



Enforced Disappearance and the role of Law Enforcement Agencies and Judiciary in Pakistan

Vol. IV, No. IV (Fall 2019) | Pages: 556 – 562 | DOI: 10.31703/grr.2019(IV-IV).61

p- ISSN: 2616-955X | e-ISSN: 2663-7030 | ISSN-L: 2616-955X

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Abstract

Enforced disappearance has become a global phenomenon; over one million have disappeared in the last 50 years, (Sarkin, 2012). Since the Afghan war, the incident began to start in Pakistan and the law enforcement agencies turned a blind eye to it. The International Convention for the Protection of all people from enforced Disappearance (2006) looks after the events globally and has concluded in an article that: "... the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (Convention for the Protection of all people from enforced Disappearance, 2006).

Key Words: Enforced Disappearance, Law Enforcement Agencies, Government Efforts

Introduction

The event is against the international norms and the doctrine of fundamental rights as envisaged in the constitutions of most of the countries of the world, it violates article 6 of the International Covenant on Civil and Political Rights, it is against the UN declaration as well as the article 1 of the said convention. The work shall analyze the existence of missing persons, international and national obligations and the role of the Supreme Court to recover these people.

International and National Provisions for the Protection of Enforced Disappearance

Enforced Disappearance have become an International issue for a long and no proper attention has been given in the beginning to eliminate this menace; as discussed in the introduction millions of innocent persons have been forcefully disappeared, in order to discourage it, number of the International organization started work over it, to inform the people, and to create awareness among the stakeholders. It violates fundamental human rights i.e. Right to life, liberty, religion, and many more, the convention for the protection of the innocent individual has set guidelines for the member states to act, it sought to recover these people and to provide compensation for the victims globally.

International Covenant on Civil and Political Rights (1966) argue in article 6 that the right to life is the basic right of every individual; while going back to history, the Universal Declaration of Human Rights (1948) set principles for the member states to initiate the process at home. Enforced Disappearance is at the same time, stern, worldwide and dirigible in nature which attracts the attention of the world because of its importance; it is a heinous offence against humanity, Article 5 of the International Convention on the protection of all persons against enforced disappearance reports that:

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“The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.” UDHR (1948) in article 9 declares that “–No one shall be subjected to arbitrary arrest, detention or exile” (Art. 9, UDHR, 1948).

While ICCPR gives a detailed description of protection against this problem, it says that security and liberty of the individual is the basic right and must be protected on a priority basis, no person can be detained without a lawful act, and a proper reason must be given to a person who has been detained, the arrested one shall be brought before the court and full time should be given to him to defend himself against his detention if it proves that he has been detained illegally full compensation shall be awarded to him. United Nations General Assembly in his declaration on the protection of Disappearance persons (1992) states:

“... in many countries, often in a persistent manner, enforced disappearances occur ... which places such persons outside the protection of the law” (United Nations General Assembly in his declaration on the protection of Disappearance persons, 1992).

The declaration focuses on the safe security of the individuals if his liberty was at stake, it is against the international commitment to protect innocent people from the atrocities; International criminal court gives a detailed account of the said problem as stated “...enforced disappearance of persons|| to mean ...the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”. Convention has given a different definition to the concept as “enforced disappearance to mean the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization ... which place such a person outside the protection of the law” (ibid).

In the light of the above-mentioned landmarks, International bodies direct the states to legislate in their home for the protection of missing persons inside their State. Geneva Convention has been considered a milestone for securing the rights of people including the rights of the treatment of prisoners (1949), and the protection of civilians especially when war has erupted (1949), in the case of armed disputes the victims must be protected (1977).

The continent of Europe had taken drastic measures to protect the basic rights of the people; The council of Europe (1950) was a milestone in the direction to provide protection regarding human rights, The council o Europe convention on the right of the protection of individuals (1981), in the same manner, United States convention on human rights (1969) also focuses to concentrate on the issue aforementioned, in the continent of Africa the efforts were taken in the shape of The African charter on human and people's rights (1981). On the regional level The Rome Statute of the International criminal court (1998), and UN efforts to safeguard the interests of woman rights (1979) were some of the famous works to protect the interests of the people.

In Pakistan since the Afghan war back in 1979 the cases of missing persons began to report indigenously; General Zia ul Haq Marshal Law has curtailed fundamental rights in the country, and from 1985 the issues erupted on a frequent basis, Baluchistan, KPK and ex FATA remain the main hub of these cases in the State, almost all section of the society were included (Human Rights Watch 2011, P. 2).

The dawn of the twenty-first century has enhanced the cases of disappearances in the country due to the government's decision to become an ally of the United States in the war against terror (Mughal, 2013). People from different regions of the country began to disappear on suspicion and were not brought before the courts which were against the International treaties, such cases were found in Punjab and KPK on a frequent basis, and many cases of such incident took place in Baluchistan as a head of Baloch student organization was disappeared (International Commission of Jurists, 2014), no efforts on the part of law enforcing agencies can be seen to recover him (Shah, 2014).

The constitution of 1973 under article 9 calls to protect the individuals against arbitrary arrest, article 4 declares that individual access to the law must be ensured and the liberty of the citizens must be safeguarded. Article 10A has been inserted in the constitution to protect the liberties of the people, after the Pakistan

Protection act (2014) a number of measures have been taken in this regard, it talks about the access of each person to a free trial, earlier this facility was not available under article 10 of the constitution, article 10 (3) suggests that the accused must be given opportunity to defend himself against the arbitrary arrest, information's and reasons for his detentions are being offered to him. But in the case of forced disappearance, nothing practical has been done to legislate, the Pakistan Protection act rather protects the army, police and other agencies to disappear innocent people in the name of security. By analyzing these provisions of the constitution, one thing is clear that there exists no specific legislation against missing persons, although Pakistan is a member of the United Nation and the among the countries who had ratified various conventions which are working against the forced disappearance globally, it must comply all the provisions of International treaties to protect the rights of the citizens in this regard. Presently in Pakistan, weak procedures are being adopted for dealing the cases of disappearance; it is section 359 and 360 of the Pakistan penal code which is applied to these cases where the issues of disappearance have been involved while in the abduction issues section 362 of the said penal code is being tried which is less fruitful in this matter.

Role of Supreme Court for the Protection of Forced Disappearance in Pakistan

While dealing with the case of missing persons in Muhabat Shah (2014) the court opined that such cases must be made accountable under the law of the land; it declared "its inextricable link to the right of life" the constitution under article 9 protects the life of every individual, the government went against the decision of the court and stated that Pakistan has not ratified the convention formed for the protection against forced disappearance; the analysts argue that the decision of the government to go for the review was to protect the law enforcing agencies, who were involved in the heinous crime.

In another case in which the issue of forced disappearance was involved in Baluchistan, nearly 197 people were missing; when their relatives of them approached the court for justice, under the direction of Chief Secretary Baluchistan, their cases were re-directed to the high court of Baluchistan with the intentions that no further investigation could be arranged, it was the politically perpetuated incident not to involve security agencies in the matters of disappearance.

The United Nations Group working on missing persons has criticized the government of Pakistan, for not comply the convention established for enforced disappearance; it was told that a list of new 321 cases has been given to the government in which a maximum number of people was from Sind. The Working Group had strong observation over The protection act 2014, in which very less investigations have been allowed against the law enforcement agencies; in its reports, it declared India as the most brutal nation in the world, it has more than eight thousand cases only in Kashmir, the other countries like Pakistan, Sri Lanka and Nepal record was not satisfactory. There have been procedural flaws in these countries to deal with such cases as Pakistan still adopts 1859 and 1860 PPC rules which can't meet in such cases; according to the Inquiry commission on enforced disappearance in 2016, nearly 728 fresh persons were added to the list of missing persons which is a matter of great concern for the State, Abdul Wahid Baloch a social activist had been abducted by the Ranger in Baluchistan, in another case disappearance an accused was released when the protestors staged a protest at Islamabad. In KPK during Swat operations number of people from nearby areas disappeared by law enforcement agencies; a commission had been constituted to decide the future of these people but people have observation regarding the decisions of the Supreme Court, the performance of the said commission was not satisfactory as it couldn't conclude 1300 cases in six years.

Zeenat Shehzadi disappeared by agencies in Lahore. She was a journalist by job; when questions were asked in the parliament, the Chairman human rights commission of Pakistan told in Senate that NGOs have been involved in the blame game against the State, the actual cases are less than 100 and they are those involved in the terrorist activities against the State. But on the other reality is that round about 1000 dead bodies have been found in Baluchistan which are suspected to be killed by law enforcing agencies

In the third government of the Pakistan People's Party, the cases of missing persons began to report in the post-1995 when the families approached the court; the abductees were never recovered, in this regard, MQM raised voices against this issue but nothing pragmatic has been done in this regard nor any investigation has been

finalized to recover these people. A petition was lodged by a wife of a disappeared person against the SHO that he has been involved in the case, but the case was denied by a said police officer, although he disappeared by him and handed over him to the agencies, on the continuous reminder of the courts to inform it about the where about of the said person was done accordingly; the role of administration in the cases of missing persons are very poor because in most of the case they are involved in such cases of disappearance. The role of the Supreme Court in the missing persons is quite miserable, it should take positive steps to recover these people and must protect the basic rights of the people to restore the confidence of the people over the courts. Missing persons in Pakistan have been deprived of the facilities of lawyers, family members and courts; the incidents of extra-judicial killings have diverted the attention of the world that security forces are being involved in this heinous crime (Ansari, 2012).

Due to the psychological effects, the relatives of the disappeared persons fear the repercussions against their family members; a maximum of people don't approach the police for FIR and courts for rescue. The Ministry of Interior had a record of only less than 1000 missing persons but the actual was more than 7000 is increasing day by day. In Pakistan the issue of enforced disappearance came to court in 2006 when the relatives filed a petition for the safe recovery of their relatives; sensing the situation Chief Justice Iftikhar Muhammad Chaudhry took sue motto to recover these people, and a list of 242 persons was submitted in the honourable court, he declared the same as against the basic right and norms of democracy. The court order constituted a commission to know where these people were; at that time the list reached 1600 and was increasing with the passage of time; most incidents took place in the province of Baluchistan ([Jillani, 2012](#)).

The government had frequently admitted the fact of disappearance but had not taken a real step to discourage it; it also acknowledge that the issue is not only against the International norms but also against the constitution of the State, article 4 of the constitution state that "to enjoy the protection of the law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be..." (The Express Tribune, 2014).

Supreme Court had investigated 600 cases of missing persons under article 184(3) of the constitution which state that "the Supreme Court shall if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article" (Article 184(3), constitution of 1973).

When Chief Justice Iftikhar Chaudhry investigated the issue it was reported that a maximum number of people has been disappeared in the name of security, some on a political basis while there have been cases as well; he stated that it is confirmed that security agencies are involved in these cases (Report of UIN Working Group on enforced disappearance, 2009).

The action on the part of the Supreme Court to declare security agencies responsible for the enforced disappearance has created a gulf between establishment and judiciary which led to the suspension of the judges of the superior judiciary including the chief justice of the State; it was followed by Lawyer Movement in 2009 which was a turning point for the restoration of judiciary in the country, it led to the concept of judicial activism and had strengthened the concept of public interest litigation in Pakistan (Proclamation of Emergency, 2007).

The modern trend in the judiciary have to compensate the victims to a maximum level (Sherwani, 2011, PP. 75-78), this has led the courts to introduce the concept of Sue motto cases, mostly utilizing article 184(3) of the constitution, not only supreme but high courts quite frequently exercise this power (Rizvi, 2013). By analyzing the issue the courts in a few cases it has encouraged rather legitimized the action of security forces against the violation of human rights. In Nadia Mushtaq, who was 15 years old had been kidnapped in Rawalpindi in 2006; his father lodged FIR against a person under the offence of Zina, but police couldn't rescue her but found her mobile from him, the accused was acquitted, her family members approached Lahore high court, the decision was upheld, again they lodged a petition for appeal in the Supreme Court in 2010. The court took suo moto and ordered police officer Rawalpindi to recover the girl, due to the double jeopardy the accused had the advantage and since the case was first registered in 2006, a lapse of three years has been passed, although police were now trying to recover the girl. In order to enforce the orders of the Supreme Court police started harassing the relative

of the accused; till 2013 forty-five police officers were involved to recover the said but nothing pragmatic could be done in this regard and the court order remains effective.

In another case Raja Moazzam, his mother lodged an FIR against the kidnapping of his son, a complete story was narrated to the security agencies which led to the abduction of his son; the authorities arrested three brothers of the accused while sensing the situation Supreme Court took Sue Motto in this case. The police completely failed to recover the persons; meanwhile, the three brothers of the accused were set free by the court; the case was then submitted to the commission working on the enforced disappearance but still, no progress has been made so far in this regard. In C.M.A No. 4588/2009 in Cons.P.No. 5/2007 in the Supreme Court, it was the matter of kidnapping of Dr Imran Muneer who had been abducted by security forces; but now has been released on the orders of Military Courts but still shall remain in the custody of Adyala jail for security purposes, without the approval the honourable court he couldn't be arrested, in this case, the court ordered the ministry of interior that a number of Pakistan citizens are being handed over to the foreign countries, their details must be submitted to the honourable court. Mr Masood Janjua was among the missing persons, the court declared that detention of the citizens without committing any offence is against article 4 of the constitution of 1973; article 8,9, 10, 11, 13, 14 and 15 also gives rights in this regard. The court quoted all the International treaties which work for the protection of innocent citizens, these all must be complied with in letter and spirit, it also ordered that those families suffering the abduction can lodge petitions regarding the recovery of their bellowed, it was a significant move towards the implementation of national and International obligations which works for improving the standard of life of the innocent people.

A petition was filed by Human Rights of Pakistan V. The Federation of Pakistan in C.M.A No. 4420/2009 in constitution petition No. 5/2007; it was requested that the pending cases of missing persons must be concluded, and it was told by the petitioner that a list of 198 persons was submitted in 2007 in which 83 persons have been released while 99 persons are still awaited, even its where about is not known, the maximum people were from the province of Baluchistan, a complete detail has been provided in the list. The Supreme Court of Pakistan couldn't play a decisive role to recover these people which created mistrust among the victim's families and the law enforcement agencies, the courts could do nothing to pressurize the administration about their recovery.

A case was submitted in the Supreme Court of Pakistan in Human Rights Case No. 13140-S of 2009; in the above case Mr Sikander S/O Muhammad Siddique and Noor Muhammad S/O Muhammad Achar, initially DPO submitted a report that yet they had not yet recovered. The petitioner stated that a police officer at Bhattai Nagar police station had captured him and handed him over to the agencies; the court gave 15 days' time to the high officials to recover the abductees, but no serious efforts could be made for their safe recovery, the court couldn't implement his decision, again the law enforcing agencies couldn't implement the order of the honourable court.

A Sue Motto action was initiated by Supreme Court on the news clipping in "The Daily Nation" a Human Rights case No. 7679-4 of 2009; Mr Saeed Mengal had been kidnapped by FC in Baluchistan and his where about are not known. The mother and sister of the abductees have been told that if he has committed any offence, must be brought to court, further told that they are poor and can't pay for any amount regarding his release. The police demanded to take some time in order to reach the root of the issue, but couldn't recover him; again the court couldn't pressurise security agencies to release the said person. Another case of Human Rights was submitted to the Supreme Court in "Human Right Case No. 4878 of 2006; a complaint was made by Hanifa bibi for the recovery of her daughter, the court directed police authorities to recover the said girl Miss Shazia, the police wanted to investigate the issue and shall submit a report, on the compliance of the orders of Supreme Court she was successfully recovered.

Mr Mustafa Azeem had been kidnapped by the security forces; a case was lodged in the Supreme Court "H.R.C.No. 2724/2007" to recover the said person, the court ordered police authorities and Inspector General Frontier Corpus to explain the position. The inspector General police constituted an investigation team to probe the matter, he further told that full justice shall make, and in this regard, an FIR has been lodged. The court was furious at the careless behaviour of law enforcement agencies not doing the needful in this case; again security agencies could do a pragmatic approach to resolve the issue. A Human Right Case No.09 of 2009 had been lodged in the Supreme Court on the news published in "The Daily Khabrain"; the petitioner submitted a complaint

against the atrocities of Gujranwala police, who kidnapped Mr Kashif and severely tortured him, till his death took place. After a thorough investigation of the courts and examining the reports of medical boards it concluded that the deceased death was natural and thus the case was disposed of and no further inquiry is needed.

Conclusion

The basic philosophy of the court is to provide access to justice; the protection of enforced disappearance is the prime duty of the court which can safeguard the interest of the citizens including the right to life, liberty, no arbitrary detention and many more freedoms (Art.9, on the protection of all persons from enforced disappearance, 2006).

The person detained or missing must be brought before the court to face the national law, depriving a person of a fair trial or personal liberty is against the constitution of Pakistan as articles 8-28 protect all these rights and can be sued in the courts; Supreme Court must ensure to safeguard the said provisions of the constitution, whether it is against a common man or any government agency or any institution; these all things will restore the confidence of the people over the judiciary in the State.

Recommendations

The government must take essential legislation for criminal jurisdiction for the enforced disappearance; presently while applying section 359 and section 360 of the Pakistan Penal Code is not fair in any way; the procedure for dealing with such a sensitive issue must be redressed as quickly as possible. The security agencies must be made accountable not to take the law of the land I hand while committing the act of enforced disappearance (Art.6, International Convention for the protection of all persons from enforced disappearance, 2006). The said convention must be applied in the true sense while dealing with the cases of missing persons, (Section 10 (1) of International Convention for the protection of all persons from enforced disappearance, 2006), the people involved or suspected must be brought before the court for defending his cases as stated by the said convention.

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