

Draft petition for delegation

Background

On 07.07.01, an FIR was filed in the Hazratganj Police Station, by one Mr Rajesh complaining that he had been sexually assaulted by an unknown individual. On the basis of this FIR, the Lucknow Police raided a park, which was frequented by men who have sex with men (MSM) and arrested some people. One amongst the arrested was an outreach worker from an NGO called the Bharosa Trust. Thereafter, the Police ran amok and raided the offices of two organizations: Bharosa Trust and Naz Foundation International (NFI). Bharosa Trust works in the field of HIV/AIDS intervention with men who have sex with men (MSM) in Lucknow. NFI is a UK-based international agency that has its South Asia Liaison office in Lucknow under permission of RBI and other authorities, which provides technical support for the development of projects addressing MSM issues around HIV/AIDS. The police arrested four activists working with the Bharosa Trust and NFI and also seized literature and materials that are used for educating MSM on safer sex practices, and subsequently charged the workers of Bharosa and NFI with sale, etc. of obscene materials, on the basis of the material seized. The police then beat up the arrested workers at the police station. The office of NFI was sealed.

The Charges

The NGO workers have been accused of criminal conspiracy (Section 120B IPC) to commit unnatural offences (Section 377), abetment (Section 109), sale of obscene books (Section 292), Sections 3 and 4 of the Indecent Representation of Women Act and violations of Section 60 of the Copyright Act. Of these, only the charge pertaining to unnatural offences (Section 377) is cognizable and non-bailable. The police have failed to produce any evidence to support the charge of conspiracy to commit unnatural offences (377) against the workers. Even the medical report as disclosed by the police explicitly states that no clear case of sodomy has been made out. The police have represented the education materials seized by them as obscene. The SSP Police and the SP [East] of Lucknow have repeatedly charged in the media that these workers were 'spreading homosexuality against Indian culture'. This when the Government of India specifically recognises MSM as a high risk group, and has made provisions for NGOs working specifically with this community. Bharosa acted within the bounds of this national policy.

The Government response to HIV/AIDS

India today has the unhappy distinction of being the country with the second largest population of HIV positive persons in the world. The infection has already reached epidemic proportions and it is estimated that there are nearly 39 lakh HIV positive persons in the whole of India. Infection is spreading rapidly. It has been recognized that measures at a war footing are required to tackle the epidemic and stem the spread. The Government of India has formed the

National AIDS Control Organisation [NACO for short] in the Ministry of Health and Family Welfare to take measures and frame policies at a national level to take on this gigantic task.

In the year 1992, NACO formulated the first five year intervention programme which emphasized the spread of safer practices, including blood transfusion, safer sex and other protection information to the general public, by way of mass publicity campaign. In the year 1999, NACO formulated the Project Implementation Programme Phase II [hereafter called the 'programme-II']. One of the main components of programme-II is the adoption of 'targeted interventions' with groups that are more vulnerable to HIV infection. This implies that the groups engaged in high-risk activity are identified and then they are encouraged to mobilise themselves for the purpose of HIV/AIDS intervention. The objective of this strategy is that these groups come out in the open and avail of the services afforded to them. Mechanisms for targeted interventions include facilitating the formation of support groups, integrated peer counselling and dissemination of safer sex information sensitive to the specific needs of the targeted group. This targeted intervention is sought to be implemented by the participation and involvement and training of NGOs. One of the groups that have been identified in Programme II is that of MSM.

To guide program-II, NACO also formulated the National AIDS Control Policy. The purpose of the policy, amongst other things, is to ensure that state agencies like the police etc. do not act in a manner that impedes the implementation of programme-II, for often the groups engaged in high-risk activity are stigmatized and their practice criminalized. The present case, i.e. the use of Sections 377 and 292 of the IPC against NGO workers is a stark example of police action impeding HIV/AIDS interventions that are functioning as per the Government's policy.

The Government of India has also clearly articulated its support for HIV/AIDS interventions at various public fora. At the recently concluded United Nations General Assembly Special Session on HIV/AIDS, the Indian Government took the stand that MSM and sexual minorities are vulnerable and need to be provided with HIV/AIDS intervention. The actions of the Lucknow Police in the present case exposes the gaps between Government policy and State action.

Judicial proceedings

As has been mentioned earlier, the only non-bailable offence that has been alleged is that of Section 377. The workers are in judicial, not police, custody, which means that they are not required for questioning. Yet the Chief Judicial Magistrate and the Sessions Court have denied them bail on the grounds that they are a 'curse on society'. These are not grounds that are acceptable under law and consequently an application for bail has now been moved in the High Court and the hearing is expected to take place in the next ten days.

The charges against the workers and their continued incarceration in jail is a perversion of justice and a direct assault not only on the arrested but also on the rights of MSM to access health information around HIV/AIDS.

Police action in violation of law

The police action and the denial of bail on two occasions is a violation of the law and of fundamental and human rights for the following reasons:

- Section 377 is a specific offence and it cannot be charged just to implicate persons working with MSM under national policies.
- A case for Section 377 is not made out in any event in light of the medical report that states that no case of sodomy exists.
- Right to health is covered under the Fundamental Right to life under Article 21 of the Constitution, and health information cannot be denied to MSM just because of social perceptions.
- No one can be criminalised for providing health information.
- Indian culture is a subjective matter and no one can be jailed for supposed violation of supposed Indian culture.
- The police action for supposed protection of supposed Indian culture if allowed would give free reign to the police to act in an arbitrary fashion, and this shall result in the breakdown of the rule of law in civil society.

This police action in Lucknow has very serious implications for all sexual health projects in India and on the work being done by HIV/AIDS intervention NGOs with vulnerable populations like sex workers, drug users and MSM, who become open to such kind of abuse and victimisation by organs of the state, including the police.

CHARTER OF DEMANDS

In light of the above disturbing facts we demand that:

1. The false and concocted charges made out against the arrested workers of Bharosa and NFI be dropped and they be released forthwith.
2. The office of NFI that has been sealed be forthwith released and the work of the organisations with the vulnerable population of MSM be allowed to go on without any interference from the police.
3. The state assure the protection of the workers of the organisations and the outreach workers of these organisations from any kind of harassment and violence from the Police.
4. The entire state machinery speak in one voice in matters of policy, which include the various commitments made by the government of India in international forums including UNGASS, where it has asserted that MSM form part of its HIV/AIDS intervention efforts.
5. The police force be educated about this policy.