

THE POLITICS OF LAND LAW:
POVERTY AND LAND LEGISLATION IN BANGLADESH

BY

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Abstract

This thesis examines the major colonial and post-colonial land laws of Bangladesh and their relationship with poverty. It interprets them in the light of historical developments and social realities. The thesis argues that land laws in Bangladesh are essentially anti-poor. They contribute to the perpetuation of poverty.

At present, two-thirds of the poor in Bangladesh are land-related poor. The land system that prevailed in colonial Bengal during the British period deprived the peasants of their land rights. This situation demanded a radical land reform based on a distributive approach upon decolonisation in 1947. Unfortunately, in the post-colonial political and legal settings of Bangladesh, land distribution has been unequal. Such inequality coupled with a weak land tenure system and fragile institutional reform created widespread poverty.

The Bangladeshi land laws are complex and vague and dominated by politics. Its land law regime has structural loopholes and ideological drawbacks, which are enough to make reform attempts dysfunctional.

Poverty in Bangladesh is a result of cumulative and mutually reinforcing deprivations. Land law is a major participant in it. Poverty will persist unless law addresses the true reasons of the poverty and a pro-poor approach to land reform is pursued.

The gap between “law” and “land” is exposed and a distributive land law reform model is proposed.

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He aha te mea nui o te ao

[What is the most important thing in the world?]

He tangata, he tangata, he tangata

[It is the people, it is the people, it is the people!]

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Glossary

Abwabs	Temporary and circumstantial taxes and impositions levied by the government over and above regular taxes on land.
Adhiar	Sharecropper.
Alluvion	The increase in the area of land due to sediment deposited by a river.
Amini	Survey.
Andolon	Movement.
Bargadar	Sharecropper.
Beel	A lake-like wetland with static water.
Benami transaction	A transaction where property of one person is placed in the name of another.
Bhagchashi	Sharecropper.
Bhagi	Sharecropper.
Bigha	A traditional term used in the measurement of land area.
Land-ceiling	Maximum land ownership limit by an individual.
Char	The newly accreted land left by the rivers in their wake.
Debutter	An endowment. A name derived from the Hindu word for property dedicated to a deity.
Dhankarari	A form of tenancy-at-will.
Diara	Fluctuating river areas.
Diluvion	The loss of landmass through the recurring acts of river systems.
Diwani	The right of revenue collection.
Faraiyezi	A kind of Islamic reformism that emerged predominantly amongst the peasantry of Eastern Bengal in the 1820s.

Gorib	Poor.
Haptam	Seventh. Usually refers to Regulation number VII of 1799.
Heba	A gift under Muslim law.
Hujuri	A kind of tenancy. The tenancy holders had to pay revenue to the government directly without any intermediate agency.
Jalmahal	A large territorial water body.
Jatiyo Sangsad	Bangla synonym for the Bangladesh parliament.
Joreep	Survey.
Jotedar	A yeoman class of Bengal peasantry. They were cash rich peasants who gained control of land and had other raiyats work for them. They had also influence over the zamindars who relied on them for revenue.
Jumma	Land.
Kanungo	A land record officer.
Karshadar	A form of sub-tenancy.
Kharija	A voluntary tenure holder under a property owner.
Khas land	Government-owned land.
Khatian	Record of Rights (land).
Khilafat	A pan-Islamic movement in British India (1918-1924). This aimed at mobilizing pan-Islam for saving Ottoman Turkey from dismemberment and securing political reforms for India.
Khudkast	The resident cultivator of a village enjoying hereditary occupancy rights and paying rent at customary rates.
Kishan	A labourer cultivator.
Kishani system	The worst form of sharecropping where the <i>kishan</i> supplies only labour and in exchange receives a wage in kind that may vary with the actual production.
Krishok Proja	The agriculturalist tenant. In the later days of British India, there was a political party named the Krishok Proja party led by AK Fazlul Huq.
Kurfa	A form of sub-tenancy.
Krishoke Jote	Peasant League.
Majkuri	A kind of tenancy. The tenants had to pay revenue to the government through the zamindars.

Malik	Owner.
Maliki	Ownership.
Mazdoor	Labourer.
Moulana	Religious leader. A colloquial name for the famous peasant leader and politician Moulana Abdul Hamid Khan Bhashani.
Mutuwalli	A superintendent of a waqf property under Mohamedan law.
Naib-i-Diwan	Deputy Finance Minister.
Najay	A kind of tax imposed on Bengal peasants to answer the deficiencies of other individuals.
Nawabi	Governorship.
Neel	Indigo.
Operation Barga	A land reform movement throughout rural West Bengal for protecting the interest of the sharecroppers.
Paikast	The non-resident cultivators of a village enjoying lesser degree of security of tenure.
Paiwsti-sikasti	The process of alluvial accretion and destruction of river.
Panjam	Fifth. Usually, refers to Regulation number V of 1799.
Parganah	A former administrative unit in Bengal.
Patta	A revenue deed/record of rights
Patni	A tenure created by the zamindar.
Plassey	Also known as Palashi, a village of West Bengal, India, particularly well-known due to the Battle of Plassey fought there in 1757.
Raiyat	The term was customarily used for the peasantry of Bengal during the Mughal and British periods. In its widest sense, the term also indicated the subjects of the state and of the ruling classes.
Raj	Rule/King
Ryotwari	A settlement system of British period. Introduced by Lord Munro the system emphasised collecting taxes directly from the raiyats through a large number of officials.
Sanad	Certificate.

Sannyasi	Monk.
Selami	Security money.
Sepoy	Soldier.
Sabha	Meeting or committee.
Santal	An indigenous community of Bangladesh.
Subah	Province.
Talukdar	An intermediary landed class in British-Bengal.
Tanka	A form of tenancy-at-will. Related to famous Tanka Movement in late colonial Bengal in which the tanka peasants demanded recognition as raiyats and the commutation of produce rent into a normal cash rent. The tanka peasants mostly belonged to Hajong tribe.
Tebhaga	Three divisions (of crops). A famous land-protest by the Bengal sharecroppers where they demanded two-thirds of their produce.
Tehsilder	Local revenue officer.
Upazila	An administrative unit (local government) of Bangladesh.
Usufructuary	One having the enjoyment of property.
Waqf	An endowment made under Muslim law.
Waqf-alal-Awlad	A Muslim endowment for the welfare of the family members.
Zamindar	The landed gentry under the British land system in Bengal.
Zamindary	Landlordism.

List of Abbreviations

AD	Appellate Division (of Bangladesh Supreme Court).
ALRD	Association for Land Reforms and Development (Bangladesh).
ARIPO	Acquisition and Requisition of Immovable Property Ordinance 1982.
BADA	Bengal Alluvion and Diluvion Act 1825.
BELA	Bangladesh Environmental Lawyers' Association.
CLC	Chancery Law Chronicles (Bangladesh).
DC	Deputy Commissioner.
EBPLA	East Bengal Provincial Legislative Assembly.
FAO	Food and Agricultural Organisation.
HCD	High Court Division (of Bangladesh Supreme Court).
HDRC	Human Development Research Centre.
LRAP	Land Reform Action Programme.
LRO	Land Reforms Ordinance 1984.
SAT Act	State Acquisition and Tenancy Act 1950.
UNDP	United Nations Development Programme.

Chapter 1

Introduction

I Prologue

In this thesis, I examined the relationship between land law and poverty in Bangladesh. The main research question is whether the legal framework relating to land contributed to the perpetuation of poverty in Bangladesh. I studied the types of land reform that might lead to improvements in the situation and what might be the obstacles to translating those reforms into reality.

Bangladesh is a developing country of about 147, 570 sq/km located in South Asia. It has a colonial past which has far-reaching implications for post-colonial land reform.¹ As a part of British India, it inherited a common law legal tradition. A large part of the Bangladeshi legal system was shaped by English colonialism. The land system of British-India, particularly of colonial Bengal, therefore, furnishes the backdrop for this study.

Landlessness is a critical issue in Bangladesh. The country has nearly 150 million people.² The population density per sq/km land area is 1176.³ Eighty per cent of the people live in the rural areas. Most of the rural people are cultivators and scarcity of land leads them to the status of marginal farmers, tenant farmers including sharecroppers, and landless agricultural labourers and wage labourers. According to Barkat's estimation 22 per cent of the people in Bangladesh are "absolute landless" and 18 per cent of the people own 67 per cent of the total land of the country.⁴ Poverty in Bangladesh, therefore, is primarily a rural

¹ British colonialism in the Indian sub-continent spanned from 1757 to 1947. In 1947, two independent countries ie India and Pakistan came into being upon decolonisation. Bangladesh formed the East wing of Pakistan and later emerged as an independent country in 1971.

² Bangladesh Bureau of Statistics "Bangladesh Population and Housing Census: Bangladesh at a Glance" (5 March 2011) <www.bbs.gov.bd>.

³ World Bank "Population Density" (2009-2011) <<http://data.worldbank.org>>.

⁴ Abul Barkat and Prosanta Roy *Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage* (ALRD & Nijera Kori, Dhaka, 2004) at 5.

phenomenon.⁵ The rural economy is largely agriculture-based. Hence, access to land can prove to be very significant in addressing the poverty situation.

However, Bangladeshi land law is not well organised. There is no comprehensive land legislation. The laws relating to land are overlapping, scattered and inconsistent. There is a variety of statutes, ordinances, rules, regulations, government manuals, policies and bylaws that deal with land questions. These laws owe their origin to colonial rule and are largely characterised by colonial features.⁶ Moreover, they demonstrate inconsistencies on important land questions.⁷

The land laws appeared to be of little help in improving the fate of the poor, as a study revealed that landlessness increased three-fold over the last four decades.⁸ The laws also do not address land as a resource that should be shared amongst the people on principles of distributive justice. Hence, there is a necessity for thoughtful legislation geared to the social need of poverty alleviation.

II Context

This thesis examines how the structure of contemporary Bangladeshi land law is deeply rooted in the colonial past. The history of land reform is also useful in understanding how the current situation came about and the type of reform that should take place now. The thesis firstly looks at the colonial legislation and then examines the implications of the post-colonial land laws in the creation of poverty in Bangladesh.⁹

The overall thrust and effect of the colonial legislation can best be explained by examining two main colonial legislative interventions: (i) The Permanent Settlement Regulation of 1793 and (ii) the Bengal Tenancy Act 1885. The former created a property right in land and vested it in a privileged landowning class and thus laid the foundation for social exploitation. The latter further complicated the situation instead of solving it.

The Permanent Settlement Regulation concentrated proprietary rights in the hands of a landed aristocracy called the *zamindars*.¹⁰ The system wiped out at a stroke the peasants'

⁵ World Bank "Bangladesh: Priorities for Agriculture and Rural Development" (2011) <<http://go.worldbank.org>>.

⁶ Ie Non-deliberative law making, the system of legal drafting, the creation of social groups and the introduction of hegemonic rules unsuited to local conditions.

⁷ For example, the legal limit of private land ownership is governed by several laws at the same time ie State Acquisition and Tenancy Act 1950 (SAT Act), Bangladesh Land Holding (Limitation) Order 1972 and Land Reforms Ordinance 1984 (LRO). These laws are not complementary to each other on the question of land ownership limit and their conditions. See chapter 6.

⁸ Abul Barkat "Poverty and Access to Land in South Asia: Bangladesh Country Study" (The National Resources Institute, University of Greenwich, 17 March 2004) <www.hdrc-bd.com>.

⁹ In this thesis, the term "post-colonialism" is understood not only as a temporal concept (ie denoting the time immediately after the colonialism had ceased) but also as an identity discourse to denote a space created by the legalistic continuation of power relationships that controlled the colonial politics.

¹⁰ The word *zamindar* literally means "one who holds the land," but in political rhetoric, it came to mean a category of proprietor created by British revenue reforms. They are understood to be the landed class under

customary right on their land and put them under a legal obligation to pay rents at the landlord's whim.¹¹ The Regulation conferred unfettered power on the *zamindars* to evict the tenants. It also did not recognise the customary practice of determining the land revenue. The peasants often could not pay the land taxes and faced eviction. Thus, the concept of Permanent Settlement opened the way to a kind of feudalism on the one hand and impoverishment of the peasantry on the other. The far-reaching impact of the system was that it created many intermediary interest groups enjoying sub-infeudatory rights and constituting a chain of economic exploitation.¹²

To cure the maladies of the Permanent Settlement system the Bengal Tenancy Act was passed in 1885. Though this Act was aimed at ameliorating the condition of the tenants, it conferred possessory rights only upon the tenants who were in continuous possession of land for twelve years. It did not provide any protection to the vast body of unrecorded tenants-at-will including the sharecroppers.¹³ Moreover, the law allowed the landlords to keep the cultivator as a virtual debt-serf.¹⁴ If the farmers could not produce a good harvest for whatever reasons, they failed to repay the debt. Consequently, they had to lose other belongings or accept onerous obligations in satisfaction of the debts. Indebtedness, thus, was a major cause of agrarian malaise in Bengal.

In this way, the laws ignored the subordinate class of farmers and thereby introduced a historical process of depeasantisation.¹⁵ This, in turn, became the foremost reason of colonial poverty.

The cumulative effect of the 1793 Permanent Regulation and 1885 tenancy law created a long lasting situation of poverty. The land question again gained momentum in the late colonial phase of the 1940s. The State Acquisition and Tenancy Act 1950 (SAT Act) was passed by the East Pakistan Provincial Government on recommendations made by the Bengal Revenue Commission.¹⁶ This law abolished the 157 years old *zamindari* system

the British land system. During the British rule (1757-1947), the system had its worst effects in Bengal the eastern part of which constituted East Pakistan (presently Bangladesh) after the partition in 1947.

¹¹ Peter Robb *Empire Identity and India: Peasants, Political Economy and Law* (Oxford University Press, New Delhi, 2007) vol 2 at 66.

¹² The *zamindars* had a legal obligation to pay revenue on a given day. In the case of failure, they ran the risk of losing their land through auction. So, they passed the pressure of revenue on to the peasants and rented out the land to the highest bidder. Thus, they created a chain of subinfeudatory tenure holders.

¹³ Tajamul Haque and Amar Singh Sirohi *Agrarian Reforms and Institutional Changes in India* (Concept Publishing Company, New Delhi, 1986) at 16.

¹⁴ Eric Stokes *The Peasant and The Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge University Press, Cambridge, 1978) at 12.

¹⁵ In its socio-historical sense, the term "depeasantisation" denotes a process of the peasants being dispossessed of their land. See Jos Mooij, Deborah Bryceson and Cristóbal Kay *Disappearing Peasantries: Rural Labour in Africa, Asia and Latin America* (Intermediate Technology Publications, London, 2000) at 175.

¹⁶ The Bengal Revenue Commission, popularly known as the Floud Commission, was formed in 1938 headed by Sir Francis Floud. In its report on 2 March 1940, the Commission recommended, amongst other things, abolishing the *zamindari* system to protect the Bengal peasantry from exploitation.

introduced by the 1793 Regulation. It established a direct relationship between the state and the peasants through the acquisition of the rent-receiving interests of the intermediary groups. The law also fixed the limit of land-holding¹⁷ and empowered the government to acquire the surplus land. The law, in essence, appears to be pro-poor.

However, the efficacy of this law in addressing poverty is open to question. Firstly, the government's attempt to acquire the *zamindari* was frustrated by constant legal challenges.¹⁸ Secondly, the SAT Act provided a maximum limit of individual land-holding with too many exceptions. A person could own landed property beyond the legal limit on the pretext of public purpose, charitable trusts and commercial activities. These exceptions enabled many *zamindars* or their successors to retain surplus land in their possession. So, the purpose of narrowing the gap between the rich and the poor in terms of land ownership was not fully achieved. Thirdly, the SAT Act along with its Rules provided a complex and vague procedure of conducting land surveys and preparation of land records.¹⁹ Consequently, the peasants once again were not able to ensure access to the land they cultivated. Fourthly, the law instead of recognising their customary right over land, required the indigenous communities to produce land deeds. From time immemorial, the indigenous communities believed in the community ownership of land. Therefore, they could not produce any documentation of their ownership. As a result, either their land was taken by the dominant class or they were evicted from their land. This process pushed them to the brink of marginalisation.

With these shortcomings, the SAT Act continued to operate even after Bangladesh's independence in 1971. It is still the basis of post-colonial land reform initiatives in the country.

The post-colonial land reform initiatives had two types of bearing on poverty:

(i) One facet of poverty was based on the in-built religious discrimination in the land system. The birth of India and Pakistan on the basis of religion had an impact on the law-making process. This became particularly problematic for Pakistan as this state was constitutionally declared an Islamic Republic in 1956. This encouraged the making of discriminatory property law on the basis of religious considerations in 1965 when war broke

¹⁷ 375 *bigha* per person/ family. *Bigha* is a traditional land measurement unit in Bangladesh. One *bigha* is roughly equivalent 0.33 acres/33 decimals.

¹⁸ *Jibendra Kishore v Province of East Pakistan* [1957] 9 DLR SC 1 is a landmark case in which the validity of the government's power to acquire landed property under the State Acquisition and Tenancy Act 1950 was challenged. Unlike India, Pakistan did not afford constitutional protection to the *zamindari* abolition laws at the outset. Many *zamindars* took advantage of this situation and either halted the acquisition or obtained compensation through legal challenges. Many of them became influential government members of East Pakistan. This was one of the reasons why the legacy of the *zamindari* system was perpetuated in East Pakistan's (later Bangladesh) political system.

¹⁹ The SAT Act 1950 ss 17-31, ss 142-145 and the SAT Rules 1955 rr 28-31 envisage eleven stages of preparation of land records which are archaic and dilatory in nature. This long drawn out process opens the gates to corruption.

out between India and Pakistan. The Hindu communities living in East Pakistan fled to India for the fear of persecution and the Pakistan government declared their property as “enemy property”.²⁰ When the Hindus returned home after the war was over, they could not get hold of their properties. Their land was either taken over by the state or seized by the political actors. This deprivation continued even after Bangladesh’s independence in 1971 through the law relating to vested property.²¹ Thus, these laws contributed to marginalise a segment of the Hindu communities, perpetuating their poverty.

(ii) The second implication for poverty is related to the peasants’ land rights upon enactment of the land reform legislation. This aspect can also be explained from the perspective of the Fundamental Principles of State Policies that were constitutionally set to establish economic, social and political justice. The Constitution of the newly independent Bangladesh pledged to establish a socialist society through a democratic process.²² It overlooked the fact that the concept of property ownership was understood differently in socialism and democracy. The former puts emphasis on the state-controlled means of production, while the latter tends to private ownership. Thus, the constitutional position on land reform created a tension in the acquisition and redistribution process of land. Effective land redistribution could not take place because of the influence of the vested interests within the political system itself.

Moreover, the right to equality clause and the property clause of the Constitution²³ maintained a tension between the guarantee of existent property ownership and the state’s power of compulsory acquisition of property. The framers of the Constitution opted not to take a clear stand on the question of land reform. Nowhere in the Constitution was the necessity of land reform mentioned, whereas it required a full-fledged political debate in the post-independence setting to achieve the constitutionally declared objectives of social justice. Thus, the Constitution failed to provide a workable framework where pro-poor land reform could take place. Further, the judiciary failed to redefine the relationship between property rights, constitutionalism and the state’s power. Therefore, the subsequent initiatives of land allocation through law²⁴ proved to be of little help for the poor.

²⁰ The Defence of Pakistan Ordinance 1965, the Enemy Property (Custody and Registration) 1966, the East Pakistan Enemy Property (Land and Buildings Administration and Disposal) Order 1966.

²¹ The 1972 Bangladesh (Vesting of Property and Assets) Order, the 1974 Vested and Non-Resident (Administration) Property Act and the 2001 Vested Property Return Act (amended in 2011).

²² The Constitution of the People’s Republic of Bangladesh in its preamble speaks about establishing a socialist society through a democratic process.

²³ Article 42 of the Constitution of the People’s Republic of Bangladesh enshrines the right to property subject to certain reasonable restrictions imposed by law. Article 27 of the Constitution speaks about the right to equality and equal protection of the law.

²⁴ Bangladesh Land Holding (Limitation) Order 1972, State Acquisition and Tenancy (Amendment) Order/Act (1972 & 1994), Land Reforms Ordinance 1984, Agricultural Land Management and Settlement Policy 1997 and *Jalmahal* Lease Policy 2009 some are examples of such laws.

In addition to the above mentioned two streams of poverty, the land law and policy in the post-colonial East Pakistan had, and still has, a gender connotation that work to the disadvantage of the Bangladeshi women. The religious law of inheritance discriminates against the women in inheriting properties, which contributes to their economic insecurity and hence poverty.

This thesis is concerned mainly with the poverty of the peasants of Bangladesh. After the independence of Bangladesh, no full-fledged deliberative land reform law was enacted by the country's parliament though there were legal initiatives through Presidential Orders or Ordinances or policy formulations. By these Ordinances or policies, effort was made to bring a change in the land system either through "ceiling-redistributive approach"²⁵ or "tenure regulation model"²⁶ but without success. Thus, it is seen that the present poverty scenario in Bangladesh has not come on suddenly. The inequalities of land distribution accentuated by the failure of land law have historically deprived the poor.

III The Scope of the Thesis and Clarification of Leading Terms

This thesis examines the nexus between land law and poverty in Bangladesh. As evident from the context discussed above, there had been reforms in the land legislation during the colonial, post-colonial and post-independence period but they did not benefit the poor. This was largely because the laws failed to establish a framework within which reallocation of land could take place properly. It also failed to define the competing property interests (ie those of the state, landowners and peasants). Bangladesh carried through the same trend of law making even after its emergence as an independent country.

The discussion of land reform initiatives from the colonial to post-colonial era leads to a more general consideration of the role of law in relation to drastic social change. Holmes J's view was that historic "continuity with the past is not a duty, it is only a necessity".²⁷ After decolonisation, the law faced the challenge of reconciling this "necessity" with sharply rising expectations and pressing demands of land reform. The role of law then is to "mediate, to accommodate and to cushion".²⁸ It will be interesting to see then, whether Bangladesh maintained merely a "continuity" with the colonial past or effectively "accommodated", "mediated" and "cushioned" that necessity to meet the post-colonial needs.

²⁵ In this approach, an upper limit or ceiling is placed on agricultural holdings; land in excess of this ceiling is appropriated by the state, with or without compensation and redistributed among landless or poor cultivators gratis or at some cost, either individually or collectively.

²⁶ Under this model, the terms on which non-owning cultivators hold the land are readjusted without fundamental alteration of the social organisation of production. Typically, rents are lowered and regulated and continuity of rights to use land (security of tenure) is mandated.

²⁷ OW Holmes *Collected Legal Papers* (Lawbook Exchange, New Jersey, 2006) at 211.

²⁸ Paul Freund "Social Justice and the Law" in Richard Brandt (ed) *Social Justice* (Englewood Cliffs, Prentice-Hall, 1962) at 110.

The reality is that most of the peasants in Bangladesh fight with poverty. What are the legal attributes of poverty then, particularly in a country like Bangladesh where laws are believed to be unsuitable to native conditions? Does the legal system which scares away (or even sometimes victimises) the weak with “mystiques of legalese, lacunas of laws and a processual pyramid”²⁹ contribute to poverty?

A *Law and Poverty*

“Poverty” is a situation that has various dimensions. Paul Spicker sketches eleven aspects of poverty. They range from the satisfaction of basic needs to social exclusion or inequality.³⁰ On the other hand, Amartya Sen reinforces the concept of poverty from the “capability” approach. According to this approach, the goal of both human development and poverty reduction should be to expand the capability that people have to enjoy “valuable beings and doings”.³¹ People should have access to the positive resources they need in order to have these capabilities. Importantly, they should be able to make choices that matter to them. Accordingly, Sen’s point is that poverty is a phenomenon where an individual’s grievance and discontent are submerged in “cheerful endurance by the necessity of uneventful survival”.³² Sen’s capability test, as he calls it, worked as an inspiration for social policy priorities on different fronts including poverty law. Martha Nussbaum refined the capability approach from the perspective of legal-political philosophy. Nussbaum calls for some political principles that a government should guarantee all its citizens through its Constitution.³³

John Alexander argued for a unified vision of capability approach in the light of “social justice”.³⁴ Lucy Williams interprets poverty from the law and human rights perspective.³⁵ To quote Williams:³⁶

Unlike what many people think, poverty is not a natural or pre-legal condition. Income distribution is not separate from the law. To believe that poverty is based only on individual failure ignores the legal structures that create and perpetuate income imbalances both internally to the nation state and globally. Each country's legal system determines the ways in which the law constructs poverty internally and cross-border.

²⁹ VR Krishna Iyer *Processual Justice to the People: Report of the Expert Committee on Legal Aid* (Department of Legal Affairs, Ministry of Law, Justice & Company Affairs, Government of India, New Delhi, 1973).

³⁰ Paul Spicker *The Idea of Poverty* (Policy, University of California Press, 2008) at 3.

³¹ Amartya Sen *Inequality Reexamined* (Harvard University Press, Cambridge MA, 1992) at 39.

³² Amartya Sen *Development as Freedom* (Oxford University Press, Oxford, 1999) at 87.

³³ Martha Nussbaum *Creating Capabilities* (The Belknap Press of the Harvard University Press, Cambridge, 2011) at 75.

³⁴ John Alexander *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Ashgate, London, 2008) at 53.

³⁵ Lucy Williams, Asbjorn Kjonstad and Peter Robson *Law and Poverty: The Legal System and Poverty Reduction* (Zed Books, London, 2003) at 1.

³⁶ At 1.

Lucy Williams, thus, shifts the focus on the legal construct of poverty. Williams' theme of poverty was earlier signposted by the Australian Commission on Inquiry into Poverty. This Commission in its 1975 report proposed many reforms in the areas of substantive law including the land law of particular importance to poor people.³⁷ The report developed certain themes, first of which was to view the legal system itself as a powerful force for social change.³⁸

Upendra Baxi prefers the word "impoverishment" to the word "poverty".³⁹ For Baxi, the trouble with the word "poverty" is that it is a passive expression suggesting a state of social affairs which has to be confronted by the state and society and until then, to be endured by those called "poor".⁴⁰ According to Professor Baxi, this substitution draws an attention to the fact that "people are not naturally poor but they are made poor".⁴¹ To quote Baxi: "Impoverishment is a dynamic process of public decision making in which it is considered just, right and fair that some people may become or stay impoverished. These decisions are made by people who hold public power".⁴² With this note of difference, however, Baxi himself endorsed the use of the term "poverty" as a title of his work *Law and Poverty: Critical Essays*, on the ground that the word "poverty" is widely used as a "weapon to combat injustice".⁴³

From these interpretations, it appears that viewing poverty from a single perspective will be misleading and incomplete. This thesis, therefore, makes its arguments from a participative and inclusive understanding of the term. Here, poverty has been viewed as a syndrome of cumulative and mutually reinforcing deprivations, where law plays a pivotal role. This understanding will be helpful to re-determine the nature of land law reform to mark a social transformation.

B *Land and Land Law*

Another point to be clarified at this stage is the meaning of "land" as used in this thesis. The statutory definition of the term can be found in the State Acquisition and Tenancy Act 1950 (Bangladesh). It reads:

"Land" means land which is cultivated, uncultivated or covered with water at any time of the year and includes benefits arising out of land, houses or buildings and also things attached to the earth, or permanently fastened to anything attached to the earth.

³⁷ *Main Report: Law and Poverty in Australia* (The Commission of Inquiry into Poverty, AGPS, Canberra, 1975) at 2.

³⁸ Ronald Sackville "From Law and Poverty to Access to Justice" (1995) 20(5) *Alternative Law Journal* 212.

³⁹ Upendra Baxi (ed) *Law and Poverty: Critical Essays* (Tripathi, Bombay, 1988) at vi.

⁴⁰ At vi.

⁴¹ At vi.

⁴² At vi.

⁴³ At vi.

This definition follows, in essence, the concept of land used in the Law of Property Act 1925 (UK).⁴⁴ At the heart of land law is the idea that land includes not only tangible property but also intangible rights in the land. Hence, land law is the study of the creation, transfer, operation and termination of these rights and the manner in which they affect the use and enjoyment of this physical object.⁴⁵ As a matter of legal definition, land in Bangladesh usually has been classified as agricultural and non-agricultural. This thesis mainly focusses on that aspect of land law which calls for an intervention by the state to ensure rights of the peasants in the agricultural land.

In so doing, I have picked up four specific areas of Bangladeshi land law for analysis in order to formulate my arguments on land law and poverty relationship. I have taken the Bangladeshi peasants as representative of the poor, though it is sometimes argued that the definition is problematic because the peasants are not a homogenous class and may differ in themselves in terms of status, wealth or otherwise.⁴⁶ Yet, I have presented them as “poor” in general terms for three reasons: i) the term has an historical appeal signifying a class being systematically exploited by the upper landed class; ii) they resorted to meaningful struggles to establish their land rights at different junctures of history; and iii) they are understood as the “poor” in the common Bengali understanding.⁴⁷

The four specific areas of land law constitute four distinct chapters of the thesis. These are:

- i) the land law relating to marginal peasants ie the sharecroppers;
- ii) the alluvion and diluvion law dealing with the rights of the riparian peasants;
- iii) the land law and policy ensuring distributive land reform; and
- iv) the law of eminent domain and its meaning for land reform.

In selecting these four areas of land law, I have considered their probable implications for poverty alleviation through the state’s legal interventions. The issues succinctly they cover are:

⁴⁴ “Land” includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land.—The Law of Property Act 1925, s 205 (1) (ix) (UK).

⁴⁵ Martin Dixon *Modern Land Law* (Routledge, London & New York, 2012) at 3.

⁴⁶ Manoj Misra "Is Peasantry Dead? Neoliberal Reforms, the State and Agrarian Change in Bangladesh" (2016) *Journal of Agrarian Change* 3.

⁴⁷ Suraiya Begum notes that 53.57 per cent of families of Bangladesh possess cultivable land. Among them, 38.63 per cent are marginal peasants (0.02-0.20 hectares of land), 49.85 per cent are small peasants (0.21-1 hectare of land), 10.35 per cent are middle-class peasants (1-3 hectares of land) and 1.17 per cent are rich peasants (above 3 hectares of land). Though the marginal and small peasants altogether constitute 88.48 per cent of the agricultural families, they only hold 36.30 per cent of the cultivable land. See Suraiya Begum “Fostering Agrarian Strategies for Overcoming Small Farmers’ Challenges” (Key Note Paper, Research Initiative Bangladesh, Centre on Integrated Rural Development for Asia and the Pacific, Dhaka, 8 November 2014).

- i) the nature of land redistribution by the state;
- ii) the purpose of addressing the poverty of the peasants;
- iii) the constitutional goal of establishing an egalitarian society based on social, political and economic justice; and
- iv) the state's responsibility to ensure the best use of land as a natural resource.

Thus, this thesis examines the land laws having relevance to the state's role for implementing land reform.

C *Land Reform*

It will now be pertinent to clarify the meaning of "land reform" used in this thesis. The phrases "land reform" or "agrarian reform" have received mixed interpretations from scholars.⁴⁸ The import of the terms is wide, not only because the countries are diverse but also because the ways at looking at the subject are different. Doreen Warriner suggests a restricted definition to mean the redistribution of property or rights in land for the benefit of small farmers and agricultural labourers.⁴⁹ The United Nations, on the other hand, prefers a broader definition of land reform. It sees land reform as a process to include "any improvement" in the institutions of land tenure or agrarian structure.⁵⁰ Thus, the United Nations enjoins a restorative element in addition to the redistributive dimension of land reform. Again, Hung-Chao Tai's definition has a legalistic overtone:⁵¹

... Public programs that seek to restructure equitably and rationally a defective land tenure system by compulsory, drastic and rapid means. The objectives of the reform are to attain just relationships among the agricultural population and to improve the utilisation of land. This both includes redistributive programs and developmental programs.

Tai argues that a land reform programme involves changes of land tenure as well as improvement of agricultural service institutions. Mushtaqur Rahman sees land reform as a programme for accomplishing "agrarian egalitarianism".⁵² According to Rahman, "land reform seeks to resolve tenure problems and redistribute the land among the landless peasants for agricultural development" with the clear objectives of attaining agrarian egalitarianism. The aspects of this "egalitarianism" are: (i) to attain a congenial working relationship among the peasants; (ii) to provide positive self-esteem and self-direction to the farmers; and (iii) to motivate them into becoming a "growth society".⁵³ It seems that land reform had an all-

⁴⁸ In accordance with common usage and for the sake of simplicity, I have used the terms "land reform" and "agrarian reform" interchangeably, irrespective of their differences with regard to scope and application.

⁴⁹ Doreen Warriner *Land Reform in Principle and Practice* (Clarendon Press, Oxford, 1969) at xiv.

⁵⁰ The United Nations "Progress in Land Reform" (Third Report, FAO Office, Rome, 1962) at chapter 6.

⁵¹ Hung-Chao Tai *Land Reform and Politics: A Comparative Analysis* (University of California Press, Berkeley, 1929) at 11-12.

⁵² Mushtaqur Rahman (ed) *Agrarian Egalitarianism: Land Tenures and Land Reforms in South Asia* (Kendall/Hunt Publishing Company, Iowa & Toronto, 1981) at 3.

⁵³ At 3.

embracing nature over the years to include redistribution, tenurial security and other institutional improvements.

Nonetheless, this thesis is essentially focused on the redistributive dimension of land reform. It, however, views “land tenure security” as a corollary to redistributive approach. For, in the case of tenurial reform certain rights are essentially conferred onto the tenants in the form of “quasi-property” rights. There are two compelling reasons for attaching importance to the redistributive aspect. Firstly, unlike other approaches, redistribution requires some degree of compulsion in the expropriation of land, which essentially gives it a political hue. Perhaps that was the reason why Warriner termed it as a “point of edge off the definition” showing a conflict between the “haves” and “have-nots”.⁵⁴ The second reason is that “without redistributive justice”, as Ladzenisky argues, “all else prove ephemeral”.⁵⁵

D Limitation

The limits of what has been attempted in this thesis should be clarified at this point. I have focused on the land legislation which incorporates the state’s role to carry out land reform.

I have not looked at the property laws that religiously discriminated against the Hindu population of Bangladesh and contributed to their suffering and discrimination. I have also not considered the land law relating to the marginalisation of the indigenous community of Bangladesh.

The historical process of marginalisation of the indigenous peoples through denial of their customary rights on land could have furnished a good ground of interpreting the poverty paradigm, but I have not considered them, as the thesis is confined to the land rights of the Bangladeshi peasants. Besides, the topic of indigenous land law encompasses wider questions of international law which deserves an independent research.

The law of registration, land taxation, soundness of land institutions, law relating to transfer of land (lease, mortgage and pre-emption) are other areas of relevance that also deserve close examination. I, however, have not delved into those issues as they are only loosely connected to the poverty paradigm and are rather matters of sophisticated legal principles dealing with transfer of property between individuals. The law covering the role of land institutions will come under scrutiny to understand its impact on land reform politics.

E Contribution

This thesis offers an intellectually compelling interpretation of already known materials on land law. It presents evidence in the field of land law and poverty in Bangladesh in the context of legal history, land law making and land law politics. The thesis not only claims that the land

⁵⁴ Warriner above n 49, at xv.

⁵⁵ Wolf Ladejinsky “Land Reform” in David Hapgood (ed) *Policies for Promoting Agricultural Development* (Center for International Studies, Cambridge MA, 1965) as cited in Hung Chao-Tai *Land Reform and Politics* above n 51, at 9.

law reforms in Bangladesh have failed but also reveals why and how they failed from a legal point of view. The findings of the thesis will have broader implications for similar jurisdictions as I have used works about countries with comparable legal instruments in reviewing the poverty situation of Bangladesh. I have made concrete suggestions as to what should be put in the place of existing land laws. The work situates law in history and the context of poverty of the peasants at the time of enacting land reform legislation, which is a comparatively less explored area of knowledge.

IV The Significance of the Research

The importance of the study lies in the fact that it unveils the law's contribution to the creation of poverty in Bangladesh. In the Bangladeshi context, a question often bewilders the economists: "Why are the people poor"? The answer one usually gets is: "Because they have no land". This begets another question: "Why do they have no land". The usual answer reverts to the original question: "Because they are poor". These recurring questions are not to be understood as an over-simplification of why poverty has been so persistent in the life of Bangladeshi peasants. The inner meaning of this cycle of questions cannot be ignored in Bangladeshi society which has the legacy of a long agrarian history for its subsistence and continuation. In such a peasant society, ownership of land acts as a critical variable in the distribution of power. The biggest challenge for law is to deal with land problems which at the core are power problems—of disparity in economic, social and political power. Land law reform, therefore, has its own political implications. In order to understand its impact on the poor, the study of the politics of land law is significant.

Land reform can make a huge contribution to removing poverty.⁵⁶ The far-reaching gap between "land" and "law" represents a space which offers law to be understood as something remotely related to social necessity. This understanding has largely characterised the traditions of legal scholarship in the field of Bangladeshi land law. Therefore, my research proposes in metaphorical tone to "take the law for a walk into the land" and suggests that legislation for land justice ensuring the redistributive model can change the fate of the poor.

V Comments on Relevant Literature

I have drawn the issues on land questions mainly from two streams of works: (a) works specifically on Bangladesh land reform initiatives during the colonial and post-colonial

⁵⁶ Amartya Sen while commenting on a book on property rights viewed land reform as a meaningful way to reduce poverty. See Michael Lipton *Land Reform in Developing Countries: Property Rights and Property Wrongs* (Routledge, London, 2009) at 16. Ricardo Hausmann in the same place noted that land reform is an emotive political battleground. It provides a roller-coaster ride from panacea to venom. It can be considered as a panacea when one looks at the successes of Japan and Korea; it turns into venom when it destroys property rights and creates unviable production units that lead to agricultural decline and urban migration. See also RL Prosterman, Robert Mitchell and Tim Hanstad (eds) *One Billion Rising: Law, Land and Alleviation of Global Poverty* (Leiden University Press, Amsterdam, 2007) at 14.

regimes and (b) works on other analogous or developing jurisdictions. In addition, I have benefitted from the works of New Zealand scholars to broaden my understanding of legal history and colonisation.⁵⁷ In understanding the first stream, I studied the works of the English, Indian and Bangladeshi writers. The second stream of works helped me understanding the legal, political and philosophical approaches to land reform.

English writers like Frykenberg, David Washbrook and Peter Robb seemed to have found justification for land reform initiatives in British India largely on the ground of making the land system simple, certain and expedient.⁵⁸ These works were used to get the ideas about colonial land reform from the British perspective.

The Indian scholars, however, are mostly negative about the intention of colonial legislative interventions in India, particularly in Bengal. Ranajit Guha's work *A Rule of Property for Bengal*⁵⁹ examines how the western notion of private property was imposed through the British introduction of Permanent Settlement. Anand Swamy, an Indian economist, in his essay "Land and Law in Colonial India"⁶⁰ wondered why India remained poor even after so much pre-occupation of the colonial regime with agrarian issues. The question holds substance for Bangladesh as both these countries share the common legacy of land reform. BB Chaudhury, another historian from India, discusses the conditions of peasants of the Indian subcontinent from the historical point of view. However, Chaudhury did not consider the influence of law in shaping the land institutions. Chaudhury wrote:⁶¹

Our peasant history is not 'agrarian history' in its usual sense. We are not interested in the history of agrarian institutions. For instance, questions such as origins and growth of *zamindari* power, history of the laws and customs affecting this power and the changing social composition of *zamindars* do not interest us.

⁵⁷ My main thought on reading New Zealand scholars was to conceptualise some of the history or philosophy of land law movements taken place here—not to investigate or even really to compare them, but to demonstrate that the ideas of land law, colonisation and poverty have been encompassed before in different societies. Land was no less central to British colonialism in New Zealand than in Bengal. Richard Boast has shown that British immigrants to New Zealand came from a culture which placed strong emphasis on clear property rights particularly so in the case of land. See Richard Boast *Buying the Land, Selling the Land* (Victoria University Press, Wellington, 2008) at 9. See also Giselle Byrness *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Melbourne, 2004); Michael Belgrave *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005); Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991); Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (Brookers, Wellington, 2001) and Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999).

⁵⁸ RE Frykenberg *Guntur District 1788-1848* (Oxford University Press, Oxford, 1965) and David Washbrook "Law, State and Agrarian Society in Colonial India" in C Baker, G Johnson and A Seal (eds) *Power, Profits and Politics* (Cambridge University Press, Cambridge, 1981) and Peter Robb *Empire Identity and India: Peasants, Political Economy and Law* (Oxford University Press, New Delhi, 2007).

⁵⁹ Ranajit Guha *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Mouton & Co, Paris, 1963).

⁶⁰ Anand Swamy "Land and Law in Colonial India" in Debin Ma and Luiten Van Zanden (eds) *Law and Long-term Economic Change: A Eurasian Perspective* (Stanford University Press, Stanford, 2011) at 138.

⁶¹ BB Chaudhuri (ed) *Peasant History of Late Pre-Colonial and Colonial India* (Pearson Longman, New Delhi, 2008) at 4.

I argue that the best way to deal with land arrangements is to examine the current land laws in the light of the circumstances in which they were passed and the effects they produced. An effective reform agenda should presuppose an inquiry into the social needs and purposes of enacting legislation.⁶² Bangladeshi researchers have attempted to address the issue basically from an extra-legal perspective. Abul Barkat,⁶³ a noted political economist of Bangladesh, considered the reality of changing dynamics of poverty and poor people's access to land in Bangladesh. Barkat writes: "The evolution of the land related laws gave an impression that things were made difficult to understand, consciously, reasons for which are best known to the colonial and post-colonial lawmakers".⁶⁴ Mustafa Alam in his thesis claims that land tenure arrangements in Bangladesh contributed to the perpetuation of inequality and inefficiency among agricultural households.⁶⁵ Anwarul Islam's thesis looks at the land tenure system from a comparative perspective and identifies various defective features including land concentration and asymmetric tenancy arrangements.⁶⁶ Ebadul Hoque's work gives an account of historical evolution of land laws and systems in Bengal.⁶⁷ Other works by Abu Abdullah,⁶⁸ Sirajul Islam,⁶⁹ Badruddin Umar⁷⁰ and Taj Hashmi⁷¹ offer clues to understanding the historical context of particular land legislation in Bengal.

At the global level, Patrick McAuslan's work helps develop an idea about how the British used land law as a tool to expand colonialism in like jurisdictions.⁷² McAuslan identified that the contrast between native customary land laws and the imposed rules of

⁶² Between the 1950s and 1980s, protection from poverty was regarded as a critical subject matter for legislation and redistributive measures. See Margot Young, Susan Boyd, Gwen Brodsky and Shelagh Day (eds) *Poverty, Rights, Social Citizenship and Legal Activism* (University of Columbia Press, Canada, 2007) at ix.

⁶³ Abul Barkat "Poverty and Access to Land in South Asia: Bangladesh Country Study" (The National Resources Institute, University of Greenwich, 17 March 2004) <www.hdrc-bd.com>.

⁶⁴ Abul Barkat, Shafique Uzzaman and Selim Raihan "Khas Land: A Study on Existing Laws and Practice" (November 2000) <www.hdrc-bd.com>.

⁶⁵ Muhammad Mustafa Alam "Problems of Size-tenure Structure in Bangladesh Agriculture and Prospects of a Land Reform Program in Developing the Rural Economy of the Country" (PhD Thesis, University of British Columbia, 1976) at 3.

⁶⁶ Anwarul Islam "Land Reform: A Study of Social Processes" (PhD Thesis, University of Alberta, 1980) at 7.

⁶⁷ Kazi Ebadul Hoque *Bangladesher Bhumi Ain o Bhumi Bebothar Kromobikash* (Bangla Academy, Dhaka, 2000) (translation: Land law and development of land system in Bangladesh).

⁶⁸ Abu Abdullah "Land Reform and Agrarian Change in Bangladesh" (1976) 4(1) Bangladesh Development Studies 67.

⁶⁹ Sirajul Islam *The Permanent Settlement in Bengal: Study of Its Operation, 1790-1819* (Bangla Academy, Dacca, 1979).

⁷⁰ Badruddin Umar *Chirosthayee Bandobaste Bangladesher Krishok* (Mawla Brothers, Dhaka, 1974) (translation: Bengal Peasants under the Permanent Settlement).

⁷¹ Taj Ul-Islam Hashmi *Peasant Utopia: The Communalization of Class Politics in East Bengal, 1920-1947* (University Press Limited, Dhaka, 1994).

⁷² Patrick McAuslan "Property and Empire" (Paper presented to Sixth Biennial Conference, University of Reading, 2006) at 21.

land laws was at the heart of the colonial enterprise. This provided a formal legal backing for the land taking. McAuslan's work also gives us an understanding of how legal history blends in with law and development in giving the shape of existing land laws. Further, McAuslan's method of analysis in *Bringing the Law Back In*,⁷³ furnishes useful guidelines for identifying the nature of post-colonial land reform of different jurisdictions of Asia, Commonwealth Africa and the Caribbean. In another work, McAuslan argues for a transformative land law reform after surveying the land reform laws of seven countries of Eastern Africa.⁷⁴ Interestingly, McAuslan distinguishes between "land reform" and "land law reform" and argues that the issue of land reform for certain post-colonial jurisdictions is primarily the issue of land *law* reform. By way of extending McAuslan's argument, my thesis will explain the nature of Bangladeshi land reform from a legal point of view.

Poverty reduction through land reform received particular attention in the writings of Peruvian economist Hernando de Soto. Soto in his book *The Mystery of Capital*⁷⁵ advocated that legalisation of the informal economy would help to reduce poverty. De Soto's proposition has particular relevance to this study, for, Soto emphasised strengthening land law systems to change the fate of the poor.

Michael Lipton, on the other hand, made a compelling case about the need of refocusing on agricultural growth as an engine of reducing rural poverty.⁷⁶ Lipton showed various dynamics of land reform and explained how access to land will benefit many millions of rural poor. Joseph Stiglitz laments that there is an inattention of the international community to treating land reform efforts with proper policy. Stiglitz wrote:⁷⁷

In a world in which we are constantly confronted with equity and efficiency trade-off, land reform is one of those rare instances of a policy, which simultaneously promotes both. Yet the issue has for too long been neglected—perhaps because the elites in many developing countries have done well by their *status-quo*. It is a shame that the international institutions have not pushed this agenda more.

Lucy Williams, approving Stiglitz, showed how law establishes and reinforces economic and power imbalances. Williams' findings are: i) poverty constitutes denial of human rights and social justice; ii) judicial review, social antagonism and process of litigation are tools of combatting poverty; iii) the legal element of litigation cannot be detached from the social history of a country and the tools and services provided by the legal system for the protection of fundamental rights have been and are long denied to

⁷³ Patrick McAuslan *Bringing the Law Back In: Essays in Land, Law and Development* (Ashgate, London, 2003) at 200.

⁷⁴ Patrick McAuslan *Land Law Reform in Eastern Africa: Traditional or Transformative?* (Routledge, New York, 2013).

⁷⁵ Hernando de Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, New York, 2003).

⁷⁶ Michael Lipton *Land Reform in Developing Countries: Property Rights and Property Wrongs* (Routledge, London, 2009).

⁷⁷ JE Stiglitz *Preface* in Roy Prosterman, Robert Mitchell and Tim Hanstad (eds) *One Billion Rising: Law, Land and Alleviation of Global Poverty* (Leiden University Press, Amsterdam, 2007) at 14.

various disfavoured and underprivileged groups; and iv) if the law is to successfully combat poverty it is essential for the law to address the reasons for poverty.⁷⁸

Hung-Chao Tai's comparative analysis of land reform issues of eight developing countries including Pakistan (parent state of Bangladesh) delves into the political battleground of the issue.⁷⁹ Tai proceeds with three hypotheses of land reform: i) political legitimacy; ii) relationship between the landed elite and the landless class; and iii) implementation depending upon the degree of political commitment.⁸⁰ Tai's thesis, however, does not say how the land reform law of the then Pakistan was characterised by these three approaches.

The works of Peter Robson and Dan Banik have been philosophically useful to understand the law and poverty milieu.⁸¹ The World Bank model of legal empowerment of the poor, an extension of de Soto's work also raises issues of legal implications of the land reform agenda.⁸²

VI Research Questions

The literature analysis presents a knowledge gap on post-colonial land reform issues. They can be summed up as follows:

- i) Land law is a subject steeped in history. The poverty of the Bengal peasants has also a history of its own. The existing literature does not sufficiently juxtapose the history of land law and poverty. There is a necessity to situate land law in the context of history and poverty. The Bangladesh legal system provides an interesting context to stimulate this necessity.
- ii) The existing literature on land question tells sufficiently about "land reform" and its relationship with politics, but makes hardly any difference between "land reform" and "land law reform"⁸³ on the one hand and "land reform politics" and

⁷⁸ Lucy Williams above n 35, at 1.

⁷⁹ Hung-Chao Tai *Land Reform and Politics* above n 51. Another work by Moor and Rothermund deals with the nature of land law from the perspective of colonial society dedicating two chapters on British land policy towards India. See Jap de Moor, Dietmar Rothermund (eds) *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies* (Lit, Hamburg, 1994) at [120-154].

⁸⁰ Hung-Chao Tai above n 51, at 7.

⁸¹ Peter Robson and Asbjorn Kjonstad *Poverty and Law* (Hart Publishing, Cambridge, 2001) and Dan Banik *Rights and Legal Empowerment of the Poor* (Ashgate, London, 2008).

⁸² *Making the Law Working for Everyone* (Commission on Legal Empowerment of the Poor, Working Group Reports, New York, 2008).

⁸³ "Land reform" and "land law reform" are often used interchangeably in development economics. However, property in land, as Elizabeth Cooke sees it, is a legal concept and a human construct. Land law defines the nature of this concept. See Elizabeth Cooke *Land Law* (Clarendon Law Series, University of Oxford Press, 2012) at 1. The role of political reformers invites subtle differences between them. Patrick McAuslan argues that in order to make "land reform" successful, the first reform is to be made in the "law" itself. See Patrick McAuslan *Land Law Reform in Eastern Africa: Traditional and Transformational?* (Routledge, London, 2013) at 248. From this perspective, "land law reform" appears as a means to carry out the objectives of "land reform". Critics, however, allege that McAuslan's view does not sufficiently explore

“land law politics” on the other.⁸⁴ This is because Bangladesh and other developing countries lack serious study on the post-colonial land reform from the legal point of view. Most of the national and international works are economic or historical studies.⁸⁵

- iii) “Land law reform” is a less spoken term in the current political dialogue of Bangladesh. It should be re-invigorated given the fact that the initial land reform attempts did not succeed. The poverty cannot be eliminated and the constitutionally declared objectives of social justice cannot be fulfilled unless deeply ingrained inequality due to past land injustice is effectively approached through a new and just land system.
- iv) The nature of land law in making a revolutionary land reform successful has not been debated in Bangladesh’s legal settings. Therefore, it needs to be examined whether the land law of Bangladesh is well textured and structured to make the “ceiling-distributive model” approach to land reform meaningful.
- v) The existing literature does not sufficiently explain the relationship between land rights, land law and state’s power of realising the constitutional goals of economic, social and political justice.

Thus, it is yet to be seen whether the post-colonial land law structurally and textually provides the possibility to transform the land system in a pro-poor way. In this connection, the following are the central issues of the thesis:

- i) To what extent is the present land law regime of Bangladesh influenced by colonial land law and policy?
- ii) What are the political, historical factors that have shaped the post-colonial land reform in Bangladesh?
- iii) Is the land law regime of Bangladesh anti-poor? In what way, could the land legislation accommodate the concept of property so as to make pro-poor land reform happen?

the difference in the classic sense of land distribution. See Pauline Peters “Analysing Land Law Reform” (2014) 46(1) *Development and Change* 167; Ambreena Manji *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (Zed Books, London, 2006) at 51.

⁸⁴ This thesis uses the phrase “land law politics” in a generic sense. It accommodates the competing interests in the same statute and includes the legislative intention of land enactments following a land protest, the political ideology of the party bringing in the land reform and the non-participatory nature of the land law making process. “Land reform politics,” on the other hand, is understood as a goal of “land law politics.”

⁸⁵ There is, however, a recent trend to interpret the issue of land reform from a legal point of view. Agrawal added a legal and constitutional dimension to the issue. See PK Agrawal *Land Reforms in India: Constitutional and Legal Approach* (MD Publications, New Delhi, 1993). Patrick McAuslan made a distinction between “land reform” and “land law reform”. While studying the land reform legislation of Eastern Africa, McAuslan argued that land reform in African Sub-Sahara is predominantly related to land law reform. See Patrick McAuslan *Land Law Reform in Eastern Africa: Traditional or Transformative?* (Routledge, New York, 2013).

- iv) Can the present poverty be interpreted as an outcome of colonial process of depeasantisation?
- v) Is “land reform” largely a question of “land law reform” in case of Bangladesh?
- vi) What more proactive role can law play in reducing poverty in Bangladesh?
- vii) What are the challenges of land law reform in Bangladesh?
- viii) What approaches to land law reform will be appropriate for Bangladesh?

VII Methodology

I have essentially followed a qualitative legal research methodology. The research is qualitative in the sense that it has analysed and interpreted the primary sources including the land legislation and case law by taking their relevance, authority and context into account. I have taken a comparative legal approach in order to be able to suggest law reform. In this approach, I have considered the “law-in-context method” with an emphasis on historical origins of the present land laws. It is found that historical antecedents of land law offer a fine angle to interpret poverty of the peasant's—an approach less explored nationally, even globally. This approach falls in line with the thought of Lucy Williams:⁸⁶

If any academics and activists who work on behalf of the impoverished are to understand and be able persuasively to articulate the economic and personal situation of the poor, they must immerse themselves in the context and history of power relationships and income imbalances and the role of the legal system in establishing and maintaining inequitable societal structures.

In the process, I have frequently referred to the corresponding legislation and case law of India that shares the same colonial legacy and legal heritage. Through this approach, I have been able to know where a particular law comes from and why it is as it is today. The information and sources on the legal history of Bangladesh and India are generally more readily available. An historical study of the land issues has helped me inevitably to go through the political context of land law making. In addition to India, I have also looked at the authorities on and principles and practice of land law reform developed and followed in analogous jurisdictions of Asia, Europe and Latin America. I also studied the works of New Zealand scholars to conceptualise the historical and jurisprudential tenets of land law movements in Aotearoa—New Zealand. This helped me develop the understanding that the ideas of land law, colonisation and poverty are historically encompassed in different societies. Land was no less central to British colonialism in New Zealand than in Bengal. The purpose was not necessarily to argue their application in the Bangladeshi setting, but it was to show why a particular principle of land law reform should or should not be followed in Bangladesh.

VIII Chapter Overview

The thesis contains nine chapters. The summary of the chapters are as follows:

⁸⁶ Lucy Williams above n 35, at 1.

A *Chapter 1*

This introductory chapter focuses on the conceptual issues of land law, land rights and poverty situation in Bangladesh. After a brief statement about the nature of Bangladeshi land law, this chapter provides an overview of the project and its significance. It also demarcates the scope of the thesis and narrates the methodology of the research. It also provides reviews and analysis of the relevant literature for an understanding of the existing gaps in knowledge on the research topic.

B *Chapter 2*

This chapter analyses the history of Bangladeshi land law and shows how it came to be as it is. The chapter shows how land law was a major feature of the story of British colonial expansion in Bengal. It presents the legal and political context of colonial land reform so as to understand the requirements of land reform upon decolonisation. The chapter also explains the implications of the present land law regime for the peasants and its role in addressing post-colonial poverty in Bangladesh.

C *Chapter 3*

This chapter discusses the political and legal approaches to post-colonial land reform in East Pakistan (later Bangladesh). The chapter outlines the major loopholes of the main post-colonial land reform law and shows how the law went against the interest of the peasants. It argues that the redistribute approach to land reform that Bangladesh adopted soon after decolonisation, was not effectively translated into the body of land reform law. It underscores the political reality of the post-colonial era that hindered making a law appropriate to deal with the challenges of post-colonial radical land reform.

D *Chapters 4 to 7*

These chapters critically analyse the legislation relating to land rights of the peasants and question the efficacy of the reforms the legislation brought in the post-colonial and post-independence settings of Bangladesh. Chapter 4 examines the tenurial land reform done for the sharecroppers, chapter 5 examines the vulnerability of the riparian peasants and the law's failure to address their situation, chapter 6 examines the efficacy of the distributive land reform taken by Bangladesh and chapter 7 underscores the state's power of eminent domain law and its implications for the peasant's rights in or over the land.

E *Chapter 8*

Based on the analysis of chapters 4 to 7, this chapter determines the nature of land law reform as "politics" and tells the way it ought to be done in Bangladesh. The chapter examines different approaches to land reform and investigates their suitability for Bangladesh. It outlines the basic principles of land reform according to these approaches. The chapter offers some specific modalities of land reform and the way to implement them in Bangladesh.

F Chapter 9

This is the concluding chapter of the thesis. It states the findings of the thesis and makes recommendations to make land law reform in Bangladesh more meaningful.

IX Epilogue

This thesis looks at major colonial and post-colonial land laws of Bangladesh and examines their relationship with poverty. The thesis argues that land laws in Bangladesh are essentially anti-poor. They contributed to the perpetuation of poverty.

The land system that prevailed in colonial Bengal during the British period deprived the peasants of their land rights. This situation demanded a radical reform based on a distributive approach upon decolonisation in 1947. Unfortunately, in the post-colonial settings of Bangladesh, land distribution has been unfair and unequal. Such inequality along with a fragile land tenure system and administrative reform created widespread poverty.

Bangladeshi land laws are complex and vague and dominated by politics. The most striking feature of the Bangladeshi land laws is that they have operated to the detriment of the peasants since colonial days. The thesis finds that the land law regime in Bangladesh has structural loopholes and ideological drawbacks, which were enough to make the reform attempts dysfunctional.

Poverty in Bangladesh is a result of cumulative and mutually reinforcing deprivations. Land law is a major component of that process. The poverty will persist unless law addresses the true reasons of poverty and a pro-poor approach to land reform is espoused.

The thesis firstly gives an historical account of colonial land law and explains how the present problem came about. Then it looks at the main post-colonial reform laws to test their suitability to meet the present need in the light of recent developments. In particular, it questions the efficacy of acquisition law, sharecropping law, riparian law and eminent domain law as instruments of land reform. The thesis identifies a gap between law and reality and advocates the reinvigorating of distributive land law reform. The thesis proposes that land law reform should provide distributive justice to best serve the greater needs.

Chapter 2

The Legacy of Land Law in Bengal and Colonial Poverty

I Introduction

The role of land law as a principal legal tool for the expansion of colonialism is omnipresent in British colonial history. The Irish experience provides ample proof that land law was at the heart of British imperialism from the 16th century.¹ Bengal is no exception.² The purpose of this chapter is to examine the land reform attempts made by the British in colonial Bengal. It argues that in spite of much preoccupation with the agrarian issues by the colonial government, the fate of the poor in Bengal hardly changed. It also shows that the political process of the legislative interventions did not address the causes of the “men behind the plough” who constituted the bulk of Bengali society. This historical study of the reform attempts will be useful to understand the structure of contemporary Bangladeshi land law as it is rooted in the colonial property regime. It will also be helpful in

¹ In fact, colonial societies share identical stories about land rights, although they vary according to the degree of immigration from the colonial power, the nature of the colonial economy, the cultural expectations from each other and of course the availability of land. Patrick McAuslan showed how the land law was central to British colonialism in different jurisdictions from the 16th century. See Patrick McAuslan *Bringing the Law Back in: Essays in Land, Law and Development* (Ashgate, London, 2003). See also Patrick McAuslan “Property and Empire” (Paper presented to Sixth Bi-annual Conference, University of Reading, 2006). Mark Hickford offers a historical study of indigenous property rights that examines the interface between policymaking, popular politics and law in the establishment of imperial rule. Hickford’s focal point is New Zealand, however, significant part of the study also deals with how the ideas of indigenous property rights and the jurisprudence of empire intersect and travel through countries such as Canada, South Africa and Australia. See Mark Hickford *Lords of the Land: Indigenous Property Rights and Jurisprudence of Empire* (Oxford University Press, Oxford, 2011). The Africans and Maori shared a common experience of massive land loss in the latter half of the 19th century. In both cases, as also happened in Bengal, land became one of the powerful catalyst for independence. See William Worger “Gods, Warriors, or Kings: Images of Land and People in South Africa and New Zealand (1997) 31 (1) New Zealand Journal of Legal History 169. For a detailed discussion on the British Land Policy in Australia, see Stephen Roberts *History of Australian Land Settlement* (Macmillan and Melbourne University Press, 1924).

² CA Bayly *Indian Society and the Making of the British Empire* (University of Cambridge, Cambridge, 1988) at 150.

understanding how the current situation of Bangladesh came about and in seeing what type of reform should take place in the post-colonial period.

The chapter mainly looks at two major land law reform initiatives during the British colonial period (1757-1947). The two laws are: i) The Permanent Settlement Regulation 1793 and ii) The Bengal Tenancy Act 1885.³ These laws moulded the underlying changes in the social fabric of colonial Bengal.⁴ Their implications depended upon how the social classes reacted to the reforms through questioning the political, economic and administrative viability they prescribed.

This chapter consists of ten parts. Part I is the introduction. Parts II-IV focus on the land questions of the pre-British and early colonial days. Parts V-VII consider the land law reform attempts by the British. Part VIII examines the impact of the land legislation on poverty. Part IX then considers the political process of land law making. Finally, part X provides a summary.

II Pre-Colonial Bengal and the Land Question

Bengal was the first Indian province to succumb to British domination. Prior to the British conquest of Bengal in 1757 following the battle of Plassey, the province was ruled by different dynasties.⁵ Bengal's autonomous status under Mughal dispensation was well established before the British intervention.⁶ From ancient times, its economy had been overwhelmingly agricultural. Its fertile land along with rich and varied agricultural output made it a lucrative prize for European territorial ambitions.⁷ Bengal was the springboard from which the British expanded their territorial acquisition and subsequently built up the empire which gradually engulfed most parts of India. So, the 1757 victory at Plassey laid the foundation of the British Empire in the Indian subcontinent.

From then on, the British East India Company (the Company) emerged as a colonial ruler out of its commercial nature.⁸ Though the first British policy for political conquest was visible through the enactment of Pitt's India Act 1784, by then a considerable part of

³ Other attempts of land law reform will be referred as an aid to interpreting the broad premises of these two enactments.

⁴ Neeladri Bhattacharya "Colonial State and Agrarian Society" in Burton Stein (ed) *The Making of Agrarian Policy in British India 1770-1900* (Oxford University Press, New Delhi, 1992) at 149.

⁵ The *Pala and Chandra* dynasty (8th-11th century), *Sena* dynasty (11th-12th century), the Sultanate (11th-16th century) and the Mughal dynasty (16th-18th century). Geographically, the Mughal *subah* of Bengal comprised the present-day Indian states of West Bengal, Bihar and Orissa together with modern Bangladesh.

⁶ *Subah* Bangla was usually governed by the *Nawabs* of Bengal nominally accountable to the Delhi-based Mughal government.

⁷ Sushil Chaudhury *From Prosperity to Decline: Eighteenth Century Bengal* (Manohar, New Delhi, 1995) at 2.

⁸ Chartered by the British Sovereign, the East India Company was on the scene from the beginning of the 17th century. It gradually expanded its commercial activities in different parts of India and attained legal status through its endeavours. The most important amongst them is the 1698 acquisition of *zamindari* (rent collecting rights) over three villages in Calcutta.

the Indian Territory was already under the control of the Company.⁹ From the viewpoint of land law history, the grant of *Diwani* (right of revenue collection) of Bengal in 1765 by the Mughal Emperor marked the beginning of a new era. After some experiments on land policies, the Company made the radical legislative intervention in 1793.

The land issue in the pre-*Plassey* period centred on its ownership and mode of revenue collection. During the Pre-Mughal period, the kings were looked upon for all practical purposes as the owner of the soil though the subjects exercised a great degree of freedom in transferring lands.¹⁰ The kings were entitled to a fixed share of the produce as land revenue. In the Mughal period, there was a shift in the land ownership. The widely accepted view is that in this period, land ownership was vested in the peasants themselves.¹¹ The Mughal regime demonstrates several land reform initiatives that had implications for the subsequent agrarian reforms. Sher Shah's flexible and humane principle of revenue structure in the mid-16th century is widely acclaimed by legal historians.¹² Sher Shah's system was further refined during the reign of Akbar the Great (1556-1605).¹³ Todar Mall, Akbar's Revenue Minister, conducted a detailed survey of land before determining the revenue (1570-1580). This investigation, it may be noted, was laborious and never completed in India and certainly not in Bengal. As such, Akbar's revenue scheme did not affect the Bengal province to a great extent. In Bengal, the revenue had been fixed according to customary rates and divided amongst the villagers according to their ability to pay. There were further unstable settlements from 1658-1728. An identifiable settlement can be traced during the latter part of the reign of Aurangzeb in 1728. Until the British rule began in 1757, there was an increased trend of *abwabs* (cesses) in addition to the nominal land revenue.

⁹ There is a view that the British did not consciously start the colonial process in India. The Company's success encouraged the state to enter on to the scene. Bandyopadhyay, however, forcefully argues that both the state of England and the Company were interconnected to pursue England's diplomatic goals. The Company received its legal status from Royal Charter and their relationships were mutually beneficial. The foundation of the Company's empire in India was the subject of political discussion from the early 18th century and it became very clear when the Regulating Act 1773 ensured that the Company should carry out its activities as a "delegated sovereignty." See Sekhar Bandyopadhyay *From Plassey to Partition: A History of Modern India* (Orient BlackSwan, New Delhi, 2008) at [37-40]. The Company's possession and power were taken care of by the British Government through successive laws like the Charter Acts of 1813, 1833 and 1853. In 1858, the Company Administration was abolished following the 1857 Sepoy Mutiny and Queen Victoria formally took over the power by the Government of India Act 1858.

¹⁰ Thomas Trautmann *Arthashastra: The Science of Wealth* (Penguin Books, New Delhi, 2012) at xii.

¹¹ In contrast, Irfan Habib contends, "it is not possible to discern the emergence of any quantitative peasant property in Mughal India." Habib, however, sets a "peasant's relational substance with the land" to determine the ownership question. See Irfan Habib *The Agrarian System of Mughal India 1526-1707* (Oxford University Press, New Delhi, 1999) at 134.

¹² Sher Shah fixed the share of revenue as one-fourth of the produce. Following a survey, Sher's administration also introduced the system of providing a revenue deed to the peasants. Thus, Abraham Eraly wrote: "Revenue assessment and collection in Mughal India was a battle of wits between the government and the people. Sher Shah was the only ruler in Mughal times who had seen the workings of the revenue system in all its facets from the side of the taxpayer as well as the side of the taxed." See Abraham Eraly *The Mughal World: Life in India's Last Golden Age* (Penguin Books, New Delhi, 2007) at 272.

¹³ The revenue was increased to one-third of the produce.

The most striking feature of the Mughal administration was the introduction of a new class—the *zamindars* for the purpose of collecting the land revenue.¹⁴ These *zamindars* were varied in their categories and statuses. In Bengal, the Mughal conquerors used the term to denote those persons, drawn from almost every level of society, whom they employed to collect the revenue from the land. In lieu of salaries, they received a grant of land free from revenue and retained a specific portion of the collection. They also were entitled to levy transit duties and dispose of waste lands. So, in origin, the *zamindari* tenure in Bengal was an official one which was solely founded on a governmental *sanad* (charter of appointment).¹⁵

With the decline of the Mughal Empire, the authority of the *zamindars* gradually amplified and they increased the taxes under various names to establish their authority.¹⁶ Up to this stage, however, there was no absolute possessory title of the state or of the *zamindars* in the land. The real occupants were the persons who produced the crops on the land. “In the Mughal theory of government”, Ratnalekha Ray writes, “the *zamindars* held the office to the satisfaction of the government upon due performance of the duties of revenue collection and rural administration assigned to him by the *sanad*”.¹⁷ Thus, the institution of *zamindari* was an integral part of the administrative and political structure of the Bengali society before the advent of British colonialism.

The proprietary rights in land, up to this period, were not clearly defined in law. Different classes of people—state, *zamindars*, peasants—could have different rights in the same land.

III Company Land Policy from 1757-1793

Under the 1765 *Diwani* dispensation, the amount that the Company agreed to pay (2.6 million rupees) to the central Mughal Government, records suggest, was unreasonably meagre, for the nominal amount of tax to be realisable from Bengal without resorting to oppression was 24.7 million rupees (by some accounts 30 million rupees). Frederic Sachse, however, claims that in no year was more than 15.3 million rupees of land tax collected.¹⁸ Even if it is taken to be the correct estimation, this amount proved to be beneficial for the Company after providing the local *nawab*’s allowance (5.3 million rupees) and satisfying other administrative expenses. The Company, Umar claims, applied force and resorted to

¹⁴ The term *zamindar* came over the time to be used in a generic form irrespective of its varied contexts. See WH Moreland *The Agrarian System of Moslem India: A Historical Essay with Appendices* (Cambridge University Press, Cambridge, 2011) at 8.

¹⁵ S Gopal *Permanent Settlement and Its Results* (George Allen and Unwin, London, 1949) at 9.

¹⁶ By 1761, the Mughal Empire was empire only in name, as its weaknesses had enabled the local powers to assert their independence. Yet the symbolic authority of the Mughal Emperor continued, as the Emperor was still considered as the source of political legitimacy. See Bandyopadhyay above n 9, at 12.

¹⁷ Ratnalekha Ray *Change in Bengal Agrarian Society c. 1760-1850* (Manohar, New Delhi, 1979) at 15.

¹⁸ Frederic Sachse “The Work of the Bengal Land Revenue Commission” (1941) 89 *Journal of the Royal Society of Arts* 666.

oppression in realising the revenue.¹⁹ Due to its commercial nature, the Company was “more rapacious”²⁰ to earn the profit. As a result of over-exaction of rents, the peasantry in Bengal was on the verge of ruin. In 1770, Bengal saw an unprecedented famine. Many commentators attribute it to natural calamities but there is testimony to the reverse. Despina Iliopoulou identifies the monopoly of grain trading by the Company officials as one of the main reasons for the famine, though she also finds a contribution of the 1768 prolonged drought.²¹ The Company administration withdrew large quantities of rice from the market through hoarding in order to satisfy the demands of its army in Bengal.²²

By 1771 half of the revenue payers and cultivators perished in the famine. Consequently, the land was left uncultivated and the Company administration faced difficulty in recovering the revenues. However, the revenue practice prevailing at the time suggests that the Company condoned peasant exploitation. The revenue realisation was “violently kept up to its former standard”.²³ No land revenue was remitted; rather ten per cent *najay* tax²⁴ was added to it in the year following the famine (1770-1771).²⁵ Warren Hastings, the first Governor-General of Bengal²⁶ seemed to defend the *najay* practice as a continuation of general usage of the country, which in essence was, as Iliopoulou argues, a mistaken view about its origin, purpose and applicability.²⁷

The Company’s land policy with its emphasis on a revenue scheme had experienced a shift between 1765 and 1789. The first half of this period saw an attempt to legitimise such policies in terms of peasant welfare. The exclusion of the *zamindars* from offering land settlement,²⁸ supervision of the local tax collectors²⁹ and formation of the Amini

¹⁹ Badruddin Umar *Chirosthayee Bondoboste Bangladesher Krishok* (translation: The Peasants of Bangladesh under the Permanent Settlement System) (Mawla Brothers, Dhaka, 2013) at 17.

²⁰ Jerry Dupont *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (FB Rothman Publications, Littleton, 2001) at 482.

²¹ Despina Iliopoulou “State Formation and the East India Company in Colonial Bengal” (PhD Dissertation, York University, Ontario, 1994) at 188.

²² At 188.

²³ WW Hunter *The Annals of Rural Bengal* (Smith, Elder and Company, London, 1897) at 39.

²⁴ Special type of tax assessed upon the actual inhabitants of every inferior description of the land to make good the loss sustained in rents for the dead or absent neighbours. See Zaheer Baber *The Science of Empire: Scientific Knowledge, Civilisation and Colonial Rule in India* (State University of New York Press, Albany, 1996) at 162.

²⁵ Hunter above n 23, at 39.

²⁶ The office of Governor-General of Bengal would gradually become the Governor-General of India, as other presidencies (Madras and Bombay) under the British control would gradually be placed under Bengal through successive Acts of the British parliament.

²⁷ Despina above n 21, at 190.

²⁸ Sachse above n 18, at 666.

²⁹ From 1765 to 1772, the actual administration of the revenue was in the hands of the Indian officials known as *Naib-i-Diwan* (Deputy Finance Minister) under the supervision of Muhammad Reza Khan in Bengal and Raja Shetab Roy in Bihar. In 1772, the Company took over the entire revenue management directly.

Commission³⁰ were some examples of this trend. Arrangements with revenue-farmers, periodic inquiries and revised settlements (quinquennial followed by yearly settlements) may also be interpreted as a corollary of this trend. All the attempts were unsuccessful. The limited experience in land management, insufficient officials and cultural differences contributed to this failure. However, the mounting claim of revenue made all other well-intentioned attempts a secondary consideration. Every administrative change that aimed to increase revenue contributed directly to the institutionalisation and multiplication of illegal taxes.³¹ After 1776, focus, therefore, shifted once again to pro-*zamindar* policies to obtain the maximum collection. This confirms the Company's weakening position which Guha compared to a "rudderless boat blown by every wind and turned by every tide", an impression of "empiricism and short-sightedness" resulting in the insecurity of property, oppression and famines.³² Even the shift towards the *zamindars* did not prevent over-assessment of land taxes. Gupta testifies that in 1779 the *Raja* of Birbhum (by now a district of West Bengal) recovered 40,000 rupees from a single tax imposed upon the peasants.³³ In a period of two years, ten types of new taxes were imposed on the peasants by the *zamindars*. It is evident that the *zamindar*-state colonial enterprise started to get a firm footing from this time. The assistance of Hastings' troops offered to the *zamindars* to suppress some early peasants' uprisings, including the Rangpur Rebellion (1783) further supports this assumption.

In 1776, Philip Francis, one of the Members of Hastings' Council advocated a stable land settlement plan.³⁴ Hastings, however, was against any permanent revenue mechanism though he regarded the *zamindars* as "more than mere officials".³⁵ The India Act 1784

³⁰ Warren Hastings formed the Amini Commission in 1776 with David Anderson and George Bogel as its members to obtain in-depth information about the agrarian system in India. The Commission's 1778 Report though unheeded, offered the "most valuable contemporary document in the early revenue history of Bengal." See JH Rose, AP Newton, EA Benians, Henry Dodwell (eds) *The Cambridge History of the British Empire* (CUP Archive, London, 1929) at 425.

³¹ According to Hunter's testimony, more than one-third of the arable land was returned in the public accounts as "deserted." In 1776, it reached to one-half of the whole tillage. The Company increased its demand from less than £1, 00,000 in 1772 to close to £112,000 in 1776. See Hunter above n 23, at 63-64.

³² Ranajit Guha *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement of Bengal* (Mouton & Co, Paris, 1963) at 13.

³³ Ranjan Kumar Gupta *The Economic Life of a Bengal District, Birbhum 1770-1857* (University of Burdwan, Calcutta, 1984) at 34.

³⁴ The Amini Commission's Report of 1778, however, exposed many of the inaccuracies of Francis' Plan.

³⁵ James Stephen *Selected Writings of James Fitzjames Stephen: The Story of Nuncomar and the Impeachment of Sir Elijah Impey* (Oxford University Press, Oxford, 2013) at [257-259]. The Hastings administration advised a *zamindar* to ignore a prerogative order from the Calcutta Supreme Court, because Hastings held the view that the *zamindars* were neither the "British subjects" nor the servants of the Company. This was evident from the 1779 Cassijurah event that involved a conflict between the early colonial administration and the judiciary over the interpretation of 'British subjects'—a term used in the 1773 Regulating Act.

afforded a “rigorous system of control” over Indian affairs.³⁶ A subsequent direction from the Company officials also prescribed a definite settlement for a moderate *jumma* (revenue) “in all practicable instances” with the *zamindars*, in line with the spirit of the Pitt’s India Act.³⁷ Contemporary public opinion and robust ideological debate also favoured a definite settlement to terminate existing uncertainties and confusion.

The selection of Lord Cornwallis as the Governor-General appeared to be a judicious decision by the Pitt administration. His assumption of office in 1786, notes Jerry Dupont, laid the foundation of the British Empire in India setting standards for the administrative, judicial and land reforms which remained remarkably unaltered almost to the end of British era.³⁸ In the field of land practices, Cornwallis was confronted mainly with three challenges: i) determining a reasonable revenue based on sound assessment; ii) defining the exact nature of conflicting land tenures and iii) affording protection to the *raiyats* (peasants) against illegal and arbitrary eviction by the *zamindars*. Keeping these three challenges in view, Cornwallis concluded the decennial settlement with the *zamindars* in 1789, subject to its confirmation upon successful operation. After an “intensive study” of the problem, Pitt (Prime Minister) and Dundas (Adviser on Company affairs) approved his plan in 1792. As a result, the decennial settlement was promulgated as permanent in 1793. This is historically known as the “Permanent Settlement” or the “Cornwallis system”.

IV The Landed Society

The composition of the late 18th century landed society in Bengal was very complex in nature. The landed class then, as appears from the Mughal social structure, was founded on different orders and ranks. It was a massive social pyramid from top to bottom. It will suffice for present purposes to classify the landed society into broad categories.³⁹ The land hierarchy up to 1793 as suggested by Sirajul Islam was as follows: i) the great *zamindars*⁴⁰;

³⁶ Popularly known as “Pitt’s India Act”, this law was the first public acknowledgement of controlling India through the “legitimate executive power of the Constitution.” See Patrick Tuck *The East India Company 1600-1858* (Taylor and Francis, London, 1998) at 200.

³⁷ Herbert Harrington *Extracts from the Harrington’s Analysis of the Bengal Regulations* (Office of Superintendent Printing: Military Orphan Printing, Calcutta, 1868) at 3.

³⁸ Jerry Dupont *Common Law Abroad* above n 20, at 483.

³⁹ Sirajul Islam names five classes of claimants in the land, which is substantially in line with the findings of William Hunter, though they differ in the appellations of the landed classes. Hunter’s classification of the landed groups were as follows: i) the *zamindars*; ii) the *talukdars*; iii) revenue farmers; iv) military and other holders of the lands; and v) the holders of lands. See Sirajul Islam *The Permanent Settlement in Bengal: A Study of Its Operation* (Bangla Academy, Dacca, 1979) at 3. The 1938 Floud Commission also found four classes of *zamindars* with the *Maharajas* at the top.

⁴⁰ They were at the peak of the landed class titled as *raja* or *maharaja*. Their *zamindary* was extensive and the lifestyle was princely. Islam names twelve great *zamindaries* in Bengal that covered half of the total revenue of Bengal during the introduction of the decennial settlement of 1789.

ii) middle-class *zamindars*⁴¹; iii) petty *zamindars* and *chowdhuries*⁴²; iv) *talukdars*⁴³ and v) *raiya*⁴⁴. The standard narratives of land law in Bengal describe the first four categories ‘conveniently and misleadingly’ under the single nomenclature: *zamindars*. As will be discovered later, however, a regrouping of social forces and rearrangement of social relations took place in the post-1793 era. The fifth class—the *raiya* deserves special attention.⁴⁵ They were the numerous and inferior classes of people who held and cultivated small parts of land on their own account. However, the notion of *raiya* also brings a certain degree of confusion as it received a changing meaning according to rental and tenurial terms of land they held.⁴⁶ In the late 19th century, the upper class of the *raiya* would appear as the ‘immediate upper exploiters’ of the *raiya* under the name of *jotedars*.

In the post-1793 era, the reordering of property relations greatly remodelled the agrarian structure of Bengal. Thorner’s model of an agrarian structure is of particular relevance for this period.⁴⁷ Thorner broadly refers to the *maliks*, *kishans* and *mazdoors* as the three principal social classes. The first group includes the big and rich landlords, the second group includes the well-off tenants and the third category incorporates the poor tenants, sharecroppers and the landless labourers.⁴⁸ Though Thorner’s sub-categories are very close to Indian reality, Dhanagare proposes a further refinement of the model in the light of the works of Lenin and Mao.⁴⁹ According to this model, the landlords are placed at the top and the landless labourers at the bottom of the five-tier agrarian pyramid. The rich peasants, middle peasants and poor peasants constitute the others in the structure.⁵⁰

Given this extensive classification of the Bengal peasantry, the general use of the term “peasants” or “*raiya*” in the context of colonial poverty and in the present context may

⁴¹ This class was near to the status of the great *zamindars*. Usually, they dominated in the Eastern part of Bengal.

⁴² They were next to the middle class of *zamindars*. This group were largely found in the districts of Chittagong and Sylhet of Eastern Bengal.

⁴³ Next to the *zamindars*, the *talukdars* were of two types: dependent and independent. Some of them were equal in status to the *zamindars*. One group paid revenue directly to the government (*hujuri*), as other group paid revenue to the government through the *zamindars* (*majkuri*). The latter were further sub-classified as voluntary (*kharija*) and non-voluntary (*patta*).

⁴⁴ They were the class at the lower strata. However, there were even classifications among the *raiya*. The broad classification was *khudkast* (original cultivators based in the village—enjoyed hereditary occupancy paying rents and customary rates) and the *paikast* (settler cultivators coming from outside the village—tenants-at-will). The lowest class of tenants were the landless *bargadars* or *adhiars* (sharecroppers). The 1859 Rent Act and 1885 Tenancy Act made further regroupings of the *raiya*.

⁴⁵ The term *raiya* was incorporated in Bangla language from the Persian literature. The term has fallen into disuse.

⁴⁶ WH Moreland above n 14, at 3.

⁴⁷ Daniel Thorner *The Agrarian Prospect in India: Five Lectures on Land Reform Delivered in 1955 at the Delhi School of Economics* (University Press, Delhi, 1956) at 4.

⁴⁸ At 4.

⁴⁹ At 4.

⁵⁰ DN Dhanagare *Peasants Movements in India 1920-1950* (Oxford University Press, New Delhi, 1983) at 15.

produce some confusion. This is heightened by the fact that the term “peasant” has no agreed definition. In historiography, generally the term “peasant” is used in a specific sense to mean a land-holding proprietor. In Western narratives, the landless labourers are not classified as peasants.⁵¹ This understanding of peasants needs to be cautiously used while referring to Bengal peasants. In this thesis the term “*raiya*s” or “peasants” is used to highlight their subordinate economic status in agrarian status. The majority of the Bengal peasants were non-owners of land and did not enjoy the protection of the tenancy law. As such, Taj Hashmi emphasised the traits of agricultural pursuit and exploitation in offering nomenclature to Bengal peasants.⁵² After consulting different authorities, Hashmi contends that the *raiya*s are cultivators existentially involved in agriculture taking autonomous decisions regarding the process of cultivation. BB Chaudhuri’s notion of peasants takes into account the cultural and material aspects of the term.⁵³ For Chaudhuri, one of these aspects is the primacy of agriculture as a source of income and employment. From this viewpoint, even a tenant farmer may fall within the purview of the term “peasant”. Therefore, peasants are defined, though in a complex way, as what they are. In a peasant’s world-view, being a peasant is a relational issue—their relationship with land and labour processes that together define the peasant as a social actor. These relations create a symbolic space that allows for many specifics and dimensions. Among these dimensions, it is argued, “being a peasant” or being involved in agricultural production is the lowest denominator.

V *Permanent Settlement Regulation 1793*

A *The Change*

In the light of the experience of feudalism, the British thought the *zamindars* to be the owners of the land, which they were not. Thus, in a “bad case of mistaken identity”,⁵⁴ Cornwallis conferred prized private property rights in land on the *zamindars* through a Proclamation of 22 March 1793 followed by a barrage of Regulations. Sir John Shore, perhaps the most experienced revenue official then in Bengal found “certain hereditary and prescriptive” rights in favour of the *zamindars*. It was thought that coming to terms with the *zamindars* would be simplistic, satisfactory and convenient from all points of view.⁵⁵

⁵¹ See generally Marc Bloch (Translated by JE Anderson) *Land and Work in Medieval Europe* (Routledge Revivals): *Selected Papers* (Routledge, London, 1967) at 130.

⁵² Taj Ul Islam Hashmi *Peasant Utopia: The Communalization of Politics in East Bengal, 1920-1947* (University Press Limited, Dhaka, 1994) at 2. Hashmi contends that unlike commercial farmers, peasants have only limited access to the market and they mainly produce for subsistence and sell their surplus to buy goods they do not produce. Even in some cases, wage labourers and sharecroppers are not excluded from being peasants so long as they take part in the agricultural pursuit.

⁵³ BB Chaudhuri *Peasant History of Late Pre-colonial and Colonial India* (Pearson Longman, New Delhi, 2008) at 43.

⁵⁴ Sugata Bose “Peasant Labour and Colonial Capital: Rural Bengal Since 1770” in Gordon Johnson (ed) *New Cambridge History of India: The Indian Empire and the Beginnings of Modern Society* (Cambridge University Press, Cambridge, 1993) at 70.

⁵⁵ Peter Robb *Ancient Rights and Future Comfort: Bihar, the Bengal Tenancy Act of 1885 and the British Rule in India* (Curzon Press, Richmond, UK, 1997) at 66. Pitt and Dundas both were convinced about the

This argument based on the ground of expediency had been buttressed by appeals to history and law.⁵⁶ Peter Robb terms the step as a “quasi-feudal response of a weak state”.⁵⁷ Article II of the Proclamation elevated the independent *taluqdars* (parallel category of landed class) to the status of *zamindars* and declared the *jumma* (land revenue) payable by them “fixed for ever” in the following terms:

The Marquis Cornwallis, the knight of the most noble order of the Garter, Governor-General in council, now notifies to all *zamindars*, independent *taluqdars* and other actual proprietors of land, in the provinces of Bangla, Bahar and Orissa, that he has been empowered by the honourable Court of Directors for the affairs of the East India Company, to declare the *jumma* (revenue), which has been or may be assessed upon their lands under the regulations above-mentioned, fixed for ever.

The Permanent Settlement thus started “had a long lease of life” matched by an “exceptionally prolonged gestation”.⁵⁸ The Proclamation ensured the continuance of the decennial settlement of 1789 as “unalterable” with the “approbation of the Honourable Court of Directors”.⁵⁹ The *zamindars* were formally declared “actual proprietors of the land”⁶⁰ and their estates in the land were made freely heritable and transferable. They were also allowed to appropriate all profits accruing from the extension or improvement of cultivation.⁶¹ Thus, the Cornwallis system concentrated property rights in the hands of the limited number of *zamindars* and wiped out at a stroke the peasants’ customary rights on their land and put them under a legal obligation to pay “exorbitant rents at the *zamindars* whim”.⁶² The follow-up regulations conferred absolute power on the *zamindars* to evict tenants arbitrarily, affording no legal protection to the *raiyyats*.

However, it appears that many early Regulations of the scheme seemed to bring the *zamindars* under accountability. Certain accountability provisions of the early regulations may be noted:

a) The *zamindars* must pay a fixed amount of tax to the Company by a deadline—known as the sunset rule). No remission of taxes for natural calamities was allowed. Sale of the land or a part of it would positively and invariably take place in case a *zamindar* failed to maintain punctual discharge of the debt to the public revenue.⁶³

expediency theory. See Patrick Tuck (ed) *The East India Company 1600-1858* (Taylor & Francis, London, 1998) at 69.

⁵⁶ S Gopal above n 15, at 13.

⁵⁷ Peter Robb above n 55, at 66.

⁵⁸ Guha above n 32, at 11.

⁵⁹ Article I of the Cornwallis Proclamation. The annual amount of public revenue was fixed at ten-elevenths of the net assets. The *zamindars* could retain one-eleventh of the share after offsetting their expenses.

⁶⁰ Regulation II of 1793.

⁶¹ Article III of the Cornwallis Proclamation.

⁶² Peter Robb *Empire Identity and India: Peasants, Political Economy and Law* (Oxford University Press, New Delhi, 2007) vol 2 at 66.

⁶³ Regulation II of 1793, s (7).

b) There would be no power of distraining or sale of land or other properties of the *raiyats* under the *zamindars*. Even ploughs, seeds and cattle were not subject to distraint.⁶⁴

c) If the *zamindars* wished to settle a matter in the court, they would not be entitled to attach property by themselves.⁶⁵

d) No corporal punishment or confinement was allowed in the case of any default in the payment of the tax. The victim had the right to have a criminal or civil remedy in case of such violation.⁶⁶

e) Imposition of new cesses was prohibited, violation of which invited a treble penalty.⁶⁷

f) *Zamindars* would have to issue a receipt called *patta* to the *raiyats*, which would contain the exact amount of the rent to be paid by them. They were also enjoined to register the forms of the *patta* with the district courts.⁶⁸

These checks looked promising to protect the *raiyats*, but soon a sweeping transformation in the government's agrarian policy would take place in making these protections virtually ineffective.

B *The Wisdom of the Cornwallis Reform*

The wisdom of the Cornwallis system is open to question. The main ideological underpinning of the system was to make an agricultural revolution in Bengal. It was believed that declaring some groups as "proprietors of the soil" and fixing their "dues to the state" would create proper conditions to induce them to invest in the agriculture.⁶⁹ The first requirement for that was to establish a legal framework to define properly the competing interests in the same land. Following the English model of land tenure, the *zamindars* were given the proprietary rights in the hope that they would enjoy exclusively the fruit of their good management and industry.⁷⁰ However, this interpretation tends to oversimplify the great British colonial enterprise. It overlooks the tension between the practical problems and philosophical doctrines of setting a proper agrarian policy in India and hence arguably in Bengal. At the very basic level, the system ignored the local requirements of an agrarian economy. "How could a government legislate a land revenue settlement", asks Christopher Hill, "in an area that yearly changed in its size, shape, fertility

⁶⁴ Section VII (3).

⁶⁵ Section XVII (9).

⁶⁶ Section XVII (28).

⁶⁷ Section VIII (55).

⁶⁸ Section VIII (57) & (58).

⁶⁹ BB Chaudhuri "Agrarian Relations: Eastern India 1757-1947" in Tapan Raychaudhuri, Irfan Habib and Dharma Kumar (eds) *The Cambridge Economic History of India c. 1757-c. 1970* (Cambridge University Press, New York, 1983) vol 2 at 88.

⁷⁰ John Dacosta "The Bengal Tenancy Act 1885" (1892) 18 Law Magazine and Review 165.

or even location” on an ‘unaltered’ revenue scheme?⁷¹ It appears that the late 18th century British imperial policy greatly influenced Cornwallis to go for a *laissez-faire* principle.⁷²

Guha shows how the works of the earlier thinkers like Alexander Dow, Henry Patullo and Philip Francis gave courage to Cornwallis to devise such a revenue scheme. Alexander Dow formulated an “assessment for ever” scheme as a policy recommendation for Bengal in 1770. Henry Patullo’s essay recommended the English model of land tenure for France and Bengal.⁷³ Philip Francis in his controversial 1776 plan sought a stable remedy against the revenue disturbances in both preventive and compensatory measures so that the source of tribute did not dry up. He was prepared to allocate the Company a fixed sum out of the revenues and then to let them go to the market for their investment. Thus, he made the land question one of the main concerns to stabilise the British Empire.⁷⁴ Moreover, Blackstonian doctrines (1765-1769) like the Crown ownership of land as a defining element of feudalism and “assigning to everything, capable of ownership, a legal and determinate owner” greatly influenced late 18th century debate on Bengal’s land question.⁷⁵

These all helped Cornwallis to hold that “mere admission to *zamindari* right would not contribute to the improvement of the country unless it is supported by other virtues of landed aristocracy”.⁷⁶

C *The Private Rights Debate*

In order to devise an effective and efficient land revenue system, it was necessary first to solve the vexed problem of land tenure. It is surprising that in the 1790 context even an ordinary settlement was not carried out, though it was in the thought of the policy makers since the 1770s.⁷⁷ The 1793 Regulation did not consider the occupancy rights of various classes of *raiyyats*. It attached more importance to the dominant rights of the *zamindars* with a view to fit the English concept of private property rights in land into the Bengal context. The emphasis on *zamindars*’ absolute rights was preferred in a desperate search for “ownership” of land. Thus, the 1793 law ignored the known canons of the customary rights

⁷¹ Christopher Hill “Riparian Legislation and Agrarian Control in Colonial Bengal” (1990) 14 (4) *Environmental History Review* 1 at 8.

⁷² This era was largely influenced by the thoughts of William Blackstone, Adam Smith, Philip Francis, Sir John Shore and Thomas Law. In particular, Blackstone’s view of property had a deep and lasting influence on contemporary British thought. Blackstone said: “There is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” See William Blackstone *Blackstone’s Commentaries on the Laws of England* Vol 2 (Cavendish, London, 2001) at 2.

⁷³ Guha above n 32, at 42.

⁷⁴ At 126.

⁷⁵ Amalendu Guha “Ideological Roots of the Permanent Settlement” (1982) 17 (41) *Economic and Political Weekly* 1651.

⁷⁶ S Gopal above n 15, at 19.

⁷⁷ At 24.

of the tillers that they had been enjoying from the Mughal and *Nawabi* Bengal.⁷⁸ The Mughal jurisprudence of land ownership, at no time established that the state was the absolute owner of the land.⁷⁹ The other prevailing laws (Hindu and Muslim law) of the land also did not recognise the state's absolute ownership over the land. Therefore, it was questionable on what legal basis the new administration the Company conferred absolute ownership of land on the *zamindars*.

If the government or the state did not own the land, could they transfer a better title to the *zamindars* than they themselves had that is the question that strikes at the root of the system. Baden-Powel found that by the end of the 18th century a de facto right of the state was established over land.⁸⁰ If we accept Baden-Powel's view, Cornwallis's government only had de facto, not de jure rights over land. Moreover, the post-1765 land policy of the Company itself suggests that the *zamindars*' claim over land was exercised with unchecked aggression. The 1793 law, furthermore, placed the land ownership question and the exaction of land revenue on the same terrain. Thus, the jurisprudential soundness of the Cornwallis system is debatable.

The private property rights theory, it is argued, was introduced into India to liberate individual enterprise from the shackles of customary practices and to modernise the economy and society through the notion of the rule of law. Interestingly, the application of English property rights theory varied in different parts of colonial India. In Bengal, the *zamindars* were vested with property rights under the *zamindari* system. By contrast, in Madras, the *raiyyats* were entrusted with the same under the *ryotwari* system.⁸¹ The freedom of private rights on the property was a misnomer for Bengal. The British had to choose the *zamindars* among several claimants to rights in perplexing tenure systems largely unknown to them and they added their own element of confusion in their natural tendency to look at everything from an English law point of view.⁸²

⁷⁸ Sugata Bose above n 54, at 69.

⁷⁹ For an excellent account of Mughal agrarian policy, see Irfan Habib *The Agrarian System of Mughal India 1556-1707* (Oxford University Press, New Delhi, 1999).

⁸⁰ BH Baden-Powel "Permanent Settlement of Bengal" (1895) 10 (38) *The English Historical Review* 276 at 285.

⁸¹ The *ryotwari* settlement introduced by Lord Munro emphasised collecting taxes directly from the *raiyyats* through a large number of officials. Both under the *zamindari* and *ryotwari* arrangements, the condition of the cultivators was miserable. Raja Rammohun Roy, however, sounded more compassionate for the Bengal *raiyyats* in his famous testimony before the Select Committee of the House of Commons in 1831. Raja deposed that the *zamindari* system had placed the Bengal *raiyyats* at the mercy of "avarice and ambition" of the landlords and the *ryotwari* system had made the Madras peasants subject to "extortions and intrigues" of the land surveyors. In Bengal, the landlords had met with an "indulgence from the government in the assessment of revenue" but "no part of this indulgence is extended to the poor cultivators" who sometimes had to sell all their crops to meet the demands of the landholder. See SK Sharma *Raja Rammohun Roy: An Apostle of Indian Awakening* (Mittal Publications, New Delhi, 2005) vol 3 at 224. For an account of *ryotwari* system, see generally A Satyanarayana *Andhra Peasants under British Rule: Agrarian Relations and The Rural Economy* (Manohar, New Delhi, 1990).

⁸² RE Frykenberg (ed) *Land Control and Social Structure in Indian History* (University of Wisconsin Press, Madison and London, 1969) at xv.

The law also made the land an instrument of trade unknown to Indian practice in those days. The expansion of the land market was phenomenal in late 18th century England as a championed idea for the expansion of capitalism. That time saw the development of a political alliance between land and money.⁸³ Chambers and Mingay argue that the agricultural revolution in Britain largely was confined between 1750 and 1880, as this period witnessed a marked acceleration in the tempo of change.⁸⁴ The marketability of land in India provided a good laboratory for the purpose. Indeed, Francis and Cornwallis subscribed to the view that security of land ownership would provide a necessary condition for the development of capitalism in agriculture.⁸⁵ Thomas Law, another stalwart of the Cornwallis School, also wanted the land market to act as an “engine of development”.⁸⁶ As early as 1790, Law looked forward to a new international division of labour in which India was to emerge as a supplier of the raw materials like cotton instead of its regular products. Titles to land were expected to be freely bought and sold and in due course fall into the hands of the thriftiest class of people. The Cornwallis system successfully accommodated this principle.

During the early years of its introduction, there was a reordering of property relations in Indian society taking its toll on the rights of the *raiya*s. This was the “magic of private property designed to improve the agriculture”.⁸⁷ Thus, the private rights theory exemplified the feudal agrarian relations having been “forcefully subjugated to an external capitalist economy”.⁸⁸ In this sense, the *zamindari* system may be described as colonial landlordism.

D *Non-protection of the Raiya*s

Another fatal blow of the Cornwallis system was its virtual neglect of the rights of the *raiya*s. The 1793 law paved a way to surrender a great amount of land tax from government’s part under the “fixed for ever” rule. Nonetheless, it appeared as a useful tool of oppression to the *raiya*s. For, the law omitted to declare that rents could not be raised and thus left the perfectly natural inference that they could be increased. Several points are to be noted in this connection:

Firstly, in the absence of recorded *parganah* rate (customary rate prevailing in district), every effort was made to fix it at the maximum because it was being made for perpetuity.⁸⁹

⁸³ PJ Cain and AG Hopkins *British Imperialism, 1688-2000* (Longman, London & New York, 2002) at 279.

⁸⁴ JD Chambers and GE Mingay *The Agricultural revolution 1750-1880* (BT Batsford, London, 1966) at 115.

⁸⁵ Amalendu Guha above n 75, at 1651.

⁸⁶ At 1653.

⁸⁷ Bandyopadhyay *From Plassey to Partition* above n 9, at 84.

⁸⁸ Nariaki Nakazato *Agrarian system in Eastern Bengal C 1870-1910* (KP Bagchi & Company, Calcutta, 1994) at 196.

⁸⁹ The rate varied from region to region and ranged from one-third to nine-sixteenths. The revenue finally fixed in 1789 was twenty per cent higher than what prevailed in 1757.

Secondly, the law prescribed no protection for the *raiyats* against the unfettered powers of the *zamindars* to raise the amount subsequently.⁹⁰

Thirdly, except for the shadowy protection of courts and a vague promise of succour in future, it provided no scope for the state's intervention in governing the *zamindar-raiyat* relationship.⁹¹

The notorious law of *haptam* (Regulation VII of 1799) turned the system into one of "lip-service".⁹² It withdrew the earlier "sunset" provision of imprisoning the defaulting *zamindars* and of distraining their personal property. Instead, it devised a flexible revenue pay scheme subject to a *punctual* payment clause. What was perilous, it is argued, was that it offered a wide summary distraining power to the *zamindars* and empowered them to inflict corporal punishment on defaulting *raiyats* without the sanction of law. Under the *haptam* arrangement, they could realise the arrears of revenue from the *raiyats* through a summary sale after attachment. Moreover, it placed a burden of proof on the *raiyats* and considered an *ex parte* statement of a *zamindar* sufficient to imprison a *raiyat*.⁹³ Thus, the pendulum swung even further towards the *zamindars*.⁹⁴ These legal attempts, critics point out, were driven by the Company's government to mitigate the financial consequences of the 1799 Anglo-Mysore war⁹⁵ on the one hand and to make the landed class loyal to the British administration on the other.

A remedial response to the *haptam* law, however, came under the *panjam* arrangements (Regulation V of 1812). It afforded a greater security to the *raiyats* by abolishing the power of arrest, exempting cattle, ploughs and agricultural implements from attachments and requiring a written notice to be served on the *raiyats* before distraining their property. Yet there were many loopholes in it that facilitated the eviction of the *raiyats*. Thus, notwithstanding the 1812 reforms, up to the early 19th century, the colonial state primarily

⁹⁰ There was no rule of fair rent assessment under the Cornwallis scheme. Such assessment was beyond the realm of practical contemplation at that time. Nonetheless, there was no serious alternative plan for comprehensive adjustment to protect the *raiyats*. Unlike the case of Ireland, the authorities in Bengal suffered from the lack of good relationship between the *zamindars* and the *raiyats*. See BH Baden-Powel "The Permanent Settlement of Bengal" (1895) 10(38) *English Historical Review* 276 at [289].

⁹¹ Sir John Shore favoured "state intervention" to ensure the accountability of the *zamindars*. See BH Baden-Powel "The Permanent Settlement of Bengal" (1895) 10(38) *The English Historical Review* 276 at [287]. See also Ranajit Guha *A Rule of Property for Bengal* above n 32, at 195. Interestingly, Shore's arguments formed the final determinant of the Cornwallis policy but Shore himself toughened it succeeding Cornwallis. For example, Shore abolished the office of the *kanungo*, took away the magisterial and judicial power of the collectors and placed them under judicial scrutiny to offer a sense of security to the *zamindars*.

⁹² Anand Swamy "Land and Law in Colonial India" in Debin Ma and Jan van Zanden (eds) *Law and Long-Term Economic Change: A Eurasian Perspective* (Stanford University Press, California, Stanford, 2011) at 144.

⁹³ A *raiyat*, economically and socially subservient, was wary about asking the Court to summon a witness who happened to be employed by his *zamindar*.

⁹⁴ Swamy above n 92, at 144.

⁹⁵ The Anglo-Mysore wars were a series of battles between the Company and the Madras Presidency over the last three decades of the 18th century. The victory of the Company in the fourth and last one in 1799 consolidated the British rule in India.

regulated *zamindar*-tenant relations to attain its fiscal objectives, broadly with a pro-*zamindary* bias.⁹⁶

Some shallow protection clauses, however, must be noted. Firstly, the 1793 law expressly reserved a general power to legislate in the future for the protection and welfare of the *raiyats*. It decided to rely on the *zamindars*' "good faith and moderation" until 1859 when it was too late. Secondly, it required the *zamindars* to furnish accounts with the collectors' office, which had nothing to do with the *raiyats*' rights. Thirdly, the law required the *zamindars* to issue a *patta* (revenue deed) to the *raiyats*. But the *zamindars* were reluctant about this requirement from the very beginning. Interestingly, the provision also did not receive a warm welcome from the *raiyats* either. The *zamindars* had hardly any direct connection with the vast body of cultivating *raiyats*, so they found it too impracticable to implement the *patta* project. Besides, they found the *raiyats* reluctant to engage in short-term leases (maximum 10 years) under a written *patta*. More so, the well-off *raiyats* were not inclined to expose their secret gain from their land holdings and the general *raiyats* were apprehensive of any exploitation under a written rule.⁹⁷ Both groups, thus, had developed a distrust towards the new system of *patta*. The *panjam* Regulation of 1812 made a compromise on the point. It exempted the *zamindars* from the *patta* requirement but asked them to fix their rents on equitable considerations. However, it only added to the problems because of its vagueness.

E *The Customary Rights Debate*

The 1793 law failed to appreciate the customary practices of fixing the land revenue.⁹⁸ Metcalf claims that the law initiated an "ordered system of precise legal definitions" by replacing the "jungle of customary rights".⁹⁹ The desirability of an ordered property system can hardly be overstated, but that should not mean a wholesale abandonment of weighty customary practices. Moreover, as shown above, the law could not define the perplexity of land tenures precisely. Washbrook sounds less critical on the point. Washbrook believes that the framework of Bengal legal system incorporated the personal law's (Hindu and Muslim law) concept of property as a "trust" rather than "rights".¹⁰⁰ The British, therefore, attempted to reflect this concept in land relations. Washbrook maintains that theoretically,

⁹⁶ Swamy above n 92, at 144.

⁹⁷ In the first sixty years, no lawsuit was instituted by the *raiyats* to enforce their demands under the *patta* provision.

⁹⁸ The customary rights of the *raiyats*, John Harington testifies, were legitimately established under the Mughal constitution. These included the rights to occupancy and to the limitation of rent to either a hereditary fixed rate or a local rate depending on the specific status of the *raiyats*. See Andrew Sartori *Legalism in Empire: An Alternative History* (University of California Press, Berkeley, California, 2014) at 45.

⁹⁹ Thomas Metcalf "Social Effects of British Land Policy in Oudh" in RE Frykenberg (ed) *Land Control and Social Structure in Indian History* (The University of Wisconsin Press, Madison, Milwaukee and London, 1969) at 144.

¹⁰⁰ David Washbrook "Law, State and Agrarian Society in Colonial India" (1981) 15 (3) *Modern Asian Studies* 649 at [656].

the Permanent Settlement had no intention to offend the 'traditional' and 'customary' rights of the agricultural tenants. What was problematic, he argues, was the failure to define the "species of property rights" and leave that to the mercy of the courts.¹⁰¹ Whatever may be the correct position, it is clear from the repeated references to custom in the post-1793 Regulations that the *raiya*s had been enjoying some pre-existing and independent right of property before the introduction of the Cornwallis system.

The *raiya*s often could not pay the land taxes and faced arbitrary eviction. Thus, the system could not check the creation of feudalism on the one hand and impoverishment of the agricultural tenants on the other. "Creation of property rights" and "land market" substituted "customary production relationship with contract" that encouraged the dominant mode of surplus extraction. As "tribute and profit" went side by side, the net result was the failure of all forms of agrarian relations.¹⁰² Raja Rammohan Roy testified that under the *zamindari* system the landholders acquired the full measurement of the land to their satisfaction and raised the rents to the "utmost possible extent".¹⁰³ The outright rejection of the "customary rights" of the *raiya*s, was thus, fraught with consequences on property rights.

F Social Stratification

One of the significant aspects of British rule in India was to create new social relations among its people. The hierarchies were multiplied day by day. The most important agency of this change was the land policy.¹⁰⁴ The inexorable operation of the sunset law created problems even for the *zamindars*. Many *zamindars* lost their properties in the early years for not being able to pay taxes to the Company. Their *zamindari*s were then sold out to others. This, in turn, created new faces of *zamindars*. The great survivor of this diminishing era was, however, the Burdwan *Raj* which pioneered a unique strategy, known as the *patni* system, to mitigate the mounting revenue demands. The law's vagueness inspired the *Raja* to split his *zamindari* into hundreds of tenancies and sublet those for *selami* (security money) and new rent rates.¹⁰⁵ Thus, the *Raja* managed to realise a huge amount of rent through the creation of small tenancies and innumerable intermediary classes between him and the actual cultivators. His example became a system received by others. The example created a huge agrarian disorder in Bengal by violating the spirit of the Cornwallis system. There was no law to guide the courts about this problem.

The situation went beyond the control of the Company and it was compelled to accord validity to this practice through the enactment of the Bengal *Patni Taluk* Regulation 1819.

¹⁰¹ At 656.

¹⁰² Bandyopadhyay above n 9, at 166.

¹⁰³ SK Sharma *Raja Rammohun Roy: An Apostle of Indian Awakening* (Mittal Publications, New Delhi, 2005) vol 3 at 224.

¹⁰⁴ Metcalf above n 99, at 143.

¹⁰⁵ Hunter *Statistical Account of Bengal* above n 23, at 79.

The Act recognised all these mushrooming tenures as legal institutions and outlined the legal rights and liabilities of the tenure-holders. This, in essence, Sirajul Islam argues, was an admission of the inadequacy of the Cornwallis system in the early decades of the colonial venture.¹⁰⁶ For all practical purposes, the *patni* system was a Permanent Settlement in miniature form. The 1819 *Patni Taluk* Regulation was enacted to give it a legal garb in defiance of the spirit of the Cornwallis system.

The intermediary groups, the by-product of the *patni* system, enjoyed sub-infeudatory rights and constituted a chain of economic exploitation.¹⁰⁷ According to Majumdar's estimation, by the year 1872-1873, at the top of the pyramid of the land title there were 1.5 million *zamindars* and under them, there were 9 million intermediary classes of varied interests in Bengal.¹⁰⁸ Raychaudhuri finds 162 revenue terms to describe the various forms of tenures and sub-tenures in the Bakerganj district of East Bengal in the early 20th century. In that district, there were four grades of under-*raiyats* by 1952 indicating the bizarre nature of the problem.¹⁰⁹ Thus, the Cornwallis system enmeshed various kinds of land interests in an 'incredible maze of crisscross relationships' putting the *raiyats* in a permanent cycle of impoverishment.¹¹⁰ The middlemen were the greatest tyrants in this process. As will be elaborated on later in this chapter, the effect of this sub-letting system exploded in many ways creating poverty and wretchedness in Bengal.

In wrapping up this part, it can be argued that the East India Company consciously started a colonial process in India and the process "permanently" established its root through the enactment of the 1793 Permanent Settlement law. The Company's success encouraged the British government to intervene. It appears that both the state of England and the Company acted together to pursue England's diplomatic goals. As will be evident from later discussion, the foundation of the Company's empire in India was the subject of political discussion from the early 18th century and it culminated with formal takeover of the power by the Queen in 1858. In the process, the 1793 Regulation acted as forceful agent of colonial expansion.

¹⁰⁶ Sirajul Islam above n 39, at 221.

¹⁰⁷ The *zamindars* were under pressure to pay revenue on a given day or risked losing their land through auction. They passed this pressure on to the peasants or rented out the land to the highest bidder and thus created a chain of subinfeudatory tenure holders.

¹⁰⁸ RC Majumdar *Bangladesher Itihash* (General, Dhaka, 2011) at 386.

¹⁰⁹ Tapan Raychaudhuri "Permanent Settlement in Operation: Bakarganj District, East Bengal" in RE Frykenberg (ed) *Land Control and Social Structure in Indian History* (The University of Wisconsin Press, Madison, Milwaukee and London, 1969) at 167. Some examples of sub-tenures were: *bargadar*, *karshadar*, *kurfa*, *dhankarari* etc.

¹¹⁰ At 163.

VI Bengal Tenancy Act 1885

Thus, by 1859, the peasants had reached the bottom of their fortunes. Their rights passed sub silentio and they became for all purposes tenants-at-will.¹¹¹ Almost one hundred years after the passing of the Permanent Settlement law, the Bengal Tenancy Act 1885 was passed in a completely changed legal and political background. The post-1857 era was the high point of the British Empire for the English directly took over charge of India from the Company following the 1857 Sepoy Mutiny.

A Legal Context

The fears of agrarian unrest and the blatant failure of the 1793 Regulation led to the passing of the Bengal Rent Act 1859. This law was a first small attempt to remedy the wrong of the Cornwallis system. The legislation established the security of the occupancy *raiyats*. The major changes the law brought were:

a) The occupancy rights of the *raiyats* were made permanent and heritable subject to 12 years of possession. It prescribed some guidelines to increase the rents taking into consideration the rent rate of similar tenancies and the increase of the value of the produce.

b) The law also afforded protection against the arbitrary eviction by the *zamindars* and tenure-holders. Any eviction would require the decree of a civil court.

c) It removed the provision for compulsory attendance of the tenants to the courts at the *zamindar's* instance.

The 1859 law offered some kind of check on the powers of the landlords, nonetheless, it proved to be meaningless, firstly; because the landlords were allowed to evict the tenants on the ground of right of resumption. Secondly, it sowed the seeds of conflict between the *zamindars* and the *raiyats*. The *zamindars'* efforts, after the passing of the legislation, were to split up the tenancies so that the tenants could not attain the possession for 12 years required by the law. Thirdly, the law placed the burden of proof on the cultivators. This enabled the landlords to evade the law by the frequent shifting of tenants making the proof of possession difficult.¹¹² They also manipulated the measurement standards and charged illegal cesses known as *abwabs*. Fourthly, the judiciary had been rendering conflicting judgments on the question of criteria of enhancement of rents and the standard of "fair and equitable" rents.¹¹³

¹¹¹ By this time, fifteen-sixteenth of the cultivators held land without any *patta* (record of rights).

¹¹² Sarvepalli Gopal *The Viceroyalty of Lord Ripon 1880-1884* (Oxford University Press, London, 1953) at 190.

¹¹³ Barnes Peacock CJ in *Ishore Ghose v James Hills* (No 1607 of 1862, High Court of Judicature at Calcutta, cited in WR Supp, Vol 48) ruled that the 1859 legislation did not bar the landlords from increasing the rent up to the full market rate as their ownership was unfettered under existing law. The rule was reversed by a full Bench of fifteen judges in *Thakurani Dassee v Bisheshur Mukherji* (1865) Bengal Law Reports (Full

B *Social Context*

The loopholes in the Rent Act 1859 thus fuelled debates at the administrative and judicial level. These could not prevent the *zamindars* from increasing illegal cesses. In 1873 organised agrarian disturbances in Pabna (East Bengal) and famine reports of a terrible nature in southern India shifted the weight of opinion in Bengal. Nightingale writes: “The impoverished, degraded and rack-rented peasantry [were] becoming more embittered and threatening day by day”.¹¹⁴ The rents were withheld and the *zamindars* were challenged in the courts. The government then realised the need for a comprehensive land reform. In 1876, Richard Temple, the Lieutenant Governor of Bengal, drafted a Bill to make a definitive statement of agrarian rights to pacify the peasants with no success. In 1879, however, a Rent Law Commission was formed by Ashley Eden (Campbell’s successor) mainly having the mandate to suggest reforms in 1859 Rent Act which could lead to broad reforms in the agrarian field.

C *Imperial Policy*

This time, Viceroy Lord Lytton’s Indian policy (1876-1880) attracted vitriolic criticism of what Gopal terms as “uglier aspects of Disraeli’s Imperial policy”.¹¹⁵ However, his replacement Lord Ripon’s appointment as India’s Viceroy in 1880 represented a change of opinion in England and a change of policy towards India by the liberal party government led by William Gladstone.¹¹⁶ Lord Ripon had to swiftly acquaint himself with the ‘dry and diverse detail of the Bengal land system’ before he could form an opinion about the land reform proposal suggested by the Rent Commission in 1880. After a series of consultations, Lord Ripon was able to make a Tenancy Bill which was introduced in the Indian Council by its Law Member Courtney Ilbert in 1883. However, due to political deadlocks, it was left to his successor Lord Dufferin, who after compromising the tenancy principles enacted the Bengal Tenancy Act 1885.

Bench) 326 [popularly known as the *Great Rent Case*] that held that the enhancement of rents should be proportionate to the production.

¹¹⁴ Gerrard Vallee *Florence Nightingale on Social Change in India: Collected Works of Florence Nightingale* (Wilfrid Laurier University Press, Ontario, 2007) at 579.

¹¹⁵ Gopal above n 112, at 1. Quoting Harrington Gopal writes: “Indian policy (at the time) was everything which an Indian policy ought not to be.”

¹¹⁶ The Liberals in England also attempted to reform tenures in Ireland at the same time as they were dealing with India. They showed a greater willingness to offer legal sanction to customary rights (“Ulster Custom”). Gladstone’s land reform interventions (1870, 1881) made ejectments by the landlords “dear and difficult”. It was a bold step indeed, yet it could not achieve its purpose. The reform laws were curative rather than preventive. The main defect in the laws would seem to be, that they did not, in express terms, place the tenants absolutely beyond the capricious control of the landlord. See RB O’Brien *The Parliamentary History of the Irish Land Question from 1829 to 1869* (Gilbert and Rivington, London, 1880) at 122. For a similar kind of argument see Frank Thompson *The End of Liberal Ulster: Land Agitation and Land Reform 1868-1886* (Ulster Historical Foundation, Belfast, 2001) at 273.

D *Reforms under the 1885 Legislation*

The 1885 Act was designed to cure the longstanding ills perpetuated by the Cornwallis system. It hoped to ameliorate the condition of the *raiya*s and to redefine their relationship with the *zamindars*.

Three major questions were to be addressed by this legislation: i) the extent of force the *zamindars* could use on the *raiya*s ii) the *zamindars* liberty to raise rents and iii) the security of tenancy (the conditions under which a landlord could evict the tenant). In responding to the issues, the 1885 law, perhaps in its most bold attempt, devised a provision for settlement of rent and revenue based on a cadastral survey.¹¹⁷ The law then fixed a limit of rent increase up of to 12.5 per cent with no further increase for fifteen years.¹¹⁸ To prevent tenant switching under the 1859 law, it stated that occupancy status would be given if somebody held land anywhere in the village. Importantly, the law classified all persons holding land under the *zamindars* as tenure holders. Beneath the tenure holders, the law classified the *raiya*s into four groups: i) *raiya*s holding at fixed rates; ii) occupancy *raiya*s; iii) settled *raiya*s and iv) non-occupancy *raiya*s and under-*raiya*s. The first three classes of the *raiya*s were afforded the privileges and securities mentioned above.¹¹⁹

The *raiya*ti privileges were made heritable. However, the lawmakers balked on the point of transferability. Landlords' pressure groups succeeded in maintaining the inviolability of their rights to choose one's own tenants (who in most cases were non-agriculturalist moneylenders). The 1885 Act directed the courts to recognise the transfer of *raiya*ti holdings only if it would satisfy the test of customary practices.¹²⁰ Moreover, the limit of rent increase was made non-applicable to produce rents and the legal privileges were not extended to *khas* land (government owned land). This offered the landlords an opportunity to twist the provisions of law. They started to purchase the *raiya*ti rights and then create a produce paying tenancy to make more money. They could declare a piece of land *khas* to dispossess a *raiya*t and thus force him to be a sharecropper.¹²¹ The status of the sharecroppers, the subjects of the worst exploitation, was left with ambiguity in the scheme of the 1885 Act.¹²² Whether they could be regarded as "tenants" within the purview

¹¹⁷ Section 103 of the Bengal Tenancy Act 1885. The cadastral survey was conducted in Bengal 1888-1940.

¹¹⁸ Section 9 of Bengal Tenancy Act. See also, Dietmar Rothmund, *Government, Landlord and Peasant in India: Agrarian Relations under British Rule 1865-1935* (Franz Steiner, Wiesbaden, 1978).

¹¹⁹ The non-occupancy *raiya*s and under-*raiya*s, still the bulk of Bengal society, were left at the mercy of the *zamindars* and the tenure holders under the promise of "stable rent".

¹²⁰ Sugata Bose above n 54, at 82.

¹²¹ Adrienne Cooper *Sharecropping and Sharecroppers' Struggle in Bengal 1930-1950* (KP Bagchi & Company, Calcutta, 1988) at 25.

¹²² See chapter 3.

of the tenancy law was a matter of interpretation. The *zamindars* insisted in not registering their name in the “record of rights” using the legal lacunae reinforced by a court ruling.¹²³

It was beyond all contemplation to repeal the *zamindari* system in the contemporary political reality. Yet experts found this law a step forward to strengthening the property component in the *raiya* rights. It will be seen, however, that the 1793 Regulation and the 1885 Act jointly started a new dimension of marginalisation by way of social exploitation and chain of indebtedness.¹²⁴

VII Colonial Land Law and Poverty

It is claimed that in the early years of the Permanent Settlement there were remarkable extensions in agriculture. The substance of the “extension” is not disputed but to whom the “success” is to be credited is arguable. Colebrooke credited the *zamindars* for this reviving prosperity.¹²⁵ James Mill, to the contrary, claimed that the legal reforms could not bring any relief to the poor cultivators. He maintained that it was the *raiya*s, not the *zamindars* who were to be credited with this development. There is no evidence that the *zamindars* had given any encouragement to this effect.¹²⁶ Under the legal structure, the “landlord became the landowner” infusing the concept of “bourgeois” landed property.¹²⁷ Thus, writes Sirajul Islam:¹²⁸

...The *raiya*s were thrown to such a vicious circle of subsistence economy as would never enable them to accumulate capital in their hands and rise from the vicious life of poverty and ignorance.

The 1885 law, on the other hand, defined the conditions of *raiya*s’ tenancy. However, it paved for further divisions amongst the *raiya*s at the grass-root level. It provided the grounds for the process of pauperisation for the lower segments of the *raiya*s and polarisation and upward mobility for their upper strata. In the post-1885 era, the upper strata came to be termed as *jotedars*. Rajat and Ratnalekha Roy argue:¹²⁹

Beneath all the changes effected by colonial policies, the power of this class and their control over the rural society remained unaffected and herein lay the basic continuity of the rural social structure in colonial Bengal.

¹²³ Cooper above n 121, at 23.

¹²⁴ Eric Stokes *The Peasant and The Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge University Press, Cambridge, 1978) at 12.

¹²⁵ Councillor HT Colebrooke’s minute 20 June 1808 as cited in Sirajul Islam above n 39, at 216.

¹²⁶ Minutes of Evidence before the Select Committee on the Affairs of the East India Company, UK Parliamentary Papers (Testimony of James Mill, 1831) vol 5 at 314.

¹²⁷ Hamza Alavi “India, Transition from Feudalism to Colonial Capitalism” (1980) 10 *Journal of Contemporary Asia* 359 at 371. Partha Chatterjee, however, contests this simplification of “bourgeoisie” theory, for the property itself was ambiguously located in different persons. See Partha Chatterjee “The Colonial State and Peasant Resistance in Bengal 1920-1947” (1986) 110 *Past and Present* 169 at [175].

¹²⁸ Islam above n 39, at 227.

¹²⁹ Rajat Ray and Ratnalekha Ray “Zamindars and Jotedars: A Study of Rural Politics in Bengal (1975) 9(1) *Modern Asian Studies* 81.

Sugata Bose makes a reservation about the generalisation of the *jotedar* proposition. Bose claims that *jotedar* domination was confined to Northern Bengal.¹³⁰ Bose finds that the West and East Bengal *zamindars* continued to exercise unhindered power until 1930, a suggestion also confirmed by Akinobu Kawai in 1986.¹³¹ However, both cases are illustrative of the law's indifference to the poor peasants. Nariaki Nakazato writes:¹³²

The class interests of the *zamindar* type landlords and the *jotedar*-type landowners were not necessarily opposed to each other. There was widespread cooperation between them until the beginning of the twentieth century.

These changes almost uniformly affected the poor peasants and perennially excluded them from any control over land and power resulting in a series of peasant revolts.¹³³ Recurrence of famine in Bengal during the British rule is further testimony to rural poverty.¹³⁴ Though there are various interpretations of the causes of the famines, “drainage of money from the peasants to the landlords” and “non-responsive British policies and absence of democracy” were two reasons for Bengal famines as argued by Nightingale and Amartya Sen respectively.¹³⁵

VIII *The Politics of Land Law Reform*

It is observed that the colonial land reform interventions had gradually improved in extending protection to the *raiyyats*. But it remained a big question whether the reforms were at all sufficient to restore the peasants' land rights snatched away by the very first colonial legislative intervention namely the Cornwallis system. Two common features of colonial land reform initiatives are to be noted: i) all land legislation was made in the face of a peasant revolt and ii) in every case, the law failed to define effectively the nature of the competing interests in land.

It is true that law cannot address every economic and social problem with precision; but it is equally true that law can be a factor contributing to those problems. Was the law indifferent to the rights of the peasants? Were there any politics behind the law-making

¹³⁰ Sugata Bose *Agrarian Bengal: Economy, Social Structure and Politics, 1919-1947* (Cambridge University Press, Cambridge, 1986) at chapter 1.

¹³¹ Akinobu Kawai *Landlords' and Imperial Rule: Change in Bengal Agrarian Society c 1885-1940* (Institute of the Study of the Languages and Cultures of Asia and Africa, Tokyo, 1987) vol 2.

¹³² Nariaki Nakazato above n 88, at 197.

¹³³ Bandyopadhyay above n 9, at 86.

¹³⁴ The 1901 Indian Famine Commission found that twelve famines and four severe scarcities took place between 1765 and 1858. See *Report of the Indian Famine Commission* (Office of the Superintendent of the Government Printing, India, 1901) at 1-8. The last famine took place in Bengal was the Great Famine of 1943, four years prior to the departure of the British from India.

¹³⁵ Gerard Vallee *Florence Nightingale on Social Change in India* (Wilfrid Laurier University Press, Ontario, 2007) at 487 and Amartya Sen *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press, Oxford, 2013) at 6.

where the *raiya*ts had to struggle for their rights year after year? Peter Robb finds the answer in the affirmative:¹³⁶

...land and politics had long been entwined in India. In colonial times, land policies were particularly significant in determining the competing styles of Indian administration. The decisions of the 1880s were political because they represented a victory largely for officials of one persuasion.

One needs to look at the terrain of the British Empire-building process in India and the development of Indian political consciousness to have a broader outlook on the point.

A *Colonisation*

The use of land policy as a tool of colonial governance can be seen from the days of Permanent Settlement. The following words of William Bentinck (Governor-General from 1828 to 1835) are relevant:¹³⁷

I should say that the Permanent Settlement, though a failure in many other respects and in most important essentials, has this great advantage at least, of having created a vast body of rich, landed proprietors deeply interested in the continuance of the British Dominion and having complete command over the mass of the people.

The colonial course of the land revenue scheme also manifested in the words of Thomas Law, one of the early advocates of the Permanent Settlement system:¹³⁸

Politically it was considered that the confirmation of the hereditary rent collecting agents as the sole proprietors of land and perpetually fixed government demands on them would bind the landholders to the government which had granted and which alone would maintain so great a privilege.

Thus, it may be argued that the *zamindars*, intermediaries and the colonial state came to constitute a “composite apparatus of dominance over the peasant”.¹³⁹ The frequent legal transformation in *raiya*ts’ status, unchecked power of the administration, oppressive exactions of rents, the pressure of sunset law, increasing indebtedness and arbitrary eviction of the *raiya*ts and the commercialisation of land together formed the constituent elements of this dominance.

B *The Peasants’ Uprisings and the Politics of Tenancy Bill*

The interface of land legislation and peasant discontent in Bengal is also indicative of the political dimension of the land question in Bengal. The recurrent peasant disturbances suggest a common pattern of peasant behaviour in all regions of British India including Bengal. The discontent represented a reaction to the adverse impact of the British land

¹³⁶ Peter Robb above n 55, at 214.

¹³⁷ AB Keith (ed) *Speeches and Documents on Indian Policy 1750-1921* (Humphrey Milford, Oxford University Press, London, 1922) vol I at 215.

¹³⁸ Thomas Law *A Sketch of Some Late Arrangements and A View of the Rising Resources in Bengal* (J Stockdale, Piccadilly, 1792) at 63.

¹³⁹ Guha above n 32, at [61-69].

system and the laws on property rights that appeared as ‘alien impositions’ from the top that tended to turn “their world upside down”.¹⁴⁰

Firstly, the *sannyasi* and *fakir* rebellions in Bengal and Bihar (1770-1800), the peasants’ resistance in Rangpur (Northern Bengal) 1783 offer two early examples of the defiance against the British revenue policy. The *zamindars*-Hastings’ troops managed to suppress the resistance. Secondly, Titumir’s Bamboo Fortress Resistance (1831) and Shariatullah and his disciples’ *Faraiyezi* movement (1830-1870) were two other manifestations of the desire of the poor peasantry for establishing “egalitarian idealism” in the land system.¹⁴¹ Thirdly, peasant involvement in the great *sepoy* mutiny of 1857 suggests their socio-economic subjugation perpetuated by the British agrarian policy. Added to this, the *neel* (indigo) revolt of 1859-1860 is also indicative of a serious challenge to the imperial policy of forced indigo cultivation. Fourthly, the organised *krishok jote* (peasants’ league) uprisings in different districts of East Bengal (particularly in Pabna) during the 1870s exposed the systematic agrarian policy repercussions of the British.

The 1873 uprisings against the consistent increase of rent rates, imposition of illegal cesses and violation of occupancy rights generated by the 1859 law were more organised than the previous ones.¹⁴² The 1885 Tenancy Bill, therefore, came in as a remedial response to the peasants’ discontent exemplified by the post-1859 political developments.

However, the peasants’ expectations were not fully reflected in the 1885 law, because many of the recommendations suggested in the Tenancy Bill 1883 were dropped from the Bill at the last moment. A careful look at the post-1857 political dimensions exposes the issue.

C *English Home Politics*

As mentioned earlier, Lord Ripon’s appointment as Governor-General of India was a victory of the British liberal politics led by Gladstone. During the 1870s the political developments and financial stability of the government in India had all been in doubt. Peasant discontent, famines and the vagaries of administration had made the country very restive. Indian affairs had a considerable impact on English party politics and that helped the Liberals win the 1880 election. It was expected that with Ripon’s assumption of office Britain’s India policy would change, “fears and prejudices” would go and “ideas and institution” according to local requirement would flow.¹⁴³ Ripon’s first attempt was to offer a sense of confidence to the *rai-yats* through suspension (or remission) of revenue at an early

¹⁴⁰ Bandyopadhyay above n 9, at 198.

¹⁴¹ At 163. The *santal rebellion* of 1855-1856 in Eastern Bengal can also be mentioned because it took place to establish the indigenous people’s right to land, identity and culture against the *zamindar*-state joint venture.

¹⁴² Between 1861 and 1881, the temporarily settled revenue had risen by about 17.5 per cent. See S Gopal above n 105, at 189.

¹⁴³ S Gopal above n 112, at 4.

stage of the famine. In the second place, Ripon consulted with experts about tenancy rights as he considered the recommendation of the Rent Commission inadequate.

In principle, Ripon favoured a fair and reasonable measure of protection to all kinds of *raiyyats*, though he disagreed with a proposal of treating the problem of tenant rights and those of land revenue separately. Ripon, however, achieved a “long step in the right direction” when he was able to prepare a Bill with the help of Courtney Ilbert on 2 March 1883.¹⁴⁴ The main features of the Bill were “revolutionary in character”¹⁴⁵ with the attaching of an occupancy right to the continuous occupation of land in the same village or estate for twelve years and defining its incidents.¹⁴⁶ The Bill proposed introducing into Bengal all the facets of tenancy reforms like fixed tenure, fair rents, free sales, compensation for disturbance and improvements and abolition of the freedom of contract in the light of Irish experience. The Bill promised to be a charter of tenancy rights. This can be presumed from the vehement opposition it faced from India and England.¹⁴⁷ The Indian landed class joined hands with the Anglo-Indians who were at this time “whipping themselves up into a frenzy” against the government in England.¹⁴⁸ That is the second part of the land law politics behind the Bengal Tenancy Act 1885.

D *Contribution of Indian Politics*

The Indians got the opportunity to have their say, though in a limited way, in the governmental decision following the Indian Councils Act 1861 that indicated a “conservative response” of the colonial rulers towards Indian affairs.¹⁴⁹ The landed gentry were promoted as Indian voices that started to evolve as the modern premise of Indian politics. Another stream of politics was championed by the members of the Indian Association which was already on the scene after 1850. Having English education as their background, they were absentee landlords and had a scornful attitude towards the peasant revolts. This section of the educated middle class took advantage of the vacuum in the peasant leadership. They appeared to be a good channel of communication between the peasants and the rulers. Because of their educational orientation, this professional leadership was more exposed to colonial rule and favoured limited land reform. Their

¹⁴⁴ Illbert was the law adviser to the Council of India. The Tenancy Bill is not to be confused with another thwarted Ilbert Bill of 1883 that had proposed conferring criminal jurisdiction on Indian Magistrates to try offenders of European origin.

¹⁴⁵ John Dacosta *Remarks and Extracts from Official Reports on the Bengal Tenancy Bill* (AH Allen, London, 1884) at 1.

¹⁴⁶ Some of the incidents of occupancy holding were: not voidable by contract, transferability, the right to compensation for improvement, non-eviction without a judicial decree, fair and equitable and equitable rent and limited landlord's right to enhance of revenue. Even ordinary *raiyyats* were to have the right to compensation for disturbance.

¹⁴⁷ Dacosta's extracts and remarks on the Bill seem to represent only the views of the Bengal “high officials” and *zamindars* and hence tends to ignore the real picture of the *raiyyats*. See Dacosta above n 145, at 6.

¹⁴⁸ Gopal above n 112, at 193.

¹⁴⁹ Bandyopadhyay above n 9, at 163.

priestly and literary social background based on monopolised proprietary rights in the land placed them in a dilemma. Therefore, the landed gentry, professional class and the Anglo-Indians jointly sponsored agitation against Ripon's "socialistic theory" and his revolutionary "measure of confiscation".¹⁵⁰ The moderate *zamindars* pleaded a compromise over the Tenancy Bill in line with the example of the earlier thwarted Ilbert Bill on the criminal jurisdiction of Indian courts.

The Maharaja of Darbhanga (part of Bihar) in his speech on the Bengal Tenancy Bill apprehended a political danger that underlay the legislation and commented that constant intervention of revenue officers in all the details of agricultural life would lead to the most widespread confusion and would be as disastrous to the *raiyats* as to the *zamindars* themselves. The Maharaja sounded very cautious about the sweeping changes in agrarian structure.¹⁵¹

I dread the passions and animosities which this legislation will kindle and inflame. We are embarking rashly on a sea of change and many will be shipwrecked on the voyage. Such vast innovations cannot be introduced into the rural economy of the [Bengal] province without exciting great commotions.

The Bill also received vigorous criticism from legal minds like Richard Garth, Chief Justice of Bengal (1875-1886). When consulted about the Bill, Garth criticised the report of the 1879 Rent Commission. He also questioned the authority of the government to interfere unjustly and unnecessarily with the vested rights of any class particularly when they were well recognised by the state's own legislative enactments. He found no "single statement that the *raiyats* themselves desired anything of the kind".¹⁵² Garth CJ found some provisions of the Bill contrary not only to the opinions and the policy of the last three generations but also to the laws and usages which had prevailed in Bengal since the time of the Permanent Settlement.¹⁵³

Thus, in the face of criticism, Lord Ripon sought to devise an acceptable modification of the rights of the *raiyats*. In spite of that, the Bill did not see the light of the day before he left India. The joint state-*zamindar*-professional elites' political venture encouraged Lord Dufferin, his successor, to make a compromise about the rights of the *raiyats*. The 1885 Act initiated the concept of occupancy rights and merely extended protection to the holders

¹⁵⁰ Gopal above n 112, at 193. The Indian Constitutional Association and the Liberty and Property Defence League were also against the Bill.

¹⁵¹ Dacosta above n 70, at 169.

¹⁵² At 169. In contrast, Garth's understanding about the *raiyats* can be compared with the feelings of Lord Ripon: "These silent millions (*raiyats*) were unable to voice their own interests or to organise themselves for continuous action. There was no Land League in India, no Captain Moonlight to shoot landlords, no Parnell to obstruct public business and unless the government took the initiative, their condition would remain hopeless. Nowhere was the position worse than in Bengal." See Gopal above n 102, at 190.

¹⁵³ Dacosta above n 70, at 168.

of land continuously for twelve years. So, it emerged more as a political “compromise” than as “remedial legislation”.¹⁵⁴

Lack of political will, argues Peter Robb, restricted the effectiveness of the Tenancy Act as a charter for tenant rights or as a device of socio-economic reform.¹⁵⁵ Had Ripon’s ideas been implemented in full, the position of both *zamindars* and *raiyats* in most parts of India would have been considerably improved.¹⁵⁶ Thus, the “smallest instalment of justice to the *raiyats*”¹⁵⁷ was used as an excuse to achieve “coveted financial advantage” for the government through the complicated machinery of the Bengal Tenancy Act.¹⁵⁸

IX *The Politicisation of Peasants’ Rights*

The late 18th century saw the rise of Indian nationalism in a more organised way through the vehicle of peasants’ anti-colonial resistance. Though in many cases the uprisings were localised and isolated due to their varied social structures, cultural and religious orientation, they posed a serious challenge to colonial rule.

The establishment of the Congress in 1885 and of the Muslim League in 1906 took the nationalist movement of the Indian sub-continent to a new height. The importance of the peasants again became significant in the 1920s with the rise of *khilafat* movement (pan-Islamic movement having overtones against the British). The religious identity of the groups, however, added a different dimension to this situation. In East Bengal (which later became Bangladesh), the majority of the peasantry were Muslims and they used to hold land under the *zamindars*, moneylenders and professional elites who were mostly Hindus.¹⁵⁹ The resulting differentiations between these two classes were primarily “economic”, however, conflicts between them attained communal brand from the political point of view.

The two amendments to the Bengal Tenancy Act in 1928 and 1938 came with the advent of Indian nationalism and the more organised peasant politics of the first four decades of the 20th century. The former modified the degree of freedom in the land by way of recognising the transferability of the rights of the *raiyats* subject to the pre-emption rights of the *zamindars* and payment of 20 per cent transfer fees. It suspended the right of the *zamindars* to increase land taxes. The latter extended the right of pre-emption to the co-

¹⁵⁴ PJ Marshall “The Ilberts in India 1882-1886: An Imperial Miniature” (1990) 6 (3) Journal of Royal Asiatic Society 444.

¹⁵⁵ Peter Robb above n 55, at 215.

¹⁵⁶ Gopal above n 112, at 196.

¹⁵⁷ Florence Nightingale “The Bengal Tenancy Bill” (1883) 44 Contemporary Review 587.

¹⁵⁸ Dacosta above n 70, at 164.

¹⁵⁹ Bhaskaran Nair *Politics in Bangladesh: A Study of Awami League 1949-1958* (Northern Book Centre, New Delhi, 1990) at 22.

sharer *raiya*ts abolishing the provision for transfer fees. Once again, however, the non-occupancy *raiya*ts (sharecroppers) found themselves unprotected under these amendments.

The changing political landscape of Britain after the World War II and local political factors conditioned by the peasants' cause created a mounting opinion to abolish the *zamindari* system. Soon after decolonisation in 1947, both India and Pakistan abolished the system through their respective enactments.¹⁶⁰

The British government, argues Taj Hashmi, helped develop the Muslim and poor peasants' cause to counteract Hindu nationalism.¹⁶¹ Similarly, Muslim elites and bourgeoisies supported the government efforts for their own conflicting interests with the Hindu nationalists. This ultimately compromised the rights of the poor peasants when in 1938 only minor amendment was made in the Bengal Tenancy Act disregarding their expectation to abolish the *zamindari* system. However, it definitely weakened the power and position of the *zamindars* and the intermediary classes. The recommendations of the 1940 Land Revenue Commission to abolish the *zamindari* system emboldened the rich *raiya*ts to challenge the legitimacy of the *zamindari* system. The absence of any alternative piece of land legislation to protect the non-occupancy *raiya*ts and the sharecroppers left them at the mercy of the upper-class peasants.¹⁶² This again led the lower class peasants and the sharecroppers to resort to resistance, the *Tanka* movement 1942-1950 (tribal peasants' militant movement) and the *Tebhaga* movement 1946-1947 (demand of two-thirds of the sharecrop produce), were the final examples of resistance to the British land reform policies.

Thus, the East Bengal peasants in the shattered rural order of society had to adjust themselves to the colonial rule circumscribed by the politicisation of peasants' movements. They could never cope with the process.¹⁶³ The legal interventions could not stop turning the occupancy peasants in debt being reduced to sharecroppers and agricultural labourers without any rights on their own land. All these introduced a process what BB Chaudhuri termed as "depeasantisation" in Bengal.¹⁶⁴ Chaudhuri's thesis was that the 1885 Act could not effectively redress the evils of the 1793 Act. The 1885 Act extended to the middle class the benefit originally provided to the *zamindars* and thus progressively impoverished the majority. Chaudhuri's depeasantisation theory has been debated, but it is generally accepted

¹⁶⁰ See chapter 3.

¹⁶¹ Taj Hashmi above n 52, at 268. Hashmi argues that the peasants understood that their emancipation lay in the program-oriented politics of the elites that would abolish the exploiting land tenure and moneylending systems, mainly through the legislature. The government, therefore, projected itself as the champion of the Muslim masses through educating people about the exploitative land system to furnish a ground for further tenancy legislation to benefit the peasants.

¹⁶² See chapter 4.

¹⁶³ Radhakamal Mukerjee *Land Problems in India* (Longmans Green, London, 1933) at 141.

¹⁶⁴ BB Chaudhuri "The Process of Depeasantisation in Bengal and Bihar 1885-1947" (1975) 2(1) Indian Historical Review 105.

that in Bengal's backward agricultural scenario, the enactment of 1885 tenancy legislation was a belated reply.

X Chapter Summary

The chapter showed how property inequality was linked with the role of landlordism in colonial Bengal. Almost all the reform attempts during the colonial period were advanced to rectify the wrong introduced by the 1793 Permanent Settlement Regulation. The chapter also demonstrated how the political process of land law making compromised the rights of the Bengal peasants and the agrarian reform laws were used as potent forces to expand colonialism in the Indian subcontinent in general and Bengal in particular. Colonialism started with creating a landed class and intensified the social exploitation through constant reinforcing of societal hierarchies. In a “delightful irony of history”,¹⁶⁵ colonialism ended with the proposal of abolishing the *zamindari* system leaving the task of resolving redistribution claims and incidental matters for the post-colonial regimes.¹⁶⁶

During the colonial period, no reform law effectively defined the nature of conflicting property rights. This posed serious questions about the land rights of the peasantry for both the colonial period and later days. The “odd mixture of repression and concession” created new life for the politics of land law after decolonisation. The British land policies had their shifts within the domain of British politics and then were injected in Bengal in an identical fashion to what was done in other British colonies during the same time. Moreover, Bengal ended up with great famines from time to time during the colonial period. This unique feature, amongst others, is indicative of the toll of colonial land policy on the Bengal peasantry.¹⁶⁷

The Bengal peasants had been fighting for an equitable land system from the time of British intervention. Even, the sharecroppers, one of the most neglected sections of the peasants had been pressing their demands in the late colonial phase. The peasant protests also indicate the inadequacy of the land reform attempts. The cumulative influence of these factors suggests a historical process of “depeasantisation” in Bengal.¹⁶⁸ The process, in turn, became the foremost cause of colonial poverty.

¹⁶⁵ S Gopal at above n 112, at 45.

¹⁶⁶ The specific issues of post-colonial land reform has been examined in chapters 4 to 7 of this thesis.

¹⁶⁷ Burton Stein (ed) *The Making of Agrarian Policy in British India 1770-1900* (Oxford University Press, New Delhi, 1992) at 18.

¹⁶⁸ BB Chaudhuri above note 164, at 105.

Chapter 3

Post-Colonial Land Reform (1947-1971)

I Introduction

Land law was instrumental in consolidating British colonialism in Bengal. In chapter 2, it was shown that the principal colonial land legislation ie the Permanent Settlement Regulation 1793 and the Bengal Tenancy Act 1885, did not effectively address the cause of the Bengal peasants. From 1793, the British administration had been introducing an exploitative and inequitable land system in Bengal. The 1793 Regulation and the 1885 Act reordered the agrarian structure in a manner which impoverished the Bengal peasants. The land question, therefore, became one of the priorities of the post-colonial governments of Bengal.¹

In August 1947, the British left the Indian empire, dividing it into two nations. As a part of that historic division, Bengal and the Punjab, the two Muslim dominated provinces of British India, were partitioned between the successor states of India and Pakistan. Roughly, two-thirds of Bengal were carved out to create the province of East Bengal in Pakistan.² Separated by more than a thousand miles from the rest of Pakistan, East Bengal later broke away from its dominant partner to form the sovereign state of Bangladesh in 1971. The remaining part of the undivided Bengal, became the State of West Bengal of today's India. Bengal's partition and formation of Pakistan had far reaching consequences for the post-colonial settings of the region. The partition also influenced the land question radically.

After the partition, the Bengal land policy took a decisive turn with respect to the status of the *zamindari* system.³ Decolonisation, thus, offered a strong impetus to agrarian reform

¹ As this thesis uses the term “post-colonial” in a continuity sense, it covers the developments from 1947 up to the present time. The thesis, however, also uses the term “post-independence” in discussing the land reform developments taken place in Bangladesh since 1971.

² Joya Chatterjea *The Spoils of Partition: Bengal and India 1947-1967* (Cambridge University Press, New York, 2007) at 1.

³ AMM Shawkat Ali *Politics and Land System in Bangladesh* (National Institute of Local Government, Dhaka, 1986) at 198.

legislation. The reform, however, did not take place until the enactment of the State Acquisition Tenancy Act (SAT Act) by the East Bengal Provincial Assembly in 1950.

The purpose of this chapter is twofold: (i) to examine the extent to which the post-colonial land reform was successful in addressing the poverty in East Pakistan (now Bangladesh) and (ii) to investigate whether Bangladesh was able to incorporate the land reform agenda into the textual and structural framework of its Constitution. For this purpose, the chapter will critically analyse the politics of land law that marked the post-colonial era of Bangladesh.

The chapter consists of seven parts. Part I is the introduction and Part II sets the scene for the chapter. Part III gives the pro-poor features of the main legal instrument of land reform in the post-colonial period. Part IV critically examines those features and explains their implications for poverty alleviation. Part V examines the preparation of Bangladesh to bring land reform in a post-independence environment. Part VI is the summary of the chapter.

II *Abolition of the Zamindari System*

The Bengal government formed a Land Revenue Commission on 5 November 1938.⁴ The Commission was mandated, inter alia, to examine: i) the existing land revenue system with special reference to the Permanent Settlement introduced by Lord Cornwallis; ii) to estimate its effect on the economic and social structure of Bengal and its influence on the revenues and administrative machinery of the government; and iii) to consider what, if any, modifications could and should be made. On 21 March 1940, the Floud Commission reported:⁵

...the majority of the Commission hold the view that in the interests of the Province as a whole, the present land tenure system cannot remain unaltered. In fact, if present conditions continue, it may not be too much to say that the system will break down of its own accord. It is unsuited to modern conditions and has brought about a situation in the Province, in which the welfare of agriculture is neglected and a great proportion of the wealth of the land is appropriated by middlemen, most of whom have no connection with agriculture and have treated the land simply as a commercial investment. The choice lies between introducing a *ryotwari* system by buying out all the interests in the land above the cultivator and attempting to prolong the life of a system which has already outlived its usefulness. The majority of members feel that the defects in the present system can only be remedied if the state comes into direct relation with the actual cultivators and would strongly emphasise their view that this should be the aim of the government.

Thus, the Commission suggested that it was “practical and advisable for the government to acquire all the superior interests in agricultural land so as to bring the actual cultivators

⁴ Headed by Sir Francis Floud, the Commission ensured representation from different interests groups: *zamindars* (2), Congress (1), Muslim League & Krishok Proja Party (3), government official (1), lawyers (2) and schedule castes (1).

⁵ Government of Bengal *Report of the Land Revenue Commission, Bengal* (Bengal Government Printing Press, Alipore, Bengal, 1940) at 65.

into the position of tenants directly under the government”.⁶ The recommendation received support from the 1944 Bengal Administrative Inquiry Committee subsequently formed to comment on governance issues.⁷ This 1944 Committee also recommended discarding the “outmoded system of land tenure” in order to remove the “clogs” of the administrative machinery of the government for the purpose of achieving the maximum results in the exploitation of the land and water resources.⁸ In the light of these findings, the East Bengal Legislative Assembly considered the State Acquisition and Tenancy Bill of 1948. After an arduous political battle, the Bill saw the light of day two and half years later in 1950 with considerable modifications.⁹ The resultant legislation is still in force and is characterised as the ‘*zamindari* abolition law’ in political rhetoric.

III The State Acquisition and Tenancy Act 1950 (SAT Act)

The 1950 Act actually had its origin in pre-partition Bengal. This was a time when the British were having dialogues with the Indian leaders about the mode and way of Indian Independence. At the same time, the Bengal sharecroppers were fighting for their due share in the produce. The SAT Act raised many expectations among the people for a radical change in the land system of East Bengal. The main expectation was that this law would end the exploitation of the *zamindari* system by establishing a defined relationship between the state, *zamindars* and the peasants. It was expected that the SAT Act will look at, amongst others, these issues: (a) address the question of acquisition, compensation and redistribution of land; (b) fix a practicable land ceiling per family or person; (c) establish an efficient land reform agency; (d) lay down the owner’s rights and liabilities in respect of land and (e) provide for an operational method for preparing land records. In short, the law was expected to be an effective instrument of social change to address the poverty of the toiling masses of East Bengal.

In order to examine the post-colonial land reform approach, it will be proper to critically analyse the relevant features of the 1950 Act in the light of its objectives. The relevant features of the 1950 Act having implications for poverty are succinctly these:

(a) All rent receiving interests in all lands shall stand acquired so that actual tillers of the land became direct tenants under the government. All *raiyyats* were termed “*malik*”

⁶ At 65.

⁷ The Governor of Bengal constituted the Bengal Administration Enquiry Committee on 5 December 1944 with Sir Archibald Rowlands as its Chair. The other Members were Sir HM Hood, RL Walker, Khan Bahadur MA Momin and Rai Debendra Mohan Bhattacharya Bahadur. The main task of the Committee was to assess the work to be done by the Government of Bengal to ensure the efficient administration on “modern and progressive” lines. See Government of Bengal *Report of the Bengal Administration Inquiry Committee 1944-45* (Bengal Government Press, Alipore, Bengal, 1945) at [1-2].

⁸ At [5-6].

⁹ The Act received the assent of the Governor-General of Pakistan on 16 May 1951.

(owner) of the land and they were to have permanent, heritable and transferable rights to use their land in whatever manner they liked.¹⁰

(b) The land ceiling was fixed at 33.3 acres. All cultivable land in excess of 33.3 acres per family or 3.3 acres per member of the family, whichever was the larger, plus homestead land up to a maximum of 3.3 acres, were to be acquired by the government.¹¹ The excess land thus acquired would be settled with “bona fide” cultivators holding less than 3 acres of land.¹²

(c) The law provided a list of acquirable and retainable land. The *hats* and *bazaars* (periodic and daily marketplaces), fisheries (several or territorial) were to be acquired by the government irrespective of their status.¹³

(d) For acquisition of the *zamindaries*, compensation was payable on a graduated scale.¹⁴ This meant that the rate of compensation was to decrease with the increase in net income. For the acquisition of excess land, compensation was payable at the rate of five times the net annual profit from the land. The compensation could be paid either in cash or bonds or both. The bonds were non-negotiable and payable in not more than forty annual instalments and would carry three per cent interest per annum.

(e) Subletting of land was forbidden.¹⁵ However, cultivation under sharecropping was not to be treated as subletting but as equivalent to cultivation through wage labour.¹⁶

(f) Maximum rent would not exceed one-tenth of the annual gross produce of the land.¹⁷

(g) The Revenue Officer could order the consolidation of plots of land; if not less than two-thirds of the villagers holding three-fourths of the land of a particular village apply for that. No holding could be subdivided to the extent that the rent of any portion would be less than one taka.¹⁸

(h) Transfer of land would be restricted to “bona fide” cultivators.¹⁹

¹⁰ State Acquisition and Tenancy Act 1950, ss 3 & 83.

¹¹ The land ceiling was flexible in case of commercial endeavours, charitable or religious endowments and large-scale farming by power driven mechanical appliances.

¹² State Acquisition and Tenancy Act 1950, ss 20, 90 & 119.

¹³ Section 20.

¹⁴ The compensation rate ranged from ten times the net annual income (in the case of persons with net annual income of 500 taka or less) to two times the net annual income (in the case of persons with net income of 1,00,000 taka or more). In the case of ‘public religious property’, the compensation was fixed to be a perpetual annuity equal to the annual net income.

¹⁵ State Acquisition and Tenancy Act 1950, s 93.

¹⁶ Sections 2(9), 82, 90(4) & 92,

¹⁷ Sections 100(3).

¹⁸ 1 taka is equivalent to 0.013 USD. State Acquisition and Tenancy Act 1950, ss 117 & 119.

¹⁹ Section 90 (2).

(i) The Act extended protection to the land rights of the “aboriginals” or “tribal groups”. The law prescribed a kind of “safeguard” to their land from “non-tribal” encroachment through the requirement of prior approval from the Deputy Commissioner.²⁰

(j) The Act incorporated the “reformation in situ” (reappearance of submerged land in the same site from which it disappeared) and accretion (alluvion) principles in determining the ownership of land close to the river or sea.²¹

There are many other issues in the legislation the majority of which are procedural in nature. The present chapter confines its analysis to the provisions which have implications for poverty. The legislation is generally commended for the possibilities it held for improving agricultural practices.²² However, the scope and working of the legislation are open to criticism. Commenting on the changes introduced by the SAT Act, Mohiuddin Alamgir mentions three important pro-poor aspects of the Act:²³

(i) The Act projected an egalitarian spirit and trend through the abolition of the rent-receiving interests or the *zamindari* system. The social distinction between the *zamindars* and the *raiyyats* was significantly removed and accrual of unearned income to the rent-receivers stopped through this statute. In spirit as well as in substance, this was definitely a step towards attaining a pluralistic and exploitation free society.

(ii) The SAT Act did not confer subsoil rights on the owner of the land. All rights to any interests in the subsoil including rights to minerals were acquired and retained by the government.²⁴ This ensured the state ownership of minerals and prevented the possibility of a few exploiting the subsoil rights. In the context of Bangladesh, such retention of subsoil rights gave the government an “equipollent lever” to consolidate the fragmented holdings and to use subsoil water in a cooperative manner.²⁵

(iii) The SAT Act in s 97 imposed restrictions on alienation of land of “aboriginals”. The Act allowed the transfer of land between the “aboriginals” themselves and required government’s approval in case of any other transfer. This restriction was imposed to protect the comparatively disadvantaged sections of the population from the scheming land grabbers of neighbouring communities.

Opposed to Alamgir’s claim, Shawkat Ali examined the provisions of the Act and pointed out many defects of the law. However, Ali agreed that the SAT Act was a “revolutionary legal measure” judged in the context of the time it was enacted. Abul Barkat

²⁰ Section 97.

²¹ State Acquisition and Tenancy Act 1950, ss 86 & 87.

²² JR Andrus and Azizali F Mohammed *The Economy of Pakistan* (Stanford University Press, Stanford, California, 1958) at 122.

²³ MK Alamgir (ed) *Land Reform in Bangladesh* (Center for Social Studies, Dacca, 1981) at iii.

²⁴ Ss 44 & 81.

²⁵ Alamgir above n 23, at iii.

also termed it as one of the rarest examples of a pro-poor law.²⁶ These opinions invite a critical analysis of the SAT Act in order to determine its effectiveness as a land reform instrument in the post-colonial context of Bangladesh.

IV Critical Analysis of the SAT Act

A Variance from the Bill

Any evaluation of the SAT Act is to be adjudged against the original schemes devised firstly by the State Acquisition and the Tenancy Bill 1947²⁷ and secondly by the East Bengal State Acquisition and Tenancy Bill 1948.²⁸ These two Bills contained many pro-poor provisions. This was the time when undivided Bengal saw the rising of peasants' political consciousness. Consequently, land reform appeared as a prominent consideration in the immediate political environment of post-partition Bengal.²⁹

The Bill of 1948 was under the scrutiny of a Select Committee of the East Bengal Provincial Legislative Assembly. One of the important elements in the formation of the 45 Members' Committee was the *zamindar-jotedar* majority.³⁰ These landed classes were naturally in favour of retaining the *zamindari* system or maintaining a system that would not radically affect their interests. Inevitably, the questions of *zamindari* abolition, compensation upon acquisition and sharecroppers' rights were marred by lengthy debates in the House. Those opposing the Bill used all the delaying tactics that parliamentary practice permitted. As a result, the Bill became an Act two and half years later on 16 February 1950. Moreover, it took further six months to obtain the assent of the Governor-General of Pakistan for its coming into operation.

Kamal Siddiqui claims that measures prescribed by the SAT Act were more conservative than what was stipulated in the earlier Bill.³¹ Siddiqui's claim seems to have substance. Because, firstly, the 1948 Bill proposed a land ownership ceiling of 33.33 acres per household, whereas the SAT Act increased it to 125 acres per household with greater

²⁶ Abul Barkat and Prosanta Kumar Roy *Political Economy of Land Litigation in Bangladesh: A Colossal National Wastage* (Association for Land Reform and Development, Dhaka, 2004) at 4.

²⁷ This Bill was considered by the Bengal Provincial Legislative Assembly before the Partition.

²⁸ This Bill was considered by the East Bengal Provincial Legislative Assembly (EBPLA) after the Partition. The EBLPA consisted of members drawn from the Bengal Provincial Legislative Assembly.

²⁹ The leftist parties of the time incorporated slogans related to peasants' emancipation into their political manifesto. The slogans principally echoed the abolishing of the *zamindari* system without compensation. They also urged reduction of rent, stopping of exploitation and oppression by the intermediary groups and distribution of surplus land to the working peasants. The slogans, ultimately, came to be expressed in a single motto: *Land to Tillers*. See Badruddin Umar *The Emergence of Bangladesh: Class Struggles in East Pakistan 1947-1958* (Oxford University Press, Oxford, 2004) at 144.

³⁰ There were twenty *zamindars* out of 45 Members of the Select Committee. It can be inferred that they must have formed the majority with the support of the *Jotedars*.

³¹ Kamal Siddiqui "Land Reform Legislation in the 50s and 60s" in MK Alamgir (ed) *Land Reform in Bangladesh* (Center for Social Studies, Dacca, 1981) at 2.

flexibility.³² Secondly, while the 1948 Bill proposed limiting the rent of the sharecropped land to not more than one-third of the gross produce with secure tenancy for the sharecroppers, the SAT Act came to regard them as no more than “agricultural labourers” having no right over the use or produce of land as the cultivator. Thus, the Act remained silent about protecting the sharecroppers’ interest on the one hand and failed to discourage absenteeism of the landlords on the other. The government instead, wrote William Bredo, became a “super absentee landlord”.³³

It was expected that provision would be made for the betterment of the marginal peasants, sharecroppers in particular. The Floud Commission had recommended two-thirds share of the produce for them. The SAT Act did not take the recommendation into consideration. To the contrary, the 1948 Bill incorporated a chapter prohibiting the sharecropping practice.³⁴ The prohibition move was highly ambitious for attaining the goal of an egalitarian society. The goal could not be achieved unless the state could effectively translate its allocative power of land resources into reality in favour of the tillers. However, the SAT Act realistically did not put any embargo on the system. Sadly, it remained silent about the sharecroppers’ interest. In this way, it bypassed the grievance this class had been suffering under the colonial land legislation.

The Special Committee constituted to examine the 1948 Bill suggested omitting the chapter prohibiting the practice and observed that the system “should not be interfered with in any way as the system is beneficial, in the present state of agriculture, both to the landowners and to the *bargadars*”.³⁵ However, the Committee’s recommendation appeared to serve the interest of the absentee landowners more than the sharecroppers. PC Lahiry, one of the dissenters of the Committee, was of the opinion that the SAT Act ultimately placed the “landowners”, “sharecroppers” and the “agricultural labourers” on the same footing in defining the terms “cultivating *raiyyat*” and “bona fide cultivator”.³⁶ Thus, the inclusion of sharecroppers as a dependent class of the “bona fide cultivators”, observed PC Lahiry, was merely introduced to meet the demands of a “parasite class” who live upon the

³² See chapter 6.

³³ William Bredo *Land Reform and Development in Pakistan* (Stanford Research Institute, Menlo Park, 1959) at 4.

³⁴ Chapter XIV: Ss 105-107 (omitted). The minors, lunatics, invalid persons, widows, persons suffering from physical infirmity and convicts in jail were allowed to practise the *barga* system of cultivation provided they did not have any other person to look after the cultivation.

³⁵ East Bengal Legislative Assembly Department “The Report of the Special Committee on the Bill, Embodying Amendments Recommended by Them, Annexed” (Superintendent, Government Printing, East Bengal, 1948) at 8.

³⁶ According to s 2(9) of the SAT Act “cultivating *raiyyat* or under-*raiyyat*” means a *raiyyat* or an under-*raiyyat*, as the case may be, who holds land by cultivating it either by himself or by members of his family or by servants or by *bargadars* or by or with the aid of hired labourers or with the aid of partners. Section 81(1) of the Act defines “bona fide cultivator” as a person who cultivates land by himself or by members of his family or by, or with the aid of, servants or labourers or with the aid of partners or *bargadars* and includes an agricultural labourer.

“tears and toil of the actual tillers”.³⁷ Lahiry also noted: “It is not only unfair, [but also] a reactionary move in a progressive legislation”.³⁸ The sharecroppers had to suffer from these defects of the SAT Act until the promulgation of the Land Reform Ordinance 1984 which arguably gave better protection to their interests.³⁹

Thus, a number of variances between the Bill and the Act compromised the interests of the land-poor. The 1950 Act went more to preserve the class interests of the land-rich than to give a better deal to the land-poor and the actual cultivators.

B *The Jurisprudential Basis of the SAT Act*

In spite of the compromises made in the final Act, the legislation seemed to promise a social transformation through the acquisition of intermediary interests and surplus land.⁴⁰ Thus, in spirit, the SAT Act did not miss its pro-poor character. But whatever potential a land reform statute contains, it cannot materialise unless projected against a sound constitutional canvas. The government of the day appeared to have ignored this basic constitutional requirement with regard to the “inviolability or otherwise of the permanent and heritable rights conferred on the *zamindars* and other rent-receivers”.⁴¹

Pakistan became an independent country in 1947, but it did not enact its Constitution until 1956. The nine-year’s absence of the constitutional background was bound to have an all-pervading impact on the whole political, legal and economic system. It inevitably had, therefore, concomitant implications for the land question.

Of course, actions under the SAT Act were given protection by the Government of India Act 1935. The 1935 Act enjoyed constitutional sanctity for the early years of Pakistan. However, it did not have any framework suitable to meet the challenges of post-colonial land reforms. The absence of a Constitution and half-hearted protection by the 1935 Act provided the *zamindars* with an opportunity to resort to the long, complicated and vague procedures of civil law and thereby thwart the *zamindari* abolition process.

The constitutional property clause, it is sometimes argued, acts to the disadvantage of reform measures. The argument, it is noted, is jurisdiction specific. In the instant case, it was not merely an issue of the constitutional property clause, but also an issue of radical land reform to remedy past injustices. Therefore, the post-colonial East Bengal context

³⁷ See the dissenting notes of Provash Chandra Lahiry in the “Report of the Special Committee on the East Bengal State Acquisition and Tenancy Bill 1948” (East Bengal Legislative Assembly Department, 1948) at 10.

³⁸ At 10.

³⁹ See chapter 4.

⁴⁰ The preamble of the SAT Act 1950. Hung-Chao Tao, however, found the legislation as reactionary against the Hindu-dominated *zamindari* system in a “Muslim nation.” For Tao, the SAT Act, in essence, was more of a law to endorse an “established reality” rather than a “program seeking a planned change.” See Hung-Chao Tai *Land Reform and Politics: A Comparative Analysis* (University of California Press, California, 1974) at 66.

⁴¹ Shawkat Ali *Politics of Land Law* above n 3, at 218.

demanding a more concrete, systematic and pragmatic constitutional stand to crystallise the political commitment for sweeping land reform. Contradictory to this commitment, many *zamindars* became influential government members of East Pakistan. This was why the legacy of the *zamindari* system perpetuated in Pakistan's subsequent political and governance system was something from which it has not been able to escape.

In 1956, Pakistan for the first time got the opportunity to deal with the land reform issue from a constitutional perspective through its first Constitution. The Constitution afforded protection to the land reform laws including the SAT Act 1950. At the same time, it included the equality and right to property clause. This, in turn, created tension between the constitutional claim of equality on the one hand and constitutional protection of (existing) inequality (of property ownership) on the other.⁴² This treatment of equality concept fell short of the requirement in a post-colonial context. The frustration was explicit even in the lawmakers' deliberation. Huseyn Shaheed Suhrawardy, the leader of the Awami League, one of the political parties that had been advocating emancipation of East Bengal peasants, pointed out in the Legislative Assembly:⁴³

I do not find anything either in the Rights of Directive Principles to look after the interests of the agriculturists and labour and to prevent them from exploitation except a general clause of social and economic wellbeing....we do maintain that the cultivator the man who produces the food grains should be the owner of the land which he is tilling. This should be provided for in the constitution. At least this should be the main objectives of this government.

Badrudin Umar, however, questioned Suhrawardy's seriousness on the land reform issues. Umar doubted the honesty of Suhrawardy's stand as the Awami League did not bring about adequate land reform initiatives for the protection of the peasants from the exploitation of the landowners and the moneylenders.⁴⁴ Thus, the 1956 Constitution made no clear provision about the *zamindari* system, land reform, land allocation and distributive justice.

However, it is noteworthy that the judiciary played an encouraging role by adding life to the SAT Act through purposive interpretation. One such case was *Jibendra Kishore*.⁴⁵ The case delayed the *zamindari* acquisition process, yet it provided ample scope to the government to acquire all the landed interests.

The issue in the case was whether government's power of acquisition under the law was justified. Section 3 of the Act enabled the East Bengal government to acquire by Gazette

⁴² Gray and Gray writes: "Property is not a thing or resource, rather a socially endorsed power relationship in respect of a thing or resource". See Kevin Gray and Susan Francis Gray "Private Property and Public Propriety" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, London, 1999) at 13.

⁴³ Badruddin Umar *The Emergence of Bangladesh* above n 29, at 320.

⁴⁴ For example, the then government of the Awami League set up a state corporation for the jute trade, which allegedly had served the interest of the landlords and rich peasants. See Badruddin Umar above n 29, at 331.

⁴⁵ *Jibendra Kishore v Province of East Pakistan* [1957] 9 DLR SC 21.

Notification all interests of the rent receivers in respect of their tenancies. It also empowered the government in a similar manner to acquire all or any of the land in *khas* (self-cultivated) possession of such rent-receivers. Section 37 of the Act, on the other hand, provided for compensation on a sliding scale to the expropriated landlords.⁴⁶

In exercise of the authority conferred by s 3, the government by several notifications acquired the interests of certain rent-receivers and the lands in their *khas* possession. Eighty-three petitions for mandamus were moved before the Dacca High Court to withdraw or rescind the notifications. The principal attack on the notifications was the strength of art 5 of the 1956 Constitution which provided: “All citizens are equal before the law and are entitled to equal protection of the law.” It was argued that s 3 of the Act conferred on the government a naked and arbitrary power which was capable of being used in a discriminatory manner and therefore, was violative of art 5. For example, the government might pick out any rent-receiver of any locality for expropriation it might like and that could lead to discrimination between one rent receiver and another, hence it tended to violate the equality clause of the Constitution. It was further argued that s 37 of the Act drew a distinction between the income groups of rent receivers and was, therefore, *ex facie* discriminatory and void. The judges of the High Court unanimously rejected all the constitutional objections to the notifications. The petitioners, being aggrieved, preferred an appeal to the Supreme Court of Pakistan against the findings of the Dacca High Court.

The Supreme Court dismissed the appeals and upheld the High Court’s findings considering the “scope and objectives” of the Act manifested in its “statements and objects” and the “preamble”. Munir CJ held:⁴⁷

...If the law be, as I think it is, that in cases where the statute is *ex facie* discriminatory, but is capable of being administered in a discriminatory manner, the party challenging the constitutionality of that statute must show that it has actually been administered to the detriment of a particular class and in a partial, unjust and oppressive manner, the appellants’ case must fail because the acquisition challenged is not piecemeal but wholesale and nobody can have any occasion to complain that he or the class to which he belongs to has been singled out for a discriminatory treatment.

Thus, the Court rejected the allegation of discrimination against the SAT Act. As to the question of classification between the rent receivers in respect of rate of compensation on sliding scale, the Court admitted that the Act in question was an essentially confiscatory enactment because it took property by paying the owner, say, twice the annual income of that property. The Court referred to the constitutional safeguards against compulsory acquisition of property envisaged in art 15. This article stated that property could only be compulsorily acquired for a public purpose and under a law which provided for a just compensation. The law must fix the amount of compensation or state the principles on which and the manner in which the compensation is to be determined and given. Munir CJ

⁴⁶ The rate of compensation decreased as the net income of the rent receiver increased.

⁴⁷ *Jibendra Kishore* above n 45, at 38.

observed that the Act could not have survived a “well-directed attack” based on the words of the Constitution had there been “discriminatory application of the law coupled with inadequate compensation”.⁴⁸ The proviso to art 15, however, excluded “any existing law” (ie the SAT Act) from the scope of judicial review on the ground of inadequacy of compensation. To quote Munir CJ:⁴⁹

...Our constitution makers in their wisdom and for reasons best known to them decided to provide in the Constitution that whereas no property could in future be acquired without compensation, the acquisition laws that had already been passed, however piratical, were not to be called in question on the ground of want of or inadequacy of compensation.

Munir CJ also found justification for the classification of the rent-receivers on the ground of “reasonableness”. If as a consequence of abolishing the system of “private landlordism” it became necessary to devise some means of classification of the landlords on the basis of their net income it cannot be held to be repugnant to the equality doctrine unless it is “arbitrary or capricious”, not “natural and reasonable” and not “fairly and substantially related to the object of the legislation”.⁵⁰

It seems that the reasoning principally rested on the equality and non-discrimination ground. The reliance on the failure of the petitioner to show any actual discriminatory application may be seen mechanically. It is, however, significant to note that the judge was not oblivious to the historical context of the SAT Act.⁵¹

If the provisions of the East Bengal State Acquisition and Tenancy Act are examined in the light of the history of the Act, it appears to be perfectly clear that the intention was to eliminate all rent receiving interests in all lands in the Province and to create a uniform class of tenants directly under the Provincial Government. In order to attain that purpose, s 3 gave to the Provincial Government the power or discretion to acquire simultaneously or from time to time as was considered to be expedient from time to time.

Thus, the *Jibendra Kishore* ruling paved the way to uphold the egalitarian spirit of the SAT Act. It gave an indication as to how the government should deal with the perplexing problem of assuring a more widespread sharing of economic improvement. It firstly justified the governmental action for acquisition and thereby, offered scope for the government to carry out land reform activities for the benefit of the poor. In the second place, it drew the curtain on using the SAT Act as a political ploy to make the acquisition process lengthy.

One of the significant aspects of the *Jibendra Kishore* ruling was that the Court admitted the owners’ right to retain *wakf-alal-aulad* properties in their possession⁵². For, allowing

⁴⁸ At 39.

⁴⁹ At 39.

⁵⁰ At 41.

⁵¹ At 36.

⁵² *Wakf-alal-Aulad* is a kind of private endowment under Muslim law to support the members of one’s own family. Under such *wakf* arrangements, the ownership of the property legally belongs to the Almighty.

the government to acquire those, according to the Court's opinion, would go against the "right to profess, practice and propagate religion" guaranteed under the Constitution.⁵³ This line of reasoning encouraged in many respects the evasion of the land ceiling law and retaining surplus land beyond the legal limit. The Court, on this point, made the statutory law subservient to Muslim law and lost an opportunity to rationalise the property system in question. This finding along with the overriding effects of Muslim law in the Pakistan legal system rendered land reform attempts challenging.⁵⁴

C *Acquisition, Compensation and Redistribution Controversy*

From the *Jibendra Kishore* ruling, it appears that the SAT Act had an ideological underpinning for the peasants. The political process of the enactment of the SAT Act suggests a gap between the land reform as an "ideology" and as a "programme".⁵⁵ The success was contingent upon SAT Act's ability to accommodate the issue of *zamindari* abolition and allocation of surplus land reasonably.

The main challenge of the post-colonial government was to acquire the rent-receiving interests and surplus land within shortest possible time. There was one obvious advantage in acquiring the bigger estates as those were certainly discernible with precise size and documents. But in the case of acquiring small intermediary interests, the government faced difficulties to proceed without revising the land records first. So, the government decided to acquire the big estates "summarily" in the first instance and gradually to acquire the small estates once the revision settlement was completed. Regrettably, there was unreasonable delay in acquisition in respect of both the interests. It took six years to take over 443 big estates in spite of adopting the summary procedure.⁵⁶ This was largely due to litigation and the administrative inefficiency of the government in the post-colonial political mayhem. Despite that, the success in acquiring fifteen big *zamindari* estates of East Bengal within a reasonably short time was widely accepted as a great achievement of the SAT Act.

This "success" of the Act was marred by several factors.

(a) The SAT Act did not consider the necessity of conducting an immediate land survey through settlement operation. This "lack of recognition of the enormity of the task" resulted

However, in practice, it is under the care of an administrator (*mutawalli*) for the benefit of the author's legatees.

⁵³ *Jibendra Kishore* above n 45, at 44.

⁵⁴ See generally, Martin Lau *The Role of Islam in the Legal System of Pakistan* (Koninklijke Brill NV, Leiden, 2006).

⁵⁵ PC Joshi "Land Reform in India and Pakistan" (1970) 5 Economic and Political Weekly A145.

⁵⁶ According to Talukder Moniruzzaman, by 1956, 421 *zamindaries* were acquired and East Pakistan came to be freed from the feudal grip by 1956-57. It seems that this claim of Moniruzzaman gives rise to some confusion as the government was allowed to go with the summary procedure only after the *Jibendra Kishore* ruling in 1957. See Talukder Moniruzzaman "Group Interests in Pakistan, 1947-1958" (1966) 39 (1) Pacific Affairs 83. In contrast, the view of Shawkat Ali that the acquisition of *zamindaries* was completed by 1964 seems more compelling. See AMM Shawkat Ali above n 3, at 198.

in the delay of acquiring the intermediary interests. However, probably, the lengthy procedure of making land records was inevitable and understandable given the technological support the government had at the time. It was only in 1956 the government took the decision of wholesale acquisition pending the revision of settlement but by then six years had elapsed.⁵⁷

(b) The SAT Act fixed the land ceiling at 33.3 acres.⁵⁸ This was relatively high from an equity and efficiency angle. In a way, the 1950 Act only created numerous “mini *zamindaries*”⁵⁹ replacing the old big *zamindaries*. From an Indian perspective, PC Joshi commented on this phenomenon in this way: “At best it denoted the tension between the old moribund and a new dynamic landlord class”.⁶⁰ Joshi’s comment had equal force for the East Bengal situation. Even prior to the all-out success of the *zamindary* acquisition, the ceiling was further increased to 125 acres through the 1961 amendment to the SAT Act which was opposite to its vision.⁶¹ The then Pakistani President, General Ayub Khan, formed a Committee to inquire into the land reform issues in 1959 for the whole of Pakistan.⁶² The Committee in its 1962-1963 Report recommended raising the land ceiling from 33.3 acres to 125 acres and the Ayub government complied with that. The merit of this fourfold increase is open to debate. Ayub Khan held the view that “everyone must own land just does not make sense”.⁶³ Khan was very critical of the “so-called reforms” introduced by the 1950 Act. So, in order to prevent the destruction of the “entire middle class”, he decided to raise the land ceiling. Ayub Khan put the issue in his 1967 autobiography in the following manner:⁶⁴

A Land Revenue Commission set up for East Pakistan in 1958 led to an amendment of the East Bengal State Acquisition and Tenancy Act 1950 by which I was able to raise the ceiling of *khas* (self-cultivated) land from 33 acres to about 120 acres or so. With 120 acres in East Pakistan, one can have adequate production if one is prepared to work. The land is fertile and responsive.

⁵⁷ East Bengal State Acquisition and Tenancy (Amendment) Ordinance, 1956 (East Bengal Ordinance No III of 1956).

⁵⁸ In the Assembly debate, lawmakers belonging to the Muslim League were active in safeguarding the interests of the *jotedars* by suggesting a ceiling, which hurt the *zamindars* more than the *jotedars*. This was a middle stand between the landed interests and the interests of the land-poor. The Muslim League tried to take advantage of the communal politics. Because also, most of the East Bengal *zamindars* (75 per cent) belonged to the Hindu religion and some of them possessed 75,000 acres of land. See Talukder Moniruzzaman above n 56, at 83.

⁵⁹ Prosanta Kumar Roy *Bangladesh: Dark Facets of Land Rights Management with Directions to Agrarian Reforms* (AH Development Publishing House, Dhaka, 2008) at 51. See also, Iftekhhar Ahmed and John F Timmons “Current Land Reforms in East Pakistan” (1971) 47(1) *Land Economics* 55.

⁶⁰ PC Joshi “Land Reform and Agrarian Change in India (1947:1)” (1974) 1(2) *Journal of Peasant Studies* 164.

⁶¹ East Bengal State Acquisition and Tenancy (Third Amendment) Ordinance 1961.

⁶² The government of East Pakistan *Report of the Land Revenue Administration Enquiry Committee, 1962-63* (Revenue Department, East Pakistan, Dacca, 1963).

⁶³ Mohammad Ayub Khan *Friends Not Masters: A Political Autobiography* (Oxford University Press, Oxford, 1967) at 92.

⁶⁴ At 91. Actually the ceiling was raised to 125 acres.

Ayub Khan did not clarify who were his middle classes. He also did not clarify that if the land was fertile why the “middle-class” needed so much land for leading a decent life. However, it can be inferred that Khan meant the class whose “main source of income was rents from their tenants” and acquisition of whose land will place them in “comparative poverty”.⁶⁵ Khan wrote:⁶⁶

I had been pressing the East Pakistan Government to get the land records made as quickly as possible and start giving compensation to the landlords from whom land was resumed. They had to have something with which to start life afresh and become useful members of the society.

The attempt brought to light a “military ruler’s intention to favour the landed class to consolidate the power-base”.⁶⁷ The kind of “basic democracy” Ayub Khan later introduced in 1962 is a testimony to that intention.⁶⁸ Thus, the 1961 amendment to the SAT Act was the antithesis of the spirit of post-colonial land reform. It served to bring blessings for the landed class because firstly, they were able to take alternative measures to subvert the legal provisions due to the delay of the implementation process of the SAT Act⁶⁹ ie the delay offered ample scope to partition of excess land among family members of the landowners as the SAT Act suggested a very loose definition of “family”.⁷⁰ Secondly, they were able to retain surplus land due to this raising of the land ceiling. As such, the possibility of getting more land for distribution reduced a great deal and the reallocation of surplus land to the landless did not succeed.

(c) The issue of providing compensation to the expropriated *zamindars* was the subject of intense debate. The compensation controversy had jurisprudential and political dimensions. It was argued that the *zamindars* were never the owners of the land. The colonial governments conferred on them absolute proprietary rights in order to serve their purpose. Any compensation, therefore, would be legally untenable. If on the other hand, it was accepted that the *zamindars* established their rights on the land in the course of time,

⁶⁵ *Report of the Land Revenue Commission* above n 5, at [51-52].

⁶⁶ Ayub Khan above n 63, at 91.

⁶⁷ Talukder Moniruzzaman wrote: “Ayub’s land reforms were moderate in nature and did not affect the landed interests.” It seems that Ayub Khan viewed the land problem of East Pakistan from a West Pakistani outlook. Because of the differing system of land tenure, any partnership between East Pakistan and West Pakistan became precarious. See Talukdar Moniruzzaman above n 56, at 83. See also, Hung-Chao Tai *Land Reform and Politics* above n 40, at 101.

⁶⁸ Ayub Khan introduced the “basic democracy” system in 1962, which elicited huge debate. The system termed sometimes as a “parody of democratic politics” at its root was based on electoral colleges with the participation of rural elite who were recipients of government’s favour. See Hamza Alavi “The State in Post-Colonial Societies: Pakistan and Bangladesh” (1972) *New Left Review* 65.

⁶⁹ The acquisition process, somehow, ended as late as 1964. Nevertheless, the rent-receivers continued to exert their rights of rent collection for more than a decade even though such rights were formally abolished by the 1950 SAT Act. This unreasonable delay provided them with the opportunities to thwart the law by creating new rights, concealments and forged documents.

⁷⁰ MA Zaman “Bangladesh: The Case for Further Land Reforms” (1975) 3(2) *South Asian Review* 102. Section 20 (b) of the SAT Act defined a family of a rent receiver to include him/herself and all other persons living in the same mess along with their dependent excepting any servant or hired labourer.

they were to be compensated from the government treasury upon expropriation. One of the main sources of revenue for the government treasury was the land revenue raised from the peasants who were historically exploited by the *zamindars*. This paradox influenced the development of three different categories of political stand: i) The *zamindari* system was not to be abolished but to be modified according to the needs of the time; ii) The *zamindari* interests should be expropriated without any compensation; iii) The *zamindars* were to be compensated upon acquisition.

The first proposition was unrealistic given the political development soon after decolonisation. The real political battle took place between the proponents of the second and third lines of thinking. The leftist political parties were the main advocates of “no compensation”. The ruling party Muslim League, being an organisation of the landed gentry, advocated a compensation package that largely favoured the interests of the classes it represented.⁷¹ The leftist political philosophy lost its appeal in the post-colonial period. However, the Awami League, a big threat to Muslim League politics in the post-colonial East Pakistan supported the “no compensation” stand. Moulana Abdul Hamid Khan Bhashani, the then President of this party, termed the SAT Act as “*zamindars*’ property purchasing Bill”.⁷² Newspaper commentaries of the time echoed the same sentiment.⁷³ As such, the “no compensation” stand had a prominent place in the later political development. Thus, one of the 21 points programme designed by the United Front that emerged as a coalition of political parties led by the Awami Muslim League and Krishok Proja party against the Muslim League in 1954 election ran as follows:

The abolition without compensation of all rent-receiving interests in land and to redistribute the surplus land among the landless proletariat and bring down the rent to a fair level and to abolish the certificate procedure for realising the rent.

The landslide victory of the United Front was indicative, amongst other things, of dissatisfaction of the people about the compensation scheme prescribed by the Muslim League in the garb of the SAT Act.⁷⁴ However, the United Front after being elected in 1954 election could never translate their “no compensation” motto into law. Rather their pro-peasant political philosophy became blurred due to internal factionalism and later

⁷¹ Compensation, including three per cent interest for deferred payment, was assessed at about 400 million Taka. The East Pakistan Land Revenue Commission (Khan Bahadur Mahmud Commission, 1959) estimated the amount at 500 million Taka, while according to the estimation of Land Revenue Administration Inquiry Committee (Hussain Committee, 1962-63) it was 365 million taka.

⁷² M Bhaskaran Nair *Politics in Bangladesh: A Study of Awami League* (Northern Book Center, New Delhi, 1990) at 220.

⁷³ At 221. The Pakistan Times in its editorial 16 October 1955 noted: “The SAT Act gives a long lease of life to parasitism in agriculture by allowing big landholders a rate of compensation which it is well-nigh impossible for an impoverished country to pay.”

⁷⁴ Daniel Thorner wrote: “They (the peasants) have been liberated from the *zamindars* only to be bound down anew in the straightjacket of compensation.” See Daniel Thorner *The Agrarian Prospects in India* (University Press, New Delhi, 1956) at 25.

development of Pakistan's politics of what Hamza Alavi described as "military-bureaucracy oligarchy".⁷⁵

Equally important was the redistribution of land to the tillers after the acquisition. The 1950 Act did not contain any meaningful provision for reallocation of the land to the landless, except writing down simply that preference was to be given to "bona fide cultivating families" in settling land under s 76.⁷⁶ The discretionary power on redistribution of land was left with the government, making it open to abuse. There were frequent changes in the priority list that bred not only confusion but also corruption, delay and discretion on the part of the implementing officials.⁷⁷ Siddiqui testified: ... "From the various priority lists, there was never any specific concern for the landless agricultural labourers and sharecroppers".⁷⁸ One of the priority policies showed that the sharecroppers were placed third in order to be considered for the redistribution of land.⁷⁹ The agricultural refugees and ex-rent receivers preceded them in the list. The sharecroppers were left out altogether from the preference of redistribution list in 1962.⁸⁰ This order of preference was contradictory to s 76 of the SAT Act. Evidence suggests that by 1962, only 465,139 acres of land were ready for redistribution of which only 3,325 acres were allocated.⁸¹ Shawkat Ali showed that there was 3.6 per cent landless population out of 53.6 million rural population of East Bengal in 1964-65. Thus, the surplus land could have been allocated to this segment of the rural population. In this way, each of them could have expected to own 0.25 acres of land.⁸²

D Record of Rights and Land Administration

An updated record of rights was a prerequisite for acquiring the rent-receiving interest and distribution of excess land to the landless. No one knew how much land was available for allocation.⁸³ Responding to this need, the SAT Act along with its Rules provided a complex and vague procedure of conducting land surveys and making land records.⁸⁴

⁷⁵ Hamza Alavi above n 68, at 63. The United Front government fell twice due to the political fraction and in 1958 military rule was imposed on the whole Pakistan by General Ayub Khan. The first decade of Pakistan, thus, was characterised by frequent changes in government—too frequent to allow any meaningful political direction to the substantive questions of land reform and agrarian welfare measure. See Hamza Alavi "The State in Post-Colonial Societies: Pakistan and Bangladesh" (1972) *New Left Review* 65.

⁷⁶ The relevant part of s 76 reads: "In making settlement of any cultivable land, preference shall be given to an applicant for settlement who cultivates land by himself or by the members of his family and holds a quantity of cultivable land which, added to the quantity of cultivable land, if any, held by the other members of his family, is less than three acres".

⁷⁷ Kamal Siddiqui above n 31, at 17.

⁷⁸ At 17.

⁷⁹ Revenue Department Memo No 2224-LR, 23 January 1960.

⁸⁰ Revenue Department Memo No 122-V295/62, September 1962.

⁸¹ Report of the Hussain Committee above n 71, at 53.

⁸² Shawkat Ali above n 3, at 226.

⁸³ At 219.

⁸⁴ State Acquisition and Tenancy Act 1950, ss 17-31 & 142-145 and SAT Rules, 1955 rr 28-31 envisage eleven stages of preparation of land records which are archaic and dilatory in nature. This tended to open floodgates of corruption.

Consequently, the peasants, mostly illiterate, were not capable of protecting the land they cultivated. The picture can be reasonably inferred from the popular saying: “Deshe elo joreep, manush holo gorib”.⁸⁵

Another significant shortcoming of the SAT Act, related to the preparation of the record of land rights, was its failure to suggest an efficient land administration capable of dealing with the vast reform it had proposed. An efficient land administration suited to the post-colonial requirement was necessary in order to make the land reform agenda successful. The commentators considered the lack of efficient and honest land administrators as one of the principal impediments of land reform.⁸⁶ The SAT Act mechanically shifted the charge of realisation of rent from the *zamindars* to the land revenue officers. No effective mechanism capable of carrying out the huge land reform initiative was devised in the Act. Therefore, the old land administration clogged the process rather than accelerated it.

The go-slow process, however, it must be admitted, was perhaps unavoidable given the post-colonial setting. Any government would have probably proceeded slowly and with caution in implementing the land and tenancy reform measures keeping in view the legal and administrative difficulties. Carrying out a radical change in the land system in a post-colonial setting was a very difficult and complex task requiring unremitting attention and constant drive.

Therefore, a state agency devoted to the purpose was essential. The substitution of the government for the landlord required the handling of a large amount of survey and administrative work and placed considerable responsibility in the hands of officials not experienced in this field. The necessity of a separate agency for post-colonial land reform was stressed in the report of the Bengal Administrative Inquiry Committee:⁸⁷

When a new task of such a nature and magnitude arises, it is both expedient and sound in principle to create a separate agency to carry it out, so long as the new agency does not involve serious overlapping or conflicts of jurisdiction. When the task is completed, the functions which will remain can probably be easily absorbed into pre-existing agencies.

The Committee also recommended a separate ministry for land reform. However, this was not envisaged in the SAT Act; neither did the government carry out necessary changes in the administrative mechanism.

E Subdivision and Consolidation

One of the strong reforms suggested by the SAT Act was subdivision and consolidation of holdings. The size of holding matters for production. Too many divisions lessen the amount of cultivable land and affect the nature of the land. Moreover, subdivision of large

⁸⁵ Translation (from Bangla): With the appearance of the survey system in the village, people became impoverished.

⁸⁶ Konrad Bekker “Land Reform Legislation in India” (1951) 5 (3) Middle East Journal 319.

⁸⁷ *Report of the Bengal Administrative Inquiry Committee* 1944-45 above n 7, at 12.

estates, Prosterman argued in Latin American context, would increase income inequality and thus reduce the appeal of land reform.⁸⁸ The consolidation of holdings, on the other hand, increases the area of cultivation, encourages cooperative farming and facilitates cultivation of suitable crops. Thus, the ideal state of holding-sizes helps to maximise production and thereby promotes the living standard of the peasants. Keeping this spirit in view, the SAT Act prescribed a subdivision and consolidation scheme based on subsistence and economic parameters. The limits of subsistence holding (land adequate to provide food) and economic holding (land adequate to give a cultivator a reasonable standard of living) were fixed at three acres and eight acres, respectively.⁸⁹ No division of holding was allowed if it would compromise the subsistence standard.

The requirement to consolidate holdings initially was voluntary. Section 119 of the SAT Act prescribed that any two or more *raiya*s (cultivators) having land in the same or contiguous villages might apply in the prescribed form to the Revenue Officer for consolidation of their holdings. An application for consolidation by two-thirds of the village farmers holding three-fourths of the village holding was to be deemed an application on behalf of all villagers.

No doubt the SAT Act aimed at radical changes in the land system through these provisions. However, these proved to be a failure. Firstly, the Act remained silent about the effect of the Muslim law of succession in case of its conflict with the subdivision provisions. The subdivision practice under the Muslim law of succession was deeply ingrained in the society. Without an overriding statutory law, this practice proved to be meaningless. The 1962 Hussain Committee viewed the practice as “unpreventable” and recommended not to make it mandatory. However, there was a clear example of statutory modification of Muslim inheritance law at the time when the Committee was offering such suggestion to the government.⁹⁰ Secondly, the government created a dilemma between the subdivision and consolidation drive. On the one hand, restrictions on subdivision were thought to be inadvisable for East Pakistan on social and religious grounds; on the other hand, consolidation of holdings was made obligatory in 1961⁹¹ without paying heed to these factors. Consequently, on this “inherent contradiction”, none of the schemes came to fruition.⁹² Thirdly, the legislation treated the issue mechanically and conferred this huge task on the revenue authority—a colonial time and ill-equipped administration following

⁸⁸ Roy Prosterman “Land Reform in Latin America: How to Have a Revolution without a Revolution” (1966) 42 Washington Law Review 189.

⁸⁹ MA Zaman “Land Reform in Bangladesh up to 1970” (A Research Paper, University of Wisconsin-Madison, Wisconsin, 1976) at 35.

⁹⁰ Ayub Khan modified the Islamic law of inheritance, which is known as the doctrine of representation. Under Islamic law, the grandson did not get any share of his grandfather’s property in the event of his (grandson) father’s death. The Muslim Family Law Ordinance 1961, promulgated by Ayub Khan, made it clear that the grandson would represent his deceased father and receive his share as if he was alive.

⁹¹ East Pakistan Ordinance No XV of 1961.

⁹² Shawkat Ali above n 3, at 237.

the abolition of *zamindari* system. Thus, the topic required more caution and thought geared to the social needs of the time.

V Preparedness for Post-Independence Reform

The 1950 Act remained instrumental as land reform legislation during 1947-1971. In the 1960s, works on this agenda were minimal. In this decade, Bangladesh was marching to achieve independence from Pakistan. It emerged as an independent country in 1971.

In the post-independence period, it was expected that Bangladesh would firstly establish a constitutional approach to land reform upon sufficient discussion and participation of the people. It would then formulate a broader land policy under which further land reforms law would be made. Opposed to this, Bangladesh opted to replicate the similar reform approach adopted in the early 1950s. Firstly, it issued some executive orders to bring immediate reforms in revenue and land ceiling matters. Then it inserted a vague property clause in the 1972 Constitution of the new country without properly clarifying the constitutional stand to land reform.⁹³ At this stage, it may be argued that the new Constitution of Bangladesh could not offer a breakthrough from the earlier land reform philosophy espoused by the 1950 Act and the 1956 Constitution. The relevant part of the 1956 and 1972 constitutional property clauses are reproduced below:

1956 Constitution

- (1) No person shall be deprived of his property save in accordance with law.
- (2) No property shall be compulsorily acquired or taken possession of save for a public purpose and save by the authority of law which provides for compensation therefore and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given.
- (3) Nothing in this Article shall affect the validity of-
 - (a) any existing law.

...

1972 Constitution

Article 42: (1) Subject to any restrictions 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, nationalised or requisitioned save by authority of law.

...

It seems that the word “land reform” had no place at either time. Rather the articles merely talk about right to property. “Property” is a word of very wide import. The constitutional texts of 1956 and 1972 did not offer any guidance to define “property”. It seems in both cases, the Constitution apparently made a balance between the individual

⁹³ In chapters 4 and 5, the thesis deals with two distinct issues of land reform relating to the rights of the sharecroppers and riparian peasants having their root in the 1950 Act. It then examines the political nuances of constitutional land reform in the post-independence setting in chapter 6.

rights and the rights of the society in dealing with the right to property. However, they lack the state's assertive claims of right to redistribution. The question then remains, whether a reference to right to property in general terms did justice to the issue of land reform.

VI Chapter Summary

It appears that post-colonial land reform (1947-1971) was ostensibly legal but fundamentally political in nature. The inherent tension in the reform process of this period was that the 1950 Act got its motivation from the pre-partition socialist political philosophy advocated by the leftist parties but was enacted by the political groups of the Muslim League who mainly represented the new landed class of the post-colonial settings of East Bengal. Therefore, the era was marked by the land law politics inherently biased against the peasants. After the partition of Bengal in 1947, the economic power groups came to acquire the political power. With the abolition of landlordism by the 1950 Act, the power came to be vested in the hands of a 'professional middle class' who played the pivotal role in the post-colonial land law politics. Therefore, in spite of having a few pro-poor features, the SAT Act failed: i) to neutralise the status of landlordism; ii) to recognise the importance of preparation of an immediate record of rights through settlement operation; iii) to devise a coherent, systematic and progressive package of land ceiling, acquisition, compensation and redistribution; iv) to set up and develop an efficient administrative agency to tackle the challenges of radical land reform. The 1950 SAT Act, therefore, was not progressive land reform legislation.

For land reform, the 1947-1971 era is a complex period. The 1950 Act seems quite radical and ambitious. The problem was partly one of practical implementation, but there were even deeper issues at work. The fundamental lesson of the post-colonial period is that legal reform cannot work in a state of constitutional ambiguity and confusion. The reform legislation has become bogged down in these wider problems. The loopholes, ambiguity and absurdity within the 1950 Act further accentuated the problem. After independence, Bangladesh had to get its house in order before an ambitious land reform programme could happen. The new Constitution of Bangladesh did not facilitate the dynamic connotation and missionary message of the anti-poverty imperative of the independence.

Chapter 4

Sharecropping Legislation and Poverty in Bangladesh

I Introduction

Chapter 3 examined the philosophical and constitutional approaches to post-colonial land reform adopted by Bangladesh (then East Pakistan). In particular, it investigated the extent to which the State Acquisition and Tenancy Act 1950 (SAT Act), the chief post-colonial land reform law, was successful in fulfilling the land reform expectations that mounted up in the colonial era. It was argued that the 1950 Act did not effectively address the issues of acquisition, compensation and allocation of land to the landless as intended. One of the biggest shortcomings of the 1950 Act was its silence on the rights of the sharecroppers. Sharecropping practice was a widespread “historical form of sub-tenancy” with “inferior rights” in Bengal.¹ It was one of the wide variations of land tenures that existed in Bengal. Therefore, it is important to see how the post-colonial reform laws responded to the interests and rights of the sharecroppers. This chapter examines the status of the sharecroppers in Bangladesh’s subsequent land reform attempts.

The chapter has six parts. Part 1 is the introduction. Part II describes the nature of sharecropping and shows how poverty has been a regular feature in Bengal sharecroppers’ life. Part III gives the main features of the Land Reforms Ordinance 1984 (LRO). Part IV tests the LRO’s capability to address the poverty of the sharecroppers. Part V makes a critique of Bangladeshi legislative approach in the light of the legislation of an analogous jurisdiction, West-Bengal, India. Part VI summarises the chapter.

¹ Partha Chatterjee “The Colonial State and the Peasant Resistance in Bengal 1920-1947” (1986) 110 *Past and Present* 169 at [197].

II Nature of Sharecropping

Sharecroppers are a class of marginal farmers who lead their lives by cultivating others' land. Colloquially known as *bargadar*, they are the typical example of the rural poor.² The narratives on agrarian history of Bengal usually place them at the bottom of the agrarian ladder.³ From long ago, the practice of sharecropping has been the underlying cause of the poverty and stagnation which characterise the Bangladesh agrarian economy. Under the sharecropping arrangement, some factors necessary for production are provided by one party (landowner) in return for an agreed proportion of the resulting production by the other (*bargadar*).

Sharecropping practice involves several interrelated ingredients of class relations, exploitation and poverty. Firstly, it involves the question of access to land and labour; secondly, it entails a relationship between the landowner and the sharecropper and thirdly, it relates to the maximisation of production. Considering these elements, experts formulate two opposing views about the practice of sharecropping. One view claims that sharecropping is an inherently inefficient way to organise production. The advocates of this view regard the landlord's share of the produce as a tax on the tenant.⁴ In this view, the tenant has an incentive to work and invest less than would an owner-cultivator of the same land.

The other view, also known as "Chicago School", stresses the importance of property rights.⁵ This school claims that sharecropping would not be widespread if it were not an efficient allocative mechanism. According to this school, share contracts are voluntary, mutually agreed upon and hence no one would enter into a sharecropping contract if it were not the best alternative available. Putting the Bengal land system into this context, sharecropping may be viewed as a practice lying between the above two opposing schools. The first reason for placing it there is that when the concept originated in England in the late 18th century, sharecropping was not prevalent there; though it was pervasive in other parts of Europe. The European experience was not suitable for Bengal, because under the British colonial land law policy the landlords enjoyed the unfettered power to impose illegal taxes upon the tenants. Secondly, an enormous supply of potential tenants was available in Bengal so the system became exploitative. Thirdly, in Bengal, the landlords had always a dominant role in the political process of law making and thus render the rights of the

² Kamal Siddiqui *Land Reform and Land Management in Bangladesh and West Bengal: A Comparative Study* (University Press Limited, Dhaka, 1998) at 17. In some areas, the sharecroppers are also known as *adhiaar* or *bhagchashi*.

³ DN Dhanagare *Peasants Movements in India 1920-1950* (Oxford University Press, New Delhi, 1983) at 15.

⁴ James Peach and Kenneth Nowtny "Sharecropping Chicago Style: The Oppressed Landlord and the Inefficient Peasant" (1992) 26(2) *Journal of Economic Issues* 365.

⁵ SNS Cheung *The Theory of Share Tenancy* (Chicago University Press, Chicago, 1969) at 16.

sharecroppers nugatory. As such, the Bengal system of sharecropping is primarily an illustration of the exploitative relationship between the landlords and the sharecroppers.

The rural economy of Bangladesh is essentially agriculture based and characterised by the practice of sharecropping. In 2008, the Bangladesh Agricultural Census reported a total of 7.98 million sharecroppers in Bangladesh which is about 58 per cent of the peasant class. Studies show that the trend of sharecropping is rising over the past decades.⁶ The study also reveals that the richest 10 per cent of the landowners control 25 to 50 per cent of the agricultural land in rural areas of Bangladesh.⁷ The increase of sharecropping has a pervasive impact on poverty.⁸ Thus, it is necessary to take into account the situation of the sharecroppers in any poverty reduction strategy. The issue has been addressed from the historical, sociological and economic point of view by scholars. This chapter of the thesis, however, focuses its attention on the legal aspects of the problem. It is argued that good sharecropping legislation can transform a society by bringing in new remedies and equities for the sharecroppers. Their legal empowerment can bring a positive change in the poverty eradication strategy.⁹

III Sharecroppers' Legacy

The practice of sharecropping is a naturally allied phenomenon in the Bengal agrarian scene. Historical and contemporary circumstances have led to the widespread use of such phenomenon. Dasgupta claims that, sharecroppers, for all practical purposes, came into existence during the British period in response to the changes brought about in the land system by the British.¹⁰ The British legislative interventions (1757-1947) in the land system of Bengal contributed to the marginalisation of the sharecroppers. Successive colonial laws like the 1793 Regulation and 1885 Act marked the regrouping of social classes with no change in the status of the sharecroppers. The 1793 Regulation granted proprietary rights to *zamindars* in return for fixed and prompt revenue payments, ensuring a constant income

⁶ Mahabub Hossain and Abdul Bayes *Rural Economy & Livelihoods: Insights from Bangladesh* (AH Development Publishing House, Dhaka, 2009) at 10.

⁷ Kamal Siddiqui *Bangladeshe Sthanyio Sarkar* (translation: Local Government in Bangladesh) (National Institute of Local Government, Dhaka, 1989) at 13.

⁸ Keith Griffin and others outlined several factors responsible for such continued practice. They are: i) in the sharecropping system, the landowner runs less risk than the sharecropper who often does not have any crop insurance; ii) in sharecropping, the landowner incurs no expense for monitoring of production and supervision of labour; and iii) there is a socio-psychological status attached to land ownership that often yields political allegiance to the land owner. See Keith Griffin, Azizur Rahman Khan and Amy Ickowitz *Poverty and Distribution of Land* (University of California, Riverside, 2001) at 5.

⁹ Dan Banik *Rights and Legal Empowerment in Eradicating Poverty* (Ashgate Publishing, Surrey & Burlington, 2008) at 3.

¹⁰ Biplab Dasgupta "Sharecropping in West Bengal: From Independence to Operation Barga" (1984) 19(26) *Economic and Political Weekly* A85-A96. Generally, however, it has been stated that sharecropping was prevalent in Bengal in different forms before the intervention of the British. See Tushar Kanti Ghosh *Operation Barga and Land Reforms: An Indian Experiment* (BR Publishing Corporation, New Delhi, 1986) at [1-5].

hedged against risks.¹¹ The responsibility for land improvement and management was handed over to the *zamindars* who were expected to develop their estates in a manner similar to English gentlemen farmers.¹² The *zamindars* generally failed to fulfil these expectations, discovering alternative means of stabilising and boosting their incomes. They were allowed to transfer and divide rights and to sub-let holdings to others. Intermediate interests were created as a means of simplifying management of estates or raising income. Further subdivision and sub-letting of landholdings created a large class of rent-receivers between the *zamindars* and the cultivators, all claiming their own share.

On the lowest rung of the ladder were the sharecroppers, unprotected by legislation, with no rights or status.¹³ As such, they became one of the most exploited classes under the colonial land policy. HT Colebrooke's account on Bengal cultivation practices in the early 18th century showed that the landlords used their social position to make arbitrary deductions from the total produce before the crops were divided.¹⁴ The 1885 Tenancy Act did not even touch the fringe of the problem of the disinherited and oppressed sharecroppers created by the *zamindari*-tenure system.¹⁵

This was one of the reasons of widespread sharecroppers' unrest in Bengal during the late colonial phase. The then worldwide economic depression, the 1943 Bengal famine and the increased pressure on land coupled with the absence of legal protection "crushed out the existence of the sharecroppers" or "reduced them to the position of mere labourers".¹⁶ The Floud Commission Report of 1940 admitted their sufferings. The Commission favoured a strong security regime for the sharecroppers and recommended that their share in the produce be raised to two-thirds.¹⁷ Biplob Dasgupta commented that the Floud Commission's stand gave a strong impetus to the later developments of the institution of sharecropping.¹⁸ It supplied the moral justification to the sharecroppers' movements in the late 1940s led by the Bengal Kishan Sabha.¹⁹

¹¹ Adrienne Cooper "Sharecroppers and Landlords in Bengal, 1930-50: The Dependency Web and its Implications" (1983) 10(2) *Journal of Peasant Studies* 227.

¹² Ranajit Guha *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Mouton & Co, Paris, 1963) at 195.

¹³ BB Chaudhury "The Process of Depeasantisation in Bengal and Bihar, 1885—1947" (1975) 2 *Indian History Review* 1.

¹⁴ HT Colebrooke *Remarks on the Husbandry and Internal Commerce in Bengal* (Black and Parry, Calcutta, 1806) at 65. The share of the produce varied from region to region, but in no case did it exceed half of the total produce.

¹⁵ Amit Hazra *Land Reforms: Myths and Realities* (Concept Publishing Company, New Delhi, 2006) at 52.

¹⁶ Radhakamal Mukerjee *The Land Problems in India: Calcutta University Readership Lectures* (Longmans Green, London, 1933) at 107.

¹⁷ *The Government of Bengal Report of Land Revenue Commission* (Alipore, Calcutta, 1940) at 472.

¹⁸ Biplob Dasgupta, "Sharecropping in West Bengal during the Colonial Days" (1984) 19(13) *Economic and Political Weekly* A2 at [A8].

¹⁹ The Bengal Kisan Sabha was the Bengal branch of the peasant wing of Communist Party of India formed to mobilise peasant grievances against the zamindari attacks on their occupancy rights.

One of such organised movements was the *tebhaga andolon* of 1946-47. The *tebhaga andolon* was about the demands of the sharecroppers based on socialist political philosophy.²⁰ Sunil Sen's account of the movement provides an intensity of feeling of the sharecroppers in their rightful struggle.²¹ The movement left far-reaching political, social and economic implications in shaping the post-colonial agrarian relation.²²

Unfortunately, the post-colonial phase (1947-1971) faced huge political and communal turbulence and the rights of the sharecroppers passed sub silentio. There was one immediate attempt to ease the agitation in the form of a Bargadar's Bill in 1947, but this did not see the light of the day.²³ The subsequent law, the 1950 Act did not provide any protection to the sharecroppers.²⁴ The Act brought about a radical change in the land system of East Pakistan (currently Bangladesh) through the abolition of the *zamindari* system and created a uniform class of tenants under the government. Sadly, the Act refused to recognise the sharecroppers even as tenants.²⁵ Such omission, Obaidullah and Shawkat Ali claimed, was intended to protect "entrenched vested interests".²⁶ A study said that 90 per cent of the rural population of Bangladesh was faced with "ubiquitous sharecropping", "widespread sub-marginal holdings" and "dubious land records" in the early 1950s.²⁷ The subsequent reform attempts largely served the interests of the substantial landholders who constituted the important catalyst of power politics in the post-colonial era (1947-1971).²⁸ The *tebhaga* spirit was met by massive state repression. The question of the rights of the sharecroppers then principally became the issue of socialist-led agrarian struggles which had to face the complex series of post-colonial relations.²⁹

²⁰ The principal demands of the *tebhaga* movement were: i) two-thirds share of the produce; ii) occupancy rights on land; iii) reduction of moneylenders' interest rate; iv) abolition of illegal cesses; v) receipts for share taken by the landlords and vi) Threshing of crops in the sharecroppers' courtyard. See generally, Asok Majumdar *Peasant Protest in Indian Politics: Tebhaga Movement in Bengal* (NIB Publishers, New Delhi, 1993) at 69.

²¹ Sunil Sen "*Tebhaga Chai*" (translation: we demand two-thirds share) in AR Desai (ed) *Peasant Struggle in India* (Oxford University Press, New Delhi, 1981) at [442-452].

²² Adrienne Cooper above n 11, at 227.

²³ The Bill received opposition from both the Congress and the Muslim League benches. As such, it was shelved.

²⁴ In its original Bill, the SAT Act contained a chapter on the rights of the sharecroppers, but it was dropped at the discussion stage of the Bill. See Government of East Bengal, East Bengal Legislative Assembly Proceedings (Official Report), 4th Session, 1949-50.

²⁵ S 2(27) of the SAT Act provides that: "A person, who, under the system generally known as "*adhi*", "*barga*" or "*bhag*", cultivates the land of another person on condition of delivering a share of the produce that person, is not a tenant."

²⁶ AZM Obaidullah Khan and AMM Shawkat Ali *Legal and Administrative Aspects of Land Reform Measures and Agrarian Welfare in Bangladesh* (Bangladesh Agricultural Research, Dhaka, 1984) at 24.

²⁷ Lutful Kabir *Land Laws of Bangladesh* (Law House, Dacca, 1969).

²⁸ FT Jannuzi and JT Peach *The Agrarian Structure of Bangladesh: An Impediment to Development* (Westview Press, Colorado, 1980) at 9.

²⁹ Partha Chatterjee above n 1, at 200.

After Bangladesh's independence in 1971, it was hoped that all unfair and insecure contractual arrangements would be modified in time with the constitutionally declared objectives of economic, social and political justice. The early attempts of land reform were, however, predominantly occupied with determining of land ceiling and the settling of redistribution claims.³⁰ The sharecroppers again remained outside the purview of land reform agenda for more than a decade. In 1984, the Land Reforms Ordinance (LRO) was passed to recognise their status. The LRO incorporated the *tebhaga* principle of share-produce, suggested a share contract between the landowners and the sharecroppers, specified the grounds for eviction and established a process of dispute resolution. Two subsequent action plans were formulated in 1987 and 1997 to give effect to the provisions of the LRO. But the attempts were hardly successful as a study shows that the percentage of sharecroppers had increased considerably over the previous two decades and the poverty emanating from the *barga* practice remained almost same.

In the post-colonial situation, the different economic relations that existed between the sharecroppers and the landlords during the colonial days continue to influence the terms of sharecropping arrangements.³¹ The share contracts reflect the origins of sharecropping and the unequal power relationship between sharecroppers and landlords. The contract scarcely reflected a "consensus" between the parties required by the basic principles of contract law. "What justice", asked Adrienne Cooper in 1983, "was there in the share contract that maintained the landlord in affluence and the sharecropper just above destitution?"³² Cooper's question is still relevant as the situation has not changed a lot since then.

IV The Land Reforms Ordinance 1984

After independence, as mentioned above, the Land Reforms Ordinance 1984 (LRO) was the first land reform law since 1947 that dealt with the interests of the sharecroppers. Following the recommendations made by the Land Reform Committee, 1983, the law came in the form of an "Ordinance" promulgated by a Military Ruler.³³ It appears from the

³⁰ The land ceiling is the highest legal limit of private land ownership. In 1972, the ceiling was fixed at 100 *bigha* (33.3 acres) per family and the land surplus over the legal limit was to be acquired and distributed to the landless or poor farmers. However, the success of this land reform attempt is open to question. See chapter 6.

³¹ Atiur Rahman's empirical evidence from two villages of Bangladesh suggests that the land concentration in the hands of a few increased after the introduction of the State Acquisition and Tenancy Act 1950. Rahman found a "pattern of differentiation between the owners and non-owners" in the following thirty years of the post-colonial period and discovered that there was a "fast increase in the ranks of the landless." See Atiur Rahman "Differentiation of the Peasantry in Bangladesh: 1950s to 1980s" (1986) 14(11/12) *Social Scientist* 68.

³² Adrienne Cooper, above n 11, at 227.

³³ General HM Ershad ruled Bangladesh for nine years from 1982-1990. General Ershad took many legislative steps in the form of "Ordinance" with a view to bringing changes in the agrarian life of Bangladesh. The 1984 LRO was one of such steps. The political intention of the LRO, however, is open to question. It is said that the "Ordinance" was a colourable exercise of the President's legislative power with a view to attaining political objectives, gaining of popularity at the root level. See Prosanta Roy *Bangladesh: Dark Facets of*

preamble of the LRO that the law was promulgated, amongst other objectives, for the purpose of “maximising production” and ensuring a “better relationship between landowners and sharecroppers”. Keeping these objectives in view, the LRO provides three important aspects of sharecroppers’ protection:

(a) The law recognises the *tebhaga* principle of sharing the produce.³⁴ Under this principle, the produce is to be divided into three portions of which the landowner and the sharecropper receive one each. The owner gets this portion as he supplies the land and the sharecropper gets the portion as he provides the labour. The third portion should be owned or shared by the parties according to the inputs they invest in the cultivation.

(b) The law fixes the tenure of the *barga* contract at five years and the ceiling of *barga* land as fifteen *bigha*.³⁵ Thus, it extends to the sharecroppers a couple of rights including the fixity and heritable right of tenure, right to purchase the *barga* land, right to remedy and right not to be arbitrarily evicted.

(c) The law prescribes an “authority” to intervene in resolving “disputes” between the *bargadars* and the landowners.

V *Reforms and the Interest of the Sharecroppers*

The rights and protection thus offered to the sharecroppers appear to be encouraging features of the 1984 LRO. However, an in-depth perusal says otherwise.

A *No Sharecropping without Contract*

The principal safeguard provided by the 1984 LRO is its requirement of a written share contract. No doubt the absence of any formal document was one of the main reasons of sharecroppers’ sufferings in the colonial days. To remedy the situation, therefore, s 8(1) of the LRO provides as follows:

Subject to the other provisions of this Ordinance, no person shall allow another person to cultivate his land and no person shall cultivate the land of another person on condition of sharing the produce of such land between them unless they execute a contract for such cultivation in such form and manner as may be prescribed.

The provision is posed from a negative angle. It does not recognise the practice of sharecropping in a straightforward way. Rather it obliges the parties to enter into such arrangements subject to execution of a share contract. Section 15 of the LRO in a repetitive fashion imposes an obligation particularly upon the sharecropper not to cultivate another’s

Land Rights and Management with Directions to Agrarian Reform (AH Development Publishing House, Dhaka, 2008) at 60.

³⁴ *Tebhaga* principle suggests that a sharecropper will be entitled to receive two-thirds of the *barga* produce. See AZM Obaidullah Khan and AMM Shawkat Ali above n 26, at 26.

³⁵ The produce that the *bargadar* may obtain from any land surplus to the ceiling of *barga* land (15 *bigha*) is liable to be compulsorily acquired by the government. See LRO, s 14(2).

land except under a “*barga* contract” or “complete usufructuary mortgage”³⁶ or as a “servant or labourer”. Thus, the requirement of a formal contract is a development upon the capricious eviction of sharecroppers by the landlords. The law also tightens the security of tenure by providing the share contract’s validity for five years that commences from such date as may be specified in the *barga* contract. The *barga* arrangements that existed at the time of coming into operation of the law were given validity and the parties were asked to execute contracts within a specified time. Further security was provided in the event of the death of a sharecropper. Where a *bargadar* dies before the expiry of the period of *barga* contract, the cultivation of the *barga* land might be continued by the surviving members of the family of the deceased *bargadar* till such expiry or till the *barga* contract is ended on any other grounds under the termination clause. These all seem progressive.

However, the written formality is not complied with in real practice. In Bangladesh, 42 per cent of all arable land is sharecropped under terms and conditions that do not reflect the legal mandate.³⁷ The Asian NGO Coalition for Agrarian Reform and Rural Development in its Bangladesh Country Report 2011 found that fewer than one per cent of Bangladeshi sharecroppers has legal documents. The sharecroppers, therefore, have traditionally been subject to extreme insecurity in rural Bangladesh since share agreements are almost exclusively oral in nature.

The requirement for a formal contract, thus, failed to make an impact on the share-tenancy system.³⁸ Consequently, in the absence of written agreements, the landlord can evict any sharecropper at their whim, thereby violating the interests of the sharecroppers. The following provision of the LRO also works to the detriment of the sharecroppers:

If a person cultivates the land of another person in violation of the provisions of this section, the produce of the land may be compulsorily procured by the Government by order made in this behalf by the prescribed authority.

Jannuzi and Peach criticised the way the main features of the LRO were drafted. They were of the opinion that such linguistic vagueness rendered the LRO’s principal provisions either unenforceable or meaningless.³⁹ Predictably, the ‘Ordinance’ did not prove difficult to evade as loopholes were built in.

³⁶ The LRO provides no definition of “complete usufructuary mortgage.” However, under s 2(6) of the SAT Act such mortgage means that the mortgagor will transfer the right of possession in the land to the mortgagee for securing the payment of some money or the return of grain advanced or to be advanced by way of loan. The condition is that the loan, with all interest is deemed to be extinguished by the profits arising from the land during the period of the mortgage.

³⁷ Brigitta Bode, Jay Goulden, Francis Lawanda and Elisa Martinez “CARE’s Programming Approaches in Malawi and Bangladesh: The Winners and Losers from Rights-Based Approaches to Development” (University of Manchester, Manchester, 2005).

³⁸ Mausumi Mahapatro “An Analysis of Land, Migration and Rural Differentiation: A Case Study in Bangladesh” (PhD Thesis at SOAS, University of London, 2013) at 311.

³⁹ FT Jannuzi and JT Peach “Bangladesh: A Strategy for Agrarian Reform” in Roy Prosterman, MN Temple and Tim Hanstad (eds) *Agrarian Reform and Grassroots Development: Ten Case Studies* (Lynne Rienner, Boulder, 1990) at 372.

B *Share of the Produce*

There is a view that reforms designed to eradicate poverty cannot be effective unless they address the real cause of poverty.⁴⁰ One of the real causes of poverty of the Bangladeshi sharecroppers is the existence of an exploitative relationship in the agrarian structure. So, a land reform law is expected to take into consideration the reasons of poverty. The LRO frustratingly ignores this “exploitative” character of the sharecropping system. It seems that the LRO places the parties on the same juridical plane and ignores existing unequal societal relationships between the parties who enter into the *barga* contract. This becomes apparent if one of the cardinal aspects of the *barga* contract—the share of *barga* produce—is taken into consideration. Section 12 of the LRO suggests the manner of distribution of the share of produce between the parties:

Section 12. (1) The produce of any *barga* land shall be divided in the following manner, namely:

- (a) one-third shall be received by the owner of the land;
- (b) One-third shall be received by *bargadar* for the labour;
- (c) 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.

On a plain reading, it seems that the shares of the produce are to be divided equally among the parties. The sharecroppers may expect to have more than half of it only if they bear “something more”⁴¹ than their own “labour”. In reality, the sharecroppers cannot bear these as they are at the bottom of the agrarian hierarchy and as such, financially impoverished. They can support the costs only if the state raises their capability.⁴² In the absence of such support from the state, the division arrangement prescribed by s. 12 (a) of the LRO, turns into a form of rent or labour remuneration. This becomes an ideal situation for the landowner to increase the share of the produce by exploiting the sharecroppers’ labour. The *barga* contract, thus, in essence, ends up as a method of “surplus appropriation” by the landowners who control the “means of production” in a capitalist society like Bangladesh. In the process, the “labour” of the sharecropper is transferred to the landowner in the form of a benefit which has been termed by the Marxist school of jurisprudence as “surplus product”.⁴³ From this perspective, it may be argued that the existing relations of production in sharecropping arrangements accentuate unequal access to its means and facilitate the transference of surplus labour to the landowner.

⁴⁰ Lucy Williams, Asbjorn Kjonstad and Peter Robson *Law and Poverty: The Legal System and Poverty Reduction* (Zed Books, London, 2003) at 1.

⁴¹ Cost of seeds, fertiliser, irrigation, insecticides, threshing, marketing etc.

⁴² As of 2016, the Bangladesh Bank has come up with some loan schemes to help the sharecroppers for running their cultivation. This, however, is subject to conditions and bureaucratic formalities.

⁴³ R Pearce “Sharecropping: Towards a Marxist View” in TJ Byres (ed) *Sharecropping and Sharecroppers* (Frank Cass, London, 1983) at 40.

There is another exploitative aspect of the share equation. The sharecroppers are often compelled to enter into a debt-bondage as their income from cultivation is too small to support the family beyond the harvest. Often, their landlords become their creditors. Perhaps this is the situation of Bengali agrarian society what Amit Bhaduri calls the society of “semi-feudalism”.⁴⁴ In such a society, Bhaduri argues, the relationship between the sharecropper and the landowner is of a highly “personal character” where the former enters into debt-bondage with the latter and faces difficulty to access the modern capital market without the mercy of landowner.⁴⁵ Bhaduri championed the model based on the study of the *kishani* system of Birbhum (West Bengal).⁴⁶ As such, the model may not suit with all situations.⁴⁷ Nonetheless, the relevance of this model to the Bangladeshi context cannot be overlooked. The reason is that the personal nature of the relationship, presence of debt-bondage and sharecropper’s difficult access to modern market are the benchmarks for the Bangladeshi sharecropping system.

The LRO, while making the share allocations, lost sight of this phenomenon. In an identical situation of a mortgage deal between a cultivator and a money lender, the legislature of Bangladesh earlier took note of the poverty of the cultivators. It inserted provisions in the 1950 SAT Act to protect the peasants from the moneylenders who taking advantage of poverty of the tenants would force them to enter into a disadvantageous deal.⁴⁸ In the case of sharecropping law, this protection was not provided.

The sharecropping mechanism, essentially, constitutes social exploitation. MA Taslim, however, seems sceptical in admitting any exploitative relationship between the landowners and sharecroppers in the 21st century. In particular, Taslim claims that the exploitative relationship cannot be inferred where the social status of the parties to the contract are close in terms of the amount of land they possess.⁴⁹ Taslim, therefore, contends that an “exogenous” change in the share of the produce will lead to distortions in the village economy. Taslim’s view avoids the necessity of transforming the law for the purpose of creating new opportunities and building up capabilities of the sharecroppers by targeted state interventions.

The point, therefore, is not essentially of an increase in the share, but of devising a way of enhancing the bargaining capacity of the sharecroppers in the type of agrarian hierarchy

⁴⁴ Amit Bhaduri “A Study of the Agricultural Landlessness under Semi-Feudalism” (1973) 83(1) Economic Journal 124.

⁴⁵ Amit Bhaduri “An Analysis of Semi-Feudalism in East Indian Agriculture” (1973) 16 Frontier 34.

⁴⁶ The *kishani* system implies the worst form of sharecropping where the *kishan* (person cultivating) supplies only labour and in exchange receives a wage in kind that may vary with the actual production.

⁴⁷ Critics point out that the Bhaduri model is problematic on two grounds: i) sharecropping is not always semi-feudalistic and ii) it is locally specific. See Biplab Dasgupta above n 10, at [A85-A96].

⁴⁸ *Asek Elahi v Jalal Ahmed & Others* [2015] 20 BLC 5(AD). See also *Bangladesh v Haji Abdul Gani Biswas* [1981] 1 BLD 8 (AD).

⁴⁹ MA Taslim “Redistributive Land and Tenancy Reform in Bangladesh Agriculture” (1993) 27 (3) Journal of Developing Areas 341.

in which they live. This is necessary, as Arjun Sengupta argues in a general context, to produce the desirable and fundamental values of an equitable and just society.⁵⁰ If the state could have enhanced the capability of the sharecroppers to help them grow more crops, they could have claimed the maximum produce even under the present legal framework prescribed by s 12 of the LRO. In order to make the arrangement more meaningful, the state needs to assume a pro-active role in terms of supplying the inputs to the agriculture. In the absence of such a role from the state, the “insecure sharecropper” becomes fearful of losing the tenancy that drives them to renew their onerous contract with the landowners. Even they learn to compromise with the landowners’ terms so the latter become satisfied to offer more tenancy to the obedient sharecroppers. The sharecropper learns to take the “small mercy” offered by the landowner and loses the courage to enter into a “better deal”.⁵¹ This is the situation of poverty what Amartya Sen calls, “capability deprivation”.⁵² The idea of “capability deprivation” as Sen explains, takes away the corresponding capability to choose to live in the way one hopes to choose.⁵³

The LRO provision illustrates a situation identical to “capability deprivation” where a landowner refuses to receive the share of the produce. The law prescribes a time consuming and cumbersome process if the landowners refuse to take their share being dissatisfied with the produce.⁵⁴ The *bargadar* in such situation may well accede to the wish of the owner rather than go through the processes of filing application about disputes, selling the produce and depositing the sale receipts with the “prescribed authority”.⁵⁵ It is more likely that the sharecropper will resort to the former than going for the prescribed legal avenue, as that tends to save the *bargadar*’s time, energy and money.⁵⁶ The 1984 LRO, therefore, is inherently biased against the sharecroppers. Under such legal arrangement, the sharecroppers are placed in a poverty cycle.

⁵⁰ Arjun Sengupta “The Political Economy of Legal Empowerment of the Poor” in Dan Banik (ed) *Rights and Legal Empowerment in Eradicating Poverty* (Ashgate Publishing Limited, Surrey & Burlington, 2008) at [31-46].

⁵¹ Amartya Sen *Resources, Values and Development* (Clarendon Press, Oxford, 1984) at 309.

⁵² Amartya Sen *Development as Freedom* (Oxford University Press, Oxford, 1999) at 20.

⁵³ At 20.

⁵⁴ The owner is required to give a receipt to the sharecropper after the acceptance of his share of the produce and vice-versa. Then, a long process starts in the event of owner’s refusal to receive his share. A sharecropper is then left with the following legal avenues: (i) apply to the “prescribed authority”; (ii) hear of the parties after notice; (iii) ask the owner to take delivery; (iv) sale of the produce in case of refusal to take delivery; (v) deposit of the sale money with the “prescribed authority” and (vi) offer of money to the owner or deposit with the government treasury in case of refusal.

⁵⁵ As of 1 February 2017, no “prescribed authority” has been formed by the government.

⁵⁶ Obaidullah and Ali *Legal and Administrative Aspects of Land Reform* above n 26, at 22.

C *Security of Tenure*

The grounds of termination of the share contract are significant for ensuring the security of tenure of the share contract and protect the sharecroppers from arbitrary eviction. Section 11 of the LRO suggests grounds for termination of the share contract. It reads:

(1) No owner shall be entitled to terminate a barga contract except in execution of an order, made by the prescribed authority, on the ground that-

- (a) the *bargadar* has, without any reasonable cause, failed to cultivate the *barga* land;
- (b) the *bargadar* has, without any reasonable cause, failed to produce any crop equal to the average output of such crop in any land similar to the *barga* land in the locality;
- (c) the *bargadar* has used the *barga* land wholly or partly for any purpose other than agriculture;
- (d) the *bargadar* has contravened any provision of this Ordinance or the rules or orders made thereunder;
- (e) the *bargadar* has surrendered or voluntarily abandoned his right of cultivation;
- (f) the barga land is not under personal cultivation of the *bargadar*; or
- (g) the owner requires the barga land bona fide for personal cultivation.

(2) If the owner, without reasonable cause, fails to bring under personal cultivation any land on termination of a barga contract under subsection (1)(g) or allows such land to be cultivated by some other *bargadar* within twenty-four months of the date of such termination, the prescribed authority may, on an application made by the evicted *bargadar*, restore the possession of the land to such *bargadar* who shall thereupon continue to cultivate the land till the expiry of the period of barga contract or termination of the barga contract under this Ordinance.

Some vagueness in the clauses offered convenient loopholes for the landowners to evict the *bargadars*. Firstly, at the micro level of economy in Bangladesh, there is no acceptable method of determining the “average output” as stated in clause 11 (b).⁵⁷ So, the clause appears to weigh heavily against the *bargadars* in the absence of any systematic records of yield at the micro level. Secondly, the euphemistic term “personal cultivation” in clause 11(g) is open to wide interpretation.⁵⁸ This seemingly reasonable but ill-defined right of the landlord to resume tenanted land can lead to the eviction of the sharecropper any time. Thirdly, the clauses 11(a) and 11(b) heavily rely upon the “reasonable cause” test. The clauses do not define “reasonable cause”. Moreover, it is not clear who should decide the question of reasonableness. If it is inferred from the LRO’s structure that the “prescribed authority” is empowered to determine the question, it can be argued that the decision may be highly unfavourable to the sharecroppers as the constitution of the “prescribed authority” is not defined by the LRO.

⁵⁷ AMM Shawkat Ali *Politics and Land System in Bangladesh* (National Institute of Local Government, Dhaka, 1986) at 200.

⁵⁸ Section 2(h) of the LRO 1984 defines “personal cultivation” as cultivation not only by owner’s own labour but also by the labour of any member of his family or by the labour of any servant or labourer employed on wages to supplement his own labour or that of any member of his family.

Moreover, the legislation discourages a judicial determination of the question of reasonableness as it bars the civil courts from entertaining any dispute between the landowners and the sharecroppers.⁵⁹ In this way, the share tenure envisaged in this section is poorly articulated with ambiguities open to misuse and exploitation. The loopholes create insecurity of tenure that goes against the interest of the sharecroppers. Insecurity of tenure serves an “economic function”⁶⁰ ie it encourages landowners to alter share arrangements to the detriment of the sharecroppers.

D *Sharecropper’s Right to Pre-emption*

One of the encouraging features of the LRO is its grant of the right of pre-emption to the sharecroppers, if the owner wishes to sell the land under *barga* arrangement. The grant of such a right raises a possibility that if the owner desires to sell the *barga* land, the sharecropper may be a candidate to purchase the land. Section 13 of the LRO, however, seems to have compromised the attributes of the right to pre-emption. It imposes too many restrictions on the right and prescribes long formalities in order to be able to apply for the right to pre-emption. Section 13 of the LRO reads:

(1) Where the owner intends to sell the *barga* land, he shall ask the *bargadar* in writing if he is willing to purchase the land: Provided that this provision shall not apply where the owner sells the land to a co-sharer or to his parent, wife, son, daughter or son's son or to any other member of his family.

(2) The *bargadar* shall, within fifteen days from the date of receipt of the offer, inform the owner in writing of his decision to purchase or not to purchase the land.

(3) If the *bargadar* agrees to purchase the land, he shall negotiate the price of the land with the owner and purchase the land on such terms as may be agreed upon between them.

(4) If the owner does not receive any intimation from the *bargadar* regarding his decision either to purchase or not to purchase the land within the specified time or if the *bargadar* informs the owner of his decision not to purchase the land or if the *bargadar* does not agree to pay the price demanded by the owner, the owner may sell the land to any person he deems fit: provided that the owner shall not sell the land to such person at a price which is lower than the price offered by the *bargadar*.

(5) Where the *barga* land is purchased by a person other than the *bargadar*, the *barga* contract in respect of the land shall be binding upon the purchaser as if the purchaser were a party to the contract.

It appears that the section does not expressly recognise the concept of “pre-emption”.⁶¹ Yet, there is scope to interpret the provision as a kind of pre-emption by fiction in the sharecroppers’ favour. The prevailing law on pre-emption, however, does not contemplate

⁵⁹ LRO 1984, s 20: “No order, decision, action, or proceedings made or taken by any authority under this Ordinance shall be called in question in any Court and no Court shall entertain any suit or proceeding in respect of any such order, decision, action or proceedings.”

⁶⁰ Keith Griffin, Azizur Rahman Khan and Amy Ickowitz *Poverty and Distribution of Land* (University of California, Riverside, 2001) at 5.

⁶¹ The marginal note of s 13 uses the term “*bargadar*’s right to purchase.”

such a fictional analogy.⁶² Therefore, the attributes for pre-emption rights are compromised by s 13 of the LRO. In a legal challenge, a sharecropper claiming the right of pre-emption may face difficulty in establishing the standing to sue. It was necessary to grant the right to pre-emption at least to the extent the legal system permits for a better chance of the sharecroppers.

The 1950 SAT Act, the main post-colonial land reform law, granted the right of pre-emption only to the co-sharers by inheritance. The LRO, in contrast, widened the number of claimants—extending the right to all types of co-sharers (co-sharer by inheritance and co-sharer by purchase) and “any other member of his family”. Thus, under the 1984 LRO, a sharecropper competes with more candidates as claimants of the right to pre-emption. It appears from the linguistic vista of s 13(1) of the LRO that a sharecropper will only have a chance, if persons entitled to pre-emption under the 1950 Sat Act refuse to purchase the land. In essence, therefore, the right to pre-emption accorded to the sharecroppers under s 13 is an illusion and an example of drafting politics designed to serve the interest of the landed class. The procedural formalities mentioned in other clauses of s 13 of the LRO do not protect the sharecroppers' interest, as it is clear that the attributes of the pre-emption right are compromised in s 13(1).

E Resolution of Disputes

The law prescribes a complicated procedure for the settlement of *barga* disputes.⁶³ The “prescribed authority” is made the sole judge to decide whether a person is a *bargadar* or not or to whom the share of the produce should be delivered. The application for settling any dispute needs to be submitted within three months from the date of the dispute arising. The “prescribed authority” is required to give the parties an opportunity of being heard and adducing evidence and such enquiries as may be necessary. The prescribed authority is required to give its decision within three months from the date of filing an application by the *bargadars*. This is followed by the provision relating to appeal against the decision of the “prescribed authority”. A separate appellate authority is proposed under the legislation. An appeal is required to be filed within thirty days from the date of receipt or knowledge of the order passed by the “prescribed authority”. No time limit, however, is prescribed for the disposal of appeals.

Shawkat Ali defends such a prescription of settlement on the ground of the necessity to keep the law within the “bounds of the juridical foundation of the state”.⁶⁴ However, if the sharecroppers are to be saved from social exploitation, the law has to forge new remedies

⁶² The existing law on pre-emption in Bangladesh is governed by s 96 of the State Acquisition and Tenancy Act, 1950. The legal system, however, also recognises the Muslim law of pre-emption without affecting the statutory provisions.

⁶³ The law prescribes three types of disputes under s 16. These are: (a) division or delivery of the produce; (b) termination of *barga* contract; and (c) place of storing and thrashing of the produce.

⁶⁴ Obaidullah and Ali above n 26, at 32.

and equities. Ebadul Hoque J, for example, argues for introducing alternative dispute resolution system to settle the disputes between the landlord and the sharecroppers.⁶⁵ Otherwise, the formidable institutional mechanism prescribed by the LRO for settling *barga* disputes remains antithetical to the interests of the *bargadars*.

Thus, the list of shortcomings of the 1984 LRO is long. It is now pertinent to look at the West Bengal experience in order to have a better understanding of the situation of the sharecroppers.

VI *The Experience from West Bengal: A Better Model?*

The “reform” attempt by 1984 LRO was a failure. One of the reasons of the failure was the politics of land law making in the post-colonial land reforms. It needs to be noted that the LRO 1984 came in the form of an “Ordinance” which indicates that it was not debated in the parliament.⁶⁶ Therefore, the legislation is of questionable value, firstly because, it was promulgated by General HM Ershad, a military ruler who captured the country’s power through unconstitutional means and used the village landlords to accentuate the power-base.⁶⁷ In the second place, the LRO also lacks procedural and jurisprudential soundness as one of the Bangladesh Supreme Court rulings declared all the activities of General Ershad “unconstitutional”, although the same judicial ruling saved Ershad’s legislative measures on the grounds of “necessity”.⁶⁸ In addition to these weaknesses, the LRO lacked pro-sharecropping provision in three main aspects: (i) the state’s role in increasing the bargaining power of the sharecroppers; (ii) provision for official help to execute the *barga* contract and (iii) a simplified procedure for dividing the *barga* produce and settling disputes.

Successive governments have created a system which determines the ways to construct poverty among the sharecroppers. A concerted and collaborative legal regime was to be established to enhance the bargaining capacity of the sharecroppers. The law needs to embody a commitment on the part of the state to change the fate of the many millions. This is a requirement for pro-poor law which VR Krishna Iyer describes as: “law at people’s service”.⁶⁹ The idea is also expressed in terms of “legal empowerment of the poor”.⁷⁰ Under

⁶⁵ Kazi Ebadul Hoque *Bangladesher Bhumi Ain o Bhumi Beboothar Kromobikash* (Bangla Academy, Dhaka, 2000) at 235.

⁶⁶ Under the Bangladeshi constitution, the President is empowered to promulgate an “Ordinance” subject to conditions when the parliament is not in session or stands dissolved. The Ordinance requires to be approved within thirty days of the next session of parliament. However, this requirement was never fulfilled in this case, as there was no parliament under the military regime. Subsequently, the instruments promulgated during the military government were validated by the Constitution (Seventh Amendment) Act, 1986.

⁶⁷ Prosanta Roy above n 33, at 59.

⁶⁸ *Siddique Ahmed v Government of Bangladesh and Others* [2013] 65 DLR 8 (AD).

⁶⁹ VR Krishna *Wandering in Many Worlds: An Autobiography* (Dorling Kindersely & Pearson, New Delhi, 2009).

⁷⁰ The Commission on Legal Empowerment of the Poor *Making the Law Working for Everyone and United Nations Development Program* (Working Group Reports, World Bank, New York, 2008).

this idea, the state and other institutional machinery must be geared towards the provision of rights recognised in law. The poor can protect their interests when their supporters or governments—employing legal and other means—create new rights, capacities and opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalisation.

The experience of land reforms from West Bengal, India, can be an example for Bangladesh. There are two principal reasons for this. Firstly, both West Bengal and Bangladesh share a common legacy of land system. Secondly, the *tebhaga* movement of the sharecroppers was as intense in Bangladesh as it was in West Bengal in the late 1940s.

In dealing with the sharecroppers' right, however, Bangladesh and West Bengal's stands are the reverse of each other. West Bengal legislated about the sharecroppers' right preceding its tenancy legislation of 1953 that abolished *zamindari* system. Though Bangladesh abolished the *zamindari* system first, it could not legislate on the issue of sharecropping until 1984. This considerable time gap made a remarkable difference between the sharecroppers' status of the two regions.

In 1951, the Conciliation Board was established in West Bengal to settle the disputes. Representation of the sharecroppers was thus ensured. The West Bengal Land Reforms Act 1955 and its subsequent amendments set shares of the crops and made other provisions to protect the sharecroppers.⁷¹ Despite several amendments, the 1955 Act did little to plug out the problems.⁷² Nonetheless, in the changing political and legislative landscape, the “operation barga”⁷³ project was introduced in the late 1970s with the participation of all stakeholders. The project was modelled on the concept of legal land reform with popular participation, what Bandyopadhyay terms as the “Konar recipe”.⁷⁴ Though not infallible in its operation, “operation barga” scored a better record than Bangladesh in affording protection to the *bargadars* and setting conditions for them so that they feel motivated to produce surplus crops and thus lead to the development of the rural economy.⁷⁵

⁷¹ The West Bengal government at first enacted the *Bargadars* Act 1950 as an interim measure. This law did not recognise the occupancy rights of the sharecroppers and therefore, they enacted another legislation called the Estate Acquisition Act 1953. In 1955, the Land Reforms Act was enacted in a more comprehensive form. It, however, underwent regular amendments in 1957, 1960, 1962, 1965, 1966, 1969 and 1970. An illuminating analysis of the land reforms in West Bengal can be found in Ratan Ghosh and K Nagaraj “Land Reforms in West Bengal” (1978) 6(7) *Social Scientist* 50 at [67].

⁷² At 55.

⁷³ The “operation barga” is a programme designed by the West Bengal government in 1977 to implement and enforce land laws that protected the interests of the sharecroppers.

⁷⁴ The concept was formulated by Hare Krishna Konar, the 1967-1969 West Bengal Communist Government's Land Minister. See D Bandyopadhyay *Land, Labour and Governance* (Worldview, Calcutta, 2007) at 94.

⁷⁵ A major criticism of the system is made by Ratan Khasnobis on the ground of reducing land reform's “revolutionary” character into an “ordinary” one. See Ratan Khasnobis “Operation Barga: Limits to Social Democratic Reformism” (1981) XVI (25-26) *Economic and Political Weekly* A 43-A48. Dasgupta, however, terms the criticism as a “lack of understanding” of the real objectives of the “operation barga.” See Biplab

Under “operation barga”, the sharecroppers registered their contract so that they can enjoy legal protection concerning the division of crops and security against eviction. The sharecroppers’ names were recorded and they were given a certificate describing their status. The recording of the names was done after a series of “reorientation camps” participated in by the political organisations, government officials, *bargadars* and other poor villagers.⁷⁶ Thus, the drive had four elements: organisation, verification, sensitisation and mobilisation of the sharecroppers and other stakeholders related to the process. Experts admit the importance of these elements to prevent the exploitation of the landowners. Brigitta Bode emphasises mobilising the sharecroppers in terms of cooperation and assistance. These all, Brigitta, argues, potentially contribute to greater productivity.⁷⁷ “Operation barga”, though in essence a mechanism of tenancy law, can be seen as affecting a limited yet significant change in property rights to the extent that it de facto confers quasi-property rights to the sharecroppers.⁷⁸

While notions of property rights and legality thus played an important role in the West Bengal land reform process,⁷⁹ Bangladesh did not adopt any such programme. Hussain, therefore, admits the necessity of amendment of the LRO in the light of operation barga. Hussain favours an obligatory registration of the *barga* contract where the owners should be asked to bear the cost of registration. Hussain also advocates the making of *khatiyani* (a document of rights to land) in the name the *bargadars* in an effort to protect their interests.⁸⁰

The West Bengal system ensured a fifty-fifty share of the produce should the landowner bear the inputs. In all other cases, the sharecropper gets two-thirds—an ideal proportion based on the *tebhaga* philosophy. The Bangladeshi provision on the point is contradictory to the *tebhaga* principle. The effect of the 1946 *tebhaga* movement, as Kamal Siddiqui argues, was “lost in Bangladesh in the post-colonial political context”.⁸¹ As argued above, generally the landowner can take away two-thirds of the share of the produce in the context

Dasgupta “Sharecropping in West Bengal: From Independence to Operation Barga” (1984) 19(26) Economic and Political Weekly [A85-A96].

⁷⁶ An illuminating discussion on the innovative methodology of operation barga can be found in Tim Hanstad and Jennifer Brown “Land Reform Law and Implementation in West Bengal: Lessons and Recommendations” (2001) 112 Rural DevInst Rep. 1.

⁷⁷ A project of CARE Bangladesh found in 2004 that the Land Reforms Ordinance 1984 (LRO) did not ensure a fair share of agricultural yields; provide security from eviction; and increase the agricultural productivity of the land. See Brigitta Bode, Jay Goulden, Francis Lwanda and Elisa Martinez “Putting Rights-based Development into Context: CARE’s Programming Approaches into Malawi and Bangladesh” (University of Manchester, 2005) at 9.

⁷⁸ Ajitava Raychaudhuri “Lessons from the Land Reform Movement in West Bengal” (Working Paper, World Bank, Washington DC, 2004) <<http://documents.worldbank.org>>.

⁷⁹ Kenneth Nelson “Not on our Land! Peasants’ Struggle against Forced Land Acquisition in India’s West Bengal” in Dan Banik *Rights and Legal Empowerment in Eradicating Poverty* (Ashgate, Surrey & Burlington, 2008) at 226.

⁸⁰ T Hussain *Land Rights in Bangladesh* (University Press Limited, Dhaka, 1995) at 39.

⁸¹ Kamal Siddiqui above n 2, at 22.

of Bangladeshi society. Moreover, unlike West Bengal, the Bangladesh system lacks provision for cooperatives and land banks to enhance the capability of the sharecroppers.

Unlike Bangladesh, the West Bengal system importantly kept the situation under constant review and necessary adjustments were made in the light of social and political changes. Thus, the Bangladeshi legislative steps were “exceedingly meagre and vague” compared to the legal provisions enunciated under “operation barga”. Obaidullah and Ali point out three important shortcomings of the Bangladeshi legislation compared to corresponding provisions in the West Bengal law:⁸² i) it allows owner’s right to resumption on the ground of sharecropper’s negligence; ii) it imposes no restriction on owner’s to retention of land on the ground of personal cultivation; iii) it fixes no place of storing and threshing of crops in the event of disagreement between the owner and the sharecropper.

The main reason for such a difference can be attributed to the kind of land law politics Bangladesh and West Bengal pursued after decolonisation. It appears that the post-colonial historical and political process in West Bengal led to a liberal policy towards the sharecroppers in West Bengal. In spite of challenges posed from the lower echelons of bureaucracy and land rich, the leftist government of West Bengal introduced “operation barga” in a politically feasible way with the provision for all-out participation, constant review and redistribution of land. Albeit with some shortcomings, the operation had an impressive record of success.⁸³ This was one of the reasons why the communist party led government reigned in West Bengal politics for a long period. In contrast, Bangladesh never had a pro-peasant party in power after decolonisation (1947) and independence (1971).⁸⁴ The country was ruled either by military rulers or by the new bourgeois class who are guilty of using the peasants simply as a power base or vote bank.

VII Chapter Summary

After decolonisation in 1947, the Bangladeshi sharecroppers remained in a dependency relationship remarkably similar to that of the colonial era. They continued to be powerless, although the economic and the political contexts changed a lot. The chapter finds that the sharecropping practice in Bangladesh still bears the imprint of historical injustice.

The sharecroppers are still the typical example of rural poor and suffer from exploitation. Pro-poor sharecropping legislation should have constituted one of the basic

⁸² Obaidullah and Shawkat Ali above n 26, at 41.

⁸³ Most analysts admit the success of “operation barga” in addressing the poverty in West Bengal. Anirban Dasgupta’s thesis summarises the views on the point and concludes that the drive was “largely positive.” See Anirban Dasgupta “Agrarian Reforms in West Bengal since 1977” (PhD Dissertation submitted in University of California Riverside, 2006) at vii. Mallick, however, dissents. See R Mallick “Agrarian Reform in West Bengal: The End of an Illusion” (1992) 20(5) World Development 735.

⁸⁴ The United Front government of 1954 promised to translate the *tebhaga* spirit into reality but took no action after it came to power. The post-1971 government of Awami League bypassed the issue of the sharecroppers in its land reform agenda. See Kamal Siddiqui above n 2, at 22.

tenets of post-colonial land reform. The 1950 Act, however, did not take the situation into account. The subsequent law, the 1984 LRO, after a period of stagnation, dedicated a chapter to the sharecroppers' protection. This legislation, however, also failed to develop a well-defined and secure land rights regime for the sharecroppers. Certain provisions of the legislation are susceptible to going against the interests of the sharecroppers. It is argued that there is a yawning gap between the actual requirements on the ground and the LRO 1984 as enacted. Moreover, the LRO-making process was not participatory enough to bring social transformation through the introduction of new remedies and equities for the sharecroppers.

The sharecropping law of West Bengal, India offers a better protection regime under the “operation barga” model. Political mobilisation at the grassroots level and a considerable degree of legal creativity made the difference.

Chapter 5

The Law Relating to *Char* Land: Poverty Implications

I Introduction

The main post-colonial land reform legislation, the State Acquisition and Tenancy Act 1950 (SAT Act), addressed numerous land problems of Bangladesh. Chapter 4 of the thesis examined the legislative provisions with regard to one such problem—the deprivation of the Bangladesh sharecroppers. The chapter also discussed their position under the 1984 LRO. This chapter investigates another important land reform issue—the status of the riparian peasantry of Bangladesh. The riparian question involves a complex issue of ownership and has a history somewhat distinct from the issues of land law so far discussed.

Bangladesh is a riverine country and the land these rivers leaves in their wake is officially known as *diara* (fluctuating river areas) and colloquially known as *char* (newly accreted land). The *char* land is important in determining the fate of the riparian peasants, for, in most important cases, the land formed by the movement of the river is composed of rich silt and hence is very fertile in varied degrees. As such, possession and ownership of *char* land attracted the attention of British lawmakers in the early days of colonialism. Some principles of land law were then developed to settle the issues and they continue to govern the area in the post-colonial settings with certain modifications. This chapter looks at the present alluvion and diluvion law, also popularly known as *paiwsti-sikasti* (the alluvial formation and destruction of river) law with special focus on the interest of the riparian peasantry and assesses its overall impact on poverty in Bangladesh. The chapter argues that the issue of *char* land did not receive serious attention as a land reform matter in the post-colonial period.

Agrarian relations of Bengal, as shown in chapter 2, were greatly influenced by the English private property concept. The case of alluvial and diluvial ownership was no exception. In particular, the importation of English riparian principles affected the social

relationship of colonial Bengal.¹ The principles, as a result, had far-reaching implications on the *zamindar-raiyat* relationship for the purpose of raising land revenue. In the colonial period, the alluvion and diluvion law were developed as a distinct branch of agrarian law. However, the 1950 Act incorporated provisions relating to the ownership of *char* land along with addressing other land reform issues. The alluvion and diluvion law exemplified the ramifications of the colonial attempt to universalise the land policy. As such, its role and effectiveness in addressing the poverty of *char* people in the post-colonial settings need to be examined closely.

II *Char Land and Poverty in Bangladesh*

Bangladesh is widely known as a “riverine” land. Its land terrain is characterised by the presence of innumerable crisscrossed rivers. This gives the country a deltaic landmass and a large part of it suffers annual river erosion. There are two inherent characteristics of the *char* land system. The riparian peasants lose huge amounts of agricultural *char* land into the river every year and at the same time, they also hope to receive a vast area of land accreted annually through the deposit of sediment carried by the river water.² As diluvion makes the people rootless and destitute, it is important to see how they regain their control over the regained land and how the law addresses the matter.

Bangladesh is one of the most densely settled parts of the world with large numbers of people living on the deltaic floodplains.³ The Human Development Research Center (HDRC) study of 2013 reveals that *char* land constitutes 1.2 per cent of the country’s total land area.⁴ Sarker and Haque estimate that there are approximately 600,000 people living on different *chars* of Bangladesh.⁵ However, the United Nations Development Programme (UNDP) Report of 2004 suggests that there are three million *char* dwellers in the country. The 2013 HDRC study says that 5 per cent of the total population of Bangladesh lives in *char* areas.⁶ Clearly, it involves the fate of a large number of people.

The evidence relating to *char* people’s poverty is constant and consistent. Social scientists and political economists have shown that poverty is a regular phenomenon in *char*

¹ Christopher Hill “Water and Power: Riparian Legislation and Agrarian Control in Colonial Bengal (1990) 14(4) Environmental History Review 1.

² Prosanta Roy *Bangladesh: Dark Facets of Land Rights and Management with Directions to Agrarian Reform* (AH Development Publishing House, Dhaka, 2008) at 139.

³ About 1.7 million hectares of the floodplain area is prone to riverbank erosion. Riverbank erosion takes place in about 94 of the 476 upazila (local administrative unit) of Bangladesh. Amongst these, erosion in 35 upazila is severe and recurrent. Annually, it affects about 100,000 people living on the riverbanks. According to Sarah Hessel’s estimation, each year approximately 26,000 people lose their land in a *char* area. See Sarah Hessel “Living on New Land: *Char* Development in Bangladesh” (IFAD Social Reporting Blog, 2 February 2013) <<http://ifad-un.blogspot.co.nz/2013/02/living-on-new-land-char-development-in.html>>.

⁴ *Land Laws in Bangladesh: A Right Based Analysis and Suggested Changes* (Research Report of Human Development Research Center, Dhaka, 2013) at 11.

⁵ MH Sarker, I Haque and M Alam “Rivers, Chars and Char Dwellers of Bangladesh” (2003) 1 (2) International Journal of River Basin Management 61.

⁶ *Research Report of Human Development Research Center* above n 4, at 11.

life. Abul Barkat's study found the *char* lands as traps for "distress, destitution and deprivation".⁷ Abdul Baqee characterised the *char*-land as the "land of Allah *jane*",⁸ epitomising the poverty fatalism of the *char* dwellers.⁹ Such nomenclature also indicates the uncertainties of life on the *char* land. Miah, Bari and Abir examined the claims on *char* land along the coastal regions of Bangladesh and found that dispossession and displacement are critical aspects of land relations in the *char* community.¹⁰ Shelly Feldman and Charles Geislar regard the issue of *char* land as one of the important factors of "growing rural inequality" and "instability" in Bangladesh that generates the urban migration and fuels poverty.¹¹

Against the impressive record of social and economic research on the *char* land and people, the record of legal research seems insufficient. Jannuzi and Peach's work concentrates on the nature of the agrarian structure of Bangladesh, however, they ignored the role of *char* land in changing the life of riparian landowners and de-emphasised the legal implications of the problem.¹² However, laws' implication in creating the *char* land based poverty also needs to be examined. Shelly Feldman and Charles Geislar suggested that the present condition of the *char* people is the outcome of the kind of land law that had shaped the right of the peasants to the shifting *char* lands over the time.¹³ David Hutton and Emdad Haque observed that the alluvion-diluvion rules have augmented the interest of the "established property owners" but accelerated the marginalisation process and vulnerability of the *char* dwellers.¹⁴ The subsequent paragraphs, therefore, examine the legal responses to the problem.

III The Alluvion and Diluvion Law

The present law relating to *char* land, according to Hutton and Haque, had colonial roots.¹⁵ After the introduction of the Permanent Settlement in 1793, the British attempted

⁷ Abul Barkat, Prosanta Roy and Shahnewaz Khan *Charland in Bangladesh: Political Economy of Ignored Resource* (Pathak Shomabesh, Dhaka, 2000) at 12.

⁸ Translation from Bangla: "land of only God knows".

⁹ Abdul Baqee *Peopling in the Land of Allah Jaane: Power, Peopling and Environment: The Case of Charlands of Bangladesh* (University Press Limited, Dhaka, 1998) at 65.

¹⁰ Giashuddin Miah, Masimul Bari and Abdur Rahman "Resource Degradation and Livelihood in the Coastal Region of Bangladesh" (2010) 4(4) *Frontier Earth Science China* 427.

¹¹ Shelly Feldman and Charles Geislar "Land Grabbing in Bangladesh: In Situ Displacements of Peasant Holdings" (Paper presented to International Conference on Global Land Grabbing, University of Sussex, 6-8 April 2011) at 3.

¹² FT Jannuzi and JT Peach *The Agrarian Structure of Bangladesh: An Impediment to Development* (Westview Press, Colorado, 1981).

¹³ Feldman and Geislar above n 11, at 6.

¹⁴ David Hutton and Emdad Haque "Human Vulnerability, Dislocation and Resettlement: Adaptation Processes of River-Bank Erosion-Induced Displacees in Bangladesh" (2004) 28(1) *Disorder* 41.

¹⁵ At 41.

to resolve the maze of alluvion-diluvion problems.¹⁶ Afterwards, the law underwent a series of amendments at different stages of the colonial and post-colonial venture. The present law is incorporated in ss 86, 86A and 87 of the State Acquisition and Tenancy Act 1950. Sections 86 & 86A deal with the diluvion question. They can be summarised as follows:

- (a) If a holding is lost by diluvion, the tax of the holding shall be abated by such amount as may be considered by the Revenue Officer fair and equitable on the application of the affected person. The event of diluvion is to be recorded in accordance with prescribed rules and the record will be treated as proof of title to the piece of land when it re-appears *in situ*.
- (b) The original owners or their successors-in-interest shall have the right, title and interest in the diluviated land provided that the land re-appears *in situ* within thirty years of its loss. The right is also subject to a ceiling provision (60 *bigha* ie 20 acres per family). The right to immediate possession of the land that re-appeared shall be exercised by the Collector (government's chief revenue officer at the district level), either on his own motion or on an intimation made in writing by the tenant or tenant's successors-in-interests or any other person.
- (c) On taking possession of the re-appeared land the Collector should give public notice of the fact of taking possession in accordance with prescribed rules and cause a survey to be made of the land so re-appeared and prepare the map thereof. No person should initiate any legal action on this matter during a period of twelve months starting from the publication of the notice. The Collector should hand over the land to the owner or his/her heir within 45 days after the completion of the survey and preparation of the map.
- (d) The land so owned shall be free from *selami*, however, the owner will have to pay fair and equitable land tax to the government.
- (e) If the re-appearance of land is caused or accelerated by any artificial or mechanical process as a result of development works undertaken by the government or any other authority so empowered, the accreted land will go into the possession of the government.

The law of alluvion, on the other hand, is stated in s 87 of the SAT Act. It can be explained as follows:

- (a) When any land has been gained by accession, whether from the recess of a river or of the sea, it shall not be considered as an increment to the holding or tenancy to which it may be thus annexed, but shall vest absolutely in the government.

¹⁶ Kuntala Lahiri-Dutt "Chars: Islands that Float within Rivers" (2014) 8(2) International Journal of Research into Island Cultures 22.

- (b) Any land so gained, however, may be owned by an individual if it was gained before 28 June 1972 and the claim was conclusively decided by a court of competent jurisdiction.¹⁷

It appears from the above provisions that the right over *char* land is governed by two different common law concepts: the right to reformation *in situ* and right to accretion. There has always been a debate on the nature and scope of these two concepts. The affected owner's right to re-entry, the desirability of state's intervention and the mode of allocation of the accreted land are central issues pertaining to these rights. The forceful possession of the accreted lands by the local influential indicates political ramifications of the problem.¹⁸ As such, there are implications of alluvion and diluvion law for the land rights of the *char* people, the riparian peasantry in particular. It will be useful to follow the development of the law relating to those two rights in the light of their legislative history to understand the implications for access to land.

A *Right to Reformation in situ*

The right to reformation *in situ* occupies an important place in determining the ownership of diluvion land, provided that it reappears. There has been no separate legislation creating or defining the right to reformation *in situ* in Bangladesh. The Bangladesh Supreme Court, however, in *Mowali*¹⁹ held that it was a right incidental to one's title to a tangible property. The principle underlying this right is that a person's right to any property is not destroyed or affected in any way if it merely goes under or is covered by the waters of a sea or a river.²⁰ The original owner is deemed to be in constructive possession of the property throughout the period of its submergence. The owner can claim back the said property as of right, whenever it reappears if it can be so identified, reappears out of the water. James LJ established the classic exposition of this principle in the 1870 Privy Council case of *Felix Lopez*,²¹ where after referring to the analogous English law, Lord James stated the principle in the following words:²²

This principle is one not merely of English law, not a principle peculiar to any system of municipal law, but it is principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano or a

¹⁷ The amending law, the State Acquisition and Tenancy Act (Sixth Amendment) Order 1972 was promulgated by the President of Bangladesh on 28 June 1972.

¹⁸ Abul Barkat, Shafique uz Zaman and Selim Raihan *Political Economy of Khas Land in Bangladesh* (Association for Land Reform and Development, Dhaka, 2001) at 50.

¹⁹ *Abdul Mannan v Kulada Ranjan Mowali* [1979] 31 DLR 206 (AD).

²⁰ At 206.

²¹ *Felix Lopez v Muddin Mohan Thakur* [1840] 13 Major Indian Appeals 467 (PC). In this case, the plaintiff's land was submerged in the Ganges and re-appeared after 12 years at the same site but annexed to the defendant's property. The Privy Council held that the defendant could not claim the added land as an accretion because the plaintiff's right over his submerged land was not extinguished.

²² At 473.

field covered by a sea or by a river, the ground, the site, the property remains in the original owner.

The James LJ, however, indicated that the right is not unqualified and subject to written law of the land:²³

... They (the owner) do not hold that the property absorbed by a sea or a river is, under all circumstances and after any lapse of time to be recovered by the owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain as part of the sea or river of the state and so liable to the written law as to accretion and annexation.

Since *Felix Lopez*, the doctrine of reformation *in situ* is ingrained in the Bangladeshi land system in a qualified manner. The SAT Act 1950, amongst others, incorporated the principle providing individual ownership subject to re-appearance of the land within twenty years²⁴ and compliance with the 375 *bigha* land ceiling. A radical deviation, was, however, made in 1972 through the Presidential Order No 135.²⁵ In this Order, it was stipulated that the original landowner would not be able to re-enter his land after re-appearance but such land would absolutely vest in the government for distributional purposes. In 1994, the position under the 1950 Act was restored, however, this time the re-entry condition was made subject to re-appearance of diluviated land within 30 years and maximum limit of private ownership being 60 *bigha*.

B *The Right to Accretion*

An accretion is a land formed by a slow and gradual process so as to be imperceptible in its progress.²⁶ Unlike, the right to reformation *in situ*, the right to accretion is not recognised in the same form as it was established in the *Felix Lopez*. Two opposing views governed the law in different times. Under the colonial and early post-colonial legislation, the owner with whose land the accretion had taken place, could enjoy the benefit of the right. The present law²⁷ does not recognise the owner's right to accretion; rather it says that the gained land should absolutely vest in the government.²⁸

The right of accretion in respect of property which was a part of the public domain and to which a riparian owner had previously no right, was the creation originally of usage. However, the right first came to be recognised in legislative shape in the Alluvion and

²³ At 468.

²⁴ Before the *Felix Lopez* was decided, reformation *in situ* was not subject to any time rule. Whatever the period of submergence might be, the owner was entitled to re-entry under the previous statute ie under s 17 of the Bengal Rent Act 1859.

²⁵ State Acquisition and Tenancy (Fourth Amendment) Order 1972.

²⁶ Lutful Kabir *Land Laws of Bangladesh* (Ain Prokashan, Dhaka, 2011) vol III at 218.

²⁷ State Acquisition and Tenancy (Amendment) Act 1994, s 2.

²⁸ Section 87(1) of the SAT Act reads: ... "When any land has been gained by accession, whether from the recess of a river or of the sea, it shall not be considered as an increment to the holding or tenancy to which it may be thus annexed, but shall vest absolutely in the Government of the People's Republic of Bangladesh and shall be at their disposal."

Diluvion Regulation 1825 (popularly known as BADA)²⁹ promulgated in the Presidency of Bengal, which included the territory of present Bangladesh. The law stressed the context of the right:

Chars or small islands are often thrown up by alluvion in the midst of the stream or near one of the banks and large portions of land are carried away by an encroachment of the river on one side, whilst accretions of land are at the same time, or in subsequent years, gained by dereliction of the water on the opposite side.

The main purpose of the BADA was to resolve disputes which frequently arose between the *zamindar* and the *rai-yats* because of the peculiar physical features of the soil in the Bengal region. The land was formed by the deposit of alluvial sands with the sea, rivers and streams which often shifted their courses. The first clause of section 4 of the BADA spoke about the right of accretion:

When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered as an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from government by a *zamindar* or the superior land-holder or as a subordinate tenure by any description of under-tenant whatever.

This provision shows that the accrual of the right of a riparian owner to the land gained by the recess of a river or the sea was not dependent upon the recognition of the said right or settlement of any rent in respect of the land so gained by any authority. There was no postponement of the accrual of the right, which arises as and when the accretion takes place. The only condition attaching to the accrual of the right was that the owner cannot claim a better title in the accreted land than the tenant had in the land to which it was annexed. The tenant also could not claim any exemption from the liability to pay rent in respect of such added land.

The principle underlying the law of accretion also found recognition by James LJ in the case of *Felix Lopez*:³⁰

... Where there is an acquisition of land from the sea or river, by gradual, slow and imperceptible means, therefrom, the supposed necessity of the case and the difficulty of having to determine year by year, to whom an inch or foot or a yard belongs, the accretion by alluvion is held to belong the owner of the adjoining land.

Thus, the Judge explained the rationale behind the right of accretion. The acquisition of land having been by the gradual, slow and imperceptible process, it is very often extremely difficult to measure and demarcate the additional land with any amount of precision and to allocate the same to somebody else for the useful utilisation of such land. If the accreted land is not of a sizable area, the riparian holder to whose land it has been annexed, can fruitfully use the land.³¹

²⁹ Bengal Alluvion and Diluvion Regulation 1825.

³⁰ *Felix Lopez* above n 21, at 473.

³¹ *Abdul Mannan v Kuloda Ranjan Mowali* [1979] 31 DLR 206 (AD).

The reference to the necessity and difficulty regarding the frequent measurement of the additional land every year made by James LJ, in *Felix Lopez*, is to be understood in the context of natural features of soil and the behaviour of the rivers of the Bengal region. It is to be noted that the right of accretion could be claimed by a riparian owner of the land, in respect of some land, which did not belong to any individual but appertained to the public domain. The owner was liable to pay a proportionately increased rent in respect of the additional land gained by the accretion. If the land so added was the reformed land belonging to another individual, such individual could claim back the said land according to the principle of reformation *in situ*. The riparian owner can exercise the right to accretion without derogating anybody else's right. In other words, the right could not be claimed in defeasance of an owner's right to reformation *in situ*.³²

Amendments to the BADA provision of accretion were made in 1928 when s 86A was inserted in the Bengal Tenancy Act of 1885. It provided that the tenant's right in the diluviated land, in the absence of a contract to the contrary, would be deemed to have been surrendered and would be extinguished, if the tenant obtained any abatement of rent in respect of any such diluvion. However, it was laid down that such extinction of right would not affect the accrual of tenant's right of accretion in respect of the said land if it was available to the tenant under any other law. In 1938, the aforesaid provision was substituted by s 86A, enlarging the rights of the tenant in certain respects. This new provision provided for automatic abatement of rent in case of the loss of land by diluvion and also ensured the subsistence of the right, title and interest of the tenants in the land lost by such diluvion for a period of 20 years, notwithstanding the abatement of rent of such land.

The right to accretion under the BADA was designed primarily to protect the interests of the original owners. It viewed others as infiltrators. This created complexities in defining and regulating the relationship between landlords and tenants.³³ As a result, in spite of retention of the right to accretion in favour of the owner by the 1950 Act, the 1994 position vested the ownership into the government.

IV Critical Analysis of the Issues

A State Ownership v Individual Ownership and the Position of the "Landless"

The doctrine of reformation *in situ*, in essence, puts emphasis on private ownership. Private ownership, it is often argued, presents challenges in carrying out radical land reforms. Therefore, it is to be seen the extent to which the doctrine of reformation *in situ* helps achieving land reform objectives. In a post-colonial setting, where poverty reduction based on land justice is imperative, the role of the state in governing the riparian land seems prominent. Arguably, that was the reason why the first land reform law of Bangladesh soon

³² *Ram Kirpal Pandey & Others v Janki Prasad Chaudhury & Others* [1951] AIR 420 (pat).

³³ Abul Barkat "Poverty and Access to Land in South Asia: Bangladesh Country Study" (The National Resources Institute, University of Greenwich, 17 March 2004) at 11 <www.hdrc-bd.com>.

after its independence³⁴ ensured the state's ownership over the diluviated land with a view to distributing it among the landless, subject to the land ceiling law. The law clearly indicated that all newly emerged lands that were previously lost by erosion should be treated as "*khas*" (government owned) and restored to the government and not to the original owner. The law was meant to recover *chars* from the more powerful local elites in order to redistribute them among the landless peasants. This was manifested in the claim of the Minister for Land Reforms and Administration who stated that under the 1972 amendment such lands would be released from the "unscrupulous land grabbers, who maintain their possession with the aid of professional *goondas* (miscreants) and will now be entirely distributed among landless peasant".³⁵

The law, however, did not operate as it posed potential threat to rural power structure and failed to fulfil this promise. Peter Bertocco argued that the connection between the 'rich peasants' and the middle class contributed to this failure and since the 1950 SAT Act nothing in the way of legislation disturbed the dominance of the "rich peasants" in the countryside.³⁶ Moreover, the "democratic legislative system" of the country was abrogated following the military takeover of the government in 1982.³⁷ Along with such abrupt political changes, the political forces supporting large landlords regained their power and rights at the local level. The renewed policies of the conventional political parties and vested interest groups were echoed in the 1975 Ordinance,³⁸ which established that the owner of the land lost by diluvion was the first person eligible for a settlement of *char* land. Since 1975 to 1994, there was no further development on the issue of the rights of the *char* people. The 1994 amendment to ss 86 and 87 of the SAT Act was merely a continuation of the political trend that the earlier government professed.

In order to make the post-colonial land reform meaningful, the state should have taken a more pro-active role and the practice of reformation *in situ* should have been made more suitable according to the needs of the toiling masses. The Bangladesh Constitution obliges the state to take action for the emancipation of the toiling peasants and to establish a socialist society through a democratic process.³⁹ The condition of the riparian peasants augments this obligation.

Empirical study favours a more pro-poor stand of the state in obtaining the alluvial lands and distributing the same to the landless. The International Land Coalition study finds that

³⁴ State Acquisition and Tenancy (Amendment) Order 1972.

³⁵ As cited in IN Mukherji "Agrarian Reforms in Bangladesh" (1976) 16(5) Asian Survey 452.

³⁶ Peter Bertocchi "Bangladesh in the Early 1980s: Praetorian Politics in an Intermediate Regime" (1982) 22(10) Asian Survey 988.

³⁷ C Emdad Haque *Hazards in a Fickle Environment: Bangladesh* (Kluwer Academic Publishers, Boston, 1997) at 159.

³⁸ State Acquisition and Tenancy (Amendment) Ordinance 1975 (Ordinance No XLIV of 1975).

³⁹ The Constitution of the People's Republic of Bangladesh, art 14 read in conjunction with the preamble and art 9.

some 57% of households in *char* areas own no land at all, either homestead or cultivable and 3% of households own less than 5 decimals (approximately 1/100 acre) of land. This means that 60% of households in the *chars* are landless.⁴⁰ Though the 1994 provision requires the government officer to actively help the original owner to obtain the possession of the re-appeared land, it does not say anything about distributing it among the landless.

State take-over could have helped in resolving the dispute regarding the time of diluvion of the property in the bed of the river. The case of *Shamir Chandra Sajwal*⁴¹ provides such an illustration. The parties, in this case, confronted the question of when and in how many years the land in dispute reappeared after being submerged in the river. As such, the time test (30 years) prescribed by current diluvion law seems unreasonable and problematic to prove before the court particularly for the diluvion affected peasants.⁴² It is unlikely that the affected person would stay at the same locality for such a long period without being rehabilitated by the state. State ownership could have avoided such dismal record. Moreover, this would have ensured stricter compliance with the land ceiling law. The government may take over the re-appeared land and make the process of allocation of the same prioritising the needs of the poor. Thus, it is argued that the right to reformation *in situ* as reflected in the present diluvion law has lost its relevance and utility. It also appears to be anti-poor.

One of the main criticisms against state take-over, however, is that the government officials are often corrupt. The *Bangladesh Environmental Lawyers' Association (BELA)*⁴³ case brings to light this aspect of the problem. In this case, the Appellate Division of the Bangladesh Supreme Court found that the government officer unlawfully leased the diluviated property to a company for the establishment of an industry in contravention with the law. It was only to be leased out when the diluviated land re-emerged at the same site. The challenge of corrupt practices is an overall land reform issue and also related to land administration and management. As such, the problem does not lie with government's take-over of the re-appeared land, rather it lies with the question of devising a sound land administration system that can properly implement the state's vision to change the fate of the landless.⁴⁴ As will be argued later in this chapter, this should form an integral part of the land reform programme relating to the distribution of *char* land.

⁴⁰ David Wilson (ed) *Promoting People Centred Land Governance: Bangladesh* (International Land Coalition, Rome, 2012) at 24.

⁴¹ *Shamir Chandra Sajwal and others v Government of Bangladesh* [2013] 42 CLC 8823 (HCD).

⁴² *Research Report of Human Development Research Center* above n 4, at 16.

⁴³ *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh represented by the Secretary, Ministry of Environment and Forest and 18 others* [2010] 39 CLC 7831(HCD).

⁴⁴ The 1987 Order of the Ministry of Land Administration and Land Reforms of Bangladesh Government [Memo No. 2-2/87/90 (1060)] stated the vision that proper distribution of the *char* land among the “landless and penniless” will reduce the socio-economic problem of the country. This Order, however, did not make it clear who those “landless and penniless” are.

The amendment of 1994 was intended to improve the survey and record process of the alluviated land, for, the initial responsibility of taking over possession of the *char* land was vested in the Collector (Government's Chief Revenue Officer at the District level). The Collector after the survey and preparation of map should allot the lands reformed *in situ* to the persons whose lands were diluviated. The success of this measure depends upon the ability of the Collector's office to conduct the surveys and prepare maps soon after the creation of the *char* and to take over possession of the same in spite of political pressure.⁴⁵ Prosanta Roy, a bureaucrat of Bangladesh Government, testified to the contrary. Roy questioned the competence and efficacy of the survey, recording and settlement procedure of land in Bangladesh in terms of its equipment and supply with "poor and unskilled manpower" and structural facilities.⁴⁶ Kamal Siddiqui also admitted the backlogs of the survey and settlement processes and identified conferment of the "highly technical task" to the newly appointed land officers as one of the main weaknesses of the system.⁴⁷ In addition to this shortcoming, the law does not prescribe any time framework for the *diara* survey. As a result, by the time the officials come up with the alluvion-diluvion report and the map, the land has already fallen into the possession of illegal grabbers, who are mainly "established property holders" of the locality.⁴⁸ Eviction of them from the land then become a question of political will than that of law.

The provision for conducting the survey after the *char* emerges brings three related issues to the front. The first is about the competence and promptness of the government agency to carry out the survey. In *Shamir Chandra Sajwal*,⁴⁹ it was found that the suit property was wrongly shown under water of the river Arial Kha, in spite of the fact that the same had reappeared long before. In *Talukdar Chemicals Limited*,⁵⁰ the government lost the case as it failed to prove that the suit land was acquired by it in compliance with the

⁴⁵ Aminul Huq "Alluvion and Diluvion" (Banglapedia: National Encyclopedia of Bangladesh) <http://en.banglapedia.org/index.php?title=Alluvion_and_Diluvion>.

⁴⁶ Prosanta Roy above n 2, at 143.

⁴⁷ Kamal Siddiqui *Land Management in South Asia: A Comparative Study* (University Press Limited, Dhaka, 1997) at 342.

⁴⁸ Mohammad Towhidul Islam *Lectures on Land Law* (Northern University Bangladesh, Dhaka, 2013) at 151. Feldman and Gieslar found the complicity of rural bureaucrats, political parties and influential others in the land grabbing process. See Shelly Feldman and Charles Geislar "Land Grabbing in Bangladesh" above n 11, at 7. Shapan Adnan's view also supports this stand. Adnan claims that the reach peasants (known as *jotedars*), influential both nationally and locally establish control over the *char* land. See Shapan Adnan "Resistance to Accumulation by Dispossession in the Context of Neoliberal Capitalism and Globalisation: Struggles for Defending and Gaining Land Rights by the Poor Peasantry in the Noakhali Chars of Bangladesh" (Paper presented to International Conference on Global Land Grabbing, Institute of Development Studies, University of Sussex, 6-8 April 2010).

⁴⁹ *Shamir Chandra Sajwal and others v Government of Bangladesh* [2013] 42 CLC 8823 (HCD).

⁵⁰ *M/S Talukder Chemicals Limited v Government of Bangladesh and others* [2012] 41 CLC 8266 (HCD).

process of alluvion and diluvion. These two cases show that though the law prescribes a *diara* survey, it omits to delineate how the survey can properly be carried out.

The second point is about the difficulty of proving reformation *in situ*. In *Padmabati*,⁵¹ the High Court Division of the Bangladesh Supreme Court laid down the following standard of proof:

The plea of reformation *in situ* cannot be sustained unless it is proved that the land appearing as *chars* are the same land which was lost by diluvion and that the claimants possessed the same land both before diluvion and after the reformation.

After a long gap, the river erosion induced displacees can rarely establish this higher threshold of proof, particularly when they migrate to another place for alternative livelihood.⁵² The third is about the difficulty of differentiating the claims of reformation *in situ* from that of accretion. As per the 1994 law, the re-appeared land goes to the original owner, but the accreted land vests in the government. As such, in a legal action, the parties attempt to prove their land either to be reformed or accreted whichever suits them. The distinction between the two was explained in *Abdul Wahid Sheikh* by the High Court Division of Bangladesh Supreme Court in the following manner:⁵³

There is a clear distinction between the claim on the basis of reformation and the claim of accretion. The claim on the basis of reformation *in situ* is tenable only if the lands diluviated reappear within 20 years of the diluvion. But if this land does not appear within 20 years of its disappearance, the same become part of the public domain. Here comes in s 86 and s 87 of the SAT Act to the plaintiff. As soon as this land becomes part of the public domain, the plaintiffs are entitled to claim the same as gained by gradual accession resulting from the recession of the river.

Keeping this distinction in mind, it is to be noted that in the absence of regular monitoring, reporting, mapping of the *char* zones, it becomes a question of fact to prove which part of the land diluviated and which part of the same alluviated. The law, however, also cannot effectively answer the question, as it is not solely a legal affair. Neither the law can effectively address the nature of the river and *char* land of a particular zone. Nonetheless, the riparian law can establish an effective monitoring system through the participation of the *char* peasants in this identification process.

C Time of Commencement

After Bangladesh's independence, a good number of alluvion-diluvion cases came before the Bangladesh Supreme Court to settle the question of commencement of the law. The issue was significant as the ownership of the *char* land depended on the time of its origin. The law underwent frequent changes and as such, confusion and complexities arose in dealing with the time of alluvion-diluvion and the events that should attract these

⁵¹ *Padmabati Biswas v Bangladesh and others* [1992] 21 CLC 7566 (HCD) at [28].

⁵² Prosanta Roy *Dark Facets of Land Rights* above n 2, at 144.

⁵³ *Government of Bangladesh v Abdul Wahid Sheikh (dead) his heirs & others* [1990] 19 CLC 5131 (HCD) at [5].

provisions of law. The 1972 amendment to Sections 87(2) and 87 (3) of the SAT Act deals with the issue as follows:

87 (2): The provision of sub-section (1) shall apply to all lands so gained whether before or after the 28th June 1972, but shall not apply to any land so gained before the said date if the right of a *Malik* to hold such land as an increment to his holding was finally recognised or declared by a competent authority or court before the date of commencement of the State Acquisition and Tenancy (Sixth Amendment) Order, 1972 (P.O. No. 137 of 1972) under the law then in force.

87 (3): All suits, applications, appeals or other proceedings for the assertion of any claim to hold, as an increment to any holding, any land gained or alleged to have been gained from the recess of a river or of the sea, pending before any court or authority on the date of commencement of the said Order shall not be further proceeded with and shall abate and no court shall entertain any suit, application or other legal proceedings in respect of any such claim.

The provision is long and complex in language. It gave rise to a great deal of interpretational debate as to whether a particular *char* land accrued before or after 28 June 1972. In *A Wahed Miter & others*,⁵⁴ the Supreme Court of Bangladesh noted that the commencement provision gave rise to a “great deal of controversy” as to the extent of their retrospectivity at one time. However, by referring to *Mowali*,⁵⁵ the Court held that the suits, applications, appeals and other legal proceedings must relate to lands which are lost by diluvion after the commencement of the Order. It was also laid down that the provision as to the barring and abatement of suits is attracted where a claim of the right is asserted in respect of such land. The law, therefore, failed to make a clear demarcation of time regarding the claims on *char* land that generated animosity and litigation.

V *The Poverty Implications of Alluvion and Diluvion Law*

With the loopholes discussed above, the alluvion and diluvion law had operated in Bangladesh for about a century. The law still operates with the latest 1994 amendment to the SAT Act. One common feature may be traced out in both the colonial and post-colonial version of alluvion and diluvion law. Reform attempts in both the period mainly concentrated on the revenue raising from the *char* land. Except the unsuccessful attempt to redistribute land among the landless under the 1972 amendment, the reforms did not focus on the interest of the riparian peasants. Abdul Alim argued that a comprehensive alluvion and diluvion law could have helped to rehabilitate 1,560,384 landless poor.⁵⁶ Regrettably, the alluvion-diluvion law did not explore this possible avenue of poverty reduction. Abdul Baqee observes that the successive alluvion and diluvion laws are “deceptively simple on paper” but are “complicated in the implementation”.⁵⁷ Baqee identified five factors why the

⁵⁴ *Government of Bangladesh v A Wahed Miter & others* [1990] BLD 270.

⁵⁵ *Abdul Mannan and others v Kulada Ranjan Mowali and others* [1977] 31 DLR 195 (AD).

⁵⁶ Abdul Alim “Land Management in Bangladesh with Reference to Khas Land: Need for Reform” (2009) 14 *Drake Journal of Agricultural Law* 245.

⁵⁷ Abdul Baqee *Peopling in the Land of Allah Jaane* above n 9, at 65.

alluvion-diluvion laws are unable to ensure security for *char* dwellers: i) the opaque legalistic language used by land records; ii) the large variety of papers required to prove ownership along with the difficulty in obtaining them; iii) the requirement of continued rent payments for lost land; iv) access to land document officials and v) the difficulties of establishing rights over resurfacing chars. A deadly combination of these factors means that those who lose their holdings due to diluvion fail to get them back even if they resurface or when another *char* land rises nearby. Sarker and others blame the law for the creation of poverty in the *char* areas.⁵⁸ They argue that lack of welfare provision coupled with state policy and its weaker implementation lead to the insecurity of the *char* people.

From the legal point of view, the *char* land management and settlement, to borrow Barkat's words, is “no simple matter” and weighed down with the highest degree of “labyrinthine complicity”.⁵⁹ There are five stages to finish the process: survey, inquiry, verification, recording and distribution. Even, if these stages are met with, the government faces difficulty in obtaining possession of the land. Following are the reasons:⁶⁰

- (a) preparation of forged documents and law’s failure to check that;
- (b) the use of inheritance law by the big landholders to establish their control over the land;
- (c) ancient system of record keeping;
- (d) non-compliance with the law of land ceiling; and
- (e) long absence of the original land owner from the land site.

Thus, starting from the loss of land to the restoration of its possession is a long drawn process accentuated by the weak legal protection afforded to the riparian peasants. The alluvion-diluvion law, therefore, brings huge consequences for the *char* people including landlessness and human displacement. It causes disruption of people’s attachment to the society. Displacees suffer from the loss of quality of life. Their future becomes insecure. Their lives are left at the mercy of the big landholders whose settlement in the locality is somewhat permanent in nature.⁶¹ Abdul Bagee sketches the picture in the following ways:⁶²

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*

⁵⁸ Maminul Haque Sarker, Iffat Huque, Mustafa Alam and Rob Koudstaal “Rivers, Chars and Char Dwellers of Bangladesh” (2003) 1(1) International Journal of River Basin Management 61.

⁵⁹ *Research Report of Human Development Research Center* above n 4, at 8.

⁶⁰ Abdul Kader “Charland and the Rights of the Landless” (*The Daily Star*, Dhaka, 4 December 2013) <<http://archive.thedailystar.net/newDesign/cache/cached-news-details-9034.html>>.

⁶¹ Mizanur Rahman (ed) *Life on a Swing: Human Rights of the River Bank Erosion Induced Displacees*, (Empowerment through Law of the Common People, Dhaka, 2007) at 40.

⁶² Abdul Bagee above n 9, at 218.

Land of Allah Jaan-e' in focusing on the uncertainties of life in the *char* lands of Bangladesh

Thus, the picture of poverty-fatalism is persistent in the socio-economic life of the riparian peasants of Bangladesh. The picture fits into the concept of “capability deprivation” advocated by Amartya Sen.⁶³ Sen explained poverty in the light of social justice and viewed it as the deprivation of “basic capabilities” of the people where they learn to lead a life of uneventful survival. As per Sen, in analysing social justice, there is a strong case for judging individual advantage in terms of the capabilities that people have, that is, the substantive freedoms they enjoy to lead the kind of life they have reason to value. The basic drawback of the alluvion and diluvion law, from this line of argument is that it does not reinforce the “capability” of the riparian peasants of Bangladesh. As such, the alluvion-diluvion law in Bangladesh perpetuate landlessness that leads them to become poor.

VI Chapter Summary

The chapter considered some core issues of land reform relating to the rights of the riparian peasants during the post-colonial period. It firstly reveals that the law relating to alluvion-diluvion in Bangladesh did not get rid of the *char* related problems that persisted in colonial Bengal. Secondly, it shows that this branch of land reform did not help the riparian peasants in a meaningful way to change their condition. Thirdly, it finds that amendment to the alluvion-diluvion law with its focus on distributive land reform may bring positive changes to the poverty situation of *char* areas of Bangladesh.

It appears that all the changes in the post-colonial state structure were mainly in the interest of the large landowners. They did not legally empower the *char* tillers to address their poverty. The condition of the riparian peasantry in contemporary Bangladesh, thus, remained relatively unchanged, both institutionally and structurally, irrespective of several legislative attempts.⁶⁴

Moreover, in the socio-economic and political context of Bangladesh, alluvion and diluvion land law remained an ignored tool for poverty alleviation. In the reform attempts, the link between the *char* land's role in addressing poverty, the nature of state's intervention and its equitable distribution among the peasantry has always been missing. As a result, the riparian peasantry has fallen into destitution.

The land law relating to alluvion-diluvion failed to devise the concept of development by mainstreaming the *char* peasants. The government also lost sight of devising a proper settlement and rehabilitation policy for the displacees caused by diluvion. Finally, the laws on the point were not participatory in nature. Since Bangladesh's independence in 1971, no

⁶³ Amartya Sen *Development as Freedom* (Oxford University Press, London, 1999) at 497.

⁶⁴ C Emdad Haque above n 37, at 159.

riparian law was made through parliamentary intervention. The laws in the present form of “Presidential Orders” show how they are unrelated to land, riparian peasants and their ways of life. Thus, riparian land reform in the post-colonial setting never addressed the poverty of the peasants.

Chapter 6

The Land Ceiling Legislation and Redistributive Land Reform

I Introduction

In a bid to say good-bye to the colonial invention of the *zamindari* system, the post-colonial administration of Bangladesh (then East Pakistan) enacted the State Acquisition and Tenancy Act 1950 (SAT Act). However, the findings of chapter 3 suggest that this legislative intervention did not lead to the end of landed gentry; rather it helped the creation of a new rural privileged group. Professor Rehman Sobhan's research concluded that since 1947, a kind of capital accumulation process took place in Bangladesh.¹ The national powers in a like manner to the colonial rulers influenced the character of the state-peasant connection. The capitalistic development opted for by the national powers generated class differentiations within the peasantry and shaped a polarisation process. It led to the stabilisation of the rich-peasant layer, on the one hand and a depressed layer of impoverished, middle and poor peasants, on the other.² It is necessary, in this context, to examine the Bangladeshi land reform legislation and policies and their effect on its agrarian structure. This chapter, therefore, investigates into the post-independence (1971-2016) land law reform of Bangladesh. It does so by looking at two aspects of the land reform legislation: i) laws on land ownership-limit known as ceiling laws and ii) the policy of surplus land redistribution (colloquially known as *khas* land).³

¹ Rehman Sobhan *Basic Democracies, Works Programme and Rural Development in East Pakistan* (Bureau of Economic Research, University of Dacca, 1968) at 111.

² BK Jahangir "Nature of Class Struggle in Bangladesh" (1977) 12 (50) *Economic and Political Weekly* 2063.

³ Policy, the state and law are three sides of a single process; policy—"the concentrated expression of economics"—conditions the development of the other two. It is the drive belt, which sets in motion the state and law and creates their interaction and interdependence. See P Yudin (trans: Hugh Babb) *Soviet Legal Philosophy* (Harvard University Press, Cambridge, 1951) at 256.

Bangladesh adopted land ceiling legislation from independence to minimise the land-ownership gap between the rich and the poor peasants. Arguably, a ceiling-redistributive approach to land reform became one of the immediate objectives of the post-independence government led by the Awami League. Prior to the enactment of the country's Constitution, the Founding Father of the country Bangabandhu Sheikh Mujibur Rahman announced a programme of land reform which fixed a ceiling of landed property that a "family" or "body" may hold. The law authorised the government to take possession of land surplus above the ceiling and make it available for distribution among the landless, poor and marginalised farmers. The prompt legislative steps on land issue apparently indicated the commitment of the new-born state to addressing the land injustice perpetrated during the British and Pakistan period. The reforming step was also an indication of dissatisfaction with the dismal record of the 1950 Act.

The attempt soon became blurred and ambivalent. The drawbacks in the ceiling laws soon became obvious. The question also arose about the strategy for distributing the surplus land to the poor peasants. In handling the issue, Bangladesh got land ceiling laws (1972, 1984) and redistribution policies (1987 and 1997) among other executive and legislative steps. The performance of these laws and policies, nonetheless, was poor. This chapter argues that Bangladesh failed in the first instance to create a constitutional property regime from which responsive land reform legislation might originate. In the second place, it reveals that the reform legislation had shortcomings that made the legislation itself a problem for land reform. Finally, it shows that the reform legislation had political ramifications that acted against the interests of the poor.

The chapter has five parts. Part I is the introduction. Part II examines the ceiling laws and their limitations. Part III examines how Bangladesh deals with land redistribution issues. Part IV makes a critique of the reform approach along with its legal and political results. Part V is the chapter summary.

II The Case for Ceilings

A The Motivation and the Law

The law that limits the land ownership is known as the ceiling law. In Bangladesh, as elsewhere, the ceiling question is an important ingredient of any agrarian reform where land redistribution is one of its principal aims for reasons not only ideological but also practical. The underlying philosophy of the ceiling law is to widen the scope of land redistribution among the landless or nearly landless and to narrow rural income inequalities and ease the rural tensions.⁴ It is a necessary step in a labour-surplus and land-scarce country, at least, as a short-term goal without which the tendency towards maldistribution goes high.⁵ The

⁴ Wolf Ladejinsky "Land Ceiling and Land Reform" (1972) 7 (5) Economic and Political Weekly 401.

⁵ AM Khusro *Economics of Land Reform and Farm Size in India* (McMillan, Delhi, 1973) at 32.

necessity for a ceiling law found recognition even in the old land system to encourage the well-being of the small farmers. HC Tai, for example, quotes an ancient Chinese official statement that acknowledged the necessity of a ceiling law:⁶

Let us set a limit to the amount of land an individual may own, give the excess land to those who really need it and put a stop to the concentration of land ownership in the hands of the few.

In the recent past, such steps were considered essential in the South Asian, Far East Asian and Latin American jurisdictions.⁷ India had begun ceiling measures as early as 1948 and afterwards all provinces of India enacted different ceiling legislation determining different land ownership limit.⁸ For India, PC Joshi argued that setting up an ownership limit is necessary from the viewpoint of efficiency, equity, nationalism and democracy.⁹ From Joshi's reasoning, it seems that the law of ceiling is motivated by the desire for an equitable distribution of land among the landless or poor peasants and thus, for some sort of "agricultural democracy".¹⁰

However, the effectiveness of ceiling laws has often been called into question. One argument against ceiling law is that it makes the land-size technologically non-viable for better cultivation. This view is contestable in the sense that the benefits of new advancements can apply to large and small holdings alike especially when such measures are accompanied by adequate resources to work that land. For India, Dandekar and Rath noted that the problem of poverty cannot be solved by redistribution of land to everyone who needs it.¹¹ The validity of this statement cannot be denied, but it must be tempered by the fact that the intention of land reform is not to satisfy every landless person; its main purpose is to ameliorate, wherever likely, the worst consequences of admittedly difficult conditions. In contrast to Dandekar and Rath, Ladejinsky favours ceiling laws and writes: "In a real sense, any meaningful reform without it is a misnomer, while its presence is one of the main causes of the few reforms which have succeeded".¹² Many, however, question the necessity of setting a ceiling on a farmer's harvest in the absence of the same for non-farm earnings. AM Khusro points out that this is also a misconceived question as there is

⁶ Tung Chung-Shu, an official of the Han Dynasty and a Contemporary of the Emperor Wu (140-86) as cited in HC Tai *Land Reform and Politics: A Comparative Study* (University of California Berkeley, 1974) at 83.

⁷ W Klatt "Agrarian Issues in Asia: II. Reform and Insurgency" (1972) 48 (3) *International Affairs* 395.

⁸ Sita Ram Singh *Land Reform and Farm Diversity* (APH Publishing, New Delhi, 2005) at 148.

⁹ PC Joshi *Land Reforms in India—Trends and Perspectives* (Allied Publishers, New Delhi, 1982) at 40.

¹⁰ K Ahmad "Book Review: Economics of Land Reform and the Farm Size in India by AM Khusro" (1974) 7(3) *Canadian Journal of Economics* 533.

¹¹ VM Dandekar and Nilakantha Rath "Poverty in India II: Policies and Programmes" (1971) 6 (2) *Economic and Political Weekly* 106.

¹² Wolf Ladejinsky above n 4, at 401.

no ceiling on agricultural income but only on the agricultural assets of which there is a permanent shortage ie “land”.¹³

Contemporary researchers look at the issue from the perspective of “social justice”¹⁴ and “distributive justice”.¹⁵ The ideas of “social justice” and “distributive justice” can be weighty reasons for a ceiling, if they are presented in the light of the realities of the agricultural structures and more equitable distribution of farm land. This ideological position runs close to Bangladesh’s reality, for, acquiring land from the landed aristocrats and redistributing it to the tillers (“land to the tillers” as sometimes symbolised in leftist political understanding) were the main goals of agrarian reform of Bangladesh in the post-colonial era. The ownership limit then became legally, economically and politically advisable to prevent concentration of land resources. The issue, therefore, is not whether a ceiling law is necessary but whether it can effectively incorporate the ideological principles of land reform.

To this end, Bangladesh, so far, has seen three rounds of ceiling laws: 1950, 1972 and 1984 respectively. The first ceiling measure was considered under the SAT Act 1950 in the post-colonial setting indicated in chapter 3. The second attempt was made after Bangladesh’s independence when a separate ceiling law was promulgated. Known as “the Bangladesh Landholdings (Limitation) Order 1972”, this law was a manifestation of the Awami League’s land reform commitment made during the pre-independence election campaign. The third and the last round was done under the Land Reform Ordinance 1984 (LRO) which was promulgated under a martial law dispensation.

The 1972 law did not expressly repeal the ceiling provision in the 1950 Act. Nor did the LRO 1984 repeal the 1972 and 1950 versions of the ceiling laws, except by providing a *non obstante* clause in s 3 to this effect: “The provisions of this Ordinance shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any custom or usage or in any contract or instrument”. The *non obstante* clause, under rules of interpretation, serves the purpose of avoiding any conflict of laws with the earlier ones. Thus, the ceiling laws in Bangladesh are to be understood in the light of the concurrent existence of the three versions of ceiling legislation. A reading of the three laws presents the following features:

¹³ AM Khusro above n 5, at 32.

¹⁴ Karol Boudreaux *Land Reform as Social Justice: The Case of South Africa* (Institute of Economic Affairs, Oxford, 2010) at 13. See also, Frank Moore “Land Reform and Social Justice in India” (1955) 24 (8) *Far Eastern Survey* 124.

¹⁵ SN Misra, Jaytilak Guha Roy, Kushal Kaushik and Alka Aria (ed) *Land Reform and Distributive Justice* (Mittal Publications, New Delhi, 1991) at 5. Borrás contends that the concept of redistributive land reform suffers from a lack of clarity. See Saturnino Borrás *Pro-Poor Land Reform: A Critique* (University of Ottawa Press, Ottawa, 2007) at 21. This thesis, however, uses the term in the sense of land reform policy that changes the relative shares of land resource between groups in the society.

1 Objectives

The purpose of first ceiling provision was identical to the purpose of the SAT Act 1950. By this law, the *zamindari* was abolished. The government attempted to establish a just property system for all under its control. For that purpose, the 1950 Act in its preamble stated that the underlying purpose of its enactment was to create a uniform class of peasants under the government in order to establish an egalitarian society. So, it was intended to facilitate the transfer of a landowner's surplus property over the ceiling-limit to the "tillers of the soil". The success of the SAT Act 1950 in abolishing the *zamindari* is debatable, therefore, the 1972 law, in the post-independence setting, invoked the ground of "expediency" for the purpose of reducing the maximum limit of land to be held by a person or a family or a body. Subsequently, the 1984 law set two purposes of ceiling law: one to "reform the law of landholding" and the other to "maximise production". Thus, from the 1984 legislation, it appears that the idea of ceiling law is not only to ensure equitable distribution of land resources but also is to ensure its best use for increasing productivity of land and in that way, address poverty.

2 Ceiling limit

Under the 1950 Act, the land ownership ceiling was 100 *bigha* (33.3 acres), however, it underwent an amendment in 1961 during the regime of Ayub Khan that raised the ceiling to 375 *bigha* (125 acres). The 1972 law restored the original limit fixed by the 1950 Act (ie 33.3 acres). The 1984 LRO, however, again reduced the ceiling to 60 *bigha* (20 acres).¹⁶ This 20 acres rule is the governing law on the limit of private ownership of land today. Surplus land over this limit vests in the government subject to payment of compensation to the person surrendering the land. The ceiling law prohibits acquiring of land in excess to 20 acres by way of purchase, inheritance, gift, *heba* or otherwise.

3 Exceptions

The ceiling law is not applicable to land held under *waqf*, *debuttor* or any other religious or charitable trust if any income from such land is exclusively dedicated to religious or charitable purposes. This means that if any part of the religious or charitable endowment is reserved for the pecuniary interest of any individual or a particular class, the land falls within the ambit of ceiling regulation. The ceiling can be relaxed in cases of tea, rubber, coffee, sugar plantations. There may also be a relaxation on the ground of making orchards, establishing industries, large-scale farming through cooperatives and power-driven mechanical appliances. The government can extend the grounds in the public interests.

¹⁶ The 1972 law confers the power on the government to reduce the ownership limit whenever it is necessary.

B *A Critique*

Understandably, the simultaneous existence of three versions of ceiling law gives rise to a great deal of confusion and offers grounds for flouting them. As a result, it has been subjected to criticism from lawmakers, researchers and experts equally. The 1984 law specifically mentions that the ceiling is about “agricultural land”, whereas, the 1972 & 1950 law refer to “land” in general. Thus, there is a confusion as to what kind of land the ownership limit is applicable. The large landholders take full advantage of this ambiguity to define the nature of the land so as to place their property beyond the reach of the ceiling law. One interpretation of this anomaly may be that the state did not take the issue of ownership limit seriously, except as a political promise. The other interpretation places the onus on the legislation drafters.

1 *Ceiling limit*

The maximum limit of land ownership in Bangladesh has always been a point of controversy. As mentioned earlier, the 1950 Act fixed the ceiling at 33.3 acres with the intent of aiding in land redistribution. There were some attempts to redistribute lands but soon the ceiling was raised to 125 acres. Michael Harris notes that these clearly had little effect on the *zamindar*’s rights in land, on the peasants for that matter, but simply eliminated their rent collecting functions.¹⁷ The *zamindars* and tenure holders became rent paying subjects of the state. Their influence remained the same and the agrarian structure, therefore, remained unaffected.¹⁸ Abu Abdullah echoed the findings of Harris that the redistributive impact of the 1950 Act was negligible.¹⁹

Consequently, the 1972 law restored the original ceiling of 33.3 acres. But the contexts of 1950 and 1972 were not the same in terms of population. Critics point out that the 1972 change was directed towards the surplus and middle-class farmers. The land-people ratio would necessitate a considerable reduction in the ceiling for land in the interest of small and landless farmers.²⁰ It was argued that among 60 million peasants, 27 million owned less than 1.85 acres of land per capita and 22.5 million had no land at all and were day labourers or sharecroppers.²¹ As a result, the proposed ceiling did not provide any solution

¹⁷ Michael Harris “Land, Power Relations and Colonialism: The Historical Development of the Land System” (1989) 18 (3/4) *Urban Anthropology and Studies of Cultural Systems and World Economic Development* 265.

¹⁸ At 275.

¹⁹ Abu Abdullah “Land Reform and Agrarian Change in Bangladesh” (1976) 4(1) *The Bangladesh Development Studies* 67.

²⁰ According to Mahbub Ullah the pressures of population growth have led to worsening land to man ratios; for instance, a ratio of 0.35 acre in 1961, which plummeted to 0.27 acre in 1974 and further deteriorated to 0.25 acre in 1980. See Mahbub Ullah *Land, Livelihood and Change in Rural Bangladesh* (University Press Limited, Dhaka, 1996) at 45.

²¹ Tushar Kanti Barua *Political Elite in Bangladesh: A Socio-Anthropological and Historical Analysis of the Process of their Formation* (Peter Lang, Berne, 1978) at 119.

to the problems of the marginal or landless peasants.²² A more egalitarian attitude of distributive justice should perhaps guide the allocation of shares at least to launch a fair model from which to begin afresh.

2 Exemptions

The 1984 law does not offer any exemption to the land ceiling. Presumably, the exemptions granted by the 1950 Act and 1972 Landholding Order stand operative. Accordingly, one can retain land beyond the ceiling limit on “charitable”, “religious”, “cooperatives”, “orchards”, “industrial” and “public purpose” grounds. These terms, however, have wide connotations in the absence of any principled guidelines. One ambiguity, for example, arose in *Jibendra Kishore*,²³ a leading case that examined the validity of the *zamindari* abolition law in East Pakistan. Among other questions, the Court had to answer whether land held for religious or charitable purposes (such as, *waqf*, *debutter*) but whose pecuniary benefit was partly reserved for an individual or a particular class, could be acquired by the government under the SAT Act 1950. The Court thought that the SAT Act did not authorise the government to acquire such land whatever be the size of the land. The Court’s ruling on the point offered an opportunity for many large landowners to evade the ceiling provision under the SAT Act on the pretext of “religious” or “charitable” endowments. The *Jibendra Kishore* effect continued until it was nullified by the 1972 Order, s 3 of which reads:

- (a) no family or body shall be entitled to retain any land held by it in excess of one hundred standard *bigha* in the aggregate and all lands held by it in excess of that quantity shall be surrendered to the Government; and
- (b) no family or body shall be entitled to acquire any land by purchase, inheritance, gift, *heba* or otherwise which, added to the land already held by it exceeds one hundred standard *bigha* in the aggregate:

Provided that the limitation imposed by clause (a) shall not apply to any land held under *waqf*, *debuttor* or any other religious or charitable trust if the income from such land is exclusively dedicated to religious or charitable purposes without reservation of any pecuniary benefit for any individual:

Provided further that if the income from any such land is partly dedicated to religious or charitable purposes and partly reserved for the pecuniary benefit of any individual, only such portion of the land, to be selected in the prescribed manner, shall be exempted from such limitation, as would yield the income exclusively dedicated to religious or charitable purposes.

Thus, the 1972 Order made it clear that land used for religious or charitable trusts whose benefit was partly reserved for the pecuniary benefit of any individual did not enjoy the protection of ceiling exceptions. This clarification, however, by itself could not do much, because, in order to make the “charitable” or “religious” exemptions reasonable, there

²² The government, however, exempted revenue for agricultural families having land up to 25 *bigha* (8.33 acres).

²³ *Jibendra Kishore v Province of East Pakistan* [1957] 9 DLR 21 (SC).

should have been a limitation on land holding used absolutely for such purposes. That was not set. On the contrary, the 1972 law added “orchards” and “any other public interest” as new grounds of exclusion to the ceiling law. These “special loopholes” in the prescribed ceiling further diluted the efficacy of the land reform. Khan and Zaman observe that the big landowners take full advantage of these drawbacks to bypass the ceiling law.²⁴ Mausumi Mahapatro’s thesis also supports this view. Mahapatro notes that land ceilings are often circumvented by large landholders who also hold entrenched positions within the state.²⁵ In practice, the exceptions govern the system and people become the owner of land much larger than the ownership limit.

3 *The concept of family*

The ceiling law regards the “family” as the unit for ownership limit. This invites problems, because, “family” itself is a fluctuating concept and the number of family members varies from family to family. It also has cultural and religious denotations in Bengali society. As such, these related aspects should have been reflected in the definition of family prescribed by the ceiling laws. The 1972 and 1984 ceiling laws adopted an identical definition of a “family”:

“Family”, in relation to a person, includes such person and his wife, son, unmarried daughter, son's wife, son's son and son's unmarried daughter.

Provided that 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 shall be deemed to constitute a separate family.

This definition of the family left scope for controversy since members of the extended family could claim the status of a separate family by this definition. It appears that if an “adult” or “married” son lives in a separate mess independently of his parents and pays tax in his own name, he may be said to have constituted a separate family. In the Bangladeshi family culture, one may apparently live with the joint family but still may arrange meals in a separate mess. The law fails to take into account this societal peculiarity. The family heads can definitely show that their sons belong to a separate mess and pay the local government’s tax in a separate account and as such, the extended family can hold land altogether beyond the ownership limit.

Another problem related to this is that the ceiling law suggests the same ceiling for each family irrespective of family size. This, in essence, does not serve the egalitarian ethos of land reform. Interestingly, the 1950 Act considered both person and family as units for determining the ceiling. It read: [ownership of land] ... “shall not exceed 375 standard *bigha* (replaced for 100 *bigha* in 1961) or an area determined by calculating at the rate of ten

²⁴ Morshed Mahmud Khan and Shima Zaman “Land Ownership and Law on Ceiling: An Agenda for Land Reform in Bangladesh” (1998) 3 Chittagong University Journal of Law 22.

²⁵ Mausumi Mahapatro “An Analysis of Land, Migration and Rural Differentiation: A Case Study in Bangladesh (PhD Thesis, SOAS, University of London, 2013) at 97.

standard *bigha* for each member of his family, whichever is greater.”²⁶ As already discovered, the limit of 375 *bigha* was a higher ceiling than necessary in the 1950 context. As such, the “person-family” unit, considered by the 1950 Act, did not yield an effective result, though it encapsulated a more rational interpretation of ceiling objectives.

4 Discrimination

One may argue that the ownership limit tends to discriminate between the citizens of Bangladesh. Section 4 of the LRO 1984 reads:

- (i) No *malik* (owner) who or whose family owns more than sixty standard *bigha* of agricultural land shall acquire any new agricultural land by transfer, inheritance, gift or any other means.
- (ii) A *malik* who or whose family owns less than sixty standard *bigha* of agricultural land may acquire new agricultural land by any means, but such new land, together with the agricultural land owned by him, shall not exceed sixty standard *bigha*.
- (iii) If any *malik* acquires any new agricultural land in contravention of the provisions of this section, the area of land which is in excess of sixty standard *bigha* shall vest in the Government and no compensation shall be payable to him for the land so vested, except in the case where the excess land is acquired by inheritance, gift or will.

According to this clause, a person is barred from acquiring more than 60 standard *bigha* of land. If land is acquired in contravention of this rule, the surplus is vested in the government without any compensation excepting lands acquired through inheritance, gift or will. Sub clause (3), however, omits saying anything about the status of the surplus land over 60 *bigha* already held by the people. One authority summed up the position as follows:²⁷

The land reform law of 1984, in so far as it relates to land ownership ceiling is more of a preventive law and not a prescriptive law. The existing law prevents owners holding less than 60 *bigha* to own land beyond this ceiling. It does not impose new ceilings for those owning more than 60 *bigha* but does prevent them from acquiring new agricultural land.

Thus, it appears that the spirit of the ceiling provision is in contradiction to the constitutional objectives of equal justice. For, the Constitution ensures “equality before the law” and “equal protection of the law”.²⁸

5 Land classification

The ceiling law does not consider the nature of land and its location. The value of land varies from locality to locality and from urban to rural area. As such, the same ceiling for all types of land is not realistic. The 1984 law also left an ambiguity as to the meaning of “land” in its clause that prohibits *benami* transactions (property is placed in the name of

²⁶ State Acquisition and Tenancy Act 1950, s 20 read with s 90.

²⁷ AZM Obaidullah Khan and AMM Shawkat “Legal and Administrative Aspects of Land Reform Measures and Agrarian Welfare in Bangladesh” (1985) VIII (2) Bangladesh Journal of Agricultural Economics 1.

²⁸ The Constitution of the People’s Republic of Bangladesh, art 27.

another). The arguments in *SN Kabir*,²⁹ gravitated towards the question whether or not the word “immovable property” covered by the 1984 LRO applied to “non-agricultural land”, for the preamble of the LRO stated that its purpose was to reform the “land relating to land tenures, land holding and transfer with a view to maximizing production and ensuring a better relationship between landowners and sharecroppers”. The Supreme Court of Bangladesh delved into the historical settings of the LRO and denied the role of the preamble in interpreting an unambiguous term like “immovable property” and ruled that as the short title of the LRO had used the term “land” in a wider import, the word immovable property cannot be said to exclude “non-agricultural land”. The Court was perhaps correct to hold this as a safe test, but the point to be made is that the provision is ill-drafted. A law designed to cover the measures of agrarian reform should have skilfully drafted the interpretation clause.

6 *Land institution's capability*

The ceiling law was made without considering the ability of the land administration to undertake the gigantic task of land reform in addition to its routine functions. The 1972 ceiling law was made in a post-war setting, in which the land administration was not ready to do the tasks related to the proper implementation of ceiling laws. The First Planning Commission of Bangladesh emphasised extensive land reform and structuring the local land institutions in such a way that marginal or landless farmers could participate effectively in local decision making. This could have brought a check on matters like family partitions, transfers and *benami* transactions. In the result, the purpose of ceiling laws gets defeated through the well-known device of transfers and partitions. Not much land was made available for distribution to the landless and small farmers.³⁰ This unpreparedness of the state is an antithesis to the tenets of land reform that widely embrace the socio-economic regeneration of the village people. The shortcomings of the ceiling laws, thus, frustrated the purpose of land reforms.³¹

The analogous jurisdiction, West Bengal of India, offers a compelling case of studying the ceiling laws, though West Bengal's ceiling laws are not immune from criticism.³² West Bengal and Bangladesh share a common legal heritage on land relations and their agrarian pattern is almost similar. West Bengal sets a relatively smaller landownership as the ceiling than did the other States of India. The ceiling ranges from 7 to 17 acres depending on the

²⁹ *SN Kabir v Fatema Begum & Others* [2014] 66 DLR 193 (AD) at [22-23].

³⁰ Khan and Zaman “Land Ownership and Land Ceiling” above n 24, at 31.

³¹ Aminur Rahman *Bhumi Bonchito Manusher Bhumi Odhikar* (trans: the land rights of the land-deprived) (AH Development Publishing House, Dhaka, 2010) at 35.

³² Raj Krishna “Agrarian Reform in India: The Debates on Ceilings” (1959) 7(3) Economic Development and Cultural Change 302.

family size.³³ The 1955 West Bengal Land Reforms Act makes a classification of the family. It sets separate ownership limits for individuals and family. The 1955 Act prescribes a ceiling in a graduated scale with 2.5 hectares for an adult or unmarried or sole surviving person in a family. For a family consisting of two to five members, the ownership limit is 5 hectares per person, for each member exceeding five an extra amount of 0.5 hectares. So it seems that the West Bengal law is more rational than the Bangladeshi law on this point.

Unlike Bangladesh, West Bengal repealed its previous laws. From the date of the commencement of the 1955 Act, everyone came within the same ceiling system. The West Bengal system also defined the standard of hectares depending on the nature and productivity of land; Bangladesh lacks this detail.³⁴

III Khas Land

A The Case for Khas Land

The *khas*³⁵ land is land that comes under government's possession through the implementation of the ceiling laws. This land may also come from other sources.³⁶ In addition to the ceiling laws discussed above, quite a few other legal arrangements were in operation in Bangladesh since the colonial time to regulate the *khas* land affairs under the settings stated therein.³⁷ This part of the chapter mainly focuses on the *khas* land that comes to the governments' grip through the operation of the ceiling laws. In applicable cases, it makes references to the *khas* land recovered from other sources.

The purpose of a ceiling law is best achieved by a corresponding law of distribution. There was no such law since the days of decolonisation. The issue had long been a question of political commitment. One of the allegations against the Pakistan regime was that it did not allocate the *khas* land recovered through the ceiling measures to deserving people. Bangabandhu, the Founding Father of Bangladesh, in one of his pre-independence addresses in 1971, said:³⁸

During Ayub Khan's regime, *khas* land was distributed among the well offs. Let me tell you today, we will look into the matter. We will take away the lands from the haves and allocate them to the have-nots. We will take care that the rich do not receive *khas* land anymore.

³³ Tim Hanstad, Robin Nielsen, Darryl Vhugen and T Haque "Learning from Old to New Approaches to Land Reform in India in Hans Binswanger Mkhize, Camille Bourguignon, Rogier van den Brink (eds) *Agricultural Land Redistribution: Towards a Greater Consensus* (World Bank, Washington) at 246.

³⁴ 1 hectare = 2.47 acres for irrigated land, 3.47 for non-irrigated land, 3.46 for other types of land.

³⁵ Literally means exclusive.

³⁶ State Acquisition and Tenancy Act 1950, s 76. The property of public easement, land fit for settlement, abandoned property, un-inherited land, *jalmahal* (water-bodies) fall within the category of *khas* land.

³⁷ Government Estates Manual 1958, *Barga* Settlement on *Khas* Land 1956, State Acquisition and Tenancy (Amendment) Act 1972.

³⁸ Sheikh Mujibur Rahman "Speech of Bangabandhu" (Dacca, 3 Jan 1971) <<https://www.youtube.com>>.

As such, it was not surprising that the post-independence Awami League government announced the distribution of *khas* land among the landless and the peasants having uneconomic fragments of land. The people were asked to submit returns of land surplus to ceilings by specific deadlines. From the declarations made by the potential landholders, it appeared that the government could expect to recover 76,712 acres of land, however, it ended up recovering only 20,317 acres.³⁹ It was reported that there might be cases of understatement or no statement on surplus land, mainly due to the wider notion of “family” and to the frequent shifting of dates for submissions of returns of excess land.⁴⁰ Besides, many landowners succeeded in creating legal grounds for not submitting returns for large areas of excess land by forging documents and instituting suits.⁴¹

The distribution of even this surplus land to the deserved ones had been very slow, in the absence of a corresponding distribution law. Abu Abdullah, however, noted that there was an “unofficial guideline” for settlement of *khas* land in the early 1970s.⁴² The guideline, among others, delineated the process of *khas* land allocation. It also proposed to allocate land without *salami* (security money) to the bona fide agricultural families having no land or having less than 1.5 acres of land. Under the “unofficial guideline” as stated by Abdullah, the government distributed about 900 acres of *khas* land among the marginal peasants including the allottees of clustered villages by the end of 1973.⁴³

No further significant progress was made in the allocation of land until 1984 when the ceiling figure was once again lowered to 60 *bigha*. Since then, the estimation of *khas* land varies. Rehman Sobhan found that as of 2001, the government had control over 3.5 million acres of *khas* land.⁴⁴ Barkat, Zaman and Raihan gave almost similar account; they estimated that the country had 3.3 million acres of *khas* land, among which 0.8 million acres were agricultural land available for distribution to the poor.⁴⁵ Barkat, Zaman and Raihan further observed that the amount should actually be higher because part of the *khas* land were not identified due to inefficiency of the land record system.⁴⁶

³⁹ IN Mukherjee “Agrarian Reforms in Bangladesh” (1976) 16(5) Asian Survey 452.

⁴⁰ At 463.

⁴¹ At 463.

⁴² Abu Abdullah “Land Reform in Bangladesh” above n 19, at 93.

⁴³ Mukherji above n 39, at 463. Sheikh Hasina, President of Bangladesh Awami League claimed at the Inaugural Session of the party Council of 1987 that the Awami League government had distributed 9000 acres of land to the landless people. See Sheikh Hasina *Awami League National Council* (Radical Asia Publications, Dhaka, 1987) at 4. Mukherji’s figure seems realistic as he noted the figure in 1976 and relied on a 1973 progress report published by the government of Bangladesh.

⁴⁴ Of this, 25 per cent was agricultural land, 50 per cent was non-agricultural and 25 per cent was waterbodies. See Rehman Sobhan *Challenging the Injustice of Poverty: Agendas for Inclusive Development in South Asia* (Sage, New Delhi, 2010) at 61.

⁴⁵ Abul Barkat, Shafique uz Zaman and Selim Raihan *The Political Economy of Khas Land in Bangladesh* (ALRD, Dhaka, 2001) at 223.

⁴⁶ At [84-107].

Views differ with regard to how much *khas* land has been allocated to the landless and poor people so far. However, they seemed to agree that only small portion of land has been allocated to them. Barkat, Zaman and Raihan claimed that only 11.5 per cent of the agricultural *khas* land has been distributed until 2000. Recent official sources claimed a better record of allocation.⁴⁷ The Annual Report of the Ministry of Land reveals that the government allocated 0.094 million acres of *khas* land among 193,000 landless families across the country from 2009 to 2015.⁴⁸ If Barkat, Zaman and Raihan's study is taken as a base, there should still be land in the control of the government for reallocation. Importantly, the land in private possession in defiance of the ceiling laws is yet to be placed at the service of the poor.

In order to implement the new ceiling made under the LRO 1984, a temporary Land Reform Action Programme (LRAP) was taken in 1987 enunciating the principles of distribution of existing *khas* land and any other land that could be attained under the new ceiling measures. In line with this LRAP, a complete Agricultural *Khas* Land Management and Settlement Policy was adopted by the Bangladesh government in 1997.

B *The Law Governing Khas Land*

The redistribution of *khas* land may greatly alleviate poverty and landlessness.⁴⁹ Sadly, the government of Bangladesh have not fully taken possession of the surplus land and the vested interest groups have been occupying the major part of it. Failure to make a comprehensive list of *khas* land added an insult to this situation. The procedural difficulties in getting *khas* land allocated is a perennial problem virtually denying the needy access to land. The poor could not reap benefit even from the small amount of land they were distributed.⁵⁰ The redistribution laws, in Bangladesh, are not laws in the proper sense, because, they were formulated either as a policy or action plan. The failure of their implementation, therefore, does not attract a legal challenge.

In spite of this, there are two important instruments of land redistribution: i) the 1987 LRAP and the 1997 Agricultural *Khas* Land Management and Settlement Policy. The 1987 plan, as just mentioned, was temporary in nature and the 1997 Policy was an extended version of the plan, using more sophisticated terms like “management” and “settlement”

⁴⁷ At 217. See also Aline Herrera “Access to Khas Land in Bangladesh: Discussions on the Opportunities and Challenges for the Landless People and the Recommendations for the Development Practitioners” (Policy Paper, Dhaka, March 2016) at 10.

⁴⁸ Ministry of Land, Government of Bangladesh <<http://www.minland.gov.bd>>.

⁴⁹ It is estimated that the available *khas land* can be fairly be distributed to the landless families. In that case, each family would receive 1.5 *bigha* (0.5 acres) of land. They would be able to improve their condition by using this land, provided other structural supports are offered by the government to ensure a meaningful and sustainable use of the land.

⁵⁰ Rahman gives an account of a sub-district of Satkhira, a southern region of Bangladesh for the period between 1985 and 1988. In that sub-district, 500 landless were offered *khas* land at that period; however, they did not get possession of the land until 2007 because of administrative difficulties. See Aminur Rahman above n 31, at 36.

instead of “redistribution”. The objectives of the LRAP were, amongst others, to ensure “equitable use” and “distribution of land resource” and to “infuse a new life in the rural economy”. The LRAP proposed to establish Land Reform Committees and Task Forces at the national, regional and local levels; set the criteria of the beneficiaries; classified the *khas* land, set a priority list and established the procedure of applying for the *khas* land. Abul Barkat made a critical study of the LRAP and the 1997 Policy and found discrepancies between the law of land ownership ceiling and the distribution policies; noted the bureaucratic complexity in allocating land to the deserving peasants and questioned the latter’s failure in devising a collaborative distribution process.⁵¹

C *The Khas Land Policy of Bangladesh: A Critique*

The 1987 LRAP and the 1997 Policy have attracted criticism from legal experts, academics and development economists.⁵² The following are some of the often mentioned flaws in the *khas* land settlement policy:

(i) The Policy is dependent upon the successful operation of the ceiling laws. But as there is no deadline for surrendering the ceiling-excess land, the policy cannot come into operation with its full force.

(ii) Different types of *khas* land are placed under different ministries of the government. Lack of coordination among them, therefore, looms large and the poor do not get access to *khas* land in a timely manner.

(iv) Successive governments in the post-independence era could not take the ceiling surplus land into their control. Much land has fallen into the possession of illegal entrants or occupiers.

(v) The policy recognises the right of landless peasants to get a permanent or long-term settlement. However, in the case of short-term or yearly lease settlements, they do not enjoy this right. This presents an opportunity for the haves to manipulate the settlement auction process in their favour.

(vii) The process of allocation is sometimes thwarted by the existence of conflicting laws. For example, if the *khas* land happens to be a waterbody suitable for prawn cultivation, the relevant government rule prefers the well-off businessmen over the poor riparian fishermen in allocating the land.

(vii) The process of distribution of *khas* land is itself problematic and complicated under the present policy. It is contingent upon certain other related and incidental factors: Firstly; the procedure of selection of the land recipients is hostile to the interest of the poor. The applicants need to produce testimonial from the local government representative

⁵¹ Abul Barkat, Zaman and Raihan above n 45, at [19-82].

⁵² Abdul Alim “Land Management in Bangladesh with Special Reference to *Khas* Land” (2009) 14 Drake Journal of Agricultural Law 234.

confirming their status of landlessness. This requirement subjects them to the local political dynamics. Secondly; the exact amount of *khas* land has never been identified by the government of Bangladesh. Thirdly; there is no mechanism to make the *tehsildars* (local revenue officer) accountable, if no sketch map of the distributable *khas* land is made. Fourthly, in the absence of legal obligation, the institutional capacity of the *Khas* Land Allocation Committee is weak. Fifthly; only the record of agricultural land is maintained by the office, the non-agricultural land does not get recorded. Finally, there is no authenticated list of landless people. At times, the rich farmers present themselves as landless. Moreover, there are no practical steps to redeem the land from the powerful lessees. Neither is there any example of penalty by the Deputy Commissioner (Revenue) in the event of mistaken allotment of *khas* land to the non-deserving farmers.

(ix) Litigation relating to possession of *khas* land is never ending and there is no real step taken to speed up the disposal of cases. The formation of the local *Khas* Land Committee is also disputed. There is no effective participation of the right-bodies in this Committee. Moreover, the right-bodies do not have any standing to institute the case for the landless.

IV Distributive Justice and Land Reform Legislation

Thus, the dismal record of the “ceiling-distributive” land reform adopted by Bangladesh in the post-independence era is clear. Looking back, it may be noted that the whole episode of ceiling law is one of evasions by commission and omission. With the poorly drawn enactments, the distribution of surplus land has been the subject of policy fiasco. This raises the question of political commitment to implement the objectives of land reform. It seems that the problem started from the early days of Bangladesh, when land reform issues were discussed politically, but there was a serious lack of deliberation to set them into the new state’s legal framework. The ambivalent politics of land reform that started after the birth of Bangladesh are in many ways responsible for the state of disappointment the ceiling law and distribution policies have met with. The next part of this chapter, therefore, reverts to the post-independence settings and looks at the ceiling-distribution issue to understand the politico-legal vacuum of the land reform approach.

A The Property Rights and Redistribution

The post-independence setting of Bangladesh called for a distributive land reform. The Awami League that led the country’s independence and also dominated the state apparatus in Bangladesh during the years 1972-1975 adopted this approach in line with its pre-independence political manifesto.⁵³ It promised to bring a change in the land ownership system with a view to redistributing land to the landless and marginal peasants. However,

⁵³ Syed Sirajul Islam “The Role of the State in the Economic Development of Bangladesh during the Mujib Regime 1972-1975” (1985) 19 (2) *Journal of Developing Areas* 185.

the phrase “distributive justice” was not used in the Constitution of Bangladesh, but the phrase was understood to form an aspect of “social justice”. It was important to see, nonetheless, whether or not the framers of the Constitution opted for a property clause and if so, in what terms. They opted to insert one. Mollah noted that such insertion largely influenced by the USA-Indian constitutional thought.⁵⁴ There was, however, no serious discussion about its content.⁵⁵ The sole opposition lawmaker in the Constituent Assembly, Suranjeet Sengupta complained that the Constitution did not adequately offer grounds for the establishment of socialism.⁵⁶ Sengupta favoured a maximum limit of private property to be fixed in the Constitution and a clear commitment to state ownership of property. That view was rejected. Ultimately, the property clause that the Constitution accepted, purports to safeguard property rights from the arbitrary interference of the state. It seems that the framers perhaps wanted to see the right to property in the context of personal liberty.⁵⁷ This stand, at times, appears as a barrier to land reform as it brings other legal consequences. India, for example, saw conflicts between the executive and the judiciary on land reform issues. For Bangladesh, the question was not perhaps the constitutionalisation of property, rather of the way and nature of accommodating the concept of land reform within the constitutional framework. This did not take place with clarity. It can be argued that a constitutional revision of the system of economic access to land in the interest of social justice was needed. In the recent past, land reform was viewed as an issue of “quasi-constitutional right” in South Africa, where the framers protected the property right and provided for the enactment of land reform legislation requiring government’s intervention.⁵⁸

B *Socialism and the Issue of Land Reform in the Constitution*

A meaningful land policy depends upon the constitutional nature of the state. The 1972 Constitution of Bangladesh adopted “socialism” as one of the basic four pillars of Bangladesh.⁵⁹ Article 10 of the Constitution says that the state should establish an exploitation-free society. It also urges installing a socialistic economic system. Article 13

⁵⁴ MK U Mollah “The Influence of the US Constitution on the Indian Subcontinent: India, Pakistan and Bangladesh” in J Barton Starr (ed) *The United States Constitution: Its Birth, Growth and Influence Asia* (Hong Kong University Press, Hong Kong, 1988) at 154.

⁵⁵ Two members of the ruling party, Awami League, favoured granting of the absolute power of the State to nationalise any property for the purpose of progressive realisation of socialism.

⁵⁶ Abul Fazl Huq “Constitution-Making in Bangladesh” (1973) 46(1) *Pacific Affairs*, University of British Columbia 59.

⁵⁷ The use of the phrase “life, liberty, body, reputation or property” in art 31 of the Constitution is an impression of this.

⁵⁸ Martin Adams and John Howell “Redistributive Land Reform in South Africa” (2001) *Natural Resource Perspective* 1.

⁵⁹ The preamble of the Constitution of the People’s Republic of Bangladesh. The four pillars are: (i) “democracy”; (ii) “socialism”; (iii) “nationalism”; and (iv) “secularism.” Two of these pillars ie “socialism” and “secularism” were deleted from the Constitution; however, they were restored in 2011 by the 15th amendment to the Constitution.

declares that machinery and the means of production belong to the people. It recognises, however, three kinds of ownership: (a) state ownership through a nationalised public sector; (b) collective ownership through co-operatives; and (c) private ownership within the limits determined by law. Thus, the Constitution keeps both the concept of “socialism” and concept of “private ownership”. Critics point out that a Constitution that does not provide for the abolition of private property can have no claim to socialism. It is also argued that the Constitution assigned in a general and abstract manner ownership of the machinery and means of production to the people while providing enormous scope for the expansion of private interests and property for exploitation of the people by the ruling classes.⁶⁰

The idea of private property envisaged in art 13 is further reinforced by the constitutional property clause in art 42 which lays down that subject to legal restrictions each citizen will have the right to acquire, hold, transfer and distribute property. These “restrictions” often become instruments of championing the idea of private property in an anti-poor manner.⁶¹ From the linguistic point of view, it is not clear from art 42 whether a landless person has a right to “acquire” property and if so, from whom and under what circumstances?

There is an insufficient appreciation of the issue by the judiciary; the case of *Mohammad Ali*⁶² may offer an illustration. The petitioner was a landless cultivator and received a piece of land from the government without any *selami*⁶³ and rent under certain terms and conditions. It was agreed that the settlement would automatically convert into a permanent *maliki* (ownership) after expiry of fifteen years. The government took back the property before the expiry of that period on the allegation of conversion. The petitioner invoked the constitutional protection of art 42 and argued that he had a right to property under this clause. The contention, however, was rejected by the Court. It was held that as the petitioner had violated one of the conditions of the settlement, the agreement was liable to be rescinded.⁶⁴ The Court considered the policy of *khas* land management to reach this conclusion. While the Court’s position was literally correct, the problem lay with the way the right to property was viewed in the Constitution and land distribution policy.

One critic mentions the theoretical dilemma of socialistic and democratic visions of the Constitution makers:⁶⁵

⁶⁰ Badruddin Umar (*Weekly Holiday*, Dhaka, 2 October 1972) as cited in Tushar Kanti Barua *Political Elite in Bangladesh* above n 21, at 130. See also BK Jahangir “Nature of Class Struggle in Bangladesh” (1977) 12 *Economic and Political Weekly* 2063.

⁶¹ Tushar Kanti Barua *The Political Elite in Bangladesh* above n 21, at 130.

⁶² *Mohammad Ali v Bangladesh and Others* [2007] 36 CLC 2589 (AD).

⁶³ A sum of money that a successful applicant for *khas* land has to pay.

⁶⁴ Per Fazlul Karim J.

⁶⁵ MA Awal (*The Daily Ganakantha*, Dhaka, 7 November 1972) as cited in Tushar Kanti Barua above n 21, at 134.

... It can be said that although the Constitution has been presented as a symbol of the exploited and deprived people's hopes and aspirations it is neither a democratic and socialistic one. Rather by an assemblage of the obsolete part of democracy and socialism, the ruling elites under the mask of 'democracy' and 'socialism' have tried to appropriate for themselves the nationalised capital.

The Constitution in part II made some further references to "agrarian revolution" "emancipation of the toiling masses" and declarations on other socio-economic rights.⁶⁶ But nowhere does it mention land reform. Badruddin Umar criticises this omission:⁶⁷

[The Constitution] ...refrains from saying anything regarding the abolition of feudal relations and of private property in land or about any fundamental change in the land system. In this context the declarations ... are nothing but an empty exercise in political propaganda.

Barua, however, questions Umar's use of the term "feudal relations" given the fact that the feudal system (*zamindari*) had been abolished by the 1950 SAT Act. Curiously, Barua agrees in the final analysis that the constitutional stand on the land reform issue served the purpose of the ruling elites:⁶⁸

... Umar might have used the term 'feudal' in a loose sense, meaning thereby, the exploitative character of the big and middle 'class' land owners in relation to the landless peasants. It is a well-known fact that the attachment of the peasants to land (however, insignificant the amount may be) is a great obstacle to the abolition of private ownership. The Awami League might not have liked to risk its popularity in such a venture. Of course, the landless peasants (by far the most numerous) and the small landowners could have been made to accept any agrarian reform which would have ensured them a better living. But it seems that the ruling elite had neither the will nor the desire to embark on radical land reform. If our elaborate discussion of the Awami League's socialism and nationalisation programs is any guide, then it would appear that constitutional provisions are consistent with the 'socialistic' goals of the political elite. Their 'socialism' is a kind that helped them to establish and retain a dominant political and economic base from which to operate and the articles in the Constitution seem to reflect the *de jure* recognition of the legitimacy of such objectives.

It is clear that the issue of land reform did not receive proper attention in the Constitution. As such, it was not surprising that land reform laws made out of this fragile constitutional property law would not be strong enough to ensure a fairer distribution of land resources. The constitutional stand on land reform, thus, fell short of creating an environment to satisfy the conditions of redistributive justice. The ambiguous status of right to property in the Constitution, pro-rich ceiling laws and problematic *khas* land management policies—altogether came to generate a polarisation in the rural economy that acted against the interest of the landless and poor peasants.⁶⁹

⁶⁶ Bangladesh Constitution, arts 14-16.

⁶⁷ Badruddin Umar (Weekly Holiday, Dhaka, 22 October 1972) as cited in Tushar Kanti Barua above n 21, at 130.

⁶⁸ Tushar Kanti Barua *The Political Elite in Bangladesh* above n 21, at 130-131.

⁶⁹ Abu Abdullah above n 19, at 67.

A question may arise, why, even in the time of democratic governments that professed a clear intention to undertake land reform, the target was not achieved? Why did the government fail to enact effective legislation to make the programme of land reform successful? Why is the list of errors of omission and commission so long considering the unresolved land problems? The answer of W Klatt is appealing.⁷⁰

This is true in particular regimes, untried in public debate and parliamentary government, where—as so often in Asia—large landowners, high-ranking officers and senior civil servants combine to make up an autocratic leadership. As it is the purpose of agrarian reform to shift economic advantage, social status and political power from this group to another less fortunate sector of society, it is, of course, not surprising that the ruling elites, representing the interests of the privileged minorities, are disinclined to give way on the land question.

Bangladesh land ceiling laws offer an unusual case in the sense that none of them was made through parliamentary deliberation. Had it been done so, the list of shortcomings could have been shorter. The 1972 and 1984 ceiling laws were in the form of Presidential Orders, the 1987 land reform action was done by the military government and the 1997 *khas* land settlement policy was formulated in a democratic environment, but under a heavy bureaucratic influence.

Klat's analysis in the context of Asia in 1970 reveals another political aspect of the land reform law making. Klat found that in the majority of the Asian countries the interests of the poor peasants were represented by “pseudo-political groups” often marked by the leftist school of political thought.⁷¹ The “reluctance of the established forces” to compromise on the land question usually “leaves the political left as the chief critic of the order in force in the rural area”.⁷² In major parts of Asia, the Left were banned from activity and thus forced to operate clandestinely.⁷³

In the post-colonial East Pakistan, the socialist parties that advocated the emancipation of the peasants, went underground, under the corrosive regime of the Muslim League government.⁷⁴ The leftist political parties, though banned in the early days of Pakistan, had a great role in the independence movement of Bangladesh in 1971 and therefore, continued to influence the constitution-making process of the new country. However, their influence was largely from outside of the parliament as they did not have any representation in it. It can be argued that the ruling party Awami League wanted to make a balance between the leftist thought of socialism and its own thought of democracy. The Preamble of the

⁷⁰ W Klatt above n 7, at 395.

⁷¹ The Communist-led Bengal *Kishan Sabha* in the late colonial phase of the British rule in India was a good example of this.

⁷² Klatt above n 7, at 400.

⁷³ Japan, India and Sri Lanka being the exception.

⁷⁴ See chapter 3.

Constitution of Bangladesh stated it like this: “A socialistic society through a democratic process”. This created much confusion.

The 1984 ceiling law reform and the 1987 land reform action were undertaken during a military administration, arguably an autocratic regime in Bangladesh. The autocracy and redistribution have a relationship. Michael Albert in the Latin American context shows that redistributive land reform better takes place under an autocracy, for an autocracy faces small “institutional constraints” and it does not care about the interests of the landed elite to remain in power.⁷⁵ Albert’s theory of redistributive land reform has only a qualified relevance to the Bangladesh case.

Firstly, the relative intensity of land redistribution to the poor, according to Abul Barkat’s study, gets a better score during the military regime 1981-1990.⁷⁶

Secondly, the 1984 reform legislation enacted by the military administration, only increased the legal loopholes. It shifts more emphasis on to tenurial land reform by recognising the institution of sharecropping than the redistributive land reform. Experience shows that redistributive land reform is more attuned with the post-independence or post-colonial settings.⁷⁷

Thirdly, Peter Bertocci shows that during the 1980s the military government of Bangladesh formed an interest based alliance between the intermediate classes, civil bureaucrats, politicians and the rich peasants.⁷⁸ The urban and rural labourers, workers and small peasants formed the lower class and were politically dominated.

Fourthly, as per Ronald Herring’s findings in most of the South Asian countries, the drafters of land reform legislation were more concerned about getting popular legitimacy than delivering substantial benefits to the poor.⁷⁹ The lacunae in the land legislation of Bangladesh, therefore, are not merely a normal feature of law but also an example of the politics of land law. These lacunae effectively derailed the land reform proving yet again that legislation itself can be the root of the problem rather than the process for its resolution.⁸⁰

⁷⁵ Michael Albertus *Autocracy and Redistribution: The Politics of Land Reform* (Cambridge University Press, New York, 2015) at 66.

⁷⁶ This was 36 per cent of the total land distributed in ten years. See Abul Barkat, Shafique uz Zaman and Selim Raihan *Political Economy of Khas Land in Bangladesh* (ALRD, Dhaka, 2001) at 219.

⁷⁷ Ambreena Manji *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (Zed Books, London, 2006) at 35.

⁷⁸ Peter Bertocci “Bangladesh in the Early Eighties: Praetorian Politics in an Intermediate Regime” (1982) 22(10) *Asian Survey* 988.

⁷⁹ Ronald Herring *Land to the Tiller: The Political Economy of Agrarian Reform in South Asia* (Yale University Press, New Haven and London, 1983) at [153-179].

⁸⁰ Ayesha Jalal *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge University Press, Cambridge, 1995) at 146.

V Chapter Summary

The chapter has showed that the notion of the land ceiling has a direct impact on the distributional pattern of land. Its purpose is to prevent the monopolistic concentration of land. The post-independence land reform of Bangladesh took certain legislative steps to remedy the past land injustice. However, far less land has been redistributed than promised and those who did benefit from the land reform laws had to compete on disadvantageous terms in the market without any structural support from the state. This perpetuated the existing differences in land relations and offered vested groups an opportunity to sidestep the intentions of the lawmakers stated in the land reform policies. As a result, the damage seems to be fatal because land ceiling legislation has lost much, if not all, of its potential to make a significant contribution towards establishing distributive justice.

The malady of land redistribution has not been addressed with a comprehensive legislative enactment in the post-independence era. The Constitution of Bangladesh failed to make a solid start by creating a property regime, textually and structurally, where pro-poor land reform could take place. The half-hearted land reform attempts in the form of presidential orders, governmental action programmes and policies turned this serious national issue into mere political rhetoric. In addition, the ceiling reforms have never been followed by fundamental institutional changes. Land reform did not become an issue of distributive justice. As such, only a few of the village poor benefited from the land reform legislation promised by the state.

Chapter 7

The Eminent Domain Law: Land Reform and Poverty

I Introduction

This thesis so far has shown that: i) the post-colonial settings of Bangladesh (then East Pakistan) could not respond to the needs for radical land reform;¹ ii) the post-colonial land reform legislation contributed to the poverty of the marginal farmers, the sharecroppers in particular;² iii) the riparian land law worked to the disadvantage of the riparian peasants;³ and iv) the “ceiling-redistributive approach” to land reform taken in the post-independence era was confronted by implementation challenges.⁴

Against the backdrop of these findings, the present chapter examines a further crucial aspect of Bangladeshi land law—the law of eminent domain and its implications for the land reform laws. Under the land reform laws, the state purports to allocate land to the poor.⁵ The power of acquisition by nature stands opposite to this. The state exercises this power under the eminent domain law. The power of eminent domain allows the state to override private property rights to land in the “public interest”. While land reform mainly targets the empowerment of the farmers to deliver social justice,⁶ the apparatus of acquisition, if exercised irrationally, disempowers them in the sense of losing land.

¹ See chapter 3.

² See chapter 4.

³ See chapter 5.

⁴ See chapter 6.

⁵ Abhijit Guha “Dispossession of Peasants by Industrial Projects” in Shobhita Jain and Madhu Bala (eds) *Economics and Politics of Resettlement in India* (Dorling Kindersley, New Delhi, 2006) at 156. See also Abhijit Guha *Land, Law and the Left: The Saga of Disempowerment of the Peasantry in the Era of Globalisation* (Concept Publishing Company, New Delhi, 2009) at 129.

⁶ Ensuring social justice is an of poverty alleviation. R Khasnabis argues that hidden in every land law, there is a concept of social justice relating to land relations, ownership rights, land management and land utilisation pattern. Ratan Khasnabis “Land Acquisition Act and Social Justice: A Study on Development and

The need for eminent domain power is more or less acknowledged in state practice. However, excessive exercise of this power diminishes property rights of the people. In agrarian societies like Bangladesh, landed elites disproportionately control access to land. As such, when the state acquires land by exercising its eminent domain power, the poor, the peasants or minority groups suffer more than the landed class. It is important, therefore, to examine the nature of Bangladeshi eminent domain law.

This chapter is divided as follows. After this introduction, parts II and III set the scene for the chapter. Part IV examines the principles of compulsory acquisition enunciated in the 1982 Acquisition and Requisition of Immovable Property Ordinance (ARIPO) —the key eminent domain law of Bangladesh. Part V explores the situation of the peasants—a frequently group for unlimited use of eminent domain power. Part VI is the summary of the chapter.

II *The State's Power of Eminent Domain and Land Acquisition*

Eminent domain is the power of a state to expropriate private property. The power is said to be an “inherent attribute of sovereignty” and an “offspring of political necessity”.⁷ Therefore, the law of every nation recognises that the state is able to take private property. The claim of the state that private interests need to be sacrificed for the public exigency has been a recognised principle in state governance. The well-known phrase “people’s welfare should be the highest law” was founded upon the generally accepted doctrine of eminent domain.⁸ In the United States, the power of eminent domain is recognised in both the Federal (Fifth Amendment) and State Constitutions. The US Constitution limits the power of taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners whose property is taken.⁹

The Bangladesh Constitution implicitly endorses the eminent domain principle in its property clause.¹⁰ Besides this, the ARIPO statutorily manifests this principle.¹¹ In

Displacement” in Ranabir Samaddar (ed) *State of Injustice in India: The Issue of Social Justice* (Sage Publications India, 2009) at 45.

⁷ William Fischel *Regulatory Takings: Law, Economics and Politics* (Harvard University Press, Cambridge MA, 1995) at 77; James Huffman, *Private Property and the Constitution: State Powers, Public Rights and Economic Liberties* (Palgrave Macmillan, New York, 2013) at 65.

⁸ Silas Alward “Expropriation of Property” (1899) 18 Can L Times 230.

⁹ The Fifth Amendment of the US Constitution sets forth the principle of eminent domain in this fashion: “nor shall private property be taken for public use, without just compensation.”

¹⁰ The Constitution of the People’s Republic of Bangladesh, art 42.

¹¹ There are manifestations of this power in other special laws ie Town Improvement Act 1953 (for urban development), Emergency Requisition of Property Act 1989 (for requisitioning of land to prevent flooding in Dhaka city), Jamuna Multipurpose Bridge Project (Land Acquisition) Act 1995 (for establishing Jamuna Bridge). These enactments, however, are complementary to the ARIPO. This chapter confines itself to the ARIPO.

interpreting this legal arrangement, the Bangladesh judiciary has termed eminent domain as a right of the “sovereign” to acquire private property for public use.¹²

In reality, the exercise of the power of eminent domain is not always unproblematic. One obvious problem is that landowners may not be fully compensated for their losses. Another problem lies in the fact that it often results in state led displacements.¹³ Therefore, it has been stressed that the principle should be exercised with great caution.¹⁴ Present-day governments acquire property (principally land) under different developmental guises.¹⁵ Generally, private property is its main source of land supply in order to satisfy the ends of development. Nader and Hirsch stressed the need to consider fundamental human rights law seriously in preventing the abuse of this power.¹⁶ The US Supreme Court’s decision in *Kelo*¹⁷ also ignited the debate on economic development versus private right to property.¹⁸ The case of Bangladesh is no different. The Bangladesh government also frequently invokes the claim of “economic development” to defend the acquisition projects.¹⁹

The issue is involved with the property rights of the people. It also exposes the enormity of the state’s control over private property. Hidden in the concept of “property” and “acquisition” the issue of “deprivation” is at the heart of eminent domain law. Judicial interpretation in some cases suggests that once compensation is paid upon acquisition, the owners are deprived of their property rights.²⁰ Moreover, the owner, excepting in some cases, cannot get back the property validly acquired even if it is used for a purpose different from the purpose of original acquisition.²¹

Socially disadvantaged groups suffer excessively when the government takes land giving unjust compensation or no compensation for doubtful public purposes. Their land is targeted because those groups are unorganised, uninfluential and have ill-defined property rights. Experts regard the law of eminent domain as a blind spot in distributive land

¹² *The Government of Bangladesh & Others v Md. Giasuddin Choudhury & Others* [2011] 40 CLC 5422 (AD) (per SK Sinha J).

¹³ Katrina Powel *Identity and Power in Narratives of Displacement* (Routledge, London, 2015) at [1-26].

¹⁴ Silas Alward above n 8, at 230.

¹⁵ The most recent examples of development projects giving rise to acquisition controversies are: power plant, mining, industry, transportation, parks and special economic zones.

¹⁶ Ralph Nader and Alan Hirsch “Making Eminent Domain Humane” (2004) 49 Vill Law Rev 207.

¹⁷ *Kelo v New London* [2005] 125 S Ct 2655. In this case, the US Supreme Court allowed the government to force the sale of private property to promote economic development.

¹⁸ Janice Nadler and Shari Seidman Diamond “Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment and Taker Identity” (2008) 5(4) Journal of Empirical Legal Studies 713.

¹⁹ Syed Al Atahar “Development Project, Land Acquisition and Resettlement in Bangladesh: A Quest for well-formulated National Resettlement and National Policy” (2013) 3 (7) International Journal of Humanities and Social Science 306.

²⁰ *Bangladesh v Samandra Narayan Mahajan* [2006] BLD 145 (AD).

²¹ *Brahmanbaria Pauroshava v Bangladesh* [1999] BLD 87 (AD).

reform.²² Since the British period, a multitude of reform laws in Bangladesh has granted useful property rights to the people but left in place laws on eminent domain with wide grounds of expropriation.²³ There is evidence suggesting the use of this law in the cause of private influential corporations instead of the interests of the masses.²⁴ In particular, the acquisition process of agricultural land often gives rise to controversy. Wholesale acquisition of agricultural land leads to consequences including peasant protests.²⁵

Bangladesh's *Arial Beel* (2011) land protest and West Bengal's *Singur* and *Nandigram* land protests (2006, 2007) being the latest illustrations.²⁶ The acquisition protests have their political ramifications and legal undertones. They also indicate how social groups in the developing world have been struggling for land reform alongside ambitious but unfulfilled constitutional promises.²⁷ A careful look at the text of the eminent domain law of Bangladesh reveals the inner social tension and the nature of justice that the dominant social groups offer to the sufferers. One of the reasons of these sufferings is that the compulsory acquisition law, as will be discovered shortly, fails to furnish a reasonable framework for the rational use of the state's power of eminent domain.

While exercising the power, the government is required to follow established procedures and principles of land acquisition. The eminent domain law usually allows acquisition for a public purpose, followed by just and proper compensation to the dispossessed.²⁸ In the event of displacement, the law also should oblige the state to devise a resettlement plan. Furthermore, it also should consider the opinion of the affected person/groups in carrying out plans for industrial and commercial projects. These characteristics are central features of acquisition law, disregard of which results in human rights violations including a marginalising process of the persons whose land are acquired.

III The Context of the ARIPO 1982

The ARIPO is the principal eminent domain law of Bangladesh. The story of the enactment of a first law on the point is traced back to the colonial era. In 1894, the British

²² John Bruce *Land Reform, Achieving Policy Development Objectives* (World Bank, Washington DC, 2006) at 229.

²³ Kamal Siddiqui *Land Management in South Asia: A Comparative Study* (Manohar, New Delhi, 1997). See also Paula Banerjee, Sabyasachi Ray Chowdhury and Samir Kumar Das (eds) *Internal Displacement in South Asia: The Relevance of UN's Guiding Principles* (Sage Publications, New Delhi, 2005).

²⁴ Abul Barkat et al, *Land Laws in Bangladesh: A Rights-Based Analysis and Suggested Changes* (Human Development Research Centre, Dhaka, 2013) at 37.

²⁵ The land protest is a regular feature in the agrarian politics of Asia. For a general account of the Asian land law politics, see Connie Carter and Andrew Harding (eds) *Land Grabs in Asia: What Role for the Law* (Routledge, London, 2015).

²⁶ See part V of this chapter.

²⁷ George Meszaros *Social Movements, Law and Politics of Land Reform: Lessons from Brazil* (Routledge, London, 2013) at 151.

²⁸ John Humbach "Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use" (1988) 66 Oregon Law Review 547. See also BA Lee "Just Under-compensation: The Idiosyncratic Premium in Eminent Domain" (2013) 113 (3) Columbia Law Review 593.

enacted the Land Acquisition Act after a series of temporary taking laws.²⁹ This 1894 law remained operative as the sole acquisition legal instrument until 1948 when it was supplemented by an emergency requisition law to satisfy post-colonial demands.³⁰ Bangladesh (then East Pakistan) afterwards experienced a couple of developments to the 1948 law to advance infrastructure. They provided unqualified power of eminent domain to be exercised by the Pakistani regime. The 1982 ARIPO was a culmination of all the preceding legislative steps. The AIRPO repealed the earlier acquisition enactments including its parent legislation of 1894 and aimed to set out comprehensive provisions for acquisition. The law also vested power in the government to frame rules and instructions to facilitate the process of acquisition.

Four important features of the Bangladeshi land question need to be noted:

i) After the partition in 1947³¹, the land policy of Bangladesh took a decisive turn in terms of settling the question of the abolition of the *zamindari* system.³² Decolonisation offered a strong impetus to agrarian reform legislation. The reform, however, could not take place until the enactment of the 1950 SAT Act. The success of this Act is open to question.³³ Considered as a reform of the land tenure system, the abolition of *zamindari* did not change the distribution of ownership.³⁴ The 1982 law was set to operate against the unimpressive record of the *zamindari* abolition law and ceiling law of land ownership made in the post-independence setting of Bangladesh.

ii) The 1982 law was promulgated in the backdrop of a constitution that concurrently recognised right to property (art 42) and right to equality (art 27, 32). The constitutionalisation of property rights created a tension between the constitutional claim of “equality” on the one hand and constitutional protection of inequality on the other. This is because property is closely related to power and supports unequal power structure.

iii) The 1982 law was promulgated a decade after Bangladesh’s independence when the fundamental objectives of its redistributive land reform remained substantially unachieved.

²⁹ The earlier colonial laws on acquisition were Bengal Regulation 1824 (amended in 1850, 1857, 1863 and 1870) and Land Acquisition Act 1870.

³⁰ The Emergency Requisition of Property Act 1948 was enacted to establish public offices and institutions.

³¹ See chapter 3.

³² AMM Shawkat Ali *Politics and Land System in Bangladesh* (National Institute of Local Government, Dhaka, 1986) at 198.

³³ AZM Obaidullah Khan and AMM Shawkat Ali *Legal and Administrative Aspects of Land Reform Measures and Agrarian Welfare in Bangladesh* (Bangladesh Agricultural Research, Dhaka, 1984) at 24.

³⁴ Doreen Warriner *Land Reform in Principle and Practice* (Clarendon Press, Oxford, 1969) at 156.

iv) The 1982 law originated from an “Ordinance” promulgated by President HM Ershad³⁵ without parliament.³⁶

Considering these four contextual conditions, it may be argued that the 1982 eminent domain law viewed the acquisition power of the state in isolation from its obligation of land reform. The link missing between the state’s power of acquisition and its obligation of land reform detached the ARIPO 1982 from the goal of “agrarian egalitarianism”—an aspect of the constitutional pledge of economic, social and political justice. This, in turn, had political and social ramifications for land related poverty in Bangladesh.

Created as an Ordinance, the ARIPO empowers the state to exercise the power of eminent domain. Its focus is more on the procedural aspects of property taking than property rights of the poor.³⁷ The law entails two kinds of property taking depending on the nature and urgency of the taking: “acquisition” and “requisition”. The former denotes the right and action of the government to take property for public use, while the latter implies acquisition of the property by the government for emergency needs. Therefore, acquisition by its very nature has an “air of permanence and finality” and requisition is “transitory in nature”.³⁸ Under the ARIPO, the state enjoys more flexibility in exercising the power of requisition. Consequently, the owners have little scope to challenge the requisition process.³⁹

The acquisition process begins when the Deputy Commissioner (DC)⁴⁰ issues a public notice to that effect.⁴¹ Those affected by the proposed acquisition have the right to object to the DC who is obliged to consider such objections before forwarding the final recommendations to the government.⁴² Once the decision is taken by the government to acquire land, the DC initiates the process of marking out and measuring the land and asks the interested parties to submit claims for compensation.⁴³ The “market value” of the land at the time of the publication of the notification is “taken into account” when the award of

³⁵ In Bangladesh, an Ordinance can be promulgated by the President only when parliament stands dissolved or is not in session and there are urgent circumstances requiring the law promulgated. See The Constitution of the People’s Republic of Bangladesh, art 92.

³⁶ In 1982, Ershad government formed a Land Reform Committee to recommend land reform with a view to protecting the interests of the sharecroppers. However, the Committee was not mandated to examine the relationship of land reform with the power of eminent domain.

³⁷ The preamble of the ARIPO states that its purpose is to “consolidate and amend the law relating to acquisition and requisition of immovable property and to provide [guidelines] for matters connected therewith and ancillary thereto”.

³⁸ *Brij Narain v Union of India* AIR (1988) Delhi 116 (per SS Chadha J).

³⁹ The DC has the power to make an order of requisition of land without any prior approval from the government. The property can be kept under requisition for a period of two years which period can be extended with the permission of the government. The ARIPO, s 18.

⁴⁰ The topmost bureaucrat at the district level.

⁴¹ The ARIPO, s 3.

⁴² Sections 4 & 5.

⁴³ Section 7.

compensation is made.⁴⁴ Those affected by the acquisition can challenge, for example, the amount of the award and the DC's measurement of their land by going to the arbitrator appointed under the ARIPO.⁴⁵

They can also refuse to accept the compensation in which case it is deposited with the Arbitrator to decide its future.⁴⁶ However, the law does not allow anybody to constitutionally challenge the acquisition *per se*.⁴⁷ The judicial remedy, thus, only allows adjustment of the compensation.

IV The Parameters of Acquisition and the Enormity of Eminent Domain

The ARIPO is a statutory exercise of the constitutional property clause. Article 42 of the Bangladesh Constitution guarantees citizens the right to “hold, acquire and dispose of property” subject to “restrictions imposed by law”. The ARIPO is one such law. The property clause sets the criteria of the acquisition as follows:

- i) That such acquisition must be by authority of law;
- ii) That such law must provide for compensation for the property so acquired; and
- iii) That the law must either fix the amount of the compensation or specify the principles on which and the manner in which, the compensation is to be determined and given.

Curiously, the property clause does not expressly mention the requirement of “public purpose”, though the existence of this requirement is an implied condition of the exercise of eminent domain by the state. Perhaps, it was a deliberate oversight, as the presence of such purpose is “inherent” in the acquisition. As such, public purpose is a feature of the acquisition power itself.⁴⁸ This becomes clear from the fact that the ARIPO 1982 statutorily recognises the necessity of public purpose though in an open-ended clause.⁴⁹ The debate, therefore, rests on the question whether the public purpose criterion set by Bangladesh can reasonably control the state's power of eminent domain.

There is a scarcity of serious academic study on this issue in Bangladesh. Perhaps, the people and experts alike consider the power so obviously justified that they accept it uncritically. Generally, it is thought that without such power the functioning of government will be inconceivable. However, there is a recent shift from this thinking. The commentators examining its implications for “new developmentalism”⁵⁰ have been critical of the

⁴⁴ Sections 8 & 9.

⁴⁵ Section 28.

⁴⁶ Section 10 (2).

⁴⁷ ARIPO s 44.

⁴⁸ *State of Bihar v Kameshwar Singh* [1952] AIR 252 (SC) (per Patanjali Sastri CJ).

⁴⁹ ARIPO 1982, s 3.

⁵⁰ This thesis considers the concept of “new developmentalism” as a process of discovery. David Trubek makes the same point in David Trubek “Law, State and New Developmentalism: An Introduction” in David Trubek, Diogo Coutinho, Mario Schapiro and Alvaro Santos (eds) *Law and New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge University Press, New York, 2013) at 10.

ARIPO's capability to meet the requirements of a just property system. Fabio Pittaluga, for example, examines various aspects of the ARIPO and notes its inadequacy compared with the international standard of acquisition law and incidental matters.⁵¹ MQ Zaman looks at the ARIPO from a displacement perspective and notes that the 1982 law is totally unsuited to meet the needs of the displacees and operates outside the reality of loss suffered by the people.⁵² Shamsuddoha et al criticise the open-ended public interest clause of the ARIPO and record the misuse of public purpose to the detriment of the poor and voiceless.⁵³ In the light of these findings, therefore, the ARIPO 1982 and its main principles ie due process, public purpose and compensation require a fresh legal critique in order to understand the way Bangladesh wishes to exercise its power of eminent domain.

A *Due Process*

The acquisition proceedings carried out by the Deputy Commissioner (DC) are administrative in nature. As such, the proceedings should fulfil the requirement of due process including the right to be heard. Section 3 of the ARIPO requires prior notice from the DC for the purpose of acquisition:

Whenever it appears to the Deputy Commissioner that any property in any locality is needed or is likely to be needed for any public purpose or in the public interest, he shall cause a notice to be published at convenient places on or near the property in the prescribed form and manner stating that the property is proposed to be acquired:

Besides this notice requirement, s 6 of the ARIPO enjoins the DC to publish a follow-up notice in the "prescribed manner" at "convenient places on or near such property": i) stating the government's decision about the acquisition; ii) the intention to take possession and iii) asking for submission of compensation claims by all parties interested in the property in question. From a combined reading of s 3 and s 6 of the ARIPO, it appears that the notices are required to be served and placed at "convenient places on or near the property" in the prescribed form and manner. Therefore, it seems that the ARIPO does not enjoin service of notice on the landowner/s personally. The judicial rulings of s 3 also confirm that the service of notice need not be personal in nature.⁵⁴ If a landowner or interested person claims that the notice of acquisition needs to be served on them, not to be

Trubek feels the necessity to empower the private sector. However, Trubek insists on the collaborative structure of the state and private corporations.

⁵¹ Fabio Pittaluga "Land Scarcity and the Imperative of Growth: Challenges for Bangladesh Development" (7th FIG Regional Conference, Hanoi, 19-22 October 2009) at 4.

⁵² MQ Zaman "Development and Displacement in Bangladesh: Towards a Resettlement Policy" (1996) 36 (7) *Asian Survey* 691.

⁵³ Md Shamsuddoha, Mohammad Shahid Ullah and Mohammad Shahjahan "Land Acquisition for Climate Displaced Communities in Bangladesh" in Scott Leckie (ed) *Land Solutions for Climate Displacement* (Routledge 2014) at 179.

⁵⁴ *MA Salam v Secretary, Ministry of Land Administration and Land Reforms and Others* (2001) 6 MLR 184 (AD).

published on or around the property to be acquired, their claim must fail, as “such contention does not have any place within the four corners of the section”.⁵⁵

The notice requirement serves the purpose of natural justice as it enables a person to effectively object to the acquisition proceedings.⁵⁶ Non-service of notice under s 3 usually strikes at the root of the acquisition process and renders it void.⁵⁷ However, in *Abdur Rouf Choudhury*,⁵⁸ the highest court of Bangladesh examined the legal effect of non-service of notice under s 6 of the ARIPO. The Court came to the conclusion that non-service of notice does not vitiate the process of acquisition, provided other requirements of acquisition are fulfilled. In another case, the Court noted that in the case of “urgency” notice may be dispensed with.⁵⁹ This line of judicial thought compromises the fairness of eminent domain law.

The judiciary sometimes endorse the “expediency” claim of the state. The judicial hands-off, as noted by an Indian critic, gives enormous power to the state.⁶⁰ Though the criticism was made of the Indian judiciary’s approach to acquisition, it is arguably applicable to Bangladesh with equal force. However, the judiciary of Bangladesh has been very affirmative about the content of the notice. It has referred to s 3 of the ARIPO that states DC’s power to acquire property in two situations: i) if the property is needed; and ii) if the property is likely to be needed. The High Court Division of Bangladesh Supreme Court in *Nazrul Islam*⁶¹ observed that while acquiring property, the DC must be satisfied with either of these aspects. The DC cannot keep both the alternatives open. Any ambiguity in the content of the notice goes to the root of the proceedings and renders it void.

Irrespective of this judicial oversight about the content of the notice, the right to due process is frequently violated. The notice provision of the ARIPO appears to be loosely articulated: i) it does not require the service of the notice upon the interested persons;⁶² ii) it leaves no room for land losers to contest and prevent their land being acquired. Once the DC is satisfied with the necessity of the acquisition, the proceedings can move on unopposed; and iii) the property losers are not consulted while the decision of acquisition is made. Thus, the ARIPO contains a coercive element which compels one to fall in line

⁵⁵ *Haji Nasirullah and another v Government of Bangladesh and others* [2008] 37 CLC 8756 (HCD). A similar view was also expressed in *Noel Gregory Mendes v Deputy Commissioner* [2001] 6 MLR (AD).

⁵⁶ ARIPO, s 3.

⁵⁷ *Sankar Gopal Chatterjee & Others v The Additional Commissioner, Dhaka Division & Others* [1989] 41 DLR 326.

⁵⁸ *Abdur Rouf Chowdhury and 4 others v Additional Deputy Commissioner (Land and Acquisition) and others* [2003] 3 BLC 330.

⁵⁹ *Zahed Hossain Mia v Deputy Commissioner* [1997] 26 CLC 427 (AD).

⁶⁰ Usha Ramanathan “Displacement and the Law” (1996) 31(24) Economic and Political Weekly 1486.

⁶¹ *Nazrul Islam (Md.) v Bangladesh and others* [2007] 36 CLC 829 (HCD).

⁶² *Land Laws in Bangladesh: A Rights-Based Analysis and Suggested Changes* (Research Report of Human Research Development Center, Manusher Jonno Foundation, Dhaka, 2013) at 37.

with the findings of the DC. In this way, the notice provision makes the ARIPO a unilateral government-centric eminent domain law—a characteristic of its colonial version of 1894.

B Public Purpose

Private property taking may be good as long as the exercise of the eminent domain power is rationally related to a conceivable public purpose.⁶³ Nevertheless, one of the key points of legal controversy in the acquisition process is the notion of “public purpose”. The ARIPO in ss 3 and 18, categorically states that land can be acquired or requisitioned by the government, as the case may be, for “public purpose” or “public interests”. This statutory position reflects the test suggested by Woodbury Willoughby. Amin Ahmed Chowdhury and Sattar JJ approvingly quoted Willoughby in *Razab Ali*:⁶⁴

As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighbourly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.

The judicial import of this test to Bangladeshi understanding of eminent domain is significant to indicate that no person can be deprived of his/her right to property for private causes, however public interest enjoys precedence.⁶⁵ Thus, Bangladesh attaches importance to the utilitarian rationality of the public purpose doctrine.⁶⁶

The utilitarian thinking is not, however, an end in itself. It is inherently tolerant of social injustice because of “greater good” here, as John Rawls puts it, is not for “all” but for “greater number”.⁶⁷ The problem, moreover, lies in the gap between the legislative, administrative and judicial meaning of public purpose. The ARIPO does not define the term. Instead, the law sets a presumption of public purpose in the event of the final decision of acquisition.⁶⁸ The Constitution is also silent on the idea. The lawmakers perhaps wanted to keep the concept deliberately open in line with the statutory practice of common law jurisdictions. Therefore, primarily, the government needs to be trusted about the intention of acquisition. The necessity of judicial intervention only arises in case of any ambiguity.

Rights activists have displayed considerable legal creativity in challenging the scope of public purpose in the courts. The classic case on the issue was *Jogesh Chandra Lodh*⁶⁹ under the 1948 acquisition and requisition law. In this case, a piece of land was

⁶³ Ralph Nader and Alan, above n, 16 at 212.

⁶⁴ *Razab Ali v Province of East Pakistan* (1958) 10 DLR 489 (Amin Ahmed Chowdhury and Sattar JJ). See also WW Willoughby *The Constitutional Law of the United States* (Baker, Boorhis & Company, New York, 1910) vol 1 at 794.

⁶⁵ Thomas Cooley *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown and Company, Boston, 1903) at 657.

⁶⁶ AK Badrul Huq J endorsed the eminent domain’s necessity with notes of caution in *Dr Mohiuddin Farooque v Bangladesh* [1998] 50 DLR 84 (HCD) at [68].

⁶⁷ John Rawls *A Theory of Justice* (Harvard University Press, Cambridge MA, 2003) at 13.

⁶⁸ ARIPO, s 5.

⁶⁹ *Jogesh Chandra Lodh v Province of East Pakistan* [1957] 9 DLR 272.

requisitioned for the development of jute industries through a certain private agency and the petitioner questioned the intention of the requisition. Ispahani and Khan JJ held that “public purpose” encompasses something that is of “benevolence to the whole community or a substantial part thereof”.⁷⁰ Thus, the judges amplified the idea of communitarian interest as opposed to the particular interest of an individual in setting the terms of public purpose. The judges also stated that mere assertion of development by reason of general public policy will not suffice to validate an order of requisition unless the order is made in the public interest.

Murshed and Siddiqi JJ endorsed the *Jogesh Chandra* test in a more concrete manner in *Abdus Sobhan Sowdagar*.⁷¹ They were of the view that the minimum consideration of public purpose should be “the efficient working of public utility” and the absence of an alternative to the compulsory order of acquisition. Thus, in determining the scope of public interest the judges placed emphasis on “direct benefit” and insisted on a coherent relationship between “requirement” and “public purpose”.

Again in *Brahminbaria Pauroshava*,⁷² the concept of public purpose was given a broader meaning on the basis that if the purpose serves some public use or interest, as opposed to the particular interest of an individual, then the purpose would be termed a public purpose.⁷³ In *Masudul Hossain*,⁷⁴ the Appellate Division of the Bangladesh Supreme Court observed: “Action taken for the public purpose must be shown to be not merely that this specific result will be reached as a final end, but that the public themselves have a direct interest in it”.⁷⁵

It is, therefore, clear from Bangladeshi case law that the notion of “public purpose” is flexible and its content depends on the facts and circumstances of the case.⁷⁶ The benchmark of “facts and circumstances” created by the leading precedents in reviewing public purpose legislation, is not something new. This cannot stop the legal and political debate on the topic. The elasticity of the public purpose doctrine tends to have the following consequences:

i) Due to the loopholes in the due process requirement of the ARIPO, the people, particularly socially disadvantaged groups, cannot effectively challenge the grounds of

⁷⁰ Approved in the *State v Government of Bangladesh and Others (BGMEA Building Case)* [2011] 40 CLC 8237 (HCD) (per AHM Shamsuddin Choudhury J).

⁷¹ *Abdus Sobhan Sowdagar v Province of East Pakistan* [1962] 14 DLR 486.

⁷² *Brahminbaria Pourashava v Bangladesh* [1999] BLD 87 (AD).

⁷³ At 87.

⁷⁴ *Masudul Hossain & Others v The Deputy Commissioner* [1995] 15 BLD 493.

⁷⁵ The petitioner’s land was acquired for establishing a three-star hotel. The acquisition was declared unlawful being not for a public purpose.

⁷⁶ *Sk Aminuddin and Other v Deputy Commissioner and Others* [1963] 15 DLR 442; *Razab Ali v Province of East Pakistan* [1958] 10 DLR 489.

public purpose. The notice requirement in its existing form makes the power of eminent domain abusive and restricts the scope of legal challenge to acquisition;

ii) Socially disadvantaged groups often do not have the means to test the validity of the phrase; even if they can manage to do so, by the time they may hope to receive a court order, they are suffering the agony of displacement;

iii) The ARIPO sets a presumption in favour of public purpose which casts extra onus on the petitioner; and

iv) The ARIPO along with judicial oversight failed to strike a balance between the notion of public purpose and the fundamental right to property.

Thus, statutory, judicial and juristic commentary in Bangladesh has failed to provide an intellectually compelling interpretation of public purpose. This failure makes the power of eminent domain enormous because the power of eminent domain is related to the breadth or narrowness assigned to the definition of “public purpose”.⁷⁷ With this degree of state control over private property, some additional unresolved issues linked with the concept of public purpose have arisen. The issues are about displacement and environmentalism.

C *Displacement*

One unresolved issue in the scheme of the ARIPO is that it does not contemplate “displacement” within the “public purpose” doctrine. The process of acquisition has a concomitant relationship with displacement. So, in order to understand the sanctity of the eminent domain law, one must take note of Bangladesh’s peculiarity of displacement issues.⁷⁸ Fabio Pittaluga notes that “displacement” occurs in Bangladesh “nearly by default” on the acquisition.⁷⁹ Sadly, the ARIPO’s response to the issue is not encouraging, because it has nothing to offer to protect the rights and freedoms of the people whose property is being acquired. The ARIPO endorses and reinforces the idea that the affected person is a single entity. Such legal construction is inherently inadequate and inequitable.⁸⁰

Furthermore, the ARIPO does not require a resettlement policy.⁸¹ As a result, Bangladesh has not formulated any resettlement policy. The absence of a resettlement policy encourages the acquiring authority to evict people from their land without reasonable steps.⁸² In Bangladesh, the density of population is the highest in the world. So, it is

⁷⁷ Stephen Jones “Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment” (2000) 50 Syracuse Law Review 285.

⁷⁸ Atahar estimates that in the recent past an average of 20,000 to 30,000 people have been affected annually in Bangladesh by infrastructure development projects. See Syed al Atahar above n 19, at 306.

⁷⁹ Fabio Pittaluga above n 51, at 4.

⁸⁰ Usha Ramanathan above n 60, at 1488.

⁸¹ The Planning Commission’s recent background paper on land management suggests that Bangladesh has no resettlement policy. See Monzur Hasan “Improving Land Administration and Management in Bangladesh” (7th Five Year Plan, 2016-2020, BIDS, Dhaka, 2015).

⁸² Syed Al Atahar above n 19, at 306.

materially impossible to acquire land for a development project without displacing a large number of people. The Kaptai Hydroelectric Project embarked on during the 1960s, for example, displaced close to 90,000 people in the Chittagong Hill Tracts of Bangladesh.⁸³ Due to the rapid growth of industrialisation and the means of development, these types of involuntary displacements have increased day by day.

The consequences of this involuntary displacement are enormous: it destroys the existing modes of production and affects community life, causes environmental problems and impoverishment.⁸⁴ The displacees suffer a tremendous stress as they lose productive resources—land or otherwise—in the adjustment process.⁸⁵ Thus, the entire experience of displacement leaves a deep mark on people's way of life. Moreover, the cash compensation prescribed by the ARIPO proves not to be useful in resettling the communitarian way of living. Definitely, displacement from one's land, however, mitigated by compensation, effectively affects a person's autonomy.⁸⁶ For resettlement, therefore, a “cash for land” approach proves to be inadequate.⁸⁷ In the case of relocation, argues Partridge, “replacement assets” are more effective than monetary compensation.⁸⁸

The ARIPO focuses the acquisition process on the individual, therefore, compensation upon acquisition is not sensitive to the displacement of a community or a group of people. Thus, the ARIPO does not acknowledge displacement and omits to ask for a resettlement policy and thus fail to oblige the state to rehabilitate the dislocated groups. From this perspective, the ARIPO turns out to be a coercive law with the pretext of public expediency.

D Environment

The environmental impact of the acquisition of land for large-scale industrial projects does not come under the purview of the ARIPO. As such, the requirement of environment approval per se is not a part of the acquisition process. In spite of this, the environment consideration is important in evaluating public purpose because both acquisition and environmental justice issues often involve targeted minority communities who bear the burden of the government's desire for “economic development”.⁸⁹

⁸³ MQ Zaman “Crisis in the Chittagong Hill Tracts: Ethnicity and Integration” (1982) 17(3) *Economic and Political Weekly* 75. A huge displacement was also reported in the case of Phulbari Coal Mine project, Boropukuria Coal Mine Project, Jumana Multi-Purpose Bridge project and the Padma Bridge project.

⁸⁴ In this thesis, the concept of “community” is understood as an articulation of a shared life—encompassing culture, economy, norms and ethics.

⁸⁵ WL Partridge “Involuntary Resettlement in Development Projects” (1989) 2(3) *Journal of Refugee Studies* 373.

⁸⁶ Laura Mansnerus “Public Use, Private Use and Judicial Review in Eminent Domain” (1983) 58 *NYU Law Rev* 409.

⁸⁷ Partridge above n 85, at 375.

⁸⁸ At 380.

⁸⁹ Catherine Beideman “Eminent Domain and Environmental Justice: A New Standard of Review in Discrimination Cases” (2007) 34 *Boston College Environmental Affairs Law Review* 273.

International human rights law recognises the right to environment and obliges states to ensure that right of the citizens.⁹⁰ Environmental issues demand participation of all concerned citizens, at the relevant level. International treaties place importance on participatory legislation. Agenda 21 adopted at the Rio Earth Summit 1992, for example, called on legislators to establish judicial and administrative procedures for legal redress and remedy for actions affecting the environment.⁹¹

The issue of environment has been in the good books of the Bangladesh judiciary for a long time. In *Dr Mohiuddin Farooque*,⁹² the judges asked the government to place due weight on the ecological aspects of industrial projects and their effects on socially disadvantaged people. The position was further affirmed by SK Sinha J, in *Modhumati Model Town*,⁹³ where a housing project was declared unlawful on the allegation of being detrimental to the environment. Sinha J took note of international developments of the right to environment and thought that environmental viability should be a consideration in acquisition-projects for developmental purposes. The judge also noted the need for new forms of participation in environmental impact assessment procedures and in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work.

The ARIPO has not yet incorporated the environmental principles set by the judiciary. In particular, it leaves the relationship between environment and public purpose unresolved.

E Compensation

The Bangladesh constitutional property clause (art 42) says that any acquisition should be supported by compensation. However, it limits the scope of judicial review of an acquisition law merely on the ground of inadequate compensation. The compensation must be fixed by a law that should lay down the principles and manner by which the compensation is to be determined. It has been held that though the court cannot entertain litigation questioning the amount of compensation, it is not barred from examining the soundness of the principles applied in determining the amount of compensation. As such, the principles that set out the amount of compensation under ARIPO should be looked at closely. The principles also need to have a connection with the meaning of public purpose. A sound compensation law requires taking care that socially disadvantaged people are not

⁹⁰ Luis Rodriguez-Rivera “Is the Human Right to Environment Recognised under International Law: It Depends on the Sources” (2001) 12 Colorado Journal of International Environmental Law and Policy 1.

⁹¹ United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3 to 4 June 1992, s 1, paragraph 8.

⁹² *Dr Mohiuddin Farooque v Bangladesh* [1997] 49 DLR 1 (AD). The Indian Supreme Court also indicated the importance of a nexus between acquisition and development in the light of the right to life enshrined in the Indian Constitution. See *MC Mehta v Kamalnath* [1997] 1 SCC 388.

⁹³ *Metro Makers and Developers Limited and others v Bangladesh Environmental Lawyers’ Association Limited (BELA) and others* [2012] 41 CLC 8366 (AD).

prejudiced by the amount of compensation. Section 8 of the ARIPO sets out the following criteria for making an award of compensation:

- (a) The market value of the property;⁹⁴
- (b) Damages sustained for i) taking away of any standing crops or trees; ii) severance of the property from the other property of the affected owner; iii) any injury done to their earnings or other properties; and iv) diminution of any profits;
- (c) The reasonable expenses of any incidental changes to residence or business;
- (d) A surplus fifty per cent of the market value due to the compulsory nature of the acquisition.

Section 9, on the other hand, sets out matters not to be considered in measuring the compensation:

- (a) the urgency which has led to the acquisition;
- (b) any disinclination of the person interested in parting with the property to be acquired;
- (c) any damage that may be sustained by the owner, which if caused by a private person, would not render such person liable to a suit;
- (d) any damage likely to be caused to the property to be acquired after the date of service of the final notice of acquisition or in consequence of the use to which it will be put;
- (e) any increase in the value of the property to be acquired likely to accrue from the use to which it will be put when acquired; or
- (f) any alteration or improvement in, or disposal of, the property to be acquired, made or carried out without the sanction of the DC.

Keeping the above matters in mind, the DC has to make an inquiry into any objections on the value of the land acquired and respective interests of the persons claiming compensation and finally, make an award of compensation which, in the DC's opinion, should be allowed for the property.⁹⁵

The legal provisions for compensation invite some contradictory propositions. In the first place, s 8 offers an extra fifty per cent of the 'market value' as a solatium to make the acquisition less coercive. But s 9 asks the DC not to consider the nature of 'urgency' leading to the acquisition in fixing the compensation rate. The law thus omits to appreciate the fact that the question of urgency inherently involves the coercive nature of the acquisition. Moreover, there may be a contradiction between the consideration of "diminution of profit"

⁹⁴ The market value of the property is determined based on the preceding twelve-month's average value of the properties of similar description close to it.

⁹⁵ ARIPO, s 7.

stated in s 8 and “increase of the value of the property to be acquired likely to accrue” stated in s 9 of the ARIPO. In addition to this linguistic abstruseness, the following should also be noted:

i) The law suggests providing a compensation on the basis of “market value” of the land acquired. The “market value” test, thus suggested, has shortcomings. There is a general consensus among researchers that in estimating the value of the property taken for public use, the “fair market value” should be considered. However, there are problems with determining the “fair market value”. Even one expert questioned the capability of market value to make good any loss done in acquisition projects.⁹⁶

ii) The market value so determined does not take into account the real value of the property. The law does not require any inspection in person during the determination process of market value. In practice, the market value is calculated by the DC on the basis of past land transfer records. In Bangladeshi practice, it is a common scenario to undervalue the property at the time of transfer. This is usually done to avoid taxation. So, the “market value” criterion works to the disadvantage of the person whose land is to be acquired.⁹⁷

The ARIPO fails to take account of the trick associated with the “market value” issue. There is also an absence of a judicial test on the determination of the market value of the land. The test, however, propounded by Krishna Iyer J in the Indian context is relevant for Bangladesh, as both the countries bear the legacy of the same acquisition legislation ie the Land Acquisition Act 1894. Justice Iyer held in *Dollar Company, Madras*:⁹⁸

It is a commonplace of this branch of jurisprudence that the main criterion is what a willing purchaser would pay a willing vendor We may even say that the best evidence of the value of the property is the sale deed of the very property to which the claimant is a party. If the sale is of recent date, then all that need be proved is that the sale was between a willing purchaser and a willing seller, that there has not been any appreciable rise or fall since and that nothing has been done on the land during the short interval to raise its value.

In fact, Justice Iyer’s test is a reemphasis of the “market value” characterised by an old Massachusetts case *Lawrence*⁹⁹ where it was held that: ... “It [market value] is what it would bring at a fair public sale when one party wanted to sell and the other to buy”.¹⁰⁰ The success of the “willing purchaser versus willing vendor” test prescribed by Justice Iyer depends on the creation of a sound land record and land transaction system which Bangladesh lacks.

iii) Yet there is another phenomenon. The payment of compensation is often made in instalments, making it impossible for affected people losing property to purchase

⁹⁶ Ratan Khasnabis above n 6, at 39.

⁹⁷ However, instances of fake transfers at an artificially high-level price are also on record to show that people do it in order to raise the level of compensation in case their property is taken.

⁹⁸ *Dollar Company, Madras v Collector of Madras* [1975] AIR 1670 (SC).

⁹⁹ *Lawrence v City of Boston* [1875] 199 Mass 126.

¹⁰⁰ Quoted in Silas Alward above n 10, at 230; *United States v Miller* [1943] 317 US 369.

replacement land or invest in a new house or business.¹⁰¹ Even if the affected person gets the compensation, delay in payment is in-built in the system. The DC may delay the payment on the pretext of deciding the ownership of the property in question. Moreover, the law offers no increment for the delay.

iv) The ARIPO 1982 is based on a philosophical reasoning that distinguishes between legal and illegal owners of immovable property to determine eligibility for compensation. In so doing, it effectively excludes small interest groups like the sharecroppers, renters, landless labourers and squatters from any compensation. Thus, the 1982 legal framework deprives the poor of any compensation.¹⁰²

These shortcomings of the compensation clause should now be read in conjunction with the property clause of the Bangladesh Constitution. Though the right to compensation enjoys a constitutional sanction, the property clause of the Constitution imposes a bar on judicial review of acquisition legislation on the ground of inadequacy of compensation.¹⁰³ In *Shahjahan Ali Khan*¹⁰⁴ the petitioner challenged an amendment to the ARIPO restricting the power of the arbitrator to increase the amount of compensation. Under the amendment, the arbitrator could revise the amount only to the extent of ten per cent over the amount assessed by the acquiring authority. The petitioner considered it as an interference with the Arbitrator's independence and argued that the amendment had violated his right to get the protection of the law in the event of offering an “unfair and inequitable” compensation. Ruhul Amin J found force in the argument, however, rejected the petitioner’s claim on the ground that the legislature is competent to legislate fixing the amount of compensation in the event of compulsory acquisition.¹⁰⁵ The judiciary, thus, reposed faith in the sagacity of the legislators.

Perhaps one of the purposes of the limited scope of judicial review about inadequate compensation was to facilitate the programme of land reform. But the property clause does not mention it explicitly. As such, the limited scope of judicial review is to go to the disadvantage of the poor. Since compensation is based on the principle of ownership of property, it does not take into account any other interest in the particular piece of land that is being acquired, such as the interest of the sharecropper. Therefore, such affected poor people cannot lay any claim to compensation for their loss of income.

¹⁰¹ William Halcrow “River Bank Protection Project Resettlement Action Plan (RAP)” (Bangladesh Water Development Board, Dhaka, 1995).

¹⁰² MQ Zaman “Development and Displacement in Bangladesh: Towards a Resettlement Policy” (1996) 36 (7) Asian Survey 691.

¹⁰³ Article 42 (2) of the Constitution of Bangladesh states that ‘no question can be put before any court on the ground that any particular compensation is not adequate’.

¹⁰⁴ *Shahjahan Ali Khan (Md) & others v Government of Bangladesh* [2000] 52 DLR 99 (HCD).

¹⁰⁵ At 100.

The law lacks a commitment to “just and equitable” compensation.¹⁰⁶ The American Constitution in its fifth Article uses the term “just” before the word ‘compensation’ in order to intensify the meaning of “compensation” and convey the idea that the award to be rendered for the property taken should be full, substantial and ample.¹⁰⁷

The provision for just compensation is comparable to the conscience of the law of eminent domain. It can be viewed as the means for reducing the injustice inherent in the concept of property taking. The ARIPO includes the provision for compensation intending to soften the blow in the acquisition process. In spite of that, the limited understanding of compensation in its scheme has eroded its moral base. The process of impoverishment, then, is inevitably set in motion, except in cases where the displaced groups may be aided by public spirited lawyers.

V *Acquisition Law and its Meaning for Peasants’ Land Rights*

This chapter so far finds that the eminent domain law of Bangladesh has many negative characteristics. This part of the chapter focuses on the implications of ARIPO for the peasants. Evidence confirms that the government often targets agricultural land for development projects. Therefore, peasants have been one of the main victims of development politics.¹⁰⁸

The ARIPO 1982 is far from adequate in addressing the issue of development in a pro-poor sense. It encourages the market principles of growth to transform a predominantly agrarian society of South Asia into an industrial one.¹⁰⁹ It fails to see the cleavages and ruptures produced by the harsh introduction of neoliberal policies into law. For this failure, the sufferers often question the wisdom of the acquisition law and interrogate the government’s development paradigms in the form of mass protest. As mentioned above, the *Arial Beel* land protest in Bangladesh (2011) and West Bengal’s Singur and Nandigram land protests (2006, 2007) offer identical illustrations of this scenario. These are also instances of tension between industrialisation and agrarian reforms.¹¹⁰ The similarity of the

¹⁰⁶ An ideal property clause can be found in the South African Constitution (art 25). South Africa inserted the property clause in its Constitution in 1996. The South African context resembles Bangladesh with regard to its history of land injustice during the period of apartheid and the colonial regime respectively. Unlike Bangladesh, the South African property clause states that compensation and the time and manner of payment of compensation must be “just and equitable.” It reflects an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

¹⁰⁷ Silas Alward above n 8, at 234.

¹⁰⁸ An account of the adverse impact of industrial projects on peasants can be found in Abhijit Guha's work from an Indian perspective. See Abhijit Guha above n 5.

¹⁰⁹ Ranjit Sau “A Ballad of Singur: Progress with Human Dignity” (2008) 43 (43) Economic and Political Weekly 10. Chandrachud CJ termed “developmental interference” as one of the hurdles to agrarian reform in India. See YV Chandrachud CJ “Rural Development and Human Rights in South Asia” (Keynote Speech, International Commission of Jurists and Human Rights Institute, Lucknow, 1984) at 50.

¹¹⁰ Nirmal Kumar Chandra “Tata Motors in Singur: A Step towards Industrialisation or Pauperisation” (2008) 43 (50) Economic and Political weekly 41.

protests lies in the fact that they were the by-products of the same legislative enactment ie the Acquisition Act 1894.

In the case of *Arial Beel* (2011), the government of Bangladesh had to face a huge protest against the move to acquire 6000 acres of land to construct a world class airport including a satellite city surrounding it. The people were divided into two groups: one fighting for their land (“unwilling” group); the other, awaiting a golden opportunity of better employment (“willing” group). Accordingly, the protest attained political colours leading to organised protest and local conflict. The protest sought to thwart the proposed land acquisition. The unrest soon spread over the whole locality and claimed the lives of 100 people when police tried to establish control.¹¹¹

A similar protest to *Arial Beel* was West Bengal’s *Singur* and *Nandigram* (2006, 2007). In these cases, the peasants in West Bengal protested against establishing corporate bodies’ industrial projects in agreement with the West Bengal Government. The farmers of Singur and Nandigram formed a committee to protect their cultivated land and refused to accept the compensation as inadequate offered under the Land Acquisition Act 1894.¹¹² In a legal challenge to the validity of *Singur* acquisition, the Indian Supreme Court has recently asked the West Bengal government to return the acquired land to the farmers and reinforced a more just system of land acquisition.¹¹³

The *Arial Beel* model of development (corresponding to the *Singur/Nandigram* model of West Bengal) brings certain regressive features of the ARIPO to the fore:

i) It does not classify immovable property. Evidence suggests that large tracts of fertile agricultural land are brought under development projects.¹¹⁴ The law allows the government to think that everything in people’s possession is “property”¹¹⁵ and the government can put a price tag on it and take it away;

¹¹¹ “Mayhem in Munshiganj: Cop Killed, 100 Others Injured as Over 30,000 People Stage Violent Protest against Airport in Arial Beel” (*The Daily Star*, 1 February, Dhaka, 2011).

¹¹² Maitreesh Ghatak, Sandip Mitra, Dilip Mookherjee and Anusha Nath “Land Acquisition and Compensation: What Happened in Singur” (Working Paper, University of Warwick, CAGE online Working Paper Series, 2013); D Bandyopadhyay “Singur: What Happened, What Next and Time to Pay Cost” (2008) 43(48) *Economic and Political weekly* 13.

¹¹³ “Return Singur Land to Farmers, SC Orders West Bengal Government” (*The Hindu*, New Delhi, 21 September 2016).

¹¹⁴ The supplementary instructions to the ARIPO only suggests that agricultural land should be avoided as far as possible while acquisition. See ARIPO Instructions 1982, Cl 12.

¹¹⁵ This traditional thinking underrates the importance of property in a person’s life. For an illuminating discussion on the meaning of property, see Laura Underkuffler *The Idea of Property: Its Meaning and Power* (Oxford University Press, Oxford, 2003) at [141-148]. Underkuffler considers property as an “idea” as well as an “institution.” She argues that the notion of property cannot be analytically and physically separated from the maintenance of life itself—which should be the substance of property rights.

ii) It allows the government offer the private corporations to run developmental projects.¹¹⁶ This public-private enterprise often suffers a transparency crisis. The corporations do not have to obtain the consent of the people whose land would have to be seized. Abul Barkat's study shows that most of the government-corporate ventures are susceptible to be anti-people.¹¹⁷ According to Barkat, corporate interest is better served within the existing realm of the ARIPO.¹¹⁸ Even, at times, the amount of land needed for a corporate project is not properly inquired into by the government.¹¹⁹

In achieving the objectives of such developments, the power of eminent domain is being turned into a politically sensitive instrument of state power in different parts of the globe including Bangladesh and India.¹²⁰ Recent research suggests that the appeal of such a meaning of development is declining day by day and facing an ideological defeat.¹²¹ This leads Ellen Paul to question the innocuousness of the eminent domain doctrine.¹²² Paul Ellen argues that the power needs a more compelling defence than an unabashed assertion of its attribute of sovereignty.¹²³ From this viewpoint, the Bangladeshi law seems quietly resting in an undebated area, as the ARIPO is being exploited by the corporate bodies with the acquiescence of successive regimes in the guise of an eminent domain exercise.

The Supreme Court of Bangladesh stressed "general welfare" and "fullest development" while dealing with natural resources under the power of eminent domain.¹²⁴ Sadly, land protests bring to light at least the understanding that things are not right with the acquisition law dealing with agricultural land.

Lessons may be drawn from West Bengal's *Singur* protest. One meaning of the protest, write Tanika Sarkar and Sumit Chowdhury, is that multinationals and governments need to be more careful in acquiring agricultural land in future.¹²⁵ The *Singur* effect tends to travel beyond the border and naturally impacts on Bangladeshi understanding of land acquisition because Bangladesh is so close to India geopolitically, culturally and in many other respects. The 2011 *Arial Beel* land protest in Bangladesh supports this proposition.

¹¹⁶ ARIPO, s 15. The Land Acquisition Act 1894, however, expressly set "Company need" as an objective of acquisition.

¹¹⁷ Abul Barkat et al above n 24, at 42.

¹¹⁸ At 42.

¹¹⁹ At 42.

¹²⁰ Maitreesh Ghatak and Parikhshit Ghosh "The Land Acquisition Bill: A Critique and a Proposal" (2011) XLVI Economic and Political Weekly 71.

¹²¹ Sam Moyo and Paris Yeros (eds) *Reclaiming the Land: The Resurgence of Rural Movements in Africa, Asia and Latin America* (Zed, London, 2005) at 55.

¹²² EF Paul *Property Rights and Eminent Domain* (Transaction Publishers, New Jersey, 2009) at 4.

¹²³ At 4.

¹²⁴ *Dr Malik Mehdi Kabir and Others v Rabit-Al-Alam-Al-Islami and Others* [2010] 16 MLR 273 (AD).

¹²⁵ Tanika Sarkar and Sumit Chowdhury "The Meaning of Nandigram: Corporate Land Invasion, People's Power and the Left in India" (2009) 54 European Journal of Anthropology 73.

The ARIPO is an inflexibly drafted law incapable of taking the challenges of new developments. Development policies often are not attuned to prevailing local circumstances. Therefore, in the acquisition projects where large areas of agricultural land owned by peasants are involved and as the peasants do not agree to surrender their land, the acquiring authority should exercise the power of eminent domain sparingly. By disagreeing to part with their land, the peasants seem to disapprove the approach of the state towards development. Thus, there is the need for a shift in the use of the eminent domain power of the state.

VI Chapter Summary

This chapter questions the notion of eminent domain in relation to land reform. The necessity of eminent domain law is acknowledged. From the perspective of land reform, however, its rational and humane use is necessary. The chapter finds that the ARIPO hinders the process of land reform.

Under the ARIPO, the state enjoys an unqualified power of eminent domain. The ambiguities about the meaning of “public purpose” and the controversial nature of the compensation principles make the power of eminent domain less palatable for the peasants. In particular, the ARIPO is silent on the contemporary acquisition debates prompted by large-scale agricultural land acquisition in the name of development projects. The ARIPO contains nothing that would help the peasants seek legal remedy in times of necessity. It constitutes an apparatus of deprivation, displacement and landlessness. It abets the marginalisation of the peasants by lending the force of state power to agencies or corporations requiring land.

In this way, it clearly runs contrary to the constitutionally declared objectives of social, economic and political justice. The eminent domain law appears as an instrument of exclusion rather than inclusion. It establishes a gap, not fully bridgeable, between the state and people—a situation of enduring poverty.

Chapter 8

Land Reform: Taking the Law for a Walk into the Land

I Introduction

Land laws examined in this thesis mainly deal with three broad issues: riddance of the landed gentry (*zamindari*), setting a maximum land ownership limit and ensuring tenurial security. The thesis also looked at the land distribution policy and eminent domain law so as to understand their relation with poverty and the marginalisation process of the peasants.

The impact of these laws on poverty reduction is insignificant. All laws, colonial and post-colonial, worked to the disadvantage of the peasants in an identical manner. The reasons for this failure are many. Chief among them are the loopholes in the laws, the lack of political will and institutional incapacity. Laws were made to abolish or to amend existing laws that failed to bring any radical change in agrarian relations. It appears that the land laws were reluctantly enacted as a temporary response to political necessity and were overburdened with complexity, ambiguity and discretion. They also did not create competent administrative machineries that would implement land reform. Based on this, it appears that the prime issue now for Bangladesh is how to use land law to restructure agrarian relations. A test for this purpose would be to see whether post-colonial reform laws were able to create a new substantive land law useful to the context of Bangladesh. If not, the motivation, objectives and process of land law making warrant a closer examination. The ultimate purpose of land reform law is to make the property regime suitable for national development. For this, Bangladesh requires focusing on enacting pro-poor land law. It follows therefore that not only should the law reflect the general requirements of the Bangladeshi peasants, but also present a plan of how to get there.

Based on this premise, this chapter reveals the nature of Bangladeshi land reform and shows how the land question may be approached effectively through law. In addition, the chapter argues for a pro-poor land law regime with its focus on distributive justice to reduce

poverty. The chapter also looks at the principles on which the legislative projects of land reform should be considered.

The division of the chapter is as follows. After this introduction, part II of the chapter discusses the various approaches to land reform and their relations with law. Part III identifies a suitable approach to land reform to address poverty in Bangladesh. Part IV develops certain characteristics of Bangladeshi land law. Part V shows the relationship between land law and poverty. Part VI argues for a pro-poor land reform in Bangladesh. Part VII is the summary of the chapter.

II Land Reform Approach and Law

Bangladesh needed a transformation in the land system after decolonisation in 1947 when it became a part of Pakistan or at least after liberation when it emerged as an independent country in 1971. To make this transformation happen, a visionary legal and constitutional approach to the issue was crucial. Viewed from this perspective, the State Acquisition and Tenancy Act 1950 (SAT Act)—the main post-colonial land reform law failed to convey a visionary message, though from the background of the Act three motivational aspects can be traced as its underlying philosophy.

The first inspiration was the “land to the tiller” slogan. This was a political slogan championed by the socialist political parties that had been demanding widespread land reform since the late 1940s. However, the role of socialist political parties in influencing the law making process had declined by the time the SAT Act was passed. In theory, the “land to the tiller” approach expects all owners to be cultivators and all cultivators to be owners. In such an approach, the landlord-tiller organisation of production and the institution of rent are abolished and prohibited by law; the peasants become the owner of the land they till. A very low ceiling is implicit in such an approach because no family is felt to deserve any more land than it can cultivate. The normative principle of this model presupposes a classical peasant society and economy.

The second motivation behind the SAT Act was to ensure “tenurial security”—a long advocated goal of land reform during the colonial period, particularly under the scheme of the 1885 Act. Under this approach, the terms on which non-owning cultivators hold the land are readjusted without fundamental alteration of the social organisation of production. In this type of reform, usually rents are lowered and regulated and the continuity of rights to use land is mandated in the land legislation. In addition to this, continuous supervision of and intervention in tenurial relations by the administrative apparatus of the state is posited as the mean to achieve these ends. Thus, the bundle of rights which is otherwise known as “ownership” is transferred from the owner to the tenant. It is left to the tenant to exercise the rights and challenge any encroachment on the part of the landlord.

The third motivation of the SAT Act was to adopt a “ceiling-redistribution” approach to land reform. In this approach, an upper limit or ceiling is placed on agricultural holdings.

Land surplus over the ceiling limit is appropriated by the state, with or without compensation and redistributed among landless or poor cultivators gratis or at some cost either individually or collectively.

A comparison of the three motivational approaches suggests that the “land to the tiller reform” tends to eliminate landlords as a class and landlordism as a social institution. A tenure reform, on the other hand, alters the relations between landlords and tenants, theoretically in the direction of more equitable distribution and improved efficiency. A ceiling-redistributive reform does neither but takes land from large owners and redistributes it among the landless and the land-poor.¹

The reformers attempted to incorporate all three motivational approaches in the 1950 Act, however, none of them flourished. The land did not go to the tiller, the sharecroppers were not accorded tenurial security and a large land ownership ceiling was fixed without any corresponding assurance for redistribution. The 1950 Act did not appear to be a strong corrective to the 1793 Regulation or the 1885 Act of the colonial period. Rather, tenancy principles of 1885 were incorporated into the 1950 Act. Therefore, the approach ultimately adopted by Bangladesh did not fit into any of the recognised approaches to land reform. At best it appears to be merely a “ceiling model” where the state owed no commitment to implement the ceiling laws.

III The Nature of the Bangladeshi Approach

A Political Rhetoric

The history of legal reform in Bangladesh is Janus-faced: it is famed for its land reform commitment but notorious for its inability to make a progressive reform law or for its recalcitrance to enforce whatever legislation it enacted. While recognising that “land reform” would be considered as an intrinsic part of the anti-poverty strategy, the reformers have only been making promises since the early 1950s. Some examples are worth quoting:

- (i) 1954: [if voted to power the alliance will take measures] to abolish without compensation *zamindari* and all rent receiving interest in land and to distribute the surplus lands amongst the cultivators; to reduce the rent to a fair level and abolish the certificate system of realising rent.²

¹ Ronald Herring *Land to the Tiller: The Political Economy of Agrarian Reform in South Asia* (Yale University Press, New Haven and London, 1983) at 85.

² Clause 2 of 21 Points Programme objectives incorporated in the election manifesto of the United Front, an alliance of the opposition political parties, to contest elections of the East Bengal Legislative Assembly in 1954 against the then party in power, the Muslim League.

- (ii) 1973: Radical land reform measures will have to be implemented because land distribution and tenure systems are the fundamental factors determining rural employment and income distribution in a predominantly agricultural society.³
- (iii) 1979: Our revolution will be peaceful and come in the democratic process through parliament ...our revolution means a distribution system based on social justice ... it will establish politics of production and social justice. We shall bring about agricultural reforms.⁴
- (iv) 2008: Village development will include the provision of urban facilities and distribution of *khas* land among the landless farmers ... All land records will be computerised and a Land Reform Commission will be formed to ensure increased production and social justice in the distribution of land and water bodies.⁵

It thus appears that the political rhetoric of land reform has been identical since the 1950s. But it has never been seriously pursued. Three principal pieces of land legislation shaped the land question in the post-partition era.⁶ A cross-match of the political rhetoric with the objectives of the reform legislation reveals a gap between the words of law and worlds of politics. The preamble of a reform law statute will be adequate to convey the significance of what is being enacted. It is, therefore, sufficient to reproduce the preamble of the respective land legislation in order to understand the gap between promise and performance:

- (a) As against (i), the relevant law prevalent at that time was the 1950 SAT Act. The preamble of SAT Act reads: “An Act to provide for the acquisition by the state of the interests of rent-receivers and certain other interests in land in Bangladesh and to define the law relating to tenancies to be held under the state after such acquisition and other matters connected therewith”.
- (b) As against (ii), the Landholding (Limitation) Order 1972 stated in its preamble: “WHEREAS it is expedient to provide for the reduction of the maximum quantity of land that may be held by a family [or a body] in Bangladesh and for matters ancillary thereto; NOW, THEREFORE, in pursuance of the Proclamation of Independence of Bangladesh, read with the Provisional Constitution of Bangladesh Order, 1972 and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order.”

³ The Government of Bangladesh “The First Five Year Plan 1973-1978” (Bangladesh Planning Commission, Dacca, 1979) at 89.

⁴ As cited in S Kamaluddin “Bangladesh: Revolution and Confusion” (1979) 106 (44) Far Eastern Economic Review 32.

⁵ Ninth Parliamentary Elections 2008 “The Election Manifesto of Bangladesh Awami League: A Charter for Change” (Dhaka, 2008) <<https://www.albd.org/index.php/en/resources/articles/4070-election-manifesto-of-bangladesh-awami-league,-9th-parliamentary-election,-2008>>.

⁶ State Acquisition and Tenancy Act 1950, Land Holding (Limitation) Order 1972 and Land Reforms Ordinance 1984.

- (c) As against (iii), the preamble of the 1984 LRO reads as follows: “An Ordinance to reform the law relating to land tenure, land holding and land transfer with a view to maximising production and ensuring a better relationship between land owners and *bargadars*.”
- (d) As against (iv), there is no new law in place. However, the government seemingly depends on the 1997 *khas* land management and settlement policy in pursuing the election promise of 2008.

Thus, one may see that none of the reform legislation addressed the issue of redistribution of the land promised by the reformers from time to time. The redistributive question is usually left with the task of policy formulations which ultimately becomes politically emotive. A radical land reform depends upon the enactment of a law reflecting the realities of society. Unless action is taken, the gap between law and reality will not just evaporate. The gap-phenomenon in Bangladeshi land law has not put justice to work which have disadvantaged the poor.

B *The Legal Traits*

1 *Loopholes in the law*

There are considerable gaps between the declared objectives and the legislation enacted in furtherance of the objectives. In order to fulfil the objectives of land reform, an agrarian reform law should ensure “almost everything it could do”.⁷ Upon its implementation, one hopes to see a rise in peasant-proprietorship, a reduction in tenancy and an increase in security of tenure, investment in land improvement, advancement in agricultural techniques, expansion of agricultural productivity, an increase in the standard of living and a welcome reshuffling of the power structure in the rural community. A progressive land reform law may also create a new and active concern on the part of the politicians about the state of agriculture and the welfare of the peasants.

As has been argued elsewhere in this thesis, the Bangladeshi land reform laws, reflected only a few of the objectives with a limited and vague content.⁸ The laws also manifested a limited intention to translate the objectives into reality. Why was this so? The reform law passed after decolonisation set itself to ease the fate of the peasantry by a drastic overhaul of the land system. The *zamindari* system was to be abolished, tenures were to be simplified and the cultivators were to be granted a more secure way of paying the land tax directly to the State. Nevertheless, these were not enough judged by the light of the necessity of that time. It was not difficult to understand why the abolition of the *zamindari* system, with its absurdities and injustices, was a success. Wolf Ladejinsky noted a compelling reason.⁹ The *zamindari* system was imposed by a foreign power which handed out proprietary rights to

⁷ Wolf Ladejinsky “Agrarian Reform in Asia” (1964) 42 93) Foreign Affairs 445 at 452.

⁸ See chapter 3.

⁹ Wolf Ladejinsky above n 7, at 453.

which neither the British nor most of the recipients had any claim. Thus, the abolition of the system appeared as one of the symbols of decolonisation from British rule and it was not surprising that abolitionists largely succeeded in eliminating it.¹⁰ This success of the abolition can at best be termed as “liberative” in the sense that it put an end of the institution of *zamindary*. It was, however, not “distributive”.¹¹

Riddance of the *zamindary* system by itself did not ensure peasant-proprietorship in the land; the SAT Act, the so-called *zamindary* abolition law, neither in its title nor in its preamble purported to abolish the *zamindary* system. What it proposed to do was to “acquire” the “intermediary-interests” and place the peasants directly under the state instead of the *zamindars*. One then has to see what other mechanisms the law had devised to make the acquisition process effective in order to prevent creation of any identical exploitative system. Contrary to this expectation, the largescale evasion of the ceiling provisions which happened to be the main means of acquiring land ownership for the peasants was enough to thwart the purpose of the 1950 Act.¹² In anticipation of ceiling provisions, the landlords divided up the land among members of their families so as to make sure that properties were under the declared ceiling. The legislative provisions did not have the teeth to stop such transfers. The later amendments designed to end such transfers have had a little effect on the evasions. In the political milieu, vague and complicated measures benignly seeded with loopholes became the rule and as did evasions causing great delays in implementing enactments. Thus, as early as in 1976 Mukherji came to the following conclusion about Bangladesh’s legal attempt at land reform:¹³

The provision of land ceiling legislation in Bangladesh does not indicate a radical shift from the State Acquisition and Tenancy Act 1950. Whatever boldness was introduced in the program initially to prevent the circumvention of the ceiling law has been gradually eroded by subsequent amendments in response to the demands of pressure groups.

The ceiling provision of the 1984 LRO, as shown in chapter 6, did not improve the situation observed by Mukherji. Little effort was made to explain to the peasants the implications of the enactments or to propagate the idea that they were the beneficiaries of the reforms. The law allowed the enforcement officers to perform in a way as if the reforms were not meant to be enforced and they got away with the same impunity as that enjoyed by those whom they were supposed to police. Neither did the reform law make provisions to involve the peasants in implementing measures that affected them so directly.

The key to successful reform is the degree to which the controlling political forces of a country are willing to support reform and their readiness to use the instruments of

¹⁰ At 455.

¹¹ Muhammad Mustafa Alam “Problems of Size-Tenure Structure in Bangladesh Agriculture and Prospects of a Land Reform Programme in Developing the Rural Economy of the Country” (PhD Thesis University of British Columbia, 1976) at 45.

¹² See chapter 6.

¹³ IN Mukherji “Agrarian Reforms in Bangladesh” (1976) XVI (5) Asian Survey 463.

government to attain their goals. Those against whom the reforms were directed did not naturally divest themselves of their property and their political and economic power simply because a government passed a decree.

2 *Drafting politics*

In Bangladesh, law relating to land is also a part of the law relating to governance. This acted for the benefit of the ruling class since the colonial days. In the postcolonial period, this legacy approach was too strong for the reformers to discard. For this reason, the land laws in Bangladesh were drafted with pharisaic formalism. This formalism of land law obscured the clearer, creative and curative views of the emancipation of the peasants. The laws were never timely, even if so made, they were loosely drafted. Bangladesh is a good legal laboratory of Patrick McAuslan's idea of drafting politics. Professor McAuslan discussed the issue of legal drafting in formulating the land law in the Eastern African context.¹⁴

Land laws have been the products of politics not of objective considerations of what is best for economic or social or sustainable development ... they are directed to bolstering and benefiting the ruling group or class in each country.

The drafters often claim land issues to be highly technical and complex. This claim, as well as the imposed time limits, seemed to govern the strategies to foreshorten debate limiting citizens' participation in enacting the land law. McAuslan noted:¹⁵

To move from policy formulation to drafting laws is not, as some people assume, to move from a debate on policy to one on legal technicalities: the move changes the context of the debate but it remains, none the less, a policy debate When these ideas are turned into precise powers, duties, limitations, restrictions, procedures, when it becomes clear who is to benefit and who is to lose out, then objections begin to be voiced. These are not, of course, objections on 'policy' grounds but on technical legal grounds: a particular clause 'wouldn't work', a certain provision is 'unnecessary' or 'impracticable'.

People talk about law reform, but at the same time culturally see the law as an impediment to change. The art of legal draftsmanship, therefore, in habitual style confers wider powers on the officials with few safeguards against misuse. In this way, an ambivalence can be found in the land law regime of Bangladesh. In an oft-quoted repeated cliché, it has been stated that the drafting style in a country is responsible for half of the litigation produced.¹⁶

Land reform in Bangladesh is pre-eminently land *law* reform, a line of argument also advanced by McAuslan in the context of Eastern Africa. According to this view, the law should facilitate the rights of the peasantry to access and hold land instead of facilitating

¹⁴ Patrick McAuslan *Bringing the Law Back In: Essays in Land, Law, and Development* (Ashgate, London, 2003) at 78.

¹⁵ At 251.

¹⁶ GR Rajagopaul *The Drafting of Laws* (The Indian Law Institute, New Delhi, 1980) at xiii.

the state's administrative control over their access to land.¹⁷ McAuslan's idea holds relevance for Bangladesh with respect to the mechanism prescribed by the post-colonial land reform law in Bangladesh. While the law claimed to recover land from the control of the *zamindars*, instead the state itself assumed the role of *zamindars* through its unreformed agency that it had inherited from the colonial regime. This raises the question of administrative fairness in legislative drafting to ensure that the objectives of land reform law are not thwarted. Thus, McAuslan compellingly argues:¹⁸

Administrative justice requires that official power be bounded by legal rules, be exercised with certain principles of fairness, allows for hearings and appeals and be subject to review, how else this can be done except through statutory provisions which go beyond merely granting powers to officials, to setting out of the matters and form of their exercise and control.

Legal technicality is a problem, however, the political reformers are to legislate for justice.¹⁹ Thus, the task of making a competent reform law starts from a favourable political condition and from the decision of politicians to carry out the reform. Wolf Ladejinski wrote of the role of politicians in land reform in the following terms:

Politicians and only politicians, make good or poor reforms or do not make them at all. They control the political climate, which determines the will or lack of will to proceed with the task; the specific measures with which the reform is not endowed; the care or lack of care with which the enabling legislation is formulated; the preparation or lack of preparation of the pertinent and administrative services... and, most important, the drive or lack of drive behind the enforcement of the provisions of the law.

The "intention" of a politician is again a political question. Even then, it is to a great extent, a question of the legislative process which is not always an unmixed blessing.

3 *Anti-poor elements*

The study of land laws of Bangladesh reveals the lack of a clear theoretical link between land reform and poverty alleviation. Bangladeshi land law is not designed or implemented in a way that specifically addresses poverty. Indeed, much of what it does could be said to be anti-poor and unlikely to lead to significant benefits for any but a small minority of the already better off. This becomes evident from the prescribed process of selecting the beneficiaries, nature of land-ownership ceiling, the kind of tenurial security afforded to the landless or nearly landless cultivators, the process through which the regained *char* land is returned to the riparian peasants and the coercive nature of eminent domain laws. All these are compounded by a continuing failure of the law to prescribe a monitoring system for the empowerment of the people. Although there is a political appetite for translating land

¹⁷ McAuslan *Bringing the Law Back in*, above n 14, at 249.

¹⁸ At 256.

¹⁹ Jairam Ramesh and Muhammad Ali Khan *Legislating for Justice: The Making of the 2013 Land Acquisition Law* (Oxford University Press, New Delhi, 2015) at 2.

reform into poverty alleviation, there is little evidence to show a commitment to link this effort to that purpose.

IV The Land Law and Poverty

The land law and poverty of the peasants have a shared history in Bangladesh. The reforms to land laws were made from time to time, often as remedial measures to pacify peasant discontents, but they could not improve the situation: most of the reform attempts were fragmented and piecemeal. The laws focused more on the political necessity of appeasing the peasants rather than improving their lot. The reform laws did not establish a pro-peasant pattern in agriculture nor have the laws upset the agrarian hierarchy. At times, the laws ended up creating a new social class without protecting the groups lying at the bottom of the agrarian ladder. Angus Maddison captured the process nicely with a graphic metaphor:²⁰

The rural structure is still like an onion with many layers. The British peeled off one layer. The *zamindari* abolition peeled off another. This time, as under the British, all the benefits have been absorbed by the next two or three layers ... But the sharecroppers and labourers are still squeezed to a sub-human margin of subsistence as they were under the Moghuls.

Peasants' poverty in Bangladesh, therefore, is not some kind of fate befalling them; rather, it is a historical process involving struggle and resistance. This poverty process brings the historic vitality and resilience of the peasants to the front.²¹ Poverty being a dynamic process of public decision making, land reform law in Bangladesh has made it justified and right that some people may remain poor and that there is nothing wrong in it.

In this manner, the land law has contributed to the perpetuation of poverty in Bangladesh. The post-colonial and post-independence land law did not remedy the situation rather deteriorated it. Such a dismal record demands a remodelling of land law. This warrants debate on the role of land law as a poverty elimination tool on a wider canvas. Otherwise, as past history tells us, there will be peasant revolt as and when the situation demands. Huntington perhaps sketched the issue convincingly:²²

Where the conditions of land tenure are equitable and provide a viable living for the peasant, revolution is unlikely. Where they are inequitable and where the peasant lives in poverty and suffering, revolution is likely, if not inevitable, unless the government takes prompt measures to remedy these conditions. No social group is more conservative than a landowning peasantry and none is more revolutionary than a peasantry which owns too little land or pays too high a rental.

²⁰ Angus Maddison *Class Structure and Economic Growth: India and Pakistan since the Mughals* (New York, Norton, 1971) at [105-106].

²¹ Upendra Baxi (ed) *Law and Poverty: Critical Essays* (Tripathi, Bombay, 1988) at viii.

²² Samuel Huntington *Political Order in Changing Societies* (Yale University Press, New haven, 1968) at 375. See also Roy Prosterman "Land Reform in Latin America: How to have a Revolution without a Revolution" (1966) 42 *Washington Law Review* 189.

Therefore, it is argued that Bangladesh needs to reinvigorate its land reform approach in the light of past and recent developments in the global land law reform scene.

V *Legal Approaches to Land Reform*

Land reform in a post-colonial setting is extremely challenging, as James Gibson candidly mentions, it implicates exceedingly difficult issues of “law, justice and history”.²³ This implication calls for the adoption of the principle of transformation. It presupposes a continued ideological motivation against the traditional method of land reform. For Bangladesh, this motivation was the creation of an agrarian egalitarianism by reducing the poverty of the peasants who were exploited from colonial days. It desires to make land policies more inclusive and seeks to guarantee legal access to land by the poor.²⁴ This requires taking land from the “landed class” who generally control the law-making process. This paradox makes the issue highly political, complex and difficult.²⁵ Transformation through law, therefore, occurs only where the foundation of the property regime itself is questioned. Van der Walt wrote about land law reform in the South African context:²⁶

The property regime, including the current system of property holdings and the rules and practices that entrench and protect them, tends to insulate itself against change (including social and political transformation) through the security and stability seeking tendency of tradition and legal culture, including the assumptions about security and stability embedded in the rights paradigm . . . the rights paradigm tends to stabilise the current distribution of property holdings by securing extant property holdings on the assumption that they are lawfully acquired, socially important and politically and morally legitimate. This function of the rights paradigm tends to resist or minimise change, including change brought about by morally, politically and legally legitimate and authorised reform or transformative efforts.

Walt, thus, used the concept of “transformation” as the guiding principle of distributive land reform. For Walt, the social and political transformation highlights the fundamental tension between the protection of established property interests and promotion of socio-economic justice through some form of redistributive politics.²⁷ Walt explains “transformation” in the context of changes in the land law as follows:²⁸

The traditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do the transformative work . . . the point is to identify and explain instances

²³ James Gibson *Overcoming Historical Injustices: land reconciliation in South Africa* (Cambridge University Press, New York, 2009) at [4-5].

²⁴ Robert Home “Towards a Pro-Poor Land Law in Sub-Saharan Africa” in Robert Home (ed) *Essays in African Land Law* (Pretoria University Law Press, Pretoria, 2011) at 25.

²⁵ Benjamin Davy “The Poor and the Land: Poverty, Property and Planning” (Working Paper 2, Liverpool University Press, Liverpool, 2009) at 11.

²⁶ AJ van der Walt *Property in Margins* (Hart Publishing, London, 2009) at 11.

²⁷ At 11.

²⁸ At 11.

where transformation justifies changes that question the very foundations upon which the current distribution of property rests.

In this regard, transformation is indicative of changes in the land law which have their avowed and deliberate aim to right the past social and economic injustices. The change should also create a system of land law designed to ensure a favourable position for the people previously deprived by the old land law regime. The redistribution of rights and opportunities under the reformed law should enable them to better their lives. The whole colonial land law regime introduced by the British over two-century demands that upon decolonisation the new country take steps to redistribute land and property rights to those who had been deprived of them during the colonial period. From that angle, “transformative” is very much a relevant theme in assessing the trajectory of land law reforms in Bangladesh since 1947.

Opposed to the transformative theme, Bangladesh took the traditional approach to address the necessity of radical land reform having a small impact on the land-poverty of the peasants. It adopted and continued the colonial approach of vesting land in the state (substituting *zamindars*) and importantly made little or no effort to address the inequalities. The post-colonial, as well as post-independence national politics, introduced this reform as something to be imposed from the upper levels of the state.

VI Distributive Land Reform and the Creation of a Property Law Regime

A Distributive Land Reform

Decades of land reform efforts have failed to address the poverty of the peasants in Bangladesh. Why is this so? Mere development economics does not provide an intellectually compelling answer to this question. The focus needs to be on the mutual impacts of law, politics and social structure. It appears that the chief mistake in the land reform approach of Bangladesh was the failure to incorporate the concept of distributive justice in the land reform law in connection with the abolition of the *zamindari* system and the subsequent sharecropping and ceiling legislation. The half-hearted reform under the 1950 Act partially explains why the later reforms have been so much less revolutionary than was expected. Although, the post-independence ceiling laws reaffirmed the ceiling principle on the grounds of satisfying the land hunger, reducing inequalities in land ownership and income and providing greater opportunities for self-employment, yet in none of the competing ceiling provisions was it mentioned that the measure would yield significant acreage for distribution. If the sole objective of the land reform laws was to reduce the holdings of the larger owners with a view to providing for the landless or for increasing the farms of those who have uneconomic fragments, the picture would have been different. The ceiling episode was one of evasions through commission and omission. With poorly drawn enactments, holdings had been fictitiously divided up among close and distant relations so as to make them appear under the ceiling or fit them into one of the broader exceptions the law had conceded.

The pledge to develop a legal answer to land reform, to seeing land reform as being, in part, land *law* reform, is driven by a vision of creating substantive land law in the post-independence setting. Bangladeshi reformers failed to incorporate this in the reform laws. The principal characteristic of the land reform in Bangladesh was that it granted certain rights in favour of the peasants but placed them at the mercy of administrative whim.

A pro-poor approach to land reform in Bangladesh is needed. The basic tenet of this reform should be to revise the whole land reform issue in the light of distributive justice.²⁹ Griffin, among others, argues from a broader perspective that redistributive land reform is necessary to accelerate agrarian growth in developing countries. However, there are two opposing views on the necessity of distributive land reform in Bangladesh in the present day context: market-led reform and state-led reform. Influenced by the World Bank, the main idea behind market-led reform is that redistribution of land should take place through the market. Thus, land reform received a fundamentally different meaning as an instrument of neo-liberal free market ideology than the constitutionally promised objective of social justice. This school does not consider land reform to be a means of repairing historical injustices and providing equal redistribution of land by taking away excess land from the rich and distributing it to the poor. In this new concept of “land reform”, it is not the state, but the market that takes care of redistribution of land.

Under the concept of market-led reform, poor peasants are to buy excess land from the rich peasants on the market instead of receiving back the land that has been taken away from them. Thus, this concept tends to deny the rightful share of the poor. The state is under an obligation to formulate policies that enhance the marketability of land, such as legal reforms to facilitate land market transactions, land titling and increased security of property rights, combined with credit facilities for the poor.³⁰ During the past decades, the Bangladesh government has taken several measures along these lines, such as improving land registration procedures and reducing registration costs. The underlying argument is that agricultural production is more efficient if more land makes its way into the hands of small peasants. Thus, this new concept of “market-led land reform” is sold to the public as a measure of pro-poor growth, poverty reduction and gender equality. But in fact, the objective is “mainstreaming” the poor as producers and consumers in the competitive capitalist market economy that runs according to the principle of the right of the strongest.

The market-led approach to land reform contradicts and undermines the proper implementation of existing government policies of land redistribution.³¹ Moreover, it

²⁹ Mahar Mangahas and Ma Agnes R Quisumbing “Land Reform and Redistributive Justice” (Working Paper, Center for Policy and Development Studies, University of the Philippines, 2002) at 1.

³⁰ For a critique on market-led land reform see Saturnino Borras “Questioning Market-led Agrarian Reform: Experiences from Brazil, Columbia and South Africa” (2003) 3(3) *Journal of Agrarian Change* 367.

³¹ Jenneke Arens “Women, Land and Power in Bangladesh: Jhagrapur Revisited” (PhD Thesis, Amsterdam Institute for Social Science Research, Amsterdam, 2011) at 35.

promotes commodification of land. This drives up the price of land and further strengthens the grip of corporate bodies.

Distributive land reform was a social need for Bangladesh. Yet there are challenges in adopting such an approach. Mushtaqur Rahman Khan terms the distributive approach as a “modelling of political power” and claims it to be deeply misleading even with its modified version.³² Khan’s view holds substance considering the arduous process involved in the redistributive claims. Galbraith’s pithy formulation of six decades ago is still relevant:³³

Some of our current discussion of land reform in the underdeveloped countries proceeds as though this reform were something that a government proclaims on a fine morning – that it gives land to tenants as if it might give pensions to old soldiers or as it might reform the administration of justice. In fact, a land reform is a revolutionary step: it passes power, property and status from one group in the community to another. If the government of country is dominated or strongly influenced by the landholding groups—the one that is losing its prerogatives—no one should expect effective land legislation as an act of grace—the best assurance of land reform which I am for one hope can be orderly and peaceful, is a popular government by those who really want reform.

Frankel’s comments from an Indian perspective also are instructive:³⁴

In retrospect, it was probably inevitable that a development strategy requiring extensive land reform and institutional change as preconditions for success should meet with powerful opposition from landed groups; and that in a political democracy where landowning interests are heavily represented in the legislatures, this resistance should manifest itself in a go-slow approach towards land reform ... most legislation on tenancy reform and ceilings on land ownership had not been effectively implemented.

Atul Kohli analysed “land reform” processes in West Bengal, Karnataka and Uttar Pradesh, and persuasively argued that without the ascension of well-organised left-of-centre regimes in other states, the prospects of alleviating rural poverty by deliberate state intervention will remain slight.³⁵ Therefore, targeted state intervention for carrying out land reform is crucial. For that, the first and foremost requirement is a constitutional property framework under which pro-poor land laws can be made.

It is said that the state has a duty to allocate property under its control (public property ie *khas* land) to the landless. But can the state expropriate an individual’s property in order to transfer it to another individual? On this point, Robert Nozick argues that under a system of “just entitlements” the state has no right to redistribute benefits in order to secure an equal spread.³⁶ Nozick’s claim was based on the idea that a distribution of property is just

³² Mushtaq Hussain Khan “Power, Property Rights and the Issue of Land Reform: A General Case Illustrated with Reference to Bangladesh” (2004) 4 (1 & 2) *Journal of Agrarian Change* 73 at [106].

³³ JK Galbraith “Conditions for Economic Change in Underdeveloped Countries” (1951) 33(2) *Journal of Farm Economics* 689.

³⁴ FR Frankel *India’s Green Revolution: Economic Gains and Political Costs* (Princeton University Press, Princeton, 1972) at 4.

³⁵ Atul Kohli *The State and Poverty in India: The Politics of Reform* (Cambridge University Press, Cambridge, 1987) at 230.

³⁶ Robert Nozick *Anarchy, State and Utopia* (Basic Books, New York, 1974) at 238.

if everyone is entitled to the holding he or she possesses. However, Nozick's' idea has been criticised for its failure to consider the developing state's unjust allocation of property in the first place.³⁷ Tony Honore, for example, in response to Nozick, convincingly writes:³⁸

The individual ownership is a sort of stewardship or ownership in trust. It carries with it management and the right to use but does not exclude the right of others to a similar use.

The state, therefore, is to act as a surrogate for the community as a whole for a participatory system of property. This duty of the state does not operate in isolation. In addition to the state's land policy, the obligation should be supported by constitutional tools.

B Land Law Regime and the Engagement of the Judiciary

Bangladesh needs to make a clear case for land reform that is constitutionally functional.³⁹ Jennifer Nedelsky questions the constitutional entrenchment of property as she thinks that such a clause may insulate land reform programmes and perpetuate existing injustices and imbalances in the property system.⁴⁰ In the same line of thought, Gregory Alexander argues that the formal inclusion of a right to property does not guarantee any specific changes in the actual status of property in the national system.⁴¹ It seems that this view does not fit in the Bangladeshi context. Firstly, the judiciary in Bangladesh showed a pragmatic approach towards the reform laws. Secondly, a couple of land reform initiatives were taken even prior to the commencement of the Constitution.⁴² This was the same approach taken soon after decolonisation and it did not work. A clear case of redistribution was in place and that could not have been dealt with without making a clear constitutional stand. Therefore, the issue for Bangladesh was how the property clause could be set textually and structurally where a pro-poor land reform could take place in the post-independence setting.

The South African example may offer some guidelines in this respect in spite of the fact that it also have limitations. Importantly, the South African property clause cautiously avoids the objections against constitutionalisation of property rights often raised by scholars. It creates a structural opportunity where pro-poor land reform can take place.

³⁷ Tony Honore *Making Law Bind* (Clarendon Press, Oxford, 1987) at 217.

³⁸ At 224.

³⁹ For an illuminating comparative discussion on land reform and constitutionalism, See John Murphy "Insulating Land Reform from Constitutional Impugnment: An Indian Case Study" (1992) 8 SAJHR 362.

⁴⁰ Jennifer Nedelsky *Private Property and Future of Constitutionalism: The Madisonian Framework and Its Legacy* (University of Chicago Press, Chicago and London, 1990) at 417.

⁴¹ Gregory Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press 2006) at 6.

⁴² For example, Bangladesh Landholding (Limitation) Order 1972 was promulgated on 15 August 1972 before the Constitution came into effect. The law reduced the maximum landholding by a person or family from 375 standard *bigha* to 100 standard *bigha*.

Bangladesh could perhaps learn from this with regards to establishing a relationship between property rights, constitutionalism and the state's power.

Reference may also be made to Indian experience. India shares a common past with Bangladesh in terms of property regime. Like Bangladesh, India also had the challenge of a transition from feudalism to egalitarianism. So it was quite expected that the Indian Constitution would have a special constitutional clause. And so, art 19 (1) (f) and art 31 incorporated a double guarantee for property protection, though after an intense debate.⁴³ The framers of the Indian Constitution included a limited protection of property clause which provided compensation for petty compulsory acquisitions but not for large-scale social welfare programmes.

But this philosophy was soon contradicted by the Courts.⁴⁴ This ignited a long drawn battle between the Indian judiciary and the legislature regarding land which culminated in the removal of property clause from the Constitution. Article 300A of the Indian Constitution states: “No person shall be deprived of his property save by authority of law”. Thus, the property right in India is now an ordinary constitutional right. The parliament can remove this right by a valid law provided that it does not violate fundamental rights and other constitutional restrictions. Thus, as of now, deprivations of property in India require a basic due process of law.

John Murphy contends that the Indian judiciary failed to establish a suitable approach to the constitutional clause when land reforms were needed.⁴⁵ The judiciary itself did not recognise that it had been insulating the process of land reform in India by declaring the reform laws invalid.⁴⁶ Interestingly, the Indian judiciary in subsequent decisions held that law designed to promote directive principles of state policy would most certainly advance the broader principle of egalitarianism and constitutional goal of economic and social

⁴³ Article 19 (1) (f): All citizens shall have the right to acquire, hold and dispose of property. Article (5): There are some reasonable restrictions on this right. Article 31(1): No person shall be deprived of property except by authority of law. Article 31(2): No property shall be disposed or acquired for public purposes unless the law in question provides for compensation. Article (31)(5): There are some exceptions to the compensation guarantee.

⁴⁴ Some leading cases having implications for land reform and indicating a tussle between the Indian judiciary and the parliament are: *Kameshwar Singh v State of Bihar* [1951] 38 AIR Pat 91 (FB): Land reform law unconstitutional; *State of West Bengal v Subodh Gopal Bose* [1954] 5 SCR 587: Both acquisition and deprivation require compensation; *State of West Bengal v Bella Banerjee* [1954] AIR 41 SC 170: The Court has the power to see the stand of the compensation principles; *Golaknath v State Of Punjab* [1967] AIR 1643: The parliament cannot curtail fundamental rights; *RC Cooper v Union of India* AIR [1970] 57 SC 564: Principles of compensation unreasonable; *Kesavanando v State of Kerala* [1973] 60 AIR 1461 (SC): The right to property as a basic structure cannot be amended by the parliament.

⁴⁵ John Murphy “Insulating Land Reform from Constitutional Impugnment: An Indian Case Study” (1992) 8 SAJHR 362.

⁴⁶ Soli Sorabjee, however, identifies the absence of “political will” as the real reason for the failure of land reform legislation. See Soli Sorabjee “Role of the Judiciary—Boon or Bane?” (1993) 20(3) India International Centre Quarterly 1.

justice.⁴⁷ Given this shift of approach, it may be argued that constitutionalisation of property rights is not a problem in itself rather it is important how the actors—legislature, judiciary and political reformers—wish to see the nature of property rights within the constitutional ambit.

The judiciary versus legislature debate brings the judicial aspect of land law reform to the forefront. The established power structure in the legal culture is not always welcoming to the changes in the property arrangement. Hernando De Soto from his perspective on property rights criticises the legal culture for its in-built dogmatism and adherence to traditional processes and impairing chances for poverty reduction.⁴⁸ This even led de Soto to question the concept of pro-poor law which in itself may appear as a challenge to legal culture. Soto's thesis is based on his study on the legal empowerment of poor in the developing countries like Bangladesh. In such a society, whenever a land reform law is enacted, it is very likely that the new law will face judicial challenge.

The fate of the reform is then at the mercy of the judiciary. From this angle, the involvement of the judiciary in the land reform process has often been called into question. Engagement of the judiciary makes the reform process time consuming and uncertain. The judicial weapon is also used as a political camouflage of land reform in many jurisdictions. The Indian situation provides an example close to this. At the same time, however, India is also an example of a situation where the legislators did not give up. They made constant efforts to bring changes in the land relations of the post-colonial settings. The judiciary merely wanted to see that the reform takes place within the ambit of the law and Constitution.

Unlike India, Bangladesh had one obvious advantage. The lawmakers of Bangladesh had a trend-setter judicial decision in favour of the distributive land reform. The Court in *Jibendra Kishore*⁴⁹ upheld the constitutionality of laws relating to *zamindari* when its acquisition was challenged in the mid-1950s. This opportunity was not properly explored by the political reformers, except acquiring the *zamindari* in a controversial manner. In the post-1971 period, the engagement of the Supreme Court of Bangladesh in the cases of land reform remained critically minimum. Interestingly, the subordinate judiciary has always remained overburdened with vexatious land litigations between private parties on the questions of land transfer, partition, possession, mortgage and the like.⁵⁰ One may offer three interconnected interpretations for this dual picture of the land question in the upper and lower judiciary of Bangladesh. One is the limited scope of judicial review in the reform

⁴⁷*Sanjeev Coke Manufacturing Company v M/S Bharat Coking Coal Ltd and Others* [1983] AIR 239 (SC).

⁴⁸ Hernando de Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Every Where Else* (Basic Books, New York, 2000) at 210.

⁴⁹*Jibendra Kishore v Province of East Pakistan* [1957] 9 DLR 21 (SC).

⁵⁰ Abul Barkat and Prosanta Roy *Political Economy of Land Litigation in Bangladesh* (ALRD, Nijera Kori, Dhaka, 2004) at 78.

laws that kept litigators out of the higher courts. The other interpretation is that the laws were not acted upon by the government and thus did not invite judicial challenge. The poor record of land redistribution among the peasants supports this proposition.⁵¹ In the instances where laws were made, they were poorly made, or were made but were not intended to be acted upon. The third proposition might be that the state was just a reluctant observer of the land question, allowing citizens to enter into legal disputes in the vast body of property laws other than land reform laws. It did not create a land law regime with a coherent relationship between the state, constitutionalism, property and poverty. The land law reform in the post-colonial settings of Bangladesh was, thus, a story of failure.

From this perspective, it may be argued that an understanding of the experiences of other analogous jurisdictions like India and South Africa may be an aid for a broader understanding of the issue of post-colonial land reform of Bangladesh. A sound property law regime with its emphasis on land reform may function as an important tool for the transformation of property law and change the existing patterns of land rights, particularly of the peasants. A degree of political commitment and a level of legal creativity are necessary for this purpose.

VII Chapter Summary

Land reform in Bangladesh is an unsettled question. With the passage of time and possible decline of agriculture in relative importance, many see it as a dead issue. Yet there is still a fundamental case to be made for land reform in Bangladesh. No important change was made from the colonial way of law reform in the post-colonial period. Even, after emerging as an independent country, Bangladesh showed no commitment to land law reform. A redistributive land reform would have helped to address the social inequities.

Land reform with a focus on the rights of the peasants is a necessity. In response to this, historically, the land laws in Bangladesh mainly covered the area of land ceiling, land (re)distribution and tenurial reforms. Unfortunately, the reform laws of Bangladesh were less than satisfactory. With certain exceptions, land reform usually has been the first legislative act of all new regimes in Bangladesh. Nonetheless, the laws failed to incorporate the objectives of the land reform. There was always a gap between the law and the land. The reform legislation did not make a just property regime within which a pro-poor land reform can take place.

It is submitted that rapid economic growth alone will not alleviate poverty. The absence of distributive justice will undermine the democratic foundations of the agrarian economy. To change the situation, this chapter argues that land reform law should take into account the true reasons of poverty. The reformer must then view land law through the lens of the disadvantaged. However, law by itself is not the panacea for poverty. The results of land

⁵¹ See chapter 6.

reform depend more on social, institutional and political forces than on legal specifications. Nonetheless, the role of law is not unimportant. A socially responsive reform law can offer motivation within society. The law made by a participatory process, can set the target of land reform, define the key issues, specify the institutional mechanisms and envisage the modality of transforming the agrarian system.

The chapter finds that the crisis of land law in Bangladesh is at bottom ideological. Fundamentally, the crisis in land law lies in politics. Bereft of social need, it is the politics of historic atrophy empowering neither individual transcendence nor peasant solidarity. As Holmes put it, the substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient. Its form and machinery and the degree to which it is able to work out desired results depend very much upon its past.⁵²

⁵² OW Holmes *The Common Law* (Transaction Publishers, New Brunswick, 2005) at 5.

Chapter 9

Conclusion and Recommendations

I Overview of the Thesis

A complex land law system was one of the major problems faced by Bangladesh (previously East Pakistan) on Bengal's partition in 1947. The scenario did not change even after its emergence as an independent country in 1971. The land system of Bangladesh derived from an inequitable rural social structure based on multifarious hierarchies which had deep roots in the country's colonial past.¹ That is the reason why the majority of the peasants of Bangladesh live on or around the poverty line.

The land system and poverty of the peasants are historically linked with the politics of land reform in Bangladesh. Its most problematic feature was the Permanent Settlement introduced by the British in 1793. This land system gave rise to a class of parasitical intermediaries called the *zamindars* who paid a fixed rent to the government but rack-rented and oppressed the peasantry. Eventually, the *zamindari* system prevailed in colonial Bengal and many other parts of British India. The class inequality built into this pattern of ownership was further complicated by its interface with the country's social hierarchy.

Bangladesh thus inherited an agricultural hierarchy from the colonial days in the making of which land law was instrumental. In the post-1947 era, the first objective of land reform law in Bangladesh was to establish an equitable society based on distributive justice. The second objective was to increase productivity through elimination of poverty of the Bengal peasants. The objective of distributive justice was subsumed in the programme of elimination of the exploitative forces in the agrarian sector. The elimination of *zamindari*

¹ Mangesh Kulkarni "The Political Economy of Land Reform in India: Retrospect and Prospect" in Varsha Bhagat-Ganguly (eds) *Land Rights in India: Policies, Movements and Challenges* (Routledge, New Delhi, 2016) at 103.

system was the basic step towards this end. It was partly successful in the sense that the intermediary interests were abolished; the peasants were to pay taxes to the government instead. As far as the second objective is concerned, while various other reform measures were taken by Bangladesh in an attempt to ensure the peasant's access to land and security of land tenure, the objectives of those measures have not been achieved.

Land reform, therefore, is still a pressing issue for Bangladesh. In fact, it should be pursued as an anti-poverty programme that should have immediately followed the achievement of independence. It is of course a revolutionary process that requires profound and radical alteration of the very basis of wealth and power.² The process, therefore, is closely bound to the institutional and legal structure of a developing society.

This thesis studied the subject from the legal point of view. However, it situated land law in the socio-historical setting of Bangladesh. One compelling justification for adopting this perspective was given by a great American Judge, OW Holmes in the following words:³

In substance, the growth of law is legislative The very considerations which judges rarely mention and always with an apology, are the secret root from which the law draws all the juices of life ... And as the law is administered by able and experienced men who know too much to sacrifice good sense to a syllogism ... when ancient rules maintain themselves in the way ... new reasons more fitted to the time have been found for them and that they gradually receive a new content and at last a new form, from the grounds to which they have been transplanted.

The thesis, therefore, considered the leading land reform laws in colonial Bengal and post-colonial Bangladesh. It examined the extent to which these reform laws helped the peasants of Bangladesh get out of poverty. The contention is that *land reform* in Bangladesh is at the first instance land *law* reform. Two questions need to be asked about the reformer's task on the land issue; firstly, what did they do? And secondly, what did they think they were doing? What they thought they were doing is in part contained in the policy logic of the reform. What they actually did can be found in the respective reform law and actions based on the provisions of the law. In each case, this thesis compared the context with the text of the legislative enactments. The gaps between the two add to the understanding of the political ramifications, social tension and ideologies that influence the land policy of Bangladesh.⁴

² Robert Heilbroner *The Great Ascent: The Struggle for Economic Development in Our Time* (Harper & Row, New York, 1963) at [128-129].

³ OW Holmes *The Common Law* (Dover Publications, New York, 1991) at [35-36].

⁴ Ronald Herring *Land to the Tiller: The Political Economy of Agrarian Reform in South Asia* (Yale University Press, New Haven and London, 1983) at 4.

II Major Findings

A Land Law and Colonialism

Land law was a major part of the story of the expansion of British colonialism in Bengal. The major legislative interventions started reforms with emphasis on exacting land revenues; the rights of the peasants over their land were significantly left out every time. Distributive land reform could not come out of this “revenue centric” trend. The issue of tenancy reform was added to the idea of land reform in a later colonial phase but it remained as an unresolved issue of land reform. The colonial legal practices failed to define the competing interests in the same property and condoned peasant exploitation. Therefore, the legislative intent of the reform laws has frequently been questioned and there is reason to believe that Bangladesh never understood the legal aspect and meaning of land reform in the post-colonial settings.

B Land Law and Ambiguity

The colonial land laws acted against the interests of the peasants and the post-colonial laws continues the same trend. The main common feature is the excessive and corrosive presence of loopholes and exclusionary clauses having social and political ramifications. As soon as a statute becomes prolix, overburdened with exclusions, loopholes, complex language, it becomes difficult to apply, especially in a country like Bangladesh where the courts are slow moving and expensive at the best of times. In the same vein, the people and the institutions that administer the law know how to “sacrifice good sense to a syllogism”.⁵ This common feature implies that the post-colonial reform laws failed to incorporate effectively the needs of a new social order.

C The Process of Law Making and Context

A fundamental peculiarity in the land law making process in Bangladesh deserves attention. Most of the laws were enacted in revolutionary or transformative contexts. The 1793 Regulation was made with the intent to bring a new order in property relations without sufficiently according recognition to the customary rights. The 1885 tenancy law was preceded by the widespread peasant protests in Bengal. The 1950 Act had the sharecroppers’ movement of the late 1940s and the Bengal’s partition as meaningful backgrounds. The reform laws made in the Bangladesh phase (post-1971) can also be understood as a manifestation of the anti-poverty imperatives of the 1971 liberation war of Bangladesh.

The established practice for making these laws was to form a Committee, then to draft a Bill based on the Committee’s recommendations and then to enact the respective laws.⁶

⁵ OW Holmes *The Common Law* above n 3, at 36.

⁶ The 1793 Regulation was preceded by the report of the 1776 Amini Commission; the 1885 Act was made on the basis of the 1880 Rent Commission’s report; the 1950 Act was enacted following the

There were significant variations among the recommendations of the Committees, the Bills introduced and the laws ultimately enacted. One interpretation of this practice of land law making is that this was a political subterfuge to pacify the peasants' protests and thwart the aspirations of the people. In none of the laws was there any widespread informed participation of the people. Even as an independent state, Bangladesh did not make any land reform law through the *Jatiyo Sangsad*—the national legislative body. The reformers promulgated a couple of “Orders” or “Ordinances” that were not sufficient to transform the basic structure of agrarian relations. The poverty of the Bangladeshi peasants, thus, is the outcome of a process of public decision-making in which the people in power consider it just, right and fair that some people may become or stay impoverished.

D Constitutional Stand

Bangladesh attempted to facilitate the land reform approach in a constitutional vacuum. This happened both during the Pakistan period (1947-1971) and in independent Bangladesh (1972-Present). Under the Pakistan regime, the Constitution for the country was enacted nine years after decolonisation. A pre-constitutional law (the 1950 SAT Act) was enacted without establishing a proper nexus between powers, property, plenty and poverty. The same story was replicated when Bangladesh adopted its own Constitution as an independent country.

The issue of land reform was high on the political agenda at independence, but a curious silence fell at the time of enacting the Constitution. A couple of Presidential Orders, however, were promulgated before the enactment of the Constitution stressing only the revenue reforms and the ownership limit. The question left was how to accommodate both a right to property and a directive to address the historical disadvantage created by the colonial and post-colonial land reform laws.

E Land Law Reform Approach

Legal history and development of land law in Bangladesh run in parallel. Related to this is the history of colonial and post-colonial poverty itself. The 1793 Regulation created the *zamindari* system and the 1885 Act failed as a socio-economic charter to properly protect the tenants, let alone emancipate the Bengal peasants. The 1950 Act, though a pro-peasant enactment in spirit, essentially created a new landed class given the fact that the land ceiling laws were circumvented and the distributive land reform suffered a serious jolt.

The land reform model Bangladesh ultimately developed was merely a “ceiling model” not “ceiling redistributive” model. The state merely set a maximum limit of private land ownership but did not really act to distribute the surplus land over the ceiling limit. On the question of distribution, the 1950 SAT Act failed to make an ideological shift. To this, the

recommendations of the 1938 Floud Commission and the 1984 Land Reform Ordinance was based on the recommendations of the 1983 Land Reforms Committee.

agricultural land distribution policy of 1997 was a belated and weak reply. The legal framework relating to the rights of the riparian peasants also presents a dismal picture of redistributive justice. Furthermore, the 1982 ARIPO—the main eminent domain law of Bangladesh—acted as an antithesis to land reform. It tended to deprive the peasants of their right to land in a coercive manner. On the issue of tenurial reform, the 1984 LRO failed to offer a better regime than in the colonial period.

III Recommendations

The longstanding suffering of the Bengal peasants under the colonial rule made a clear case for land reform upon decolonisation. The basic principle for the reform was to establish agrarian egalitarianism. It is yet to be materialised. Drawing upon the many specific needs discussed in the foregoing chapters, this thesis makes the following recommendations for future land law making.

First, Bangladesh, a country based on past land injustices, should clarify its constitutional and legal approach to land reform by amending the property clause of the Constitution. The property clause that Bangladesh acknowledged does not fully complement the constitutionally declared objectives of social, political and economic justice. This lacuna demonstrates Bangladesh's indifference to the underlying purpose for which the right to property was constitutionalised. So, the clause requires to be reframed to establish the legitimacy of land reform and redistribution efforts. A sound property clause with emphasis on land reform may function as an important tool for the transformation of property law and change the existing patterns of property rights. A degree of political commitment and a level of legal creativity are necessary for this purpose.

Once the constitutional approach to land reform is settled, the necessity will arise to formulate a comprehensive land policy for different categories of land. In order to bring about changes, the existing land policies must be evaluated specifically in terms of their impact on poverty. As well as underpinnings of efficiency, property system have a welfare component, which requires a clearer focus on impacts of land law reforms on the poor. As the specific chapters of this thesis argued, land law reforms must be supported by poverty-reduction strategies.

Second, Bangladesh should redraw the whole land legislation from a deliberative and participatory perspective. It has been sometimes argued that whatever land reform has been made in Bangladesh, it was either under a “concentrated power” or a martial law regime. The democratic parliament has not been effective to bring change in the land system. This is mainly an age of participatory law-making. The population should have the option to take part in the law-making process and put pressure on the government of the day. The comparative land reform success of the Indian state of Kerala and West Bengal suggests that even in a competitive political environment effective land reform may take place through deliberative reform legislation. The claimed success of land reform in Bangladesh

under concentrated power took place not due to the autocracy, but to the mobilisation of rural people who demanded redistribution. This thesis rejects the idea of land reform imposed from the top based upon arguments for a land reform that permeates the society through a participatory legal process.

Third, a pro-poor approach to land law reform requires a re-examination of the difference between the legal frameworks of agricultural and non-agricultural land. Land reform laws must prevent the conversion of the nature of land without just cause.

Fourth, Bangladesh needed to make a comprehensive land distribution policy as early as in 1950, but did not make one until 1997. The distribution policies that were made in the intervening period were general and transient in nature. As a result, they provided only broad guidance for distributive land reform and did not get to the core of the issue. Even the 1997 Agricultural Land Management and Settlement Policy has many anti-poor elements. Before making a reform law, therefore, Bangladesh needs to formulate a sound land policy to set the broad objectives of land reform. Policy reform logically precedes law reform. Law reform seeks to translate those policies into action. A socially responsive land reform law would be a critical step, even though follow-through would equally be as important in determining whether the reform contributes to social welfare.

Fifth, law reform relating to customary rights of peasants requires a new approach. Today, much land law reform is concerned with the formalisation of “informal” land rights. The customary system is not always informal. It represents an alternative formality by reflecting the needs of the society. Legal recognition of the customary rights by the state will often be the first step towards the creation of solid property rights in the land. It will set the stage for reform to increase transparency, accountability and equity.

Sixth, the law of eminent domain vis-à-vis land reform is also significant. While it is not often recognised, small peasants suffer disproportionately when governments appropriate agricultural land with or without compensation for public purposes which are often controversial. Their land is appropriated because the peasants lack influence and have no clearly defined property rights. The 1982 eminent domain law of Bangladesh appears to have been a blind spot in land law reform in many respects. It failed to establish the sound principles of land acquisition in respect of public purpose, displacement, development and compensation. The eminent domain law is necessary, however care must be taken to ensure that it does not make peasants poorer and more vulnerable.

Finally, the real challenge for Bangladeshi reformers is to focus on how legal reforms impact on poor. The challenge is to refuse to be satisfied with ignorant assumptions and optimistic scenarios, and instead to demand and provide clear and convincing evidence and analysis for pro-poor impacts before land reform laws are legislated or reallocation policies are articulated. Specifically, the following things should occur:

(i) In all questions of land policy, a primary need for governing authorities is to ensure the best use of land within their jurisdictions. They should take into consideration modern trends and points of view. Land officials should be thoroughly trained in these matters or be assisted by specialists.

(ii) Land legislation can benefit targeted groups once the important concepts are clarified sufficiently. In an effort to end the exploitive relationships, Bangladesh's tenancy laws have often imposed excessive restrictions. These laws failed to recognise the role of the state in providing land access for the poor while also meeting the legitimate needs of landowners. The thesis has argued to need to revisit key concepts such as "land", "property", "personal cultivation", "malik", "family", "eminent domain", "alluvion and diluvion" and "public purpose". Furthermore, the phrase "land reform" should have a clear articulation within the statutory purview. None of Bangladesh's reform legislation examined in this thesis used the term "land reform" nor clarified the concept.

(iii) Bangladesh's first generation land reforms (1947-1971) suffered in their effectiveness because they failed to take into account the vulnerability of small peasants ie the sharecroppers and the riparian peasants. The 1950 SAT Act that successfully abolished intermediary interests in the land caused some of those most dependent on the land to be evicted and become landless. If there had been a greater knowledge of the realities and the likely response of all groups to the new legislation, governments could have made efforts to design protections for these people, such as granting protected status to sharecroppers as in the Indian State of West Bengal. Likewise, Bangladesh could have effectively dealt with the problem of the riparian peasants to make the approach more pro-poor.

(iv) The rights of those with existing land rights cannot be ignored in efforts to help the beneficiaries of land reform. One of the reasons why land ceiling laws fail is the lack of adequate compensation to the land owners whose land is acquired. While it is to be remembered that Bangladesh legislatively granted compensation to the *zamindars* in defiance of historical and legal arguments that arose at the dawn of decolonisation, it also needs to be understood that in the present reality the need to pay adequate compensation to the landowners cannot be denied. Bangladesh has been unable to implement its ceiling laws mostly because the laws do not provide fair compensation to the larger landowners. This inadequate compensation caused landowners, who might otherwise be willing sellers, to evade the law and local officials lacked any incentive to enforce the ceiling. The compensation regime should also be responsive to the needs of the peasants in the event of acquisition of agricultural land.

(v) Legal scholarship often focuses on law-as-text, but in a place like Bangladesh, law reform raises vastly wider questions ie practical effectiveness of the judicial arm of the state as such. The challenge of land law reform and land redistribution in particular is for a transformation in legal thinking. And this needs to be applied on the ground, recognising local peculiarities. A related consideration of the land reform programme should be to

create forms of judicial administrations with expertise in land tenure matters in order to provide more effective access to justice for those who are unable to pursue redress in the ordinary courts.

IV Concluding Remarks

Land-related poverty in Bangladesh is not an extra-legal phenomenon. The 1793 law created the landed gentry and the 1885 tenancy law further benefited the entrenched landed class. The 1950 reform law, though revolutionary in character, failed to make an adequately profound response to the colonial legislative interventions. The 1984 land reform law along with other supportive laws and policies made an insufficient and inefficient attempt to address the post-colonial needs. A nexus is established between the land law and poverty of the peasants. It is, therefore, submitted that land legislation has contributed to the perpetuation of poverty in Bangladesh since the colonial and post-colonial days.

The investigation of the principal land laws in this thesis underlined the ambiguities and dilemmas in the conceptualisation of and commitment to the announced goals of reform. The political forces behind the reforms claimed justice, stability and productivity in promoting the necessity of land reform. The laws ultimately made failed to reflect the essence of distributive justice, clearly showing a gap between “land” and “law”. The thesis argued that land law has the potential to alleviate poverty in Bangladesh. The future economic and political stability of the country, largely depends on the intelligent handling of land issue. Land law reform should be planned to bring about such distribution of ownership and control of agricultural land as best to serve the common good.

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