

The Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No.14 of 2016; A way forward

Ishara Kumudumalee Munasinghe^{1#}

¹ General Sir John Kotelaala Defence University, Kadawala Estate, Ratmalana, Sri Lanka

[#]For correspondence; <isharakumudumalee@gmail.com>

Abstract— Every human has the right to free from disappearances (enforce or involuntary) and the many states across the globe which were specially experienced the situations of conflict had took the initiation of protecting this right by introducing a specific legal framework for the same. The Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No.14 of 2016 (herein after referred as OMPA) was one of the key statutes passed by the parliament of Sri Lanka during past year in order to establish the justice for the personals who had been subjected to the disappearances due to numerous conditions and situations occurred in the country during the stage of internal conflict and the post conflict era. The study is focused on assessing the level of accuracy and the effectiveness of the domestic legal framework introduced in order to protect the rights of personals subjected to disappearances with reference to the main international legal instrument, International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (herein after referred as ICPAPEP) as appropriate. The study is based on legal research methodology which totally based on the assessment of the primary sources of domestic and international instruments. The study specifies few practical difficulties in implementing the introduced mechanism under the statute and appraises the level of protection available towards the rights of disappeared persons. The study concludes with recommending few amendments to the domestic statute, highlighting the necessity of guarantying effective intervention of the law and policy makers towards guarantying the right of free from enforce or involuntary disappearances in Sri Lanka.

Keywords: Missing persons, Enforce or Involuntary Disappearances, Rights, Sri Lanka.

I. INTRODUCTION

The missing persons include those who are missing as victims of abduction, persons missing in action or otherwise missing in connection with armed conflicts, political unrest and civil disturbances. In the domestic context, this has been an outspoken issue with the unpleasant memories of disappearances of the people belonging to different social, cultural and ethnic backgrounds as a result of the numerous stages of the internal conflict situation which lasted for nearly three decades. Apparently, many claims were received by the

relatives of missing personals against the state on non-guarantying the right to be free from disappearances.

Recently, Sri Lankan government passed the statute of the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016, emphasising the necessity of guarantying the rights of the disappearances.

The preamble of the legislation recognised that the establishment of an Office on Missing Persons is necessary to take all necessary measures to search and trace missing persons; to protect the rights and interests of missing persons and their relatives (who are entitled to know the circumstances in which such persons went missing, and the fate and whereabouts of such missing persons) and towards ensuring non-recurrence.

The “relative of a missing person” shall in relation to such missing person include the spouse, children including adopted children, non-marital children, or step children, parents (including step-mother, stepfather, adopter), full or half-brother or sisters or adopted brothers or sisters, father / mother- in-law, brother/sister-in law, sons/daughters-in-law, grandchildren and grandparents (OMPA, 2016, s 27).

The research question of the study is, does the mechanism established under the newly introduced statute of Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No.14. of 2016 of Sri Lanka successfully guarantee the justice for the persons whose right to free from disappearances is violated in Sri Lanka?.

The objective of the study is to assess the level of accuracy and the effectiveness of the newly introduced domestic legal framework, The Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016, in order to protect the rights of personals who subjected to disappearances, ether enforce or involuntary, with reference to the main international legal instrument, International Convention

for the Protection of All Persons from Enforced Disappearance, 2006 as appropriate.

The study is based on legal methodology, which is mainly focused on black letter approach which critically analyses the provisions and approach of Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No.14 of 2016 PDVA (2016) of Sri Lanka with the principles of Constitution of the Democratic Socialist Republic of Sri Lanka (1978). Further, the study reveals the standards and principles found in International Convention for the Protection of All Persons from Enforced Disappearance, 2006 in highlighting the global standards of guaranteeing the right of refraining from enforced disappearances. Moreover, the study emphasises the relevant and applicable standards/principles in the other international instruments where appropriate.

II. DEFINING "MISSING PERSONS"

According to the Section 27 of OMPA, Sri Lanka (2016), a "missing person" means a person whose fate or whereabouts are reasonably believed to be unknown and which person is reasonably believed to be unaccounted for and missing:-

(i) in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces or its aftermath, or is a member of the armed forces or police who is identified as "missing in action"; or

(ii) in connection with political unrest or civil disturbances; or

(iii) as an enforced disappearance as defined in the "International Convention on Protection of All Persons from Enforced Disappearances".

Sri Lanka is a signatory party to the ICPAPEP (2006) since 10/12/2015 and became a ratified state in 25/05/2016. Therefore, the statute is par with the definition of enforced disappearance mentioned in the ICPAPEP (2006).

The right of refraining from enforced disappearances has been recognized by Article 01 of the ICPAPEP (2006) and whenever situation of 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 (ICPAPEP,2006,Art.01).

Further, the convention defines "enforced disappearance" as 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 (ICPAPEP, 2006, Art. 02).

III. OBJECTIVES OF THE STATUTE

There are four objectives of enabling the OMPA, Sri Lanka (2016) as mentioned below in order to par with principles of the Article 10,12(1) and 12(4) of Constitution of the Democratic Socialist Republic of Sri Lanka (1978).

(a) to provide appropriate mechanisms for searching and tracing of missing persons, and to clarify the circumstances in which such persons went missing, and their fate;

(b) to make recommendations to the relevant authorities towards reducing the incidents of 'missing persons'

(c) to protect the rights and interests of missing persons and their relatives

(d) to identify proper avenues of redress to which such missing persons or their relatives may have recourse (OMPA, 2016, s 02).

IV. ESTABLISHMENT OF THE OFFENCE ON MISSING PERSONS (OMP)

The OMP shall be situated in Colombo and the regional branches will be established in order to achieve the mandate of the office (OMPA, 2016, s 03). The office shall consist of seven members and shall be appointed by the President with the recommendation of the Constitutional Council (OMPA, 2016, s 04). The term of the appointed member of the OMP is three years (OMPA, 2016, s 06) and they are qualified for the consideration of reappointment for one further term of three years only. (OMPA, 2016, s 07).

Part II of the statute specifies a comprehensive elaboration of the mandate, powers and duties of the OMP.

The OMP shall have the mandate to search for and trace missing persons and identify appropriate mechanisms for the same, and to clarify the circumstances in which such persons went missing, to make recommendations to the relevant authorities towards addressing the incidence of missing persons, to protect the rights and interests of missing persons and their relatives, to identify avenues of redress to which missing persons and relatives of missing persons are entitled and to inform the missing person

and their relatives, to collate data related to missing persons obtained by processes presently being carried out, or which were previously carried out and centralize all available data within the database established and finally, to do all such other necessary things that may become necessary to achieve the objectives under the Act (OMPA, 2016, s 10).

The powers vested with the OMP is of two types; general (OMPA, 2016, s 11) and investigative (OMPA, 2016, s 12), while the statute specifies a sound framework of functions of OMP (OMPA, 2016, s 13).

The OMP shall have a Secretariat which shall be charged with the responsibility for the administration of the affairs of the OMP (OMPA, 2016, s 16) including the OMP Teaching Unit (OMPA, 2016, s 17) and OMP Victim and Witness Protection Division (OMPA, 2016, s 18).

Every offence of contempt committed against the authority of the OMP shall be triable at the Court of Appeal as though it were an offence of contempt committed against the Court or Appeal (OMPA, 2016, s 25).

V. CRITICAL ASSESSMENT OF THE OMPA

This section of the study is focused on assessing the framework established under the OMPA successfully guaranty the justice for the persons violated the right to free from disappearances in Sri Lanka.

The section elaborates few highlights of the statutes in the light of guarantying the rights of the missing personals.

A. *Lacun of public consultations process in drafting the OMPA*

According to the official communication released by Dr. D. Udagama, the Chairperson of Human Rights Commission of Sri Lanka (2016), the statute might have obtained much legitimacy, if it had undergone a public consultations process in pre-grafting process of the law. The public consultations process must be an essential ground work in order to recognise the nature of the issues/expectations exists and identify the proper means of settling issues relating to missing persons in different capacities and/or conditions.

B. *The political authority and the discretion on the appointment of the membership of the OMP*

The members of the OMP shall be appointed by the President on the recommendation of the Constitutional Council. The political ideology of the Constitutional Council definitely effects on the final selection of the seven members and similarly on the office of the Chairman even the statutes specifies that the composition of the OMP should reflect the pluralistic nature of the Sri Lankan society and previous experience in fact finding or investigation, human rights law, international humanitarian law, humanitarian response, or possess other qualifications relevant to the carrying out of the functions of OMP(OMPA, 2016, s 4).

Further, the statute provides a platform to the Constitutional Council itself to dominate and control the sole authority of the OMP since their recommendations shall be upheld anonymously as the members of the OMP where If the President is unable to appoint the Chairman on the recommendation of Constitutional Council within fourteen days (OMPA, 2016, s 5).

Similarly, the term of the members of the OMP is three years and subject to the consideration of the re-appointment (OMPA, 2016, s 6).

Therefore, it is controversial whether the composition of the OMP would successfully achieve the objectives of the establishment and the mechanism.

C. *Ensuring the effective functioning of the OMP*

When establishing the office, particular attention has to be paid to the recruitment of staff to ensure that they are persons of unimpeachable integrity, have no prior allegations of human rights violations against them, and have the ability to be empathetic to the needs and concerns of victims and the families of the disappeared (Udagama,2016).

Further the objective of effective functioning of the OMP shall be strongly established if the staff had been recruited in consideration of too adequate gender, ethnic, and regional representation and language proficiency.

To ensure transparency the OMP has to formulate and widely publicise information on its methods of operations and procedures to which it adheres, including rules regarding confidentiality, guidance to families on how to approach the OMP and their rights in relation to

obtaining information regarding progress of their complaint. Communication with victims should be in a language they understand (Udagama,2016).

The OMP should have personnel who are qualified to provide on-site psycho-social support to those who require it (Udagama,2016).

D. The issues relating to issuance of the Certificate of Absence (COA)

Where the issuance of the Certificate of Absence (COA) is concerned, the families have to be made aware of their rights in this regard. Given previous reports of families of the disappeared being coerced to apply for death certificates, it is important to ensure they are in no way subject to any form of coercion to opt for a death certificate instead of a COA (Udagama,2016). The COA should be valid for a reasonable period of time to allow for the investigation of the disappearance and the person's fate. If investigations are on-going the COA should be valid until investigations conclude. Since both the OMP Act as well as the proposed Registration of Deaths (Temporary Provisions) Bill refer to the COA, it should be ensured the definitions and processes set out in both laws are consistent and provide maximum benefit to families of the disappeared (Udagama,2016).

VI THE WAY FORWARD

Finally, the study emphasises few key areas of the OMPA that need to be concerned and improved in order to guarantee the right to be free from disappearances and to ensure the rights of the missing personals.

- a. Need of continuous process of public consultations which may be an appropriate approach to recognize the issues in relation to missing personals.
- b. Assurance of establishment of rule of necessary discretion in appointing of the membership of the OMP.
- c. Establishment of an internal mechanism to address grievances of complainants regarding shortcomings in the functioning of the Office.
- d. Achievement and establishment of databases to document and preserve the work and records of previous commissions of inquiry as well as from diverse reliable sources after verification of facts to consolidate data on the disappeared and construct a single database.
- e. Guarantee the transparency of the OMP.

- f. The OMP should have personnel who are qualified to provide on-site psycho-social support to those who require it, for instance, during or after making statements to the OMP.
- g. The mechanism of OMP Act shall not envisage a victims of Crime and Witness Assistance and Protection Division. (Udagama,2016)

REFERENCES

- Constitution of the Democratic Socialist Republic of Sri Lanka (1978)
- Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, 2016
- International Convention for the Protection of All Persons from Enforced Disappearance, 2006
- Udagama, D. (2016). Recommendations To The Government On The Establishment Of The Office On Missing Persons. [online] Human Rights Commission Of Sri Lanka, pp.1-3. Available at: http://hrcls.lk/english/wp-content/uploads/2016/08/IMG_0011.pdf. [Accessed 20 Mar. 2017].