



Land Dispute in CHT: An investigation of long standing unsettled issue of Bangladesh

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Declaration

I declare that the thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. I confirm that the thesis presented for the undergraduate program as Law- 406 (Supervised Dissertation) of Department of Law, East West University has been composed entirely by myself, been solely the result of my own work and not been submitted for any other degree or professional qualification. Any information and contents that have contributed in carrying out this research are explicitly referred and acknowledged.

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Abstract

The historical evidence shows that one of the unsettled problems of Chittagong Hill Tract (CHT) is dispute related to land. The nature of land cultivation, ownership and possession is quite different in CHT from the other of Bangladesh. In general, the tribesmen do not have any clear notion of ownership of land. The tribal communities believe that land, forest and hills are collective property and the existing system of land registration is at variance with the ancestral land management system. In spite of advancement in socio-economic conditions the tribal generally remained firm in their perception about land rights including use. Problem remains on the point that land matters administered by the district administration, Hill District Council and the traditional system under the Circle Chiefs. Hence, the procedure existing is very time consuming. On the other side complexity of law may in some cases may be a reason to deprive the Bangalees to their land rights ensured by the constitution. Land disputes are the result of complicacies regarding laws and constitutional rights. Though to settle dispute regarding land several different institutions envisaged under different laws which are considered different from the other part of Bangladesh. This position can be taken against the equality notion of the Constitution of Bangladesh. After the signing of peace accord in 1997 and establishment of Chittagong Hill Tract Land Dispute Resolution Commission land disputes were expected to be resolved. However, till now the Chittagong Hill Tracts Land Dispute Resolution Commission remains ineffective and has failed to resolve any land related disputes even after so many years of its establishment because of the ambiguous and doubtful nature of the relevant statutes. The statutes under the 'Peace Accord' are envisaged to resolve the land disputes. As the constitutionality of the peace accord is still to be decided, the fate of the said statutes remains uncertain. Hence, the thesis draws the conclusion that, the unsettled land disputes have worsened the already tensed situation in the CHT region.

Abbreviations and Acronyms

AC (L)	Assistant Commissioner (Land)
ADC (R)	Additional Deputy Commissioner (Revenue)
CEO	Chief Executive Officer
CHDs	Chittagong Hill Districts
CHT	Chittagong Hill Tracts
DC	Deputy Commissioner
EO	Executive Officer
UNO	Union Nirbahi Officer
HDC	Hill District Council
PCJSS	Parbatya Chattagram Jana Samhati Samiti
CHTR	Chittagong Hill Tract Regulation 1 of 1900
Accord	Hill Tract Peace Accord, 1997
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
LDRCA	The Chittagong Hill Tracts Land Dispute Resolution Commission Act, 2001

1. Introduction:

Bangladesh attained sovereignty in 1971 through a war of liberation against Pakistan and adopted its Constitution in 1972. The Constitution of Bangladesh contemplates a unitary state integrated on the basis of a common culture. It does not recognize specifically the existence of a distinct ethnic culture practiced by the tribal indigenous¹ people living in the Chittagong Hill Tracts (hereinafter CHT) region². The Chittagong Hill Tracts region is comprised of Rangamati, Bandarban and Khagrachari districts and is the home of eleven different ethnic tribal groups³ named Bawm, Chak, Chakma, Khumi, Khyang, Lushai, Marma, Mru (Mro), Pankhua, Tanchangya, and Tripura. Since Bangladesh's nationhood, the tribal people⁴ living in the CHT region have been demanding recognition of their separate identity and autonomy from Bangladesh on the basis of their distinct culture and traditional practices.⁵ They also wanted to restrict Bengali settlement in the CHT region⁶ and in this regard tribal people organized themselves into an armed separatist group 'Parbotya Chottogram Jono Sanghati Somiti' hereinafter (PCJSS)⁷ in a movement to attain autonomy for the CHT region. Considerably, this movement was a serious threat against the sovereignty and indivisibility of Bangladesh as a unitary state. Section- III of the thesis describes the brief history of the land administration system in the CHT and how it differs from the other area of Bangladesh. The constitution of Bangladesh guaranteed the rights regarding land and ownership system in Bangladesh namely private, individual and state ownership. But it does not recognize the collective ownership

¹ There is no official recognition on part of the Bangladesh Government regarding the status of the tribal people as 'indigenous'. On the basis of international standards prevailing in this context there is no bar to consider them 'indigenous'. For details, see: Kawser Ahmed, 'Defining "Indigenous" in Bangladesh: International Law in Domestic Context' (2010), 17 International Journal on Minority and Group Rights 47-73.

² Amena Mohsin, 'Identity, Politics and Hegemony: The Chittagong Hill Tracts, Bangladesh' (2000) 1 Identity, Politics and Hegemony 78-87.

³ Naima Haidar, 'Indigenous Peoples of Bangladesh and the Chittagong Hill Tracts Peace Accord: A case of Distrust and Disintegration' (2006) XVII (1) The Dhaka University Studies Part-F 25-48.

⁴ There is no official recognition in the Constitution of Bangladesh that the tribal people living in the Chittagong Hill Tracts area are indigenous people. However, in some legislation, the term 'Indigenous People' is used to describe this tribal people. For details, see: Devashish Roy (Chakma Chief) 'Constitutional Reform & Indigenous Peoples' Rights in Bangladesh: Terminology on Identity: Indigenous versus Other Terms' CHT News Update, (September 2010).

⁵ Parbatya Chattagram Jana Samhati Samiti (Chittagong Hill Tracts United Peoples' Party, hereinafter 'PCJSS'), 'Brief History and Struggle of the CHT' PCJSS (undated). For details see the below link; access date 20 January, 2019. <http://pcjsscht.org/index.php?option=com_content&view=article&id=9&Itemid=99>.

⁶ K.C. Saha, 'The Chittagong Hill Tracts Peace Accord: A Land Mark Model for a Viable Solution to the Refugee Problem' (1999); Refugee <<http://pi.library.yorku.ca/ojs/index.php/refugee/article/viewFile/22008/20677>>

⁷ PCJSS website <<http://pcjss-cht.org/>>ibid

system. In this situation what complexities arose are described in the section- IV. The land administration system and the issues concerned are discussed in section-V. In this it has been discussed how the land administration has become complex and time consuming. In the section VI the Constitutional questions has been discussed and how the provisions of existing statues in CHT are stayed out of Constitutional ambit. Section VII emphasis on the identity recognition and the international obligation towards the Hilly people. As the identity is still unrecognized it has arisen complexities in determination of rights regarding land in following the international obligation. In section VIII the overview and the outcomes of the peace accord has been discussed and in section IX the complexities regarding the CHT Land Dispute Resolution Commission has been analyzed. In the end the conclusion has been drawn with the aim to find out the brief historical background of land disputes in CHT and the complexities in determination of the rights regarding land.

2. Methodology:

This research is an exploratory research of qualitative method. Both primary data namely- The Chittagong Hill Tract Regulation,1900; Constitution of the people's Republic Of Bangladesh, The Hill Tract Regional Council Act, The Hill Tract Peace Accord, The CHT Districts Council Act and Secondary data sources are used in the analysis of the study. Secondary data has been collected through content analysis of various literatures, scholarly writings and documents related to the subject matter. These documents provided valuable information. Relevant documents that have been consulted were the CHT Regulation 1900, the Hill District Council Act, the CHT Peace Accord, relevant circulars and orders issued by the Ministry of CHT Affairs and Ministry of Land from time to time, online articles, e-books, notes etc.

3.1. Brief Historical Background of Land Disputes in CHT Regions:

As the historical evidence shows, the Chittagong Hill Districts were self-governed traditionally and they used to pay an annual tax (in terms of cotton) to the Mughal Emperor. During the British Period, the British took control of the hilly region in 1860 and recognized it as an area distinct from the rest of the country and demarcated as non-regulated area. Here it should be pertinent to mention that land related matters in CHT have always been distinct from other regions of Bangladesh. The British found the system of land tenure in the CHT was very different from their concepts of land administration, and hence they reshaped the system for their convenience of collecting land revenue. As a consequence, some administrative and legislative reforms were brought through the *Chittagong Hill Tract Regulation 1 of 1900* (hereinafter CHTR).

This Regulation is considered as the main instrument to administer Land Administration System in the CHT. By the Regulation, the area of CHT was demarcated into three separate "Circles" and the three traditional leaders were designated as "Chiefs."⁸ Although these leaders had enjoyed the status of heads of state within their territories for centuries. After that regulation, they required the national authorities to recognize their right to rule. The British also divided the CHT into some territorial administrative units known as 'Mouzas'. They appointed headman⁹ for each mouza who had the authority to collect revenue and try local disputes. Each mouza was comprised of a number of villages and head of a village is known as Karbari.¹⁰

Whereas the land regime in the plains is based on private ownership and inheritance, the transfer and disposal of land is regulated by written law, either religious or state law the 'Jummas' enjoy individual rights over homestead and 'Jhum' land and collective rights of extraction in common land. But the ultimate ownership of the land belongs to the community as a whole. The land

⁸ Chief is the head of the community. The decision of the Chief is always final. He can pardon anyone at his discretion. His decision cannot be overruled by anyone. Only the District Commissioner can appeal to review his decision. Besides the responsibility of a Chief, he is also responsible to take care of some mauzas (i.e. groups of villages). It is hereditary.

⁹ Headmen are the chiefs of mauzas. In terms of decision-making, headmen's role closely succeeds the King in the Chakma justice system. They resolve most of the cases. Generally their position is also a hereditary title and approved by the King. Only the King has the privilege to select headmen outside of heredity.

¹⁰ Karbaris are the local or grassroots level leadership in the justice system. Karbaris assist the headmen in the judicial process. The Karbaris position is not inherited. The headmen, with the approval of the King, select most of the Karbaris.

tenure is based on oral tradition and the community used to decide the issue of dispute management and disposal of land. Therefore, the differences in regarding land issues between Bangalees and Hilly people remained unsettled. Later, with a view after long time military insurgency; to bring peace and to end up the movement '*Hill Tract Peace Accord, 1997*' (hereinafter Accord) was signed between the ruling government. However, the 'Accord' has addressed a little to land issues. The absence of defined traditions and customs having the force of law relating to land related matters made the issues more complex in later time.¹¹ Based on the 'Accord' several other institutions namely CHT District Council, CHT Regional Council are formed to administer the land related issues and other administrative regulations of said area. The situation worsen following two events namely the execution of Hydroelectric Project during (1959 to 1963) and Military Insurgency and Bangali Settlement during (1973-1996). The impact of the events are discussed in the following paragraphs.

3.2. Impact of the Hydroelectric Project (1959-1963):

The Pakistan government took a decision to produce more electricity in the region by exploiting the current of the hilly Karnaphuli River. A hydro-electric power plant was constructed in the CHT region between 1959 and 1963. An embankment was built on the Karnaphuli River and it created a lake occupying 256 square miles which was one of the erstwhile largest artificial lakes in the world and had great impact on the land management of the region. The barrage submerged 54,000 acres of agricultural land in the CHT Region, about 40% of the total cultivable land. Most of these lands were the paddy-fields. Beside losing the cultivable and homestead lands, more than 100,000 hilly people were displaced to evacuate the designated area. The information is noted in the official Government records namely CHT District Gazetteer 1971: 42. According to the said survey undertaken by the Rehabilitation Officer about 10,000 ploughing families having land in the reservoir bed and 8,000 landless jumia families comprising more than one lakh people were displaced through this project. The reservoir submerged a vast area comprising 125 mouzas. Moreover, the inundation threw over 54,000 acres of plough land out of cultivation. In fact, fertile valleys of the district, viz., Karnafuli, Chengi, Kassalong and Maini have been inundated. Hence, therefore the displacement made numbers of people landless and their right to

¹¹ See, for details of land related aspects in CHT Accord of 1997, CHTC, 2000. Life Is Not Ours, Dhaka: The Chittagong Hill Tracts Commission.

land has been infringed through this project which constitutes 40 per cent of the total settled cultivable land of the district.

3.3. Impact of the Military Insurgency and Bangali Settlement (1973-1996):

In 1972, the people of the CHT formally demanded regional autonomy and constitutional safeguards under the leadership of left-leaning lawyer named Manobendra Narayan Larma, Member of Parliament, and head of the new political organization known as the Jana Samhati Samiti hereinafter (JSS). The demands raised were (a) autonomy for the CHT with its own legislature, (b) retention of the 1900 regulations, (c) continuation of the three chiefs' offices, (d) constitutional provisions against amendment of the regulations, and (e) a ban on the influx of non-hilly peoples. However, these demands were summarily rejected by Sheikh Mujibur Rahman,¹² and peaceful demonstrations in favor of autonomy then met with brutality. Other acts of discrimination, reminiscent of the new days of Pakistan in 1947, followed, and it came as no surprise to anyone when the hitherto peaceful struggle for autonomy turned into an armed revolt in the early 1970s. Larma, unfortunately, was killed in an intra-party conflict in 1983, but the movement continued. In this conflict thousands of people were killed, gross human rights violations were perpetrated upon the CHT people, thousands had to flee for their lives across the border into India.¹³ Meanwhile, in the eighties the government dispatched several thousand landless Bengali families to settle in CHT. The Government allotted 5 acres of land for every Bengali family, which the tribals consider unduly given. The combination of military operations and a population transfer program of the government brought a few hundred thousand Bengali people into the CHT which added ethnic and religious overtones to the conflict and helped spread the conflict among the noncombatant population. Later on in the wake of heightened insurgency, the situation deteriorated and the Bengalis relocated themselves in and around secured zones. The tribals then took hold of the lands left by the Bengali settlers. That is how the land disputes kept on getting complicated. Meanwhile, the intra-indigenous conflict between the

¹² CHT Commission. 'Life is not Ours', Land and Human Rights in the Chittagong Hill Tracts, Bangladesh. Report distributed by the International Work Group for Indigenous Affairs (IWGIA) and the Organizing Committee Chittagong Hill Tracts Campaign. Copenhagen, May 1991, p.14

¹³ For the human rights dimensions of the conflict period, see, among others, The Chittagong Hill Tract: Militarization, Oppression and the Hill Tribes, The Chittagong Hill Tracts Commission (1991 and updates up to 1999).

rival JSS factions gradually subsided by 1985, following a truce between the renegade group and the Bangladesh Army. However, the major conflict between the guerrillas and the government forces continued until 1997.¹⁴

In this situation, the Government of Bangladesh tried to resolve this issue through dialogue.¹⁵ However, this approach failed to settle this problem. In this context, the CHT Peace Accord¹⁶ was executed between the Government and the tribal people of the CHT region in 1997. Both parties agreed to end the conflict and establish peace in the region. As indicated before, conflict in CHT is apparently consequence of the politics of nationalism within the state. But the consequent violence,¹⁷ even in post-conflict time, is not merely result of conflict, rather an outcome of the process of conflict.¹⁸ One may find a precise link between land and conflict in CHT¹⁹ as the land issues are still unsettled, it has remained a fundamental reason for conflict and violence. Challenges to access and control over land are still rolling over the conflict process.

The next section examines the Constitutional guarantee of right to property that protects the rights of the citizens. Making any law by imposing absolute restrictions be against the constitutional spirit as well as incompatible to the rights ensured by the Constitution. The thesis aims to argue that, without determining and addressing the constitutional guaranteed rights over land, access to land optimum, equitable and sustainable use of land in the CHT might not be possible and on the other side the land disputes might not be settled for ensuring justice.

¹⁴ Despite the Accord of 1997, the post-Accord situation has seen the birth of a new conflict that pits indigenous political activities against each other, and sometimes through violent confrontations resulting in deaths. The two groups are generally known as the “pro Accordists” – referring to those who politically support the 1997 Accord and are campaigning for its full implementation and are led by the JSS – and the “anti-Accordists” – who campaign for “full autonomy” and reject the 1997 Accord as a “sell-out” and are led by the UPDF.

¹⁵ PCJSS website <<http://pcjss-cht.org/>>ibid

¹⁶ The Accord was signed on 2 December 1997 between the Government and the Parbatya Chattagram Jana Sanghati Samity (PCJSS) on behalf of the inhabitants of the Chittagong Hill Tracts. The original text of the Accord was written in Bangla.

¹⁷ Historically, the conflict rooted in British colonial era followed by a process of political, social and economic alienation not only by the British and Pakistan regimes but also during different political regimes in Bangladesh. Violent conflict started after the Independence of Bangladesh when the new government rejected the demands of political and cultural autonomy of the tribal people. But, the CHT area underwent armed violence in the early of 1975 with massive militarization and armed activities by the state military forces and non-state rebels. The rebels were from 11 ethnic communities living in CHT. The armed violence has been continued since decades.

¹⁸ Mohsin, A. 1997. The politics of nationalism: the case of the Chittagong Hill Tracts, Bangladesh. Dhaka: The University Press Ltd.

¹⁹ Aynul Islam, ‘The Land Tenure Dynamics in the Post-conflict Chittagong Hill Tracts (CHT), Bangladesh’, Bangladesh Political Science Review; University of Dhaka Volume 9, Number 1, June 2013

4.0. An investigation of right to land of Hilly people:

The right to land is the Constitutional right. This right cannot be infringed by any action. Here in this part what sort of right has been guaranteed is discussed and the context of CHT region has been given focus. The complexities in determination of the rights and lack of constitutional recognition and its effects has been discussed in the following.

4.1. Constitutional guarantee of right to property:

The Constitution has guaranteed the right to property and the safeguards. In *Part III, Article-42(1)* of the Constitution provides that subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of the property and the right cannot be affected by administrative order.²⁰ Besides that the expression ‘restriction’ has to be understood as not including ‘prohibition’ or ‘extinction’²¹ as well as principle stands that in placing a restriction on the right to property, parliament cannot prohibit the exercise of the right or extinguish the right.²² Moreover, the expression ‘restriction’ is not qualified by the word ‘reasonable’. Furthermore, it does not mean that parliament has unfettered power to impose any restriction it chooses.

The right to property is protected by *Article-31* which mandates reasonable law to interfere with the right. Therefore, the inclusion of the word ‘reasonable’ in this article would have subjected any restriction imposed by law to a stricter scrutiny.²³ A law interfering with right to property will not be reasonable under *Article-31* if it does not sub serve any legitimate governmental interest and the combined effect of *Article-31* and at *42* is that any acquisition, requisition or nationalization of property to be valid must be for a public purpose.

The second part of *Article 42(1)* provides for extinction of right to property only by way of compulsory acquisition or nationalization under the authority of law and acquisition under any

²⁰ Raj Kumar Behani v. Bangladesh, 1995 BLD 633

²¹ Mahmudul Islam, Constitutional law of Bangladesh, Third Edition, Mullick Brothers. See para-2.213

²² Mahmudul Islam, Constitutional law of Bangladesh, Third Edition, Mullick Brothers. See para-2.213

²³ Mahmudul Islam, Constitutional law of Bangladesh, Third Edition, Mullick Brothers. See para-2.214

law cannot be called in question.²⁴ Thus the right to property and safeguards has been provided in the Constitution of Bangladesh for all the citizens of it.

However, the contradiction can be found in the CHT. After the CHT Peace Accord, the Hill District Councils have been empowered with some land related authorities. According to *Article 26(1) of the 'Accord'* for any sale or purchase or transfer of land ownership, District Council's²⁵ permission is mandatory²⁶. Moreover, there is a bar on transfer and acquisition of land in CHT without permission from the respective Hill District Council under *Section 64 of the Hill District Council Act, 1989* as amended by the Act 10 of 1998. By this, the Hill District Council possibly has been given unfettered power in regard to land administration. Whereas in the other part of the country no such permission is required from any authority by introducing a distinct institution under law. This stance is clearly creating a disparity between the people living in the hilly areas and in the other part of Bangladesh.

In the above context and constitutional stand it may be asserted that the embargo and restriction may amount as unconstitutional and contradictory with *Article 42, 31, 36* of the Constitution.

Apart from the restriction put on the land transfer system by the hilly people, the Accord also puts the ownership of land as a mandatory requirement to resident status²⁷ in the hilly areas by the people not belonging to any tribal community. As the said restriction is required in a particularly designated area, namely the CHT regions, such provision may lead to a division

²⁴ M.A Salam v. Bangladesh,(1995) 47 DLR 280

²⁵On the basis of historical peace accord signed on 2nd December 1997 between the National Committee on Chittagong Hill Tracts and PCJSS, some major amendments, passed in National Assembly in 1998, have been done in the aforesaid act by the act of 9 of 1998. By the act of 9 of 1998, after peace accord, this council is established.

²⁶Clause 26(2), Section B/Kha of the Accord states the requirement of prior consultations [with] and approval of the HDCs for compulsory acquisition of lands, hills and forests in CHT by the government. See more- Section-26. By amendment of the section 64 the following sub-sections shall be made—sub-section-1. Notwithstanding anything contained in any law for the time-being in force, no land within the boundaries of Hill District shall be given in settlement, purchased, sold and transferred including giving lease without prior approval of the Council. Provided that this provision shall not be applicable in case of areas within the reserved forests, Kaptai Hydro-electricity Project, Betbunia Earth Satellite Station, State-owned industries and factories and lands recorded in the name of government. Sub section- 2. Notwithstanding anything contained in any law for the time-being in force, no lands, hills and forests within the boundaries of the Hill District shall be acquired and transferred by the government without consultation and consent of the Hill District Council. Sub section- 3. The Council may supervise and control functions of Headman, Chairman Amin, Surveyor, Kanungo and Assistant Commissioner (land).Sub section- 4. Fringe land in Kaptai Lake shall be given in settlement on priority basis to original owners.

²⁷ Article – B (3) of the Chittagong Hill Tract Peace Accord, 1997 leads- Who is not a tribal and possesses land legally in the Hill District and generally lives at a certain address in the Hill District he shall be meant 'non-tribal permanent resident.

among the citizens of Bangladesh. Hence the spirit of the unitary state under the Constitution might be abrogated by the introduction of the said provision in the accord. On a related issue Rule 51 of the CHT Regulation demands a particular mention.

The right to locomotion is an important part of liberty and gives a citizen of a state to move freely, to reside where he will and to work where he will being connected with the livelihood and for pursuit of happiness. Nowhere, if the provision exist after the adoption of ‘Constitution of Bangladesh’ it raise question whether it is constitutional or not? Whether this provision has been kept to make a complete autonomous and self-regulated land where nobody has the right only but a few? Does not it is a violation of the Constitutional right to move and reside anywhere as will? Whether it would be in conformity to acquire land in the CHT if the above mentioned context exist?

Apparently it may be assumed that *Rule 51* transpires unconstitutional for infringement of right to movement. Perhaps the Constitution of Bangladesh does not contemplates for isolated demarcated area restricting the right to movement of the citizens and restricting constitutional right to live anywhere a citizen wish to . If such provision is promoted then the unitary system of the state may not be contemplated. Thus keeping such provision may not be admired as constitutional.

Rule 51 of the Chittagong Hill Tract Regulation provides as follows:

If the Deputy Commissioner is satisfied that the presence in the district of any person, who is not a native of the district, is or may be injurious to the peace or good administration of the district, he may, for reasons to be recorded in writing, order such person if he is within the district to leave the district within a given time or if he is outside the district forbid him to enter it. Whoever disobeys or neglects to comply with any order passed under this rule shall be punishable with imprisonment, which may extend to two years, or with fine, or with both.

The constitutionality of the rule 51 must be scrutinized to find whether it is against the right to movement guaranteed under the constitution. In the *Mustafa Ansari vs. Deputy Commissioner*²⁸ Case the High Court found the rule void as because the rule does not put any limitation during which an order passed thereunder will remain in force. The result is that the Deputy Commissioner can, on the *ipse dixit* of any person, turn a person out forever. Moreover, that this rule provides no check or safeguards against arbitrary exercise of power. It transpires clearly it is contradictory to the 'Right to Movement' of the Constitution and may be said as a barrier for establishing the right to land. In spite of that, this provision still exists in the CHT Regulation. However by not resolving these constitutional issues the land dispute resolution may not be possible.

The constitution as the supreme law of the land gives right to property and safeguards to all of its citizen. It restrict right to land laws of CHT like *Hill Tract Regulation, Hill Tract District Council Act, and Hill Tract Regional Council Act*. Unless the questions are settled the cardinal point of land dispute would standstill.

4.2. Right to ownership individual or collective/community ownership:

Land is the central to the lives of the tribal communities of Bangladesh. They think of themselves as son of land and forest because they were completely dependent on land. Without land they have no existence to survive at all. The land provides the material base for the enjoyment of their cultural rights, and their right to a separate identity as a distinct people. But their land rights are conceptualized within the framework of a separate legal regime, distinct from that of the rest of the country. Traditionally, common lands are jointly used, managed and controlled by the community and each family extracts only what is necessary.²⁹ The use and extraction rights over common land are based on oral traditions as opposed to written laws.³⁰ The tribal communities believe that land, forest and hills are collective property. They also believe that the existing government system of land registration is at variance with the ancestral land management system. To the Chakmas, land used for habitation is considered as one's personal

²⁸ *Mustafa Ansari vs. Deputy Commissioner* (1965) 17 DLR 553

²⁹ *Ibid* at 61, 120.

³⁰ Shapan Adnan & Ranjit Dastidar, *Alienation of the Lands of Indigenous Peoples in the Chittagong Hill Tracts of Bangladesh*, (Bangladesh: CHTC & IWGIA, 2011); p.44

property, but a collective ownership prevails over lands outside their habitats. According to the tradition of the Chakma clan, anyone can use a piece of land to build house for which no deed or legal document is needed. The perception about land ownership and use also largely vary from tribe to tribe. In Chakma community, a land cannot be used for cultivation if it has been already used by someone else. Khyang people believe that children and lands are the gifts of nature. Everyone has equal share on any land.

In spite of advancement in socio-economic conditions the tribal generally remained firm in their perception about land rights including use. As per *Article- 42* of the *Hill Tracts Manual 1900*, one does not need the ownership to use a land. As a result, the ethnic minority people did not feel the necessity of documentation of lands occupied by them. They continued to live and farm in their ancestral lands without exhausting the legal formalities and acquired new lands as per need by just paying land taxes to the Circle Chiefs. Which is a major concern in the land dispute settlement because the non-exhaustion of legal formalities causes problem in determination of rights.

Rights along with interests in land of CHT Region are regulated and administered by their customary institutions according to customary law (*Hill Tract Regulation, Hill Tract District Council Act, and Hill Tract Regional Council Act, Peace Accord etc.*) and it also includes provisions for the control, use and management of the land and its resources. They believe that land belongs to the community. The land is meant to be used for the duration of their lives, and must be preserved for future generations. According to the report of CHT Commission's³¹ fact finding mission to CHT:

“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

³¹ CHT Commission. ‘Life is not Ours’, Land and Human Rights in the Chittagong Hill Tracts, Bangladesh. Report distributed by the International Work Group for Indigenous Affairs (IWGIA) and the Organizing Committee Chittagong Hill Tracts Campaign. Copenhagen

individual families exercising the right to use the land - in western terms, a usufruct.”³²

Therefore, ownership and possession to them are cumulative rights, and those lands which are not under individual ownership are identified as common lands, accessible to all members of the community.

However the Constitution of Bangladesh provides the ‘principle of ownership’ in *Article-13* of the Constitution which mandates the ownership shall assume the State ownership, Co-operative ownership, Private ownership. The constitution does not recognize the collective or communal ownership system. Moreover, the ‘CHT Peace Accord’ does not explicitly recognize the concept of traditional collective land ownership. Besides that, Roy³³ points out that the state does not formally recognize the collective rights of indigenous peoples to common arable lands and as many of the indigenous peoples do not have their lands recorded or documented, the government regard these lands as Khas, or, state-owned. According to him it disempowers the ethnic entitlements on their ancestral lands.

Hence, inference can be drawn that the Constitution of Bangladesh does not recognize the collective ownership system; which is a cardinal belief of the hilly people. Moreover, the peace accord does not specially recognize their traditional customary rules. In this regard ownership system of the hilly people is unrecognized and in contrast to the land related laws of plain land of Bangladesh. Without settling this issue in a legal framework and in conformity with the Constitution the land dispute settlement in the CHT might not be accelerated.

³² CHT Commission. ‘Life is not Ours’, Land and Human Rights in the Chittagong Hill Tracts, Bangladesh. Report distributed by the International Work Group for Indigenous Affairs (IWGIA) and the Organizing Committee Chittagong Hill Tracts Campaign. Copenhagen, May 1991, p. 60.

³³ Raja Devasish Roy, “Occupations and Economy in Transition: A Case Study of the Chittagong Hill Tracts”, in ILO, Traditional Occupations of Indigenous and Tribal Peoples: Emerging Trends (Geneva, 2000).

4.3. Jhum Cultivation: As unrecognized form of cultivation

As discussed earlier the hilly people mostly depends upon land and since there is no conception of private property³⁴ the hilly people in CHT areas practice 'Jumm' cultivation on the basis of collective ownership system. Hilly people asserts that land is communally held and individuals have rights to usufruct. Therefore for such title, does not require a registered document of landownership. Moreover, that *Article 42 of the Hill Tracts Regulation, 1900* states the hill people did not need ownership to use a land. The belief and provision of law mentioned may give justification of Jhum cultivation in the CHT Region. But problem arises regarding Jhum Cultivation is determination of occupying, it is crucial to know whether fallow lands, periodically used for swidden (slash and burn) or *jhum* cultivation, are occupied or unoccupied land. Which might be a reason for land dispute.

Whereas, the hilly people assert that the rights are not in the individual cultivators but in the larger communities use lands in a particular area on a shifting basis. But the Government representatives, at various times, have stated that shifting cultivators do not have any ownership for the reason they do not have fixed lands. Hence, there is no specific and formal recognition from that about 'Jhum' Cultivation System. If the government recognizes 'Jhum' cultivation then the 'collective ownership system' is also to be recognized within the legal ambit because the 'Jhum' cultivation system is based on the collective ownership system.

If the collective ownership system is recognized the question regarding occupied and unoccupied land might raise another complex situation in settlement of the land dispute in the CHT Region. The reason is that *Hill Tract Regulation* provides that 'khas land', also described as government land, cannot be granted to anyone without a determination by the local headman that- the land is unoccupied land. In this regard complexity may arise between determination of occupied and unoccupied land because of the shifting system of cultivation or 'Nomadic' cultivation system. Complexity if to solve and settle the "nomadic" Jummas into specific land restriction is imposed on 'Jhuming' this situation may lead to interference to the customs of tribal communities.

³⁴ A. Mohsin, (2003); *The Chittagong Hill Tracts Bangladesh, on the Difficult Road to Peace*, London, Lynne Rienner Publisher.

In the said Regulation there is provision of restriction upon Jhum cultivation. *Article-41* of the *Chittagong Hill Tracts Regulation 1900* empowers the Deputy Commissioner to control and regulate Jhum cultivation in the Chittagong Hill Tracts and to issue and enforce such orders as he considers necessary for the same. He may for sufficient reasons shown declare any area to be closed to jhum cultivation and restrict the migration for the same.³⁵ In this regard it can be asserted that, the Deputy Commissioner holds the power to restrict or closing ‘*Jhum*’ in any particular area. In 1988, on the advice of the General Officer Commanding³⁶ of Chittagong, the Deputy Commissioners of the Hill Tracts placed a ban on ‘*jhum*’ cultivation in the area. However, the official reason was that juming cultivation system caused soil erosion, thereby contributing to deforestation and that juming is environmentally detrimental being “a system for food production before the invention of technological innovations.³⁷ Whereas to the hilly people juming is not only a way of life. The system is a means of survival and is described as an “extremely successful human adaptation to the rigors and constraints of the humid tropics.³⁸ But in the Regulation there is no specific rules, procedure and forum to challenge the decision. It gives the Deputy Commissioner complete discretionary power to do such. Since the Chittagong Hill Tract Regulation empowers Deputy Commissioner to control and regulate the *Jhuming*, the question is still unsettled that whether Deputy Commissioner can restrict for forever or not. Therefore, both situations should be taken into consideration whether state recognize the ‘*Jhum*’ cultivation or not. If it is recognized then what would be the rules regarding this which would comply with ownership system and how it would comply to address the land dispute settlement process. Without settling this complex issue regarding recognition of ‘collective ownership system’ and ‘Jhum culture’ the settling of land dispute might not be possible.

³⁵ Article 41 of the The Chittagong Hill Tracts Regulation, 1900 (Regulation I of 1900). As inserted by notification No. 7848 E.A. dated, the 15th July 1939 published at page 1723 Part I of the Calcutta Gezette dated the 20th July, 1939.

³⁶ The GOC (General Staff Officer One, Counter-Insurgency) is the highest ranking army official in Hill Tracts matters, stationed in Chittagong. The very fact that the GOC advises the Hill Tracts DCs, who are the highest ranking executives in the CHT area is indicative of the authority and power exercised by the armed forces in civilian matters in the Hill Tracts, and their dominant role in policy formulation.

³⁷ See Sattar, M.A., Conservator of Forests. “Jumias Settlement Schemes of Local Forest Department: With Major Focus of Proper Village Land Use Planning and Implementation”. Paper presented at the National Workshop on Development Experiences and Prospects in the Chittagong Hill Tracts, arranged jointly by ICIMOD/Special Affairs Division/CHT Development Board/BIDS at Rangamati on 23-25 January 1995, p. 8

³⁸ Pratap, Tej and Harold R. Watson. ICIMOD Occasional Paper No. 23. Kathmandu, Nepal: International Centre for Integrated Mountain Development, 1994, p. 11

5. Land Administration System and Issues Concerned:

Land Administration system in the Chittagong Hill District is much complicated and is accompanied by lengthy procedures. Moreover, there can be found legal pluralism in the same country where the Constitution and the other laws encompasses the notion of equality before law. The ambiguous stance of law can be a root for dispute and barriers for any legal remedy. The ongoing paragraphs describes the land administration systems applicable for the whole of Bangladesh except from the CHT regions. The stance may lead to inequality among the people living in hilly areas and the people living in other part of the country.

At present, land in CHT is looked after by the district administration, Hill District Council and the traditional system under the Circle Chiefs³⁹; in contrast in plain-land districts, land is looked after only by the district administration. For this reason, it takes much more time in hill districts than that of plain-land districts, to transfer any title of land.

The Headmen⁴⁰ are the lowest tier of the Land Administration in CHT. Deputy Commissioners appoint the Headmen in consultation with the Circle Chiefs. The Headmen collect revenues within their jurisdictions under the overall supervision of the Circle Chiefs. The headmen are not government employees and hence are not under the direct control of district administration. The post of Chief, Headman and Karbari is hereditary and held for life.⁴¹ They do not get any office

³⁹ “The karbari is the head of a hamlet or village” (Roy R. D., 2004). The headman is the head of a mouza while the chief is the head of the circle. A village consists of several paras while a mouza consists of several villages. The main duty of this three-tiered justice system is to “supervise social functions and to administer traditional justice in accordance with customary laws” (Roy R. D., 2004). See more- Roy, R. D. (2004). Challenges for juridical pluralism and customary laws of Indigenous peoples: The case of the Chittagong Hill Tracts, Bangladesh; Arizona Journal of International & Comparative Law, Vol 21, No. 1; However, according to the CHT Manual they are entitled to administer the personal, social and family issues in the traditional court. “The traditional justice system is also responsible for collecting taxes and to resolve the cases regarding natural resource management of their respective jurisdictional area” (Roy R. D., 2005) see more- Roy, R. D. (2005); Traditional customary laws and Indigenous peoples; Asia, Minority Rights Group International.

⁴⁰ Article 48 of the Hill Tract Regulation, 1900 asserts that the Deputy Commissioner (DC) in consultation with the chief would appoint the headmen and they may be dismissed by the DC for incompetence or misconduct after a reference to the chief concerned. The DC will not be bound in any case by the wishes of the chief. But full consideration should be given to them. This appointment is not hereditary. A son, when competent, may succeed his father.

⁴¹ But Roy (2004) argued that the post of chief, headman and karbari is hereditary and held for life. He also went on to add, “Though formally the DC is to appoint headman and karbari with consultation with the chief, it is an unwritten convention that the DC endorses the circle chief’s nominee except in very rare cases” (Roy R. D., 2004). He further argues that the village men can also select headman and karbari and get it approved by the chief. Vacancy occurs only through death of the incumbent or the villagers raise no confidence motion or the incumbent’s

provided by the government. However, as they are the lowest tier of land administration in CHT, their role is very important because there are no Tahshildars (Union Land Assistant Officers) in CHT as the plain-land districts. Moreover, there is no Assistant Commissioner (Land) post in some upazilas of CHT. The UNOs are in charge of AC (L) but cannot provide sufficient time in land related matters. There are no posted Land Officers in all three HDCs. The CEO/EOs are in charge of Land Officers and are not able to spend as much time on land issues as it should be. So, land related services, mostly the Land Mutation or land title transfer process, is so lengthy, time consuming and complex that many applicants die before the end of the process. Thus, many people turn out as illegal buyers or owners. Some frauds and land grabbers exploit this opportunity. Land disputes also trigger communal violence sometimes in CHT. Since no land survey was performed in the region, there is no Khatian or Record of Rights (a statement containing details information regarding a piece of land) and it is difficult to identify one's land properly. Such type of complicacies also generated many land disputes. Consequently, involvements of the middlemen and unfair means are increasing as a pitfall of the land administration system in CHT. On one hand there is administrative complicacies in handling land administration on the other hand there are legal complicacies.

CHT Regulation, 1900 was introduced for the convenience of administration the region. Land administration is one of the measures envisaged in CHT Regulation. According to *rule 34 (5) of the regulation*, for any sale, purchase or transfer of land, Deputy Commissioner's permission is mandatory. This is how the district administration got involved in land administration since the period and this still exists. According to *rule 12(a)*, registration of deeds for sale or transfer of immovable properties is compulsory⁴² and according to *rule 20*, DC is authorized to do

malfeasance and misconduct are proved. Roy (2004) mentioned that deposition as a result of misconduct or malfeasance is very rare case in CHT. "Succession usually goes to the male heirs, though wives or daughters of incumbents may sometimes succeed to this position" (Roy R. D., 2005). See more- Roy, R. D. (2004). Challenges for juridical pluralism and customary laws of Indigenous peoples: The case of the Chittagong Hill Tracts, Bangladesh; Arizona Journal of International & Comparative Law, Vol 21, No. 1 and Roy, R. D. (2005). Traditional customary laws and Indigenous peoples. Asia, Minority Rights Group International.

⁴² Deeds of the following kinds shall be registered, provided that the property to which they relate is situated, or the work or act to which they relate is to be performed, within the Chittagong Hill Tracts. (a) Deeds of sale, gift, partition or mortgage of immovable properties, (b.) Leases of immovable property for any term exceeding one year, excluding Kabuliate executed by tenants in favor of Government. (c) Bonds, promissory notes, and engagement for payment of money. (d) Engagements or contracts for the delivery of product or goods of any kind or for work to be done. (e) Authorised to adopt. (f) Certificates of discharge of mortgage. (g) Deeds appointing a manager of any estate or property

registration.⁴³With this provision, DC or district administration is involved in the registration process. Thus, land registration is integrated within the land mutation process in the hilly districts. That is why there is no separate land registry office in the region. According to *rule 43(1)*, Headmen collect all types of taxes and submit it to DC. There are no Tahshildars or Union Land Assistant Officers in the region. Headmen are performing ULAO's duty and they are the root-most tier of land administration in CHT.

Hill District Council Act, 1989 was introduced to strengthen the local government in the region. The Hill District Councils were given some authority in land related affairs after their formation. However, those were not in practice until the CHT Peace Accord was signed between Government and PCJSS in 1997. The *HDC Act, 1989* was amended in 1998 after the Peace Treaty with activating the following: According to *clause 64 (1) (a) of Hill District Council Act, 1989*, no sale, purchase, transfer can be executed without the prior consent of the council. This provision added additional requirement to the land administration of CHT and also made the process lengthier.

Now at present, if we consider the whole process it appears that at first, the binanama or primary deed between seller and buyer needs to be registered at DC Office/UNO Office. At DC Office, an Assistant Commissioner acts as Registration Officer on behalf of DC. Then the applicant collects Headman's report and submits his application to DC in AC (L) Office along with that report. AC (L) asks report from Surveyor and justifies both reports. After justification of reports, hearing of seller and buyer is taken by AC (L) and file is sent to DC Office. DC Office sends the file to HDC for prior approval. HDC sends the file back to DC Office with approval and again the seller and buyer are called to DC Office/UNO Office for registering the sale deed. Finally, mutation is done by DC and an order is sent to AC (L) Office to update the record.

Therefore from the aforesaid analysis it can be construed that the land administration system in CHT region is more time consuming and complex than the other areas of the country as well as difficult to complete within a short time. This factor might have contributed the grievance regarding land related issue in the CHT region.

⁴³ Rule 20 of the Hill Tract Regulation, 1900 states that -The function of the Registering Officer shall be performed by the Deputy Commissioner or Sub-Divisional officer or by such other officer as the local Government may appoint for the purpose.

6. Constitutionality of the ‘Peace Accord’ ‘CHT Hill Tract Regulation’ ‘District Council Act’ ‘CHT Regional Council Act’: An unresolved issue

The Hill Tract Peace Accord and subsequent statues-CHT Regional Council Act 1998 and the Rangamati, Khagrachari and Bandarban Hill District Council Amendment Acts of 1998⁴⁴ were challenged as unconstitutional in two writ petitions⁴⁵ filed before the High Court Division hereinafter (HCD) of the Supreme Court of Bangladesh. In the petition it was argued that the arrangements made through the Accord and implementing legislations are inconsistent with the unitary character⁴⁶ of the republic⁴⁷ and it was also argued that the Accord violates the rights of the other citizens of Bangladesh to be treated equally before the law ⁴⁸by providing advantageous position to the tribal people of the CHT Region. In this regard the reason may be mentioned is by the regulating laws the local administration of the CHT region has been given the power to function autonomously without interference from the Government. Though these laws have been amended during Bangladesh period but the conflicting provisions remained which might raise complexity and inequality. Moreover, full implementation of the laws may isolate the CHT from the other part of Bangladesh and might be a reason for loss of unitary character of Bangladesh.

In two cases it has been alleged that the reservation of the office of chairperson of the CHT Regional Council and that of the hill district councils solely for “tribals” and the authority of the circle chiefs to grant permanent resident certificates relegates the Bengali inhabitants of the region to “second class” citizens and thus, offends the equal rights or non-discrimination clauses of the Constitution.⁴⁹ The 1998 amendments⁵⁰ to the Rangamati, Khagrachari and Bandarban Hill District Council Acts of 1989 provided that no land including the khas land⁵¹ suitable for settlement within the jurisdiction of the Hill Districts shall be leased out, settled with, purchased,

⁴⁴ Act No. XIX, XX and XXI of 1989

⁴⁵ Mohammad Badiuzzaman vs. Bangladesh and Others, Writ Petition No. 2669 of 2000 & Advocate Md. Tajul Islam vs. Bangladesh and Others, Writ Petition No. 6451 of 2007

⁴⁶ The constitution, Article 1

⁴⁷Badiuzzaman (2010) BLC (HCD) 531-572

⁴⁸ The Constitution Articles 27, 28, 29, 31. Article 27 provides for equality before law, Article 28 prohibits discrimination on the grounds of race, sex or religion. Article- 29 provides for equality of opportunity in public employment and Article 31 provides for equal right for protection of law.

⁴⁹ Writ Pet. No. 4113 of 1999 (Shamsuddin Ahmed v Gov’t of Bangladesh & Others) and Writ Pet. No. 2669 of 2000 (Mohammed Badiuzzaman v Gov’t of Bangladesh & Others) in the Supreme Court of Bangladesh (High Ct. Div.).

⁵⁰Act No IX, X and XI 1998.

⁵¹ ‘Khas land’ is a Bengali word. It means the property vested in Government ownership.

sold or transferred otherwise with the prior approval of the Councils.⁵² Through this provision an embargo of the free ownership and transfer of land property is created subjecting it to the prior permission of the respective Hill District Councils. Even the Government cannot Acquire, sell, transfer or dispose of Khas land without the prior permission of the Hill District Councils. It is alleged that this provision violates Article 42 of the Constitution which guarantees right to property for the citizens of Bangladesh without any discrimination.⁵³ There are also conflicting provisions in the various laws, namely the *CHT Regulations of 1900* promulgated during British period, *Hill District Council Acts of 1989* and the *Regional Council Act of 1988*⁵⁴ which are in some cases direct confrontation with the Constitution of Bangladesh and with the constitutionally guaranteed rights.

Over the last decades, many countries have either reformed their Constitution and/or laws, or adopted new legislation for conferring rights to indigenous peoples in the form of affirmative action and implemented international norms enumerated in international conventions. For example, the Constitutions of Argentina (1994), Brazil (1988), Columbia (1991) and the Russian Federation (1995) expressly recognize indigenous peoples and grant human rights to them under international law. In Canada, indigenous rights are protected in section 25 of the Canadian Charter of Rights and Freedoms, 1982. The Constitution of the Bolivarian Republic of Venezuela, Article 77 establishes the principle of special protection for the indigenous peoples in order to facilitate their inclusion in the life of the nation. In Guatemala, the 1995 United Nations-supported Agreement on Identity and Rights of Indigenous Peoples establishes the State's obligation under the Guatemalan Constitution to give special protection to cooperative, communal or collectively held lands. The 1975 Constitution of Papua New Guinea recognizes the customary laws of the various indigenous groups as binding as parts of the national legal system. Which has not been incorporated in the Constitution of Bangladesh. However no such effort is seen in Bangladesh.

As per Article 7 of the Constitution any law incompatible with the Constitution is Ultra Vires. As the Constitutionality of the peace accord is still not decided by the judiciary the Constitutionality of the other statutes enacted under the Accord is yet to be decided.

⁵² Act No. IX, X and XI 1998 Section 64.

⁵³ The Constitution, Article 42.

⁵⁴ Raja Devasish Roy, 'Land and Forest Rights in the Chittagong Hill Tracts'.

7. International obligation of Bangladesh and dilemma of identity:

In the preceding section it is mentioned that there is no special provision in the Constitution that provides special rights for indigenous people of Bangladesh considering their distinctive cultural lines. Similarly, there is no formal recognition in any official deed regarding the 'indigenous' status of the tribal people living in the CHT region. Now here it is also expedient to mention that there is no international agreement on the definition of indigenous people. In the anthropological perspective there are many definitions of the indigenous peoples around the world.

In the historical perspective 'Indigenous' or 'Aborigine' means 'Native Born, Originating or Produced naturally in a country, not imported or belonging to a particular place rather than coming to it from somewhere else. Hence, if this definition comes to effect then the Hilly people may not be recognized as 'Indigenous' or 'Aborigine' for the reason of the historical origin of the hilly people in reference to Captain Thomas Herbert Lewin's 'The Chittagong Hill Tracts and Dwellers There in' (1869) described the origin of the hilly people.

'Captain Thomas Herbert 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'⁵⁵

Another researcher Dutta, J. P. (2000) on the basis of findings regarding historical origin; in his research work titled 'Impact of Development Programs on Environment and Demographic Phenomena of the Ethnic Minorities of Chittagong Hill Tracts' describes the hilly people as follows-

"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

⁵⁵Captain Thomas Herbert Lewin 'The Chittagong Hill Tracts and Dwellers There in' (1869); 'The Hill Tribes'; Chapter-two; 36-37pp

onwards, ‘plainsmen’ and ‘hill men’ started living together in CHT, although the latter always formed the overwhelming majority”

Therefore, it can be asserted that if the historical origin is considered and based on that the identity is determined the hilly people of the CHT may not be recognized as ‘Indigenous’ or ‘Tribal’. Because of non-fulfillment of the elements of the definition of ‘Indigenous’ or ‘Aborigine’ in the historical perspective and in following the origin of the hilly people living in the CHT region.

Whereas the historical perspective emphasis on the origin the international instruments defines ‘indigenous’ in a different perspective. The ‘Cobo report’ provides criteria of ‘indigenous and tribal’ as follows-

379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

If the recognition is given by following the definition given in International conventions and instruments then the status would lead the state towards international obligation. The obligation towards the indigenous will include the rights and fulfilling the obligation under international law⁵⁶, obligation includes issues of land rights,⁵⁷ issue of displacement,⁵⁸ the procedures for the

⁵⁶ ILO Convention on Indigenous and Tribal Populations, 1957 (No. 107) described as: “..... the first attempt to codify the rights of indigenous and tribal peoples in international law. Convention No. 107 covered a range of issues such as land rights, working conditions, health and education.”

⁵⁷ ILO Convention on Indigenous and Tribal Populations, 1957 (No. 107) Articles 11 to 14 address the issue of land rights. Article 11 recognizes both individual and collective land rights. Article-11 states that- the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized”

⁵⁸ Article 12 of Convention No. 107 addresses the issue of displacement: It states as follows: Article “12 (1) The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national

transfer of land rights among the indigenous peoples, and that measures are to be taken to ensure that their lack of knowledge of the national laws and regulations does not facilitate the loss of their lands by non-indigenous persons.⁵⁹ If on the basis of the definition if the recognition is to be given then the country having multicultural people will be in trouble. After gaining independence from Pakistan, Bangladesh ratified Convention No. 107 in 1972. The Government of Bangladesh (GOB) previously though ratified ILO convention-107 in 1972 but did not ratify ILO convention-169 in 1989. The term ‘indigenous’ has been expressed in this convention in such a way that might create confusion in a multicultural nation country like Bangladesh. Later in 2007, some special rights have been granted to the indigenous people by UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples) during the General Assembly on 13 September 2007. As Bangladesh was not agreed with ILO convention-169, she did not vote for the UNDRIP proposed special rights of indigenous people in 2007. Hence therefore as Bangladesh did not ratify the ILO Convention-169 in 1989 Bangladesh does not have any international obligation under the said convention.

In some statutes currently in force in Bangladesh, the Bengali word ‘Adivashi’, is used to refer the community living in the CHT region. The meaning of ‘Adhivashi’ is indigenous in English.⁶⁰ But in many of the official documents of Bangladesh, indigenous people are documented as “Tribal”. However, in some other laws they have been documented as “indigenous” For example, Act 12 of 1995 and rules 4, 6 and 52 of the CHT regulation 1900.

Moreover, Adivasi/ indigenous peoples/ indigenous Hillman terms are used in Social Forest Act 2004 6(2) (E), Small Ethnic Cultural Institutions Act 2010, Education Policy 2010 (Article 18-20) and other official documents. Another word is “Aboriginal” which is also used in

economic development or of the health of the said populations.” Article 12 (2) goes on to say that such removal should take place only if: “Necessary as an exceptional measure, they [the indigenous people] shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.....” Article 12 (3) states: “Persons thus removed shall be fully compensated for any resulting loss and injury.”

⁵⁹ Article 13 of Convention No. 107 addresses the issue of displacement. Article- 13. (1) states - Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected... sub-article (2) states Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

⁶⁰ Devashish Roy (Chakma Chief) ‘Constitutional Reform & Indigenous Peoples’ Rights in Bangladesh: Terminology on Identity: Indigenous versus Other Terms’ CHT News Update, September 2010.

government documents such as in Section 97, State Acquisition and Tenancy Act, 1950 to refer people with distinctive cultural identities. Very recently, the ministry of foreign affairs through a letter instructed to the Ministry of CHT to use the word “Upazati (Tribals)” in place of Adibashi⁶¹ in the PRSP (Poverty Reduction Strategy Papers) documents.⁶² Government has recognized them as “ethnic minorities” Now if we consider the Hill Tract Peace Accord the people of CHT region are mentioned as ‘Tribal’.⁶³ Article 23A of the Constitution of Bangladesh is inserted with the aim to taking steps to protect and develop the diverse culture and tradition of different ethnic groups. But the article does not clarify what term will be used to identify them in social, cultural, administrative and other sectors. On the other side, if we consider the definition of ‘Nationalism’ in Article-9 of the Constitution it reads-

9. The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism.

From the above mentioned article of the Constitution it may be transpired that it ignores the identity of the minor races, ethnic sects and communities living in Bangladesh. In accordance to this definition they either holds the identity as ‘Bangalee’ or in accordance to Article -23A they are ‘ethnic and minor races’ not indigenous.

The absence of constitutional recognition of the special status of the CHT people and the identities has raised confusion and complicacies for the long-term and fuller commitments to the rights and needs of the peoples of the region. The lead author of the Constitution of Bangladesh Kamal Hossain personally agreed many times that the issue of indigenous people did not get

⁶¹ <https://iva.aippnet.org/bangladesh-chakma-circle-chief-denounces-cht-ministrys-directive-on-the-use-of-adviasi/> ibid. See more- On 23 October 2017, Chittagong Hill Tracts Affairs Ministry issued a letter to Divisional Commissioner of Chittagong, Chairman of three Hill District Councils, Deputy Commissioners of three Hill Districts and Circle Chiefs of the three Circles that imposed restrictions on using the term of “adviasi” in regarding to distribute any certificate to citizenship and official purpose. The CHT Affairs Ministry issued the letter to indicate Mong Circle Chief titled “the term adviasi instead of upazati (tribal) was used by Mong Circle Chief”. See further- <https://bdnews24.com/bangladesh/2006/05/15/indigenous-people-protest-fm-circular-to-call-them-tribal>. Ibid.

⁶² Unlocking the Potentials, PRSP document

⁶³ Article A (1) of the Chittagong Hill Tract Peace Accord,1997 states- Both sides, considering CHT as Tribal Populated Region, recognized the necessity for protection of the character of this region and for overall development of it.

specific importance at that period. He also suggested incorporating their recognition as the Indigenous people in the Constitution in Article- 29⁶⁴

The clarification as to their identity is one of the important issues to settle the dispute regarding their customary rights regarding land, culture, self-regulatory administration etc. Without such identity determination the obligation under international law and also the land rights determination may not be possible. Absence of specific recognition may delay the land dispute settlement process.

8. An overview of Peace Accord and its outcomes:

The 1972 Bangladesh constitution had no provision for the CHT. Since then the JSS wanted "provincial autonomy". The hilly people wanted to use a phrase '*Jhumma Land*' to mean autonomy with a legislature. The model was a tribal state like the states of Mizoram or Nagaland in India. Basically the pre-accord conflict was result of Constitutional non recognition of the culture of hilly people and their land right. The complex situation may have been occurred due to the proper codification of law in conformity with the Constitution and lack of proper recognition of the customary rights by scheduling the castes along with their rights after independence. Which has been successfully done in India; where some of the hilly people either moved or resides. Therefore after a lot of conflict to settle the dispute in 1997 Hill Tract Peace Accord was signed between the ruling government and PCJSS. But from then to now the 'Accord' remained controversial because of its complex provision.

Hill Tract Peace Accord which has been adopted for conflict resolution has envisaged a distinct administration for the CHT region which is completely different from other parts of the country.⁶⁵ It seems that "provincial" status would require a change in the Bangladesh Constitution, for Bangladesh is now described as a "unitary state" An alternative is "regional autonomy", which is out of the conception of Constitution of Bangladesh.

The *Hill District Local Government Council Act, 1989* had been repealed but by the 'Accord' by changing and amending the previous Act reestablished 'District Council' with same nature of

⁶⁴ "Biponno Adibashi jibon O Somaj", Mithushilak Murmu, Kashbon Prokashani, Dhaka

⁶⁵ PCJSS website <<http://pcjss-cht.org/>> ibid

power in force of '*District Council Act, 1989*'. The Land Administration System in CHT experienced another turning point due to the *Hill District Council Act, 1989*⁶⁶ which may have the effect of giving CHT a semi-autonomous self-government system that is quite "pluralistic". It combines traditional, bureaucratic, and elective regional authorities with separated, and sometimes concurrent, responsibilities by adoption and incorporation of completely separating laws for the administration of the CHT Region which has little consistency the other laws of the state.

The CHT legal system incorporates both codified and customary laws. Therefore, the rights over forests and other land may not always be clearly defined as a result of the existence of overlapping rights to the same parcel of land. Since, the land disputes were one of the issue of conflict in the pre accord period; to resolve the problem in the 'Accord' there was a agreement to establish a Land Dispute Resolution Commission for the speedy settlement of land related disputes in the Chittagong Hill Tracts Region and to formulate rules related to it as part of implementation of that agreement. From the establishment of the commission the complex formulation of the Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001 have been in controversy and questioned.

As a result of long conflict a lot of people in CHT Region were displaced and became landless for which 'Accord' provides condition for both the repatriation and rehabilitation.⁶⁷ Nearly 70,000 ethnic minorities fled to the Indian state of Tripura during the insurgency period and the rehabilitation of over 100,000 internally displaced persons were rendered homeless and destitute by the counter-insurgency operations, including transmigration and forced evictions. The Task Force on Rehabilitation of Returnee Refugees and Internally Displaced Persons was expected to expedite the rehabilitation process. Since this process has been much criticized because of the

⁶⁶ Both sides agreed to change, amend, add and repeal the Hill District Local Government Council Acts, 1989. (Rangamati Hill District Local Government Council Act, 1989, Bandarban Hill District, Local Government Council Act, 1989 and Khagrachari Hill District Local Government Council Act, 1989) and its various sections described by article- B/KHA of the Peace Accord, 1997.

⁶⁷ Article D)/(Gha)(1) of the Chittagong Hill Tract Peace Accord, 1997 states that An agreement has been signed between the govt and the refugee leaders on March 9, 1997 with an aim to take back the tribal refugees from India's Tripura State based on the 20-Point Facilities Package. In accordance with the said agreement repatriation of the refugees started since March 28, 1997. This process shall continue and with this in view, the JSS shall provide all kinds of possible co-operation. The internal tribal evacuees of 3 districts shall, after determination, be rehabilitated by the Task Force.

floated lists⁶⁸ it has always been a subject of controversy how many to be rehabilitated. As the rehabilitation process is in complicity and identified as unimplemented clause of ‘Accord’ by the ‘CHT Peace Accord Implementation and Monitoring Committee’ over there that’s why no survey could take place in CHT region for the reason of there is an obligation under ‘Accord’ to conduct survey after implementation of the rehabilitation clause.⁶⁹ So, the rehabilitation process is important for the reason that there is an obligation under the peace accord to rehabilitate and giving land to those displaced and refugees. The complexity regarding the rehabilitation may destitute the peaceful settlement of the land disputes.

In conclusion it can be asserted that lack of uniformity of laws, complicacies regarding the laws and its provision along with the mutual distrust on the one sided pluralistic laws may be considered as a barrier towards proper implementation and to redress the issues properly to bring a positive outcome.

9. The CHT Land Dispute Resolution Commission Act: Justice Denied:

In this regard, some 35000 cases had been filed involving land disputes between indigenous people and settlers. A recent report also hints that the backlog of land-related cases still persists.⁷⁰ The latter report however, does not show the possible solution in the numbers of cases filed so far. Whereas there is increasing cases the commission is not yet can function due to the complex and questioned status of the law. Without settling this legal issue, land disputes cannot be resolved.

Firstly if the formation of the commission is noticed the Act⁷¹ envisages the formation⁷² of the commission as the follows-

⁶⁸ <<https://www.thedailystar.net/city/news/unfounded-lists-spark-concern-confusion-1657213>> ibid see more-Mehedi Hasan polash; Chairperson of Chittagong Hill Tract Research Foundation; ‘List of displaced and people to be rehabilitated to be made by the Bangladesh Army’.

⁶⁹ Article D)/(Gha)(2) of the Chittagong Hill Tract Peace Accord,1997 states that - After signing agreement between the govt and the JSS and implementation of it as well as after rehabilitation of the tribal refugees and internal tribal evacuees the govt shall start survey of land in CHT as soon as possible and after proper inquires ownership of land shall be recorded and ensured.

⁷⁰ The Chittagong Hill Tracts Commission (CHTC), (2000). Life is Not Ours, Land and Human Rights in the Chittagong Hill Tracts Bangladesh. Report distributed by the International Work Group for Indigenous Affairs (IWGIA) and the Organizing Committee Chittagong Hill Tracts Campaign. Copenhagen

⁷¹ Act 53 of 2001; Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001

The commission shall be set up comprising the following members:- (a) A retired justice of the Supreme Court of the Bangladesh who shall also be the Chairman Of the commission; (b) The Chairman of the Regional Council or a representative nominated by him from any Member of the council; (c) Chairman of the concerned Hill District Councils , ex-officio; and (d) Circle Chief of the concerned circle, ex-officio; Divisional Commissioner of the Chittagong Division or an Additional Divisional Commission nominated by him.

From the formation of the commission we can outline that the majority members of the commission belong to the tribal community. They represent the tribal community by their respective institutions⁷³. Therefore, here a question arises whether in this formation impartial appreciation can be ensured or not.

In the legal jurisprudence, *Nemo iudex in causa sua* (or *nemo iudex in sua causa*) is a 'Latin phrase' that means, literally, "no-one should be a judge in his own case." It is a principle of natural justice that no person can judge a case in which they have an interest. So here a question reasonably arises whether in the cases before court can the majority decision makers make their decision being not biased; especially when they belong to a community and they represent them by their positions. If the biasness exists and functions in this present form it may be a barrier for ensuring justice and may be against the principle of natural justice. Moreover, the aim of this Act may be in failure by failing to settle the land dispute for lack of proper legal framework.

Secondly, in the Act the commission is entrusted with the following functions ⁷⁴ these are- (a) to settle the land related dispute of the rehabilitated refugees in accordance with the existing laws⁷⁵ and customs in the Chittagong Hill Tracts; (b) The scheduled land in the petition of the claim and

⁷² Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001 ; Section-3

⁷³The Regional Council, the Hill Tract District Council, the Circles-Chakma Chief or Bohmang Chief or Mong Chief Circle.

⁷⁴ Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001; Section- 6; see more- 13-Point Amendment Proposals and Amendment Bill introduced in the Parliament on 16 June 2013. On 20 June 2011 Ministry of CHT Affairs (MoCHTA), with the consultation with CHT Regional Council, finalised 13-point amendment proposals of the CHT Land Disputes Resolution Commission Act 2001 and sent them to Land Ministry for taking necessary initiative to place Cabinet and Parliament for final adoption. Later on, Land Ministry sent them twice to the CHT Accord Implementation Committee seeking its opinions and accordingly the CHT Accord Implementation Committee approved them in its 4th and 5th meetings held on 22 January 2012 and 28 May 2012 respectively and finally the Inter-ministerial Meeting headed by Law Minister Barrister Shafique Ahmed held on 30 July 2012, where representative of the CHT Regional Council attended, also approved them.

⁷⁵ Hill District Council Acts of 1989, Regional Council Act of 1988, Chittagong Hill Tract Peace Accord,1997; Hill Tract Regulation, 1900

rights of the petitioner or the opposite party be settled under the existing laws and regulations of the Chittagong Hill Tracts and also can be restored, if necessary; (c) If any land settlement is made against the existing laws of Chittagong Hill Tracts it shall stand rejected and on account of this settlement if any lawful owner is evicted from land, his possession shall be restored.

In the all three mentioned power and functions the Act mentions about the existing laws naming- Hill District Council Acts of 1989, Regional Council Act of 1988, Chittagong Hill Tract Peace Accord,1997; Hill Tract Regulation, 1900. It is still to be decided whether these laws are constitutional or not. If the laws are declared unconstitutional then question arises what would be the measures to decide the land disputes in CHT region. This may arise a fresh new legal vacuum in deciding the land disputes in the CHT region, which might create another discrepancy and barrier for the land dispute settlement in the CHT region. Moreover that, using this clause any settlement made by the government can be challenged as the law of the region says that government has to take permission from the Regional Council to make any transfer of land. Taking this opportunity there is enough scope to reject the settlements made by the government in the past history. Consequently ‘Bangalees’ may become landless. Hence it may be asserted that by that the government may lose the effective control over land administration in Chittagong Hill Tract because there is a bar on transfer and acquisition of land in CHT without permission from the respective *Hill District Council* under *Section 64* of the Hill District Council Act, 1989 as amended by Act 10 of 1998. This is how the land dispute settlement in complexity. Without settlement of the legal issues the land dispute settlement may not be completed in a legal, just and equitable process.

Beside that The Commission shall have fullest power for cancellation of ownership of those lands and hills which have been so far illegally settled and occupied⁷⁶. This implies that the Land Commission shall return the land to the legal owners once it determines the question of ownership. Legal ownership itself depends on documentation as a proof of title to land. Conversely, as aforementioned, traditional landownership among the ethnic minorities in CHT does not require a document. Hence, such stipulation does not seem to reduce the land problem in the CHT, unless it recognizes traditional ownership. Therefore if such discrepancies are not settled first it might not settle the land dispute in CHT Region.

⁷⁶ Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001 ; Section-6 sub-section (c)

Now if we see, the decision of the Commission has been made final without any provision for appeal, revision.⁷⁷ *Section 16* of the Act provides as follows- any decision given by the commission on any petition submitted under section 6(1) shall be treated as decree of the civil court and neither appeal or revision petition can be submitted to any court or any authority nor can question be raised regarding its legality or appropriateness. Which appears opposite to the state law in the matter of land affairs. Keeping no provision for challenging any decision made may curtail the right to legal remedy and also keeps the door open for arbitrary exercise by taking advantage of this Act and the provisions which may cause violation of the natural justice.

The Act provides that the existing laws, regulations, rules and customs relating to land will form the basis of the Commission's decision. If customary right is considered there may be no khas land or public land in the CHT, because they are owned by the Jummas on the basis of collective property system. The exception may remain only the Government Property excluded⁷⁸ by the Act itself. Therefore, the Act suffers from inherent dichotomy. Another point is that *Section 7 (5)* of this Act, is likely gives unfettered powers to the Chairman to overrule the opinion of other members, if there is no consensus. Rather than opting for a majority decision, such concentration of power in the hands of the Chairman may be assumed to have frustrated the purpose of the Commission.

The above analysis makes it clear that for a land dispute settlement regime to be effective it has to be rooted in a firm policy framework. The LDRCA was passed in haste avoiding all the complexities of the legal plurality involved in the land and resource rights of the CHT. Several issues were either ignored, excluded or not sufficiently explained, like i) the enjoyment of common property of the Jummas, ii) precedence of customary law over state law in case of conflict, iii) the question of absence of registered deed and weighing of oral evidence, iv) the procedure of ascertaining or applying customary law,

Thus, the provisions of the Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001 is formulated with some uncertain propositions so that the settlement under this law may subject to controversy and may not bring positive result by resolving the long running land

⁷⁷ Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001 ; Section-16

⁷⁸ This section shall not be applicable in case of Reserved Forests, Kaptai, and Hydroelectricity Project area, Betbunia Earth Satellite Station, state-owned industries and land recorded with the Government or local authorities. See Section- 6, proviso of Chittagong Hill Tracts Land Dispute Settlement Commission Act 2001 ;

disputes. Therefore, these need to be resolved, or at least reasonably addressed, to ensure both justice as well as unhindered and peaceful access to, and use of, land and forests by those living within and around them.

10. Conclusion:

However, Land administration and dispute settlement system in Chittagong Hill Tracts is a combination of traditional land administration system and formal land administration system which has made it very complicated. It has become even more complex after the CHT Accord, 1997. In addition to this, as no formal land survey was done in the region, it is difficult to identify one's land properly. As a result, the number of land disputes tends to be high and nature of the disputes is also very complex. Moreover, the Constitutional questions are still unsettled. The court is delaying to resolve these Constitutional questions regarding Constitutionality of the Peace Accord and other laws that have been enacted based on it. However, the case *Mohammad Badiuzzaman vs. Bangladesh* was disposed of by the High Court Division of Bangladesh Supreme Court but the appeal is still pending. So, in this situation the delay may prolong the land related disputes for a long time. Hence, to settle the issues regarding land in the CHT the effort of the government is desired. As there are some political issues and legal issues involved the effective role of government is required. Moreover, the appellate court should speed up the process to dispose of the pending case before it, to settle the issues regarding constitutionality of the regulating statutes in CHT. If the court finds the statutes unconstitutional then the duty would lie on the government to repeal the statutes and frame fresh laws to regulate and settle the land related issues in CHT. This might help to settle the land related disputes in the CHT.

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