

ENFORCED DISAPPEARANCE: AN UNDEFINED CRIME IN BANGLADESH

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Abstract: Enforced disappearance is regarded as State sponsored heinous crime which emerged recently in Bangladesh. Political oppositions and differing people are the main target of forced disappearance; however, civilians are also victim of this offence. Most of the incidents are unsolved and law enforcing agencies repeatedly denied their involvement with this. United Nations has adopted an International Convention to eliminate the offence from the planet. Some other international conventions are also treated it as crime against humanity. The principal aim of this research article is to scrutinize and analyze the socio-legal aspects of forced disappearance and is to suggest a way forward to overcome the circumstance. To achieve the aim, this paper will closely examine legal status of enforced disappearance' in domestic as well as global perspective and will draw a conclusion to prevent this. However, no criminal laws of Bangladesh have yet recognized forced disappearance as offence albeit now it is a reality in Bangladesh. Nevertheless, right to life is one of the key fundamental rights guaranteed under Bangladesh constitution which is violated by continuous occurring of this crime. It has huge impact on victim's family as well as on the whole society. Hence, Bangladesh needs to be a state party of the International Convention for the Protection of All Persons from Enforced Disappearance immediately and needs to legislate a new law to prevent any sort of state sponsored crime to stop further consequences. Otherwise, present illegal practice of forced disappearance will bring massive consequences for the whole nation.

Keywords: Enforced disappearance, human rights, violation, crime.

Introduction

In last couple of years, the occurrences of abduction, kidnap, enforced disappearance, killing etc. have increased immensely in Bangladesh. Among them, the seven murders case at Narayanganj in 2014 drew sharp reaction from the citizens, which exposed the cruelty and inhumanity of the incident. Apart from this, in recent years there have been a huge numbers of allegations regarding kidnap, abduction, forced disappearance, extortion and finally killing by unidentified perpetrators.

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Most of the incidents are still unsolved and a very few people are rescued successfully by the law enforcers. However, in most of the abduction cases family members, relatives and friends of the victim triggered their assertion towards law enforcement agencies and specifically they have suspected and alleged that people wearing civil dress introduced them as members of Rapid Action Battalion (RAB) or Detective Branch (DB) or other law enforcing agencies arrested or took the victims away.

But when victim's family or media asked the law enforcers, they denied the matter and told that they even did not know anything about it or they did not conduct any such operation. Till now, very few offenders have been brought to trial. Moreover, still the incidents are neither properly investigated nor any actions have been taken with proper liabilities to prevent such events. Hence it is not impractical at all that the criminals took the opportunity and gained their desire by the name of law enforcement agency. However, state should take some measure to prevent this crime whoever commits this. Otherwise, whole nation will pay for this impunity culture. The main aim of this research paper is to scrutinize and analyze the socio-legal aspects of forced disappearance and to suggest a way forward to overcome the circumstance. To do it, this research will analyze the definition of enforced disappearance in international criminal law and in our national law and the significance of these instruments to recognize it as a crime firstly. The United Nations (UN) has suggested to form a Committee on Enforced Disappearance (CED) in its convention to monitor and evaluate the overall situation of forced disappearance of the state parties. Then this paper will assess the role of the CED. The effects of this crime are huge on the victim's family as well as whole society. Hence, this study will also examine the impacts and effects of it on the individual and on society as a whole. Next, it will show that it is a violation of national international law, custom and practice which amount to crimes against humanity. Finally, it will try to recommend some effective measures to abolish the offence and to draw a conclusion of it.

Objectives

The objectives of this paper are to:

- Find out the definition of forced disappearance in various legal instruments and their significance.
- Scrutiny and analyze the socio-legal aspects of enforced disappearance in Bangladesh.
- Evaluate the role of the CED.

- Measure the impacts and effects of this crime on individual level and on the society as a whole.
- Assess the gravity of the offence in international criminal law.
- Draw a way forward to overcome the situation.

Methodology

The general methodological approach of this study is grounded on theoretical approach based on data and information systematically gathered and analyzed. To do this research the researcher has collected data from both primary and secondary sources. However, the study is being conducted on the basis of critical analysis of secondary sources of data. In order to collect the secondary data, relevant literature reviews have been made. For secondary data books, journals, newspaper clips, published articles, and other available resources were explored on this issue.

Definition of Enforced Disappearance in International Law

Enforced disappearance is relatively new addition to state crime. Enforced disappearances persist in many countries all over the world, having been a continuing feature of the second half of the twentieth century since they were committed on a gross scale in Nazi-occupied Europe. After the expansion of this offence in December 2006, the UN has adopted the International Convention for the Protection of All Persons from Enforced Disappearance. The Convention entered into force on 23 December, 2010. Till then, 90 states have become signatories, and 30 have ratified the Convention. Among those states, 12 have recognized the competence of the Committee of Enforced Disappearances (CED) constituted under the Convention to receive and consider communications both by individuals alleging that their rights under the Convention have been violated as well as communications by states claiming that another state party is not fulfilling its obligations under the Convention. Very few states have implemented the Convention into national law. The convention aims to prevent enforced disappearances taking place, uncover the truth when they do occur, punish the perpetrators and provide reparations to the victims and their families. This Convention is legally significant because it not only ensures prevention, investigation and punishment of the crime but also arranges reparations for the victims and their family. In addition, it disallows enforced disappearance even under any exceptional circumstances such as war, political instability etc. In Bangladesh, there is very little scope of reparation in criminal laws whereas this Convention imposes an obligation upon the state parties to compensate the victims.

The Convention delivers a definition of the crime of enforced disappearance and necessary state action in order to both prevent the occurrence of the crime and to allow for the investigation and prosecution of the culprits. According to the language of Article 2 of the mentioned Convention an enforced disappearance takes place when a person is arrested, detained or abducted by the state or agents acting for the state, who then deny that the person is being held or conceal their whereabouts, placing them outside the protection of the law. Hence the International Convention for the Protection of All Persons from Enforced Disappearance identifies the following elements in the definition of enforced disappearances:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;
- That conduct is carried out by agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state;
- The conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- The objective result of the conduct is that the disappeared person is placed outside of the protection of the law.

Article 1(2) of the same Convention also furnishes, in no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. In addition to this, under Article 4, each State party has an obligation to take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Moreover, the aforementioned Convention added in Article 6(1) (a) & (b) that any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; and a superior who: knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance and he/she shall be liable for the commission of that offence.

Hence, enforced disappearance is a cumulative violation of human rights. This is because it may inflict a wide range of human rights violations, including violation of:

- The right to life: as the person may be killed or his or her fate may be unknown;
- The right to security and dignity of a person;
- The right to be free from arbitrary detention;
- The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;
- The right to humane conditions of detention;
- The right to legal personality;
- The right to fair trial;
- The right to free movement;
- The right to family life etc.

All of the above rights are guaranteed as fundamental rights whether directly or indirectly and enforceable by the court under the scheme of the Constitution of the People's Republic of Bangladesh.

Apart from this, the Rome Statute of the International Criminal Court, the Committee of the Red Cross Rules of Customary International Humanitarian Law, the Inter-American Convention on the Forced Disappearance of Persons prohibits the act and obliges the State parties to define forced disappearance of persons as a crime in their national law and to impose a appropriate punishment commensurate with its gravity.

Rome Statute of the International Criminal Court particularly treats forced disappearance as crime against humanity in Article 7 as *“For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

(i) Enforced disappearance of persons.”

Additionally, Inter-American Convention on the Forced Disappearance of Persons affirmed the obligation of State parties in this regard in Article 1 as *“The States Parties to this Convention undertake: a) Not to practice, permit or tolerate the forced disappearance of persons, even in the states of emergency or suspension of individuals guarantees.”*

Yet enforced disappearance is not a crime in Bangladesh due to lack of recognition in law. Hence to prevent this kind of offence Bangladesh should become a state party to the International Convention for the Protection of All

Persons from Enforced Disappearance and must needs to legislate a new law urgently to stop the crime effectively.

Importance of the International Convention for the Protection of All Persons from Enforced Disappearance

Unlike other human rights violations, enforced disappearances were not prohibited by a universal legally binding instrument before the Convention came into force in 2010. Before that only the Rome Statute of the International Criminal Court provided for prosecution and award of reparation to victims in cases where enforced disappearance amounted to crimes against humanity.

The crime of enforced disappearances was also prohibited prior to 2010 by two legal instruments i.e. the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance and the 1996 Inter-American Convention on Forced Disappearance of Persons Rights and customary international humanitarian law. However, these legal frameworks exhibited both serious gaps and ambiguities and have proven to be insufficient as a protection mechanism. The present Convention, despite its own flaws, corrects some of the existing gaps in the legal framework.

- Firstly, the Convention makes enforced disappearance crime under international law and recalls the right of every person not to be subjected to it, even under exceptional circumstances, such as the state of war or a threat of war, internal political instability or any other public emergency.
- Secondly, it is an important treaty because it obliges states to implement it into national law. Therefore, ensuring that impunity shall not prevail for enforced disappearance.
- Thirdly, it guarantees the rights of victims or their relatives to have access to justice and full and effective reparation.
- Fourthly, the Convention sets up the Committee on Enforced Disappearances, which begins its work in November 2011.

Prior to this, the only mechanism specialized to deal specifically with enforced disappearances was the UN Working Group on Enforced or Involuntary Disappearances. This body has received and examined reports of disappearances submitted by relatives of disappeared persons or human rights organizations acting on their behalf since its establishment in 1980. This important global rapid response mechanism for requesting states to carry out investigations into cases in

which the Working Group believes an enforced disappearance has taken place and monitoring state compliance with the Declaration on the Protection of all Persons from Enforced Disappearance continues to exist.

The Committee on Enforced Disappearance (CED) will similarly receive requests for urgent action from relatives of the disappeared, their legal representatives or others, which it can transmit to the state party concerned with a request to clarify the fate and whereabouts of the disappeared person. Also it will be able to consider individual complaints by persons who claim to be a victim of a violation of the provisions of the Convention, although only after states parties have recognized the Committee's competence to do so. The Committee is also empowered to perform other functions to monitor implementation and state parties' compliance with their obligations under the 2010 Convention

Forced Disappearance under the Criminal Laws of Bangladesh

It is unfortunate that there is no mention of enforced disappearance in any law of Bangladesh. It is not only undefined in any penal law but also not treated as an offence in any way. It is a new form of crime in this country and mainly launched last couple of years past. But there are provisions regarding kidnap & abduction in the Penal Code, 1860. However, enforced disappearance is totally different form of crime than kidnap or abduction. It is more grievous in nature. Law enforcing agencies are playing key role behind this crime whereas kidnap and abduction is committed by individual and the gravity is far less than forced disappearance. The usual consequence of forced disappearance is death while in others cases death is not the ultimate intention of the crime.

However, according to section 362 of the Penal Code, 1860 a person is said to commit the offence of abduction when he by force compels or by any deceitful means induces any other person to go from one place to another.

On the opposite side, section 359 enumerates kidnapping is of two kinds i.e kidnapping from Bangladesh and kidnapping from lawful guardianship. Whoever conveys any person beyond the limits of Bangladesh without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from Bangladesh. On the contrary, whoever takes or entices any minor or any person of unsound mind, out of the keeping of the lawful guardian without such guardian's consent is said to kidnap such person.

As per the provision of the Penal Code a person whoever kidnaps any person from Bangladesh or from any legal guardian shall be punished with detention of either description for a term which may extend to seven years and shall also be liable to fine. Further, section 364 prescribed the punishment for kidnapping or abduction where the intention is to murder up to imprisonment for life or rigorous imprisonment for a term, which may extend to ten years and fine also. After analyzing these two we can say that kidnapping and abduction have the following features:

- Kidnapping is committed in respect of minors under sixteen years in case of a male and under eighteen years in case of a female, or a person of unsound mind. Abduction can be committed in respect of a person of any age.
- In the event of kidnapping, a minor is usually taken away, forcefully or not, without the consent of legal guardian but force, compulsion or deceit are basic elements of abduction.
- Consent of the victim in case of kidnapping is immaterial where in case of abduction absence of voluntary consent is of vital importance.
- Kidnapping moves the victim away from the custody of legal guardian and being so it is a substantive offence but abduction is an auxiliary offence.

Apart from this, if a person kidnaps or abducts any child under the age of ten, in order that such child may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person, shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years, and shall not be less than seven years. Additionally, if a person kidnaps or abducts any woman with intent that she may be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse shall be punished with death or transportation for life or with rigorous imprisonment of either description for a term which may extend to twenty years but not less than ten years, and shall also be liable to fine.

The punishment for murder after abduction is death penalty or imprisonment for life as stipulated in section 302 of the Penal Code, 1860. In addition to this, if kidnapping or abduction is committed with an intention to wrongful confinement, the offender shall be punished with custody of either description for a term, which may extend to seven years and shall also be liable to fine.

Hence, the gravity of these two distinct classes of crimes is not same. Enforced disappearance is a crime under international law for which states are obliged to hold perpetrators responsible through criminal investigation and prosecution. Moreover, it amounts to a crime against humanity when it is committed as part of a widespread or systematic attack on a civilian population. Forced disappearance is a particularly cruel human rights violation; a violation of the person who has disappeared and a violation of those who love him/her. The disappeared person is often tortured and in constant fear for their life, removed from the protection of the law, deprived of all their rights and at the mercy of their captors while every person has the right to life, liberty and security of person.

Role of Committee on Enforced Disappearance (CED) to Prevent Forced Disappearance

The Committee on Enforced Disappearance (CED) is similar in its form and function to other UN human rights treaty bodies, such as the Committee against Torture (CAT). CED is composed of ten experts in the field of human rights, who serve on the Committee in their individual capacity and are expected to exercise their functions independently and impartially. Within two years of accepting the Convention, state parties are required to submit a report to the Committee about the measures they have been undertaking to implement the Convention. Upon examining the report, the Committee will make general suggestions and recommendations as it considers appropriate to the state party. Furthermore, the Committee can transmit requests for urgent action sent by or on behalf of the relatives of a disappeared person to state parties requesting that they clarify the fate and whereabouts of the disappeared person. It can also undertake visits if it receives reliable information indicating that a state party is seriously violating the provisions of the Convention, or may bring situations of widespread or systematic practices of enforced disappearances to the attention of the UN General Assembly.

Moreover, the Committee also has an optional individual complaints system. This means that it can consider communications submitted by or on behalf of individuals alleging to be victims of a violation of the provisions of the Convention by a state party, which has declared that it accepts the competence of the Committee to receive such individual communications. The Committee may also receive and consider communications in which a state party claims that another state party is not fulfilling its obligations under the Convention if the

state party concerned has agreed to the optional inter-state communications procedure.

Effect of forced disappearance on the societies and individuals

An enforced disappearance of an individual has a tremendous effect on the lives of his or her loved ones and their communities. Families are often emotionally unable to find closure and come in terms with the disappearance of their loved ones. Many suffer from severe psychological distress, sometimes resulting in physical illness as well. Children are not immune from such anguish; disappearance of a parent, sibling, spouse or other members of the family often adversely affects their educational performance and social behaviour.

Furthermore, families frequently face enormous economic consequences, especially when the victim was the principal bread-winner of the family. Even if this was not the case, many families find themselves in dire economic straits during the course of their search for the victim. The societal and cultural isolation faced by the families frequently go undocumented. For example, while widows in certain cultures have a well-established support system within communities, wives of disappeared victims are at times left in limbo.

Often, people who have disappeared are never released and their fortune remains unknown. Their families and friends may never find out what has happened to them. But the person has not just vanished. Someone, somewhere, knows what has happened to them. Someone is responsible but all too often the offenders are never brought to justice. However, the sufferer and his/her family not only have right to get fair justice but also to reparation. They also have the right to know the truth about the circumstances of an enforced disappearance and the destiny of the disappeared person, and the right to freedom to seek, receive and impart information to this end.

Grave Violation of Human Rights as Well as National and International Laws

A series of incidents happened in Bangladesh indicate the serious scenario of falling rule of law in Bangladesh. The Republic is constitutionally bound to ensure security and safety of life and property of every citizen. Furthermore, it has also responsibility to ensure citizen's fundamental rights guaranteed by the constitution. But, by detaining any person without any due process of law, government has grossly violated his fundamental rights. The Constitution of the

People's Republic of Bangladesh says that: *to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.*

On the other hand, another Article of the Constitution incorporates: *no person shall be deprived of life or personal liberty saves in accordance with law.* In reality, this has not been implemented and this foremost fundamental right is being repetitively violated with complete impunity by state agencies and state remains silent even to investigate the matter and bring out the truth before the nation. The government has violated these two core Articles of the Constitution of Bangladesh by depriving it's citizen from enjoying the protection of law and to be treated in accordance with law that are announced in our sacred Supreme Charter as inalienable right of every detenu. In this case the law enforcing agencies detained without any warrant of arrest from any court of law. In many cases even they have no allegation against the victim. Most of the time they do it without wearing their prescribed uniform and denied their involvement with the detention when the victim's family shows their finger to them. Even they didn't inform the ground(s) for arrest, didn't produce him before the nearest Magistrate Court and didn't get chance to consult with any lawyer which are clear violation of human rights, right to get fare justice and constitutionally guaranteed other rights as well.

The Universal Declaration of Human Rights, 1948 prohibits government from arbitrary arrest with its clear cut text as it includes: *"no one shall be subjected to arbitrary arrest, detention or exile."* Each and every forced disappearance incident violated universal human right to be safe from illegal arrest. Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR), 1966 that prohibits the grave violations of all the basic human rights highlighted above. According to Article 6 and 2 of the ICCPR, Bangladesh has the obligations to ensure the right to life of its people and to ensure prompt and effective reparation where violations occur. That mean under this international legal instrument mere trial is not sufficient for the victim or his family. Moreover, state is responsible to provide adequate reparation to the victim/his family.

It is also another obligation of every state party to bring legislation into conformity with the ICCPR. Under the obligation of ICCPR, the Bangladesh government must ensure a fair and public trial for anyone charged with a criminal offense, and such a trial must take place "without undue delay." ICCPR also requires Bangladesh to protect freedom of expression. Bangladesh is a state party to the Convention Against Torture (CAT) and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Under CAT, the Bangladesh government must ensure that any person who alleges he has been subject to torture has the right "to complain to and to have his case promptly and impartially examined by competent authorities." Albeit Bangladesh is a state party to the abovementioned conventions and covenants yet it fails to fulfill its legal obligations under the covenant. Weak monitoring system under the covenant and lack of holy will are liable for this unlawfulness. On the contrary there is a CED under the UN convention on enforced disappearance, what can compel state parties to obey its provisions.

Recommendations to Stop Forced Disappearance

The government of Bangladesh should ensure a fair and independent investigation into all the cases of disappeared citizens. The government also must make it clear to its security forces that the era of torture with impunity is over. The state should follow the principle that any criminal offence must be tried by competent court of law; not by security forces outside of the due process of law. In fundamental human rights violation case, government should take positive steps to prevent it from very beginning. After arresting anyone, every person must be produced before the court immediately by the concerned law enforcing agency within whose custody he is detained.

United Nations, international communities, human rights organizations, donor agencies etc. should ensure that no person is kidnapped or tortured due only to his political identity, and that all people get equal protection of law from the state. Bangladesh must be advised to halt the growing phenomenon of enforced disappearances and show its commitment to do so by ratifying the International Convention for the Protection of All Persons from Enforced Disappearance without delay and producing and implementing in full domestic legislation in line with the provisions of this instrument.

States must commit themselves to ending the practice of enforced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. Furthermore, states must tackle the issue of

impunity and ensure that the perpetrators are brought to justice. Moreover, Bangladesh should accept the competence of the Committee on Enforced Disappearances to receive complaints from individuals and state parties under Articles 31 and 32 of the Convention.

Adoption of a long-term and comprehensive plan can prevent and eliminate enforced disappearance from this country, which involves establishment of effective training programs of law enforcement and other personnel. Civil society actors can take specific actions to support their calls urging governments to ratify the Convention and legislate a law in this regard. Civil society may participate in drafting and commenting of national implementing legislation. Civil society members can provide information in relation to the Committee's (CED) review of state reports and its other functions under the Convention. It may pursue for submitting urgent requests for action to clarify the fate and whereabouts of a disappeared person, or submit individual communications on behalf of an individual who claims to be a victim of a violation of the Convention's provisions by a state party. Women and women's organizations should particularly be encouraged to do so to ensure that gender issues are taken into account and that the process of preparing implementing law is inclusive. Also, in many countries, it is men who are most often subject to disappearance, and it is their women family members who spearhead efforts to obtain justice for their loved ones.

Conclusion

Enforced disappearance is one of most heinous crimes around the globe because it is committed by state agencies, directly or indirectly. Here State acts as patron to a crime while State is responsible to protect right to life and liberty of every human being. State must commit to conclude the practice of forced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. In existing legal systems of Bangladesh, it is not possible to prosecute the criminals due to lack of legal instrument in this regard. In absence of a specific law, it will be very difficult to eliminate this crime from the soil of Bangladesh. Because court has no jurisdiction to punish anyone through a liberal interpretation. Albeit the constitution of the Republic guaranteed right to life and personal liberty but without enacting a new law it will not be possible to punish and prevent the crime. A piece of legislation could be a weapon for the victims and their families to get complete justice. If the stakeholders have a law before them, they will be able to demark the incident of enforced disappearance. Hence, Bangladesh

should ratify the convention and incorporate the offence in domestic law immediately. Also the State should take effective legislative, administrative, judicial and other essential measures for the taxpayers to prevent forced disappearance and to provide protection against unacknowledged disappearances.

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