

## CASE STUDY: BANGLADESH

### Global State of Democracy 2023 Report

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Bangladesh's political landscape has historically been dominated and polarized by two political parties: the Bangladesh Awami League (AL, in power between 1972 and 1975, between 1996 and 2001, and from 2009 until the present day) and the Bangladesh Nationalist Party (BNP, in power between 1991 and 1996 and between 2001 and 2006) (Ali 2022). AL is a centre-left party known for its role in the war for liberation and historically secular ideology, while BNP leans centre-right and is associated with nationalist ideology broadly rooted in Islamic values, although both parties appeal to religious sentiments for political gain (Shehabuddin 2016). Despite impressive economic growth in the half-century since independence (in 1971), the country has struggled to consolidate democratic norms (World Bank 2023; International IDEA 2022). In fact, a history of military coups (in 1975 and 1982) and a military-backed caretaker government in 2007, combined with civilian rule that has included and normalized human rights violations and the persecution of dissent, has limited democratic expansion.

The Global State of Democracy data shows that Bangladesh's rankings in Rights (134) and Rule of Law (135) are among the bottom 25 per cent in the world (International IDEA 2022). One particular area of concern is Judicial Independence, steadily weaponized by both dominant parties to consolidate power (Anam 2023). Indeed, Bangladesh's measures of Judicial Independence have suffered serious declines in the last five years, placing it among the lowest performing in South Asia. These declines have been coupled with decreases in Representation (and particularly Elected Government) measures over the past decade. Part of these declines can be traced back to the 2014 and 2018 elections, which resulted in a weakened parliament lacking effective opposition, and centralized power in the hands of AL in what some critics argue resembles a one-party state (Mostofa and Subedi 2021; The Hundred 2023). These elections were also marred by claims of electoral manipulation, political repression and violence, perpetrated by the ruling party (Riaz 2014; Human Rights Watch 2019). Democratic institutions such as the judiciary and the Election Commission were also accused of handling electoral complaints in a partisan manner. While the judiciary has long faced challenges to its ability

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to exercise its powers as a countervailing institution (CI), this more recent post-election context has further weakened the courts.

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## ZERO-SUM POLITICS

Since 2008, party competition in Bangladesh has been diminished by a range of factors, including party boycotts of elections, criminalization of leaders and intra-party divisions (Mostofa and Subedi 2021; Rahman 2022). BNP has struggled to recover from its decision to boycott the 2014 general election, which led to a parliamentary majority for the AL of over two-thirds. Indeed, the lack of credibility and genuine competitiveness of the two preceding elections has led to BNP's declaration of a potential boycott for the forthcoming 2024 election (Sakib 2023). The decision to boycott is rooted in AL's controversial 2011 constitutional amendment, which abolished a neutral caretaker government (CTG) system (a non-partisan administration consisting of a chief advisor and several other advisors) for overseeing elections. Historically the chief advisor—a role that gradually became politicized over the years—was selected from the ranks of the retired chief justices of the Supreme Court. Indeed, the BNP government (during its tenure) attempted to 'tweak the CTG to its advantage' through, for example, extending the retirement ages of Supreme Court judges from 65 to 67 to suit its preferred chief advisor candidate (Mishra 2023). Conversely, some political analysts suggest AL's move to scrap the CTG provisions was done in a 'majoritarian' manner with no proper deliberation with opposition or civil society (Siddiky 2018). They also criticize the party's controversial reliance on a 'misrepresented' court order that in the preceding month had declared the CTG unconstitutional but had also directed that a CTG should remain in place for two more elections (Majumdar 2023). As a result, the judiciary was manipulated to consolidate power by changing the 'rules of the competition' to both parties' benefit. Beyond BNP, smaller opposition parties struggle to exert influence due to organizational and ideological factors, and they often rely on politicking through larger parties (Rahman 2022). Such weak competition has a knock-on effect on the courts:

If there is a strong opposition and two or more parties are competing with each other, then the ruling party will be more likely to accept and encourage judicial independence . . . When parties compete for power, rulers support judicial independence as a form of insurance in the face of possible electoral defeat. (Siddiky 2018: 6)

A zero-sum approach to retaining political power is further exacerbated by weak intra-party democracy, centred around patronage networks that feed off a dynastic culture (Amundsen 2013). Patronage politics have seeped into democratic institutions as a means of consolidating party power, including in the judiciary, primarily manifested through laws related to judicial appointments, as discussed below.

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## SEPARATION OF POWERS

While the Constitution of Bangladesh has always included a provision regarding the separation of the judiciary from the executive, it was not consistently enforced until the Masdar Hossain Case of 2007 ([Constituent Assembly of Bangladesh 1972](#); [FORUM-ASIA and Law & Society Trust 2017](#)). Despite some reforms, the executive retains significant influence over the judiciary, especially in the control of judicial appointments ([Mollah 2012](#)). The executive is given power over the recruitment, promotion and postings of subordinate court judges ([Hannan and Arifuzzaman 2021](#)). Various measures over the past decade have undermined judicial integrity, including the 16th amendment of the Constitution (2014), empowering parliamentarians to impeach Supreme Court judges ([Hossain 2022](#)). Similarly, the Bangladesh Judicial Service (Discipline) Rules 2017 make the lower judiciary subservient to the executive ([Daily Star 2018](#)). The 16th amendment has been put on hold after being struck down by the Supreme Court in 2017 (a move hailed for counteracting the threat to judicial independence) ([Financial Express 2023](#)). However, the subsequent removal and indictment of Supreme Court Chief Justice Surendra Kumar Sinha, who headed the Supreme Court during this time, dealt a blow to judicial independence ([Al Jazeera 2021](#)). Legal experts regard his removal as having been politically motivated ([FIDH 2021](#)).

Furthermore, anecdotal evidence from recent years shows that judges who rule in favour of defendants, and against the preferences of the ruling party, have in specific cases encountered consequences like demotions or transfers to less favourable roles. For instance, a judge who acquitted BNP Senior Vice-President Tarique Rahman in a money-laundering case from 2013 was forced to leave the country due to alleged threats and pressure to convict Rahman ([FIDH 2021](#)).

Another controversial issue has been the use of mobile courts, which are run by executive-appointed magistrates with the power to render immediate verdicts on cases that can sentence the accused to prison sentences of up to two years ([Tamanna 2023](#)). Despite a High Court order declaring mobile courts conducted by executive magistrates as illegal in May 2017, they remain in use after the Appellate Division stayed the order, with the matter still pending in court ([Hossain 2022](#); [Daily Star 2019](#)). While the government argues that these courts are needed to address the thousands of backlog cases that have overwhelmed the capacity of Bangladesh's justice system, many legal experts regard the order in which these courts are conducted by executive officials as unconstitutional, fundamentally contradicting the separation of powers and spirit of the Masdar Hossain Case ([Rhythm 2015](#); [Daily Star 2019](#); [Tamanna 2023](#)). Moreover, the speedy nature of the trials deprives the accused of the right to a fair trial and sometimes means that the accused do not have time to find legal representation. These courts have also occasionally been exploited to stifle dissenting voices. For example, a mobile court hastily sentenced journalist Ariful Islam to a year in prison for alleged narcotics possession on 14 March 2020, though rights experts were of the opinion that the charges were politically motivated and tied to Islam's publications exposing corruption

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in district administrations (*Dhaka Tribune* 2020; CIVICUS 2020). Islam was later absolved of charges following a High Court decision, with the deputy commissioner involved in the jailing penalized for misconduct, although most of her penalties were later cleared by the President (*Bdnews24* 2021).

Indeed, court proceedings at all levels have increasingly become weaponized to serve political ends. For example, corruption charges were brought against several members of the opposition and the current ruling party by the former 2007–2008 military-backed government. However, while the charges against the opposition are still active and used as a tool of repression, most of the charges against the ruling party were conveniently dropped after AL came to power in 2009—implied by some rights experts and practitioners as being influenced by the executive (*Adams* 2019). The number of politically motivated arrests has also tended to increase ahead of elections as evidenced in 2018 and in the lead up to the next elections, due to be held January 2024 (*Human Rights Watch* 2018; *Human Rights Watch* 2023a). According to BNP, at least 20,000 cases have been filed against its supporters and political members (*Ellis-Petersen and Rahman* 2023). As noted by Human Rights Watch, numerous cases over the past few years also appear unfounded, including ‘ghost cases’ where the accused is either dead, abroad or hospitalized at the alleged time in which an incident took place (*Human Rights Watch* 2023b). Moreover, there are numerous cases where the police have failed to take legal action against ruling party members for attacking the opposition, as exemplified by the lack of arrests or charges against AL supporters following clashes on 29 July. Conversely, 628 legal proceedings were initiated against BNP leaders and activists following the sit-in protest (*Daily Star* 2023). As a result, electoral competition takes precedence over adhering to the rule of law.

In essence, the judiciary’s ability to act as a CI and guarantor of rights has been and will continue to be constrained until reforms are brought in to ensure its full independence and separation from the executive. Key reforms recommended by experts include establishing autonomous bodies responsible for judicial appointments with clear guidelines for merit-based recruitments, strengthening and amending constitutional safeguards to prevent executive interference in judicial matters, and increasing dialogue and cooperation between political parties and civil society to reinforce a political culture that encompasses values of inclusiveness and tolerance.

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## ABBREVIATIONS

AL	Bangladesh Awami League
BNP	Bangladesh Nationalist Party
CI	Countervailing institution
CTG	Caretaker government

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