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Victorian stick

Home and health ministries at loggerheads on a 1860 law

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On May 22 a Delhi High Court hearing brought to the fore the rift between two Union ministries. The object of discord was a law dating back to days of high Victorian puritanism: section 377 of the Indian Penal Code. It criminalizes sexual acts "against the order" and is often used to harass the gay community—in the process making them vulnerable to HIV/AIDS. The ministry of health and family welfare wanted changes in the section, while the home ministry contends that only victims can demand a change in laws—not a third party.

The health ministry's National AIDS Control Organisation (NACO) is against Section 377 because it feels that it creates obstacles in carrying out AIDS awareness programmes amongst homosexuals. The home ministry has not countered these objections. The High Court has asked the Attorney General to clarify the Union's stand. The case's next hearing is scheduled for July 2.

The dispute between the ministries is germane to a 2001 petition of the NGO, Naz Foundation (Trust) India, against the Union government. The petition filed in the Delhi High Court stated that section 377 is affecting the NGO's work with homosexuals. It was triggered by a

police raid on the Lucknow offices of Naz Foundation International and another NGO, Bharosa.

The petition was countered by affidavits from the NGO Joint Action Council Kannur (JACK) and B P Singhal, a prominent member of the BJP. The Kannur NGO's affidavit contended that the Naz Foundation's case was not backed by an independent scientific study. It also claimed that section 377 was important for victims of child abuse and rapes. Singhal's petition asserted that homosexuality is against Indian culture and evolution.

But health ministry agencies like NACO endorsed Naz Foundation's stand (See time line: An enduring law). Samarjit Jana, national programme advisor to the organization says that fear of section 377 makes many keep their homosexuality under wraps. The hidden nature of homosexual groups leads to poor access to healthcare and safe sex information, he says. Jana is categorical that the health ministry "is the only ministry that works with these marginalized groups." So it understands the problem better, he says.

Archaic law

Section 377 is an amazingly enduring law. Part of the original Indian Penal Code of 1860, it deems sexual acts



An enduring law

1860	The Indian Penal Code formulated. Section 377, an important part
1994	Condoms not allowed in Tihar Jail
2001	Offices of the NGOs working with homosexuals raided
2001	Naz Foundation files a case in the Delhi High court
2002	JACK files a counter affidavit
2004	Ministry of home affairs says section 377 necessary to protect children from abuse
2004	Naz Foundation petition dismissed
2006	Supreme Court asked Delhi High Court to look at the legal status of 377
2006	NACO said section 377 was a problem for its education programmes
May 22, 2008	Hearing brings about differences between home and health ministries

between men illegal; violations can invite imprisonment for 10 years—even for life. While imprisonments have been rare, section 377 is often used to harass the gay community. For example, in January 2006 the Lucknow police traced down a person in the city through a website and then charged him and his friends of having sex in a public park.

"Section 377 affects people's right to information about safety," says Sumit Daudh, a Delhi-based lawyer activist. Repealing it would help many change their self-perception and realise what they are doing is not a crime, he adds.

Health and human rights issues led Germany, France, UK, Denmark, Norway, Finland, Iceland, Ecuador, Mexico, Australia, New Zealand, Fiji, South Africa, Hong Kong and Taiwan to legalize homosexuality. Canada, Belgium, Netherlands, South Africa, Spain and some US states even allow same sex marriages. Activists also say that section 377 violates fundamental rights guaranteed in the Constitution. ■

Vulnerable behind bars

In 1994, a medical team suggested that condoms be made available in Tihar Jail after finding high rates of homosexuality there. Kiran Bedi, the then Inspector General of prisons, refused because that would tantamount to admitting an illegal activity, homosexuality, on jail premises. A human rights group, AIDS Bhedhav Virodh Andolan filed PIL in the Delhi High Court challenging the constitutional validity of section 377 and arguing for the supply of condoms to jail inmates. The case died out because the NGO did not turn up for the hearings. The jail still does not provide condoms to inmates. NACO plans to lobby with the home ministry to mend matters.

Meanwhile, the National Sentinel Surveillance Data 2005 shows that more than 8 per cent of the 25 lakh population of men who have sex with men are infected by HIV while HIV prevalence among the general population is less than one per cent.



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