

RIGHT TO FREEDOM OF EXPRESSION

This chapter examines the positive and negative implications of the Right to Information Ordinance, and discusses the constraints imposed by the State of Emergency (SoE). It also examines a few defamation cases.

Freedom of expression is a cornerstone of democratic rights and freedom. In its very first session in 1946, before any human rights declarations or treaties had been adopted, the UN General Assembly adopted resolution 59(I) stating, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." Article 39 of the Constitution of Bangladesh has guaranteed "the right of every citizen to freedom of speech and expression; and freedom of press". Articles 36, 37 and 38 have also guaranteed the right.¹

Freedom of expression is essential for a working democracy and public participation in decision-making. Citizens cannot exercise their right to vote effectively or take part in public decision-making if they do not have free access to information and ideas and are not able to express their views freely. Violations of freedom of expression often go hand in hand with other violations, in particular the right to freedom of association and assembly.

Right to Information Ordinance

On 20 October 2008, the Government promulgated the Right to Information Ordinance 2008, following long-standing demands from the media and human rights organisations.

The Ordinance provides that any person seeking public information may apply in writing in prescribed forms or by e-mail to the designated officers by paying a reasonable fee as specified.² The officers concerned must provide the information requested within 20 working days, and inform the applicant within 10 days if they are unable to provide the information on demand in any case.³ It also provides for the establishment of an Information Commission but till date this has not been established. A few commentators, including journalists, have observed that the provisions may curtail the current more informal arrangements for information gathering by press. However most have welcomed the law, seeing it as a potential instrument for strengthening accountability of government institutions, subject to the need to establish an effective Information Commission and to frame and adopt proper Rules.⁴

More serious concerns relate to the law's wholesale exemption from its ambit of eight security and intelligence agencies, given the continuing complaints, particularly under the SoE, of their overstepping their legal jurisdiction and violation of human rights.⁵ The bar on access to information classified under at least 20 separate categories also appears to be inconsistent with the right to freedom of expression. Section 7 of the Ordinance says "Whatever be the provisions elsewhere in this Ordinance, no Authority shall be obliged to provide information in the following cases:

- a. such information, disclosure of which may pose to be a threat to the security, integrity and sovereignty of Bangladesh;
- b. such information relating to any foreign policy matter as may offend the existing relationship with any foreign country or international organisation or any regional bloc or organization;
- c. secret information received from a foreign government;

1 Article 36: Freedom of Movement, Article 37: Freedom of Assemble and Article 38: Freedom of Association.

2 Section 8, RTI Ordinance.

3 Section 9, RTI Ordinance.

4 "RTI Ordinance to curb freedom of press: speakers", *New Age*, 30 October 2008.

5 National Security Intelligence, Directorate General of Forces Intelligence, defence intelligence units, Criminal Investigation Department, Special Security Force, intelligence cell of the National Board of Revenue, Special Branch and intelligence cell of the Rapid Action Battalion: see Section 32 and Schedule, Right to Information Ordinance.

- d. publication of any information relating to inherent secrets of commercial or business nature, copyright or intellectual property publication of which may harm the intellectual property right of a third party.
- e. disclosure of any of the following information which may be gainful or damaging to any particular individual or organization, such as:-
 - i. any advance information about income tax, customs, VAT and law relating to narcotics, about budget or change in the tax rate;
 - ii. any advance information about changes related to exchange rate and interest rate;
 - iii. any advance information about the management and supervision of the financial institutions including banks;
- f. disclosure of any such information as may obstruct the enforcement of law or may incite any offence;
- g. information, the disclosure of which would endanger the security of public or impede the due judicial process of a pending case;
- h. information, the disclosure of which would offend the privacy of the personal life of an individual;
- i. information, the disclosure of which would endanger the life or physical safety of any person;
- j. information given in confidence to law enforcement organization by a person;
- k. any matter pending in any court of law and which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
- l. information which would impede the process of investigation;
- m. any information which would affect any criminal investigation process and arrest or prosecution of offenders;
- n. any such information which, according to law, is liable to be published only for a certain period of time;
- o. information obtained through technical or scientific experiment, which it is expedient to keep secret for strategic or commercial reasons;
- p. any information pertaining to a purchase process before it is complete or a decision has been taken about it;
- q. such information as may be prejudicial to the special rights of the National Parliament;
- r. any secret information of a person which is guarded by law;
- s. advance information relating to question papers of an examination or marks obtained;
- t. documents including summaries to be placed before the Cabinet, or as the case may be, Council of Advisers and information relating to discussions and decisions of such meetings.”

Government Restricts Court’s Powers of Contempt, Allows Criticism of Judgments

The Contempt of Court Ordinance 2008, approved by the Council of Advisers on 30 April 2008, was promulgated on 21 May. The Ordinance repealed the Contempt of Court Act 1926.

The new Ordinance sought to define acts of contempt of court with more specificity, and also to narrow the range of acts or statements that could be considered to fall within its ambit, as well as to provide specific exemptions to public servants. While it did away with the vague common law offence of ‘scandalising the Court’, it also sought to bring within the definition of contempt ‘defamation of a *judge*’ including in relation to matters under their judicial consideration which could be seen as an important step in the direction of curbing judicial impropriety.

Table VIII.1: Contempt of Court Ordinance

Contempt of Court	<ul style="list-style-type: none"> • ‘any wilful act, statement or expression by words or visible signs that may be considered as a violation of any judgment, decree, order, writ or warrant issued by a court, or undermine any court, or may obstruct the process of justice. • Defamation of a judge regarding any matter, which is
-------------------	---

	<p>under the judicial jurisdiction of the judge' (Section 2(ga))</p> <ul style="list-style-type: none"> • Publication of information on any proceedings of a court, which sits in camera on a matter related to public order or security of the state, and on any confidential act, invention or discovery, which is under trial, will constitute contempt. (Section 4)
Excludes	<ul style="list-style-type: none"> • Innocent and fair comment • Information on normal proceedings and functioning of court, good faith statements in 'restrained' language regarding the government or the court, including seeking disciplinary proceedings against any judge • Any information, comment or news item regarding the personal conduct of judges if not connected with the performance of their judicial functions; • Constructive criticism of an order or judgement • Any constructive criticism of a judgement in a case finally disposed of; • Any objective comment or information or news regarding any pending proceedings, • Any information, comment or news in the public interest, on corruption, irregularity, incompetence and ignorance of judges, in connection with their judicial functions or regarding any courts or judges, on any matters of public importance in the public interest (Section 3)
Exclusion for Public Servants	<ul style="list-style-type: none"> • No proceedings if unable to implement or comply with any judgement, order or direction because of any existing laws and rules or any other practical reasons, no contempt proceeding will be draw up (Section 3) • No personal appearance required for contempt regarding his/her official functions (but personal hearing may be allowed for ends of justice) • Government may pardon and to remit, commute or suspend any sentence given to a public servant on contempt charge relating to official functions.
Penalties	<ul style="list-style-type: none"> • No penalties if proof by contemner that no practical interference caused in the normal process of justice delivery.
Apologies	<ul style="list-style-type: none"> • Unqualified/ unconditional apologies possible at any stage of the trial, including appeal against conviction.

HC declares void new law on contempt

The High Court on 24 July 2008 declared the Contempt of Court Ordinance 2008 to be void as being unconstitutional, after issuing a *suo motu* rule on the Government in a writ petition filed by two lawyers.⁶

It did so on the basis of its holding the Ordinance to be the outcome of a policy decision by the Government and its interpretation that it was therefore beyond the authority of the President, whose powers during a Caretaker Government tenure were limited under Article 58D of the Constitution to promulgating ordinances which are directly related to elections or indispensable for running routine government work.⁷ The Court referred to the specific provisions in the Ordinance which gave the President the power to waive punishment for contempt of courts and exempt public servants from personal appearance during proceedings in such cases and

⁶ "Contempt of Court, HC declares new ordinance invalid; Says it undermines spirit of constitution, free judiciary", *The Daily Star*, 25 July 2008: "HC strikes down Contempt of Courts Ordinance", *New Age*, 25 July 2008. A Division Bench of the High Court Division comprising of Justice ABM Khairul Haque and Justice M Abu Tariq delivered the judgment after hearing a writ petition filed by Supreme Court lawyers M Shamsul Haque and Tajul Islam and after a rule had been issued *suo moto* by the Court asking the government to explain the constitutionality of the ordinance.

⁷ Article 58D of the Constitution provides: '...except in the case of necessity for the discharge of such [routine] functions it [Caretaker Government] shall not make any policy decision.' However, the President's powers to promulgate ordinances are in a separate provision of the Constitution.

from liability for trial after their retirement, and noted that by giving special benefits to public servants these had violated the right to equal protection of law. In a more disturbing vein, the Court's further observations striking down the provisions allowing criticism of judgments appeared to negate continuing demands for accountability of the judiciary, and to inhibit freedom of expression and academic debate with regard to judgments and judicial reasoning.

The Government sought provisional leave to appeal against this judgment shortly after it was handed down, but the Appellate Division's Chamber Judge, directed that a regular leave petition be filed before the Court once the written text of the judgment became available, and refused to stay the judgment in the meantime.⁸

Case against cartoonist Arifur Rahman dismissed

Free lance cartoonist Arifur Rahman, arrested on 18 September 2007 after Islamist groups protested a cartoon published in a weekly supplement of the daily *Prothom Alo* on 17 September 2007, was finally released from jail on 20 March 2008 after six months.⁹

Earlier that day, the Dhaka Judicial Magistrate, Mosammat Ismat Ara, dismissed the case as the complainant, the Tejgaon police officer-in-charge, successively failed to appear in the court for the trial of the case. The complainant had alleged that the cartoon about a young boy and his cat had hurt religious sentiments of a section of the community, namely 'believing Muslims' and thereby caused an offence under Section 295A of the Penal Code.¹⁰ After repeated rejections of bail petitions including by the High Court, Rahman finally secured bail from the High Court days before he was acquitted. Earlier, in February 2008, the High Court had held that the detention order passed against him under the Special Powers Act was without lawful authority.

Defamation case against *Shamokal* dismissed

A Pirojpur court, on 15 September 2008, dismissed a defamation case filed against the daily *Shamokal* by former Jamat I Islami Member of Parliament Delwar Hossain Sayeedi. The case related to a 10 February 2007 news report titled "Jamater Godfatherra Dhorachhoar Bairey [The Jamat's Godfathers are Untouchable]". The Court passed this order after Sayeedi had failed to appear in court even once after initially filing the case on 11 February 2007, clearly exposing that he had only done so to harass the journalists concerned, a common pattern in defamation cases nation-wide.

Jamat's defamation case against ATN

The Four-Party candidate Moulana Habibur Rahman (also Ameer of Sylhet district (south) unit of Jamat) in the Sylhet-6 Constituency on 24 December filed a defamation case against ATN Bangla for telecasting a news report about war criminals contesting the parliamentary election. He filed the case with the Chief Judicial Magistrate of Sylhet. Moulana Habib after the channel telecast a news report on 16 December stating 13 political leaders, including the Jamat Ameer Moulana Matiur Rahman Nizami, Secretary General Ali Ahsan Mohammad Mojahid, Assistant Secretary General Md Quamaruzzaman and Moulana Delawar Hossain Saidee, Moulana Abdus Sobhan, ATM Azharul Islam, Shah Mohammad Ruhul Quddus, Moulana Abdul Aziz, M Riasat Ali, Moulana Habibur Rahman(1), Moulana Farid Uddin Chowdhury and Moulana Habibur Rahman

8 "Contempt of Court Ordinance: Govt asked to file regular appeal against HC verdict", *New Age*; "SC upholds contempt verdict", *The Daily Star*, 29 July 2008. The Chamber Judge of the Appellate Division, Justice MA Matin, on 28 July 2008 asked the Government to file a regular leave petition before the Court and did not grant a stay of the High Court judgment, which remains in force.

9 "Cartoonist released in Bangladesh", BBC News online, *news.bbc.co.uk*, 20 March 2008, downloaded on 3 November 2008.

10 "Cartoonist Arifur Rahman discharged", *The Daily Star*, 21 March 2008; "Case against *Alpin* cartoonist Arif dismissed", *New Age*, 21 March 2008.

(2) are war criminals contesting the 2008 parliamentary polls. The magistrate ordered the officer-in-charge of Sylhet Kotwali police station to investigate the matter and take action on it.¹¹

Legal Notice against *Amar Desh*¹²

The editor, publisher and a reporter of *Amar Desh* were served with two legal notices for not begging unconditional public apology and publishing the full rejoinder to a false, malicious and defamatory report about *The Daily Star*, *Prothom Alo* and Transcom Group. The notice issued by Dr Kamal Hossain and Associates asked *Amar Desh* Editor Ataus Samad, Publisher Hasmot Ali and the correspondent concerned to immediately withdraw the report published on 3 September 2008, beg unconditional public apology and publish the full rejoinder sent to them earlier. The second notice was served on 17 September on behalf of *Prothom Alo* Editor Matiur Rahman, *The Daily Star* Editor-Publisher Mahfuz Anam and Transcom Group Chairman and Managing Director Latifur Rahman.

The notice said, "Following the legal notice sent on behalf of our clients on 7 September, to which you are yet to reply, we have been instructed by our clients to write that you have published an editor's note on 12 September 2008, which makes reference to our legal notice and states that you have published a large part of our rejoinder, especially those that relate to your story, it was not the intention of *Amar Desh* to defame or harm anybody, your intention was to point out another example of trying to depict Bangladesh as an outpost of ULFA, since you have come to know that Matiur Rahman, Mahfuz Anam and Latifur Rahman have seriously reacted to your report, you are expressing your sincerest regret, and since you have been served with a legal notice, you would reply through your legal counsel to that legal notice."

Censorship

In the earlier part of the year, sections of the media reported receiving telephone directives from persons claiming to be intelligence agency officials, as to which news items they could carry and which they should not; the private television channels categorically were told who they could invite to their talk shows, which programmes they could air live and which programmes they could not. This pattern set after the promulgation of the SoE in 2007, had in turn induced chronic self-censorship.¹³ However, despite such constraints, critical comments of the Government and court decisions were regularly aired on the broadcast media and published in the press without any apparent repercussions.

On 3 November 2008, the Government repealed Rule 5 of the Emergency Powers Rules¹⁴ which had allowed for restrictions to be imposed on the broadcasting or publication of any news or information about meetings, rallies, processions, seige programmes, demonstrations, speeches, statements, and other 'provocative activities' and any news, editorials, post-editorials, articles, features, cartoons, talk shows and discussions tantamount to constituting 'provocation' against the Government.

Even on 3 November 2008, immediately after the revocation of the restriction on media, key persons in several newspapers received phone calls, claiming to be from a military intelligence agency, asking them to publish a statement on alleged irregularity in the Trust Bank on the first page of their papers on 4 November 2008.¹⁵

Harassment

11 "Jammat sues ATN for news against war criminals", *The Daily Star*, 25 December 2008.

12 "*Amar Desh* served with 2nd legal notice", *The Daily Star*, 19 September 2008.

13 "Press freedom a major victim of emergency rule", *New Age*, 3 May 2008.

14 *Bangladesh Gazette, Extraordinary Issue*, p 6499, published on 3 November 2008.

15 On file with the author.

As in 2007, and in contrast to earlier years, there were no reports of any journalist being killed during 2008. However, there were reports of journalists facing threats and harassment from private parties. At least 14 journalists faced such threats or harassment from law enforcing agencies and 40 from gangsters [*shontrashi*]; ten faced death threats from different quarters, including one from the Islami Chhatra Shibir, the student wing of the Jamat i Islami. No investigations or action regarding such incidents have been reported to date.

As political parties became active again in mid-year, renewed reports of journalists facing assault by political activists raised concerns. At least three journalists faced assaults from members of the Bangladesh Chhatra League, one from the Jatiyatabadi Chhatra Dal, three from the Chhatra League and the Chhatra Dal. In one recent incident, five journalists were admitted to hospital in Nilphamari after having been beaten indiscriminately by Jatiya Party workers on 4 November 2008, when they went to cover a meeting of the party that was addressed by its leader, the former military dictator, Lt. General HM Ershad.¹⁶

Table VIII.2: Violence against Journalists (Jan-October 2008)¹⁷

Description	No. of Harass
Torture/Harassment/Threat by Law Enforcement Agencies	14
Murder threat	9
Torture/Attack/Threat/Harassment by gangsters (<i>shontrashi</i>)	40
Assault by Political Party Members (JCD and BCL)	3
Assault by BCL	3
Assault by JCD	1

Journalists also faced practical restrictions in reporting cases as they were reportedly barred from entering a room in the High Court., after publication of a factual report on the unprecedented number of bail orders issued by that Bench in a single day, including to ‘VIPs’ implicated in corruption cases. No journalist was allowed to enter the courtroom to cover these hearings. To date, no inquiry has been initiated into how a journalist could be prevented from entering an open courtroom either by the Bar Association or by the Supreme Court.

Control of Wall Writing and Poster Painting Ordinance 2008 (Draft)

The Election Commission on 10 February finalised a draft ordinance to penalise the writing of slogans and pasting of posters on walls in any election campaign.¹⁸ This proposed a penalty of Taka 10,000 for anyone committing such acts, and a sentence of three months’ imprisonment on failure to pay any imposed fine. Till 26 December the draft Ordinance had not been approved.

16 “*Nilphamarite Ershad-er kormi shobhai sangbadik-der upor shontrashi hamla*” (Journalists attacked at Ershad’s workers’ meeting in Nilphamari), *Jugantor*, 5 November 2008.

17 ASK Documentation Unit.

18 “Putting posters and writing on walls punishable crimes: law being formulated”, *Shamokal*, 11 February 2008.