A] it does not violate Right to Equality u/a 14 and 15, [I.B] it does not violate Article 21, and [I.C] it does not violate Article 19 of the Constitution.

#### **[I.A] SECTION 377 DOES NOT VIOLATE RIGHT TO EQUALITY U/A 14 AND 15 OF THE CONSTITUTION**

It is contended that Section 377 of the IPC does not violate one's Right to Equality since [I.A.i] It does not violate Article 14 of the constitution, [I.A.ii] It does not violate Article 15 of the Constitution.

##### **[I.A.i] It Does Not Violate Article 14 Of The Constitution**

It is contended that Section 377 of the IPC does not violate Article 14 of the constitution as [I.A.i.a] the classification is founded on an intelligible differentia, [I.A.i.b] there is rational nexus between classification and objective sought, and [I.A.i.c] possibility of abuse of power does not render a legislation arbitrary.

##### **[I.A.i.a] The Classification Is Founded On An Intelligible Differentia**

Article 14 forbids class legislation; it does not forbid reasonable classification of persons by the Legislature for specific ends. Classification in such a case should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.<sup>2</sup>

Section 377 classifies acts based on whether they are in consonance with the ordinary course of nature or against it.<sup>3</sup> The section impugned includes the acts of carnal intercourse between man and man, man and woman and woman and woman.<sup>4</sup> The Supreme Court, in its recent judgement in the matter of *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors*<sup>5</sup>,

<sup>1</sup> Laws in Indica are para materia to laws in India.

<sup>2</sup> Laxmi Khandasari v. State of Uttar Pradesh, AIR 1981 SC 873.

<sup>3</sup> Naz Foundation v. Government of NCT of Delhi, 2010 Cri LJ 94.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.



held that those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.

It is contended that Section 377 is gender neutral and covers voluntary acts of carnal intercourse against the order of nature irrespective of the gender of the person committing the act. It does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence and merely talks about a particular mode of sexual activity, independent of the sex of people or sexual orientation.<sup>6</sup> Thus, Section 377 distinguishes sexual acts from unnatural sexual offences or carnal intercourse against the order of nature. It does not distinguish between procreative and non-procreative sex and it is contended this classification is reasonable.

**[I.A.i.b]There Is Rational Nexus Between Classification And Objective Sought**

It is contended that the law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience.<sup>7</sup> If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation.<sup>8</sup>

The objective behind Section 377 is to clearly demarcate sexual activities in consonance with the order of nature and differentiate them from activities against the order of nature, which is necessary in cases of allegation of child sexual abuse and for complementing lacunae in the rape laws.<sup>9</sup> The state looks to uphold public morality and decency and it is a compelling state interest in this matter. It is contended that deletion thereof would well open flood gates of delinquent behaviour. If Section 377 is struck down, there will be no way the State can prosecute any crime of non-consensual carnal intercourse against the order of nature or gross male indecency. Thus, there is rational nexus between classification and objective sought in the case of Section 377.

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<sup>6</sup>Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1, Mihir alias Bhikari Chauhan Sahu v. State, 1992 Cri LJ 488; *Re: Special Courts Bill, 1978* (1979) 1 SCC 380i.

<sup>7</sup>Ibid.

<sup>8</sup>MP JAIN, INDIAN CONSTITUTIONAL LAW, 917 (7<sup>th</sup> ed. 2015).

<sup>9</sup>Supra note 6.

**[I.A.i.c] Possibility Of Abuse Of Power Does Not Render A Legislation Arbitrary**

Arbitrariness on the possibility that a power may be abused, despite the guidelines, in the provisions providing for such power cannot be held to be arbitrary and unreasonable.<sup>10</sup> Classification is justified if it is not palpably arbitrary. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons shall be treated alike both in privileges conferred and liabilities imposed.<sup>11</sup>

The possibility of abuse of power by executive officials who are responsible for Section 377's implementation cannot be a valid ground to contest its constitutionality since the ill-treatment of homosexuals is neither mandated by the section nor condoned by it. Hence, it is contended that mere possibility of abuse of power by the responsible officials cannot be considered as a sufficient ground for holding Section 377 arbitrary.

**[I.A.ii] It Does Not Violate Article 15 Of The Constitution**

It is contended that Section 377 does not violate Article 15 of the Constitution of India as **[I.A.ii.a]** it is not disproportionate and discriminatory in its impact and **[I.A.ii.b]** there is compelling state interest involved.

**[I.A.ii.a] It Is Not Disproportionate And Discriminatory In Its Impact**

Section 377 is applied on complaints by victims and there are no instances of arbitrary use or application in situations where the terms of the section do not naturally extend to Section 377. In more than 150 years, less than 200 persons have been prosecuted for committing offence u/s 377 IPC and this should not be made a sound basis for declaring Section 377 ultra vires the constitution.<sup>12</sup> The ill-treatment of homosexuals is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police officials and others is not a reflection of the vires of the section.<sup>13</sup>

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<sup>10</sup> Commissioner of Central Excise Jamshedpur v. Dabur (India) Ltd., (2005) 3 SCC 646; Sushil Kumar Sharma v. Union of India and Ors. (2005) 6 SCC 281; Thangal Kunu Musaliar v. M. Venkatachalam Potti, Authorised Official and Income Tax Officer and Anr., (1956) 29 ITR 349 (SC); Budhan Choushary and Ors. V. State of Bihar, 1955 CriLJ 374; Mafatlal Industried Ltd. And Ors. V Union of India and Ors., 1997(89) ELT 247 (SC); Collector of Customs v. Nathella Sampathu Chetty 1983 ECR 2198D (SC); H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Meth (1954) 1 SCR 1005.

<sup>11</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

<sup>12</sup> Ibid.

<sup>13</sup> Supra note 11.

It is contended that the statistics remain wholly insufficient for recording a finding that Section 377 adversely affects control of HIV/AIDS amongst the homosexual community and that decriminalisation will reduce the number for such cases.

**[I.A.ii.b] There Is Compelling State Interest Involved**

The Supreme Court laid down in *Gobind v. State of M.P.*<sup>14</sup> 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.<sup>15</sup> In such a situation, the state interference must be justified and proportional.<sup>16</sup>

It is contended that homosexuality is considered against cultural norms of our society and hence Section 377 is crucial for maintaining public decency and morality.<sup>17</sup> It is further imperative to maintain public health in the general society since homosexual sexual activities constitute High-Risk Groups (HRGs) among population prone to HIV/AIDS. It is thus contended that since Section 377 is based on legitimate and compelling state interest, its retention is justified and more importantly, crucial.

**[I.B] IT DOES NOT VIOLATE RIGHT TO FREEDOM OF SPEECH AND  
EXPRESSION U/A 19**

It is contended that Article 19(2) provides a reasonable ground to impose restrictions on one's Freedom of Speech and Expression in the case of Section 377.

**[I.B.i] Article 19(2) expressly permits imposition of restrictions in the interest of decency  
and morality**

Article 19(2) provides that nothing shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions in the interests of the State, in matters of public order, decency or morality among other grounds.<sup>18</sup>

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<sup>14</sup> Govind v. State of M.P., AIR 1975 SC 1378.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1.

<sup>18</sup> Constitution of India is para materia to Constitution of India.

It is contended that the restrictions imposed by Section 377 are justified since it is in the interests of public decency and morality.

**[I.C.i.b] Public decency and morality**

The test of obscenity is whether the tendency of the matter charged as obscene is to deprive and corrupt those whose minds are open to such immoral influences.<sup>19</sup> It is necessary to see whether a class which comes into contact with such knowledge suffer in their moral outlook or might have impure or lecherous thoughts aroused in their minds.<sup>20</sup> The Supreme Court has further widened the scope of public decency and morality by saying that it is not confined to sexual morality alone and the ordinary dictionary meaning indicates that an action must be in conformity with the current standards of behaviour or propriety.<sup>21</sup>

In its 42<sup>nd</sup> Report, the Law Commission had recommended the retention of Section 377 because the societal disapproval thereof is strong. Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of the country.<sup>22</sup>

‘Order of nature’ has been defined as something pure, as distinguished from artificial and contrived.<sup>23</sup> Every organ of the human body has a particular function assigned by nature. If the organs are abused by virtue of usage for any reasons other than these functions assigned, it goes against nature. Decriminalisation of Section 377 would result in detrimental effects on India’s social structure and the institution of marriage. The legislature has treated carnal intercourse against the order of nature as an offence and thus the presumption of constitutionality is strong.

Further, it is imperative at this juncture to emphasise on the fact that social conditions as well as general intellectual levels are different in our nation and other Western nations and thus arguments which would be valid in respect of one area of the world may not hold good in another area.<sup>24</sup> The Supreme Court observed in *Jagmohan Singh v. State of U.P.*<sup>25</sup> that there remain grave doubts about the expediency of transplanting Western experience in our country and mere acceptance of a way of life in another nation cannot be the basis for change in our perceptions. Thus, in the context of India, Section 377 is crucial to maintain public decency

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<sup>19</sup> R v. Hicklin, L.R. 3 Q.B. 360; Ranjit D. Udeshi v. State of Maharashtra AIR 1965 SC 881.

<sup>20</sup> Chandrakant Kalyandas Kakodkar v. State of Maharashtra, AIR 1970 SC 1390.

<sup>21</sup> Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte, AIR 1996 SC 1113.

<sup>22</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

<sup>23</sup> De Armond v. State, Okl. Cr., 285 P.2d 236; Black’s Law dictionary (6<sup>th</sup> Ed., 1990).

<sup>24</sup> Law Commission of India, 35<sup>th</sup> Report 1967, p. 354.

<sup>25</sup> Jagmohan Singh v. State of U.P., (1973) 1 SCC 20.

and morality. It is contended that Section 377 is a justified interference by “public authorities in the interest of public safety and protection of health and morals”. The promotion of majoritarian sexual morality was a legitimate sexual interest<sup>26</sup> and the retention thereof is crucial to the interest of our nation.

### **[I.C.] SECTION 377 DOES NOT VIOLATE ARTICLE 21**

It is contended that Section 377 does not violate Article 21 of the Constitution of India as **[I.C.i]** it qualifies the test of substantive due process, **[I.C.ii]** it does not violate one’s Right to Privacy, and **[I.C.iii]** it is in the interest of public health.

#### **[I.C.i] Section 377 Qualifies The Test Of Substantive Due Process**

Article 21 provides that the right to life and liberty is subject to procedure prescribed by law.<sup>27</sup> The requirement of substantive due process has been read into the Constitution of India through a combined reading of Articles 14, 21 and 19 and it has been held as a test required to be satisfied while judging the constitutionality of a statute.<sup>28</sup> The due process requirement was laid down by the Supreme Court in the celebrated case of *Maneka Gandhi v. Union of India*<sup>29</sup> which states that apart from the prescription of some kind of procedure for curtailment of one’s right, the procedure must be just and reasonable. Further, it must satisfy the requirements of other provisions of the Constitution, like Articles 14 and 19.

Section 4 of the Code of Criminal Procedure Act, 1973 provides “*All offences under the Indian Penal Code(45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*” Thus, the CrPC prescribes a fair procedure before any person committing an offence u/s 377 IPC can be punished. Further, courts have come forward and held that “*In order to attract culpability u/s 377, it has to be established that: The accused had carnal intercourse with man, woman or animal, such intercourse was against the order of nature, the act of the accused was done voluntarily, and there was penetration.*”<sup>30</sup>

No uniform test can be culled out to classify acts as “carnal intercourse against the order of nature”<sup>31</sup> and yet a reasonable, just and fair procedure has been established for the

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<sup>26</sup>Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>27</sup>A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

<sup>28</sup>Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

<sup>29</sup>Maneka Gandhi v. Union of India, 1978 AIR 597.

<sup>30</sup>Calvin Francis v. Orissa 1992 (2) Crimes 455.

<sup>31</sup>Mihir alias Bhikari Charan Sahu v. State, Cri LJ 488.

implementation of Section 377. Further, as has already been discussed, Section 377 does not violate Article 14 or 19 which is a requirement under the test laid out in *Maneka Gandhi v. Union of India*.<sup>32</sup> Thus, it is contended that Section 377 follows a substantive due process that is reasonable and non-arbitrary and is thus not violative of one's Right to life and liberty.

**[I.C.ii] Section 377 does not violate one's Right to Privacy**

It is contended that Right to Privacy is not violated in the case of Section 377 as **[I.B.ii.a]** Right to Privacy is not absolute, and **[I.B.ii.b]** it can be curtailed by following due process of law.

**[I.C.ii.a] Right To Privacy Is Not Absolute**

The Constitution does not grant in specific and express terms any right to privacy as such.<sup>33</sup> It has merely been culled by the Supreme Court from Art. 21 and several other provisions of the Constitution read with the Directive Principles of State Policy.<sup>34</sup> The scope of the Right of Privacy, as also the permissible limits upon its exercise, have been laid down in the case of *Kharak Singh v. State of UP and others*<sup>35</sup> which held “*Our Constitution does not in terms confer any like constitutional guarantee.*”

In *Mr. X v. Hospital Z*,<sup>36</sup> it was held that Right to Privacy is not absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others. Nor does it include the right to commit any offence as defined u/s 377 or any other section. Thus, Right to Privacy is not absolute.

**[I.C.ii.b] It Can Be Curtailed By Following Due Process Of Law**

In *Govind v. State of Madhya Pradesh*,<sup>37</sup> the Supreme Court considered the constitutional validity of a regulation which provided for surveillance by way of several measures indicated in the said regulation. Further, it was held, “*right of privacy must be subject to restriction on the basis of compelling state interest.*”

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<sup>32</sup>Maneka Gandhi v. Union of India, 1978 AIR 597.

<sup>33</sup>MP JAIN, INDIAN CONSTITUTIONAL LAW, 1168 (7<sup>th</sup> ed. 2015).

<sup>34</sup>Ibid.

<sup>35</sup>Kharak Singh v. State of UP and others, (1964) 1 SCR 332.

<sup>36</sup>Mr. X v. Hospital Z, (1998) 8 SCC 296.

<sup>37</sup>Govind v. State of Madhya Pradesh, AIR 1975 SC 1378.

As has already been contended in the previous sub-issue, the state in this case has compelling interest in the form of ‘public morality and decency’. Further, Section 377 is in the interest of maintaining public health and preventing a widespread problem of HIV/AIDS. In light of this, it is contended that Section 377 does not violate one’s Right to Privacy since there is due process of law involved.

**[L.C.iii] Section 377 Is In The Interest Of Public Health**

National Aids Control Organisation (NACO) states that the groups identified to be at greater risk of acquiring and transmitting HIV infections due to a high level of risky behaviour and insufficient capacity of power for decision making to protect themselves from infection, generally described as ‘High Risk Groups’ (HRG), broadly include men who have sex with men (MSM)<sup>38</sup>, among others. HIV/AIDS is transmitted through the route of sex and specifically that of sex by men-with-men. Out of the estimated 5 million people living with HIV in Asia in 2007, 3,80,000 were those who had been newly affected. This significant increase was attributed, amongst others, to “unprotected sex” in which unprotected anal sex between men is stated to be a potential significant factor.<sup>39</sup>

Anal intercourse between two homosexuals is a high risk activity, which exposes both the participating individuals to the risk of HIV/AIDS, and this becomes even grave in case of a male bisexual having intercourse with a female partner who may not even be aware of the activity of her partner and is yet exposes to high risk of HIV/AIDS.<sup>40</sup>

The strategy for preventing further transmission of infection includes reinforcing the traditional Indian moral values of abstinence, delayed sexual debut till marriage and fidelity among youth and other impressionable groups of population.<sup>41</sup>

Section 377 helps in putting a brake in the spread of AIDS and if consensual same-sex acts between adults were to be decriminalised, it would erode the effect of public health services by fostering the spread of AIDS. Further, it is contended that Section 377 does not obstruct personality development of homosexuals or affects their self-esteem in any way because the observation is such a case is solely based on reports prepared by academicians and such reports cannot be relied upon to declare any legislation violative of one’s fundamental

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<sup>38</sup>National AIDS Control Organisation, Annual Report 2011-12, page 9.

<sup>39</sup>UN Report on Global AIDS Epidemic, 2008, pp 47-50.

<sup>40</sup>National AIDS Control Organisation, Annual Report 2014-15.

<sup>41</sup>WRIT PETITION (CIVIL) NO.7455 OF 2001, Reply Affidavit on Behalf of Respondents 4 and 5.

rights.<sup>42</sup> Thus, Section 377 is crucial for maintenance of decent public health standards in our nation.

Based on the above contentions, it is hence humbly submitted that Section 377 is not violative of any fundamental rights conferred upon the citizens of India and its constitutionality must be upheld.

**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 valid as **[II.A]** it does not violate Article 14 of the Constitution, **[II.B]** it does not violate Article 21 of the Constitution, and hence **[II.C]** Abbey (hereinafter referred to as Petitioner no.1) should not get custody of the child born through surrogacy.

**[II.A] THE SURROGACY ACT DOES NOT VIOLATE ARTICLE 14 OF THE  
CONSTITUTION**

Article 14 of the Constitution of India<sup>43</sup> guarantees one's Right to Equality which is a necessary corollary of Rule of Law which pervades the Constitution.<sup>44</sup> However, equal protection of the laws does not postulate equal treatment of all persons without distinction. It denotes equality of treatment only in equal circumstances<sup>45</sup>. It is contended that The Surrogacy Act does not violate Article 14 of the constitution as **[II.A.i]** the classification is founded on an intelligible differentia, and **[II.A.ii]** there is rational nexus between classification and objective sought.

**[II.A.i] The Classification Is Founded On An Intelligible Differentia**

Article 14 allows reasonable classification when it is based on real and substantial distinction based on intelligible differentia.<sup>46</sup>

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<sup>42</sup>Southern Petrochemical Industries v. Electricity Inspector, (2007) 5 SCC 447; Tamil Nadu Electricity Board v. Status Spinning Mills, (2008) 7 SCC 353; Seema Silk and Sarees v. Directorate of Enforcement, (2008) 5 SCC 580.

<sup>43</sup>Constitution of India is para materia to the Constitution of India.

<sup>44</sup>Ashutosh Gupta v. State of Rajasthan, AIR 2002 SC 1533.

<sup>45</sup>Jagannath Prasad v. State of Uttar Pradesh, AIR 1961 SC 1245; Mohd. Shaheb Mahboob v. Dy. Custodian, AIR 1961 SC 1657.

<sup>46</sup>State of Haryana v. Jai Singh, (2003) 9 SCC 114; Welfare Association, ARP v. Ranjit P. Gohil, (2003) 9 SCC 358.



In the present matter, the Act classifies persons on the basis of their marital status, nationality and sexual orientation<sup>47</sup>. Secondly, the Act specifies the categories of women who can act as the surrogate mother.<sup>48</sup> Lastly, it differentiates between altruistic and commercial surrogacy.<sup>49</sup> It is contended that these bases for classification are not artificial, evasive or arbitrary.

It is relevant to note that Florida Gestational Surrogacy Statutes<sup>50</sup> impose strict requirements on the contracts, among them limiting involvement to “*couples that are legally married, which prevents same-sex from being allowed to use surrogacy as they are not legally married.*” Similarly, the Embryo Carrying Agreement Act, 1996 in Israel allows only heterosexual couples to enter into an agreement with the surrogate mother.

It is contended that the classification between married heterosexual couples and homosexual couples is not artificial as there is no present legislation that recognises conjugal rights of a homosexual couple in Indica<sup>51</sup>, as opposed to the availability of conjugal rights for the former<sup>52</sup>. It is inferred from the following fact that the status of homosexual couples in Indica is not at the same footing as legally married couples and their standing in the society differs. Further, Section 2(r) of The Surrogacy Act provides that an “intending couple” must be a medically certified infertile couple intending to become parents through surrogacy and “infertility” means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception.<sup>53</sup> It is contended that this classification for intending couples is purely medical for the purposes of the technicalities of surrogacy and is not based on one’s sexual orientation.

It is contended that the classification of surrogacy into altruistic and commercial is necessary in order to reduce the instances of exploitation of women by financial means and violation of their fundamental rights. Thus, the classification sought by The Surrogacy Act is contended to be reasonable and non-arbitrary.

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<sup>47</sup>Section 2(g) of The Surrogacy (Regulation) Act, 2016.

<sup>48</sup>Section 2(ze) of The Surrogacy (Regulation) Act, 2016.

<sup>49</sup>Section 3(ii) of The Surrogacy (Regulation) Act, 2016.

<sup>50</sup>Florida Statute 63.212(1)(i) and Florida Statute 742.15.

<sup>51</sup>Laws of Indica are para materia to the Laws of India.

<sup>52</sup>Hindu Marriage Act, 1955, No.25, Acts of Parliament, 1955; Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954.

<sup>53</sup>Section 2(p) of The Surrogacy Act, 2016.

**[(II.A.ii) There Is Rational Nexus Between Classification And Objective Sought**

The requirement of a rational nexus between classification and objective sought has been put forth by the courts in various cases.<sup>54</sup> 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.<sup>55</sup>

The 228<sup>th</sup> Law Commission Report suggested that active legislative intervention was required to facilitate correct uses of the new technology i.e. Assisted Reproductive Technology (ART) and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour was to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.<sup>56</sup>

Most women who get involved as surrogates do so because they are in need of money and are often unaware of their legal rights and due to their financial situation they cannot afford the services of lawyers, as is the case in the present matter with the surrogate mother, Radhika Ghosh.<sup>57</sup> Further, surrogates are physically exploited once they have signed contracts agreeing to give birth to babies for clients. The contracts can also place liability on the mother for risks including pregnancy-induced diseases, death and post-partum complications.<sup>58</sup>

Further, it is contended that the classification between homosexual and heterosexual couples is necessary in order to protect the rights of the child born through surrogacy. It is a requirement of the United Kingdom's 'Human Fertilisation and Embryology Act, 1990' that the welfare of any child born as a result of surrogacy treatment and of any existing children must at all times be taken into consideration.<sup>59</sup> The lack of legislation and recognition of the rights of a homosexual couple brings forth grave doubts about issues related to custody, upbringing and stability in the life of the surrogate baby. The case of *Baby Manji Yamada v. Union of India*<sup>60</sup> concerning custody of a child relevant in this case. Similarly, in *Jaycee B. v. Superior Court*<sup>61</sup>, the surrogate child did not have a legal battle for three years due to anonymity of donors.

<sup>54</sup>Javed v. State of Haryana, (2003) 8 SCC 369; State of Haryana v. Jai Singh, (2003) 9 SCC 114.

<sup>55</sup>Statement of Objects and Reasons: The Surrogacy (Regulation) Bill, 2016.

<sup>56</sup>Law Commission of India, 228<sup>th</sup> Report 2009, p. 24.

<sup>57</sup>Andrew Kimbrell on Surrogacy [Feb 14, 2017, 11:05 AM]  
<http://www.andrewkimbrell.org/andrewkimbrell/doc/surrogacy.pdf>.

<sup>58</sup>Surrogate Motherhood-Ethical or Commercial, Centre for Social Research (CSR) [Jan. 29, 2017, 10:04 AM], <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>.

<sup>59</sup>Section 34(2)(b), Human Fertilisation and Embryology Act, 1990.

<sup>60</sup>*Baby Manji Yamada v. Union of India*, JT 2008 (11) SC 150.

<sup>61</sup>*Jaycee B. v. Superior Court*, 42 Cal.App.4Th 718 (1996).

It is contended that the issues regarding the child's right become complicated when the intended parents are a homosexual couple and this goes against the state's interest to protect the right to dignity of individuals.

**II.B] THE SURROGACY ACT DOES NOT VIOLATE ARTICLE 21 OF THE  
CONSTITUTION**

It is contended before this Hon'ble Court that the Surrogacy Act, 2016 does not violate Article 21 as [II.A.i] it does not violate one's Right to Life and liberty, [II.A.ii] it does not violate one's Right to Privacy, and [II.C.iii] it protects one's Right to health.

**II.C.i] It Does Not Violate One's Right To Life And Liberty**

It is contended that The Surrogacy Act does not violate one's Right to Life and liberty since it lays down a due process to implement its objectives that is reasonable and imperative in the light of compelling state interest<sup>62</sup>.

The Law Commission, in its 228<sup>th</sup> Report, recommended the prohibition of commercial surrogacy citing the reason that the practice of surrogacy has been misused by surrogacy clinics, which leads to rampant commercial surrogacy and unethical practices.<sup>63</sup> There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos as well as gametes.<sup>64</sup> Further, the Report also raised the criticism that surrogacy leads to commodisation of the child, breaks the bond between the mother and child, and leads to exploitation of poor women in underdeveloped nations who sell their body for money.<sup>65</sup> Commercial surrogacy has only become a means to aid poor women financially by renting their womb.<sup>66</sup> For example, in the present case, Radhika Ghosh, the surrogate mother was an illiterate woman with a poor family background who was compelled into the commercial surrogacy by her own family.<sup>67</sup>

In the famous *Baby M case*<sup>68</sup>, the New Jersey Supreme Court came to the conclusion that surrogacy contract is against public policy. The surrogate parenting contracts in New York

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<sup>62</sup>Maneka Gandhi v. Union of India, 1978 AIR 597.

<sup>63</sup>Law Commission of India, 228<sup>th</sup> Report 2009, p. 24.

<sup>64</sup>Statement of Objects and Reasons, The Surrogacy (Regulation) Bill, 2016.

<sup>65</sup>Law Commission of India, 228<sup>th</sup> Report 2009, p. 11.

<sup>66</sup>Background of Moot Proposition ¶4.

<sup>67</sup>Moot Proposition, ¶6.

<sup>68</sup>*In re Baby M*, 537 A.2d 1227.

have also been seen as void, unenforceable and contrary to public policy<sup>69</sup> and provides civil penalties for those who participate or facilitate commercial surrogacy. Thus, it is contended that the provisions of The Surrogacy Act are crucial to maintain good health and dignity of both surrogate mothers and babies.

**[II.B.ii] It Does Not Violate One's Right to Privacy**

Article 21 guarantees right to life and personal liberty which encompasses right to privacy but right to privacy is not absolute and is subject to restrictions on the basis of public interest.<sup>70</sup> It is subject to restriction by the state to promote compelling interest of the state<sup>71</sup>.

It is contended that compelling state interest has already been proved in the preceding sections. The Act prohibits commercial surrogacy and provides certain specifications for the process which is in the interest of the surrogate mothers and the children born out of surrogacy process. This is imperative in the light of protection of their Right to Health as well as liberty. The Act thus does not violate right to privacy as the right in question is subject to restrictions in the interest of public.

**[II.B.iii] It Protects One's Right To Health**

Article 21 guarantees life and personal liberty and there are many rights which are comprehended under Article 21, one of which is one's 'Right to health'.<sup>72</sup> The preamble of World Health Organisation (WHO) states that, it is one of the fundamental rights of every human being to enjoy the highest attainable standard of health. The term "health" encompasses within its ambit women's right to reproductive health. In the case of *Roe v. Wade*<sup>73</sup>, the U.S. Supreme Court held the protection of health of the women to be 'a compelling interest to the State'.

In the process of surrogacy, there is the impending possibility of intense physiological and physiological changes which have a negative impact on the health of surrogate mothers.<sup>74</sup> In the US, surrogates are given no more than two embryos for their safety, whereas in India, surrogates are implanted with up to five embryos in order to increase the chances of pregnancy. Further, pregnancy, birth and the post-partum period includes complications such as pre-eclampsia and eclampsia, urinary tract infections, stress incontinence, haemorrhoids,

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<sup>69</sup>New York Code, Article 8, Section 122.

<sup>70</sup>Govind v. State of Madhya Pradesh, AIR 1975 SC 1378.

<sup>71</sup>B.K. Parthasarathi vs Government Of A.P. And Others, 2000 (1) ALD 199.

<sup>72</sup>Keshavnanda Bharti v. State of Kerela ,(1973) 4 SCC 225.

<sup>73</sup>Roe v. Wade, 410 U.S. 113 (1973).

<sup>74</sup><http://www.nomaternitytraffic.eu/wordpress/wp-content/uploads/2015/09/2015-Contribution-HCCH-No-Maternity-Traffic-EN.pdf>.

gestational diabetes, life-threatening haemorrhage and pulmonary embolism. A surrogate host of advanced maternal age has increased risk of perinatal mortality, perinatal death, intrauterine foetal death and neonatal death.<sup>75</sup> There is a greater risk to the mother of pregnancy induced hypertension, stroke and placental abruption.<sup>76</sup> Induced lactation in most surrogates or adopting mothers presents a problem in terms of infant nutrition as well.<sup>77</sup>

It has been held that the right to health is an integral factor of a meaningful right to life,<sup>78</sup> and there is a crying need in India that reproductive rights of women be protected for the current trend is not only dismissal but also worrisome. It is estimated that about 33 percent of all women in India are malnourished, and 52 percent are anaemic; and nearly 21 percent of all pregnancies in India are either unwanted or mistimed.<sup>79</sup>

The Act bans commercial surrogacy and lays down specifications such as age barrier of surrogate mother<sup>80</sup>, limitation on number of children she may bear<sup>81</sup>, requirement of genetic relation to surrogate parents<sup>82</sup>, among others. It is contended that these provisions are important to maintain the health of surrogate mothers and babies. Thus, The Surrogacy Act protects their Right to Health u/a 21 of the Constitution.<sup>83</sup>

### **III.C] PETITIONER NO.1 MUST NOT GET CUSTODY OF THE CHILD BORN THROUGH SURROGACY**

It is contended that Petitioner no.1 must not get custody of the child born through surrogacy since the contract subsequently becomes void due to ‘doctrine of frustration’.

<sup>75</sup> Kevin T, *The ethics of surrogacy contracts and nebraska's surrogacy law*, Vol. 41. Creighton Law Review, 2008. p. 185-206.

<sup>76</sup> Jacobsson B, Ladfors L, Milsom I, *Advanced maternal age and adverse perinatal outcome*, *Obstet Gynecol*, 2004;104:727-33.

<sup>77</sup> Van den Akker OB, *Psychological trait and state characteristics, social support and attitudes to the surrogate pregnancy and baby*, *Hum Reprod* 2007;22:2287-95.

<sup>78</sup> *Consumer Education and Research Center v. Union of India*, (1995) 3 SCC 42.

<sup>79</sup> Shivam Goel, *Curious case of “Reproductive Rights” : Indian and International Perspective* (Jan. 19, 2017, 02:04 AM),

[http://www.academia.edu/14736581/Curious\\_Case\\_of\\_Reproductive\\_Rights\\_Indian\\_and\\_International\\_Perspective](http://www.academia.edu/14736581/Curious_Case_of_Reproductive_Rights_Indian_and_International_Perspective).

<sup>80</sup> Surrogacy (Regulation Act), 2016

<sup>81</sup> Ibid.

<sup>82</sup> Supra note 81.

<sup>83</sup> Para materia to constitution of India.

**[[III.C.i] The Contract Subsequently Becomes Void Due To ‘Doctrine Of Frustration’**

The doctrine of frustration of the contract is provided for in Section 56 of the Indian Contract Act, 1872<sup>84</sup>. Section 56 lays down the effect of subsequent impossibility of performance wherein the subsequent happening of an event renders the performance of an act unlawful. In this case, the contract becomes void.<sup>85</sup> A contract is dissolved when legislative or administrative intervention has so directly operated upon the fulfilment of the contract for a specific work as to transform the contemplated conditions of performance.<sup>86</sup> Where the intervention makes the performance unlawful, the courts will have no choice but to put an end to the contract.<sup>87</sup> In the present matter, it is contended that the fulfilment of the contract has not taken place yet since the custody of the child has not been handed over to the surrogate parents.<sup>88</sup>

In the present matter, Petitioner no.1 and his homosexual partner, Aldo, signed an agreement with the Agency offering surrogacy to homosexual couples. The parties agreed and the document was signed with the consideration being Rs. 10 lakhs on 10 January 2016.<sup>89</sup> The contract was for commercial surrogacy to be carried out between an Agency and a homosexual couple in a live-in relationship<sup>90</sup>. The Surrogacy Act, 2016 seeks a ban on both commercial surrogacy<sup>91</sup> as well as homosexuals and live-in couples opting for surrogacy.<sup>92</sup> Thus, the contract becomes void by the subsequent impossibility of performance by legislative intervention in this case. It is thus contended that by applying the doctrine of frustration in the present case, the custody of the child may not be given to Petitioner no.1 and his partner since the contract become void by the provisions of The Surrogacy (Regulation) Act, 2016.

In the light of the above contentions, it is humbly submitted that The Surrogacy (Regulation) Act, 2016 is unconstitutional by virtue of being violative of Articles 14 and 21 of the Constitution.

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<sup>84</sup>Laws of Indica are analogous to laws in India 2017 (Moot proposition notes 2)

<sup>85</sup>Avtar Singh, Law of Contract and Specific Relief 148 (5<sup>th</sup> ed. 2015).

<sup>86</sup>STC v. Union of India, 1994 Supp (3) SCC 40; Rose Valley Real Estate & Construction Co v. United Commercial Bank, AIR 2008 Gau 38.

<sup>87</sup>Boothalinga Agencies v. V.T.C. Poriaswami Nadar, AIR 1969 SC 110.

<sup>88</sup> Moot proposition ¶6.

<sup>89</sup>Moot proposition ¶5.

<sup>90</sup>Moot proposition ¶5.

<sup>91</sup>The Surrogacy (Regulation) Act, 2016.

<sup>92</sup>Section 2(g) of The Surrogacy(Regulation) Act 2016.

**ISSUE III: WHETHER THE DIRECTION GIVEN BY HIGH COURT REGARDING DRAFTING AND IMPLEMENTATION 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 be upheld as [III.A] UCC does not infringe the basic feature of 'Secularism' guaranteed by the Constitution and [III.B] The Courts have jurisdiction to issue directions to the Union Parliament regarding implementation of UCC.

**[III.A] UCC DOES NOT INFRINGE THE BASIC FEATURE OF 'SECULARISM' GUARANTEED BY THE CONSTITUTION**

It is contended that the provision of Article 44 to secure for the citizens a uniform civil code does not infringe the basic structure of secularism guaranteed by the Constitution as [III.A.i] there is no necessary relation between religion and personal law, and [III.A.ii] matters of secular nature cannot be brought within the guarantee enshrined in Article 25, and [III.A.iii] Implementation of UCC will promote secularism instead of infringing it.

**[III.A.i] There Is No Necessary Relation Between Religion And Personal Laws**

Article 25 guarantees freedom of conscience, profession, practice and propagation of religion. In order, however, that a practice should be treated as a part of a religion, it is necessary that it be regarded by the said religion as an essential and integral part. This caution is necessary because otherwise even purely secular practices, not essential to religion, will be clothed with religious sanction.<sup>93</sup>

The basic concept which exists in a secular state is that there is no essential or necessary connection between religion and personal law.<sup>94</sup> The objective of implementing Art. 44 is to effect national integration by bringing about a collusion of all communities, thereby creating a common national conscience, law will be used to unite people of different communities<sup>95</sup>. Further, personal law systems have always been manipulated to preserve traditional male privileges, since they existed at a time where there existed no equality between man and women. Thus, all personal systems, whether based on Muslim, Jewish or

<sup>93</sup>MP JAIN, INDIAN CONSTITUTIONAL LAW, 1431 (7<sup>th</sup> ed. 2015).

<sup>94</sup>Ibid.

<sup>95</sup>Ms. Jordan Diengdeh v. S.S. Chopra, AIR 1985 SC 935.

Hindu Laws, constructed through readings of sacred texts and traditions have come to discriminate heavily against women.<sup>96</sup>

The High Court of Kerala has held in the case of *Haseena Mansoor v. State of Kerala*<sup>97</sup> that if any personal law is contrary to principle of equality enshrined in Art. 14 and 15(1) of the Constitution, especially when it involves discrimination on the bases of sex, then it must face the wrath of Art. 13 of the Constitution.

It is contended that it is the duty of the legislators to take positive steps in bringing an end to this tyranny on the minority which is brought about by inequitable personal laws, and establishing a Uniform Civil Code as enshrined u/a 44 of the constitution.<sup>98</sup>

**III.A.ii) Matters Of Secular Nature Cannot Be Brought Within The Guarantee Enshrined In Arts. 25, 26 And 27**

The objection taken to the provision of UCC in the Constituent Assembly by Muslim members who apprehended that their freedom of religion and personal law might be abrogated was met by pointing out that secular activities such as inheritance and maintenance should be separated from religion and a uniform law applicable to all would promote national unity<sup>99</sup>

The guarantee of a person to the “freedom of conscience” and “right to freely profess, practice and propagate religion” is subject to public order, health, morality, and other provisions relating to Fundamental Rights.<sup>100</sup> The state is not prevented from making any law regulating or restricting any economic, political or other secular activity which may be associated with religious practice<sup>101</sup>, or any law providing for social welfare and reform.<sup>102</sup>

It is contended that the right to practice and profess one’s religion guaranteed under Art. 25 of the constitution is not absolute, rather is subject to proviso 2(a) of the same Article which states that, any law or activity done by the state in respect to a ‘secular activity’ will not result violation of Art. 25<sup>103</sup>. Rather laws regulating certain aspects of a religion can be made

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<sup>96</sup>Yuksel Sezgin, *Religious and Legal Pluralism in Global Comparative Perspective: Women's Rights In the Triangle Of State, Law, And Religion: A Comparison Of Egypt And India*, (2011), Emory International Law Review.

<sup>97</sup>*Haseena Mansoor v. State of Kerala*, ILR (2010) 2 Ker 891.

<sup>98</sup>*John Vallamattom v. Union of India*, AIR 2003 SC 2902.

<sup>99</sup>VII CAD 540-2

<sup>100</sup>MP JAIN, *INDIAN CONSTITUTIONAL LAW*, 1246 (7<sup>th</sup> ed. 2015).

<sup>101</sup>INDIA CONST.Article 25(2)(a).

<sup>102</sup>INDIA CONST.Article 25(2)(b).

<sup>103</sup>*Acharya Jagdishwaranand Avadhut v. Commissioner of Police, Calcutta* (1984) 4 SCC 522.



keeping in mind public order, morality and health.<sup>104</sup> Also, the laws relating to marriage, divorce, succession etc. have been held to be part of ‘secular activities’ and hence state regulation over them may be justified.<sup>105</sup> It is up to the Courts to decide<sup>106</sup>, on the basis of evidence adduced before them concerning the conscience of the community and the tenets of the religion concerned<sup>107</sup>, whether a practice for which protection is claimed is religious in character or not and if so, whether it is an essential and integral part of the said religion, it is merely ‘secular’ or ‘superstitious’ in nature.<sup>108</sup> Thus, it is contended that personal laws pertain to secular activities and hence fall within the regulatory power of the state.

**[III.A.iii] Implementation Of UCC Will Promote Secularism Instead Of Infringing It**  
In *S.R. Bommai v. Union of India*<sup>109</sup>, a nine-judge bench of this Hon’ble Court referred to the concept of secularism in the context of Indica and held it as an essential part of our Constitution. Thus, secularism is not merely a passive attitude of religious tolerance, it is also a positive concept of equal treatment of all religions. It does not denote irreligion.

The urgent and dire need of establishing a Uniform Civil Code in the nation has been reiterated by the Court in numerous cases. It is necessary that law be divorced from religion. With the enactment of a uniform code, secularism will be strengthened; much of the present day separation between religious groups will disappear and Indica will emerge as a much more cohesive and integrated nation.<sup>110</sup>

In the absence of general laws regarding matrimony, divorce, maintenance, the Court has pleaded for a uniform civil code “for protection of the oppressed and promotion of national unity and solidarity.”<sup>111</sup> Rather, it has been urged by this Hon’ble Court time and again that “*A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.*”<sup>112</sup> In the context of *Sarla Mudgal v. Union of India*<sup>113</sup> and similar cases where Hindus converted to Islam only to escape the consequences of bigamy, the Court pleases for a uniform civil code for “*protection of the oppressed and promotion of national unity and solidarity.*”

<sup>104</sup>Police v. Acharya Jagadishwarananda, AIR 2004 SC 2984.

<sup>105</sup>Prakash and Ors. v. Phulavati and Ors., ILC 2015 SC (Civil).

<sup>106</sup>Tilakayat Shri Govind Maharaj v. State of Rajasthan, AIR 1963 SC 1638.

<sup>107</sup>Sarup v. State of Punjab, AIR 1959 SC 860 (866).

<sup>108</sup>Commissioner, Hindu Religious Endowments v. Lakshmindra Swamiar, AIR 1955 SC 282.

<sup>109</sup> S.R. Bommai v. Union of India, AIR 1994 SC 1918.

<sup>110</sup>MP JAIN, INDIAN CONSTITUTIONAL LAW, 1431 (7<sup>th</sup> ed. 2015).

<sup>111</sup>Lily Thomas v. Union of India, (2000) 6 SCC 224.

<sup>112</sup>Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945

<sup>113</sup>Sarla Mudgal v. Union of India, AIR 1995 SC 1531.

The piecemeal attempts by the Courts to bridge the gap between personal laws in cases such as *Daniel Latifi v. Union of India*<sup>114</sup>, *Lily Thomas v. Union of India*<sup>115</sup> and *Sarla Mudgal*<sup>116</sup> cannot take the place of a uniform civil code. It is contended that these problems can be eliminated only if a law is made in conformity with the present day social and economic realities.<sup>117</sup> It is thus contended that the implementation will promote rather than infringe secularism in our nation and will help the cause of national integration by removing contradictions based on ideologies.<sup>118</sup>

Taking into consideration all the above contentions, it is thus humbly submitted that a uniform civil code is of utmost importance and thus the direction of the High Court to the Parliament regarding the same is constitutionally valid and should be upheld.

### **[III.B] THE COURTS HAVE JURISDICTION TO ISSUE DIRECTIONS REGARDING IMPLEMENTATION OF UCC**

The Directive Principles enumerated in Part IV of the Constitution aim at creating an egalitarian society whose citizens are free from the abject conditions that had hitherto prevented them from fulfilling their best selves.<sup>119</sup> It is contended that The Supreme Court can direct the appropriate authority to work out a broad framework for the effective implementation of a certain matter that has been reiterated by it time and again in the interest of public.<sup>120</sup>

Numerous petitions have been filed in cases involving violation of rights of women and other members of the society by the implementation of arbitrary and archaic Personal Laws and the court have continuously tried to restore the rights infringed in such cases. The Courts have also stressed on the dire need to implement UCC at the earliest in most cases.<sup>121</sup> However, it is contended that it becomes difficult for the courts to tackle any huge problem in the absence of a valid law. Without a proper statutory framework, it becomes impossible for the Courts to

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<sup>114</sup>Daniel Laifi v. Union of India, AIR 2001 SC 3958.

<sup>115</sup> Supra note 111.

<sup>116</sup> Supra note 116.

<sup>117</sup>MP JAIN, INDIAN CONSTITUTIONAL LAW, 1432 (7<sup>th</sup> ed. 2015).

<sup>118</sup>John Vallamattom v. Union of India (2003) 6 SCC 611.

<sup>119</sup>J. K.G.Balakrishnan, Constitutional Control Praxis in the Present day, 15<sup>th</sup> August 2008.

<sup>120</sup>Laxmi Narain Modi v. Union of India, (2013) 10 SCC 227.

<sup>121</sup>Sarla Mudgal v. Union of India, (1995) 3 SCC 635 ;Lily Thomas v. Union of India, (2000) 6 SCC 224.

regulate various disputes. Thus, structured regulation and legislation is urgently required to control and regulate fundamental rights of the individuals in Indica.<sup>122</sup>

Legislations such as ‘The Hindu Marriage Act, 1955’, ‘The Hindu Adoptions and Maintenance Act, 1956’, ‘The Hindu Succession Act, 1956’, ‘Dissolution of Muslim Marriages Act, 1939’, ‘Special Marriages Act, 1954’<sup>123</sup>, etc. point to a clear attempt made by the Legislature to regulate marriage, divorce, succession and other aspects of various religious communities in our nation.

However, it is contended that the nature of the problem defies a proper solution by this court by any judicially manageable standards. The Court in *Gainda Ram and ors. v. MCD and ors.*<sup>124</sup> in the matter of the Delhi hawkers’ case, disposed of the writ petition and directed that within a specified time, the appropriate government should legislate and bring out the law to regulate hawker’s and fundamental rights. The Court held that it gave the direction in exercise of its jurisdiction to protect the fundamental rights of the citizens.<sup>125</sup>

It is contended that the question of a unified civil code of conduct is vitally important to a large section of people and such an issue cannot be left to be decided by schemes and judgements which are monitored by the Court only from time to time. The fundamental right of certain sections of individuals, just because they belong to a particular religion or gender, cannot be left in a state of limbo nor can they be left to be decided by the varying standards of personal law which changes from time to time under orders of the Court.<sup>126</sup>

In light of the above contentions, it is submitted that the drafting and implementation of a Uniform Civil Code is crucial to uphold the basic feature of secularism among the citizens of our nation and the court, by virtue of its jurisdiction to protect the fundamental rights of the citizens of Indica and its responsibility to do complete justice, must direct the Parliament to consider the same.

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<sup>122</sup>Gainda Ram v. MCD, (2010) 10 SC 715.

<sup>123</sup>Laws of Indica are para materia to the Laws of India.

<sup>124</sup>Gainda Ram v. MCD, (2010) 10 SC 715.

<sup>125</sup>Ibid.

<sup>126</sup>Ibid.

**PRAYER**

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

1. **UPHOLD** *the order of the High Court declaring Section 377 as constitutional.*
2. **UPHOLD** *the order of the High Court declaring The Surrogacy (Regulation\_) Act, 2016 as constitutional and hold that the contract is frustrated.*
3. **UPHOLD** *the direction of the High Court regarding drafting and implementation of a Uniform Civil Code.*

**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 Respondent, as in duty bound, shall humbly pray.*

Place:

Date:

Sd/-

(Counsel for the Respondent)