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**UNDERSTANDING POSTCOLONIAL PENAL REFORM IN BANGLADESH**

**SPECIAL LEGAL REGIME IN CONTEXT**

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**ABSTRACT**

This research involves a socio-legal analysis of postcolonial special penal reform in Bangladesh. In spite of robust presence of constitutional commitment to the rule of law ideals, the shadow of colonial hangover continues to haunt the justice institutions in this post-colonial state. In addition to its colonial legacies, some postcolonial statutes offer harsh sentences and stringent procedures in investigation, trial and punishment of many vaguely defined new forms of crime. In practice, such sporadic postcolonial reforms have turned out to be either inappropriate or inadequate because the persons at helm of the state have the tendency to arbitrarily manipulate the course of law to buttress their power with an eye on controlling their adversaries.

In order to fathom the dynamics of an offshoot of criminal justice system, this thesis is premised upon some philosophical and practical debates surrounding some highly invoked expressions including rule of law, criminalisation, and postcolonial legal politics.

The key query investigated in this research is how and why a particular postcolonial penal trend is systematically problematic. The data sources used to answer this question include interviews with 15 key informants and court observations supplemented by an auto-ethnography.

The thesis argues that an eclectic complex of law, justice and society has emerged in a volatile state that tends to move between the high ideals of the rule of law and oxymoronic rule by law. It finds that the special legal regime *per se* is not at adds with the rule of law; rather, empirically it forms a host of problematic menifestations of erosion of rule of law as special laws leave wider scope for abuse. It also presents a *sui generis* case of methodological barriers undertaken in socio-legal contexts that posed formidable challenges to a researcher.

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However, given the relative unfamiliarity of empirical research culture on Bangladesh’s laws and judiciary, it has been tough for me to navigate the fieldwork in a tightlipped atmosphere. More so, the most troublesome civil and political unrest has posed formidable obstacles to the smooth conducting of the interviews with the stakeholders. Therefore, the research interviewees deserve special thanks who have narrated their stories on a sensitive topic that has always been oscillating between the rule of law and thin veneer of rule by law, a discernable hallmark of adversarial political and social realities of a postcolonial state. I also offer my gratitude to Dr Kamal Hossain, Justice Moyeenul Islam Chowdhury, Barrister Sara Hossain, Advocate Jyotirmoy Barua, Barrister Shameem Haider Patwary and many other individuals who have cordially furnished valuable insights. I owe the perennial debt to my respected professors M Shah Alam, Mohiuddin Khaled, Abdullah Al Faruque of the University of Chittagong, Ridwanul Hoque, an independent researcher, and Jill Marshall of Royal Hallway University whose lively lectures have ignited my deeper interest in legal research. My debt is also to the justice seekers and practitioners who have come in contact with the laws in my jurisdiction that have furnished a broader idea of how the law works at the grassroots level. May I also extend my thanks to the Bangladesh Supereme Court and the Ministry of Law, Justice and Parliamentary Affairs for giving me the leverage to conduct this research with an extended period of sabbatical leave.

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**GLOSSARY**

*Adalat* Court

*Ain* Law

*Dewani* The pivilege of revenue collection and relating to civil matters

*Fouzdari* Relating to criminal courts

*Kuchari* Court

*Munsif* A lower grade civil judge

*Nejamat Adalat* Criminal Court

*Panchayet* A form of local arbitration

*Plassey* A place also known as Palashi, situated in West Bengal of India. Battle of Plassey 1757

*Raj* Rule, King

*Sanatana* Relating to Hindu Law and Practice

*Sarai* Inn

*Sepoy* A military person of lower rank

*Sharia* Canonical rules based on religious scriptures that are supplemented by state legislation within the purview of various sources of Islamic law.

*Subah* Province

*Zemindary* Landlordism

**ABBREVIATION**

AD Appellate Division of the Supreme Court

ADJ Additional District and Sessions Judge

AI Amnesty International

AIR All India Reports

AL Awami League

Art Article

ASB Asiatic Society of Bangladesh

ASK Ain o Shalish Kendra

BLAST Bangladesh Legal Aid and Services Trust

BLD Bangladesh Legal Decisions

BLT Bangladesh Law Times

BNP Bangladesh Nationalist Party

CJ Chief Justice

CJM Chief Judicial Magistrate

CJS Criminal Justice System

DC Deputy Commissioner

DJ District and Sessions Judge

DLR Dhaka Law Reports

HCD High Court Division of the Supreme Court

JM Judicial Magistrate

LC Law Commission (Bangladesh)

MLR Mainstream Law Reports

MM Metropolitan Magistrate

PLD Pakistan Legal Decisions

PO President’s Order

S Ss Section, Sections

SCOB Supreme Court Online Bulletin

SL Special laws

ST Special Tribunal

UN United Nations

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Criminal Law (Amendment) Act 1927

Criminal Law (Industrial Areas) Amendment Act 1942

Cruelty to Animals Act 1920

Cruelty to Women (Deterrent Punishment) Ordinance 1983 (Repealed)

Currency Notes Forgery Act 1918

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Representation of the People Order 1972 (P.O. No. 155 of 1972)

Repression of Cruelty to Women and Children Tribunal Act 1995

*Sarais* Act 1867

Special Martial Law Regulations 1976

Special Powers Act 1974

Suppression of Cruelty to Women and Children Act 2000

Suppression of Terrorist Offences Ordinance 1992 (Repealed)

Terrorist and Disruptive Activities (Prevention) Act 1987 (India)

Torture and Custodial Death (Prevention) Act 2013

Touts Act 1879

**INTERNATIONAL INSTRUEMNTS**

UDHR Universal Declaration of Human Rights 1948

ICCPR International Covenant on Civil and Political Rights 1966

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women 1979

CAT Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

CPED Convention for the Protection of All Persons from Enforced Disappearance 2010

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Report of Macaulay 1837

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**CHAPTER 1**

**INTRODUCTION**

The authority of the courts of law is a force which can be used for both justice and injustice. In the hands of a just government, it becomes the best instrument for attaining right and justice. But, for a tyrannical and repressive government, there is no better weapon of wreaking vengeance and perpetrating injustice.

(Maulana Abul Kalam Azad (1922) as an accused uttered this striking explanation before a court of law under British raj)

**1.1 Prologue**

This thesis is about understanding the growth and practice of special criminal laws and procedures in Bangladesh. In this research I have explored the special criminal law reform with a clear focus on how and why a non-western postcolonial regime is systematically problematic, and what are the effects of its presence in the criminal justice system and also in the state of governance. Through in-depth interview with 15 key stakeholders, observation in 7 courts, and an autoethnographic reflexive method, the present study has investigated an offshoot of criminal justice system, by juxtaposing and interpretating the findings drawing on the rule of law, criminalisation and postcolonial studies.

The story behind this thesis germinated long back when I set out my journey as a hesitant lawyer in a small city of Bangladesh. As an aspiring pleader of a district judiciary, I was initially captivated by the conceptions of law and justice that I was taught at the tertiary level of my education. Within a few months after taking over the advocateship role in a district bar, the cloistered upbringing and romanticism of a young pleader drifted towards endless intricacies and different contours of colonial laws and complicated processes alongwith iconic red-brick infrastructures that exposed very little threads of the rule of law. I must, however, acknowledge that I generally enjoyed the ever-buzzing court environment that continued to display regular trial-drama orchestrated by the justice officials including the lawyers, judges, prosecutors. Yet, my vague understanding of the law and judicial processes continued with an intimate contact with the legal literature, case files, modes of oral submission and written papers of the practitioners while the litigants and the victims remained too distant from me. An embryo of the present research further grew as I struggled to meet both ends as a newly enrolled advocate of the High Court Division of the Supreme Court of Bangladesh. However, during my role as a lawyer of the superior court, I tried to comprehend whether the iconic battlefield of higher judiciary was exclusively reserved for those who could afford to pay the exhorbitant fees of the finest lawyers. Yet, my stint with Ain o Salish Kendra (ASK), a legal aid and human rights organisation, gave me the opportunity to take part in public interest litigation (PIL) movement that spearheaded the notion of social justice for the disenfranchised sections of the society.[[1]](#footnote-1)

Finally, in 2006 my odyssey was set in motion when I started to officiating as a judge of the subordinate judiciary. Apart from my initial sojourn as a trainee-presiding judge, I generally worked in the criminal court of different tiers for more than a decade. During my engagment with the administration of criminal justice, I always aspired to achieve the rule of law by disposing of criminal litigation fairly and expeditiously. I also could sense the feelings of the lawyers, police, prosecutors, offenders, victims, court-touts or onlookers who too had apparent regard to the value of jurisprudence and fair play. However, oftentimes I was at pains to witness the sufferings of the justice seekers who were mere bystanders like the raucous birds sitting outside the crumbling red-brick building, an iconic symbol of colonial lawfare. The mental agony of a disgruntled litigant was depicted by Nobel Laureate Rabindranath Tagore (1861-1941) in a graphic and poignant style as if a free bird were happier than the jealous justice-seeker who remained stuck in the web of laws:

A cukcoo sitting on a branch of a big banyan tree outside the court-compound was chirping frantically; alas, she has no court, no law![[2]](#footnote-2)

As a judge, I sought to apprehend why there were a plethora of laws, procedures and dilapidated infrastructures in an ever-crowded court arena. The facts encompassing black and white laws composed in the blue legal paper *prima facie* appeared to be fairly neutral. However, the flaws implicit in the statutes and processes specially designed and further developed by postcolonial elites appeared to leave a wider scope for misuse of the same. The role of justice functionaries including the special judge and the investigators to apply the laws was also crucial as to how and why such special regime could be a potential tool to generate numerous instances of miscarriage of justice in a weaker democracy where institutional autonomy of judiciary and other organs did not flourish in a meaningful way. Other issues persisted too in the state of governance. This domino effect of this dysfunctional governance could lead to the dismantling the rule of law principles. The paradox was that it was as rare to find a practitioner who did not talk about rule of law, fair trial and independence of judiciary as it was to find a consumer of justice who seemed to be satisfied with the performance of the criminal courts in particular. I pondered over vaguely why there was a simmering discontent about operation of such regime among the litigants and the practitioners alike. My general perception was that justice and fairplay remained mostly elusive in the courts especially those were set up as first-track with special jurisdiction.

It is to be noted that Bangladesh bears colonial legacies as far as its laws, processes and institutions are concerned. As an adherent of postcolonial studies, I tried to understand that special laws and procedure could have been seen as a mechanism in attoning our ‘original sins’ of British period (1765-1947) when most of the laws, procedures and justice institutions took formal shape in this region. Such inchoatic thinking of mine proceeded with the premise that they arose historically, and then nurtured and innovated upon with newer techniques in a postcolonial set up that was systematically stuck into peculiar legal, political and cultural peculiarities. In brief, this is how I became involved with the actual and epitemlogical quagmire of a particular legal regime. Finally, the rough impressions and ideas of a humble participant in the criminal justice system took on a shape of a thesis during my days as a postgraduate researcher at Sheffield.

It would, however, appear in the latter part of the thesis that the fruits of such postcolonial laws in general and the special laws are rarely availed of, and injustice continues in practice, inspite of presence of a robust constitution that provides an overarching ideal:

[I]t shall be a fundamental aim of the State .….. a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice …… will be secured for all citizens.[[3]](#footnote-3)

The Appellate Division of the Supreme Court envisages that the rule of law is a basic structure of the constitution.[[4]](#footnote-4) However, in a weaker rule of law country like Bangladesh, there is a greater scope for the rulers to evade the accountablity and consolidate their arbitrary rule in many ways.[[5]](#footnote-5) For instance, in 2023 Bangladesh ranks 120 among 142 surveyed countries in the global rule of law rankings.[[6]](#footnote-6) It shows that democracy and rule of law has always stood at crossroads in this state. Instances are galore that an apparently neutral or innocuous piece of legislation can turn out to be an instrument of dismantling the rule of law at the expediency of the rulers. In order to excavate, critique and shed light through the prism of the rule of law and its related concepts, in addition to my observation in several courts and my autoethnographic reflection, I did in-depth interview with some key informants. For instance, I interviewed a person who was one of the politicians responsible for including the rule of law principles in the constitution of Bangladesh.[[7]](#footnote-7) He was among the vociferous critics of the partisan Pakistani policies that generated yawning economic disparity and acute injustices to the people of eastern wing of the then Pakistan.[[8]](#footnote-8) During our conversation, the octogenarian politician vividly exchanged that democracy and the rule of law were the major motivations of the freedom-loving Bengali people who fought vehemently against the democracy-deficit Pakistani rulers.

Like its predecessor Pakistan, Bangladesh follows basic the laws and procedures that were framed by British rulers. However, even after its independence, Bangladesh’s democratic institutions and rule of law culture are yet to take firm roots.[[9]](#footnote-9) The rule of law is thus chosen as the overarching lens upon which the fieldwork was undertaken to investigate the puzzle that making and impact of special criminal laws is best understood by examining the the application of law in its socio-legal context as to how *it feels like*, rather than by alluding to its formal shape alone as to how *it looks like*.

This chapter proceeds with some background information and concepts that will be used in turn throughout the thesis. It then justifies the implication of seleting Dhaka as a research site. Finally, it provides a layout of the thesis.

**1.2 Context**

Bangladesh, a relatively young state in South Asian region, follows a justice system that owes its rules and processes in the British colonial rule.[[10]](#footnote-10) It bears a colonial past alongwith a complicated postcolonial continuum that poses far-reaching implications for subsequent law making and its operation. Although there was no explicit consent from the natives regarding creation of the new legal order in the conquered regions of India, the imposition of a centralised secular justice system is a legacy of the colonial rule (1765-1947). Before the colonial takeover, the criminal laws and processes were broadly based on Muslim *sharia*. However, in Bengal, Hindu law’s ideas of crime and punishment were also in unofficial operation in various ways.[[11]](#footnote-11)

As in 1947, India and Pakistan became independent following the negotiated ending of the British rule, the successive regimes during which Bangladesh has been either under Pakistani rule or independent state will be termed as the postcolonial period.[[12]](#footnote-12) The criminal justice framework of Bangladesh was broadly shaped during British colonial period (1764-1947). Broadly speaking, as far as the legal regime is concerned, most of the laws, procedures and institutions that evolved during colonial rule still govern the postcolonial system of Bangladesh. Upon decolonisation, successive regimes either in postcolonial Pakistan era (1947-1971) or in independent Bangladesh (since 1971) have retained the colonial rules with only peripheral amendment.[[13]](#footnote-13) However, with the passage of time and change in social ethics, the colonial laws have become antiquated to a greater extent.[[14]](#footnote-14) As far as the penal reform is concerned, Bangladesh has either finessed the titles of the old laws or prescribed some stringent procedures and disproportionate sentences by way of enacting special criminal laws. In this way, not only the colonial rules have been in operation, but also some special mechanisms have been imposed with a view to containing some emerging social issues relating to corruption, public safety, offences relating to violence against women, narcotics, hoarding, prejudicial activities to the state, abuse of the information technology, transnational crimes and so on.[[15]](#footnote-15) In many instances, the goals and purpose of the new laws are not well- articulated, rather they remain broadly imprecise. In other words, a piece of law apolitically framed demonstrates some inconsistencies in its application. Therefore, such laws without well-articulated goals and purposes tend to achieve a rather piecemeal solution to the already overburdened criminal justice system.[[16]](#footnote-16)

It is pertinent to note here that the Penal Code 1860, the principal substantive legislation, makes a definitional reference of the special law.[[17]](#footnote-17) Interestingly, such laws owe their genesis to the colonial rule and are largely characterised as repressive tools.[[18]](#footnote-18)Although a very few special laws including Arms Act 1878, Explosive Substances Act 1908 were legislated during the British rule, postcolonial regimes have not only kept such unprincipled legislation, but also have enacted a series of new special laws. In general, such postcolonial laws offer harsh sentences and stringent procedures in investigation, trial and punishment of many vaguely defined crimes. As the penal law represents the most coercive authority of the state, save the war, observance of due process is ‘indispensable of protecting individual rights and liberties’.[[19]](#footnote-19) However, most of the newly created crimes have been designed in a wider fashion with consequent scope of their misuse and widespread discretion in actual operation.[[20]](#footnote-20) Duplication of efforts often creates problem of procedural multiciplity and confusion. Emerging froms of crime has evolved due to industrialisation, urbanisation, globalisation and changing view of morality. In view of the inadequacies of the provisions of the Penal Code, a series of laws have been enacted to deal with new patterrns of crime. In other words, some noble patterns of crime are made punishable in a plethora of special criminal legislation and other postcolonial statutes. Although special regime is not the mainstay of the central criminal justice regime, its arbitrary operation can turn out to be inconsistent with liberty jurisprudence. Although the rule of law (the right to a fair trial inclusive) is included in the basic features of the Constitution[[21]](#footnote-21), the imposition and application of the postcolonial regimes undermines the rule of law in a postcolonial country that has frequently been exposed to a complex interplay of law, justice and society.

**1.3 Aims and objective**

Although the special penal laws have been aimed at containing many emerging forms of crime, this research investigates how and why they are yet to develop in a coherent fashion and shaped in an appropriate balance.[[22]](#footnote-22) Particularly inspired by the rule of law principles, criminalisation and postcoloniality debates advanced by a growing number of scholars, the thesis will explore the implications of those special laws as to how they adversely impact the rule of law.

**1.4 Research question**

A thorough literature review has led to the formulation of the following overarching question:

Why and how the postcolonial proliferation of the non-codified penal laws is problematic in Bangladesh that aims at achieving the rule of law?

This principal query is broken down into following sub-questions:

1. What are the postcolonial trends of introduction of the special laws?
2. Why has been the growth of the special penal laws since 1947?
3. What is the pattern of use of such laws and how they impact the rule of law?
4. What are the effects of special court’s presence in the criminal justice process?
5. Why or why not the special legal regime adds or subtracts the rule of law?

The objective of these queries is to assess the rule of law versus rule by law debate with reference to imposition, operation and effects of special criminal laws in the context of a postcolonial polity.

**1.5 Research site**

Bangladesh with fascinating historical and political contexts presented a textbook case study for this type of inquiry. Initially, I deemed it fit to collect data from Dhaka, the capital city of this state, and also from a far-flung district, Cumilla. However, my journey to a local distirct was neither possible nor desirable when on-going civil unrest was escalated to the whole country. After some initial contact with prospective interviewees of a peripheral district- Cumilla, the participants of that area seemed to be more taciturn than those who practiced in Dhaka, a metropolitan area. Moreso, the courts and the law chambers in the periphery were found to be less organised and imperfect. Pragmatically, Dhaka was selected as the primary location of this research for analytic and practical reasons. I also thought that use and impact of the special laws would be highly felt in the courts situated in capital city. Practically, it was anticipated that choosing Dhaka as the research site would make it easier to have relatively smooth access to the interviewees whose residence and working chambers were in Dhaka. Court observation in the capital city area was also daunting during violent political chaos as my family members were concerned for my psysical safety during turbulent days of the anti- discrimination movement. Yet, I continued to go to Dhaka courts. Interestingly, at that time some protesters and political dissidents were detained under special laws, an epitome of postcolonial penal reform. Such atmosphere in the streets of the capital city furnished the real picture of administration of such criminal laws as to who encated the law, who practiced the law and who bore the burnt of such problematic regime. In particular, it was perceived that use and effect of such postcolonial reforms could be accurately measured in Dhaka, the legislative centre and also the seat of superior court. Therefore, the capital city Dhaka provided easier access to data and interviewees pertient to my research topic.

**1.6 Limitation**

This thesis has not encapsulated the whole landscape of the postcolonial criminal law regime, rather its analysis is confined to the postcolonial special laws and related processes alone. Numerous sporadic postcolonial legislation that do not provide for separate trial courts (popularly known as minor laws) are beyond the radar of this study. Penal issues concerning the environment, armed forces, international crimes tribunal, tax appellate tribunal, and customs issues are also outside the purview of this research.

**1.7 Contribution**

This research aims to advance a meaningful conversation among the legal professionals, academic scholars and policy makers in Bangladesh and beyond. This thesis furnishes a nuanced analysis of a particular law reform of a postcolonial state. In this way, it seeks to unfold the story of penal reform of a volatile state, and the peculiar interplay of its law and politics that bears considerable value for the societies with similar legacies and struggles.

In particular, this thesis bears novelty in terms of research methods and framework that was deployed to understand why certain legal regime of postcolonial period has turned out to be either inadequate or inappropriate in the context of institutional weaknesses of a democracy-deficit state. Plainly speaking, Bangladesh’s postcolonial special regime *per se* cannot be termed as at odds with the rule of law, yet empirically they form a host of thorny manifestations of rule by law approach. This is one of the pioneering socio-legal analysis of an under-researched and least discussed terrain of some laws and processes that are historically and contemporaneously contingent. It advances that such a penal reform, incoherently developed, intellectually compartmentalised, arbitrarily imposed and arbitrarily practiced in fragile institutions, not only invites a plethora of instances of miscarriage of justice, but also leads to dismantling the rule of law ethos. It also engages with some practical methodological obstacles confronted by the researcher in a hostile environment on the ground due to confrontational civil and political unrest, in addition to common bureaucratic, manual and tight-lipped atmosphere.

**1.8 Thesis layout**

This thesis is a combination of seven chapters that bring together the commonality of objective indicated above. Following this brief introductory focus, chapter 2 sheds light on the evolution of the criminal justice system and political context of Bangladesh. Its aim is to present the historical landmarks and issues about criminal law reform and to exaplain the present research in its proper perspectives.

Building upon discussions on the nature of the problem and background information as depicted in the previous chapters, Chapter 3 examines dominant theoretical and conceptual approaches to rule of law, criminalisation and postcolonial studies with a view to locating the thesis within the jurisprudential perspectives. Analyses of major theories and concepts together with their contextualisation will furnish a useful lens that will be explored for appreciating the subsequent findings and discussion. Critically engaging with discussion on the major attributes of the classical rule of law debates, this chapter gradually makes references to some recent works on rule by law in the context of postcolonial soceities that has relevance for analysing Bangladesh’s peculiar interplay of law and governance. It concludes with reflections on ontological standpoint of the research.

Chapter 4 presents the methodological approach that has been chosen for the research. A brief discussion on operationalisation of the main problems precedes the reruitment and sampling criteria and related processes. I carefully adhered to the ethical issues of fieldwork that will be referred to next. I have encountered a host of challenges while conducting the empirical work that will find a place in this chapter.

Chapter 5 will showcase the findings gathered from the dataset. It zooms on the analysed narrations of the interviewees who volunteered to disclose their own stories. This chapter continues with the findings of my own experiences as an active participant in the criminal justice system together with my court observation.

Chapter 6 critically analyses different approaches to special criminal laws and processes in view of the findings indicated in previous chapter. In doing so, after recapping the context of Bangladesh’s penal landscape, it specifically scans the laws and procedure of different eras. It also refers to why such laws are used as means of social and political control. In addition to identifying the procedural irregularities *vis-a-vis* challenges of legislative process, it also sets a historigraphical lens into trends of penal reform. In sifting and analysing the predicament of the major stakeholders, it concludes that incoherent special legislation leaves wider scope of arbitrariness due to some formidable challenges of the justice institutions.

Following a summary of the findings, Chapter 7 discusses the implications of the analysis made above. Drawing on theoretical framework and empirical evidence, it recaps the ways in which more granular picture of structural and textual analysis of certain criminal law reform can be made. It also highlights the novelty of the research. Finally, it argues for a coherent penal reform in an appropriate balance.

**CHAPTER 2**

**THE POLITICAL CONTEXTS AND THE EVOLUTION OF CRIMINAL LAWS**

We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic struggle for national liberation established the independent, sovereign People's Republic of Bangladesh.

(The Constitution of Bangladesh, the preamble)

Following an introductory note on Bangladesh and its brief political trajectory, this section gradually sets a historiographical lens to the evolution of criminal laws during pre-British period. In turn, the transplantation of modern criminal law during British period will also be referred to in brief. Thematic issues and amendments of the Penal Code, the principal penal legislation, together with trends of proliferation of special penal laws are pointed out in next part. After exploring the dynamics of imperial codification and postcolonial half-hearted penal reforms, a brief conclusion finally wraps up this chapter.

**2.1 A snapshot of a postcolonial state**

Bangladesh principally consists of an area whose territory changed significantly during past two thousand years.[[23]](#footnote-23) Historically, it was the eastern part of the Bengal *subah*. For long, it was a semi-autonomous rural society whose peaceful life was frequented by occasional political hiccups. This territorial zone was referred to as either one Great Bengal or many tiny Bengals. During pre-Muslim period, Bengal was divided into some loosely demarcated independent parts. From 1204 to 1757, Delhi-based Muslim empires under various dynasties consolidated their sway to Bengal. However, during this period, Bengal remained *de facto* autonomous for about 300 years.[[24]](#footnote-24) Despite political upheavals, it generally remained an economically stable country. For instance, Smith in his ‘The Wealth of Nations’ pointed out that Bengal was the richest province of ‘Industan’.[[25]](#footnote-25) During colonial period, the area what comprises present Bangladesh was part of Bengal province.[[26]](#footnote-26) In fact, Bengal was the epicentre of the British administration (since 1765) until the capital was finally shifted to Delhi in 1931. During partition, there was somewhat a feeble attempt to retain a united Bengal. However, the political rivalry at the centre led to the inevitable partition of Bengal.[[27]](#footnote-27) Upon decolonisation, Bengal was arbitrarily bifurcated and Eastern Bengal became a province of Pakistan in 1947. Ultimately, Bangladesh became an independent state in 1971 in the exercise of its right to self-determination. According to Jahan, late emergence of Bangladesh into statehood was not the culmination of a long historical processes, rather it became a fully independent state due to Pakistan’s failure to integrate it in its political unity.[[28]](#footnote-28)

Since independence, political history of this state can be broadly divided into following eras: populist authoritarianism (1972-1975), military or quasi military rule (1975-1990), the era of representative democracy (1991-2006), military backed emergency regime (2006-2008), era of democratic restoration and weaker democracy (2009-2014), and ‘extreme democratic decline and constitutional autocracy’ (2014- 2024, August 05).[[29]](#footnote-29) During 53 years’ of its political journey, Bangladeshi people succumbed to frequently violation of rights relating to ‘equality, human dignity and social justice’ that were proclaimed as high ideals in the Proclamation of Independence 1971.[[30]](#footnote-30)

Of late, student-led anti-discrimination movement compelled the longest serving Prime Minister to resign and effected the formation of a non-party interim government with Nobel Laureate Professor Muhammad Yunus as its Chief Adviser.[[31]](#footnote-31) Without delving deep into the nature of this unprecedented political crisis, it can be assumed that such protest and uprising cannot be understood in isolation. Because Bengal has perennially been the hotbed of troublesome political protests during precolonial, colonial and postcolonial eras. In the words of Khan, this country had always been a land of rebels due to fierce spirit of independence that was nurtured by its geographical isolation and distinctiveness.[[32]](#footnote-32) Abrupt fall of the immediate past regime, current political landscape has posed both opportunities and challenges for democratic culture and emaciating institutions to flourish in a coherent fashion.[[33]](#footnote-33) For instance, given the vacuum in the political arena and in absence of reference to such interim government in the constitution, it would be interesting to see how the current interim regime consolidates and furthers its commitment towards the path of democracy and the rule of law.[[34]](#footnote-34) However, the Appellate Division of the Supreme Court in a special reference conveyed that an interim government can be formed amidst the situation arising out of resignation of the then prime minister.[[35]](#footnote-35) The interim government seems to be active in initiating some reform agenda in key institutions including public administration, judiciary, police, constitution by forming few committees.[[36]](#footnote-36) In order to try the perpetrators of human rights violations, ratification of International Convention for the Protection of All Persons from Enforced Disappearance 2010 appears to be bold step.[[37]](#footnote-37) However, despite some bright moves of the newly formed interim regime, instances of mob violence, and poor law and order often leave a question mark to the rule of law performance of this government. For instance, Amnesty International raised serious concern for forcibly picking up a model for personal issues with a diplomat at mid-night and also placing her in detention without trial for 30 days under Special Powers Act 1974.[[38]](#footnote-38) Therefore, a question germinates regarding the use of a postcolonial law with such arbitrary provisons that leaves wider room for detaining people for long period of time without concrete allegation and without judicial oversight. In fact, Bangladesh’s state of rule of law generally stands at precipice with deteriorating human rights records due to socio-political upheavals and shifting power dynamics. A recently published UN Fact- Finding Report identifies the reasons of such poor state of governance:

Violations were enabled and exacerbated by outdated laws and policies, corrupted governance structures, and erosion of the rule of law, which readily facilitated the use of disproportionate force against protesters, the militarisation of policing, the politicization of the security and justice sectors, and institutionalized impunity. [[39]](#footnote-39)

**2.2 Judiciary at a glance**

Although ‘this noble but flawed ide any contemporary state, Bangladesh is constitutionally committed to the rule law, and judiciary is entrusted to uphold the democracy and rule of law by fair disposal of the disputes as well as by imposing the just punishment to the convict. The constitution of Bangladesh postulates that Part VI of the constitution deals with judiciary. Bangladesh’s judiciary is broadly divided into two parts, namely, the supreme court or the higher judiciary and the subordinate judiciary. The supreme court consists of two divisions, namely, high Court Division and the Appellate Division.[[40]](#footnote-40) High Court Division has original, appellate, revisional and reference jurisdiction. As far as administration of criminal justice is concerned, HCD has appellate power provided by the Code of Criminal Procedure 1898 or any other statute. For instance, any order and sentence passed by the Special Tribunal established under Special Powers Act 1974 is amenable to HCD.[[41]](#footnote-41) In addition, HCD has intrinsic inherent power under section 565A of the Code of Criminal Procedure to make any order to prevent an abuse of process and also for ends of justice.[[42]](#footnote-42) Most significantly, the constitution conferred writ jurisdiction to the HCD whereby fundamental rights guaranteed under the constitution are exercised.[[43]](#footnote-43) More so, death sentence passed by any subordinate judge is always subject to confirmation by the HCD. Furthermore, HCD has general advisory and supervisory jurisdiction over administrative and judicial matters of subordinate judiciary. HCD can pass or confirm any sentence prescribed by law. In other words, its sentencing power is unlimited.

Appellate Division is at the pinnacle of judiciary comprising of a few senior most judges alongwith Chief Justice of Bangladesh. AD has appellate, supervisory and advisory jurisdiction. It generally hears appeal and revision against order or judgment passed by the HCD. As far as the criminal justice is concerned, it can pass any sentence or make an order for the sake of complete justice.

Beneath the superior judiciary, criminal courts are classified into: courts of sessions, additional sessions judge and the joint sessions judge. There are also courts of chief judicial magistracy with the chief judicial magistrate as the head while additional chief judicial magistrate and judicial magistrates are part of it. It may be noted that judicial magistracy was initiated by active intervention of the Supreme Court in 2007.[[44]](#footnote-44) There are a plethora of special courts and tribunals instituted under different laws. For example, every sessions judge, additional sessions judge and joint sessions judge shall, for the areas within sessions divisions, be a special tribunal for the trial of offences triable under Special Powers Act 1974.[[45]](#footnote-45) A special tribunal is not only a criminal court as classified in Code of Criminal Code 1898, but is also a court meaning a court of law as defined in article 152 of the Constitution.[[46]](#footnote-46) The judges of such special tribunals function in addition to performing their regular sessions power. In other words, there is no a separate tribunal structure. A judge of regular sessions court deals with offences under the Penal Code 1860 while a judge officiating as judge of the special tribunal has exclusive jurisdiction to try offences under Special Powers Act 1974, Explosive Substances Act 1908 and Arms Act 1878 etc. However, there are other full fledged special tribunals created by the legislature. For example, Suppression of Violence Against Women and Children Act 2000 constituted a tribunal under section 26. Similarly, Cyber Security Tribunal was formed under Cyber Security Act 2023. According to Criminal Law Amendment Act 1958, a special court is designated to deal with offences including bribery, criminal breach of trust, criminal misconduct and scheduled offences under Anti-Corruption Act 2004 committed by the public officials and others. Similarly, many other tribunals can be found under different laws.[[47]](#footnote-47) However, the special tribunals established for dealing with tax issues, abandoned properties, customs etc. are beyond the scope of our research.

It may be noted that in addition to formal justice mechanism, various non-formal settlement practices are in *en vogue* in Bangladesh. Such compromise-type mechanism aims at achieving friendly disolution of some innocuous crimes due to delayed, inefficient, costly and acutely adversarial court processes and the maintenance of social harmony in rural areas.[[48]](#footnote-48) The Supreme Court of Bangladesh not only recognises the role of such informal comprise as a popular mode of settlement, but also encourages the disputant parties to take recourse to this alternative tool.[[49]](#footnote-49) Wojkowska confirms that huge percentage of poor and disenfranchised population in many weaker democracies including Bangladesh resort to such informal justice mechanism.[[50]](#footnote-50) Without fully discarding the value of the local comprise of *quasi-civil* and inchaote offences, it can however be argued that local compromise of serious crimes can undermine the formal judicial system.

Although an independent and strong judiciary is indispensable for the rule of law-based country, apart from acute backlog of cases, some systematic crises haunt the judiciary.[[51]](#footnote-51) As far as the administration of criminal justice is concerned, very nomenclature ‘special tribunal’ is misleading in the sense that such tribunals are by name only, they have all trappings of general court and essentially subordinate to the supreme court, and they are required to follow strict judicial procedure.[[52]](#footnote-52) A question arises whether they can be used to advance some patchy micro-reform agenda aiming at speedy trial of some newly defined crimes. We shall see empirically whether such reforms are ideally and carefully theorised, and whether ‘they together fit into a coherent whole’ of the criminal justice system. Here comes the question of critically examining the adjunct legal processes, their lacunae and effects of such regime. According to a leading newspaper, successive regimes have used lower courts as tools to consolidate political interests in absence of rational and acceptable policies for the transfer and discipline of the judges whose true independence is still mired in political expediency.[[53]](#footnote-53) Such state of governance stems from weaker the rule of law that leaves greater the opportunity for the ruling elites to evade accountability and consolidate their arbitrary rule.[[54]](#footnote-54) In fact, nothing can be more acutely felt than the injustice and miscarriage of justice carried out in authoritarian use of laws.

Next section will make an overview of the evolution of the criminal laws in this region starting from pre-colonial period.

**2.3** **Criminal laws during pre-British period**

Before the conquest of Indian region by the Muslim rulers, the criminal law that was *en vogue* in this region was *sanatana* principles which was at its rudimentary form. The indigenous rules on crimes and punishment were predominantly based on religious dicta and social norms.[[55]](#footnote-55) Sentencing of an offender was mostly considered to be a sort of remorse which purified the character of the offender. Crime and sin were interchangeably synonymous while unbridling disparity of sentence on the basis of different castes was also in operation in ancient Bengal. Admonition, fine, imprisonment, death penalty, forfeiture of property, exile, expulsion from caste and corporeal punishments including whipping and mutilation, the practices of ordeal, blood money, compensation to the victim were the sentencing options. The victims used to take the prosecutorial role in absence of state prosecution. Sentences were invariably executed in some designated public places with a clear eye on deterring the members of a society.

With the advent of *Sultanate* system (1100-1526) by the Muslim rulers, Mohammedan criminal law was initiated. Rules based on Islamic scriptures and practices were gradually conceived and further developed during Mughal era (1526-1757 with intermittent laxity). Bengal was an important administrative unit during most of the Mughal period.[[56]](#footnote-56) Under the Muslim regime, a crime, with some exceptions, was treated as a ‘private wrong’ committed against the injured persons alone. Generally, commission of an offence against the state and the punishment was consequently regarded as the exclusive private right of the victims and their relatives.[[57]](#footnote-57) Further, a Muslim’s depositions were equivalent to those of two infidels while oral testimony of two females was equivalent to one male’s evidence. The deposition of the eye witnesses was of greater value. Some apparently harsh sentencing options including mutation, death, banishment, imprisonment and fine for a small number of offences defined on the basis of moral values were in practice. For example, death or lashing was generally prescribed for extra-marital sex, although that required the strongest piece of evidence. Broadly speaking, the emperor could make supplementary law within the ambit of *sharia*, the practices of the prophet and commentaries and consensus of the recognised Islamic scholars of earlier period of Islamic history. However, victim compensation scheme was a discernable feature of the Mohammedan criminal regime. In practice, the judges who were *mufti* (religious scholars) would administer trial in applying their sense of situation-specificity. [[58]](#footnote-58) However, it was not easy to predict what would be the exact law and punishment in a specific situation. Although there was no control over unbridled arbitrariness of the Mughal Emperors, the people were generally left undisturbed in their traditional rural life, Mughals were rightly credited for introducing and developing a somewhat well- organised legal system.[[59]](#footnote-59) Nevertheless, such justice agencies had decayed to a greater extent because of laxity and venality of the judicial officers and their associates both functioning at the capital and the peripheral regions.[[60]](#footnote-60)

**2.4 Colonial legislative scheme**

During early eighteenth century onward, British colonial onslaught attacked the emaciating Mughal Empire in India, and its legal landscape begun to vacillate at the caprice of the East India Company officials. In 1772 Governor General Warren Hastings first interfered with the local justice system. During 1793 to 1833, an array of 675 company regulations was imposed. According to Malik, during 1790s to 1820 British East India Company imposed a new regime concerning crimes and punishments, and from 1820s the amendments were mostly procedural in nature.[[61]](#footnote-61) Fisch noted that in spite of notoriously defective local laws, Company’s early years’ concern for law and order control was supplemented by incoherent reforms that turned out be more severe, more deterrent and disproportionate.[[62]](#footnote-62) British judges’ lack of knowledge on local laws and culture, too much dependency on local religious scholars, incoherent sentencing practice in overlapping jurisdictions and most importantly urgency of the accumulation of revenue were the predominant reasons that ignited the company officials and then British *raj* to indulge in a desperate legal transplantation illusion. Gradually, company-imposed secular legal norms started to gradually replace the local laws that were hitherto premised on religious ethos and local usages. The state agency accordingly took the prosecutor role in the trial of an offender in a system where the lawyers started to fight for the offenders by all possible means. Consequently, the actual victims of crime were relegated to the status of mere witnesses and notion of consensual justice of the by-gone era simply evapourated. Although the British ‘benevolent despots’ constructed a legal system on the premise of Western notions of freedom, individualism, reasons and justice, early colonial interventions issued hundreds of patchy circulars and orders aiming at administering and revising the existing criminal laws in extant company territory.

Finally, Regulation VI of 1832 effectively abolished Anglo-Mohammedan construct that were assembled together over fifty years from Islamic tenets, company regulations and official circulars. We shall see, massive penal reform followed with the passage of Penal Code1860 together with its practice directives. This approach of law making was often termed as ‘an enlightened and paternal despotism’.[[63]](#footnote-63) However, the scholars of the global south generally appraised that colonial criminal law making was unpromising and race-conscious.

**2.5.1 Macaulay and his codification enterprise**

With the passage of Charter Act 1833, the first Law Commission was formed, and Macaulay was appointed as its chair. In 1837, the Commission officially submitted its report while it was explicitly conceded by a member of the commission that illness and inertia of other members compelled the enthusiastic Macaulay to delve into his long- cherished penal codification enterprise.[[64]](#footnote-64) Highly inspired by penal reform debates of the then England, Macaulay resurrected his codification scheme on the premise of the then British criminal law’s drawbacks. His philosophical motivation and context of codification was summed up by some scholars:

Macaulay embraced Bentham’s ‘science of legislation’ and his aspiration for ‘universal jurisprudence’ after Macaulay developed a close association with James Mill during the passage of the India Charter Act 1833.[[65]](#footnote-65)

Keeping an eye on Robert Peel’s English consolidations, Macaulay also had a glimpse at French Penal Code (1810) of Jean-Etienne-Marie Portalis and the draft Louisiana Code (1826) of Edward Livingston.[[66]](#footnote-66) However, the Macaulay’s draft code went into long hibernation before it could be transformed into a substantive piece of law. Initially, the draft code was transmitted to the judicial members of the Courts at Bombay, Calcutta and Madras who made some marginal scribes on it without making any dissenting comments. Charles Cameron and Daniel Elliot, Indian Law Commissioners then juxtaposed the views of those judges and British Royal Commission’s Penal Code of 1843 with the Macaulay’s original text of 1837. It is to be pointed out that Royal Commission’s Penal Code 1843 is the outcome of the undue long reports about loopholes in British Penal Law. Finally, Indian Law Commission submitted couple of reports in 1847 and 1848 respectively and recommended for the passage of the Macaulay’s draft with no discernable change. Final draft Code underwent scrutiny by the members of the legislature including Barnes Peacock CJ and James Stephen before it set out its journey as a piece of legislation.

Following abortive ‘*Sepoy* Mutiny’ in 1857, the sovereignty of company territories in India was passed on to the British Crown with the passage of Government of India Act 1860. As a part of the British empire, conquered Indian region witnessed a greater change in its political landscape. Perhaps revolution of 1857 necessitated the robust penal reform at the first instance. However, prime objective was recognised to the deterrence that could consolidate its aggressive colonial dominance. Finally, the Indian Penal Code turned out to be a law on 6 October 1860 and came into effect on 1 January 1862. For smooth functioning of the Penal Code, the Code of Criminal Procedure 1861 (only to be substituted with new codes in 1872 and 1898), Police Act 1861, Evidence Act 1872, Police Regulations of Bengal 1943 and Jail Code 1920 were legislated. These laws basically formed the new criminal legal regime in India, and Bengal was the capital of the British bureaucracy.

According to Novak, Penal Code 1860 was legislated in view of criminal justice reform of the then England that includes overhaul of the Bloody Code and paradigm shift in sentencing with an eye on transportation to a penal colony.[[67]](#footnote-67) However, transportation, being introduced as a mode of economic labour for far flung islands, was reported to be more deterrent than death sentence at least in the initial years.[[68]](#footnote-68) In fine, an adversarial system equipped with the passive role of the judges, vehement lawyering, fair evidence and arbitrary law enforcing agencies was drafted by the colonial rulers and imposed upon a society whose members had no explicit consent on its legal transplantation.[[69]](#footnote-69)

We shall examine the Penal Code in later part.

**2.5.2 Outline of the Penal Code and its amendment**

Penal Code 1860, the principal substantive criminal law, was originally divided into 23 Chapters with 511 sections. At the outset, it enumerates certain terms including offence, act, document, omission, common intention, wrongful loss or gain, injury, good faith, abetment and some guiding principles on sentencing.[[70]](#footnote-70) It also deals with some general exceptions that can exonerate the culpability of the offence.[[71]](#footnote-71) Chapter III deals with modes of various sentences.[[72]](#footnote-72) The first few chapters prescribe definitional statements together with sentences in relation to offences against the sovereign authority of the state and public tranquility etc.[[73]](#footnote-73) Chapter X outlines the sentences for avoiding or obstructing the orders or authority of public servants[[74]](#footnote-74) while Chapter XI deals with offences relating to giving false evidence.[[75]](#footnote-75) Offences affecting the public health, safety, morality decency were accommodated in Chapter XIV.[[76]](#footnote-76) Outraging and insulting the religious feelings and sects were also made offences in Chapter XV.[[77]](#footnote-77) Chapter XVI refers to the myriad of offences affecting human body that include murder, attempt to murder, culpable homicide, causing miscarriage, hurt, unlawful confinement, illegal force, assault, kidnapping, abduction, rape etc.[[78]](#footnote-78) Chapter XVII embarks on offences against property that include theft, extortion, robbery, dacoity, misappropriation of property, breach of trust, cheating, mischief, criminal trespass, house trespass etc. while Chapter XX reflects the offences relating to marriage including adultery.[[79]](#footnote-79) Chapter XXI deals with defamation while Chapter XXII defines criminal intimidation.[[80]](#footnote-80) It appears that much importance was given to the offence against property and person while a catalogue of penal principles including series of defences for criminal exoneration were also clearly enumerated in Penal Code.

Let us now have a glimpse at the amendments to the Penal Code. As deterrence was one of the major aims of colonial law making, offences of sedition was included in the Code with a view to silencing any criticism of empire and its policy and conspiracy to commit offences of waging war against state was also made punishable with long term imprisonment.[[81]](#footnote-81) Offences relating to election, for example, bribery, undue influence, false personation, failure to keep election accounts were inserted in 1920.[[82]](#footnote-82) Injurious acts intended to outrage religious feelings of any group by insulating its religion was defined as an offence in 1927.[[83]](#footnote-83) Causing death by accident was made a punishable offence in addition to various genres of homicide in 1870.[[84]](#footnote-84) In 1918, counterfeiting currency notes and bank notes were made punishable offences.[[85]](#footnote-85) During colonial era, Penal Code was amended on 39 occasions.

**2.6 Law reform during Pakistan period**

In 1947, British rule in India ended with the creation of two independent states, namely- India and Pakistan.[[86]](#footnote-86) East Bengal accordigly became a province of Pakistan with a new name as East Pakistan. Government of India Act 1935 served as the temporary *de facto* constitution, and existing laws and institutions of colonial era were accepted to operate in Pakistan. Government of Indian Independence Act 1947 paved the way for creating a constituent assembly that would legislate and frame the constitution. However, it took almost a decade when a constitution was framed in 1956. Although Pakistan was created as a separate state for the Muslim-majority people and there was an explicit reference of Islamic features of law to be made, sharia-based criminal law never found a place. Rather, newly adopted constitution provided for a catalogue of fundamental freedoms on the basis of secular notions of equality and fairness in trial and punishment. It, therefore, leaves a question on the premise of creation of a state on basis of religious indentities. My line of thinking, however, does not lend any support for installing any religion-based criminal laws. By the way, in 1958, the fragile democratic journey of a newly independent state came to end with whimsical imposition of martial law regulations that abrogated the constitution of 1956. As the political and civil unrest engulfed the state in subsequent years, there was a tendency to enact some harsh laws predominantly aiming at controlling the political opponents of the East Pakistan. During this period, section 123A was inserted in Penal Code for prescribing 10 years’ imprisonment for condemnation of creation of state and its sovereignty.[[87]](#footnote-87) Inducing students to take part in political activity was made a punishable offence by the Pakistani military rulers.[[88]](#footnote-88) Public servant obtaining valuable things from person concerned in proceeding or business transaction by such public servant was inserted as an offence by virtue of Criminal Law (Amendment) Act 1953. In practice, ‘acute discrimination towards Bengali people, successive military interventions, curtailment of fundamental rights, imposition of deterrent laws, harsh treatment of political opponents were the hallmark of 23 years’ long authoritative regime in the then East Pakistan’.[[89]](#footnote-89) In order to give a constitutional cover up to the martial law, a new constitution was promulgated in 1962 with an overarching aim of so called ‘basic democracy’. The constitution also declared a host of fundamental rights including the protection in respect of trial and punishment. During the regime, the Penal Code was amended on many occasions and some sporadic repressive laws were also enacted. For instance, 1967 Sheikh Mujubur Rahman, a pioneering political leader of East Pakistan and his comrades were implicated in a sedition case in a newly constituted special tribunal.[[90]](#footnote-90) This is popularly known as Agartala conspiracy case. As popular movement intensified with an aim of the autonomy of East Pakistan, state withdrew the charges of Agartala case. The way state mechanism tried to some political leaders and finally non-prosecution of the case implies that operation of criminal laws was contingent on political expediencies of the ruling elites. Such arbitrary use of the legal tools to criminalise mass movements raises a question about the quality of the lawmakers and their motivation for making such laws.[[91]](#footnote-91)

Finally, in 1969 General Ayub Khan (1958-1969) who was at the helm surrendered to the mass movement of East Pakistan. However, the ordeal of freedom loving people continued with the imposition of new martial law regulations by General Yahia Khan. However, law and order situation did not improve substantially, political crises continued to worsen. Eventually, in 1970 a national election was held and Sheikh Mujibur Rahman emerged as victorious leader. However, failure to hand over the power to the newly elected leaders, the political chaos reached its pinnacle with brutal military crackdown in 1971, 25 March. Ironically, such military operation was conducted as a coercive use of state power against the unarmed citizens of East wing of Pakistan who demanded their autonomy and legitimate share in the governance of Pakistan. In this way, the worst kind of genocide, arson, torture and looting was set in motion by the military junta of Pakistan that continued for nine months.[[92]](#footnote-92) Finally, the freedom loving Bengali people fought fearlessly and achieved their independence in 1971, 16 December.

**2.7 Independent Bangladesh carries colonial legacy**

In its quest of rule of law, democracy and social justice, Bangladesh attained real statehood on 16 December 1971 following prolonged struggle for its independence. By virtue of declaration of independence (26 March 1971) and promulgation of Laws Continuance Enforcement Order 1971 (10 April 1971), all laws inherited from British and Pakistan era necessarily continued to function in Bangladesh.[[93]](#footnote-93) Bangladesh Laws (Revision and Declaration) Act 1973 made some nominal substitution with Bangladesh in place of province or Pakistan and Taka in place of Rupee.[[94]](#footnote-94) For example, Pakistan Penal Code 1860, (hitherto Indian Penal Code 1860), was renamed as Penal Code 1860. During first decade after its independence, the regime resorted to enacting few special laws with a view to containing law and order. In 1985, colonial sentencing relic, viz.- ‘transportation’ was substituted with ‘imprisonment for life’.[[95]](#footnote-95) Age of culpability of a child was increased from 7 to 9 years in 2004.[[96]](#footnote-96) More precisely defined and classified offence was inserted when causing death by rash driving or riding on a public way was made punishable with up to seven years’ imprisonment.[[97]](#footnote-97) However, following a mass strike of the transport workers sentencing term for such offence was reduced to up to two years.[[98]](#footnote-98) Voluntarily causing grievous hurt by means of corrosive substances was inserted as a corollary offence to grievous hurt.[[99]](#footnote-99) Causing grievous hurt by rash driving or riding on a public way was made punishable with up to five years’ imprisonment (Penal Code (Amendment) Ordinance 1982); however, sentence for such offence was reduced to up to two years’ imprisonment with the passage of Penal Code (Second Amendment) Ordinance 1985. Initially offence of extortion was punishable with up to two years’ imprisonment. By virtue of Penal Code (Amendment) Act 1991 such sentence was substituted with term of imprisonment from 5 years jail to maximum 14 years.

**2.8.1 Special Criminal Legislation**

As stated above, the Penal Code 1860 is the principal penal legislation that defines a catalogue of offences and provides for sentencing options mostly based on the deterrent philosophy.[[100]](#footnote-100) Although the original Penal Code was almost exhaustive, an assumption is that more than 160 years’ old legislation can, in no way, effectively deal with various forms of emerging crime that were not so widely prevalent when codification of the criminal laws took formal shape by the British rulers.[[101]](#footnote-101) Over the years, in tandem with many societal problems relating to rise of corruption, sexual violence against women and children, money laundering, information technology, political movements, the growth, scope and functions of criminal law have increased exponentially. In general, the postcolonial laws with special procedures that deal with special categories of offences can be termed as special laws. In the absence of regular updates to the general criminal laws, a piecemeal response to myriad forms of societal problems has been the postcolonial introduction of the special laws. However, not much has been achieved in terms of coherent legal reform over the last five decades to assuage the effects of the colonial legal framework that predated independent Bangladesh.[[102]](#footnote-102) One crucial effect of such laws is the growth of many special trial forums in which the offenders can be implicated generally under more tougher processes. Although the preambles of the statutes provide some aims, real purpose of such laws is to ensure the speedy trial of specified offences. For instance, a special law generally gives a shorter time-limit for the conclusion of the investigation and trial.[[103]](#footnote-103) Although the sentencing options and procedures prescribed under those laws are mostly generally disproportionate, the conviction rate under special laws remain low due to many loopholes and technicalities of apparent in the system.[[104]](#footnote-104) My initial assumption is that such a postcolonial special trend presents potential problems in the justice system that partly stems from the absence of a coherent legislative reform. More so, provisions of such legislation are subject to use, abuse and misuse the justice officials with wider discretionary power of. In essence, postcolonial special criminal laws and proceedings tend to affect the rule of law ethos upon which the constitution of Bangladesh is at least theoretically premised.

In fine, Bangladesh follows a legal system that was mostly imposed in this region by the British rulers. However, some elements of pre-British periods passed through various stages and has been gradually developed in a historical continuum. The process of evolution has been partly indigenous and partly foreign, and the legal system of the present day grows out of structure, rules and concepts modelled on Indo-Mughal and English law.[[105]](#footnote-105) However, as far as criminal justice is concerned, it is basically built upon British idea of crime and punishment.

In general, the scholars of the East are overly critical of the ‘negative legacies’ of the British transplantation. At the same time colonial administrators are often credited for introducing a centralised legal system on the basis of equality principle, predictable procedural justice and strict reliance on evidence. Although the British rulers had left this region 77 years back, the repressive tools of the colonial era have frequently been used and even innovated upon in a postcolonial setup. Sad reality is that postcolonial penal reform has been peripheral as may be evident in the revisions of the Penal Code 1860 or in the form of enactment of draconian special laws.

**2.8.2 Growth of non-codified penal laws**

It may be specifically noted that the British rulers initiated sporadic penal legislation outside the purview of the provisions of Penal Code. For example, Public Gambling Act 1867, Arms Act 1878, Tout Act 1879, Cattle Trespass Act 1871, Negotiable Instruments Act 1881, Railway Act 1890, Suppression of Immoral Traffic Act 1933, Explosive Substances Act 1908 among the few laws that arguably prescribed harsh sentences. Similarly, Cruelty to Animals Act 1920, Passport Act 1920, Drug Act 1940, Forest Act 1927, Child Marriage Restraint Act 1929, Vagrancy Act 1943 were enacted with a view to deal with circumstances not contemplated by Macaulay. Whipping Act 1909, Official Secrets Act 1923 also provided for separate laws to deal with issues not covered by the Penal Code 1860.

During Pakistan period (147-1971) an attempt was initiated to bypass the provisions of Penal code with passage of few special laws that aim at preventing corruption and electoral issues. Prevention of Corruption Act 1947, Criminal Law Amendment Act 1958 were instances of some laws legislated with special aims and processes. However, due to crises in democracy and more reliance on successive military regimes, martial regulations were frequently promulgated and used as an instance of unprincipled legislation.

In order to combat the declining in law and order, food crisis, natural calamities and other prejudicial activities, Bangladesh resorted to enacting series of penal laws that tended to bypass the provisions of Penal Code. Accordingly, Enactment of Scheduled Offences (Special Tribunals) Order 1972 was set in motion. In 1973 International Crimes (Tribunal) Act 1973 was passed that paved way for trial of the perpetrators who committed some serious offences including murder, arson etc. during liberation war. Finally, Constitution (Second Amendment) Act 1973 was passed that contained preventive detention and emergency power to the President. In combating a series of prejudicial activities Special Powers Act 1974 was passed and operation of such law has a far-reaching consequence in the governance.

During first Martial Law rule, Martial Law Regulations 1975 was promulgated for spearheading summary trial in martial law courts for trial of possession of illegal arms, corruption and other vaguely defined crimes. Special Martial Law Regulations 1976 was also used to try many army officials. In 1978 a provision for separate sentence hearing in criminal trial was inserted in sections 265 K(2) of Code of Criminal Procedure 1898. In 1980 Dowry Prohibition Act was legislated for trial of perpetrators of dowry-related crimes. During second Martial Law regime (1982-1990), Penal Code underwent revisions on five occasions. However, the sentence hearing provision in criminal trial was abolished in 1982. In 1982 Code of Criminal Procedure was amended to provide for specific time limit to complete the investigation and failing which to stop further investigation and to release of the accused. Sentencing powers of the Magistrates were enhanced in 1982. Cruelty to Women (Deterrent Punishment) Ordinance 1983 and Narcotics Control Act 1990 are a couple of laws enacted during military controlled regime.

Ultimately, in 1991 democratic order was restored. Passage of Suppression of Terrorist Offences Ordinance 1992 followed the democratic journey. In order to contain offences relating to violence against women and children, Repression of Cruelty to Women and Children Tribunal Act 1995 was passed that effectively repealed the Act of 1983. Following years saw the passage of Public Safety (Special Provisions) Act 2000, Suppression of Cruelty to Women and Children 2000, Environment Court Act 2000. Although Legal Aid Act 2000 is not a penal statute, it empowers indigent justice seekers, both the offender and the victim, to indulge in a legal fight at the cost of government.

In 2002 Law and Order Disruption (Special Provisions) was enacted while Act for Control of Acid 2002 and Acid Offences Act 2002 were also passed. In 2006, Bangladesh’s democratic journey again came to a halt, and Emergency Power Ordinance 2007 and Emergency Power Rules 2007 allegedly strangulated the smooth enjoyment of civil and political freedoms of the citizens. Promulgation of Anti-terrorism Ordinance 2008 and Anti-Corruption Act 2004 provided for formation of special courts in respect of investigation and trial of specified offences. During this period, many politicians arguably received harsh treatments at the caprice of Military-backed institutions due to pick and chose policy to prosecute or not to prosecute.[[106]](#footnote-106)

However, democracy was again restored in 2008. Following years witnessed the proliferation of special statutes that include Prevention of Human Trafficking Act 2013, Prevention and Protection of Domestic Violence Act 2013, Children Act 2013, Torture and Custodial Death (Prevention) Act 2013, Maintenance of Parents Act 2013, Pure Food Act 2013, Digital Security Act 2018, Motor Vehicles Act 2018.

It would also be profitable to refer to Mobile Court Act 2009. Initially Mobile Court Ordinance 2007 was promulgated in view of creation separate judicial magistracy under the auspices of the Supreme Court. A striking feature of this court is that they would only punish an offender upon his or her confession. By including more than hundred statutes its trial umbrella, such mechanism, run by the executive officers alone, created a judicial parallelism that runs counter to the doctrine of separation of powers, an important corollary to the rule of law. In view of the empirical findings, we shall critically examine this mobile regime in detail in chapter 6.

Although not all postcolonial statutes are special laws, the common thread of all special statutes is disproportionate sentencing options alongwith procedural hardships in investigation, bail, trial and sentencing because they provide for special trial forums, quite distinct from regular criminal courts. They also provide for some overlapping jurisdictions with general penal laws, eg, Penal Code 1860 and Code of Criminal Procedure 1898. While the substantive and procedual laws can be found in these laws enacted from time to time, the constitutional provisions stand as an overarching prism through which substantive validity and application of certain laws can be examined. Although many of the laws seem to be neutral and harmless, their use solely rests on authoritarian application by the justice functionaries. More so, due to Bangladesh’s adherence to some international instruments, Bangladesh is under obligation to enact, revise, repeal the repugnant laws in addition to its commitment to follow the fundamental human rights including the right to fair trial in an idependent judiciary while applying the penal provisions equally and in a fair manner.

**2.9 Constitutional protection in respect of trial and punishment**

In 1971 Bangladesh became an independent state in its quest of equality, human dignity and social justice.[[107]](#footnote-107) The preamble of its constitution specifically refers to the rule of law as an overarching aim of the statehood.[[108]](#footnote-108) Article 7 of the constitution clearly speaks about representative government. However, truly representative government will remain elusive unless free and fair election to reflect the aspiration of the people can be ensured. Further, article 7 mandates all governmental actions to be carried out in accordance with the provisions of the constitution and laws of the land. In other words, state action must be within the ambit of laws alone especially when it curtails the rights and liberty of the citizens. Article 27 posits that all citizens are equal before law. It implies that all public functionaries are under obligation to treat the citizens equally and if there is any infringement of the the rights and liberties of the individual citizens, they will be amenable to the court of law. Article 28 prohibits discriminatory laws and actions by the government. However, doctrine of reasonable classification can be accommodated in governmental actions and policies. Rule of law also requires that individuals should be treated in accordance with law.[[109]](#footnote-109) Article 32 provides that ‘no person shall be deprived of life or personal liberty save in accordance with law’. Article 33 and 35 unequivocally contain a catalogue of procedural safeguards in respect of trial and punishment.[[110]](#footnote-110) In addition to to constitutional commitment to rule of law and fair trial, Bangladesh follows Sustainable Development Goal 16 that specifically posits working towards a system of "Peace, Justice and Strong Institutions". This goal can be related to criminal justice reforms. However, Bangladesh faces huge challenges in updating the colonial and post-colonial era laws due to operational shortcomings of justice institutions in a complex interplay of law and justice.

It may also be noted that Bangladesh ratified International Covenant on Civil and Political Rights 1966, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Convention on the Elimination of all Forms of Discrimination Against Women 1979. Its ratification of these universal rights shows its obligation towards revising and updating its laws and improving its justice institutions. Nevertheless, formidable economic, social and institutional barriers are impediments for the offenders and victims alike for taking help of formal judiciary in significant ways.[[111]](#footnote-111)

A fundamental attribute of the rule of law system is that only a valid statute can allow the deprivation of the liberty of an individual who is found guilty of a declared crime where the conviction is the outcome of a fair and open trial. The right to a fair trial is included in the category of fundamental rights that Bangladesh is constitutionally committed to protect. Indeed, the right to a fair trial is indispensable for the rule of law and it is one of the most safeguards of justice.[[112]](#footnote-112) This right is implicit in the right to life and personal liberty.[[113]](#footnote-113) The right to a speedy and fair trial is an inalienable privilege of the defendant.[[114]](#footnote-114) The entitlement to a fair trial entails a public trial in an independent court. The Code of Criminal Procedure 1898 specifically provides for open justice. The Supreme Court held that the rule of law is included in the basic structure of Bangladesh’s constitution.[[115]](#footnote-115) However, subtle threads of the rule of law have not been consistently followed in the administration of justice as far criminal sentencing is concerned.[[116]](#footnote-116) In particular, with adversarial colonial legacies, Bangladesh’s criminal justice system has focused excessively on imposition of harsh punishment in the form of special penal laws, a hallmark of in post-colonial regimes. In absence of a systematic review of the penal laws, the imposition and operation of such laws create another strain for the ‘under-functioning’ criminal justice system.[[117]](#footnote-117) Although the constitution ideally embraces the rule of law ethos, the democratic practices and the rule of law have consistently declined in Bangladesh.[[118]](#footnote-118) In essence, weaker democratic norms and fragile institutional establishments can weaken the pillars of the rule of law in a country where legal reform has been minimum.[[119]](#footnote-119)

**2.10 Concluding reflections**

To sum up**,** the political history alongwith evolution of the legal system of Bangladesh has shown some fascinating trends of different regimes.In 1971 its democratic journey started as a Westminster-type polity with the law and institutions initiated and developed in colonial era (1765-1947), and continued in postcolonial Pakistani period (1947-1971). Although Bangladesh’s birth as an independent state aims at democracy and rule of law, it has also been exposed to long episodes of democracy-deficit. Even its subsequent exclusionary democratic trajectory remains detrimental to good governance due to absence of checks and balances, prevalent corruption and consequent dysfunction of the state machineries including the judiciary. Although ‘equality, human dignity and rule of law’ have been the inspiring ideals of the independence of Bangladesh, its legal procedure has, in most cases, turned out to be either too cumbersome or dysfunctional for the ordinary justice-seekers. In particular, some of the postcolonial special laws are subject to use, abuse and misuse as they leave room for some arbitrariness in their operation. In practice, inviolable right to fair trial remains no longer sacrosanct in Bangladesh due to politico-legal upheavals once germinated during the colonial period, and further nurtured and intensified in subsequent years. Such a state of governance implies that formal legitimacy of the rules alone is not sufficient, rather it is also concerned with laws in action *vis-à-vis* the extra-legal issues associated with governance and the rule of law.

**CHAPTER 3**

**THE THEORETICAL FRAMEWORK: THE RULE OF LAW**

‘The law’ also means the rule of law and here the allegiance is to the philosophical ideal that we should be ruled by laws and not by men. It means that power should not be exercised arbitrarily or on the whim of rulers and their officials, but should be dependent on and flow from properly constituted authority and from rules written down and approved by some form of representative assembly, it is an admirable and necessary, if partial, safeguard against tyranny.

(JAG Griffith, *The Politics of the Judiciary* (HarperCollinsManufacturing Glasgow 1991) 276)

Previous section has depicted that the evolution of the constitution and the criminal laws has been topsy turvy in nature, and it grows and grows steadily over time in response to the socio-political landscape of this democracy-deficit region. This section seeks to examine the dominant theories and associated topics to locate the study in its proper perspective. This part engages with the concepts of the rule of law, criminalisation and postcoloniality that provide the theoretical underpinnings that helps to understand the implication of a particular penal reform. Accordingly, I will explain and juxtapose the salience, strengths, limitations and perspectives of these concepts and themes with a view to frame a theoretical standpoint that I will follow in carrying out this research. In doing so, I hope to triangulate and integrate several approaches of these interrelated themes to explain the impact of law, justice and society. This chapter concludes by adding that an integrated framework is the most appropriate to analyse how the postcolonial penal regime can encroach upon its constitutional commitment to the rule of law.

**3.1 The rule of law**

The rule of law is a legal principle of general application premised upon legislative and executive sanctions, and interpreted and protected by judicial authorities. In general, the rule of law basically means supremacy of law. The rule of law, as opposed to rule by law, is a core democratic ideal that presupposes equality and fairness in the application of some fixed laws. It aims at protecting the basic freedoms and autonomy of the individuals in a systematic arrangement that follows due process. In fine, rule of law means both the ruler and ruled are ruled by the law alone. A number of scholars and practitioners have attempted to define, expand and critique the ever-elusive conception of the rule of law.[[120]](#footnote-120) In other words, frequently invoked ‘the rule of law’ is an ‘esoteric expression’. At normative level, we have a robust idea of what rule of law entails in relation to constitutionalism and democracy.[[121]](#footnote-121) It is deeply embedded in historical realities of different societies. Yet, philosophical debates about thin way of procedural requirements and thick concept of rule of law including substantive commitments to legal rules are endless due to diverse national histories that gave rise numerous terms including *Rechtsstaat* of German tradition, for instance.[[122]](#footnote-122) In particular, Greek philosophers sporadically referred to the rudimentary elements of fairness in state governance. For instance, Plato envisaged law as the master of the governance and Aristotle was inclined to rule of reasons. Overall, the idea of rule of law either germinated or expanded in the writings of political thinkers of medieval Europe.

In practice, the popular struggle against despots, clergymen and monarchs can be equated with the history of rule of law movement. Through long evolution of legal and political process in Europe and other countries of the world, the concept and the practice of rule of law has attained some sort of maturity, and it is still in the constant process of modification. However, the prominence of rule of law concept was graphically recorded in English legal history, notably in 1215 when Magna carta was signed between the autocratic King James and the disgruntled Barons. Over the years rule of law has become a prominent aspect of British constitutionalism. Law is sometimes presented as a form of salvation while EP Thompson referred to the rule of law as ‘an unqualified human good’.[[123]](#footnote-123) In essence, the aims and legal institutions that developed in England through the eighteenth and nineteenth centuries became ‘a role model for what rule of law was later imagined to be and to achieve’.[[124]](#footnote-124) In particular, in a wide variety of conquered territories including India, colonial rulers introduced English-styled rule of law as they sought to reformulate defective law and culture at the far-flung peripheries.[[125]](#footnote-125)

**3.1.1 Dicey’s account of the rule of law**

Although ‘this noble but flawed ideal’[[126]](#footnote-126) of the rule of law can be traced from time immemorial, Albert Venn Dicey is credited with popularising and elaborating the concept neatly through his *magnum opus* titled ‘Introduction to the Study of the Law of the Constitution (1885)’stated that the rule of law is a trait common to all civilised societies while furnishing explanatory details of the British culture of human dignity and equality. In its classic formulation, the rule of law is essentially a bulwark against the arbitrary exercise of the authority to deny people their individual liberties.[[127]](#footnote-127) It embraces three major attributes. First, ‘no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land’.[[128]](#footnote-128) Second, the rule of law means the absence of arbitrariness in the functions of the government.[[129]](#footnote-129) Third, the rule of law implies equality before law.

In sum, it is possible to pinpoint two conceptions of the rule of law: a formalistic, or thin definition and a substantive or thick definition. The former simply focuses on procedure while thick definition in contrast takes note of normative standards of rights, fairness and equity. For instance, a pragmatic approach can be found in the definition used by a thinktank:

The rule of law is a durable system of laws, institutions, norms, and community commitment that delivers four universal principles, accountability, just law, open government, and accessible and impartical justice.[[130]](#footnote-130)

Critically analysing the major attributes, strengths and limitations of the rule of law, this part gradually makes the case for the relevance and justification of a suitable framework that will be taken in this research.

**3.1.2 Understanding law**

Now, a pertinent question arises about what the law is or should be. Law, in its generic sense, is a set of rules of action or conduct prescribed by a law-making authority having binding legal force. For instance, constitution of Bangladesh defines law as:

‘Law’ means any Act, ordinance, order, rule, regulation, by-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh.[[131]](#footnote-131)

According to Dyzenhaus, the idea of law within the rule of law sometimes become ambiguous between the positive law and the principle of legality.[[132]](#footnote-132) Although Hobbes has no reservation against autocratic legalism in the sense that law is mere command of the sovereign, his idea depicts an imagined emergence of political order.[[133]](#footnote-133) The essence of law also attracts the attention of the other political scientists including Bentham and Austin who fundamentally lean towards Hobbes’ idea of legal positivism.[[134]](#footnote-134) In twentieth century, Hart (1961), Kelsen (1967) and Raz (1979) endorse this positivist approach with respective refinements. However, Fuller articulates what are known as eight desiderata of the procedural morality of law – that a law should be ‘general, widely promulgated, prospective, clear, non-discriminatory, implementable, certain and congruent in aligning laws’ intent and mode of their implementation’.[[135]](#footnote-135) In other words, the concept of law is to be viewed in terms of inner (substantive) morality and Fuller’s model does not align itself with any particular substantive morality of law. Yet, the crux arises how to make a congruence between the promulgated rules and the official implementation thereof. A corollary to this issue is the law-making process or also who are the legislators. This may lead to another query as to how far the popular opinion is reflected in the legislation. It appears that the very normative definition of a law is still contested one as it stimulates complex philosophical questions of legal validity and moral value.[[136]](#footnote-136)

Then comes the role of the justice officials including the police and judges. For instance, as ardent follower procedural justice, Fuller considers courts as essential to the rule of law.[[137]](#footnote-137) Opposing the idea of Fuller’s concept of the inner morality of law, Raz instead argues that the rule of law has a non-encroachment value and there is no such connection between law and morality.[[138]](#footnote-138) Von Hayek, an adherent of Dicey, argues that a government in its actions is bound by laws fixed and promulgated beforehand.[[139]](#footnote-139) However, it may be recalled that unlike Raz and Hayek, Fuller never theorises the rule of law *per se*. Rather, he incidentally touches upon the procedural features of the rule of law. Yet, the perennial tension between law and morality continues to dominate the discussion relating to the elements of the rule of law.[[140]](#footnote-140) Further, when the law is seen purely as a set of rules, one may lose sight of the social and moral dimensions as its purpose.

Relying on general principles, some critical scholars also refer to the aspiration of neutrality, objectivity and determinacy of the legal method that are corollary to the rule of law.[[141]](#footnote-141) Dworkin also sheds light on formulation of the rule of law as a form of political morality.[[142]](#footnote-142) Marxist and feminist theorists rather vehemently castigate the *status quo* nature of the legal regime that can perpetuate existing discrimination that continues in different contexts.[[143]](#footnote-143) Such standpoints indicate that the rule of law is created and nurtured by a ruling class who rules through law, and much vaunted ideals of universality and formalism generally fall outside the ambit of the plight of the proletariat and women’s private sphere. Here lies the question of definitional aspects including universality and formalism. Still, both ideologies generally seem to avoid the value of the formal justice system and the subtle distinction between the rule of law and rule by law or rule under law.[[144]](#footnote-144) Yet, Raz rightfully recognises that social goals may be acquired by way of legislation, be it special enactment or general rules.[[145]](#footnote-145) Nevertheless, equality, fairness and human dignity attributes of the rule of law are opposed to rule by law as the latter may turn out to be a cloak in a system that may be misused by the power-holder. Consequently, the underdeveloped or derailed rule of law institutions in many democracy-deficit jurisdictions fail to limit the abuse of uncontrolled state power.[[146]](#footnote-146)

**3.1.3 The value of Dicey’s concept**

Having identified the features of the rule of law and related constitutional notion on trial and punishment, this part will pinpoint the value of Dicey’s concept to situate my thesis.

Some legal scholars are highly critical of Dicey’s idea of absolute parliamentary sovereignty and unreasonableness in the administrative rules such as French *droit administratif*. Although there is some logic in such critical argument against Dicey, his theory arises out of a peculiar historical and political landscape. Indeed, any theory and analyses including postcoloniality are generated in the context of particular historical and societal milieu.[[147]](#footnote-147) Dicey also misconceives the multifarious functions of a modern state because at that time governmental power was confined to regulatory functions alone. Without impairing the necessity of some sort of consistent discretion in day-to-day functions of the governance, it can be added that at times the distinction between discretion and arbitrariness becomes blurred at the expediency of the officer bearers. For instance, government officials may misuse wider discretion while implementing legal provisions at the grassroots levels, although laws are understood to be applied equally and consistently. Yet, the higher judiciary possesses an effective tool to check the substantive and procedural validity of the provisions of a statute and their operation. Unfortunately, Dicey fails to gauge the greater value of this judicial power. In a country with a written constitution, such principle is included in the category of the ideals of rule of law.

In sum, with its limitations, idea of Dicey has relevance in locating and explaining the rule of law operation in contemporary societies. Although focused on English context, Dicey’s perspective still continues to be useful in understanding the situation of a postcolonial society. According to Krygier:

What is precious about the rule of law is not this or that bit of legal stuff, but an outcome, a state of affairs, in which the law counts, at least as a reliable restraint on the exercise of power, and arguably as more than that as well.[[148]](#footnote-148)

**3.2 Criminalisation and the rule of law**

In this section I will shed light on criminalisation as an essential corollary to the rule of law. Accordingly, different perspectives about criminalisation and penalisation will be anlaysed with a view to refine my perspective.

Although the rule of law has often been dubbed as ‘essentially contested concept’, ‘semantically vague topic’ in the domain of constitutionalism and political discourse, discussion on the rule of law and the penal reform has mostly been either indirect or piecemeal.[[149]](#footnote-149) Yet, recalling the classical rule of *nulla poena sine lege*, Farmer states that state punishment has been central to modern debates about the rule of law.[[150]](#footnote-150) In his writing on the rule of law, Dicey also engages, to some extent with the process of criminalisation when he postulates that there is no punishment without a breach of a law.[[151]](#footnote-151) His approach clearly suggests that inflicting punishment to a wrongdoer presupposes commission or omission that has already been a defined crime.

In general, the criminal law is an authoritative response to public wrongs.[[152]](#footnote-152) The purpose of criminal law is to give sanctions to those who have committed previously defined crime. A person can only be convicted and sentenced if the allegation has been fairly disposed of before a judicial body that follows some procedural safeguards.[[153]](#footnote-153) In effect, the criminal law is presented as an essential tool for achieving social control.[[154]](#footnote-154) And, punishment is a punitive response by which the sovereign authority inflicts some hazards to the body or property of person who is convicted in a court of law. The object of punishment is to save the members of a society by ‘deterring potential offenders, by preventing the actual offenders from committing further offences and by reforming and turning them into law abiding citizens.’[[155]](#footnote-155)

As the operation of criminal legislation involves some curtailment of the rights and freedoms of the individual, the state’s authority to punish poses a question about what is its legal ambit. This is important in the sense that a criminal conviction involves shame and censure of public punishment.[[156]](#footnote-156) However, a pertinent question arises whether a state possesses an unfettered authority to declare any law that can potentially deter the individuals. Essentially, there are some constitutional limits on such state authority as a law should conform to some the essential attributes including legal validity and moral value. There is also perennial tension between the privilege of the state and the rights of the offenders. It can be recalled that some procedural safeguards including right to equality before law, presumption of innocence, right to public hearing, right to a competent and independent tribunal, right to informed of charges, right to adequate time and facilities for defence, right to legal representation, right to examine witnesses, protection against self-incrimination, right from double jeopardy, right to appeal, prohibition of retroactive law form the core of right to fair trial of an accused. Such fair trial right follows the trends as to how criminal wrongs are defined, framed and structured by a state.

**3.2.1 Evolution of crime and punishment**

In earlier societies, penalty has generally been arbitrary, crude and brutal as the notion of crime and punishment has been quite vague. This is mainly due to absence of a centralised political authority. Over the time the statehood has started to gain currency and idea of criminalisaiton and punishment has continued to develop. Elias calls it ‘civilizing process’ that shows ‘substantial reduction of use of overt physical violence and an increase in the intensity of psychological control’.[[157]](#footnote-157) As the feudal, land-based societies advance towards constitutional monarchies or republics, individual freedom is surrendered in return for state protection against harm from the others. This is known as social contract theory. According to Hobbes, the proponent of this theory, no such mutual obligation between the individual and the state did exist before the formation of a sovereign state.[[158]](#footnote-158) This theory implies that citizens abandon their natural rights to use force against the attacker and hand it over to the state that takes authority to apply the rules by creating and maintaining justice institutions.[[159]](#footnote-159) In pre-enlightenment era, penalty has been solely dependent upon the caprice of the monarchs or the local nobles. Foucault illustrates the transition in options of harsh punishment of pre-industrial period to the rule governed sanctions of the industrial era.[[160]](#footnote-160) He shows how replacement of capital punishment to penal confinement has taken place as a part of discipline. Durkheim and Weber conceive the role of law and punishment is crucial for a coherent society while Marx opines that there is a nexus between the importance of labour and the modes of punishment.[[161]](#footnote-161) Such insights with relative virtues and weaknesses are valuable. However, the central issue concerning the state’s exclusive power to criminalise is not so widely debated now; rather the crux is: to what extent and how this coercive power of the state is imposed and exercised over the individuals.[[162]](#footnote-162) In other words, defining and delimiting the respective periphery of political authority and individual autonomy is an issue that merits careful consideration.

**3.2.2 Rationale for punishment**

Obviously, there must be some coherent justification for drawing the scope and contours of the punishment as it poses an infringement on liberty of an individual. Consequently, such approach requires the state to ensure that just punishment is prescribed and imposed given that criminal punishment is unpleasant, retrospective, intentional, legally bound and individuating.[[163]](#footnote-163) To Bentham:

Punishment is only justified if the harm it prevents is higher than the harm inflicted on the offender by punishment.[[164]](#footnote-164)

Although Bentham’s philosophy plays a dominant role in popularising the deterrent theory, the essence of such utilitarianism can be traced in the classical works of Beccaria, Hume and Helvetius.[[165]](#footnote-165) In this connection, I would like to refer to John Stuart Mill’s ‘harm principle. According to Mill, ‘harms to other’ is the precondition of criminalisation.[[166]](#footnote-166) Millain term ‘harm’ may be defined as violation of the rights and interests of the person harmed. The ‘harm principle’ gives importance to individual freedom. However, not all offences are justified within the ambit of this formula. For instance, a drug-addict causes no harm (direct) to others, but he or she may become a burden for the society. In a way, his or her conduct causes harm to the society or society’s morality. It appears that defining the extent and levels of ‘harm to others’ is always shrouded in vagueness. Such principle is also silent if the person-harmed gives assent to the conduct in question. With its limitations, ‘harm principle’ is still a catalyst to the discussion on criminalisation.

**3.2.3 Crime and Morality**

Another approach to criminalisation is that only morally offensive acts should be criminalised. This is also known as the offence principle. Feinberg is the chief proponent of this principle who leans towards moral or legal ground for enshrining an individual’s behaviour.[[167]](#footnote-167) However, sometimes it is not easy to define morality as its definition varies in different contexts. More so, not all moral considerations are enshrined in legislation, nor are all statutes necessarily reflecting an ethical norm.[[168]](#footnote-168) Further, there are exponents of the ‘common moralism principle’ who give emphasis on community’s morality. For example, Devlin argues that common morality is crucial for the preservation of a society and that society falters if the moral bonds are somehow relaxed.[[169]](#footnote-169) Nevertheless, defining and measuring such common morality is also a difficult task. Hart makes an objection against Devlin’s thesis by adding that there is no such shared morality in a society.[[170]](#footnote-170) Such common morality approach can also encroach upon the autonomy and privacy of individuals. Still, morality issue cannot be discarded in toto as there is also a balancing need for the safeguard of the majority members of the society at large from the wrongdoings of some.[[171]](#footnote-171) As secular contents are the norms of contemporary legislation, the principle of minimalism is a viable solution to Devlin-Hart debate.[[172]](#footnote-172)

Another school of thought rejects the concept of legal moralism, but relies on a paternalistic approach in which certain conduct is criminalised when it is detrimental to others and the actor himself or herself.[[173]](#footnote-173) Ultimately, the triangular tension of the authority of the state, rights of the offenders and the protection of the society comes to the fore. This may lead us to ponder over what are the aims and justification of punishment. It shoud be borne in mind that branding the offender as wrongdoer is the mainstay to the concept of punishment.[[174]](#footnote-174) This why substantive proportionality is an explicit requirement of law in many jurisdictions.[[175]](#footnote-175) Ashworth points out that proportionality is not only related to the sentencing issues, but also applicable ‘for the process of state penalisation itself’.[[176]](#footnote-176) Farmer advances that ‘the culpability principle is a specific expression of the proportionality principle, which is also a constitutional requirement of the rule of law’.[[177]](#footnote-177)

**3.2.4 Justification for just sentence**

There is not gainsaying that the philosophy, aims and essentially the quantum of punishment find primacy on debates about criminalisation and penalisation. Over the centuries, utilitarianism and retributivism offer philosophical justification for imposing just sentence. Although deterrence, incapacitation and rehabilitation appear to have lost popularity, retribution seems to dominate contemporary sentencing regimes. While utilitarian theories aim at maximising utility, retributive theory requires that an offender should suffer as much because he or she has wrongfully caused harm to the victim.[[178]](#footnote-178) Although the trace of a retributive approach of sentencing can be found in religious texts, Hegel is inclined to explain punishment as a mode of vindictive justice as people at large find pleasure when the offender endures the pain of sentence.[[179]](#footnote-179) However, his approach overlooks the issue of reform of the offender. Obviously, each sentencing theory suffers from some inherent flaws. The upshot is to ensure proportionate punishment, a refined retributive idea, requires some mixed elements of ‘parsimony, mercy, human dignity and solidarity to pursue penal minimalism’.[[180]](#footnote-180)

**3.2.5 Law as a tool of social control**

What follows is: the rationalisation of criminal law is crucial as it is used as a tool of governance and control.[[181]](#footnote-181) In modern times, Garland’s theory of the social foundations of punishment gives impetus to the new thought on crime and punishment when he argues that ‘punishment is a complex social institution that affects both social relations and cultural meanings'.[[182]](#footnote-182) His line of thinking resonates the sociological approach to law. To advance, in the words of a scholar, ‘the criminal law can be understood through its relation with the function it performs in society and the place it has in the political constitution of that society’.[[183]](#footnote-183) Here lies the importance of regular updating the penal laws in view of the shift in values and emergence of some societal problems with the passage of time. While exposing the illegality and injustice of overcriminalisation, Husak rightfully argues that regular revising the criminal law is indispensable for the rule of law.[[184]](#footnote-184) However, criminal law reform has never received adequate attention in many postcolonial states including Bangladesh.

**3.3 Rule by law: Interplay of law, justice and politics**

In this part I will juxtapose the tension and conflict of abusive use of law with a view on postcolonial law and justice system.

Within the literature on interplay of law, politics and justice, scholarly attention exposes how political ideals can purposefully divert the course of law at the behest of the ruling elites. In effect, spurious notion of the rule of law or more specifically the rule by law is in severe tension with the aspirations of the rule of law. Holmes opines that rule of law and rule by law presents a lone continuum and do not invite mutually discarding mechanism. However, Tamanaha rightfully makes a clear distinction between two.[[185]](#footnote-185) Accordingly, Krygier observes that:

Mere existence of law by itself does not necessarily bring the rule of law. In many states, law has been conceived of, and is wielded, as an instrument for repression or at least top-down direction of subjects, and little more. Indeed, law has often been very useful vehicle (and at times equally useful camouflage) for the exercise of unrestrained and uncivilised power. Where this is so, law does not rule, but is an instrument of rule; in the common distinction, rule is by law and not of law.[[186]](#footnote-186)

An increasing number of works also have examined the trends of the rule of law in postcolonial polities where there are instances of democratic regression.[[187]](#footnote-187) According to some scholars, the rule of law project for each state requires to be negotiated by the indigenous population with reference to local cultural moorings and governance issues prevailing in that country.[[188]](#footnote-188) Nevertheless, the rule of law model should adhere to certain minimum standards with an aim of keeping political use of law in check. In this context, it is safe to advance that explosion of rule of law projects under the auspices of global organisations and developed states aim at assisting the developing countries to reform their laws and institutions based on some rule of law indicators. Although the success rate of hugely spent rule of law movements is matter of critical evaluation, vaguely understood rule of law concept has turned out to be ‘a core legitimating principle’ of the contemporary state of governance around the globe.[[189]](#footnote-189)

Overall, despite having some distinctiveness in their approaches regarding the relation of law, justice and politics, above studies will foreground my research in its proper perspective.

**3.4 The Dual State**

In this regard, it would be profitable to contextualise and theorise our discussion with reference to Fraenkel’s ‘Dual State’ thesis. In his seminal work, Fraenkel observed that dualism describes a single state which seems to be Janus-faced with regard to the substantive legality and the operation of law. In essence, dual state thesis is initially located in the concrete historical realities of genesis and further development of Nazi system. Fraenkel tried to expose the principles of governance and the use of law as a strategy of autocratic legalism. In other words, such dual state involves the rule of law with pick and choose reservation; it is not inviolable rule of law. The bifurcation between normative state and prerogative state exposes prominence of formal reasonableness in the normative state as well as the presence of substantive irrationality or injustice in the prerogative state.[[190]](#footnote-190) Before delving deep into the dynamics of Nazi politics of judicialization, let me give a general idea about what was dismantled in Nazified Germany.

**3.4.1 The German concept of *Rechtssaat***

Dicey is genuinely credited for giving precise account of the rule of law in the context of English regime. However, German concept of *Rechtssaat* was *en vogue* long before Dicey elaborated his ideas. The values of *Rechtssaat* gained momentum during 1848 revolution when the liberal activists invoked this doctrine with an eye on individual liberty and protection from arbitrary encroachment to life and property.[[191]](#footnote-191) However, Immanuel Kant’s idea of *Rechtssaat* could not be in application due to massive debacle of movement of 1848 in presence of an omnipotent authoritarian regime. Finally, a rather middle course was advanced that governmental actions should be exercised in accordance with existing laws with no scope for arbitrariness. In fact, German variant of rule of law was historically, philosophically and semantically different to Dicey’s rule of law concept. At best, it can be referred to as ‘govern by way of law’ because the supremacy of *Rex* over *Lex* is not applicable to the German idea of *Rechtssaat* .[[192]](#footnote-192)

With the emergence of Nazism, the German variant of the rule of law started to falter between different meanings of *Recht* (law) and *Staat* (State).[[193]](#footnote-193) Although fair application of laws was a universal attribute of a polity, Third Reich in Germany allegedly thwarted the *Rechtssaat*. A question was whether there was any semblance of law during Third Reich. It was rather evident that the Nazi state was inherently categorised into two. In the first place, the Nazi regime controlled everything through the use of criminal law that fell within the ambit of political affairs. However, there remained a thin way of taking the help of law for civil and economic affairs available for the people of Aryan origin alone. Fraenkel, champion of resistance lawyering during Nazi period furnished a critical evaluation of the ways in which formal legislation and judicial processes were used in the service of Nazi authoritarianism in 1930s. This was the framework upon which Fraenkel formulated his dual state thesis. It is interesting to note that a dual state was in operation in the Stuart monarchy of England in which omnipotent prerogative state was in tension with a normative half.[[194]](#footnote-194) In fine, England’s history of seventeenth- century also unmasked a spurious notion of rule of law- a dual state.

Let us have a look at the contemporary societies. For instance, Meierhenrich applied Fraenkel’s equation with apartheid in South Africa while Hendley used it with reference to Russian lopsided legal system where regular cases have been disposed of by following fair legal rules while legal affairs involving complex politics have been handled by undue interference by the executives.[[195]](#footnote-195) It may be noted that Bangladesh, a postcolonial state, has also been exposed to long episodes of democracy-deficit. Even its subsequent exclusionary democratic trajectory also poses detrimental effects to good governance due to dysfunction of the state organs including the judiciary. Although ‘equality, human dignity and rule of law’ have been the inspiring ideals of the independence of Bangladesh, its legal procedure has, in most cases, turned out to be either too cumbersome or dysfunctional for the ordinary justice-seekers. Therefore, in practice, inviolable right to fair trial remains no longer sacrosanct in Bangladesh due to politico-legal upheavals once germinated during the colonial period, and developed and intensified further in subsequent years. Although Fraenkel fails to make a differential classification among the categories of dictatorship,[[196]](#footnote-196) his dual state thesis presents a relevant context for excavating the Bangladesh’s challenges of the colonial legacies and postcolonial repression in a comparative and contextual perspectives. Against this backdrop, this part sheds light on how subsequent postcolonial regimes resorted to this theorem in containing the dissidents in their respective regimes.

**3.5 Postcolonial legal politics**

While writing in the context of postcolonial Sudan, Massoud points out that successive authoritarian regimes have sought unprecedented control over lawyers, judges, police officials and even legal academics while simultaneously investing huge resources in constructing courts, prisons, bar or even law schools.[[197]](#footnote-197) Further, international rule of law projects also have carried out their noble works of assisting in law building and awareness. Yet, it seems that the path to rule of law has been in chaos. The way Massoud has mapped out Sudan is a suitable guide to analyse a particular situation of Bangladesh as both share same legacies and similar challenges. However, my methodological approach and research topic would be distinctive and narrower in the sense that it deals with a particular form of postcolonial legal regime, instead of permutation and combination of politics of law as a whole. It is better to divert our attention to postcoloniality to situate our study within the rule of law framework.

**3.5.1 Understanding postcoloniality**

The term postcolonial is a historical marker that refers to certain periodisation after formal decolonisation. It also indicates significant changes in intellectual approaches to analyse colonialism and its continuing effects. Although different scholars have followed diverse perspectives, Said’s Orientalism is the most influential text that theorises postcolonialism as a discourse. For Said, ‘Orientalism’ needs to be understood as a discourse by which European culture was able to manage -- and even produce—the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during post-Enlightenment period.[[198]](#footnote-198) In line with such thinking, a growing number of scholars have attempted to unmask the Western constructions of the binary- the coloniser and the colonised, centre and periphery, law and lawlessness, civlised and the savage.[[199]](#footnote-199) Such standpoint implies that some ‘primitive otherness’ is evident in grand narratives of progress and civilisation of the colonisers. In other words, postcolonialism foregrounds the colonial legacies to understand the culture of socio-political, cultural- historical and racial differences affected by the imperial process from the moment of colonisation to the present day.[[200]](#footnote-200)

**3.5.2 A historical gaze into colonial lawfare**

In general, the imperial aggression of the colonisers is often termed as an attempt to humanise and modernise primitive societies that were lagging behind in terms of development, rationality and enlightenment.[[201]](#footnote-201) Colonialisation of Indian region is also depicted as a mission in this direction. In particular, viewing law as an insignia of civilisation and progress, colonial rulers started to interfere with the administration of justice and then undertook full scale codification. Colonial rule of law project was premised on utilitarianism.[[202]](#footnote-202) It may be recalled that Bentham’s utilitarian philosophy originally sought massive reform in the archaic common law based penal law in England. Although having some tension with Bentham’s idea, Mill took initiative for codification in a faraway colony, India. Perceived justification for codification, as a part of colonial the rule of law project, was that the local laws on crime and punishment were defective, obscure and scant.[[203]](#footnote-203) This is a highly contested claim of the colonial rulers. Skuy, however, rightfully shows that the defects in England’s own legal system rather motivated the codification scheme in India.[[204]](#footnote-204) Research by Malik, Tharoor, Singh and Kolsky draw out how haphazardly colonial rules were imposed and executed.[[205]](#footnote-205) Although it is often claimed that the rule of law is the greatest single benefit that India received from its colonial rulers, some scholars conclude that the notion of ‘utilitarian universality’ remains vague and unpromising in the case of penal law reform in colonies.[[206]](#footnote-206) Regarding imposition of a new system, Fisch’s observation seems quite logical:

It was introduced mainly by the needs of a foreign power in establishing a centralized bureaucratic rule over a distant empire.[[207]](#footnote-207)

In fine, the colonial rulers designed colonial laws to promote colonial governmentality. However, rich historical, social, cultural and legal milieu of the colonised people was fundamentally compromised whenever the colonial rulers set out their coercive authority in the name of legal reform. Such colonial lawfare aimed at consolidating colonial dominance over the colonised people by way of artificially imposing legal frameworks, processes and institutions that might not adequately consider the interests and culture of the local people. Upon decolonisation, such legacies including laws, frameworks and institutions continue.[[208]](#footnote-208) In many significant ways, a country’s colonial past and postcolonial present led to a historical continuum.[[209]](#footnote-209) Raz applies ‘the doctrine of legal continuity’ to consider whether two different legal systems belonging to different times and contexts can be treated as the same system.[[210]](#footnote-210) This approach explains how laws continue to remain functional despite some drastic changes have taken place by way of independence of a new state, for example. Burra suggests that concept of ‘colonial continuity’ obscures the notion about postcolonial laws and issues as defining the very term ‘colonial’ is problematic when applied to laws and institutions in India’s colonial past.[[211]](#footnote-211) Still, colonialism involves a distinctive periodisation that formally ended in Indian region in 1947.

However, upon decolonisation, many postcolonial regimes have not only retained such colonial special laws, but also have innovated with more severe laws and techniques in the name of curbing new forms of crimes like terrorism.[[212]](#footnote-212) In the words of Spivac, the rupture of decolonisation repeats the rhymes of colonialism with consolidation of distinctive trends.[[213]](#footnote-213) For example, the genesis of the non-codified special laws can be found even during the colonial period. Arms Act 1878 and Explosive Substances Act 1908 etc. are examples of harsh legislation that were used against the anti-colonial political activists.[[214]](#footnote-214)

While episodic penal revisions add fuel to the recurrent crises of the colonial laws in Bangladesh, deterrent aim of ‘governing through crime’ appears to have reinvigourated in the form of the special criminal laws. However, theoretically faulty and systematically discriminatory laws are inconsistent with the basic attributes of the rule of law and justice.[[215]](#footnote-215) I will accordingly investigate how and why the postcolonial proliferation of special penal laws that had its roots in colonial lawfare also impacts the rule of law. Such approach is plausible as Brown suggests that a historical gaze into ‘colonial lawfare’ can be helpful to fathom the contemporary challenges of rule of law making.[[216]](#footnote-216)

**3.6 Dynamics of use of law: Shadow of dual state**

There is no denying that the principal function of law and courts in a regime is the efficient and disciplined exercise of state power. Ironically, many of the same justice institutions that we associate with liberty jurisprudence- elections, legislatures, law and courts- can be notoriously deployed as lethal instruments to manipulate representative democracy thereby constraining liberty rights.

In Global South, instances are galore in which law and legal functionaries can become increasingly oppressive by dint of unbridled arbitrariness and impunity they enjoy. Too much reliance on prerogative powers can frequently permeate into the government agencies in which corruptions and nepotism also become dominant in the judicial system and other state organs. Ultimately, prerogative powers can also effectively encroach upon the normative state and dismantle the formal rationality attached with it through subservient judicial orders and extra-legal oppressive measures of the submissive security forces. Extra-judicial killing, enforced disappearance, torture in police custody, detention without charge are few brutal examples in this regard. In this way, omnipotent political executives massively rely on prerogative powers in the exercise of dual state practice. However, rule of law rhetoric of the hybrid regimes may aim at facilitating fair disposal of cases relating to civil and commercial matters. Therefore, in order to evaluate the postcolonial repression and rule of law with reservation, dual state structure seems to be a relevant lens for fathoming a nascent state like Bangladesh. Such approach is relevant for a state where the democratic institutions including the judiciary have generally been in crisis. According to a scholar:

The protracted delay in institutionalising the complete separation of the judiciary from the executive organs continues to constrain the independence of the lower judiciary while the upper judiciary has also been exposed to controversy.[[217]](#footnote-217)

If look at the weaker democracies, similar challenges can be evident. For instance, in Singapore legislations and justice institutions can be imparted to control opposition and buttressing party hegemony without deploying excessive forces.[[218]](#footnote-218) While analysing the laws of East Asia, Jayasuria also confirms that state of governance in Hong Kong is bifurcated, and it may be present in similar regimes that precisely follow the shadow of the dual state of Nazified Germany.[[219]](#footnote-219) Through a detailed evaluation of few colourable provisions, Rajah shows that a seemingly neutral law has been a key tool for effectively controlling the opposition parties, constraining the civil society while it apparently embraces the liberal ideas of rule of law as an inheritor of British common law system.[[220]](#footnote-220) It implies that court processes may be subject to executive encroachment especially in controlling the political dissidents. Moustafa similarly unmasks the measures in which law serves as an instrument by which political oppositions can be effectively controlled in Egyptian regime.[[221]](#footnote-221) He metaphorically advances that in some instances the power-hungry rulers deploy judiciary as ‘a fig leaf for a naked grab at power’, and consequently, the rule of law rhetoric thus turns out to be mere lip service.[[222]](#footnote-222) It shows that by rule by law approach, the authoritarian governments can sideline and befool the disenfranchised sections while showcasing the stories of a liberal democracy with the rule of law. Similar narratives of the rule of law as well the pains of the victims can be found in many other consolidated regimes. Likewise, Bali shows that Turkey provides an example of how justice institutions like the judiciary may instead function as a brutal check on political liberalisation.[[223]](#footnote-223) A perennial query can thus be directed whether there is any remnant of liberal ideas of rule of law if democratic space is too constrained in a battlefield of repression. Cheeseman asserts that in presence of repressive laws and special processes in some subservient courts, the rule of law ideals can never coexist in military regimes.[[224]](#footnote-224) It also appears that not all of such regimes adhere to precisely the same methods even though they move to the same direction. For example, many rulers assume power ‘not with bullets but with laws’, and they tend to maintain the rule of law shell of the liberal state, an *ex facie* continuity of same institutions and a rhetoric of safeguards against violation of rights, but continue to removing its moral core by way of using tools of authoritarian rules while same courts and major state functionaries may stand tall. [[225]](#footnote-225)

However, the strength the law and legal institution is that it can turn into a tool of active resistance at an opportune time as may be evident during the twilight of colonialism in India.[[226]](#footnote-226) Having regard to political realities of the fragile states, such approaches can give insight to explain the state of postcolonial penal regime of Bangladesh. Therefore, an assessment and gaze into dysfunctional state of governance is crucially important with a view to replicate good practices. For example, Dann advances that methods and approaches to comparative constitutionalism can open up fresh insight emanating from the North, South and the world.[[227]](#footnote-227) He also argues that challenges advanced by decolonial experts can be explored to formulate a fairer system.[[228]](#footnote-228)

Another dilemma is that distinction between democratic and authoritarian polities is often narrower. For example, there may be instances of telephonic justice for political expediency or for private interests of the ruling elites. Telephonic justice can be construed as the undue interference in the administration of justice especially in political matters by way giving instructions from the executive officers. At the same time, day to day mundane commercial case may generally be outside the purview of political encroachment save in case of corruption of the high officials of the government. In this way, dual state nurtures the economy and free market while keeping a close eye on political opponents. However, after some time, prerogative powers tend to engulf other half, the mundane civil cases. In other words, an authoritarian state governs through crime by deploying state tools to consolidate its power while making its political opponents to be criminal enemies of the state and people.[[229]](#footnote-229)

In fine, the writings of Fraenkel unmask the dualism of the nazified legal system. Contemporary scholars of the Asia, Africa and Latin American also show how law and courts are deployed to strengthen the authoritarianism while accelerating the trade and commerce in few hybrid regimes. Therefore, keeping an eye on challenges of such type of governance, the proposed research will principally juxtapose this spurious notion of dual state in the context of Bangladesh.

**3.7 Concluding Reflections**

This chapter has explored, juxtaposed and integrated some terms and debates to frame and understand the phenomena of criminalisation and postcoloniality with a leaning towards the rule of law. The classical rule of law rule approach as formulated by Dicey provides an obvious theoretical underpinning for understanding the implications of special penal legislation, a discernable hallmark of postcolonial Bangladesh. Indeed, the strength of rule of law lies in its traditional resilience against arbitrariness that can provide an explanatory lens to understand the possible tension between the concepts of law and justice. Establishing a theoretical framework is not only crucial to locate this study within the discussions made above, but also in terms of designing its suitable ontological stance. Indeed, recurrent research and developments in the rule of law, criminalisation and postcolonial studies have led to new research evolving and sharpening our understanding of how an incoherent penal reform can not only create strain in the justice system, but also potentially generate the miscarriage of justice.

**CHAPTER 4**

**METHODOLOGICAL APPROACH: DATA COLLECTION & ANALYSIS**

While native academics face many of the challenges highlighted in existing publications addressing non-natives (i.e., surveillance, ethical questions related to research involving vulnerable populations, access to informants, personal safety, and data security), they also face additional risks and distinct obstacles.

(Kira D Jumet and Merouan Mekouar (eds), *Doing Research as a Native* (Oxford 2025) Introduction)

This chapter sheds light on the selection and justification of data sources that have been deployed in this research. It also highlights practical and ethical challenges in respect of diverse data sources, namely semi-structured interviews and court observation conducted during fieldwork that are supplemented by an auto-ethnograhical reflection in the institutional context where I used to work. Finally, it describes the methods used to analyse the data.

**4.1 Diverse methods**

A scientific inquiry always leans towards some ontological and epistemological standpoints, encompassing, respectively, the nature of social reality and exact ways of knowing about an intellectual puzzle.[[230]](#footnote-230) To be particular, this study adhered to a constructionist ontological perspective in the sense that ‘a social event is rather created’ while remaining faithful to interpretivist epistemological approach that required the contextualisation of certain phenomenon.[[231]](#footnote-231) As a qualitative research generates rounded and contextualised understandings on the premise of nuanced and rich data, an eclectic approach comprising interviews, observation as a researcher, and retrospective workplace-autoethnography is best suited to carry out the current research.

**4.2 Interviewee selection and interview process**

In terms of specific methods, first, I sought to adduce certain perspectives and facts from the interviews of some key stakeholders. Keeping an eye on purposive sampling tradition, finally, I tried to see through the participants’ eyes and interpret the selected phenomena and trends from their point of view. Purposive sampling is one in which the researcher uses his/ her judgment to get all possible means that fit particular criteria.[[232]](#footnote-232) This sampling provided maximum diversity among the participants. As the purpose of such research method was to collect detailed facts from those who were either experts or have practical experience and clear understanding on the subject-matter of the research, I conducted Key Informant Interview (KII). KII is a qualitative interview with persons who are well-acquainted with certain topic. In other words, an in-depth semi-structured interview was a vital method that I employed. My purpose of interviewee selection has resonance with the observation of Mason who opined that a semi-structured interview gave wider scope for detailed conversation between the researcher and the participant.[[233]](#footnote-233) In essence, this method allowed me to decipher the narratives from the key stakeholders who were in contact with the special penal regime.

**4.3 Rationales for interviewee selection**

Interview is a useful way of understanding the interviewees’ perspectives. Therefore, I intended to conduct interviews with diverse groups of participants: lawyers, judges, lawmaker, legislative drafter, human rights activist, victims, and the defendants. Initially, I thought that a semi-structured, face to face interview with all the participants would be the most suitable for conducting this phase of my empirical work. Adopting a semi-structured format enabled a discussion steered by research questions and prompts, but with substantive content largely determined by the respondents. Conducting face to face interviews allowed me to establish a rapport with the interviewee and also to observe their non-verbal communication and tone.

**4.4 Interviewees**

The University of Sheffield enlightened me to be neutral and passive while conducting an interview. I understood my role as inviting a participant only to talk about certain themes, rather than to opine about the themes. My primary duty was to listen carefully with full of curiosity while thinking about the themes alone. However, I faced huge challenges while interviewing the elite participants because most of the KI continued in an unduly long speech. Therefore, many a times, I had to intervene gently and requested them to talk in view of the themes alone. At times, I responded with non-argumentative style to seek a clarification. In order to confine our conversations, I took help from an aide memoir prepared beforehand.

08 interviews were conducted face to face while audio calls were recorded. 3 respondents responded with written answers. However, on several occasions I received phone calls from the participants about the adjournment of the proposed meeting. Yet, I had to be patient. For example, I followed a lawyer for a week on his way to chamber. As the civil unrest took the most violent turn at the last part of my fieldwork, I also had to rely on zoom calls for the rest of interviews as that was the most convenient option. I had to use email and audio calls in cases where the KI expressed preference against face- to- face conversation.

As the special laws have an impact on the governance and the rule of laws issues, the viewpoint and the stories of the practicing stakeholders including the lawyers and judges were of greater value to juxtapose the daily experience of the above-stated participants. A formal dialogue with some officials of the Ministry of Legislative and Parliamentary Affairs and Law Commission was also required to understand the trends of legislative research and the law- making process while the view of a legislator was crucial to fathom how a lawmaker could perceive the passage of the special laws and their practice in view of the state of legislature and other justice functionaries. All the participants except the defendants and the victims-the most vulnerable interviewee, are experts in their own fields.

Following table shows the number of people interviewed in different categories:

|  |  |
| --- | --- |
| Category | Number of people |
| Lawyers | 4 |
| Judges | 4 |
| Lawmaker | 1 |
| Defendant | 2 |
| Victim | 2 |
| Legislative drafter | 1 |
| Drafter of the constitution 1972/ Politician | 1 |

**4.5 Interviewing**

My professional identity as a judge helped me to make an acquaintance with many of the elite participants who initially expressed their enthusiasm to engage in in-depth dialogue and exchanges of their stories about the chosen themes. At the outset, I contacted them via emails and/ or phone calls. Few of them obliged to tell their experience while the rest declined politely. At the beginning of the interview, I started with a known interviewee who not only gave her interview at a mutually convenient place, but also referred me to some unfamiliar participants such as other experts and the defendants. This was something like ‘snowball sampling’ that allowed a non-random strategy in which the researcher began with one interviewee and then, identified other interviewees on the tip off furnished by the first and conveniently repeated the process.[[234]](#footnote-234) For example, a leading a human rights lawyer connected me to a veteran lawyer- turned politician. Initially the aged politician was not willing to give an interview. Following exchanges of emails, finally my tenacity worked. I took it a golden opportunity to listen to live stories from a person who was one of pioneers in the making of the constitutional charter for a new country.

I was prepared with an interview schedule that was approved by the University of Sheffield Ethics Committee. While the research questions were framed in a theoretical tone, I have reformulated the interview questions in the everyday language of so that the particpants could easily understand the querries. This is in complaince with a qualitative research convention as reiterated by the scholars.[[235]](#footnote-235) I followed an aide memoir to address the key questions in order to solicit the most valuable data. However, the most of the lawyers were impatient. After conducting a couple of interviews with the lawyers, I adapted the format so as to cover all the relevant themes. I encouraged interviewees with the follow ups and prompts in order to find any clarification of what was responded. As the interview ended, I always asked the participants to raise any issues that was not addressed in accordance with interview practice in social sciences.[[236]](#footnote-236)

At the outset of the interview, most of the lawyers seem tight-lipped. I had to assure them time and again about the voluntariness, confidentiality and anonymality. Some seem to be self-sensored. While I tried my best to record the interviews by using my phone which was encrypted. At times, I had to rely on notes made during the interview.

**4.5.1 Judges’ tales**

After finishing the interviews with some of the selected lawyers, I tried to collect the stories from my fellow colleagues, the judges. Due to my engagement with the judiciary for long and especially my few years’ stint as a deputy secretary at the ministry of law, I was in contact with many of the members of the judiciary. Initially, they were enthusiastic when I shared my project to them. However, as I sent formal invitation for an interview, most of them declined in the sense that they were not officially permitted to tell about what was going on on the ground. A couple of fellow colleagues officiating in a peripheral district even ridiculed me as if I was a spy or trouble-maker for the *status quo* nature of the judiciary and the special regime. However, they wished me all the best for my academic inquiry as such finding might open a pandora’s box of the legal regime. Whenever I contacted the high officials of the ministry of justice for giving me the permission to talk to the special judges, initially they seemed reticent. After some time, a ministry official directed me to the registry office of the supreme court to have its consent. Whenever I went to the supreme court registry, they advised me that there was no need to obtain formal permission from them, it rather might fall within the ambit of ministry’s work. In this way, I was trapped in a vicious red-tape of judicial bureucracy both at the ministry of justice and the registry of the supreme court. It may be mentioned that appointment, posting, discipline etc. of the judges of the subordinate judiciary were usually caught in the dual rule played by the executive-led ministry of justice and the judiciary-led supreme court registry office. Finally, a high-level official at the registry office advised me that you could gain insight from your colleagues for academic purpose, and there was no need for any formal approval for that. Further, as the court proceedings were statutorily open to all, unless same might be held in camera. Therefore, I took it appropriate to sit as a layman inside the packed court room and tried to observe the proceedings after conducting some interview with lawyers.

**4.6 Discarded idea of collecting judgment**

Initially I was trying to gather some data by analysing the judgments. It was highly challenging to collect judgments and orders from the special courts and the judicial magistracy. Accordingly, I went to a special judge who simply dismissed my idea that they would not provide any judgment, although a judgment is a public document, and a person can collect a certified copy of it upon a petition alongwith payment of some fees. I started to collect a series of judgments available on website of the supreme court. While it was tougher to sift the judgment under special laws, it was also evident from the published precedents of the superior court that they very rarely travelled beyond the clear-cut decision of either conviction or acquittal decisions. In particular, I generally found no or very nugatory trace of critical analysis about rule of law ideals built around questionable practices of special criminal laws. However, apex court very rarely touched upon the critical discourse in this regard that would be appropriated in relevant section of the chapter 6. In this way, some textual analysis of the statutory provisions alongwith the judgment will also find place in our discussion part. However, such approach, not being deployed as a method *per se*, would be employed to locate and interpret certain trends in its proper perspective. This was how I reformulated my methods by discarding the idea of textual analysis of the judgements with the concurrence of my supervisors. This pragmatic approach could be justified as a scholar rightly pointed out:

It is important to develop a good formal research design, while at the same time recogni(s)ing that, once you go out into the field, you have to be very willing to adjust, reconstruct, adapt, or maybe even throw it out.[[237]](#footnote-237)

**4.7 Court Visit**

At first, I visited a tribunal that dealt with prevention of repression of women and children. A victim narrated that she was not getting justice as the accused was freed on bail. She had very little idea about the statutory victim support. A few lawyers told me during formal KII that there was a tendency to file false cases and achieving bail in such court became tougher. The presiding judge conceded that conviction rate in this court was low. It was also interesting to see why a full-fledged criminal court presided by a sessions judge could be termed as a tribunal instead of a court. In the similar vein, it was found that an additional sessions judge who was presiding over a regular criminal court instituted under the Code of Criminal Procedure 1898 was entrusted with the job of a special judge who dealt with cases arising out of Special Powers Act 1974, Explosive Substances Act 1908 and Arms Act 1878. I found it disturbing as the same judge sitting in a same chamber was officiating the role of a special judge in addition to his regular job. As the textual overview of such laws will show that apart from harsher sentences, they provided for strict and special rules of evidence. I could sense that apart from a presence of signboard of special tribunal etc, the actual court atmosphere seemed like a regular criminal court. I had to visit 2 judicial magistrates’ courts (pre-trial supervisory court) to have first-hand experience about the processes relating to cases arising out of a series of special laws. Overall atmosphere inside and outside the court area seemed like a fish-market. It was not easy to follow the flow of cases, rather what caught my immediate attention was presence of robust cage-like dock where the under-trial offenders were brought from the jail custody. I felt *déjà vu* to witness that the offenders were placed under bar fetters! As a young lawyer of the High Court, I fought for prohibition of bar fetters in containing the under-trial prisoners as such colonial practices went against the notion of human dignity and fundamental freedoms. Upon query, a lawyer who sat beside me was surprised to know that in 2005 High Court gave specific guidelines about use of bar fetters.[[238]](#footnote-238) It appeared that neither the lawyer nor the offenders had any idea about illegality of indiscriminate use of bar fetters. He, however, in an informal tone advanced that all suspects and accused implicated under special laws were brought under special security and they were placed under bar-fetters. I saw a huge difference in the court area that within almost two decades, structures of the court got developed with higher security arrangement and the cage-like higher dock.

At last, I had the chance to visit a tribunal that dealt with offences related to cyber security. This is one of the tribunals in which security was tightened. A stony-faced judge with formal black gown and white band took the seat in a higher sitting area that bore the old vestiges of red clothes and other relics of the colonial area. The busy judge was watching the case dockets in blue and grey papers while there were heaves of law reports bounded with black hides embroidered in golden letters. The lawyers dressed up with black gown and colourful tie/ white band were fighting the legal battle for their clients. The defendants stood like devastated persons inside the cage-like dock while the prosecutor vehemently opposed the defence. There were hue and cry inside and outside the court area. A bench clerk loudly declared the case number amidist whispering of the blank-eyed lawyers’ assistants and other onlookers. The lawyers also seemed to impatient. The court compound was glazing with acute sunlight during twilight. On a very day I visited the tribunal, I heard that not a single offender was bailed out given to the offenders. The special courts that dealt with offences relating to prevention of corruption remained more security conscious. I visited the courts as a civilian with a lawyer.

**4.8 Autoethnography: Locating self restrospectively**

As a judge who rose from being a practitioner at district courts to the High Court, followed by ten years on the bench, I had the rare honour of witnessing the recent evolutionary processes and the hindrances of criminal justice system in general and the postcolonial legal reform in particular. Dearth of data source, paucity of reliable literature, taciturn attitude of the participants were also the compelling reasons to supplement the interview with my reflection. My odyssey with the actual and epistemic complex of a particular legal landscape led me to ponder over as to why and how it could be a potential tool for generating instances of injustices in a state where institutional autonomy of state organs is yet to take solid roots. Therefore, I undertook this method of self- reflection due to my long engagement with the institutional and cultural contexts of certain experience that displayed a host of thorny issues regarding particular trends of penal landscape. The value of situating personal experience in relation to empirical research surely enhanced the quality of the findings that provide intelllectual, professional and personal alignment to readers.[[239]](#footnote-239) In this way I simply focused on self-experience in order to fathom the multiple interplay of law and justice. I tried to recall and juxtapose my experience while remaining faithful to the general ethical standards of anonymised narration of the facts involving ‘others’.

**4.9 Ethical issues**

A researcher’s integrity, responsibility and sensible behaviour are at the forefront to the scientific knowledge and the soundness of ethical decisions in qualitative inquiry.[[240]](#footnote-240) Therefore, all ethical considerations for conducting the interview were strictly adhered to. All the participants were furnished with information sheets and informed consent forms to sign. In particular, I abode by more stringent formal ethical requirements for the vulnerable participants. I complied with the University of Sheffield’s guidelines about ethical research as well as General Data Protection Regulations about voluntariness, anonymity and confidentially following approval of the project, application reference number being 044342. I also discarded the idea of collecting selected judgements. Rather I deemed it fit to engage in autoethnographical reflexive approach that would be supplementary to in-depth interviews of the KII and the court observation as referred to above.

**4.10 Challenges of a researcher**

Significantly, I had spent time in the field that posed some challenges as discussed above. I was also heartened by the personal narratives of sensitive nature. I could easily understand the local dialect. There was also a concern of my physical safety. In particular, in the wake of volatile political movement and governtal crackdown to the activists, I found the task exceedingly daunting because I had to blend the dynamics of law and sociology with a historical look into legal issue that regenerated into squabbles of comtemporary politics of a volatile postcolony. Methodologically, I delineated a theoretical framework to juxtapose and explain the facts and stories from key stakeholders. During my field work, chaotic political protests and brutal actions of the law enforcing members went one. As Bangladesh was experiencing serious political turmoil, overall atmosphere in courts and other government bodies were generally tight-lipped. Many countries including the US declared possible visa restrictions over persons involved in hindering in the administration of free and fair election- apart from politicians, police, and election conducting officials, judges are also under US scanner as courts are allegedly being used for arrest, detention and trial of dissidents. After all, there was a constant challenge of conducting empirical work on such a sensitive topic. For instance, a former chief justice had to leave and resign from his office due to (undue) pressure from some quarter and he wrote an autobiographical memoir that showed how he left his office.[[241]](#footnote-241) While I had the privilege of using my professional role to have relatively easier access to the judges and other participants, my new role as a researcher worked as a double-edged sword. I was not fully aware that my standalone approach of ethnography was likely to earn more enemies than friends among the practitioners. While many elite participants view me as a troublemaker because most of them were not that much conversant with academic research. The obstacles originating from the fieldwork location in a repressive state might outweigh the relative advantages of insider’s knowledge of a native researcher.[[242]](#footnote-242) However, my challenges as a native researcher who held an official position in a decaying system further aggravated as the successive regimes sought to unprecedented control over the regime under my scrutiny. Yet, I had to wade through the additional risks as ‘a potential troublemaker’ as tagged by some government-lawyers.

As the interviews with lawyers continued, I approached a few prosecutors for interviews. I made several phone calls to a few prosecutors who at first gave lukewarm response. A seasoned prosecutor even admonished me for undertaking this research in place of presiding as a judge in a court when Bangladesh’s judiciary was grappling with shortages of judges in view of 4200000 pending cases. With some trepidation I went to the chambers of a few prosecutors. They gently expressed that they were enthusiastic to hear about my project; however, without permission from the controlling authority, interviewing with them might make their professional life in jeopardy, they added. This is understandable in the sense that such prosecutors were appointed on the basis of their political affiliations and they remain in office at the sweet will of those who were at the helm of the ministry of law.

**4.11 Data Analysis**

After collecting the data, I analysed them in three phases- preparation, theme identification and finally analysis. First, notes from the court observation was composed. All recorded interviews was transcribed and notes made during an interview will also be composed. I was faithful to the original and natural meaning of the narratives found in the interview. Then Bangla transcripts were translated. However, some lawyers gave interview in English as English is widely used in legal practice in Bangladesh. By reading the transcripts time and again I was able to identify the themes. Such analysis technique would provide well-rounded answers to the research questions. As the next process, suitable themes were identified through reading and re-reading of the printed transcriptions and notes also from secondary literature. After identification of the themes, a chart was used as analytical tool to summarise what was found.

**4.12 Conclusion**

To sum up,the key questions when planning an interview concern the why, what and how of the interview.[[243]](#footnote-243) I prepared myself well-ahead of the proposed interview. While all possible attempts were made to conduct face-to-face interview of the participants, in some cases I had to take notes of what was told by the participant concerned. I was flexible and practical in my approach while I conducted an interview.

Overall, I spent a prolonged period of time in the field that posed considerable challenges due to lack of empirical research culture in a postcolonial country. Apart from the lacklustre attitude of key informants, the atmosphere in courts and other government bodies were acutely bureaucratic and skeptical about disclosure of certain facts reserved in their domain. There was also a real risk in undertaking an empirical work involving truths, biases, assumptions, ethos, and operations of some postcolonial laws in a volatile state. My ordeal in conducting fieldwork further aggravated due to chaotic civil and political unrest escalating in a state that could be at best characterised as a weaker democracy with a deeply flawed application of rule of law principles. My experiences present a sui generis case of methodological barriers undertaken in socio-legal contexts that posed formidable obstacles to a researcher. In other words, my initial romanticism of conducting the fieldwork as a carefree bird drifted me towards a volatile and tight-lipped environment that I had to strategically navigate with tenacity, discipline and resilience.

**CHAPTER 5**

**SALIENCE AND TRENDS OF SPECIAL REGIME:**

**LIMITS OF THE LAW AND ITS PRACTICE**

The rule of law implies that law cannot be arbitrary, and law must be equally applied to all. Not only arbitrary, you see there is a pick and choose, selectivity in terms of who the law is applied to and in what context. It depends not upon what you’ve done, rather who you’re, whether the law will be applied in a particular way.

(A lawyer divulged above viewpoint during my fieldwork in Dhaka 2024)

This chapter presents the findings collected from qualitative analysis based on my fieldwork conducted in Dhaka. I have explored the narratives of the key informants alongwith my research-time court-observation. Finally, above data have been supplemented by my autoethnography as an insider of the legal regime. Some data has been gathered through semi-structured interview with 15 research participants who are either experts or the parties to the criminal cases together with my court observation in 5 special courts and 2 pre-trial courts (court of metropolitan magistracy) in Dhaka. In view of the interviews, observation and reflexive auto-ethnographical approach, this section displays overall the salience and application of postcolonial laws without interpreting any trend in-depth. Accordingly, the findings are organised around some major themes identified from data analysis. Drawing on thematic analysis, following sections will highlight the major findings.

**5.1** **Episodic victim protection scheme in laws on VAW:**

For our convenience of study and analysis, the postcolonial penal trends can be broadly categorised into three different heads: (a) laws aiming at prevention of offences relating to violence against women and children, (b) laws aiming at prevention of offences relating to prejudicial activities to state and abuse of information technology etc., and (c) laws aiming at protection of public safety and daily affairs (being run by executive officers- also known as mobile courts).[[244]](#footnote-244) Therefore, it was necessary to gather the data from all of these categories of cases.

Interviews of most of the practitioners revealed that postcolonial laws aiming at protection of women and children were enacted without analysing the real reasons of the commission of certain crimes. According to a drafter, it was thought that somehow emerging problems would be solved by ‘fair operation of such laws’ while most of the lawyers disclosed that such laws were made through hugely punitive and excessive processes with a clear eye on deterrence. Offenders and the victim alike, mostly lay persons, were not conversant with the genesis, legislative process and definitional aspects of such laws, they appeared to have bore the brunt of the law most. It appeared that apart from some victim protection scheme, such laws provided for fast-track procedures, tougher bail provisions and harsher sentences. However, the judges and the lawyers alike observed that provisions of such statutes were misused in many instances. For instance, the practitioners stated that an occurrence involving domestic violence might lead to institution of series of cases in three courts on self-same offence. Elite participants also suggested that for making this law more an effective victim support scheme would have been in place, and the specified timeframe for speedier trial and investigation should be followed in letter and spirit. In the words of an activist lawyer:

If the legislature would have taken step to correct the overall system that deal with offences agaisnt women and children, that would have been better.

Concerns of the practicing lawyers were almost echoed by two fellow judges who worked as the judges of the tribunal dealing with offences against violence against women. They in unison advanced that procedural irregularities, presence of harsh sentence including mandatory death, poorly managed victim protection scheme made the noble system almost dysfunctional. According to them, although these laws provided for specific time limit for conclusion of investigation and trial; however, such directives were never strictly followed. I also interviewed a former judicial magistrate who worked at a supervisory court that dealt with issues till the cases were ready for trial by designated tribunal. According to her, although there was no legal bar to grant bail to an offender brought under such provisions, the consistent practice was that a judicial magistrate could not allow bail to such offender. However, a judicial magistrate could send the accused to the jail custody, placing him for police interrogation, providing the order for custody of the victim. It is to be noted that such special cases were disposed of by the judicial magistracy before the police submitted the charge-sheet implicating the offender. While working as a judicial magistrate (2007-2009) I exercised my judicial discretion to give bail to persons in view of uniqueness of the facts and circumstances of cases. However, a retired judge stated:

Very wording of the statute *ipso facto* led to the conclusion that only a judge officiating in the tribunal can give bail under this law while any other court including the judicial magistrate has no legal authority to grant bail in a case instituted under this special law.

All the judges stated that conviction rate of the tribunal was around 10 percent and most of the cases ended in acquittal of the offenders. The judges also referred to a series of instances of institution of false and vexatious cases. According to them, prosecution’s failure to produce the witnesses led to acquittal of the offenders, many of whom might be real perpetrators. I never worked as a judge of such a tribunal that dealt with VAW offences. However, apart from of first-hand experience as a judicial magistrate for more than two years I came across a series of VAW cases and granting bail under such law was very rarely exercised. Further, in my opinion, the victim protection scheme was rather better than worst in the sense that a magistrate could write down the initial statement of the victim and could send the victim to proper custody. My reflexive observation was that there was much room for improvement of institutional victim protection scheme and the role of the various rights organisation’s shelter home provided modest shelter to the victims of crime. Another crucial issue was that comprehensive victim protection will require huge resources. However, tougher provision of bail remained a grey area under this law.

**5.2 Other postcolonial special Law: Aims, objectives and thematic Issues**

According to elite participants, there was a tendency of overcriminalisation that resulted in litigation explosion. In case of other category of postcolonial laws, for example, Cyber Security Act 2023, Public Safety Act 2002, Speedy Trial Act 2002, most of the participants confronted same old problems. According to them, few old provisions were revised, fast tracking procedure made, but the principles and thematic issues remained the same as those were in the previous laws.

According to some elite participants, the aims, objectives and definitions of offences or even procedural aspects are vague in some special statutes. According to lawyers and activists, in case of other category of postcolonial laws, for example, Cyber Security Act, Public Safety Act, there were serious problems as a law on the face might be neutral, but its provisions left room for arbitrariness and wider discrimination of the state functionaries. A lawyer elaborated in the following language:

As we fail to control crimes, without analysing the reasons of commission of such crimes and without tackling the basic institutional challenges, we are in the habit of enacting a series of harsh laws one after another. The idea is that somehow problems will be solved through such laws.

A former lawmaker asserted that in addition of Macaulay’s Penal Code, we made hundreds of ‘tiny penal codes’ in the name of postcolonial non-codified statutes.

**5.3 Polticised prosecution and bar**

The officiating judges seemed most reticent participants while the retired judges stated their stories and viewponits in some belligerent mode. However, after icebreaking, the current judges stated that there were problems in special legislation that provide for special forums with special rules of procedure and harsher implementation. Regarding use of law by the ruling government, most of the elite participants stated that politicisation of bar encroached upon the judiciary. According to the judges interviewed, absence of professional prosecution, poor investigation and bar politics are few culprits.

A conversation with the prosecutors revealed that they were appointed on *ad hoc* basis, and they would be at the service of prosecution at the sweet will of the ministry of law. According to them, although the prosecutors were duty-bound to represent the state, their salary and related perks were below par. They boastfully contended that it was their duty to protect the interest of the state in a case where the defendants were trying to tarnish the image of the state. Although the prosecutors’ stories could be accomodated in this background discussion, I did not consider their narration for data generation because they did not continue the conversation with me. Therefore, I did not include their names in the lists of formal interviewees. The defendants rather alleged that office of the prosecutors and the courts were quite hostile towards their needs. Allegations of a defendant was that in every date of hearing they had to give some tips to the lower-level staff of such offices, yet they were not served of what was expected. According to the prosecutors, busy judges with formal dress lived in isolation. They added that the formalistic judges had very little time to dig the real scenario of different stages, therefore they rather excessively relied on supporting staff that led to prolonged procedure. According to the defendants, the lawyers and the prosecutors treated them as mere ‘money machines’. Detecting the actual proportion of such allegation directed against them was not our focus. Other key participants considered that absence of regular prosecution service with adequate rules and facilities is real stumbling block to the proper functioning of the criminal justice system, and that perspective was particularly relevant for the postcolonial law in operation. All participants were of view that there should be a permanent prosecution service. To quote an elite interviewee:

Since prosecution is *ad hoc*, there is hardly any scope for developing professionalism. With the change of government, existing prosecutors resign, or get sacked, a new pool of prosecutors are appointed on the basis of party politics of the bar.

There are other agencies responsible for operation of the criminal laws, eg., the investigators. No participant seemed to be happy at the performance of the police who investigated the cases and managed the prosecution role during pre-trial stage. My attempt to interview the investigating officers were rejected outright by the office of Dhaka Metropolitan Police. Laws including Cyber Security Act 2023, Special Powers Act 1974 provided government or the police with opportunities of oppression pursuant to its rigidness. Such laws gave extreme discretionary power to the police officials to conduct and finish an investigation. The judges and the lawyers echoed that it was solemn duty of the police to investigate criminal cases in an impartial and professional way. They lamented that in case of investigation of politically motivated cases, the investigator could not go beyond political clouts. Recalling the utmost value of criminal investigation, a judge elaborated that:

Police report may end in either final report or chargesheet, the foundation of the criminal case. If the very foundation of the case is defective, then entire edifice of the case will fall apart.

I asked the judge if there was any scope for punishment for the liable police officers, he indicated such conduct of the police might be the result of impunity that they were enjoying in a spurious system that can be traced to colonial era.

Some participants including the judges alleged that over the years, apart from alleged malpractice, overall standard of lawyering became shockingly poor. Asked why was such debacle, the answer of the judges was: apart from mushrooming of private schools, politicisation of the bar in line with the dirty political culture of the state made the lawyering highly partisan and problematic. According to them, such tendency was a serious impediment to the proper administration of criminal justice. The key participants also alluded to the defects in legislative drafting.

**5.4 Use of law**

The judges and the lawyers in unison stated that the special legal regime was systematically faulty. By way of clarification, an activist-lawyer replied:

Because the entities, the institutions that are responsible for enforcing our rights and protecting them, respecting them, are not doing their functions in accordance with law. The officials, be the from executive, legislature or judiciary, are functioning in an authoritarian mode.

During the interview, the retired judges made some scathing remarks that there was a tendency of using law for those who were in power. They were of the view that British laws *per se* were not bad, because some procedural safeguards that were present in old colonial laws, remained absent in some contemporary special laws. They added that fair application of the laws is the key. According to a retired judge:

In a fragile democracy, the judiciary is the ultimate rescuer of the dissidents etc, although courts are often remote-controlled.

According to the practising lawyers, many special statues were black laws that went beyond the constitutional spirit of rule of law, and there were systematic defects in the system that left scope for abuse of law. A legislator was also vocal against abuse of special laws. A lawyer made the following remark:

There are *two systems in one country*- law favours the persons with money and power while innocents and opponents are implicated in false cases. Special laws are applied in postcolonial setting as a repressive tool. This is called the rule of law, not rule by law. (Italic is mine).

According to a politician-turned lawyer, deficit in democratisation was a formidable challenge in Bangladesh. He emphasised that path to democracy was the path to rule of law. He recalled his memories about the liberation war of 1971 and added that during Pakistan period, democracy was in crisis and so was the state of governance, and there was ample evidence of law by law as might be seen in hundred of cases filed against the political workers. He also alluded to the Agartala conspiracy case of 1969 in which allegation of sedition was instituted against the then political leaders, and the accused persons got released amidst unprecedented pressure from the freedom loving people. His concern for rule of law was shared by other lawyers whom I interviewed. According to an expert participant:

The rule of law implies that law cannot be arbitrary and law must be equally applied to all. Not only arbitrary, you see there is a pick and choose, selectivity in terms of who the law is applied to and in what context. It depends not upon what you’ve done, rather who you’re, whether the law will be applied in a particular way.

A practitioner advanced that:

Yes, rule by law is very much present in this country. However, the trial process at this courts are more abusive. Such laws pose challenges to the rule of law because there is room for exception that these laws cannot applied in a fair way, these laws create scope to deprive people of the protection of the law.

**5.5 Defendants’ stories**

The defendants whom I intervieweed were not satisfied with how law was exercised. In a sad tone, a defendant stated that he was implicated in false charges under Digital Security Act 2018. Initially he was denied bail and after some time, government lost interest in cases and after getting bail, he had to visit the court regularly at the date fixed for taking evidence. But the prosecution witnesses did not turn up. Judge was in the habit of fixing a date after date, or sometime the defendant had to collect next date of hearing from the court staff by giving some tips. I asked a defendant if the accusations against him was false, why he did not prefer an appeal to the superior court. He replied that there were some technical strategies and procedures that he learnt from his stay in jail (pre-trial) and from getting in contact with police, lawyers, lawyer’s clerk and also regular visits. He was certain that he would be acquitted someday. It seemed that apart from his costly journey to and from court, he became accustomed to the court system and procedure. His only regret was that he lost his means of income due to being entangled in a false case. According to another defendant, a clerk suggested him that it was better to file regular *hajira* (presence) to the court when witnesses were not turning up. Because if the defendant was released from court, he might be implicated in another case owing to his political leaning to the opposition party. My observation in the cyber tribunal was that the harsh sentencing options and acutely adversarial procedures created hardship for the offenders, even though most of the cases ended in acquittal. More so, the court atmosphere was subjected to tighter security check, although court proceedings are open to the public.

**5.6 A quest for an independent judiciary**

The judges were of the view that British laws are not bad, because some procedural safeguards that are present in old laws, are absent in some special laws. They are of opinion that proper implementation of the laws is the key and judiciary as an organ should play more proactive role. They added that aims, objectives and definitions of offences or even procedural aspects are vague in some special laws that provide for harsh sentencing options. Therefore, in absence of sentencing guidelines, the judges differ in respect of awarding sentence. According to the lawyers, many special laws are black laws that go beyond our constitutional spirit of rule of law. While giving example of Special Powers Act 1974, some lawyers added that there are systematic defects in the system, and there are elements of abuse of law. All elite interviewees were of the view that comprehensive legal reform was overdue. There was a consensus among the most of the participants that the Supreme Court should play active role in upholding the rule of law. There appeared a simmering discontent with the practitioners about the erroneous operation of mobile courts that arguably contravened the constitution. Those who come in contact with law were not satisfied with how special laws and processes were exercised in repressive ways.

**5.7 Law making process**

The practitioners stated that instead of amending colonial laws, government made many special laws to supplement the colonial laws. The judges suggested that their opinion should be included in the drafting process of a new law. The lawyers alleged that without considering informed public opinion, and without an extensive parliamentary debate, most of such laws were passed in a haste. According to a legislative drafter, in one sense, there was always a room of public opinion, eg, some drafts were placed in the websites for public opinion, no real public debate looking at pros and cons of such drafts took place. He explained that:

Sometimes, a draft could be made in a haste with a sudden instruction from the political executive because certain occurrence needed to be addressed. If any consultation meeting on draft law was held, the officials invited were never found enthusiastic about providing any substantial input. Therefore, thematic issues and the objectives of many laws might remain vague and unpromising.

A lawyer advanced that as a party to ICCPR, Bangladesh is under legal obligation to repeal draconian provisions that goes against the spirit of the human rights. He also hinted that a draft is passed in the cabinet meeting and it went to the parliament for the passage. In Bangladesh a parliament member cannot vote against his party owing to article 70 of the constitution.

**5.8 Mobile Court**

All the judges except one stated that excutive officer’s run- mobile court was in conflict with the idea of separation of judiciary, and it was a deliberate attack to the independence of judiciary. The dissenting judge opined that petty matters should be reserved for trial on spot. Likewise, a lawyer stated that day by day mobile court was gaining popularity, and it shoud not come to an end. However, other lawyers stated that such mechanism was an attack to the rule of law and separation of power. A former member of the parliament opined that Mobile Court Act amassed more than 100 laws in its schedule thereby creating a parallel judiciary. He advanced that it was astonoshing to see that orders of the mobile court were made whenever a person had committed a scheduled offence in presence of the executive magistrate!

**5.9 Erosion of rule of law**

Most of the participants conceded that there was an enormous amount of evidence of rule by law. According to a lawyer:

In order to be a law, it has to be clear and certain. The question of legality and certainty is important. A piece of law should be precise. Law should be understood what is the ambit of law. If the law is widely vague, nobody can clearly understand what is the clear scope of definitional aspects, such legislation fails in the test of certainty. If law does not clearly provide which actions fall under the law, it’s problem. Whatever be written in the law, whether the law itself is reasonable or not, that has to be seen.

Another practitioner advanced that:

Arbitrary practice of many special laws ends up exactly the rule by law, not rule of law. Because the rule of law implies that law cannot be arbitrary and law has to be equally applied to all. Not only arbitrary, you see there is a pick and choose, selectivity in terms of who the law is applied to and in what context.

In the words of a lawyer:

It depends not upon what you’ve done, rather who you’re, whether the law will be applied in a particular way.

A sitting judge who was in favour of proper application of law alone stated that integrity of a judge was of paramount importance. Another judge was more interested in quality of prosecution-led evidence and rate of conviction:

It depends upon the quality of evidence. If the prosecution can produce evidence of credence, definitely there is a good chance that the court will give punishment. In that case, chance of conviction is higher. That’s a question of merit of the case. If the evidence is strong, convincing and very cogent, reliable, then the prosecution succeeds. But if it is case of shaky evidence or no evidence, or if it’s case of unreliable evidence, untrustworthy evidence, then definitely the offender will get acquittal.

**5.10 A call for penal revision**

A participant suggested that there should be a single Penal Code fully revised in view of new values and constitutionalism while most of the practitioners stated that law reform should be carefully done after doing extensive research. Although the defendants and the victims whom I interviewed had little idea about dynamics of penal revision, they also stated that law and processes should be simple so that everybody could understand it. A majority of the key stakeholers told that there is urgency for making new criminal laws in view of emerging forms of crime. Most of the lawyers sought to repeal the colonial era Penal Code 1860. However, while referring to coherent penal reform, an elite participant cautioned that:

In a fragile democracy like ours, readily overhauling of Macaulay’s Code 1860 and other colonial laws might not be a good idea because the safeguards of those laws became constrained with the passage of special laws.

It is not surprising that there was consensus among the expert participants that age-old criminal laws should be revised. However, their concerns varied slightly regarding overhauling the colonial legacies once transplanted by colonial rulers.

**5.11 Space for civil society**

A few lawyers praised that judiciary occasionally did some good work in view of media attention and civil society cry. However, they added that over the years space of the civil society became limited with the emaciating state of governance. According to them, special trial process became more abusive and there seemed to be no or little outcry from the members of the civil society about infringement of rights and liberty of the people. An expert added that in presence of draconian laws like Cyber Security Act, freedom of media houses became risky. Some lawyers added that NGO activities became narrower for want of resources.

**5.12 Aspiration for the rule of law**

Reflecting on my professional life, I can submit that I never found anybody who had not high regard for the rule of law. Such was the mode of the justice officials who aspired for due process and fair operation of law. For example, during my engagement with the administration of justice, I always sought to dispose of case expeditiously and fairly. As stated earlier, the constitution also aims for rule law, equality and human dignity. People of this soil continued stuggle for democracy and rule of law. My fieldwork diary also reveals that not only the pracitioners, but also the defendants and the victim aspired for fair trial and equalilty before law. Yet, the common perception of the interviewess was that justice and rule of law remained mostly elusive. A constitutional expert also referred to the value of rule of law principles while recalling the struggle of freedom-loving Bengali who fought for equality, justice and human dignity for all. He lamented that during last five decades, aspiration for rule of law remained elusive. He stated that even in an independent country, the persons in power brooked no dissenters and opposition and, special legislation, eg Special Powers Act 1974 and in recent times Cyber Security Act 2023 were used for the sake of ruling elites. He added that:

We need to revise law and implement laws in view of rule of law, the guiding principle of our constitutionalism and our independence. For proper functioning of judiciary and fair application of laws, checks and balances in executive organs, legislature and judiciary are of paramount importance. Over the decades, it has not been the rule of law what we see in the name of democracy. Quality of parliament mostly depends upon how they are elected and who are elected. Hope is that people are raising their voice despite brutal crackdown.

**5.13 Judges’ agony**

All the judges, both retired and officiating presently in unison referred to the value of independence of judiciary in general and effective separation of the lower judiciary from the executive clutches in particular. They alluded to the fair and full implementation of the Masdar case that gave a few directives to institutionalise an independent judiciary in its letter and spirit. Above view seemed to be quite pertinent in sense that most of the litigants came to the lower judiciary at the court of first instance, and the judicial functions free from personal favour or authoritarian control could be most visibly experienced in lower criminal courts.

While two retired judges referred to the problematic issues of bureaucratic red-tape and stratification of the judiciary like subordinate judiciary, officiating judges also identified that the dual rule of the supreme court and the ministry of law gave the political executives a wider control in dealing with the posting, transfer and promotion of the judicial officers. Regarding use of law by the ruling government, the judges stated that some judges declined to grant bail due to fear of transfer to a remote place or some other harassment or being not in the good book of law ministry. I directly asked an officiating judge whether he digested any form of pressure while disposing of a case instituted against a dissident person, he replied in an evasive tone:

You know better what is happening in judiciary. Some times, we feel stressed due to telephonic instructions from the Ministry of justice.

What the judge concealed with an agonising clue to this researcher was more insightful than he told disclosed above.

**5.14 Conclusion**

To sum up,this chapter has exposed the trends, issues and effects of postcolonial special law and procedure disclosed by some expert participants and some laymen. At the heart of the lawyers is procedural safeguards and fairness in various stages of the trial. The expert interviewees emphasised on value of rule of law, a sacrosanct idea of constitution. Most of the practitioners opined for holistic review of penal laws, instead of piecemeal solution to emerging forms of crimes. From their narration it appeared that the causes, context and consequences of poor compliance of law served to maintain *status quo* of crippling justice system. Certainly, some participants alluded to the non-compliance of the laws in a fair manner, however such experiences did not capture the whole. Major findings generated from participants’ narration were: incoherent legislation with wider scope for arbitrariness, legacies of weaker state of governance, and need for institutional autonomy of judiciary. The stories of the interviewees led us to understand the genesis, trends and effects of such postcolonial law. Following chapter will juxtapose and interpret such findings with a clear focus on rule of law, criminalisation, postcoloniality and independence of judiciary.

**CHAPTER 6**

**DYNAMICS OF POSTCOLONIAL PENAL REFORM: SPECIAL LEGAL REGIME**

We are urging that law is, in truth, not the will of the State, but from which the will of the State derives whatever moral authority it may possess. … It assumes that the rationale of obedience is in all intricate facts of social organisation and in on one group of facts. It denies at once the sovereignty of the State, and that more subtle doctrine by which the State is at once the master and the servant of law by willing to limit itself to certain tested rules of conduct. It insists that what is important in law is not the fact of command, but the end at which that command aims and the way it achieves the end.

(Harold J Laski, *A Grammar of Politics* (Routledge 1984) 286)

The previous chapter has showcased data gathered from an autoethnography, court observation, and viewpoint of the research participants who are key stakeholders in the justice system. The present chapter focuses on context, ethos, antecedent, contours, operation and spill over effects of a particular legal regime. It allows us to interpret and juxtapose the narratives of the research participants *vis-à-vis* the recurrent debates as framed by a growing number of scholars including AV Dicey. Accordingly, it endeavours to advance a critical debate that can be located and interpreted within broader political and social context. First, I will recap the salience of the special laws and the context of the justice system in Bangladesh. Second, a few selected special laws will be analysed with an eye on its genesis and operation. Third, some procedural challenges alongwith the concerns of the defendants and the victims will be interpreted. Fourth, the political and social contexts in which the law operates will be pointed out. Fifth, legislative processes and the erosion of rule of law will be located while value of independent judiciary and the rule of law will conclude the discussion.

**6.1 Contextual vignette**

This section will revisit the contextual background on how and why special criminal regime has emerged and operated in Bangladesh that still follows a legal system once imposed by the British rulers. The scholars of the East are highly critical of the ‘negative legacies’ of the British transplantation. At the same time, the colonial administrators are often credited for introducing a centralised legal system that was premised on equality principle, predictable procedural justice and strict reliance on evidence, some core values of Western enlightenment. Although the British administrators left this region long ago, postcolonial penal reform has either been peripheral or in the form of enactment of draconian special laws. More importantly, democracy-deficit governance often exposes a ‘Janus-faced’ criminal justice system in Bangladesh. Neither of the participants seems to be happy with the state of governance in general, and they have divulged their stories about a dim picture of the special penal regime. The postcolonial vignette of a struggling democracy shows that there are bottlenecks in court processes and governance. Menski makes reference to:

It creates a lot of continuing pain and injustice because even postcolonial governments that rule in the name of the people have been tempted to abuse power. Bangladeshis know only too well that this is not even an issue of party politics or of a particular personality trait; it seems to be systematic defect built into postcolonial structures of governance in South Asia and elsewhere.[[245]](#footnote-245)

Yet, the constitution of Bangladesh places the rule of law as the prime objective of the constitution. The rule of law implies the presence of representative government that is to function in accordance with law alone. The constitution also gives a cluster of procedural safeguards in respect of trial and punishment. Paradox is that the judiciary has become hostage to cumbersome procedure in ordinary litigation[[246]](#footnote-246) and high handedness in combating emerging issues involving political activists, dissidents and indigent persons in cases instituted under some of the ‘draconial laws’.[[247]](#footnote-247) Overall, the political climate of the state has also been in disarray. As strikes and demonstrations have become the common feature, the ruling circles have the tendency to control the protesters by using legal and extra-legal weapons. However, the legal challenges have occasionally been met by dubious claims, and technicalities have been adopted to frustrate the legal fight of the justice seekers.[[248]](#footnote-248) At the same time, nepotism, corruption and malpractices have also permeated the justice institutions even in the day- to- day mundane cases.[[249]](#footnote-249) Therefore, by means of arbitrariness and impunity mechanism of the executives, the secular and egalitarian transplantation of British rulers has turned out to be system of exploitation for the justice seekers.

It should be noted that Bangladesh is a Muslim majority state. However, its Muslim identity has both linguistic and socio-cultural connotations apart from religious.[[250]](#footnote-250) Consolidation of democracy and nurturing of democratic institutions in a Muslim-majority postcolonial state can also demonstrate whether liberal Islam can be compatible with democracy.[[251]](#footnote-251) The truth is that democracy and rule of law remain mostly elusive in this area. In particular, the criminal justice reform has never been at the forefront of agenda of the governance. While critically evaluating certain trends of criminal law reforms, it is therefore important to keep in mind the state of governance, role of the different stakeholders, and the overall political culture of a country. In the words of a politician-turned academic:

The behaviour of the political parties and leaders, their lack of respect for the democratic institutions, their mutual suspicion and betrayal, the arrogance of power, intolerance of opposition and criticism, lack of democratic practices within the respective parties and the role of the press are all essential elements which contribute to the negation of democracy in Bangladesh.[[252]](#footnote-252)

Having regard to the above context and relying on AV Dicey’s rule of law framework and other related works of the scholars, this chapter dissects the trends and issues of special legal regime while excavating and critiquing the historical and contemporary interplay of legal processes and political upheavals

**6.2 A plethora of special laws and their salience**

In postcolonial settings, decline in law and order, shift in values, political convenience of the ruling elites and emergence of new forms of crime including violence against women, cybercrime etc. has given rise to explosion of special penal laws that provide for stringent procedures, special courts and excessive sentences. At first, it may seem that number of special courts are a few and so are number of special cases. Although the special legal regime does not form the mainstay of legal system, its corrosive effect runs counter to a fairer justice landscape. For example, laws such as Cyber Security Act 2023, Special Powers Act 1974, Prevention of Corruption Act 1947, Speedy Trial Act 2009 provide for specific procedure than those are in the Code of Criminal Procedure 1898. First, these are special laws that deal with specific offences as enumerated in the title of these laws and define the offences and procedure in a detailed manner. The investigation process of these laws is much faster than the colonial code. There is also scope of judicial inquiry within these special postcolonial laws. Digital evidence, photographs and video etc are included as admissible piece of evidence within the legislative framework. It may be mentioned that age-old Evidence Act 1872 does not allow admission of such items as evidence. In this way, few laws complement the colonial legislation dealing with Evidence Act 187. Last, not the least, the judges have more power in disposing of these special law offences as there are special trial forums. Another striking feature is that a piece of special law has overriding effect to general criminal law. For example, Special Powers Act 1974 is a piece of law with *a non-obstante clause*. It means that this law overrides all other laws and provisions covered in any other laws. For instance, although ‘smuggling’ is defined and punishable in several laws, it can be tried under the Special Powers Act 1974 alone. All these are alleged strengths and the salience of special laws. These special laws are not immune from challenges, however. For example, offences are mostly non-bailable which causes miscarriage of justice especially in case of frivolous cases. Although laws provide for specific time limit for conclusion of investigation and trial, such directives are not mandatory. Owing to its rigid nature, false cases were instituted out of vengeance which led to jail of innocent persons. As indicated above, the victims were also relegated to the status of a bystander and their right to get protection remains ever elusive in some of those laws. It appears that even a benign law dealing with offences relating to voilence against women can also work as ‘a double-edged sword’ for both the defendants and the victims of crime. As we shall see, such legal regime smacks of a trend of criminalisation that can be termed as incoherent and unprincipled.

**6.3 Postcolonial special laws under scanner**

There is no denying that there has been the exponential growth of postcolonial laws in general and the special laws in particular. Presence of hundreds of postcolonial penal laws are reflective of suc

h trend. From the narratives of the practitioners sifted in chapter 5, it appears that some procedural irregularities are evident beneath the massive umbrella special laws that can generate instances of miscarriage of justice. Interestingly, *a priori* assumptions about the most of the special laws may seem *ex facie* innocuous and neutral. We shall also examine if there is any intellectual premise upon which a piece of special legislation has been promulgated.

**6.3.1 Law and Order Disruptions Crime (Speedy Trial) Act 2002**

In the face of rapidly evolving trends of crimes, legislative efforts to address to new forms of crime are underway in Bangladesh, albeit in a sporadic fashion. Upon query, a legislative draftsman could not show any detailed record on alleged reasons and intellectual premise upon which a special legislation was drafted. However, in the criminal justice landscape, birth of a piece of special legislation was once boastfully termed as an innovation predominantly based on ‘right to speedy trial’ as enshrined in article 35.[[253]](#footnote-253) According to Ahmed, the then Law Minister who wrote an observation while he was in jail on corruption charges by the military-backed interim regime (2006-2008):

The whole idea of speedy trial and bring it under a legal framework in Bangladesh was conceived by me based on the constitutional mandate of article 35.[[254]](#footnote-254)

However, it is highly contested whether this law and first-track mechanism has brought any qualitative change in the justice system. It is also debatable whether it has been able to make a positive impact in the overall law and order situation. I would like to refer to a precedent in which some provisions of a piece of special law were challenged in the superior judiciary. Facts of the case was that a member of parliament of the opposition bench was implicated under the Explosive Substances Act 1908 for allegedly making bombs at his residence in a peripheral district. The case was prepared under the Speedy Tribunal Act 2002. He challenged the vires of section 6 by a writ petition before the High Court. The contention of the accused was that the transfer was done *mala fide* to implicate him for political harassment. HCD held that a speedy trial under article 35 of the constitution could not be a reason to seek any relief.[[255]](#footnote-255)

The practising lawyers, however, stated that this law has some systematic elements that are brutally deployed against the political opponents. I would like to proceed with the the preamble that shows that ‘whereas it is expedient to provide for special measures for trial of certain offences on ‘law and order disruptions’, it is hereby enacted as follows.’ The preamble appears to be quite vague that can not direct a reader to the exact meaning of aims and objectives of the law. This law also transpires that it provides for minimum 2 years’ and maximum 5 years’ rigorous imprisonment. Some special provisions are also there for completion of investigation and trial by the investigator and the judges respectively. The law also provides for exclusive trial courts for speedy trial of the specified offences in every district and metropolitan area by a magistrate. Apparently, these provisions do not contravene the provisions of constitution.

**6.3.2 Public Safety (Special Provisions) Act 2000**

Reference may be made to another precedent in which the division benches of HCD were divided about the constitutionality of a piece of law entitled Public Safety (Special Provisions) Act 2000. In Afzalul Abedin and others v Bangladesh and others, Justice Aziz struck down some provisions of PSA 2002 boldly declaring that PSA had no attributes to be a certain law.[[256]](#footnote-256) It was argued by Dr Kamal Hossain, an architect of the constitution 1972 that due to selective law operation by selective law officers, there was scope for concurrent prosecution of the same offences, and hence the law was vague, unreasonable and arbitrary. He also alluded to the hardship of bail right guaranteed under Code of Criminal Procedure under certain circumstances. Another presiding judge Huda J however saw no vires in the law in view of even increasing crime scenario of a volatile state. The split decision of the HCD was then forwarded to the Chief Justice.

An overview of such statues shows that some offences defined in Penal Code 1860 were made new offences under new statutes. During my sojourn as an additional chief judicial magistrate (2013-2015), I also dealt with offences involving extortion, hijacking, damage to vehicles and properties, looting, interference in tenders in public offences, terrorising government functionaries to do or not to do duties or creating obstacles preventing public functionaries from discharging their duties. However, my reflexive autoethnography also mirrors the poor performance of a court. Only difference is that new law curtailed sentencing discretion of the magistrate as it provided for minimum and maximum punishment. In my opinion, this law was a mere extension of some provisions of the Penal Code 1860 and there seemed to be no cogent reason as to why such offences already defined in the Penal Code 1860 could not be effectively dealt by normal criminal courts constituted under the Code of Criminal Procedure 1898. My experience as a judicial magistrate can be summarised thus: a special magistrate court established under this law was like any other ordinary court where achieving bail became tougher for the offenders who were in most cases political opponents. In this way, a vague law worked as a strategic tool to deter the adversaries. In addition to my reflection as stated above, my first attempt to visit a similar court went in vain as I found the magistrate of special court concerned on leave. Finally, I was able to observe a court of special magistrate who presided over a special forum in addition to his regular judicial works. Although it can never be said that such law is a mainstay of CJS, it can be a used as a potential tool of repression directed towards political opponents. This trend can be explained as an instance of governance through crime. Such approach attempts at taming the political opponents and the disenfranchised sections while keeping the citizen glued to the fear of crime.[[257]](#footnote-257) In this way, the rulers tend to consolidate their powers while keeping the mundane civil and commercial cases beyond its undue interference.

Let me now critically examine few other special laws in turn.

**6.3.3 Cyber Security Act 2023**

The practitioner- participants except the current judges made scathing attack against misuse of provisions of Cyber Security Act 2023, a unique piece of postcolonial special law.

Background of passage of this law is that in 2006 Information and Communication Technology Act was passed. It dealt with the security of cyber space. Apart from offence related to cyber security, most controversial provision was section 57 that dealt with criminal defamation in digital form. The law also established a first track special tribunal that should complete the trial within 6 months from the date of framing of charge. Due to huge criticism posed against this law, a new piece of legislation entitled Digital Security Act 2018 was passed. However, abuse of the law continued, and finally, old law was repealed by a new law entitled Cyber Security Act 2023. Within this law, in addition to various other penal provisions dealing with digital security, the digitally published works were made punishable. At first look, this piece of law seemed to be noble and neutral law in this age of digital revolution, but it could turn out to be a repressive tool for the political opponents and the journalists or even a common person who could be arbitrarily tried even for a simple social media post. During the fieldwork, all lawyers conceded that time-bound directives for trial and punishment were never strictly adhered to in this tribunal. For instance, an activist-photographer was detained on 05 August 2018 under ICT Act for making comments against the then government.[[258]](#footnote-258) First Information Report (FIR) referred to Section 57 of ICT Act that imprecisely criminalised ‘*the* *publication of any material that deemed to deprave and corrupt persons or that creates the possibility to deteriorate law and order, prejudice the image of the State or person or causes to hurt or may hurt religious belief or instigate against any person or organization.’* However, amidst criticism directed against vaguely defined law, DSA 2018 was substituted by a new law entitled Cyber Security Act 2023. However, That activist-photographer’s ordeal continued, and he was in detention for 107 days before he was granted bail by the superior court. However, same offences were renamed in the new statute and cases filed under old law continued. Despite its renaming, CSA continues to be a repressive tool that again criminalised same vaguely defined offences including treason and defamation while definition of such crimes is covered by the Penal Code. However, the ill-fated photographer’s ordeal goes on and the police is yet to submit report in this case. Till date, that person was required to be present regularly on date fixed for submission of the police report. It can be argued how far newly framed Cyber Security Act makes a solution to the cyber security issues. Rather, this case clearly indicates that such law has become a lethal weapon to silence the free thinkers, dissidents and political activists.

During my fieldwork, a few lawyers stated that with the presence of such a hugely deterrent law, people had to keep mum. Previously, such type of provision of Penal Code 1860 aimed at controlling the public assembly and political activities. In other words, with the passage of this law, constitutionally guaranteed freedom of speech is controlled at the whim of the arbitrary law enforcing agency. This throttling law can be potential tool to gag the people who are famous for the argumentative and talkative styles.[[259]](#footnote-259) It is important to note that theoretically speaking, there is also a scope for concurrent jurisdiction of certain offences including libel because criminal defamation is punishable under the Penal Code 1860. And, the police can pick and choose whom to prosecute and whom to spare under special law. As the ruling persons fail to control crimes, they are in the habit of enacting a series of harsh laws one after another, without tackling the basic institutional challenges. My observation at the cyber tribunal can be summed up thus: although conviction rate was not higher, law itself gave a deterrent effect in presence of provisions of higher punishment and tougher bail provisions. In fine, patchy reforms as evident above can be referred to as ‘governing through crime’ that can make this democracy-deficient state more constrained and disenfranchised.

**6.3.4 Mobile Court : Justice at will**

Although Code of Criminal Procedure 1898 provides for summary trial provisions for some minor offences, Mobile Court Act 2009 is in operation that deal with offences listed in the schedule of the Act.[[260]](#footnote-260) It empowers the Executive officers to prosecute and try an offence committed on spot if the offender confessed his or her guilt. If the offender does not plead the guilt, the presiding judge, always the executive officer, will commit the accused to the regular criminal court for trial. According to this Act, highest sentencing power is two years’ imprisonment, unlimited fine, or both.

A couple of lawyer-participants stated that such first-track court is special one that facilitates justice at the grassroots level. However, they raised their concerns that use of executive officer as officiating judges goes against the spirit of separation of judiciary as pronounced in Masdar Hossain case. In Masdar Hossain case, the apex court directed the state to ensure the separation of the judiciary from the executive organs of the state in compliance of a directive policy.[[261]](#footnote-261) Accordingly, by amending Act II of 2007, Code of Criminal Procedure 1898 was drastically overhauled for creation of different types of magistracy, namely, executive Magistrates and judicial Magistrates. Revised provision of Code of Criminal Procedure 1898 alludes to distinctive nature of judicial functions and administrative responsibilities.[[262]](#footnote-262)

The rest of the lawyers and a lawmaker however denounced current scheme of mobile court on the premise that it is a flagrant violation of independence of judiciary principle. Upon perusal of the schedule of the Mobile Court Act, it appears that this tiny law has enlisted a huge number of Minor Acts along with some provisions of Penal Code. Most dangerous aspect of this law is that government can create more offences simply by adding some law to the schedule of the Mobile Court Act. It can be argued whether an amendment to a schedule of a statute can be added or deleted by an executive order.

Let us now move to the point of operation of such law. It can be argued whether an executive officer exerts undue pressure to an offender to obtain a confessionary statement from the offender. Therefore, veracity of the confession before an Executive officer equipped with the police can be called into question in a sense that section 164 of the Code of Criminal Procedure 1898 implies that presence of the police and any other undue pressure will render the confession not-voluntary. Another issue is that same offence is triable simultaneously by an executive officer in a Mobile Court and a judicial magistrate. Consequently, there may a potential scope for sentencing disparity for committing same offences. For example, a person has committed an offence that is punishable with 5 years’ imprisonment. An executive magistrate cannot hand down sentence beyond two years while a judicial magistrate can pronounce punishment beyond that period. Further, appellate authority of such Mobile Court is an executive officer.

Most importantly, absence of taking evidence also is serious lacuna. Although it is termed as part of judiciary, mobile court’s appellate authority are higher executive officers, and they sent statement of cases disposed of to the cabinet ministry, not to the Supreme Court. Staggering growth of such temporary courts at the sweet will of the executive officers is quite problematic and systematically faulty. In a country where democratic culture and institutions have not taken firm roots, devising a special judicial branch like this can be potentially more abusive to those who are implicated under such law.[[263]](#footnote-263) It not only subtracts the quality of justice, but also it creates another pain to the over-burdened judiciary. Therefore, such mechanism can be taken as an illustration of rule by law method.

Upon a series of writ petitions, HCD finally held that the running of the mobile courts by the executive magistracy is a vicious blow to the rule of law and constitutionalism in this country.[[264]](#footnote-264) However, the government preferred an appeal against the judgment of the HCD to the Appellate Division, and the operation of the judgment is currently stayed.

**6.4 Procedural irregularities in some other laws**

Not only the mobile court, other special courts that deal with VAW offences also display some procedural issue that can jeopardise the offender’s right to fair trial. It appears from the narratives of the participants vis-à-vis the provisions of these laws that some overlapping application of special laws and provisions of Penal Code creeps in the proceedings that obliquely tend to generate more litigation. The judges also seldom took it a privilege to construct new meaning to many provisions of the Penal Code that goes against its originating principles, although Lord Macaulay was opposed to judicial law making. Macaulay’s conservative approach can be critiqued from the angle of higher value of precedents and pro-active role of the judiciary following massive explosion of public interest litigation in many jurisdictions.[[265]](#footnote-265) Yet, sometimes unnecessary embellishment and judicial interpretation of the existing principles also tended to hit at the basic premise of due process. For instance, excessive reliance is made to the confession of the accused in awarding the sentence.[[266]](#footnote-266) Further, the rule of presumption of innocence was shifted to the extent that in some cases, accused need to prove his or her innocence if he or she is present at the time occurrence of offence.[[267]](#footnote-267) One of the features of special laws is that there is hardship in acquiring bail for the defendants. The division benches of the High Court Division are of divergent views on the question as to whether a judicial magistrate can grant bail to the accused produced before him in connection of offence under special law. In Fajlur Rahman and another v State*,* the High Division bench decided that there is no legal bar to entertain a bail prayer and to dispose of the same by the judicial magistrate so long the case remains a GR case.[[268]](#footnote-268)However, on another occasion, division bench pronounced that the chief judicial magistrate has no jurisdiction to entertain a bail prayer under this law.[[269]](#footnote-269) Another division bench observed that though the tribunal and High Court Division on appeal are empowered to grant bail under general provisions of the Code of Criminal Procedure, 1898, the power is limited and such power should be exercised subject to specific conditions and restrictions mentioned in the law.[[270]](#footnote-270) Another High Court division bench was of opinion that bail can only be granted upon hearing the informant or complainant or to that effect the state.[[271]](#footnote-271)

After an initial assessment of a few selected laws and processes, the effect of the special legislations can now be pointed out.

**6.5 A means of social and political control**

It appears that a piecemeal solution without any clear intellectual leaning has further complicated the problem of crime control instead of solving it. For example, with a series of vagueness and shortcomings, CSA, PSA etc. continue to operate as the controlling tools that deters the potential political opponents and the free thinkers. One of the major problems of special legal regime is that it fails to establish a coherent framework within the already decaying CJS that bears laws, procedures and institutions from the colonial period. An overview of the criminal law reform initiatives from the pre-colonial era to the postcolonial regime led us to see law as a means of social control. I would argue that addressing the issue of penal reform requires a holistic approach than such piecemeal solution. For the victims, the trauma and sufferings arising out the legal proceedings could be often compounded on the account of the nature of the offence as well as dilatory court procedure and frequent acquittals of the offenders. However, similar type of stress associated with the adversarial law was relevant for the offenders who expressed disappointment over unnecessary delay and prolonged harassment, even they got released. The framework of the law transpires that there is an urgency to move beyond focusing on crime control. It is also necessary to turn to broader socio-politico concerns to deal with the root causes of emerging social problems in a weaker democracy. My line of analysis can be supported by a scholar who stated in the context of laws on VAW:

Even if the women in Bangladesh have secured favourable legislation, they could not secure its benefits due to impediments to its implementation. The reason behind this lies in the traditional norms and values in the male dominated patriarchal society.[[272]](#footnote-272)

Monsoor’s work, however, did not deal with the issue of victim protection while most of the participants raised concern for lack of victim protection that has resonance with my court observation and an autoethnography. The participants’ concerns are corroboarated by some practitioners who advocated for adequate and systematic victim protection scheme in such specialised courts.[[273]](#footnote-273) It is pertinent to note that in India, such offences are covered by provisions of the Penal Code and the trial forums are regular sessions court. Some practitioner- interviewees asserted that three or four cases could germinate from same occurrence under three different laws in three different courts. From my experience as a judge, I can confirm that the institution of several lawsuits against the same offenders was a common practice in a far-flung district.

Now it is time to enter the actual special court arena.

**6.6 The court scenario: Too many colours, too many processes**

My court observation during my fieldwork revealed that government was investing huge money on court-building renovation while new constructions also went on. It may be argued whether any particular attention was directed to dispose of unfinished cases. Iconic *ejlash* (a seating arrangement of a judge) covered by red cloth, brick-coloured court building of colonial era and official dress of the judges and lawyers apparently look like a sign of dignity and a vestige of the colonial rule.

Let me look back at the days when I had the opportunity of visiting a few special tribunals in Dhaka. It appeared that the newly coloured red-brick compound stood like a symbol of justice. There was a newly erected a cage-like higher dock inside the court. It appeared to me that state tried to make a huge investment in developing court infrastructure. The lawyers and the politically appointed prosecutors were making their regular submissions before the formalistic judge. Inside the court, many colours of lawbooks, formal gowns and shirt of the judges and lawyers and red-coloured sitting arrangements of the judge were visible from a long distance. Huge presence of blue colour- dressed police constables was also visible. The colourful atmosphere in and around this court could might attract the attention of the art critics, but a series of procedural formalities with rainbow like scattered colours displayed by the stakeholders kept the offenders at bay, although everything in the court premises seemed perfect! In a formal interview, the defendant who belonged to a political party had the impression that he was entangled in false allegation, yet he wished to be released. However, it was not easy to be released from legal regime as depicted abobve.

**6.7 Legislative process**

Drafting process and the manner of passage of certain laws also dominate the narratives of the elite key informants who exposed their stories to me. It is interesting to note that Mobile Court Act 2009 is a legislation that effectively substituted a Mobile Court Ordinance 2007 that was promulgated by the military-backed emergency regime (2006-2008). Another law entitled Speedy Trial Tribunal Ordinance 2002 also promulgated as an ordinance when the parliament was not in session.[[274]](#footnote-274) All expert informants were of the view that role of Law Commission was nowhere seen in law making process during last decades. An academic wrote that Macauley’s Penal Code provides hardly any influence in subsequent penal legislation.[[275]](#footnote-275) However, a closer look into the series of postcolonial laws reveals that there is no radical shift in the laws promulgated from time to time. As the criminal law reform is an exercise controlled by politics, reports of the Australian Law Commission are not generally considered by the politicians.[[276]](#footnote-276) Almost similar incidents occurred in the UK where many reform packages suggested by the Law Commission were occasionally ignored by the politicians.[[277]](#footnote-277) Tindley opined that by making criminal law sharper in governance, such laws facilitate the authority of the state in place of restricting it.[[278]](#footnote-278) His comment is quite pertient when a democracy deficit- country attempts at revising its criminal laws and procedures. Therefore, enhancing the capacities of a state to combat various forms of crime and also to promote the rule of law are now policy priorities of governance that not only lead to greater freedom and equality, but also stimulate the capability approach leading to social justice and economic growth.[[279]](#footnote-279)  For instance, Bangladesh’s 7th Five Year Plan along with its Information and Communications Technology Policy 2015 also aims for a justice system that is more fair, accessible, transparent, cost-effective and expedient. However, in actual practice, the application of criminal law and constitutional guarantees stands on a precarious relation, and reform of criminal law has never been a priority agena in Bangladesh.[[280]](#footnote-280)

While reiterating the value of public consultation, an official of the ministry of legislative affairs stated that after making initial draft, consultations were generally held either in the form of meetings and/ or displaying the draft in the ministry’s website. Denouncing the role of the legislative drafters, a lawyer alleged that:

It remains a question as to how many common people have a look at the ministry’s website for a draft law; rather consultation on draft is generally held in the upscale hotels or within the strict confines of the secretariat where the relevant stakeholders have no practical access.

A legislative drafter rather stated that even draft statutes were uploaded in the website, response from the stakeholders remained very negligible. He added that invitees very rarely put forward any substantial input to the proposed law. An activist suggested that drafters and parliamentarians could take help from the UN bodies or donor agencies in making certain draft. Legislative drafter also acknowledged that there was a tendency of doing copy and paste of laws of neighbouring countries including India. Judges stated that judges and lawyers should be effectively consulted in the law-drafting process otherwise it would invite instances of miscarriage of justice. For example, Digital Security Act 2018 and then Cyber Security Act 2023 were drafted and passed in a hurry that invited huge uproar at home and abroad.

In addition to my experience as a judge, I worked a deputy secretary at the ministry of law, justice and parliamentary affairs for three years. While I was entrusted with dealing some matters relating to land registration and the notary public, I saw rather some half-hearted law reform initiatices by another division of the ministry of justice. While preparing the periodic reports on ICCPR, CAT, I rather witnessed a tug of war between the officials of different government departments and division. I attended some consultation meeting arranged at the ministry of home affairs that initiated some reform agenda in formulating a draft law involving blanket power of police officials in a new law. It may be noted that the division of legislative drafting and parliamentary affairs oversaw the technical issues about legal drafting while the making the first draft of the law and convening proper consultation mostly was the work of the initiating ministry. My observation was that technocratic officials occassionally used to draft law in a hurry without proper consultation and research. It also appeared to me that Penal reform was never a priority agenda for successive regimes.

A former member of parliament lamented that no effective deliberation was made while a law bill was placed for discussion before the legislators. According to him, this is linked with the level of parliamentary democracy being practised in Bangladesh, and lawmakers are more interested in development projects. Unfortunaely, nowhere in the making of law common people are genuinely consulted or even informed. In other words, the spirit of the people or what is termed as *Volksgeist* is the missing link in law-making process of Bangladesh.

**6.8 Colonial legacies require updating**

Lord Thomas Babington Macaulay’s *magnum opus* that was conceptually composed in 1837 still defines the basic notion of crime and punishment in Bangladesh. Macaulay in his maiden sojourn (1834-1837) as the Chairman of the Law Commission of India finished a draft Code that was officially set in motion as the Indian Penal Code in 1860. The key participants were in consensus that the colonial vestige has become outmoded and outdated to some extent with the passage of time and through the perspective of an independent Bangladesh. A former legislator even ridiculed that ‘apart from Macaulay’s Penal Code 1860, we have got hundreds of tiny penal codes (or special laws) enacted during both colonial and postcolonial periods’. It can be safely asserted that special postcolonial laws can create further strain to the already overburdened criminal justice system. Strict application of some laws showcases a tough approach towards criminal justice by the state with an aim of containing and detaining the political opponents. Although the context, *raison d’etre* and *modus operandi* of those imperial rules have changed drastically, a plethora of laws, procedure and institutions that evolved during the British period still regulate the functioning of the criminal justice system in Bangladesh. It however, appears that the principles and definitional statements on sentencing consolidated in the Penal Code still remain mostly relevant that require marginal finessing alone.

Some key informants suggested that Bangladesh should overhaul the colonial vestiges and it is high time to enact some codes in view of passage of Indian Nyaya Samhita 2023 and Indian Code of Criminal Procedure 1974. A lawyer however cautioned that in this state of fragile democracy, it may not be a good idea to repeal and review the Penal Code and Code of Criminal Procedure altogether. Because certain procedural safeguards that are present in colonial laws are non-existent in some draconian laws enacted in postcolonial setting for the benefit of the ruling elites. Without rejecting the concern of the practitioner, it can be argued that the Penal Code 1860, Code of Criminal Procedure 1898 and Evidence Act 1872 of bygone era can in no way cope with new forms of crime, eg, in view of digital advancement in a changing dynamics of a democracy-deficit postcolonial society.

**6.8.1 A flashback on colonial lawfare**

While having impetus for the penal codification of Australia, New Zealand, Canada and Jamaica, Macaulay’s Penal Code still outlines the sentencing principles and penal landscape in many Afro-Asian former British colonies including Bangladesh, Pakistan, Sri Lanka, Malaysia, Brunei, Nigeria and Sudan. It may be, however, noted that overwhelming colonial deterrence together with revenue collection was the major driving force for crafting a new legal order in a colonised territory. Macaulay envisioned periodic legislative updating the penal law. However, revision of those laws has never been a comprehensive legislative priority. Rather myopic revision was achieved through *ad hoc* mechanism that mostly gave rise to peripheral trimmings of laws and emergence of a few non-codified legislation promulgated during the British period. In particular, leaving aside ‘governance through penal laws’ mechanism of the benevolent despots of England, postcolonial legal reform (since 1947) has not always evolved in a coherent pattern in Bangladesh; rather some palliative legislative measures were initiated with a view to easing the procedural trappings alone. Further, sporadic enactment of special penal laws during post-colonial period aimed at containing the organised and more serious crimes that were not fully contemplated by Macaulay and his colleagues. Ironically, widespread prescription of harsh punishment and procedural hardship at times add sufferings to the offenders and the victims. Moreso, overlapping jurisdictions in diverse legislation tend to make some of the Penal Code’s provisions redundant. It is also evident that scheme, objectives and even some provisions of the colonial laws have now become obsolete with the passage of time, advancement of technology, easy communication, rise of human rights and emergence of constitutional notion of due process. Furthermore, many state-of-the-art crimes and motivational aspects of sentencing have also come to the fore. Judiciary traditionally keeps itself aloof in procedural *cul de sac* while inefficient and oppressive policing also tends to clog the formal justice system. At times, popular demand of justice for the offence committed is often percolated for want of fair application of laws. Without impairing the value of common law legacy, it can be argued whether Britain had controlled the natives with an awfully accusatorial system that has now become almost crippled with an acutely dilatory procedure, deterrent penal policy, authoritarian attitude of the justice officials and dominance of the unbridled lawyering.

In general, the imperial aggression was often termed as an attempt to humanise and modernise the primitive societies that were allegedly lagging behind in terms of development, rationality and enlightenment.[[281]](#footnote-281) After examining British imposed legal system, Menon rightly observed that very little local concept of crimes and processes were accommodated in its imperial legal transplant.[[282]](#footnote-282) While relying on Pritchett et al, Khan argued that owing to introduction of lawyer-centric adversarial system of the British rulers turned out to be ‘isomorphic mimicry’ which looked like its Western counterpart, but in practice was system of exploitation.[[283]](#footnote-283) While dissecting the objectives of the imperial rulers, Malik noted that it was not alleged rationality and enlightenment, but colonial deterrence that prompted the colonial rulers to rein the local people in the name of penal reform.[[284]](#footnote-284) In particular, during colonial era, the criminal justice agencies including police, courts and prisons were precisely employed against the locals to further colonial dominance in general and collection revenues in particular. Harari observed that the British killed, injured and persecuted the inhabitants of the Indian subcontinent.[[285]](#footnote-285) Capital punishment of Raja Nand Kumar (1775) is a classic example of a judicial killing among series of punishments handed down to many nationalists and poor natives. Although during the later stage, egalitarian laws were mostly implemented in a well-organised judicial system, acute harsh and biased trial of the dissents including Bahdur Shah Jafor, Khudiram, Gandhi, Nehru, Tilak, Ghose, Indian Nationalist Army, Azad and Ali Brothers were hallmark of biased political trials in colonised India.[[286]](#footnote-286) However, mass-uprising and nationalist movements during the fag end of British rule virtually bypassed the abuse of the imperial legal processes.[[287]](#footnote-287) However, the dream of politically democratic state with an elalitarian order remained elusive in postcolonial Pakistan era (1947-1971) run by autocratic rulers. In my analysis, nuanced understanding through a historiographical lens is surely pertinent to make sense of the problematic manifestation of postcolonial penal reform.

**6.9 Offenders’ curious tale**

Although colonial laws and processes were often termed as selective and arbitrary tools, ultimately, law’s strength was that during twilight of the colonialism, the nationalist those who were implicated in sedition charges relied on jurisprudence and legal processes to get themselves acquitted. As we have seen in chapter 5, in many instances, implementation of postcolonial law is still selective that tends to expose the shadow of dual state in a country where democracy is yet to take firm roots. My conversation with the defendants shows that the they are not familiar with the value of the rule of law, rather they are of opinion that the criminal law is a repressive tool to silence the poor like them. My conversation with two victims of crime at the tribunal on VAW shows that they have no idea about the victim protection scheme available in some laws while the practitioners are of view that victim protection scheme is elusive.

In sifting and analysing predicament of the defendants, however, some curious issues have loomed large. These are the resilience and legal strategies of the offenders that they rely on. In other words, despite all procedural hardships and apparent injustices caused to the defendants, they still have some faith in the justice system. According to them, due to presence of courts and laws only, one day they will be acquitted of the false and inappropriate charges brought by the authoritarian police. It was surprising for me to decipher their confidence in the justice system that has been exposed by their elite pleaders as ‘systematically faulty’. Even the erudite research participants including the judges and the legislator appeared to have been vocal against malaise of the special regime that have posed serious impediment to the right to fair trial. My ethnography also reflects such a dismal picture of decaying system. Yet, the defendants’ confidence on legal strategies can be explained in two ways: first, they have had no other alternative, but to succumb to the procedures of the courts. As the defendants who were political workers of the opposition parties might have been aware of the inviolable rights and freedoms that are guaranteed in the constitution. Second, by becoming familiar with procedural weaknesses of the legal regime, they have unconsciously taken resort to legal strategy to bypass the poorly drafted cases built on incoherent legislation. Overall, it appears that the offenders have learnt to navigate through different spaces and procedures while they have initially felt out of water in an abysmally hostile system. In this context, an ethnographical inquiry of a scholar can be referred to. Analysing some terror trials in Delhi court, the scholar was also amazed to see the value of legal technicalities that gave the discarded offenders some standing before the court of law, and by employing such technicalities inclusive of rule, processes, judicial institutions and people, they got acquitted from terror charge.[[288]](#footnote-288) Such resilience and tenacity of the disenfranchised offenders as found in the fieldwork can be seen as the fighting character of the poor Bengali. Such tendencies can be traced to volatile political protests of Bengal during colonial and pre-colonial eras. For instance, Bengal was the nucleus of all the major political movements against the colonial rulers, and Bengali people’s fight for a society based on democracy and rule of law continued until the masses took up arms and achieved independence in 1971. Irony is that this state awaits the completion of its struggle for independence by dismantling the authoritarian regime erected and nurturted by the ruling elites. A commentator’s observation on erosion of rule of law and the political history of Bangladesh can be referred to:

The phenomenon, indeed, blurs the facts of history that the people of Bangladesh had to fight for decades to get rid of British colonialism and then underwent a series of painful political struggles for autonomy with Pakistan and, finally, fought a bloody war of liberation against the neo-colonialist forces of Pakistan for national independence.[[289]](#footnote-289)

Massoud also referred to use of legal tools to protect by the non-state actors while engaging with the rights and liberties of the disenfranchised sections of the society.[[290]](#footnote-290) If we were also able to a backward journey through a time-machine towards Nazified Germany, we could enter the court room in which Fraenkel frantically tried to use the available legal strategies to acquit his clients. For instance, the champion lawyer made the submission before cloistered judgeship that the confessions of the defendants were recorded through police torture. Gestapo representative might be present inside the court. On the day of judgment, the defendants wept and added that his confession was not voluntarily made. In a short judgment, the judge acquitted all but one defendant.[[291]](#footnote-291) The kind of dual state Fraenkel unmasked is evident in many postcolonial states that constrained the political arena while keeping aloof in commercial and civil suits.

**6.10 The shadow of dual state**

It appears that as far as legal landscape of Bangladesh is concerned, its justice institutions mostly remain cumbersome, fragile and even unresponsive to people’s need. The challenges have their roots in the colonial period that have been intensified further upon decolonisation. To be specific, pervasiveness of the special legal regime of postcolonial era and post-independence period mirrors the rule by law approach adopted by the colonial rulers.

As stated in chapter 5, a seemingly frustrated member of parliament has referred to the dual state like situation in Bangladesh. According to him, many of the draconian special provisions are applied in a way that can be termed as one state- two systems. However, a veteran politician who was in the drafting committee of the constitution seemed to be quite optimistic when he uttered:

Yes, law is the ultimate rescuer. People must fight for the rule of law and democracy, and that is the solution. We had struggle during Pakistan period and British period. And mass stuggle for the democracy will show the course of future Bangladesh.

Such optimism towards the people has resonance in a scholarly work that rightfully argues that the prime prerequiste of the rule of law is the will of people to act cohesively and to check the power of the politicians.[[292]](#footnote-292)

As far as British rule is concerned, barring few exceptions involving race-conscious immunity for crimes committed against the servants and disgruntled political activists, actual implementation of penal law had in most cases been ‘more or less fair’ in day-to-day litigation among the commoners. At that time, there was ‘a dual state like situation’ where there was ‘rule of law’ for issues involving natives’ regular affairs and ‘rule by law’ as a repressive tool for containing the nationalist activists. Even upon decolonisation, Pakistani forces continued repression. Even in independent Bangladesh, the ghost of dual rule continues to haunt. In particular, special legislation leaves wider scope of arbitrariness. In other words, Bangladesh has been trapped into the typical postcolonial malady of janus-faced system.

Although Bangladesh’s judiciary is constitutionally independent, provisions on independence of judiciary are not followed in letter and spirit. A litmus test for democracy and rule of law is available legal norms and institutions are sufficiently meaningful for the dissenters. In this regard, reference may be made to Khan who observed that due to increased arbitrariness and impunity mechanism, the legal transplantation of the finest minds of late Victoria era has become a system of oppressive tool and system of exploitation.[[293]](#footnote-293) Although imposition of British common law tradition is often criticised, centralised legal system, equality principles, rigorous reliance on procedure and evidence are fair legacies. At times, too much reliance on prerogative powers permeates into the government agencies in which corruptions and nepotism also become rampant in addition to entrenched trapping of colonial rule and postcolonial malaise. In other words, such contexts offer significant risks to the rule of law. For example, the submissive institutions can provide legal cover for extra-ordinary measures through teleological interpretation. Prerogative powers can also effectively invade the normative state and undermine the formal rationality attributed to it through subservient court rulings and (extra-legal) oppressive measures of the law enforcing agencies. Extra-judicial killing, enforced disappearance, torture in police custody, detention without charge are few examples in this regard. In this way, the political executive relies on prerogative powers in the exercise of the dual state practice. All these symptoms are applicable in Bangladesh, which has been caught between democracy-deficit and the absence of inviolable rule of law.

**6.11 Need for democracy and rule of law**

The last meeting I did for this thesis was with a jurist of international reputation who made a new constitution for newly independent Bangladesh in 1972. We met at his chamber situated in commercial hub of the capital. A lawyer of international imminence served as a top policymaker of newly freed country that was born out of 9 month- prolonged war of independence 1971. For me, visiting the chamber of great jurist like him was going to the pilgrimage as I assisted him in several public interest litigation many years back when I was trying to meet both ends as a young lawyer aspiring to achieve the rule of law. The gigantic lawyer nowadays has become a shadow of himself with old age health complications. Yet, the indomitable person has gazed at me with a blank look. Then he asked me why I have chosen this arduous terrain of research on such a complicated topic. I replied in an evasive tone- if I had had the wisdom, I would not have embarked on this journey in a faraway land -the UK whose people tried to impose a centralised legal system as ‘benevolent despots’! As conversations went on, I tried to take notes of what he said. It was more than a usual interview with a lawyer. At the end, he murmured the rule of law while looking blank at the cloudy sky. As I took leave from him and came out, I saw that the olive- coloured para-military vehicles started patrolling nearby roads. I overheard that curfew was imposed in the major cities with an aim of curbing the dissidents. Irony was that such extra-ordinary legal measures were initiated by using the provisions of Special Powers Act 1974, a postcolonial law. Exploring the potentially repressive nature of criminal justice system also raises the questions about who makes the law and whose interests are served by the criminal justice system.[[294]](#footnote-294) This is because a fair and effective CJS marks the distinction between a civilized society and the anarchy. Although the road to the rule of law is perennially political, violent and chaotic, still law can be the great liberator.[[295]](#footnote-295)

**6.12 Judging the judges**

The framers of the Constitution of Bangladesh not only includes Chapter IV for judiciary, but also clearly states that “the Chief Justice and the other judges shall be independent in the exercise of their judicial functions. In fact, presence of independent, strong and committed judiciary is a basic cornerstone of the rule of law. The right to fair trial inclusive of cluster of procedural safeguards in respect of trial and punishemnt is included as an invoilable fundamental rights of the accused in the constitution. Although the superior judiciary is constitutionally thought to be independent, subordiante judiciary where most of the grassroots litigants come has been some formidable challenges. The constitution stipulates that state shall ensure the separation of judiciary from the executive organs of the state.[[296]](#footnote-296) Finally, upon a litigation, the Appellate Division of the Supreme Court issued 12 points directive to separate the judiciary from the executive clutches. As the successive political regimes were procrastinating with the implementation of the Masdar directives, ultimately military-backed interim government (2006-2008) effected the separation of lower tier of the criminal courts from the executives. In this way, court of chief judicial magistracy started to officiating. As far I can recall, I had the privelege of working as a judicial magistrate from 01 November 2007 and initially it was a decent move. However, the key participants added that over the years, successive political regimes appeared to have manouevered the affairs of the subordinate judiciary by effectively controlling the judges in various ways. In fact, due to dual administration run by the executive-led ministry of justice and the judicial members-led Supreme Court, initiation of posting, discipline and promotion of the member of the subordiante judicary sometimes marks a question over the autonomoy of the suboridiante judiciary. Most of the elite participants conceded that successive regimes exploited the lacunae of the constituion to tame the judiciary by exerting pressure even to the senior judges of the judiciary. For instance, absence of specific law on appointment of the judges of the High Court Division leaves a room for political interference in their appointment.

An interview with a member of cabinet of 1972 suggests that persons of high moral character with sound knowledge on law and practice should be appointed as the judges of the High Court Division. Again, here comes the crux as to who is the final authority to appoint a judge to HCD. In this context, I would like to refer to an incident. In 1967 Mr. Syed Mahboob Morshed, the then Chief Justice of Dhaka High Court nominated Tayyabuddin Talukder to be a judge. As Chief Justice of Pakistan Mr. A R Cornelius did not concur with the recommendation of Mr. Morshed without assigning any reason whatsoever, said Mr. Talukder could not be appointed by the President. Consequently, Justice Morshed resigned as the Chief Justice of Dhaka High Court. This incident is reflective of personality and uprightness of a judge who tried to uphold the dignity of his office.[[297]](#footnote-297)

There was another incident that showed how High Court took seriously an issue of undue interference in the administration of justice. On 03 May 1949 the then *munsif* (a civil judge of lower tier) of Sirajganj Mr Fazlul Karim Chowdhury wrote to the Registrar of the Dhaka High Court that Moulvi Abdur Rashid Tarkabagish, local Member of Legislative Assembly (MLA) requested him orally to dismiss a suit pending before his court, and the judge of lowest tier deemed it a nefarious act that a judicial official should never tolerate. High Court of Dhaka called for a report from the District Judge Pabna who confirmed that said MLA requested the *Munsif* to dismiss Title Suit no. 43 of 1949. Upon the report, High Court issued show cause notice to MLA concerned as to why he should not be committed to the law of contempt for approaching the judge privately as such. AK Fazlul Huq, former Chief Minister of Bengal appeared on behalf of MLA who sought unconditional apology for inadvertent mistake done, and the person charged with the contempt of court never knew the parties to the case personally. While accepting the apology tendered by delinquent MLA, Justice Elis held that:

It is all the more necessary to deal with contempt firmly for it is now that the pattern will be set for the future development of the institutions of this country’.

Ultimately, the MLA was found guilty of gross contempt of the court and directed him to pay a fine of Rs. 500.00 in default to suffer imprisonment of one month.[[298]](#footnote-298)

These two incidents are reflective of how an upright judge can protect the image of judiciary, even when the institutionalisation of judicial independence was a far cry. Although some elite participants are in favour of fair appointment of judges who possess the intellectual capability and moral base, in absence of clear law on appointment of judges of the HCD, it leaves an open question as to who has the final say in the appointment of the judges. In Bangladesh, the judges of the HCD are appointed additional judges for a period of two years and then they can made permanent judges. According to the Montreal Declaration on the Independence of Justice, 1983, appointment of ad hoc judges runs counter to the independence of judiciary. While dissecting the lacunae in the constitutional provisions, a scholar rightly evaluated that the succeeding regimes appointed loyal judges by exploiting the weaknesses of those provisions.[[299]](#footnote-299)

All the elite participants expressed their dissatisfaction over dysfunctional state of the courts that are specially designed. It was also evident from the diverse data sources that there is serious dissatisfaction among the practitioners about efficiency of the court.[[300]](#footnote-300) In the words of a scholar:

Bangladeshi courts operating under undemocratic regimes failed to make the right choice between doing justice and participating in the process of injustice.’[[301]](#footnote-301)

There is no denying that whatever may be the form of state governance, formal judicial independence always exists in a constitutional document. There is no death of law in hybrid regimes. This is because even the most notorious regimes including China, Chile, Saudi Arabia and South Africa never claim that they flout the rule of law ideals, rather they always claim to act accordance with the laws alone.[[302]](#footnote-302) Chile provides a classic example as to why judicial independence is not, by itself, an unqualified good. It highlights that unless there is an institutional freedom of the judiciary, the judges will not only be miserably failing in controlling executive generated injustices, but also will be pawns of the repressive regimes. The judiciary in Pinochet’s regime is an example of subservient judiciary that has been used to consolidate the questionable regime while justice seekers has become mere bystanders to the thorny path of rule of law.

The United Nations also on many occasions affirmed that human rights, rule of law and democracy are interwined and mutually reinforcing and that they form a core ideals of the world body.[[303]](#footnote-303) According some scholars, although the many states stand at crossroads for democracy due to massive capturing, curbing, instrumentalising and weaponising legal systems, only judicial independence can help in protecting democracy and resisting autocratisation.[[304]](#footnote-304) While writing in the context of rise of populism in Eastern European Countries, Bugaric also expressed higher belief for strong, independent and professional legal institutions.[[305]](#footnote-305) Such observation has more relevance in states where judiciary is often meek in upholding the rights and freedoms of the common citizens. In other words, in absence of an independent judiciary, democratic culture cannot flourish; and consequently, an innocuous piece of postcolonial special law, eg., Cyber Security Act 2023 can be arbitrarily deployed to consolidate the power of the ruling elites, instead of safeguarding the rights and liberty of the common citizens. Irony is that the people of this country fought for democracy and rule of law during colonial period and Pakistani period, and their aspiration and struggle still goes on even after 53 years of independence. Although originally framed to deal with new situations, new crimes, the postcolonial penal regime as discernable adjunct to over-burdened criminal justice system tends to generate instances of injustices thereby dismantling the constitutional commitment to rule of law. However, the path to rule of law has never been a bed of roses and the members of judiciary is entrusted with the noble obligation to nurture the rule of law. At least, the courts should pay more attention to effectiveness of the criminal justice system while drawing distinction between authorised practices and overt injustices.[[306]](#footnote-306) Finally, we would like to reproduce the observation of the Chief Justice of Bangladesh:

The judiciary has the greater role to play in upholding the rule of law by carefully investigating ‘the true proposition of the law based on notions of justice, equity, and fairness’. [[307]](#footnote-307)

Obviously, the rule of law is great concept. Yet, the crux is *‘ruling’ involves action, and it is ‘men’, not laws that possess that capacity*.[[308]](#footnote-308) At the beginning of this research, I have referred to Rabindranath Tagore wrote about the pain of the justice seekers in a poignant manner. At the fag of our discussion, Tagore can also be alluded to:

Above all, the bearers of the scale of justice are the hands of a human being, and any sort of intidimation or pressure from the outside can make them imbalanced.[[309]](#footnote-309)

**6.13 Dearth of scholarship**

I have delved into issues of certain criminal reform from a range of works: first, works on Bangladeshi law reforms made during colonial and postcolonial eras. Apart from a few textbooks of some sorts, there does not seem to exist detailed analysis on the special criminal regime specially with reference to decided cases. Some writers seldom write reports; however, the analysis of postcolonial laws has largely remained ignored. Although some books are available on this subject, these are not updated and comprehensive. According to some scholars:

The paucity of international publications on Bangladesh-focused constitutional and legal research is a hurdle that scholars aiming to work in the area often face.[[310]](#footnote-310)

Second pool of knowledge that lend support my thesis are the works on some other postcolonial regimes including colonial India, Pakistan, Sudan, and Singapore. Finally, in order to fathom the legal, political and philosophical underpinnings to law, justice and society, I extensively relied on the works of scholars of the west and the reports of the United Nations.

**6.14 Researcher’s of dilemma**

I had the privilege of officiating as a judge in criminal courts of different tiers since 2006. As a humble participant at the subordinate judiciary, I had observed that bureaucratic procedures and lack of political tend to hinder the efficient function of the criminal courts. Part VI of the constitution implies an idea of independent judiciary at all levels.[[311]](#footnote-311) The constitution also declares that state ensures the separation of judiciary from the executive organs of the state.[[312]](#footnote-312) This thesis can in no way be an attempt to furnish an intimate account of the evolution, trends and development of popular aspiration for right to fair and rule of law. Rather, I intended to recollect experience of a sitting judge as well as a debutant lawyer while dispensing justice in view high ideals of the rule of law. I had no hesitation to admit that at times I was perturbed by the imperfect system of which I was a part!. As a judge, I had to preside over a legal battle orchestrated at the edifice built on British adversarial system. I was particularly careful while writing an ethnographical account of my experience so that any description involving others did not disclose their identity. I was also pained to recollect the sufferings of the justice seekers. I viewed the self-experience as a social phenomenon in an organisational setting. I also tried to be truthful to self while using the tenets of autobiography and ethnography as described by Ellis.[[313]](#footnote-313) The reason why I also relied on this method can be summed up thus:

Autoethnography is a highly regarded research methodology whereby the researcher is immersed in self experience while observing, writing, journaling and reflecting. [[314]](#footnote-314)

Significantly, data gathering continued to offer huge challenges during whole period of my fieldwork. First, there is no or little comprehensive data on crime and punishment preserved in government offices and courts. Second, most of the law practitioners are not familiar with the empirical research culture on judiciary and penal reforms. It also appears that many of the particiapnts were self-sensored. Third, the officials of the courts generally have displayed their total non-cooperation to share any data; however, they cooperated only when they came to know my profession. Fourth, the offenders and victims are most inaccessible participants who suffer most at the edifice of the legal regime. Fourth, journey to and from courts and to the chambers of few participants has been challenging due to huge traffic and acute mismanagement of the public transport. Fifth, acute civil and political unrest of this volatile country has posed a serious threat to the personal safety of this researcher. Last, not the least, the political and social context of a particular regime could even make a local ethnographer’s fieldwork more challenging and I had to devise coping strategies for conducting the fieldwork in a disciplined way.

**6.14 Conclusion**

This chapter has tried to furnish a nuanced understanding of truths, assumptions, biases, ethos, operations of a few of the special laws while looking at the judiciary’s inherent defects and complex interplay of social and political contexts that are generally beyond the long hand of a judge. It concludes that the extant reforms are highly effective and inappropriate and they have become tools of domination and exploitation by the ruling elites. It also dwells on the dilemma of researcher has confronted some challenges in doing this research. The recurring debates on the rule of law versus rule by law were the essence of our discussion.

**CHAPTER 7**

**CONCLUDING REFLECTIONS**

**7.1 Summary of aims**

Drawing upon the rule of law and some related conceptions including rule by law, dual state, criminalisation and postcoloniality, this thesis has provided an in-depth understanding of postcolonial special legislation and its application in the context of Bangladesh. The fundamental query it has explored is: what are the wrongs with non-codified special criminal laws. The analysis was done to explore this quagmire based on some data sources: 15semi-structured interview with some key stakeholders, court observation and an auto-ethnography. This closing chapter begins with recapping an assemblage of the major findings of this research. Finally, it ends with an aspiring note on future research and broader implication of the substantial academic contribution advanced by this thesis.

**7.2 Summary of findings**

In seeking to understand the crises of the postcolonial special laws, this thesis has found that the dominant problems of the special laws expose absence of coherent criminalisation in a postcolonial polity. Such incoherence has reinforced the rule of law erosion or vice versa. While determining the formal laws is one thing, their fair and effective implementation is also crucial. This is important in the sense that malfunctioning of law generates miscarriage of justice only to the justice seekers, but also to the members of the society at large.

Second, a regime with no accountability can criminalise any act without making any assessment and without doing any effective consultation with the people. It has also left a query as to who have been elected as legislators and what have been the process of their election, and how far the members of parliament have enjoyed autonomy so far as the law-making process is concerned.

Third, it also asserts that an authoritarian regime can be more interested in investing on court- structures and also taking control the justice officials to manipulate law for their interests. For instance, active monitoring and criminalising the harmless digital post or loose talk of a dissident has been an attempt to gag the dissidents. In this way, a democracy-deficit regime can create a culture of control while advocating for maintenance of law and order, state image, conspiracy against state etc. to buttress its authority. Such legal politics not only encroaches upon the people’s constitutionally guaranteed freedom and liberty, but also puts a nail to the popular aspiration for rule of law and democracy.

Fourth, the operational shortcomings and service delivery failure of the justice system cannot be remedied unless the latent defects of colonial trapping are substantially updated. In particular, Macaulay’s Penal Code requires some systematic review in view of changing circumstances of the digital era and emergence of new forms of rights and shift in values. However, it is doubted how far any penal reform will be effective unless the democratic institutions are reformed.

The thesis finally argues that trends and issues of postcolonial legal landscape is mostly shaped by the historical and contemporary fragility and possibility of a particular society. However, a strong and independent judiciary can check the arbitrary and whimsical operation of laws. Therefore, the legal reform should be decontextualised and ahistoric to the idea of what Savigny advocated:

The proper laws and the legal system of a people only emerge, and also ought to emerge, organically over time from the Volkgeist or the “the spirit of the people”.[[315]](#footnote-315)

**7.3 RESEARCH NOVELTY**

In line with the postcolonial rule of law research, this thesis has found that the operation of the criminal justice is inextricably linked with the socio-political pecularities of a society. Further, as criminalisation and postcolonial studies suggests, this study held that the special category of law is not by itself problematic, rather there is wider scope of authoritarian use of such laws in democray-deficit state of governance. Research novelty can be highlighted thus:

First, this thesis has analysed the issues why and how a seemingly neutral piece of legislation can turn out to be a tool of social control. It has also highlighted the inappropriateness and incoherence of criminalisation of some emerging forms of crime. In other words, while critiquing the formal operation of substantive and procedural laws, it has pointed out the effects of authoritarin use of some postcolonial laws that are historically and contemporarily contingent.

Second, the methodical approach used in assessing the special legal regime was also unique in the sense that apart from conventional key informant interviews and research-time observation, my auto-ethnographic inquiry has also provided a deeper understanding of the challenges of the postcolonial penal reform debates that has remained mostly underexplored in the Global Southern postcolonial democracy-deficit context.

Third, a novelty of research can also be related to practical challenges of the research site and how the actual fieldwork was carried out in a hostile and tight-lipped state. Dhaka, the capital of Dhaka was the actual space of the empirical work.

Last, not the least, the conceptual schema I have developed bears novelty because I have endeavoured to blend some disctintive concepts on the rule of law and politics of penal landscape. I hope that this framework with contextualisation and refinement can be used to identify and compare similar trends in selected jurisdictions. More so, this research will be quite pertinent to the academic scholars, practitioners and policy makers who are interested in rule of law projects in contemporary postcolonial societies that aspire to achieve the rule of law, an esoteric expression once artificially transplanted by the ‘benevolent despots’ in colonised soils.

To conclude, this research has sought to understand the dyanmics of postcolonial special laws in Bangladesh. The primary objective was to highlight how and why an *ex facie* neutral piece of law can turn out be in tension with the rule of law, a sacrosanct ideal of Bangladesh’s constitution. Key findings indicate that special legal regime continues to operate as a controlling tool due to arbitrary exercise of its provisions. Further, it fails to establish a coherent penal reform framework within already decaying criminal justice system that bears a series of rules, processes and institutions from colonial rulers. To be specific, in many instances, postcolonial special laws can be arbitrarily deployed to consolidate the power of the ruling elites, in stead of safeguarding the rights and liberty of the common people. The thesis finds that a complex of law, justice and society has emerged in weaker democracy that moves between the rule of law and rule by law. It concludes that an autonomous judiciary can check the abuse of law.

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**APPENDIX 1: TIMELINE FOR POLITICAL LANDMARKS & LEGAL REFORM**

|  |  |  |
| --- | --- | --- |
|  | Historical landmarks | Remark |
| 1204 | Muslim conquest of Bengal and it continues with rise of city states including Sonargaon. | Criminal laws based on Kuranic injunctions and traditions were initiated, although local practice of *panchayet* in the mode of compromise was in wider practice. |
| 1352 | Shamsuddin Ilias Shah united Bengal Sultanate which continues for most of the period till 16th century | As above. |
| 1556 | Mughal rule started in North India | Not applicable |
| 17th century | Mughal controlled Bengal |  |
| 18th century | Bengal elites, nawabs, became *de facto* autonomous rulers of this area | Sharia based Islamic law were the official laws. |
| 1757 | After the Battle of Plassey, East India Company conquered Bengal that ultimately extended to take over of almost whole of Indian regions. |  |
| 1765 | East India company gain *dewani* (authority of managing civil matters pertaining to revenue collection and land related matters). |  |
| 1769-1772 | Warren Hastings introduced a new system of criminal courts, but these courts were not taken into British hands. | Company had some supervisory roles over criminal courts and company attempted at a few feeble legislation. |
| 1773 | Company built new *nejamat* *adalat* (criminal court) alongwith existing *dewani adalat* (criminal court). Move was slow and cautious. | By passing Regulating Act 1773, British Parliament gave full authority to the company. |
| 1774-1790 | Some half-hearted legislation did not alter the existing criminal law substantially, but only transferred some policing functions from the traditional authorities to the British Magistrates who could apprehend criminals, but not try them.  Some regulations abandoned the idea of pardoning the murderer by surviving relatives. | Administration of justice was still notoriously defective. |
| 1795 | Criminal law enacted for Bengal extended to Benaras with a proviso that no Brahmin shall be subjected to death penalty. |  |
| 1796-1802 | Existing laws were made more severe; religious and local privileges were abolished.  Perpetual stigma could be inflicted on the forehead of a convict (1797)  Under the cover of some technicalities, the Islamic law concerning murder and homicide had been replaced by a law based on Western ideas. |  |
| 1802 to 1820s | Imposed series of regulation on crime and punishment on procedural issues. |  |
| 1832 | Regulation VI of 1832 effectively abolished Ango-Muslim construct assembled together over last fifty years. |  |
| 1834-1837 | Lord Macaulay made the draft of penal laws. |  |
| 1857 | Sepoy Mutiny |  |
| 1860 | Indian Penal Code 1860 was promulgated. |  |
| 1861-1872 | Code of Criminal Procedure 1861, Police Act 1861 and Evidence Act 1872 were imposed. |  |
| 1870 | Sedition was inserted as a form of crime in the Penal Code |  |
| 1878 | Special piece of law named Arms Act 1878 was issued. |  |
| 1908 | Explosive Substances Act was imposed. |  |
| 1920s | Offences relating to election including bribery, undue influence, false personation were included in the new law. |  |
| 1935 | Government of India Act was passed. | It was the de facto constitution of India |
| 1947 | East Became a province of Pakistan following decolonisation. | By virtue of Indian Independence Act 1947 |
| 1947 | Prevention of Corruption Act was passed |  |
| 1956 | Constitution of Pakistan was adopted. |  |
| 1958 | Criminal Law Amendment Act created special courts for trial of corruption charges.  Military rule was set in motion and constitution of 1956 kept in abeyance or suspended.  Imposed few military regulations. |  |
| 1967 | Mass upsurge in East Pakistan intensified and political leaders were implicated in sedition and corruption charges. Political persecution continued. |  |
| 1971 | Bangladesh became independent. |  |
| 1972 | Newly liberated Bangladesh adopted the constitution with a catalogue of fundamental rights. |  |
| 1974 | Special Powers Act 1974 was passed. |  |
| 1975-78 | Martial Law Regulations were promulgated for spearheading summary trial of possession of illegal arms, corruption etc. |  |
| 1983 | Cruelty to Women (Deterrent Punishment) 1983 was issued. |  |
| 1982-1990 | Military rule |  |
| 1991 | Restoration of Parliamentary democracy |  |
| 1992 | Suppression of Terrorism Offences Ordinance was issued. |  |
| 1995 | Repression of Cruelty to Women and Children Act was passed. | Repealed in 2000 |
| 2000 | Public Safety (Special Provisions) Act was passed.  Repression of Cruelty to Women and Children Act was passed.  Environment Court Act was passed |  |
| 2002 | Law and Order Disruptions (Special Provisions) Act, Acts of Control of Acid and Acid Offences were passed. |  |
| 2004 | Anti-Corruption Act provided formation of special courts.  Information and Communication Technology Act 2006 was passed (repealed in 2018). |  |
| 2006-2008 | Emergency Power Ordinance 2007 and Emergency Power Rules 2007 strangulated enjoyment of civil and political rights.  Democratic journey came to halt.  Anti-terrorism Ordinance 2008 was passed.  Separation of lower judiciary was initiated in 2007 by pro-active intervention of the Supreme Court.  Mobile Court 2007 |  |
| 2009 | Restoration of democracy  Mobile Court Act 2009 |  |
| 2013-2018 | Passage of Prevention of Human Trafficking Act 2013, Prevention of Torture and Custodial Death Act 2013, Pure Food Act 2013, Digital Security Act 2018 substituted ICT Act. |  |
| 2023 | Cyber Security Act substituted DS Act 2018. |  |
| 2024 | The students led mass movement effected the fall of the government that was in power since 2009 | Military officers were given magistracy power to apprehend and try offences on spot and sentencing power is maximum 2 years’ imprisonment and unlimited fine. |

**APPENDIX-2: ETHICS APPROVAL LETTER**



Downloaded: 28/07/2023 Approved: 09/12/2022

Hussain Bari  
Registration number: 200230524 School of Law  
Programme: PhD in Law

Dear Hussain  
**PROJECT TITLE:** Understanding Postcolonial Penal Reform in Bangladesh: Special Criminal Legislation in Context

**APPLICATION:** Reference Number 044342

On behalf of the University ethics reviewers who reviewed your project, I am pleased to inform you that on 09/12/2022 the above-named project was **approved** on ethics grounds, on the basis that you will adhere to the following documentation that you submitted for ethics review:

University research ethics application form 044342 (form submission date: 08/12/2022); (expected project end date: 17/12/2024). Participant information sheet 1100075 version 5 (17/11/2022).  
Participant information sheet 1114030 version 1 (17/11/2022).  
Participant information sheet 1114081 version 1 (18/11/2022).

Participant information sheet 1114082 version 1 (18/11/2022).

Participant information sheet 1115162 version 1 (08/12/2022).

Participant consent form 1100074 version 4 (17/11/2022).

Participant consent form 1114031 version 1 (17/11/2022).

If during the course of the project you need to deviate significantly from the above-approved documentation please inform me since written approval will be required.

Your responsibilities in delivering this research project are set out at the end of this letter.

Yours sincerely

Penelope Russell

Ethics Administrator

School of Law

Please note the following responsibilities of the researcher in delivering the research project:

The project must abide by the University's Research Ethics Policy: https://www.sheffield.ac.uk/research-services/ethics-integrity/policy The project must abide by the University's Good Research & Innovation Practices Policy: <https://www.sheffield.ac.uk/polopoly_fs/1.671066!/file/GRIPPolicy.pdf>

The researcher must inform their supervisor (in the case of a student) or Ethics Administrator (in the case of a member of staff) of any significant changes to the project or the approved documentation.

The researcher must comply with the requirements of the law and relevant guidelines relating to security and confidentiality of personal data.

The researcher is responsible for effectively managing the data collected both during and after the end of the project in line with best practice, and any relevant legislative, regulatory or contractual requirements.

**APPENDIX-3: INTERVIEW SCHEDULE**

**Research Project: Understanding Postcolonial Penal Reforms in Bangladesh**

**INTERVIEW SCHEDULE FOR THE PRACTITIONERS**

**Introductory question:**

1. Name, age and role in criminal justice system.

**Specific questions**

1. Can you describe the distinctive features and procedure of the postcolonial specified legislation[[316]](#footnote-316) (eg, Special Powers Act, Money Laundering Act, Digital Security Act etc), compared to the Penal Code 1860 and the Code of Criminal Procedure 1898?
2. How will you evaluate the sentencing regime of these special laws? Do you think that processes and sentencing under these laws is harsh or appropriate? Why?
3. Some are arguing that there are instances of overcriminalisation that also gives rise to litigation explosion. Is this fair or not? Why?
4. Is there any redundancy or overlapping of Penal Code provisions and special laws’ provisions? Is there any scope for prosecuting a defendant either under the provisions of the Penal Code or the special laws. If so, is there any scope for disparity in sentencing if the defendant is tried under the special law instead of the Penal Code 1860? Why might this happen? Are there aspects of case characteristics, or other factors, that would explain prosecutorial choice?
5. How well are the specialised courts (courts created under laws other than the Code of Criminal Procedure) functioning? Why is lower conviction rate in special courts? Is that a sign of success (bulwark against inappropriate prosecutions) or failure? Why?
6. Some have argued that the postcolonial legal regime is also systematically faulty and potentially more abusive due to the discretion of the justice officials. Is this fair or not? Why do you say that? What is the systemic element, and why is it problematic?
7. In your role as an expert, what are the challenges of contemporary non-codified legislation and special procedure? Are these simply results of poor drafting, or are they there by design, do you think? What explains this? What problems is this a solution to?
8. Do you think that postcolonial laws (laws other than the Penal Code) as a type of law poses challenges to the rule of law? If so, what the reasons for such thinking? Legal scholars have referred to a distinction between rule of law and rule by law. Is there any evidence of a rule by law approach in Bangladesh? What is your comment on this?
9. What is your comment on British legacies, such as the adversarial system and colonial criminal legislation? What are the challenges in updating the Penal Code 1860 and the Code of Criminal Procedure? Might this explain the use of postcolonial laws? If not, what does explain their expansion? (To understand the perspective of colonial legacies and challenges of postcolonial reforms)
10. What are the effects of specially created courts’ presence in the criminal justice process? How do they change things? In a practical sense, in other ways (please suggest)? (To understand whether it adds dividend to rule by law, separation of power and institutional autonomy)
11. What are your suggestions for penal reform in the face of new forms of crime?
12. Generally, how satisfied are with how the overall criminal justice process works in Bangladesh? Do special laws function well in this? Why or why not? Do they add or subtract regarding the overall quality of justice in Bangladesh?
13. Feel free to refer to anonymised examples relating to use, abuse or misuse of postcolonial special laws that come to your mind. Do you think these challenges arise in the context of postcolonial laws only?

**Part 3 Closing the interview**

1. Was there any other aspect of the topic you think I should have addressed? Feel free to bring notice of anything that you think is important.

Thank you for your time!

**APPENDIX 4: CONSENT FORM**



**Project: Understanding postcolonial Penal Reform in Bangladesh**

**Researcher: Hussain Bari, Researcher, School of Law, the University of Sheffield.**

**Consent Form**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| ***Please tick the appropriate boxes*** | | | **Yes** | **No** |
| **Taking Part in the Project** | | |  |  |
| I have read and understood the project information sheet. The project has been fully explained to me. (If you will answer No to this question, please do not proceed with this consent form until you are fully aware of what your participation in the project will mean.) | | |  |  |
| I have been given the opportunity to ask questions about the project. | | |  |  |
| I agree to take part in the project. I understand that taking part in the project will include interviewing that can be recorded if I agree. | | |  |  |
| I understand that by choosing to participate as a volunteer in this research, this does not create a legally binding agreement nor is it intended to create an employment relationship with the University of Sheffield. | | |  |  |
| I understand that my taking part is voluntary and that I can withdraw from the study at any time before the data is anonymised generally within 7 days from the date of interview; I do not have to give any reasons for why I no longer want to take part and there will be no adverse consequences if I choose to withdraw. | | |  |  |
| **How my information will be used during and after the project** | | |  |  |
| I understand my personal details such as name, phone number, address and email address etc. will not be revealed to anyone. | | |  |  |
| I understand and agree that my words may be anonymously quoted in publications, reports, web pages, and other research outputs. I understand that I will not be named in these outputs unless I specifically request this. | | |  |  |
| I understand and agree that only the PhD supervisors will have access to this data. | | |  |  |
| **So that the information you provide can be used legally by the researchers** | | |  |  |
| I agree to assign the copyright I hold in any materials generated as part of this project to The University of Sheffield. | | |  |  |
|  |  |  | | | |
| Name of participant: | Signature & date: |  | | | |
|  |  |  | | | |
| Name of Researcher: Hussain Bari | Signature & date: |  | | | |
|  |  |  | | | |

**Project contact details for further information:**

1. **Dr Mark Brown,** Senior Lecturer, School of Law, University of Sheffield, Sheffield S3 7ND (Principal Supervisor), Email: [mark.brown@sheffield.ac.uk](mailto:mark.brown@sheffield.ac.uk)
2. **Dr Surabhi Shukla**, Lecturer, University of Sheffield, Sheffield S3 7ND (Co-Supervisor), Email: [s.shukla@sheffield.ac.uk](mailto:s.shukla@sheffield.ac.uk)

**APPENDIX 5: INFORMATION SHEET**



Researcher: Hussain Bari, Researcher, School of Law, The University of Sheffield, UK

Participant Information Sheet

1. Research Project Title:

Understanding Postcolonial Penal Reform in Bangladesh

1. Invitation

You are being invited to take part in this research project. Before you decide whether or not to participate, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask me if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part.

1. What is the project’s purpose?

The purpose of this project is to understand the postcolonial penal reform in Bangladesh.

1. Why have I been chosen?

As one of the key stakeholders in the criminal justice system, you are chosen to give your opinion on non-codified special laws.

1. Do I have to take part?

It is up to you to decide whether or not to take part. If you do decide to take part you will be given this information sheet to keep and be asked to sign a consent form. You do not have to give a reason for your withdrawal. You can withdraw yourself from the process till the data are aggregate and anonymised generally within seven days from the date of conducting interview, and data will be curated, analysed and interpreted throughout the project.

Please note that that participating in this research will not create a legally binding agreement, nor is it intended to create an employment relationship between you and the University of Sheffield.

1. What will happen to me if I take part? What do I have to do?

You will be interviewed. An outline of the topic that will be covered in the questions will be provided to you. Proposed interview will be held in a place mutually convenient to you and me, and the duration of interview will be about 30-45 minutes. An outline of the topics that will be covered in the questions will be provided to you before the interview.

1. What are the possible benefits of taking part?

Whilst there are no immediate benefits for those people participating in the project, it is hoped that this work provides an understanding in identifying some challenges of postcolonial penal reform. This research will offer scholastic insight to understand a certain trend of penal reform in Bangladesh.

1. Will my taking part in this project be kept confidential?

All the information that I collect about you during the course of the research will be kept strictly confidential and will only be accessible to me. You will not be able to be identified in any reports or publications unless you have given your explicit consent for this. Rather I will use the anonymised data for my research and publication alone.

1. What is the legal basis for processing my personal data?

According to data protection legislation, I am required to inform you that the legal basis we are applying in order to process your personal data is that ‘processing is necessary for the performance of a task carried out in the public interest’ (Article 6(1)(e)). Further information can be found in the University’s Privacy Notice <https://www.sheffield.ac.uk/govern/data-protection/privacy/general>.’

As I will be collecting some data that is defined in the legislation as more sensitive (information about law and justice), I also need to let you know that I am applying the following condition in law: that the use of your data is necessary ‘for archiving purposes in the public interest, scientific research purposes or statistical purposes' (9(2)(j)).

1. What will happen to the data collected, and the results of the research project?

The result arising out of the data will be used for research purpose only and result will be published in future as a PhD thesis and may also be published for academic purposes while maintaining the anonymity of your identity. Anonymised data will be destroyed after completion of my PhD.

1. Who is organising and funding the research?

The University of Sheffield School of Law Scholarship is the primary funder of this research

1. Who is the Data Controller?

The University of Sheffield will act as the Data Controller for this study. This means that the University is responsible for looking after your information and using it properly.

1. Who has ethically reviewed the project?

This project has been ethically approved via the University of Sheffield’s Ethics Review Procedure. University’s Research Ethics Committee monitors the application and delivery of the University’s Ethics Review Procedure across the University.

1. What if something goes wrong and I wish to complain about the research or report a concern or incident?

If you are dissatisfied with any aspect of the research and wish to make a complaint, you can contact me Hussain Bari, PhD Researcher, School of Law, the University of Sheffield, email; [hmfbari1@sheffield.ac.uk](mailto:hmfbari1@sheffield.ac.uk) Address: PGR Room, School of Law, Bartolome House, Winter Street, Sheffield, S3 7ND at the first instance You can contact the lead supervisor, Dr Mark Brown, Senior Lecturer, School of Law, the University of Sheffield, email: [mark.brown@sheffield.ac.uk](mailto:mark.brown@sheffield.ac.uk) Address: Bartolome House, Winter Street, Sheffield, S3 7ND. If you feel your complaint has not been handled in a satisfactory way you can contact Dr Richard Kirkham, Head of the School of Law, email: [R.M.Kirkham@sheffield.ac.uk](mailto:R.M.Kirkham@sheffield.ac.uk)  Address: Bartolome House, Winter Street, Sheffield, S3 7ND. If the complaint relates to how your personal data has been handled, you can find information about how to raise a complaint in the University’s Privacy Notice: https://www.sheffield.ac.uk/govern/data-protection/privacy/general.

If you wish to make a report of a concern or incident relating to potential exploitation, abuse or harm resulting from your involvement in this project, please contact lead supervisor, Dr Mark Brown, Senior Lecturer, School of Law, The University of Sheffield. If you feel a report you have made to this Contact has not been handled in a satisfactory way, please contact Head of School of Law, University of Sheffield and/or the University’s Research Ethics & Integrity Manager (Lindsay Unwin; l.v.unwin@sheffield.ac.uk).

1. Contact for further information

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Dr Mark Brown, Principal Supervisor, Senior Lecturer, School of Law, University of Sheffield, email: [mark.brown@sheffield.ac.uk](mailto:mark.brown@sheffield.ac.uk) Phone: +44 114 222 6817

1. Will I be recorded, and how will the recorded interview be used?

The audio and/or video recordings of your interview will be used only for transcription. All precautionary measures will be taken to ensure that the recording in on secure devices. Recording will be destroyed once transcription is done.

I thank you for taking part in the project.

1. Hafizur Rahman and others v State [2007] 16 MLR 389 (HCD) is one of the few instances in which I worked as a lawyer for a cluster of human rights organisations that challenged the illegality of the use of bar fetters for the under-trial prisoners. < <http://www.clcbd.org/judgment/search.html?q=seizure-list&Judgment_page=28>> (accessed 04 October 2024). [↑](#footnote-ref-1)
2. (Justice) Muhammad Habibur Rahman, *Rabindra Rachanay Aini Bhabna* (Legal thoughts in the Writings of Rabindra (in English)) (University Press Limited Dhaka 2002) 31 [↑](#footnote-ref-2)
3. The Constitution 1972, Preamble. [↑](#footnote-ref-3)
4. Anwar Hossain Chowdhury v Bangladesh Special Edition BLD 1989 para 443 (AD). [↑](#footnote-ref-4)
5. Gowher Rizvi, ‘Holding the State Accountable’ [2011]56 Journal of the Asiatic Society of Bangladesh (Humanities) 33. [↑](#footnote-ref-5)
6. World Justice Project, the Rule of Law Index 2023, World Justice Project; ><https://worldjusticeproject.org/rule-of-law-index/country/2023/Bangladesh/Constraints%20on%20Government%20Powers/> >(accessed 09 September 2024). [↑](#footnote-ref-6)
7. Asif Nazrul, *Sangbidhan Bitorko 1972: Gonoporishoder Rastrabhabna (Constitution Debates 1972: Political thought of the Constituent Assembly (in English))* (Prothoma 2022) 195. [↑](#footnote-ref-7)
8. Kamal Hossain, *Bangladesh: Quest for Freedom and Justice* (Oxford 2013) 1-10. [↑](#footnote-ref-8)
9. Mahmudul Islam, ‘Rule of law in Bangladesh’ [2005] 50 Journal of the Asiatic Society of Bangladesh 423. [↑](#footnote-ref-9)
10. Kazi Ebadul Hoque, *Administration of Justice in Bangladesh* (Asiatic Society of Bangladesh 2003)1. [↑](#footnote-ref-10)
11. Werner F Menski, 'Crime and punishment in Hindu law and under modern Indian law' [1992] 58(4) *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions* 295-334. [↑](#footnote-ref-11)
12. Government of India Act 1935; Indian Independence Act 1947; Muhammad Mahbubur Rahman, *Criminal Sentencing in Bangladesh: From Colonial Legacies to Modernity* (Brill 2017) 71-115; R Sisson and L E Rose, *War Secession: Pakistan, India and the Creation of Bangladesh* (Berkeley CA 1990); Upon decolonisation, in 1947 Bangladesh became a province of Pakistan; however, through a prolong struggle, Bangladesh gained independence from Pakistan in 1971. [↑](#footnote-ref-12)
13. The Indian Penal Code 1860 was renamed as the Pakistan Penal Code 1860 during Pakistan period (1947-1971) while it was titled as the Penal Code 1860 after the Independence of Bangladesh in 1971. [↑](#footnote-ref-13)
14. Wing Cheong Chan, Barry Wright and Stanley Meng Heong Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate 2011) Introduction. [↑](#footnote-ref-14)
15. According to Special Powers Act 1974, s 2, “prejudicial act” means any act which is intended or likely

    (i) to prejudice the sovereignty or defence of Bangladesh;

    (ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign states;

    (iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;

    (iv) to create or excite feelings of enmity or hatred between different communities, classes or sections of people;

    (v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;

    (vi) to prejudice the maintenance of supplies and services essential to the community;

    (vii) to cause fear or alarm to the public or to any section of the public;

    (viii) to prejudice the economic or financial interests. [↑](#footnote-ref-15)
16. Hussain Bari, ‘An evolution of the criminal justice system in Bangladesh: colonial legacies, trends and issues’ [2019] 45 Commonwealth Law Bulletin 25-46. [↑](#footnote-ref-16)
17. The Penal Code 1860, s 41. [↑](#footnote-ref-17)
18. A G Noorani, *Indian Political Trials 1775-1947* (Oxford 2005) 17. [↑](#footnote-ref-18)
19. Andrew Ashworth, *Sentencing and Criminal Justice* (Oxford 2006) Introduction. [↑](#footnote-ref-19)
20. Shahdeen Malik, ‘Perceiving crimes and criminals: Law making in the early 19th century Bengal’ [2002]6 Bangladesh Journal of Law 42-59. [↑](#footnote-ref-20)
21. The Constitution 1972, Preamble; See Anwar Hossain Chowdhury v Bangladesh BLD special issue (1989)1 (SC). [↑](#footnote-ref-21)
22. It indicates a balance between due process model and crime control model with reference to the rule of law values that Bangladesh is obligated to follow. [↑](#footnote-ref-22)
23. Mizanur Rahman Shelly, *Emergence of a New Nation State in a Multi-polar World: Bangladesh* (University Press of America 1978) 18. [↑](#footnote-ref-23)
24. Akbar Ali Khan, *Discovery of Bangladesh: Explorations into Dynamics of a Hidden Nation* (University Press Limited 2023 reprint) 10. [↑](#footnote-ref-24)
25. Adam Smith, *The Wealth of Nations* (London 1776) 868. [↑](#footnote-ref-25)
26. Government of India Act 1935, sec 46(1). [↑](#footnote-ref-26)
27. Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (Cambridge 1985, South Asian Edition 2007) 280-290. She noted that most of the Congress leaders including Nehru were not in favour of an independent Bengal while at least initially Jinnah was fascinated by the idea of undivided Bengal as advanced by Suhrawardy, Bose and Roy, the leaders of Undivided Bengal. [↑](#footnote-ref-27)
28. Rounaq Jahan, *Pakistan: Failure in National Integration* (University Press Limited 1994) Preface. [↑](#footnote-ref-28)
29. For example, Ali Riaz, *Inconvenient Truths about Bangladeshi Politics* (Prothoma 2012)1, Moudud Ahmed, *Bangladesh: A Study of the Democratic Regimes* (University Press Limited 2012) 13-16, Ridwanul Hoque and Rokeya Chowdhury (eds), *A History of the Constitution of BangladeshThe Founding, Development, and Way Ahead* (Routledge 2024). [↑](#footnote-ref-29)
30. Nurul Kabir, *Birth of Bangladesh: The Politics of History and the History of Politics* (Samhati Publications Dhaka 2022) 938. [↑](#footnote-ref-30)
31. The Guardian 08 August 2024, *Bangladesh: Muhammad Yunus Sworn in as Chief Advisor of Interim Government* 08 August 2024 < <https://thedailyguardian.com/bangladesh-muhammad-yunus-sworn-in-as-chief-advisor-of-interim-government/>> (accessed 01 September 2024). [↑](#footnote-ref-31)
32. Akbar Ali Khan, *Discovery of Bangladesh: Explorations into Dynamics of a Hidden Nation* (University Press Limited 2023 reprint) 12. [↑](#footnote-ref-32)
33. Saqlain Rizve, ‘Islamist parties gaining ground in Bangladesh amid post-Hasina political vacuum’ The Diplomat 16 September 2024 < <https://thediplomat.com/2024/09/islamic-parties-gaining-ground-in-bangladesh-amid-post-hasina-political-vacuum/> >(accessed 20 September 2024). [↑](#footnote-ref-33)
34. Fatima Raisa and Suriya Susan, ‘Bangladesh Through the Prism of Doctrine

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39. Office of the High Commissioner for Human Rights (OHCHR) Fact-Finding Report: Human Rights Violations and Abuses related to the Protests of July and August 2024 in Bangladesh (12 February 2025) < <https://www.ohchr.org/sites/default/files/documents/countries/bangladesh/ohchr-fftb-hr-violations-bd.pdf>> (accessed 12 February 2025). [↑](#footnote-ref-39)
40. Constitution 1972, article 94(1). [↑](#footnote-ref-40)
41. For instance, Special Powers Act 1974, s 30 provides that an appeal from any order, judgment or sentence of a special tribunal may be preferrable to the HCD within 30 days from the date of the delivery of passing thereof. Also see Safar Ali v A R Chowdhury [1980]32 DLR 142 (HCD). [↑](#footnote-ref-41)
42. Code of Criminal Procedure 1898, s 561A: Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. [↑](#footnote-ref-42)
43. Constitution 1972, article 102: 102. (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution. [↑](#footnote-ref-43)
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45. Special Powers Act 1974, s 26. [↑](#footnote-ref-45)
46. Safar Ali v AR Chowdhury [1980] 32 DLR 142 (HCD). [↑](#footnote-ref-46)
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48. Muhammad Mahbubur Rahman, *Criminal Sentencing in Bangladesh From Colonial Legacies to Modernity* (Brill 2017) 158-159. [↑](#footnote-ref-48)
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51. Justice Khandaker Musa Khaled, ‘The Judiciary in Bangladesh’ [2015]14 Journal of Judicial Training Institute5. [↑](#footnote-ref-51)
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53. The Prothom Alo, Chief justice's address: Why judiciary not separated in so many years 23 September 2024, < <https://en.prothomalo.com/opinion/editorial/6fvke61jl8>> (30 September 2024) [↑](#footnote-ref-53)
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55. T K Banerjee, *Background to Indian Criminal Law* (EasternBook Company 1997) 23. [↑](#footnote-ref-55)
56. David Lewis, *Bangladesh Politics, Economy and Civil Society* (Cambridge 2011) 46. [↑](#footnote-ref-56)
57. N V Paranjape, *Criminology and Penology* (Central Law Publications) 31. [↑](#footnote-ref-57)
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59. Bangladesh v Bangladesh Legal and Services Trust and other 64 DLR 1(AD). [↑](#footnote-ref-59)
60. Radhika Singh, *A Despotism of Law: Crime & Justice in Early Colonial India* (Oxford 1998, reprint) 2. [↑](#footnote-ref-60)
61. Shadeen Malik, ‘Perceiving crimes and criminals: Law making in the early 19th century Bengal’ [2002]6 *Bangladesh Journal of Law* 42-59, 43. [↑](#footnote-ref-61)
62. Jorg Fisch, *Cheap Lives And Dear Limbs: The British Transformation of the Bengal Criminal Law 1769-1817* (Wiesbaden 1983) 49. [↑](#footnote-ref-62)
63. 1833 Hansard debates, as cited in Radhika Singh, *A Despotism of Law: Crime & Justice in Early Colonial India* (Oxford 1998, reprint) Preface. [↑](#footnote-ref-63)
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66. Barry Wright, ‘Macaulay’s Indian Penal Code: Historical Context and Originating Principles’, in Cheong-Wing Chan, Barry Wright and Stanley Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform (*Ashgate 2011) 11. [↑](#footnote-ref-66)
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69. Shashi Tharoor, *An Era of Darkness: The British Empire in India* (Aleph 2012) 211. [↑](#footnote-ref-69)
70. Penal Code 1860, ss 6-52, 107-120. [↑](#footnote-ref-70)
71. Penal Code 1860, ss 76-106. [↑](#footnote-ref-71)
72. Penal Code 1860, ss 53-75. [↑](#footnote-ref-72)
73. Penal Code 1860, ss 121-130. [↑](#footnote-ref-73)
74. Penal Code 1860, ss 161-171. [↑](#footnote-ref-74)
75. Penal Code, ss 191-206. [↑](#footnote-ref-75)
76. Penal Code 1860, ss 268-294B. [↑](#footnote-ref-76)
77. Penal Code 1860, ss 295-298. [↑](#footnote-ref-77)
78. Penal Code 1860, ss 299-377. [↑](#footnote-ref-78)
79. Penal Code 1860, ss 378-489; ss 493-498 [↑](#footnote-ref-79)
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81. Indian Criminal (Amendment) Act 1870, s 121A (India). [↑](#footnote-ref-81)
82. Elections Offences and Inquiries Act 1920 (India). [↑](#footnote-ref-82)
83. Criminal Law (Amendment) Act 1927 (India). [↑](#footnote-ref-83)
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     In this Code, unless the context otherwise requires, any reference-

     (a) without any qualifying word, to a Magistrate, shall be construed as a reference to a Judicial Magistrate;

     (b) with a qualifying word not being a word clearly indicating a Judicial Magistrate shall be construed as a reference to a Magistrate as indicated in sub-section (2) (b);

     ..……

     ……..

     (2) Where, under any law for the time being in force other than this Code, the functions exercisable by a Magistrate relate to matters-

     (a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty of detention in custody pending investigation, inquiry or trial or other proceeding or would have the effect of sending him for trial before any Court, they shall subject to the provision of the Code, be exercisable by a judicial Magistrate; or

     (b) which are administrative or executive in nature, such as the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.] [↑](#footnote-ref-262)
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316. For the purpose of our research, such laws are generally referred to as ‘postcolonial laws’ other than the Penal Code 1860 and the Code of Criminal Procedure 1898. Such laws mostly provide for special procedure and stringent sentencing provisions and will also have separate trial courts. [↑](#footnote-ref-316)