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## **Land Rights of Indigenous People in CHT: An Unsettled Issue**

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## **DECLARATION**

Except for a few references and summaries that have been properly acknowledged I, Md. Nakib Hasan Khan, solemnly declare and proclaim that this research is completely my own work. The purpose of this research is to fulfill my undergraduate degree, as it is a requirement for graduation.

# **Land Rights of Indigenous People in CHT: An Unsettled Issue**

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## **Abstract**

One of the unsettled issues in the Chittagong Hill Tracts (CHT) is the land dispute. They have been deprived of land rights often in many ways. And this deprivation has been getting more day by day. There are reasons behind it. We know that the land administration system, cultivation system, ownership and possession system of the CHT all are totally different than the other areas of Bangladesh. That's why their customary laws regarding land rights are not consistent all the time with our Constitution or the laws. So, that's how the land disputes arise basically. There are some loopholes in "the CHT Peace Accord" and its subsequent statutes. Two writs were filed challenging those laws and 'peace accord' is unconstitutional. In these laws or 'peace accord' a few issues were upheld for the CHT indigenous people. Even our govt. does not recognize them yet and have not enacted any special provision for them so that they can get rid of the deprivation of land rights. In this thesis paper consisting four chapters I tried to uphold the background history of the unsettled land rights issue, behind the reasons that the indigenous people in CHT have been depriving of their land rights, the inconsistency with the CHT customary law with the Constitution of Bangladesh or statutory laws as well as I tried to uphold what kind of international obligations Bangladesh has towards the indigenous people of the CHT. At last, I added a recommendation section where I tried to say that why we should acknowledge them and how their land rights should be ensured.

# 1. Introduction

In 1971 Bangladesh achieved her independence. From the very beginning Bangladesh intended to become a unitary state based on her same culture. The Constitution of Bangladesh doesn't ever recognize the culture that the tribal indigenous people<sup>1</sup> of the Chittagong Hill Tracts (CHT) have been holding for a long time. The Chittagong Hill Tracts is consisted with Rangamati, Bandarban and Khagrachari and home of eleven ethnic tribal groups.<sup>2</sup> They have been demanding their cultural recognition, their separate cultural identity. The indigenous people of CHT want their region as an autonomous province as they have a distinct identity and traditional practices which are totally different than the people of other areas of Bangladesh. They were opposing Bengali settlement at the early stage.<sup>3</sup> To achieve their demands they had formed an armed force which is a huge threat for the sovereignty of our state. So, the protection of the sovereignty is necessary as well as ensuring the land rights of the people of the CHT. And it's been delaying for a long time. The protection of CHT indigenous people is still being questioned and their land rights as well. So, it is high time to take some necessary steps to protect our sovereignty at the same time ensuring their land rights as well. Through this thesis paper we can find out the reasons that why the indigenous people of CHT are deprived of getting land rights, the loopholes of existing laws as well as we can understand what kind of measures should be taken by our government to ensure the land rights of the indigenous people of the CHT.

In the first chapter of this thesis the background history of land rights dispute of the CHT and the existing land administration system of the CHT are upheld. Here we can find out the major differences of the land administration system of CHT and the other areas of Bangladesh. The second chapter of this thesis paper upholds that what kind of land rights is guaranteed in the Constitution of Bangladesh and the dissimilarities between statutory law and customary law of CHT indigenous people regarding land ownership system. From this we'll also find out the problems that have been facing by the CHT indigenous people because of their inconsistent customary law with our Constitution. The third chapter of this thesis paper upholds the loopholes

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<sup>1</sup> There's no official recognition the tribal people as indigenous people from the government of Bangladesh. Bangladesh has no international obligation to recognize the tribal people as the indigenous people as well.

<sup>2</sup> Naima Haider, 'Indigenous Peoples of Bangladesh and the Chittagong Hill Tracts Peace Accord: A case of District and Disintegration' (2006).

<sup>3</sup> K.C. Saha, 'The Chittagong Hill Tracts Peace Accord: A Land Mark Model for a Viable Solution to the Refugee Problem' (1999)

of “The CHT Peace Accord 1997” and its other subsequent legislations. In the fourth chapter we’ll know the international obligations of Bangladesh towards the CHT indigenous people and at last the recommendations.

### **1.1 Research Question**

What legal factors are disrupting the land rights of the CHT indigenous people?

### **1.2 Scope of the Study**

The general purpose the study is to analyse the whole CHT administration system and how its causing defilement to the land rights of the indigenous people of CHT. During the study I have to tried address the administration structure and how its laws are maintained with our constitutional validation. Along with those, I’ve also covered the loophole in the “Peace Accord” & its subsequent laws and highlighted whether the obligations under international law in Bangladesh exist or not.

### **1.2 Limitations**

The purpose of this thesis was to finding the loopholes in the existing laws & the CHT land administration system. Due to the nature of the topic and to collect this bunch of information in such a short time, this thesis was based on several research papers & journals.

## **2. Methodology**

This study uses a qualitative technique to conduct an exploratory study. The study's analysis relies on both primary and secondary data sources, including "The Chittagong Hill Tract Regulation, 1900," the Constitution of the People's Republic of Bangladesh, "The Hill Tract Regional Council Act," "The Hill Tract Peace Accord," and "The CHT Districts Council Act." Secondary data was gathered through analyzing the content of numerous literatures, scholarly papers and documents on the issue. These documents included important information. "The CHT Regulation 1900," "The Hill District Council Act," "The CHT Peace Accord," relevant circulars and instructions issued by the Ministry of CHT Affairs and Ministry of Land from time to time, online articles, e-books, notes, and other sources were studied.



### 3. The CHT Overview

#### 3.1 Historical Background on the Land Rights Controversy in the CHT

**I) Pre-Colonized Period:** Before being colonized the CHT area was administrated differently than the other parts of Bangladesh. That means the plain area. There were two different developments in between the hill tracts area and the plain area. So, the land administration of those sides was also different since that time. The maximum portion of CHT was belonged to Chakma Raja and Bohmong Raja but there were some other small groups of indigenous people who used to reside in the remaining part of the CHT.<sup>4</sup> So, basically the land rights or the land administration was handled by Chakma and Bohmong Raja. Later CHT was administered The Mughal Emperor.

**II) Mughal Period:** This era is the first chapter in the history when CHT got colonized. At that time indigenous people of CHT paid land taxes voluntarily on an irregular basis in terms of cotton to the Mughal Governor of Chittagong and thus this way indigenous people of CHT got colonized.<sup>5</sup> Mughal emperor accepted the customary law that was adopted by the indigenous people as the paramount law for their administrative purpose.<sup>6</sup> But we can see that there was no direct influence from Mughal emperor.<sup>7</sup> Indigenous people were administered by their own customary law i.e. land law, land tax etc. So, the Mughal emperor hardly imposed land laws on them.

**III) British Period:** After the fallen down the Mughal emperor the Bengal had been annexed by the British East India Company in 1757. For including Chittagong Hill Tracts area within their control British started a military campaign in 1776 but they were resisted strongly by the Chakma Raja.<sup>8</sup> The fighting continued for a decade and for that British imposed an economic blockade cutting off essential supplies to the hilly area.<sup>9</sup> Having no other option Chakma Raja entered into a treaty of peace with British that Chakma had to pay land tax to British for the right of trade.<sup>10</sup> Later British imposed land tax on the indigenous people of CHT. That was

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<sup>4</sup> Raja Devasish Roy, Land and Forest Rights in the Chittagong Hill Tracts, Bangladesh (ICIMOD 2002)

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Ibid

instrumental just for establishing British authority over hill tracts area but British did not interfere in their internal land administrative issues.<sup>11</sup>

For the convenience of their ruling British brought some changes in land administration of CHT as this area was administered differently than the other parts of the State. They reshaped the land revenue system as well as they enacted *the Chittagong Hill Tract 1900*<sup>12</sup> for land administrative and legislative reformation issue. Local administration was controlled by indigenous people and economy was controlled by the plain men who were below 2% of the total population.<sup>13</sup> *The CHT Regulation 1900*<sup>14</sup> had a great significance. British formulated a number of administrative regulations ensuring protective means to preserve the cultural and territorial wholeness of CHT people.<sup>15</sup> The British objective was to keep the CHT as a separate entity from the plains district with its own administrative framework.<sup>16</sup>

**IV) Pakistan Period:** After the partition in 1947, the CHT was belonged to the Pakistan side. The Constitution of Pakistan recognized the CHT as “excluded area” that’s a special recognition. For that indigenous people of CHT could exercise special power protecting their land rights. Subsequently the term “excluded area” was removed in the amendment of the Constitution of Pakistan in 1962. “Excluded area” was replaced by “included area”. Then the CHT area was recognized as tribal area. Later, another constitutional amendment came with a list of tribal area where CHT was deleted from the list.<sup>17</sup>

**V) Bangladesh Period:** In 1971 Bangladesh had born as a new state. The CHT was not recognized as “Excluded area” in the Constitution of Bangladesh either. That means our Constitution did not give any special recognition of the indigenous people of CHT. So, they did not have any distinct identity as indigenous people but tribal. As CHT did not have any special recognition as “excluded area” that’s why outsider of CHT who’re not indigenous people got the access to live or move here. More importantly, this had the constitutional consequence of easing

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<sup>11</sup> Ibid

<sup>12</sup> Regulation I of the Chittagong Hill Tracts 1900

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Rajkumari Chandra Kalindi Roy, Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh (Centraltrykkeriet Skive A/S 2000)

non-indigenous people's access to the hill tracts, i.e. opening it up to outside colonization.<sup>18</sup> In practice, this allowed non-indigenous people to access the hill tracts and purchase land.<sup>19</sup> Thus this way many indigenous people of CHT are losing their ancestral land basis on formal law. Their land rights still are not protected yet. However, the Regulation 1 of *The Hill Tracts Manual 1900*<sup>20</sup> remained in effect and lands were not distributed to plainspeople indiscriminately.<sup>21</sup>

In the plain area other than the CHT area the ownership system is based on individual or personal ownership where written law is followed to transfer or dispose the land. On the other hand, in the hill tracts area the ownership system is based on collective ownership system. Oral customary law is followed to administer the land rights related issue. The “jhum land” is considered that it belongs to the society. So, rights over jhum lands are considered as common right. And the land where the indigenous people live making house that homestead land is vested on indigenous people as individual rights. As a whole the ultimate ownership of the land is society. So, common rights shall prevail in CHT when there arises a land issue. So, the difference regarding land issue remained unsolved between the CHT area and plain area. *'Hill Tract Peace Accord, 1997'* was signed to solve the land dispute in CHT for the indigenous people but this accords a little could address land related issue. Several additional legislations such as *The CHT District Council Amendment Acts 1998* and *The CHT Regional Council Act 1998* have been established in accordance with the 'Accord' to govern land related issues and other land administrative laws for ensuring land rights of the indigenous people in CHT. In the next section of the chapter, we'll know the administration system in the CHT.

### **3.2 CHT Land Administration Scheme**

Land Administration was established when the British held control of the Chittagong Hill Tracts and consisted of several authorities. Since the CHT were once part of East Pakistan, it was annexed by Bangladesh following independence. Different regimes enacted land policies for the region that was detrimental to the well-being of the native Chittagong hill tracts people. Bangladesh is governed by a unitary administration rather than a federal government.

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<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Regulation I of Hill Tracts Manual 1900

<sup>21</sup> Rajkumari Chandra Kalindi Roy, Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh (Centraltrykkeriet Skive A/S 2000)

Nonetheless, the legal and administrative systems in the CHT are distinctive from those in other regions of the country.<sup>22</sup> In 1900, the British passed *the CHT Regulation*<sup>23</sup>. *The CHT Regulation, 1900* was amended many times in between 1971 and 1979.<sup>24</sup> This rulebook served as a safeguard for the self-determination of administrative, judicial, and legal measures in CHT which were implemented through procedural mechanisms. But its layered structural process has been causing several complexities since its inception.

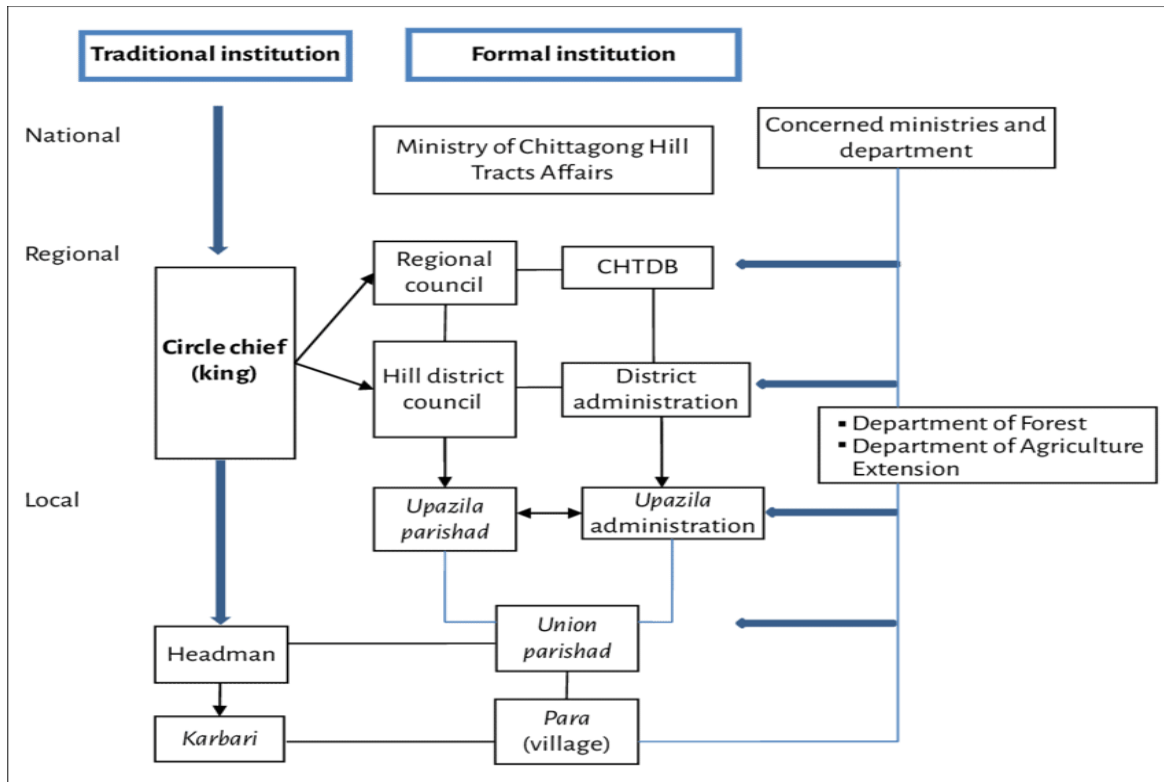


Figure 6.4 Institutional framework related to forest and land management in the Chittagong Hill Tracts region of Bangladesh.<sup>25</sup>

<sup>22</sup> Raja Devasish Roy, *The Land Question and the Chittagong Hill Tracts Accord* (Victoria Tauli Corpuz et al (eds.) 2000)

<sup>23</sup> *The Chittagong Hill Tracts Regulation, 1900.*

<sup>24</sup> Regulation I of the Chittagong Hill Tracts Regulation was instituted by British colonizers to safeguard the varied culture and indigenous population from foreign intruders (Roy R. C., 2000). On May 1, 1900, this regulation became effective. This regulation granted special status to the Chittagong Hill Tracts. The CHT became a part of independent Bangladesh after the liberation war of 1971 (Chakma P. , 2020). When political turmoil erupted in the CHT in 1989, the military junta established local government councils at the district level (via Acts 19, 20, and 21 of 1989) and overturned the CHT Regulation (Act XVI of 1989) by passing unconstitutional legislation (Roy R. C., 2000).

<sup>25</sup> Data from GoB and FAO (2013)

Usually, the land has been separated into distinct groups based on the mode of usage, management and revenue has been distributed to the indigenous administrations appropriately. Each territory of the CHT was split into taluks (later mauzas) and controlled by indigenous officials who were in charge of local entanglements adjudication.<sup>26</sup> Land in CHT is now governed by the district administration, DC (Hill District Council) and the conventional Circle Chief's authority.

The Karbaris<sup>27</sup> at the village level, the headmen at the mauza<sup>28</sup> level (a mauza encompasses numerous villages or hamlets), and the Circle Chief<sup>29</sup> or raja at the circle<sup>30</sup> level make up the traditional government of the CHT (consisting of several mauzas).<sup>31</sup> They are responsible for formulating all policy concerns in their units and wield control in the territories under their jurisdiction. The major responsibility of the karbari is to officiate over social activities and administer traditional justice in accordance with traditional law.<sup>32</sup> While The headman is in charge of resource management, land and revenue administration, law, order and justice administration as well as serving as an adjudicating body over the karbari's judicial powers. The position of the headmen is a natural continuation of their job in that; first, the deputy commissioners (DCs) are required to consult the chiefs on "critical problems affecting the administration of the Chittagong Hill Tracts". As a result, the headmen are consulted as the chiefs' spokesmen at the mouza level. Hill people hold most headmen's posts, and succession is

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<sup>26</sup> The British split the CHDs into administrative entities called mouzas, which superseded the taluk system (Roy R. C., 2000).

<sup>27</sup> The karbari is the traditional leader or chief of a hamlet or village, generally an elderly man. Although the post was initially elected by the people themselves (the Chakma claim they "raised a karbari"), it has since become nearly hereditary, with the chief as the final appointing authority. There are no women's karbaries today (Roy R. D., Case of the Chittagong Hill Tracts, 2004).

<sup>28</sup> A mauza is a cluster of villages. In Bangladesh, the mauza is a land and revenue management unit with clearly defined geographical limits (Roy R. D., Case of the Chittagong Hill Tracts, 2004). The mauza is a unit of civil and judicial administration as well as a unit of revenue administration in the CHT, and it is led by a headman (Roy R. D., Case of the Chittagong Hill Tracts, 2004).

<sup>29</sup> Unless there are exceptional circumstances, the circle chief's choice (typically a son of the previous incumbent) is supported by the Deputy Commissioner. The CHT's 380 mauzas are part of one of the three chiefs' or rajas' administrative and revenue "circles,"<sup>25</sup> as well as one or more of the three districts of Rangamati, Khagrachari, and Bandarban (Roy R. D., Case of the Chittagong Hill Tracts, 2004).

<sup>30</sup> The Chakma Circle (179 mauzas; 2,421 square miles, including 763 square miles of reserved forest), the Bohmong Circle (97 mauzas; 2,064 square miles, including 620 square miles of reserved forest), and the Mong Circle (100 mauzas; 653 square miles, with no reserved forests) are the three 'circles' (Partha, 2005).

<sup>31</sup> Traditional administration in the Chittagong Hill Tracts (CHT) (Barkat, Halim, Osman, Hossain, & Ahsan, 2010).

<sup>32</sup> Roy R. D., Case of the Chittagong Hill Tracts, (2004)

largely managed in practice through male heirs' inheritance. The chiefs have the authority to advise the deputy commissioners, hill district councils, the CHT Development Board (a statutory organization), the Ministry of CHT Affairs and monitor the operations of the headmen.

The following chapter examines one of the constitutional guaranteed rights that's the right to property which safeguards people' rights. The thesis argues that without establishing and addressing constitutionally protected rights to property; optimal, fair and sustainable land use in the CHT may not be attainable. And land conflicts may not be resolved in a way that ensures justice.

## **4. Land Rights of the Indigenous People in CHT**

Land rights have been protected by our Constitution. Any activity that infringes on this right is prohibited. In this section the type of rights that have been guaranteed is examined with an emphasis on the CHT region. The next sections explore the difficulties in determining rights as well as the lack of constitutional recognition and its consequences.

### **4.1 Constitutional Recognized Right: Land Rights**

Property rights or land rights and its safeguards are protected by the Constitution. **Article 42(1) of Part III of the Constitution** states that everyone has the right under the law to own property, transfer it or otherwise dispose of it and this right is not impaired by administrative orders.<sup>33</sup> Aside from that, the term 'restriction' must be understood to exclude the words 'prohibition' or 'extinction'<sup>34</sup> therefore the principle holds that parliament cannot ban or extinguish the right to property by imposing a restriction on it.<sup>35</sup> Furthermore, the word 'reasonable' is not used to qualify the term 'restriction.' Furthermore, this does not imply that parliament has unrestricted authority to set any restrictions it sees fit. **Article 31** of the Constitution protects the right to property stating that no law can be made that interferes with it. As a result, if the word 'reasonable' had been included in this article, any legal restriction would have been scrutinized

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<sup>33</sup> Raj Kumar Behani vs Bangladesh, 1995 BLD 633

<sup>34</sup> Mahmudul Islam, Constitution Law of Bangladesh, third edition, Mullick Brothers.

<sup>35</sup> IBID

more closely.<sup>36</sup> The combined consequence of **Article-31** as well as **Article-42** is that every purchase, seizure, or public ownership of land must be for a public interest in order to be valid under **Article-31** unless this satisfies a legitimate state interest. Forcible purchase or nationalization of properties can only be used to revoke property rights according to **Article 42(1)** and the acquisition of property under any statute cannot be disputed.<sup>37</sup> As a result, our Constitution guarantees all citizens the right to property and protections.

On the other hand, the CHT contains the inconsistent. **Article 26(1) of the "Peace Accord"** stipulates that every transfer or bought land entails the consent of the District Council (DC).<sup>38</sup> Furthermore, **Section 64 of the Hill District Council Act,1989** that's amended by **Act 10 of 1998** prohibits the transfer or acquisition of land in CHT without the authorization of appropriate HDC (Hill District Council). The Hill District Council may have been given unrestricted jurisdiction over land administration as a result of this. In contrast, in other parts of the country no such approval is necessary from any official by establishing a separate legal entity. This attitude is definitely causing a divide between those indigenous people who are residing in the CHT side and those who are living in the other parts of Bangladesh.

In light of this foregoing issue and constitutional position, the embargo and restrictions may be deemed illegal and in violation of **Articles 42, 31 and 36** of our Constitution. The '**Peace Accord**' makes land ownership as an obligatory prerequisite for non-tribal persons seeking resident status<sup>39</sup> in the CHT. Because the limitations are imposed specifically in CHT area, it can cause divide among Bangladeshi residents. As a result, the motto of the unitary state established by our constitution may be undermined by the inclusion of the aforementioned provision in the agreement.

**Rule 51 of the CHT Regulation** which is relevant deserves special attention. **Right to mobility** is one of the important aspects of liberty since it allows an inhabitant of a country to move without any restrictions. It is his right to live anywhere he wants & work wherever he wants as long as he wants to be connected to a source of income. The presence of a legislation after the

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<sup>36</sup> IBID

<sup>37</sup> M.A.Salam v Bangladesh, (1995) 47 DLR 280

<sup>38</sup> The obligation of prior consultations [with] and consent of the HDCs for forced purchase of lands, hills, and forests in CHT by the government is stated in Clause 26(2), Section B/Kha of the Accord.

<sup>39</sup> People who are not indigenous people residing in hill tracts area and owning hilly land lawfully, they are recognized as "non-tribal permanent resident."

Constitution's passage does not raise the issue as to whether it is unconstitutional or not. Is it true that this clause was preserved in order to create a completely autonomous and self-regulating territory where no one has more rights than a few? Isn't it a breach or disrespect of one's right that is recognized by our constitution which is freedom to relocate and live at anyplace one pleases? Is it permissible to purchase land in the hilly area if the written above conditions remain?

It's safe to presume that **Rule 51 of CHT Regulation** is unconstitutional because it violates one's right to mobility. Apparently, our constitution does not allow for an excluded defined territory that restricts citizens' freedom of movement and their constitutional right to live anywhere they want. If such a provision is supported the state's unitary system may not be considered. As a result, maintaining such a clause can't be considered as constitutional.

**Chittagong Hill Tract Regulation, Rule 51** states that if the deputy commissioner believes that the appearance in the district of any individual who is not a native of the district is or may be harmful to the district's peace or good administration, he may, for reasons to be properly recorded, order such person to exit the district within a certain period of time if he is within the district, or forbid him to enter if he is outside of the district. Anyone who disobeys or non-compliance with any order issued under this rule is subject to a sentence of imprisonment up to two years, fine or both.

The validity of **Rule 51 of the CHT Regulation** must be examined to see if it violates the constitution's protection of freedom of movement. The High Court deemed the rule unconstitutional in the *Mustafa Ansari vs. Deputy Commissioner*<sup>40</sup> case because it does not specify how long an order issued under it will remain in effect. As a result, the Deputy Commissioner can misuse his power. He can detain someone indefinitely on basis of no ground. Furthermore, this provision contains no checks or safeguards against arbitrary power exercise. It is evident that it is in conflict with the Constitution's '**Right to Movement**' and might be considered a roadblock to establishing the right to land. Despite this, the CHT Regulation still contains this requirement.

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<sup>40</sup> Mustafa Ansari vs Deputy Commissioner, 1966 PLD 589



The indigenous people in CHT consider private ownership only when they live in a particular land building a house. They use their land for cultivation as well. Traditional land use practices among ethnic groupings in the region include shifting farming. Slash and burn agriculture, also known as '**Jhum cultivation**' locally is a common land use form in CHT.<sup>41</sup> Those lands are considered as collective ownership. The indigenous people believe that those lands are belong to their society and they have usufruct right.

As a result, a registered document of land ownership is not required for such a title. Furthermore, according to **Article 42 of the Hill Tracts Regulation of 1900** the CHT indigenous people did not need to own land in order to use it. The above-mentioned belief and legal framework may justify Jhum cultivation in the CHT Region. However, one issue with Jhum cultivation is determining whether land is occupied or unoccupied that could be one of the reasons for land conflict. Because, it is really tough to know that who're working in that land for jhum cultivation and whether it's occupied or not.

The hilly people, on the other hand argue that land rights are held by bigger communities who have been using lands in a certain area rather than by individual producers. They have to change the land that already been used as jhum cultivation as there's no individual ownership system. As they don't have any fixed land so they can't jhum on a particular land all the time and they can't be considered as individually owner of a particular land that's what government leaders also claim. They claim that as indigenous people in CHT are moving farmers so, they don't have fixed land to cultivate and all those lands are belonged to their community. So, there's no particular acknowledgement of this jhum cultivation system. If the government recognizes this jhum cultivation system then government indirectly will recognize collective ownership system of CHT indigenous people. But we know that in our Constitution does not recognize collective ownership system.

If communal ownership is acknowledged then issue of occupied and unoccupied land could become even more complicated in the CHT Region's land dispute settlement. The reason for this is the **Hill Tract Regulations** provides '**khas land**' that will not be given to anybody unless the local headman certifies that the area is vacant. As the change of land in farming or 'Nomadic'

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<sup>41</sup> Ranju Ahammad and Natasha Ellen Stacey, Forest and agrarian change in the Chittagong Hill Tracts region of Bangladesh, January 2016

cropping process there may be some difficulty in determining occupied versus vacant land. If the "nomadic" Jummas are resolved and particular land restrictions are enforced on 'Jhuming,' this condition may clash with indigenous peoples' customs.

*The CHT Regulation 1900*<sup>42</sup> gives the discretionary power to the Deputy Commissioner to control as well as regulate the “jhum” cultivation system. With the permission of Deputy Commissioner indigenous people can do jhum cultivation on a particular land. Still now this rule exists in **the CHT Regulation 1900**. So, if he wants he can stop jhum cultivation on a particular area showing a reasonable cause. His decision is the final decision here. So, there’s a huge chance to misuse the power. In *The CHT Regulation 1900* there’s no rule or provision to arise a question against Deputy Commissioner’s decision. So, the issue is still unsettled that if Deputy Commissioner can restrict on a particular land for the lifelong time or not. On the other hand, State does not recognize the “jhum” cultivation system as State does not recognize the collective ownership system. So, if State recognizes the “jhum” cultivation system then State has to recognize the collective ownership system. There arises a great complexity regarding the “jhum” land whether government should recognize the “jhum” cultivation for ensuring safety regarding CHT lands or not. If government recognizes it then what kind of ownership shall be considered by the govt. Without solving the issue regarding “jhum cultivation system” and “collective ownership system” the land dispute in CHT will never be ended.

However, if these constitutional issues are not resolved then the controversy regarding land rights for indigenous people in the CHT never end. Our constitution is considered as the paramount law of the state, guarantees property rights and protects all citizens. **Hill Tract Regulation, Hill Tract District Council Act and Hill Tract Regional Council Act** are among the legislation that restrict CHT's entitlement to property. The cardinal point of land confliction would come to a halt unless the questions were resolved.

## **4.2 Confliction of the Land Ownership System in the Existing Laws**

The importance of land in the lives of the people of the CHT cannot be overstated. They consider themselves to be sons of the land and forest because they were entirely reliant on it. They

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<sup>42</sup> Article 41 of the Chittagong Hill Tracts Regulation 1900 (Regulation I of 1900)

wouldn't be able to subsist if they didn't have land. Their identity sometimes depends on land. Generally, there are two types of systems as regard to land ownership.<sup>43</sup>

The CHT indigenous people consider their lands belong to their society. They believe in common ownership which is not recognized in the Constitution of Bangladesh. Oral law is practiced in the CHT region not the written law. Current government land registration system is not similar like CHT indigenous peoples' customary law. Land used for living is considered personal property by the Chakmas, although properties outside of their habitats are owned collectively. According to their customary law anyone can build house on a land without having legal papers. Land ownership and use are also seen differently by different tribes. A land cannot be used for cultivation in the Chakma community if it has already been exploited by someone else. Children and land are considered gifts from nature by the Khyang people. On any piece of land everyone has an equal share.

Despite improvements in socioeconomic conditions, tribal peoples' views on land rights, including use remained steadfast. To use land, one does not need to own it according to **Article 42 of the Hill Tracts Manual 1900**. As a result, indigenous people did not see the need for documentation of the territories they occupied. They used to reside and cultivate on their lands without having to go through the legal way and they were able to obtain more holdings as needed by simply paying land taxes to their circle chiefs. This is a fundamental concern in the settlement of land disputes because the failure to exhaust legal requirements produces problems in determining rights.

Customary law (**Hill Tract Regulation, Hill Tract District Council Act and Hill Tract Regional Council Act, Peace Accord etc.**) regulates as well as administers rights and interests in land in the CHT region and customary law also includes regulations for controlling, using and administration of the property. Indigenous people think their society owns the land. The land is intended for them to utilize for the rest of their life but it must be protected for upcoming generations. According to the fact-finding mission report to CHT by the CHT Commission<sup>44</sup>:

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<sup>43</sup> Brigadier General Md Sarwar Hossain, BSP, SGP, hdmc, ndc, psc, CHITTAGONG HILL TRACTS (CHT) LAND ISSUE: CHALLENGES AND WAY AHEAD

<sup>44</sup> 'Life is not Ours', The Report of the Chittagong Hill Tracts Commission, May 1991

*“In the land system in the Hill Tracts, hill people could only subsist from their fields as a part of a community, bound in ties of mutual reciprocity. For the shifting cultivators of the Hill Tracts, land is common property, belonging to the community, kinship groups and even members of the spirit world, with individual families exercising the right to use the land - in western terms, a usufruct.”<sup>45</sup>*

In **Article 13 of our Constitution** establishes ‘**principle of ownership**’ where it is stated that ownership must be divided into three categories: state ownership, cooperative ownership and private ownership. The collective or communal ownership structure is not recognized by the Constitution. Furthermore, ‘*the CHT Peace Accord*’ does not acknowledge their concept of traditional community land ownership officially which is a core principle of the indigenous people of CHT. So, their ownership system is not acknowledged. That’s why sometimes they lose their ancestral lands due to they have no legal documents. For establishing their land rights, this issue has to be solved through legal framework in accordance with Constitution.

In the following chapter of the thesis upholds the loopholes of the ‘peace accord’ and its subsequent laws.

## **5. Loopholes of ‘CHT Peace Accord’ and Its Subsequent Other Statutes**

To establish land rights for indigenous people of CHT ‘*the CHT Peace Accord*’, ‘*the CHT Regional Council Act 1998*’, ‘*The Hill District Council Amendment Act of 1989*’, ‘*the Regional Council Act of 1988*’ these laws were enacted. But in some cases some provisions of those laws contradict with our constitutional guaranteed rights. Two writs<sup>46</sup> were filed for challenging those contradicting provisions of ‘*the CHT Peace Accord*’, ‘*the CHT Regional Council Act 1998*’, ‘*Hill District Council Amendment Act of 1989*’, ‘*the CHT Regional Council Act of 1988*’ as unconstitutional.

The argument from the two writs was like “The Peace Accord Treaty” and its subsequent statutes deny the conception of unitary state of our Constitution. But based on this conception our

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<sup>45</sup> Ibid

<sup>46</sup> Writ petition no. 4113 of 1999 and writ petition no. 2669 of 2000

Constitution's enacted. The argument also upheld that the 'Accord' violates the right of every citizen to be treated equally which is guaranteed by our Constitution.<sup>47</sup> Here by this accord the indigenous people of CHT are given an extra benefit than the plain people. According to the "accord" that is only indigenous people of CHT can exercise their land rights within their region but the non-indigenous people do not have the land rights to exercise like the indigenous people in CHT. At the same time the people of indigenous people in the CHT have the right to buy, transfer, dispose any land outside their region as well just like the other citizens of the country. So, here arises the discrimination.

Right to movement<sup>48</sup> is also a recognized constitutional right that's also been guaranteed by our Constitution. But the 'peace accord' violates this right too. It gives restrictions on plain people to move, reside and settle in the CHT area.

By those legislations, peace accord the District Commissioner (DC) got some extra powers. His decision is considered as the final decision. The CHT people still abide by those rules. DC's permission is necessary to regulate local administration of the CHT. Without govt. interference he can dispose any land case, give the permission to transfer or sell any land etc. His prior approval is must in those cases.<sup>49</sup> Giving supreme power to DC other than govt. by this accord and some other legislations is totally contradictory with our Constitution. Though these provisions are amended after our independence, those provisions can arise the complexity and inequality. Full implementation of those laws can make Bangladesh isolated and for that we can loss our unitary status that's recognized by our Constitution.

The chief of each circle grants the permanent resident to non tribal in the CHT area but the govt. has no power to deal this issue. Thus, the Peace Accord makes the inequality and gives indigenous people of CHT some extra benefits that violate our Constitution.<sup>50</sup> This came up from writ petition No. 4113 of 1999.

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<sup>47</sup> Article 27 of the Constitution of Bangladesh states that all citizens are equal before law and are entitled to equal protection of law.

<sup>48</sup> Article 36 of the Constitution of Bangladesh.

<sup>49</sup> Act No. IX,X and XI of 1998, Section 64

<sup>50</sup> Shamshuddin Ahmed v Govt. of Bangladesh and others.

In two writs, writ petition no. 4113 of 1999 and writ petition no. 2669 of 2000 it's alleged that the peace 'Accord' violates our constitutional right that's the right to property<sup>51</sup> for the people of Bangladesh without any discrimination as the outsiders of the CHT can't acquire, sell, transfer or dispose any land without the permission of the respective hill district council. Even the govt. of Bangladesh can not do so without his permission. Other mentioned legislations also contradict with our Constitution that were promulgated in the British period.<sup>52</sup> Those violate our constitutionally guaranteed rights.<sup>53</sup>

Many countries like Argentina, Brazil, Columbia either amended their Constitution/law or adopted new legislation in favor of indigenous people. That's the way to implement international norms that are represented in the international convention. The Russian Federation recognized indigenous people and under international law the Russian Federation grant human rights. Canada as well protected indigenous people by *Canadian Charter of Rights and Freedoms, 1982*.<sup>54</sup> Venezuela adopts special provisions to protect their indigenous people, ensuring their land rights. Same scenario we can see in Guatemala where indigenous people are protected by the State forming new special laws that are convenient for indigenous people. Papua New Guinea also recognizes the customary law of their indigenous people and includes those customary laws in their legal system.

Bangladesh does not show any sufficient effort to acknowledge indigenous people and adopt any special provision in the Constitution to give them their rights including land rights like other countries. According to **the Constitution of Bangladesh**<sup>55</sup>, any regulation incongruent with our Constitution is Ultra Vires. As the Constitutionality of the international agreement is as yet not chose by the legal executive the Constitutionality of different rules authorized under the Accord is still in question.

In the next chapter we'll be discussing Bangladesh's international obligation toward her indigenous people, whether Bangladesh is bound to recognize them under international obligation or not, reasons behind Bangladesh's dilemma of giving their identity and at last there will be recommendation section.

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<sup>51</sup> Article 42 of the Constitution of Bangladesh.

<sup>52</sup> Raja Devasish Roy, 'Land and Forest Rights in the Chittagong Hill Tracts'.

<sup>53</sup> Ibid

<sup>54</sup> Section 25 of the Canadian Charter of Rights and Freedom, 1982.

<sup>55</sup> Article 7 of the Constitution of Bangladesh

## 6. International Obligations of Bangladesh and Dilemma of Identity

The government of Bangladesh does not provide any special provision or protective measure to ensure the special land rights of the indigenous peoples in CHT. Moreover, Bangladesh doesn't even recognize the people living in the CHT region as "Aboriginals" or "indigenous". Moreover, the matter gets even more complicated when there's no universally accepted definition for the term "indigenous". Although, there are some anthropological concepts regarding the indigenous people and their cultures around the globe.

The puzzling fact of being certain about their identity still lingers. According to definition from the Oxford dictionary the term indigenous defines as "originating or occurring naturally in a particular place; native." Which essentially means that the precondition for any particular group of population to be called indigenous they'll have to meet the criteria of being native to that particular land, originating from there or naturally produced from there. But problem arises when further details shows that the people living in the CHT might not be verifiable as indigenous at all.

'Captain Thomas Herbart Lewin' in his historical research describes –

*'A greater portion of the hill tribes, at present living in the Chittagong Hills, undoubtedly came about two generations ago from Arracan. This is asserted both by their own traditions and by records in the Chittagong Collectorate'<sup>56</sup>*

Also, Information about the hilly peoples origin can be found in some other source e.g. Dutta J.P. published a research paper. A reliable source for finding out the true origin of the hilly people. In it he describes-

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<sup>56</sup> Captain Thomas Herbart Lewin, 'The Hill Tracts of Chittagong and the Dwellers There in' (Calcutta: Bengal Printing Company, Limited 1869)

*“Historically, the land of CHT has been inhabited by more than a dozen tribes of Mongoloid race mostly of Arakanese origin. From the later part of the 19th century, Bangalees from the plains of Chittagong started settling on the lower parts of the hills at the invitation of tribal ‘Rajas’ for introducing plough- cultivation since plough-cultivation was not indigenous to CHT.... From then onwards, ‘plainsmen’ and ‘hill men’ started living together in CHT, although the latter always formed the overwhelming majority”<sup>57</sup>*

Therefore, if the historical perspective is taken into account, then the chances are that hilly people living in the CHT won't be recognized and identified as 'Indigenous' or 'Tribal'. Mainly because the criteria for being identified as such doesn't fulfill under the historical circumstances. Based on the historical data analysis they might not pass as 'aborigines' of the CHT region. So, it is quite evident that if the parameters are set by historical records and sources then Bangladesh might be exempted from international obligations towards the CHT hilly people.

But on the other hand, if the recognition of the hilly people is determined the ILO given guidelines, then this will lead the state towards international obligations. There will be multiple obligations towards the indigenous. One of the obligations includes issues of land rights<sup>58</sup>. The procedure for the transfer of land rights among the indigenous people of CHT and those steps are to be taken to make sure that their lack of knowledge of the statutory laws and regulations does not facilitate the loss of their property or lands by non-indigenous persons<sup>59</sup>.

After Bangladesh got its independence from Pakistan and after forming a sovereign state Bangladesh did ratify convention No. 107 in 1972. Under this code Bangladesh is bound to have some obligations but Bangladesh didn't ratify ILO convention no 169 because of its dubious nature. If the definition given on this convention was agreed upon then it would have been quite troublesome for Bangladesh. The definition of the term 'indigenous' is expressed on this paper in a way that might be the cause for troubles and be puzzling for a multicultural society like Bangladesh. Later, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

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<sup>57</sup> Dutta J.P., 'Impact of Development Programs on Environment and Demographic Phenomena of the Ethnic Minorities of Chittagong Hill Tracts', 2000.

<sup>58</sup> Articles 11 to 14 of the ILO Convention on Indigenous and Tribal Populations, 1957.

<sup>59</sup> Article 13 of Convention on Indigenous and Tribal Populations, 1957.



granted some exclusive rights to the indigenous people in accordance with **the ILO convention no 169**. But since ratification was not made on behalf of Bangladesh upon this convention. Therefore, Bangladesh did not cast its vote for the UNDRIP proposal in 2007. Concluding that, Bangladesh didn't ratify the **ILO convention 169** so it makes Bangladesh free of any obligations under the said convention.

Currently, many of the official documentations and papers refer the people of the CHT region as 'Tribals'. But again, in other statutes the term "Adivashi" meaning 'indigenous' in English is in force to refer to the people living in the CHT region. They are also in some other laws are called as indigenous e.g. *CHT regulation 1900*.<sup>60</sup> There are also examples of them being labeled as 'aborigines' in some laws that are currently in practice. Also, 'adivashi/ indigenous people /indigenous hillman terms are seen being used in various government documents and Acts. Such as *Social Forest Act 2004*<sup>61</sup>, *Small Ethnic Cultural Institutions Act,2010*<sup>62</sup>, *Education Policy 2010*<sup>63</sup> as well as in other official documents. In recent times, The Govt. of Bangladesh has recognized them as ethnic minorities.

Moreover, the foreign affairs ministry has issued an order to the ministry of CHT to ensure the use of the word "Upazati (Tribals)" in place of 'adivashi'. Which is not at all welcomed by the Communities of the CHT region. In the constitution of Bangladesh, it is observed that it talks about preserving indigenous people's rights and cultures but it doesn't specify in details and how in terms of social, cultural, administrative and other sectors. Again, the Constitution of Bangladesh<sup>64</sup> states that, "The people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshies".<sup>65</sup> Again in regarding the definition of nationalism in **Article 9 of the Constitution of Bangladesh** states-

*The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a*

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<sup>60</sup> Rules 4, 6 and 52 of the Chittagong Hill Tracts Regulation 1900.

<sup>61</sup> 6(2) and (E) of Social Forest Act,2004

<sup>62</sup> Small Ethnic Cultural Institutions Act,2010

<sup>63</sup> Article 18- 20 of Education Policy,2010

<sup>64</sup> Article 6 of the Constitution of Bangladesh.

<sup>65</sup> Article 6 of the Constitution of Bangladesh.

*united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism.*<sup>66</sup>

In the above-mentioned articles, it is very evident that it ignores to recognize the people as aborigines rather it prefers to use “ethnic and minor races”. It avoids the recognition of the identities of the indigenous people of CHT region. The lack of vigilance from the government advocating their rights has created a complicated situation which may be a tough one to overcome. Proper recognition of them as ‘aborigines’ and ‘indigenous’ is needed to improve their social stand and quality of life. Otherwise, they will not get their land rights. In the next section of the chapter there’ll be some recommendations about how their land rights can be assured.

## **6.1 Recommendation**

To establish land rights of CHT indigenous people *The CHT Peace Accord 1997* was enacted. Subsequently many more legislations were also enacted but that was not enough ensuring their land rights. So, here are some recommendations to follow for ensuring the land rights of the CHT indigenous people.

(I) It is important to give constitutional recognition to the CHT indigenous people so that the CHT indigenous people can exercise their land rights properly.

(II) The proper codification of law consisting with the Constitution of Bangladesh is mandatory. So, the inconsistent provisions of those laws should be amended or omitted. *The CHT Peace Accord 1997* was signed to settle down some conflictions regarding land disputes and ensuring land rights of the CHT indigenous people. But lacking of conformity with the Constitution of Bangladesh and its complex provisions this ‘Accord’ remained as controversial. So, it’s so necessary to amend the ‘Accord’ and its subsequent litigations as well that were enacted based on it. This ‘Accord’ could address a few issues regarding land rights of CHT indigenous people.

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<sup>66</sup>Article 9 of the Constitution of Bangladesh.

(III) To ensure their land rights it's so important to acknowledge their customary laws. India acknowledged the customary law of her indigenous people though there are some dissimilarities with her Constitution.

(IV) Formal land survey should be held in the CHT region so that we can understand who is the real owner of a particular land.

(V) We should bring some special provisions for removing the backlog of cases, repealed those provisions that are inconsistent with our Constitution. Because, based on those inconsistent provisions many disputes are filed before the Court.

(VI) Court should not delay anymore to give decision on those constitutional questions that are regarding constitutionality of the 'Peace Accord' and other laws.

(VII) The govt. should repealed the statute and frame new one when the statute's found as unconstitutional by the Court.

(VIII) Political and legal issues regarding the land rights of the CHT indigenous people should be fixed by the government as soon as possible. After then we can hope that one day the indigenous people of CHT will get their land rights properly.

(IX) Bangladesh should show the sufficient effort to acknowledge indigenous people and adopt special provision in the Constitution for ensuring the land rights of the CHT people like many other countries did so. After then, we can hope that the land rights of the indigenous people will be assured one day.

## **7. Conclusion**

However, the Constitutional questions are as yet disrupted. The Court is postponing to determine these constitutional questions with respect to constitutionality of the international agreement and different regulations has been ordered in light of it. Land abrogation is a common scenario right now in the hilly areas as there's no land survey yet. That's why we can't determine one's right to ownership over a particular land. To solve all these problems and ensuring land rights for the

indigenous people of CHT the govt. should take a necessary step immediately. Without solving the political and legal issues we can't assure land rights of the indigenous people of the CHT.

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