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# Journalistic Exemption from Data Protection Laws: A Critical Appraisal from the Perspective of Bangladesh

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## ABSTRACT

*The right to profession and freedom of expression are considered as one of the most valid human rights. Beside these, data protection is a serious concern in modern age. The professionals who mostly face difficulties in between these are the journalists. Journalists often need to do secret investigation regarding any crime or corruption and disseminate confidential or evidentiary documents before the public which is the main object of their duty, that may lead to violations of data protection laws. The protection of any kind of data is necessary, but it is equally important to protect the journalistic freedom and the object of their profession, especially for the issue of public interest and human rights. However, there is no legal provision that strongly can lead to the protection of these concerning issues other than the recently introduced draft Data Protection Act. It is high time to introduce provisions with specific exemption within all laws related to data protection for the higher protection systems to ensure the safety, privacy, and freedom of journalists regarding their independent practice. This paper works on the actual standpoint of Bangladesh about ensuring the rights and protection of journalists. Bangladesh needs to enact and enforce effective mechanisms to protect the rights of the journalists about their professional conduct. Thus, the purpose of the paper is to identify the actual necessity of journalistic exemption from the data protection laws and recommend possible solutions by analyzing the current legal framework in Bangladesh with a comparative analysis of international law.*

**Keywords:** *Journalistic exemption, Public interest, Data Protection.*

## I. INTRODUCTION

One of the most important missions of journalists is to discover in-depth information. In this process, the main aim is to make reports for public interest which leads to awareness by uncovering corruption.<sup>2</sup> Journalism is a distinctive sector that requires the collection, storage,

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<sup>2</sup> 'Liberties EU', "Independent Journalism: Definition, Importance, And How To Protect It", (2021), available at <<https://www.liberties.eu/en/stories/independent-journalism/43789>> [last accessed 3rd July 2023].

and transmission of large amounts of information, raising data protection concerns. While highlighting identifiable information, this may violate data privacy. On the other hand, journalism plays a crucial role in knowing public perception and serves as a vital public inspection body for this investigation and data transmission. It is their duty to report genuine news which is entirely related to general interest. The process of journalism involves the right to privacy to be at risk in order to protect the right to freedom of expression.<sup>3</sup> In reality, the right to privacy should not be compromised, nor the right to freedom of expression. In these two vital right decisions, journalists often get trapped and the fundamental right to freedom of profession gets highly violated. *Journalism* is a terminology in which freedom of expression should prevail for the public welfare.<sup>4</sup> Therefore, to uncover the factual stories kept secret from the public and to report for the betterment of the people is the aim of journalism.<sup>5</sup>

We can perceive that journalism can play an important role to destroy corruption from negative entities of our society. They are bound to adopt new strategies to come successful in their reporting. Doing so, they need to collect information privately. Consequently, they constantly fall into trouble and insecurities. For example, digital platforms are used to collect documents which are sometimes considered a crime as against these activities, the government enacted Data protection laws to ensure public digital security. The provisions came for the protection while the general public use digital platforms for their communication and information exchange.<sup>6</sup> The right to press is guaranteed under article 39(2) of the Constitution of Bangladesh, but is not unlimited and is subject to reasonable restriction by other laws.<sup>7</sup> As a result, data protection laws are creating that restriction on press freedom. More specifically, article 39(2) allows restriction on such rights for some reasons including state security, friendly relations with foreign states.<sup>8</sup> As journalists are bound to discover corruption before the public, their transmission may harm the image of the state if the state is involved in any corruption. The Constitution empowers journalists to report news, but if it comes out as an abuse of such power, they will be punished by law.<sup>9</sup> On the other hand, Bangladesh has made several controversial laws that have already been used against journalists. Constitutional provisions are enough to restrict abuse; others are creating fear to the main motive of journalism, not only to the abuse

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<sup>3</sup> Aliur Rahman & Harun Ur Rashid, *Digital Security Act & Investigative journalism in Bangladesh: A critical analysis*, 2 CenRaps JSS. 216, (2020). Online: <[https://www.researchgate.net/publication/342999618\\_Digital\\_Security\\_Act\\_and\\_Investigative\\_Journalism\\_in\\_Bangladesh\\_A\\_Critical\\_Analysis](https://www.researchgate.net/publication/342999618_Digital_Security_Act_and_Investigative_Journalism_in_Bangladesh_A_Critical_Analysis)> [last accessed 25 June 2023].

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> The Constitution of Bangladesh, Art. 39(2).

<sup>8</sup> Ibid.

<sup>9</sup> M. Jashim Ali Chowdhury, *An introduction to the Constitutional Law of Bangladesh* 217, (4th Edition, Book Zone Publication, Chottogram, 2010).

some journalists may do if the powers given to them were unlimited. Hence, here comes the necessity to talk about their code of conduct along with professional freedom without any fear. According to analysis, there is a valid reason to be afraid that the laws instigate a challenge to independent journalism.<sup>10</sup> Journalists are bound to have a strategy of reporting to search out necessary ways of information collection and uncover the wrong.<sup>11</sup> But the Digital Security Act made the action an offence which led to restrictions on journalists.<sup>12</sup> This matter is still creating fear in independent journalism for the existence of DSA provisions on the new Cyber Security Act, 2023. There are cases in Bangladesh which affected the freedom of expression of journalists for applying the data protection laws by the government.<sup>13</sup> Consequently, it has become necessary to talk about the journalistic exemption from data protection laws in order to protect their freedom of expression and the aim of their duty.<sup>14</sup> At first about a lot of controversial issues of Section-57 of the ICT Act, 2006 have been spoken, as the freedom of thought, expression and right to privacy are ensured by the Constitution of Bangladesh, whereas 'Section-57 of the ICT Act, 2006' dealt with punishment for publishing information in digital form, which appeared as a contradictory with the constitutional rights.<sup>15</sup> This provision had a focus on 'right to privacy' bearing much ambiguities. Then the DSA came into action by the repeal of the ICT Act. After such action, it has been seen that some provisions of DSA had no logical reasons with constitutional restriction; it eventually comes as a new face of section 57 of ICT Act 2006.<sup>16</sup> Manjurul Ahsan Bulbul is a journalist leader who told Prothom Alo that the DSA is misused sometimes for harassing the journalists.<sup>17</sup> There are cases which were not filed for legitimate reasons against the journalists.<sup>18</sup> Professionals and concerned persons have spoken about the malfunctional connection of DSA and investigative journalism by pointing out that DSA was nothing but the previous provisions of ICT Act which was creating a constant threat to independent journalism.<sup>19</sup> As the constitution has a spirit to ensure the right to freedom

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<sup>10</sup> Ahmadul Hassan, *Police-ruling party men are defendants in 47pc DSA cases*, PA, 19 Sep, 2022. Online: <https://en.prothomalo.com/bangladesh/o42q79f1nla>. [last accessed 28th June 2023].

<sup>11</sup> Supra note 3.

<sup>12</sup> Ibid.

<sup>13</sup> Supra note 10.

<sup>14</sup> Ibid.

<sup>15</sup> Mohammad Badruzzaman, *Controversial Issues of Section-57 of the ICT Act, 2006: A Critical Analysis and Evaluation*, 21, IOSR-

JHSS.62,(2016).Online:<[https://www.researchgate.net/publication/320263058\\_Controversial\\_Issues\\_of\\_Section-57\\_of\\_the\\_ICT\\_Act\\_2006\\_A\\_Critical\\_Analysis\\_and\\_Evaluation](https://www.researchgate.net/publication/320263058_Controversial_Issues_of_Section-57_of_the_ICT_Act_2006_A_Critical_Analysis_and_Evaluation)> [last accessed 10th July 2023].

<sup>16</sup> Tashmia Shabera, *All that is wrong with the digital security Act*, TDS online, 9 Mar, 2021. Online: <<https://www.thedailystar.net/law-our-rights/news/all-wrong-the-digital-security-act-2057321>>[last accessed 4th Aug 2023].

<sup>17</sup> Supra note 10.

<sup>18</sup> Ibid.

<sup>19</sup> Supra note 3.

of speech, press and expression, which is being violated by the DSA and as without changes of the language of DSA into CSA with some provisions, the possibilities of such violations still will remain at same place, here comes the necessity to enhance the negative impacts on journalism after the enactment and implementation of data protection laws of Bangladesh. Threat to independent journalism was visible with the presence of ICT Act, which increased more after the enactment of DSA.<sup>20</sup> An international organization named article-19 collected information from 2020 to September 2022 of 514 cases filed under DSA.<sup>21</sup> Most of the cases were filed against journalists.<sup>22</sup> DSA basically was used to create fear among journalism, as many cases were filed under DSA came into action as the weapon of the ruling party to stop critics against them, which leads to curtailment of the freedom of expression, especially in digital devices.<sup>23</sup> After so many human right violations, the law ministry announced to replace DSA and pass a new law which was expected to have some genuine changes. The Wire Staff made a report on 'International Press Institute Welcomes Repeal of Bangladesh's Digital Security Act', which highlighted that the IPE acknowledges the changes to CSA, but urges to have reviews, so that no problematic provision of DSA exists.<sup>24</sup> 'The Daily Star' has published an article on 8 August 2023 that states the DSA will be replaced by the newly proposed CSA, where the reporter stated that the law minister has announced about what changes..<sup>25</sup> It previously made another report on 7th August named about the information related to changes of some sections of DSA, not the whole Act.<sup>26</sup> On 23rd August, this newspaper again published an article which highlighted the problems of DSA still remain in the CSA.<sup>27</sup> After all of these discussions, it was understandable that the new one is coming as a photocopy of the previous one and now it is visible.<sup>28</sup> There are genuine points of controversy that are on the way to

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<sup>20</sup> Ibid.

<sup>21</sup> Supra note 10.

<sup>22</sup> Ibid

<sup>23</sup> Ali Riaz, 'Carnegie Endowment for International Peace', "How Bangladesh's Digital Security Act is creating a culture of fear", (2021), available at <<https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951>> [last accessed 17th July 2023].

<sup>24</sup> The Wire Staff, "International Press Institute Welcomes Repeal of Bangladesh's Digital Security Act" (2023), available at <<https://thewire.in/media/international-press-institute-bangladesh-digital-security-act>> [last accessed 24 Aug 2023].

<sup>25</sup> Staff Correspondent, *Cyber Security Act to replace DSA*, TDS online, 8 Aug, 2023. Online: <<https://www.thedailystar.net/news/bangladesh/news/cyber-security-act-replace-dsa-3388841>> [last accessed 9 Aug 2023].

<sup>26</sup> Star Digital Report, *Cyber Security Act: What we know so far*, TDS online, 7 Aug, 2023. Online: available at <<https://www.thedailystar.net/news/bangladesh/news/cyber-security-act-what-we-know-so-far-3388746>> [last accessed 9 Aug 2023].

<sup>27</sup> Staff Correspondent, *Cyber Security Act: Make bail for accused pending trial the norm*, TDS online, 23 Aug, 2023. Online: <<https://www.thedailystar.net/news/bangladesh/news/cyber-security-act-make-bail-accused-pending-trial-the-norm-3400886>> [last accessed 23 August 2023].

<sup>28</sup> Shaikh Azizur Rahman, "Bangladesh Criticized Over Plan to Replace Controversial Law with One Considered Equally Repressive", South and Central Asia (Dhaka, 2023), available at <<https://www.voanews.com/a/bangladesh-criticized-over-plan-to-replace-controversial-law-with-one-considered-equally-repressive-7234227.htm>> [last

existing in the new law.<sup>29</sup> Hence, the author talks about the issues, as there are no basic linguistic changes visible in the newly introduced Cyber Security Act.

Official Secrets Act, 1923 is another law which is creating the situations tough for the journalists and easy for the corrupted authority.<sup>30</sup> Harassing journalists under this law was mostly talked about when Rozina Islam got arrested under OSA.<sup>31</sup>

Considering the facts of journalism practice in Bangladesh and the actual state of the right to freedom of speech, this paper focuses on the situation of Bangladesh regarding the matter of journalistic sources and their necessity to be exempted from the data protection laws of Bangladesh. This paper tries to discuss the domestic laws of Bangladesh that apply to data protection and journalism. The author also looked into the standards of international laws in order to protect journalistic activity. To analyze the above mentioned matters, this paper deals with two questions. Firstly, the author explores where Bangladesh's laws actually stand regarding the data protection of journalistic sources. Subsequently, the author deals with the issue that, whether journalists should be exempted from data protection laws in Bangladesh, or not.

The connection between journalism and data protection laws is a matter of concern, as the laws of Bangladesh that are related to data protection may put fear into independent journalism. Moreover, the laws of data protection may create a bar to the fundamental right to freedom of speech. The most obvious bar that data protection laws can create on journalists is limiting their authority to report. As there may be uncountable difficulties caused by those laws to journalism, the necessity of journalists to be exempted is not really a surprising issue. Rather it should be a concern to discuss the situation in order to maintain the rights. Thus, to what extent the journalistic exemption can happen, so that the application of data protection law can not result in the serious curtailment of the fundamental rights, how a proper balance can be ensured between the right to privacy and freedom of expression in Bangladesh, are the main focuses of this paper. The author looked into the laws related to data protection, their application to journalism and the necessity of the journalistic exemption in Bangladesh from those laws in order to protect the right to freedom of speech and right to profession. In order to address these issues, the method that has been followed is qualitative and also the paper has been based on

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accessed 23 Aug 2023].

<sup>29</sup> Ibid.

<sup>30</sup> Kohinur Khyum Tithila, *Can journalists be exempted from the Official Secrets Act?*, DT online, 21 May, 2021. Online:<<https://archive.dhakatribune.com/bangladesh/2021/05/21/can-journalists-be-exempted-from-the-official-secrets-act>> [last accessed 10 July 2023].

<sup>31</sup> Ibid.

critical and analytical studies of the primary and secondary sources. The tools, such as journals, articles, local laws, writings from books, and international laws have been discussed and analyzed to achieve the purpose of this paper. The national and international framework have been discussed from both a conceptual and legal perspective. The aim of this paper is to look into the content of the laws of data protection in the matter of journalistic sources from Bangladesh's perspective. Subsequently, the necessity of exemption for journalists from the data protection laws in Bangladesh is the topic of this paper. To discuss the issues briefly, this paper firstly deals with the international framework of journalism and data protection from conceptual and legal aspects. Then the author looked into the national framework of journalism and data protection from conceptual and legal aspects. After that, the author focuses on the analysis and discussion based on the international and national frameworks. Lastly, this paper tries to cover an overall conclusion and possible recommendations based on the findings from the analysis.

## **II. INTERNATIONAL FRAMEWORK OF JOURNALISM AND DATA PROTECTION**

Journalism holds importance worldwide for their activities related to public interest to ensure democracy.<sup>32</sup> Consequently, the protection of journalistic sources with the relation of right to expression is a recognized concern in many countries and international law.<sup>33</sup> The right to privacy of every individual with data protection is also a concern. These two major rights and their proper protection may seem as a challenge to balance.<sup>34</sup> Many countries and organizations have accepted this challenge to make an appropriate balance between these rights.<sup>35</sup> The main legal tools of data protection in the matter of right to freedom of speech on the international level are GDPR, ICCPR, UDHR, ECHR etc. Some countries also enacted their own laws to protect freedom of expression of journalists in their domestic area. 'The International Declaration On the Protection of Journalists' reflects some major points of views regarding the protection of journalistic sources.<sup>36</sup> For the context of international human rights standard, the author of this paper discusses the laws and theories related to the data protection of journalistic sources in international perspective, as well as explains and analyzes the significance of journalistic exemption from international data protection laws in order to safeguard the right to freedom of expression from both the conceptual and legal aspects.

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<sup>32</sup>Natalija Bitiukova, "Journalistic Exemption under the European Data Protection Law"(2020), available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3531977](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3531977)> [last accessed 25 June 2023].

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup>'International Press Institute', "International Declaration on the protection of journalists", (2016), available at <<https://ipi.media/international-declaration-on-the-protection-of-journalists>>[last accessed 2nd July 2023].

**(A) Conceptual Aspects:**

Freedom of expression and right to privacy are two major rights throughout the world.<sup>37</sup> Journalism involves the collection of private data, information and photographs, which are to disseminate for public interest.<sup>38</sup> This matter also is a part of freedom of expression as their major duty is to collect and disseminate information to the public to play a vital role in democracy. Consequently, journalists carry a duty to report necessary events that can lead to the risk of right to privacy.<sup>39</sup> Many countries have already addressed this issue and are trying to solve it in a balanced manner. In order to balance these rights and also to protect the rights of journalists for independent journalism, the concept of 'journalistic exemption' from statutory data protection laws came into existence. Journalistic exemption requires protection from the data protection laws, as the independent journalism must have the rights to report or inquire for sources secretly that may be offences as per the data protection laws and right to privacy.<sup>40</sup> The journalistic exemption will be applied when the journalists have that reasonable faith on their action to be held for public welfare.<sup>41</sup> The laws shall give exemption to journalism, when those will act as a barrier to the responsibility of journalists. Journalistic exemption involves zero creativity and obvious originality with their efforts to reveal facts for public interest.<sup>42</sup> These concepts created the existence of journalistic exemption on the international level. Many countries adopted these theories to make their laws to balance the journalistic and data protection rights.

**(B) Legal Aspects:**

The journalistic exemption is not a new matter from an international perspective. As the rights and duties often conflict with the data protection laws made by states themselves, the incorporation of the 'journalistic exemption' comes as a valid question. Consequently, careful states and international laws recognized this issue.<sup>43</sup>

- a. *EU*: This concept of 'journalistic exemption' was previously mentioned in the EU Data Protection Directive, 1995 (DPD).<sup>44</sup> Later the DPD was repealed in 2016

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<sup>37</sup> Supra note 2.

<sup>38</sup> Ibid.

<sup>39</sup> Pinsent Masons', "ICO moves to clarify journalism exemption to UK data protection law"(2022), available at <<https://www.pinsentmasons.com/out-law/news/ico-clarify-journalism-exemption-uk-data-protection>> [last accessed 28 June 2023].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Supra note 32.

<sup>44</sup> Ibid.



by EU General Data Protection Regulation (GDPR).<sup>45</sup> The provisions of GDPR and DPD are mostly similar with some minor changes.<sup>46</sup> Previously, DPD recognized that there may be some conflict between the freedom of expression and right to privacy and introduced journalistic exemption in article 9 of the Act.<sup>47</sup> In this article, a provision had been made to ensure the protection of journalistic sources and freedom of expression by stating that, if this is necessary to maintain the right to privacy with the laws regulating the rights to expression, member states must establish exemptions from the rules of Chapters II, IV, and VI for the handling of private information performed entirely for journalistic objectives.<sup>48</sup> In 2016, EU GDPR recognized the necessity to adjust a balance between the right to privacy and expression.<sup>49</sup> Internationally, it is a valid matter about implementation of GDPR for 'Journalistic Exemption' under the European Data Protection Law.<sup>50</sup> The decisions taken by the EU Member States to apply Article 85 of the GDPR that talks about "journalistic exemption" in the state's legal frameworks has a standard that balances between right to freedom of speech and the right to privacy.<sup>51</sup>

- b. *UK*: In 1998, a new law was enacted in the UK as primary legislation named Data Protection Act, 1998.<sup>52</sup> It was enacted in order to implement the law of EU DPD in UK domestic law. After the repeal of DPD and enactment of GDPR, the UK legislature updated the law in 2018 into DPA 2018.<sup>53</sup> GDPR was enacted due to some conflicts of the previous provision, so it has not changed that much.<sup>54</sup> When the UK enacted law to implement DPD in their territory, they referred to the provision as "special purposes exemption" in the Act.<sup>55</sup>
- c. *Malaysia*: In Malaysia, the data protection is governed by the *Personal Data Protection Act, 2010 (PDPA)*. This law was enacted to safeguard the data of the citizen and other entities with some restrictions. A mere exemption is there for

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Supra note 39.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

the protection of journalists.<sup>56</sup> The law gives exemption to not only the journalists, but also statistical work of a researcher.<sup>57</sup> It states that journalistic, artistic and literary sources are exempted from this law.<sup>58</sup> This exemption arises in the matter of public interest related to freedom of expression and the data user needs to believe that these will be used solely for the public welfare. These provisions provide the perception that the state recognized the trouble of journalistic sources and curtailment of rights if the data protection laws apply to them. So, they incorporated the theory of journalistic exemption into data protection laws.

- d. *Overview of GDPR*: GDPR was incorporated based on the EU DPD.<sup>59</sup> To make a proper balance between the right to freedom of expression and privacy, GDPR repealed the word “solely” from the provision of DPD regarding the journalistic protection. Article 85(1) of the GDPR states that, the right to personal data protection under this regulation and the freedom of speech, including processing for journalism must be balanced in each Member State's law.<sup>60</sup> Also, some chapters will not be applied when processing is accomplished for the objective of journalistic work.<sup>61</sup> There is a difference between the DPD article 9 and GDPR article 85, that the word *solely* was removed in GDPR only to balance between the right to privacy and freedom of expression.<sup>62</sup>
- e. *Overview of ICCPR*: ICCPR gives protection to the right to freedom of expression through a provision.<sup>63</sup> According to that provision, everyone will get the right to expression without restriction, including the freedom to search for, receive, and share information with no boundaries, either orally, writing or through any other form of his desire.<sup>64</sup> Here the right to freedom of speech and receive information are visible as necessary rights. The responsibility of journalists is as similar as this provision is stating. On the other hand, another

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<sup>56</sup> The Personal Data Protection Act 2010 (PDPA).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Supra* note 32.

<sup>60</sup> EU General Data Protection Regulations 2016, Art. 85.

<sup>61</sup> *Ibid.*

<sup>62</sup> Inigo de Miguel Beriain, Lorena Pérez Campillo, Data protection in journalism: a practical handbook 3 (Federico Caruso eds, version 0.5, 2020) Online:<ede\_caruso/bookdown/the-journalistic-exemption-in-the-gdpr.html> (last accessed 25 June 2023).

<sup>63</sup> International Convention on Civil and Political Rights, Art. 19(2).

<sup>64</sup> *Ibid.*

provision limits this right with some conditions.<sup>65</sup> This states that the limitation must be provided by Law.<sup>66</sup> When it comes as important for the reputation of others, protection of national security, public orders, health or morals.<sup>67</sup> But, these create confusions when the action comes to the discussion of independent journalism. HRC cleared this confusion by stating that, if a state party wants to impose restrictions in the matter of freedom of expression, those must be free from jeopardizing the fundamental right to freedom of expression itself.<sup>68</sup> These matters of restriction and right must not be overturned to each other.<sup>69</sup>

- f. *Overview of UDHR:* The Universal Declaration of Human Rights (UDHR) states about the right to freedom of expression. According to the provision related to these rights, every individual has a right to hold freedom of opinion and expression that includes freedom to express without intervention, right to ask and get information from any media.<sup>70</sup> This provision of UDHR provides a clear view of the importance not only regarding the freedom of expression, but also regarding the right of people to know about any information. If state laws restrict journalists to express the truth, it is called creating violation of such rights. As these rights are considered as one of the most important human rights, UDHR tried to make it clear.<sup>71</sup>
- g. *Overview of ECHR and the Human Rights Act:* The Human Rights Act is a UK legislation which came into force in 2000.<sup>72</sup> This Act sets out principles regarding the fundamental rights that every individual is entitled to have.<sup>73</sup> The relation between ECHR and HRA is, the Act incorporates the rights set out in the ECHR into the local laws of the UK.<sup>74</sup> It provides provision to protect the rights to hold the opinion and express freely without interference.<sup>75</sup> This includes

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<sup>65</sup> 'Australian Human Rights Commission', "4 permissible limitations of the ICCPR right to freedom of expression", available at <<https://humanrights.gov.au/our-work/projects/4-permissible-limitations-iccpr-right-freedom-expression>> [last accessed 23 June 2023].

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Human Rights Committee, General Comment No. 34, note 4, para 21.

<sup>69</sup> Ibid.

<sup>70</sup> Universal Declaration of Human Rights, Art. 19.

<sup>71</sup> Ibid.

<sup>72</sup> Claire Brader, 'House of Lords Library', "Human Rights Act 1998: Does it need replacing?" (2022), available at <[https://lordslibrary.parliament.uk/human-rights-act-1998-does-it-need-replacing/#:~:text=The%20Human%20Rights%20Act%201998%20\(HRA\)%20came%20into%20force%20on,Fundamental%20Freedom%2C%20into%20UK%20law](https://lordslibrary.parliament.uk/human-rights-act-1998-does-it-need-replacing/#:~:text=The%20Human%20Rights%20Act%201998%20(HRA)%20came%20into%20force%20on,Fundamental%20Freedom%2C%20into%20UK%20law)> [last accessed 4th July 2023].

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> The Human Rights Act, Art. 10.

that everyone has the right to express their opinions through publication or any kind of expression through the internet.<sup>76</sup> Question may arise whether there is any restriction to this broadly given right or not. If one person has the freedom of expression, it is his responsibility to behave respectfully with others.<sup>77</sup> No hate comments should be expressed by using the right.<sup>78</sup> When the matter comes to the rights of journalists, it acts as a strong weapon to protect the right to freedom of expression.

The journalists need to express their opinion for the welfare motive as part of duty.<sup>79</sup> To maintain this duty, they often need to leak data of various entities.<sup>80</sup> If the state laws restrict these activities as a whole by data protection laws, how does this come to protect the duty to exercise journalism? Is it not conflicting with the rights and aims of journalists? To provide a proper protection to the rights of journalists and to safeguard their duty, international law felt the necessity to exempt journalists from data protection laws as mentioned above. However, some limitations have been imposed by law for the protection.

### **III. BANGLADESH FRAMEWORK OF JOURNALISM AND DATA PROTECTION**

The duty of journalists is to uncover a fact and disseminate it to the public.<sup>81</sup> In Bangladesh, the Constitution ensures the rights to freedom of expression and the rights of people to know the facts.<sup>82</sup> On the other hand, data protection is a serious concern and laws are enacted with higher protection. A conflict is visible here when it comes to the question of protection regarding journalistic sources. Journalists often keep confidential documents on their digital devices which can easily lead to violation of data protection laws of the state.<sup>83</sup> The protection of data is necessary, but is it not equally important to protect the rights of journalists, especially for the issue of human rights? However, there is no legal provision that strongly can protect these concerning issues, rather there are laws to use against independent journalism when it comes to the matter of revelation of any data of the state, government, or other entity.<sup>84</sup> It is high time to be concerned about the provisions of our statutory laws which are misused against journalists and constitutional rights.<sup>85</sup> In this context, the author discusses the laws and theories of data

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Supra note 3.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> The constitution of Bangladesh, Art. 39.

<sup>83</sup> Supra note 3.

<sup>84</sup> Ibid.

<sup>85</sup> Supra note 10.

protection and analyzes the application of laws against journalists in Bangladesh. To discuss the national framework, the author looked into both the conceptual and legal aspects of Bangladesh in the matter of journalism and data protection.

**(A) Conceptual Aspects:**

- a. *Journalism:* Journalism is a process of making reports about incidents happening here and there and conveying the facts to the people.<sup>86</sup> When the question is about independent journalism, investigation is necessary to uncover a fact.<sup>87</sup> The position of independent journalism in Bangladesh should be a matter of concern in order to analyze its connection with the right to freedom of expression and data protection laws. The main aim of a journalist is to discover factual information for the people.<sup>88</sup> To reach the aim, journalism requires opening the closed door in order to come up with real facts, through an independent investigation process, in which the main task is to discover information with freedom and publish those on the basis of findings.<sup>89</sup> In this whole process, they need access to all possible legal help, but Bangladesh carries the opposite scenario.<sup>90</sup>
- b. *Data protection:* Data protection is a serious matter in this digital era, as we can not imagine a moment without the internet. Internet based communication and work are common matters now, in which use of digital platforms is a must. As we are very used to digital life in Bangladesh now, protection of our data on digital devices is a necessary concern indeed in order to safeguard our data from any attacks and consequently our state enacted laws to protect our data.<sup>91</sup> Data protection stands for having safeguard from illegal actions committed using the digital platform which are crimes under the statutory laws to keep data secret and safe.<sup>92</sup>

**(B) Legal Aspects:**

- a. *The Constitution of Bangladesh:* Constitution is the supreme law of the state which is above all other laws. Freedom of speech and expression is specifically

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<sup>86</sup> Supra note 2.

<sup>87</sup> Supra note 3.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

mentioned here as the fundamental right of every citizen.<sup>93</sup> This right is enlightened under article 39.<sup>94</sup> This states that freedom of thought and conscience, freedom of speech and expression, and freedom of the press are guaranteed, that are subject to any legal limits which are reasonable and necessary for maintaining public order, morality, public decency, or public safety, or in the case of judicial contempt, defamation, or incitement to commit an offense.<sup>95</sup> Here comes the question of the limitation of freedom for article 39(2).<sup>96</sup> Journalists are human rights activists and their main duty is to dig for information from every secret entity which is connected to public welfare.<sup>97</sup> Doing so, they may fall down in the limitation of security of state policy, public orders or any other limitation imposed by the provision, as there are now other laws to restrict them that can impose serious curtailment of their right to freedom of speech.<sup>98</sup>

- b. *ICT Act*: ‘The ICT Act, 2006’ was passed by the government of Bangladesh to prevent cyber crimes.<sup>99</sup> After being amended in 2013 to strengthen the provisions, the Act got criticism.<sup>100</sup> Since the amendment, it was widely used to arrest and take initiative against persons who expressed their views online.<sup>101</sup> Human Rights Watch showed analysis that there were nearly 1,300 charges filed by Bangladeshi Police from 2013 to April 2018. Most of those initiated under section 57.<sup>102</sup> Controversial issues of the section arised as it stated that, if any person purposefully discloses, sends, receives or results in to circulate anything in digital format, that are incorrect and offensive, or whose impact has such as to contribute to the degradation of any individuals, or of the rule of law, prejudicial views the reputation of the State, that will be an offence.<sup>103</sup> It made provision regarding punishment of both imprisonment and fine.<sup>104</sup> Here the main thing was, the section provided the ways of crimes that appeared as most

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<sup>93</sup> The Constitution of Bangladesh, part-III.

<sup>94</sup> The Constitution of Bangladesh, Art. 39.

<sup>95</sup> Ibid.

<sup>96</sup> Supra note 30.

<sup>97</sup> Supra note 3.

<sup>98</sup> The Constitution of Bangladesh, Art. 39(2).

<sup>99</sup> Supra note 15.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> The ICT Act 2006, s 57.

<sup>104</sup> Ibid.

confusing.<sup>105</sup> From the language of the provision, a simple online posting could be considered as cybercrime, upon the beliefs of authority.<sup>106</sup> More specifically, the crime would not depend on the illegal nature, rather it might depend on the viewers.<sup>107</sup> This provision was synonymous with threat to the right of speech and expression.<sup>108</sup> Legal experts made the opinion that the vagueness of this section was fearful for the journalists.<sup>109</sup> After so much criticism, the government took initiative to repeal controversial sections of the Act.<sup>110</sup>

- c. *Digital Security Act*: The Digital Security Act 2018, which is now repealed by a new law that is passed to replace this existing law.<sup>111</sup> It was enacted based on the previous law named ICT Act. Mostly, by amending some sections of that Act, the government passed the DSA to protect the people from cybercrimes when they use digital platforms.<sup>112</sup> This law ensures to punish the offenders involved in such crimes.<sup>113</sup> Bangladesh Government thought to take initiative to pass this law to safeguard the national digital security. This initiative was taken in 2016, though it got the approval from parliament in 2018 after discussions at different stages.<sup>114</sup>

There were controversies regarding the ICT Act.<sup>115</sup> When the concerned party thought to enact a new law, they passed the DSA which was eventually approved as a new face with the previous risks.<sup>116</sup> The effect of the DSA on independent journalism is hilarious.<sup>117</sup> Some provisions of the Act were making threats to the journalists, while using it as a safeguard tool for data protection.<sup>118</sup>

The preamble of the Act states that it is enacted to ensure National Digital Security and to prevent crimes related to digital security.<sup>119</sup> In reality, the negative impacts of the provisions are much more evident, especially in the matter of journalism.<sup>120</sup> Section 25 of the Act states

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<sup>105</sup> Supra note 15.

<sup>106</sup> Ibid, 5.2.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid, 5.3.

<sup>110</sup> Ibid.

<sup>111</sup> Supra note 25.

<sup>112</sup> Supra note 3.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Supra note 15.

<sup>116</sup> Supra note 16.

<sup>117</sup> Supra note 23.

<sup>118</sup> Ibid.

<sup>119</sup> The Digital Security Act 2018.

<sup>120</sup> Ibid.

that, if a person takes part in actions of intentionally sending offensive information, publishing or supporting in the publication, or spreading of any data with the intention to insult the nation, or doing these despite knowing to be false, they will have punishment of imprisonment and fine or both.<sup>121</sup> 'Knowing it to be false' was enough for national security, the other words are creating a bar to independent journalism.

Section 32 of the Act says that if any person violates the Official Secrets Act, by using any kind of digital medium, will be punished with a term of imprisonment not more than 14 years, a fine not to exceed Twenty Five Lac taka, or with both of the punishments.<sup>122</sup> Again, a person who repeatedly or for the second time commits the offence will face a sentence for life imprisonment, a fine of up to one crore taka, or both.<sup>123</sup> This provision has clearly made fear of the way of collecting information for reporting. Journalists need to seek help from digital platforms to manage information secretly. But this law was making ways of collecting information using digital platforms as 'Breaching Secret' and imposing punishment.<sup>124</sup> Overall, the DSA has made the way harder for journalists who want to practice journalism accurately.<sup>125</sup> Another section says, if a person accesses critical information illegally or intends to do so, or considers the infrastructure ineffective through an illegal entry, that person is deemed to be guilty of the mentioned offence.<sup>126</sup> Then it further states that, whoever violates these terms, will be punished either with a term of imprisonment that does not exceed seven years or a monetary penalty not to exceed twenty-five million taka, or both. Moreover, if the perpetrator breaches any of the terms of clause (b), they are subject to a sentence of a maximum of fourteen years in jail or a fine of up to 1 crore taka, or both.<sup>127</sup>

In the whole Act, there is no specific definition of *critical information* which creates ambiguity.<sup>128</sup> This ambiguity is the tool for the powerful people to be more empowered with which they can easily initiate cases against persons who reveal information on their criminal activities, wrongfully defining the term.<sup>129</sup> It actually was acting as a discouragement to journalists from doing their duties. Photojournalist Shafiqul Islam is one of the victims of this Act.<sup>130</sup> He was found near the Benapole border, 53 days after got missing from Dhaka. Later

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<sup>121</sup> The Digital Security Act 2018, s 25.

<sup>122</sup> The Digital Security Act 2018, s 32

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Supra note 23.

<sup>126</sup> The Digital Security Act 2018, s 17.

<sup>127</sup> Ibid.

<sup>128</sup> Supra note 3

<sup>129</sup> Ibid.

<sup>130</sup> Supra note 10.



the police arrested him and put him in three cases under the DSA which led him to 10 months in jail.<sup>131</sup> The persons who filed those three cases against him were the Awami League member, two leaders of Mahila League and an associate body of the AL.<sup>132</sup> In May 2023, the IPI sent a letter to the prime minister to look into the DSA and make assurance about independent journalism.<sup>133</sup> The letter urged to make reviews on the provisions, so that journalists can work without any fear of harassment.<sup>134</sup>

- d. *Data Protection Act (Draft)*: The Data Protection Act is proposed for specific data protection legislations. In this Act, section 33 exempts journalists from the provisions directly.<sup>135</sup> According to the section, data processed for the purposes of investigation and journalistic sources shall be exempted from Act.<sup>136</sup> However, section 34(2) states that, government can put any condition to such exemptions.<sup>137</sup> Here, a vagueness is visible that to which extent the limitation of exemption will be settled down is not clear by this law.
- e. *Official Secrets Act*: Section 3A (1) of the OSA 1923 states, no one shall take pictures of any part or object in any forbidden place, or of any other area which the government has marked, where such a restriction seems to be convenient with its interests of Bangladesh's safety, unless they have obtained a written permission letter from the government.<sup>138</sup>

As the law has specified *no person*, clearly indicating that nobody is above the law if their actions come up as violating provision of the Act.<sup>139</sup> There are cases where this provision is used against journalists.<sup>140</sup> The most talked about case regarding this matter is against journalist Rozina Islam.<sup>141</sup> She took photos of negotiations to buy Covid-19 vaccines where the negotiators were the government itself.<sup>142</sup> The Health Services Division along with Shahbagh police station made a complaint against her and eventually an FIR was filed under the OSA and

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<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Supra note 24.

<sup>134</sup> Ibid.

<sup>135</sup> Draft Data Protection Act 2022, s 33.

<sup>136</sup> Ibid

<sup>137</sup> Draft Data Protection Act 2022, s 34(2).

<sup>138</sup> Official Secrets Act 1923, s 3A(1).

<sup>139</sup> Ibid.

<sup>140</sup> Supra note 30.

<sup>141</sup> Ibid.

<sup>142</sup>The Financial Express, *Police Arrests Prothom Alo Reporter for breaching Official Secrets law*, TFE online desk, 18May,2021. Online:<<https://thefinancialexpress.com.bd/national/police-arrest-prothom-alo-reporter-for-breaching-official-secrets-law-1621307446>> [last accessed 14th July 2023].

Sections 379 and 411 of The Penal Code, prior to the record of the main case.<sup>143</sup> The secretariat had detained her there over 5 hours before handing over to the police.<sup>144</sup> Such harassment for performing investigative journalism shouldn't be tolerated in the name of law, when the investigation and transmission are only for the necessity of public interest.

f. *The Cyber Security Act*: After so many controversies arose for DSA in the International level, the discussion to pass a new law named 'The CyberSecurity Act' to repeal the DSA came into action.<sup>145</sup> This new law has replaced the DSA with changes to some sections.<sup>146</sup> The journalists were at risk under DSA, some provisions were urged to be amended and finally now some sections have been amended in the new Act. Before passing the new Act, the Law minister said that punishment of section 25 and 32 will be reduced in the new Act.<sup>147</sup> It appeared from the proposal that the new Act is on the way to come only with changes of sentencing.<sup>148</sup> As there are no changes in the language, Amnesty International has given a letter to the ICT ministry to address the issues of the proposed CSA.<sup>149</sup> The letter stated that although the right to freedom of expression is subject to the lawful barriers, the limits proposed by the draft CSA are not allowed by international laws.<sup>150</sup> Moreover, the new Act adopted the provision of DSA which empowers the police to arrest any person without a warrant.<sup>151</sup> While supporting the decision to replace the DSA, IPI's head of advocacy stated that the government must guarantee that the CSA follows the national and international obligations about right to press and does not regenerate the clauses of the DSA.<sup>152</sup> After the announcement about the repeal of DSA and the publishing of this new law named CSA, a roundtable titled "From Digital to Cyber-what's the difference" happened with enormous concerned people of different backgrounds about human rights issues.<sup>153</sup> In that conference, Professor Dr. Golam Rahman, who is the former chief information commissioner and

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Supra note 25.

<sup>146</sup> Ibid.

<sup>147</sup> Supra note 26.

<sup>148</sup> Supra note 27.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> The CyberSecurity Act 2023, s 42.

<sup>152</sup> Supra note 36.

<sup>153</sup> The Business Standard Report, 'Journalists, rights activists sceptical about 'proper use' of CSA, TBS online, 12 Aug, 2023. Online: <<https://www.tbsnews.net/bangladesh/journalists-rights-activists-sceptical-about-proper-use-csa-681410>> [last accessed 20th Aug 2023].

editor of the 'Daily Ajker Patrika' expressed his concerns about the new law.<sup>154</sup> He addressed that, the new law is about to go under another scrutiny, just like the previous ICT Act and DSA got public disapproval for their misuses.<sup>155</sup> CSA is still creating the fear about continuation of independent journalism, as there is no concern about the changing of the language that is visible to work for the protection of journalists.

Although the Constitution has ensured the right to freedom of speech, it does not work in reality.<sup>156</sup> The right to freedom of press, thought, conscience, and expression are specifically mentioned to ensure freedom of speech.<sup>157</sup> However, this freedom is "subject to any reasonable restrictions imposed by law"<sup>158</sup>, which makes the situation complicated for journalists if they express their speech to the society as per rule of their profession.<sup>159</sup> Is the supreme law capable of ensuring proper safety of the journalists? Is it not making things tough for them by putting further words as 'any reasonable restriction imposed by law'?<sup>160</sup> Here the importance of 'journalistic exemption' from data protection laws in Bangladesh comes into existence.

In Bangladesh, starting from ICT Act, implementation of 'Digital Security Act(DSA)' to enactment of Cyber Security Act(CSA), whole history is the evidence in destroying independent journalism. The discussion about passing the new law called 'The CyberSecurity Act' to repeal the immediate previous 'Digital Security Act' commenced, after the provisions generated quite a bit of attention on an international level. With particular changes, the DSA has been superseded through this new bill. Under the DSA, journalists were in threat; consequently, certain provisions required to be altered, but they still exist in the latest version of the law. The notion of the discussion on the new law stated that it would merely bring about modifications to sentences that are eventually visible in the CSA.

#### **IV. ANALYSIS OF THE INTERNATIONAL AND NATIONAL FRAMEWORK OF JOURNALISM AND DATA PROTECTION IN A COMPARATIVE MANNER**

Application of international and national framework shows that the journalistic exemption from data protection laws in Bangladesh is an important matter. As shown in the previous

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Supra note 23.

<sup>157</sup> Constitution of Bangladesh, Art. 39(1).

<sup>158</sup> Constitution of Bangladesh, Art. 39(2).

<sup>159</sup> Supra note 23.

<sup>160</sup> Ibid.

discussions, journalistic exemption is completely related to the practical use of freedom of speech, expression and information.<sup>161</sup>

- a. *Overview regarding the journalistic exemption:* In the international and national context, it is shown that journalistic exemption from data protection laws is valid in order to maintain the fundamental rights to speech and expression.<sup>162</sup> GDPR, ICCPR, UDHR, HRA, ECHR, etc. have provisions to indicate the necessity of journalistic exemption. The main thing of international protection to the journalist is, it has given a shield by the laws that journalists must be exempted from the provisions of data protection.<sup>163</sup> Even in Bangladesh, the constitution itself has given the right to freedom of expression to any citizen of the country.<sup>164</sup> Moreover, it is a requirement of journalism that it must disseminate truth to the people, which is another fundamental right of the people to receive information.<sup>165</sup> If the state restricts journalists to express the truth to people, does not this restriction violate their right to freedom of expression and people's right to receive information? In Spite of having such questions, Bangladesh has not recognized the 'journalistic exemption' of the data protection laws, which is a bar to the profession.<sup>166</sup> However, the Draft DPA is trying to introduce this fact, but it does not make the 'journalistic exemption' stronger in Bangladesh for other laws.<sup>167</sup>
- b. *Application of laws:* In international laws, the GDPR is applied to the exemption of journalists from the rules when the journalists process data for the purpose of public interest.<sup>168</sup> But when their purposes are for their own interest, the GDPR will be imposed on them for breaching law.<sup>169</sup> The ICCPR has provision to exempt journalists, as it mentioned everyone has the right to express his opinion through any media.<sup>170</sup> It limits this freedom in further provision, and the HRC made it clear by stating that when the matter is to uphold the right to expression, no restriction will be applicable.<sup>171</sup> The UDHR has provisions that create a clear view of the importance of the right to

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<sup>161</sup> Supra note 3.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> The Constitution of Bangladesh, Art. 39(1).

<sup>165</sup> Supra note 2.

<sup>166</sup> Ibid.

<sup>167</sup> The Data Protection Act(Draft) 2022, s 33.

<sup>168</sup> Biriukova Natalija, "The GDPR's Journalistic Exemption and its Side Effects: GDPR anniversary – what does it mean for the media?"(2023),available at<<https://verfassungsblog.de/the-gdprs-journalistic-exemption-and-its-side-effects/>> [last accessed 28 July 2023].

<sup>169</sup> Ibid.

<sup>170</sup> Supra note 65

<sup>171</sup> Ibid.

expression and get information.<sup>172</sup> The ECHR and HRA have the same view regarding freedom of expression.<sup>173</sup> In Bangladesh, no such laws other than DPA,2022 (Draft) has recognized journalistic exemption from laws of data protection. Moreover, the constitutional right of freedom of expression is violated in many cases by the other statutory Acts, as the constitution itself has imposed limitations on further provision.<sup>174</sup> There are many cases in which journalists are being harassed by the misuse of restrictions provided in the DSA and OSA.<sup>175</sup>

- c. *Which one is better for the rights of journalists and data protection to balance equally?:* When the matter is of public interest, independent journalism should be considered as a necessary tool.<sup>176</sup> Independent journalism requires exemption from the laws which creates a bar to their duty.<sup>177</sup> The international law recognizes the 'journalistic exemption' to ensure the right to freedom of expression and to get information.<sup>178</sup> But as the whole exemption will create a difficulty to protect personal privacy, this imposes some limitations on such exemption.<sup>179</sup> Consequently, this limitation creates a balance between journalism and data protection. In Bangladesh, no such exemption is recognized in DSA, neither is it in CSA, nor was it recognized at ICT Act and the OSA. But the proposed DPA(Draft) has a provision of exemption for journalists with limitations.<sup>180</sup> When the data protection laws will not be used as a whole against the journalists, they can perform their duties with dignity. Moreover, they will have a sense of authenticity while performing duties.

## V. DISCUSSION ON THE LAWS AND FACTS IN BANGLADESH'S PERSPECTIVE

- a. *What is the standpoint of the legal framework for the privacy of journalistic sources in Bangladesh?*

Analyzing the laws of data protection in the previous discussion, it is shown that only the draft DPA has provision to exempt journalists from the rules mentioned in the Act.<sup>181</sup> But other laws have no provision which talks about exemption. The DSA and OSA were directly used against

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<sup>172</sup> Universal Declaration on Human Rights, Art. 19.

<sup>173</sup> Ibid.

<sup>174</sup> The Constitution of Bangladesh, Art. 39(2).

<sup>175</sup> 'United Nations Human Rights Office of the High Commissioner', "UN experts urge Bangladesh to end judicial harassment of journalists" (2023) available at <<https://www.ohchr.org/en/press-releases/2023/02/un-experts-urge-bangladesh-end-judicial-harassment-journalists>> (last visited on 10th July 2023.)

<sup>176</sup> Supra note 165.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> The Data Protection Act(Draft) 2022, s 33.

<sup>181</sup> Ibid.

journalists when they performed independent journalism.<sup>182</sup> Some provisions of the DSA were contradictory to the constitution.<sup>183</sup> Most of those are only amended in the matter of sentencing in the CSA, not as a linguistic change, which clearly remain as tools for constitutional rights and international human rights violation. The constitution guarantees the freedom of speech for every citizen, whereas DSA created a bar to such expression by imposing punishment in sections.<sup>184</sup> So, it is visible that the unchanged provisions of the DSA remain in CSA mostly to create conflicts with the spirit of the constitution when the provision would be used again against fundamental rights.<sup>185</sup> Moreover, it is squeezing the ways of the right to freedom of press.<sup>186</sup> This is none other than the previous misuse of the ICT Act.<sup>187</sup> But when a journalist named Prabir Sikdar was arrested under the ICT Act, that invoked importance to amend the laws.<sup>188</sup> However, the particular section of ICT Act was replaced in the provisions of the new DSA.<sup>189</sup> This controversial law jeopardizes the rights of the media workers.<sup>190</sup> With DSA section 32 in action, it was dangerous for journalists to carry digital devices while visiting any office of government or statutory body.<sup>191</sup> Even now, the law is finally repealed by CSA that has no provision to protect journalists from such harassment too. In the newly passed Act, Sections 25 and 32 of the DSA, which are fearful for independent journalism, are amended.<sup>192</sup> However, the content does not appear to be altered, rather this proposal is intended to reduce the penalties.<sup>193</sup> This will ultimately not exempt journalists from the penalties overall, even if they practice independent journalism for public welfare. If the newly passed CSA solely seeks to decrease penalties or make bail available under the currently non-bailable clauses, it will only function as another DSA for journalists.

Similarly, the duties of collecting information to prove the allegations about national corruption are considered as an offence under the OSA.<sup>194</sup> This Act has a provision that imposes restriction on every individual to collect information without written permission of the government.<sup>195</sup> The provision states as *no person*, where the journalists are trapped.<sup>196</sup> When journalists are

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<sup>182</sup> Supra note 172.

<sup>183</sup> Supra note 3.

<sup>184</sup> Ibid.

<sup>185</sup> Supra note 153.

<sup>186</sup> Ibid.

<sup>187</sup> Supra note 3

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Supra note 26.

<sup>193</sup> Ibid.

<sup>194</sup> Supra note 3

<sup>195</sup> The Official Secrets Act 1923, s 3A (1).

<sup>196</sup> Ibid.

occasionally bound to keep secrets while collecting information that can reveal the news which the public should know, the DSA and OSA create barriers and the same may happen by the CSA. However, the proposed DPA (draft) has recognized the journalistic exemption by mentioning that journalists shall be exempted from the rules of this Act, but not all laws.<sup>197</sup> The vagueness arises for further provision stating the government may put any limitation to such exemptions.<sup>198</sup>

b. *Whether it would be appropriate to exclude journalists from Bangladesh's data protection laws or not:*

As the duties of Journalists require independent practice, and the public has the right to information, for which the 'UN general' recognized journalistic exemption in international law, it is clear that journalistic exemption is a valuable matter in the present situation of Bangladesh. It is important to point out that the constitution of Bangladesh guarantees the right to freedom of press and expression with restriction.<sup>199</sup> This guarantee is not absolute for the further restriction indicating law imposed by states will bar everyone as well as journalists from expressing their views to the people.<sup>200</sup> Moreover, the state has made laws that are misused in the matter of journalistic sources.<sup>201</sup> For the ambiguity of the provisions, using laws against journalists wrongfully if they collect or disseminate information to the public, should be exempted from the data protection related laws in Bangladesh to protect their duties, rights and people's right to receive information.

Although the main aim of the laws related to the data protection in Bangladesh may be to control the crimes of digital platforms, the fear of journalists for the using of the laws against them has logical grounds.<sup>202</sup> Journalists may be afraid of taking protection under the laws for negative impacts.<sup>203</sup> The laws of data protection may be regarded as great initiatives by the government in the matter of providing shields to the ICT sector.<sup>204</sup> Some discussion may arise that these laws have ensured to prevent crimes and try offences involving digital devices in order to maintain national security.<sup>205</sup> It also should be a matter of discussion about the position of journalists. Without exemption, the laws will be used against them in any situation regardless

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<sup>197</sup> The Data Protection Act(Draft) 2022, s 33.

<sup>198</sup> The Data Protection Act(Draft) 2022, s 34(2).

<sup>199</sup> The constitution of Bangladesh, Art. 39(2).

<sup>200</sup> Ibid.

<sup>201</sup> Supra note 10.

<sup>202</sup> Supra note 3

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

of wrong or right, as already happening.<sup>206</sup> Journalistic exemption is not only important to protect independent journalism to express the views of journalists, but also important to know the opinion of the general public for the sake of their interest. When news related to common interest is transmitted before the public, they can express their views or opinion regarding the matter.<sup>207</sup>

## VI. CONCLUSION

To uphold the constitutional right to freedom of speech, press, and expression, it is necessary to amend the laws that hamper journalists to play the vital role of human rights activists through collection and revelation of any information for public interest. 'Journalistic Exemption' from the data protection laws may be a solution to the unwanted situations that are raised by the misuse of laws against journalists. Analysis shows that many cases were filed under the DSA in the past years and many of them were against journalists.<sup>208</sup> The law ministry had no intention to change the language of the Act in the newly passed CSA, which actually has brought a new version of DSA.<sup>209</sup> It could be a concern in 2021, when Mushtaq Ahmed died in jail, after being detained and tortured.<sup>210</sup> He was arrested for a social media post against the government.<sup>211</sup> In the same year, charges were framed against journalist Shafiqul Islam Kajol for spreading *objectionable* news about the ruling party.<sup>212</sup> The case of Rozina Islam was also very disrespectful for the profession.<sup>213</sup> These types of incidents are happening in the country by the name of law, which should not happen at all. Professional ethics should be maintainable by all and laws should be a protection, not a bar. This is what brings the necessity of 'journalistic exemption' from the data protection laws in Bangladesh for the right to profession, freedom of speech and public interest. The aim of this paper was to have an understanding about the necessity of journalistic exemption from Bangladesh's data protection laws. After conducting the research, the author has found the following findings:

1. The DSA declares the entrance into critical information as an offence under section 17, but does not provide definition of critical information. It has put punishments in the section for such entrance, without giving definition. Section 25 makes "spreading information with an intention to affect the image or reputation of the country or to spread

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<sup>206</sup> Supra note 23.

<sup>207</sup> Mahmudul Islam, Constitutional law of Bangladesh, 330, (2nd Edition, Mullick Brothers, Dhaka,2003).

<sup>208</sup> Supra note 28.

<sup>209</sup> Ibid.

<sup>210</sup> Supra note 23.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Supra note 30.



confusion" illegal, which has no logical connection with state security as 'intention' can't be proved. Any standards are incapable of restricting expression that damages the nation's image, for instance, it is the public's right to know any information regarding corruption that may create damage to the reputation of the nation. This provision's vague wordings may have a negative impact on democracy. Section 32 puts punishment for offences of the OSA through digital devices. Journalists are at high risk to maintain their secret investigation and keep information in their digital devices, where their main duty is to investigate for information, keep those safe and reveal before the public for welfare. Section 25 and 32 were on the way to be repealed in the newly proposed Cyber Security Act.<sup>214</sup> The proposal intended to reduce punishments of the provisions, which would eventually not exclude journalists from the punishments as a whole, even if they practice independent journalism for the public interest, as the language was not changing. However, the concerned party didn't look into these matters, and eventually section 25 and 32 have no linguistic changes in the new Act now, it only focused on reducing sentences. Section 17 remains with no change in the CSA.<sup>215</sup>

2. Law minister had confirmed that the DSA would not be abolished, it would be changed.<sup>216</sup> The passed CSA creates confusion about the future as this may act as another hindrance on journalism. When the matter is to protect independent journalism, it is necessary to make provision which excludes them from punishment or harassment, which is not visible in the aim of the CSA. Without taking initiatives for protection of journalism, the new Act has been opened with the same provision to arrest any person without warrant that makes the situation more tough if a journalist wants to perform his duties properly.
3. The Vienna based media watchdog stated that a minimum nine journalists have fallen under complaints by the DSA in a few months.<sup>217</sup> This is a human right violation under the UDHR.
4. The OSA declares that "no person" can take information of any prohibited area of government without permission.<sup>218</sup> Journalists often need to go for secret investigation as a part of their strategy, when maybe the matter is of any means of corruption that the public should know. Here comes the complication of the provision.

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<sup>214</sup> Supra note 26.

<sup>215</sup> Supra note 25.

<sup>216</sup> Supra note 26.

<sup>217</sup> Supra note 33.

<sup>218</sup> The official secrets Act 1923, s 3A(1)

5. Section 34(2) of the draft DPA makes it unclear by stating that the government may put limitations on the exemption given by section 33. There is no further provision in this Act which clears that to what extent this limitation will apply. For the words of this provision, the journalists are at risk, if there arise any cases under this Act against them.
6. Self-criminalization is a violation of the constitution.<sup>219</sup> When journalists are unsafe with their sources, if any authority gets easy access to the devices through their power and misuse of law, it ends up into criminalization.
7. The Constitution not only gives the right to freedom of press, speech and expression, but also gives the authority to violate such rights by imposing limitations through other laws. Here, fundamental rights of journalists are not protected for further limitation.

Journalists have grounds to be afraid of conducting duties for the impacts of the laws. To ensure their rights, some laws need to be amended. Analyzing the laws of Bangladesh and international standards, here are few recommendations to ensure the rights of the journalists.

1. As the government had taken initiative to repeal DSA, they needed to introduce Journalistic Exemption in the CSA that is not happened. It is high time this matter should be under consideration, otherwise, more unwanted situations will arise on a continuous basis, as many cases have been filed in past years since the official introduction of DSA. Moreover, section 42 of the CSA should be changed for journalists, otherwise it will bring harassment for them for the 'arrest without warrant' power given to police.<sup>220</sup>
2. There are landmark cases in Bangladesh under the OSA against journalists. In the DSA, as it is mentioned in section 32 that the violation of OSA will lead to an offence, it is very easy to arrest journalists after any of their information is revealed to the public, or even when they collect those using digital devices. In this regard, specific provision about journalistic exemption from this Act is a must. Section 32 of the DSA should be amended in this matter also in the newly passed CSA.
3. Section 3A(1) of the OSA needs amendment, as it states that any person who wants to access data must need written permission from the government. As journalism requires secret investigation, it will not be possible to practice that, if this section is not amended.
4. A change is required in section 34(2) of the draft DPA, as this provision imposes limitations on the exemption and it is not clear to what extent journalists have freedom,

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<sup>219</sup> The Constitution of Bangladesh, Art 35(4).

<sup>220</sup> The CyberSecurity Act 2023, s 42.

hence it should be amended at this point to clear the ambiguity.

5. The laws should give clarification about the protection of journalistic sources. Otherwise, the forced access into their devices may lead to criminalization that is a violation of the constitution.<sup>221</sup> This clarification may minimize the criminalization.
6. The legislators need to make sure that the newly passed CyberSecurity Act is completely compliant alongside international human rights standards, otherwise it will be none other than the opening of a new chapter of previous DSA.
7. Restrictions should be introduced in the laws using a neutral nature to avoid prejudices under provisions guaranteeing free speech.<sup>222</sup> In other words, statements can only be limited, if they provoke violence, not on the grounds of public interest.

The right to privacy, right to freedom of expression and right to profession, all are necessary and shouldn't be violated one for another. In this process, the journalists also have the same obligation to play their role in good faith, not for their own interest. There is no doubt that journalism plays an essential role in determining how people view things. Furthermore, journalists tend to be seen as public investigators that play an integral part in democracy as a whole. They have the duty to disseminate information and enlighten the public on all issues of public concern, which the public has a right to know about. Thus, regardless of whether it might jeopardize the rights of those that are harmed by their publishing process, journalists have an obligation to adequately store incidents that could potentially be of public interest. For all of the necessity of public interest, it is now important to be concerned about journalistic rights in Bangladesh.

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<sup>221</sup> The Constitution of Bangladesh, Art 35(4).

<sup>222</sup> *Supra* note 15.

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