(WRITTEN SUBMISSION BY PROF. NIVEDITA MENON AND OTHERS - PROFESSORS AND TEACHERS FROM MUMBAI AND DELHI)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
I.A. NO. 10 OF 2010
IN
S.L.P. (C.) NO. 15436/2009

IN THE MATTER OF:

Suresh Kumar Koushal & Anr. … Petitioners

VERSUS

Naz Foundation &Ors. … Respondents

AND IN THE MATTER OF:

Professor Nivedita Menon & Ors. … Intervenors

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS IN I.A. NO. 10

1. The following issues are being raised by the intervenors for consideration in the present matter:
   (i) Whether a law which is religious in origin has any place in a constitutional democracy which considers secularism as part of the basic structure of its Constitution?
   (ii) Strictly in the alternative, Section 377 of the IPC has to be read with General Exceptions in Chapter IV which are engrafted into each provision of the IPC by virtue of Section 6 (Chapter IV of the IPC). Since this is so, consensual acts, such as contained in Section 87 and 88 IPC, are exempt from prosecution. Section 377 IPC read with Section 87 of the IPC would thus exempt consensual acts of intercourse between men or women, irrespective of whether or not they are against the order of nature.
   (iii) Whether 150 years after the IPC came into being, a law prohibiting consensual sexual acts ought to be decriminalized, especially when consensual acts are stated to be rarely prosecuted, based upon the doctrine of desuetude?

A. SECULARISM

2. Secularism has been found to be part of the basic structure of the Constitution. In **S.R. Bommai v. Union of India, (1994) 3 SCC 1**, this Court recorded that: -

> "Though the concept of secularism was not expressly engrafted while making the Constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the Preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualize not only of the subject of God but also an understanding between man and man. Secularism in the Constitution is not anti-god and it is sometimes believed to be a stay in a free society. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the state on grounds of public interest, order and general welfare. The state guarantee individual and corporate religious freedom and dealt with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another." [Para 178]

> "Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure to all its people socio-economic needs essential for man's excellence and of his moral well-being, fulfillment of material and prosperity and political justice." [Para 186]

> "Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a Constitutional goal and a basic feature of the Constitution as affirmed in *Kesavananda Bharati* and *Indira N. Gandhi* v. *Raj Narain.* Any step inconsistent with this constitutional policy is, in plain words, unconstitutional." [Para 304].

> "In short, in the affairs of the State, (in its widest connotation) religion is irrelevant; it is strictly a personal affair. In this sense, and in this behalf, our Constitution is broadly in agreement with the US Constitution, the 1st Amendment whereof declares that "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof..." (generally referred to as the "Establishment Clause"). Perhaps, this is an echo of doctrine of doctrine of separation of Church and State; may be it is the modern political thought which seeks to separate religion from the State - it matters very little." [Para 307]

3. In the **Constituent Assembly Debates**, with respect to secularism, Sh. K.M. Munshi stated that:-

> "Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation." [Cited in *Bommai,* para 304].

4. *Bommai* has been followed, inter alia, in **State of Karnataka & Anr. v. Praveen Bhai Thogadia, (2004) 4 SCC 684**, wherein it was held that:

> "Secularism is not to be confused with communal or religious concepts of an individual or a group of persons. It means that State should have no religion of its own and no one could proclaim to make the State have one such or endeavour to create a theocratic state. Persons belonging to different religions live throughout the length and breadth of the country. Each person whatever be his religion must get an assurance from the State that he has the protection of law freely to profess, practice and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of ones own presumptuous good social order." [Para 6]

> "Our country is the world's most heterogeneous society, with rich heritage and our Constitution is committed to high ideas of socialism, secularism and the integrity of the nation. As is well known, several races have converged in this sub-continent and they carried with them their own cultures, languages, religions and customs affording positive recognition to the noble and ideal way of life - 'Unity in Diversity'. Though these diversities created problems, in early days, they were mostly solved on the basis of human approaches and harmonious reconciliation of differences, usefully and peacefully. That is how secularism has come to be treated as a part of fundamental law, and an unalienable segment of the basic structure of the country's political system. As noted in S.R. Bommai v. Union of India etc., [1994]2SCR644 freedom of religion is granted to all persons of India. Therefore, from the point of view of the State, religion, faith or belief of a particular person has no place and given no scope for imposition on individual citizen…Religion cannot be mixed with secular activities of the State and fundamentalism of any kind cannot be permitted to masquerade as political philosophies to the detriment of the larger interest of society and basic requirement of a welfare State." [Para 9]

5. In **A.S. Narayana Deekshitulu v. State of Andhra Pradesh, (1996) 9 SCC 548** this Hon'ble Court held that:

> "There is a difference between secularism and secularisation. Secularisation essentially is a process of decline in religious activity, belief, ways of thinking and in restructuring the institution. Though secularism is a political ideology and strictly may not accept any religion as the basis of State action or as the criteria of dealing with citizens, the Constitution of India seeks to synthesise religion, religious practice or matters of religion and secularism. In secularising the matters of religion which are not essentially and integrally parts of religion, secularism, therefore, consciously denounces all forms of super-naturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices. In other words, non-religious or anti-religious practices are anti-thesis to secularism which seeks to contribute in some degree to the process of secularisation of the matters of religion or religious practices. For instance, untouchability was believed to be the part of Hindu

> religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under Civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17." [Para 89]

6. Since secularism is a part of the basic structure of the Constitution, the issue is whether a law which is religious in character without any independent secular purpose can be permitted to exist after:-

   a) the coming into force of the Constitution of India (1950)

   b) the 42nd Amendment Act, 1976 [w.e.f 03.01.1977], which introduced the term "secular" in the Preamble; and

   c) the judicial interpretation given to secularism.

Article 372(1) of the Constitution of India

7. The constitutionality of Section 377 IPC would have to be tested in light of Article 372(1) of the Constitution of India. Article 372(1) of the Constitution states as under:

> "**372. Continuance in force of existing laws and their adaptation. -** (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

8. This Court has taken the Preamble into account to test the constitutionality of a pre-constitutional legislation. In **State of Madras v. C.G. Menon, AIR 1954 SC 517**, this Hon'ble Court observed that:-

> "The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and the coming into force of the new Constitution by no stretch of imagination could India be described as a British Possession and it could not be grouped by an Order in Council amongst those Possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned the extradition of persons taking asylum in India, having committed offences in British Possessions, could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation."

History of Section 377 IPC

9. The history of Section 377 IPC can be traced to the vice of buggery, punished under a law enacted in 1533. The offence of sodomy/buggery had ecclesiastical origins. In 1533, Henry VIII - to break the link between the English Church and Rome - revised the common law to introduce these ecclesiastical crimes into the common law codes. The Statute of 1533 punished the "Vice of Buggery". The offence was punishable by death. After Queen Mary the I[st] restored the jurisdiction of this offence to the Church, it was reenacted by the British Parliament in 1563 as the Buggery Act of 1563. This offence remained on the statute books in England till 1861.

10. In the early 1800s, an attempt was made to reform the criminal law both in England and its colonies. Although this was not accepted in England itself, five Codes were created which were applied to various colonies. This included Macaulay's Draft Penal Code, which became the Indian Penal Code. Same-sex activity, being morally unacceptable to the rulers, was punishable in all the colonies. The Macaulay Code thus remains a legacy in a number of countries, including India. In England, the Sexual Offences Act, 1967 has decriminalized private same-sex relations.

11. The original provisions as per Macaulay's Code were Clauses 361 and 362, which read as follows:-

> "Of Unnatural Offences"
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> 361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to 14 years and must not be less than two years, and shall also be liable to fine.
>
> 362. Whoever, intending to gratify unnatural lust, touches for that purpose, any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than 7 years, and shall also be liable to fine."

12. In his Notes on Clauses, Macaulay declined to even comment on the said clauses, instead stating that:

> "Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. We leave without comment to the judgment of His Lordship in Council the two clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any

> benefits which might be derived from legislative measures framed with the greatest precision."

13. The Indian Law Commissioners, in their Report on Macaulay's Penal Code, while leaving the said provisions to the judgment of the Governor General in Council, records the advice of one Colonel Sleeman, in Paragraph 453, to the following effect:-

> "Colonel Sleeman advises the omission of both these clauses, deeming to most expedient to leave offences against nature silently to the odium of society."

14. J.W. Macleod, one of the Indian Law Commissioners, published his own "Notes on the Report of the Indian Law Commissioners dated 23rd July 1846 On the Indian Penal Code", wherein he took the entirely opposing view, that:

> "I shall offer only one more observation on this subject; it is, that in considering Colonel Sleeman's advice, to omit these Clauses and not substitute anything for them; the Europeans and descendants of the Europeans in India, and especially the large number of European soldiers always serving in that country, should not be forgotten."

15. Sir Michael Kirby, in an article titled "The Sodomy Offence: England's Least Lovely Criminal Law Export" [2011] JCCL 23, has traced the history of the offence and its impact on Britain's erstwhile empire.

16. On a reading of the law in the context of India, it shows that Section 377 was introduced in India not to achieve a social purpose or protect all individuals from harm, but was focused on the protection to Europeans and Englishmen.

17. Section 377, on its face, appears totally neutral and prohibits:-

    a)all kinds of intercourse

    b) between man, woman or even same sex relations, in addition to man/woman relations with an animal.

    The use of the term "against the order of nature" would only exclude penile-vaginal intercourse between man and woman.

18. In India, the understanding and interpretation of S. 377 IPC initially focused on anal sex between men. **Khanu v. Emperor, AIR 1925 Sindh 286**, traced the origins of the law including its religious origins. *Khanu* has been followed till date by various courts in this country.

19. The question is, therefore, whether such a law - which is purely religious in origin, connotation and interpretation - can be permitted to survive once secularism is recognized as part of the basic structure of the Constitution.

20. In **Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615**, it was observed "We only wish to add: our tradition teaches tolerance; our philosophy preaches tolerance; our constitution practices tolerance; let us not dilute it."

B. Section 87 IPC - "CONSENT" AS AN EXCEPTION TO SECTION 377 IPC

21. The Indian Penal Code engrafts general exceptions into each punishing provision. Section 6 states that:

> "Definitions in the Code to be understood subject to exceptions. Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though these exceptions are not repeated in such definition, penal provision, or illustration.
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> Illustrations
> (a) The sections, in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences, but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.
> (b) A, a police-officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement for he was bound by law to apprehend Z and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it".

22. Though Section 377 IPC does not distinguish between consensual and non-consensual sexual acts between two individuals, Section 87 IPC[1], which falls within the Chapter on General Exceptions, carves out an exception for acts causing harm which are not offences on account of consent between parties to take the risk of that harm. The illustration to Section 87 exempts games such as fencing.[2]

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[1] Section 87. Act not intended and not known to be likely to cause death or grievous hurt, done by consent.
Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.
Illustration: A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

23. Section 87 IPC applies those acts which are:-

    a) neither intended to cause death of grievous hurt; and are

    b) based on consent by a person over 18 years of age, who has consented to take the risk.

24. The question will arise as to how the general exceptions are to be read into the provision. Section 105 of the Indian Evidence Act[3] requires that the person claiming the general exception also prove it. This is a rule of evidence.

25. However, this burden to prove a general exception exists where the act complained of does not include the ingredients of the exception which is taken as a defence. Section 6 IPC is a proviso to Section 105 of the Indian Evidence Act.[4]

26. Reading Section 6 of the IPC, it is clear that, if Section 87 IPC were conjointly read with Section 377 IPC, acts of sex between men and/or women falling under the provision, if consensual and if the individuals involved are above the age of 18 years, cannot be proscribed or subject to punishment.

27. In **Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker, AIR 1960 SC 1113: [1961] 1 SCR 1**, it was held that the general exceptions can be considered by a Magistrate just as the police can consider a plea of alibi (see paras 4 and 6). Thus, the exception is when the offence is invoked and not merely as a defence.

2! *Tunda* v. *Rex*, AIR 1950 All. 97. A conviction was set aside on the ground that, while wrestling, while injury was received as a consequence of foul play, the same is protected by Sections 80 and 87 IPC.

3 105. Burden of proving that case of accused comes within exceptions - When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.
Illustrations
(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.
The burden of proof is on A.
(b) A, accused of murder, alleges, that by grave and sudden provocation, he was deprived of the power of self-control.
The burden of proof is on A.
(c) Section 325 of the Indian Penal Code, (45 of 1860), provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.
A is charged with voluntarily causing grievous hurt under section 325.
The burden of proving the circumstances bringing the case under section 335 lies on A.

4! See *Khujiram Somoi Singh* v. *State of Manipur*, 1997 Cri.L.J. 1461 @ Para 3, Page 1463, (Gauhati High Court); *Subodh Tewari*, 1988 CriLJ 223 @ Para 8, 9; *Abdul Lateef*, 1981 CriLJ 1205 @ Para 5.

28. Other than *Vadilal,* there is no definitive judgment on the effect of Section 6 IPC. It is submitted that if this Hon'ble Court were to clarify the effect of Section 6 IPC and the introduction of the general exceptions into Section 377 IPC, the consequence would be that the provision should be interpreted in its correct context by exempting consenting homosexual acts by adults.

C. DOCTRINE OF DESUETUDE

29. Before the High Court, the Ministry of Home Affairs in its Counter-Affidavit stated that

> "A perusal of cases decided under Section 377 IPC shows that it has only been applied on the complaint of a victim and there are no instances of its being used arbitrarily or being applied to situations its terms do not naturally extend to. Section 377 has been applied to vases of assault where bodily harm is intended and/or caused and deletion of the said section can well open flood gates of delinquent behavior and be misconstrued as providing unbridled license for the same. Sections like Section 377 are intend to apply to situations not covered by the other provisions of the Penal Code and there is neither occasion nor necessity for declaration of the said section unconstitutional." [Para 9]

30. A doubt has repeatedly been expressed as to the extent of the application of Section 377 IPC to consensual sexual acts by enforcement agencies due to the absence of official statistics in this regard.

31. The last reported cases in respect of consensual acts are over 80 years old.

32. In these circumstances, a question which confronts us is whether a case is made out for decriminalization of consensual sexual acts between adults in private.

33. Decriminalization is defined as follows:-

> "We understand by decriminalization those processes by which the "competence" of the penal system to apply sanctions as a reaction to certain forms of conduct is withdrawn in respect of specific conduct. This may be done by an act of legislation or by the way in which legislation is interpreted by the judiciary…
>
> The concept of decriminalization and the term "decriminalization" are of recent origin. Yet, during the history of criminal law there have been processes, if not programmes of decriminalization at different periods." [Report on Decriminalization, Council of Europe, 1980, Pages 13, 14, 55]

34. The doctrine of desuetude has been applied in India originally in the context of religious practices and parliamentary practices [**Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha, (2007) 3 SCC 184**, at Paragraphs 136, 137, 242]. In **Municipal Corporation for City of Pune v. Bharat Forge Co. Ltd. & Ors., [1995] 3 SCC 434**, this Hon'ble Court was pleased to hold that the doctrine of desuetude applies to Indian statutes:

> "Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the 'dead letter'. We would think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also Our soil is ready to accept this principle: indeed, there is need for its implantation, because persons residing in free India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become 'dead letter'. A new path is, therefore, required to be laid and trodden." [Para 34]

35. Thus, based on the available material, a case can be made out for a decision by this Court that consensual sexual acts ought not to be prosecuted by this dead letter law.