

UNLAWFUL DISAPPEARANCES AND THE CONSTITUTIONAL GUARANTEES: A CASE STUDY OF PAKISTAN

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Abstract

Unlawful disappearances have caused significant harm to Pakistan since the late 1980s. This evil happens when individuals disappear under the custody of law enforcement or their agents, putting families in a condition of extreme anxiety and fear. The situation is made worse by broader socioeconomic issues, such as cultural disputes, economic inequality, and the establishment's hold on democracy. Finding out more about Pakistan's terrible practice of enforced disappearances and the constitutional guarantees provided to the citizens is the aim of the study. The available data indicates that between 1985 and 2000, there were numerous cases of forcible disappearance in Pakistan. Journalists, nationalists, separatists, and students are among the disappeared in Pakistan. Not only fundamental rights given to the individuals in the constitution should be implemented in letter and spirit but drastic changes in the criminal justice system should also be made to overcome this issue.

KeyWords: *Forced Disappearance, Due Process, Human Rights, the Constitution of Pakistan, International obligation*

INTRODUCTION

One urgent issue that is considered infringement in Pakistan is the practice of forced disappearances by neglecting people's fundamental constitutional rights, freedoms, and privileges without following the law. In this way, hundreds of people have disappeared from Pakistan.ⁱ The phrase "forced disappearance" has no clear definition in Pakistan. As per The Penal Code of Pakistan, kidnappings, abductions, improper restraints, incarceration, and unlawful detentions are prohibited.ⁱⁱ by municipal law. Since the latter half of the 1980s, enforced disappearances where people are gone by the state or its agents have had a significant impact on Pakistan, leaving families in a condition of extreme anxiety and suffering. The victims come from a wide range of backgrounds, including students, doctors, media professionals, and communication specialists. Because of their ongoing fear of bodily harm and death, their loved ones stay unconscious for almost the whole duration.

Those who disappear often leave behind lifelong traumas if they are permitted to return, and they typically leave behind chronic agony if they are slain. In an attempt to find their missing loved ones, many families are motivated to take on the role of activists due to social and economic challenges. Although the UN has acknowledged the negative effects of enforced disappearances, Pakistani law gives families few legal options. Notably, the purported occurrence of abduction is growing dramatically, mostly as a reaction to extremism and terrorist activities. Resultantly, counterterrorism activities involved the kidnapping and detention of people in clandestine places.ⁱⁱⁱ Pakistan's fight against enforced disappearances has been remarkably vigorous. It has drawn attention to powerful entities' illegal activities and prompted the courts to hold influential organizations responsible for their conduct.^{iv} The Islamic Republic of Pakistan's participation in the "war of terror" as a front-line ally of the United States of America has plunged the country into conflict, prompting UN human rights provisions that complicate the analysis of its international commitments pertaining to personal security and protections against arbitrary arrest.^v

LITERATURE REVIEW

The genesis and progression of unlawful abductions in Pakistan

Pakistan gained its independence from Britain in 1947. Shortly thereafter, the Pakistani elected officials allied with America to secure its geostrategic objectives and brutally crushed the Communist Party, leading to the party's 1954 ban. The disappearance of Hasan Nisar, the general secretary of the Communist Party, a Marxist organization in Pakistan, was the first well-known instance of forcible kidnapping in Pakistani history. In August 1960, two months after his arrest, he was tortured to death. Pakistan has been deeply troubled ever since by the dreadful practice of enforced disappearances.^{xii}

The Zia-ul-Haq regime's overall policies

Zia's government had gained traction by the middle of the 1980s. The UN Committee on Arbitrary Abduction conducted research on the issue of forced abduction. The results showed that between 1985 and 2000, there were 93 instances of forced disappearance. General Zia-ul-Haq's government employed harsh measures to crush nationalist and political opposition from 1977 and 1988. During this period, several activists were imprisoned, suffered abuse and were even assassinated.^{xiii}

The recurrence of compelled disappearances since 9/11

Particularly since late 2001, there have been a lot more cases of persons going missing. The United States was fully supported by General Pervez Musharraf's administration in its hunt for alleged Islamists. Due to the fight against terrorism, many individuals were unfortunately victims of this crime. It has been claimed that the majority of missing persons were abducted by officials and brought to hidden locations. While others were kept hostage in Afghanistan's Bagram Airbase, some of the missing were turned over to US authorities and imprisoned at Guantanamo Bay.^{xiv} The prevalence of such heinous acts has significantly increased following the Pakistani government participation in America's combat on counterterrorism. As a result, hundreds of individuals have been forcibly removed and disappeared from several provinces, including Federally Administered Tribal Areas, Sindh, Punjab, and Khyber Pakhtunkhwa. In KPK, victims of this practice are thought to have been held by the state agents due to their involvement in crimes connected to terrorism.^{xv} Reporters, separatists as well as supporters of the separatist groups are among the people abducted in Baluchistan.^{xvi} Likewise, reporters, human rights activists and competitors in politics have also been abducted from Punjab and Sindh.^{xvii} The missing people have reportedly joined militant organizations or fled across the border, according to the law enforcement officials. Though law enforcement authorities try to eradicate crimes, forced disappearances are still a serious problem.^{xviii}

The legal framework

"Enforced disappearance" is the practice of abducting someone against their will and then keeping their location or whatsoever happened to them a secret forever. The 1973 Pakistani Constitution has many clauses that address this violation of basic human rights:

Article 4: Individuals' right to be treated according to the law, etc.

Each and every resident of Pakistan has an inescapable fundamental right to protection and legal treatment, according to the 1973 Constitution. Furthermore, unless otherwise permitted by law, the state would not take any action that may endanger the accused's life, body, liberty, reputation, or property.^{xix} Furthermore, any violation of a person's human rights by an authority or someone else must be supported by the laws of a nation.^{xx} Additionally, unless there are legitimate reasons, no action would be done that may endanger someone's life, liberty, reputation, or property.^{xxi} Furthermore, Coram non iudice or malicious prosecution refers to acts or processes that might impair an individual's right to seek justice or be held under lack of legal authority.^{xxii} Consequently, every single person has a fundamental right to obtain justice and ought to be prosecuted in an unbiased courtroom or the court.^{xxiii} In a case, the high court declared that the only authority that the administrative body may

exercise is that which the constitution grants it by law to interfere with private rights.^{xxiv} Furthermore, a lawsuit or writ petition may be filed to complain of a violation of a right granted by Article 4^{xxv} and law enforcement bodies may be effectively subject to legal authority if its bylaws, statutes, and rules are violated.^{xxvi} Furthermore, it would be breach of the Constitution's mandate to treat an accused person under special law if they were arrested and tried by regular criminal justice system.^{xxvii} The tribunal also declared that all citizens inside the state's borders have the right to legal safeguards and should be treated in conformity to the rules of the land^{xxviii}. Additionally, it is an irrevocable basic right that must be construed in conjunction with the right to an impartial trial, which is safeguarded by Article 10A of the country's Constitution. Additionally, the Constitution's key elements such as judicial sovereignty, the supremacy of law, and democracy must be seen as unchangeable.^{xxix}

Article 9: Security of person

Each citizen of Pakistan is guaranteed security by Article 9 of the 1973 Constitution, which also forbids arbitrary deprivation and stipulates that no one may be deprived of their life unless it is required by law. Magna Carta, which was signed in 1215, was the first document to promote the idea of human body liberty. It declared that each person is born independent and that no person may be detained unless following the proper legal procedures. Together with life and property, liberty had emerged as one of the three most important ideals to uphold by the last decade of the 18th century.^{xxx} The Pakistani Constitution also forbids the wilful denial of privileges and protects freedom of choice.^{xxxi} It safeguards individual security, and no one may be deprived of their life or freedom unless permitted by law. The term "life" does not just refer to vegetative or animal life. It includes rights that are inherited from the right to life, such as a healthy ecosystem as an entitlement, the entitlement to dignity, the entitlement to the supremacy of constitutional law, the entitlement to an administration that is free from corruption and the entitlement to be protected from invasions of privacy, and the entitlement to access justice. Additionally, Pakistan upholds this constitutional right in accordance with its globally rights-based commitments.^{xxxii} Ultimate freedom is obviously unachievable as it can only result in chaos when it is overextended. Independence is not an unassailable or ultimate right in every situation; rather, limitation must follow the due process of law.^{xxxiii}

Article 10: Safeguards as to Arrest and Detention

No governmental body has the authority to hold or apprehend someone in any other way without first being told of an allegation, according to Article-10 of the Pakistani constitution.^{xxxiv} Additionally, he has the entitlement to appear in tribunal or court of law in a 24-hour period and to have a lawyer of his choosing defend him. He cannot be held in jail after the allotted time except the court of law permits it. Additionally, it specifies that whenever an individual is operating in a way that might endanger Pakistan's integrity, defense, external affairs, public order, maintenance, or security, he may be placed under preventive detention for a term of three months. Furthermore, a trial must be held and should proceed with due process in order to determine the entitlements as well as responsibilities of anyone contrary to any offense or accusation. In this regard, the provisions of Article 199 of the Constitution gives the high courts the authority to order that a detainee must be brought or appear before the court within their territorial jurisdiction so that the court can determine whether or not the detainee's imprisonment is lawful. The rights of detainees and abductees are likewise protected under the criminal procedure law. The tribunal has the authority to release the individual if it determines that they are being held unlawfully or incorrectly under the boundaries of its territorial authority.^{xxxv} In addition, the Lahore High Court declared that the people who were arrested needed to show up before the closest magistrate within the time limit stipulated. Subsequent incarceration might be considered unlawful if the prerequisites weren't met.^{xxxvi} The magistrate cannot remand the detainee to custody by visiting the location to which he continues to be held. He will be in violation of this clause if he does so.^{xxxvii} At Mst. Rowshan Bijaya Shaukat Ali Khan versus Government of East Pakistan, the court ruled that the arrestee was required to be notified of the reasons regarding being arrested during

an acceptable duration, however not afterwards ahead of a period of fifteen days, as well as the correspondence has to include enough information to enable the person to understand the nature of the case against them. Without an explanation, the imprisonment would be illegal.^{xxxviii} In another case, the tribunal decided to uphold the constitutional clause guaranteeing the privilege of someone charged to seek defense counsel must be interpreted as part of the law, regardless of whether the legislation grants or prohibits that right.^{xxxix} Pakistan is also an Islamic Republic State, and the constitution declares Islam to be the official religion. Islam likewise condemns this misconduct and maintains that no one can be kept unless he is found convicted. According to the religion, it is forbidden to detain someone just on suspicion and put him behind bars without following the proper legal procedures. Additionally, it grants everyone the freedom to defend themselves in public.^{xl}

Protection against Preventive Detention

Second section of Article 10 addresses pre and post qualifications for preventive detention. Nevertheless, there is no universally accepted definition for the word preventive detention. However, the term "preventive" has been employed in juxtaposition to "punitive," indicating that the former refers to an action that is intended to prevent rather than to punish. It has three distinct qualities. First, it is detention rather than jail; second, it is executive custody without judicial trial or investigation; and third, the goal is preventative rather than punishing.^{xli}

In essence, this regulation was carried over from colonial times and is protected by the Constitution. Both India and Pakistan decided to keep this regulation in place permanently after gaining independence in 1947. On the other hand, the UK only used preventative detention in extreme urgent circumstances such as war and armed conflicts, and saw it as an unusual measure. As a result, the statutes pertaining to preventative detention that were passed for this reason only became applicable during times when conflicts were ongoing.^{xlii}

Numerous laws pertaining to preventative imprisonment have been passed at the national level^{xliii} as well as local or regional^{xliv} stages in Pakistan by offering comprehensive administrative protections.

These laws empower the administration to arrest and detain suspected individuals if required to maintain order and security among the community within certain timeframes.

The Constitution prohibits incarceration for more than three months and requires a specific designated empowered Board to consider the case. Additionally, anyone's matter must be reviewed within a certain amount of time, and they cannot be held indefinitely. The reported practice of enforced disappearance violates Article 10 of Pakistan's Constitution.^{xlv}

The law enforcement organizations use the Army Act of 1952 and the Security of Pakistan Act of 1952 to support their conduct. The legislation provides the government at the center or regional level the authority to detain or arrest those who endanger the security of the general population, protection, foreign matter or diplomacy and sustainability standards.^{xlvi} Moreover According to the Prevention Detentions Laws (Amendment Act) 1962, the government must inform detainees of their detention grounds within 15 days of detention, unless otherwise directed by the Federal Government for security reasons.^{xlvii}

Detaining authorities must have legitimate grounds to issue preventative detention orders. They have to justify themselves on all grounds of incarceration. In the absence of a single legal need, preventative detention could become unconstitutional.^{xlviii}

Neither national nor regional preventative incarceration laws nor criminal charges have been brought against abducted persons. Therefore, none of the legal procedures for arrest, detention, or preventive custody, whether constitutional or otherwise, were likely to have been properly followed in the case of an enforced disappearance. This blatantly violates both international human rights standards and constitutional norms. Missing individuals are both a breach of constitutional law and a misuse of the legal system.

Article 10-A: Right to Fair Trial

Individuals are entitled for receiving equitable treatment and an impartial hearing while assessing their basic freedoms and duties, as well as when facing criminal charges. A person's entitlement to a free and impartial trial is crucial because of human rights philosophy. Without it, other rights may be violated or remain at risk. Due process of law is currently a constitutional entitlement for all Pakistanis, encompassing both criminal and civil rights. The entitlement to receive an impartial trial is not explicitly stated in the Constitution. A trial that is impartial may be defined in part by the European Convention on Human Rights and the United Nations Declaration on Political and Civil Rights. Both civil and criminal cases must have a public hearing by an independent and impartial judge within a reasonable time frame, and the verdict must be announced in a public hearing in a tribunal, as stipulated by the fourteenth article of the International Covenant on Civil and Political Rights as well as the sixth article of the European Convention on Human Rights. The equal treatment of law theory acknowledges that everyone has an equal claim to justice. Before an impartial jury or court, the accused is entitled to a trial that is impartial.^{xlix} Deprivation of due process is not an entitlement to challenge the result or judgment, but rather a safeguard for the processes.^l During a criminal trial, the court has to offer the person being tried with an impartial trial and offer protections to ensure the effective functioning of fair treatment^{li}. A legislative body cannot make legislation that restrict access to courts of justice and the law, if doing so violates basic rights.^{lii}

An extension of jurisdiction was given to the Pakistan Army Act (PAA), allowing civilian proceedings to take place in military tribunals. The public cannot access or is not provided with transparency regarding these trials. Separately, The High Court overturned the guilty judgments of at least 200 individuals who had been convicted guilty of terrorism related offenses by military courts, stating that the trials were based on malice of facts and law.^{liii}

Foundation of World Law Regarding compelled Absenteeism

The UN General Assembly formalized the Resolutions and Protocols intended to protect and secure the Liberties of Abductees. Contrary to convention restrictions, every nation must respect and ensure protections for arrest and imprisonment, as well as the entitlement of a free and impartial trial. Ensuring Proper procedure according to law is essential for protecting rest rights.

The Universal Declaration of Human Rights, 1948 (UDHR)

The Universal Declaration of Human Rights (UDHR) was created by the United Nations General Assembly in the year 1948 as a baseline for all individuals and governments to strive for.^{liv} Experts agree with the reality that many countries have accepted and brought up, making it an established norm that is obligatory on all states. On the other hand, other experts claim that only hardcore rights are obligatory on this rationale, such as enslavement, exploitation, the entitlement to secure living and survival.^{lv} Humans have the entitlements to safety, liberty, autonomy and existence, which cannot be taken away even during a catastrophic event. Besides, the person being charged has the privilege to be believed innocent unless convicted.

International Covenant on Civil and Political Rights, 1966 (ICCPR)

The International Political and Civil Rights Convention is a well acknowledged covenant throughout the world. It protects the rights of detainees and provides adequate procedure for accused individuals throughout their custody.^{lvi} This implies that nobody ought to be detained unless legally required. When someone is arrested, they should be quickly notified of the cause and charges against them. The accused have to appear before a court or court officials and confront prosecution in an established length of times. The court must first evaluate the legitimacy of his custody and if a judge rules that detention is improper, the person being detained may be qualified for restitution.^{lvii} The Committee of Human Rights plans to write its third voluntary instrument About the International Covenant on Political and Civil Rights to ensure one's entitlement to a free and impartial hearing in every situation.^{lviii}

In a different scenario, the HR Council clarified that the phrase 'promptly' varies by situation and

that the period between arrest and court appearance should be limited to a couple of days or twenty four hours.^{lix} To ensure due process of law in terrorist cases, use the concept of uniformity and avoid derogatory tactics.^{lx} In extraordinary situations, a country can put on hold certain constitutional rights, such as the entitlement to undergo an impartial hearing. However the threat is required considerable grave in nature.^{lxi} Anti-terrorist actions must align with obligations of a nation under the international charter. The ICCPR is the appropriate tool for identifying acceptable deviations. Human rights legislation applies throughout peacetime, armed conflict, and emergencies. During emergencies, human rights legislation and the ICCPR's provisions continue to be enforceable.^{lxii} Pakistan, a participant to the ICCPR, violates worldwide agreements and commitments by persisting carrying out unlawful disappearances.

RECOMMENDATIONS

1. Rather than putting down the non-violent demonstrations of sufferers' relatives, the administration ought to address unlawful disappearances by pursuing the actual perpetrators.
2. The superior courts should ensure enforcement of fundamental rights as enshrined expressly in the Constitution of Pakistan.
3. The law should be amended while taking affected relatives' input and the suggestions of the United Nations Working Group into consideration.
4. Implementing internal standard to successfully resolve unlawful disappearances in Pakistan should be ensured.
5. To ensure neutrality, there should be no external pressure on the functioning of Commission of Inquiry on Enforced Disappearances (COIED).
6. Taking action to stop these atrocities against humans and raising awareness about deliberate abduction is the need of the hour.
7. Bring those who have been disappeared before an impartial tribunal so that a jury can determine that their detention or incarceration was lawful and either or not they should be released.
8. The Global Covenant intended to avoid coerced absenteeism of any individual should be adopted and its rules and regulations should be incorporated into domestic legislation.

CONCLUSION

International attention has been drawn to Pakistan's ongoing issue of compelled disappearances since 9/11. Courts may find terrorists not guilty due to defects in penal procedural legislation. Consequently, as a quick fix, law enforcement officials unfairly jail those who seem to be connected to or involved with terrorist groups. Administration has repeatedly informed the courts that the current criminal justice system in the nation is ineffective at maintaining peace. Despite many incarcerations, the current criminal justice system has produced few indictments, which has allowed extremism to spread across the country. Certain provisions in the Pakistani Constitution and global democratic norms specifically ensure that everyone is provided an equal opportunity to a fair trial. Furthermore, it is certain that the nation's substantive and procedural laws have some loopholes. Among the primary reasons for the delays in the settlement of these cases are the insufficient system for recognizing offences and the inefficient apparatus for trying perpetrators. The justice system for crime needs reform. In real terms, it is the duty of the government to amend pertinent laws to conform to the stipulations of the constitution. Furthermore, the State itself runs the risk of inciting terror among its own citizens if individuals charged with terrorism are convicted without following the proper legal procedures. In order to make enforced disappearance a crime in and of itself, Pakistan needs change its Penal Code, 1860. Finally, Pakistan must maintain its integrity as a democratic nation while upholding the fundamental rights of the citizens. References

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