Land Dispute Resolution in the Chittagong Hill Tracts
Caught between Liberalism and Legal Pluralism

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ABSTRACT

This thesis highlights how the indigenous people (*Jummas*) in the Chittagong Hill Tracts (CHT), Bangladesh survived with their distinct identity despite land and resource alienation over a century. This survival makes the CHT a field of legal pluralism, where the *Jumma* land title and community ownership has retained space competing with state imposed discriminatory laws. I argue that the state law regime in the CHT is based on the hegemony of Bangalee nationalism rather than legal pluralism. The ineffectiveness of the Land Dispute Resolution Commission for over a decade is directly linked to the non-recognition of legal pluralism and a bias for assimilation.

The state is systemically depriving the *Jummas* from their land and resources and relying on liberalist claim of autonomy and equal worth of citizens for justification. Given the legal and constitutional framework of the country the pluralistic claims of the *Jummas* for control over land and resources are always weighed against these principles. Therefore, the study assesses what the state has to offer for legal pluralism operating within a liberal framework. By analyzing different tenets of liberalism the study concludes that liberalism can at best offer a lesser form of legal pluralism; as it avoids recognition of collective rights at any cost. Collective rights are central to the *Jumma* land tenure and identity. Therefore, the thesis does not suggest any definitive steps for placing *Jumma* land rights within the liberal framework. Rather it stresses for a dialogue between the two separate national identities and legal traditions in the context of historical deprivation of the *Jummas*.

Résumé

Cette thèse souligne la façon dont la communauté indigène (*Jumma*) dans les monts de Chittagong (Chittagong Hill Tracts – CHT), au Bangladesh, a maintenu une identité distincte malgré l'aliénation des terres et des ressources de ses membres durant plus d'un siècle. La survie de cette identité fait des CHT un champ de pluralisme juridique, où le titre foncier et la propriété communautaire *jumma* ont conservé un espace qui est en concurrence avec des lois discriminatoires imposées par l'État. J'argumente que le régime législatif de l'État appliqué dans les CHT est fondé sur l'hégémonie du nationalisme bangladais plutôt que sur le pluralisme juridique. L'inefficacité de la Commission des règlements des différends territoriaux, en anglais (LDRC) est directement liée à la non-reconnaissance du pluralisme juridique et à une tendance à l'assimilation, durant plus d'une décennie.

De façon systémique, l'État prive les *Jumma* de leurs terres et ressources sous prétexte d'instaurer l'autonomie et l'égalité du droit selon l'idéologie libéraliste. Compte tenu du cadre législatif et constitutionnel du pays, les revendications pluralistes des *Jumma* pour le contrôle de leurs terres et ressources sont toujours soupesées contre ces principes. Ainsi, cette étude évalue ce que l'État peut offrir pour que le pluralisme juridique opère dans un cadre libéral. Par l'analyse des différents principes du libéralisme, cette étude conclut que le libéralisme peut, tout au mieux, offrir une forme atténuée de pluralisme juridique, comme elle évite la reconnaissance des droits collectifs à n'importe que

prix. Les droits collectifs sont au cœur de l'occupation des terres et de l'identité des *Jumma*. Ainsi, cette thèse ne suggère aucune mesure définitive pour inclure les droits fonciers de *Jumma* dans le cadre libéral. En revanche, elle insiste sur la nécessité d'un dialogue entre les deux identités nationales distinctes et les traditions juridiques dans le contexte de privation historique des *Jumma*.

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LIST OF ABBREVIATIONS

AD	Appellate Division
BLC	Bangladesh Law Chronicles
BoR	Board of Revenue
CHT	Chittagong Hill Tracts
CHTDB	Chittagong Hill Tracts Development Board
CHTLAR	Chittagong Hill Tracts (Land Acquisition) Regulation
CHTPA	Chittagong Hill Tracts Peace Accord
DC	Deputy Commissioner
FA	Forest Act
FAA	Fifteenth Amendment Act
FSO	Forest Settlement Officer
GoB	Government of Bangladesh
HCD	High Court Division
HDC	Hill District Council
IDP	Internally Displaced Persons
ILO	International Labor Organization
IP	Indigenous People
LDRCA	Land Dispute Resolution Commission Act
MoCHTA	Ministry of Chittagong Hill Tracts Affairs
PAIC	Peace Accord Implementation Commission
PCJSS	Parbotyo Chattogram Jana Samhiti Samiti

PF	Protected Forest
PM	Prime Minister
RC	Regional Council
RCA	Regional Council Act
RHDCA	Rangamati Hill District Council Act
RF	Reserved Forest
SB	Santi Bahini
SDO	Sub-divisional Officer
UNCERD	United Nations Convention Against Elimination of All Forms of Racial Discrimination
UNDRIP	United Nations Declaration on Rights of Indigenous People
USF	Unclassed Social Forest

Chapter One: Introduction

The Chittagong Hill Tracts (CHT), Bangladesh is inhabited by thirteen indigenous people collectively termed as the *Jummas* for their dependence on swidden (*jum*) cultivation.[1] An area composed of dotted valleys and hills, the CHT is readily distinguishable from the plains of Bangladesh.[2] Except for the commonality of *jum* farming these thirteen indigenous people are different in their ethnicity, language, culture and religion. In popular narrative they are often distinguished as *paharis* (hill men) from the Bangalees (plainsmen who speak Bangla). Apart from life style, land management pattern and language *Jummas* differ from the predominantly Muslim plainsmen inasmuch as they follow Hinduism, Buddhism, Christianity and Animalism. The land regime in the plains is based on private ownership and inheritance. The transfer and disposal of land is regulated by written law, either religious or state law. In contrast, the *Jummas* enjoy individual rights over homestead and *jum* land and collective rights of extraction in common land, but the ultimate ownership of the land belongs to the

[1]These thirteen groups are *Bawm*, *Chak*, *Chakma*, *Khumi*, *Khyang*, *Lusai*, *Marma*, *Mro*, *Pangkhua*, *Tanchangya, Murung, Khasi* and *Tripura*. Section 2 of the Chittagong Hill Tracts Regional Council Act, 1998 (Act No. XII of 1998) does not include the *Murungs* and the *Khasis* [*RCA*].

[2]The CHT is situated in the south eastern corner of the Bangladesh bordering the hill areas of the Burma (Myanmar) and India and the plain land of the Chittagong District in the west. At the time of division of the British India in 1947 the *Jummas* preferred joinder to India than Pakistan. Because Pakistan was established on Islamic ideology and had nothing to offer to the *Jummas* compared to the secular India. But the CHT was awarded to the then East Pakistan (now Bangladesh) because of its dependence on the plains of the Chittagong District and for equal distribution of natural resources. For more see Amena Mohsin, *The Chittagong Hill Tracts, Bangladesh: on the Difficult Road to Peace* (London: Lynne Rienner Publishers, 2003) at 16-19 [Mohsin, "Road to Peace"] and Abul Barkat *et al*, *Socio Economic Baseline Survey of Chittagong Hill Tracts* (Bangladesh: HDRC, 2009) at 2. For the geographical loaction of Bangladesh in the Indian subcontinent and the CHT in particular, see Appendix-A at 129.

community as a whole. The land tenure is based on oral tradition and the community decides on the management and disposal of land.

For these differences between the Bangalees and the *Jummas* the CHT enjoyed special designation under the colonial rulers and in the pre-independence Pakistan regime until 1964 when the special constitutional status was receded. This special designation was *partly* aimed at regulating Bangalee in-migration and protecting the *Jummas* from majority cultural encroachment.[3] Since the British were more interested in revenue generation than protecting the *Jumma* rights, this designation had the effect of segregating the CHT form the rest of the country. Consequently, the *Jummas* were deprived from any participation in the political or public sphere.[4] Therefore, in independent Bangladesh the *Jummas* claimed both special constitutional recognition of their distinct identity and regional autonomy, which were denied by the Bangalee leaders.[5] This denial led to the unification of the *Jummas* under the leadership of Manabendra Narayan Larma in the name and style of *Parbotyo Chattogram Jana Samhiti Samiti* (PCJSS) in 1972. In 1976 the *Santi Bahini* (SB), an armed wing to the PCJSS was formed which started an armed insurgency movement against the Government of Bangladesh (GoB).

The counter insurgency strategy of the GoB involved militarization of the region and state sponsored settlement of 400,000 Bangalees in the CHT to reduce the *Jummas* into an ethnic minority in their own land. After a series of

[3]Willem Van Schendel, "The Invention of the 'Jummas': State Formation and Ethnicity in the Southeastern Bangladesh" (1992) 26:1 Modern Asian Studies 95 at 110 (JSTOR).
[4]*Ibid* at 114.
[5]Anu Mohammad, "Problems of Nation and the State: Parbotyo Chattogram" in Subir Bhaumik *et al*, eds, *Living on the Edge: Essays on the Chittagong Hill Tracts* (Kathmandu: South Asia Forum for Human Rights, 1997) 1 at 3.

negotiations the GoB was able to put an end to the insurgency by signing the Chittagong Hill Tracts Peace Accord (*CHTPA*) in 1997 with the PCJSS. By the time the *CHTPA* was signed land and resource alienation became the most pressing issue in the discourse of ethnic conflict in the CHT. This is so because in the course of government sponsored settlement multiple titling in favor of the Bangalees was created in the lands already owned and possessed by the *Jummas*.

The *CHTPA* had several short term and long term arrangements for dealing with land dispute, e.g., rehabilitation of refugees, cancellation of illegal leases, strengthening of the *Jumma* governance; and setting up a land commission for adjudicating disputes. Pursuant to the *CHTPA* the CHT Land Dispute Resolution Commission (the Commission) was established and formalized by the Land Dispute Resolution Commission Act in 2001.[6] Unfortunately, in a period of more than a decade the Commission has been unable even to initiate land dispute resolution.

The Commission has failed to reverse the history of land and resource alienation of the *Jummas* over a century carried out in four main phases: i) during the British Period through state appropriation of the *Jumma* common land and introduction of private ownership, ii) dislocation of 100,000 *Jummas* during the Pakistan regime due to submersion of land caused by a development program, iii) with the government sponsored settlement of the Bangalees in the independent

[6]See Act No. LIII of 2001 [*LDRCA*]. The title to the official English translation of the Act is "The Land Dispute Settlement Commission Act". For the sake of clarity this thesis will refer to the state sponsored migration and allocation of land in favor of the Bangalees as "settlement" and settlement of land dispute as "dispute resolution".

Bangladesh and militarization; and iv) after signing of the *CHTPA* through land grabbing, continued land acquisition; and militarization.[7]

The first research question for this thesis is based on the reason for this ineffectiveness, i.e., whether the failure of the Commission in resolving land disputes is a result of denial of legal pluralism in the CHT? I answer this question in affirmative. Based on this answer I pursue the second question, i.e., what is the place of legal pluralism within the liberal democratic framework of Bangladesh?

By legal pluralism I mean the existence of more than one legal order in the same social field where the law applicable on ground is decided through conflict between different normative orders. For example, in the CHT land laws applicable to the rest of the Bangladesh apply, some of the laws have taken elements of the customary law of the *Jummas* and the *Jummas* retain their collective ownership and management of land. The tenets of these separate legal norms exist together through interaction and conflict. Liberalism allows individuals to pursue different (*plural*) ways of life but on the premise of *equality* of all with regard to the right to life, liberty and property.[8] Departure from this rule is allowed only if there is no harm to the rights or interests of another.

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[7]For an account of continued land alienation of the *Jummas* in the CHT see, Mohsin, "Road to Peace", *supra* note 2 at 24-30. See also, Rajkumari Chandra Kalindi Roy, *Land Rights of the Indigenous people of the Chittagong Hill Tracts, Bangladesh* (Copenhagen: International Working Group on Indigenous Affairs, 2000) at 107-35; Raja Devashish Roy, "The Land Question and the Chittagong Hill Tracts Accord" in Victoria Tauli Corpuz *et al,* eds, *The Chittagong Hill Tracts: the Road to a Lasting Peace* (Philippines: Tebtebba Foundation, 2000) online: ProPDFSearch <http://propdfsearch.com> at 4-8 [Roy, "Land Question"] and Raja Devasish Roy, "The Population Transfer Program of the 1980s and Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts" in Subir Bhaumik *et a*l, *supra* note 5, 167 [Roy, "Population Transfer"].

[8]I agree to Merquior that "[i]t is far easier-and wiser-to *describe* liberalism than to attempt a short definition" [emphasis in original] and for this I use liberalism in this descriptive manner in the thesis. See J. G. Merquior, *Liberalism: Old and New* (US: Twayne Publishers, 1991) at 1.

Accommodating legal pluralism in the CHT will mean allowing the *Jummas'* to retain the *right to* a separate land base, which apparently contradicts the liberal principle of equality for all. The thesis will try to assess the nature and extent of this contradiction.

Till date the *Jummas* in the CHT or any other indigenous community in Bangladesh living in the plains have not been recognized as "indigenous", they are lumped together as "tribes", "minor races" or "ethnic sects and communities".[9] In this study I refer to the *Jummas* as indigenous people (IP) because they have a "historical continuity with pre-colonial society", they have been reduced to "non-dominant" portion of a larger society; and they intend to preserve their ancestral territories and identity.[10]

The thesis is based on both primary and secondary sources. The former includes statutes, jurisprudence, international conventions, and administrative decisions. Secondary sources include empirical works on the CHT in forms of books, journals, human rights reports and also theoretical writing on legal pluralism and liberalism. As the thesis could not be supplemented by field work, studies involving field work has been considered to fill in the gap between official records and the situation on the ground.

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[9]See art 23A of the Constitution of the People's Republic of Bangladesh. There are at least 47 communities of indigenous people in Bangladesh. The thirteen communities are concentrated in the CHT and the others are dispersed in the northern and southern districts of the Bangladesh as small pockets within the predominant Bangalee community. See *A Brief Account of Human Rights Situation of the Indigenous People in Bangladesh* (Thailand: Asian Indigenous Peoples Pact, 2007) at 7.

[10]See Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (New York: UN, 1986).

The thesis is divided into three substantial chapters. Chapter II highlights the existence of legal pluralism in relation to land and resources in the CHT. Starting from the British period to the present time the successive regimes in course of conflating the *Jumma* land customs and weakening the traditional authorities had to commit long term and short term changes to the state law. This signals the existence of legal pluralism, where competing sources of law shape the law on the ground by interaction and conflict with each other. By analyzing the provisions of the *LDRCA* the chapter concludes that the reason of stagnation of land dispute resolution in the CHT is the failure to address the nuances of legal pluralism. Without giving the *Jumma* law its due place in official dispute resolution there are probability of legalizing Bangalee settlement in the name of justice.

Chapter III shows how Bangalee nationalism has been applied to marginalize the *Jummas* by examining legislative and counter-insurgency policy, judicial decision, signing of the *CHTPA* and choices made for acceding to international obligations. The chapter concludes that the state has actively pursued a policy of Bengalization of the CHT, but the *Jummas* in course of protesting the alienation and deprivation has formed their own competing identity based on collective right over land and resources. This leads us to Chapter IV where the study evaluates how these competing identities fit in within the constitutional framework of Bangladesh.

In Chapter IV the thesis notes that the claims of the *Jummas* are generally required to satisfy the constitutional principle of equal rights of all citizens since

Bangladesh follows a liberal democratic framework at least in theory. Therefore, the study assesses what the state has to offer for legal pluralism operating within a liberal framework. By analyzing different tenets of liberalism the study concludes that liberalism can at best offer a lesser form of legal pluralism, as it avoids recognition of collective rights at any cost. Collective rights are central to the *Jumma* land tenure and identity. The thesis does not suggest any definitive steps for placing the *Jumma* land rights within the liberal framework. Rather it stresses for a dialogue between the two separate national identities and legal traditions in the context of the deprivation of the *Jummas*.

Chapter Two:
Legal Pluralism and Land Dispute Resolution

This chapter is divided into two broad sections. In the first section, the chapter argues that the narrative of legal pluralism in the CHT only addresses the formalization and circumscription of the *Jumma* customary law in the CHT. But legal pluralism in the CHT lies in a broader context, precisely in the fact that the *Jumma* customary law and institutions are still valued by the people and they use their traditional law to pressurize the GoB to change the state law in accordance with the *Jumma* law. In the second section the chapter argues that the *LDRCA* has failed to appreciate the nuances of these competing claims and being based on a state centric model it has failed to address the disputes arising out of legal pluralism.

A. Nature of Legal Pluralism in the CHT

In the following three parts this section will highlight: *first*, the institutionalization of traditional authorities and the official administration in the CHT in colonial and post-colonial period, *second*, the popular narrative of legal pluralism which focuses on imposition of state law over the *Jummas* through institutionalization and legal pluralism in a broader context; and *third*, the competing rights over land to show how in the blind spot of the popular narrative of legal pluralism the *Jummas* are exerting pressure over the GoB to revise its legal position.

I. Colonial and Postcolonial Institutionalization in the CHT

Despite being a tributary to the British rulers since 1787 the CHT was governed by the indigenous *Rajas* (king/chief) with mostly decentralized administration system.[11] The loosely formalized administrative structure among the *Jummas* varied from one group to another and had more or less three tires. At the lowest level were the *paras* (villages) governed by locally elected village chief or elder. Next to that were the *taluks* consisting several *paras* of the same *goza* (clan) under the authority of the *dewans* and their subordinate *khisas* for revenue collection. At the highest level the *Rajas* held land on behalf of the people of their respective territories.[12] In 1860 during the annexation of the CHT to the then Bengal the power of the *Rajas* and other traditional authorities were left unaltered. The first significant change was made in 1884 by dividing the CHT into three administrative circles resembling to the territory of the Chakma, Bohmong and Mong *Rajas* who had control over the entry points of the CHT.[13] These three *Rajas* were designated as the Circle Chiefs and all other traditional authorities including small chiefdoms were made subordinate to them. Land not belonging to any individual, i.e., the customary common land of the *Jummas* was taken under

[11]For more on the British annexation of the CHT, see Mohammad, *supra* note 5 at 4; Raja Devasish Roy, "Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of Chittagong Hill Tracts, Bangladesh" (2004) 21:1, Ariz J Int'l & Comp Law 113 at 117 [Roy, "Juridical Pluralism"] and Kalindi, *supra* note 7 at 38-42.
[12]See Kalindi, *supra* note 7 at 55 and Roy, "Juridical Pluralism", *supra* note 11 at 124-25.
[13]Willem van Schendel, Wolfgang Mey & Aditya Kumar Dewan, *The Chittagong Hill Tracts: Living in a Borderland* (Thailand: White Lotus Press, 2000) at 28; Kalindi, *supra* note 7 at 42. Schendel, Mey & Dewan observed that the traditional authorities were based on kinship rather than control over the land. Kalindi viewed this observation as misconceived as the *Jummas* had clear division of boundaries for each tire of administration and tax system based on such delimitations. In her opinion this view of *Jummas* not having control over land was advanced by the colonial rulers to deprive them from their ancestral land, see Kalindi, *supra* note 7 at 58.

government control. They were regarded as public land known as *khas* land in the plain.[14]

In 1900 the *CHT Regulation*[15] with the Rules thereof (collectively called the CHT Manual) was passed to reframe the administrative, judicial and legislative nomenclature of the CHT. Only the laws specified in the Schedule applied to the CHT and that also subject to necessary modification and non-repugnancy to the Manual (Regulation 4).[16]

The *CHT Regulation* in effect introduced a diarchy in the administration system with formalization of traditional authorities and topping them by bureaucratic officers. No regular court was set up in the CHT. Rather the entire CHT was considered to be a district for civil, criminal, revenue and general purposes and was placed under the control of the Deputy Commissioner (DC).[17] The Divisional Commissioner of the Chittagong Division also enjoyed original jurisdiction over criminal matters as a Sessions Judge (Regulation 8). Although jurisdiction over family, petty crimes and customary matters resided with traditional authorities, their power continued to diminish with time as the state run administration flourished.[18] The three Chiefs were reduced to an advisory board to

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[14]Kalindi, *supra* note 7 at 61-82 and Raja Devashish Roy, *Land and Forest Rights in the Chittagong Hill Tracts, Bangladesh* (Nepal: International Centre for Integrated Mountain Development, 2002) at 15 [Roy, "Land and Forest Rights"].

[15]Act No. I of 1900 [*CHT Regulation*].

[16]When Part III of the Government of India Act, 1935 came into force the CHT was considered as a "totally excluded area" under s 91 of the Act and the Government had to make a gazette notification under s 92 of that Act for application of new laws in the CHT. From that point Regulation 4 was no longer effective in the eyes of law [*GoIA*].

[17]See the *CHT Regulation*, *supra* note 15, rr 5 & 7. Under r 17 any decision made by the DC can be revised by the Commissioner and the Government can revise any decision taken under the Regulation.

[18]Kalindi, *supra* note 7 at 32.

the DC with the power of supervision over the formalized traditional authorities (Rule 38).

During the Pakistan regime significant constitutional changes were brought which arguably diminished the special status of the CHT.[19] In independent Bangladesh the Constitution attached no regional designation to the CHT. In 1983 the designation of the CHT as a district in its entirety was altered by dividing it into three hill districts, namely, Rangamati, Khagrachari and Bandarban.[20] The local government institutions in the three hill districts like other parts of Bangladesh included the union council at the bottom, topped by the sub-district council and municipal council, respectively. In the process of negotiating autonomy and peace with the *Jummas* in the counter-insurgency period the GoB formed various hybrid institutions. The Chittagong Hill Tracts Development Board (CHTDB) was established in 1973 for adopting development policies but was run under the control of Bangalees. The Hill District Councils (HDC) for Rangamati, Khagrachari and Bandarban were set up in 1989 which failed to satisfy the claim for autonomy over resources of the *Jummas*.[21] Therefore, to better ensure representation of the *Jummas* in the local institutions and control over resources the *CHTPA, 1997* provided for strengthening of the HDCs; setting up a Regional Council (RC), a separate Ministry for the CHT to be known as the Ministry of Chittagong Hill Tracts Affairs (MoCHTA), a three member Peace

[19]The CHT was regarded as a "totally excluded area" in the 1956 Constitution of Pakistan and "tribal area" in the 1962 Constitution. But the 1964 Constitution of Pakistan denied any special status to the CHT. See Roy, "Juridical Pluralism", *supra* note 11 at 118.
[20]Schendel, *supra* note 3 at 96.
[21]The HDCs were established under the Rangamati, Khagrachari and Bandarban Hill District (Local Government) Council Act, 1989 (Act Nos. XIX, XX, and XXI of 1989).

Accord Implementation Committee (PAIC); and the Land Dispute Resolution Commission.

The HDCs are different from the regular local government bodies because of the majority representation given to the indigenous people. The RC enjoys supervisory power over the HDCs and consultative authority with other local government bodies and the GoB. These representative bodies were given limited control over land and resources, but the GoB is yet to empower them.[22] Although it was agreed that the MoCHTA will be assigned to a *Jumma* minister it is still under the control of the Prime Minister (PM).[23] The Commission has failed to gain trust of the *Jummas* for the arbitrary and single handed decision of the Bangalee Chairman. While these hybrid institutions could not function due to the non-devolution of power, the state control was further assured by setting up of regular courts in the CHT in 2008.[24] Run with formal adjudication system these state courts have gained more acceptance among the Bangalee settlers compared to their indigenous counterparts.

As evident, the bureaucratic offices functioning from the colonial period, formalized traditional authorities, special local bodies having *Jumma* majority, implementation and monitoring bodies, formal and traditional dispute resolution all apply concurrently in the CHT. But in absence of clearly defined function and

[22]See Shapan Adnan & Ranjit Dastidar, *Alienation of the Lands of Indigenous Peoples in the Chittagong Hill Tracts of Bangladesh*, (Bangladesh: CHTC & IWGIA, 2011) at 20-22 and Kalindi, *supra* note 7 at 34.
[23]Roy, "Juridical Pluralism", *supra* note 11 at 126.
[24]The Chittagong Hill Tracts Regulation Amendment Act, 2003 (Act No. XXXVIII of 2003), s 8.

retention of power by the GoB, both *de jure* and *de facto* superior authority lies with the government.

II. Legal Pluralism in the CHT

The CHT is governed by multiple layers of administrative authorities and multiplicity of laws originating from traditional and non-traditional sources. Therefore, for the "presence in a social field of more than one legal order"[25] it can be said that the CHT represents a situation of "legal pluralism". It is a contrast to legal centralism, where the state as the only source of law commands uniform law for all citizens and is governed by a single set of institutions.[26] Taking this state centric view, the CHT exists as a 'hybrid space' within the otherwise 'uniform' legal structure of Bangladesh.[27] This "hybrid space" is the continuation of the colonial legacy, which was created by imposing state law on top of *partially* recognized indigenous authorities.[28] Commentators have often identified the prevailing legal and administrative structure in the CHT with legal pluralism:

> The CHT is an example of a legally and juridically pluralistic system. Legal pluralism exists on account of the *concurrent application of customary, regional, and national laws to the region*. Juridical pluralism is reflected through such matters as the *co-existence of traditional and state courts*, based upon different

[25]John Griffiths, "What is Legal Pluralism?" (1986) 24 J Legal Pluralism 1 at 1 (HeinOnline). See Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27:2 JL & Soc'y 296 (JSTOR) where he argues that the study of 'multiple legal orders' in a social field addresses multiplicity of one basic phenomenon, i.e., law and therefore, cannot be free from an *a priori* definition of law. Without such prior conception whatever is regarded as law by sufficient people having conviction will qualify as law. Since this definition does not fix any content of law, legal pluralism in this sense will encompass different phenomenon going by the name of law.

[26]Griffiths, *supra* note 25 at 3.

[27]To term the CHT as a 'hybrid space' is not to deny the existence of legal pluralism in the rest of Bangladesh, but it has been used to distinguish between the 'uniform' administrative structure elsewhere except in the CHT.

[28]Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (New York: Cambridge University Press, 2012) at 13.

> traditions of justice, litigation procedure, penal and reform systems, restitution and compensation processes, and so forth.[29]

In relation to land and resources this "concurrent application" finds meaning in "coexistence and parallel operation" of the formal laws applicable to the whole Bangladesh (e.g., The Forest Act, 1927), formal laws applicable only to the CHT (e.g., the *CHT Regulation*); and the customary laws of the *Jummas*.[30] Raja Devashish Roy also finds the administrative structure of the CHT to be pluralistic for combining "traditional, bureaucratic, and elective regional authorities" with "separated and sometimes concurrent responsibilities."[31] It is often stressed that this redundancy or assertion of authority by multiple bodies leads to a nuanced negotiation of power among the communities holding different claims and as such it is conducive to legal pluralism.[32] But in absence of clear division of power among the authorities and withholding devolution of power to the representative bodies as in case of the CHT; this redundancy or plurality can only generate *problems*.[33]

Notably, the narrative of "legal pluralism" is focused on administration of 'state law' with reference to the difference of the laws applicable to the CHT from the rest of the country. Customary law is discussed only to the extent that it has been formalized, limited or so to say "recognized" by the state. Chiba calls this

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[29]For example, Roy, "Juridical Pluralism", *supra* note 11 at 127 [emphasis added].
[30]Adnan & Dastidar, *supra* note 22 at 44.
[31]Roy, "Juridical Pluralism", *supra* note 11 at 125.
[32]Berman, *supra* note 28 at 236-37. The Chakma Chief Raja Devashish Roy has expressed similar opinion about multilayered administration in the CHT for he believes simultaneous exercise of jurisdiction by different authorities will ensure check and balance, see Mohsin, "Road to Peace", *supra* note 2 at 61.
[33]*Ibid*.

state law and state sanctioned customary law together as "official law".[34] This 'togetherness' or 'pluralism' depends on the state for both its validity and functioning, which Griffiths has named "weak legal pluralism". In situations of weak legal pluralism the state "implicitly" commands different laws for different groups as a "technique of governance on pragmatic grounds".[35] This command is implicit because the group law or customary law in question does not originate from the state, rather from their own independent sources, e.g., divine source, kinship etc. As law or state cannot readily depart from the factual heterogeneity or legal pluralism, a "messy compromise" is made through formalizing some of the "customary" laws on basis of an *a priori* recognition. This weak legal pluralism is allowed to function on a pragmatic ground until the heterogeneous population gets completely assimilated in the process of homogenous nation building.[36]

According to Chiba a field of legal pluralism or the "whole structure of law" goes beyond state law and covers all regulations which are regarded as law by people governed under their respective cultures. These regulations or laws coexist and interact with each other in harmony or conflict.[37] Therefore, apart from official law, the whole structure of law also involves unofficial law and legal postulates. Unofficial laws are laws not sanctioned by any authority but based on group consensus which is sanctioned through practice.[38] Among the group consensuses only those which some way influence the effectiveness of the official

[34]Masaji Chiba, "Introduction" in Masaji Chiba, ed, *Asian Indigenous Law: In Interaction with Received Law* (London: KPI, 1986) 1 at 5-6 [Chiba, "Introduction"].
[35]Griffiths, *supra* note 25 at 5.
[36]*Ibid* at 7-8.
[37]Chiba, "Introduction", *supra* note 34 at 4.
[38]*Ibid* at 5-6.

law are regarded as unofficial law. Legal postulates on the other hand are value principles attached to official or unofficial law which found or justify those laws.[39] It may be any idea, e.g., sovereignty of the state over its territorial jurisdiction or any culture or norm that holds a clan together, e.g., community ownership.

Legal postulates of both official and unofficial law compete with each other as they support different legal systems. Therefore, legal pluralism is the "normative heterogeneity" arising from the self-regulation of multiple "semi-autonomous social fields" and the law which actually applies to a given situation is "[t]he result of … competition, interaction, negotiation, isolationism and the like".[40] Chiba believes while complete consonance among the postulates of official and unofficial law cannot be expected, every polity has to arrive at a minimal degree of consonance for preservation of its national identity. [41]

It is the identity postulate of a legal culture that allows the group to accommodate in changing circumstances, whether triggered by internal or external stimuli. In any case the identity postulate works as the determining force

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[39] *Ibid* at 6-7.

[40] Griffiths, *supra* note 25 at 39. "Semi-autonomous social fields" are self-regulating small social fields creating internal mode of compliance and they are subject to interference from wider social matrix at the same time. Therefore these social fields are the sources of law on their own and in relation to other fields as well and they replace the state as the only source of law. For more see Sally Falk Moore, "Law and Social Change: The Semi-autonomous Social Fields as an Appropriate Subject of Study" (1973) 7:4 JL & Soc'y 719 (HeinOnline).

[41] Chiba, *supra* note 34 at 7-8. According to Griffiths any view on legal pluralism which starts from the premise of how the state deals with normative heterogeneity is misplaced and will only add to the study of legal centralism, see Griffiths, *supra* note 25 at 12. Although the starting premise of Chiba's theory is the state, it actually views the interaction between the heterogeneities from the perspective of both the state and group identity. His insistence on concepts like "legal structure" and "legal identity" makes the theory apparently rigid, but it is helpful in explaining situations similar to the CHT.

to limit or promote the community's choice as to how or to what extent it will accept or reject the factors of the competing legal system.[42] It has been noticed that with the passage of time many aspects of the *Jumma* life including customary law and their application have seen changes. These changes were driven by factors both internal and external to the tradition.[43]

The existing narrative of legal pluralism in the CHT only covers official law in complete disregard of the unofficial law and legal postulates. But it is the latter two which actually regulate the interaction between separate legal systems and act towards constant conflict and reshaping of them. As opposed to this weak form, pluralism proper means the existence of normative order outside of the laws recognized as official law. This involves a wide variety of law that state considers as being opposed to morality or non-existent, in other words, laws that are "[m]orally or ontologically not recognized".[44] For example, the criminal law of the *Jummas* is not recognized for presumably moral grounds. Similarly, the existence or validity of most of the customary land rights is not recognized. The legal pluralism in the CHT in effect lies in those unrecognized parcels of law which exist independent of state recognition. For the existence of those laws the *Jummas* consider the *khas* lands as their own. The legal narratives on the CHT continue to emphasize and reemphasize that the *CHT Regulation only partially* recognized some of the customary rights. But it is for the unofficial law of

[42]See Masaji Chiba, *Legal Pluralism: towards a General Theory through Japanese Legal Culture* (Japan: Tokai University Press, 1989) at 60-67 [Chiba, "Legal Pluralism"].
[43]Roy, "Juridical Pluralism", *supra* note 11 at 114.
[44]Griffiths, *supra* note 25 at 6.

common ownership and the underlying legal postulate of the *Jumma* identity that the state is being compelled to make newer compromises.

Hence, Griffiths' famous quote "[l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion."[45] In purely pluralistic understanding state law can never fully exclude other laws and there can be no "retreat from hybridity".[46] "Accordingly, instead of insisting on a single set of authoritative norms, we can direct our attention to a more comprehensive investigation of how best to mediate the hybrid spaces where normative systems and communities overlap and clash."[47]

III. Problems of Weak Legal Pluralism in the CHT

The CHT is no exception to Griffiths' observation that the resultant state of affairs of weak legal pluralism is dissatisfactory, complex and regarded as problematic by everyone. Based on a two pronged division of the problems identified by Griffiths the following section of the thesis will highlight the problems of weak legal pluralism in the CHT. *First*, the authority of the traditional chiefs has been diminished by selective recognition of customary laws and offices, and subordinating them in the state legal order. *Second*, as most of the *Jumma* laws are based on oral tradition and custom, the state either conflated or flouted them as their "validity and content" did not match the operative rules of the state legal system.[48] In the second part I address land regulation in the CHT

[45]Griffiths, *supra* note 25 at 4.
[46]Berman, *supra* note 28 at 57.
[47]*Ibid.*
[48]Griffiths, *supra* note 25 at 7.

starting from the British period because those colonial formulations of customary laws are operative as of date and are crucial to the understanding of the land dispute.

a. The State Law has Weakened the Traditional *Jumma* Authorities

During colonization the role of traditional authorities was curtailed at least in two respects: *firstly*, by selective recognition of some of the traditional authorities and limiting their jurisdiction; and *secondly*, making the traditional authorities subordinate to the government officials. Historically, different groups among the *Jummas* had different governing patterns. The *CHT Regulation* imposed a uniform homogenized administration system resembling to traditional institutions of certain groups making other institutions bereft of authority. The CHT Regulation only recognizes the Circle Chiefs for the three administrative circles and headmen for each *mauza*, the lower tire of the administration.[49]

Despite non-recognition the office of the *karbari* in the lowest tire of the administration, i.e., the *para* or the village survived and is governed by traditional norms. The *karbaries* are selected from among the villagers by the *Raja* directly or upon recommendation by the headmen and is responsible for the matters relating to the village. On the other hand, the offices of the headmen and *Rajas* were placed at the disposal of state officials. The headman/woman is responsible for revenue collection, resource management and maintenance of peace in his/her

[49]Going back to the traditional institutions the *karbaries* were the traditional village elders, the *muaza* headmen can be compared to the Marma or Tripura *rauza* or clan chief and the Circle chiefs were the three most significant paramount chiefs or *Rajas* at the time of annexation. See, Roy, "Juridical Pluralism", *supra* note 11 at 113, n 1. The erstwhile *dewans* of the *taluks* were replaced by the *mauza* headmen. See, Kalindi, *supra* note 7 at 55.

mauza and is subordinate to the DC, sub-divisional officers (SDO) and the Chief (Rule 38). The DC appoints the headmen in consultation with the Chief and can remove him from office on grounds of incompetence or misconduct after a reference to the Chief.[50] The investiture of the *Rajas* is done by the DC as well (Rule 48). The Chiefs were reduced to an advisory council from autonomous rulers. They were given the function of enforcing administrative orders of the DC in their respective circles, supervising the headmen; and working for spreading education, improving the health and material condition of the residents (Rule 38). Through the formalization of traditional authorities the *Jumma* justice and resource administration system was weakened and the supremacy of the state over land, resources and general administration was established. Therefore, the *CHT Regulation*, the operational framework that "recognized" the customary law, "circumscribed" it at the same time.[51]

Coming to the dispute resolution system the *CHT Regulation* provided the Chief and the headmen jurisdiction over customary issues and divested them from civil or criminal cases unless empowered otherwise (Rule 40). Surprisingly, even today most of the issues relating to customary law are resolved before the village councils under the *karbaries* which do not enjoy any designation under the

[50]Although the DC is not bound by the suggestions of the Chief in relation to the appointment, it is usual to follow the recommendation of the Chief. See Roy, "Juridical Pluralism", *supra* note 11 at 124-125. The office of the headmen is not hereditary, but a competent candidate in male decent is often accepted (r 48).

[51]Roy, "Juridical Pluralism", *supra* note 11 at 119 and Raja Devashish Roy, "Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts" (1992) 1:1 *Land: A Journal of the Practitioners, Development & Research Activists* 4 at 11. [Roy, "Land Rights"]. Commenting on the institutionalization of the traditional offices in the South Africa in the colonial period Klug observed, "[t]his imposed a system of patronage and political dependency, simultaneously undermining community governance and reshaping the role of traditional authorities in the political process". See, Heinz Klug, "Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law" (1995) 35 J Legal Pluralism 119 at 120.

official law. Decisions are taken on basis of consensus, where no consensus is reached or where the dispute involves members of different villages the dispute is referred to the headmen.[52]

Dispute resolution in the *Jumma* tradition is a process of mediation between parties based on oral testimony. Written evidence is almost entirely absent from the proceedings.[53] Written records of the decision are not maintained by the *karbaries* or headmen. Elaborate written records are kept only when an appeal is brought before the Chiefs, which is a rare case. Taking this into view the *CHT Regulation* provided only for *viva voce* examination of the parties by the DC and for witness examination only in exceptional cases. No lawyers were allowed in the region, the provision existing till date has lost its significance over time (Rule 11).[54] Although the CHT Regulation provided the DC with concurrent jurisdiction over all matters alongside the traditional authorities it has been rarely exercised.[55]

The *CHT Regulation* included provision for revision of all decisions made by the traditional authorities by the Divisional Commissioner (Rule 40). A five years record from the court of the Chakma Chief shows sixty-one cases were filed with the Chief, of which one-third were original and others were appeals from the decisions of the headmen and *karbaries*. No further application for revision from

[52]Kalindi*, supra* note 7 at 29-32, 35.
[53]Roy, "Juridical Pluralism" *supra* note 11 at 130-32.
[54]Raja Devashish Roy & Pratikar Chakma, "The Chittagong Hill Tracts Accord & Provisions on Land, Territories, Resource and Customary Law" in Victoria Tauli-Corpuz *et al*, eds, *Hope and Despair: Indigenous Jumma Peoples Speak on the Chittagong Hill Tracts Peace Accord* (Philippines: Tebtebba Foundation, 2010) 115 at 142 .
[55]Roy, "Juridical Pluralism", *supra* note 11 at 135.

the decision of the Chief was made.[56] This shying away from the state officials has been related to confidence in traditional office, lack of familiarity with formal adjudication, relative complexity and higher cost; and having a "culturally demeaning view of litigation".[57] This view also explains the *Jumma* reluctance to move the recently set up regular courts. The survival of the *karbaries* office despite non-recognition and the *Jumma* reliance on traditional dispute administration system demonstrates the significance of traditional institutions even after decades of circumscription.

b. Conflation of Customary Land Tenure and Property Rights Violation

The traditional understanding of land rights among the *Jummas* involves both individual and collective ownership. The members have individual rights to parcels of *jum* land and homesteads, and collective rights of grazing cattle, hunting, fishing, and gathering over common land.[58] Common lands are jointly used, managed and controlled by the community and each family extracts only what is necessary.[59] The use and extraction rights over common land are based on oral traditions as opposed to written laws.[60]

Once, the method of slash burning cultivation (*jum)* was central to the *Jumma* life due to the geographic disposition of the CHT. Each year *jum* fields were distributed by the community and farmed on a rotational basis. The rotation allowed the swidden field to regain fertility during fallow period which ranged

[56]*Ibid* at 134, n 50.
[57]*Ibid* at 134.
[58]Kalindi, *supra* note 7 at 38, 56.
[59]*Ibid* at 61, 120.
[60]Adnan & Dastidar, *supra* note 22 at 44.

from 6 years to 20 years depending on land to man ratio in the concerned area.[61] *Jum* was being objected by the British on the ground of waste of natural resources and to settle the "nomadic" *Jummas* into specific land. Contrary to the rationale of this policy, available studies report the economy of the CHT to be self sustaining. Far from being "nomadic" in character in most cases the *Jummas* resided in permanent villages.[62] The underlying reason for objecting the *jum* was to enhance the land revenue by introducing plough cultivation. The aim was to settle the *Jummas* to definite plough land to facilitate revenue collection and reducing dependency on the traditional authorities for such collection.[63] Some of the *Jummas* eventually took up plough cultivation and traditional heads, chiefs were also given private ownership over land for mediating land issues and revenue collection.[64]

Unlike the *Jumma* customary family law, laws relating to the ownership and management of land and resources have been intervened and encroached by the state.[65] Due to state restriction *jum* is no longer the principle method of cultivation. Private ownership has been introduced by encouragement of commercial and plough cultivation. Many people are being driven to commercial plantation, fishery, and industry etc., although the *Jummas* remain minimal in terms of formal employment. Along with plough cultivation the Bangalees have

[61]Kalindi, *supra* note 7 at 25-29; Schendel, Mey & Dewan, *supra* note 13 at 121.
[62]*Ibid* at 128-29.
[63]Jenneke Arens, "Foreign Aid and Militarisation in the Chittagong Hill Tracts" in Subir Bhaumik *et al*, eds, *supra* note 5, 45 at 47; Kalindi, *supra* note 7 at 25.
[64]Adnan & Dastidar, *supra* note 22 at 40.
[65]This non-intervention can be related to the established practice of recognition of different personal law regimes for the Hindus, Muslims and Christians in the British India. See, Roy, "Juridical Pluralism" *supra* note 11 at 140.

introduced plain land habits and lifestyle in the CHT.[66] These changes were induced by land alienation in different phases in colonial and postcolonial period and can be directly linked to the changes in the pattern of land ownership. This chapter discusses these changes in four phases: i) the British Regime (1860-1947), ii) the Pakistan Regime (1947-1971), iii) the Bangladesh Regime: Pre-Accord (1971-1997); and iv) the Bangladesh Regime: Post-Accord (1997-present).

i. The British Regime: 1860-1947

The first phase of land alienation in the CHT started in the British regime when all land in the CHT was declared to be vested on the British Ruler and ended when the CHT was awarded to the then East Pakistan (now Bangladesh). While at the time of annexation people of the plain were given ownership right over land, the *Jummas* were only given tenancy right.[67] In the context of CHT no question of extinguishment of traditional rights can arise because the chiefs have never signed any agreement with the British for the transfer of land or any rights thereof.[68] Soon after the annexation almost entire forest area of the CHT was declared as District Forest (DF) in 1871. In next twelve years one-third land of the CHT was taken from the *Jummas* and placed under the Forest Department (DoF). Extracting forest resources became a highly profitable concern for the state and forest extracts were used for development of the plains in deprivation of the *Jummas*.[69] In course of time almost all the land in the CHT was taken under state control and a threefold classification emerged: (i) Reserve Forest (RF) under the

[66]See Mohammad, *supra* note 5 at 14; Roy, "Land and Forest Rights" at 7.
[67]For more see Arens, *supra* note 63 at 47, 78, n 1.
[68]*Ibid*.
[69]Schendel, Mey & Dewan, *supra* note 13 at 131; Kalindi, *supra* note 7 at 25; Roy, "Land Question", *supra* note 7 at 4 and Roy, "Juridical Pluralism", *supra* note 11 at 151.

Forest Department (DoF),[70] (ii) Protected Forest (PF) owned by the DoF but regulated by the DC office and (ii) Unclassed State Forests (USF) under the DC office.[71] In RFs access and extraction are forbidden without authorization and in PFs access and use are allowed unless forbidden. The USFs do not have any designation in law and in fact they are the *mauza* reserves held by the community in common.[72] The rights granted to the *Jummas* over the USF are limited and conditional. The state can take them back at will and settle or lease them to anyone.[73] Apart from ownership of common land sufficient change was brought to the ownership, occupational and extraction rights of the *Jummas*.

Homestead Land: The existing literature widely endorses that Rule 50 of the *CHT Regulation* recognized *Jumma* customary right over homestead land. In effect, a two pronged rule was adopted for homestead land: *first*, "occupational" right over non-urban *khas* land not-exceeding 0.30 acres for homestead was given. This right was enjoyable with the permission of the *mauza* headmen without any formal settlement, although record was kept by the headmen. In case of resumption of the land by the DC compensation was paid only in respect of buildings, structures and trees and *not* the land itself. *Second*, settlement from the DC or the SDO could be obtained for "occupation" of land exceeding 0.30 acres and in case of resumption, compensation *for* land was available where permanent

[70]The government could declare any forest land or waste land as reserved forest over which the government has "proprietary" rights or which belongs to the government or the whole or part of forest produce by a proclamation in Bangla. See the *Forest Act*, 1927 (Act XVI of 1927) ss 3-5 [*FA*]. Claims over the area reserved could be brought within a given time and failing that period all rights were extinguished, for details see ss 6-9.
[71]Adnan & Dastidar, *supra* note 22 at 36 -38; Mohsin, *supra* note 2 at 26.
[72]See, Roy, Glossary to "Land and Forest Rights" *supra* note 14.
[73]Adnan & Dastidar, *supra* note 22 at 40.

and heritable right has been acquired according to conditions of the lease deed. The rule clearly shows that all land was regarded as *khas*, only *tenancy* right as opposed to full *ownership* was given and there was *no* chance for obtaining full ownership where land was being enjoyed *only* with the consent of the headmen.

Jum: *Juming* was regulated by functioning of the DoF in the RF and by the DC and chief-headmen in the USF. The DC was entitled to issue orders for regulating *jum* including closure of any area for *juming*, restricting *migration* of the *juming* families (Rule 41) and prohibiting *juming* on or near the banks of any river to prevent silting (Rule 34B). *Jum* taxation involved a headmen-chief-DC hierarchy. *Jum* tax is levied by the headmen at a rate fixed by the Government on each family living in one mess and cultivating the same *jum*. The headmen after reducing his share pay the rest to the Circle Chief. Persons entitled to customary exemptions are decided by the Chief and approved by the DC each year. The families who live and *jum* in different *muazas* pay an additional tax to the headmen of the *juming mauza* according to the traditional *parkulaiya* system. The *jum* tax is recorded by the headmen with all relevant details in a *jum tauzi*. Although the provision of *juming* formalizes customary exemptions, *parkuliya* and *jum tauzi*; the ultimate control resides with the state official especially in RF areas. Moreover, this hierarchical revenue collection created an elite division among the *Jummas*.[74]

[74]The headman was also given the right of collecting rent from all existing tenants and from all lessee to whom lease would be given under sub-rule 34(1). The headman will pay the amount to the SDO or to the DC, and receive commission on collection except for grove land. For grove land same proportion of rent will be received by the Chiefs and headmen when assessed to rent as in case of *jum* (r 43).

When any area of land is declared to be reserved the claims relating to *jum* over such land are recorded by the Forest Settlement Officer (FSO), who then sends it to the government along with his opinion for allowing or prohibiting such cultivation. The Government may permit or prohibit the claim in whole or in part. The practice when allowed is "deemed to be a privilege subject to control, restriction and abolition by the Government" (Section 10, *FA*). In case of right of pasture or forest produce the FSO can admit it in part or whole, but such right can be commuted in lieu of monetary compensation where alternate forest land is not available (Sections 12-17). The *Jummas* claim that in most of the cases procedure for reservation are not followed. Since, the notifications are made in Bangla as per the Act, unfamiliarity with language and complex legal procedure significantly harms the *Jumma* rights.[75]

Mauza **Reserves**: The headmen were given the responsibility of conservation of resources in his/her respective *mauza*. A headman can prohibit removal of forest produce for purposes other than domestic for residents of the *mauza* and for all purposes for non-residents. He may also exclude any area or areas in his/her *mauza* from the *juming* area, prevent newcomers from cutting *jums* in his *mauza* if in his opinion their doing so is likely to result in a scarcity of *jum* land for his own tenants in future years; and prevent any person from grazing cattle in his *mauza* when such grant is harmful to his *juming* area (Rule 41A). No permit for felling trees in the USF (*mauza* common) could be issued except with

[75]Mohsin, *supra* note 2 at 26.

the approval of the *muaza* headman and chief concerned.[76] So the decision of the community in preserving local resources was replaced by the headmens' decision.

Gathering and Grazing: The DC may allow any hillmen to extract free of royalty, sun grass for home consumption (Rule 45A). *Grasskholas* are settled by the DC on yearly or ten yearly basis (Rule 45). Grazing taxes are levied on animals owned, kept or grazed in the CHT at the rate determined by the DC with the approval of the Commissioner. These provisions clearly involve regulation and evidently were inserted to facilitate revenue collection rather than recognizing customary law.

Due to prohibition on *juming* in RFs the fallow period of *jum* land reduced and there was concentration on plough cultivation and it was soon understood that restriction has to be imposed on population influx.[77] Moreover, there was an urging necessity to protect the *Jummas* from Bangalee moneylenders.[78] Rule 51 empowered the DC to expel any outsider from the district if his presence was injurious to the peace and administration of the District. Thereby Rule 52 required permit from outsiders to enter the CHT which was in force until 1930.[79] The original Rule 34 provided that plough land on lease taken from the government cannot be sub-let or transferred, except on hereditary succession or with the consent of the Commissioner.[80] Any reallocation or transfer of land among the *Jummas* had to be done with the knowledge and

[76]See the DC's standing order dated 30 April, 1955 in Appendix-E, Roy, "Juridical Pluralism" *supra* note 11 at 182.
[77]Kalindi, *supra* note 7 at 44.
[78]Schendel, *supra* note 3 at 110.
[79]Roy, "Land and Forest Rights*"*, *supra* note 14 at 19, n 27.
[80]Kalindi, *supra* note 7 at 76.

agreement of the concerned headman. Furthermore, obtaining private titles (*kabuliyat*) of settlement on common lands, as well as the sale and transfer of such lands, required the headman's written recommendation. While not explicitly specified in the CHT Regulation, obtaining the headman's recommendation for any transfer of land rights in the region became a universal practice in the system of land administration operating under the DC.[81] These mechanisms of control protected the land base from outsiders to an extent but at the same time excluded the *Jummas* from any participation in the political process.[82]

Authors and commentators on the CHT say that some of the customary laws have been transformed into written law or recognized but most customary land rights are unacknowledged.[83] From the above discussion it can be said that laws in relation to land and resources in the CHT were made either in complete disregard of customary ownership or in cases where the law addressed customary institutions it did so either to facilitate revenue collection or to bring traditional authorities under state control. To sum up in British colonial regime the independent chieftaincies in the CHT was reduced to a thoroughly regulated authority with no control over land or resources. The doctrine of "*terra nullius*" and the idea that customary ownership attached to anything but immoveable property was used to deprive the *Jummas* from their common land.[84] Where customary rights could not be denied completely a "lesser" form of right was recognized, e.g., consider the rights granted in the USF.

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[81]Adnan & Dastidar, *supra* note 22 at 38-39.
[82]See *supra* note 4.
[83]Roy, "Juridical Pluralism", *supra* note 11 at 149-50.
[84]For an observation on land alienation in colonial South Africa see, Klug, *supra* note 51 at 124-26.

ii. The Pakistan Regime: 1947-1971

In Pakistan regime the same colonial framework continued to apply. Major development programs e.g., the Karnaphuli Paper Mill, the Kaptai Hydroelectic project and tourism industry were established. The development policy was aimed at revenue generation and as such the *Jummas* were not allowed to participate on an equal footing. The *Jummas* were considered unfit for the labor and workforce was brought from the plains. The whole process revolved around foreigners, west-Pakistanis and Bangalees.[85] In 1960 the Kaptai Dam was built which flooded 40 per cent of arable land in the CHT by creating a huge reservoir now known as the Kaptai Lake. The disaster caused serious environmental damage to the region apart from loss of land and displacement of 100,000 people for submersion of households and villages.[86] The submerged land was approximately 54,000 acres but only 20,000 acres of land from the RFs were de-reserved for the purpose of rehabilitation.[87] The monetary compensation scheme also failed for lack of translation facilities and the *Jummas* in most cases got lesser than what they were entitled to.[88]

Mechanisms of land alienation in various forms were also approved. Land which could not be resumed under the *CHT Regulation* could be acquired by the

[85]Schendel, Mey & Dewan, *supra* note 13 at 191-218.
[86]*Ibid* at 143,203-206; Roy, "Land and Forest Rights", *supra* note 14 at 6.
[87]For detail on the rehabilitation process and the choices that the *Jummas* had to made during the project planning period see David E. Sopher, "Population Dislocation in the Chittagong Hills" (1993) LIII: 3 Geographical R 337. The study shows that the Bangalee plough cultivators were offered quality land and settled properly (350-51) whereas the *Jummas* found themselves settled in forested land which had to be prepared for vegetation (358).
[88]Kalindi, *supra* note 7 at 100.

DC at will or satisfaction on existence of public purpose.[89] A non-obstante clause was inserted to the *CHT Regulation* under which the Board of Revenue (BoR) may by general or special orders authorize the DC to settle any class of land up to any quantity to a hillmen or non-hillmen.[90] Nevertheless, the land base was not completely opened to the outsiders. Rule 51 of the original Manual empowering the DC to order any non-hillmen to leave the district in case his conduct was harmful was declared unconstitutional by the then Dhaka High Court (now the Supreme Court of Bangladesh) in 1964.[91]

The restriction on leasing "*khas*" land was overhauled in 1971 allowing settlement of land to "outsiders" and "deserving industrialists" with prior approval of the BoR. Kalindi is of the view that the use of the term "outsiders" somewhat left a trace of the fact that people were deliberately being brought from the plain land. The patent discrimination of the provision is clear because the area of land to be granted to resident farmers was reduced from 25 acres to 10 acres. At the same time the Commissioner and the BoR were empowered to grant lease of 100 acres and exceeding 100 acres, respectively to deserving industrialists for setting up industry, commercial plantation and residential purposes. Given the pattern of subsistence economy among the *Jummas* it is clear that the provision was clearly biased towards plains land people. But "[T]his law was never acted upon, as it was passed only a few months before Bangladesh became independent."[92]

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[89]See the Chittagong Hill Tracts (Land Acquisition) Regulation, 1958 (Regulation No. 1 of 1958), s 3 [*CHTLAR*]. Under this provision service of personal notice can be dispensed with and land can be acquired immediately by causing a public notice.
[90]Regulation 34 (B) was inserted vide the Chittagong Hill Tracts – No. 1R – 17/60/276 – R.L. dated 16/06/61 from the Section Officer to the Government.
[91]Roy, "Land and Forest Rights" *supra* note 14 at 19.
[92]*Ibid* at 7-8 and Kalindi, *supra* note 7 at 76-77.

iii. The Bangladesh Regime: Pre-Accord Period (1971-1997)

Soon after the independence of Bangladesh due to denial of recognition and autonomy of the *Jummas*, the PCJSS through its armed wing SB started armed insurgency movement in the CHT. The Government took several steps to contain the insurgency which included militarization of the region, setting up of different hybrid bodies and transmigration of people from the plain land as a strategy of counter insurgency. Rule 34(1) was amended in March, 1979 which virtually allowed settlement of land to outsiders without any prior approval of the BoR. A transmigration program was carried out by circulating secret memoranda through the DC and Commissioner of the then undivided district of CHT and between 200,000 and 400,000 landless Bangalees were settled in the CHT.[93] There was no official initiation and conclusion of the settlement program.[94] It was promised that each Bangalee family will be provided with land, money; and ration for six months.[95]

[93]Roy, "Population Transfer", *supra* note 7 at 169, Adilur Rahman Khan, "Conflicts in the Chittagong Hill Tracts-Bangladesh" in Subir Bhaumik *et a*l, eds., *supra* note 5, 81 at 84-86; Roy, "Land and Forest Rights", *supra* note 14 at 29.
[94]Roy, "Population Transfer" *supra* note 7 at 169.
[95]Khan, *supra* note 93 at 53.

Type of Land	Hillmen (H) /Non-hillmen (NH) Resident	Limitation	Granting authority	Amount Payable
Cultivable or cultivated flat land 34 (1) (a) (i)	Single family	Not exceeding 5 acres inclusive of the land already in possession	H-Sub-divisional officer via recommendation from headmen NH-The DC 34 (1) (a) (ii)	Free of salami 34 (1) (a) (i) Rent to be determined by the authority granting lease, no rent for previously uncultivated land for three years 34 (1) (a) (iii)
Grove Plantation 34 (1) (a) (i)	Ditto	Not exceeding 5 acres, in case of satisfactory performance additional settlement may be made by the DC but not exceeding 10 acres in total	In case of both H/NH DC 34 (1) (a) (ii)	Free of salami 34 (1) (a) (i) Rent free for the first three years and determined by the DC for future years 34 (1) (a) (iv)
Rubber and other plantation on commercial basis 34 (1) (b) (i)	Any person Long term lease	Not exceeding 25 acres	DC	Rent usual Salami 100 per cent of market value for non-residents 50 per cent of market value for H/NH residents
		Not exceeding 100 acres	Commissioner	
		Exceeding 100 acres	GoB	
Industrial plants 34 (1)(c)(i)	Deserving industrialist Long term lease	Non-urban areas n/e 10 acres Urban areas n/e 5 acres	The DC	Rent ½ per cent of market value Salami 100 per cent of market value for non-residents 50 per cent of market value for H/NH residents
Residential purposes 34(1)(d)(i)	Any person Long term lease	No limit for non-urban areas	The DC	Rent 1/4 per cent of market value Salami 100 per cent of market value for non-residents in urban areas 50 per cent of market value for H/NH residents in urban areas No salami for residents in non-urban areas
		Less than 0.30 acres in urban area	The DC	
		More than 0.30 acres in urban area	By the DC with prior approval of the Government	
Urban area for commercial purposes 34(1)(e)(i)	Any person Long term lease	Unlimited	On prior approval of plan by the Government by the DC	Rent ½ per cent of market value Salami 100 per cent of market value for non-residents 50 per cent of market value for H/NH residents

Table 1: Amended Rule 34(1) as of March 1, 1979

Although, the requirement for the prior permission of the BoR was dispensed with, but plough land and grove land could be given only to hillmen and non-hillmen residents and not to the outsiders. An analysis of the table shows the categories under which settlement can be made to outsiders were long term lease of commercial rubber plantation, commercial purpose or industrial plants which cannot be said to cover mass settlement of landless people from the plains land. These landless peasants also do not fit in the category of residential purposes for they were not paying the high tax or rent fixed by the government for such settlement, rather it was fixed at the rate of one or two BDT.[96]

The settler families were promised 5 acres of hillside land, 2.5 acres of paddy land or plain land and 4 acres of mixed land (plain and bumpy land).[97] Settlers were first placed in make shift camps and then settled in demarcated lands.[98] The settlers were not interested in hilly land and as the CHT did not have any unoccupied plough land, the only way to give plain land to the settlers was to dispossess the original owners.[99] The settlement program was therefore carried only in the valley areas owned by the *Jummas*, the Bangalee residents were exempted from such encroachment.[100] The non-indigenous survey officials manipulated the boundary of the land given to the settlers so as to include plain

[96]Roy, "Population Transfer", *supra* note 7 at 174-75. The author brings in another highly technical ground, that the 1971 amendment being made on 16 September, 1971 was null and void since Bangladesh was already an independent state. Therefore, the 1979 amendment erroneously amended sub-rule 34(1) of 1971, but it should be counted as amending the original provision. And if that view was accepted very little or no change could be arrived at because the original sub-rule 14 would have prevented the settlement as it restricted the increase in number of non-hillmen lessee and to permit the inheritance of any Hill Tracts land by non-residents of the district except with the express consent of the DC, see at 177.
[97]See *supra* note 95.
[98]Roy, "Population Transfer", *supra* note 7 at 170.
[99]*Ibid* at 172.
[100]*Ibid* at 170.

and bumpy land owned by the *Jummas*. The *Jummas* who did not already leave their villages protested the settlement and some of them had fully registered ownership deed.[101] Therefore the forceful settlement had to be made in presence of security officials.[102] After this forceful settlement the GoB enacted the Chittagong Hill Tracts (Land Khatiyan) Ordinance in 1985 for facilitating the legalization of the possession of the Bangalees in the *Jumma* land.[103] The GoB also placed an embargo on the return of the sponsored settlers to the plains, which was lifted only in 1989.[104]

iv. The Bangladesh Regime: Post Accord Period (1997-to date)

The CHTPA aimed at a three pronged procedure for the settlement of land disputes: i) repatriation of refugees and rehabilitation of both refugees and internally displaced persons (IDPs) by a task force, ii) settlement of overlapping claims over land by the Land Commission; and iii) recording of the land title through a cadastral survey.[105] Preventive measures to avoid future land alienation was placed by giving the HDCs overriding power over the DC and DoF in terms of any land transfer and assigning "tribal" law, social justice and supervision of the HDCs under the jurisdiction of the RC.[106] In this section the thesis discusses how land alienation continued even after making these changes to the law.

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[101]Roy, "Population Transfer", *supra* note 7 at 171-72, 175.
[102]Adnan & Dastidar, *supra* note 22 at 61-62.
[103]Ordinance No. 2 of 1985.
[104]*Life is not ours: Land and Human Rights in the Chittagong Hill Tracts Bangladesh*, the Report of the Chittagong Hill Tracts Commission (OCCHTC and IWGIA: 1991) at 19 [*Life is not ours*, "Original"].
[105]Part D, the *CHTPA*, 1997. See, Roy, "Juridical Pluralism" *supra* note 11 where he opines that non-implementation of this land related provisions of the *CHTPA*, 1997 is the most crucial issue now.
[106]Part B and Part C, the *CHTPA*, 1997.

Drawing from this account of alienation in the next section the thesis will scrutinize the performance of the Commission and the complexities surrounding the land survey.

Failure of the Task Force Program

A 20 point Agreement was reached between the GoB and the PCJSS for rehabilitation of returnee refuges from India through a task force. The *CHTPA* extended this agreement to rehabilitation of the *Jumma* Internally Displaced Persons (IDPs) in the CHT. Although the Task Force was set up in 1998 it received inadequate support from the GoB. The returnee refugees could not be settled in their original land as they were under Bangalee possession. Even under these circumstances the GoB chose to include the Bangalee settlers in the list of IDPs, as they were moved from one district to another within the country.[107] The Task Force operation saw a closure due to protest from the *Jummas*. To allow such operation will mean legalizing the Bangalee settlement in the CHT.[108] The GoB willfully neglected the fact that in some indigenous communities the rate of out-migration from homestead was as much as 71 per cent compared to only 17 per cent out-migration among the settlers.[109]

The HDC Remains Weak and the Illegal Land Grabbing Continues

The three HDCs were given the power to restrict all transfer of land in the CHT. Therefore if the provision was applied the DC or DoF could not further

[107]Adnan & Dastidar, *supra* note 22 at 22.
[108]Mohsin, *supra* note 2 at 73.
[109]Barkat, *supra* note 2 at 44.

acquire *Jumma* land without permission from the concerned HDC. In absence of devolution of power to the HDCs state acquisition of *Jumma* land is still on vogue.[110] The DC office has suspended issuing *Kabuliyat* or formal title to an extent, but that has not stopped settlement of the Bangalees. The Bangalees grab land possession and wait until a period so that they can apply for approval of issuing title deeds from the DC office.[111] These settlements are *prima facie* illegal for lack of permission of the HDC, but since the HDCs have not been empowered yet the DC office continues this corrupt practice. [112]

On December 21, 2000 the MoCHTA served a notification empowering the DCs to issue permanent resident certificate to the illegal settlers. In line with the directive of the PM permanent resident certificate was also given to settlers in the cluster villages.[113] In 2006 the Parliamentary Committee of the MoCHTA confirmed that the number of the settlers in cluster villages of the CHT rose to 50,000 after the issuance of certificates begun.[114] From 2009 the DoF has been taking plans for turning more areas in the USF to RFs. In 2010 adoption of a new type of forestry "notified forest" was being discussed for bringing more USF land under legal framework.[115] Reportedly powerful *Jumma* elites and headmen/ *karbaries* are also converting common lands into private property.[116] In the counter-insurgency period security officials grabbed land either for settling the

[110]Adnan & Dastidar, *supra* note 22 at 46-47.
[111]*Ibid*.
[112]*Ibid* at 47.
[113]*The Ministry of Chittagong Hill Tracts Affairs of Bangladesh: An Agency for Discrimination against Indigenous Jumma People* (India: Asian Indigenous and Tribal People Network, 2008) at 14.
[114]*Ibid* at 15.
[115]Adana & Dastidar, *supra* note 22 at 48.
[116]*Ibid* at 56.

Bangalees or setting up their own installation, land alienation in their hands continues even today.[117] This conducive environment kept the flow of self propelled migrants into the CHT who were first placed in local camps and were given settlement by the DC office regularly even in the post-accord period. This gradual and constant in-migration has changed the demographic composition to such an extent that today the self-propelled migrants outnumber the settlers of the 1980s.[118] Absence of fear of attack from the SB in the post-accord period and any bar or limit on such migration has geared the change.[119] The Baseline Survey reveals that about 62 per cent of the Bangalees in the CHT are living there for less than 30 years.[120] One prime reason for this is some of the settlers of 1980s never got possession of any land, some could not hold the large tracts and left the CHT by selling their settlement, some were impersonated by others.[121] In 2009 the Parliamentary Standing Committee issued an order for cancellation of all leaseholds which were left unutilized. The Bangalee lessees created artificial plantation by bringing trucks loaded of trees overnight and they used it as a pretext for removing the *Jummas* from adjacent lands. Although a few leases were cancelled they were re-issued in most cases.[122]

As have been seen due to the structural diarchy in administration, land and resources in the CHT have become an issue of competing regimes of customary

[117] *Ibid* at 57.
[118] *Ibid* at 65-66.
[119] *Ibid* at 30-31.
[120] Barkat, *supra* note 2 at 42.
[121] Adnan & Dastidar, *supra* note 22 at 68.
[122] *Ibid* at 85; Roy, "Land and Forest Rights", *supra* note 14 at 33.

law and statutory legislation between indigenous and non-indigenous people.[123] The non-indigenous claim holders are government entities, land and forest ministries and individual settlers, both government sponsored and self propelled.[124] The state has actively taken part in creation of multiple competing interests over the same territory depriving the lawful owners. In the process of constant "dialectic" between the two competing systems both have seen some changes. The *Jummas* have made the GoB yield to some of their demands. The GoB had to revise its legal mechanisms more often than not. In case of the *Jummas* "dialectic" with a different legal system has created both radical change in the time of colonization and incremental changes over the years in independent Bangladesh.[125] The legal pluralism in the CHT lies in this dialectic of constant conflict and not in the black and white letters of the official law or the numerous offices created by such law.

So far, these changes have been in detriment of the *Jummas*. Thus *jummas* in the CHT were discriminated by the legal framework in at least three ways, i) non-recognition of customary resource rights and community ownership, ii) introduction of private ownership based on title deeds as opposed to oral tradition; and iii) illegal settlement and grabbing of the *Jumma* land by government authorities. Equally true that in this process of systemic alienation the *Jummas*

[123]Md. Zahid Hassan, *Institutional Responsiveness to Indigenous Rights: the case of Chittagong Hill Tracts Land Dispute Resolution Commission* (Masters Thesis, University of Tromso, 2011) at 47 [unpublished].
[124]Roy, "Land and Forest Rights", *supra* note 14 at 2.
[125]For the dialectic between legal systems and concomitant changes see Sally Engle Merry, "Legal Pluralism" (1988) 22:5 JL & Soc'y 869 at 889 (JSTOR).

have survived and shaped their identity to fight the overarching Bangalee nationalism.

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

The *CHTPA* provided that a land commission will be set up for resolution of land claims of the rehabilitated refugees and all *illegal* settlement and *occupation* of land and hills in the CHT will be cancelled (Clause 4, Part D). It was also agreed that after rehabilitating all the refugees and IDPs ("tribals") the GoB will initiate a cadastral survey in consultation with the RC. After resolution of all land disputes and on confirmation of ownership of the *Jummas* the land shall be recorded (Clause 2, Part D). The main concerns for setting up a Land Commission was to redress the land alienation for three major cause, i) appropriation of the *Jumma* common land, ii) Kaptai submersion; and iii) 1980s settlement program and subsequent land grabbing. But these concerns were not sufficiently spelt out. The *CHTPA* did not address the conflicting land interest in depth, no background of the conflict or any mention of land alienation was made. Important questions were left unanswered, e.g., whether customary law or state law will prevail in case of conflict between the two or whether or not the Bangalee settlers will be removed from the CHT? Whether the *Jummas* will receive compensation for acquisition of common land? The Act is silent about awarding any compensation or alternate land to the losing party. These questions were clearly not given a thought while drafting the *LDRCA*. More so once passed by the Parliament in 2001 significant difference was seen from what was agreed

under the *CHTPA*. Therefore, the *LDRCA* was either not meant to be effective or it was passed to further compromise the interest of the *Jummas*. From the inception the RC and PCJSS demanded revision of the provisions of the Act so as to bring conformity with the *CHTPA*.[126] Almost twelve years have lapsed, but the GoB has not been able to amend a single provision of the law. The following sections will try to explain the non-functioning of the Commission in light of the complexities of jurisdiction, composition, conflict of laws, failure to gain trust of the *Jummas* and stagnation of the dispute resolution.

I. Jurisdiction of the Commission

The Act clearly addresses the claims made by the rehabilitated refugees, but the claims of the IDPs have not been directly addressed (Section 6). The issue has been indirectly addressed inasmuch as the Act endorses any land settlement made in contravention of the existing laws shall be rejected, and in the case of an eviction based on such settlement, the land shall be restored to the original owner (Section 6). This differs from the provision of the *CHTPA* in at least two respects, *first*, the *CHTPA* addressed both settlement and occupation, the *LDRCA* applies only to settlements; *second*, the application of this provision has been limited by exempting "Reserved Forests, Kaptai Hydroelectricity Project area, Betbunia Earth Satellite Station, state-owned industries and land recorded with the Government or local authorities." This provision takes away government

[126]Hassan, *supra* note 123 at 3. On July 30, 2012 the GoB in an inter-ministerial meeting approved the amendments suggested by the *PAIC*. The approved amendments even if carried out are not likely to bring any qualitative change in dispute resolution. And the Parliament has not passed the proposed amendment as of date. See, Staff Correspondent, "Govt Decides to Amend CHT Land Commission Law", *The New Age* (31 July 2012) online: New Age <http: www.newagebd.com>.

acquisitions from any challenge, when in the process of land grabbing the government agencies had a major share of responsibility. Under this provision only ten per cent of the arable land in the CHT will fall under the Commission's jurisdiction.[127] Moreover, neither the Act nor the *CHTPA* specifically mentions about taking back the settlers of 1980s elsewhere in the country. The PCJSS claims and the GoB denies that such an agreement was orally reached.[128] Therefore, what the Act offers by excluding the claims of the IDPs and denying even compensation for government acquisition may be at best termed as token justice.

a. Composition of the Commission

The Commission established under the Act is a five member body headed by a retired Justice of the Supreme Court of Bangladesh (Section 3). The other members are the Chairman of the RC or his representative, the chairman of the HDC concerned, the relevant Circle Chief and the Divisional Commissioner or Additional Divisional Commissioner of the Chittagong Division. Since there have been no Justice or Divisional Commissioners in Bangladesh drawn from the *Jummas* so far, it can be said that two out of five members are non-indigenous members. But the Act centralizes the power in the hands of the Chairman, i.e., a non-indigenous member inasmuch as, in case of failure to reach unanimous decision the Chairman's decision prevails (Section 7(5)).

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[127] *Life is not Ours: Land and Human Rights in the Chittagong Hill Tracts Bangladesh*, Update 4, the Report of the Chittagong Hill Tracts Commission (OCCHTC and IWGIA: 2000) 15 [*Life is not Ours*, "Update 4"].
[128] *Ibid* at 14; Roy, "Land and Forest", *supra* note 14 at 33.

The three year tenure of the Commission shows that the Act in emphasizing speedy settlement has ignored the complexities involved in the land claims (Section 5). Further, quorum of the Commission is fulfilled by the chairman and any two members and in cases where the agenda remains unresolved proceeding can be continued in the next day even in absence of the members who were present in the earlier meeting (Section 7 (3) (4)). The decision of the Commission has been made final without any provision for appeal, revision or judicial review (Section 16).

b. Conflict of Laws

The Act provides that the existing laws, regulations, rules and customs relating to land will form the basis of the Commission's decision. Even if it is assumed that the majority indigenous members will contribute with their knowledge of indigenous tradition and custom, the silence of the Act about whether customary or state law prevails makes solution of concrete problems impossible as official law and customary law has created separate rights over the same piece of land.[129] Moreover, if customary right is considered there can be no *khas* land or public land in the CHT, because they are owned by the *Jummas*. But the Act exempts those lands from challenge which the GoB regards as *khas* land. Therefore, the Act suffers from inherent dichotomy. In the absence of any provision in the Act to put customary laws and practices into operation for dispute

[129]Roy, "Land Question", *supra* note 7 at 12.

settlement the viability of the Commission in resolving disputes is under serious doubts.[130]

The Question of Land Title

Even if the question of precedence of law is narrowed down to private ownership conflict arises between registered and unregistered title. The *Jummas* have some of their private land title recorded with the headmen and *karbaries*, but it cannot be said with certainty that full legal recognition will be accorded to those traditional records. Again, the level of titled ownership is significantly low in the CHT among both the *Jummas* and Bangalee settlers (only 29 per cent). Only 21 per cent of the *Jumma* private property and 52 per cent of the Bangalee private property in the CHT is registered.[131] The high rate of registration among settlers is the result of the government sponsored settlement as the settlers were always provided with registered deed. If the customary recorded ownership is taken into consideration, the number of registered *Jumma* holdings increases, but that also brings into question the unrecorded titles and common property not belonging to any individual. As long as these recorded, unrecorded and collective traditional customary institutions of ownership rights are not recognized, any adjudication based on state law will not be favorable for the *Jummas*.

There are certain ways in which title deeds are problematic from the viewpoint of both *Jummas* and settlers. The reasons for non-registration of *Jumma* land title includes reliance on oral arrangements which is also supported by the *CHT Regulation* and the delay and denial of the land office to register even when

[130]Adnan & Dastidar, *supra* note 22 at 25.
[131]Barkat, *supra* note 2 at 54.

the *Jummas* apply for registration.[132] Many title documents were lost during the insurgency movement when people fled and because of the burning of the Khagrachari Land Record office in 1994.[133]

In case of the Bangalees the settlement documents often lacked specificity, since the same land may have been allocated to multiple persons and many of the settlers sold their land or failed to cultivate them as per condition of the settlement.[134] The title given to the Bangalee settlers can be questioned not only from the viewpoint of *Jumma* land rights but also for the irregularities of the settlement.[135] On the other hand in many cases settlement given to the Bangalees of land owned by the *Jummas* has caused ejection of the lawful owners.[136] There are even instances where settlers unable to take possession of the land have filed petitions against the *Jumma* owners whom they have never seen.[137] Therefore the legality of the deeds and settlement of the Bangalees can be questioned. But the *LDRCA* does not provide any answers to situations where contested claims are brought based on both title and possession by settlers and only traditional ownership not backed by written deeds by the *Jummas.*

[132]The *CHT Regulation* requires compulsory registration of deed of sale, gift, partition or mortgage of immovable properties (r 12); but other documents are not inadmissible in any court of law due to non-registration (r 13). Bangalee officers are not familiar with the *Jumma* name, they often refuse to register document on ground of inappropriate name spell, interlineations or unclearness etc. basing on r 16 of the Manual. But the same land registry office registers deed in favor of Bangalees without proper description or delimitation of the property in violation of r 17.
[133]Adnan & Dastidar, *supra* note 22 at 121; Mohsin, *supra* note 2 at 51.
[134]Adnan & Dastidar, *supra* note 22 at 66-70.
[135]Roy, "Land Question", *supra* note 7 at 13.
[136]Adnan & Dastidar, *supra* note 22 at 54.
[137]Hassan, *supra* note 123 at 49.

II. The Land Commission has failed to Gain the Confidence of the *Jummas*

The Land Commission has failed to create an atmosphere which will promote trust and confidence among the *Jummas*. The petitioners have to frame their claims in Bangla, but translation facility is available only for record of oral evidence (Sections 9 and 11). Although *Jummas* are unfamiliar with formal dispute resolution no special mechanism has been made for facilitating claims to be brought forth by them. Some serious allegations of irregularities have been found even before the Commission has started formal hearing. In some cases blank petitions with only name and signature of the Bangalee settlers have been accepted, that shows the lack of integrity of the dispute resolution process. There are even reports of bribery by Commission officials.[138] The procedure followed in the three hill districts are not same, some officials are accepting petitions after the deadline or charging fees for further correspondence, while others are not.[139] The Commission has even used the police to send official mail instead of the regular postal service which has created fear among the *Jummas*.[140] These irregularities can be attributed to the absence of detailed workable rules. In any case the Commission has failed to gain any form of confidence among the *Jummas*.[141]

[138]Adnan & Dastidar, *supra* note 22 at 116.
[139]Hassan, *supra* note 123 at 51.
[140]See, *ibid* at 52 and Adnan & Dastidar, *supra* note 22 at 26.
[141]In a small filed study 66 per cent of indigenous people said the Commission is biased and 70 per cent suspected that the Commission will not be able to overcome military influence. Even 40 percent of the Bangalee settlers were of the opinion that the Commission was an apparatus to serve government interest. See, Hassan, *supra* note 123 at 47.

Among the 5,000 petitions pending before the Commission only ten to fifteen per cent is from the *Jummas*.[142]

III. The Stagnation of Land Dispute Settlement

Justice Khademul Islam Chowdhury, the present Chairman of the Commission in 2010 declared that cadastral survey will be conducted in the CHT before resolution of disputes. It is said that the land records will allow easy disposition of land disputes. The judges of the newly set up courts in the CHT do not shy away from expressing their preference for registered over traditional oral evidence.[143] The *CHTPA* provided for survey after resolution of land disputes to be conducted by the GoB in consultation with the RC. But the Chairman arrogated the authority to himself. He called for the first hearing of disputes on 27 December, 2010 without consulting other members.[144] The day before the scheduled first hearing, the *PAIC* postponed all activities of the Commission until amendments were made to the Act to bring it in conformity with the *CHTPA* as per demands of the RC and PCJSS. The *Jummas* so far have been active and successful in preventing the Commission from initiating land surveys and hearings.[145] The government's support towards the Chairman in initiating land survey has created both fear and grievance among the J*ummas*. A survey will identify the boundaries and physical properties of the land and since occupation is

[142]Adnan & Dastidar, *supra* note 22 at 26.
[143]I had the opportunity of interviewing the District Judge of the Rangamati District Judges Court during a field visit conducted by the Bangladesh Legal Aid and Services Trust (BLAST) in June, 2010. The Judge openly said that due to his lack of knowledge about indigenous land title it is impossible for him to settle disputes based on oral evidence and the only way to solve the dispute was to get the titles in record first.
[144]Hassan, "Responsiveness', *supra* note 123 at 47.
[145]The groups include Hill Student's Forum, Hill People's Council, Hill Women Federation and the United People's Democratic Front.

recorded survey gives a sort of legitimacy to the occupier.[146] A cadastral survey based on possession when most of the *Jummas* remain displaced from their ancestral land will only legitimize the title of the Bangalee settlers.

The *PAIC* recently agreed to the proposed amendments but the Chairman again unilaterally called for two hearings in late March and early April, 2012; which could not be carried out due to quorum crisis as the *Jumma* members boycotted the tribunal.[147] Outraged with the boycott, the Chairman briefed the press that if the quorum crisis persist the Commission would proceed with hearings on basis of special measures under the *LDRCA*. But no such provision exists under the Act. The *Jummas* continue to demand immediate amendment of the Act and the dismissal of the Chairman from office,[148] but the GoB seems to be sympathetic to the Chairman. The Law Minister has expressed his dissatisfaction that no-one is cooperating with the Commission.[149]

Apart from that the government's stand or policy regarding the irregular settlement is not clear. The PM's adviser recently opined in a meeting that it will be extremely hard to remove the Bangalee settlers from the CHT after so many

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[146]Roy & Chakma, *supra* note 54 at 124.

[147]Abdullah Juberee, "Move to Resolve CHT Land Disputes Make a Break Through", *The New Age* (23 January 2012) online: New Age <http://www.newagebd.com>. See also, "Chittagong Hill Tracts: Land Disputes Progress Disrupted", *Unrepresented Nations and Peoples Organization* (4 May 2012) online: Unrepresented Nations and Peoples Organization <http://www.unpo.org> and "Chittagong Hill Tracts: Land Issue Still Pending", *Unrepresented Nations and Peoples Organization* (1 March 2012) online: Unrepresented Nations and Peoples Organization <http://www.unpo.org>.

[148]"Jummas continue to protest Chittagong Hill Tracts: Human Chain Formed in Protest against Legislation", *Unrepresented Nations and Peoples Organization* (2 March 2012) online: Unrepresented Nations and Peoples Organization <http://www.unpo.org>.

[149]Staff Correspondent, "Nobody is Cooperating", *banglanews24.com* (8 June 2011) online: banglanews24.com <http://www.banglanews24.com>.

years.[150] In view of this statement, the political will of the respective governments in Bangladesh to settle the dispute may be questioned. It is obvious that resolving disputes between indigenous and non-indigenous people is the greatest challenge before the Commission. But without taking requisite policy decisions or judicial standards there can be no effective dispute resolution.

In view of the above, the inadequacy of the *LDRCA* makes it completely unworkable for an acceptable or just dispute resolution. If forcefully put into operation it might be counterproductive in relation to the rights of the *Jummas*. The failure to give due place to the customary law may even have the effect of legitimizing the illegal settlement in favor of the Bangalees.

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

The GoB has managed to stop armed insurgency in the CHT based on promises of land settlement made in the *CHTPA*. But the *LDRCA* in effect has deviated from the agreed clauses. In the post-accord period the HDCs and RC

[150]Special Correspondent, "It is Hard to Move the Settlers from the CHT", *The Daily Prothom Alo* (25 Januray 2011) online: Dainik Protom Alo <http://www.prothom-alo.com> [Translated by the author from Bangla].

have not been made effective, and taking advantage of the peace situation, land grabbing in the CHT has reached new heights. Much time has elapsed after the signing of the accord and the socio-economic pattern in the CHT is changing with pace. Over time, the changes and disruption made through Bangalee settlement, illegal land grabbing and in-migration will get more firmly rooted and more difficult to reverse.[151] The situations that led to the violent conflict in the CHT remains unchanged in the post-accord period and the failure to resolve the conflicting land rights in the CHT is increasing the possibility of future insurgencies.

Even after the signing of the *CHTPA* there were chances to engage into consultation with the traditional indigenous authorities to formulate a land settlement procedure that might be more sensitive to the history of the region. The policy of the GoB is more concerned with putting an end to the insurgency in any manner rather than remedying the wrongdoing against the *Jummas*. The land conflict in the CHT is complex and to reverse the alienation process initiated by the state itself it is important to accommodate the separate legal regime of the *Jummas*. Without recognizing the prior claim of the *Jummas* over the Bangalee settlers in the lands of the CHT land dispute resolution is not possible.

This Chapter has focused on legal pluralism in the CHT driven by two identity postulates, the Bangalee nationalism and the *Jumma* identity. While the former being linked with the numeric majority has marginalized the latter, the latter has asserted its claim to shape and reshape the law making or enforcement by the former. Before going to the question of how this minority identity postulate

[151]Adnan & Dastidar, *supra* note 22 at 32.

can be reconciled or reconciled at all to that of the majority, in the following Chapter the thesis will outline the interaction between the two identity postulates in the context of marginalization of the *Jummas*.

Chapter Three:
The Nationalist Policy for Assimilating the *Jummas*

This Chapter looks into the legal postulate or the identity postulate of the GoB in relation to the CHT. In the first section the chapter focuses how the state has developed a hegemonic claim by denying the separate existence of the *Jummas* and marginalized them through militarization and eviction. The second section describes how the thirteen indigenous people in the CHT have unified under the *Jumma* identity and challenged the overarching claims of the Bangalee nationalism. Then in three separate sections the chapter examines the signing of the *CHTPA*, judicial principles applied in relation to the *Jummas;* and the policy consideration in acceding or rejecting international obligations. These sections have highlighted the conflict between the interests advanced by two competing identity postulates, i.e., the Bangalee nationalism and the *Jumma* identity.

A. Bangalee Nationalism and Marginalization of the *Jummas* in the CHT

The Constitution of Bangladesh enshrines that "[t]he people of Bangladesh shall be known as *Bangalees as a nation* and the citizens of Bangladesh shall be known as Bangladeshis."[152] The Constitution does not recognize the existence of the *Jummas* in the CHT as a national minority. The

[152]See, art 6(2) amended by the Constitution (Fifteenth Amendment) Act (Act No. XIV of 2011) [*FAA*] [emphasis added]. In the original constitution all citizens were named as "Bangalees" despite opposition from the *Jummas*. In 1979 the Fifth Amendment to the constitution replaced "Bangalees" with "Bangladeshis". Although several provisions of the Amendment were struck down for being made by military dictators; the provision on citizenship was condoned. The *Jummas* have been critical of this recent amendment for despite judicial condoning the GoB imposed the identity of the majority as the only identity.

Jummas have a "collective identity" distinct from the Bangalees and at the same time they are part of a larger polity, Bangladesh.[153] The Constitution on the other hand endorses 'Bangalee nationalism' based on the unity and solidarity of the 'Bangalee nation' deriving its identity from the Bangalee culture, language and the struggle for independence.[154] The state has been placed with the responsibility to foster the national language, literature and art, the cultural tradition and heritage and ensure participation and contribution of all citizens to the "national culture".[155] Overwhelmed with the success of the war of liberation in 1971 the Bangalee leaders failed to appreciate the heterogeneity of the people within its territory. The *Jummas* were advised that it is more respectful for them to be known by the name of a nation, i.e., "Bangalee", rather than remaining with their "sub-national" or "tribal" identity.[156] In South-Asian perspective the term sub-nation or tribe (*upajati*) is used to denote the IP in a derogatory sense to locate them to a remote phase of civilization.[157] Recently, a provision has been added to the Constitution which requires the state to "preserve and protect" the local culture and tradition of the "tribes", "minor races", "ethnic sects and communities".[158] To this end the Small Ethnic Minority Cultural Institution Act, 2010 has been enacted for setting up certain cultural institution for the "ethnic minorities" under state control and supervision. It is ironical that the state does not

[153]For the definition of 'national minority' see Bhikhu Parekh, "Liberal Democracy and National Minorities" in Ferran Requjo *et al*, eds, *Political Liberalism and Plurinational Democracies* (USA & Canada: Routledge, 2011) 31 at 31.
[154]Art 9, amended by *FAA*, *supra* note 152, s 9.
[155]Art 23 of the Constitution.
[156]Legislative Assembly, *Official Report of Debates*, 2nd Sess, Vol 2, No 9 (25 October 1972) at 293. Ms Sajeda Chowdhury, a member of the Legislative Assembly who made this remark during the debate is the Chair of the *PAIC* at present.
[157]Mohammad, *supra* note 5 at 3.
[158]Art 23A, inserted by the *FAA, supra* note 152, s 14.

recognize the different identity of the minorities in question, but it is trying to "protect" the ethnic minority "culture" severing it from all social and historical contexts.[159]

Therefore, in Bangladesh 'national identity' has been interpreted as involving a single political community living in a bounded territory sharing the same sense of community regulated by *a* single set of rules.[160] This idea of nationalist unity is based on cultural and political homogeneity and for this ideology to be successful it is essential that heterogeneity be replaced by a common base wherein everyone becomes a part of the shared cultural community.[161] Based on this nationalist ideology the GoB pursued its policy of Bengalization of the CHT by militarization and reducing the *Jummas* into a minority in their own land.

I. Militarization of the CHT

The CHT has officially gone under constant militarization from 1977 onwards.[162] Apart from physical possession and counter insurgency the military took control over political and administrative and development matters in the CHT. The operation of the military officers in the CHT was aimed at furthering Bangalee nationalism. They worked on basis of a divide and rule policy by

[159] *Life is not ours*, "Original", *supra* note 104 at 74.
[160] Anthony D. Smith, *National Identity* (London and New York: Penguin Books, 1991) at 9.
[161] *Ibid*, at 76, 97
[162] Amena Mohsin, "Military Hegemony and the Chittagong Hill Tracts" in Subir Bhaumik *et al* (eds), *supra* note 5, 17 at 21-22 [Mohsin, "Military Hegemony"]. Even today almost one third of the Bangladesh Army is deployed in the CHT and they interfere in all administrative and policy matters. See *Militarization in the Chittagong Hill Tracts, Bangladesh: The Slow Demise of the Region's Indigenous People*, IWGIA Report 14 (OCCHTC & IWGIA: 2012) 12, 18-24 ["Militarization in the CHT"].

creating various local groups among the *Jummas* in the name of development. They placed the *Jummas* in cluster villages to cut off their contact with the SB. Information infiltration from the region was strictly regulated. Right to movement, freedom of expression and association of the IPs all were compromised.[163] The military officials carried on rape, killing, massacres, detention without trial, forced dislocation, torture in relative impunity. So far inquiry has been made against only 196 officials out of them only 96 were punished.[164] In 2011 The United Nations Permanent Forum on Indigenous Issues recommended that the military personnel engaged in human rights violation in the CHT should not be recruited to the UN Peace Keeping Mission.[165] In response the Foreign Minister of Bangladesh said that there are no indigenous people in Bangladesh. The people in the CHT previously identified as "tribes" have now come to be known as "ethnic minorities" by the way of amendment of the constitution.[166] The Minister said that the *Jummas* already enjoy a "legal entity" as "ethnic minority" and tagging them as indigenous people is contrary to "national identity, image and territorial integrity of Bangladesh". The next move for the GoB was to remove the word "indigenous" from all the laws, policies,

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[163]Mohsin, "Military Hegemony" *supra* note 162 at 26-28.
[164]*Ibid* at 38.
[165]"Militarization in the CHT", *supra* note 162 at 41. Bangladesh has the second largest number of armed officials in the UN Peace keeping Mission. CHT is shown as a "low intensity conflict zone" which significantly plays in the selection to the Mission (39).
[166]"'Indigenous People' a Misnomer: Moni", *bdnews24.com* (26 July, 2011) online: bdnews24.com <http://www.bdnews24.com>. This statement is misleading inasmuch as; the range of words used in government documents was not uniform and varied from "tribes" to "indigenous people". The terms 'tribe' and 'tribal' ("*upajati*" in Bangla) got general preference over the term 'indigenous'. However, in some government documents the terms "*Adivasi*", "indigenous communities" and "indigenous people" were used. The CHT Regulation, 1900 and the Finance Act, 1995 (Act XII of 1995) address *Jummas* in the CHT "indigenous hillmen" and the State Acquisition & Tenancy Act, 1950 (Act XXVII of 1951) uses the phrases "aboriginal castes or tribes". For more see, Roy, "Juridical Pluralism", *supra* note 11.

documents etc.[167] Even a circular was issued to the local administration in the three hill districts that no government official should deliver any speech on the World Indigenous Day or no sponsorship or support should be given.[168] The human rights violation in the CHT in this way has been insulated by impunity and the GoB continues to marginalize the *Jummas* in the name of Bangalee nationalism.

II. Reducing the *Jummas* in Numeric Minority in their own Land

The GoB often argues that the CHT has a vast land mass with significantly low population density compared to the plain lands of Bangladesh. This lower "land to man ratio" is forwarded as a justification for the 1980s settlement program. The researchers have long since established that this land to man ratio to be a myth at least from two perspectives. *First*, considering the nature of land in the CHT the amount of cultivable land is lower than the plains. And *second*, that the people in the CHT on average have a much lower count of land then the permitted ceiling. On face of this scarcity the government decision to settle the plain land people in the CHT created two-fold discrimination: one, the *Jummas* were displaced from their own land and *two*, the land in which *Jummas* were previously denied settlement, were made accessible to the people from the plains.

The myth of emptiness of the CHT actually generated with initiation of development programs. It was believed that development of the CHT is not possible without replacing *jum* with permanent cultivation and for that plough

[167] "Militarization in the CHT", *supra* note 162 at 41.
[168] *Ibid.*

cultivation should be spread in the CHT by bringing wet-rice farmers from the rest of the country.[169] Contrary to this popular belief even in 1967 the East Pakistan Agricultural Development Corporation reported that the CHT had at least 1600 people against per square mile of cultivated land. The report concluded that "[T]he emptiness of the Hill Tracts is, therefore, a myth. As far as its developed resources are concerned, the Hill Tracts is as constrained as the most thickly populated [plains] District".[170]

The basic claim of the lower land to man ratio is that the CHT constitutes 10 per cent of land mass of Bangladesh, but is inhabited by only 1 per cent of the population. On the contrary, Mohammad argued that out of the 30 lakh acres land in the whole CHT only 3 per cent is cultivable. At least 40 per cent of this 3 per cent land was submerged in the Kaptai project reducing the quantity of arable land into only one lakh acre. Taking that there were 1.5 lakh families counting both *Jummas* and Bangalees in the CHT, each family had 0.7 acres of land. If each family had five members on an average, per person had 0.14 acres cultivable land; which in the plains of Bangladesh is 0.20 acres per person. Mohammad therefore explained that the per capita land mass in the CHT might be higher but per capita cultivable land is not. Moreover, all cultivable lands were possessed or owned by the *Jummas* or resident Bangalees at the time of settlement. But the GoB promised the settlers to provide with 2.5 acres of cultivable land, 5 acres of hilly land and 4 acres of sloppy land. Mohammad argued that taken the state of affairs in the then CHT even if all the hill people were removed from their

[169]Schendel, Mey & Dewan, *supra* note 13 at 261.
[170]*Ibid.* See also, *Life is not ours*, "Update 4" at 15.

cultivable land the settlers could not be given what they were promised.[171] The GoB often claims that the settlers were accommodated in *khas* land, but the lands given in settlement were actually privately owned land of the *Jummas*.[172]

The design of patent discrimination against the *Jummas* in the CHT is further evident from the amendment made to the provisions of the *CHT Regulation*. Since there was a reported scarcity of land in the CHT, the land ceiling for the *Jummas* was lowered than the plains land in order to legalize grant of large scale lease to outsiders. Land ceiling applied to only hillmen and resident Bangalees but the outsiders were not subjected to this ceiling. Where in plains individual private ownership ceiling is 33.3 acres in the hills it was made 5 acres only. Mohsin showed that in early 1970s each CHT family "theoretically" held 3.7 to 4.6 acres of land. From this data she questions the decision of settling the Bangalees where the people in the CHT had lesser land than the ceiling. The amount of land de-reserved for settling the Bangalees into the CHT was only one-tenth of the required land to carry out the settlement program. Therefore, this policy was implemented by evicting and making at least 100,000 *Jummas* homeless. Even today half of them are living as international refugees in India and the others have become IDPs. Some live as dependent families with relatives and some have moved to remote forests and practice *jum*.[173]

Roy's analysis gives the essence of a systemic discrimination to the situation. During the Kaptai submersion due to the failure of the government to

[171]Mohammad, *supra* note 5 at 10-11.
[172]Roy, "Population Transfer" *supra* note 7 at 192.
[173]Mohsin, "Road to Peace", *supra* note 2 at 31-32.

replace the submerged land the *Jummas* had to take refuge to India. The *Jummas* who took refuge in the RFs have been claiming for de-reservation which was denied by the authority. But during the settlement those *Jummas* were evicted by the DoF from the same land and the land was de-reserved and settled in favor of the Bangalees.[174]

The above analysis warrants the claim that the Bangalees were taken from the plains as part of a counter-insurgency strategy and at the same time for changing the ethnic demography of the region. Far-reaching consequences were created in the region by implementing that single discriminatory policy. If we look at official and unofficial census, in-migration of the Bangalees in the CHT is not unusual. But the 1980s settlement program was different from this natural process of migration. This deliberate step radically changed the demography of the CHT in a very short period of time.[175] In 1951 there were only 2.94% Bangalees in the CHT and 97.6% *Jummas*, in 1961 the proportion came to 6.29% Bangalees against 93.71% *Jummas* and in the next ten years it came to 11.77% and 88.23%. An unofficial census from 1974 shows that the ratio in ethnic demography doubled in case of the Bangalees 22.83% wherein the *Jummas* were reduced to 77.17%. This shift can be related to the submersion of Kaptai Dam and land eviction and at the same time relaxation of land settlement in the CHT. But with the 1980s settlement program the *Jummas* were brought almost at parity with the Bangalees, there were 58.77% Jummas and 41.48% Bangalees in 1981. In

[174]Roy, "Population Transfer Program", *supra* note 7 at 72-73, 179.
[175]*A Brief Account of Human Right Situation of the Indigenous People in Bangladesh*, *supra* note 9 at 9.

1991 *Jummas* were almost in way to become a minority with 51.40% *Jummas* and 48.60% Bangalees. The 2001 official census does not provide any ethnically segregated data. The population census of 2011 has confirmed that the population growth in the CHT is noticeably higher than the plains. The survey officials have identified influx of Bangalees as the reason for this growth. The census reveals that the *Jummas* hold a fragile majority by a difference of fifty thousand only. The IPs in Bangladesh claim that the population census always underestimates their original number, in the remote hills many area are not surveyed by the officials and in the plains most of the groups are not counted as having separate ethnicity.[176] Therefore the *Jummas* are being faced with a double discrimination; they are being reduced to a minority in their own area through discriminatory settlement policy and their aggregate number is being underestimated in the official census so as to deny the claim of concentration of the IP in the CHT.

This situation of non-recognition, land eviction, religious and racial persecution has completely marginalized the *Jummas* and have left them with two options, either to assimilate with the mainstream Bangalees or to face extermination in the hand of the state. A commentator on the CHT has rightly said, "[t]his indeed is an extreme case of nationalist hegemonism."[177] But this nationalist hegemony based on the identity postulate of the Bangalees was eventually challenged by the *Jummas*.

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[176]Muktasree Chakma Sathi, "Over Forty Ethnic Groups not Individually Recognized for Census", *The New Age* (13 February 2011) online: New Age <http://www.newagebd.com>.
[177]*Ibid* at 39. See also, *Life is not ours: Land and Human Rights in the Chittagong Hill Tracts Bangladesh*, Update 1, the Report of the Chittagong Hill Tracts Commission (OCCHTC and IWGIA: 1992) at 16 [*Life is not ours*, "Update 1"].

B. The rise of the *Jumma* Identity

Since the GoB does not recognize the separate identity of the *Jummas*, the educational institutions and local administration in the CHT is run in Bangla. In order to participate in public life the *Jummas* had to learn Bangla and Bangalee life style was slowly infused for the constant influx of Bangalees in the region.[178] After the denial of constitutional recognition in the seventies the IP in the CHT started political mobilization. A cultural awareness was created which boosted a trend of abandonment of the Bangalee culture.[179] There was a need to unify the thirteen indigenous people who have little in common between them other than the *jum* cultivation. The PCJSS took this commonality as a building block for the *Jumma* national identity and the thirteen groups were unified under the umbrella term "*Jumma*".[180] The "*Jumma*" identity is based more on social than cultural characteristics, inasmuch as the identity is derived from the common social context of marginalization and deprivation.[181]

The *Jumma* identity has attempted to come out of Bangalee influence in three ways, by the development of an indigenous cultural model, by pressing the claim for a separate land base and by sharing of historical experience.[182] The *Jummas* have joined the international movement for indigenous rights and they frame their claims with reference to human rights and minority rights. They are networking with indigenous organizations throughout the country so as to build

[178]Schendel, *supra* note 3 at 119; Mohammad, *supra* note 5, at 14.
[179]*Ibid* at 120.
[180]Schendel, *supra* note 3 at 120-21.
[181]*Ibid* at 121.
[182]*Ibid* at 121-24.

an indigenous cultural model to challenge the hegemony of Bangalee nationalism.[183] In the *Jumma* discourse land is not a matter of possession or ownership, it is a gift from nature.[184] But with the state claiming proprietary right over land from the British regime the *Jummas* have started asserting their claim over the territory of the CHT.[185] Today the *Jummas* demand that the CHT should belong to the *Jummas* and occupation of land by non-*Jummas* should be prohibited.[186] The distinct *Jumma* groups have been sharing the same land for ages without any feeling of commonality or unity, but this land has now become a prime component of their common identity.[187] The *Jummas* press that the CHT as a unit was "carved" by the British and Bangladesh holds it as a colonial inheritance, but the land in the CHT belong to the *Jummas*.[188]

When the recognition of the separate identity of the *Jummas* (then demanded as distinct groups) was denied in the Legislative Assembly in 1972, Manabendra Narayan Larma said they are not being able to realize their claims for lack of political organization.[189] Once the *Jummas* were united and politically organized they started to play a significant role in shaping and reshaping the political stand and laws enacted by the GoB. The formation of this identity has led to the signing of the *CHTPA* and created an increased international monitoring.

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[183] *Ibid* at 123.
[184] *Ibid* at 122-23.
[185] *Ibid*.
[186] *Ibid*.
[187] *Ibid*.
[188] *Ibid*.
[189] See the Legislative Assembly Debate, *supra* note 156 at 293.

C. *CHTPA*, 1997 Signing and Implementation: Autonomy Compromised

The significance of the *CHTPA* in the history of the CHT cannot be denied, but whether it has benefited the *Jummas* is not beyond question. The CHTPA was signed between the GoB represented by the National Committee on the Chittagong Hill Tracts and the PCJSS. There was no civil society participation or grass root involvement of the *Jummas*. Different fractions of the IP (the Hill Student's Forum, the Hill People's Council and the Hill Women's Federation) have mobilized the demands of the *Jummas*, but none of them were consulted in course of peace negotiation.[190] The *CHTPA* mentioned the IP as "tribals" and the CHT as a "tribal inhabited area", while the *Jummas* claim themselves to be IP. This shows that the imminent aim of signing the *CHTPA* was ensuring an end of the insurgency and not an agreement reached by resolution of conflicting interests.

The *Jummas* have a feeling that the *CHTPA* has not been able to address all their grievances. This led to the formation of the United People's Democratic Front (UPDF) who became active against both the PCJSS and the GoB.[191] There have been reports of abduction and killing in conflict between both groups and the GoB. The Accord did not address the trial of the military officials, prosecution for land grabbing or violence against women, let alone the nuances of complex and conflicting land rights.

The *CHTPA* is not an end in itself but it has been translated to various legislations and institutions and those institutions when put in function have

[190]Mohsin, "Road to Peace", *supra* note 2 at 15.
[191]*Ibid*.

reconfirmed the lacking of the *CHTPA*. The HDCs and the RC established pursuant to the *CHTPA* are not exclusively *Jumma* institutions and the ultimate control is retained by the GoB.

I. The Regional Council

The Regional Council Act, 1998 was enacted for setting up the RC composed of twenty one members besides the Chairman.[192] The office of the Chairman is exclusive to the *Jummas*, through indirect election by the elected members of the HDCs. The RC exercises overall supervision and coordination of i) the functions of the three district councils, ii) local councils including the municipalities, iii) the matters of administration, law and order situation and development of the Hill Districts, iv) of "tribal" rules, customary laws and dispute resolution; and v) licensing of heavy industry, disaster management and NGO activities.[193] Although the list sounds extensive no operational framework was laid down for the actual functioning of the RC and the GOB is yet to empower the Council. The GoB can resolve the RC after giving an opportunity to show cause.[194] This is not the case with any other local body of Bangladesh. Far from being an institution regulated by the *Jummas* in accordance with their law, the RC is a hybrid institution regulated by the GoB. The Act provided that in case of

[192]The Council shall consist of Chairman (1), Members Tribal (12), Members Non-tribal (6), Member Tribal (Women-2), and Member non-tribal (women-1). Among the tribal members five persons shall be elected from the Chakma tribe, 3 persons from the Marma tribe, two persons from the Tripura tribe, 1 person from the Murung and Tanchangya tribes and one person from the Lusai, Bawm, Pankho, Khumi, Chak and Khiyang tribes. Among the non-tribal members two persons shall be elected from each district. Among the tribal women member one woman shall be elected from the Chakma tribe and one woman from other tribes.
[193]See the *RCA* s 22.
[194]See the *RCA* s 40.

adopting any law regarding the CHT and the Council, the GoB shall consult with the RC and pass laws according to recommendation of the RC. The RC has been never consulted in the process of law making. The Council was given the power to file petition or put recommendations to amend any law that may be harmful for development of the CHT or for the welfare of the "tribes", or to make any new law.[195] But as has been seen in relation to the *LDRCA*, the petition for amendment is pending for more than ten years.

II. Hill District Councils

Pursuant to the *CHTPA* the original Acts setting up the three HDCs were amended in 1998.[196] The HDCs were set up afresh with combining elected office of both tribal and non-tribal members. [197] There is a majority representation of the *Jummas*, but it is not an institution under exclusive control of the *Jummas*. The GoB can make rules, seek information, advise the councils or even suppress them.[198] The Councils were given three important powers; i) maintaining separate electoral roll, ii) putting restriction on transfer of land and iii) placing of objection regarding state laws.

The definition of "non-tribal permanent resident" was changed so as to cover people who have legal land and generally live in a certain address in the

[195]*Ibid*, *RCA*, s 53; clause 13, Part C, *CHTPA*.
[196]In relation to HDCs reference will be made only to the provisions of the Rangamati Hill District Council Act [Act No. XIX of 1989] amended as of 2000 since all three Acts are identical [*RHDCA*].
[197]The Council shall consist of Chairman (1), Members Tribal (20), Members Non-tribal (10), Member Tribal (Women-2), and Member non-tribal (women-1). Among the tribal members ten persons shall be elected from the Chakma tribe, four persons from the Marma tribe, two persons from the Tanchangya tribe, and one person from the Tripura, Lusai, Pankho, and Khiyang tribes. See *RHDCA* s 4.
[198]*Ibid*, *RHDCA* ss 50, 53.

CHT. Apart from the *Jummas* only non-tribal permanent resident could enroll in the voter list.[199] Non-tribal permanent residency is determined by the Circle Chief on basis of certificate given by the headmen, the union council chairman or the municipality chairman.

The Act provided that no land including *khas* land suitable for settlement can be leased, settled, purchased, sold out or transferred without prior approval of the Council. The Council was also given the power for settlement of fringe land to the original owners and supervision and control over the headmen, *chainman*,[200] *amin*, surveyor, *kanungo* and Assistant Commissioner (Land).[201] The RFs were exempted from this provision. But the GoB has not yet assigned this power to the Council.

The Council can place petition before the GoB to amend or relax any law passed by the Parliament which in its opinion will hurt or be objectionable for the "tribal" people. [202] This is not a provision for prior consultation and the GoB is not under strict obligation to make changes according to the petition. The observations in relation to the RC are applicable in this case as well.

The *CHTPA* provided for setting up the MoCHTA with a "tribal" minister, but till date the ministry is run by the PM and a *Jumma* is given the office of the Deputy Minister (DM). The former DM has claimed that during his five years

[199] *Ibid* ss 2(aa) and 17.
[200] The chainman is a land survey office stuff who measures the land.
[201] *Ibid* s 64.
[202] *Ibid* s 79.

tenure he was never called for any meeting or consultation.[203] From the functioning of these three institutions it is clear that the *CHTPA* was not appropriately designed to reestablish *Jumma* control over resources. In view of the accumulation of Bangalee stakeholder interests in the CHT for years; joint functioning of the Bangalees and the *Jummas* will not bring any change in policy decisions. The reservation of seats for the Bangalees in the RC and the HCDs provides legitimacy to the Bangalee settlement in the CHT.[204] With the growing number of Bangalee population in the CHT the Bangalees in near future may demand more seats in the Councils.[205] These hybrid institutions have not recognized the right to self-determination of the *Jummas*, rather they legalized the presence of the Bangalee settlers.[206]

Unlike most of the peace accords in South Asia the *CHTPA* was not backed by constitutional entrenchment. Many think that this non-entrenchment gave the GoB a leeway for flouting or even changing or altering the *CHTPA*.[207] Lack of constitutional entrenchment in itself cannot be taken to be a shortcoming because it is dependent more on the constitutional practice of a country.[208] But lack of entrenchment allowed the court to view this agreement as a mere political checklist for future actions and not as a binding agreement:

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[203]*The Ministry of Chittagong Hill Tracts Affairs of Bangladesh: An Agency for Discrimination against Indigenous Jumma People*, *supra* note 113 at 11.
[204]*Life is not ours*, "Original", *supra* note 104 at 94.
[205]*Life is not ours: Land and Human Rights in the Chittagong Hill Tracts Bangladesh*, Update 2, the Report of the Chittagong Hill Tracts Commission (OCCHTC and IWGIA: 1994) at 11-12. [*Life is not ours*, "Update 2"].
[206]*Life is not ours*, "Update 4", *supra* note 127 at 9-10.
[207]Adnan & Dastidar, *supra* note 22.
[208]Raja Devashish Roy expressed this view in a Court Hearing in the case of *Badiuzzaman & others v Bangladesh & others,* 2000 W.P. No. 2669 and 2007, W.P. No. 6451 [2010] 7 LG (HCD) 208 [*Badiuzzaman* cited to LG] which challenged the constitutionality of the Peace Accord.

> In the view of this Court, the Peace accord is a further checklist of measures to be adapted by the Legislature and the Executive to ensure sustainable peace and does not of itself create substantive and enforceable rights and obligations but merely charts the pathways through which this may be achieved.[209]

Statements like this coming from the HCD will further stagnate the peace process as the *Jummas* will not even have the right to insist on implementation of any of the provisions. The Bangalees who have their own interest at stake in the CHT, the illegal settlers, self-propelled settlers, elites and industrialists are against proper functioning of the Land Commission or even empowering the councils. They often suggest that the *CHTPA* should be revised so as to legalize the rights they have acquired illegally.[210] The GoB has already started to voice the opinion that the *CHTPA* cannot be implemented in its original form due to passage of time and that it needs revision. Indigenous groups suspect such assertions as being another means to legitimize the claims of the Bangalee settlers.

D. Supreme Judiciary: Another Mechanism of Implementing Bangalee Nationalism

As observed in the previous chapter most of the disputes of the *Jummas* are resolved before traditional authorities. Neither the regular courts nor the land Commission has been able to win the trust and confidence of the *Jummas*. Therefore, presumably there are not many cases which speak about *Jumma* laws or relates to customary issues. In reality such cases can be counted with fingers. But the higher judiciary of Bangladesh has taken fatal decisions against the *Jummas* while dealing with the rights and interest of the Bangalee traders against

[209] *Ibid* at 227 para 32.
[210] Adnan & Dastidar, *supra* note 22 at 32.

the government. Reading those judgment one can start doubting whether the *Jummas* actually exist or they are already extinct. In this section the thesis considers five selected cases, one from the Pakistan period and four from the independent Bangladesh. The aim is to show how the judiciary has implemented the Bangalee hegemony.

I. *Mustafa Ansari v Deputy Commissioner, Chittagong Hill Tracts, Rangamati and another, [1965] 17 DLR 553*

The petitioner purchased several timber lots of the de-reserved Baghachari Forest within Kassalong Rehabilitation area in the Chittagong Hill Tracts at an auction sale. After a number of stoppages on his working order he was finally given a time limit for removal of the felled timber. The reserved forest was de-reserved for rehabilitation of people affected from the Kaptai Dam. The petitioner was creating havoc in the area and there was exodus of refugees to India due to his activities. The DC issued an order under Rule 51 of the *CHT Regulation* stopping the petitioner from working and asked him to leave the area along with his laborer at once. The petitioner challenged the order on the ground that it has interfered with his fundamental right of movement and pursuing his vocation and to deal with his own property.

The Court reasserted that a writ petition was not appropriate for determining the *facts* of the case or the determination or enforcement of contractual rights. But the case as it appears was not about determination of contractual rights but rather about restriction put on some fundamental rights of

the petitioner. In course of judging such restriction against the constitutionally guaranteed rights the Court applied a very strict legal framework.

The Court observed that Rule 51 was framed at a time when the CHT was regarded as a tribal area. By the time the challenges were brought, the CHT had ceased to be a tribal area under the constitution of 1964.[211] In absence of any special designation the constitution applied equally to the whole country. Therefore the citizens enjoyed the right of freedom of movement throughout the country. Rule 51 empowered the DC to direct a person to leave the district within a given time or not to enter the district, if he was satisfied that the presence of the person in his district was or might be injurious to the peace or good administration of the district. As this rule put restriction on the constitutionally guaranteed right of freedom of movement of the citizens it had to satisfy the doctrine of reasonable restriction. The Court found this provision to be violative of the principle of natural justice as no chance was given to the aggrieved person to explain his situation. Without any chance of show cause or without any option for redress of grievances given to the aggrieved person this rule could not satisfy the principle of reasonable restriction.[212] Moreover, the restriction put by the Rule was disproportionate to the mischief sought to be prevented, i.e., the presence of the person in question could be injurious to the peace and good administration.

The Court therefore concluded that Rule 51 was contrary to the freedom of movement and as such *ultra vires* the Constitution. The Court said that even if the

[211] *Mustafa Ansari v Deputy Commissioner*, *Chittagong Hill Tracts, Rangamati and another* [1965] 17 DLR 553 at 556-557.
[212] *Ibid* at 560-61.

rule was not *ultra vires* the court would have dismissed the order for being in contradiction of the Rule itself. The DC did not explain any ground for his satisfaction. Since the petitioner was asked to leave only a part of the district, his presence could not be said to have been injurious to the whole District. Although, the second ground is questionable, nevertheless the Court had the option to cancel the order on technical grounds, without striking down Rule 51. Although the constitutionality of the Rule was in question, Rule 51 could not have been struck down with such ease if the Court considered the vulnerability of the IP in the CHT. Since the Court said it cannot decide complex factual accounts while deciding a writ petition it should not have made the straight conclusion that the mischief to be prevented was disproportionate to the restriction imposed. Because even the case which the Court was deciding showed that the petitioner was forcing the IP to cross the border by his activities. The petitioner in this case was an instance of the traders from outside the region who made the living of the IP difficult in the region. This decision made in the Pakistan regime was one instance of the many to be followed in the Bangladesh regime where the Court jeopardized interest of the *Jummas* in deciding rights of the Bangalee traders.

II. *Bangladesh Forest Industries Development Corporation and others v Jabbar, [2001] 53 DLR 488*

The BFIDC appointed the respondent, a timber merchant as a supervisor in the timber extraction project in Kaptai, CHT. Several inquiries were made against him for alleged financial irregularities during the period of 1988 to 1993, before he was finally suspended in 1993. He submitted an appeal with the BFIDC

authority to cancel the dismissal. During the pendency of the appeal in 1995, he filed a civil suit before the DC, Rangamati Hill District for the declaration of the dismissal to be void *ab initio*. The DC dismissed the suit in 1997 for pendency of appeal before the BFIDC. The respondent preferred an appeal to the Divisional Commissioner of Chittagong, and the ADC set aside the order of the DC. Being aggrieved by this the BFIDC preferred a revision to the HCD under section 115(1) of the Civil Procedure Code (CPC).

The question to be decided was whether the Divisional Commissioner was amenable to the HCD and therefore the HCD had revisional power under section 115 of the CPC. The Court held that the provisions of the CPC are not applicable to the CHT. *First*, because the Schedule to the *CHT Regulation* does not list CPC as an applicable law, under the CHT Regulation the HCD has been given supervisory power in relation to criminal matters and not civil matter and that in absence of express mentioning the Divisional Commissioner was not amenable to the HCD.[213]

After deciding the case the Court made an observation that the Divisional Commissioner operating under the Regulation was not a civil court as he worked more as an arbitrator based on viva voce exam rather than full determination of rights of the parties. The Court observed that the provisions of the Regulation were not adequate for determining suits of civil nature and therefore the CPC should be made applicable to the CHT.

[213] *Bangladesh Forest Industries Development Corporation and others v Jabbar,* [2001] 53 DLR (HCD) 484 at 490 para 9.

The Court while traversing into this larger question decided to ignore the very reason for the existence of the *CHT Regulation*, the *Jummas* and their life style and legal system which is separate from the plains. The inadequacy of the *Regulation* was felt in the backdrop of newly created economic interest of the peoples form the plains and the Court was merely looking for accommodating those interests in complete ignorance of the heterogeneity of the region.

This decision was declared to be *per in curium* or made in ignorance of law by another Bench of the HCD which declared the *CHT Regulation* as a "*dead law"* in its entirety.

III. *Rangamati Food Products Ltd v Commissioner of Customs and others, [2005] 10 BLC 524*

The petitioner in this case was a public limited company registered in the Rangamati Hill District, operating canned food business all over Bangladesh. The Chittagong Port Customs authority realized advance income tax and VAT from the company on importation of empty cans. The petitioner filed a civil suit to the Divisional Commissioner, Rangamati against this decision. The Divisional Commissioner issued an order of *status quo* which was not complied by the customs authority on ground that the order issued by the DC will apply within the territorial jurisdiction of Rangamati and not outside. Therefore the case was brought before the HCD challenging the constitutionality of the order of the customs authority.

The petitioner argued that due to the presence of Regulation 4(1) which requires laws to be applied to the CHT with notification the VAT Act is not applicable and therefore the impugned order has no force of law. The respondent claimed that the VAT Act is applicable in the CHT as the Regulation is not a special law and it can be subjected to any law passed by the Parliament.

The Court noted that under the Income Tax Ordinance, 1984 the income of a hillmen is exempted from tax as long as the income is earned from economic activities within the CHT. It also noticed that the majority shareholders of the company were not hillmen and the company was carrying business in the whole of Bangladesh.[214] Therefore there can be no denying that the VAT Act and the Income Tax Ordinance applied to the petitioner company.

Having decided this, the court unnecessarily ventured into a larger question. The question was framed in a rhetorical manner as an "[i]mportant issue that has been raised by the petitioner company, i.e. whether *the Regulation* is still alive."[215] The Court said that Regulation 4 was valid only until Part III of the *GoIA*, 1935 came into force. After coming into force of Part III the CHT enjoyed the status of totally excluded area under section 91 and the Governor used to pass law under section 92 of the same part. Regulation 4 was rendered ineffective and not in force. The CHT was given the status of a tribal area under the Pakistan Constitution of 1963 which was resumed under the 1964 amendment. The court opined that although the central authority noticed the change the provincial

[214] *Rangamati Food Products Ltd v Commissioner of Customs and others*, [2005] 10 BLC 524 at 530 para 8.
[215] *Ibid*.

authority failed to act over it and continued to rely on the dead law, i.e., the *CHT Regulation*. In independent Bangladesh absenting any special constitutional status the CHT formed a part of Bangladesh as any other part and the plenipotentiary power of the Parliament extended to the CHT.[216] But bureaucrats again failed to appreciate the death of the law and continued to apply it. The fact that the Parliament sought to repeal the *Regulation* in 1989, shows that, like the bureaucrats, the parliament also failed to appreciate the correct legal position and treated the Regulation as valid law up till now though it died its natural death long ago.[217]

The Court observed that the *CHT Regulation* "died its natural death" in 1964 when its special status under the Constitution was resumed. All laws in Bangladesh are equally in force in the CHT and "in order to give benefit of those laws to the inhabitants of those areas it is high time for the Executive Organ of the State to take necessary steps for setting up of Civil and Criminal Courts as **per provisions of Civil Procedure Code 1898 forthwith and apply all others laws of the country to that area** without any let or hindrance."[218]

The Court took an erroneous view of the state of affairs. Even though it is true that Regulation 4 became ineffective after s 92 of the *GoIA* came into force, the whole *Regulation* did not become obsolete. Only Regulation 4 was replaced by s 92. In Pakistan period when constitutional special status was abolished all laws did not automatically become operative to the CHT or the *CHT Regulation*

[216] *Ibid* at 531-32.
[217] *Ibid* at 533.
[218] *Ibid* at 535 [emphasis added].

did not die any natural or superficial death. If it were so the successive governments had to take steps to fill in the administrative vacuum, which was not done. In absence of Regulation 4 or section 92 the legislature was lacking appropriate mechanism to make any law applicable to the CHT. And by relying on Regulation 4 the state has created a legitimate expectation from which it cannot step back.[219] There is no reason to render the whole Regulation bereft of force just because one regulation was no more effective. The Court while hearing a dispute on taxation took upon itself the responsibility of deciding the fate of thirteen different communities, without even mentioning them for once. The act of declaring the *CHT Regulation* to be dead and calling for application of all laws in the region at one breath demonstrated the dire neglect and paternalistic approach of the Court towards the *Jummas*. This case is pending on appeal for many years and no decision has been yet reached.

IV. *Bikram kishore Chakma v Land Appeal Board, [2001] 6 BLC 436*

In this case the same question of applicability of laws made by the Parliament in the CHT was mooted. The Court drew a very clear conclusion that Bangladesh is a unitary state with a constitution which is unitary in character and therefore the state is run under a single set of laws with no special status being

[219]The GoB issued a circular in 1991 confirming that the CHT Regulation is still in force, see *Life is not ours*, "Update 2" *supra* note 201 at 7. Therefore, the GoB cannot change its position for the application of the doctrine of promissory estoppels as well. "Where one party by words or conduct has made a clear or definite promise which he knows will be acted upon by the promisee and the latter in fact has acted upon it, then the promise is binding upon its maker who will not be entitled to back upon it. This principle of promissory estoppels is available by way of defence and also as a cause of action. This principle is applicable against the government and a statutory body as well as against a private individual." See *Grihayan Limited v. Government of Bangladesh, [2005] 2 ADC 672* at para 5.

designated to any particular territory including the CHT. Therefore all laws made by the Parliament applied to the CHT.[220]

The Court stressed that the Constitution does not recognize any special status of any territory because of the unitary character of the Republic. The unitary character of the state is the basic structure of the Constitution which cannot be changed even by any amendment to the Constitution.[221] To support this conclusion the court cited Shahabuddin Ahmed J:

> 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 different regions to turn into province ultimately.[222]

Citing this paragraph from the judgment of a previously decided case the Court was agreeing to the statement that Bangladesh is a homogenous state in terms of language, culture and life style while deciding a case where the petitioner himself is a Chakma and not a Bangalee!

V. *Mohammad Badiuzzaman and others v Bangladesh and others, [2010] 7 LG HCD 209*

The Petitioner in this case was a businessman aggrieved by the passing of the HDC Amendment Acts and the RC Act. He therefore challenged the Acts

[220] *Bikram Kishore Chakma v Land Appeal Board*, [2001] 6 BLC at 443 para 26.
[221] *Ibid* at 445 para 31. The doctrine of "basic structure" puts implied limitation on the power of the Parliament in amending the constitution; wherein certain amendment to the constitution cannot be made even if they do not conflict any express provision of the constitution.
[222] *Ibid* at 445 para 32 citing *Anwar Hossain Chowdhury v Bangladesh*, [1989] 1 BLD spl 1 at 105 para 362 [*emphasis added*]. This case established the doctrine f basic structure in Bangladesh. The case had nothing to do with the *Jummas* or the CHT. It was a challenge on division of benches of the HCD to different districts.

before the HCD on these two grounds amongst others, i) the HDC in requiring permanent residency for enlistment on electoral roll affected his right to franchise and right to contest elected posts, ii) the provision for approval of land transfer by the HDC violates his right to purchase and transfer property.[223] The petitioner challenged the RC on the ground that it has made the CHT an autonomous region and therefore dismantles the unitary character of the state.

The Court emphasized that it will consider the 'factual matrix' of the case. But even the basic factual premise of the judgment was misplaced. It started by saying that CHT constitutes only one-tenth area of Bangladesh inhabited by 0.5% of the population and the Court never mentioned or highlighted the distinct ethnic origin of the *Jummas*. To struck down the RC as an expression of autonomy and therefore responsible for dismantling the unitary nature of the state the Court relied on the statement of Shahabuddin Ahmed J as quoted above, but with a slight variation:

> ……the state has been ……..organized as a unitary state by its founding fathers leaving no scope for devolution of executive, legislative and judicial powers on different regions to turn into province ultimately.[224]

If we turn a gaze back to see what was written in the omitted part, it said "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…" So, when given the technicalities of the case it became totally

[223]I have focused on the grounds of land rights and regional autonomy for their relevance and also for the reason that they have been always considered as the "most problematic" aspects of the political negotiation on the CHT. See *Life is not ours: Land and Human Rights in the Chittagong Hill Tracts Bangladesh*, the Report of the Chittagong Hill Tracts Commission, Update 3 (OCCHTC and IWGIA: 1997) at 25.
[224]*Badiuzzaman*, cited to LG at 235.

impossible to hide the heterogeneity of the people, the Court could not resist citing the same paragraph. Coming from the supreme judiciary of the country it cannot be a mere omission, it is a mockery of justice indeed.

In relation to challenges made to the HDC the Court ruled that the amendments made for right to be elected in non-tribal posts and to vote in elections of the HDC are *ultra vires* the Constitution. In the amended provisions for both right to contest and right to vote the non-tribal people had to qualify as permanent resident of the CHT having legal land and at least a fixed address. In striking down the provisions the Court said that the fact the status was determined by the Chief based on certificate issued by a headmen was a discretionary power without any further objective yardstick and violated right to equality before law and non-discrimination, right to liberty.[225] The court failed to note that similar power of issuing recommendation was given to the Chairman of the municipality or union council. The Court annulled the provision for separate electoral roll on the ground that it will prevent any non-tribal citizen to vote which he was allowed to do in the rest of the country. It is to be noted that not all non-tribal citizens were excluded; only those who are not permanent residents were excluded. This was made to ensure participation of the local people in administration and allow them to have some control over local issues by selecting people of their choice. The entire object will be rendered valueless if outsiders were allowed to vote. This decision was also appealed against and is still pending. And during pendency of the appeal the RC is being allowed to function.

[225] *Ibid at* 237, para 46.

In relation to control over land transfer the Court denied to rule on the issue and said if the court tried to make sense of the section in a case involving individual rights having social, political, economic admixture it might run aground the very reason for its intervention, i.e.; to alleviate the peace process from stagnation. The issue on challenge over land was left for future consideration by the lawgivers and policy makers of the country.

In *Ansari* case while invoking the individual right to freedom of movement the court completely ignored the collective interest of the *Jummas* in protecting the land base from the outsiders. In all future cases the observation made in the *Ansari* case as to loss of special constitutional status was followed so blindly that in the *Rangamati Food Case* the Court invalidated the whole *CHT Regulation* without considering the interests involved on both sides. In one side it was a question of economic interest and on the other side it was question of survival. And these people were not even mentioned for once.

Then the Court eventually got prejudiced with the unitary nature of the state and its territorial integrity. And the prejudice was so pervasive that it denied to recognize the heterogeneity of the people and started emphasizing assimilation. Again, one decision has invalidated the *CHT Regulation*; another has declared the RC to be *ultra vires* the Constitution. The Appellate Division is not delivering Judgment on the pending appeals. From the cases discussed above the judiciary has a clear bias towards advancing the Bangalee nationalist hegemony.

E. International Ratification: Embracing Assimilation and Avoiding Collective Rights

The GoB has ratified international conventions which are based on the principle of assimilation or which fall short of recognizing collective rights. The GoB has recognized the ILO Convention No. 107 adopted in 1957, but did not accede to the revised version, i.e, ILO Convention No. 169 of 1989.[226] Similarly, it has ratified the International Convention on Elimination of All Forms of Racial Discrimination, 1969 but has abstained from ratifying the United Nations Declaration on the Rights of the Indigenous People, 2006 (*UNDRIP*).[227]

None of the international conventions have clearly defined indigenous or tribal people. Convention 107 provided some criteria for distinguishing tribal, semi-tribal and indigenous people. Convention No. 169 has narrowed the division into tribal and indigenous people. In a progressive move the *UNDRIP* has avoided even setting any criteria for identification of the IPs as more and more people around the world identify themselves as indigenous.[228]

Convention 107 was based on the idea of modernization and nation building, which professed that the less-advanced tribal or IP needed to civilize themselves. This policy was pursued for advancing the development regime and it

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[226]See *Indigenous and Tribal Populations Convention,* C107, 26 June 1957 and *International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169) 1989, 72 ILO Official Bull. 59 - Part II.

[227]*International Convention on the Elimination of All Forms of Racial Discrimination*, 1969, UNTS vol.660, 195 and *United Nations Declaration on the Rights of the Indigenous People*, GA Res 61/295, UN GAOR, UN Doc A /61/ L. 67/ Annex (2007) (UNDRIP).

[228]Raja Devashish Roy, "The ILO Convention on Indigenous and Tribal Populations, 1957 (No. 107) and the Laws of Bangladesh: A comparative Review" online: <http://www.ilo.org/wcmsp5/groups/public/ed_norm/normes/documents/publication/wcms_114385.pdf> at 1 [Roy, "ILO Convention"].

was aimed at gradual assimilation of the tribal and IP into the mainstream nation. In this view these people were seen as "temporary societies" which will disappear with time as they assimilate with the dominant community.[229] This legal postulate of the dominant ideology was in constant conflict with the identity postulate of the tribal and IP and as such the international community had to yield to a paradigm shift towards recognition of difference. Convention 107 was closed for ratification and was replaced by a revision, i.e., Convention 169 in 1989. However, Convention 107 continues to apply to its signatories who did not ratify Convention 169. Bangladesh is one of those eighteen states who still adhere to the approach of assimilation.

The departure made by Convention 169 is that it considers tribal and IP as permanent societies and their assimilation or withering of identity is neither desired nor considered inevitable.[230] Rather integration based on recognition and encouragement of diversity is emphasized. Another important departure is the idea of self identification has been emphasized for both tribal people and IP. Under the Convention IP are those who are regarded as indigenous for their descent from a population who inhabited the country or a particular region of the country at the time of colonization or the establishment of present state boundaries and who, irrespective of their legal status retain some or all of their social, economic, cultural or political institutions.[231] Taking these identification criterions *Jummas* in the CHT are descendants of groups which inhabited the

[229]*Ibid* at 4 and "Convention No. 107", *International Labor Organization,* available at : <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>.
[230]Roy, "ILO Convention*", supra note* 228 at 4.
[231]"Convention No. 169", *International Labor Organization,* online: <http://www.ilo.org>.

CHT, a particular region even before British colonization. Even at the time of independence of Bangladesh the CHT was predominantly inhabited by the *Jummas*. And despite absence of any special recognition under the law or constitution as IP they retain at least some of their social, economic, cultural or political institutions.

ILO 169 provides for participation and decision making in the process of development (Article 7), recognition of and access to land and resource rights (Article 15), right to use, participation and management of resources (Article 15), no relocation except for necessity and prior informed consent and without alternative settlement or monetary compensation (Article 16), consultation in case of laws authorizing land alienation in hands of people outside the community (Article 17); and penalty for unauthorized intrusion (Article 18). Bangladesh has claimed that although it did not ratify Convention 169 by implementing most of the provisions of the *CHTPA* it has taken up the obligations.[232] Evidently from the above discussion this statement is not beyond challenge. Moreover, there is no penalty for unauthorized interference with *Jumma* land and resource rights. Again the position of the GoB may be contrasted with the decision taken by the HCD where it judged the validity of the HDCs and RC against the idea of "international paradigm shift from integration to self-determination" and found that the GoB has taken a move from integrationist approach towards almost a recognition of the IP ("tribals") as a distinct people. [233] The Court differentiated autonomy that creates

[232]Staff Correspondent, "NHRC Chairman Urges Government to Implement the CHT Accord", The New Age (9 August, 2012) online: The New Age <http://www.newagebd.com>.
[233]*Badiuzzaman*, cited to LG 208 at 228-29.

integration and that "ushers in self-determination" and was fine with the former.[234] Even after taking judicial notice of the fact that Convention 107 aims at assimilation it stressed that the GoB should make its municipal law conform to the provisions of the Convention. The executive has not done justice to the *Jummas* and the judiciary is way behind.

Coming to *UNDRIP* Bangladesh remains the sole country in Asia which has abstained from adopting the same. The first and foremost reason for such refusal as argued by the official position of GoB remains that there are no IP in Bangladesh. From another view under this convention IP have the recognition as individual and as members of their collective identity. The GoB has never recognized collective rights of the *Jummas*. The Convention provides the IPs to pursue their right to self determination, indigenous identity and at the same time participation in the life of the state if they so wish (Articles 1, 3, 5 & 9). *UNDRIP* requires the state to provide for preventive and remedial measure against acts that aim or deprive them of their integrity, aim or dispossess them from land, territories or resources, forced population transfer etc (Article 8). This is definitely not favorable for the GoB as it has actively pursued all these measures as a policy. Forceful removal and relocation without prior, informed consent with fair compensation is prohibited under the Convention (Article 10). The participation, decision making, and consultation with the state in relation to development and resource management by the IP as mandated by the *UNDRIP* (Articles 18, 19, 23 & 32), is in sharp contrast with the institutions sanctioned by

[234] *Ibid* at 236, para 44.

the GoB. The Convention provided for genuinely indigenous institutions, maintained and chosen by the IP with their own procedure wherein the HDC, RC, MoCHTA all are hybrid institutions maintained by state law. In relation to land and resource rights the states are required to recognize and abide by the customary land tenure of the IP for the land, territories and resources that they have traditionally owned, occupied, used or acquired (Article 26). State has to ensure restitution or compensation for land and resources confiscated, taken, occupied, used or damaged without their free, prior and informed consent (Article 28). Giving recognition to this provision is problematic and involves a lot of hardship from the point of view of the GoB. The Convention also bars using lands or territories of the IP for military purposes except for public interest or free consent or request of the IP (Article 30). GoB will never agree to such a proposition because even almost fourteen years after signing of the *CHTPA* it has not demilitarized the CHT. And till today the military officials are used to settle illegal Bangalees in the CHT.

Therefore, in terms of assuming international obligations the GoB has carefully maintained its legal postulate by choosing to ratify conventions that aim at assimilation and has allowed some hybrid institutions without strengthening them enough or outlawing the indigenous institutions. Ratification of broader provisions of international law might bring a qualitative change in the sense that the operation of customary law will be allowed on its own authority. The state will not be treated as the giver of customary law or it will not conflate customs in the name of recognition, custom will apply as perceived, shaped and reshaped by

the *Jummas*. Although reconciliation or effectiveness depends on state will and time, nevertheless, a qualitative change is possible.[235]

From one point of view it appears that the Bangalee nationalism is the overarching power that is shaping and regulating the life and law in the CHT. But if seen from a different context there is another story. In 1989 the GoB passed a law to repeal the *CHT Regulation* which was to take effect on issuing a notification to that regard.[236] No such notification has been made till date, but the Act has not been repealed as well. As seen in this Chapter the *CHT Regulation* and the RC has been declared unconstitutional, but appeals are still pending. GoB is voicing the need for revising the *CHTPA*, but at the same time *PAIC* meetings are being held. The Land Commission Chairman despite all his will and might has not yet been able to initiate land dispute resolution. All these lead to one conclusion, that the identity postulate of the GoB is not the only force in the field. Any of its effort is not going un-protested. There is another equally important force, the *Jumma* identity which has survived despite all deprivation, exclusion and marginalization.

The state law has operated in the CHT so as to establish itself as the "sole legitimate normative system" in complete disregard of the *Jumma* identity.[237] The *Jumma* laws are based on common obligations and needs of the community, they

[235]Raquel Yrigoyen Fajardo, "Legal Pluralism, Indigenous Law and the Special Jurisdiction in Andean Countries", Beyond Law, No 27.
[236]The Chittagong Hill Districts (Laws Repeal and Special Provision) Act 1989 (Act No XVI of 1989) s 1 [Translated by the author from Bangla].
[237]Emmanuel Melissaris, *Ubiquitous Law:* Legal Theory and the Space for Legal Pluralism (UK: Ashgate Publishing Ltd, 2009) at 41.

exist as "shared belief and commitment".[238] The state seeks to replace this shared belief and commitment and impose a single set of institutional interpretation or state law. This thin concept of law can be "thickened" through engagement with the shared belief and world experience of the *Jummas*.[239] The stagnation in relation to land rights in the CHT can be overcome if the "contextual aspect" of the *Jumma* legal tradition and the historical deprivation is considered in light of their shared commitment.[240] This consideration or interpretive exchange or translation of norms between the different identity postulates will create a situation where law will be seen as "mutual understanding" or agreement rather than force.[241] Is there any space within the legal framework of Bangladesh for such normative or interpretive exchange with the *Jumma* identity or legal tradition? This is the question the thesis aims to pursue in the next chapter.

[238] *Ibid.*
[239] *Ibid* 52-54.
[240] *Ibid*.
[241] *Ibid* at 60.

Chapter Four:
Accommodating Legal Pluralism

The Constitution of the People's Republic of Bangladesh follows a liberal democratic model. Therefore, any recognition and accommodation of the *Jumma* land and resource rights whether in terms of policy formulation, legislation or judicial enforcement is weighed against the principles or identity postulates of this model. The conflict between the *Jumma* land tenure and the official law in the context of land and resources arise from both claiming interest over the same resources. The *Jummas* demand control over their own resources and development in the region, transfer of land and to retain decision making power by locally elected representatives, in sum, self-determination. As has been seen in the previous chapters more often than not these debates and disagreement have been shaped in terms of freedom and equality of individuals, resource distribution, omnipotence of the national identity and unity. Taking into consideration the historical continuation of land and resource alienation a fair assessment is needed of what the liberal legal, constitutional and political framework has to offer to the *Jummas*.

For this purpose the present Chapter will briefly highlight the classical and egalitarian liberal theories to assess the stand of the GoB in relation to the questions of affording special land and resource rights for the *Jummas*. Then moving into internal critics of liberalism, multiculturalism, constructive liberalism and critical liberalism the Chapter will conclude that liberalism in general and the legal framework of Bangladesh in particular cannot accommodate collective

normativity or the group as a source of rights and obligations. Truth remains that the only force that has so far made the GoB to compromise with its assimilative approach is the *Jumma* national identity, which in itself is a collective entity. Since the liberal framework does not have an answer for this question, the chapter will look into the possibility of dialogue between the opposing claims as a potential source of agreement on conflicting interests.

A. The Constitutional Framework of Bangladesh, Liberalism and the *Jummas*

Liberalism is not limited to the west; it has shaped constitutions of many non-western countries by way of colonialism.[242] The Constitution of Bangladesh also endorses a transplant of a liberal democratic framework, where liberalism sets the limit of the democracy. The constitution is designed to deal with claims of individuals against the state and is not well equipped to deal with minority claims. Although all citizens are equal before law, some exceptions are allowed in form of affirmative action. In the following two sections, I will first outline the theoretical basis of these principles of equality and difference, i.e., liberalism and then assess the impact of these principles on *Jumma* land and resource rights with reference to the theoretical underpinning.

I. A Framework of Liberalism: Classical and Egalitarian

Classical liberalism advocates a form of polity where individuals have *the liberty to do w*hatever they chose without harming others.[243] The concomitant social

[242]Robert N. Clinton, "The Rights of Indigenous Peoples as Collective Group Rights" (1992) 32:4 Ariz L Rev 739 at 740.
[243]David Conway, *Classical Liberalism* (UK: McMillan Press Ltd., 1995) at 8.

order is marked by minimal or no interference with choices that people make. Classical liberty therefore promises equality before law meaning all members having equal right to life, liberty and property without committing to any form of social welfare.[244] In the eyes of a liberal state there is no *difference* among races, culture or sex and the laws are universal; justice means neutrality. Equality in classical liberalism means equality before law or formal equality.[245] But in reality most of the liberal democracies in name of "universality", "equality" and non-discrimination" have in effect assimilated minority cultures for the sake of political integrity.[246] Since the state in its day to day practice adopts the norm of the majority culture the superficial neutrality in effect favors the "culturally hegemonic or majority groups of the state".[247]

Modern* or *egalitarian liberals, on the other hand are concerned with a welfare state. They claim affirmative action and preferential treatment for the disadvantaged minorities.[248] They argue for substantive equality in place of formal equality. In this view a government is legitimate only if it shows equal concern for all citizens. This equal concern is achieved by ensuring *material* equality or equality of resources for all.[249] The government is required to adopt laws which will ensure that citizens' fate are insensitive to who they are (*difference*) and to work in a manner that the citizens' fate are sensitive to the

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[244]*Ibid* at 20, 26.
[245]*Ibid* at 26.
[246]Ferran Requejo & Miquel Caminal, "Liberal Democracies, National Pluralism and Federalism" in Ferran Requjo *et al*, eds, *Political Liberalism and Plurinational Democracies* (USA & Canada: Routledge, 2011) 1 at 3.
[247]*Ibid* and Parekh, *supra* note 153 at 34.
[248]Conway, *supra* note 243 at 26.
[249]Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) at 1, 3.

choices that they made.[250] In this way access to resources are ensured to all and citizens receive benefits from those resources according to the choices they make.

In egalitarian liberalism citizens remain *free* and *equal* inasmuch as they hold "[a]n equal claim to a fully adequate scheme of equal basic rights and liberties".[251] Social and economic inequalities whenever attached to positions and offices have to ensure that *fair* equality of opportunity is allowed and the inequalities are meant for the benefit of the least advantaged members of the society.[252] These two principles form the concept of "justice as fairness", which holds the free and equal citizens in a liberal society together who are otherwise divided by "reasonable" religious, philosophical, and moral doctrines.[253] It is a political conception of justice which is freestanding[254] of any "reasonable" comprehensive philosophical or religious doctrines to which individuals subscribe and serves as a basis for arriving at a "reasoned, informed and willing political agreement". This theory considers individuals as "reasonable" beings, who agree on equal scheme of fair distribution (as opposed to formal equality) by distancing themselves from the "reasonable" comprehensive doctrines. Therefore, the rights and interest protected by the liberal democracy are not locally contingent but

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[250] *Ibid* at 6.
[251] John Rawls, *Political Liberalism* (New York: Columbia University press, 1993) at 4.
[252] *Ibid* at 5-6.
[253] *Ibid* at 4. Rawls presupposes that reasonable individuals subscribe only to reasonable comprehensive doctrines and a loose definition of a reasonable doctrine involves three features: One, it is an exercise of theoretical reason through which recognized values are organized and characterized with each other and expressed in an intelligible manner, Two, Each doctrine will do this by differentiating itself from others by attributing primacy to certain values and this is done through practical reason; and Three, the reasonable comprehensive doctrine is not required to be fixed or unchangeable but it has evolved from what it views as good and sufficient reason. This doctrine is loose so as to "avoid excluding doctrines as unreasonable without strong grounds based on clear aspect of the reasonable itself." The "reasonable" in this description appears to be fixed as *a priori*.
[254] *Ibid* at 9-10.

arrived by rational deliberation based on discussion, debate and guided by public reason.[255] Public reason giving has a universal appeal and it is not contingent to group identities.[256]

II. Constitutional Framework of Bangladesh as Liberalism Incarnate[257]

In the first place, the Constitution does not admit the *Jumma* national identity. Therefore, the *Jummas* as a group or the CHT as a region does not have any special status under the constitution. Article 27 of the Constitution endorses equality before law and equal protection of law. No discrimination can be made on grounds of race, sex, religion and caste as enumerated in Article 28. The constitution ensures right to life and personal liberty of everyone (Article 32) and that "no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law" (Article 31). The constitution recognizes freedom of movement throughout Bangladesh and the right to reside and settle *anywhere* in the country (Article 36). The right to freely acquire, hold, dispose and transfer property is also guaranteed under Article 42(1). The rights enshrined in all clauses except equality and non-discrimination may be qualified in accordance with law. The non-discrimination clause also has an exception resembling the notion of substantive equality, namely that the state can

[255]Parekh, *supra* note 153 at 32.
[256]Courtney Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (New York: Cambridge University Press, 2008) at 39.
[257]I have borrowed the expression "liberalism incarnate" from Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous L J 68 at 74 [Christie, "Aboriginal Peoples"].

adopt special measures for women, children or advancement of "backward section of citizens" (Article 28 (4)).[258]

Under the constitution equality has been given a meaning of substantive or fair equality as opposed to formal equality. Law can attach inequalities only when equality of opportunity is allowed and the aim is to benefit disadvantaged section of the population, therefore the constitution endorses the principle of liberal egalitarianism. And keeping a balance between equality and difference the constitution has enshrined that any limitation imposed on freedom of individual, right to life, liberty and property has to be made in accordance with law, meaning *reasonable* law.[259] Being guided by the theoretical underpinning of liberalism or justice as fairness this *reason* requires distancing from any reasonable comprehensive doctrine. With the competing interest arising from two different comprehensive doctrines at stake it is worth pursuing the question what justice as fairness has to offer to the *Jummas*.

The constitution is mainly designed to determine the relationship of individuals with the state, although freedom of association is a recognized right, the constitution does not have room for group affiliation or collective rights. Therefore the only provision that *directly* lends support to the claims of the *Jummas* in the CHT is sub-article 28 (4) read with article 27. People who favor affirmative action for the *Jummas* bring the claim under the category of

[258]This provision was inspired by art 340 of the Indian Constitution where backward classes have been defined as people who are socially and economically disadvantaged. When a part of a state is socially and educationally backward, with reference to another part, the inhabitants of that part may be considered as a 'backward class' *en bloc*.[258] *State of Kerala v Roshana,* [1979] 1 SCC 572, paras 11, 27-28.
[259]See *West Pakistan v Begum Shorish Kashmiri,* [1969] 21 DLR AD 1.

"backward section" of the population and argue for putting limits on freedom of movement, property and liberty.[260] But this terminology of backwardness neither recognizes the state imposed injustices for decades nor enfolds the distinct cultural identity of the *Jummas*.

Those in opposition argue that there is no constitutional standard to measure backwardness, and special rights accorded to *Jummas* should not accede more than quotas in educational institutions or employment *until* they are fully integrated to the mainstream. They argue against the special measures in favor of *Jummas* in three respects.[261] First, in complete disregard of the fact that *Jummas* have been living in the CHT for centuries it is argued that the *Jummas* are not indigenous to the land. It is the Bangalees who are the original inhabitants of Bangladesh and to allocate a separate land base to the *Jummas* will be discriminatory towards the rest of the people (contra the 'here first' argument). Second, It is a matter of personal choice of a citizen of Bangladesh to settle anywhere in the country and to dispose and hold property; which cannot be interfered based on unfounded claims of the *Jummas* (contra the 'self-government' argument). Third, since Bangladesh is a unitary state and there is no special designation accorded to the CHT, allowing autonomy to the *Jummas* will go against the unitary framework of the state (contra the 'autonomy' argument). Therefore, any law endorsing such inconsistency with fundamental rights of the

[260]Here, the limitations imposed on right to liberty might be pertinent in two contexts: protection of land base in favor of the indigenous people and special franchise. These two might impose some restriction on individual liberty of both members and non-members of the *Jumma* community.

[261]I had the opportunity of attending several hearings of *Badiuzzaman*, *supra* note 208, where these sort of arguments were placed by both petitioners and some of the *amicus curiae*.

citizens is unconstitutional in view of Article 26 of the constitution. Thus, while claims on behalf of the *Jummas* have found expression in the constitutional language of special measures and affirmative action, challenges framed in terms of the fundamental freedoms of the majority have found greater favor with the judiciary:

> "Provisions and mechanisms of affirmative action based on the notion of positive discrimination must also be measured against the standards enshrined in Articles 26, 27 and 31 of the Constitution and a concept of autonomy that deters active discrimination of others."[262]

While both the divisions of the Supreme Court of Bangladesh have delivered judgment ascertaining "backwardness" of women, children (women and children are enumerated grounds) and disabled persons; in relation to the *Jummas*, the Court decided that in absence of detailed constitutional mechanism to ascertain "backwardness" the court should not intervene. Even though it did assert that the CHT was a relatively "backward" part and that the MoCHTA have developed a mechanism for assessing "backwardness", the court called on the GoB to work on the issue. Despite being part of the government the work of the MoCHTA was not treated as authoritative! Just because MoCHTA in letters of law is headed by a *Jumma* minister (still under PM's control) its work was not given any value. There can be no doubt that in absence of specific Constitutional guideline the Court itself is empowered to interpret whether any particular section of citizens qualify as "backward" section of citizens or not.

[262] *Ibid*, at para 30.

Egalitarian liberalism as enshrined or as interpreted in the context of Bangladesh fails to provide a plausible solution to the conflicting interest of the *Jummas* and the state. In case of the *Jummas* the state has not only failed to ensure substantive equality or harmed the *Jummas* by favoring majority institutions, but has adopted the policy of active discrimination and persecution. Even if it is possible to argue the case of the *Jummas* in a different way, given this systemic and identity discrimination the feasibility of such argument is questionable. It may be validly argued that since the Constitution considers custom as a source of law[263] *Jumma* land tenure is protected under right to property as enshrined in the Constitution. The interference with *Jumma* land tenure is therefore a violation of property right. If this interpretation of property right is accepted the collective rights of the *Jummas* will receive a judicial recognition. Based on such recognition the *Jummas* can bring claim for systemic discrimination for denial of rehabilitation, for forceful relocation from land, for deprival from compensation and for reducing them into a numeric minority in their own home so on and so forth. But given the constitutional dispensation so far it cannot be said with certainty that the *Jummas* will get justice or it will at least be accepted that they were discriminated.[264] In view of this uncertainty, it is better to rely on politically negotiated arrangements. But even for a moment if we give up considering the separate identity of the *Jummas* the replacement of hundreds of thousands of people from one district in Bangladesh and placing them in another district evicting the lawful owners will be considered as discriminatory

[263]Art 152 of the Constitution.
[264]For a similar concern, see Roy, "Population Transfer Program" *supra* note 7 at 185.

or at least violative of law. This shows the fallacy of liberal equality (of individuals and not of groups) in relation to the *Jummas* of Bangladesh. Moreover, the IPs living in the plains of Bangladesh enjoy certain protection over their land. Sale or transfer of land to anyone outside of the community is prohibited without permission of the revenue officer.[265] But preservation of a separate land base for the *Jummas* is being questioned. The underlying reason behind this may be in case of the plains land IPs the authority was retained in hand of a non-indigenous person, while in case of the *Jummas* it was given to the RC. So clearly in the "liberal" framework of Bangladesh the *Jumma* identity does not have its place of recognition. Nevertheless, the state is negotiating and enacting special laws for the *Jummas*. The fairness of the negotiation and the concomitant laws are questionable, but there is a more fundamental question: why the state allows a departure from indifference to the *Jumma* identity and on what grounds?

The simplest answer to this question is like many other states Bangladesh allows certain 'special measures' on grounds of pragmatism to contain the movement of minority rights. The nature and extent of the special measures vary from country to country, but they reveal a gap between the liberal theory and state practice.[266] Therefore, some liberals have taken a "gap-filling" approach by reexamining the tenets of liberalism and making liberalism "more

[265]State Acquisition and Tenancy Act, 1950 (Act No XXVIII of 1950) s 97.
[266]Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (New York: Oxford University Press, 2001) at 4 [Kymlicka, "Politics in the Vernacular"].

accommodating" to difference and divergence.[267] The rationale for these revisions is that having a theoretical basis will allow minority rights to be viewed as a matter of fundamental justice rather than mere pragmatism or discretion.[268] These liberal theories of minority rights have been criticized both from within and outside liberalism. Some liberalist argue that liberalism is not concerned with minority rights and while the urge for providing a solution is pious, liberalism is not designed for that. Some have argued that there is no or little reason that minority nations based on different world view will accept the "preferred moral viewpoint" of the liberals.[269] The following section will highlight some of those liberal ventures and their critiques from within liberalism.

B. The "Gap Filling" Approach of the Liberals

I. Multicultural Liberalism

Kymlicka, the most celebrated author on multiculturalism has proposed a 'liberal theory of minority rights'.[270] The central project of his theory is to explain "how minority rights coexist with human rights, and how minority rights are limited by principles of individual liberty, democracy, and social justice".[271] The aim is to ground minority rights in liberal theory by focusing on the value of cultural membership and the "fairness" of the special demands forwarded by

[267]Craig L. Carr, *Liberalism and Pluralism: The Politics of E pluribus unum* (New York: Palgrave Macmillan, 2010) at 4.
[268]Kymlicka, "Politics in the Vernacular", *supra* note 266 at 6.
[269]Carr, *supra* note 267 at 2. See also *ibid* at 152-53.
[270]Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press Inc., 1995) [Kymlicka, "Multicultural Citizenship"].
[271]*Ibid* at 6.

national minorities.[272] In this section I highlight four aspects of multicultural liberalism, one, it is based on individual autonomy as opposed to group autonomy, second, for this primary premise of non-acceptance of group autonomy or value, liberalism does not approve collective rights, third, liberals adopt a paternalistic and selective approach of distinguishing 'good' and 'bad' minority rights and four, liberalism approves only a qualified control over resources based on the principle of self-government rather than self-determination.

a. The Liberal Theory of Minority Rights is Conducive to Individual Autonomy

Kymlicka regards freedom and equality of opportunity as foundational blocks of liberalism. Autonomy in liberalism lies in the right of individuals to make meaningful choices about way of life they value and the freedom to question and revise the ways of life. This sort of autonomy is derived from the equal opportunity of access to one's own societal culture.[273] A societal culture is one which "provides its members meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres".[274] Protection of minority societal culture better preserves autonomy, as individuals can develop critique about their own view of a good life or what they value, make free and

[272]Kymlicka, "Politics in the Vernacular", *supra* note 266 at 215-16.
[273]Will Kymlicka, "Do We Need a Liberal Theory of Minority Rights? Reply to Caren, Young, Parekh and Frost" (1997) 4:1 Constellations 72 at 75 ["Reply"].
[274] Kymlicka, "Multicultural Citizenship", *supra* note 273 at 76.

informed choice and revise their own ends.[275] In this framework culture plays an instrumental value in providing the individual with a context of choice, no intrinsic value of the culture is recognized. Kymlicka argues that there is nothing in the theory that will hold back an individual from adopting such attitude towards his/her own culture, unless there is some restriction imposed on any individual.[276] So, the liberal theory of minority rights in the first place is based on autonomy of individuals, as opposed to autonomy of minority groups.

b. Liberalism Recognizes Moral Claims of Individuals and not Groups

Liberalism places individuals as units of moral worth and as sources of valid claims.[277] In contrast, groups are not accepted as sources of valid claims and as such there is no space for collective rights in liberalism.[278] The importance of group in liberalism lies in the fact that it nourishes the life of the individuals through societal culture and by the same coin it cannot validly claim to restrict or conflict individual rights.[279] Therefore, liberalists who support minority rights have to distinguish between 'good' minority rights that supplement individual rights and 'bad' minority rights that seek to restrict individual rights.[280] In liberalism individuals are treated equally for their intrinsic moral worth, but there is no obligation to treat the groups to which individuals belong on an equal footing.[281] "Individual and collective rights cannot compete for the same moral

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[275] *Ibid* at 82-84.
[276] Kymlicka, "Politics in the Vernacular", *supra* note 266 at 62.
[277] Will Kymlicka, *Liberalism, Community and Culture* (New York: Oxford University Press, 1991) at 140 [Kymlicka, "Liberalism"].
[278] *Ibid.*
[279] *Ibid*.
[280] Kymlicka, "Politics in the Vernacular", *supra* note 266 at 22.
[281] Kymlicka, "Liberalism", *supra* note 277 at 140.

space, in liberal theory, since the value of the collective derives from its contribution to the value of individual lives."[282] In the liberal venture of minority rights the group does not have any autonomy, moral claim and can only operate in relation to individual autonomy and individual rights. If we rethink this proposition in the context of the *Jummas* in the CHT given the wide spectrum of resource and land rights, the rights exercised by the community as a whole cannot be explained by individual rights because they are exercised collectively by the community.

c. "Group-differentiated right" as a Substitute to "Collective Rights"

Since liberalism does not support collective rights, liberal theory of minority rights have to adopt an alternate theoretical basis to distinguish between the 'good' and 'bad' minority rights in relation to the individual interest at stake. In Kymlicka's view the term collective rights creates a false dichotomy between collective and individual rights and therefore he uses the term "group-differentiated right" in place of collective rights.[283] He divides group-differentiated rights into, "(1) self-governing rights; (2) poly-ethnic rights; and (3) special representation rights", while this full range of rights are available to the national minorities (as such IPs), the ethnic communities enjoy poly-ethnic rights of language, holiday etc.[284] Kymlicka divides group differentiated rights to "external protection" and "internal restriction". Internal restrictions are limitations imposed on individuals within a community towards the end of maintaining its

[282] *Ibid*.
[283] Kymlicka, "Multicultural Citizenship", *supra* note 270 at 45
[284] *Ibid* at 26-33.

own solidarity and unity, while external protections are aimed at securing the resources and institutions of the community from external decision making of the majority.[285] Kymlicka argues that external protections are not necessarily in conflict with individual liberty (good minority rights), but internal restrictions are (bad minority rights). External protections can be in conflict with liberalism in two ways. First, when its focus is to allow the dominance of the minority over other groups rather than protecting it from majority encroachment[286] and second, when the external protection connotes some sort of internal restriction.[287] An example of the latter would be allowing external protection to the minority rights in terms of separate land base which would imply restricting individual members of the minority group.[288] Liberalism allows this as a necessary concomitant of external protection, since in this case internal restriction is not an end in itself. Therefore, **"**[w]e can say that minority rights are consistent with liberal principles if *(a)* they protect the freedom of individuals within the group; and *(b)* they promote relations of equality (non-dominance) between groups." [289]

Though most liberal states rely on civil and political rights of individual for accommodating cultural differences, in case of group-differentiated rights most states adopt "special legal or constitutional measures, above and beyond the common rights of citizenship".[290] So it is the state which decides to what extent a national minority will enjoy "protection" from the majority group. The national

[285]Kymlicka, "Politics in the Vernacular", *supra* note 266 at 22.
[286]*Ibid*.
[287]Kymlicka, "Multicultural Citizenship", *supra* note 270 at 43.
[288]*Ibid*.
[289]Kymlicka, "Politics in the Vernacular", *supra* note 266 at 22 [footnote omitted and emphasis added].
[290]Kymlicka, "Multicultural Citizenship", *supra* note 270 at 26.

minority does not enjoy such rights based on its group identity or autonomy but for the reason that it is a composite of individual members.

d. Resource Claims of National Minorities and Liberal Egalitarianism

Kymlicka has assessed the resource claims of indigenous people in the context of unjust settlement and within the theoretical framework of liberal egalitarianism. The conclusion he has drawn is coherent with the liberal standard that minority rights can be recognized only if they are in harmony with equal rights of citizens.

Justification for Restriction on Immigration

National minorities often seek to insulate their land base by claiming restrictions on immigration of people from the heartland by the way of adoption of lengthy residency requirements as prerequisite of local franchise and that public offices and educational institutions are conducted in the local language.[291] In Kymlicka's view these measures are sought to reduce influx of migrants in the national minority homeland and to ensure integration of the migrants in the local culture.[292] The response of the majority in face of these claims almost inevitably is that they contradict individuals' right to free movement. Kymlicka answers this opposition by drawing a parallel instance from restriction placed by liberal states on international immigration. He concludes that if restriction on cross border individual mobility is justified on grounds of 'collective security', it

[291]Kymlicka, "Politics in the Vernacular", *supra* note 266 at 74.
[292]*Ibid*.

is hypocritical not to restrict individual mobility for the sake of 'collective security' of the minority.[293]

Justification for Control and Prior Claim over Resources

Kymlicka notes that in most cases including Bangladesh the government settlement on indigenous land has been justified on the ground of state sovereignty over national territory and equal right of all citizens and the dire need of the poorest section of the citizens.[294] He says that this contention creates a dilemma for those who subscribe to both indigenous rights and resource egalitarianism. At the same breath he notes that there are little chances of promoting resource egalitarianism by settling indigenous land.[295] Factual situation may vary from case to case, but even within a liberal framework right to property is a basic right which cannot be encroached by unjustly depriving people from their own land through state settlement.

Moving to the larger scenario of control over land and resources Kymlicka focuses on the limit set by resource egalitarianism "on the size of the resources that any group can claim" or "the benefits they can demand or withhold from others."[296] By assessing the grounds forwarded by the IP Kymlicka argues that claim for control over resources should be based on the policy of "self-government" rather than the principle of "here first".[297] For scarcity of resources an "equal" balance in terms of appropriation has to be

[293] *Ibid* at 75.
[294] *Ibid* at 134.
[295] *Ibid* at 135.
[296] *Ibid*.
[297] *Ibid* at 148.

reached with the heartland people and as such here first argument does not have a stronghold against resource egalitarianism. Again, this argument may have different implication on a case to case basis, because in some countries years of state appropriation has left very limited resources. Kymlicka argues that these demands are served better by a right to self-government,[298] but the fact that IPs can be "[s]een as peoples with inherent rights of *self-determination* does not absolve them from redistribution obligations"[299] So Kymlicka ends with two alternate suggestions, one, resource egalitarianism should be adapted to provide extra resources to the IPs for rectifying the disadvantages suffered by them or the IPs should control the resources based on their inherent right to "*self-government*" in accordance with resource egalitarianism.[300] Kymlicka's framework falls short of recognizing full range of self-determination as claimed by indigenous groups and proposes "self-government" based on egalitarian justice.

So going back to the aim of the theory in grounding minority rights to liberalism, the value of cultural membership was found in enhancement and preservation of individual autonomy and the demands of the IPs are fair as long as the obligation of redistribution is not denied.

[298] *Ibid* at 149.
[299] *Ibid* at 150.
[300] *Ibid*.

II. Critical Liberalism

Classical liberalism places group rights into private sphere, while egalitarian and multicultural liberalism ask for protection of group through special rights based on cultural difference, although culture serves only an instrumental value. Critical liberalism argues that the idea of basing group rights into cultural difference places all cultures in the same footing and completely ignores the discrimination pursued by the state.[301] It places the state (perpetrator) and minority (victim) at the same footing due to reliance on cultural attachment.

In critical liberalism the responsibility of the state lies in the fact that it invents and applies status markers of race, sex, age, impoverishment etc. and selectively includes or excludes citizens from public life based on such markers. Markers used by the state to determine access to politics create political salience and drive to difference set of rights and responsibilities for different groups.[302] This theory places contestation over consensus as the source of liberal democracy and uses "membership" rights as the alternative to collective and individual rights.[303] Collective rights cannot be reconciled with critical liberalism as cultural difference is not admitted. In critical liberalism individuals enjoy a number of "add-on" over the universal rights available to all citizens for their membership in a deprived group.[304]

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[301] Jung, *supra* note 256 at 15, 33.
[302] *Ibid* at 33, 37, 234, 237, 243.
[303] *Ibid* at 21, 234.
[304] *Ibid* at 276.

One benefit of critical liberalism is that unlike other theories of liberalism it highlights how a particular group has been systemically discriminated by selective exclusion and inclusion. If we consider this theory in case of the *Jummas,* this approach will make them entitled to special rights because they were deprived by the state. But the theory claims that group identity or indigenous identity is "forged" by the state. If that is agreed the *Jummas* will be robbed off their agency, because it is the state which discriminates, it is the state that creates the identity and it is the state that allows special protection. Secondly, this theory emphasizes that indigenous identity is not a product of culture but of state differentiation, but it is on basis of the difference in culture that the group is targeted as a whole and individual members are known by their cultural identity and systemically deprived.

III. Criticism from within Liberalism

a. Liberalism is not concerned with Difference

The theory of multiculturalism places importance on individual moral worth and values, recognition of identity of the minority and special measures for the "protection" of minority rights. Kukathas' criticizes this endeavor to recognize minority rights or to afford any special rights to collectivities. In his view liberal polity is not based on minority or majority cultures, but on peaceful existence of "plurality" of cultures.[305] Since multiculturalism is a species of pluralism,[306]

[305]Chandran Kukatha, "Liberalism and Multiculturalism: The Politics of Indifference" Political Theory 26:5 1998 686 at 686 (JSTOR).
[306]*Ibid* at 690.

liberal theory itself is a theory of multiculturalism and as such multiculturalism is not a problem for liberal philosophy.[307] It is not a problem because the goal of liberal theory lies in ensuring peaceful existence of individuals and groups. The goal of liberal polity is not to advance any universal culture for the polity, or promoting individual dignity or to protect minorities from marginalization.[308]

First, liberalism allows individuals to pursue their end on their own or in collaboration with others without pressing any common goal for universality or harmonization. Liberalism does not promote either group membership or individual interest, individuals are free to form, join or continue to be in the group in which they were born.[309] In Kukatha's view the conflict between individual and group interest is not relevant to the liberal philosophy. Second, he underscores that the question of human dignity though important is not central to the liberal theory and as such whether human dignity requires recognizing individual identity or collective identity is not important for liberalism.[310] This is Kukatha's answer to the claim for recognition of group as a source of moral worth. Third, as to the recognition of minorities he argues that the role of liberalism is to resist recognition as it neither supports nor obstructs preservation of identity.[311] He believes that whether a minority withers away or assimilates or survives is not a liberal concern.[312] The attempt to assimilate the minority culture by the majority is common, but the minority at the same time reshapes the

[307] *Ibid* at 687.
[308] *Ibid* at 692.
[309] *Ibid* at 691.
[310] *Ibid*.
[311] *Ibid* at 687.
[312] *Ibid* at 692,694.

dominant culture. The minority can resist such assimilation by maintaining its own way of life, but liberalism does not impose any obligation on the majority to protect the minority.[313] This critique almost takes us back to classical liberalism by insisting a hands-off approach in situations of plurality.

b. Practical Liberalism/ Critical Legal Theory

The theory of practical liberalism shifts the liberal focus from individual to the group; it focuses on a system of peace and social order between different groups. The different normativites or ontologies arising from the different groups act as source of social conflict to be resolved by a civil association.[314] The civil association is acceded to by the groups on pragmatic grounds and the resultant arrangement is considered by the groups as a *modus vivendi*.[315] Practical liberalism does not try to identify any *a priori* concept of moral value guiding the polity.[316] While individuals may pursue their own value, that is beyond the inquiry of political liberalism. Rather in political liberalism people live within groups from which they develop their normativities and ontologies. But such groups do not tie individuals to their own group of origin. Individuals on their own or with others can break out from their own group and form new group (s).[317] "Group life, then, is best understood as dynamic and not static."[318] Groups are constantly changing, shaping and reshaping and individual members can increase or decrease and the strength of a given group as against others changes with time

[313] *Ibid* at 693-94.
[314] Carr, *supra* note 267 at 7.
[315] *Ibid*.
[316] *Ibid* at 5-6.
[317] *Ibid* at 7.
[318] *Ibid*.

and circumstances.[319] Groups have to value freedom which allows them to function autonomously or as having inherent right to self-government.[320]

The advocates of indigenous rights find the focus of both multiculturalism and critical legal theory to be misplaced. The question is not one as multiculturalism perceives it to be, translating indigenous rights into group rights and then fitting them into the general matrix of law. The rights are not reflective of group autonomy as understood by critical legal theorists.[321] The question is about the retention of the capacity of the IP to define their own identity as a people and projection of their theories and knowledge through self-definition.[322] Indigenous law is based on principles, theories and doctrines completely different from the liberal theory and any solution to the problem of indigenous rights lies in the assertion of this separate and distinct world view.

C. The Indigenous view of the Problem: a Separate World-view

The indigenous society is based on principles and values completely distinguishable from liberalism. Law and justice system based on the theory of liberalism operates so as to oppress indigenous people rather than redressing the historical injustice. This section discusses how law imposes liberal principles on indigenous people, how the liberal venture undermines group autonomy of the IP; and how liberalism denies right to self-determination of the IP.

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[319] *Ibid*.
[320] *Ibid* at 8.
[321] Christie, "Aboriginal People", *supra* note 257 at 72.
[322] *Ibid*.

I. The Law Advances the Liberal Values

For the theoretical underpinning of law in liberal societies it cannot but fail to protect indigenous rights.[323] The domestic legal systems promote the broad principles and values upon which they are built.[324] In liberal democracies this vision is built on the principle of the right and good, which in turn are derived from the theories of the self, the community and the state.[325] The fact that liberalism tries to impose these principles on the IPs is a form of "fundamental intellectual colonialism".[326] This intellectual colonialism assumes that the dominant society is a given and the indigenous rights have to derive their legitimacy from this established framework.[327] This essentially put indigenous rights into conflict with liberal principles because they are founded on completely different theories and in this conflict law protects the interest espoused by liberalism.

Individuals under liberalism pursue for the good life, the way of life they value without any sort of interference.[328] Liberalism does not emphasize on "the good" but on the freedom of individual to pursue such good.[329] In the process of continuous searching of the good way of life people revise their currently held beliefs[330]. The law functions to protect the freedom to pursue such end by creating

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[323] *Ibid* at 69.
[324] *Ibid* at 69-70.
[325] *Ibid* at 70.
[326] *Ibid*.
[327] Gordon Christie, "Culture, Self-determination and Colonialism: Issues around the Revitalization of Indigenous Legal Traditions" (2007) 6:1 Indigenous L J 13 at 16 ["Revitalization"].
[328] Christie, "Aboriginal People" *supra* note 257 at 74.
[329] *Ibid* at 76.
[330] *Ibid* at 80.

a context of choice and any interference with such freedom is brought before law.[331] If there is a valuable and meaningful contest over resources required to advance this pursuit the laws may be called upon to weigh the "individual" interest. Minority population may exercise its rights socially and culturally but that will conflict the interest of individuals outside and inside the group. This will curtail the autonomy of individual and equality.[332] "Liberal theory cannot countenance, then differential valuing between individuals, such that one (or a few) may be sacrificed for the good of the many, or such that the interests of the many may be sacrificed for the few."[333] In this way law as an institution is used to promote certain value over others.

II. Liberalism undermines the Autonomy of the Indigenous People

The belief system of the IPs is based on primacy of the community over individual rights, but the belief system is completely different from that of the liberals in more fundamental ways. The liberal venture of structuring society in the context of choice for searching a good life is unknown to the IPs. Based on centuries of tradition and reflection the IPs have a conception of good life. If that conception is replaced with a pursuit of continuous re-evaluation of the good way of life the IPs will run the risk of losing their self-realization or the power to define them.[334]

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[331] *Ibid*.
[332] *Ibid* at 81.
[333] *Ibid*.
[334] *Ibid* at 91.

In view of liberalism indigenous culture only has an instrumental value so far it provides the individual member of the group with a choice of context. Therefore groups do not have any value, whether intrinsic or instrumental.[335] It is only the liberal culture that has a static value for the reason of the moral agency it accords to the individuals.[336] From the point of view of the liberals non-liberal societies cannot foster good ways of life as they do not allow the individuals within the societies to choose a good way of life.[337] But liberalism fails to recognize that there may be ways outside their conception to allow moral agency and autonomy to individual and also a way of choosing a good life.

In aboriginal societies people share a different belief system from that of the liberals. In those societies people believe in the knowledge of a way of life as good life and consider living one's life in that way as fulfilling. Liberalism is simply not needed for those societies.[338] In indigenous societies the identity of the self is related to kinship and the rights and responsibilities of individuals are limited within this kinship. The individual derives autonomy from the rights it is endowed with for the membership in kinship or community.[339] The knowledge about the good life is passed from one generation to the other in a non-coercive manner and individuals are free to exercise their rationality. In the context of the existence of such societal good it is not feasible for the indigenous people to

[335]*Ibid* at 92.
[336]*Ibid* at 93.
[337]*Ibid* at 94.
[338]*Ibid* at 95.
[339]Clinton, *supra* note 242 at 274.

subject themselves to liberalism and in endless pursuit of a way of good life, which they already posses.[340]

When liberalism try to reflect the power collectively held by the group in its own terms it says groups should enjoy autonomy as individuals do.[341] Therefore the autonomy of the group must be respected as the autonomy of individuals.[342] Which in effect means the groups should collectively pursue a good way of living as individual do under liberalism. The most dearly held rights of the IPs are not how to lead the collective life but retain the power as to determine who they are.[343] If groups start pursuing plans for leading good life and constantly revising their currently held beliefs, the identity of the group will be foregone.[344]

III. Shaping and Reshaping of Indigenous Identity

The critical legal theorists criticize the liberalist idea of self as a prior entity based on beliefs and values. They replace the idea of self as a dynamic, fluid and determined self. [345]There is no fixed or *a priori* aspect of self; it is just a contingent being. Since there are no essentials (moral or cultural) of the self it allows sufficient interplay with identity. It may attract indigenous people since in an intercultural milieu they can use this notion of self to maintain a modern indigenous self-identity. Critical theories on the same plain absolve cultures from

[340]Christie, "Aboriginal People" *supra* note 275 at 95.
[341]*Ibid* at 96.
[342]*Ibid*.
[343]*Ibid*.
[344]*Ibid* at 99.
[345]*Ibid* at 111-12.

any fixed and determined criteria. The difference between cultures and selves are almost non-existent and cultures are wide open to change. If such notions of selves and cultures are extinguished there will be no difference between indigenous and non-indigenous people. Critical theorists in advancing their universal claims under the cultural gap separating indigenous and non-indigenous people are threatening the existence of the 'aboriginality' of the aboriginal people. While critical theory fosters individual autonomy in line with liberalism as the idea of the self gets more skeptical, the same does not apply to indigenous people. In indigenous societies the identity of the individual is always defined in relation to others in the kinship or society. The rights and responsibility one enjoys are tied in relation to the kinship and the autonomy of the individual lies in relationship of mutual respect within the group. [346]

These constant threats from dominant values and theories place the identity of the indigenous people and control over self-definition of identity in forefront. The question of identity is dependent on culture and the right to self-determination.[347] In the context of defining identity through collective endeavor indigenous culture acts as a

> [s]et of collectively determined processes that produce, reproduce and transmit senses of identity. Collective notions of identity are formed and transmitted through social and cultural mechanisms, and on the basis of immersion in such communities, formed around and through such senses of identity, individuals come to have certain parameters established around them within which they come to form senses of who they are, and what they might become. Essentially, then, it all comes down to one matter, centered on questions of identity and identity-formation: . . . an

[346] *Ibid* at 118.
[347] Christie, "Revitalization" *supra* note 372 at 20.

> ongoing process of regaining total control over the general mechanisms that produce, reproduce and transmit cultural identity.[348]

In this way the right to self-determination, i.e., the control over the process of self-definition is preserved.

D. Setting the Stage for a Dialogue

All liberal democracies face question of accommodating difference and there are resulting conflicts. It is particularly difficult for communities in countries like Bangladesh where the constitution is blindfolded with homogeneity of the national identity. The liberal theory of minority rights provides a broader view compared to orthodox liberalism. But it has some intrinsic risks and it does not admit any language other than its own. Therefore, the only solution is a dialogue between the two systems of justice to find out a workable framework. And the concern of "accommodating difference" will then be shifted by the majority and minority mediating the differences.

In this section I will first highlight some of the assertions from Kymlicka's liberal theory of minority rights which will explain to an extent why Christie terms the liberal venture as imposing 'liberal imperialism'. Then I will examine Rawls theory of "overlapping consensus" and conclude that it does not admit all philosophical or ontological doctrine as "reasonable". Therefore it is not the ideal option for a dialogue. Finally I consider Taylor's "unforced consensus" as explained by Newman as a plausible theory of dialogue. I conclude the chapter by

[348] *Ibid* at 25.

highlighting the impact of such cross-cultural dialogue on the *Jumma* land and resource rights.

I. No Room for dialogue in Kymlicka's Theory of Minority Rights

Kymlicka argues that the endeavor to explain minority rights in terms of liberalism does not amount to imposition of liberal principles on minority groups. Rather an enduring solution to the problem of pluralism requires a dialogue between liberalism and claims of minority rights.[349] For any such dialogue to be meaningful the liberals must be able to clearly identify the principles of liberal theory in relation to minority rights. A clear idea about these principles will facilitate the identification of the differences or disagreements with the non-liberal groups.[350]

But in effect Kymlicka does not seem to appreciate the difference. In his view the lack of liberalism in recognizing cultural membership can be solved in two ways, first, by accepting the possibility of legitimacy of minority rights under liberalism and second, by holding that liberalism is incomplete and thereby looking into some other theory with provides for the legitimacy of cultural membership.[351] He presses that the first view is favorable for both proponents of liberalism and minority rights. Because the arguments made by non-liberal theories are controversial from both moral and legal point of view and they are politically weak for not answering the liberal fear about recognizing

[349]Kymlicka, "Politics in the Vernacular", *supra* note 266 at 62.
[350]*Ibid* 62-63.
[351]Kymlicka, "Liberalism", *supra* note 277 at 152-53.

the minority rights.[352] Here Kymlicka notes the arguments in favor of minority rights, the prior occupation of the IPs, their inherent right to self-determination, the primacy of the community over individual (collective rights) and the autonomy of the group. But instead of looking for a nuanced difference for facilitation of dialogue he insists that it is the liberal majority who has to be convinced about minority rights and that also in liberal terms.

> For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand.[353]

Thus the dialogue under Kymlicka's theory of minority rights requires the minority to translate its claims in liberal terms and it is the task of liberals to identify whether the 'difference' can be accommodated within liberal tradition and understanding. Kymlicka makes this clearer by saying that minority rights or at least 'robust' form of minority rights can be secured only when they can be viewed as component of liberal political practice rather than competing interests. Thus in this framework of dialogue the reciprocity in interaction between the plural normativities are absent and minority rights are valid only if they can be reconciled with liberalism.

II. Rawls' Overlapping Consensus as Dialogue and the Voice of the Subaltern

Political liberalism is the coexistence of plurality of conflicting reasonable comprehensive doctrines. This coexistence of incommensurable doctrines is the

[352] *Ibid* at 153.
[353] *Ibid* at 154.

result of the exercise of practical reason through free institutions.[354] The doctrine of "overlapping consensus entails at the first place a consensus of "reasonable" comprehensive doctrines. Secondly, the public conception of justice should be freestanding, i.e., independent of any comprehensive doctrine.[355] The overlapping consensus is therefore reached on basis of public reasoning of equal citizens.[356] This public reasoning requires that citizens conduct discussion within the framework of freestanding political conception of justice that other equal citizens can be expected to accept and defend.[357] This requires that citizens are capable of explaining a criterion about principles and guidelines about why they consider others will accept and defend it. The idea of existence of such criteria brings discipline to the public discussion. Difference of opinion among the citizens about most appropriate political conception is normal and desirable, because this allows fair contestation between conflicting values and allows adoption of the most appropriate one over time.[358]

Public reasoning in political liberalism requires citizens to abstain from expressing such comprehensive values that their fellow citizens will find hard to endorse.[359] But dominant groups often impose such doctrines that the minority or the subaltern is marginalized or excluded from democratic dialogue. The subaltern can only resort to dialogue when the dominant group expands the

[354]Rawls, *supra* note 251 at 135
[355]*Ibid* at 144.
[356]*Ibid* at 214.
[357]*Ibid* at 226-27.
[358]*Ibid* at 227.
[359]David Ingram, *Group Rights: Reconciling Equality and Difference* (US: University Press of Kansas, 2000) at 33.

language and discourse that allows the subaltern to speak.[360] In absence of such assurance of equal access to dialogue and *a priori* idea of 'reasonable' comprehensive doctrine pluralism requires a more plausible theoretical basis for dialogue.

III. Dialogue as Cross-cultural Exchange

The dialogue between two different world views finds the expression of "cross-cultural exchange" in terms of Newman. He bases his theory on Taylor's account of 'unforced consensus'. This consensus in unforced because different minds 'world apart' based on different premises reach a common unity for 'immediate practical conclusions'.[361] In this meeting there is "[a]greement on norms, yes, but a profound sense of difference, of unfamiliarity, in the ideals, the notions of human excellence, of rhetorical tropes and reference points by which these norms become objects of deep commitment for us."[362] Unlike Rawls' "overlapping consensus" unforced consensus is not limited to a basis for coexistence of pluralities,[363] nor does it require any freestanding conception of justice. In Taylor's account difference derives significance in that it offers possibility of mutual borrowing and sharing and dialogue between traditions.[364]

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[360] *Ibid* at 34.
[361] *Ibid* at 735 citing Charles Taylor, "Conditions of an Unforced Consensus on Human Rights" in J. Bauer & D. Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 124 at 143.
[362] Taylor Ibid.
[363] *Ibid* at 736.
[364] *Ibid* at 735, 737.

Newman raises a question whether the consensus reached is only at the level of practical conclusion or also at a propositional level.[365] Since Taylor emphasizes dialogue and sharing between traditions there is a hint of agreement at propositional level apart from practical conclusion.[366] For finding a firm answer to this question Newman distinguished between difference in cultural values and different in concepts.[367] When the difference between two traditions is value based and incommensurable agreement at conclusory level may be achieved, but due to lack of commensurable values there can be no agreement on propositional level. In case of difference of concept agreement on propositional level is possible. In sum, unforced consensus will lead to consensus on both underlying proposition and conclusion depending on the actual context of difference.[368] The theory of unforced consensus respects cultural values and seeks for reinterpretation and re-appropriation of culture based on borrowing and sharing from other cultures.[369] This theory also relies in liberal discourse. As Newman has argued in absence of such reliance failure to attain cross-cultural agreement might arise for deficiency in the negotiation process or decision of a party in not altering its value commitment.[370] A conceptually based disagreement will call for translation processes that will interpret the concept of one culture to another where the first one is making a claim.[371] So this account is different from liberal theory of minority rights since in place of unilateral translation it requires

[365] *Ibid* at 738.
[366] *Ibid*.
[367] *Ibid* at 739.
[368] *Ibid* at 741.
[369] *Ibid* at 742.
[370] *Ibid* 741.
[371] *Ibid* at 743.

translation from the group that makes a claim. In case of value based difference each culture will try to reconcile such values with its competing value or look for a deeper value that would provide an easy solution to the incommensurability.[372] A meaningful cross-cultural theorizing about aboriginal rights requires serious engagement with indigenous world view.[373] But for such cross-cultural exchange there are some requisite precautions, the original tradition should not dilute and at the same time it should not be an elite representation of the culture.[374] The principle of liberalism in work in this theory requires reinterpretation of values but it does not limit such reinterpretation to IPs, it applies to the dominant group as well.

IV. Implications of Cross-Cultural Dialogue in the Context of the CHT

This theory of unforced consensus can bring a change in the negotiation of the *Jumma* identity and the self-determination in the CHT. This will at least imply a qualitative change in the *status quo*. The agreement to initiate a cross-cultural exchange will at least allow some fair term of negotiation compared to the disadvantaged situation faced by the *Jummas* at present. It will also allow the state to look into indigenous traditions and principles which is supposed to bring a change in policy, administrative and judicial level. Since cross-cultural exchange requires that concept based difference has to be translated by the party bringing the claim (in this case the *Jummas*) to its counterpart, the attendant consequence would be that the counter-claims brought by the state has to be translated to the

[372] *Ibid*.
[373] *Ibid* at 748.
[374] *Ibid* at 750.

Jummas. The land claims and resource rights of the *Jummas* differ from the official law in terms of both concept and value; therefore it is possible to reach agreements at both conclusory and procedural level. The negotiation process of the *CHTPA* and subsequent laws have been questioned from within and outside the *Jummas* for not involving all stakeholders. This cross cultural exchange can be a viable way of answering the question of who needs to be consulted.

This cross-cultural exchange is rooted in deep legal pluralism, as it admits the intrinsic value of culture. In this context of dialogue there will be constant contestation between two different identities (the state and the *Jummas*) and both will continue to shape and reshape by borrowing and sharing from the other. The locus of the law will be changed from the state and encompass the authority of the *Jummas*. This cross-cultural exchange may have the effect of changing the law from forcible imposition to a mutual understanding between the conflicting identity postulates. The land dispute resolution in the CHT stagnated due to non-recognition of the legal pluralism and unforced consensus has the potentials of redressing that stagnation. Sharing the knowledge and tradition of the *Jummas* will bar the judges from outright rejection of indigenous rights or retaining the blindfold of homogeneity. The policy decision will be more deliberative engaging with views and values of two political identities. As mentioned in the introduction this thesis did not aim at any straightjacket solution and as such the particular procedure and method to be adopted for the cross-cultural exchange is left open for political deliberation. Agreement between two completely separate traditions cannot be rushed on ground of pragmatism or for the sake of civic unity, as some

things evolve better with time. As a commentator on the CHT has observed the very first step in "overcoming otherness" is to:

> [a]cknowledge the differences in the structures of power which exist between the two groups and not gloss them over in the case of "premature solidarity". Solidarity in order to be strong and long lasting should be based on memories and counter-narratives of the people, and not on an undifferentiated and ahistorical universal notion of peace and democracy.[375]

[375]Meghna Guhathakurta, "Military Hegemony and the Chittagong Hill Tracts" in Subir Bhaumik et al (eds), *supra* note 5, 109 at 125.

Chapter Five: Conclusion

This thesis started with two research questions: One, whether the failure of the *LDRCA* in resolving land disputes in the CHT is a result of denial of legal pluralism? Second, does the legal pluralism posed by conflicting interest of the *Jummas* and the state have any space within the liberal democratic framework of Bangladesh? The thesis has answered the first question in affirmative and the second question in negative.

I have dealt with the first question in Chapter Two. By examining the transition and modification of the *Jumma* land title from the time of colonization till date I have concluded that the narrative of legal pluralism in the CHT covers only the formalization and circumscription of the *Jumma* land and traditional offices in the CHT. But the strength of legal pluralism in the CHT lies in the historical context of survival of the *Jumma* identity and institutions despite years of active discrimination by the state. Setting the claims of this legal pluralism vis-à-vis the legal framework in general and the *LDRCA* in particular the chapter concluded that the stagnation of land dispute resolution in the CHT precisely lies in the failure to recognize the nuances of legal pluralism. In describing and analyzing the reshaping and modification of the *Jumma* land title under different regimes, the Chapter has collaterally identified the differences of land and resource rights of the plain land people and the *Jummas*.

In Chapter Three I have tried to place the *Jumma* land and resource alienation in the broader framework of marginalization of the *Jummas* due to non-

recognition of their difference as a separate and distinct community. By examining the resource and development policies and judicial principles in relation to the *Jummas*, the peace process in the CHT, laws governing local institutions and the state policy in acceding or rejecting to international obligations I have concluded that the state administration and law is blind to the heterogeneity of the *Jummas* in the CHT. The state actively pursues a discriminatory policy against the *Jummas* in order to reduce them into a numeric minority in their own land and gradually assimilate them to the larger community and in so doing it denies any room for pluralism.

In Chapter Four in order to answer the second question I have tried to fit in the pluralistic resource claims of the *Jummas* within the liberal democratic constitutional framework of Bangladesh. This endeavor was based on the persistent requirement from the dominant culture to define or justify the *Jumma* in its own terms. In the first section of the chapter I discussed the theoretical framework of the constitution of Bangladesh as shaped by the egalitarian liberalism. The constitutional court of Bangladesh has denied recognizing the land and resource claims of the *Jummas* arguing that resource egalitarianism requires absence of limitation on competing rights. Then I considered liberal theories which try to reconcile this difference between liberal principle and minority rights and concluded that due to primacy of individual in liberal theory the collective claim of the group cannot be reconciled without significantly harming the viability of group identity. In the third section I considered indigenous views on the reconciliation of the special claims with liberalism. The indigenous view of

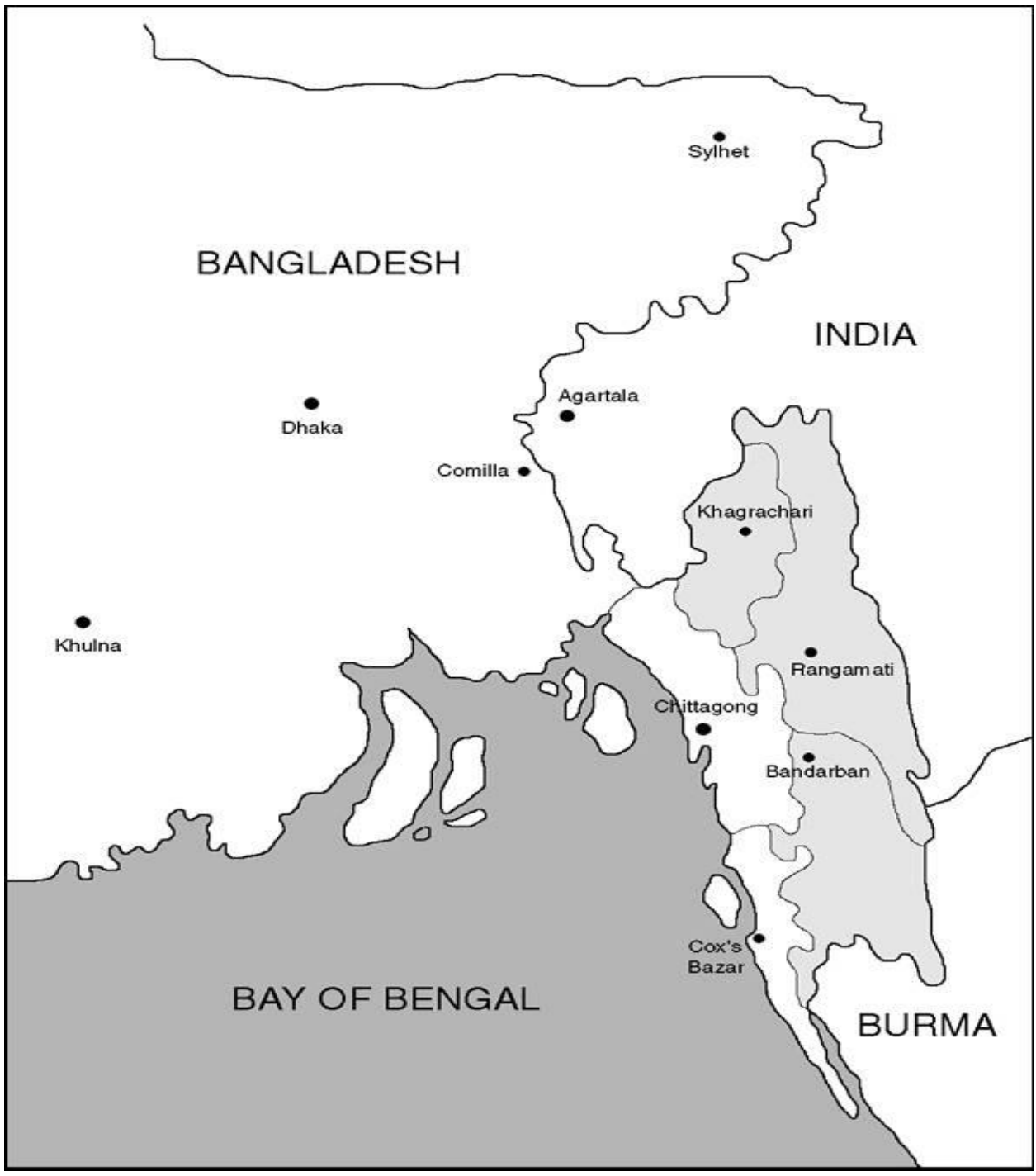
the argument concludes that the law imposes the principles of liberalism on group rights and maintains a balance by favoring claims in line with liberalism. This imposition of principles of one legal theory to the other deprives indigenous people from the control of their self-definition. Having identified the underlying principles of these remarkably different theories of liberalism and indigenous rights I have tried to ground these 'separate world views' within a fair context of dialogue. This dialogue is based on cross-cultural sharing of different values and concepts of the separate world views. From this general framework of cross-cultural dialogue I have figured out the implications of such dialogue on the *Jumma* land title in the CHT. I have concluded that such cross-cultural dialogue will allow legal pluralism and bring a qualitative change in the *status quo*. Although this recognition of otherness is a very small step, cross-cultural sharing of normativites and ontologies over time will create the possibility of an *enduring* solution.

The study therefore assessed the chances for accommodating legal pluralism within the liberal democratic framework. Liberalism is unknown to collective rights and collective rights are often viewed with suspicion in liberal framework. In relation to the Constitution of Bangladesh it only admits of one identity, Bangalee nationalism. Given this constitutional framework *Jumma* rights will not be able to go further in state centric dispute resolution mechanism.

Therefore, the study has suggested the need for a cross-cultural exchange, where two different identities might be able to reach particular decisions retaining their different ideological premises. Compared to forceful imposition of national

hegemony this is a much tolerable way to resolve identity clashes. Although mutual understanding based on cross-cultural exchange is a matter of time and constant practice, and the resultant decision might be uncertain and vague in certain cases, but this allows the conflicting traditions access to each others' inherent logic and gradually overcomes the otherness.

APPENDIX – A



The Chittagong Hill Tracts, Bangladesh

Source: *Life is not ours: Land and Human Rights in the Chittagong Hill Tracts Bangladesh*, the Report of the Chittagong Hill Tracts Commission (OCCHTC and IWGIA: 1991) at 160.

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