



**LAW CENTRE-I
FACULTY OF LAW
UNIVERSITY OF DELHI
DELHI-110007**



4th NHRC – LC-I NATIONAL MOOT COURT COMPETITION, 2016

MARCH 18-20, 2016

Organized in collaboration with

NATIONAL HUMAN RIGHTS COMMISSION

MOOT PROPOSITION

John, a Christian, is a resident US citizen. He was in Inca on a work assignment where he developed love with Maria, an Incan national, and a Hindu by religion. Both of them got married in Inca on January 01, 2009. Maria shifted to United States of America in 2010 and took up US citizenship in 2014.

It was discovered that Maria would not be able to conceive a child. The couple wanted their own baby and so decided to opt for a surrogacy arrangement.

In October 2015, during their visit to Inca, they were in talks with a licensed Incan surrogacy clinic, the “XYZ ART Clinic”. Through “XYZ” they entered into an agreement with Seema, a 25 year old house maid, mother of a four year old child, who agreed to act as the surrogate against the settled consideration and on usual terms and conditions. However, in November 2015, Inca passed a new law: ‘Commercial Surrogacy for Foreigners (Miscellaneous) Act, 2015’. It has the following provisions:

1. It banned the Assisted Reproductive Technology (ART) Clinics from providing surrogacy treatment to foreign nationals and made it an offence punishable with a fine of Rs. Five lakhs or

imprisonment for a period of 1 year or both, *in addition to cancellation of license* of the Clinic.

The above provisions were not applicable to Incan nationals and Non-Resident Incans (NRIs) and People of Incan Origin (PIOs).

2. It declared that a single woman or an unmarried woman is prohibited to be either a surrogate mother or a commissioning parent.

3. It declared that the dealings between commissioning parents and the surrogate woman would be on principal-to-principal basis without any liability or involvement of ART Clinics. If ART Clinics facilitate agreements between the intending parties, they would not charge any fee or commission.

In view of the above law, the XYZ ART Clinic refused to render services to John and Maria and Seema because John was foreign national and they had doubts about the eligibility of Seema to act as Surrogate. Maria and John approached other ART Clinics also, but with no success.

- (i) An aggrieved Maria approached the Supreme Court with a writ petition, challenging the constitutionality of the Act, contending *inter alia* that:
 - a) The law is arbitrary and there no rationale behind the law, as passed. There is no rational for prohibiting foreign nationals availing the technological process or denying her the benefit of surrogacy only because her husband is, a foreign national, when she is permitted under the law. It is inhuman and against natural law that she is told if she was married to an Incan, she could avail surrogacy arrangement but now she cannot as she is married to a foreigner.
 - b) Her human right to be a mother is being violated when technology permits.
 - c) If surrogacy arrangement is restricted to Incan couples only, then it would have adverse fallouts; a civilized country which is a member of UNO, WTO, and claims to be a responsible state cannot justify:
 - Unscrupulous persons would seek to render the same service to foreign citizens through unauthorized Clinics in isolated/hidden

places, or foreign countries - they could traffic women to foreign countries leading to exploitation of potential surrogate mothers and other malpractices.

- The effort of the state would be misdirected to wasteful prohibition denying couples the world over of their right to have their own babies through techno-biological processes.
- d) It violates the fundamental rights of the surrogates and is an unnecessary interference in the life of individuals without serving any public interest or purpose only because of orthodoxy.
- e) The Act prevents the optimal use of technological advancements. By discriminating on the basis of nationality, it denies the fruits of ART on the basis of artificial man made boundaries of the countries to foreigners. Also, surrogates usually enjoy better remuneration while providing the service to foreign nationals and may prove foreign exchange earner for the economy.

A few other stakeholders also filed writs challenging the Act:

- (ii) The Association of Medical Practitioners of ART Clinics (AMPAC) filed a petition challenging the Act as a violation of their (doctors and Clinics) fundamental right under Article 19 (1) (g) of the Constitution.

They contended that the procedures and guidelines, as adopted and issued by medical literature and bodies, were only relevant and law should be based on medical grounds and no other considerations should be allowed. They alleged that the new Act imposes unreasonable restrictions on their rights, and is anti human and anti technology law and operates against UNCHR.

- (iii) The All Inca Mahila Samithi filed a writ petition challenging the Act as a violation of the right to livelihood guaranteed under Article 21 of the Constitution of Inca on the ground that Surrogacy arrangements with foreign nationals were no different than surrogacy which has been permitted. The surrogates are wrongly being denied attractive rates for the same work, which also improves their living conditions and provide

good education to their children. There is no basis for discrimination on the ground of nationality.

A governmental agency should organize surrogates and no woman may be allowed to act as a surrogate unless she registers her availability for the purpose with National/State Commission for Women. ART Clinics should draw surrogates only from among registered women and profiteering by ART Clinics needs to be discouraged.

(iv) Single Women (Professional Surrogates) Association filed a writ petition challenging the provision which restricts the right of single woman to act as surrogate as a violation of ‘human right to be treated equally’ at par with married women in protecting their ‘right to reproduction’ and ‘right to be a parent’ and a ‘right to trade and profession’.

v) The Association of Custodians of Traditional Ethics supports the new Law, and in addition requests a complete ban on surrogacy as it jeopardizes the health of the surrogate woman and the child; and infringes the right against exploitation. Even conceding surrogacy for Incan nationals, there is no justification for surrogacy arrangements for NRIs and PIOs.

Court Action -

The petitions of Maria and 5 others are being heard together by the Supreme Court of Inca under the title “Maria and Others v. Union of Inca and Others” and served notice to the Government of Inca seeking its stand on the Act.

Arguments on behalf of the Association of custodians of Traditional Ethics would be clubbed together with the Union of Inca.

The writ petitions are now listed to be heard before the Supreme Court of Inca on 19th March, 2016.

For the purpose of this moot problem -

1. The Constitution of Inca adopts the Constitution of India verbatim and all the provisions of the Constitution of India are incorporated as the provisions of Incan Constitution.
2. The powers and the jurisdiction of the Supreme Court of Inca are the same as the powers and the jurisdiction of the Supreme Court of India.

**4th NHRC – LC-I NATIONAL MOOT COURT COMPETITION
MARCH 18-20, 2016**

3. The new law in Inca has only to be argued as stated to be passed (no corresponding Bill or law is there), rest of laws are the same as those in India except wherein specifically provided in this moot proposition.