

THE LAND RIGHTS OF PLAIN LAND INDIGENOUS SANTAL COMMUNITY IN
BANGLADESH: CHALLENGES AND PROSPECTS

* Munira Jahan Sumi

** Ramy Bulan

*** Mohammad Ershadul Karim

Abstract: Indigenous Peoples, due to their subordinate position in society, deserve necessary supports to protect or defend and establish their rights. Land, the most valuable asset of the Indigenous communities, is generally protected through national and international legal instruments. During the last decades, Indigenous Peoples' land rights claims received considerable attention and tremendous developments in the common law jurisdictions. Albeit, such communities around the world have been struggling to protect their lands in the context of various 'developmental activities. This paper intended to explore, investigate and evaluate the existing land rights practices of an Indigenous community living in the plain land area of Bangladesh, the Santals in accordance with national and international legal standards. By using qualitative legal research methodology, this paper evaluated the land rights of plain land Indigenous Santal community in Bangladesh. In doing so, the paper put insight into the present land rights practices that they are obliged to follow. The paper also identified the gap that leads to face them violation of their traditional land rights. Therefore, the paper endeavoured to find a way out amid international instruments that can bring positive change in the life of plain land Indigenous Communities like Santals, in Bangladesh by securing their land ownership. After a comprehensive literature review and relevant field data including expert opinions, the paper put forward some recommendations that may provide some significant guidelines to the Government, policymakers, and development stakeholders to resolve the issue.

Key words: Land Rights, Plain Land Indigenous Community, Santal Community, Santal Community in Bangladesh. Land Right of Santal Community in Bangladesh.

I. Introduction:

Indigenous People, living in every region of the world, have been facing more or less similar kinds of problems and insecurity in spite of the prevailing diversity in the social, political, and historical background surrounding these non-dominant Indigenous Peoples.¹ It is evident from the facts of most of the cases involving claims on Indigenous land rights in North, Central, or South America; the Caribbean; the Pacific; Asia; Africa or Northern Europe, that the state authorities attempt either to conquer or to assimilate the Indigenous Peoples, living within the state territory, into the so-called 'advanced' mainstream society.² By implementing this conversion policy, the state parties deny the existence of rights,

* **Munira Jahan Sumi**, LLM and LLB (University of Dhaka, Bangladesh), is an Associate Professor, Department of Law, Jagannath University, Bangladesh. Currently, she is pursuing her PhD in Indigenous Law at Faculty of Law, University of Malaya, Malaysia.

** **Ramy Bulan**, PhD in Indigenous Law (Australian National University, Australia), LLB (Hons) (University of Malaya, Malaysia), is a Research Fellow, Faculty of Law, University of Malaya, Malaysia.

*** **Mohammad Ershadul Karim**, PhD in Nanotechnology Law and Policy (University of Malaya, Malaysia), LLM and LLB (University of Dhaka, Bangladesh), is an Associate Professor, Faculty of Law, University of Malaya, Malaysia.

¹S. James, D. Tobis eds (1974). Cited in Torres, R., "The Rights of Indigenous Populations: The Emerging International Norm". 16 (1991) Yale Journal of International Law. P. 127.

² Torres, R., "The Rights of Indigenous Populations: The Emerging International Norm". 16 (1991) Yale Journal of International Law. P. 145, 164-165.

i.e. land rights, of the original inhabitants living at their ancestral land from time immemorial.³ According to Raidza Torres, this conversion policy has eventually created some basic rights for the Indigenous Peoples including the ‘right to have recognition of traditional land claims; cultural protections; recognition of individual, economic and social (welfare) rights and political autonomy’.⁴ Therefore, it is the human right of every Indigenous People living in any part of the world that they can claim these basic rights need to be recognized and ensured by the state authorities of the respective areas.

Obviously, the plain land Indigenous communities in Bangladesh, like the Santals, face the similar situations. Therefore, they also claim some basic human rights i.e. right to live freely on their ancestral lands, to perform their cultural programs, to feel religious spirituality, to achieve economic and political autonomy and self-government.⁵ Unfortunately, unlike the American States, in the absence of being recognized as ‘Indigenous people’ and the policy of forced assimilation into mainstream society of Bangladesh has made the way to destroy their traditional cultural and land rights.⁶ Most of the time, powerful and greedy private individuals by unlawfully influencing state authority grab their traditional landholdings and expand private property against the collective or communal property rights of Indigenous Peoples like Santals, in Bangladesh.⁷ By grabbing Indigenous lands from these peoples, they take full advantage of the local resources and establish strong political power over the territory. Therefore, this study endeavoured to analyse the complex legal issues involved in ensuring the land rights of Indigenous Peoples. As such, the present research enumerated the existing national and international laws, policies, and judicial mechanisms so that in the light of those experiences, the study can put forward some suggestions that can be applied in setting standards for the protection of land rights system of the plain land Indigenous communities, i.e. the Santals, of Bangladesh.

II. Background of the Study:

Bangladesh stands out as a country enriched by its diverse communities, distinguished by their unique languages, religions, and cultural traditions. Currently, the nation is home to at least seventy-five Indigenous communities, whose combined population is approximately 3 million. These communities are primarily concentrated in the Chittagong Hill Tracts (CHTs) and the plains.

Among the Indigenous groups, the Santals hold a significant place. They predominantly reside in the plains, making them the largest Indigenous community in these regions. According to the Bangladesh Population Census of 1991, the Santal population was nearly 261,746, making them the second-largest Indigenous group across the country as a whole. This highlights their vital role in the cultural mosaic of Bangladesh.

The latest census prepared in 2022 counts the total number of Indigenous community people as 16,50,159 including Santal community people, to be only 1,29,049. However, the community leaders claim their population would be not less than 5 Lac as the Santal people live in different places of the country originally, the Santals lived in Chotonagpur and Santal Pargana in India. They are considered among the earliest settlers in the northwestern region, primarily spread across 16 districts of the Rajshahi Division in Bangladesh, including areas such as Rajshahi, Rangpur, Dinajpur, Pabna, and Bogura.

Research on the Indigenous Peoples of the subcontinent, particularly the Santals, has predominantly been anthropological, emphasizing the documentation of their unique lifestyles and the classification of these communities. Conversely, most of the available literature addressing the rights of Indigenous groups, especially land rights, is largely confined to the Indigenous regions of the Chittagong Hill Tracts in Bangladesh. There is an insufficiency of literature that portrays the vulnerability and marginalization of Indigenous Peoples living in the plain land areas of the country. Though the accounts of the different

³ ibid

⁴ ibid

⁵ Wiessner, S., “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis”, 12 (1999) Harvard Human Rights Journal, pp.58-59.

⁶ Vine Deloria, Jr. & Clifford M. Lytne, “*The Nations Within: The Past and Future of American Indian Sovereignty*”, Pantheon Books, 1984, 291 pp.

⁷ ibid

researchers and ethnographers are significant and helpful in establishing the ground for identity as 'Indigenous people', the absence of serious legal research that can claim the recognition of traditional land rights of the Santals in Bangladesh is crucial. This necessitates the present study that aimed at standing against the discrimination towards the plain land Indigenous communities like Santals who were not being considered in the land law and land reform policy of Bangladesh.

The study highlights that, like Indigenous communities worldwide, Indigenous Peoples in Bangladesh frequently encounter various forms of human rights violations and conflicts.⁸ This research focused on the Santal, an Indigenous community in Bangladesh, exploring their traditional land rights practices and the challenges they face due to historical discrimination and the lack of recognition for their traditional systems.⁸

The findings revealed that colonial-era policies and strategies, still prevalent in many Commonwealth countries, were often deliberately structured to undermine the political, social, economic, and cultural rights of Indigenous Peoples. It is a profound duty of the world community that the relationship between land and Indigenous People should be recognized.⁹ In fact, the protection and regulation of the land rights of Indigenous and tribal populations require various kinds of action both at the national level and international levels. At the national level, the enactment of legislation and, survey and registration of the lands occupied illegally by non-Indigenous people are necessary. And, at the international level, it is necessary to provide technical assistance and advice to countries searching for solutions to these complex issues. In the case of Bangladesh all the Conventions, i.e., ILO Convention 1957, ILO Convention 169, the UNDRIP, and other international documents have been very important and valuable instruments for promoting the rights of Indigenous Peoples, like Santals. The Bangladesh government ratified the ILO Convention No. 107 for Indigenous and Tribal Population in 1972 and made a commitment to ratify the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples in its 8th Five-Year Plan. But unfortunately, Indigenous communities including the Santals have not been recognized yet as they desired to be identified as 'Indigenous people' which fully depends upon the willingness of the Government.

III. Theoretical Framework

The Santal community in Bangladesh exhibits all the defining characteristics required to be recognized as 'Indigenous People,' a fact even acknowledged by the British colonial rulers. In the undivided subcontinent, they practiced their Indigenous customs and traditions.¹⁰ However, over time, successive governments have disregarded these longstanding traditions for political reasons, attempting to assimilate these diverse communities into the mainstream. With tacit government support, opportunists and interest groups have seized their ancestral lands. This division has weakened the Santals, while the pressures of adapting to the country's realities have led them to abandon their traditions, culture, and Indigenous identity. For instance, although the Constitution of the People's Republic of Bangladesh and other laws recognize religious diversity¹¹, they fail to acknowledge other forms of diversity. Article 6(2) of the Constitution declares that "the people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as 'Bangladeshis'," thereby overlooking cultural and ethnic distinctions. Again, on the question of land ownership, the constitution of Bangladesh only recognizes three types of ownership namely, state ownership, cooperative ownership, and private form of ownership. Thus, the non-recognition of communal land ownership practices by the Indigenous communities of the country has furthered the violation of their traditional land rights practices. In the absence of recognition under the Constitution of Bangladesh therefore, the basis of traditional land rights practices of Indigenous Peoples primarily lies under International Legal Instruments. On the other hand, some national legal instruments and mechanisms, basically applicable to the Indigenous communities of CHTs, are also unavailable for the

⁸ Yamada, E.M., "Collective Economic, Social and Cultural Rights Approach to Indigenous Land Rights", *Faculty of Law, University of Lund, 2005, P. 4.s*

⁹ Daes, Erica-Irene A., "Indigenous Peoples and Their Relationship to Land", Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-first session Item 7 of the provisional agenda, 1999, Available at http://hrlibrary.umn.edu/demo/RelationshipptoLand_Daes.pdf [Last access date February 20, 2024]

Indigenous people like Santals, living in the plain land area of the country. The basic and fundamental law for the management of land in Bangladesh is said to be the State Acquisition and Tenancy Act (SAT) of 1950). But unfortunately, there is a single legal provision under Section 97 of this Act that exclusively applies to plain land Indigenous Peoples. Moreover, the Indigenous Peoples were systematically excluded from government projects and the official policy for the distribution of Khas land (land belonging to the state) to the landless peoples. Instead of becoming beneficiaries, they were the victims of these discriminatory and exclusionary government policies. An example of this is the Vested Property Act of 1974. The government offers little or no remedies to these Indigenous Peoples who have been dispossessed of their lands. Unfortunately, these dispossessed poor Santals can hardly afford the opportunity of recovering their ancestral lands and getting legal remedies under the formal legal system.¹⁰ In this backdrop, to understand and facilitate the practical measures for addressing ongoing problems relating to the land rights of Indigenous Peoples like the Santal community of Bangladesh, a number of international documents and common law precedents operate as guiding tools for the present research as well as for the Government of Bangladesh to understand and explore the relationship between the Santals with their land and help to find a way out to ensure their land right.

IV. Scope and Limitations of the Research

The research looked at the existing traditional land rights practices among the Santal community in Bangladesh, especially on the problems they face in exercising their land rights and how their existing land rights practices can be protected and secured in order to minimize exploitation under the system that exists today. It argued that the denial policy of traditional land rights of the Indigenous communities of Bangladesh as per the land legislation and the land reform policies undertaken by the Government of Bangladesh is contradictory with the main fundamental principle of the state policy of Bangladesh and also against the major philosophy behind the War of Independence of Bangladesh.

On the other hand, other human rights of the Indigenous communities in Bangladesh that are being frequently violated, have not been focused on in this research. The study did not include a detailed comparative legal study analyzing how the commonwealth countries, like Australia, Canada, New Zealand, Malaysia, etc., of similar economic and social contexts, have recognized the Indigenous communities within their state territories and ensured their citizens' rights. It only considered the benchmark judicial decisions and legal developments of the prominent common law countries and argued on the basis of those good grounds to accommodate the plain land Indigenous Santals by filling up the existing gap and bringing up positive changes in their lives.

Finally, the present study cannot be claimed to be an in-depth and comprehensive one, this exploratory research may pave the way for enthusiastic researchers and scholars to come forward for further studies on the Santals. The research shows that in Bangladesh, most of the Indigenous communities in the plain land area of Bangladesh, especially the Santals remain extremely vulnerable to land grabbing, forced displacement, and involuntary resettlement. The State representatives ignore their traditional and cultural diversity and therefore, are reluctant to recognize them as Indigenous communities. Their land right is subjected to discriminatory provisions of national land management policy, particularly the Constitutional prohibition of community ownership. The lack of and sometimes denial of their ethnic identity and traditional practices have encouraged land conflicts. Discrimination and exploitation are most often visible in the form of usurpation of land. In short, the life the Indigenous Peoples like the Santals, have been threatened and to some extent destroyed because of the lack of legal recognition and administrative insecurity over their land.¹¹

¹⁰ Roy, R. D., Hossain, S., & Guhathakurta, M.D., "Access to Justice for Indigenous Peoples: A Case Study of Bangladesh", in *Towards Inclusive Governance: Promoting the Participation of Disadvantaged Groups in Asia-Pacific*, UNDP Regional Centre in Bangkok., 2007, pp. 28-49.

¹¹ Colchester, M. & Lohmann, L., *The Struggle for land and the fate of forest*. World Rainforest Movement, 1993, 389 pp.

In this background, the present research wishes to explore the legal mechanism available for the protection of land rights of Indigenous communities with specific reference to the Santal community of Bangladesh. The research aims at putting forward some specific recommendations that would find a way for bridging the gap so that the Santal community feel comfortable to seek legal remedy and the Government can set up mechanisms that will apply or create coherence between two distinct sets of practices. To achieve this goal, the study attempted to analyze the national laws of Bangladesh intended to protect and ensure the rights of Indigenous Peoples in accordance with international norms and principles applicable to the Indigenous communities.

V. Reasons behind the violation of Land rights of the Indigenous Santal community in Bangladesh:

Present research study focused on the historical process of marginalization of the Santals through the denial of their traditional land rights. The study identified the reasons of such discriminative and assimilation policies of the governments following the colonial legacy. These include exclusionary government laws & policies, non-implementation of laws and policies of land reform, land alienation and exploitation by the mainstream society etc. Actually, land is at the heart of all the problems of Indigenous communities like, Santal in Bangladesh. The root of the problem lies behind the population size of the country, e.g., in the context of availability of land for all in the country. Since, Bangladesh is a very small size country in comparison to the population living within the territory, there is a huge demand for land. It is not only the population, in fact, it is also the dependency of people over land. Most of the people of the country are traditionally dependent on the land and agricultural that ultimately increases the demand higher. Moreover, whatever developments occurred that is basically limited to urban areas and not dispersed throughout the country. This has created a huge pressure on land which became one of the key issues in Bangladesh. As such, since, land has become one of the central ideas of occupation, the aspiration of the people to possess land has resulted in land grabbing and land alienation in anyhow to hold the ultimate power. As a result, the powerful people, generally the mainstream community of the country (overwhelming majority constituting 97% population of the country) forced the weak and vulnerable Indigenous Peoples to leave their land. Unfortunately, these majoritarian people who holds the power, politically, socially and economically, influences and to some extent controls the whole system of the country, the Executive, the Legislative and the Judiciary. Consequently, the Indigenous Peoples right have been denied in all regards, i.e., there has been no recognition of Indigenous communities in the Constitution of the country. Obviously, the traditional land rights of Indigenous communities like Santals have not been recognized.

The traditional land right, specially, the community ownership system of the Indigenous people is the globally acknowledged land ownership system which actually is one of the characteristics of Indigenous identity. They consider land as a common property and the concept of private property is absent in their traditional history or thought process till now. When the British Colonial authority introduced private or individual title or ownership of land, this system primarily could not reach the Indigenous communities like Santals, and later on even if reached it could not attract them because this system was meaningless to them as they consider that land also belongs to nature like the sun, moon or water body. Henceforth, to the community as a whole, their conception to the communal ownership right to land could not accept the importance the individual land ownership under the private ownership system of the capitalist country. Therefore, they did not feel the need respond and register their name under this new system of the country. This has created an opportunity and scope for the majority people to take advantage of this and grab the Indigenous lands, both in hilly and plain land area, of the country. In the case of plain land Indigenous people, the situation is even worst as there is only a single provision relating to the restriction on transfer of Indigenous lands to any person other than Indigenous people.¹² But, the provision is too much limited in application.

Interestingly, it is important and mentionable here is that the British rulers enacting new rules, to

¹² The State Acquisition and Tenancy Act 1950, Sec. 97.

how extent the law was Colonial, they were some extent implemented and not remained as a paper law. But, unfortunately, after 1947, though those British laws continued to be enforceable but in practice, implementation was denied by the conspiracy of some opportunists. For example, the enactment of the Enemy Property (Custody and Registration) Order II, 1965 and the Vested Property Act, 1974 paved the way to alienate Indigenous Peoples land. In both the backdrops, the Indigenous communities like Santals, moved for shelter and safety of their life and when they returned to their ancestral land, they found themselves as landless because most of their lands were already grabbed by the local influential mainstream peoples.¹³ Moreover, rest of their lands were vested to the government as 'Khas land' or 'land of the government'. Unfortunately, these khas lands were not allotted to the Indigenous Peoples though they should have the priority over those lands. On the other hand, the Indigenous Peoples who stayed in the country in spite of all the hardship, they also faced the threat to be dispossessed. Because, after 1947, though the State Acquisition and Tenancy Act, 1950 under section 97 continued to provide protection theoretically, but in practice, this provision was not implemented in its actual sense. As such, a lot of forgery were over looked by the mainstream Bangalee government officials. Therefore, the uneducated Indigenous communities like Santals, are unable to avail the protection of the said law to the extent as supposed to be given by the law even today. Thus, the only provision to provide protection to land rights of the plain land Indigenous communities, has thus turned into a black letter law which has hardly of any use.

VI. Development under the Common Law Doctrine

This research particularly focused on the success of the Common law principle for the purpose of putting forward the issue of traditional land rights in Bangladesh. Among the many positive and practical approaches initiated worldwide for the protection of Indigenous land rights including, judicial mechanisms, constitutional reform, and framework legislation, Indigenous Peoples' initiatives, human rights standards, etc., the role of judicial mechanism is vital. There are a lot of instances, whereby, legislative reforms are a direct result of court decisions supporting the Indigenous Peoples and their claim to get recognition of their ancestral lands. For example, during the 1990s, under the jurisdiction of the Supreme Court of Canada and the High Court of Australia,¹⁴ a legal doctrine on Indigenous Peoples' land rights, was established in the name of 'aboriginal' (Canada) or 'native' (Australia) title right. This new common law doctrine was referred to by other countries like New Zealand, Malaysia, Belize, South Africa, Philippines, India, etc., in their local courts. They gradually adopted and developed new rules of procedure in accordance with their national laws.¹⁵ The fundamental question that has been faced by the Indigenous communities regarding the legal repercussions of the past, was addressed by this common law doctrine, and thus common law is advanced as 'title generating'.¹⁶

All these developments are significant because the principle established under those Common law jurisdictions has been referred to not only within the Commonwealth countries but also out there. For example, in South Africa, in *the Richtersveld Community case*, the Supreme Court of Appeal declared that it was 'unnecessary to decide whether the aboriginal title doctrine is a part of common law or whether the

¹³ Halim, S., & Eshan, F. H., *Violation Against Santals: A Case of Santals Fight to Retain Land in Gobindaganj, Gainandha*. Solidarity, Bangladesh Indigenous Peoples Forum, 2017.

¹⁴ McNeil, Kent. (1989). *Common Law Aboriginal Title*. Oxford: Clarendon Press, United Kingdom.

¹⁵ Bulan, R., "Native Title in Malaysia: A 'Complementary' Sui Generis Proprietary Right Under the Federal Constitution", 11(1) (2007). *Australian Indigenous Law Review*, pp.54-78. Available at

<http://www.jstor.org/stable/26422991> (Last access date February 12, 2024]

¹⁶ Gilbert, J., "Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title", 56 (3) (2007) *International and Comparative Law Quarterly*, pp. 583-611.

common law should be developed to recognize Aboriginal rights'¹⁷. Thus, South Africa has indirectly adopted some elements of the common law doctrine. On the other hand, some national jurisdictions, like Malaysia, have directly incorporated the common law doctrine. Malaysia has recognized a pluralistic legal system where they have legislation, common law, customary laws as well as syariah laws which are administered through Federal and State courts.¹⁸ Therefore, following the examples of Malaysia, the judiciary of Bangladesh should come forward and try to apply the traditional laws and practices of the Indigenous communities like Santals to ensure natural justice and equality; and prevent the law from being oppressive, particularly with regards to traditional land rights. Moreover, the court can also follow the process as to how the Malaysian courts have applied the rules of evidence and methods of proof in order to recognize the uniqueness of customary laws and enforce their rights. For example, the oral history and narratives have been regarded as evidence in at least two of the earliest Malaysian cases on the ground of the common law recognition of customary rights to land, namely, *Sagong bin Tasi and Ors v Kerajaan Negeri Selangor and Ors* ('Sagong I')¹⁹ and *Nor Anak Nyawai & Ors v Superintendent of Lands & Surveys*²⁰ case. Again, Sarawak High Court, in *Nor Anak Nyawai v Borneo Pulp Plantation & Ors*²¹ case, followed the common law principle that 'upheld the pre-existing rights under native law or custom'.²² Bangladesh as a country of common law jurisdiction should follow the decisions of the above jurisdictions as these cases have persuasive authority over Bangladesh even if it has not ratified ILO 169 and UNDRIP.

VII. **Suggestions for developing a legal framework to reform land rights, aiming to bring meaningful improvements to the lives of the Santals in Bangladesh.**

The study reveals a significant gap between aspirations and reality. However, it provides hope that adhering to international laws and principles can still create a connection between historical events and modern land claims. This section focuses on exploring how international laws and common law principles can be applied to the land rights of Indigenous communities, such as the Santals in Bangladesh, without conflicting with the country's national land policy. As such, the research put forwards the following recommendations with proper justifications:

1. To put an end to political unpeopling of Indigenous people

In Bangladesh, like all over the world, 'unpeopling' of Indigenous people is a undeniable historical reality and as such, the Indigenous Peoples (irrespective of hill or plain land) have been the victim of social, economical and political exploitation.²³ They have to struggle against the continuous dispossession, distress, destitution, deprivation, inequality.

The process of 'unpeopling' of Indigenous Peoples has been done using many different means and ways of forcibly grabbing their wealth, resources and properties by the powerful and influential class. Therefore, attempts are made to effectively erase from the Indigenous Peoples from their long inherited ancestral lands. There are many other peculiar ways to vanish them though reality not vanished. For example, reportedly vanish them in the official population statistics. Prof. Barakat has termed this as 'enumeration politics', 'demographic politics', 'population politics' and 'official intentional act to show less than the actual population size'. For example, in Bangladesh population census is carried out in every 10 years. As such following this pattern, after the first ever census in 1974, the country has carried out surveys in 1981, 1991, 2001, 2011 and the sixth one in 2022. Due to covid pandemic, the latest one was delayed by one year and as such, it dubbed a provisional one published on July, 2022. Though there is a

¹⁷ *The Richtersveld Community v Alexkor Limited and the Government of the Republic of South Africa*. (2001). ZACC 18. Available at <http://www.saflii.org/za/cases/ZACC/2003/18.html> [Last access date February 25, 2024]

¹⁸ Bulan, R., *The Civil Courts and Determination of Native Customary Land Rights: Merely Declaring or Making Laws?* 13(2019) Borneo Research Journal, pp 1-23.

¹⁹ *Sagong bin Tasi v Kerajaan Negeri Selangor* (2002) 2 Malayan Law Journal, p. 591.

²⁰ *Nor Anak Nyawai & Ors v Superintendent of Lands & Surveys* (2001) 6 Malayan Law Journal, p. 241.

²¹ *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd*. (2001) 2 Current Law Journal (Malaysia), p. 769.

²² *Adong bin Kuwau v Kerajaan Negeri Johor* (1998) 2 MLJ 158.

²³ Barakat, A., *Political Economy of Unpeopling of Indigenous Peoples: The Case of Bangladesh*, MuktoBuddhi Prokasana, 2016, 256 pp.

need to go through many revisions and updates but, for the purpose of the study it is mentionable that the latest census counts the number of Santal people to be only 1,29,049. But the community leaders claim their population to would be not less than 5 Lac as the Santal peoples are scattered in different places of the country. Thus, Population Census of Bangladesh is blatant evidence of this ‘unpeopling’ politics.

2. To recognize Indigenous identity

The reason behind all the hardship of the Indigenous Peoples like Santals is said to be the lack of proper recognition of their Indigenous identity in the Constitution of Bangladesh as per the expert opinion of the prominent researcher and Professor Mejbah kamal²⁴. According to Professor Kamal, the Indigenous communities of Bangladesh should have support in the Constitutional of Bangladesh. He further states that the Constitution that was drafted and enacted in 1972, has mentioned only 3 kinds of ownership under Article 13 of the Constitution of Bangladesh which excludes the communal form of ownership. But, the only form of Indigenous ownership practices by all over the globe is community form of ownership that is totally absent in the ownership concept of Bangladesh. As it is absent in the Constitution of Bangladesh, it means that the laws emanate from the Constitution does not reflect the concept of Indigenous community ownership in the subsequent laws of the country. So, here lies the principal problem relating to Indigenous land. Therefore, according to him, one of the ways to ensure the Indigenous land rights of plain land of the country where the Santals are the majority Indigenous people of plain land, is to touch the root of the problem. That means, to resolve this problem we have to go to the root of the problem, which is in the Constitution of the country, i.e. the types of the ownership of the property in the Constitution. If the community form of ownership can be added within the Constitution, it will open the avenue for the recognition of the Indigenous people’s traditional land rights within Constitution.

3. To evaluate Government land policies:

The Government should evaluate it’s land policies considering the communal diversity within in the country. Otherwise, there will be a big problem in future, as from the middle of 1990s, the government of Bangladesh has started the process of land documentation following the Australian model of CA law. According to the CA law, they enlist all those land that a person owes that means this will graphically present the lands that is under any person’s ownership even those may be at some different locations of the country. This CA Law model is going to be a very difficult problem for Bangladesh as the present government of Bangladesh is giving so much emphasis on this process of CA law. In fact, from this primary model of implementation and conceptualization, this has now been taken as a national program. Professor Mejbah kamal who the part of this government project at the late 1990s as an expert on social impact evaluator, strongly feel that this policy of Government would affect Indigenous land right as this law is based on paper based legal ownership and they will record only those lands which had a valid piece of legal ownership documents. But, the Indigenous communities like Santals of Bangladesh, like globally, who did not believe and still do not believe on private ownership, and most of the lands belonging to the Indigenous community in the village, are still not under the private documentation. As such, if the CA law will be expended throughout the country, the registration process would enlist those land as khas land those belongs to the state. Therefore, it will be the power of the state to distribute those land as per their choice and own priorities. This will create another huge blow on the Indigenous communities like the Santals in Bangladesh. Already, at the northern part of the country, there are so many cases where the Santals and other communities are living on the government khas lands but how those lands become khas where they lived from time immemorial. Those lands were actually Indigenous land where they were living, their forefathers have been living but through the registration process after the abolition of Zamindari system within the country, those lands suddenly became khas land. And, now after almost 70 years it has been said by the government that the respective Indigenous Peoples are living on the khas land of the government. Therefore, it is up to the mercy of the government whether they will give it to the Indigenous communities living thereby or somebody else by through the Indigenous groups out. Since these lands are termed as khas land and often the land grabber of the localities being the influential people

²⁴ Mejbah Kamal, Professor, Department of History, University of Dhaka.

in terms of money and power, they think and believe that they have right over those lands. Thus, their land suddenly become vulnerable by the introduction of the new law on abolition of Zamindari system. Therefore, it is the duty of the government to solve their land dispute and remedied the sectors where they were deprived like, education, health care, livelihood, to increase purchase ability to fill up the existent gap.

4. To give recognition to Indigenous traditional land rights

The Constitution of Bangladesh under Article 6 declares that all the citizens of this country should be known as Bangalees as a nation which ultimately denies ethnic diversity within the state. However, it was never denied that the Indigenous people and other backward section of the society would have equal citizenship rights within the state. But the main problem lies on the fact that the traditional land right practice, i.e., community ownership has not been recognized in this country. Consequently, the lack of legal recognition for Indigenous traditional ownership practices leaves the judicial system unable to safeguard their land rights, as they often lack formal documentation to establish ownership. The root cause is nothing but the non-recognition of their traditional land rights practices, i.e., community ownership. Where non-Indigenous people can easily go and ask for legal redress to the court of law claiming to protect their constitutional right of ownership, Indigenous people have to face difficulties as the state refuses to recognize their traditional form of ownership. They cannot further support their claim because of their economic inability based on land ownership. Moreover, in the absence of valid or legal ownership document, very often Indigenous land become the subject matter of Government Khas land. Moreover, most of the Indigenous communities, like Santals, follow Hindu religion which made a way to the opportunist people to turn the Indigenous lands into Enemy property or Vested property. Through this process, the Indigenous people have become not only landless but also economically and socially marginalized and vulnerable. Therefore, only celebration of their cultural practices through their festivals, Indigenous dance or dresses in special occasion will not protect or preserve their ethnic diversity. Strong steps should be taken by the State to uphold their identity and dignity which is very much dependent on their social and economic empowerment. Protecting Indigenous traditional land right is a pre-requisite for this. Constitutionally, State is bound to protect and preserve their right as they are the citizen of this country and they are valuable resource as holder of history and multi-culture.

5. To recognize and ratify International Legal Instrument concerning Indigenous Peoples right:

The actual situation according to the field data clearly shows that mostly, the difficulties faced by the Indigenous communities are because of the Indigenous traditional land rights have no recognition since Bangladesh has not signed the ILO 169 and the UN Declaration on Indigenous Peoples right. Even if Bangladesh has ratified the ILO 107 in 1972 and other international protocols, it has not been transformed into the national laws or enacted new laws according to those signed protocols. There has been no reflection of any legal change following the ratification. With this back drop, though there are some provisions on some cultural rights indicating the ethnic diversity of these Indigenous communities, they sometimes deny or refrain from signing those protocols and abstain from voting those international instruments. The root cause behind this attitude is the denial of ethnic diversity within the country that can be mirrored in the government policies firstly and in the second place, the centralized nature of the government of Bangladesh. If the government would be decentralized then, there would have been some solution in some of the areas at least. There is a classic example of this that, the Bangladesh State does not recognize that there are any Indigenous Peoples in Bangladesh but there is a Parliamentary COCAS in the Parliament made by the Parliament member, specially, those who have a considerable number of Indigenous voters within his/her constituency. Thus, though they say that there is 'no Indigenous people' within the State, but they know that there are Indigenous Peoples within their constituency. Therefore, they have joined their hands and formed this COCAS on Indigenous Peoples and minorities, having now around 45 members in the parliaments. Another interesting thing is that though the State authority often denies the fact that there is Indigenous people within the country, the present Government has accepted the demand of Indigenous people of the Chittagong Hill Tract area and signed the CHT Peace Accord back in 1996 where they were in the Government. Moreover, Bangladesh have ratified the ILO 107 and every

year during world Indigenous Day, Head of the State, Head of the Government and Foreign Minister of the country never forgets to wish and address the Indigenous communities living within the country. Indigenous culture and festivals are appreciated very often through national media as well. But, it is very crucial for Indigenous Peoples to get the formal recognition of their land rights as it is found to be fundamental for their survival. It is their fundamental right that may live on their long inherited traditional lands as their ancestors did.

6. To bring change in the Political mind set of the Government

Though recognition has always been there in the law regarding the Indigenous people but now all of a sudden, when, the international community globally asserted the rights of the Indigenous communities, the Government of Bangladesh is denying to uphold those rights. They are applying such kind of tricks like deny to recognize the Indigenous identity by saying straight away that they don't exist. Therefore, if there will be no Indigenous people within the country, then, there is no need to enact or introduce any law on Indigenous people. Thus, instead of recognizing Indigenous identity, they are denying their existence and thereby denying diversity. Thus, the state is in full contradiction in this aspect. On one hand, they are continuously denying Indigenous existence and Indigenous rights, especially land rights and on the other hand, due to the pressure created by the Indigenous communities and civil society, the State was bound to form a committee for the identification of ethnic minorities and other distressed population of the country. This committee was first partially recognized by the Indigenous Cultural Organization Bureau in 2010 in which 27 ethnic minorities were recognized.²⁵ The committee further recommended 78 ethnic minorities to be recognized by the State. However, the Government has recognized only 50 ethnic minorities recently. This is one way that how the Government has been gradually recognizing Indigenous communities. Therefore, though they are denying their Indigenous identity under Article 6 of the Constitution saying that the people of this country are known to be Bengalee by nation, on the other hand under Article 23A, the Constitution refers to diverse cultural groups and recognizes them as 'ethnic minorities' though refrains from addressing them as 'Indigenous communities'. Thus, the Government is willing only to recognize ethnic diversity but, by way of non-recognizing as an Indigenous identity, they are denying the traditional land rights of the Indigenous communities. This is the sole politics of majority by the Government actually because if they would recognize Indigenous identity, they will be bound by the international standard to ensure Indigenous Peoples right. This is what the Government is not ready to ensure specially the Indigenous land right.

7. Land Demarcation

Bangladesh has a long history of changing its territorial boundary. After 1971 this territory got its sovereignty in the name of Bangladesh. Before that, it was East Pakistan from 1947 to 1971, and during British rule, it was known as Indian Sub-continent. Indigenous people during these periods were always separate. For example, in the Government of India Act, of 1935, some plain land territory was treated as a 'partially excluded' area e.g., it put some bar on Indigenous land transfer. This is still followed in India and also in the CHT and other hilly areas where Indigenous people reside. However, the situation is not the same for the plain land Indigenous communities, like Santals, in Bangladesh.

Though, in several provisions in the Constitution of Bangladesh and some other laws, Indigenous Peoples were addressed they were not formally recognized as Indigenous people. For example, section 97 of the SAT Act, of 1950, addresses Indigenous communities including Santals as Aboriginal, and puts restrictions on their land transfer. This provision was well enough to protect their land and this could save their land from being grabbed by the local influential and corrupted people. Unfortunately, this provision has no practical implementation. Indigenous communities in Bangladesh have lost their land only because they didn't get any protection from the Government. If their traditional land right would have been recognized, then it would be easy to protect their land from being grabbed. There is still some hope that following the footsteps of other Commonwealth countries having Indigenous population within their

²⁵ Note: This Government committee has been headed by Prof. Dr. Mejbah Kamal till now.

boarded, like Australia or Canada, we can at least demarcate Indigenous villages where they can enjoy their own traditional land rights and cultural practices.

8. Ensure right to self-identification or self determination

In a developing country like Bangladesh in a South Asian Context (surrounded by India with secessionist movements) also fears the concept of right to self-determination. The right to self-determination of peoples is a fundamental principle of international law. It is embodied in the Charter of the United Nations and the ICCPR, ICESCR. The latter Covenants say that all peoples have the rights of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

But, the Government and people of this country, except a small group of people, are not ready to accept this international standard of 'right to self-identification', rather they have named us with some name like small races, sects etc., that the Indigenous communities have always protested. Even in India, they follow the 'right to determination', i.e., there are several Indigenous areas where the Indigenous representatives form government for years and non-Indigenous political leaders have no role to play within the Indigenous areas. In Bangladesh there is no such respect for Indigenous communities and this is one of the main problems behind the non-recognition of Indigenous identity and their traditional land rights.

9. To establish separate Land Dispute Resolution/ Management Committee

Without ownership paper, it is impossible to protect Indigenous traditional land rights if the Government is not ready to implement it in its true sense. For this, the Government has to recognize traditional land right practices and at the same time, needs to enact a new Law and relevant Rules in this regard. Only if, there is legal protection provided by the Government, then it will be possible to protect Indigenous traditional land rights. In this conjuncture, it is mentionable that in CHT, for the Indigenous communities in hilly area, a separate Land Commission has been establish as promised in the Peace Accord. The success of this Commission is not arguable here but the point of argument is that if in the same way, a Commission could be established also in the plain land, it would be support for plain land Indigenous communities like Santals. This commission could approach the government in support of this marginalized class. They can also arrange restitution of lands of Indigenous Peoples of the plains by setting up a separate land commission. ^[11]_[SEP]

10. Need for proper and effective implementation of the provisions of National and International Legal Documents

In the context of Bangladesh, it is necessary to recognize and respect traditional land rights as envisaged in the UNDRIP and ILO Convention No.169 on Indigenous and Tribal Peoples. But the reality is that though Bangladesh has ratified the ILO Convention 107 but the provisions of this Convention have no application here. This convention covers both Indigenous people and tribal people. The Convention recognizes the traditional use and occupation of Indigenous people but the Government never cares. Another interesting thing is that, the Government is reluctant to term the as such. Even in CHT, there are about 25-30 Government Primary schools named as ADIBASI Schools which means that these government institutions also recognize the presence of Indigenous Peoples (called as Adibashi locally) within the country. In the same way, ILO Convention 169 and UN Declaration on Indigenous Peoples Right, 2007 need to be ratified in Bangladesh. And consequently, relevant provisions should be made either through enacting new laws or reforming the existing laws in order to recognize their identity and traditional practices. Following the footsteps of other countries who have recognized their Indigenous communities within their state boundary, the Government of Bangladesh should come forward and take effective initiatives to uphold the dignity of the Indigenous communities of this country. Moreover, it is undeniable that these international instruments have been adopted after a long discussion and recommendation from the resource persons who have great expertise on this issue. Therefore, their mind thoughts will be beneficial to overcome this distressing situation.

VIII. Conclusion

Land forms the foundation of the lives, cultures, and identities of Indigenous Peoples, making it central to their claims in Bangladesh. The core issue lies in the concept of "ownership or title" to land, as

Indigenous Peoples often view land not as a possession but as an entity to which they belong. For them, land transcends mere ownership or economic utility. However, the historical processes of marginalization and colonization have significantly impacted the Santals in Bangladesh. For instance, the ineffective enforcement of Section 97 of the State Acquisition and Tenancy Act of 1950—the only legal provision applicable to Indigenous Peoples in the plains, including the Santals—has undermined their ability to exercise land rights. This research aimed to explore how Bangladesh's existing land policies for plain land Indigenous communities like the Santals could be revised in line with international laws and common law precedents. Moreover, the policies applied to Indigenous communities in the Chittagong Hill Tracts (CHT) also offer valuable insights for developing a legal framework to address the traditional land rights claims of plain land Indigenous Peoples.

Actually, land rights and land reform in Bangladesh is a politically elusive issue. Bangladesh carries a historical legacy of land injustice. The peasants of Bengal were subjected to exploitation through the colonial land policies. The Indigenous communities have got a separate story of subjection in relation to land and land rights. Therefore, a full-fledged umbrella law should be made in order to comprehensively address the whole land question. In that umbrella law, there should be a separate chapter dealing with the land of the Indigenous communities in Bangladesh including the Santals. The customary rights should be recognized in the law as the Constitution of Bangladesh in its definition clause has said that any custom having the force of law should be treated as a law of the land. A clear constitutional stand in terms of land and property rights should be made clear, then a national land policy is to be made, then a full land Code/Act should be made by adequately addressing the land question of the Indigenous communities like Santals in Bangladesh. It is submitted that these recommendations if taken on board, would protect and establish Indigenous land rights. Considering the recommendations, the proper authority would find a way to how the existing land policy of Bangladesh toward plain land Indigenous communities, like Santals and others, can be revised in the light of the international laws and common law precedents. In doing so, it is submitted that alongside the international standards, the policies that are already followed for the Indigenous communities living in the CHT may also enlighten the way of developing a legal framework for the plain land Indigenous Peoples like Santals in Bangladesh. This would argue well for equal treatment under the Constitution.