



# THE POLITICS AND LAW OF DEMOCRATIC TRANSITION

CARETAKER GOVERNMENT IN BANGLADESH

SONIA ZAMAN KHAN



# THE POLITICS AND LAW OF DEMOCRATIC TRANSITION

Peaceful legal and political ‘changing of the guards’ is taken for granted in developed democracies, but is not evident everywhere. As a relatively new democracy, marred by long periods of military rule, Bangladesh has been encountering serious problems because of a prevailing culture of mistrust, weak governance institutions, constant election manipulation and a peculiar socio-political history, which between 1990 and 2011 led to a unique form of transitional remedy in the form of an unelected neutral ‘caretaker government’ (CTG) during electoral transitions.

This book provides a contextual analysis of the CTG mechanism including its inception, operation, manipulation by the government of the day and abrupt demise. It queries whether this constitutional provision, even if presently abolished after overseeing four acceptable general elections, actually remains a crucial tool for safeguarding free and fair elections in Bangladesh. Given the backdrop of the culture of mistrust, the author examines whether holding national elections without a CTG, or an umpire of some kind, can settle the issue of credibility of a given government.

The book portrays that even the management of elections is a matter of applying pluralist approaches. Considering the historical legacy and contemporary political trajectory of Bangladesh, the cause of deep-rooted mistrust is examined to better understand the rationale for the requirement, emergence and workings of the CTG structure.

The book unveils that it is not only the lack of nation-building measures and governments’ wish to remain in power at any cost which lies behind the problems that Bangladesh faces today. Part of the problem is also the flawed logic of nation-building on the foundation of Western democratic norms which may be unsuitable in a South Asian cultural environment. Although democratic transitions, on the crutch of the CTG, have been useful in moments of crisis, its abolition creates the need for a new or revised transitional modality – perhaps akin to the CTG ethos – to oversee electoral governance, which will have to be renegotiated by the polity based on the people’s will.

This book provides a valuable resource for researchers and academics working in the area of constitutional law, democratic transition, legal pluralism and election law.

**Sonia Zaman Khan**, a PhD from the University of London, SOAS, is a Solicitor of the Supreme Court of England and Wales and an Advocate of the Supreme Court of Bangladesh. She has been a legal and social development consultant in London and Dhaka for many years. Her research interest lies particularly in governance.

*‘The Politics and Law of Democratic Transition: Caretaker Government in Bangladesh offers a theoretically grounded, empirically rich, incisive discussion about a unique system of government in Bangladesh, and helps us to understand the challenges of governance and electoral systems in fragile democracies around the world. A must read for those interested in governance and democratization.’*

*Ali Riaz, Professor, Politics and Government,  
Illinois State University, USA*

*‘This incisive work lays bare the obstacles to “substantive” democracy gaining a foothold in Bangladesh. It is an essential read on the pitfalls of endemic friction between political hubris and popular will and opinion. The book’s prescription is for complacency to give way to foresight and innovation for a systemic leap forward.’*

*Justice Dr. Syed Refaat Ahmed, High Court Division,  
Supreme Court of Bangladesh*

*‘Sonia Zaman Khan brings into detailed focus a subject that has been pivotal in Bangladesh’s transition to democracy but has not been deliberated on to public satisfaction. This work happily fills that gap, for it explains the rationale behind the caretaker political system as a measure toward ensuring fair and free elections in Bangladesh. It enlightens readers.’*

*Syed Badrul Ahsan, Bangladeshi journalist and author of  
From Rebel to Founding Father: Sheikh Mujibur Rahman*

*‘This is an insightful study of the transitional mechanism of caretaker government. It provides relevant facts regarding the liberation movement and its history. Current political realities are presented in the context of which conditions for free and fair elections are to be devised.’*

*Dr. Kamal Hossain, Jurist, Politician and  
Chairman of the Bangladesh First Constitution  
Drafting Committee, 1972*

# THE POLITICS AND LAW OF DEMOCRATIC TRANSITION

Caretaker Government in Bangladesh

*Sonia Zaman Khan*

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Dedicated to my loving father  
Mr. Badiuzzaman Khan

The survival of our democracy and the unity and integrity of the nation depends upon the realisation that constitutional morality is no less essential than constitutional legality. Dharma (righteousness; sense of public duty or virtue) lives in the hearts of public men; when it dies there, no Constitution, no law, no amendment, can save it.

Nani Palkhivala, *Privy Purse Case*  
(*Madhav Rao Jivaji Rao Scindia v Union of India*)  
[(1971) 1 SCC 85]

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# FOREWORD

Democratic systems of governance with periodic elections are the dominant global norm in today's world. Yet even in leading Western jurisdictions, as recent outcomes in the United States, the British Brexit referendum and subsequent fresh elections indicate, manipulations of voting decisions and their consequences are not unknown. While such processes need to be constantly monitored, and no particular electoral system seems inherently perfect, politics remains everywhere a volatile, competitive balancing act, climaxing in periodic elections. Everywhere, often radically disparate aims and perspectives, with many agendas that may not be disclosed, vie for votes. While good election management would appear to involve constructive public engagement, akin to Habermasian conversations within the public sphere, these are manifestly far too romantic expectations. In many countries, not only in Asia and Africa, those in positions of power, or hoping to gain power, will be tempted to play games with people's ballots.

In normal democratic scenarios, voters periodically decide the fate of political parties and leader figures. Yet what if an electorate is manipulated or misguided so severely that a whole country and its political system is thrown into severe and prolonged turmoil? Few people may know that Bangladesh, one of the largest countries in the world in terms of population, has unfortunately suffered this kind of experience, facing what this important study calls 'an arrested democracy'. I am not suggesting here, nor does this book, that Bangladesh is the worst case imaginable of managing democratic elections freely, fairly and peacefully. However, deeply troublesome and serious deficiencies surround the ways in which Bangladesh has, since its blood-stained independence from Pakistan in 1971, dealt with its electoral processes. These troubles have motivated me, as a long-term student of Bangladeshi legal developments, and subsequently supervising the author of this study, as a more directly involved stakeholder, to engage in wide-ranging explorations of why and how the lofty visions of a bright future for a 'Golden Bangladesh' are constantly threatened by various manifestations of wanton violence. While such troubles can be related to the politics and law of democratic transitions, the core question remains of why this turbulence is so prolonged, so persistently brutal and so apparently unresolved. Worse still, dark

storm clouds are on the horizon, as the next national elections are due in 2019. Presently, the Bangladesh Nationalist Party (BNP), as the main opposition, does not have a single member in parliament, since they decided to boycott the elections of 2014. This explosive scenario indicates that grave issues of self-righteous reasoning and petty petulance over claims to power cannot be defined away, but where are the solutions? A dysfunctional two-party system is only part of the trouble, while the lack of reliable election management structures and the deep-running culture of mistrust are pertinent, too.

Apart from prolonged periods of military rule, even when democratic elections were held at regular intervals, Bangladesh experienced much more than democratic teething problems. Bangladeshis are acutely political people and their country, the former East Pakistan, was created in a euphoric moment with high expectations of freedom and development, reacting against suppression by the postcolonial Pakistani regime. The shock of discovering very soon that not all Bangladeshis were the same, or shared the same vision, forms one major reason for the continuing electoral struggles in Bangladesh. None of the four major elements of the country's founding vision, nationalism, democracy, socialism and secularism are completely endorsed by all key stakeholders. As this book clearly shows, even the sophisticated Caretaker Government arrangements of Bangladesh, which worked quite well for about two decades, were more recently ruthlessly abused and manipulated, and then suddenly abolished in 2011. Presently, the country seems thrown back into serious turmoil, a troubling fact that news blackouts, restraints on open debate and desperate efforts to control law and order can barely cover up.

This book tells a realistic story, with some important lessons on the need to manage diversity and difference more skilfully, especially if one wants this populous Muslim majority state to avoid the troubles experienced by Afghanistan and Pakistan. What goes on in Bangladesh today is not widely enough known, but urgently needs to be known better, for this experience contains important lessons about how plural societies, in which Muslims are a demographic majority, may manage differences in a sustainable form. Such lessons would apply to Turkey and Indonesia, too, for example. Key questions go much further than asking which Muslims are the 'right' Muslims, as there will always be 'others'. The tragedy of Bangladesh is partly that the deeply politicised conflicts between Muslim secularists and non-secularists play out in a global scenario of ongoing confusion over what Islam actually is, as a religion and a way of life, and what it means, in specific conditions of time and space, to be Islamic. While that is not a topic to which this book aims to make a major contribution, such issues form a major element of the ongoing struggle of Bangladesh to manage difference and diversity through democratic processes. I have theorised this in terms of the somewhat romantic *iccher ghuri*, the wish-kite of Bangladesh, whose four key visionary elements of nationalism, democracy, socialism and secularism match the four corners of the theoretical model of the global kite of law. The dynamic kite image, with (1) natural laws, (2) socio-legal normativities, (3) state-centric

laws and (4) international law and human rights principles, rather than depicting leakages in structures of good governance, simply illustrates that any attempt to cut out any of those four corners would lead to a crash scenario for the whole structure. Sadly, as political developments in Bangladesh abundantly confirm, good governance itself becomes a casualty if leader figures cannot even agree on the basics of governance, specifically in terms of whether being an elected ruler is a form of public service, an onerous duty or rather a passport to Austinian rights of domination and abuses of power, only thinly veiled by electoral endorsement.

Even today, the identity of Bangladesh as a separate nation remains challenged by those who push for some kind of imagined uniform Islamic structure and proclaim detestation of the multiple pluralities that underpin this nation. A uniformising vision, based on faulty understandings of law and Islamic jurisprudence, as well as all of history, society and politics, seems to clash over a deeply questionable vision of what it means to be Islamic in today's global, plural world. If Bangladesh, as a Muslim-dominated Asian country, wants to fly its own wish kite towards a golden future, how can some of its leaders behave as though this was an Islamic republic modelled on the very system from which it sought liberation in 1971? The country's vision of a golden future involves a certain kind of path, a form of *shari'a* – and I use that Islamic term deliberately here – that cannot avoid the challenging task of diversity management. All major stakeholders, including the political parties and their prominent leaders, actually know that Islam has a foundational pluralist principle of *ikhtilaf*, the tolerated diversity of human opinion. Islam's pluralist recognition of a diversity of approaches and opinions, also in relation to religion, should thus form the founding element of secularism in the *iccher ghuri* of Bangladesh for all stakeholders. It is clear to all that this means the acceptance of cultural and religious diversity within the context of an Islamic majority. In addition, as Bangladesh knows well, socialism does not feed people, and religion does not feed people either.

This spirited study, which involved much field research, too, is not focused on the impact of political Islam on the election troubles in Bangladesh. It shows, however, that the political struggles over the electoral arrangements in this country reflect a somewhat petty and deeply distrustful fundamental unwillingness to agree on anything, even on a common core of founding principles for this nation. As a result, the common people of Bangladesh are made to suffer and lose out, but the people remain also surprisingly confused, and thus carry a share of the blame for this arrested democracy. Since roughly half of the electorate seems somehow to favour either the BNP or the Awami League, all kinds of dramatic and devious interferences and interventions can easily swing electoral balances in a dangerously simple first-past-the-post system.

The richly documented analysis of this book generates some hope, though, that the people of Bangladesh themselves will learn to realise over time, and with more clarity, that the ballot box can give a sustainable answer for the better management of the country's internal diversity. Even if, as one currently observes, the minority populations are drastically decreased because of violence against

non-Muslims and anyone who is perceived as ‘other’, the problem will never go away. A more mature democracy, freed from the dark powers that currently arrest it, and based on more respect for diversity among the citizens and voters of Bangladesh, is manifestly the only sustainable way forward. Maybe economic progress, which is clearly strongly in evidence in Bangladesh, will carry its own lessons about what kind of governance is better for the country as a whole. For achieving that realisation, the people of Bangladesh may not need a new caretaker arrangement, as the Election Commission is in place and there is no sensible reason why it should not perform its assigned duty, if allowed to work autonomously by the executive. But the people, as well as their rather too self-centred leaders, also need to cultivate a spirit of humanity that respects the deeper implications of democracy and of existing internal pluralities of the politics and law of democratic transition in Bangladesh. Fiddling with some institutions here and there, in light of the still present memory of the Caretaker Government scheme, may be only some drop of medicine that tackles certain peripheral aspects of the deep-rooted cancer of the selfish forms of extremist self-harm in Bangladesh. Only when the people of Bangladesh learn to use their voting powers more wisely will the country as a whole, and its glorious wish kite, be able to experience a real sense of freedom. This is not freedom from ‘religion’ and ‘culture’, as so much of Eurocentric argumentation still seeks to posit, but a conscious embracement of the various local manifestations of people’s connectedness with their religions and cultures, in a spirit of respect for a higher public interest and global peace, rather than terrorist self-righteousness running amok. That basic message, by the way, is also not irrelevant, as noted earlier, when so-called developed countries are engaged in democratic elections. A defective democracy may arise when leader figures are defective, lack a sense of public accountability or feign aims and ambitions that are clearly not in the public interest. It is an increasingly visible challenge, anywhere in the world, for the common voting public to look through such argumentative scheming and to cast their votes wisely.

Werner Menski  
Emeritus Professor of South Asian Laws  
SOAS, University of London

## PREFACE

What prompted the undertaking of this work was to bring forth the inherent politico-legal difficulties Bangladesh had in managing its national elections. However, delving into the intertwining issues revealed complexities which are far more entrenched into the socio-cultural-religious milieu of the country than meets the eye. The book attempts to identify and disentangle these conflicting factors which weaken democracy – in whatever condition and if at all – it exists in Bangladesh today. Having said that, the initial journey of democracy in any nation is bound to have challenges and, to that extent, Bangladesh is no exception. If the concerned stakeholders are able to sift from this book the intricate issues which continue to remain as stumbling blocks to genuine electoral governance, my humble effort would be worthwhile.

The challenges faced in completing this project have been countless, including my stunted knowledge about the nation's political history and inherent societal dynamics; limited available academic resources on the transition of government in the context of South Asia, the Caretaker Government (CTG) in particular; and the abrupt demise of the CTG structure itself – all compounded with equally complex personal circumstances. Fortunately, I had the support of individuals whose graciousness in imparting their knowledge and experience saw me through this phase.

Although the book and its faults are mine, I know that its perspectives have been sharpened by able scholars, particularly Dr. Werner Menski, Emeritus Professor of South Asian Laws at SOAS, to whom I shall remain enormously indebted. The understanding of the subject has benefitted from constructive insights cordially offered by luminaries, such as the likes of former caretaker chief advisors and advisors, judges of the Supreme Court of Bangladesh, jurists, academics, lawyers, civil and military bureaucrats, civil society members and professionals, to whom I owe immense gratitude and who are Mr. Justice Habibur Rahman CJ, Mr. Justice Mostafa Kamal CJ, Mr. Justice Latifur Rahman CJ, Mr. Justice ABM Khairul Haque CJ, Mr. Justice Shamsuddin Chowdhury, Dr. Kamal Hossain, Barrister Amir-Ul Islam, Dr. Akbar Ali Khan, Dr. Wahiduddin Mahmud, Mr. Hafizuddin Khan, Mr. Abdul Mueyed Chowdhury, General Golam Quader

## PREFACE

(retired), Dr. Hossain Zillur Rahman, Mr. Azizul Haque, Mr. Asafuddowlah, Mr. Muhammad Nurul Huda, Dr. M Zahir, Dr. Mizanur Rahman, Professor Shah Alam, Mr. Mahbube Alam, Mr. M I Farooqui, Barrister Manzoor Hasan OBE, Dr. Iftekhharuzzaman, Dr. Sumaiya Khair, Major General (retired) Syed Muhammad Ibrahim *Bir Proteek*, Major General (retired) Muniruzzaman, Lieutenant General Masud Uddin Chowdhury, Brigadier (retired) Sakhawat Hossain, Professor Khalilur Rahman, Dr Shah M Ali, and Dr Ahsanul Habib. The time they provided was invaluable, both in terms of the quality of information shared altruistically and in fortifying my knowledge and perception about the multiple tensions which play out between ideologies, power-politics, official and unofficial laws, abuses of systems, corruptions and socio-political mindsets.

I also wish to acknowledge with gratitude the kind assistance of Mr. Syed Badrul Ahsan, whose invaluable suggestions with regard to the historical narration of the region alleviated the gaps in the book. I would like to pay tribute to the calm professionalism of the entire team at Routledge, particularly the senior commissioning editor of Taylor & Francis Ms. Alison Kirk, the production editor of Taylor & Francis Mr. Adam Guppy, and the Deanta Project Manager Ms. Anna Snyder, who meticulously ensured that the book met the style and standard of the press. I thank my research assistant Mr. Musavee Reza and remain profoundly indebted to all the educational institutions I was ever part of.

A constant source of strength and encouragement are my parents, Mr. Badiuzzaman Khan and Dr. Dalia Nilufar, whose unconditional love, consistent support and unswerving prayers across the miles and at every step of my life are pure blessings. This project is as much a dream of theirs as of mine. I would also like to mention Mrs. Nora Shariff, my godmother who watches out for me from a different realm. My brother Shafquat Zaman Khan kept my spirits high from afar while my only child, Abrar Ahmed, despite his complex medical needs, endured my relentless preoccupations and erratic dispositions during this journey with such calm and poise, which often made me wonder as to who the real parent is. Last, but not the least, my heartfelt gratitude goes to my spouse, Barrister Muhammad Nawshad Zamir, for his abiding support in sustaining my intellectual pursuits.

Sonia Zaman Khan

# ABBREVIATIONS

ACC	Anti-Corruption Commission
AD	Appellate Division
ADC	Appellate Division Cases
AI	Amnesty International
AL	Awami League
APSU	All Party Students Unity
ASK	Ain O Shalish Kendro
BCS	Bangladesh Civil Service
BDR	Bangladesh Rifles
BLAST	Bangladesh Legal Aid and Services Trust
BLD	Bangladesh Law Decisions
BLT	Bangladesh Law Times
BMA	Bangladesh Medical Association
BNP	Bangladesh Nationalist Party
BRAC	Bangladesh Rural Advancement Committee (Formerly)
C&AG	Comptroller & Auditor General
CA	Chief Advisor
CEC	Chief Election Commissioner
CEO	Chief Executive Officer
CJ	Chief Justice
CPD	Centre for Policy Dialogue
CSP	Civil Service of Pakistan
CTG	Caretaker Government
DGFI	Directorate General of Forces Intelligence
DLR	Dhaka Law Report
EC	Election Commission
EPO	Emergency Powers Ordinance
EPR	Emergency Power Rules
EU	European Union
FBCCI	Federation of Bangladesh Chambers of Commerce and Industry
FDD	Foundation for Defense of Democracies

## ABBREVIATIONS

HC	High Court
HCD	High Court Division (of the Supreme Court of Bangladesh)
HRW	Human Rights Watch
HUJIB	Harkat-ul-Jihad al-Islami Bangladesh
ICT	International Crimes Tribunal Bangladesh
IDA	Islamic Democratic Alliance
IGS	Institute of Governance Studies
INC	Indian National Congress
ISIS	Islamic State of Iraq and Syria
JIB	Jamaat-e-Islami Bangladesh
JMB	Jama'atul Mujahideen Bangladesh
JP	Jatio Party
JSD	Jatio Shomajtantrik Dal
LDP	Liberal Democratic Party (Bangladesh)
MOU	Memorandum of Understanding
MP	Member of Parliament
NBR	National Board of Revenue
NDI	National Democratic Institute
NGO	Non-Governmental Organisation
PLD	Pakistan Legal Decisions
PM	Prime Minister
PO	President's Order
PPP	Pakistan People's Party
PPRC	Power and Participation Research Centre
PSC	Public Service Commission
RAB	Rapid Action Battalion
RPO	Representation of People Order
SAARC	South Asian Association for Regional Cooperation
SC	Supreme Court
SHUJAN	' <i>shushashoner jonno nagorik</i> ' (Citizens for Good Governance)
TAC	Truth and Accountability Commission
TIB	Transparency International Bangladesh
UK	United Kingdom
UN	United Nations
USA	United States of America
USAID	United States Agency for International Development



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# INTRODUCTION

## The focus

Across the world, during election periods in general and government transitions in particular, tension, anxiety and fierce competition over the electorate's attention are commonplace and have become a well-known part of the struggles in managing the democratic process. Usually in democracies, a State's electoral system functions smoothly and along democratically acceptable ways to guide and monitor the processes of bringing about the next government. Unfortunately, this has not been the case in many nations, and particularly in Bangladesh, this has remained deeply problematic, even 45 years after independence from Pakistan in 1971. Despite its legacy in terms of inheriting presumably helpful institutions from the British Raj, the nation's historical development of arrested democracy has shaped its political landscape and its legal vicissitudes. In fact, these continuing troubles have not only influenced how Bangladeshi legal and political institutions have developed over the past few decades, but have also from time to time seriously endangered the future of the country as a whole. Even at the time of completing this book, holding acceptable free, fair and participatory elections in Bangladesh remains a burning issue, making this subject even more pertinent than it appeared at the beginning.

Amid this rather troublesome history of perennial failure to address existing problems of electoral governance in Bangladesh, a mechanism called 'caretaker government' (CTG) was devised, from 1990 onwards, to manage general elections and peaceful transitions of power. Since 1990, after ousting the prolonged military regimes, Bangladesh had entered a new phase of democracy in which the 'two' autocratically inclined battling 'Begums', as referred to in popular parlance, have given Bangladeshis no alternative but to choose between the two of them. And Bangladeshis had been content in exercising that choice in an atmosphere of free, fair and inclusive elections conducted through the CTG structure from 1990 to 2008. Given that political deadlock and violent conflict at the country's expense, between the two major political parties, the Awami League (AL) and the Bangladesh Nationalist Party (BNP), have characterised national elections since

this new phase of democracy emerged, and given that the nation's democratic institutions have not been strengthened over the years, neither of these two parties believe that it would have a fair chance of winning an election organised by its rival because of the risks of relentless manipulation. This is why the unofficial CTG structure of 1990 formally emerged through a constitutional amendment in 1996. This rather unusual legal structure, created as a remedy by the political élite with the (assumed) will of the people (no referendum was conducted when the CTG emerged, nor when it was subsequently abolished), indicates a certain type of malfunctioning of the State machinery in a developing South Asian country at the critical point of elections. Neighbouring countries, while certainly not trouble-free, have not experienced the kind of intense problems to the extent witnessed in Bangladesh, which indicates that there must be specific factors that play out in creating these kinds of difficulties. Despite delivering four free, fair and participatory national elections over a period of 20 years, this constitutional innovation of the CTG is marred with controversy as to its benefit and effectiveness in assisting democratic transition, thereby fostering democracy in Bangladesh. Its abrupt abolishment in 2011 raised important new issues about the utility and efficacy of this mechanism. Clearly, the general elections of 5 January 2014 were conducted without any CTG, and promptly raised questions over democratic credibility, but to date, Bangladesh has a functioning government that, while of course not unchallenged, has managed to rule it, and rule it in a manner of nonchalance. Although 'on the world stage, Prime Minister Sheikh Hasina has joined a list of leaders who have been elected technically but without an electoral mandate' (Joehnke 2014), the AL government cannot be termed an illegal government, but one lacking serious democratic credibility since Khaleda Zia and her party, BNP, unwisely decided to boycott the poll on the grounds of the absence of a CTG to oversee a free, fair and inclusive election. This decision of non-participation, based on the belief that free and fair elections are not possible without CTG supervision, cost BNP their seats and their standing as an opposition voice in parliament – which is the democratic platform or centre stage. The ensuing violence which followed during the January 2014 election, together with the low turn-out of voters, leaving 154 uncontested seats in the hands of the ruling party, indicates that there is a difference between choosing two candidates rather than just one.

Against this backdrop of election-time tug of war and transition, which cripples the nation prior to general elections every time, the main question posed in this book is: To what extent is there any legal basis of, and justification for, the CTG as a supportive and effective vehicle for democratic transition in Bangladesh? Additionally, to what extent has the CTG mechanism been useful for Bangladesh, and what lessons have been learnt from its operation? To answer these main questions, the book explains and analyses in depth how the CTG machinery of Bangladesh arose and operated, how and why it was abolished and how it has been evaluated by various stakeholders, including the electorate. To capture public perceptions about the CTG and its functioning, a survey of a fairly

large sample of people and interviews with stakeholders in Bangladesh regarding the CTG's utility and impact during government transition (if at all) was undertaken. The evidence yielded is integrated throughout the book, particularly in Chapters 4 and 5. While examining the extent to which the CTG is a workable instrument during the transition of power, given that its main role is to ensure that free, fair and participatory elections are regularly held, the book posits that perhaps this temporary institution itself may be a useful and constructive tool in terms of paving the way for good electoral governance in Bangladesh. The reactions to the abolition of the CTG in 2011 suggest that although such an institution may not be ideal in democracies, in the context of Bangladesh, it may still have some utility.

Nagging interrelated questions arise as to why Bangladeshi State election structures have been failing in this particular way, and what the reasons are for the failure of Bangladesh to adequately govern itself. In the troubled conditions of an emerging democracy like Bangladesh, where democratic institutions are not yet fully built, where the pendulum of power has swung between prolonged military rule and unstable civilian order, where there is clear evidence of deep mutual mistrust among most stakeholders and where there is a dysfunctional two-party system as far as holding free and fair elections are concerned, there appear to be many risks for operating an interim structure like the CTG. Despite these clear risks, including the risk of 'politicisation of the judiciary' (as involving the former chief justice as the head of the CTG ran the risk of blurring 'the separation between the judiciary and the executive') (Riaz 2013a: 3), there has nevertheless been a 20-year history of the CTG in Bangladesh. Thus, the book also questions whether the emergence of this structure itself constitutes evidence that the country's democratic system is not yet fully mature enough to handle the challenges of electoral transitions without the crutches of a neutral interim government of some kind.

Given the unscrupulous manipulation of the CTG mechanism from 2006 to 2008, a few subsidiary questions also arise as to whether and to what extent abuses of the system actually continue to pose risks to the country's progression to a satisfactory functioning of electoral governance. Looking at it from a completely different perspective, the book also attempts to examine how a jurisdiction like Bangladesh, in all its cultural specificity and variety, is able to absorb the ethos of a democratic culture when the notion of democracy actually emanates from a Western context and, to that effect, to what extent direct transplants of democratic models from the West actually function satisfactorily in the context of South Asia, specifically in Bangladesh.

The country's electoral history, post 1990, portrays a constant struggle between two deeply opposed political camps, AL and BNP, which have alternated in leading the country when elections were conducted by the CTG mechanism. It would be too simple to explain the electoral and governance troubles of Bangladesh as merely a consequence of this adversarial, vengeful and unremitting battle of AL and BNP, hence the other related questions arise which refuse to

fade away: Is it a deeper systemic problem, and to some extent a question of culture, or is it really, as has been suggested, just a personal matter related to the so-called ‘battle of the Begums’ and thus some form of dynastic warfare? These important questions, elaborating also the wider political context, all relate closely to the main challenge of assessing the operation of the CTG as a legal tool of good governance in Bangladesh.

As the nation witnessed a controversial election, without the crutches of a CTG, in January 2014, in the process it once again succumbed to a series of deadlocks. The lack of desperately needed discourses between the government and the opposition regarding election modalities, the failed attempts of civil society members and the international community to bring AL and BNP members to a dialogue regarding election-time modalities, the boycott of election by the opposition, the ensuing anarchical street violence and crippling *hartals* (labour strikes) by the opposition, the phenomenal number of casualties resulting from the *hartals* and blockades, the ruthless crackdown on the opposition, the poor voter turn-out on election day, the government’s winning of large numbers of uncontested seats – all of these tell us about the effects of the manipulation of the law as a tool of governance in a South Asian country like Bangladesh. This results in a series of electoral governance malfunctions, which the populace is compelled to bear year in and year out.

Although the myriad complexities of transitional polities are a work in progress for any nation transiting to democracy, from a vantage point in early 2017, one of the lessons learnt from the CTG experience is, perhaps, that even a CTG can be abused and manipulated. But despite the pitfalls, over a period of 20 years, the fact of the matter remains that the CTGs have delivered free, fair and inclusive elections to Bangladesh over and over again, making the transition from one government to another as trouble-free and non-controversial as possible. Perhaps lessons have been learnt through the CTG experience, but evidently not enough, and it seems that throwing away these crutches of election management completely without creating a reliable alternative may have been a too rushed and somewhat reckless decision.

### The context

Bangladesh started out in 1971 as a democracy, based on the legacies of its historical connection with India and Pakistan, but soon saw a regression into an autocratic form of governance. The ruling party, in its attempt to consolidate power, faced with infrastructural challenges, devastating famine, extreme economic hardship, severe deterioration in law and order, rampant corruption and, as a result, decreased popular appeal in the aftermath of a violent war of independence with the Pakistani army, which killed at least three million people ‘and sent ten million refugees fleeing to India’ (Bass 2014), decided to revert to a one-party system, following the communist parties of China and Russia. This socialist experiment was short-lived and was stopped in its tracks, as a military regime

usurped power within a few months of these developments becoming evident, brutally assassinating the founding father of the nation, Sheikh Mujibur Rahman (revered as *Bangabandhu* – ‘friend of Bengal’) and most of his family members in 1975. Thereafter, the process of going back to a multiparty democratic system started anew, only to be halted again a few years later by fresh military interventions. These military interventions brought religion to the political forefront in a calculative manner, altering the political landscape of Bangladesh by redefining State principles from secularism to Islam and identification of citizens from Bengalis to Bangladeshis. Professor Ali Riaz (2010: 49) identifies the impact of these military interventions in the following words:

These military regimes succeeded in bringing Islam into the political discourse and facilitated the gaining of legitimacy for the Islamists – both constitutionally and politically. The lasting legacy of this era is the change it has brought to the entire discourse of Bangladeshi politics and the serious blow it delivered to the secular ideal.

This process of Bangladesh’s faltering democratisation, coupled with worldwide economic pressures resulting from the oil price hike in the mid-seventies, had a significant impact on the quality of democracy achieved in the country.

Although Bangladesh has had no tutelary period of transition from élite parliamentary politics to parliamentary democracy, the latter is regarded as *the* legitimate form of government by virtually all politically aware and participant groups of the population except for the Islamists (Stern 2001: 17). The deficiency in democratic consolidation was initially due to a lack of democratic experience, a perspective summarised by Hossain (2000: 525) in the following words:

Political instability should be viewed as a reflection of feudal character of a traditional society in which most people are uneducated, socially backward, and politically uninformed and hence possess unsophisticated character traits, including feudal or tribal rivalry.

The same commentator further points out that ‘[t]here exists a patron-client culture in all spheres of life that is behind the personalised, factionalised character of Bangladesh’s politics’ (Hossain 2000: 525). Consequently, the democratic progress is perceived to be constantly disturbed and infected by undemocratic tendencies, worsening the prevalent climate of mistrust in the country. However, the reality is far more complex.

Although Feng and Zak (1999: 162–163) argued that widely held determinants of democratic transitions like low per capita income, low levels of education and a lack of history of democratic experience and practice are factors weighing down the road to sustainable democracy, there are other significant factors which continue to affect the quality of democracy (Fisher 2013; Vigoda-Gadot and Mizrahi 2014). With regard to Bangladesh, Islam (2005) notes that although the

rule of law underlies the entire Constitution, the concept is capable of different interpretations by different people and has, therefore, various shades of meaning. Typically, the Constitution of Bangladesh in the preamble proclaims the ‘rule of law’ as the prime objective of the Constitution and as a new habitat for substantive provisions aimed at achieving the rule of law. By itself, this is merely decorative and is not reflective of Bangladesh’s reality. The representative character of the government in Bangladesh is not confined to the central government but to the sphere of local government and all levels of administration. But this truly representative government is a misnomer unless free, fair and inclusive elections to reflect the wishes of the people can be ensured. One could actually go a little further and add that the expectation is that democracy ought to engage the bulk of the population in participation which is political. Such political participation means behaviour on the part of the mass public directed at influencing, directly or indirectly, the formulation, adoption and implementation of governmental or policy choices (Fishkin 2009: 45), for that is a hallmark of an inclusive and perhaps sophisticated democracy. Voting has become by far the most widely shared form of political participation and, although contributing money, time and effort to political causes; demonstrating; writing letters or emails to government officials; and signing petitions are all activities that involve large numbers of people, this level of advanced democracy has not yet been achieved in countries like Bangladesh. For Bangladesh, one can tick the box that there is a basic electoral governance only when the voting is participatory, and political parties enjoy a level playing field when free, fair and inclusive elections are held at regular intervals. Unfortunately, the culture of mistrust in Bangladesh is closely connected to and develops into what one may call a ‘culture of non-participation’. This thought arises in view of frequent parliamentary boycotts, *hartals* and a basic refusal of the opposition to engage in constructive discourse. Such obstructions indicate a serious and at times frustrating deficiency in the political culture, which impacts the overall quality of rudimentary democracy in Bangladesh.

It is indeed mainly the ‘free and fair election’ element of democracy which has been a prominent point of contention in Bangladesh over many years. Hossain (2000: 509) argues that although the common perception of Bangladesh’s political instability is fundamentally a self-inflicted national indulgence of trivial issues, in which all social groups willingly or unwillingly show their proclivities, this in itself does not tell the whole story and seems to be marred by rhetoric. Any attempt to identify other, deeper factors that may have caused political instability would require an investigation of the social, cultural, religious and political traits that create social and political disharmony. In analysing the need for a CTG mechanism in Bangladesh, these elements of social, historical, cultural, religious and political aspects are also discussed in this book, in Chapters 2, 3 and 4. In his article, Hossain (2000: 508–529) not only summarises the historical profile of the political parties that dominate Bangladesh’s politics, including thumbnail characteristics of voting behaviour, but also attempts to explain why these parties do not cooperate and follow parliamentary norms and practices to establish

a mutually beneficial two-party political system. He points out that confrontational politics, as practised by these parties in Bangladesh, are a manifestation of an inbuilt undemocratic political culture in which each party seeks to monopolise State power as if the other does not even have the right to exist. Hossain (2000: 509) concludes that in an underdeveloped society like Bangladesh, the mere transfer of political power from the military to the politicians or the conduct of ritualistic elections does not necessarily establish a stable democratic political system. In such a society, the existing feudal political culture, often under the rubric of dynastic political leadership, is more likely to promote confrontation than stability and cause deterioration rather than an improvement in the governance of the State.

Other State institutions in Bangladesh, such as the judiciary, have been pliant and subject to political intervention and direction. Political and bureaucratic interference are the most significant impediments to police efficiency and have resulted in the worst forms of abuse including illegal detention, death in custody, torture and pervasive corruption. The result is almost universal public disdain for the police force. Political regimes have used the police, since their inception, to regularly harass political opponents, for example, by using the Special Powers Act of 1974 (Act XIV of 1974), which has provisions for preventative detention (promulgated on 9 February 1974), rather than using them to maintain public order or to give them the opportunity to develop as a neutral institution. In addition, since 2004, the Rapid Action Battalion (RAB), an élite anti-crime and anti-terrorism unit of the police, was created to combat criminal gang activity throughout the country. It has been accused by Amnesty International of a lack of accountability and for being responsible for at least 700 deaths from 2004 to 2011, which have been attributed to crossfire, extra-judicial killings and torture. According to Odhikar (a human rights organisation in Bangladesh), the statistics for extra-judicial killings in Bangladesh in 2012 were 70, rising to a massive 329 in 2013; 172 in 2014; and 185 in 2015. In 2013, according to the report, ‘among the 329 extra judicially killed by law enforcement agencies, 174 were extra judicially killed in relation to political violence’, mostly before the impending January 2014 national elections.

In addition, governmental accountability remains elusive and this lack of accountability stems from two important sources. On one level, it can be traced to the pre-independence legacy, relating to the bureaucratic-authoritarian political institutions that pervaded what was then East Pakistan, which led to bureaucrats yielding a significant amount of political and coercive power, exercising it with considerable impunity. This matter gives rise to questions about the extent to which unsupervised or unchecked bureaucratic discretion is responsible for abuses of power also causing the gradual infiltration of impunity into the electoral system. At another level, the country’s shaky transition to democracy, marred by conflicting decisions on what Bangladesh stands for as a nation and the issue of ‘Bangladesh’s identity’, has not done much to instil an atmosphere of accountability in general, including into the country’s bureaucracy.



The predicament over Bangladesh's identity has become more pronounced over time. The birth of what appeared to be a homogenous nation, with its majority Muslim population coexisting with non-Muslim and ethnic minorities, bound by the spirit of ethnicity and culture rather than religion in 1971, has altered over the years and has now deeply polarised the very nation into two broad categories: Muslim secularists and Muslim non-secularists. Let us keep the non-Muslim secularists separate for now because that group is in contention for a different reason, namely the issues that minorities face in a State. There is a serious rift between the less-conservative Muslims, who do not perceive secularism to pose any threat to Islam, and the more conservative (including *Wahabi*-influenced) Islamists, who identify secularism as a major threat to their main objective of establishing *Deen*, or Islamic social order, and who wish to declare Bangladesh as an Islamic Republic on the basis of the Sovereignty of Almighty Allah, whereby the Holy Qur'an and the *Sunnah* will be the only source of all laws in the Republic. The interplay and contestation between these two blocs have had a profound impact on Bangladesh's political landscape. Riaz (2016a: 216) pertinently asks whether this contestation is between a 'secularist' understanding of religion's private role and a 'non-secularist' understanding of the public presence of Islam. This contestation and, indeed, how other multiple contestations have played out, both in the context of a domestic historical narrative on identity construction and the global dimension of the relationship between religion and politics, is further explored in Chapter 3.

As parliament has been functioning in a partisan fashion, little effort has been made to scrutinise the bureaucracy on the issue of accountability. While there is political interference with the bureaucracy, which is manifest in the appointment, promotion and transfer of bureaucrats as well as in the allocation of State funds to particular public projects on an openly partisan basis, there is not much routine scrutiny on the work of bureaucracy. In addition, executive scrutiny is rather absent in parliament. Despite being in session, the parliament is often ineffective due to prolonged absences of the opposition from parliamentary sessions (customarily termed as a 'boycott' by the parties in opposition) or because parliament may have an opposition which is 'handpicked or coerced into that role' (Riaz 2014a: 152), as was evident in the post 2014 election with the Jatiya Party (JP) – part of the AL-led grand coalition government during its term of 2008–2013 – which was designated as 'the official parliamentary opposition ... essentially turning the 10th Parliament into one without any opposition party' (Riaz 2014a: 152–153). Both major political parties, AL and BNP, have justified their respective boycotts over the years by coming up with a myriad of allegations against the ruling party. This has done little to convince the electorate that such boycotts have in any way strengthened pluralistic governance in the country. This clearly also reflects the prevalent 'political culture of non-participation' over many years.

Even today, the political parties remain miles away from each other. Neither is willing to concede ground on any issue of relevance to Bangladeshis. The two

political leaders have a well-known aversion to each other that has prevented them from interacting, even at a social level (Ahsan 2011b). Even when parliament is in session, the Speaker, elected generally from the members of the party in power, seldom acts neutrally in terms of allocating time for debates and in giving rulings on issues on procedure. In assessing the parliament's performance at the first session of the tenth parliament, Transparency International Bangladesh (TIB) has observed in its report that merely 1.8 per cent of the total time of the first session was spent on lawmaking.

Another instrument of accountability in a democracy is a free press and media. Although Bangladesh is gradually developing a press that is frequently critical of the ruling regime, journalists who are critical of a regime's performance risk being subjected to harassment (Bhuiyan 2012) and killings. Both the AL and BNP regimes have been seen to be very sensitive to criticism, among other things, of their human rights records. BNP has reacted with hostility to criticism of its treatment of minorities and the behaviour of some of its radical Islamist coalition partners. Possible ties of a few Bangladeshi political organisations to Islamic radicals have also clearly emerged (Hashmi 2009).

There are other important and mainly historical factors which have played a significant role in the arrested development of democracy in Bangladesh. Prominent here is a deep-rooted culture of mistrust which began first with mistrust of the British during the colonial era, followed by mistrust of the Pakistanis and their hegemonic efforts to suppress what used to be East Pakistan until 1971. Presently, in post-independence Bangladesh, there is ample evidence of blatant mistrust of major forces engaged in ruling the nation, including the aggressive climate of adversarialism which exists between the government and the opposition. This is because determining factors that create the conditions of trust such as fairness, transparency, accountability, reliability and discourse have been largely absent from the political arena. Such deficiencies are embedded in the mindset of respective opposition parties, and even of the electorate, to the effect that no government in power in Bangladesh is able to give a free, fair and participatory election to the citizens that would result in a representative government, as is evident from the electorate and stakeholders' opinions about elections held under political governments. Given this complex backdrop, elections and election results in Bangladesh have almost always been a foregone conclusion, rendering no positive effects on the political process. The 'winner takes all' rule literally means taking it all in Bangladesh, including the civil service, the Election Commission (EC), the police and, these days, most unfortunately to a certain extent, the judiciary.

It is difficult for democracies to operate effectively without mutual trust between various players and institutions, as this is a major pre-condition for effectively managing political, social and economic affairs (Vigoda-Gadot and Mizrahi 2014; Warren 1999). Increasing trust in democracies is thus imperative for improving the management of the democratic State in the wider context of an examination of the various theoretical inputs into a governance system. In this context, in Bangladesh, the need for a neutral umpire in the electoral playground

## INTRODUCTION

was deemed necessary to increase and foster trust and be an instrument which is legitimate, pragmatic, effective, efficient and essential. While the starting point for the CTG was a desperate attempt to hold free and fair elections after the demise of long-term military rule, there continued a crucial need for such a system to remain in order to develop a system of regular free, fair and participatory election culture, including its necessary management and a peaceful transition of power from one democratically elected government to another. The nation understood that, without this, the country did not stand even the remotest chance of stepping into a basic functional electoral democracy.

Hence the analytical focus of this book falls on the CTG institution as a critical tool for ultimately securing a system of good electoral governance, suitable for Bangladesh. The CTG has had the opportunity of being a bridge between citizens and the political system for 20 years. The political system had suffered the most from a perennial crisis in trust and almost childishly stubborn non-participation, be it in engaging in discourse, in elections or in parliament. Regrettably, this phenomenon prevails. In this wider context, the unilateral abolition of the CTG itself, whose original mandate was to serve as a bridge between peoples' expectations of safeguarding free and fair elections and the frail political realm, has been neither pragmatically altruistic nor constructive.

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