

pensation, it could not do so by applying a rule, such as the doctrine of "strict liability", without establishing a factual basis for the application of that rule.

➤ Besides the orders passed by the Supreme Court in this case, the NHRC's own orders dated August 4, 1997, January 13, 1999 and March 24, 1999 were crystal clear that compensation would follow "after the factual foundations are laid establishing liability".

➤ Therefore, the NHRC's order of November 11, 2004 awarding Rs 2,50,000 to 109 cases of "admitted custody" by way of compensation, without clarification on the principles of reparation or the facts of violations suffered by these persons, was whimsical and arbitrary.

➤ Even assuming that the NHRC was justified in applying "strict liability" for granting compensation to 109 cases of "admitted custody", these cases were only a small fraction of the 2097 cases which the commission was committed to adjudicate upon. In all the remaining cases, which formed the overwhelming bulk, the Punjab police denied custody while the families of the deceased asserted that they were killed in police custody. There was no way for the commission to resolve this dispute with respect to custody in the remaining cases unless it established a mechanism to adjudicate on the facts of each case by giving the victim families an opportunity to lead their evidence, countering official denials.

An important event occurred immediately after the hearing on October 18. In May-June 2005, a team of doctors, psychologists and psychiatrists from Physicians for Human Rights (PHR) and the Bellevue Hospital-New York University School of Medicine Programme for Survivors of Torture (Bellevue) had carried out an intensive study of 130 families whose relatives had been killed and cremated by the Punjab police. These families had been randomly selected by PHR-Bellevue from the cases that were before the NHRC in the ongoing proceedings in the Punjab disappearances case.

The PHR-Bellevue study was based on structured interviews and diagnostic evaluations of these randomly selected survivor family members. In each case, their assessment included:

➤ A detailed account of abuse suffered by the deceased and his or her family members.

➤ The psychological impact of the reported abuses on the family members interviewed.

➤ The impact of the abuses on the physical health of the family members interviewed.

➤ The impact arising out of the loss of the deceased, injuries and disabilities sustained by the surviving family members and/or the loss suffered on account of destruction of property by the police/security forces.

➤ The attitude of those interviewed on the issue of reparations by the state for the injury/loss suffered by them.

The report of the study provides an insight into the enormity of the human rights violations committed upon the hapless citizenry of Punjab by the police and other security forces in the name

The Physicians for Human Rights-Bellevue Hospital study provides an insight into the enormity of the human rights violations committed upon the hapless citizenry of Punjab by the police and other security forces in the name of combating insurgency. It establishes that the survivors continue to suffer severe trauma, psychological and physical, more than ten years after the event

of combating insurgency. It establishes that the survivors continue to suffer severe trauma, psychological and physical, more than ten years after the event. In fact, the report makes it clear that the lives of an overwhelming majority of the survivors, which includes a large number of children, have been irreparably shattered by the events leading to the killing of their relative by the police. Despite this, in many cases the intimidation and harassment continued for several years after that killing. A copy of the report can be had at <http://www.ensaaf.org>.

The CIIP brought this report to the attention of the NHRC at the earliest possible through an application dated October 24, 2005.

The hearing on October 24, 2005 was primarily for the purpose of hearing the state of Punjab's arguments with respect to the CIIP's application dated September 9, 2005. The solicitor general of

India, Goolam Vahanvati argued on its behalf. Not surprisingly, the state of Punjab had nothing of substance to say in opposition to the CIIP's application. Their entire argument was constructed around the cue provided to them by the NHRC itself, which had made it plain from the first that it considered all the issues being raised in the CIIP's application "closed" by virtue of previous orders with respect to them. Consequently, the solicitor general took the commission through a carefully controlled tour of the various orders of the Supreme Court and the NHRC, purportedly showing that the issues raised had indeed been "closed". Being a senior advocate of considerable skill his comments, interspersed at appropriate points of this "tour", essayed to create an aura of validity around the stand that the NHRC had chosen to take with respect to these issues.

Needless to say, it took the CIIP but a moment to demolish this aura. In brief submissions in rebuttal of the Punjab government's arguments, Indira Jaising pointed out passages from the very orders that had been read out by the solicitor general that made it clear that the NHRC had always considered itself committed to investigating the factual foundations of the allegation i.e. that the cremations by the police were merely the culmination of a series of illegalities that resulted in the death of these persons at the hands of the police.

The NHRC has reserved its order on the CIIP's application. ■

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Endnotes

¹ *DK Basu v. State of West Bengal and others*, AIR 1997 SC 3047.

Proof positive

A recent medical study highlights the magnitude of human rights violations perpetrated in Punjab even as the NHRC continues to deny evidence in the Punjab disappearances case

BY ASHOK AGRWAAL

As readers are aware, the National Human Rights Commission (NHRC) has taken the stand that its mandate in the Punjab disappearances case was confined to the scrutiny of the legality (or otherwise) of the cremation of bodies by the Punjab police as unidentified/unclaimed. On September 9, 2005 the Committee for Information and Initiative on Punjab (CIIP) filed an application before the NHRC challenging this stand and asking the NHRC to clarify its position with respect to three vital questions of law that arose in the case. The application also sought a stay of proceedings in the case till this application was decided. Despite having made its intentions clear, the NHRC had refrained from declaring them in writing. Thus, the application served the dual purpose of confronting the commission and forcing it to place the oral stand it had been taking on case records.

The application drew attention to the roots of the current proceedings: namely, the press note dated January 16, 1995 issued by Jaswant Singh Khaira and his colleagues and the writ petition filed by the CIIP before the Supreme Court on the basis of the cremation ground records uncovered by Khaira & co. Both drew an explicit connection between the enforced disappearances reported in Amritsar and other parts of Punjab and the cremations by the Punjab police. Since the December 12, 1996 order of the Supreme Court had specifically referred "the whole matter" to the NHRC and asked it to adjudicate upon all the issues that may be raised by the parties before it, there was no scope for ambiguity on this count. Any adjudication by the NHRC must include a scrutiny on the

manner in which the cremated persons met their death.

The application also questioned the manner in which the NHRC had applied the rule of strict liability to the case while granting compensation to the families of 109 persons in November 2004. Quoting from the decision of the Supreme Court in the DK Basu case, delivered by Justice Anand when he was a



judge of the Supreme Court, it was pointed out that in the context of human rights law, 'strict liability' was used as a rule of evidence, to meet the challenge posed by an ever-increasing incidence of custodial crime where it is generally "difficult to secure evidence", notwithstanding an earnest investigation.¹ It was submitted that it was premature to apply this doctrine in a case where evidence of the crime was avail-

able and where no investigation has been carried out to date.

It was pointed out that on the contrary, in the present case there was ample evidence before the NHRC - in the shape of evidence submitted by the CIIP based on its investigations and the direct testimony of the families that had filed claims pursuant to the public notice issued by the NHRC on July 19, 2004 - to belie the assumption that there was not enough evidence of the crimes committed by the police in this case. It was also pointed out that the analysis of 582 affidavits filed by the Punjab police with respect to the death and cremations of persons "identified" by the CBI, comprising list 'A' submitted by it, also made it clear that there was ample evidence of the illegalities committed by the police in the course of eliminating the persons who were ultimately cremated by them.

Hearing on this application commenced on October 18, 2005 and was concluded on October 24. The commission was hostile to the application from the inception and took the position that all the issues raised in the application had been raised earlier, and decided against the CIIP.

Indira Jaising, who argued the case on behalf of the CIIP, developed her arguments around the following points:

- > Rules of cremations cannot take precedence over the fundamental rights of life and liberty.

- > That a declaration that the fundamental human rights of the deceased persons and their families had been violated was a crucial component of any proceeding under Article 32 of the Constitution.

- > Such a declaration could not be issued without adjudicating the facts of each case.

- > Thus, even assuming that the commission was correct in holding that the sole task before it was the grant of com-