



In Bangladesh, indigenous people in the Chittagong Hill Tracts (CHT) have historically been subject to oppressive and discriminatory regimes. With the CHT Peace Accord, 1997, they had achieved a new basis for staking claims to equality. However, the CHT Peace Accord is now at stake as result of a judgment of the High Court Division of the Supreme Court of Bangladesh. This book takes the High Court judgment as the starting point in its path of "re-evaluation" of the arguments, reasoning and elucidations relating to efforts of the indigenous groups in CHT to be treated equally. In doing so, an analysis of historical and legal background of CHT and the process of CHT Peace Accord has been carried out. As a whole, this book emphasises on the questions that need to be asked and the issues that need to be addressed in relation to the right to equality for indigenous people in CHT in Bangladesh. This book may provide useful insights for students, academics, legal professionals and researchers on various socio-legal issues relating to the right to equality of the indigenous people in the CHT.

Arafat Hosen Khan

# The Right to Equality of the Indigenous Peoples of Bangladesh

An Analysis of the Challenges to the Peace Accord



Arafat Hosen Khan

Arafat Hosen Khan, obtained his LL.B (Hons) from the University of Essex and qualified as a Barrister of the Honourable Society of Lincoln's Inn. He is an Associate at Dr. Kamal Hossain and Associates - a leading law firm in Bangladesh. He is a visiting faculty at the University of Development Alternative and writes on legal and political issues.



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*I hereby dedicate this book to my parents Khan Altaf Hosen Bhulu and Anowara Begum for their unquantifiable love and moral support throughout my life.*



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01 August 2012

Dhaka

Arafat Hosen Khan



## GLOSSARY

Bengali	Language of majority group in Bangladesh. Also name of the community speaking the Bengali language.
Bengali Transmigrants/Settlers	Group of ethnic Bengali settlers – numbering between 250,000 to 450,000 – who were resettled in the CHT from different parts of Bangladesh under a government-sponsored programme from 1979-1984/85.
CHT	Widely used acronym for ‘Chittagong Hill Tracts’. Formerly, one administrative district, now includes the three ‘hill’ districts: Rangamati Hill Tracts, Bandarban Hill Tracts and Khagrachari Hill Tracts. Should be distinguished from Chittagong, which is the name of a neighbouring district, and the name of an administrative division of which both Chittagong district and the hill districts

are a part of. Chittagong is also the name of the second largest city of Bangladesh and the headquarters of Chittagong district and Chittagong division.

CHTRC	Chittagong Hill Tracts Regional Council
Circle	An administrative and revenue unit under a hereditary Circle Chief or raja.
LGC	Local Government Council, the former name of the three former district-level councils established in 1989 and renamed in 1998 as hill district council
HDC	Hill District Council (after renaming of Local Government Council)
Headman (also mauza headman)	Head of a mauza (including several villages), a traditional leader, responsible for justice and revenue administration and management of natural resources.
JSS/PCJSS	<i>Parbatta Chattagram Jana Samhati Samiti</i> , largest political party of the CHT people that led the movement for autonomy in the CHT. Political wing of

	former “Shanti Bahini” guerrillas (now returned to normal life).
Karbari	Village chief or elder, deputy to mauza headman, almost predominantly male.
CHT Land Commission	Body composed of governmental representatives and indigenous leaders, vested with powers of a civil court, and charged with resolving land disputes in the CHT in accordance with local laws, customs and practices.
Mauza/mouza	A revenue and administrative unit under a mauza headman
MOCHTA	Ministry of Chittagong Hill Tracts Affairs
Plains regions	Generic name to refer to the rest of Bangladesh in contradistinction to the CHT.
CHTPA	Chittagong Hill Tracts Peace Accord
HCD	High Court Division
DLR	Dhaka Law Report
BLD	Bangladesh Legal Decisions
BLT	Bangladesh Law Times

AIR	All India Law Report
LG	Law Guardian
MLR	Mainstream Law Report
ILO	International Labour Organization
UNDRIP	United Nations Declaration on the Rights of the Indigenous Peoples
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
PRSP	Poverty Reduction Strategic Paper
PCJSS	Parbattya Chattagram Janasamhiti Samiti
NCCHTA	National Committee on Chittagong Hill Tracts Affairs
RC	Chittagong Hill Tracts Regional Council
HDC	Hill District Council

NGO	Non-governmental Organization
MOA-AD	Memorandum of Agreement on Ancestral Domain
AD	Appellate Division

## **LAWS**

Inner Line Regulation, 1873

CHT Regulation, 1900 (Regulation I of 1900)

Finance Act, 1995 (Act XII of 1995)

State Acquisition & Tenancy Act, 1950

United Nations Declaration on the Rights of the Indigenous People,  
2007

Indigenous and Tribal peoples Convention, 1989 (No. 169)

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural Rights, 1966

ILO Convention on Indigenous and Tribal Populations (NO. 107) 1957

International Convention on the Elimination of All Forms of Racial Discrimination, 1969.

San Andres Accords, 1996

Regional Council Act, Act No. XII of 1998

Chittagong Hill Land Commission Dispute Resolution Act, 2001(Act NO. LIII of 2001)

Hill District Council Acts, 1998, (Act Nos. IX, X and XI)

Law on Indian Rights and Culture, 2001

## **PREFACE**

In Bangladesh, indigenous people in the Chittagong Hill Tracts (CHT) have historically been subject to oppressive and discriminatory regimes. With the CHT Peace Accord, 1997, they had achieved a new basis for staking claims to equality. In addition, developments regarding the rights of indigenous people on the international level added weight to their efforts. However, the CHT Peace Accord, 1997 is now at stake as result of the judgment of the High Court Division of the Supreme Court of Bangladesh.

A major part of the equality efforts of indigenous groups is ensuring access to justice. Long-standing indigenous systems of justice are not fully recognized, and often if members of indigenous groups turn to the formal justice system, they are ignored, face discriminatory treatment, and find legal remedies lacking to enforce collective and traditionally held rights. Indigenous women are often victims of sexual violence, with no possibility of effective recourse to remedies.

The three Hill Districts Rangamati, Bandarban and Khagrachari have long been administered under the Chittagong Hill Tracts Regulation, 1900 (Act No. 1 of 1900) with original civil jurisdiction and appellate jurisdiction over criminal cases vested in the Deputy Commissioner of Chittagong; while the Mouza Headmen have authority over family

matters (with provisions of appeal to the Circle Chief). In 2003 the CHT Regulation was amended for setting up separate District Court and Sessions Division in each Hill District. In June 2008, District and Sessions Court and Special Tribunals were established under the 2003 Act following a High Court Division order pursuant to a writ petition filed by BLAST.

While establishment of courts in the CHT has been a positive step forward, there remains much to do before indigenous groups enjoy effective access to justice. This paper will emphasize briefly the break with erstwhile justice administration system in CHT by setting up regular courts and the recurring problems creating hindrance in way of justice administration as part of indigenous groups' larger claim for equality.

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# 1 | INTRODUCTION

Aboriginal people or Adivashis make a contradistinctive feature from that of the “peoples” and “minorities” in respect of the territorial land where they traditionally inhabited and the “historical continuity”; and their claims are far more substantial than those of the minority claims as it ranges from collective rights to self-determination (Borlmann & Zieck 1990 and Rahman 2003).

More than 45 indigenous ethnic communities with a population of nearly three million live in Bangladesh. The largest concentration of them live in the Chittagong Hill Tracts (CHT), a region located at the South Eastern corner of the country bordering both India and Myanmar. CHT is the only region in Bangladesh where indigenous people constitute the majority of the population.

In total 11 ethnic groups are recognized as indigenous; ***Chakma, Marma, Tripura, Tanchangya, Mro, Lushai, Khumi, Chak, Khyang, Bawm and Pankhua***. Collectively, they are often called the *Jumma* people (Highlanders). In addition, a very small number of descendents of Assamese and Gorkhas, who were brought into the region during the British colonial period, also live in the CHT. During

the partition of the sub-continent in 1947 the total population of CHT was only 247,053, with the Bengalis collectively comprising only about 2.5 percent.

However, after 20 years of Pakistani rule and 42 years of the Bangladesh period, the demography of the CHT has significantly changed, particularly after the government sponsored settlement of Bengalis in the 1970s and 1980s in the region. As of now, out of a total population of 1.5 million in the region, the indigenous people are thought to make 50 percent.<sup>1</sup>

Recorded history over approximately the last six centuries shows that unlike the rest of the territory which now forms Bangladesh, the Chittagong Hill Tracts (CHT) was made up of little formalised self-governing chiefdoms and chieftaincies of various ethnic groups, which were independent of external political control, until after the then province of Bengal itself became colonised by the British during the eighteenth and nineteenth centuries.<sup>2</sup> Historically, many people

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<sup>1</sup> The government census does not provide ethnically disaggregated data.

<sup>2</sup> Raja Devasish Roy, "The Discordant Accord: Challenges in the Implementation of the Chittagong Hill Tracts Accord of 1997

A. M. Serajuddin, "The Rajas of the Chittagong Hill Tracts and their Relations with the Mughals and the East India Company in the Eighteenth Century", in *Journal of the Pakistan Historical Society*, Vol. XIX, Part 1 Pakistan Historical Society, Karachi, 1968, pp. 53-60.

R.H.S. Hutchinson, *An Account of the Chittagong Hill Tracts*, Bengal Secretariat Book Depot, Calcutta, 1978, pp. 8-9; Claus-Dieter Brauns & Lorenz G. Löffler, *Mru: Hill People on the Border of Bangladesh*, Birkhauser Verlag, Basel, Boston, Berlin, 1990, p.27.

have lived in, immigrated into and emigrated from, the region now forming the CHT.

The historical legacy of the indigenous people of the CHT is virtually different from the rest of the country and has always been represented as the region of ethnic conflict and insurgency in Bangladesh. Following the independence in 1971 till 1997 the CHT became one of the most turbulent areas in Bangladesh. A deep sense of resentment has built up in the hearts and minds of the indigenous people over the years. The situation was brought about by a sustained policy of discrimination, disparity and negligence, culminating ultimately in repression, or as it is officially known, a strategy of "counter insurgency".

After two decades of bloody conflict, in order to resolve the Chittagong Hill Tracts (CHT) problem and to put an end to the long-standing insurgency in the CHT region through political and peaceful means, the CHT Accord, popularly known as CHT Peace Accord was signed between the Government of Bangladesh (GoB) and the Parbatya Chattagram Jana Samhati Samiti (PCJSS) on December 2, 1997. The likelihood of the Peace Accord was to implement all the provisions of the Chittagong Hill Tracts Accord in a manner that would address equality to the indigenous people in CHT. However, while the CHT Peace Accord, 1997 had achieved a new basis for staking claims to equality for the indigenous people in the CHT region, the said Peace Accord is now at stake as

result of the judgment of the High Court Division of the Supreme Court of Bangladesh.

Therefore, when any attempt is made to examine the right to equality from the perspective of indigenous people in Bangladesh's in CHT, it calls for a normative interpretation with a view to achieving progressively the full realization of the rights. It is also important to examine the 'peace process' that guarantees rights and protection to these indigenous people through the lens of constitutionality. Furthermore, it is essential to look at subsequent events, the case law and judgements, which to an extent created a dichotomy of the efforts to bring the equality for the indigenous people of CHT.

## 2 | HISTORICAL BACKGROUND OF CHT

Little is known of the region's history prior to the advent of the British colonial rule in Bengal in the 18<sup>th</sup> century. In 1787, after prolonged fighting the then Chakma King/Chief entered into a treaty - named the 'Cotton Treaty' - with the British East India Company. The region subsequently became a British tributary area, although *de facto*, the Company maintained a policy of non-interference in governing the region. The subject matter of the treaty<sup>3</sup> between the Governor General and Chakma King was as follows:

(1)The East India Company recognized Jan Bakhsh Khan<sup>4</sup> as the Raja of the Chakmas.

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<sup>3</sup> Chakma Resistance to British Domination 1772 – 1798, by Suniti Bhushan Qanungo, published by the author from the Signet Library, Chittagong, Bangladesh. Also see 'The Origin of the *Rajas* of the Chittagong Hill Tracts and their Relations with the *Mughals* and the East India Company in the Eighteenth Century', by A. M. Serajuddin, The Journal of Pakistan Historical Society, January 71, pp. 51 - 60

<sup>4</sup> The Chakma Prince, son of the Chakma King *Raja Sher Doulat Khan* (1776 – 1782 AD) who was in power in the hill people and Chakma dominated regions during the rule of the British East India Company in the Indian Sub-continent. Following the death of his father, *Jan Bakhsh Khan* became the next Chakma King in the year 1782 and fought the

- (2) It was agreed that the collection of revenue was the responsibility of the Raja.
- (3) The British government would preserve tribal autonomy and prevent migration from the plains.
- (4) Jan Bakhsh Khan was bound by the treaty to maintain peace in his country.
- (5) British troops would remain in the Chakma territory not to terrify the Chakmas but to protect the land from the inroads of the fierce tribes.<sup>5</sup>

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British invasion the same year in line with the policy adopted by his father. *Khan* is a title used by the then Chakma rank and files allegedly being inspired by the *Mughals*. For more details please see the "History of the Chakma Nation", by Biraj Mohan Dewan, published in January 2005 from the Sibli Offset Press, Rangamati, pp. 133 - 140

<sup>5</sup> Chakmas had historically fought against the *Mughals*, the British and the Bengalis, the challengers being three mighty nations. Besides, they had to fight with other indigenous tribal races as well, mainly the *Kukies* now live in Mizoram, India (a few in CHT) and other groups including the *Arakanese* hailing from the present day Myanmar. For more information please see 'Wild Races of the Eastern Frontier of India', by T. H. Lewin, published in 1984, from Mittal Publications, Delhi, India & 'The Chakma Tribe of Chittagong Hill Tracts in the Eighteenth Century', by A. M. Serajuddin, in the Journal of the Royal Asiatic Society of Great Britain and Ireland, Issue No. 1, 1984, pp. 90 – 98. Also see the 'Tribal Resistance in Chittagong Hill Tracts 1776 - 87', by Sirajul Islam in the *Saga of Freedom* published in 1983 (ed. Nishith Ranjan Roy) by the Peoples Publishing House, Delhi, pp. 122–129. Also the 'Chakma Resistance to Early British

In 1860, the British Government formally annexed the CHT region with Bengal and created a Non-regulated Tribal District known as 'Chittagong Hill Tracts' with limited autonomy. From 1860 to 1900 the British government administered the region through a set of rules promulgated from time to time. For example, the Frontier Police Regulation III of 1881 was promulgated on December 7, 1881 and a CHT Police Force was formed, comprising of the region's indigenous people.

In 1900 the British government enacted the CHT Regulation 1 of 1900 (popularly known as the CHT Manual along with the Rules) and declared it as an Excluded Area with the objective of safeguarding the region's indigenous minorities from exploitation by non-indigenous people. Several provisions of the CHT Manual functioned as a safeguard for the region's indigenous people as these prohibited land ownership and migrations of non-indigenous people into the CHT.

The CHT Regulation of 1900 provided for limited self-government by the people of the CHT and this was strictly followed by the

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Rule', by Ratanlal Chakravarty in the *Bangladesh Historical Studies* 2, 1977, pp. 133 – 156 & *Mogh Raiders in Bengal*, by Jamini Mohan Ghosh published in 1960 from the Bookland, Calcutta, pp. 17 – 25.

administration. Administrative changes were, however, made in the CHT under British rule:

- (a) On 1921, the CHT Regulation of 1900 was amended to declare CHT a 'Backward Tracts' and gave the Governor in council sole authority in the area;
- (b) The Government of India Act of 1935 created CHT a totally 'Excluded Area' and so granted further recognition to the special status of the CHT.

During the partition of the sub-continent, CHT was given to Pakistan despite the fact that an overwhelming majority of the region's population were non-Muslims. During the entire Pakistani period, the indigenous people continued to face discrimination which over the years only accentuated. In 1948, the Pakistani government disbanded the CHT Frontier Police Force. Although the 'Excluded Area' status was retained in the first Constitution of Pakistan passed in 1956, the government of Pakistan amended laws that relaxed the entry and settlement of non-indigenous people into the region and acquisition of land titles. Consequently the early 1950s saw the rehabilitation of several thousand Bengali Muslim refugees in the CHT from the erstwhile India, in clear violation of the CHT Regulation, 1900.

In 1960s, the Pakistan government undertook the Kaptai Hydro-Electric Project, which uprooted about 100,000 inhabitants from their ancestral homes and submerged 54% (54,000 acres) of the best arable land of the region. The uprooted Jumma people were neither compensated properly for their lands and homesteads nor provided land for their rehabilitation. Finding no alternative, some 40,000 Chakma were forced to migrate into India and about 20,000 other Jumma people had to take refuge in Myanmar.

In the second constitution of Pakistan, the Excluded Area Status was changed to "Tribal Area" in 1962. But it was abolished in 1963 by a constitutional amendment. The entire administration, including the police, was manned by Bengali Muslims from the plain districts.

After waging a nine month war of independence against the Pakistani regime, Bangladesh emerged as an independent state in 1971. Soon after independence Mr. Manabendra Narayan Larma, Member of the Constituent Assembly, led a delegation to Dhaka in 1972, prior to the adoption of the Constitution, demanding regional autonomy for the region and its indigenous inhabitants. The demands included:<sup>6</sup>

(1) CHT to be an Autonomous Region with its own legislature;

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<sup>6</sup> An appeal to Bangladesh Constitution Formulation Committee demanding constitutional rights of the inhabitants of CHT written and published by Manabendra Narayan Larma, April 24, 1972

- (2) A Statutory Provision to be guaranteed in the Constitution similar to the CHT Regulation of 1900, for the safeguard of the rights of the region's indigenous inhabitants;
- (3) Recognition of the CHT specific administrative set up (e.g. the Circle Chiefs); and
- (4) Constitutional provisions with a guarantee that no constitutional amendment on matters relating to the CHT will be made without the prior consent of the people of the area.

The first Constitution of Bangladesh, adopted in 1972, did not recognise the presence of indigenous people in the country. Mr. Santu Larma, President of the PCJSS strongly reiterated the demand for autonomy for the people of the CHT in the Parliament, with reference to their separate history, distinct culture and ethnic identity and centuries-old political, cultural and economic particularities of the CHT.<sup>7</sup> But all his efforts ended in failure and instead he was branded as a separatist, hostile to the government of Bangladesh.

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<sup>7</sup> Bangladesh Gonoparishader Bitarka (Debate of the Bangladesh Constituent Assembly), Volume 2, Issue 13, October 31, 1972

Subsequently, following the bloody incidents of 1975 when Sheikh Mujibur Rahman, Father of the Nation – architect of the independent Bangladesh – was assassinated along with most of the members of his family, Shantu Larma took his movement underground and waged a guerrilla war for claiming the rights of the region's ethnic minorities. The government, in response, initiated counter-insurgency campaigns, which included rehabilitation of as many as 400,000 Bengalis from other parts of Bangladesh under its direct sponsorship.<sup>8</sup> The region was heavily militarized – at its peak reportedly one-third of the total armed forces were deployed in the CHT.

The rehabilitation of Bengalis completely changed the demographic configuration of the region; from being a majority, the region's indigenous people are probably a minority today. Furthermore, in a large number of cases the rehabilitation took place on the legally owned land of the indigenous people which means the indigenous owners were evicted from their ancestral properties through forcible means.

The CHT Jumma people rallied behind the banner of the Parbatta Chattagram Jana Samhati Samiti (PCJSS) led by Mr. Larma. Despite

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<sup>8</sup> Ethnic Cleansing in Chittagong Hill Tracts, Saradindu Shekhar Chakma, August 2006, pp. 80–81

the government's counter-insurgency campaigns the insurgency continued unabated throughout the 1970s and 1980s. The ensuing response of the government to the insurgency resulted in serious human rights violations and large scale displacement of the region's indigenous population including about 60,000 refugees in the Tripura state of India.

Throughout the insurgency period, both the government and the PCJSS attempted to engage in dialogue. The first formal dialogue was with the Ershad government, held in 1985. In this dialogue, the government recognized the CHT problem as a national and political problem. The PCJSS submitted its five-point charter of demands including provincial autonomy with a legislature to the government. The main features of the charter of demands were:<sup>9</sup>

- (1) To accord Provincial Autonomy for the CHT with its own legislature;
- (2) To make constitutional provisions prohibiting any constitutional change regarding CHT without consent of the CHT people and preventing anyone from other parts of country from settling down in CHT;

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<sup>9</sup> Five Point Charter of Demand, PCJSS.

- (3) To remove from the CHT all those illegal outsiders who have infiltrated into the region from August 17, 1947;
- (4) To make special economic plans for the development of the Jumma people of the CHT; and
- (5) To create favourable climate for a peaceful and political solution to the crisis in the CHT.

On the other hand, the Government developed a nine point outline for resolving the problem. But both sides stood on their own ground. After holding six rounds of dialogues, it ended without any fruitful result, but the Government enacted the Hill District Local Government Council (HDLGC) Act 1989, according to its nine point outline and formed three HDLGCs, in effect bypassing the dialogue.

The dialogue resumed during the period of the Begum Khaleda Zia government in early 1990s. In order to further the negotiation process, PCJSS modified its demands and replaced their demand of provincial autonomy with regional autonomy. This time too, no concrete result was made, despite 13 rounds of dialogues.

Finally, during the period of the Sheikh Hasina government and after seven rounds of dialogues, the CHT Accord, popularly known as the CHT Peace Accord, was signed between the government and the PCJSS on December 2, 1997, ending a more than two-decade old

armed struggle for self-determination (see Annex 1 for the full text of the CHT Peace Accord).

This tripartite conflict (Government law enforcement agency-“Insurgents”-Ordinary inhabitants) later on led the way to a much awaited peace process to the whole population of the region.

### **3 | THE LAND, THE LAW OF THE LAND AND ITS PEOPLE**

Historically, many people have lived in, immigrated into and emigrated from, the region now forming the CHT. The main legal instrument for the CHT from the beginning of the 20<sup>th</sup> century until today, the CHT Regulation, 1900 considered “a Chakma, Magh or a member of any hill tribe indigenous to the Chittagong Hill Tracts, the Lushai Hills, Arakan Hill Tracts, or the State of Tripura” as indigenous to the CHT.<sup>10</sup>

The number of Bengali-speaking people has grown since then, with shopkeepers and traders coming on their own, and government-sponsored migrants joining them in the 1980s. This has caused the percentage of the Bengali population in the region to rise from about 2% in 1872 to about 48% in 1991.<sup>11</sup>

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<sup>10</sup> Rule 52 of the CHT Regulation, 1900 (since repealed). See also, rules 4 and 6, CHT Regulation, 1900 that refers to “indigenous tribe”.

<sup>11</sup> The official census from 1872 to 1991 show the percentage of the non-tribal population in the CHT as follows: 1872: 1.74%, 1901: 7.02%, 1951: 9.09%, 1956: 9.09%, 1961: 12.99%, 1974: 19.41%, 1981: 38.93%, 1991: 48.57%. Collected from data cited in Raja Devasish Roy & Sadeka Halim, “Population Transfer, Minoritization and Ethnic Conflict in Bangladesh: The Case of the Chittagong Hill Tracts” (15 BLC, 531).

Prior to annexation into Bengal as a district in 1860, neither the Mughals nor the British are known to have had any direct influence or rule over the CHT.<sup>12</sup> By the 1780s, most of the major chiefdoms and chieftaincies of the CHT were partly formalized and converted into British tributaries (like that of the Chakma Raja), while the smaller headships (e.g., of the Mro) became de-recognised, except as headmen of smaller standing and authority.<sup>13</sup>

Until 1860, most of the CHT was administered by the Chakma and Bohmong Rajas and their subordinate officials variously styled as *Dewan, Roaja, Ahun, Kheja* (Khisra), *Phaingsi, Debaing* and *Rupsa*.<sup>14</sup> In 1882, a third Chief, the Mong Raja, was recognized.<sup>15</sup> No official of the British government (or earlier that of the Mughal governor of Bengal) was posted in the CHT and hardly anything was known about the CHT, until the period after 1860.<sup>16</sup>

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<sup>12</sup> A. M. Serajuddin, "The Rajas of the Chittagong Hill Tracts and their Relations with the Mughals and the East India Company in the Eighteenth Century", in *Journal of the Pakistan Historical Society*, Vol. XIX, Part 1, Pakistan Historical Society, Karachi, 1968, pp. 53-60, at p. 55.

<sup>13</sup> Ratan Lal Chakraborty, "Chakma Resistance to Early British Rule in 'Bangladesh Historical Studies'", *Journal of the Bangladesh Itihaas Samiti*, Vol. II, 1977, pp. 133-156; R.H. S. Hutchinson, *An Account of the Chittagong Hill Tracts*, Bengal Secretariat Book Depot, Calcutta, 1978, pp. 8, 9; Willem van Schendel (ed), *Francis Buchanan in Southeast Bengal (1798)*, University Press Limited, Dhaka, 1992, p. 101.

<sup>14</sup> CHT District Gazetteer, op. cit., pp. 252, 253.

<sup>15</sup> CHT Gazetteer, op. cit., p. 253.

<sup>16</sup> In Memo No. 596 dated 31 August 1872, from H. Hankey, Officiating Commissioner of the Chittagong to the Officiating Secretary to the Government of Bengal (see above

### **3.1 REGULATION OF CHT UNDER THE 1900 REGULATIONS**

Modern day legislation on the CHT started with the annexation of the CHT to British Bengal in 1860. Prior to this, the region's legal and administrative history was distinctively different to that of most other parts of Bengal (including Bangladesh). The 1900 Regulations expressly repealed Act XXII of 1860, Bengal Act IV of 1863 and portions of the Scheduled Districts Act, 1874 and the Repealing and Amending Act, 1891 (Act XII of 1891) as they related to the aforesaid 1860 and 1863 laws.<sup>17</sup>

The Chittagong Hill Tracts Regulations, 1900 belongs to a genre of laws whose origins lie in special regulations that applied to several parts of the former British Indian empire that were populated by indigenous people. Among these is the Chin Hills Regulation, 1896 (Regulation No. V of 1896), which still applies in Mizoram State of

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for full reference), Hankey wrote thus (at paragraph 3): "The Hill Tracts of Chittagong were formed into a separate district under a Superintendent in 1860, but its capabilities and resources were not known .....". He writes further (at paragraph 9): "For some cause or other, the Hill Tracts seems to have been regarded as a sort of *terra incognita*, the detailed particulars of which it would be impossible to acquire."

<sup>17</sup> Section 20, CHT Regulation, 1900.

India, among other places<sup>18</sup>, and the Daman-i-Koh Rules, hitherto applying to parts of Santal-inhabited territory in India.<sup>19</sup>

Act XXII of 1860 was supplemented by rules, including the Rules of Provincial Government of 30 June, 1867. These rules provided thus, among others:

“(a) To allow no middlemen between the representatives of government and the people, and to debar all mookteers or attorneys from employment in matters between hillmen and hillmen.

(b) To attain simplification of procedure and freedom from expenses directing that equity guided by the spirit of the law should be observed, exempting court fees and requiring no cost further than the actual and necessary expenses.

(c) To administer justice in the simplest and most expeditious manner possible.

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<sup>18</sup> This section draws generously from Raja Devasish Roy, “The ILO Convention on Indigenous and Tribal Populations, 1957 and the Laws of Bangladesh: A Comparative Review”, submitted to ILO Office, Dhaka, July, 2006 (unpublished; 2009 revised version and Bengali translation underway for publication in 2009), chapter 4.1.

<sup>19</sup> Raja Devasish Roy, “ILO Convention...” op. cit., chapter 4.1. See also, Memo No. 316, dated, Simla, 7 September, 1899 from the Government of India, Finance and Commerce Department to the Secretary of State for India, Chakma Raja’s Archives, Rangamati.

(d) To observe and respect the local customs and prejudices of the people with as little interference as possible between the executive officers and the Chiefs and their tribes.

(e) The Provincial Government vested the Deputy Commissioner in the same orders with full powers of a magistrate. Appeal against his orders lay and still lies to the Commissioner of the Division. The latter has the final decision in all heinous cases. This wise and benevolent policy has been adhered to, and it formed the basis of all the regulations that have since been framed.”<sup>20</sup>

The CHT Regulations lay down guidelines on the basic features of the system of general, justice and land administration of the area, and kept provisions for the framing of rules, from time to time, on such matters as details of the administrative powers to be exercised by government officials, traditional chiefs and headmen, on land administration, etc. The 1900 Regulation affirms and acknowledges certain rights of the indigenous peoples, but on the other hand, it also limits those rights in some spheres, by purporting to retain supreme authority upon the government, such as in the case of land administration. It is for this reason that the CHT Regional Council Act, 1998 provides that the Government may amend the Regulation, in consultation with and on the basis of advice from the CHT Regional

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<sup>20</sup> CHT District Gazetteer, op, cit., pp. 255.

Council, when the Regulation conflicts with the Hill District Council Acts of 1989.<sup>21</sup>

The Regulations implicitly account for the practice of customary law, and lay down guidelines on the manner of regulation of land and resource-use patterns, rather than explicitly mentioning those practices and related rights. It has been said that “[the Regulation] was not intended to be a declaratory instrument that sought to identify, define and declare various customary rights and privileges, but a regulatory law that sought to regulate already existing rights...”<sup>22</sup>

### **3.2 CONSTITUTIONAL HISTORY OF THE CHT**

The CHT and its legal system under the CHT Regulations, 1900 has had a special constitutional status under different constitutional dispensations of the time. The CHT was a “scheduled district” under

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<sup>21</sup> Section 52(2) CHT Regional Council Act, 1998 (Act XII of 1998).

<sup>22</sup> Raja Devasish Roy, “Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts” in Shamsul Huda (ed), *Land: A Journal of the Practitioners, Development & Research Activists*, Association for Land Reform and Development (ALRD), Dhaka, February, 1994, Vol 1, No. 1, Dhaka, pp. 11-25, at p. 16. While explaining the background of the Regulation, the Secretary of State for India was advised that the “regulation has been framed on the principle that it should contain only a few substantive provisions, the details of the administration being regulated by rules to be issues under powers conferred by the Regulation... The officer in charge of the Hill Tracts will continue to exercise the powers of a District Magistrate, and the Commissioner those of a Sessions Judge and also of a High Court...”; Extract from Memo No. 316, dated, Simla, 7 September, 1899 from the Government of India, Finance and Commerce Department to the Secretary of State for India, Chakma Raja’s Archives, Rangamati.

the Scheduled Districts Act, 1874. Under the Government of India Act, 1919, the CHT was a “backward tract”. Under the Government of India Act, 1935 and under the Constitution of Pakistan of 1956, the region was an “excluded area”. Finally, under the Constitution of Pakistan of 1962, the CHT was a “tribal area”. This status of Tribal Area was removed by the Constitution (First Amendment) Act, 1963.

It, therefore, follows that the 1900 Regulations predated both the Government of India Acts and both the Constitutions of Pakistan, hence the subsequent constitutional entrenchment, although stood the Regulations on a stronger footing, did not have the effect of basing the validity of the Regulations on the constitutional provisions. Neither the First Amendment Act, 1963 nor any other law (except the 1989 law, discussed below) expressly repealed the 1900 Regulations.

Prior to the removal of the “tribal area” status in 1964, no laws of the CHT Regulation could be challenged in a court of law on account of the region’s special constitutional status, as mentioned in section 19 of the Regulation. Now, according to the constitutional scheme of Bangladesh, like all other laws of Bangladesh, the Regulations must be consistent with the Constitution of Bangladesh.

However, on account of the provisions of regulation 4 of the CHT Regulation, 1900, laws appended to the schedule generally apply to the CHT “so far as they are not inconsistent with this Regulation or the Rules for the time being in force thereunder”. Thus, the Limitation

Act, 1908 and the Trademarks Act, 1940 apply in the CHT only to the extent of their consistency with the CHT Regulation.<sup>23</sup>

### **3.3 THE CONTENTS OF THE REGULATIONS**

The CHT Regulation, 1900 contains four major parts or segments. The first part contains twenty sections - section 1 to section 20 - which describe the process of legislation in the CHT, the system of administration, the courts of law and the manner of framing rules to take forward the purposes of the Regulation. The second part contains a Schedule of laws, which outlines the laws that apply to the CHT and the manner of their application (i.e., whether they apply fully, or partly, or conditionally along with the nature of the conditionality). The third part consists of rules passed in accordance with section 18 of the Regulation, on administration of justice, limits on interest rates, land administration, investiture of chiefs and appointment and dismissal of headmen, regulation of jum (swidden) cultivation, and collection of revenue, among others. The fourth and last part contains a section on the boundaries of the CHT, including that of the major reserved forests of the region.

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<sup>23</sup> Schedule of the CHT Regulation, 1900 and Notification No. 5839 P dated 14 April, 1916 and Notification No. 15 S dated 11 September, 1942 as amended by Notification No. 190 S dated 30 Sept, 1942.

### **3.4 THE CHT REGULATIONS REPEAL ACT OF 1989 AND BEYOND**

In 1989, when political unrest was prevailing in the CHT, and before the CHT Accord of 1997 was signed, the Government of Bangladesh promulgated a legal package to introduce district-level councils in the CHT (through Acts XIX., XX and XXI of 1989), and to repeal the CHT Regulation (through Act XVI of 1989).<sup>24</sup> However, the law intended to repeal the Regulation and the said Regulation was never put into effect. Instead, the CHT Accord of 1997 and the CHT Regional Council Act, 1998 provided that the CHT Regional Council will advise the Government of Bangladesh to remove inconsistencies between the CHT Regulation and the Hill District Council Acts, 1989.<sup>25</sup>

Accordingly, the Chittagong Hill Tracts (Amendment) Act, 2003 (Act XXXVIII of 2003) was passed to amend the CHT Regulation 1900 to transfer judicial authority from civil administration officials to judges. Thus the question of repealing the CHT Regulation – through Act XVI or otherwise – is no longer an issue that is alive.

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<sup>24</sup> Raja Devasish Roy, "The Discordant Accord: Challenges towards the Implementation of the Chittagong Hill Tracts Accord of 1997", in *The Journal of Social Studies*, 100<sup>th</sup> Issue: Perspectives on Peace: Visions and Realities, Centre for Social Studies, Dhaka April-June, 2003, pp. 4-57, at p. 30.

<sup>25</sup> Section 52, CHT Regional Council Act, 1998.

## 4 | NEGOTIATING PEACE

After a number of peace negotiations starting from early 1980s Chittagong Hill Tracts Peace Accord was signed on December 02, 1997 between the National Committee on Chittagong Hill Tracts, on behalf of the Government of Bangladesh and the Parbatya Chattagram Janasamhiti Samiti (PCJSS) putting an end to the insurgency in CHT. Pursuant to the Peace Accord three identical amending acts, namely, the Rangamati, Khagrachari and Bandarban Hill District Local Government Council (Amendment) Act, 1998 (Act No. IX, X, and XI of 1998, hereafter amending acts)<sup>26</sup>, along with Chittagong Hill Tracts Regional Council Act, 1998 (Act No. XII of 1998, hereafter RC Act) and Chittagong Hill Tracts Land Commission Act (Act LII of 2001) were enacted.

The constitutionality of the CHTPA, the amending Acts and the RC Act was challenged in Writ Petition No. 2669 of 2000 and Writ Petition No. 6451 of 2007. The HCD delivered its judgment declaring the RC Act to be *ultra vires* the Constitution and ruling that the CHTPA is to read subject to the nullity of the RC Act. The Appellate

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<sup>26</sup> Amending Acts No. XIX, XX and XXI of 1989.

Division has stayed the operation of the said judgment pending appeal.

#### **4.1 THE BANGLADESH CONSTITUTION AND THE CHT PEACE ACCORD**

The Constitution of Bangladesh of 1972 does not directly refer to indigenous people or to non –Bengali groups. However, it has been argued that the indigenous people form part of the disadvantaged part of the citizenry, which the constitution terms as “backward section of citizens” in Articles 14, 28 and 29. Article 14 of the Constitution recognizes the emancipation from all forms of exploitation of the “backward section of citizens to be a fundamental responsibility of the State”. Furthermore, Article 27 of the Constitution proscribes discrimination on grounds of race, religion and place of birth among others, and Article 28(4) allows the State to make “special provision in favour of women or children or for the advancement of any backward section of citizens”.

Laws enacted following the Accord, such as the CHT Regional Council Act of 1998 and the three Hill District Council Acts of 1998, are not expressly protected by the constitution, although it is

understood that the provisions on “backward section of citizens” provide a protective umbrella to these laws.<sup>27</sup>

## **4.2 THE CHT PEACE ACCORD AND ITS BRIEF FEATURES**

The CHT Accord is a landmark in the history of Bangladesh as it paved the way for the peace, development and representation of the region’s people. It recognizes the CHT as a “tribal-inhabited region” and it gave them the new powers of special political arrangements for the CHT with the formation of the CHT Regional Council (CHTRC) as an apex political body of the region and the three Hill District Councils (HDCs). The newly introduced CHTRC and the somewhat older HDCs are also unique to the CHT. The majority of the seats (two-thirds) in the CHTRC and HDCs, including the positions of chairpersons, are reserved for indigenous people and one-third of seats for permanent Bengali residents. The Accord also provides for the creation of the Ministry of Chittagong Hill Tracts Affairs (MoCHTA) in Dhaka where a cabinet minister would be appointed from among the indigenous people and the establishment of an Advisory

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<sup>27</sup> The Constitution of the People’s Republic of Bangladesh, printed in April 2008, pp. 5 – 7 (Articles 14, 19, 25) & pp. 8–9 (Articles 27, 28, 29). This has been taken from the submissions that made on behalf of the respondents in the Writ Petition No. 2669 of 2000.

Committee to lend support to this Ministry. The Accord also provides for the establishment of a Land Disputes Resolution Commission, demilitarization of the region, rehabilitation of returnee tribal refugees, internally displaced families and returnee members of the PCJSS etc. The Accord is divided in four parts:<sup>28</sup>

### **A. General**

- (1)The CHT region is recognized as a tribal-inhabited region and the need for preserving the characteristics of this region and attaining the overall development thereof.
  
- (2)Both parties agreed to make, alter, amend and add to, in consonance with the consensus and responsibilities expressed in the different sections of the Peace Accord, the relevant laws, regulations and practices according to law as early as possible.
  
- (3)A 3-member *Accord Implementation Committee* with a Convener to be nominated by the Prime Minister will monitor the implementation of the Peace Accord. The Peace Accord will come into effect from the date of its signing and execution and will remain valid until completion of all tasks to be performed by both parties, as stipulated in the Peace Accord

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<sup>28</sup> Parbatya Chattagram Jana Samhati Samiti (PCJSS) Report '*Apropos implementation of the CHT Treaty*', December 2, 2008, Kalyanpur, Rangamati.

### **B. Hill District Local Government Councils:**

The Peace Accord includes provisions for further strengthening of the three HDCs with the powers and functions of 33 transferable subjects (including 12 new subjects awarded in the Peace Accord), such as supervision, maintenance and improvement of the law and order, general administration, police (local), land and land management, primary and secondary education, youth welfare, forest (except reserved forest) and environmental protection and development, local tourism, agriculture, health etc. Besides, the following provisions are also included in the HDC Acts:

- (a) Definition of a non-tribal permanent resident: A non-tribal person will not be considered as permanent resident unless s/he possesses lands of lawful entitlement in the hill districts and usually resides in a particular address in CHT.
  
- (b) No land and premises, including the leasable Khas (state-owned) lands, within the territorial limits of the Hill Districts shall be transferable by Ijara (lease), settlement, purchase or sale except with the prior permission of the Council.
  
- (c) Only the permanent residents of the CHT shall be considered as legally eligible for enlistment in the voters' list.

- (d) Responsibility of issuing permanent resident certificate was bestowed on traditional Circle Chiefs.

### **C. The Chittagong Hill Tracts Regional Council:**

The section elaborates the provisions for formation of the CHTRC with the aim of making CHT a unique political and administrative unit. The Regional Council was bestowed with the power of supervising and coordinating the subjects transferred to three HDCs, law and order, general administrations, development programmes, the CHT Development Board (CHTDB), coordination of NGO activities and disaster management and relief operation, traditional and social justice etc. and the power of giving license for heavy industries. The Government shall enact any law related to the CHT in consultation with the CHTRC.

### **D. Rehabilitation, General Amnesty and Other Matters:**

- (1) In order to restore normalcy in the CHT region and for meeting this purpose both parties, regarding the matters of rehabilitation, general amnesty and allied issues, arrived at the following consensus and agreed to undertake programmes as follows:
- (a) Withdrawal of all the temporary camps of the army, the Ansars and the Village Defence Party (VDP), except the Border Security Force (BDR) and permanent army establishments

- (three at the three district headquarters and those at Alikadam, Ruma and Dighinala), from the CHT;
- (b) Rehabilitation of returnee tribal refugees, internally displaced families and returnee members of the PCJSS;
  - (c) Rehabilitation of landless tribal families by providing land settlement;
  - (d) Formation of a land commission for settlement of land disputes, arisen due to forcible land grabbing by Bengali settlers and unlawful commercial acquisition and appropriation;
  - (e) Allocation of additional finances on a priority basis for the implementation of an increased number of projects towards developments in the CHT;
  - (f) Quota reservation for the tribal people in respect of government service and in institutions of higher studies; and
  - (g) All the posts of officers of all ranks and employees of different classes in government, semi-government, local government and autonomous bodies of the CHT, the permanent dwellers of the CHT shall be appointed, subject to priority being given to the tribal people.

(h) Provision for the establishment of the Ministry for CHT Affairs where a cabinet minister would be appointed from among tribal people and an Advisory Committee shall be constituted to lend support to this Ministry.

## **5 | WRIT PETITION AGAINST THE CHT ACCORD**

Since the signing of the CHT Peace Accord, a section of communal forces strongly supporting further rehabilitation of settlers in the region and usually linked with the BNP and Jamat-e-Islam Bangladesh have been trying to oppose the Peace Accord terming it in contravention with the Constitution and sovereignty of the Constitution of the country. They have filed at least three writ petitions against the CHT Peace Accord in High Court so far.

The first writ petition (No. 4113/1999) against the CHT Accord was filed by Md. Samsuddin in 1999. The High Court issued a Rule Nisi calling upon the respondents to show cause as to why the execution, signing and implementation of the CHT Accord of 1997 by the Government and the PCJSS is not a violation of the Constitution of the People's Republic of Bangladesh and in contravention with the sovereignty of Bangladesh. In 2000, another writ petition (No. 2669/2000) was filed against the CHTRC Act 1998 and the three HDC Acts of Rangamati, Khagrachari and Bandarban District. The Court issued a Rule Nisi upon the Government of Bangladesh.

The last writ petition (No. 6451/2007) against the Accord was filed in August 2007 at the High Court by Md. Tajul Islam, a lawyer. The High Court issued a Rule Nisi upon the Government of Bangladesh. The Court further issued an interim order directing the Respondent no. 8 (the Election Commission) not to deprive any non-tribal citizen residing in the CHT area from being enlisted as voter during the ensuring voter enlistment process on ground of being non-permanent resident in the CHT pending disposal of the rule.

The HCD, taking up the two writ petitions together, delivered its judgment when declaring the Regional Council Act, 1998 to be *ultra vires* the Constitution and the CHTPA to be read subject to the nullity of the Act.<sup>29</sup>

## **5.1 CHITTAGONG HILL TRACTS (“PEACE”) ACCORD OF 1997: CONSEQUENT LEGISLATIVE PROVISIONS CHALLENGED: THE LEGAL CHALLENGE**

Two writ petitions – Writ Petition No. 2669 of 2000 (*Badiuzzaman v. Bangladesh & Other*) and Writ Petition No. 6451 of 2000 (*Tajul Islam*)

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<sup>29</sup> For the full judgment see, *Mohammad Badiuzzaman v Bangladesh and others*, 7 LG (2010) (HCD) 208.

*v. Bangladesh & Others*) - filed in the High Court Division of the Supreme Court of Bangladesh have together challenged the constitutional validity of the following instruments:

- (i) the Chittagong Hill Tracts (CHT) Accord of 1997;
- (ii) the CHT Regional Council Act of 1998 (Act XII of 1998; hereafter “CHTRC Act, 1998”) and
- (iii) certain provisions of the three almost identical Hill District (Local Government) Council (Amendment) Acts of 1998 {Acts IX, X and XI of 1998; hereafter “LGC (Amendment) Acts, 1998”}.<sup>30</sup>

The CHTRC Act, 1998 provides, among others, for the establishment of a regional council for the CHT. The LGC (Amendment) Acts, 1998 have amended the Local Government Council Acts of 1989 (Acts IX, XX and XXI of 1989; hereafter “LGC Acts, 1989”), providing, among others, for strengthened powers and functions of the three district-level local government councils, hitherto named “local government councils” (“LGCs”) and since renamed “hill district councils” (“HDCs”).

As a consequence, the continuing validity of another law, namely, the CHT Regulation, 1900, has also been challenged. One of the Benches of the High Court in its Judgment termed the CHT

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Regulation, 1900 as a “dead law”, which is under appeal before the Appellate Division of the Supreme Court and that has also stayed the operation of the judgment of the High Court Division.

## **5.2 BACKGROUND TO THE CHT ACCORD OF 1997 & POST-ACCORD LEGISLATION**

(a) The CHT Accord, 1997, popularly known as the “CHT Peace Accord”, was signed on 2 December, 1997, between the Government of Bangladesh (GOB) and the Parbatya Chattagram Jana Samhati Samiti (PCJSS/JSS), a political party of the indigenous peoples of the CHT, and formerly the political wing of the former “Shanti Bahini” guerillas (now returned to normal life). The main provisions of the accord include the following:

- cessation of hostilities between the GOB forces and the JSS’s fighters (“Shanti Bahini” guerillas)
- handing over of arms and return to normal life of the JSS fighters
- gradual dismantling and removal of all non-permanent GOB military and para-military camps from the CHT (except six specified garrisons or “cantonments”)
- rehabilitation of refugees and internally displaced people
- resolution of land disputes by a Commission on Land

- strengthened self-government, through, among others, (a) a separate ministry on CHT Affairs; (b) a Regional Council for the CHT( hereafter “CHTRC”); (c) strengthening of the powers and functions of the three district-level councils; and (d) integration of the traditional system of Chiefs and Headmen into the overall administrative structure.

(c) A total of six laws on the CHT was passed between 1998 to 2003. Four of these have been challenged; the three almost identical HDC (Amendment) Acts, 1998 and the CHTRC Act, 1998. Two other laws, one on the establishment of a *Land Disputes Resolution Commission* on the CHT [CHT Land Disputes Resolution Commission Act, 2001 (Act 53 of 2001)] and another on reforms to the system of *Administration of Justice in the CHT* [the CHT Regulation (Amendment) Act, 2003 {Act 38 of 2003}], have not been challenged.

### **5.3 THE MAIN ISSUES UNDER CHALLENGE**

The two writ petitions— have in combination challenged the constitutional validity of the 1997 Accord (hereafter “1997 Accord”), the law on the CHTRC (hereafter “CHTRC Act, 1998”) and certain provisions of the three laws on the HDCs passed in 1998 (the three “LGC (Amendment) Acts, 1998”). The main issues under

challenge, and the grounds of the challenge, are briefly mentioned below.

#### **5.4 THE CONSTITUTIONAL VALIDITY OF THE CHT ACCORD OF 1997**

As regards the Accord, the main challenge claims the following, with the grounds mentioned thereafter:

**(a) *Signature by persons without authority to bind state***

The Accord was not signed by a properly designated persons with the requisite authority. It is alleged that it was not expressed to be signed “under the authority of the President”, conforming to the provisions of the Constitution [reference: Chapter 2 of the Constitution {on legislative procedure: articles 80-92} read with articles 55(4) and 145; Rules of Business (Rule 5, Schedule II)].<sup>31</sup> The situation in Bangladesh was contrasted with accords in India (such as on Assam, Bodoland, Darjeeling, Mizoram, Tripura), which were allegedly made in accordance with the Constitution of India (Sixth Schedule, etc).

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<sup>31</sup> The matter on the Rules of Business need not be commented upon by researchers not familiar with Bangladeshi law, which will be looked into by Dr. Kamal Hossain & Associates, counsel for the CHTRC.

**(b) *Accord violates unitary character of the republic***

The Accord violates the unitary character of the constitution by creating a “regional council”, in the nature of a unit within a federal state, which does fall within the scheme of the local government institutions envisaged by the Constitution. [Articles 1, 7, 55, 59, 60 of the Constitution of Bangladesh]

**(c) *Accord has usurped the power of parliament***

The Accord has led to the usurpation of the power of parliament by fettering its law-making powers on account of the provisions in the Accord on the Government of Bangladesh (GOB)’s requirement to consult the CHTRC prior to legislation on the CHT.

## **5.5 THE CONSTITUTIONAL VALIDITY OF THE CHT REGIONAL COUNCIL ACT OF 1998**

(a) *CHTRC Act violates the constitution as a “region” is not within the scheme of the constitution:*

The region is not a recognized “administrative unit” within the ambit of articles 59 and 60 of the Constitution of Bangladesh.

(b) *Consultation with the CHTRC on legislation affecting the CHT fetters the authority of parliament*

The requirement of consultation with the CHTRC concerning legislation affecting the CHT violates the legislative prerogative of parliament.

(c) *Provision on Requirement of Obtaining Residential Certificate from (traditional) Circle Chief prior to Contesting in CHTRC & HDC Elections discriminates against Bengalis (“non-tribals”)*

This requirement of obtaining a residential certificate from the Circle Chief in the case of Bengali inhabitants (but not, allegedly, in the case of tribal inhabitants) – as mentioned in clause 4(d) of the Accord – violates the Equal Rights & Non-Discrimination clauses of the Constitution (Articles 27, 28).

(d) *Provisions on Government’s Authority over the CHTRC fetters the executive authority of the Government*

The nature of the authority of the Government over the CHTRC – as mentioned in sections 40 and 41(c) of the CHTRC Act, 1998 – fetters the executive authority of the Government and is therefore *ultra vires* to the Constitution.

## **5.6 THE CONSTITUTIONAL VALIDITY OF CERTAIN PROVISIONS OF THE LOCAL GOVERNMENT COUNCIL (AMENDMENT) ACTS OF 1998**

### *(a) Land Administration authority of HDCs fetters executive authority of the state*

The provisions providing that lands may not be settled, transferred, acquisitioned, etc without the prior consent of the HDCs [amended section 64, LGC (Amendment) Acts, 1989] violate the executive authority of the State and also fundamental rights of citizens to freedom of movement and to own property [reference: Articles 36 (Freedom of Movement), 42(Fundamental Right to Property), 144 (executive authority of republic shall extend to the acquisition, sale, transfer, mortgage and disposal of property...) read with article 55 (2)(exercise of executive authority on the authority of the prime minister)].

### *(b) Appointment of tribal's to certain posts of HDCs discriminates against Bengalis ("non-tribals")*

The appointment of tribal's (to class III and class IV posts, etc) – as mentioned in section 32 of the HDC Acts, 1989 - discriminates against Bengali citizens and violates the Equal Rights & Non-Discrimination clauses of the Constitution (reference: Articles 27, 28).

(c) *Definition of Non-tribal resident discriminates against Bengalis (“non-tribal’s”)*

The definition of “non-tribal resident” – requiring a fixed place of abode and legally entitled land – violates the Equal Rights & Non-Discrimination clauses of the Constitution (reference: Articles 27 & 28).

## **5.7 THE MAIN ARGUMENTS OF THE PETITIONER AND THE RESPONDENTS<sup>32</sup> IN THE WRIT PETITION AGAINST THE CHT ACCORD**

The writ petitioner, in the Writ Petition No.2669 of 2000 and subsequent Supplementary Affidavit with averments and submissions, inter alia, that many provisions of the Rangamati Hill District Local Government Council Act 1989 (Act No. 19 of 1989), Khagrachari Hill District Local Government Council Act (Act No. 20 of 1989) and Bandarban Hill District Local Government Council Act (Act No. 21 of 1989) (“1989 HDC Acts”) as amended, respectively, by the Rangamati Hill District Local Government Council (Amendment) Act

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<sup>32</sup> Bangladesh represented by its Secretary, Chittagong Hill Tracts Regional Council represented by its Chairman, Chittagong Hill Tracts Development Board, Rest House, Bana Rupa, P.S. & District: Rangamati.

1998 (Act No. 9 of 1998), Khagrachari Hill District Local Government Council (Amendment) Act 1998 (Act No. 10 of 1998) and Bandarban Hill District Local Government Council (Amendment) Act 1998 (Act No. 11 of 1998) are ultra vires the Constitution. The respondent further contended that Chittagong Hill Tracts Regional Council Act 1998 (Act No. 12 of 1998) (“REGIONAL COUNCIL Act”) by establishing the Chittagong Hill Tracts Regional Council (the present petitioner) violated Regional Council Articles 1, 7 and 59 of the Constitution and negated the unitary character of the Republic.<sup>33</sup>

In response to that Writ Petition the respondents duly filed an affidavit-in-opposition to the abovementioned writ petition, and contended, inter alia, as under:

- CHT has had a long history of special treatment since the time of the Mughal rulers;
  
  - The CHT Regulations, 1900 (the “regulations”), which recognises the role of customary law in the CHT, is still a valid law which applies to that region;
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- The history and available statistics manifestly establish that the tribal population in the CHT form a backward class within the meaning of article 28(4) of the constitution;
- The CHT accord did not require constitutional entrenchment since the accord or the legislations enacted pursuant thereto was not inconsistent with any constitutional provision;
- Regional Council has been formed in order to coordinate amongst the three Hill District councils in the CHT and does not violate the constitution in any way;
- The government has adequate control over the RC and therefore it has not been made at par with the executive branch of the government;
- Article 28(4) of the constitution expressly makes provisions for special measures to be adopted in cases of backward classes of citizens, therefore, such measures in the impugned legislations do not amount to discrimination;
- The CHT peace accord is not amenable to judicial review as it is a political document, which was not intended by either party to be justiciable in a court of law;

- The principles of equality and non-discrimination as enshrined in the Bangladesh Constitution provide a broad framework/scheme for adopting affirmative action measures;
- The Constitution does not elaborate any criteria for determining '*backward section*' and the concept is inherently flexible, to be adapted according to the needs of the situation and which this court may bear in mind in making a judicial determination of '*backward section*.'

## **5.8 THE CHT ACCORD IS A POLITICAL DOCUMENT AND IS THEREFORE NOT AMENABLE TO JUDICIAL REVIEW**

The Chittagong Hill Tracts (CHT) Accord was signed in 1997 between the National Committee on the CHT formed by the Government of Bangladesh and the PCJSS, as a document of political understanding and consensus reached between the two parties bringing an end to decade old conflict in the area. Hence, the Accord itself is a political rather than an executive or legal document. As such, it cannot be challenged by a third party in a court of law.

## **5.9 THE ACCORD IS NOT A ‘CONTRACT OR DEED IN EXERCISE OF THE EXECUTIVE AUTHORITY OF THE REPUBLIC’**

The Accord is a document containing political decisions reached by the parties, and not a contract or deed in exercise of the executive authority of the Republic. As such there is no requirement for it to be expressed to be made in the name of the President, as would be required in respect of “any contract or deed made in the exercise of the executive authority of the Republic” pursuant to Article 145, and there is no question of the Accord violating the said constitutional provision.

## **5.10 THE INDIGENOUS OR ‘TRIBAL’ PEOPLE IN THE CHT CONSTITUTE A ‘BACKWARD SECTION’ OF SOCIETY**

In determining the special measures that may be constitutionally permissible in respect of the state ensuring advancement of the “Backward Classes of Citizens” (Art. 28(4) of Bangladesh), we may find persuasive decisions of the Indian superior courts in relation to interpretation of Article 15(4) and Article 16(4) of the Constitution of India. [cite some] The CHT Accord and subsequent laws providing special measures for securing the rights of the ‘tribal peoples’ of the

Chittagong Hill Tracts are special measures adopted by the Government of Bangladesh to further advancement of such peoples, who may be considered a socially and economically 'backward class of citizens' and as such entitled to such constitutional protection pursuant to Article 28(4) of the Constitution of Bangladesh.

Further Article 28(4) of the Constitution of Bangladesh must be read in conformity with Art. 14 of the Fundamental Principles of State Policy which imposes a fundamental responsibility upon 'the State to emancipate the toiling masses- the peasants and workers- and backward sections of the people from all forms of exploitation'.

## **5.11 THE JUDGEMENT**

After hearing both the parties the High Court declared the CHT Regional Council Act 1998 illegal and unconstitutional although the existence of the Chittagong Hill Tracts Regional Council for over a decade. The court declined to interfere in the peace accord because some relevant provisions of it had already been merged with the "impugned legislation". The HC in its judgment also declared a few sections of the three amended CHT District Council Acts of 1998 illegal and unconstitutional following a prayer of a writ petition filed in 2000. In one of the five guidelines of the judgment, the HC bench said it has found that the CHT Regional Council Act violated some articles of the constitution but it is still up to the government to form

public statutory authority comprising entirely nominated members as part of the peace process. The court said it is certainly an irony that the peace process, aimed at democratic governance, has not been able to ensure the practice of democracy in CHT. Democratic governance in the CHT is the lifeblood of the peace process and should be encouraged in all earnest, it said. In relation to the “backward section of citizens” in the hill tracts, the court said it is the government’s responsibility to adopt a method and procedure, which is reasonable and convenient. The court also said the peace process has to be pursued against the backdrop of geo-strategic consideration and the historical circumstances under which the conflict arose and was brought to an end in 1997.

## **5.12 LEAVE TO APPEAL AGAINST THE JUDGEMENT**

A leave to appeal was filed and then the same was moved before the Appellate Division of the Hon’ble Supreme Court of Bangladesh. Subsequently the said leave to appeal was granted by the Hon’ble Court on the basis amongst other that the judgment of the High Court Division involves a number of substantial questions of law as to the interpretation of the Constitution, including Articles, 1, 7, 28(4), 29(3), 59 and 60. The intervention of the Hon’ble Court, being the apex authority to expound upon and interpret the Constitution and the supreme guardian of the Constitution, became essential as well as

the judgment of the High Court Division involves the very existence of the respondents, a statutory authority, which has been established as the result of a protracted process to restore and sustain peace, stability and rule of law in the three districts, Rangamati, Khagrachari and Bandarban, commonly known as the Chittagong Hill Tracts (CHT), an important part of the country. The respondents of the writ petitions has been duly established by a statute, namely, the Chittagong Hill Tracts Regional Council Act, 1998, enacted by a democratically elected Parliament as a part of the commitments made in the Chittagong Hill Tracts Accord (CHT Accord) in 1997. The impugned judgment purports to declare the 1998 Act to be ultra vires of the Constitution, and as such cuts at the very roots of, and threatens the democratic and constitutional peace process in the Chittagong Hill Tracts. For this reason the guidance of this Hon'ble Court on the issues of constitutional interpretation is urgently required, so as to prevent any unravelling of the Peace Process or any untoward disturbance of the subsequent administrative arrangements.

The decision is now pending hearing an appeal before Bangladesh's Highest Court.<sup>34</sup>

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<sup>34</sup> Civil Petition No. 1891 Of 2010.

## 6 | THE CHT JUDGMENT AND ITS SHORTCOMINGS

### 6.1 “POLITICAL QUESTION”?

Before the CHT Judgment, in *Mohammad Badiuzzaman v Bangladesh* (2010):<sup>35</sup> the judicial approach to indigenous peoples’ rights was a conservative one, where the HCD found:

*“In other words “autonomy” empowers citizens to be active participants in democratic governance and inherently involves the prescription for specifying the limits on independent action so that such action does not curtail or infringe the liberties of others. It is in that light that this Court will in particular consider the validity of the various provisions of the four impugned legislations or impugned Acts. [ . . . ] There are, however, certain*

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<sup>35</sup> Above note 19, at pp. 224-5.

*features fundamental and unique to the Peace Accord itself that in this Court's perception takes it out of the fold of the constitutional scheme as we understand it."*

The CHTPA, regardless of its vulnerability to the characteristics common to the evolution of 'aboriginal jurisprudence', as a matter of fact, the whole 'peace process'<sup>36</sup> confining the legislations is amenable to the jurisdiction of the Supreme Court, the 'repository of judicial power'.<sup>37</sup> The concept of separation of power does not confined or restrains the power and exercise of the judicial review in cases of political nature more importantly, where the rights of the citizens in general are at stake. Civil and political rights along with social and economic rights are all come within the purview of the constitutional mandates. However, in the present case the Court took a narrow margin of appreciation while *considering the validity of the various provisions of the four impugned legislations or impugned Acts*. On the contrary, the Court took a wider margin of

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<sup>36</sup> The interrelation of the CHTPA and the subsequent legislation are so interwoven that comprehensive adjudication over one would require consideration of others and this probably has been manifested in *Writ Petition No. 2669 of 2000* where the constitutionality of the CHTPA though not challenged initially, was later disputed for 'removal of any cloud' after adjudication over the Acts.

<sup>37</sup> I have borrowed these phrases from the concurring judgment of Justice Mustafa Kamal in *Mujibur Rahman v Bangladesh*, 39 DLR (AD) 85, 136. Is this a reference to the judgment??

discretion in not raising question regarding the validity of the 'Peace Accord' terming it as purely political in nature. The exercise of judicial review cannot be refused by the Court in case of involvement of a question 'essentially political' in nature (Islam 2006: 446), which turns into a justiciable question being imbued with constitutional or legal question.<sup>38</sup>

While subjecting the concept of autonomy the Court took in considering the validity of the various provisions of the four impugned legislations or impugned Acts, the Court consider a very narrow approach in promoting and preserving the rights of the indigenous people from their aged long sufferings and backwardness. Autonomy and self-determination are perhaps the most common words used by the states to manipulate and degrade and delimit the rights of a particular group or collective community which is evident from the various international scenarios as a way to avoid state responsibility in the domestic level. In the Peace Accord in 1997 perhaps it was quite unorthodox for a state like Bangladesh that in the domestic sphere she took a very wider and liberal

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<sup>38</sup> See, above note 19, at p. 225. See also, *Special Reference no.1 of 1995*, 47 DLR (AD) 111, where the AD held "...there is no magic in the phrase 'political question'. While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on a issue which may be dubbed as a political question." Are these quotes from judgment, you can't then give them as if your citations.

approach in entrenching the collective rights of a particular region as opposed to the individual rights within that region. In the CHT from centuries it was the rights of the groups as opposed to the individual rights that had been infringed or neglected. Sardonically, the High Court in the CHT case created a misnomer and took a very orthodox approach in declaring *the Regional Council ultra vires to the Constitution and nullifying various other affirmative actions taken by the government in the four legislations and the impugned Acts.*

## **6.2 “LIMITED POWER OF THE COURT” AND THE STRICT CONSTRUCTIONALIST APPROACH**

Through the petitions it was argued that the lack of signatory authority of the representative of the government destroyed the validity of the CHTPA. Furthermore, it was argued that the unitary structure of the state was annihilated by the deletion of the words local government from the Regional Council Act, 1998, by making the HDCs fall outside the boundary of local government, by limiting the right of franchise to the HDCs only to “permanent residents”, by restraining the right to property by enforcing omnibus limitation on transfer without prior permission of the HDC and by giving advantageous support when appointing indigenous peoples.

The fused political, legal and constitutional aspects of the questions raised by the petitions were referred to by the Court, and in outlining

the way out from the 'stagnant' peace process, the Court preferred to be guided by the 'limits on its ability' and due deference to separation of powers.<sup>39</sup> The Court, rather than declaring the CHTPA to be bereft of authority to analyze the Accord, was in view of the debilitation of primary purpose, i.e. end of the conflict.

The execution of CHTPA being signed by the Convenor of the NCCHTA on behalf of the government was challenged as they did not have necessary authority to carry out such an agreement in purview of Articles 145 (1) and 55 (4) of the Constitution and Rule 5, Schedule II of the Rules of Business, supporting that all executive actions, contracts and deeds by the government shall be declared to be made by the President and by persons appointed and manner commanded by him.<sup>40</sup> This argument has been disagreed on various grounds, such as the Convenor having obtained signatory authority under the Rules of Business, the cessation of time, that the CHTPA is not encompassed by Article 145 (1) not being a deed

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<sup>39</sup> See, above note 19, at p. 219.

<sup>40</sup> The petitioners cited a series of cases to substantiate that there cannot be any implied contract with the government, *K. P. Chowdhury v State of Madhya Pradesh*, AIR 1967(SC) 203, that Order of detentions must be signed in name of the President and not the government, *Md. Khair Ahmed v Bangladesh*, 40 DLR 353, in absence of delegation action must be taken in name of the President, *Jn. Md. Saleh Ahmed Khan v Government of Bangladesh and others*, 41 DLR 210 and others including *Seth Bikhraj Jaipuria v Union of India*, AIR 1962 SC 113, *West Bengal v B. K. Mondal and Sons*, AIR 1962 SC 779 and *Mulamchand v State of Madhya Pradesh*, AIR 1968 SC 1218.

or contract, but a political document and referring to the political exigency of the time. The Court characterized the CHTPA as a political pact rejecting the passage of time argument as noted earlier, indeed as 'treaty of peace' providing for enduring peace outside the purview of Article 145 (1). In view of the constitutional vacuum in process formulation and the political constraint involved, the peace process cannot be subjected to a strict constructionist approach. The CHTPA rather than constructing enforceable rights and obligations depends on legislature and executive for its implementation.<sup>41</sup>

### **6.3 “BASIC CHARACTER OF THE CONSTITUTION”**

The Constitution, having no unique status attached to the CHT or any other area and the same set of laws being applicable to the whole territory, it was argued that any special characteristics attached to a specific area bears no significance. The word “area” in the Regional Council Act was said to disintegrate a basic characteristic of the Constitution, the unitariness of the state. The preamble to the Act was argued to be a fraud on the Constitution as it was purportedly completely different in terms of substance and

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<sup>41</sup> *Ibid*, pp. 225-7.

content. The Court accepted the petitioner's argument that any act of RC violative of the constitution would not bring about cessation or separation of the RC by the government frustrating the unitary character of the State.

After an analysis of the *dicta* of *Kudrat-E-Elahi Panir v Bangladesh* (1992),<sup>42</sup> it was found by the Court that the RC to be acquired of all characteristics of a "local government", but without acknowledgement to the effect of its territorial base CHT to be an "administrative unit", thereby a nullity.

It was emphatically argued by the respondents for the CHTs distinct status and the retention of the Regulation. The counter arguments that the RC was a statutory public authority acting as a coordinator of the activities of the HDCs and other local bodies was rejected by the Court. The Court identified the autonomy and devolution in other unitary states for the presence of constitutional provision and in the case of the United Kingdom, the failure of unitary character was observed not to create an obstacle because of the UK Constitution being unwritten.<sup>43</sup> The argument was put forward by the respondents that the enactments resulted in devolution of power and that this was not unprecedented. Such devolution of power

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<sup>42</sup> 44 DLR (AD) (1992) 319.

<sup>43</sup> See, above note 19, pp. 229-35.

does not violate the unitary nature of the State. For example, the United Kingdom is a unitary state and they have a system of devolution of power. This has not undermined their Parliamentary sovereignty or unitary character. However, this argument of the respondents was wrongly disregarded by the Hon'ble High Court in its Judgement.

#### **6.4 SPECIAL PROVISIONS- BACKWARD SECTION**

The Constitutional Framework for Equality enjoins the State to take positive measures for the advancement of persons. The Fundamental Rights chapter of our Constitution as well as the Fundamental Principles of State Policy lay out a broad framework enabling the state to take necessary affirmative action measures. These measures can be contrasted with the equality framework embodied in the Indian Constitution to bring forth the similarities of the schemes and also the departures and their causes. Article 27 of the Constitution of Bangladesh enshrines the principle of "equality before law" while Articles 28 (4) and 29 (3) read together empowers, and in effect, obligates the state for making "special provisions...for the advancement of the backward section of citizens".

The Constitution of Bangladesh does not provide any indicator or criteria for determining the ambit of *backward section* and as such it

may be inferred that the framers of the constitution intended the term to be a broad and flexible one, capable of adaptation according to the needs of the situation.

In Bangladesh, since there is no constitutional specification, unlike India, which has a specific commission, the state has exclusive legislative power to determine who falls within the 'backward section'. The logical inference presupposing the difference in the schemes is that the legislative intent underlying Articles 28(4) and 29(3) was that they were intended to be expansive so as to embrace diverse situations within its ambit. The government can look to available data and statistics or consistent practice or even take steps on the basis of commonly known facts without holding a specific inquiry to identify objective criteria for justifying special measures for backward sections of citizens.

'Human Rights', 'Social Justice', and 'Fundamental Rights' are cornerstones on which our democratic edifice is built upon and the impugned Accord and Acts have been enacted in pursuance of the constitutional commitment of the State to ensure the advancement of 'backward sections' that are historically disadvantaged and discriminated sections of the people, and as such the said Accord and Acts must be harmoniously interpreted with the object of economic, social and political empowerment of all citizens, as laid down in the fundamental principles of state policy. The impact of making special provisions for the advancement of "tribal people" living

in Chittagong Hill Tracts is not limited only to that region, but rather benefits all citizens and the population as a whole, as the state and the polity is thereby enabled to become more inclusive, to recognise the diversity and difference in society and to afford opportunities for all persons, thereby deepening democracy itself and fulfilling the constitutional mandate of equality, which otherwise would remain partial. However, the Hon'ble Court found no merit in this argument.

It was impressed upon the Court the provisions where priority is given to tribal people in Class 2 and 3 employees of a District Council and Police Service are adverse to equality and non-discrimination in public employment as enshrined in Articles 27 and 29 of the Constitution.<sup>44</sup> The Court, on the basis of the **assumption** that the laws in guise of providing for affirmative action actively discriminated against others without benefiting from any objective basis or standard, **struck down** special treatment in case of appointment to certain posts and ranks of the Hill District Councils and Police Force being conflicting with Articles 27, 28 (1), 29 (1) and (2) and 31 of the Constitution.

The empowerment of the concerned Circle Chief by common section 6 to determine whether a person is 'non-tribal' or not was

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<sup>44</sup> See, sections 15 (Kha) and 28 of the Amending Acts applicable to Rangamati and Khagrachari, section 14 (kha) and 27 of the Amending Act applicable to Bandarban.

argued to be inconsistent with Articles 26, 27, 28 (1) and 31 of the Constitution as it purports to discriminate on basis of race. On the other hand, the provision was contended to apply **equally** to tribes and non-tribes since the British Period it has been performed by the Circle-Chiefs the determination of non-tribal status by the Circle Chief was held by the Court to be void due to inconsistency with Articles 28 (1), 29 (1) and 31 of the Constitution.<sup>45</sup>

## **6.5 NO COMMENTS BY THE COURT ON RESTRICTION OF LAND TRANSFER**

The necessity of prior permission of the concerned District Council in purchasing, leasing out and disposing of any land was questioned as being discriminatory and contradictory to the Constitution.<sup>46</sup> The Court referring to the self-restraint and incompetence spelt at the outset of the judgment declined to adjudicate on the restriction of transfer of land, “an admixture of social, economical and political issues couched in terms of individual rights.” Predicting any attempt

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<sup>45</sup> *Ibid.*, pp. 236-7.

<sup>46</sup> It was argued that section 29 of the Amending Act applicable to Rangamati and Khagrachari and section 28 of the Amending Act applicable to Bandarban are repugnant to Articles 36 (Freedom of Movement), 42 (Right to Property), 144 (executive authority of republic shall extend to the acquisition, sale, transfer, mortgage and disposal of property.) read with Article 55 (2) (executive power to be exercised by or on authority of the prime minister)

to interpret the provisions even in a comprehensive manner would be run aground.<sup>47</sup>

## **6.6 CONSTITUTIONALITY OF THE REGIONAL COUNCIL PER SE UNITARY STRUCTURE OF THE STATE**

The Court in holding the Regional Council Act, 1998 to be *ultra vires* the Constitution reached the conclusion that since the Regional Council having all the overtones and undertones of a local government body, its functions in section 22 being co-equal to those mentioned in Article 59 (2) of the Constitution and its territorial base being “purposefully shielded” is a sham on the Constitution.<sup>48</sup> However, it has been specifically mentioned by Section 3(2) of the Regional Council Act, 1998 that the Council is a ‘statutory authority’ - an authority created by a statute having its functions defined in clear terms in Section 22 and thereby attracting the definition of ‘statutory public authority’ in Article 152 (1) of the Constitution. Not having functions of a local government, e.g., it cannot collect local

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<sup>47</sup> See, above note 19, pp. 237-8.

<sup>48</sup> Para 36-7, p. 230-31 *Ranga Reddy District Sarpanches Association & Others Versus The Government of A.P. rep by its Principal Secretary, Panchayat Raj Department & Others*, (2003 AP HC) it was held that, “Adequacy or inadequacy of the powers cannot be gone into unless it is shown that the same offends any provisions contained in any part of the Constitutional scheme. If that which is passed into law is within the scope of the power conferred on a Legislature and violates no restrictions on that power, the law, must be upheld whatever a Court may think of it.”

taxes, nor can it take up itself any project for local development. Hence the Act facilitates better functioning by the local government bodies and promotes purposes of Articles 59 and 60. Even if the contention is taken to have some footing, the Court will give effect to the constitutionality, when there are two possible interpretations one leading to constitutionality and other to unconstitutionality, the doctrine of reading down of a statute has been disregarded by the Court.

Considering the fact that Government is not possessed of the power to dissolve RC if it acts inconsistently with the Constitution, it is the Supreme Court, which is the sole arbiter of constitutionality hence it is not for the Government to decide whether any act is contrary to the Constitution.

The High Court in its Judgment laid down that the RC being already struck down avoiding possibility of the RC encouraging the HDCs to self-determination, on a second line of argument for non-interference with the Amending Acts.<sup>49</sup>

The contention of devolution of power to the RC was rejected by the Court saying that the countries which have been cited have entrenched provision in that regard, but as in present case it was

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<sup>49</sup> See, above note 19, para. 48, p.238

apparent that the Act alleged to create a territorial unit without legal or constitutional sanction. It was stated by the Court that “by sowing the seed of regionalism” CHT might gradually claim to be a federating unit. Justice Shabuddin Ahmed’s finding in the case *Eighth Amendment Case* was referred here by the Court.<sup>50</sup>

*“As to the unitary character of the state, it is clear that in view of the homogeneity of her people having same language, culture, tradition and way of life within a small territory the state has been so organized as a Unitary State by its founding fathers leaving no scope for devolution of executive, legislative and judicial powers on the different regions to turn into Province ultimately.”*

The two crucial features of unitary state are i) supremacy of the central parliament and ii) the absence of subsidiary sovereign bodies. Local authorities in unitary state and state authorities in a federal state are always discoverable. The latter cannot reduce or boost the power of a state. The test of unitary lies in the fact that beneath the central power there are only those authorities which it

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<sup>50</sup> BLD (Special Issue) Vol IXA.

can create or extinguish. (Strong 1975:72).<sup>51</sup> In this respect the dissenting opinion of Justice ATM Afzal in the 8<sup>th</sup> Amendment case is worth mentioning. A.T. M. Afzal J. rejected the doctrine of basic structures on two grounds that it is unthinkable the makers of the constitution did not leave any option to the future generation but decided on all matters for all people. And secondly the makers of the constitution envisaged the so-called 'basic features' to be 'permanent features' of the constitution. He stressed on saying that sub Article (1A) in article 142 provided the procedure of referendum which is more difficult to amend some provisions of the constitution which manifests that no other provision of the constitution is not basic that a referendum is required to be incorporated in the constitution. He feared that majority judgment in the eighth amendment case may be a 'roadblock' for the future.

Categorization of constitutions on basis of their being written or unwritten is ethereal, the nature of UK Constitution being unwritten does not make the constitutionalism less significant there (Strong 1975:58). Although the indigenous people in the Chittagong Hill Tracts (CHT) have historically been subject to oppressive and discriminatory regimes, with the CHT Peace Accord, 1997, they achieved a new basis for staking claims to equality. But, the

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<sup>51</sup> See, that due to devolution and constitutional entrenchment Italy did not forgo its unitary nature.

judgment by the High Court Division of the Supreme Court of Bangladesh against the CHT Peace Accord, 1997 is now at stake.

## **6.7 AFFIRMATIVE ACTION**

In determining the validity of affirmative action, the HCD applied the test of active discrimination; it invaded most of the measures for lack of objectively quantifiable test which is a fundamental characteristic of special measure.<sup>52</sup> The available statistics placed before it in light of the criteria of backwardness formulated by the Ministry of Chittagong Hill Tracts Affairs have been noticed by the Court itself,<sup>53</sup> and confirmed in clear terms that such information 'attest to the backwardness' justifying affirmative action, but imposing rigours of exceptionality and weighing such measures against Articles 26, 27 and 31, *i.e.*, provisions for equality and liberty and any measure in combat should be struck down to the extent of inconsistency.

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<sup>52</sup> See, *Vasanth v State of Karnataka*, A 1985 SC 1495

<sup>53</sup> See, above note 19, para 29, p. 223 and compare to, *AP v. USV Balaram*, AIR 1972 SC 1375, paras. 67, 70, 80, 81 where the Cabinet sub-committee of AP Government included such matters as poverty, low standard of education, low standard of living, place of habitation, and inferiority of education and caste as criteria for determining Backwardness.

Based on a misconceived notion of backwardness, the grounds were attacked by the petitioner and a misconceived notion of proportionality in adjudging such measures was adopted by the Court only with reference to 'autonomy' which is autonomy of individual and liberty which expressly are the greatest hindrance in realising affirmative action.

Though the Court attempted to consider the 'factual matrix', in reality the historical aspect except in reference to the defiance in CHT was not considered in proper light.

## **7 | ENTRENCHED NOTIONAL EXTENSION OF EQUALITY: CONSTITUTIONAL PURVIEW**

The right to equality has been one of the most important rights in the Constitution of Bangladesh. One of the primary promises of the Constitution is that all people would be treated equally before the law, that nobody would be unfairly discriminated against and that people who belonged to groups that had previously been disadvantaged would be the beneficiaries of programs aimed at systematic and thorough historical redress.

However, the right to equality of the indigenous peoples in CHT of Bangladesh is far from good. Discrimination is particularly glaring in the indigenous-inhabited regions. When referring to the indigenous peoples, the Government of Bangladesh appears to generally prefer the term 'tribals' in official documents, although some legal documents of the government also refers to the indigenous peoples as "aboriginals" or "indigenous hillmen" or "indigenous tribes".

The Constitution of Bangladesh does not directly recognise the indigenous peoples of the country. However, the Constitution outlaws

discrimination on grounds of race, religion and place of birth (and sex) and provides scope for affirmative action in favour of the 'backward section of citizens'.

As the history of tension between Bangalis and indigenous peoples illustrates, the latter are often being discriminated against by the state forces in the form of arbitrary arrests or non-cooperation by the police. Indigenous women are also victims of discrimination as customary laws are often unequal in family and inheritance matters<sup>54</sup>.

The CHT residents also suffer from poor realization of their social, economic and cultural rights, in a far greater proportion than the rest of the country's population. Literacy rates are alarmingly low in the CHT, with only 7.8% of the population having completed primary school, and a meager 2.4%, secondary education<sup>55</sup>. Bangladesh's emphasis on a single culture, language and religion orientation does not contribute to the preservation of the indigenous culture, and

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<sup>54</sup> Debasish Kumar Kundu, Mrinmoy Samadder, Ashrafuzzaman Khan, Sharin Shajahan Naomi, "State of Justice in Chittagong Hill Tracts: Exploring the Formal and Informal Justice Institutions of Indigenous Communities", Research Monograph Series No. 44, Dhaka, BRAC, 2011, pp. 14-20 ["State of Justice in CHT"].

<sup>55</sup> Raja Devasish Roy, "Country Technical Notes on Indigenous Peoples' Issues: Bangladesh", March 2010, at p. 13, online: IFAD <http://www.ifad.org/english/indigenous/pub/documents/notes/bangladesh.pdf> [Roy, "Country Technical Notes"]; "State of Justice in CHT", *ibid.*, at p. 22.

traditional languages are not mainly taught in school<sup>56</sup>. In the employment field, the annual average income is lower in CHT than in other districts and the poverty rate is twice the national average, with indigenous populations having a very low occupational diversity<sup>57</sup>. Finally, the region has poor infrastructure and governmental services<sup>58</sup>.

## **7.1 FORMAL EQUALITY VS SUBSTANTIVE EQUALITY**

The first step to reconciling recognition of Indigenous customary law with the principle of equality before the law is to understand the difference between ‘formal equality’ (treating everyone the same regardless of individual circumstances) and ‘substantive equality’ (treating people differently to achieve actual equality).

Equality is premised on the concept of fairness, yet an emphasis on formal equality can in practice serve to create or perpetuate inequality before the law.

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<sup>56</sup>Raja Devasish Roy, Sara Hossain and Dr. Meghna Guhathakurta, “Case study: Access to Justice for Indigenous Peoples in Bangladesh”, Bangkok, UNDP, 2007, at p. 11.

<sup>57</sup> Raja Devasish Roy, “Country Technical Notes on Indigenous Peoples’ Issues: Bangladesh”, March 2010, at p. 13, online: IFAD <http://www.ifad.org/english/indigenous/pub/documents/tnotes/bangladesh.pdf> [Roy, “Country Technical Notes”]; “State of Justice in CHT”, *ibid.*, at p. 22.

<sup>58</sup> Roy et al, *supra* note 3, at p. 10.

## **7.2 WHY SHOULD WE TREAT INDIGENOUS PEOPLE IN CHT DIFFERENTLY TO ALL OTHER BANGLADESHIS?**

There are a number of arguments that support the legitimacy of differential treatment for people in CHT. The imperative of substantive equality is a significant reason for differential treatment and one that can stand alone under both international and National law. Other compelling reasons are that Indigenous people in CHT, as members of a distinct indigenous culture, have the right to the legal protection necessary to allow their culture to survive and flourish;<sup>59</sup> that the bias and disadvantage experienced by indigenous people makes them more unequal than any other social or cultural group in Bangladesh; that Indigenous people in CHT do not access mainstream services at the same rate as other Bangladeshis therefore requiring targeted service provision; that indigenous people suffer such underlying systemic discrimination in the access to justice system that they have become the most disproportionately imprisoned culture in CHT.

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<sup>59</sup> Lokan A, 'From Recognition to Reconciliation: The functions of Indigenous rights law (1999) 23 Melbourne University Law Review 65.

Perhaps the most persuasive argument supporting differential treatment of Indigenous people by recognition of certain customary laws and practices is found in indigenous peoples' unique status as the original inhabitants of CHT.

### **7.3 APPLICATION OF EQUALITY PROVISION IN THE CHTPA JUDGMENT:**

In order to bring equality in the CHT, 'Human Rights', 'Social Justice', and 'Fundamental Rights' are cornerstones on which our democratic edifice built and the impugned Accord and Acts have been enacted in pursuance of the constitutional commitment of the State to ensure the advancement of 'backward sections' that is historically disadvantaged and discriminated sections of the people, and as such the said Accord and Acts must be harmoniously interpreted with the object of economic, social and political empowerment of all citizens, as laid down in the fundamental principles of state policy. The impact of making special provisions for the advancement of "tribal people" living in Chittagong Hill Tracts is not limited only to that region, but rather benefits all citizens and the population as a whole, as the state and the polity is thereby enabled to become more inclusive, to recognise the diversity and difference in society and to afford opportunities for all persons, thereby deepening democracy itself and fulfilling the constitutional mandate of **equality**, which otherwise would remain partial.

Therefore, to decide the validity or constitutionality of the CHTPA substantive conception of equality should have taken by the Court as it attempts to provide substance to the concept of equality. Unlike formal equality, which dictates behaviour through applying rules and procedures consistently, Substantive conception of equality seeks to invest a certain moral principle (namely social redistribution) into the application of equality. This concept of equality manifests itself through a spectrum of policies and legal mechanisms in various jurisdictions. Reverse discrimination, positive discrimination and affirmative action are just a few which have been put forward to represent this concept.

The Substantive conception of equality approach have been disregarded in the CHTPA judgment wherein it has been recognised that the principle of equal treatment sometimes requires different treatment for certain grounds of disadvantage.

Right to equality can be interpreted and applied in a manner that can render them empty vessels, lacking any significant legal impact or substance.<sup>60</sup> At times, equality guarantees in a formal way can actually have counter-productive results; grand constitutional

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<sup>60</sup> Aileen McColgan, *Women Under The Law: The False Promise of Human Rights* (London: Longman, 1999).

statements about the importance of equal treatment can give the impression that all is well with a constitutional system and encourage complacency, even in circumstances where serious inequalities persist in a society and this approach has been taken by our court deciding the validity of the CHTPA.

In the constitution of Bangladesh, the 'Fundamental Principles of the State Policy' is enshrined in Article 14 and can be given effective judicial enforcement reading in the same line of the 'Fundamental Rights' as incorporated in the Constitution. In India there are express provisions for the '**backward section of citizens**' under which the State is duty bound to take affirmative action in favour of that particular section. However in Bangladesh the Hon'ble Court can hold and acknowledge a wider '**margin of appreciation**' for the State (in relation to the legal validity of the CHT Accord 1997 and subsequent legislations) comparing this as an application of Art. 28(4) read with Art. 14, "in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges". Paradoxically, the High Court Division in CHT case failed to appreciate this notional extension of equality, while pronouncing the observation regarding the concept of equality. Equality cannot be confined within the four walls of Article 27 of the Constitution rather the notion of equality has to be submerged with those fundamental principles of state policy as enshrined in Articles 14, 28, 29 so as to give practical momentum of

true sense of equality where within a state there still exists a vulnerable group of people such as indigenous peoples in CHT whose rights can only be elevated through special measures for developing their socio-economic rights with the rest of the population.

**CHART OF RELEVANT ARTICLES ON EQUALITY,  
NON-DISCRIMINATION AND AFFIRMATIVE  
ACTION IN THE CONSTITUTION OF THE  
PEOPLE’S REPUBLIC OF BANGLADESH**

***Constitution of Bangladesh (Articles & their Short Title)***

**Article 14:** *Emancipation of peasants and workers-*

*It shall be a fundamental responsibility of the State to emancipate the toiling masses- the peasants and workers- and **backward sections of the people** from all forms of exploitation.*

**Article 27:** *Equality before law-*

*All citizens are equal before law and are entitled to equal protection of law.*

**Article 28: Discrimination on grounds of religion, etc-**

(1) *The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.*

(2) *Women shall have equal rights with men in all spheres of the State and of public life.*

(3) *No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.*

(4) *Nothing in this article shall prevent the State from making special provision **in favour of women or children** or for **the advancement of any backward section of citizens.***

**Article 29: Equality of opportunity in public employment-**

(1) *There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.*

(2) *No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.*

(3) *Nothing in this article shall prevent the State from –*

**(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;**

**(b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to**

*persons of that religion or denomination;*

*(c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.*

**Article 42: Rights to property-**

*(1) **Subject to any restrictions imposed by law**, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law.*

*(2) A law made under clause (1) shall provide for the acquisition, nationalisation or requisition with compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision in respect of such compensation is not adequate.*

*(3) Nothing in this article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977), in so far as it relates to the acquisition, nationalisation or requisition of any property without compensation.]*

## **8 | POSITIVE STEPS TOWARDS THE RIGHT TO EQUALITY FOR THE INDIGENOUS PEOPLE IN CHT**

The three hill districts<sup>61</sup> Rangamati, Khagrachari and Bandarban are regulated by a legal framework, separate and distinct from the remaining 61 districts of the country, inasmuch as the provisions of Chittagong Hill Tracts Regulation, 1900 provide for application of customary law in family matters by headman, karbaris with provision of appeal to the Circle Chiefs. Alongside this traditional dispute settlement mechanism, there were no regular Civil and Criminal Courts established or operating in the CHT. Instead, the Deputy Commissioner (DC), a civil servant in the administrative branch of the Bangladesh Government, was empowered to hear all civil disputes, except family matters (which were heard by Karbaris, Mauza Headmen and Circle Chiefs). All civil appeals from the decisions of

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<sup>61</sup> In 1984, Rangamati, Bandarban and Khagrachari, the three districts collectively known as the Chittagong Hill Tracts (CHT), were given the status of full districts. Earlier, only Rangamati had the status of a district, while Bandarban and Khagrachari were under Rangamati as Mohokumas (sub-division of a district).

the Deputy Commissioner were heard before the District Court in Chittagong. Magistrate courts were conferred power to hear original criminal cases and the jurisdiction to hear criminal appeals and some original criminal cases was vested upon the Deputy Commissioner.

In 2003, the CHT Regulation, 1900 was amended to allow for the creation of District Courts and Sessions Divisions in the CHT districts, removing jurisdiction from the Deputy Commissioner over civil matters, but retaining the Mauza Headmen and Circle Chiefs jurisdiction over family matters for indigenous persons. The CHT Regulation (original) further provided for the application of the Code of Criminal Procedure, 1898 (CrPC), the Penal Code of 1860 and the Evidence Act of 1872 in the CHT. It excluded the application of the Code of Civil Procedure, 1980 (CPC) to the CHT.

Section 26 of the Nari o Shishu Nirjatan Daman Ain, 2000 provided for setting up of special tribunals in each District of Bangladesh, essentially drawing up CHT under its area of application. However, no steps were taken by governments between 2003 and 2006 to establish the Civil Courts or Nari o Shishu Nirjaton Tribunals in the region.

In 2006, BLAST filed a public interest litigation (PIL) before the High Court Division of the Supreme Court of Bangladesh, seeking implementation of the CHT Regulations as amended in 2003, and specifically seeking directions for the establishment of civil courts in

the region. On 24 February 2008, the High Court gave a judgment directing the Government to establish the Court of District Judge (DJ) and Joint District Judge (JDJ), also to operate as Sessions Courts, in all three hill districts. The Court further directed the Government to establish Nari o Shishu Nirjaton Domon (Suppression of Violence against Women and Children) Tribunals in all three Hill districts. Though a petition for leave to appeal against the judgment is pending in the Appellate Division (CP 1791 of 2009), the Appellate Division has not yet granted leave nor stayed implementation of the High Court order. In June 2008, the Government issued the gazette notification for establishment of District Courts in each district. In July 2008, the Courts became operational in each of the three districts in the CHT.

The High Court had earlier affirmed in *Ibrahim v Ratan Chandra Nath*, 13 BLC (2008) 349, that in view of Regulation No. 4(2) of the CHT Regulation, the CPC is not applicable in the CHT. However, in 2008, in *BLAST v Bangladesh*, 61 DLR (2009) 109, the High Court observed that pursuant to the CHT Regulation (Amendment) Act, 2003 the three Hill Districts, namely Rangamati, Khagrachari and Bandarban, shall apply the civil and criminal procedure in the same way as it is applied and implemented in other 61 districts of Bangladesh.

These two decisions containing possibly contradictory orders form the basis for much of the current disputes about the application of the

CPC, though the CHT Regulation itself excludes application of the CPC in the CHT.

## 9 | CONCLUSION

Most of the indigenous people of the CHT region in Bangladesh viewed the Peace Accord as a positive approach towards the right to equality for them and thus the accord was a welcome relief from the 20 years of continuing hostility and attacks on the indigenous people in that part of our country.

Equality is the most fundamental non-derogable human rights law as well as one of the basic rights which is widely recognised by the Constitution of Bangladesh. The right to equality and non-discrimination means that no individual should be discriminated against on the basis of any distinction, such as race, sex, religion, political opinion, disability, sexual orientation, national origin or any other status and also every person must have the opportunity to enjoy his or her basic human rights on an equal basis with others along with all individuals must be protected from discrimination through effective laws and policies.

The result of failing to prevent discrimination implies that some individuals or groups do not have the same opportunities to participate in society as others (i.e. the indigenous people in the CHT).

This will quite often lead to — or further contribute to — inequality, poverty and social exclusion. Social and economic justice is one of the predominant features to achieve civil and political rights. All individuals and groups must henceforth be adequately protected against discrimination. Therefore, the right to equality requires governments to take positive steps to ensure that disadvantaged people or groups do not continue to be marginal place holders within the socio-legal strata. For this reason, it may not be discriminatory to treat people differently in order to assist or advance a person or group of persons who are disadvantaged because of discrimination, lack of socio-economic incentives which ought to be provided by a state. Thus, the justiciability and synchronization in taking certain initiative through the CHT peace Accord for the indigenous people in the CHT, such as: (i) the devolution of power to the Hill District Councils, Regional Councils and the CHT Ministry as the units of self-government in the CHT; (ii) the establishment of a land commission to deal with conflicts over land and natural resource rights; (iii) recognition of the cultural integrity of the indigenous peoples and the CHT as a 'tribal' area, and, finally, (iv) the withdrawal of military forces from CHT and the decommissioning and rehabilitation of the Jana Samhati Samiti (JSS) forces in order to ensure their substantive equality in its adjective reality is a prerequisite for a viable egalitarian polity. Socio-economic rights should not be a mere rhetoric rather for a generic society sometimes distribution of wealth should be given preference to those who are marginalised within the society for a longer period.

To recapitulate this idea, while discussing the ‘problem’ of the constitutionality of the CHTPA in light of the CHT judgment by the Hon’ble High Court Division, is attributed mostly to the absence of constitutional entrenchment. But as realised from the study, had the CHTPA been constitutionally entrenched these questions would have been still mooted. The questions would be then couched in different texture: either the amendment itself would be called into question or constitutionalisation of the rights would have been the issue.

The problem as identified throughout the paper lies in the attitude and notion of just, rights and equality, the problem is rooted in the mind exposed to individual autonomy and equality which is often seen to gain a voice at the end of the day. Along with this, the Courts’ stand to interfere or not to interfere in given situations, where it has full discretion, is a practice that lacks precision and is not comprehensible to objective standards.

From the trends of development it may be seen that Courts take a liberal approach while enforcing rights to customary offices, but when it comes to land or special representation or devolution, the findings partake a different contour.

Peace Accords can be negotiated, imposed, encountered, but a normative approach if adopted in any situation would provide a favourable outcome. The stand of CHTPA is to an extent unique in

contemporary Peace Accords as it is not backed by Constitutional Entrenchment, but an emphasis is needed on the fact that it is not introducing any radical change, the peace process was accommodated in form of agreement and transformed into legislation.

Reading in between lines of the Constitution, it is apparent that indigenous rights and equality could be accommodated for within the Constitutional framework. The standard resides in affording “contemporary protection to rights” considered as to their substance as envisioned in realisation of “progress of a maturity”, translated into local terms pursuing a normative approach ‘in keeping with the progressive aspirations of mankind.’

At the end regarding the establishment of Courts of the District and Sessions Judge and Joint District and Sessions Judge in the Chittagong Hill Tracts has led to increased access to justice and that is helping to make the people of the CHT to achieve more equality. The geographic location of the new courts, in each of the three districts within the Hill Tracts instead of in the city of Chittagong, is an improvement, as is the administration of justice by judicial officers trained in the law rather than executive officers. However, much work still needs to be done to ensure effective access to justice to people in the area.



**ANNEX 1: TRANSLATED ENGLISH  
VERSION OF THE AGREEMENT BETWEEN  
THE NATIONAL COMMITTEE ON  
CHITAGONG HILL TRACTS**



**CONSTITUTED BY THE GOVERNMENT  
AND  
THE PARBATYA CHATTAGRAM JANA SAMHATI SAMITI**

Reposing full and unswerving allegiance in the State-sovereignty and territorial integrity of Bangladesh regarding its hill tracts region within the ambit of the Constitution of the People's Republic of Bangladesh, the National Committee on Chittagong Hill Tracts on behalf of the Government of the People's Republic of Bangladesh and the Parbatya Chattagram Jana Samhati Samiti on behalf of the inhabitants of the Chittagong Hill Tracts region have reached the following Agreement, comprised of four Parts (A, B, C, D), with a view to upholding the political, social, cultural, educational and economic rights of all the citizens of the Chittagong Hill Tracts region and expediting their socio-economic development process and preserving and developing the respective rights of all the citizens of Bangladesh:-

**(A) GENERAL:**

1. Both the parties, having considered the Chittagong Hill Tracts region as a tribe-inhabited region, recognized the need of preserving the characteristics of this region and attaining the overall development thereof.
2. Both the parties have agreed to make alter, amend and add to, in consonance with the consensus and responsibilities expressed in the

different section of this Agreement, the relevant laws, regulations and practices according to law as early as possible.

3. In order to monitor the process of implementation of this Agreement, an Implementation Committee will be formed with the following members:
  - a) A member to be nominated by the Prime Minister:  
Convenor
  - b) The Chairman of the Task Force formed with the Purview of this agreement: Member
  - c) The President of the Parbatya Chattagram Jana Samhati Samiti:  
Member
  
4. The Agreement shall come into force from the date of its signing and execution by both the parties. This Agreement shall remain valid from the date of its effect until all the steps are executed as per this Agreement.

**(B) HILL DISTRICT LOCAL GOVERNMENT COUNCIL/HILL DISTRICT COUNCIL:**

Both the parties have agreed to alter, amend, add to and repeal the Parbatya Zilla Sthanio Sarkar Parishad Ayin, 1989 (Rangamati Parbatya Zilla Sthanio Sarkar Parishad Ayin, 1989, Bandarban Parbatya Zilla Sthanio Sarkar Parishad Ayin, 1989 and Khagrachari Parbatya Zilla Sthanio Sarkar Parishad Ayin, 1989) and its various sections, as may be in

force till the date of commencement of this Agreement, in the manner set forth here under:

1. The word "Tribe" used in the various sections of the Council Act shall remain intact.
2. The name of "Parbatya Zilla Sthanio Sarkar Parishad" shall be amended and this Council shall be re-named as "Parbatya Zilla Parishad".
3. "Non-tribal Permanent Resident" shall mean a person who is not a tribal and who has lands of lawful entitlement in the hill districts and who generally lives in the hill districts at a specific address.
4. a) There shall be 3 (three) seats for women in every Hill District Council. One third (1/3) third (1/3) of these seats shall be for the non-tribals.  
  
b) Sub-section 1, 2, 3 and 4 of section 4 shall remain in force as per the original Act.  
  
c) The words "Deputy Commissioner" and "Deputy Commissioner's" appearing in the second line of sub-section (5) of section 4 shall be substituted by the words "Circle Chief" and "Circle Chief's" respectively.  
  
d) The following sub-section shall be added to section 4: "Whether a person is a non-tribal or not and, if so, which community he is a

member of, shall be determined, subject to his producing a certificate from the concerned Mouza Headman/Union Council Chairman/Municipality Chairman, by the concerned Circle Chief and without a certificate in this connection being received from the Circle Chief, no person shall be eligible as a non-tribal to be candidate for the post of a non-tribal member".

5. It is provided in Section 7 that a person elected to the post of Chairman or Member shall, before assumption of office, swear or affirm oath before the Commissioner, Chittagong Division. This shall be amended by provisions to the effect that the Members shall swear or affirm oath before "a Judge of the High Court Division" instead of the "Commissioner, Chittagong Division".
6. The words "to the Commissioner, Chittagong Division" appearing in the fourth line of section 8 shall be substituted by the words "as per election rules".
7. The words "three years" in the second line of Section 10 shall be substituted by the words "five years".
8. It shall be provided in Section 14 that in the event of the post of Chairman falling vacant for any cause or of his absence, a tribal member elected by other members of the Council shall preside over and discharge other responsibilities.

9. The existing Section 17 shall be substituted by the following sentences:  
"A person shall be entitled to be considered as legally eligible for enlistment in the Voters' List if he is (1) a citizen of Bangladesh, (2) not below 18 years of age, (3) not declared by any competent court to be of unsoundly mind, (4) a permanent resident of the hill district.
  
10. The words "delimitation of constituencies" appearing in sub-section 2 of Section 20 shall be distinctly incorporated.
  
11. There shall be a provision in sub-section 2 of Section 25 to the effect that the Chairman and in his absence, a tribal Member elected by the other Members shall preside over all the meetings of the Council.
  
12. Since the entire area of Khagrachari district is not encompassed by the Mong Circle. the words "Khagrachari Mong Chief" appearing in Section 26 of the Act regarding Khagrachari Hill District Council shall be substituted by the words "Mong Circle Chief and Chakma Circle Chief". Similarly, there shall be made a scope for the attendance of the Bohmang Chief in the meetings of Rangamati Hill District Council. In the same manner there shall be provision that the Bohmang Circle Chief, at his will or on being invited, shall be entitled to attend the meetings of Bandarban Hill District Council.
  
13. It shall be provided in sub-section (1) and (2) of Section 31 that a Chief Executive Officer of the rank of a Deputy Secretary to the

government shall be the Secretary of the Council and the tribal officers shall be given preference for appointment to this post.

14. a) There shall be provision in sub-section (1) of Section 32 that the Council shall be competent, subject to approval by the government, to create posts of officers and employees of different categories for the purpose of smooth completion of the works of the Council.

b) Sub-section (2) of the Section 32 shall be formulated in the following manner "The Council shall, as per Regulations, have competence to appoint Class-III and Class-IV employees and to transfer, suspend, dismiss, remove or otherwise punish them.

Provided that it shall be the condition attached to such appointments that the tribal residents of the district concerned shall have right of preference".

c) It shall be provided in sub-section (3) of Section 32 that the Government shall, as per Regulations, have the authority to appoint officers in consultation with the Council and to transfer elsewhere, suspend, dismiss, remove or otherwise punish them.

15. The Words as per Rules shall be inserted in sub-section (3) of Section 33.

16. The words "or in any other way determined by the Government" appearing in the third line of sub-section (1) of Section 36 shall be deleted.
  
17. a) The provision starting with "Fourthly" in sub-section (1) of Section 37 of the original Act shall remain intact.  
  
b) The phrase "as per as" shall inserted in clause 'D' of sub-section (2) of Section 37.
  
18. Sub-section (3) of Section 38 shall be deleted and sub-section (4) shall be formulated as follows: "At any time before the expiry of a financial year, a budget may be prepared and approved, if necessary, for that financial year".
  
19. The following sub-section shall be added to section 42: "(4) The Council shall be competent to prepare, undertake and implement, with the help of money receivable from the Government, development projects in respect of the matters transferred to it and all development programs at national level shall be implemented through the Council by the concerned Ministry / Department / Institution".
  
20. The word "Government" appearing in the second line of sub-section (2) of Section 45 shall be substituted by the word "Council".

21. Sections 50, 51 and 52 shall be repealed and in their stead the following Section shall be enacted: "In order to ensure harmonization of the activities of the Council advice or instructive orders, if necessary, if the Government be convinced on having received such evidence that any activity done or proposed to be done by or on behalf of the Council is inconsistent with law or contrary to public interest, it shall then have the authority to call for in writing from the Council information and explanation about the matter concerned and give advice or directive in that regard.
22. The words "after the expiry of the period of being defunct" in Sub-section (3) of Section 53, shall be deleted and instead thereof the words "Within 90 days of cancellation of the Council" shall be inserted before the words "this Act".
23. The word "Government" will be replaced by word "Ministry" in the third and fourth lines of Section 61.
24. a) Sub-section (1) of Section 62 shall be amended as follows:  
"Notwithstanding anything contained in any other law for the time being in force, Sub-Inspectors and all members of ranks subordinate thereto of the Hill District Police shall be appointed by the Council as per Regulations and prescribed procedure and the Council shall be competent to transfer them and take punitive action against them in accordance with the procedure prescribed by the Regulations;

Provided that, the tribals of the district shall have preference in case of the said appointment.

- b) The words "subject to the provisions of all other laws for the time being in force" as appear in the second line of sub-section (3) of Section 62 shall be replaced and substituted by the words "as per law and rules".

25. The words "to render assistance" in the third line of Section 63 shall remain intact.

26. Section 64 shall be amended and enacted as follows:

- a) "Notwithstanding anything contained in any other law for the time being in force, no land and premises, including the leasable Khas lands, within the territorial limits of the Hill Districts shall be transferable by Ijara, settlement, purchase or sale except with the prior permission of the Council;

Provided that this provision shall not be applicable in respect of the area of Reserved Forest, Kaptai Hydro-electric Project, Betbungia Satellite Station, State-owned in the industries and factories and the lands recorded in the name of the Government".

- b) "Notwithstanding anything contained in any other law for the time being in force, No land, hill or forest under the controlled and within

the jurisdiction of the Council shall be acquired or transferred by the Government without consultation with or the consent of the Council.

c) The Council may supervise and control the works of the Headmen, Chainmen, Amins, Surveyors, Kanungos and Assistant Commissioner (land).

d) The reclaimed fringe lands of Kaptai Lake shall be leased out on priority basis to the original owners.

27. Section 65 shall be amended and formulated as follows: "Notwithstanding anything contained in any other law for the time being in force, the responsibility of collecting the Land Development Tax of the district shall rest in the hands of the Council and the collected tax of the district shall be deposited in the fund of the Council."

28. Section 67 shall be amended and formulated as follows: "in the event of necessity for harmonization of the works of the Council and the Governmental authorities, the Government or the Council shall raise proposals on specific subject and the harmonization of the works shall be effected through mutual communications between the Government and Council".

29. Sub-section (1) of Section 68 shall be amended and formulated as follows: "With a view to carrying out the purposes of this Act, the Government may, upon consultation with the Council, make Rules

through Notification in the Government official Gazette and the Council shall have a rights to apply to the Government for review of the said Rules even after they are already made".

30. a) The words "with prior approval of the Government" in the first and second lines of Sub-section (1) of Section 69 shall be repealed and after the words "may make" in the third line the following proviso shall be added:

"Provided that if the Government does not agree with any part of the Regulations made, it shall be competent to give advice or directive to the Council towards amendments of the said regulations".

- b) The words "conferment of the powers of the Chairman on any officer of the Council" in clause (h) of sub-section (2) of Section 69 shall be deleted.

31. Section 70 shall be deleted.

32. Section 79 shall be amended and formulated as follows:

"If, in the opinion of the council, any law made by the National Parliament or any other authority as applicable to the hill district is one which creates hardship for the said district or is objectionable for the tribals, the Council may, upon stating the cause of hardship or abjection, apply to the Government in writing for amending or relaxing the application of such law and the Government may take remedial measures in accordance with such application".

33. a) The word "discipline" appearing in Item No. 1 under the heading the activities of the Council in the First Schedule shall be substituted by the word "supervision".
- b) In Item No. 3 of the Council's activities, the following shall be added:  
"(1) Vocational education, (2) Primary education through mother tongue, (3) Secondary education".
- c) The words "reserved or" appearing in Clause 6(b) of the Council's activities shall be deleted.
34. The following subjects shall be included in the functions and the responsibilities of the Hill District Council:
- a) Land and land management;
  - b) Police (local);
  - c) Tribal law and social justice;
  - d) Youth welfare;
  - e) Environmental protection and development;
  - f) Local tourism;
  - g) Improvement Trust and other institutions concerning local administration, other than Municipality and Union Council;
  - h) Issuing license for local commerce and industries;
  - i) Proper utilization of rivers and streams, canals and Beels and irrigation system other than water resources of the Kaptai Lake;
  - j) Maintaining of the statistics of birth and deaths;
  - k) Wholesale business;

l) Jum cultivation.

35. The following items shall be added to the subjects for imposition of taxes, rates, tolls and fees by the Council as stated in the Second Schedule:

- a) Registration fees of non-mechanical transports;
- b) Tax on buying and selling of commodities;
- c) Holding tax on lands and buildings;
- d) Tax on selling of domestic animals;
- e) Fees for community adjudication;
- f) Holding tax on Government and Non-government industries;
- g) A specified part of the royalty on forest resources;
- h) Supplementary Tax on Cinema, Jatra and Circus;
- i) Part of the royalty received by the Government against granting Licenses or Pattas for the exploitation of mineral resources;
- j) Tax on business;
- k) Tax on lottery;
- l) Tax on catching Fish.

**(C) CHIITAGONG HILL TRACTS REGIONAL COUNCIL:**

1. Subject to amendment and addition of the various sections in the Parbatya Zilla Sthanio Sarkar Parishad Ayin, 1989 (Act IXX, XX and XXI of 1989) for purpose of making the Hill District Council more powerful and effective, a Regional Council will be formed comprising the Local Government Councils of three Hill Districts.

2. The elected Members of the Hill District Councils shall, by indirect mode, elect the Chairman of this Council whose status shall be equivalent to that of a State Minister and who shall be a tribal.
  
3. The Council shall consist of 22 (twenty-two) Members including the Chairman. Two third of the Members shall be elected from amongst the tribals. The Council shall determine the modality of its functioning. The constitution of the Council shall be as follows:

Chairman	1 person
Member	12 persons
Member (tribal female)	2 persons
Member	6 persons
Member (non-tribal female)	1 person

Of the male tribal Members, 5 shall be elected from the Chakma tribe, 3 from the Marma tribe, 2 from Tripura tribe, 1 from the Murung and Tanchangya tribes and 1 person from amongst the Lusai, Bowm, Pankho, Khumi, Chak and Khiang tribes.

Of the male non-tribal Members, 2 persons shall be elected from each district.

Of the female tribal Members, 1 person shall be elected from the Chakma tribe and another from the rest of the tribes.

4. There shall be reserved 3 (three) seats for the women in the Council and one third (1/3) thereof shall be for the non-tribals.
5. The Members of the Council shall, by indirect mode, be elected by the elected Members of the three Hill District Councils. The Chairman of the three hill districts shall be ex-officio Members of the Council and they shall have right to vote. The qualification and disqualification of candidature for membership of the Council shall be similar to those of the Members of the Hill District Councils.
6. The tenure of office of the Council shall be 5 (five) years. The procedure and other matters regarding the preparation and approval of the budget of the Council, dissolution of the Council, framing of the Rules of the Council, appointment and control of the officers and employees, etc. shall be similar to the procedure and other matters as are applicable to the Hill District Councils.
7. There shall be the Council, a Chief Executive Officer of the rank equivalent to that of a Joint Secretary to the Government and the tribal candidate shall be given preference for appointment to this post.
8. a) If the post of Chairman of the Council falls vacant, one person from amongst the other tribal members shall be, by indirect mode, elected Chairman for the interim period by the Members of the three Hill District Councils.

- b) If the post of a Member of the Council falls vacant for any reason, it shall be filled up by by-election.
9. a) The Council shall coordinate all the development activities carried out by the three Hill District Councils, and shall also superintend and harmonize all the affairs of and assigned to the three Hill District Councils. Besides, in the event of lack of harmony or any inconsistency being found in the discharge of responsibilities given to the three Hill District Councils, the decision of the Regional Council shall final.
- b) This Council shall coordinate and supervise the Local Council, including the municipalities.
  - c) The Regional Council shall coordinate and supervise the three hill districts in matters of general administration, law and order and development.
  - d) The Council shall coordinate the activities of the NGOs in addition to disaster management and carrying out the relief programs.
  - e) Tribal law and community adjudication shall be within the jurisdiction of the Regional Council.
  - f) The Council shall be competent to grant License for heavy industries.

10. The Chittagong Hill Tracts Development Board shall discharge the assigned duties under the general and overall supervision of the Council. The Government shall give preference to the eligible tribal candidates in appointing the Chairman of the Development Board.
11. The Chittagong Hill Tracts Regulation of 1900 and other related Acts, Rules and Ordinances being found inconsistent with the Local Government Council Acts of 1989, it shall be removed by law as per advice and recommendations of the Regional Council.
12. Until the formation of the Regional Council through direct and indirect election, the Government shall be competent to constitute an interim Regional Council and to empower it to discharge the responsibilities of assignable to the Council.
13. In making any law in connection with Chittagong Hill Tracts, the Government shall enact such law in consultation with and as per advice of the Regional Council. If it becomes necessary to amend any law which bears an adverse effect on the development of the three hill districts and welfare of the tribal people or to enact new law, the Council shall be competent to apply or submit recommendations to the Government.
14. The sources of the Council Fund shall be as follows:
  - a) Money received from the District Council Fund;

- b) Money or profits received from all the properties vested in or managed by the Council;
- c) Loans and grants from the Government and other authorities;
- d) Grants given by any institution or person;
- e) Profits earned from the investments of the Council Fund;
- f) Any money received by the Council;
- g) Money received from other sources provided to the Council as per direction of the Government.

**(D) REHABILITATION, GENERAL AMNESTY AND OTHER MATTERS:**

In order to restore normalcy in the Chittagong Hill Tracts region and, to that end, in respect of the works and matters of rehabilitation, general amnesty and allied issues, both the parties have been arrived at the following consensus and agreed to undertake programs as follows:

1. With a view to bringing the tribal refugees staying in the Tripura State of India back to the country, an agreement was signed on the 9th day of March,'97 at Agartala of Tripura State between the Government and the Leaders of tribal refugees. In pursuance of that Agreement, the tribal refugees started coming back to the country since 28th day of March,'97. This process shall remain un-hindered and to that end all possible cooperation shall be given from the end of the Jana Samhati Samiti. After ascertaining the identity of the Internally Displaced Persons of the three hill districts, rehabilitation measures shall be undertaken through a Task Force.

2. After the signing the Agreement between the Government and the Jana Samhati Samiti and implementation thereof and rehabilitation of the tribal refugees and internally displaced tribals, the Government shall, as soon as possible, commence, in consultation with the Regional Council to the constituted under this Agreement, the Land Survey in Chittagong Hill Tracts and finally determine the land-ownership of the tribal people through settling the land-disputes on proper verification and shall record theirs land and ensure their rights thereto.
3. In order to ensure the land-ownership of tribal families having no land or lands below 2 (two) acres, the Government shall, subject to availability of land in the locality, ensure settling 2 (two) acres of land per family. In the event of non-availability of required land, grove-lands shall be tapped.
4. A Commission (Land Commission) shall be constituted under the leadership of a retired Justice for settlement of disputes regarding lands and premises. This Commission shall, in addition to early disposal of land disputes of the rehabilitated refugees, have full authority to annul the rights of ownership of those hills and lands which have been illegally settled and in respect of which illegal dispossession has taken place. No appeal shall be maintainable against the judgement of this Commission and the decision of this Commission shall be deemed to be final. This provision shall be applicable in case of Fringe-lands.
5. This Commission shall be constituted with the following Members:

- a) Retired Justice;
  - b) Circle Chief (concerned)
  - c) Chairman/Representative of the Regional Council;
  - d) Divisional Commissioner/Additional Commissioner;
  - e) Chairman of the District Council (concerned).
6. a) The tenure of office of the Commission shall be three years. But its tenure shall be extendible in consultation with the Regional Council.
- b) The Commission shall resolve the disputes in consonance with the law, custom and practice in force in the Chittagong Hill Tracts.
7. The loans which were taken by the tribal refugees from Government agencies, but could not be properly utilized on account of the state of belligerency, shall be remitted along with interest.
8. Land allocation for rubber and other plantation: Out of the lands allotted to non-tribal and non-local persons for rubber and other plantations, the lease (allocation) in respect of the lands of those who did not undertake any project during the last ten years or did not properly utilize the lands shall be cancelled.
9. The Government shall allocate additional finance on priority basis for the implementation of increased number of projects towards developments in the Chittagong Hill Tracts. The Government shall implement new Project on priority basis for the construction of required infrastructure for

the development of the region and shall allocate necessary finance to this end. Keeping in view the environment of this region, the Government shall encourage the development of tourism facilities for the tourists, indigenous and foreign.

10. Quota reservation and stipend grant: The Government shall maintain the quota system for the tribals in respect of government service and in institutions for higher studies until their attainment of parity with other regions of the country. To the aforesaid end, the Government shall grant increased number of stipends for the tribal male and female students in the educational institutions. The Government shall provide necessary scholarships for higher education and research in foreign countries.
11. The Government and the Elected Representatives shall strive to uphold the characteristics of tribal creed and culture. The Government shall patronize and help the cultural activities of the tribes towards their efflorescence at national level.
12. The Jana Samhati Samiti shall, within 45 (forty five) days of the signing of this Agreement, submit lists of all its members to the Government including the armed ones, and the particulars of arms and ammunitions in its possession and within its control.
13. The Government and the Jana Samhati Samiti shall, within 45 (forty-five) days of the signing of this Agreement, jointly determine the date,

time and place for deposit of arms. After the determination of the date and place for deposit of arms and ammunitions of the listed members of Jana Samhati Samiti, all sorts of security shall be provided for the return of the members of Jana Samhati Samiti as per list also of their family members to normal life.

14. The Government shall declare amnesty for those members who will deposit arms and ammunitions on the scheduled date. The Government shall withdraw all those cases which were lodged against them.
15. In the event of any person's failing to deposit arms within the specified time limit, the Government shall take legal action against such a person.
16. A general amnesty shall be given to all the members of the Jana Samhati Samiti after their return to normal life and a general amnesty shall also be given to all the permanent inhabitants connected with the activities of the Jana Samhati Samiti.
  - a) For the purpose of rehabilitating the returning members of the Jana Samhati Samiti, Taka 50,000/00 per family shall be given at a time.
  - b) After deposit of arms and return to normal life of all such members, including the armed ones, of the Jana Samhati Samiti against whom cases were filed, warrants of arrest were issued, 'hulias' were published or sentence was given on trial in absentia, as against them

all cases shall be withdrawn, warrants of arrest and 'hulias' shall be called back and sentence given in absentia shall be remitted as early as possible. If any member of the Jana Samhati Samiti is in Jail, he too shall be set at liberty.

- c) Similarly, after deposit of arms and return to normal life, no case shall be filed against or punishment be given to or arrest be made of any person merely on account of his/her being a member of the Jana Samhati Samiti.
- d) The loans which were taken by such members of the Jana Samhati Samiti from Government Banks and Establishments, who could not have utilized such loan properly on account of the state of belligerency, shall be remitted with interest.
- e) Those of the returned members of the Jana Samhati Samiti, who were previously in the service of the Government or of government organizations shall be reinstated to their respective posts and the members of the Jana Samhati Samiti and members of their families shall be given employment in accordance with their qualification. In this respect, government policy regarding relaxation of age-bar for them shall be followed.
- f) Priority shall be given to the members of the Jana Samhati Samiti in giving bank loans on simple terms with a view to helping their self-

employment generating activities such as cottage industries, horticulture, etc.

g) Education facilities shall be provided to the children of the members of the Jana Samhati Samiti and their certificates obtained from foreign Boards academic Institutions shall be treated as valid.

17. a) After the signing and execution of the Agreement between the Government and the Jana Samhati Samiti and immediately after return of the members of Jana Samhati Samiti to normal life, all the temporary camps of the army, the Ansars and the Village Defence Party (VDP), excepting the Border Security Force (BDR) and permanent army establishment (being those three at the three district headquarters and those at Alikadam, Ruma and Dighinala), shall be taken back by phases from Chittagong Hill Tracts to permanent cantonments and the time-limit shall be fixed for its purpose. In case of deterioration of the law and order situation, in time of normal calamities and for similar other purposes, Army Forces may be deployed under the authority of the civil administration in adherence to Law and Rules as are applicable to all the other parts of the country. In this respect, the Regional Council may, in order to get the required or timely help make requests to the appropriate authority.

b) The lands and premises abandoned by the cantonments, the camps of the military and para-military forces shall be make over to their real owners or to the Hill District Councils.

18. Against all the posts of officers of all ranks and employees of different classes in government, semi-government, local government and autonomous bodies of the Chittagong Hill Tracts, the permanent dwellers of the Chittagong Hill Tracts shall be appointed, subject to priority being given to the tribals. But, in case of non-availability of a qualified person among the permanent dwellers of Chittagong Hill Tracts for any post, appointment may be made to such post on deputation from the Government or for a definite period.
  
19. A ministry on Chittagong Hill Tracts shall be established on appointing a Minister from among the tribals. The following Advisory Committee shall be constituted to lend support to this Ministry:
  - 1) The Minister on Chittagong Hill Tracts;
  - 2) The Chairman/Representative, Regional Council;
  - 3) The Chairman/Representative, Rangamati Hill District Council;
  - 4) The Chairman/Representative, Khagrachari Hill District Council;
  - 5) The Chairman/Representative, Bandarban Hill District Council;
  - 6) The Member of the Parliament, Rangamati;
  - 7) The Member of the Parliament, Khagrachari;
  - 8) The Member of the Parliament, Bandarban;
  - 9) The Chakma Raja
  - 10) The Bohmong Raja
  - 11) The Mong Raja
  - 12) Three non-tribal Members nominated by the Government from amongst the permanent residents of the three hill districts.

This Agreement is prepared in the aforesaid manner in Bengali language and executed and signed in Dhaka on Agrahayan 18, 1404 corresponding to December 2, 1997.

On Behalf of the Government of Bangladesh  
the People's Republic of Chittagong Hill Tracts

Sd/Illegible

**(Abul Hasanat Abdullah)**

Convenor

National Committee on Chittagong

Hill Tracts, Government of  
Bangladesh

Sd/Illegible

**(Jyotirindra**

**Larma)**

President

Parbatya Chattgram Jana  
Samhati Samiti

**Bodhipriya**





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VDM Verlagsservicegesellschaft mbH

Heinrich-Böcking-Str. 6-8  
D - 66121 Saarbrücken

Telefon: +49 681 3720 174  
Telefax: +49 681 3720 1749

info@vdm-vsg.de  
www.vdm-vsg.de





