



Star LAW update

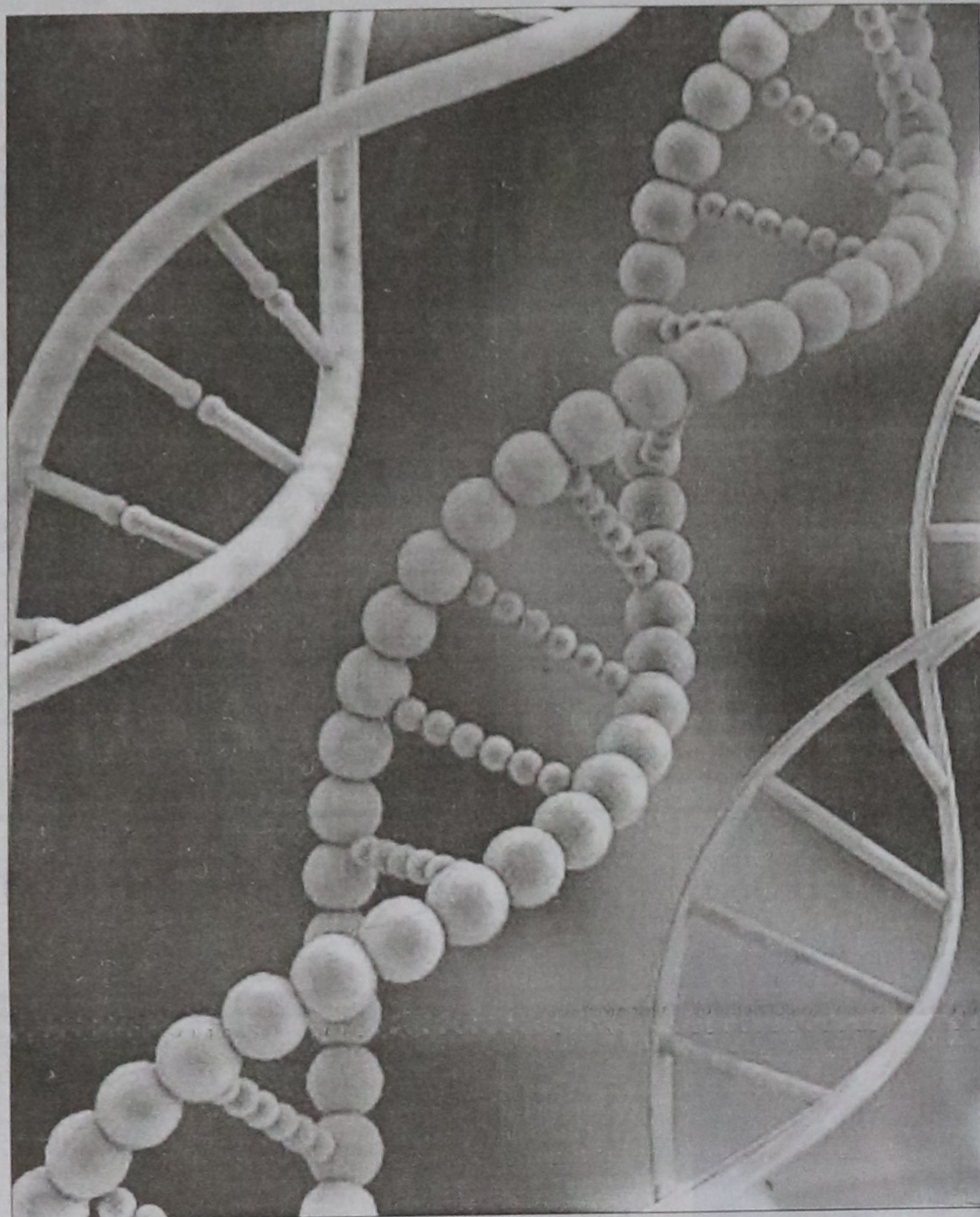
India for DNA test in child maintenance suits

ZAHIDUL ISLAM BISWAS

SINCE the discovery of DNA in 1984, DNA test has emerged as a powerful tool for determining human identity and relationship for various purposes. DNA (deoxyribonucleic acid), found in nucleus of a cell in human body, can be collected from the sample of saliva, hair, blood, semen, sweat etc. DNA test can reveal existence of relations among persons and determine the nature of their relationships. Before the advent of DNA test, test of human identity was largely completed by blood typing. Analysis of DNA has now replaced blood and it has been accepted as the most accurate method currently available for identification.

Britain started the use of DNA test in legal cases first in 1987. Later on, most of the developed countries began to use this modern technology based method in both civil and criminal justice system because of its effective role in identification. This method gains more and more importance with scientific development in latter years. Today DNA can be deduced from number of evidences in the crime scene, such as, a person's used hat, collar of shirt, pillow, blanket, bed sheet etc. By DNA test, it is now possible to obtain information on person's gender, age, ethnic background etc.

India also started to avail the benefit of DNA test in its criminal justice system long ago. Now Delhi High Court introduced the use of DNA test in civil justice system. By an order on 14 May 2008, Delhi High Court set legal precedent for the use of DNA test for determining paternity in case of child maintenance suit. The order came when the court faced with claims by a man that he didn't father a child for whom his estranged wife was seeking maintenance. The fact of the suit is as follows:



Ravindar and Sonam (name changed) tied knot in September 2000. A year later, Anup was born. Alleging Sonam of having illicit relations Ravindar walked out of the marriage only to be

slapped with a case of harassment for dowry in 2007 and a case of maintenance a year later. Sonam demanded maintenance for Anup.

In the hearing of the suit in the

lower court, Ravindar claimed that Sonam had illicit relations with her brother-in-law and this child was born out of that affair. Wondering why he should be held liable for maintenance

when he wasn't the biological father, he also claimed that he didn't have physical relations with his wife ten months before Anup was born and therefore suspected her of committing adultery. Hence, he pressed for a DNA test for determining paternity of the child.

Ravindar's plea before the magistrate was dismissed after the lower court held that holding of a DNA test will not have any effect on the merits of the case as maintenance petition doesn't differentiate between a legitimate child and an illegitimate one. Then he moved to the High Court.

Delhi High Court quashed the lower court's decision and accepted Ravindar demand for DNA test. Justice Vipin Sanghi, while ordering for DNA test, observed that 'The parentage of the child can only be determined by a DNA test. The liability to pay maintenance under section 125 CrPC can be avoided by the petitioner with respect to this child only if it is established that he is not the biological son of the petitioner'.

Usually, law acknowledges a person as a biological father of a child if there is a birth certificate naming that person as the father of the child, or if there is any signed statutory declaration acknowledging paternity (a legal document which says that he is the father of the child), or if the child was born while two persons were married or living together, or if the child was born within some specified time (like 90 days) after the relation had broken down etc. With this judicial precedent, all these evidences became weaker because now onward the DNA test will exclude all other evidences and it will be treated as exclusive evidence in the court of law in case of paternity dispute.

While this is legal consequence of the High Court decision, here are some social

impacts of the decision. A group of Indian citizenry is discontent with the decision because they think that now some people will demand the use of DNA test in other cases to prove adultery or paternity fraud creating harassment and social tension. Importantly, all of these cases will psychologically affect the child in question. In Indian society where woman's single parenthood is yet to recognize, where a child without father's identity is treated as illegal and huge social stigma is attached with it, when a mother cannot be a legal guardian for admission in educational institutions and for many purposes, the children with such disputes will psychologically suffer a lot. Not because of their own fault but because of their parents, their social position, respect and security will be affected.

The other group says there is no problem with introducing DNA test result as evidence in child maintenance cases. Rather not allowing DNA test in such dispute will create double standard, as already in criminal justice system in rape and child born out of rape cases DNA test is allowed to determine the criminal's identity and child's paternity. Hence, there is no logic in denying the benefit of the same scientific test when a woman is alleged to commit adultery and the evidence is claimed to be present there for the world to see in the form of a child. If in such dispute DNA test is not allowed, it will be a harmful endeavor to hide the social truth of adultery in Indian society. Also there is no logic in preventing a child from uniting with its biological father in the name of preventing psychological effect on the child.

The writer is an advocate of the Supreme Court of Bangladesh, is currently with the Centre for the Study of Law and Governance, JNU, New Delhi.

RIGHTS investigation



Consumer rights and Bangladesh Constitution

SYED GHOUSEZZAMAN HAIDERI ALI

A consumer is a person who purchases goods and services for his own consumption and not for resale. It is very difficult to bring together all the consumers to form an association but Bangladesh has formed a Consumers association which is known as the "Consumer's Association of Bangladesh" (CAB). CAB is performing a great role for upgrading the rights of the consumers though it is facing great obstructions and oppositions. Moreover the Consumer's protection Act is expected to be passed very soon.

Presently, what we need is to establish the rights of the consumers. People are not aware that they have so much right as consumers. The establishment of Consumer's Association of Bangladesh (CAB) has recognized consumer's rights to a great extent. After the enactment of the proposed Consumer's Protection Act, the rights of the consumers will be established further. We need to upgrade the consumer's rights even more. Consumer's rights should be raised to the status of fundamental rights of the citizens. Consumer's rights should be declared by the state to be amongst the fundamental rights and fundamental principles of state policy.

Consumer's rights ought to be inserted in the Bangladesh Constitution as fundamental principles of state policy and also as fundamental rights. Fundamental principles are contained in the Part-II, that is from article-8 to article-25, of the Bangladesh Constitution. Fundamental rights are contained in the Part-III, that is from article-26 to article-47, of the Bangladesh Constitution.

Consumer's rights are very closely related to the fundamental rights and fundamental principles of the constitution.

Article-15 (a) of the constitution indirectly touches the consumer's rights.

Article-15 It shall be a fundamental responsibility of the state to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material living of the people, with a view to securing to its citizens,

(a) The provisions of the basic necessities of life, including food, clothing, shelter, education and medical care.

Since the above-mentioned article is very similar to the consumer's rights, therefore, consumer's rights can be inserted by putting direct sentences in the fundamental principles by amending the constitution. Article-15 has sub-articles a, b, c and d. In article-15, sub-article 'e' can be added.

Article-15 (e) provides as follows:

Article-15 (e) It shall be a fundamental responsibility of the state to ensure the protection of every citizen as a consumer.

In the chapter of fundamental rights, article-31 deals with the right to protection of law.

Article-31 To enjoy the protection of law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Bangladesh and in particular no action detrimental to, life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Since the above-mentioned article deals with the right to protection of law, therefore, here the right to protection of law of the citizen as a consumer can be inserted by amendment. In article-31, article-31 (i) can be added. It can be as follows:

Article-31 (i) It is the inalienable right of all the citizens of Bangladesh to have the right to protection of law as a consumer.

Therefore by including the consumer's rights as fundamental rights in the constitution, the consumers can have recourse to the article 102 of the constitution. According to article 102, a citizen has the right to move the High Court Division of the Supreme Court to enforce his fundamental rights, when no other equally efficacious remedy is available to him. This is known as the writ jurisdiction of the High Court Division.

Thus, by including the consumer's rights in the lists of fundamental rights of the constitution, the rights of the consumers can be enhanced and established to a great extent.

The writer is an Advocate of the Supreme Court of Bangladesh.

LAWS FOR everyday life

SHAH MD. MUSHFIQUR RAHMAN

TODAY we'll be discussing registration of marriage. People have a lot to ask about this issue and there exist lots of misconceptions around this. Is marriage registration mandatory for everyone? Who is responsible for such registration? Are marriage registration and 'court marriage' synonymous? These and lot more would be answered in this article.

The law that regulates registration of marriage in Bangladesh is the Muslim Marriages and Divorces (Registration) Act 1974. The title of the law well implies that this is meant only for Muslims and people professing to other religions are kept outside of its purview. It also suggests that the law covers registration of divorce too.

Now, who has the authority to register a marriage? A Nikah Registrar does. Due licenses for working as Nikah Registrars are provided by the government to necessary number of persons. These authorized Registrars are responsible to examine the parties for satisfying themselves as to the effecting of the marriage by examining the parties to the marriage or the witnesses before they can start on the registration process. Where the Nikah Registrar refuses to register a divorce, the aggrieved person may, within thirty days of such refusal, prefer an appeal to the Registrar. In such a case the order passed by the Registrar shall be final, meaning no questions can be raised against this decision in any court.

A marriage registration takes a lot of columns to be filled up and requires signatures of a good number of persons. It is the duty of a Nikah Registrar to fill up the columns and to obtain the necessary signatures. In the case of an illiterate person, his thumb impression would do. Thereafter the Nikah Registrar shall put his signature and seal therein.

The amount payable as registration fee is dependent on the amount settled as dowry. Ten taka would be charged as fee for the dowry of every one thousand taka. But this amount would not go beyond 4,000 taka i.e. 4,000 taka is the highest possible amount of registration fee. The fees for registration of a marriage shall be payable by the bridegroom.

On completion of the registration of any marriage the Nikah Registrar shall deliver to

the concerned parties an attested copy of the entry in the register, and for such copy no charge shall be made.

If a marriage remains unregistered, it shall be reported to the concerned Nikah Registrar, within whose territorial limit it commenced, within fifteen days of such marriage. The person solemnizing such marriage would be responsible for such reporting. In case of otherwise, he will be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred taka, or with both.

Now, why registration is necessary? Is it a prerequisite for the validity of a Muslim marriage? Let's start with the answer of the latter one. No, it is not a prerequisite. So a Muslim marriage without registration is valid in the fullest sense of the term. Registration of marriage makes it easier to prove the existence of a marriage and ease the realization of legal rights, of both husband and wife, ensued from a marriage. Unregistered marriages, on the other hand, can easily be clouded with uncertainty and leaves open an opportunity to get away with foul play. It is also a strong deterrent to child marriages.

We talk a lot about court marriage and often associate it with elopement. Courts, as a matter of fact, have nothing to do with the solemnization of marriages. Actually parties to an elopement go to the court to make an affidavit. It is nothing but a written declaration made under oath before an authorized person (e.g. magistrate). The declaration in the case of elopement would invariably state that both the parties fulfill the age limit required by law and they have married each other completely voluntarily. Elopement is often followed by kidnapping charges against the bridegroom. An affidavit can pay dividends in the event of such criminal accusations.

It can well be argued that if registration of marriage is so good then why it should not be made applicable irrespective of religion. Mandatory marriage registration for everybody will reduce the hassle in proving a marriage in the court of law and in turn reduce the duration of a suit. Greater awareness is to be created for such reform and meantime to yield the benefits of existing provisions of law.

The writer is advocate, member of Dhaka Bar Association.

REVIEWING the views

Right to land -- way to poverty reduction

MD ABDUL KADER

ON 10 June in 1985 thousands of landless peasants congregated at Ghugudaha Beel in Santhia upazila under Pabna district to establish their right on the khas land. They have been raising their voice and fighting for the land right since long. On that day they made a final showdown and naturally there occurred a class of interest with the illegal occupiers of the khas land. Some sacrificed their lives, many sustained injuries, but they succeeded in establishing their right on the Ghugudaha khas land. Since then 10th June is observed as Land Rights Day in our local Bangladesh context. And since then Samata, the NGO that led the movement, has been successful to organise the landless poor to establish their right on khas land and water bodies at many places across the country.

But much more is yet to be done in their context. And that has to be done unitedly by the government, NGOs and civil society, because empowerment of the poor and ultra poor can lead to poverty reduction more than any other efforts in our largely agrarian society.

In Bangladesh, about half of the total population is still deprived of any income, share of resource, education, healthcare and social security. These people are becoming gradually poor and from poor to hardcore poor in the unequal socio-economic political race. Such unwanted race has been caused due to unequal distribution of natural resources including land. It is becoming very difficult for the poor to survive in this race not to speak of winning it. Consequently, the discrimination between the rich and the poor is increasing in the proportion of a mountain. At the village rural slums are proliferating on the other hand high rise skyscrapers are changing the urban skyline. This does not indicate actual or desired progress of a state or nation.

Therefore, the causes of poverty will have to be eliminated from the society to initiate actual progress. The unequal distribution of resources and economic discrimination will have to be reduced and the rights of the landless poor established thereupon. Land is still the base of our greater society, economy as well as culture. Land is a principal element of our socio-economic structure, source of power and means of production. So the poverty reduction effort should better start from land. The following need to be done for establishing the rights of the landless poor which will ultimately lead to poverty reduction and sustainable development of the country.

Government delegated 'District and Upazila Agricultural Khas Land Distribution Committees' should be activated inducting there committed people from real peasant organisations and NGOs involved in land issues along with government bureaucrats and a taskforce should be formed for speeding up the distribution.

The law on selling non-agricultural lands in the municipal area which the government had passed in 1995 has to be repealed for rehabilitation of the slum dwellers in the city and other public development works. Government initiatives to sell such lands must be stopped. Rather the government should take initiatives to recover all the government lands in the municipal area from illegal occupiers.

The khas water bodies-- pond, haor, baor etc-- which lie across the country need to be recovered and redistributed to the real fisher folks. All the difficulties relating to water bodies legal distribution need to be removed. The real fishermen who are inherently involved in fishing and real cooperatives should get priority while leasing out water bodies.

All the char lands (accreted from river or sea) have to be included in the khas khatian by changing the existing procedure if needed and redistributed to the real landless poor. The 'Diyaara Survey' needs to be conducted in the char areas. Those not living in the char areas should not get khas land there. A separate 'Land Management for Char areas' needs to be put in place. The land administration should give DCR to the landless poor prior to cultivation season.

A well accepted 'National Land Use Policy' should be formulated for systematic and optimum use of land. All the reforms regarding land and agrarian issue should be people-centred repealing all the discriminative laws therein.

It is very important to engage property trained, experienced and qualified persons in land survey and mapping works. A magistrate should be present in the field during the survey and mapping works. A temporary magistrate's court must be set up in the field during survey works. Contract basis survey and mapping works should not be continued.

Exemplary punishment should be introduced for those who make false documents and deeds of land ownership to grab land depriving the real and owners. Those khas lands which have already gone to the land grabbers through false documents should be recovered and redistributed among the real landless.

It is necessary to strictly maintain the ceiling



and recover the ceiling surplus lands and redistribute it among the landless.

It is also necessary to amend the ceiling based on present context, productivity and crop diversification. The ceiling may be reduced to 15 acres and the absentee ownership of agricultural land abolished.

It is necessary to strictly implement the share-cropping law. The system should be modernised and policy formulated to establish the rights of the sharecroppers.

A separate 'Land Commission' for indigenous people who are living in the plains should be instituted to retain their land ownership. A constitutional recognition has to be provided to them. The communal ownership of the indigenous people has to be respected and all the initiatives to build so-called eco-park, dam, base etc. that may go against it should be stopped.

The number of small peasants may be increased through reducing the number of big farmers while the migration to the cities can be stopped through creating agro-based income opportunities in the villages.

In most cases government depends on local marriage registrars (village kazi) to identify the inheritors of property. A well accepted system to identify inheritors of property should be developed to avoid present difficulties.

A district based 'Special Court on Land Issues' needs to be established while the Vested Property Act should be repealed.

The local government should be strengthened to make the khas land distribution easy, speedy and well accepted.

Those laws which discriminate against women in respect of rights of inheritance, ownership and control of property must be repealed and ownership rights promoted for women including joint ownership and co-ownership of land.

The functions of record keeping and registration have to be brought within a single, executive process at the field level, i.e. Tahsil office and Sub-registrar office both should come within the jurisdiction of the single executive officer, say, Assistant Commissioner (land).

The Bengal Tenancy Act, East Bangla Non-Agriculture Tenancy Act, Bengal Permanent Settlement Act, Bengal Regulation Act, Transfer of Property Act, SAT Act, Survey Act, Registration Act must be amended, for implementing proper justice in present context.

The writer is Executive Director of Samata, a NGO.