

Land Rights of Women and Hindus in Bangladesh: Defending the “Justice Claim”

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1. Introduction

Land is the most important economic resource and tool of development in Bangladesh. For economic, social and strategic empowerment, land can play an instrumental role. Land ownership provides crucial “fall-back position” for women and men, strengthening their socio-legal position and enhancing their bargaining power.¹ But the ownership and control of this highly empowering resource have remained the privileges of a few in Bangladesh.² Apart from the distributive inequality of land that has created a huge landless class vis-à-vis a tiny land-holding class, there are other kinds of deeply rooted discrimination regarding land rights. For instance, some segments of the population are alienated simply because of their sex, religious and ethnic identity, and other discriminatory criteria.

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¹ Bina Agarwal, *A field of one's own: Gender and Land Rights in South Asia* (Cambridge: Cambridge University Press, 1994), pp. 54-55. Agarwal defines “fall-back position” as “the outside options which determine how well off he or she would be if cooperation ceased.” Agarwal thinks that an intra-household interaction is a place of cooperation and conflict. During conflict, a fall-back position strengthens a member's bargaining power.

² Dr. Abul Barakat et al., “The Backpedalling Stops: Bangladesh Country Paper,” in *Securing the Right to Land* (Land Watch Asia, 2008). In this report, it was noted that 13% of households own more than half (58%) of the country's land. And, the percentage of landless households rose to 56% in 1996.

Although landlessness of people in Bangladesh cuts across identities because of the acute shortage of land,³ some segments of society are routinely and systematically deprived of land because of the stereotypical image or social position assigned to them by the state and the society. Among those chronically land-deprived segments, women and Hindus figure prominently. Notably, together they account for more than half of our population. Though there are other land-deprived groups in Bangladesh, women and Hindus deserve special attention because of their numerical strength.

Women's deprivation of land is a consequence of the social construction of their gender. The Bengali society has traditionally conceived land as the exclusive domain of men, so much so that according to some scholars, it gave birth to a unique Bengali Rule of Inheritance that deprives women of land.⁴ Such deprivation has been accepted so normally that "sometimes the deprived woman cannot even clearly assess the extent of her relative deprivation."⁵ On the other hand, Hindus in Bangladesh have consistently suffered from state-mediated deprivation through bad laws and their worse implementations. Millions of acres of Hindus' lands have been unjustly confiscated in the past, and the appropriated properties under repressive laws have not been returned as of today. For both the women and the minority Hindus, the institutionalized discrimination regarding land rights exacerbated their overall marginalization.

³ Now, 150 million people in Bangladesh have access to only 15 million hectares of land area. See *Ibid*.

⁴ Md. Mahbubur Rahman and Willem van Schendel, "Gender and Inheritance of Land: Living Law in Bangladesh," in Jan Breman, Peter Kloos and Ashwani Saith (eds.), *The Village in Asia Revisited* (Delhi: Oxford University Press, 1997), at p. 253.

⁵ Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999), p. 193.

Deprivation and violation of land rights of women and Hindus in Bangladesh can be fairly described as manifest and systematic injustice imposed by the society and the state respectively. This paper argues that for the sake of equitable and sustainable development of Bangladesh, rights and dignity of every citizen, including women and minority groups, must not only be recognized, but also be realized in practice. More than anything else, it is a question of justice, which demands giving everyone his/her due. In absence of all other arguments, women’s and Hindus’ land rights present a strong case in their favor based on the “justice claim.”

This paper is highly motivated by Amartya Sen’s theory of justice in exploring the status of women and Hindus so far as their land rights are concerned. This paper attempts to explore the factors that are responsible for their deprivations. Finally, it concludes that justice to all is a prerequisite for the meaningful development of Bangladesh as a whole.

2. Women and the Minority Hindus: A Case for Justice

Women comprise almost half of the population of Bangladesh, and Hindus account for 9.34% of the total population.⁶ Depriving these two important segments of our population of their due share of rights, including land rights, is violative of the basic norms of justice. Justice demands that every one enjoys equal rights in the society, and every one’s right is protected by the state. An opposite arrangement, favoring the dominant groups only at the cost of the peripheral groups, amounts to manifest injustice, which Amartya Sen in his *The Idea of Justice* marks as *matsyanyaya*, or “justice in the world of fish,” where a big fish can freely devour a small fish.⁷

⁶ See Bangladesh Bureau of Statistics, *Population Census of 2001*.

⁷ Amartya Sen, *The Idea of Justice* (New York: Penguin Books, 2009), p.20.

A society that aims at avoiding the unjust rule of *matsyanyaya* must resort to *nyaya*—justice in action.

Justice in the sense of *nyaya*, to Sen, is different from justice in the sense of *niti*. The term *nyaya* stands for realized justice, whereas *niti* signifies organizational rules for behavioral correctness.⁸ Sometimes, law is just, but its enforcement is unjust. A realization-focused perspective of justice seeks to prevent manifest injustices. Amartya Sen thinks that our efforts should be concentrated on achieving more justice—without being disappointed for its organizational imperfection—since a perfectly just world is analytically and historically unachievable.⁹ Even though a perfectly just arrangement of society is hard to achieve, we can realistically achieve the goal of reducing injustice, and can thereby advance justice.¹⁰ This paper seeks to focus on the realization side of justice rather than its arrangement side.

For a better understanding of Sen’s theory of “justice as *nyaya*” or realization-based justice, we have to understand other earlier theories on justice. In what follows, some of the earlier prominent theories are shortly outlined, followed by Sen’s theory.

2.1 Utilitarian Theory of Justice

One of the prominent theories of justice is utilitarianism. Developed by Jeremy Bentham, this school takes “utility,” meaning happiness, satisfaction and pleasure, as the main indicator of justice. This approach focuses on the consequences of a particular arrangement to see if human well-being is ensured, no matter what means is employed. It does not care whether well-

⁸ Supra note 5, p. 20.

⁹ Amartya Sen argues that there can exist several distinct reasons of justice, each of which can survive critical scrutiny but may lead to divergent conclusions. See Supra note 7, Preface, x, and pp. 15-18.

¹⁰ Ibid, Preface, p. ix.

being is achieved at the cost of freedom and liberty or even violating legal and equitable rights. So, in utilitarian sense, injustice occurs when someone loses utilities that were his/her due, and an unjust society is one in which people are significantly less happy. This is a narrow conception of human well-being.

Sen thinks that in spite of valuing well-being and happiness of human beings as criteria of justice, the Utilitarian school tends to ignore inequalities in the distribution of happiness, and attaches no intrinsic importance on fundamental rights and liberties.¹¹ Moreover, as happiness and pleasure are subjective phenomena, utilitarianism as a theory of social justice is unfair to vast segments of the suffering humanity who have adjusted to their deprived conditions, and apparently in a happy state of mind despite their miserable conditions. As Sen writes, “in the scale of utilities, the deprivation of the persistently deprived may look muffled and muted.”¹² For example, in a utilitarian scale, a hopelessly subdued housewife or a daughter from an affluent family may think herself happy with her material satisfaction in spite of being chronically deprived of other freedoms, like restriction on outward mobility and effective exercise of property rights. Therefore, Sen thinks that utilitarian conception of justice is substantially flawed.

2.2 Libertarian Theory of Justice

Libertarianism is based on absolute priority of rights and liberties over social and economic goals like removal of poverty or ensuring universal health care. It emphasizes on basic liberties irrespective of their consequences.

Sen thinks that this uncompromising priority of liberty regardless of its results can be problematic, since it can sometimes

¹¹ Supra note 5, p. 62.

¹² Ibid, p. 63.

lead to terrible consequences. He poses an important question as to “why should the status of intense economic needs, which can be matters of life and death, be lower than that of personal liberties?”¹³ In Sen’s view, liberty must ultimately be related to the personal advantage that a person may gain by exercising those rights and liberties. Thus, the libertarian theory of justice also suffers from some shortcomings.

2.3 Justice as Fairness

John Rawls’ theory of justice, which dominated the 20th century social and political philosophy, is based on the assumption that fairness is the basic building block of justice. Fairness is conceived as unbiased and impartial treatment of things from “an original position” i.e. from a position of primordial innocence and sense of equality.¹⁴ Rawls presented two-stage principles of justice where at the first stage emphasis is made on equal basic liberties for all; and at the second stage, argument is made for the equality of opportunity for all without any discrimination based on race, religion, sex etc. but keeping special equitable arrangements for the chronically disadvantaged.¹⁵

Sen questioned Rawls’ basic assumption that in the original position people will come to the unique choice of a just decision. To Sen, one can come to diverse, though unbiased and impartial, conclusions in a particular situation.¹⁶ If we accept this plurality of

¹³ Ibid, p. 64.

¹⁴ Sen defines Rawls’ concept of “original position” as an imagined situation of primordial equality, when the parties involved have no knowledge of their personal identities, or vested interests. So, it presupposes a judgment based on an artificial “veil of ignorance.” See Supra note 7, p. 54.

¹⁵ Supra note 7, pp. 59-60.

¹⁶ Presenting a hypothetical problem of distribution where a flute is claimed by three children, Sen shows that all the three children can justly get the flute if

reasoning, the very foundation of Rawls’ theory of Justice collapses. Moreover, Rawls’ theory attempts to build just institutions instead of building just society on the basis of actual human behavior.

2.4 Capability Approach to Justice

Amartya Sen thinks that the above-mentioned theories of justice have “serious flaws.”¹⁷ His approach of justice is different in two important ways: First, he thought that a universal agreement on the standard of a “just society” is not Possible; and secondly, the above-mentioned theories are arrangement-focused, not realization-focused.

Sen’s theory of justice centers around people’s lives, experiences and realizations. He thinks that the focus of justice must be on creating “substantive freedoms—the Capabilities” that enable individuals to choose lives they have reason to value and are willing to pursue. He argues that “the freedom to choose lives can make a significant contribution to our well-being, but going beyond the perspective of well-being, the freedom itself may be seen as important.”¹⁸ So, in his theory social realization of capabilities is given a pride of place over utilities and happiness un-espoused with freedom.

This paper applies Sen’s theory of justice because the tenor of his theory embraces justice in its formal arrangement as well as its realization. The ambit of Sen’s theory of justice is wider than earlier theories, since it focuses neither on utilities per se, nor on liberties in absolute terms, nor does it focus on building un-pragmatic just institutions. The capability approach is rather a

judged from an original position, because there is always a scope for plurality of impartial reasoning on a matter. See, *Ibid*, pp. 12-15.

¹⁷ *Supra* note 2, p. 56.

¹⁸ *Supra* note 7, p. 18.

composite whole, having a realistic goal of enhancing capabilities by ensuring justice and combating artificially created injustices.

3. Justice for Women and Hindus: the Constitutional Rhetoric

The Constitution of Bangladesh guarantees equality of all, and pledges equal protection of law as the fundamental right of all citizens (Article 27). As a fundamental right, Article 28 further holds that “the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.” Again as a fundamental right, Article 42 (1) notes that “Subject to restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer, or otherwise dispose of property.”

The above-mentioned guarantees are formal aspects of justice (*niti*), the interpretation and application of which leaves ample scope for legitimate and illegitimate discriminations. For example, “equality before law” is interpreted as “equal treatment of the equals” allowing reasonable discrimination among the so-called unequals. But such interpretations do not explore the answer to a further question: “who made some people more equal than others at the first place?”

The question as to “what makes people equal or unequal?” is critically important. Some discriminatory classifications seem quite reasonable, such as, excluding children from voting right, and exempting them from payment of tax or recruiting more qualified candidates excluding less qualified ones. But discrimination on the basis of sex, caste or religion is subject to considerable disagreements in different societies, including Bangladesh. Fitzgerald casts illuminating insights into such disagreements, as he writes:

Those who discriminate on these grounds justify their practice on the basis that such factors are as important as to render unequal those who differ with regard to them; while those who condemn such discrimination do so on the ground that such factors are irrelevant to the measurement

of human equality. Which factors are, and which are not relevant is in the ultimate a question not of fact but of outlook and attitude; and in so far as the law must answer such questions, it must do so by accepting and enshrining value judgments rather than by applying simple rule of law.¹⁹

So, who gets what and to what proportion in a society is not exclusively determined by law, rather it reflects social norms and cultural patterns of the society concerned. It explains why the constitutional rhetoric of equality has remained in reality hostage to the discriminatory practices at the hands of the male-biased and religiously dominant segments of the society.

4. Land Rights of Women: Laws of Inheritance

Despite constitutional promises of non-discrimination, Bangladeshi laws of inheritance continue to be discriminatory against women.²⁰ Since religion-based personal laws determine inheritance of Bangladeshi citizens, the degree of discrimination varies from religion to religion.

Inheritance remains the single most opportunity for women to own land. Since almost all agricultural lands are at private hands and their economic conditions bar them from owning land by other means, inheritance is the best chance of women to own lands.²¹

¹⁹ P. J. Fitzgerald, *Salmond on Jurisprudence* (London: Sweet and Maxwell, 1966), p. 64.

²⁰ Bina Agarwal makes a strong argument against such discrimination in case of India. See, “Gender and Land Rights in Agricultural Land in India,” *Economic and Political Weekly*, Vol. 30, No. 12. Similarly, Amartya Sen writes, “The ownership of land and capital in the developing countries has tended to be very heavily biased in favor of the male members of the family.” See *Supra* note 2, p. 201.

²¹ In a study of 1978 it has been found that the percentage of rural households owning some land (arable and homestead) was 89, and those owning arable land was 67. [Bina Agarwal quotes from Januzi F.T. and J.T. Peach, *The Agrarian*

People inherit property only occasionally during their lifetime, and if the chance to inherit is missed for some reason, it may mean losing the chance forever. In what follows, I will discuss on the women's share of inheritance in major personal laws of Bangladesh.

4.1 Muslim Women's Inheritance in Bangladesh

Muslims in Bangladesh are mostly regulated by Hanafi School. According to Hanafi law, there are three kinds of sharers: Koranic sharers—whose shares are specifically fixed in the Koran; Residuaries—who are all males; and Distant Kindreds—The bulk of whom are females. Among 12 Koranic sharers, 8 are women, and 4 men. Women Koranic sharers are: wife, daughter, son's daughter, full sister, consanguine sister, uterine sister, mother, and grandmother. Three of them are primary sharers and never get excluded. They are: wife, daughter and mother. Other female Koranic sharers also get excluded exceptionally, generally only in presence of higher heirs in terms of blood relation. In spite of these favorable provisions, if we take the total Muslim inheritance law into account, we find that the law is based on the principle: "Keep the bulk of the share of inheritance for male relatives." Sometimes residuaries, who are all males, inherit more share than Koranic sharers. For example, a son is a residuary, but he gets double the share of a daughter, who is a Koranic sharer.

There are some good aspects of women's inheritance in Islam. Muslim women get absolute ownership of property as an heir under Islamic law. No kind of physical or moral disability excludes them from their rights of inheritance. In Bangladesh, the exclusionary provisions of the Shariat (Islamic Law Application) Act, 1937 (whereby the 'agricultural lands' are made non-

Structure of Bangladesh: An Impediment to Development (Delhi: Sangam Books, 1980)].

heritable) does not apply. In India, because of the provisions of the Shariat Act, many women are totally denied from inheriting any property. In Bangladesh, all properties—moveable or immovable, agricultural or nonagricultural— can be inherited by Muslim women.²²

Although Muslim law of inheritance based on its religious prescription gives far more inheritance right to women than any other scripture-based inheritance system,²³ a single provision of this system seems to be highly discriminatory for women. According to that provision, female sharers get half compared to the male sharers of the same level. However, scholars find reasons behind such a discriminatory provision in the patriarchal Islamic tradition that imposes the duty of maintenance upon male members of the household: “the Quranic inheritance is based on the assumption of male responsibility for the maintenance of female.”²⁴ This refers to a principle of Muslim law whereby a Muslim woman is assigned no economic responsibility even when she is rich and male members are poor. Muslim women’s exclusive claim over their income—from dower or maintenance or their own earnings, — in absence of economic-responsibility, seems to strike a balance of their partial loss in inheritance. So, at a more modest

²² Of course, Muslim women in India can not inherit agricultural land because such lands are excluded from the purview of Muslim law of succession by the Shariat Act, 1937. See also, Bina Agarwal, “Disinherited Peasants, Disadvantaged Workers: A Gender Perspective on Land and Livelihood,” *Economic and Political Weekly*, Vol. 33, No. 13.

²³ Dr. M. Shah Alam, “In pursuit of the True Interpretation of the Islamic Scriptures to Promote Human Rights,” in *Human Rights: Sixty Years After UDHR* (Dr. Mizanur Rahman ed.) (Dhaka: ELCOP, 2008). Dr. Alam writes that the Quran has given more rights to women than any other Book, system or code in the past. Only family codes in the true and secular democracies, whether with predominantly Christian, Hindu or Buddhist background, may have edge over the Qur’anic law of inheritance to ensure equality between man and woman.

²⁴ *Ibid*, p. 38.

level, it is said that “the problem of woman’s inheritance in a Muslim society, especially in Bangladesh, is not what has not been given her in the Quran, but proper implementation of what has been given her in the Quran, whether it is inheritance from parents, or dower money, or from other sources, or even her personally earned money.”²⁵

Still equality is seen as the proper standard of justice for women, which is missing in the Muslim law of inheritance at a plain look. Apart from the promise of equality and non-discrimination in the Constitution, Bangladesh is party to numerous human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which require that states take concrete steps, legal or otherwise, to ensure equality between men and women in all spheres of life. But Bangladesh made reservation to Article 2 of the CEDAW, which obliges states to repeal discriminatory laws like Muslim law principle of 2:1 distribution in disfavor of women. Scholars think that Bangladesh can withdraw its reservation from Article 2 of the CEDAW, “since Quran and Sunnah have not been violated in the CEDAW, rather upheld in their true spirit. However, the provisions of the CEDAW would have to be applied subject to adaptations to and adjustments with the local conditions.”²⁶

It is reported that the present government of Bangladesh (Hasina government) is finalizing a bill equalizing women’s share in inheritance. Such a move is conducive to establishing an egalitarian society based on gender justice. But we should pay attention to the interconnected Muslim law principles of right and duty distribution among men and women. We have to think if keeping the obligatory provision of dower and maintenance and the “no-economic-responsibility for women” principle intact, while

²⁵ Ibid.

²⁶ Ibid, p.41.

equalizing the inheritance provision, can create new kind of inequality for men while solving that for women. For the sustainability of any change towards greater gender equality, a new legislation must be well-balanced and sensitive to the interests of both women and men.

4. 2 Hindu/Buddhist Women’s Inheritance in Bangladesh

Bangladeshi Hindus are governed by the Dyabhaga School. Succession to property under this school is governed by the capacity to confer spiritual benefit (*Pinda*) to deceased ancestors.²⁷ Since women can not give *pinda* during *Parvana Sradha* of their ancestors according to Hindu rituals, they remain highly neglected from inheritance. The only exception came in 1937, when the Hindu Women’s Right to Property Act made a special provision for widows who can now inherit along with son, grandson and great grandson.

The females recognized as heirs by the Dayabhaga School are: widow, daughter, mother, father’s mother, and father’s father’s mother. Since Dyabhaga School maintains a chronology of heirs who inherit property in strict preference, possibility of inheritance for mother, father’s mother and father’s father’s mother is quite slim, since they are placed in the 8th, 14th and 20th position respectively.²⁸ Although daughter is placed in the 5th position, she cannot inherit in presence of son, grand son or great grand son. Again all daughters do not inherit property; unmarried daughter succeeds first; in their absence, married daughter having or likely to have male issue succeeds. Daughters who cannot give birth to child or are widows having no male issue, or are mothers with

²⁷ Sunderlal T. Desai, *Mulla’s Principles of Hindu Law* (Bombay: N. M. Tripathi Private Limited, 1990), p.142.

²⁸ *Ibid*, p. 146.

female issue are excluded from succession.²⁹ Unchastity excludes all female heirs from succession under the Dyabhaga law.

All Hindu women who inherit property own only a limited estate in the inherited property, not absolute ownership. They have no power to transfer the property, which upon their death reverts to the male heirs of the person who they inherited from. “In Bangladesh, even the limited right of ownership is further limited by the fact that it is applicable only to homestead and non-cultivable estate, and not applicable to cultivable or agricultural land.”³⁰

Commenting on this vulnerable position of Hindu women, one prominent scholar comments that “Women’s position under Hindu law as regards right of succession to property is not in keeping with their interests. This position does not seem befitting to the high esteem in which women were held during Vedic period and of high status they then enjoyed.”³¹ Therefore, it is suggested that apart from equality in inheriting father’s property which is more in conformity with the human rights and human dignity for Hindu women, in modern conditions, when statutory approval of dissolution of marriage makes them more vulnerable, women’s right to inherit, acquire and own property in absolute terms is highly warranted.³²

It is mentionable that Bangladeshi Buddhist women, having no unique inheritance law of their own, are also governed by Hindu law. So, chances of Buddhist women to inherit property are also quite low in Bangladesh.

²⁹ Ibid.

³⁰ Dr. M. Shah Alam, “Review of Hindu Law in Bangladesh: Search for Reforms,” *Bangladesh Journal of Law*, Vol. 8: 1&2, 2004, p.47.

³¹ Ibid, p.46.

³² Ibid.

4.3 Christian Women’s Inheritance in Bangladesh

The inheritance of Christians in Bangladesh is governed by the Succession Act, 1925. Chapter 2 of the Act containing sections 31-49 applies for them.

Widow is never excluded from Christian succession. She gets one-third of the property of husband in presence of lineal descendents, and half in absence of them if the deceased left some kindred. In absence of lineal descendents and kindred, wife gets the whole property.³³ This is a unique provision, far favorable for women than the corresponding provisions of Hindu and Muslim law. In case of Muslim inheritance, widow’s share is limited to half of the husband’s property.

Daughters, grand daughters, great granddaughters get equal share along with sons, grandsons, and great grandsons. There is no inequality between men and women in this respect. Lineal descendents through daughters is no difference than lineal descendents through sons. This is superior in terms of equality to Muslim law provision, which gives property to son’s children to the exclusion of daughter’s children.

In absence of wife and lineal descendents, father gets the whole property to the exclusion of mother.³⁴ This provision is inferior to Muslim law provision, which provides both father and mother together, of course, mother getting half of father.

In absence of father, mother along with brothers (or their children) and sisters (or their children) get equal shares. In this case there is no inequality between brothers and sisters. If mother is living only, she gets the whole property.³⁵ If neither widow, nor lineal descendents, nor parents or siblings or their descendents are

³³ The Succession Act, 1925, Section 33.

³⁴ The Succession Act, 1925, Section 42.

³⁵ The Succession Act, 1925, Sections 43-46.

alive, other kindreds of the deceased get equally, preference being given to the nearest in blood relationship. In this case, grandfather does not exclude grandmother, rather gets equally.³⁶

If we analyze the inheritance laws of the major faith groups in Bangladesh, including statutory changes already made, we find that although women enjoy much greater inheritance rights now than ever before, substantial inequalities remain in law.³⁷ Hence, we can make strong arguments for more egalitarian arrangements in law, especially for Hindu women in Bangladesh. But, what is more important is the realization of rights already recognized in law. Practice present rather grim pictures so far as the enjoyment of land rights of Bangladeshi women is concerned. This again draws our attention to what Amartya Sen indicated as the gap between the *niti* and the *nyaya*.

5. Land Ownership of Women in Practice

In Bangladesh, a country characterized by predominantly rural, highly stratified, and staunchly patriarchal society,³⁸ women can rarely win effective control over inherited land. Bina Agarwal in her book “A Field of One’s Own” and numerous other writings noted two problems for women in realizing their inherited properties, viz., the gap between legal rights and actual ownership, and the gap between actual ownership and effective control. But in Bangladesh, the latter is more vivid a problem than the former.

The land laws of Bangladesh ensures that the legal heirs own the inherited lands. Falsely registering women’s land properties in the name of male members of the family is not easy, though not

³⁶ The Succession Act, 1925, Section 48.

³⁷ Bina Agarwal, “Disinherited Peasants, Disadvantaged Workers: A Gender Perspective on Land and Livelihood,” *Economic and Political Weekly*, Vol. 33, No. 13.

³⁸ Deborah Balk, “Defying Gender Norms in Rural Bangladesh: A Social Demographic Analysis,” *Population Studies*, Vol. 51, No. 2, p. 153.

totally absent either. Transfer of ownership by way of fraud gets no recognition in law, and is nullifiable, when challenged. Even men who want to grab women’s land “make sure that women inheritors were duly recorded as owners in the official land records.”³⁹ In a study by Rahman and Schendel, it was found that both in 1940 and 1990, half of the registered land owners were women.⁴⁰ But “only 2 percent of the women who inherited did in fact control their own land....none of the others controlled the land they legally owned.”⁴¹ Therefore, the fact remains that once registered in their own name, women may be forced, threatened or deceived by husband, brother or son to transfer the control of inherited lands.

It appears that the main issue in Bangladesh is that of control, not of ownership. Although women get ownership as per inheritance rights, it is only symbolic in absence of proper control. Literature is replete with such evidence where Bangladeshi women—Hindu, Muslim, or even Christian—do not control land, nor even many of them claim for such control due to highly gendered classification of labor and occupation in the Bengali society.⁴² In a study by White, only 4 out of 40 Hindu and Muslim women in a village had inherited land as daughters, and they received less than their entitled shares.⁴³ In numerous other studies

³⁹ Supra note 4, p. 267.

⁴⁰ Ibid, p. 254.

⁴¹ Ibid, pp. 255-57.

⁴² Although Bina Agarwal claims that increasing number of women in Bangladesh are claiming their shares, (Agarwal, 1994, p. 282), the fact remains that those who are so claiming and winning the battle for their share are not in control of their lands. Either son or husband controls the lands unless the woman has no male relative available. Rahman and Schendel in their article (Supra note 4) noted that they did not find any evidence in support of Agarwal’s claim that women’s demand of land is increasing in Bangladesh.

⁴³ (Referring to White S., *Arguing With the Crocodile: Class and Gender in Rural Bangladesh*, London: Zed Books, 1992) Bina Agarwal in Supra note 1, p. 251.

also, lack of women's effective control was consistently confirmed, though with some small variations. Despite plurality of family laws, the practice is remarkably uniform: women do not take possession of land in Bangladesh. Therefore, some writers suggest that we can call this phenomenon as "the Bengali rule of inheritance."⁴⁴

What exists in practice in most of the cases in the name of inheritance is 'right to maintenance' in a narrow sense in the natal family, known as '*nayor*'.⁴⁵ *Nayor* is a periodic visit by a woman in the natal family, which gives a fall back position for women, and provides *nana-bari*—a sweet maternal home that offers boundless love and joy for children. Social perception is that realization of inheritance ruins the bond with natal family. This is where *nyaya*—realization of justice, gets caught in the quagmire of an unjust culture.

What are the reasons behind the gap between such law and practice in case of women's land control? Different scholars answer the question differently, but thematically their answers are the same: deeply rooted social construction of gender in the Bengali society. Naila Kabeer thinks that the root lies in unwritten norms and shared understandings, and how the wider society views women's nature and capabilities.⁴⁶ According to Agarwal, a number of interactive factors, ranging from social and administrative to ideological, restrict the effective implementation of women's land rights. They are: male resistance of endowing women with land rights, women's forgoing of inheritance rights for securing potential support from natal family, institution of social seclusion through *purdah* and other internalized norms,

⁴⁴ *Supra* note 4, p. 253.

⁴⁵ *Ibid*, p.249.

⁴⁶ Naila Kabeer, *Gender Mainstreaming in Poverty Eradication and the Millennium Development Goals: A Handbook for Policymakers and Other Stakeholders* (The Commonwealth Secretariat, 2003), p. 50

preemptive steps by father and others, and legal, economic and administrative logistical bias in favor of man etc.⁴⁷

Agarwal thinks that women’s land rights are faced with strong questions of *social legitimacy* as well as *legal legitimacy* in the Sub-continent. Even though women have more legal rights of inheritance now, the level of social legitimacy enjoyed by women in case of their land rights did not improve in equal pace. It is still abysmal. The family and kinship rules, village exogamy in marriage, and the Bengali construction of gender further disable women from effectively controlling land properties.⁴⁸ The norms thus created and reflected in gender-specific behavior and gender-specific space for men and women barred women from realizing their just rights on land. Experts opine that a change of the society towards more egalitarian ends would require deconstruction and reconstruction of the society in various fronts: socio-cultural, economic, and administrative as well as legal. Unless self-respect and sense of dignity are inculcated into women’s minds through education in general, and education of legal rights in particular, more inheritance in law will not bring much of a change in practice.⁴⁹

⁴⁷ Bina Agarwal, “Gender and Command over Property: A Critical Gap in Economic Analysis and Policy in South Asia,” *World development*, Vol. 22, No. 10, pp. 1467-69.

⁴⁸ *Supra* note 4, pp. 251-253 and 270.

⁴⁹ The main requirement is the change of mentality of women, because they got habituated in uncritically accepting inequitable social norms. So, they think that their subdued condition is their due. This state of *doxa* must be dismantled. *Doxa*, as French sociologist Bourdieu defines it, signifies some decisions of society at a given time “which is accepted as a natural and self-evident part of the social order, which goes without saying and is not open to questioning or contestation—the un-discussed, unnamed, admitted without argument or scrutiny.” See, Bourdieu, P., *An Outline of the Theory of Practice* (Cambridge: Cambridge University Press, 1977), pp. 167-70; and *Ibid*, p. 58.

6. Why Land Rights for Women: A Debate

In the agrarian economy of Bangladesh, like other South Asian countries, land is the most valued property, for its social, economic, political and symbolic significance. Bina Agarwal thinks that although land right is important for both men and women, it is crucially important for women. In her words, “the gender gap in the ownership and control of property is the single most critical contributor to the gender gap in economic well-being, social status and empowerment.”⁵⁰ Agarwal thinks that land can be a great instrument for ensuring women’s own welfare as well as welfare of the family. She presented three arguments in favor of women’s land rights: the Welfare argument, the Efficiency argument and the Equality argument.

The theme of her *Welfare argument* is that due to intra-household gender discrimination, women suffer from more malnourishment, morbidity, mortality and highest medical admissions in South Asia. Direct access to resources, like land, can ensure not only their own welfare, but also the welfare of their children and the family. In support of her claim she presented the evidence where wives spent more than 90% of their income for their family, while husbands spent only 75%, the rest being spent for themselves. Children’s nutritional status was also found to be positively linked with mothers’ earnings than fathers’. It is argued that effective land ownership will increase their bargaining power in the family, and also in the society.

The *Efficiency argument* holds that women’s land ownership will enhance productivity, for secure rights and control will create incentives for them to devote greater effort in cultivation. They can

⁵⁰ Supra note 36, p. 1459.

also use resources more efficiently than men, as found in Grameen Bank experience.⁵¹

The *Equality argument* is that effective land ownership will mean realization of the constitutional commitment to ensure equality before law. It will also facilitate the constitutional goal of establishing a just society—a society that is “free from exploitation” and “in which the rule of law, fundamental human rights and freedom, equality and justice, economic, political and social will be secured for all citizens.”⁵² Equality in land right will also enable women to challenge inequality of other kinds.

Cecile Jackson, in a powerful piece, discards all the above arguments of Agarwal, and expressed serious doubt on the importance and transformative role of land in ensuring a gender-just society.⁵³ Jackson discards Agarwal’s welfare argument by holding that lack of land rights is not as great a threat for women as other factors, such as, breakdown of marital household through death of husbands, divorce and separation. In the sub-continental set up, the threat that land claim of wives may pose to marital stability can outweigh the gain of land rights. Moreover, the claim that women’s land rights will increase children’s welfare depends to a great extent on what kind of land a mother possesses. Is it in addition to a father’s land, or the sole property of the family? These factors may reveal a different reality regarding women’s land ownership.

⁵¹ Grameen Bank is a micro-finance institution in Bangladesh that gives credit to women based on trust, without any guarantee and collaterals. Amartya Sen writes, “The remarkable record of that bank in having a very high rate of repayment (reported to be close to 98 percent) is not unrelated to the way women have responded to the opportunities offered to them and to the prospects ensuring the continuation of such arrangement.” See Supra note 5, p. 201.

⁵² See, Preamble to the Constitution of Bangladesh, Para 3.

⁵³ Cecile Jackson, “Gender Analysis of Land: Beyond Land Rights for Women?” *Journal of Agrarian Change*, Vol.3, No. 4.

Jackson refutes the efficiency argument very strongly. Jackson writes that she is not aware of any research in India, which proves that women with land titles in Bodgaya (in Bihar, where women won land ownership through struggle) had greater yields than male.⁵⁴ Besides, the claim that women can use resources more efficiently is discarded by presenting an example from Burkina Faso, where on average yields were about 18% lower on women's plots than on similar [controlled for topography, soil type, distance from compound] men's plots simultaneously planting the same crop.⁵⁵ Jackson writes that "it is fiendishly difficult, methodologically, to attribute efficiency gains simply to land rights, since other important factors intervene in a comparison between yields on women's and men's fields."⁵⁶

In discarding equality and empowerment argument, Jackson thinks that it is a mere possibility, not an inevitability, that land rights will lead to more empowerment and equality in the society. Tracing the example of Bodgaya Movement (India), she finds that those who received land said that they will leave it for their sons—again leading to male control before long. By keeping the shared understanding and culture intact that sustains patriarchy, mere land rights cannot improve subordinate condition of women.

Jackson argues that land relation is a social relation, and therefore an appraisal of the effect of women's land rights needs to draw on how land is situated in livelihood and pattern of the society. Gendering land question will require understanding of women's diverse subject position and subjectivity. Women's position as daughter may be in support of land rights, but as a wife she may not support the land claim of her husband's sister. Thus whether women will ultimately claim land control depends on their

⁵⁴ Ibid, p. 458.

⁵⁵ Ibid, p. 459.

⁵⁶ Ibid.

subjectivity. The subjectivities of women may lean in favor of material, social, emotional and sexual satisfaction more than demanding land control that has the potential of straining the intimacy with husband and create mistrust. The subjectivity of South Asian women to invest in sons rather than daughters can hinder greater land control by women. Women from wealthy family are, in Jackson’s account, widely led by the subjectivity of preferring material well-being at the expense of personal freedom and empowerment.

Jackson thinks that Agarwal’s position is grounded on the assumption that family and household are institutions of repression and exploitation; but as a matter of fact, these institutions are not merely “gender inequitable, but also the source of much that is sustainable and satisfying in women’s lives.”

It is perhaps true, as Jackson claims, that unless cultural interpretation of land ownership is changed, broader empowerment of women cannot be achieved. But, certainly, conferring land ownership and freedom to women to use their own lands as they wish would be conducive to achieving more just society—a step towards right direction. Although Jackson doubts the transformative force of land rights *per se* in the existing cultural setting, she also thinks that struggle for land rights of women is worth pursuing.

7. Women’s Land Rights: From the “Justice Perspective”

I think both Agarwal and Jackson failed to see women’s land rights from the ‘justice’ perspective. They saw merely instrumental role of land rights, not its constitutive side. Amartya Sen persuasively argued that freedoms and rights, in the more foundational view of development as freedom, themselves symbolize as well-being, whether or not they play an instrumental role in bringing further

welfare or efficiency.⁵⁷ Therefore, conferring land rights for women and ensuring their effective control is justice in its own right.

Secondly, even when we accept the instrumental role of land rights, we need to view land rights in terms of improvement of capability and enhancement of functioning. As different women possess different capabilities in converting rights and resources into capabilities because of the plurality of features of their lives, a debate as to the welfare and efficiency effect of land right in absolute terms is misleading.⁵⁸ So, the emphasis should be on the impact of land rights upon *equality* and *empowerment*. Though Agarwal and Jackson basically agree on these two effects, we must be careful to take land rights as one of the tools—though it is not the main tool—in ensuring equality of capability and substantive freedom for women. Equality achieved in one space, Sen argues, will not help much.⁵⁹

Thirdly, women's land rights, including other rights, are defensible solely on the ground of its being human rights—recognition of inherent dignity and equal rights of women vis-à-vis men.⁶⁰ A sustainable economic development is not possible without recognizing all rights of women, including land rights. Non-discrimination provisions of different human rights instruments—which are universally acclaimed criteria of justice—can be invoked to establish women's right to inherit, own and manage land and personal property, and also to participate in

⁵⁷ Supra note 5, pp. 4-5.

⁵⁸ Supra note 7, pp. 231-234, and pp. 260-265.

⁵⁹ Ibid, p. 297.

⁶⁰ Both the Preamble of the United Nation's Charter, 1945 and that of the Universal Declaration of Human Rights, 1948 utter the pledge of upholding inherent dignity and equal rights for men and women.

family decision.⁶¹ From the human rights perspective, we cannot defend men’s human rights without taking a similar interest in the women’s rights.⁶² In this sense also, land rights can be defended irrespective of its welfare and efficiency effect. So, women’s land rights can be defended more strongly by the “justice argument” than any other possible arguments.

8. Land Rights of Hindus: Why the “Justice Claim” is Relevant

After thousand years of peaceful co-existence in undivided India, Hindus and Muslims played pawn at the hands of colonizers on the eve of independence in 1947. Being divided on the basis of the “Two-nation Theory,” Hindus and Muslims of India and Pakistan suffered a lot on both sides of the borders from 1947 on.⁶³ Religion became an important factor in politics, and religious identity often became the sole determiner of privilege and prejudice, favor and discrimination of individuals.⁶⁴

When Bangladesh became independent in 1971, it had a great opportunity to make a difference, since a secular sentiment was the

⁶¹ Marsha A. Freeman, “Women, Law, and Land at the Local Level: Claiming Women’s Human Rights in Domestic Legal Systems,” *Human Rights Quarterly*, Vol. 16, No. 3, p. 575.

⁶² Amartya Sen, in his book *The Idea of Justice*, draws above view from Wollstonecraft’s *A Vindication of Rights of Women*. See Supra note 7, p. 117.

⁶³ Since 1946, there have been many communal riots throughout Indian sub-continent. In recent memory, we find communal violence in Bangladesh against Hindus after Babri Mosque demolition in India, and genocide of Muslims in Gujrat, India. We find a picturesque description of the communal murder of one Kader Mia at Dhaka just before partition in 1947 in Amartya Sen’s *Development as Freedom*, p. 8.

⁶⁴ Amena A. Mohsin writes, “The issues of religion, politics and security became intertwined in South Asia, more often than not with negative consequences for human security since the colonial period.” See, Amena A Mohsin, “Religion, Politics and Security: the Case of Bangladesh,” in (Satu P. Limaye et al. ed.) *Religious Radicalism and Security in South Asia* (Honolulu, Hawaii, Asia Pacific Center for Security Studies, 2004), p. 467.

dominant spirit during the liberation war against Pakistan. Particularly, Hindus in Bangladesh are more than entitled to expect justice in Bangladesh, for they had to sacrifice more for the independence of Bangladesh because Pakistani army communalized the war from the very beginning.⁶⁵ In a statement dated November 1, 1971, the US Senator Edward Kennedy wrote: “Hardest hit have been on members of the Hindu community who have been *robbed of their lands and shops*, systematically slaughtered, and in some cases, painted with yellow patches marked ‘H’. All of this has been officially sanctioned, ordered and implemented under martial law from Islamabad.”⁶⁶ *Matsyanyaya*, which was the *causa causans* behind Bangladesh’s independence from Pakistani rule, remains the order of the day for Hindus in independent Bangladesh.

8.1 Land Rights of Hindus: Uncivilized Laws

It is a well known axiom that law reflects the level of civility of a particular time and space in which it operates. If it is the case, the anti-Hindu provisions in different legislations regarding land rights project a gloomy image of Bangladesh. The state-mediated deprivation of land rights of Hindus in Bangladesh started during Pakistan period (1947-1971). It started with the bad application of some apparently good-looking laws, like *the East Bengal (Emergency) Requisition of Property Act (Act XIII of 1948)*, *the East Bengal Evacuees (Administration of Immovable Property) Act, 1951*, and *the East Pakistan Disturbed Persons Rehabilitation Ordinance, 1964*. But the final blow came after the 17-day Indo-

⁶⁵ Ibid, pp. 485-86.

⁶⁶ Bertil Linter, *The Plight of Ethnic and Religious Minorities and the Rise of Islamic Extremism in Bangladesh* (Asia Pacific Media Services, 2003) referring to *Crisis in South Asia: A Report by Senator Edward Kennedy to the Sub-Committee investigating the Problem of Refugees and Their Settlement* submitted to the US Senate Judiciary Committee on November 1, 1971, US Govt. Press, p. 66.

Pak war in 1965, when *the Defence of Pakistan Ordinance* (Ordinance No. XXIII of 1965) was promulgated, under the rule-making power of which *the Enemy Property (Custody and Registration) Order, 1965* (Later on referred as EPO) was passed declaring India as an enemy country. Under the Ordinance, trade, business, land, building situated in Pakistan of any Indian citizen, or *any person residing in an area occupied, captured or controlled by India* were confiscated by the Pakistan government.⁶⁷ Although the war lasted only for 17 days, the law made in the particular context of war remained in effect since then, adding newer communal flavor through newer rules and regulations from time to time. Amena A. Mohsin writes,

In a circular issued, it was specified that Muslims residing in India, including Indian citizens, would be excluded from the category of “enemy” (though the act had explicitly stated that all citizens of India would be regarded as an enemy.) The circular also pointed out that the properties of such Muslim owners would be handed over to them or their legal heirs upon demand. But for a member of the minority community, once the property is enlisted as “enemy,” his or her ownership right would be lapsed forever. It was not only a clear case of discrimination, but also an explicit demonstration of the lack of confidence and trust of the state in its Hindu population.⁶⁸

After the independence of Bangladesh, a law called *the Bangladesh Vesting of Property and Assets Order* (Order 29 of 1972) (Later on referred as the VPO) was passed for taking the custody of properties left by Pakistanis and Biharis who collaborated with Pakistani soldiers against Bangladesh’s

⁶⁷ Abul Barakat and Shafiquzzaman, *Political Economy of the Vested Property Act in Rural Bangladesh* (Dhaka: Association for Land Reforms and Development, 1997), pp. 31-35.

⁶⁸ Supra note 64, p. 480.

independence in 1971. But unfortunately, the law lumped together this new type of confiscated properties with earlier confiscated properties under the EPO. Section 2 of this law holds that the properties and assets vested in the government of Pakistan will be deemed to have vested in the government of Bangladesh. In this way, Hindus, who lost their property under the EPO before 1971, did not get their property back in independent Bangladesh. Moreover, new properties and land of Hindus, who left Bangladesh during war but did not return after independence, also came under government custody under the VPO. In 1961, the Hindu population in East Pakistan was 18.4%, but after independence, it went down to 13.5%.⁶⁹ Due to the mass exodus and later outmigration, and also because of the joint-property principle in Hindu inheritance, the VPO snatched away a huge amount of lands from Hindus in post-independent Bangladesh.

In 1974, Bangladesh Parliament formally repealed the EPO, 1965, but enacted a new law in its place called, *the Vested and Non-Resident Property (Administration) Act, 1974*. Of course, this law was also repealed in 1976 by *the Vested and Non-Resident (Administration) (Repeal) Ordinance, 1976*. But a law re-vesting the seized property of Hindus under the EPO-VPO and thereby restoring the land rights of Hindus was not enacted until 2001.

8.2 Land Rights of Hindus in Practice: the Gruesome Picture

In a study, Abul Barakat, a prominent Bangladeshi scholar, estimated that the EPO and the VPO together affected one-third of the total Hindu population in Bangladesh. Hindus were driven to landlessness or marginalization as land owners by state-mediated seizure under these two laws. Approximately 1 million households

⁶⁹ See Abul Barakat, *Poverty and Access to Land in South Asia: Bangladesh Country Study*, prepared for the National Resource Institute, University of Greenwich, UK, 2004, p. 3; and Bertil Linter, *Supra* note 66, p. 2.

lost 2.1 million acres of land.⁷⁰ Even the officially acknowledged quantity of vested property under the Ministry of Land is colossal. On July 4, 1991, it was told to Bangladesh Parliament that 827,705 acres of land were in the official list as vested property.⁷¹ The gap between unofficial and official account of vested property indicates that the rest of the properties are not at government’s custody, and perhaps has already been consolidated in private hands. At any account, Hindus of Bangladesh suffered grave and manifest injustices regarding their land rights.

Besides the explicit account, there are some implicit deprivations. For example, land market is Hindu unfriendly. The unit price of Hindu land is less than that of Muslim land.⁷² Due to the overall insecurity and mistrust created by the EPO and the VPO, Hindus are discouraged to buy new lands.

8.3 The Vested Property Restoration Act, 2001: Opportunity to Restore Civility

Bangladesh Parliament has enacted the Vested Property Restoration Act in 2001 (Act No. 16 of 2001) to restore the enlisted enemy/vested properties to their real owners, or their successors or Bangladeshi successor in interest of real owners and successors. The good side of this law is that it includes, within its ambit of “restoration process,” the properties confiscated before 1971 as enemy property as well as those confiscated after independence as vested property. The main merit, of course, is the realization and virtual acknowledgment that what was done to the Hindu community under these two laws was unjust, uncivilized, and inhuman.

⁷⁰ Ibid, p. 3.

⁷¹ *State of Human Rights* (Dhaka: Coordinating Council for Human Rights in Bangladesh, 1992).

⁷² Supra note 69, p. 3.

The main demerit of this law, however, is that it makes restorable only those vested/enemy properties that are in the government's possession and control. It excludes from its agenda of restoration properties that were already removed from the list of vested property earlier, or have been already transferred or leased by the government to some individual or statutory authority or organization, or which is currently a part of share or security of any company, or which is acquired by the government in public interest etc.⁷³ Indeed, there is good reason to believe that these exclusions made the Act hollow and merely symbolic.

Of course, if we take into account the complexity of total restoration process, some of these exclusions may have a bit of toehold. However, the real issue now is that although the law is made in 2001, a little progress has been made so far to accomplish the restoration process.⁷⁴ So, despite the shortcomings of the Act, if the government from now on shows its commitment to the cause of justice and take concrete steps without politicization of the issue, we can build more just and equal society. If we remember the thesis of Amartya Sen, as discussed above, such concrete steps towards *nyaya*, though cannot bring perfect justice for the Hindu community, will heal the wounds of Hindu community to some extent. And as a country, Bangladesh can restore its lost ground in her appeal for justice in other national and international issues.

9. Conclusion

The birth of Bangladesh as an independent country in 1971 was a triumph of justice over manifest injustices. Therefore, it is no surprise that the Constitution of Bangladesh starts with a promise

⁷³ See Section 6 of the Vested Property Restoration Act, 2001.

⁷⁴ The change of government shortly after the passage of this Act in 2001 is alleged to be the reason behind the retarded restoration process. It remains to be seen what the Awami League government does now, since it passed the Act in 2001 and now in power again.

to establish a socially, economically, and politically just society for all of its citizens. It also pledges in the preamble of the constitution that the aim of the state will be to secure a society in which rule of law, fundamental human rights and freedom, and equality and justice will be secured for all citizens. But these laudatory pledges have not been fulfilled in Bangladesh on many occasions. In the above discussion, for example, we found that women and Hindus have been persistently deprived of their land rights in spite of Constitutional guarantees in their favour.

Justice requires actual realization of every one’s rights in practice; mere promises or guarantees in laws and the constitution are not enough. Of course, laws and norms of the society must be just in the first place. For women and Hindus, we found that both laws and practices were significantly unjust so far as their land rights were concerned. Such manifest injustices cannot but have strong negative effects on the development of a country. The frustration, inactivity and anguish generated by unjust treatment to women and Hindus have deprived Bangladesh of precious contributions from many of its valuable citizens. The unfreedom and incapability created by land deprivations as elucidated in the above pages must have negatively affected the healthy development of Bangladesh. Therefore, restoring justice for women and Hindus is a prerequisite not only for the sake of establishing *nyaya*, but also for the fuller development of Bangladesh.