TEAM CODE: M133R

2ND AMITY NATIONAL MOOT COURT COMPETITION, 2017

IN THE HON'BLE SUPREME COURT

OF THE DEMOCRATIC REPUBLIC OF INDICA

AT INDICA

SPECIAL LEAVE PETITION NO.**/2017, SPECIAL LEAVE PETITION NO.****/2017,**

UNDER ARTICLE 136 OF THE CONSTITUTION OF INDICA, 1950

CASE CONCERNING IMPLEMENTATION OF UNIFORM CIVIL CODE, CONSTITUTIONAL VALIDITY OF SECTION 377, INDIAN PENAL CODE AND SURROGACY ACT, 2016.

IN THE CLUBBED MATTERS OF

1. **ABBEY**
2. **ALL INDIA MUSLIM PERSONAL LAW BOARD..PETITIONERS**

v.

1. **STATE OF JANAKPUR**
2. **UNION OF INDICA ....RESPONDENT**

MEMORIAL ON BEHALF OF RESPONDENTS

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LIST OF ABBREVIATIONS

&	And
§	Section
AIMPLB	All India Muslim Personal Law Board
AIR	All India Reporter
Anr.	Another
A.P	Andhra Pradesh
Govt.	Government
ICCPR	International Covenant on Civil and Political Rights
IPC	Indian Penal Code
Ltd.	Limited
Ors.	Others
P.	Page
SCC	Supreme Court Cases
SC	Supreme Court
SLP	Special Leave Petition
U.P.	Uttar Pradesh
Vol.	Volume
v.	Versus
W.B.	West Bengal

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STATEMENT OF JURISDICTION

THE RESPONDENTS HAVE THE HONOUR TO SUBMIT BEFORE THE HON'BLE SUPREME COURT OF INDICA, THE MEMORANDUM FOR THE APPELLANT UNDER ARTICLE 136 (SPECIAL LEAVE PETITION) OF THE CONSTITUTION OF INDIA, 1950.

THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE.

STATEMENT OF FACTS

The material case arises out of a Special Leave Petition filed by Abbey and the All Indica Muslim Personal Law Board against the State of Janakpur before the Supreme Court of Indica to prevent implementation of Uniform Civil Court as well as to strike down Section 377, IPC and The Surrogacy Act, 2016.

I. BACKGROUND:

Indica is a secular country having diverse religions. The state does not own loyalty to any particular religion and gives its citizens the freedom to practice their religion. Several cases arose in the state involving the implementation of a Uniform Civil Code.

II. IMPLEMENTATION OF UNIFORM CIVIL CODE:

The first case involved a Muslim couple Aslam Khan and Nazia Yusuf where the wife was not being provided adequate maintenance by the husband on divorce. She filed a suit in the court of Chief Judicial Magistrate which ordered for maintenance of Rs. 6000 per month, aggrieved by which she with the help of an NGO 'JAN KALYAN' filed a writ petition in the High court of Janakpur for enhancement of maintenance. 'JAN KALYAN' filed another petition in the the High court of Janakpur in a case involving a Hindu married couple Ranvijay Kapoor and Sunita Mehra, where the husband in order to circumvent the law against bigamy converted his religion to Muslim. 'JAN KALYAN' clubbed both the issues and claimed that Uniform Civil Code should be made and implemented throughout the country.

III. PASSING OF THE SURROGACY ACT, 2016:

In the meantime another case involving the issue of surrogacy done by homosexuals came up involving a Christian homosexual couple, Abbey and Aldo who underwent the procedure of surrogacy to start a family but were denied the custody of the baby, which was given birth by the surrogate mother Radhika Ghosh, by the passing of The Surrogacy Act, 2016 which placed a ban on homosexuals and live-in couples from opting for surrogacy. The dispute was brought in front of the High court of Janakpur.

IV. VERDICT OF THE HIGH COURT:

After hearing the matter the High court of Janakpur held homosexuality to be an offence under section 377 of IPC and that homosexuals does not have any right over the child born banning commercial surrogacy. The court also directed the parliament that Uniform civil code should be drafted and implemented and notwithstanding the separate Muslim Personal Law system entitled Nazia Yusuf to be given maintenance u/s 125 of CrPC. The court also declared Ranvijay Kapoor's second marriage to be void.

V. INSTANTANEOUS SPECIAL LEAVE PETITION

Aggrieved by the decision of the High court of Janakpur, Abbey filed a SLP challenging the validity of Section 377 of IPC and Surrogacy Act 2016. All Indica Muslim Personal Law Board also filed a SLP representing the whole Muslim community, claiming that the direction given by the High Court for drafting of Uniform Civil Code is violating the secularism which is a part of the basic structure of the Constitution included Article 25 & 26. Both the SLPs were clubbed and admitted by the Supreme Court of Indica.

ARGUMENTS PRESENTED

-I-

WHETHER THE SPECIAL LEAVE PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE.

-II-

WHETHER THE IMPLEMENTATION OF UNIFORM CIVIL CODE IS VIOLATIVE OF ARTICLES 25 AND 26 OF THE CONSTITUTION.

-III-

WHETHER SECTION 377 IPC AND THE SURROGACY ACT, 2016 ARE CONSTITUTIONALLY VALID.

SUMMARY OF ARGUMENTS

I. WHETHER THE SPECIAL LEAVE PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE OR NOT.

Article 136 empowers the Supreme Court to grant in discretion Special leave to Appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. It vests in the Supreme Court a discretionary power to be exercised for satisfying the demands of justice under exceptional circumstances. Such power is to be exercised with caution and in accordance with law and set legal principles. In the instantaneous matter SLP is not maintainable as Special Leave cannot be granted when substantial justice has been done and no exceptional or special circumstances exist for case to be maintainable. The practice of non-interference in the decisions of lower courts is followed by the Supreme Court when it is of the view that all relevant factors have been taken into consideration as in the instantaneous matter.

II. WHETHER THE IMPLEMENTATION OF UNIFORM CIVIL CODE IS VIOLATIVE OF ARTICLES 25 AND 26 OF THE CONSTITUTION.

Uniform Civil Code enshrined in Article 44 of the Constitution aims to fulfil the wish of our constitution framers of securing for the citizens a common set of rules replacing the personal laws. It is submitted that Uniform Civil Code is not violative of Right to freedom of religion as it is permitted that the legislature can make legislations for social welfare and constitution only protects those religious practices which form the essence of the religion which is to be determined by the court. It is not violative of the Muslim personal laws as personal laws and religion are different concepts and legislature has the right to supersede personal law. It is also not violative of the right to equality as it is neither arbitrary nor unreasonable and will help every community to have the same stature.

III. WHETHER SECTION 377 IPC AND THE SURROGACY ACT, 2016 ARE CONSTITUTIONALLY VALID.

Section 377, IPC and The Surrogacy Act do not violate article 14 as a reasonable classification has been made and the operation of article 19 has been attracted. For violation of the principle of equality there must be some substantive unreasonableness. However, since the test of equality and test of reasonableness have been passed, Sec 377 and The Surrogacy Act, 2016 do not violate article 21. The Right to Privacy forming an essential part of the Right to life is not absolute and maybe lawfully restricted for prevention of crime or disorder and for the protection of health, morals, rights and freedoms of others. Commercial Surrogacy infringes public policy and is merely a contract for baby selling. The Act imposing a ban on it as such thus is constitutionally valid.

ARGUMENTS ADVANCED

I. WHETHER THE SPECIAL LEAVE PETITION BROUGHT BEFORE THIS COURT IS MAINTAINABLE OR NOT.

It is humbly submitted that the Special Leave Petition against the judgment of Hon'ble High Court is not maintainable under Article 136 of the Constitution of India. Article 136 empowers the Supreme Court to grant in discretion Special leave to Appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.[1]

It is humbly submitted that SLP is not maintainable as Special Leave cannot be granted when substantial justice has been done and no exceptional or special circumstances exist for case to be maintainable **[A]**. Also, the Supreme Court should restrict itself to interfere in the decisions of lower court. **[B]** Furthermore, the question involved in the present case is outside the jurisdiction of this court, thus entitled to be dismissed **[C]**.

A. NO EXCEPTIONAL AND SPECIAL CIRCUMSTANCES EXIST AND SUBSTANTIAL JUSTICE HAS BEEN DONE IN THE PRESENT CASE.

It is most humbly submitted before this Honourable Court that the SC will not interfere with the concurrent finding of the courts below unless of course the findings are perverse or vitiated by error of law or there is gross miscarriage of justice.

Article 136 does not confer a Right of Appeal, but merely, a discretionary power to the Supreme Court to be exercised for satisfying the demands of justice under exceptional circumstances[2]. The SC observed in the *Pritam Singh v. State*[3], in explaining how the discretion will be exercised generally in granting SLP: The wide discretionary power with which this court is invested under it is to be exercised sparingly and in exceptional cases only and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which

[1] Art. 136, Constitution of India, 1950.
[2] *N. Suriyakala* v. *A. Mohandoss*, (2007) 9 SCC 196.
[3] AIR 1950 SC 169.

can come up before it under article 136.[4] Circumspection and circumscription must induce the Court to interfere with the decision under challenge only if the extraordinary flaws or grave injustice or other recognised grounds are made out.[5]

It is contended by the respondent that the appellant must show that exceptional and special circumstances exists and that if there is no interference, substantial and grave injustice will result and the case has features of sufficient gravity to warrant review of the decision appealed against on merits. Only then the court would exercise its overriding powers under Art. 136[6]. Special leave will not be granted when there is no failure of justice or when substantial justice is done, though the decision suffers from some legal errors.[7]

Although the power has been held to be plenary, limitless[8], adjunctive, and unassailable[9], in *M. C. Mehta v. Union of India*[10] and *Aero Traders Private Limited v. Ravinder Kumar Suri*[11], it was held that the powers under Article 136 should be exercised with caution and in accordance with law and set legal principles.

B. NON-INTERFERENCE IN THE DECISION OF THE LOWER COURTS

If it appears prima facie that the order in question cannot be justified by any judicial standard, the ends of justice and the need to maintain judicial discipline require the Supreme Court to intervene[12]; the Supreme Court in this case pointed out the errors of the High Court, but, did not interfere in the decision of the High Court. The Supreme Court does not interfere with the conclusion arrived at by the High Court if it has taken all the relevant factors into consideration and there has been no misapplication of the principles of law.[13]

Normally, in exercising its jurisdiction under Article 136, the Supreme Court does not interfere with the findings of the fact concurrently arrived at by the tribunal and the High Court unless there is a clear error of law or unless some important piece of evidence has been omitted from

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[4] Ibid.

[5] *Shivanand Gaurishankar Baswati* v. *Laxmi Vishnu Textile Mills*, (2008) 13 SCC 323.

[6] M.P Jain, Indian Constitutional Law, 5776 (16th edn Lexis Nexis Butterworth 2011).

[7] *Council of Scientific and Industrial Research* v. *K. G. S. Bhatt*, AIR 1989 SC 1972 ; *State of H. P.* V. *Kailash Chand Mahajan,* AIR1992 SC 1277; *Mathai Joby* v. *George*, (2010) 4 SCC 358.

[8] *A.V. Papayya Sastry* v. *Government of Andhra Pradesh*, AIR 2007 SC 1546.

[9] *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2004 SC 3467.

[10] *M.C. Mehta* v. *Union of India*, AIR 2004 SC 4618.

[11] *Aero Traders Private Limited* v. *Ravider Kumar Suri*, AIR 2005 SC 15.

[12] *Union of India* v. *Era Educational Trust*, AIR 2000 SC 1573.

[13] *DCM* v. *Union of India*, AIR 1987 SC 2414.

consideration.[14] Though Article 136 is conceived in widest terms, the practice of the Supreme Court is not to interfere on questions of fact except in exceptional cases when the finding is such that it shocks the conscience of the court.[15]

C. MATTERS RAISED IN THE PRESENT SLP ARE OUTSIDE THE COMPETENCE OF THIS COURT

In the instant case, the two matters raised before this Hon'ble court are outside its competence. Firstly, the question of implementation of uniform civil code is a matter of national policy and the court should not interfere in such matter **[1]**. Secondly, the act of repealing Section 377 is matter of legislative competence and thus court should has no power to rewrite a law in the garb of judicial review **[2]**.

1. No Interference of Court in Matter of National Policy

It is the general rule thatcourt would not interfere with matters of legislative policy[16].Act of implementing Uniform Civil Code comes under the purview of national policy. It is not for the Courts to determine whether a particular policy or particular decision taken fulfilment of that policy is fair. They are concerned only with the manner in which those decisions have been taken, if that manner is unfair, the decision will be tainted with 'procedural impropriety'.[17]In *Maharshi Avadhesh v. Union of India*[18], Supreme Court had specifically declined to issue a writ directing the respondents to consider the question of enacting a Common Civil Code for all citizens of India holding that the issue raised being a matter of policy, it was for the Legislature to take effective steps as the Court cannot legislate. It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and it only has the legislative competence to do so. Moreover, Article 44 forms part of the Directive Principles of State Policy, this court has no power to give directions for its enforcement[19].

Hence, it is submitted that no directions can be issued by the court for the purpose of implementing uniform civil code as it is a matter fit for the legislature to act upon.

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[14]*Mehar Singh* v. *Shri Moni Gurudwara Prabandhak Committee*, AIR 2000 SC 492.
[15]*Panchanan Misra* v. *Digambar Mishra*, AIR 2005 SC 129.
[16]*D. C. Bhatia* v. *Union of India*, (1995) 1 SCC 104.
[17]*CCSU* v. *Min.* (1984) 3 All ER 935 (954) HL.
[18]*Maharishi Avadhesh* v. *Union of India*, (1994) Supp. (1) SCC 713.
[19]*Pannalal Bansilal Pitti* v. *State of Andhra Pradesh*, 1996 AIR 1023.

2. *Repealment of Section 377 is a Legislative Task.*

In our country, the legislature and the judiciary have separate roles. The Judiciary dispassionately interprets law. The Legislature can make new laws and alter old ones. The Indian Penal Code is placed under the Concurrent List of the Constitution, meaning that both Parliament and State Legislatures are competent to amend it. In keeping with the federal structure of our governance, State Legislatures may amend a central law subject to approval of the President. Only lawmakers and not the courts could change a colonial-era law that bans homosexual acts and makes them punishable by up to a decade in prison. The court can resort to 'reading down'a law to render it constitutional, but in that direction, it cannot change the essence of the law or create a new law that is in its opinion more desirable.[20]

It is submitted that the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same.

II. WHETHER UNIFORM CIVIL CODE IS VIOLATIVE OF RIGHT TO FREEDOM OF RELIGION.

The respondents contest that Uniform Civil Code as enshrined in Article 44 of the Constitution is not violative of the right to practice religion under Article 25 and 26 of the constitution**[A]**, right to equality and rule of law enshrined under Article 14 and the personal laws of Muslims, Hindus and other religions.

A. UNIFORM CIVIL CODE IS NOT VIOLATIVE OF ARTICLE 25 AND 26 OF THE CONSTITUTION

Dr. Ambedkar explained in the Constituent assembly that the bulk of different items of civil law have already been codified during the British rule and the only major items still remaining for the uniform civil code are marriage, divorce, inheritance and succession.[21] Article 44 of the Constitution aims to fulfil this wish of our constitution framers stating that the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.[22]

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[20] *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* AIR 2014 SC 563.
[21] Constitutional Assembly Debates p.550.
[22] Article 44, Constitution of India 1950.

Article 44 is not violative of the fundamental right to freedom of religion as Article 25 itself permits to make legislations aiming at social welfare; **[1]**it does not cover secular activities; **[2]**and it is the discretionary power of court to decide the ambit of religious practices. **[3]**

1. Article 25 and 26 permits to make legislations aiming at social welfare

It is submitted that Article 44 of the constitution does violate the fundamental right to freedom of religion under Article 25 and 26 of the constitution stating that subject to public order, morality and health, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. Article 25 permits legislations in the interest of social welfare and reform as a part of public order, national morality and collective health of the people. Religious practice which is not integral part of the practices of the religion is not protected under Article 25.[23]

2. Article 25 protects only those practices which form the essence of the religion

The freedom of practice would extend only to those rites and observances which are of the essence of the religion and would not cover secular activities which go by the name of religion and are no part of true religion. Such matters are those that come within the scope of the expression 'personal law' like marriage, adoption and the like, as regard which the Hindu and Mohamedan laws are founded on religious scriptures, and yet they do not form the essence of either religion.[24] The protection under Article 25 is with respect to religious practices which form the essential and integral part of the religion. All other practices can be regulated by legislation in the interest of public order, morality, health, social welfare and reforms.[25] Hence, matters of personal law are subject to regulation or restriction by the State in the larger interest of society.[26]

[23]*Javed* v. *State of Haryana* AIR 2003 SC 3057.
[24]*Ramprasad* v. *State of Haryana* AIR 1957 All. 411.
[25] Supra 3.
[26]*Durgah Committee* v. *Hussain* AIR 1961 SC 1402 (1415).

3. *It is the discretionary power of the court to determine the ambit of the practices forming the essence of religion*

It is subject to the decision of the court to determine whether a particular practice or rite constitutes the essence of the religion or is a mere secular activity.[27] It is only if a matter is a matter of religion that Article 25(1) or 26(b) can be invoked by an individual or denomination against state action.[28]

It is a settled law that in so far as rules regarding marriage, succession, etc. are concerned, they are purely secular in character and are outside the guarantee of Article 25 and 26.[29] A legislation bringing succession and similar matters of secular character, the competency of legislature cannot be doubted.[30]

It has been held that Article 25 guarantees religious freedom and Article 44 divests religion from social relations and personal laws. It was held that marriage, succession and similar matters are of a secular character and are outside the guarantee under Article 25 and 26. The court observed, "It is a matter of regret that Article 44 of the constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradiction based on religion.[31]

B. UNIFORM CIVIL CODE IS NOT VIOLATIVE OF RIGHT TO EQUALITY

It is submitted that Article 44 is not violative of the Right to Equality as Uniform Civil code is a not against the principle of reasonable classification, **[1]**and helps in bringing all communities on common platform **[2].**

1. *Uniform civil code is neither unreasonable nor arbitrary*

Article 14 contemplates reasonableness in actions of the State, the absence of which would entail its utter violation.[32]To declare an act *ultra vires* under Article 14, the Court must be satisfied in respect of substantive unreasonableness in the statute.[33] The Court must not adopt a doctrinaire

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[27]*Govindlalji* v. *State of Rajasthan* AIR 1963 SC 1638.
[28]*Ratilal* v. *State of Bombay* AIR 1954 SC 388.
[29]*Mohd. Ahmed Khan* v. *Shah Bano Begum*, AIR 1985 SC 945.
[30]*John Vallamattom* v. *Union of India,* AIR 2003 SC 2902.
[31] Ibid.
[32]*Amita* v. *Union of India*, (2005) 13 SCC 721.
[33]*Bidhannagar (Salt Lake) Welfare Assn.* v. *Central Valuation Board and Ors*., AIR 2007 SC 2276.

approach which might choke all beneficial legislations[34]. The Court must see that the inequality produced is actually and palpably unreasonable and arbitrary,[35] which is clearly not the case with Uniform Civil Code.

2. Uniform civil code helps in bringing all communities on common platform

The object behind the implementation of the a Uniform Civil Code is to effect an integration of the country by bringing together all the communities on a common platform on matters which are at present governed by diverse personal laws but which do not form essence of any religion, e.g. divorce, maintenance of divorced wife.[36] Moreover, the other objective of the Uniform Civil Code is to prevent the dignity of women in our society from the practices that are derogatory to their dignity. The Constitution confers citizenship not on the basis of caste, creed, sex or religion, but on the basis of birth, domicile, choice, etc. Thus it is the right of all citizens, and women in particular, to be treated equally and without being discriminated against; and the endeavour of the state to achieve this must be perpetual and paramount.[37]

Clause (e) of Article 51A enjoins every citizen to renounce practices that are derogatory to the dignity of women. It needs little argument to point out that indiscriminate polygamy or the practice of divorcing a lawfully wedded wife by the utterance of a word thrice within the span of three seconds, or the refusal to maintain a divorced wife after the iddat period, are all practices that are derogatory to the dignity of women.[38] Personal laws should conform to the fundamental rights of equality and if there is any conflict, equality shouldprevail.[39]A Uniform Civil Code will help in improving the conditions of women in the country and will remove the practices that are derogatory to the dignity of women.

Every law has to pass through the test of constitutionality which is nothing but a formal test of rationality,[40] and it has been put forth before this Hon'ble Court that the present enactment makes a classification for a reasonable purpose. The purpose of the implementation of a Uniform

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[34]*Lachmandas Kewalram* v. *State of Bombay*, AIR 1952 SC 235.
[35]*Arkansas Gas Co.* v. Railroad Commission, 261 US 379 (384).
[36] Supra 27.
[37]Leila Seth, A Uniform Civil Code: towards gender justice, India International Centre Quarterly, Vol. 31, No.4 (SPRING 2005), pp. 40-54.
[38]DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 2468 (Vol. 2, 8th Edition 2008).
[39] Supra 27.
[40]*Namit Sharma* v *Union of India*, (2013) 1 SCC 745.

Civil Code is a legitimate one. A common civil code will help the cause of national integration by removing desperate loyalties to laws which have conflicting ideologies.[41]

Thereby, it is humbly submitted that the Uniform Civil Code has a reasonable and substantial basis and is neither discriminatory nor arbitrary and hence, does not violate Article 14.

C. UNIFORM CIVIL CODE IS NOT VIOLATIVE OF THE MUSLIM PERSONAL LAW OF ANY RELIGION

It is submitted that Article 44 is not violative of the Muslim personal law as marriage is not an integral part of the Muslim religion, **[1]**personal laws and religion are not linked **[2]**legislature posses power to supersede personal law **[3]**

1. Marriage does not constitute the essence of Muslim religion

It can be stated that law of marriage is not an integral part of the Muslim religion by explaining the threefold avenues for state regulation.

Firstly even though some religions lay down sacramental formalities for the celebration of marriage or an obligation to marry for maintenance of the lineage, modern societies do not regard it as of the essence of any religion, but only as a secular activity, though it may be associated with religion. So regarded, it would, come under Article 25(2)(a) of our Constitution, and be liable to state regulation in the interest of general public.[42] As regards the Muslim community, an additional reason why the personal law of marriage cannot be regarded as an integral part of religion is that while Hindu scriptures regard marriage as sacramental and indissoluble, the Quoran regards marriage as a matter of contract and subject to divorce; and that not merely matters spiritual but even political and social rules of conduct are contained in the Quoran, according to the exigencies of the time.[43]

Secondly, even if it were an integral part of religion, it would be subject to state regulation, in so far as necessary, in interest of public order, morality and health.[44]

Thirdly, it has been held in a number of cases that marriage is a social institution and therefore, an object of social reform[45] and that to effectuate social reform, the legislature, under the

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[41] Supra 27.

[42] DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 3499 (Vol. 3, 8th Edition 2008).

[43] Ammer Ali, Mohamedan Law, 8-9, (Vol. I).

[44] *Cf. State* v. *Bhimsing* (1951) 6 DLR 174 (175) (Bom).

constitution, could interfere with religious practices, such as polygamy even though the parties were Muslims.[46]

Once it is established that marriage, succession or the like does not constitute an essential part of any religion but is only a secular activity associated with religious practice within the purview of Article 25(2) or that even it is a religious practice, it should give way to social reform according to the enlightened conscience of modern times, there cannot be any other bar to amendment or repeal of the Shariat Act to be replaced by a common civil code for the nation.[47]

2. *Personal laws and religion are not linked and are different concepts*

It is to be carefully noted that the expression 'personal law' is neither synonymous nor co-extensive with 'religion'. All that is included in the scriptures may not form the essence of a religion or be essential for the spiritual upliftment of man.[48] The social and economic provisions of the Islamic law were founded on the exigencies of the time and may not form the permanent foundation of the religion.[49] If such secular provisions were an integral part of the Muslim religion, it would not have been possible to infuse, by custom, the practice of adoption among the Muslim community in certain parts of country and even to confer rights of inheritance upon the adopted son, in supersession of the personal Mohamedan law, which never recognised adoption[50], or for a Muslim widow to inherit, by custom, all their husbands property during her lifetime or until marriage, to the exclusion of all other heirs under Mohamedan law.[51]

3. *Legislature possess power to supersede personal laws*

The real obsession in India arises from the Shariat Act, 1937. The Act which was passed by the Indian Legislature after the enforcement of the Government of India Act, 1935, for the first time expressly provided that Muslims should be governed by the Shariat in matters such as marriage, succession, dower, guardianship, maintenance, gifts, trust and trust property.

There is little doubt that the Shariat Act continues to be law under Article 372, however Article 372(1) makes such continuance subject to repeal or amendment by a competent legislature. It is

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[45] *State of Bombay* v. *Narasu* AIR 1952 Bom 84.
[46] *Srinivasa* v. *Saraswati* AIR 1952 Mad 193.
[47] Ibid.
[48] Supra 31.
[49] *Govind* v. *Inayatullah* (1885) 7 All. 775.
[50] *Cf. Khatji* v. *Abdul* AIR 1977 J&K 44.
[51] *Cf. Akbar* v. *Akhnoon* AIR 1972 J&K 105.

now quite clear that the State and Union legislature now concurrently possess the power to supersede the personal law of any religious community, including the repeal of the Shariat Act, in order to make a common civil code, as directed by Article 44.

D. JURISPRUDENTIAL APPROACH OF ART. 25 AS PER HOHFELDIAN ANALYSIS

Wesley Hohfeld developed an analytical framework for understanding the concept of rights and arranged eight terms in two tables of correlatives and opposites that structure the internal relationships among the different fundamental legal rights.[52]

Applying the Hohfeldian concept on Article 25 (2) (a) which states that 'Nothing in this article shall affect the operation of any existing law or prevent the state from making any law regulating or restricting any economic, financial, political or other secular activities which may be associated with religious practice,[53] the relationship between the jural correlatives and opposites i.e. power, liability, immunity and disability can be explained. In this table while power-disability and immunity-liability are jural opposites, power-liability and immunity-disability are jural correlatives.

Under Article 25 (2) (a) the state has the power to make any law regulating or restricting any economic, financial, political or other secular activities which may be associated with religious practice which puts all the persons under a liability to follow these laws and that their legal position can be altered. As all the persons are liable to follow such laws there is an absence of immunity to follow their own personal laws i.e. they would not be immune by the provisions of personal laws but would be bound by the laws made by the state. Finally, as the state has the power to regulate or restrict laws, there would be no disability on the part of the state.

The regulating law by the state in the instantaneous case would be the uniform civil code and the restriction by the state would be on the provisions of personal laws in contravention to the uniform civil code. Therefore it can be established by the relationship between the jural correlatives and opposites of the Hohfeld's table that the state has the power to formulate and implement a uniform civil code and the all citizens would be bound by it and would not be protected by the provisions of their respective personal laws.

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[52] Joseph William Singer, The legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, Wis. L. Rev. 975, 1982.

[53] Article 25 (2) (b), Constitution of India 1950.

II. WHETHER THE SURROGACY ACT, 2016 AND SECTION 377 OF INDIAN PENAL CODE, 1860 ARE CONSTITUTIONALLY VALID.

It is submitted that as general rule of interpretation the presumption is always in the favour of the constitutionality of the legislation unless proved otherwise**[A]**.The respondent contends that Sec 377, IPC and The Surrogacy Act, 2016 which puts a ban on homosexuals and live-in couples is not violative of the fundamental rights enshrined in part III of the Constitution of India. It is contended so for the reason that The Act does not violate the equal protection doctrineof Article 14 **[B],** the test of reasonableness of Article 19 **[C]**, and protects the right to life under Article 21 **[D].**

A. PRESUMPTION IS ALWAYS IN FAVOUR OF CONSTITUTIONALITY OF A STATUTE

It is submitted that the presumption is always in the favour of constitutionality of an enactment[54]and it is for the petitioner to show how his fundamental right has been infringed, failing which, his petition will be dismissed.[55] It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.[56]It is neither in doubt nor in dispute that Clause 1 of Article 13 of the Constitution of India in no uncertain terms states that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III there, shall, to the extent of such inconsistency, be void. It is submitted that public disapproval or disgust for a certain class of persons can in no way serve to uphold the constitutionality of a statute.

The counsel on behalf of the petitioner argued that if the language of the section was plain, there was nopossibility of severing or reading it down. Andso long as the law stands on the statute book,there was a constitutional presumption in its favour.Keeping in view the fact that the Act is

[54]*Mohan Choudhary* v. *Chief Commissioner, Tripura*, AIR 1964 SC 173.
[55]*Ramcharitra* v. *High Court, Patna*, AIR 1976 SC 226.
[56]*Ramkrishna Dalmia* v. *Justice Tendolkar and Ors.,* AIR 1958 SC 538.

a pre-constitution enactment, the question as regards its constitutionality will, therefore, have to be judged as being law in force at the commencement of the Constitution of India.[57]

B. THE ACT DOES NOT VIOLATE THE EQUAL PROTECTION DOCTRINE ENSHRINED IN THE CONSTITUTION

Sec 377 IPC and The Surrogacy Act, 2016 do not violate the Equal Protection clause enshrined under Article 14 of the Constitution and as such the aforementioned have been enacted to protect the interests of sexual minorities.

Mere discrimination or inequality of treatment does not amount to discrimination within the ambit of Article 14.[58] For an act not to violate Article 14, there must not be any substantive unreasonableness[59] in it, it should not be manifestly arbitrary,[60] and it should fulfil the following two conditions: (a) **intelligible differentia** which distinguishes persons or things that are grouped together from other left out in the group.[61] This is done by examining the purpose and policy of the act, which can be ascertained from its *title*, *preamble*[62] and *provisions*.[63] (b) **rational**[64]**nexus** that connects the object sought to be achieved by the act with the intelligible differentia ascertained in (a).[65] The reasonableness of the nexus is to be ascertained with reference to the object of the legislation and not on the basis of any moral considerations.[66]

1. Right to equality allows classification under certain circumstances

The principle of 'equality before the law' does not require absolute equality or equality among unequals.[67] Mere differentiation or inequality of treatment does not *per se* amount to discrimination and before considering inequality of treatment, the object of the legislation has to be considered.[68]

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[57]*Keshavan Madhava Menon* v. *The State of Bombay,* 1951CriLJ 680.
[58]D.D. BASU, SHORTER CONSTITUTION OF INDIA, 62, (13th ed., vol. 1, 2001).
[59]*Bidhannagar (Salt Lake) Welfare Assn.* v. *Central Valuation Board and Ors*., AIR 2007 SC 2276.
[60]*Bombay Dyeing & Manufacturing Co. Ltd.* v. *Bombay Environmental Action Group*, AIR 2006 SC 1489.
[61]*Pathumma* v. *State of Kerala,* AIR 1979 SC 771.
[62]*Kausha PN* v. *Union of India*, AIR 1978 SC 1457.
[63]*P. B. Roy* v. *Union of India*, AIR 1972 SC 908.
[64]*Kedar Nath Bajoria* v. *State of W.B*, AIR 1953 SC 404.
[65]*Hanif* v. *State of Bihar*, AIR 1958 SC 731.
[66]*Garg RK* v. *Union of India*, AIR 1981 SC 2138.
[67]*Devadasan* v. *Union of India*, AIR 1964 SC 179.
[68]*Thiru Muruga Finanace* v. *State of Tamil Nadu*, AIR 2000 Mad 137.

Just as difference in treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequal, i.e. differently placed, are treated similarly. In such a case failure on the part of the legislature to classify the persons who are dissimilar in separate categories and applying the same law, irrespective of the differences, brings about the same consequence as in a case where the law makes a distinction between persons who are similarly placed. A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law.[69]Article 14 forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction.[70]

By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.[71]

In the instantaneous matter, the government has made classification only to treat unequals differently and causes no unreasonable differentiation. 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.[72]

It is humbly submitted that Section 377 of the IPC does not target the homosexuals as a class as it applies to both men and women who engage in sexual acts that are against the order of the nature. It does not criminalise homosexuality and does not target homosexuals as a group. Section 377 IPC is not discriminatory as it is gender neutral[73]. Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation[74]. Hence, section 377 cannot be considered as class legislation.

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[69]*Venkateshwara Theatre* v. *State of Andhra Pradesh And Ors*., 1993 SCR (3) 616.
[70]*Chiranjit Lal Chowdhary* v. *Union of India*, AIR 1951 SC 41.
[71] Special Courts Bill 1978 (1979) 1 SCC 380.
[72]*Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* AIR 2014 SC 563.
[73]*Naz Foundation* v. *Government of NCT of Delhi*, 160 Delhi Law Times 277.
[74] Ibid at 72.

In the matter at hand, both the conditions for reasonable classification have been fulfilled.

(a) The government through this Act has classified individuals into those who can reproduce naturally and those who cannotwhich are allowed as proved aforementioned as long as there is an existing condition that qualifies for intelligible differentia. This intelligible differentia is evident since the Act allows surrogacy to those who can reproduce naturally and bans for those who cannot. The Act puts a ban on homosexuals in furtherance to its orders in *Suresh Kumar Kaushol v. Naz Foundation*[75] where the Court declared that Section 377 IPC does not suffer from the vice of unconstitutionality relyingon *Jagmohan Singh v. State of U.P.*[76] where the Court expressed grave doubts about the expediency of transplanting Western experience in our country since the social as well as intellectual set up of the nation is different. Moreover, there can be no reasonable doubt that one of the functions of the penis is to introduce semen into the vagina. It does this, and it has been selected in because it does this. Nature has consequently made this use of the penis rewarding. It is clear enough that any proto-human males who found unrewarding the insertion of penis into vagina have left no descendants. In particular, proto-human males who enjoyed inserting their penises into each other's anuses have left no descendants. This is why homosexuality is abnormal, and why its abnormality counts prudentially against it. Homosexuality is likely to cause unhappiness because it leaves unfulfilled an innate and innately rewarding[77]. Furthermore, the Act is not unreasonable or arbitrary since it allows altruistic surrogacy and bans only commercial practices in furtherance of the welfare of the society.

(b) There is thus a rational nexus between the **object** of the Act, which wasto protect the reproductive health of the surrogate mother as well as the future of the newborn child.

When a law is challenged as offending equal protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which

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[75] (2014) 1 SCC 1.

[76] (1973) 1 SCC 20.

[77]Levin, Michael, "*Why Homosexuality Is Abnormal*", The Monist, Vol. 67, No. 2, SOCIO-BIOLOGY AND PHILOSOPHY (APRIL, 1984), p. 261.

bears a just and reasonable relation to the object of the legislation.[78]Equal protection under Article 14 means the right to equal treatment in similar circumstances,[79] and the question of discrimination, if any, can arise only or between persons who are similarly, if not identically situated.[80]

The Supreme Court has held that the legislature as well as the executive must of necessity have the power of making special laws, to attain a particular object and to achieve that object, it must also have the power to classification of persons upon which such laws are to operate[81]. The principle of equal protection does not take away from the state the power of classifying persons for the legitimate purpose[82].

The Respondent humbly submits that it is in exercise of this power that the classification has been made which is reasonable according to the equality clause of Article 14 and this power cannot be taken away from the legislature.

2. Sec 377, IPC and The Surrogacy Act, 2016 are not arbitrary

To declare an act *ultra vires* under Article 14, the Court must be satisfied in respect of substantive unreasonableness in the statute.[83] The Government has enacted The Surrogacy Act, 2016 with due application of mind to curb the growing menace of exploitation of women rendering as surrogates as well as to protect the future of children born out of such arrangement. This has been done in view of the facts and circumstances that took place in cases like Baby Manji Yamada vs. Union of India[84] where the intending parents on a matrimonial discord refused to accept the child. In Jan Balaz vs. Union of India[85] the court observed: "we are primarily concerned with the rights of two new born, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance".

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[78]*Suraj Mall* v. *I.T. investigation Commn*., AIR 1954 SC 545.
[79]*Shrikishan* v. *State of Rajasthan*, AIR 1955 SC 795.
[80]*Union of India* v. *R. Sarangpani,* AIR 2000 SC 2163.
[81]*State of Karnataka* v. *B Suvarna Pillai*, AIR 2001 SC 606.
[82]*State of Bombay* v. *Balsara,* AIR1951 SC 609.
[83]*Bidhannagar (Salt Lake) Welfare Assn.* v. *Central Valuation Board and Ors*., AIR 2007 SC 2276.
[84] AIR 2009 SC 84.
[85] 2010 (2) ALL MR (Journal) 14.

Arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the constitution should ordinarily be manifest arbitration.[86]Classification is justified if it is not arbitrary.[87] If an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein.[88] The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose.[89] No enactment can be struck down by just saying that it is arbitrary or unreasonable.[90] Transferred malice is unknown in the field of legislation.[91] Every law has to pass through the test of constitutionality which is nothing but a formal test of rationality,[92] and it has been put forth before this Hon'ble Court that the present enactment makes a classification for a reasonable purpose.

To attract the operation of Article 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object with the legislature has in view.[93] To declare an act *ultra vires* under Article 14, the Court must be satisfied in respect of substantive unreasonableness in the statute.[94] Arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the constitution should ordinarily be manifest arbitration.[95] Classification is justified if it is not arbitrary.[96]

It is submitted that the object of section 377 is not arbitrary and does not only target homosexual couples. This section is the only mechanism to protect the victims of sodomy and other actions against the wishes of the persons. The rights of victims of sodomy are as much as concern for the State as the rights of the homosexuals.

Thereby, it is humbly submitted that the impugned Section 377 IPC and The Act has a reasonable and substantial basis and is neither discriminatory nor arbitrary and hence, does not violate Article 14.

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[86]*Bombay Dyeing & Manufacturing Co. Ltd.* v. *Bombay Environmental Action Group*, AIR 2006 SC 1489.
[87]*State of Gujarat* v. *Shri Ambica Mills*, 1974 3 SCR 760.
[88]*State of Andhra Pradesh* v. *Mcdowell & Co*., AIR 1996 SC 1627.
[89]*K.Nagraj* v. *State of Andhra Pradesh*, AIR 1985 SC 551.
[90] Supra 138.
[91]*State of Kerala* v. *PUCL, Kerala State Unit*, (2009) 8 SCC 46.
[92]*Namit Sharma* v *Union of India*, (2013) 1 SCC 745.
[93]*K.Thimmappa* v. *Chairman, Central Board of Directors*, AIR 2001 SC 467.
[94]*Bidhannagar (Salt Lake) Welfare Assn.* v. *Central Valuation Board and Ors.*, AIR 2007 SC 2276.
[95]*Bombay Dyeing & Manufacturing Co. Ltd.* v. *Bombay Environmental Action Group*, AIR 2006 SC 1489.
[96]*State of Gujarat* v. *Shri Ambica Mills*, 1974 3 SCR 760.

C. ARTICLE 19(1)(A) OF THE CONSTITUTION HAS NOT BEEN VIOLATED

The test laid down by this Hon'ble Court in *Bennett Coleman & Co. & Ors v. Union Of India & Ors*[97], is whether the direct and immediate impact of the impugned action is on the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. The respondents submit that the section 377 of the IPC does not impact upon the freedom under Article 19(1)(a) as what is criminalised is only a sexual act. People will have the freedom to canvass any opinion of their choice including the opinion that homosexuality must be decriminalised.

Article 19(2) expressly permits imposition of restrictions in the interest of decency and morality. Social and sexual mores in foreign countries cannot justify de-criminalisation of homosexuality in India. In the western societies the morality standards are not as high as in India. Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of the country. In 42ndreport of the Commission it was observed that Indian society by and large disapproved of homosexuality, which disapproval was strong enough to justify it being treated as a criminal offence even where the adults indulge in it in private.[98]

D. ARTICLE 21 OF THE CONSTITUTION HAS NOT BEEN VIOLATED

Article 21 envisages a right to life and personal liberty of a person, which not merely guarantees the right to continuance of a person's existence but a quality of life[99], and therefore, State is casted upon a duty to protect the rights of the citizen in discharge of its constitutional obligation in the larger public interest, guaranteed as a fundamental right under Article 21 of the Constitution.[100]

In the present case, there has been no violation of Article 21 of the Constitution. To establish the violation of Article 21, the Act should be subjected to the equality test of Article 14 and test of reasonableness under Article 19[101].

Article 14 ensures fairness[102] and guarantees against arbitrariness.[103] It provides that every action of the government must be informed by reasons and guided by public interest.[104]

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[97]*Bennett Coleman & Co. & Ors* v. *Union Of India & Ors.*, 1973 SCR (2) 757.
[98]42 LCR p. 282.
[99]*Francis Coralie* v. *Union Territory of Delhi*, AIR 1994 SC 1844;*Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647.
[100]*Consumer Education and Research Centre and Ors.* v. *Union of India and Ors.,* AIR 1995 SC 922.
[101]*Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

Article 19 provides that a restriction can be characterized to be reasonable if it strikes a balance between the fundamental right and restriction imposed thereon[105].

Section 377 of the IPC does not violate Article 21 of the Constitution. To establish the violation of Article 21, the Act should be subjected to the equality test of Article 14 and test of reasonableness under Article 19[106]. As it has been proved above that the section 377 of IPC does not violate either the test of Arbitrariness under Article 14 or the test of Reasonableness under Article 19, hence by the principle laid down, it does not violate Article 21. Similarly, The Surrogacy Act, 2016 creates an intelligible differentia while differentiating persons into those who can reproduce naturally and those who cannot and have to be assisted for the same. This differentia further supports the object of enactment of the Act and hence, has a reasonable nexus with it. On the same lines, by not violating Article 14 and Article 19 the Surrogacy Act, 2016 also does not violate Article 21.

1. *Right to Privacy is not absolute*

It is submitted that the Right to privacy can be curtailed by following due process of law and the Code of Criminal Procedureprescribes a fair procedure, which is required to be followed before any personcharged of committing an offence under Section 377 IPC can be punished.

In *Mr. X v. Hospital Z*[107], this court observed, as one of the basic Human Rights, the right of privacy is not treated as 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.

The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

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[102]*Delhi Transport Corporation* v. *DTC Mazdoor Congress*, AIR 1991 SC 101;*Mahesh Chandra* v. *Regional Manager, U.P. Financial Corpn*, AIR 1993 SC 935.

[103]*Express Newspapers Pvt. Ltd.* v. *Union of India (UOI) and Ors.*, AIR 1986 SC 872; *Netai Bag* v. *State of West Bengal*, AIR 2000 SC 3313.

[104]*MS Bhut Educational Trust* v. *State of Gujarat*, AIR 2000 Guj 160; *LIC* v. *Consumer Education and Research Centre*, AIR 1995 SC 1811.

[105]*Om Kumar* v. *Union of India*, AIR 2000 SC 3689.

[106]*Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

[107](1998) 8 SCC 296.

In*Gobind v. State of M.P.*[108] the Court observed: "There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterization of the claimed rights as a fundamental privacy right would be of far less significant.

In the instantaneous matter the Right to Privacy of homosexuals is restricted for protection of state interest which does not suffer from any vice. Moreover, the freedom and rights of others are of such importance that mere transgression of the right to privacy of a minority would amount to a compelling state interest.

The dissenting opinion given by Justice Scalia and Justice Thomas in Lawrence v. Texas[109]stated that promotion of majoritarian sexual morality was a legitimate state interest. A miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgender and in last more than 150 years less than 200 persons have been prosecuted for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution.[110]

The Respondent humbly submits that the Hon'ble Court may take the aforementioned into consideration.

2. *Section 377 curtails spread of HIV/Aids and furthers public health*

It is submitted that spread of AIDS is curtailed by Section 377 IPC and de-criminalisation of consensual - same - sex acts between adults would cause a decline in public health across society generally since it would foster the spread of AIDS. Section 377 IPC prevents HIV by discouraging rampant homosexuality by putting a brake in the spread of AIDS and if consensual same-sex acts between adults were to be de-criminalised, it would erode the effect of public health services by fostering the spread of AIDS. Sexual transmission is only one of the several

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[108]1975 CrLJ 1111
[109] 539 U.S. 558 (2003).
[110] Supra 68.

factors for the spread of HIV and the disease spreads through both homosexual as well as heterosexual conduct.[111]

UNAIDS states in its operational guidelines for MSM that even in generalized HIV epidemics, men who have sex with men are more affected by HIV than the general population.[112]

E. SURROGACY INFRINGES PUBLIC POLICY

It is argued that surrogacy leads to commodification of women since women sell their body for the end product that is child. This also commoditizes their reproductive capacity, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money[113]. Removal of the act of childbearing from the idea of motherhood treats women as objects of reproductive exchange[114]. These women have no right on decision regarding their own body and life due to lack of regulations in the field of surrogacy[115].

Commercial surrogacy is against public policy enshrined in Article 23 of the Indian Constitution and Section 23 of the Indian Contract Act, 1872. Article 23 prohibits trafficking in human beings while Section 23 makes agreements contrary to public policy unenforceable embracing within its fold such contracts which are likely to deprave, corrupt or injure the public morality[116]. The word 'traffic' connotes an element of trade i.e. buying and selling and commercial surrogacy being equivalent to baby selling certainly involves traffic in children[117]. Altruistic surrogacy involves providing only compensation in the form of medical expenses incurred by the surrogate and does not violate Article 23. The Convention on Human Rights and Biomedicine in Article 21 provides that the human body and its parts shall not, as such, give rise to financial gain.[118]

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[111] *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* AIR 2014 SC 563.

[112] Ibid at 77.

[113] Denise E. Lascarides, "A Plea for the Enforceability of Gestational Surrogacy Contracts" Hofstra Law Review, 1221 (1997).

[114] Usha Rengachary Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy between United States and India, Cumberland Law Review 15, 39 (2008).

[115] P. Saxena, "Surrogacy: Ethical and Legal Issues" Indian Journal of Community Medicine, Indian Journal of Community Medicine, 212 (2012).

[116] *State of Rajasthan* v. *Basant Nahata*, AIR 2005 SC 3401.

[117] In re Baby M, 537 A.2d 1227 (1988).

[118] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Arp. 4, 1997, E.T.S. No. 164 (entered into force Dec 1, 1999).

The Respondent submits that the sanctity of a human body must be honoured and any action which challenges it should be regulated by law. The regulation of Sec 377 IPC was a dire need due to increasing instances of crimes like sodomy which cause a breach of peace. Similarly, with a rapid growth of surrogacy in the country, creation of an industry commoditized the human body leading to exploitation of women as well as children. A regulation by the State was needed to protect the interests of this class of the society. Thus, the Surrogacy Act, 2016 does not infringe any constitutional provision.

F. COMMERCIAL SURROGACY IS A MERE CONTRACT FOR BABY SELLING AND THE BAN IMPOSED ON IT BY THE ACT IS VALID.

The Act in Section 43 provides for maintaining record of such agreements by surrogacy clinics. Surrogacy contracts involve payment of substantial amount of money to surrogates which violates prohibitions against baby selling. CEDAW also in Article 5 recognizes maternity as "a social function," rather than a commercial function[119]. Aside from alleged harms to children and alleged harms to all of us thatare supposed to flow from the commoditisation of childbearing, opponentsof paid surrogacy point to the intrinsic indignity and perhaps indecencyof the practice from the standpoint of the woman who is paid tobear children.[120]

In the light of the above, the Respondent humbly submits that a ban on commercial surrogacy is justified and the class created is reasonable. The Surrogacy Act, 2016 does not suffer from any constitutional impropriety, rather upholds the Right to Life of surrogates by offering protection.

[119] Convention on the Elimination of all Forms of Discrimination Against Women, General Assembly resolution 34/180 of 18 December 1979. Available at: http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf

[120]Richard J. Arneson, Commodification and Commerical Surrogacy, Philosophy & Public Affairs, Vol. 21, No. 2, pp. 132-164, (1992).

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited, it is humbly requested that this Hon'ble Court may be pleased to adjudge and declare:

1. That the SLP is not maintainable under Article 136 of the Constitution of India, 1950.
2. That the implementation of Uniform Civil Code does not violateArticle 25 and 26 enshrined under Part III of the Constitution of India, 1950.
3. That the Surrogacy Act, 2016 is constitutionally valid and it does not violate the fundamental rights of the homosexuals.
4. Section 377 is constitutionally valid.

And pass any such order, writ or direction as the Honourable Court deems fit and proper, for this the Appellants shall duty bound pray.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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COUNSEL FOR THE RESPONDENTS