

Enforced disappearance of persons in Sri Lanka:
Legacy and ongoing challenges

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Enforced disappearance of persons remains one of the widely known human rights violations in Sri Lanka. The war that ended in May 2009 took the figure of the alleged abductions and disappearances to alarming proportions. However, the end of the war did not bring such incidents to an end. Whether they would come to a full stop still remains to be seen despite the change in the leadership of the country in 2015. The machinery that had been set up during the past to perpetrate such incidents appears to have slowed down specially as a consequence to the passing of a Resolution at the UNHRC in September, 2015 following a Report of an UN investigation regarding accountability of the Government of Sri Lanka and the LTTE to human rights violations beginning from February, 2002 till November, 2011. However the machinery could be switched on again if those in authority could shine a green light. The presence of this machinery with its operators still in place is a legacy the current government has to deal with. Dismantling it and destroying the remains, is a challenge the government has to face ignoring the sabre rattling by the extremists in the country.

In the meanwhile the government has to deal with the untenable number of complaints of disappearances that have been lodged with the various national and international institutions calling for help to trace those who have disappeared. The current Commission of Inquiry into Missing Persons has issued a statement on 2nd May, 2016 that it has so far received 25,000 complaints of which it has been able to investigate only into 8000 of them. Most of the complaints relate disappearances of persons either after being abducted, handed to the security forces by the wives or other relatives, in response to a call by the military during the closing days of the war or had surrendered to them in the presence of witnesses. There are also allegations of torture and sexual abuse of

persons who had been in the custody of the military and had subsequently either escaped or been released. Having to deal with these complaints along with those of enforced disappearances, to the satisfaction of the victims, is a daunting legacy the government has to face.

Long years of Emergency Rule and the availing of the obnoxious provisions of the Prevention of Terrorism Act, have blunted the knowledge of the Police and the security forces of the manner in which they should deal with law and order issues during peace time. Extracting information and/or confessions from suspects by torturing them continues to be the norm. They appear to know no other way in which investigations into allegations against suspects could be conducted. The government is now left with a legacy of a Police force that has gained experience in performing more military duties than civilian functions. Bringing about a metamorphosis in their mentality and methods of investigation is another challenge the Government has to face without delay to bring about normalcy in the law and order situation in the country.

Persistent pressure on the Government to remove the Emergency Regulations (ER) made the previous regime remove it ostensibly.¹ But soon afterwards the much maligned provisions of the ER were tagged on to the provisions of the Prevention of Terrorism Act (PTA) making it more virulent than it was before.² It is the provisions of the PTA that facilitate the causing of enforced disappearances with ease. It enabled persons to be abducted and detained instead of being arrested. A few of those so abducted supposedly by 'unknown persons' had subsequently been produced in Courts, confirming the fact that the abductors were agents of the State. The whereabouts of many others is not known. Consequently there has arisen a need to remove the PTA from the laws

¹ The Emergency Regulations were removed in August, 2011 - <https://www.hrw.org/news/2011/09/07/sri-lanka-bait-and-switch-emergency-law>

² Ibid.

of the land. That is another of the legacies the current government has to deal with. Among many others, the UNHRC too has stressed the need to do so. Perhaps to show that the request has been heeded the Prime Minister of Sri Lanka has stated that British style anti-terrorism laws will be introduced in place of the existing PTA.³ Let us hope that the new laws do not turn out to be the same medicine in different bottles.

The culture of impunity had become endemic among the police and the security forces of Sri Lanka some years ago. That legacy contributed to enforced disappearances becoming so widespread. Many members of the Police and Security Forces who had been perpetrating abductions, torture and enforced disappearances in the past, have a mind-set that makes them feel they will not be made to face the consequences of their misconduct. It is understandable that to deal with the persons responsible for such misconduct, the courts would require evidence beyond reasonable doubt. It is because of that the Zonal Commission for the Central, North Western, North Central and the Uva Provinces made a specific recommendation to take disciplinary action against police officers who had violated departmental procedures in dealing with cases of enforced disappearances.⁴ This Commission had pointed out instances such as the Police Information Book for the relevant period having been destroyed in some Police Stations despite a specific circular issued by the Inspector General of Police to preserve them until the Commission of Inquiry completes its task; the Detention Register of certain Police Stations not containing the names of persons taken into custody while those names were found in the Diet Register of the Station; the running chart of the police vehicles of the Stations concerned having entries on the places visited in that vehicle on specific dates during the nights where persons from that area had disappeared allegedly taken by the police. When the complainants had gone to that Station the next morning they

³ Daily Mirror of 2nd May, 2016.

⁴ This is from the personal knowledge of the writer who was the Secretary to that Commission.

had been told that they never visited that village on the date concerned; etcetera. These are clear instances relating to instances of misconduct that facilitated enforced disappearances. Disciplinary action against those involved could easily had been taken as they only need evidence on a balance of probabilities. Not taking action even for such acts of misconduct promoted the impunity among the police officers. There is a clear case of an officer against whom a witness who had been taken to be killed escaped with a grazing wound while a few others who had been lined up and shot died. The police officer concerned had visited the home of the witness and not finding him there, had threatened the parents of the witness to ensure that he does not talk about the incident any more on pain of being killed. This incident is reported in Interim Report VII of the Central Zone Commission and a recommendation made to deal with this officer, was disregarded. That again contributed to the growth of impunity.

Similarly, in spite of the findings of many commissions of inquiry into enforced disappearances being appointed in the past, hardly any of the perpetrators identified by them had been held accountable. Perhaps the same fate awaits those who may similarly be found to be responsible for disappearances, if any, by the current Commission on Missing Persons. Making those concerned believe that such Commissions of Inquiry could genuinely deal with enforced disappearances is a challenge the Government should take on so that the prevalent lack of confidence in Commissions of Inquiry would become a thing of the past.

A word about the mandate of the current Commission on Missing Persons would be appropriate at this juncture. The mandates of the Commissions appointed by President Chandrika Bandaranaike in 1994 directed them to inquire and report into disappearances that had occurred from 1st January, 1988. The mandate of the Paranagama Commission requires it to investigate into enforced disappearance during the period

commencing from 10th June 1990.⁵ The overlapping of the periods of these Commissions is obvious. Besides, as stated earlier, this Commission has received 25,000 complaints so far. That would include complaints of enforced disappearances from 1990 onwards which may have already been dealt with by the three Commissions appointed in 1994. The mandates of those Commissions were to deal with disappearances of persons from 1st January, 1988 onwards. Consequently the question arises whether the government has decided not to accept the findings of the Commissions appointed in 1994 in respect enforced disappearances during the overlapping period. The presence of many reports of Commissions of Inquiry into enforced disappearances makes it necessary for a comparative study into the findings of all these reports. That could be one of the tasks this government may have to face to set the record straight.

Among the findings of the set of Commissions appointed during President Chandrika Bandaranaike's time,⁶ is evidence on the many mass graves that exist in different parts of the country and on the torture chambers of the relevant period. If the government wishes to look into the cases of enforced disappearances with sincerity and deal effectively with impunity that had its beginnings, as far back as in the late 1980s, the contents of the published and the unpublished parts of the reports of those Commissions must be re-visited. That is a challenge that must be met if impunity is to be wiped out, enforced disappearances made a thing of the past and the rule of law in the country is to be re-established.

It would be appropriate here to draw your attention to a case where a writ of mandamus regarding persons who went missing after surrendering to the army was being heard at the Magistrate's Court of Mullaitivu. A

⁵ Whether any persons resident in the Northern and Eastern Provinces during the period June 10, 1990 to May 19, 2009 have been abducted or have disappeared from their places of residence – Government Gazette No: 1823/42 – Thursday, August 15, 2013.

⁶ That includes the three Zonal Commissions appointed in 1994 and the All Island Commission appointed in 1998.

military officer who testified in that case had made a statement in December 2015 that the names of the persons referred to in the case was not in a list of the names of persons who had surrendered. When this case came up before the Magistrate on 17th February, 2016, the officer concerned was ordered by Court to furnish the list to Court on the next date, viz. April 20th. However it is reported that on date neither the witness nor the State Counsel had attended Court. Therefore the case has now been postponed for 17th May 2016.⁷ Whether the document would be produced on that date is anybody's guess. This incident shows how the military is, as always, shirking its responsibility to help the judiciary to deal with enforced disappearances. The list concerned would have helped to get confirmation of the persons who had surrendered and now alleged to have disappeared. That brings us to another legacy the government is faced with – the absence of co-operation by the military to let the judiciary deal effectively with cases concerning enforced disappearances.

In spite of the widespread incidents of enforced disappearances occurring during the past several years, it is not a crime in the Penal Code of Sri Lanka. The need to do so is one of the recommendations of the Commissions of 1994. Yet it is only in September 2015 that Sri Lanka finally agreed to ratify the UN Convention on Disappearances of Persons and did so in December 2015. It is still to be made part of the domestic laws of the country. According to international law, the crime of enforced disappearance is a continuous crime. It gets completed as a crime only at the point at which the fate and whereabouts of a disappeared person is finally determined. In the absence of retrospective legislation, there will be a juridical barrier to prosecutions in such cases. In other words, where the 'crimes' had been committed before enforced disappearance was made a crime in Sri Lanka they

⁷ Vide The Tamil Guardian of 22.4.2016 at <http://tamilguardian.com/article.asp?articleid=17745>

cannot be considered to be criminal acts. So none of the perpetrators of that crime can be prosecuted for that offence under the prevailing law in the country. This legacy has to be dealt with if the government is keen to put an end to the continuing agitation of the families of the victims of enforced disappearances to an end. They are still waiting for justice.

Unless meaningful steps are taken to render justice to them by taking appropriate accountability measures and providing adequate reparations, they cannot be expected cease their agitations and live peacefully. Perhaps it is to deal with this matter that the Government has stated recently that laws to create a permanent office on missing persons is in the process of being finalized.⁸ Let us hope that it is not going to be another mirage.

There is another option available to deal with this matter, that is to deal with perpetrators using the laws relating to universal jurisdiction and arraign the perpetrators before a Hybrid Tribunal. This was recommended in the Resolution jointly sponsored by the US Government and the Government of Sri Lanka at the UNHRC to deal with the human rights violations that took place during the conflict. Having agreed to create such a Tribunal at an international forum, the Government appears to renege on the undertaking. Apparently this is due to pressure from the ultra-nationalists in the country. Such ultra-nationalists groups have had the patronage of the last government. These ultra-nationalists are among the legacies the current government has to deal with effectively, if it is to bring about the change necessary to appropriately deal with human rights violations in general and the perpetrators of enforced disappearances of persons, in particular.

Let us now look at the situation with regard to taking legal action against those whom the Commissions of Inquiry have found have already found

⁸ “Laws to create office on missing persons by May-June”, Colombo Gazette, 31 March 2016, <http://colombogazette.com/2016/03/31/laws-to-create-office-on-missing-persons-by-may-june/>.

'credible material indicative of their responsibility' for causing disappearances. Commissions of Inquiry appointed under the relevant Act do not exercise judicial powers. They are fact finding bodies. They come to conclusion based on an assessment of evidence placed before them, on a balance of probabilities. However, a court of law has to look for evidence beyond reasonable doubt. Therefore it is left for the Government to refer the cases where perpetrators had been identified to the Attorney General. He has to initiate action to tie up the loose ends of the evidence to find evidence a court would need to convict an accused. The Attorney General has to get the services of the Police Department to get the necessary additional statements recorded. Whether the police would co-operate in doing so, especially if the perpetrator is a police officer, is debatable. Past performances of the police in such matters speak for themselves. Besides, can the present government deal with such cases diligently while it is faced with the legacy of the Attorney-General's Department consisting of personnel, most of whom are known to be loyal to the regime that allowed widespread disappearances of persons to take place with impunity? This was one of the issues raised by the International Independent Group of Eminent Persons when they found the Attorney General's representative leading evidence in the Commission of Inquiry into Certain cases of serious human rights violations.⁹ That eventually led to IIGEP to abort their mission stating that the government does not have the will to promote or protect human rights. Whether the current government would strive to avoid being branded in this manner is to be seen.

The government should take a serious note of a recommendation made in Reports of the Western, Southern and Sabaragamuwa Disappearances

⁹ A legal opinion drafted during that time (20.06.2007) by two highly respected retired judges of the Supreme Court, the late Justice Mark Fernando and Justice CV Wigneswaran, concluded that the 'competent, ethical, professional and impartial performance' of state law officers with the 2006 Commission had been compromised as a result.

Commission,¹⁰ in 1994 and the All-Island Disappearances Commission,¹¹ in 1998 regarding the creation of an independent Public Prosecutor with security of tenure and supporting staff of its own. It is recommended that this position be created under the ambit of the National Human Rights Commission(HRC) by an amendment to the HRC Act. The public prosecutor could then institute criminal prosecutions after collecting sufficient evidence through his own investigating officers and/or those of the Human Rights Commission. The creation of a Public Prosecutor to deal with cases of enforced disappearances, instead of letting the Attorney-General do so, is one of the challenges the government has to face in this regard.

Instances of witnesses to enforced disappearances being threatened before or after giving evidence in Courts or before Commissions of Inquiry, have been reported. Amnesty International had pointed out that intimidation of witnesses can rise to the level of the witnesses themselves being abducted and caused to be disappeared.¹² Such instances have occurred at the hands of the police and the military even during normal times. There have been instances of witnesses being taken into custody and killed.¹³ Effectively protecting witnesses, in general, and those of enforced disappearances in particular, is another challenge which the present government has to tackle. The need for this remains imperative.¹⁴ It is yet to be seen if the Witness Protection Authority set up recently can perform this function, effectively.

Another legacy the government has to face when dealing with enforced disappearance of persons, is the non-inclusion of the doctrine of

¹⁰Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, Sessional Paper No. V, 1997, at pp. 69, 83 and 175.

¹¹Report of the 1998 All-Island Disappearances Commission, at p. 16.

¹²Amnesty International, 'Sri Lanka: Extrajudicial Executions, 'Disappearances' and Torture,' 1987-1990, AI Index, ASA/37/21/90, September 1990, at pp. 27-28.

¹³*Sanjeewa v. Suraweera* [2003] 1 Sri LR 317.

¹⁴United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01.12.2003.

command responsibility in the penal laws of the country. This is a significant legacy that has to be dealt with. The principle of command responsibility is well established in international law. Article 6 of the UN Convention on Enforced Disappearances makes it obligatory for Governments to take 'measures to hold any person who commits, orders, solicits, induces the commission of, or attempts to commit', criminally responsible for the offence. It also imposes a liability on any superior 'who knew or consciously disregarded information which clearly indicated' that his subordinates were committing or are about to commit the offence of enforced disappearances. In view of this and other similar provisions in the Disappearances Convention, the Government will have to face the challenge of having to adopt appropriate laws after ratifying the Convention which it has agreed to do.

In view of the contradictory statements that are being issued by the Government on which judicial body would investigate and inquire into the cases of alleged disappearances of persons, the government will face a dilemma of having to appease the ultra-nationalists within the government and outside, if it sincerely sets out to honour the undertakings it has given to the UNHRC.

The Government is faced with the legacy of persistent misrule by a regime that thought it was invincible. Condoning and overlooking the breaches of the rule of law by its agents led to its demise. If that pattern is allowed to continue unchecked and appropriate remedial measures not taken diligently the perpetrators of human rights and disappearances in particular would continue to be a law unto themselves. The current regime has to face the challenge of disciplining the very same State machinery that brought disrepute to the previous regime and the Country itself. The lessons learnt should not be in vain. The State should henceforth be seen as protector of its citizens and not as a perpetrator of abductions, torture and enforced disappearances. It should

not also be seen as a protector of those had had been responsible for enforced disappearances or other offences. The Disappearances Convention does not condone enforced disappearances even when the country is at war or when there is internal political instability.

Past events clearly show that when the Reports of Commissions of Inquiries into Enforced Disappearances were made public none of the major political parties in the Parliament, pressed for the implementation of the recommendations and to deal appropriately with the perpetrators identified. Let us hope that this situation has now changed and the current government which is saddled with many sordid legacies of the past, would face the challenges and change the course of history by boldly taking appropriate steps to enforce accountability and provide adequate reparations to the victims of enforced disappearances.

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