LAW REVIEW

A case against the Digital Security Act 2018

Some of the recent DSA cases show a bizarre pattern: the accused is first forcibly disappeared, and then shown arrested under the Act, which is a clear violation of the directives given by the Supreme Court of Bangladesh in the *BLAST and Others* v *Bangladesh & Others* case (decided on 24 May 2016) and the Torture and Custodial Death (Prevention) Act 2013.

JULIAN RAFAH

The Digital Security Act (DSA) of 2018 was preceded by the controversial Information and Communication Technology Act 2006 (later amended in 2013). Even though the DSA was enacted to ensure digital security and identification, suppression and trial of offences committed through digital devices, various provisions of the Act are being used to suppress the freedom of expression of the people.

Freedom of expression has been guaranteed as a fundamental right under article 39 of the Constitution of the People's Republic of Bangladesh. Even though the provision imposes several restrictions, such restrictions must be reasonable and subjected to judicial review. The right to freedom of expression has also been guaranteed under article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Bangladesh has acceded to in 2000.

Section 8 of the DSA empowers the Director General of the Digital Security Agency and law enforcement agencies to block or remove information in digital media if it threatens 'digital security'. This extremely vague provision creates scope for censorship for the independent press. Section 21 of the DSA states that if any person is involved in making any kind of propaganda or campaign against our liberation war of 1971, the spirit of liberation, the national anthem or the national flag, such person shall be punished with imprisonment for a term not exceeding 10 years and if it is done repeatedly, shall be punished with imprisonment for life or a fine of Tk 3 crore. Such provisions are not only vague in terms of imposing content-based restrictions but also in providing disproportionate penalties.

Section 25 of the DSA criminalises the transmission and publication of any offensive, false or threatening information with an intention to affect the image or reputation of the country or to spread confusion, which again is too wide to be justified by any domestic or international standard. Section 31 again criminalises the intentional publishing or broadcasting of any digital format, which will destroy 'communal harmony'. These vague and wide terms bring a chilling effect on the freedom of expression on matters of public concern.

Section 53 provides that offences specified in sections 17, 19, 21, 22, 23, 24, 26, 27, 28, 30, 31, 32, 33 and 34 shall be cognizable and non-bailable. This gross criminalisation violates the right to liberty guaranteed under article 9 of the ICCPR which protects the right to liberty and security of a person and provides that 'it shall not be a general rule that persons awaiting trial shall be kept in custody.' At the same time, section 53 undermines one of the cardinal principles of criminal law, i.e., the presumption of innocence. Article 9(3) of the ICCPR allows pre-trial detention as an exception, but in the DSA, pre-trial detention has become a norm.

Some of the recent DSA cases show a bizarre pattern: the accused is first forcibly disappeared, and then shown arrested under the Act, which is a clear violation of the directives given by the Supreme Court of Bangladesh in the *BLAST and Others* v *Bangladesh & Others* case (decided on 24 May 2016) and the Torture and Custodial Death (Prevention) Act 2013.

In *Douglas* v *Jeanette* 319 US 157 case, the Supreme Court of the United States opined that freedom of speech and expression is not confined to any particular field of human interest but guarantees the broadest exercise of the right for religious, political, economic, scientific or informational ends. In *Schacht* v *US* 398 US 58, the court found that the right to discuss public affairs includes the right to criticise the government including its defence policy and the conduct of the armed forces. In *Hector* v *AG of Antigua and Barbuda* (1990) 2 All ER 103, 106, in the words of Lord Bridge of Harwich, '[i]n a free democratic society, it is almost too obvious to need stating that those who hold office in government, and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.'

Lastly, in the case of *State of Bihar* v *Sailabala* AIR (1952) SC 329, it is mentioned that advocacy of a certain political ideology cannot be restricted on the ground of security of state unless it is accompanied by the use, or threat, of violence. Such cases show that the current trend in democratic societies all around the world is to expand the ambit of freedom of expression as much as possible.

The DSA is not only limited to criminal charges and detentions but also hinders the implementation of many fundamental rights, including freedom of movement, freedom of thought, conscience, and opinion, right to life, and freedom of religion and belief. It is high time we made necessary reforms to the DSA.

The Writer is an Official Contributor, Law Desk, The Daily Star.

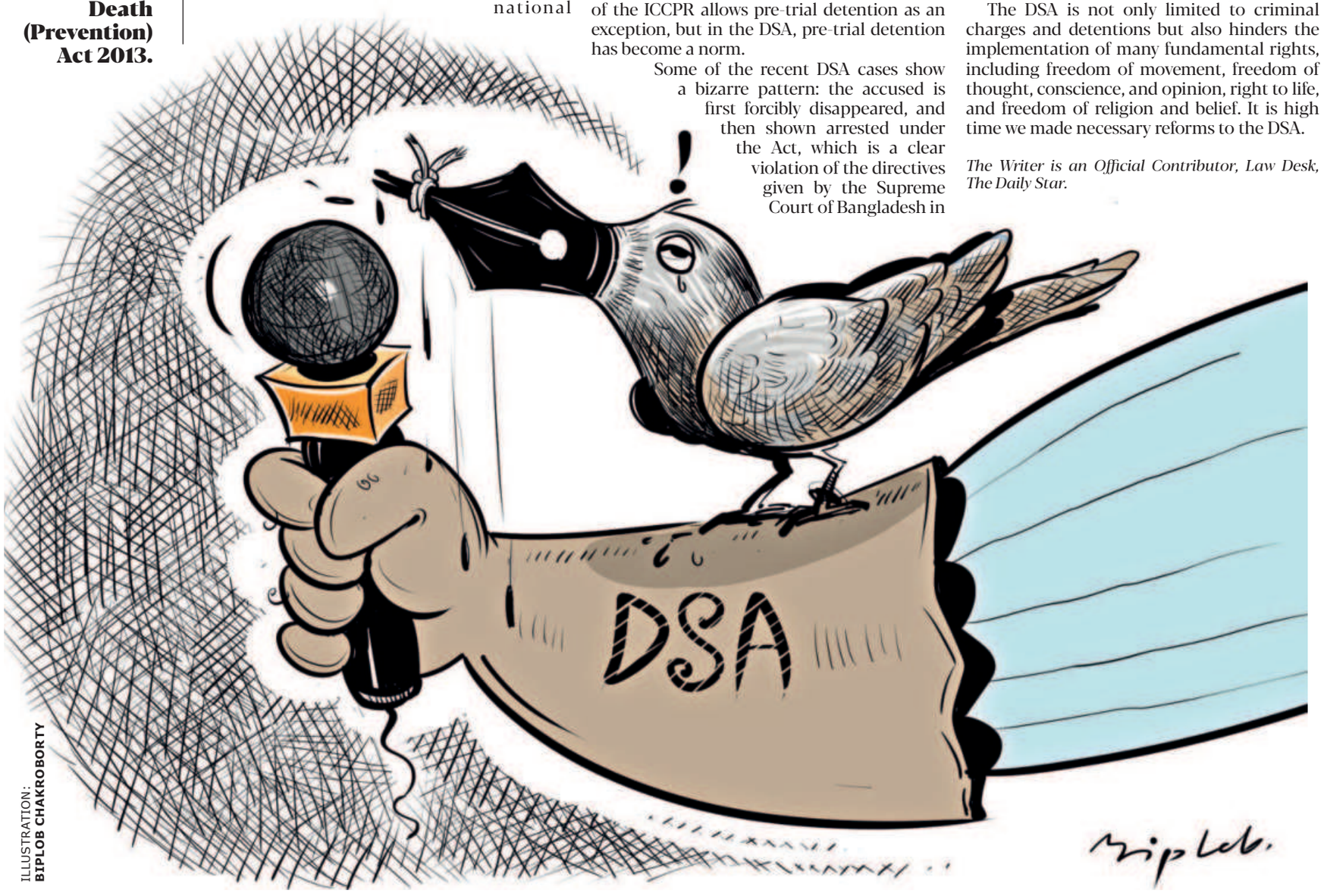

ILLUSTRATION: BIPLOB CHAKROBORTY

LAW LETTER

The state of witness protection in Bangladesh

S M MAHBUBULLAH

In both civil and criminal aspects of any justice system, witness evidence is a vital point. Witness evidence plays a critical part, among the many types of evidence, in leading to a conviction. Oral account of a witness is considered strong evidence in a trial, meaning, reliable witnesses ensure justice be delivered, whereas the lack thereof may lead to the acquittal of the offender. That is why, it is crucial to ensure the safety and security of the witnesses.

In Bangladesh, it has been extensively recorded that witnesses face threats, intimidation and even physical violence from the accused parties specially in criminal cases. In many cases, witnesses backtrack or refuse to testify in fear for the safety of their person and family.

According to Narcotics Control Department, all accused in 23,535 narcotics cases filed during the last 20 years were acquitted, mainly for the failure to produce witnesses.

In 2023, arrest warrants were issued against 34 witnesses, as they refused to come and testify in Court, in a case where 11 people were burned alive in Chittagong. Countless more instances of witness intimidation and murder exist, tarnishing the legal system of this country. Many of these instances may have been prevented by the witness protection schemes.

In Bangladesh, section 503 of the Penal Code 1860 provides for punishment for the commission of criminal intimidation. Section 14 of the Prevention and Suppression of Human Trafficking Act, 2012 provides for punishment for threatening victims and witnesses. But there are no unified witness protection laws, nor any judicial mechanism in place. In 2006, Bangladesh Law Commission submitted a report on a proposed law relating to protection of victims and witnesses of crimes involving grave offences. Again, in 2011, it submitted another report on the matter to the law ministry and the ministry drafted the Witness Protection Act in the same year. In Writ Petition No. 8769 of 2010 filed by BNWLA, the High Court Division ordered the government to enact a law to protect the victim and witness of sexual harassment.

In 2015, a High Court Division bench passed an order directing for the enactment of a witness protection law. Furthermore, in August 2017, with the joint effort of the UNDP and the Supreme Court of Bangladesh, the Witness Management Policy for subordinate Courts and Tribunals 2017 was drafted. Despite all these steps, no witness protection law or scheme has been enacted to this day.

Bangladesh has one of the lowest conviction rates in the world, meaning, most crimes go unpunished, and most criminals are not put to justice. A major reason for this is lack of evidence. In most of the rape and murder cases, the accused are acquitted for lack of witness testimony. It is not difficult to understand why, as people would want to testify in court with an axe hanging over there and their family's neck. So, there is a desperate need for a witness protection policy in our country. An effective witness protection policy, or law, if enforced appropriately, would drastically improve the speed and efficiency of investigation and prosecution stage. It would possibly also speed up the trial, and slowly drain the oceans of pending cases that is clogging our courts.

To bring positive changes in our sluggish legal system, it must be ensured that witnesses are protected and feel safe to come forward and testify. This requires a unified legislation, comprehensive legal framework and increased resources for protection, and efforts to combat corruption and impunity.

The Writer is a Student of Law, University of Dhaka.

VISUAL: SALMAN SAKIB SHAHRYAR

RIGHTS WATCH

Some unanswered questions in SULTANA JASMINE'S DEATH

SURIYA TARANNUM SUSAN

Custodial torture and death continue to be infamy in the criminal justice system of Bangladesh. Despite the presence of constitutional safeguards and legislative provisions, this gross violation of human rights persists to cover headlines. As per a report of Ain o Shalish Kendra (ASK), 1,426 incidents of custodial deaths took place from January 2017 to July 2020. A recent addition to this grim statistics is the death of Sultana Jasmine, an employee of Naogaon Union Land Office, allegedly in the custody of Rapid Action Battalion (RAB) on March 24.

Starting from Sultana's arrest, there has been a perpetual violation of due process rights. According to media reports, she was picked up on March 22 by RAB officials. One of the pieces published on 30 March in *The Daily Star* titled "How did Sultana Jasmine die?" unravels that she was sued under the Digital Security Act 2018 more than 31 hours following her detention by RAB. In a writ petition filed seeking judicial inquiry into the matter, the High Court Division questioned under what authority she was picked up without her being an accused at the time, who interrogated her, and whether she sustained any fresh wounds after she was being detained. The Court also questioned the jurisdiction of RAB to pick anyone up without any formal complaints. The director of Rajshahi Medical College Hospital stated that Sultana was brought in critical condition on March 24, and she died with her already deteriorating health. Multiple intracranial bleeds and external injuries were found on her head. However, RAB officials claimed that Sultana died from a stroke. On the contrary, her family members have repeatedly asserted that Sultana was in perfect health prior to her arrest. The autopsy report handed over on April 3 divulged that she died of shock due to excessive brain hemorrhage.

Articles 33 and 35 of the Constitution lay down the safeguards regarding arrest and detention, and trial and punishment. Bangladesh enacted the Torture and Custodial Death (Prevention) Act 2013 in compliance with the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment 1984. The Act mentions two core offences, firstly, torture by a law enforcement officer, and secondly, custodial death due to torture. Section 2(6) of the Act defines torture as physical or psychological torture that hurts and mentions specific criteria like extorting confession, punishing or intimidating any suspected person, etc. It covers the death of a person in custody of a public officer, the death of any person during illegal detention, or death during arrest or interrogation as custodial death. Though the Act provides easy avenues of complaint and investigation, victims or their relations still fear seeking remedies against law enforcement agencies.

The Act mentions in section 5(5) that the investigation will be conducted by a police officer superior to the accused officer. The proviso of section 5(2) states that the court may authorise a judicial inquiry upon satisfaction of an application by an aggrieved person that a fair investigation is not possible by the police. The sole verdict till now under this Act has been against three police officials for the death of Ishtiaque Hossain Jonny. It is pertinent to mention that the victim's family was able to secure a judicial inquiry.

The higher judiciary of Bangladesh has provided many landmark judgments concerning the issue of arbitrary arrest, custodial torture, and death. In *BLAST* v *Bangladesh* (2003) 55 DLR 363, the Hight Court Division issued 15 directives to be followed in the arrest, detention, remand, investigation, and treatment of suspects. The Court also suggested shifting the burden of proof in custodial death cases to law enforcement agencies. The Appellate Division upheld the decision of the Hight Court Division on 24 May 2016. In the case of *Human Rights and Peace for Bangladesh (HRPB)* v *Government of Bangladesh*, the High Court Division directed RAB to comply with the provisions of the Code of Criminal Procedure 1898 while arresting any citizen and to ensure the safety of persons detained in their custody.

Custodial torture contravenes due process of law. The breach of procedural requirements in Sultana's arrest and the imputations raised by her family remain to be answered. Sultana's death has also made us ask some questions which are yet to be answered by the concerned stakeholders. When will citizens be protected from oppression at the hands of law enforcement agencies? When will the judicial directives pertaining to custodial protection be strictly complied with? It reminisces the empathetic observation by the High Court Division in *AHM Abdullah* v *State and others* (2005) 25 BLD 384 that ordinary citizens often lack the resources and ability to protest against police excesses and to seek court's redress.

The Writer is an Official Contributor, Law Desk, The Daily Star.