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**Faculty of Law
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Lawless Laws: Land Rights, Poverty and Empowerment of Common People in Bangladesh

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LAWLESS LAWS: LAND RIGHTS, POVERTY AND EMPOWERMENT OF COMMON PEOPLE IN BANGLADESH

SM Masum Billah*

ABSTRACT *Access to land is considered to be the constituent element of empowerment of common people. There are many challenges in the way to ensure access to land i.e., land rights. Unfortunately, law itself is an important barrier in attaining this right, though they were supposed to be designed to remove the obstacles. The proposition is more correct in case of land related legislation. Anti-poor elements in land law frustratingly widen the possibility of landlessness. It is noted that legal regime of land law in Bangladesh bears a colonial legacy. It tends to perpetuate poverty and requires a landslide reform. In this article, law on land records, land ceiling, settlement of khas lands and water bodies, land acquisition, alluvion and diluvion, indigenous people's land rights and vested property have been critically assessed to establish that land rights, poverty and empowerment had a close nexus in the democratic polity.*

KEYWORDS: *Access to land, empowerment, land law, land rights, poverty, land reform*

1. INTRODUCTION

In this paper an effort has been made to establish that existing land laws in Bangladesh are contributing to perpetuation of poverty rather than ensuring land rights of the common people. After a thorough perusal of major areas of land laws of Bangladesh, it has been concluded that the prevailing legal regime related with land rights in the country is extremely anti-poor and a ready source of vicious circle of poverty. The language of land legislation is frustratingly written in an inaccessible language making access to land itself by the mass people almost impossible. Majority of the land legislation carry the legacy of the colonial yoke and are not devoid of landlord syndrome in asserting land tenure and rights. As a result, land right of the common mass is often left at the mercy of a feudal and discriminatory system. Empowerment of common people is, therefore, shattered by the sheer bite of poverty. Poverty in particular objectives of this essay is to be understood in terms of disempowerment through inaccessibility to land. It is submitted that land laws devoid of land justice is to be termed as 'law' less law and land law reform should precede or assimilated with other social and political reforms.

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2. UNDERSTANDING POVERTY

Poverty is to be understood rather than defined. It is a phenomenon which implies lack of basic necessities, satisfaction, triviality of income and relative deprivation. Spicker (1999: 2) has traced out 11 dimensions of poverty-need, resources, standard of living, multiple deprivation, inequality, class, dependency, lack of security, exclusion, lack of entitlement, unacceptable hardship. Baxi in his *Law and Poverty* essays mentioned that poverty is characterised by lack of opportunity. It is a state of helplessness to cope with hostile forces and exploitation. There is no dignity or self-respect. Poverty robs the individual of his dignity. This is why poor are vulnerable to injustice. It is a condition where the poor are made to feel the rights are enjoyed by only a few (Baxi 1988: 342). But a new dimension of poverty has been added by Nobel Laureate Professor Amartya Sen on the basis of 'capability deprivation'. To quote Sen (1984: 511):

The insecure sharecropper, the exploited landless labourer, the overworked domestic servant, the subordinated housewife, may all come to terms with their predicament in such a way that grievance and discontent are submerged in cheerful endurance by the necessity of uneventful survival. The hopeless underdog loses the courage to desire a better deal and learns to take pleasure in small mercies.

Thus poverty is a phenomenon at which even the poor may have cheerful endurance and they may have been turned into fatalists. The poor loves to think that they are born poor and have nothing to curse except their fate. Whereas the truth is that the historic calculated deprivation through politics of law has compelled them to live in the vicious circle of poverty.

3. LAND RIGHTS, POVERTY AND EMPOWERMENT

Why people are poor? Because, they have no land! Why people have no land? Because they are poor! This is a cycle and the answer revolves around the same center 'ownership of land' (Islam 2002: 101). It is obvious that if a person has no land, he is attracted by poverty and vice versa (Roy 2008: 14). Question of empowerment is often assimilated with attainment of right to property. Property is a prerequisite to attain means of livelihood. How is means of livelihood related with dignity, if dignity constitutes the forefront of human rights? The simple response to this question is without economic solvency no person in the society can hope to attain a status. The spirit of empowerment is beset with this attainment of human dignity. Therefore, empowerment in its majestic sense implies that every people would be capable to attain his dignity. The process of empowerment begins when people start to think that they are powerless. Legal empowerment suggests a situation where people want a change in their position and capability; ascertain their participation in the affairs having bearing on their lives. Writers¹ have applied the following meanings of empowerment amongst many other things:

- i. capacity to decide,
- ii. access to information and property,

¹ Chamberlin, Judi, *A Working Definition of Empowerment*, National Empowerment Center. Available at <http://www.power2u.org/articles/empower/working_def.html>. Accessed 25 September 2012.

- iii. right to choose,
- iv. opportunity to unfold oneself,
- v. getting education to change one's life,
- vi. to re-determine the relationship with the organised power structure,
- vii. spirit of unity,
- viii. rights consciousness,
- ix. ability to work,
- x. to establish one's image and to face the challenges of life.

The above connotations of 'empowerment' are full-fledged. It appears that concept of 'empowerment' engulfs a wide gamut of area essential for human existence. Indeed, to present oneself as a human being, empowerment of people against social odds is necessary. How access to land rights is then related with the issue of empowerment? It is because without land solvency, the connotation of 'empowerment' cannot be achieved. And why question of empowerment of people is being raised particularly by using an adjective 'mass' before the word 'people'? The answer perhaps is not that much difficult, for the society itself is deeply rooted in discrimination. For our purpose here we may say that the society is running with a prejudiced power structure, where the poor are always fighting against the omnipotent discriminatory legal system.

4. POVERTY OF LAND LAWS

Landlessness, it is rightly argued, is not because of the scarcity of land in proportion to population. Rather it is the byproduct of discriminatory land ceiling system and capitalist penetration in the land ownership system. Barkat has identified the following causes of landlessness in Bangladesh: archaic land record system, delay in disposing land litigation, non-access to land, absence of legal aid, non-friendly law, corrupt land management system, river erosion etc (Barkat and Roy 2004: 184). He has considered political economy of land litigation and has established that land litigation in Bangladesh is a 'colossal national wastage' and a 'process of pauperisation of common people'. Thus, land litigation, as per Barkat, creates 'an environment for exploiting the innocent people' and multiplying the process of pauperisation (Barkat and Roy 2004: 184). Land litigation, therefore, accentuates distress and destitution among the families under litigation; acts as a powerful disincentive against human capital formation, and causes a colossal wastage for the whole national economy and the society. Land litigation fuels corruption; perpetuates vicious cycle of litigation-mediated corruption; acts as a route to pauperisation of both parties. The gainers in the process include land officials, court system, advocate, local government, political entities, middlemen etc.

It is true that the whole court structure and justice delivery system is responsible for delay in disposal of litigation or settling disputes. But the unreasonable procrastination in land disputes, the complex, long and vague land legislations are not less responsible. Laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws (Chowdhury 2010: 148). Law is to simplify the problems of the people. Whereas, our law (land law in

the instant case) itself becomes the cause of frictions than solving them. Francis Bennion sarcastically yet rightly said:

I'm the parliamentary draftsman
I compose the country's laws,
And half of the litigation
I am undoubtedly the cause²

In the successive paragraphs, we shall demonstrate the loopholes of major areas of land laws and try to show how they are contributing in perpetuating landlessness and poverty. The major areas are: land survey, records, registration and related matters, land ceiling, rights over *jalmahal*, acquisition law, sharecroppers law, vested property, *adivashi* land rights, right over *charland*, *khas* land policy etc.

4.1 Land Survey, Record of Rights, Registration and Others

There goes a Bangla saying like this: 'Deshe Elo Jareep, Manush Holo Gareeb'! The simple translation of this saying in English may be: 'with the appearance of survey system, people turn into poor.' This traditional belief is indicative of non-confidence of mass-people to the land survey system. The land survey is the process by which the record of rights is made. The survey does not take place regularly. It is very archaic in nature, takes a long time to finish.³ The elongated process and inadequate redress against wrong record of land proves to be deprivation of one's holding. The land record system in Bangladesh is archaic, obsolete, illegible and an impression of complex labyrinth of land rights. The record of rights is the subject of forgery and a means of calculated deprivation to land rights particularly of the helpless and downtrodden. The registration process, mutation system is saddled with corruption and harassment. Added with it the local land officer (*Tehshildar*) is granted with a pervasive discretionary power to impose Land Development Tax under the Land Development Tax Ordinance 1976 and the Land Development Tax Rules 1976 by showing or ignoring the conversion of agricultural land into non-agricultural and vice-versa. From a holistic approach, it can be said that total land administration and management system in Bangladesh is unscientific, unaccountable and un-coordinated. This maladministration coupled with enfeebled land law regime has paved the pauperisation process of the mass people.

4.2 Land Ceiling

Ceiling is the amount of land a person or his family can retain lawfully. As per the Land Reforms Ordinance (LRO) 1984, a person or a family can possess maximum 60

² Francis Bennion in Renton Committee Report, England, 1975.

³ As per the State Acquisition and Tenancy Rules 1955, the stages of making record of rights are: Traverse Survey, Cadastral Survey (Kistwar), Khanapuri, Bujharat, Khanapuri cum Bujharat, Attestation or Tasdik, Determination of Fair and Equitable Rent and Preparation of Settlement Rent-Roll, Publication of Draft Record, Disposal of Objections and Final Record of Rights. Without digitization of the whole recording system, corruption, large-scale forgery will remain rampant and unchecked.

standard *bigha* agricultural land and with certain exceptions.⁴ In practice, the exceptions govern the system and people become owner of land much higher than the stipulated ceiling. The existing ceiling system is grossly flawed and twisted on the following grounds (Zaman and Khan 1998: 22):

- i. The definition of 'family' lacks equitable consideration and retains the probability of misuse. Twofold problems lie here: a) a family is allowed to hold same ceiling amount of land irrespective of the number of family members⁵ and, b) an adult or married son who has been living in a separate mess independent of his parents and pays union rate in his own name and his wife, son and unmarried daughter is deemed to constitute a separate family.⁶
- ii. A person is debarred from acquiring more than 60 standard *bigha* but a person who already possessed more than 60 *bigha* was not dispossessed from the surplus land. This is inherently discriminatory.
- iii. The value of land in urban area and rural area is not same. The ceiling applies in equal manner for both types of land. As a result it proves to be unrealistic and pro-capitalist.

Actually, government has failed to acquire the surplus amount of land as *khas* land. The result is that there remains a huge gap between the rich and the poor. The ceiling system is thus widening the social parity and becoming the instrument of creating social hierarchy in terms of land ownership. At present there are 2 crore 60 lakh acre of agricultural land in Bangladesh and each family can be offered at least 3 acre, if proper distribution of land is maintained (Bablu 2010: 35). But with the above flaws, the existing ceiling law has always put a class of people in a feudalistic position making another class of people subordinated in terms of access to land.

Rights over Jalmahal

Jalmahals are territorial water-bodies liable to be retained by the government. Under the State Acquisition and Tenancy Act 1950 (hereinafter SATA), *jalmahals* fall within the ambit of 'land'⁷ and these are said to be vested under the disposal of the government.⁸ However, customary fishing rights belong to the fishermen themselves. The prevalence of this customary right can be traced from the age-old maxims like these: 'jal jar jola tar'⁹ or 'fish follows the water, fishermen follows the fish' (Kabir

⁴ As per, the SATA 1950, an exception to the ceiling rule is permissible on the ground of holding land for cultivation of sugarcane, coffee, rubber; production of materials of industry, large scale cultivation on co-operative basis and by mechanical appliances, making charitable trusts etc. The 1984 Land Reform Ordinance (LRO) is silent about the exceptions; neither it has omitted the exceptions of legislation of 1950. Though the LRO has taken a *non-obstante* clause, the obscurity has paved the way to the opportunity seekers to take advantage of the exception clauses.

⁵ Section 4(1) of the Land Reforms Ordinance 1984.

⁶ Section 2(d) of the Land Reforms Ordinance 1984.

⁷ Section 2(16).

⁸ Section 20.

⁹ The water-bodies belong to whom, who owns the net.

1969: 10). Long practiced custom is held in high esteem in every jurisdiction and the statutory law can hardly outweigh this trend. Unfortunately, law relating to leasing out of *jalmahal* in Bangladesh, has denied this weighty customary practice. In the age of capitalist penetration, the *jalmahals* are being leased out to the people who are not related with fishing at all. The poor fishermen, being incapable of buying nets and boats are gradually being placed at the slaverism of the *jalmahal* leaseholder.¹⁰ So, they never become capable to redeem out of the cycle of poverty they are thrown in. Manik Bandopadhyay, a literary giant of the country, rightly depicted long ago the conditions of the fishermen in his famous novel, *Padma Nadir Majhee, Dhormer Cheye Era Boro Odhormo Lalon Kore, Daridro!*

In the Jalmahal Management Policy 2009, the provision for keeping local lawmakers and upazila chairmen as advisers in the management committee has opened the Pandora's Box for politicisation and conflict. The policy is far from bringing any meaningful change to protect the genuine fishermen against exploitation by the middlemen in getting the lease of *khas* water bodies.¹¹ A policy which is largely drafted by the bureaucratic process can hardly reflect the woes of poor fishermen. Under the policy, the management committee headed by a Deputy Commissioner (DC) is authorised to lease out *khas jalmahal* among the community. Local lawmakers have been made advisers to the district and upazila committees with the upazila chairmen alternative advisers to the upazila committees. Local influential and moneyed men have got the opportunity to pocket the poor fishermen's society and manage lease of the *jalmahal* to plunder thousands of crores of taka which reminds us the vicious tenets of feudal system. The policy is also silent about empowerment and participation of the marginalised fishermen in the bidding process.¹²

4.3 Acquisition Law

Law of acquisition, prevailing in Bangladesh, is seemingly surrounded by politics of development. In fact the history of land law in modern times is full of politics (Sawyer 2001: 201). In majority of the cases land is acquired in the name of developmental activities and is put under the garb of 'public purpose'. The principal legislation on the point is the Acquisition and Requisition of Immovable Property

¹⁰ With the steep rise in the value of the fisheries, and in the prices offered for leases, only those able to access relatively large cash resources, or in a position to influence the auction proceedings, are easily able to gain control of productive fisheries. This situation resulted in fewer and fewer of the primary producers, fishers themselves, having any direct control over the fisheries on which they depended for their livelihoods. Leases were generally bid for and obtained by wealthy businessmen or moneylenders or even consortiums of investors. At best, fishers who often had long-standing traditions of exploiting and managing particular water-bodies were reduced to the status of seasonal labourers. At worst, they would find themselves alienated from the fisheries which they often perceived as being theirs 'by right'.

¹¹ Jalmahal Policy wouldn't help Grass-root Fishermen, The Daily Star. Available at: <<http://www.thedailystar.net/newDesign/news-details.php?nid=98638>>, accessed 22 September 2011.

¹² Bangladesh: Poverty Reduction Strategy Papers (5-410), International Monetary Fund, Parikalpna Commission, General Economic Division, 2005 at 92.

Ordinance 1982, which was promulgated by a military ruler. This law epitomises the *Austinian* syndrome of legal definition¹³ and is an impression of an unreasonable compromise¹⁴ with fundamental right to property of the citizenry. From *Kaptai* to *Arial Beel*¹⁵ we get the same impression. There are several concerns in the acquisition process. Firstly, in assessing the compensation the opportunity cost, degree of urgency, attachment with land and disinclination of the land owner are never taken into consideration. Unfortunately, the legislation and the rules there under enjoy constitutional protection even if it affords not to provide 'adequate compensation'.¹⁶ Secondly, in the absence of standard resettlement policy any acquisition and requisition scheme is bound to collapse bringing a malady consequence for human rights. Thirdly, effective redressal forum for grievances is a foremost prerequisite for a sound law of acquisition in order to check *malafide* acquisition and deceptive compensation package. An overburdened District Judge or Joint District Judge acting in the capacity of an Appellate Arbitrator or Arbitrator can hardly perform as quick, effective, competent redressal forum. Access to no remedy, therefore, is enough to vitiate the noble purpose of all the acquisition proceedings. The cardinal ambiguity in the acquisition law of Bangladesh lies in the slippery phrase of 'public purpose.' In the absence of legislative and judicial test of the content of 'public purpose', it is always open to abuse by the administrative authorities. Moreover, the Acquisition and Requisition of Immovable Property Ordinance 1982 under section 5 has imputed the notion of conclusive presumption of public purpose once the decision for acquisition has been finally reached. This presumptive advantage in favour of acquisition authority has widened the scope of abusing the administrative discretion. In fine,

¹³ The President is required to promulgate Ordinance when the parliament is not in session and if the situation so warrants. The law making process through Ordinance in absence of Parliament is a shadow practice of John Austin's definition of law: Law is the Command of the Sovereign. The process often leaves apart the people's spirit.

¹⁴ Under the Ordinance an individual's property can be acquired subject to certain safeguards. The safeguards often appear to be weak to defend the fundamental right to property of a person.

¹⁵ Kaptai Dam of Chittagong was constructed in disregard to the indigenous people (Chakmas) in 1960s causing huge displacement of the Chakmas, while land of Arial Beel (Munshiganj) was attempted to be acquired without due process of law in 2011 for constructing an international airport.

¹⁶ Article 42 of the Constitution of Bangladesh reads: (1) 'Subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property and no property shall be compulsorily acquired, nationalized or requisitioned, save by authority of law'. (2) 'A law made under clause (1) shall provide for the acquisition, nationalization or requisition with compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid, but no such law shall be called in question in any court on the ground that any provision in respect of such compensation is not adequate' (underlined by the author). Even if this provision is pragmatically interpreted, 'the principles of assessing compensation' and the 'manner of assessing and paying compensation' are never tested in the scales of human rights.

acquisition law of Bangladesh also has been contributing in the deprivation process of people's land rights.

4.4 Sharecropper's Law

A thorough perusal of the history of land law of the Indian sub-continent will reveal that rights of the *Bhag Chashis* (sharecroppers) are a historical component of denial.¹⁷ The legacy of land laws in the sub-continent unfolds that the sharecroppers got no right in the famous laws purported to ensure the rights of the farmers. The notorious Permanent Settlement Regulation 1793 awfully neglected the rights of the *raiya*s, let alone the sharecroppers. The successive legal regime related to land law, the Bengal Tenancy Act 1885, for example, failed to protect the rights of the *under-raiya*s. Even the most pro-peasant law, namely, the SATA 1950 didn't mention the term sharecroppers as it purported to create a uniform class of tenants under the government. The increased number of landless people necessitated the changes in the ceiling system within remarkably short time in 1972¹⁸ and 1984.¹⁹ The LRO of 1984 in line with decreasing the amount of land ceiling also prescribed some written protection to the rights of the *bargadars*. This was first of its kind in Bangladesh to give written protection of the rights of the sharecroppers.²⁰ The LRO enjoins to conclude a contract between the land-owner and the *bargadar* for security of their respective rights. The fundamental flaw in this provision is that the rule has failed to grasp the matter that both the parties are never in equal footing for bargaining. The heart of a contract i.e., *consensus ad idem* is irrefutably absent here and the land-lord

¹⁷ In 1940 the Floud Commission recommended to offer one third of the produce from sharecrops. This led to resentment of *Tebhaga Andolon* (movement to obtain two-thirds of the produce) throughout Bengal especially in greater parts of Rangpur, Dinajpur, Maldah, Bogra, Jolpaiguri, Mymensingh, Jessore and Khulna claiming many lives of the farmers by the law enforcing agencies. This culminated the passing of Bengal Bargadars Temporary Regulation in 1947 by the Muslim League Government. In this law, it was provided that if the *Jotdar* (land owner) bears the expenses of cultivation the sharecropper would get the half of the produce, and in case the *Bargadar* (Sharecropper) himself provides the expenditure, he would bag two-thirds of the produce. Though *Tebhaga* (three portions) was a primary success of the sharecroppers' rights, but the *Zaminders* of certain locality continued to bag more than half of the produce, in Nababpur for example. This gave rise to famous *Nachol Bidroho* (Nachol Rebellion) of Ila Mitra. Even to these days, the sharecroppers still struggle to get the due share in their produce under the 1984 Land Reforms Ordinance and its subsequent regulations like the Land Management Manual 1994, Settlement of Khas Land Policy 1997 etc. For an account of *tebhaga* movement see, Hashemi, Taj Ul-Islam. 1994. *Peasant Utopia: The Communalization of Class Politics in East Bengal, 1920-1947*. Dhaka: University Press Limited. 237-262.

¹⁸ In 1972 it was made 100 bigha by a President's Order.

¹⁹ Section 4 of Land Reforms Ordinance 1984 has made the ceiling 60 standard bigha.

²⁰ The LRO 1984 was one of the instruments of camouflage by the Military Ruler General Ershad. Usurping state's power undemocratically, he professed to be democratic by several means, for example, using religious fervor and pretending to be pro-peasant were two most popular arms. An *ex-facie* good law culminates into nothingness due to procedural irregularities and lack of democratic spirit. LRO was not an exception.

is always at an advantageous position to govern the will of another. Thus, at the first instance, the LRO did not take into consideration the social milieu of the country. In the second place, section 12 of the LRO distributes the produce in the following manner:

- i. one-third shall be received by the owner for the land;
- ii. one third shall be received by bargadar for the labour;
- iii. one-third shall be received by the owner or the bargadar or by both in proportion to the cost of cultivation, other than the cost of labour, borne by them.

In a capitalist economy, 'the cost of the cultivation' tends to be borne by the land-owner, and it causes no hurdle for him at all. On the other hand, the landless peasant with no capital, no government amenities, learns to take the small mercy of the land owner, labour being his only capital. He becomes dangled in the hands of the landed aristocracy (Hoque 2000: 225). The law fails to compel the government to provide easy facilities of agricultural loan, fertilizers, pesticides and irrigation facilities. Once again, the LRO deformed the rights of the landlesses and failed to address to poverty of oppressed classes. Therefore, in the long run the law appears to be clumsy to defend the rights of the poor sharecroppers because of not reflecting the justice syndrome in the letter and spirit of the law.

4.5 Vested Property

Right to property can be discriminated simply on the basis of religious consideration ... this proposition can hardly be believed without the reference of Vested Property Laws in Bangladesh. The laws have accentuated sheerd is crimination to the Hindu minorities even when a secular constitution is said to be revived. During the 1965 Indo-Pak outbreak of war, the Hindus from East Pakistan fled to India for the fear of persecution. The left properties by them were declared as 'enemy property' by Pak government and that property was not returned to them even after 40 years of Bangladesh being independent.

Section 7 of the Vested Property Restoration Act 2011 (hereinafter mentioned as VPRA) provided for prohibition as to initiation of a suit or any claim regarding restorable property. This insertion was necessary for carrying away the purpose of the Act. There lies the irony of the VPRA. The provisions which were designed to provide remedy have closed the door of enforcement of the right of the claimants. In one hand one cannot enforce his right under the Act since the Schedule is not published wholly and on the other hand one cannot knock any other door for redress for the presence of section 7. However, writ petitions are being forwarded to the High Court Division on the ground that the other remedy provided by law is not 'equally efficacious'.

It is evident that the VPRA though attributed to be remedial in nature; has failed to bring the attribution to reality and has worsened the situation. The return it offered was too little and has even failed to make such return. Again, it stands totally mum about the huge quantum of property which it exempts from the list of vested property under section 9(6). It creates an indirect allowance in favour of the grabbers who are in possession of more than two third of the vested properties. So, it is apprehended

that the Act may well be the beginning of legalising the omissions and commissions committed under a patently discriminatory law.

4.6 Adivasi Eviction

Land rights of the *adivasis* are a deep concern for human rights movement in Bangladesh. Denial of collective rights of the indigenous people has led them to the point of extinction. The recent constitutional negation²¹ has appeared as a blow to the realisation of land rights of the *adivasis*. The state's bias to the word 'upajati' in lieu of 'adivasi' has given the administration a blank cheque to evict the *adivasis* from their ancestral land. Though the state is a party to international conventions relating to indigenous peoples,²² yet incidents of encroachment of *adivasi* land takes place on regular basis. That the indigenous people believe in prescriptive/customary land rights and they had no means to attain the record of rights when the SA records were being made, is totally overlooked by the state. As a result, denial of land rights has been a common phenomenon by the state mechanisms paving the way of disempowerment and marginalisation of the *adivasis*.

4.7 Rights on Charland

The politics of *charland* is yet another cause of human catastrophe in Bangladesh. A considerable portion of land²³ in the country is submerged in the river each year. And a huge number of *char* emerge in satisfaction of the submersion. The legal literature has addressed the issue *asshikasti* and *pawsti* of land or alluvion and diluvion law. Carrying the legacy of colonial provisions, these laws once again have failed to ensure the restoration of the ownership of the original owner. The first alluvion-diluvion law²⁴ in the subcontinent was passed in the year of 1825 recognising some customary practices and equitable principles as determining factor of attributing ownership. The famous *Felix Lopez* case²⁵ established the principle of *reformation in situ* doctrine which said that if a piece of holding was washed away by water and re-appeared in the same site later on, and it becomes evident that the re-appeared land resembles with the diluviated land and the original owner didn't abandon his right on

²¹ It was widely expected that through 15 Amendment of the Constitution the *adivasi* people of the land will have their recognition. However, to the contrast the amendment inserted the words 'upajati' instead of 'adivasi' to the dissatisfaction of the indigenous communities and many other civil segments of the society. However, it is argued that the insertion of the words 'ethnic community' in article 23 is definitely an improvement from the previous version of the Constitution.

²² The ILO Convention 169 of 1989 and ILO Convention 107 of 1957 in particular.

²³ A group of research students of Community Law Reform from Empowerment through Law of the Common People, Dhaka in their work on the rights of the river bank erosion induced displaces (Rahman 2007) revealed that about 1.7 million hectares of floodplain area is prone to riverbank erosion. Riverbank erosion takes place in about 94 of 476 Upazilas of the country. Amongst this, 35 Upazila's erosion is severe and recurrent. Annually it affects about 100,000 people living on the riverbanks.

²⁴ Bengal Alluvion & Diluvion Regulation 1825 (XI of 1825).

²⁵ (1840) 13 MIA 418.

the site, the *char* would belong to the person whose land was submerged. The doctrine of constructive possession was applied through legal fiction and the principle of *accretion* was recognised in this case. The doctrine of *reformation in situ* was incorporated subject to certain condition in the SATA 1950²⁶ which abolished the *zamindari* (landlord) system. It was provided that if a land or holding is lost by diluvion, the owner is entitled to get his rent abated fairly and equitably. If the land re-appears, the original owner of the submerged land can take possession of that on certain conditions.²⁷

Loosing the land in river erosion is a journey from ownership to impoverishment. This is fortified by the enfeebled legal protection by alluvion and diluvion law. The human consequences the *Shikasti-Pawsti* ensues are diverse in nature: human displacement, landlessness and homelessness, social stratification, begging, social bonds and above all marginalisation of a segment of people from the society. If we consider human displacement, we will find that displacement means attachment disruption with society. Displacees suffer from loss of quality of life. Their future becomes insecure. Erosion creates significant changes in the affected people's psychology. They see only decay. To quote from a seminal students' work on the issue in the voice of a village lady, '*Twelve times I have been affected by this erosion of river. I had my own land, own house and a happy family but now I have nothing and dragging my life depending on the mercy of permanent settlers*' (Rahman 2007: 40).²⁸ Abdul Bagee, a prolific researcher on the lives in *charland* of Bangladesh has depicted the following picture of *char* people:

Apart from nature's toll, life in the *char*-lands is beset by endemic violence born of a fierce struggle for existence compounded by a clash of interests between and among the haves and have-nots. This has turned the people of the *char*-lands into fatalists; they believe that their intense sufferings are divinely ordained. In their hearth and home, they inevitably see the unseen hand of Allah. This profound reality actuated us to coin the expression '*In the Land of Allah Jaan-e*' in focusing the uncertainties of life in the *char* lands of Bangladesh (Bagee 1998: 218).

This picture of poverty fatalism is the permanent customer of socio-economic milieu of river erosion induced displacees in our country. This is perhaps the existing dimension of poverty of what Sen (1999: 497) has called 'capability deprivation':

[I]n analysing social justice, there is a strong case for judging individual advantage in terms of the capabilities that a person has, that is, the substantive

²⁶ Sections 86 and 87.

²⁷ Over the time, the conditions of re-entry into the alleviated land have been varied. For example, under the President's Order No 135 of 1972 the reappearance time was fixed at 20 years while under the President's Order of 1994 it was increased to 30 years. The other conditions of getting back the ownership of the re-appeared were: compliance of ceiling system and production of rent-reduction receipts etc.

²⁸ (Zohra Khatun: Sirajgonj, 2007) quoted in Mizanur Rahman (ed) *Life on a Swing: Human Rights of the River Bank Erosion Induced Displacees*. Dhaka: ELCOP, 40.

freedoms he or she enjoys to lead the kind of life he or she has reason to value. In this perspective, poverty must be seen as the deprivation of basic capabilities rather than merely as lowness of income.

Thus, it appears, the alluvion-diluvion law in Bangladesh has perpetuated landlessness, marginalisation and poverty.

4.8 Khas Land Policy

Khas land is the government owned land other than land occupied by any person, organisation or departments.²⁹ Total amount of *khas* land in Bangladesh is 50 lac acres (Bablu 2010: 35). This land can be a great source of alleviation of ultra-poverty and landlessness.³⁰ But the ground reality is that government has failed to take possession of the *khas* land and most of the lands are captured by the vested groups, political hoodlums and land grabbers.³¹ Failure to make a comprehensive list of *khas* land has added deterioration to the situation. The procedural difficulties in getting *khas* land allocated is a perennial problem virtually appearing as a barrier to access to land to the day labourer landless people. The meager amount of distributed *khas* land has also not been able to protect the interests of the poor.³² Following are the flaws in the existing laws and policies relating to allocation of *khas* lands:

- i. State has not been able to obtain the surplus land beyond ceiling which was fixed under successive ceiling laws i.e., the SATA, Presidents Order 1972 and LRO 1984. There is no time framework to distribute the surplus land beyond the ceiling, as a result this ceiling laws did not help the poor to get their problems remedied. The circular of Agricultural *khas* land Management and Settlement Policy of 1997 also remained silent on the point.

²⁹ As per section 76 of the SATA 1950. Property of public easement, land fit for settlement, abandoned property, un-inherited land, water bodies' etc fall within the category of *Khas land*.

³⁰ Bablu in his work (2010: 35) reveals that one and half crore families in Bangladesh are landless. If all *khas land* can rationally be distributed amongst the landless people, each family can have one and half *bigha* of land, using of which they can change their fate and nation's fate as well.

³¹ *The Daily Shokaler Khobor* on 21 September 2011 reported that 50 lac acre *khas* land and waterbodies are illegally occupied by the land grabbers throughout the country. *Banglatimes24.com* has reported (10 September 2011) that 92.35 acre *khas* waterbody is forcefully retained by the previous lessees without participating in the new bidding process.

³² A study conducted by an independent researcher, Aminur Rahman Bablu (Bablu 2010) has revealed that only 5% of the *khas* water bodies have been distributed amongst the poor. Apart from this, in 56% cases the poor could not retain the land to their possession and has again turned into landless. In 40% cases, the poor did not get possession of the distributed land. The government resettlement projects like *adorsho gram* or *gucchogram* has not been successful, because the people accommodated under the projects had to leave the place either because of income reduction or unemployment ... Bablu has given the account from Tala Upazila of Shatkhira District. During 1985-1988, about 500 landless people of that sub-district got final approval of some *khas* land, but to the utter grief till 2007 they were struggling to get possession of their allocated land due to administrative lawlessness. The result has been, those landless people have merged with the mainstream people taking the option of leading a nomad life.

- ii. Different types of *khas* land are under the jurisdiction of different ministries of the government. Lack of coordination, therefore, is inevitable and the poor do not get access to *khas* land.
- iii. There is no effort from government's part to evict the illegal entrants/occupiers in the government *khas* property. Neither the law, nor the policy has addressed the conversion of the nature of the land (agricultural to non-agriculture and vice-versa).
- iv. In case of permanent settlement though the provision is reserved only for the landless people but in case of short term/yearly lease the scope is open for all. This unfolds the opportunity for the *wealthy persons* to vindicate the auction process in their favour.
- v. Existence of some other conflicting laws has hindered the process of allocation to a large extent. For example, in case of Prawn Cultivation, if *khas* land falls within a *chingri gher* (prawn cultivation boundary), the poor would not get the advantage of getting the land allocated, the *gherwala* (the owner of the prawn-hub) i.e., rich would take it for prawn cultivation merely by paying 1500 taka.
- vi. The process of allocation of *khas* land is itself problematic and complicated. It is at the mercy of certain other relevant and incidental factors: Firstly, identification procedure of the recipients is not poor friendly. The recipient needs to produce a landless certificate from the union parishad chairman of the respective area which once again leaves the landless people at the mercy of the power-structure. Secondly, exact amount of *khas* land has never been identified by the government and there is no statistic to that effect. Thirdly, there is no mechanism to make the *tehsilders* (the union level land revenue collector) accountable if no sketch map is made. Fourthly, in the absence of legal compulsion enough staff is not appointed to deal with the issue. Fifthly, only agricultural land as per record is preserved in land office, not other type of non-agricultural land and there is no specification in this regard. Finally, there is no list of actual landless people, riches have impersonated themselves as landless people in many cases and no steps have been taken to redeem the land from the powerful previous lessee. There is no example of penalty by Additional Deputy Commissioner (Revenue) in case of wrong settlement of *khas* land.
- vii. Land litigation relating to possession of *khas* land is never ending and there is no real step to speedy disposal of cases. The committee designed to be formed under the Khas Land Policy 1998 for identifying the landless people is unrepresentative, bureaucratic, non-native, not experienced.
- viii. Finally, the people are not informed about the total process of *khas* land distribution. As a result they cannot effectively exercise their entitlement.

5. THE LEGAL REFORM

The Constitution of Bangladesh inscribes justice as the first promise of the Republic i.e., the state power will execute the pledge of 'justice' in favour of the millions who are the Republic. The preambular pledge runs as follows:

[I]t shall be a fundamental aim of the state to realise through the democratic process to socialist society, free from exploitation—a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.

National progress is somewhat impossible without addressing the land rights issues. This is significant because of the many millions farmer's life is related with it. The odyssey of national progress is marred by the loopholes in land legislation indicated above. It transpires from our constitutional settings that in a third world country like Bangladesh land reform in terms of social justice has a dynamic connotation and missionary message:

- i. It is a solemn national tryst and anti-poverty imperative of our independence and after.
- ii. It is a promise for a transformation from the *status quo* of blood, sweat and tears to a social order in which justice—social, economic and political shall constitute the warp and woof of national life.
- iii. It appears to be a matter of socio-economic revolution in the miasmic milieu of the state affairs.

Law reform keeping in concentration of 'land ownership' in the light of 'socialism' may be the main panacea of upholding human rights and social justice, because law is mostly a mirror of the social structure and the economic texture. It is an engineer of those values into which the Constitution and parliament breathe life. A national renaissance in the field of land law reform, therefore, must flame forth from the constitution and the legislature and the basic economic relations prevailing in the society. Reform in the law, as per McAuslan (2003: 203) is to develop an appropriate legal framework to facilitate access to land and security of tenure for all people is a leitmotif to assist the poor and the disadvantaged in getting access to justice itself.

It is to be reminded that question of law reform is not that much simple (Lipton 2009: 10). To explain the matter, we can resort to a simple metaphor, attempting to reform the law is like attempting to make a sheet of corrugated iron flat with a hammer. Because discrimination in the law making process is age-old and law has always been used as a powerful instrument to vindicate the purpose of the well-offs of the society. Look at this sarcastic rhyme which epitomises the puppetry of our democracy:

The law locks up both man and woman
Who steals the goose from off the common,
But lets the greater felon loose

Who steals the common from the goose (Iyer 2010: 14)

Thus, acquisition law takes the mass people's land without proper compensation, alluvion law allows the land grabbers to take possession of *charlands*, *khas* land principles encourage the powerful persons to take over the poor's allotted land and survey law perpetuates landlessness of the poor. Hence, legal regime relating to land rights in Bangladesh attempted to suppress the injustices done to the farmers/mass people, but certain provisions of law as discussed above has appeared as an instrument of marginalisation for them. It is in this way, the justice syndrome in the

land law regime ultimately has become ineffective. Therefore, in addressing the land reform agenda the following observation should be adhered to:

Justice without power is inefficient; power without justice is tyranny.
Justice without power is opposed, because there are always wicked men.
Power without justice is soon questioned. Justice and power must therefore be brought together, so that whatever is just may be powerful, and whatever is powerful may be just (Iyer 1983: 25).

Keeping this perspective in account, the whole legal reform relating to land rights in Bangladesh needs to be addressed. In the reform agenda the following points may be stressed upon:

- i. Simplification, dissemination and wide readership of land law.
- ii. Enhancing efficacy of Judges dealing with land litigation.
- iii. Repealing of obsolete and discriminatory land laws.
- iv. Provision for meticulous and fair land records.
- v. Introducing digital systems in land survey and preparation of record of rights.
- vi. Distribution of *khas* lands simply, fairly, equitably.
- vii. Completion of the survey of accreted and alluvial land.
- viii. Revision of ceiling of lands.

Arjun Sengupta has shown that legal empowerment entails transforming the law in a manner that allows the poor to have the freedom to control their livelihoods and consequently their future developments (Banik 2008: 31). A human rights process of empowerment goes beyond rule of law in order to ensure that the law itself is so formulated as to produce the desirable and fundamental values of an equitable and just society. Bangladesh is lagging far behind that. So, merely making some laws or promulgating ordinances for the landless people prove frustratingly meager to empower the common people. It is assumed that legal empowerment of the common people occurs in the community, their allies and the governments ... employing legal and other means ... creates new rights, capacities and opportunities for them that give them new power to use law and legal tools to escape poverty and marginalisation.

6. CONCLUSION

The general notion that laws in Bangladesh are anti-poor is more perfect in case of land rights because of two reasons: firstly, land legislation carries the legacy of colonial yoke and secondly, the representation of farmers in the law making process is largely meager. Land laws in Bangladesh are themselves the major causes of land litigation. Once a land-holding is litigated, access to it is put in a state of uncertainty for period of unknown time-framework. This in the long run is snatching away the right to land of the mass people in a systematic, deliberate and deceptive manner. Perhaps the existing land laws can best be termed as state's efficient camouflage of depriving the fundamental human rights of the masses by providing effective tools to the affluent of the society. Land remains the central object of power structure and non-ownership of land by the majority people has kept them out of the power. Hence, empowerment of people issue has remained unwelcome in the democratic polity of Bangladesh. Land was never a serious reform issue here, the changes in the legal corpus related to land has always been brought merely to make the power base more

strong, firmly footed and unchallengeable. Rights of the people are marred in the sly valley of legal language. It becomes very tough to get the 'rights' in the 'law' of 'land law'. Hence, it is fair to conclude that the 'law' less law is becoming an instrument to make the people impoverished. Because, 'any law which violates the indefeasible rights of man is essentially unjust and tyrannical; it is not a law at all'.³³

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³³ Reform Issue 36, Australian Law Reform Commission 1984.