

**CHALLENGES FOR JURIDICAL PLURALISM
AND CUSTOMARY LAWS OF INDIGENOUS PEOPLES:
THE CASE OF THE CHITTAGONG HILL TRACTS, BANGLADESH**

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I. GENERAL INTRODUCTION

The Chittagong Hill Tracts (CHT) region in southeastern Bangladesh is undergoing fundamental social, economic, cultural, and political changes due to a number of parallel developments. These include the growing integration of the CHT economy with the national Bangladeshi economy (an inevitable consequence of the extension of the communications network in the region), the legal and administrative reforms resulting from the signing of a “peace” accord in 1997, and rapid socio-cultural transformation caused by the spread of formal education, the growing use of electronically-aided media, and the growing interaction in offices, markets, and other places between the indigenous peoples and other peoples and communities. Like many other aspects of indigenous society, the customary laws of the indigenous peoples, and the context of their application, are also constantly changing, whether brought about by these peoples themselves or otherwise. This Case Study looks into some important aspects of these laws, their application, and ways and means to protect and strengthen them in accordance with the wants and needs of contemporary indigenous society in the CHT.

Two broad types of customary law are of particular relevance to the indigenous peoples of the CHT. One of these is their custom-based family law, which is primarily administered by the “traditional” indigenous institutions of the *karbari*, the *mauza* headmen, and the “circle” chiefs whose offices are formally recognized as being an integral part of the CHT administrative set-up.¹ The other is the custom-based right of the indigenous peoples over the natural resources that

1. The offices of the chiefs, headmen, and *karbaries* are generally regarded as “traditional” on the basis that variants of these institutions – such as *raja* or “paramount chief” (comparable to the “circle chiefs” as recognized by colonial-period laws and followed since), the Marma and Tripura *roaza* or clan chief (comparable to today’s *mauza* headman), and village “chiefs” or elders known by different names among the different peoples (comparable to today’s *karbaries*) were in existence in the pre-colonial period (prior to 1860). In this sense, the chiefs’ offices may be regarded as largely “traditional.” During British rule, some of these institutions – such as the *Chakma* and *Bohmong* chiefs, for example – became more formalized and territorialized. In the case of the headmen and *karbaries*, the formalization had also led to the homogenization of these hitherto varied systems of village and clan chiefships. In this sense, they are perhaps not absolutely “traditional.” However, this author does not consider it to be inaccurate to refer to these three institutions as “traditional” in contrast to the other CHT institutions that originated from the colonial period onwards. This is also becoming the most commonly accepted terminology in the CHT.

they regard as their commons, irrespective of their formal legal classification.

In order to understand the nature of this co-existence of customary law and formally-enacted state law, and the pluralistic sharing of authority between state officials, regional elected authorities, and traditional leaders, it is necessary to have at least a basic understanding of the indigenous self-government institutions in the CHT and the nature of their relationship with the overall governmental structure within the wider Bangladeshi polity. Therefore, this study also includes a basic description of the CHT and its peoples as well as its administrative and juridical system.

Section II provides an overview of the CHT topography and demography. Section III outlines the constitutional and administrative history of the region from the time of the British East India Company's military offensives in the 1780s to the period immediately after the independence of Bangladesh from Pakistan in 1971. This period saw the gradual erosion of autonomy that the introduction of franchise rights in the 1950s and 1960s (during Pakistan rule), and the secular and part-"socialist" constitution of the nascent Bangladeshi republic (adopted in 1972) could not reverse.

Section IV briefly mentions the rise of the autonomy movement of the 1970s and its climax (or "anti-climax") in the "peace accord" of 1997, whose major aspects are outlined. Section V describes the basic features of the semi-autonomous CHT administration in which authority is divided between traditional chiefs and headman, state functionaries, and indigenous-majority councils at district and regional levels. Section VI describes the practice of juridical pluralism in the CHT, where customary law and regional statutes co-exist with laws of general national application, co-administered by traditional justice systems and state courts of law. Section VII highlights some of the most important elements of the customary personal laws of the CHT indigenous peoples and discusses some of the major challenges facing them, including the question of their relevance to present-day indigenous society, and their conflict with other laws and systems.

Section VIII focuses on the continued onslaughts upon the indigenous peoples' customary land and resource rights by intensive resource utilization or exploitation-oriented state laws and policies, and by interests of private individuals and corporate bodies. The first three sub-sections of Section IX (Parts IX.A, IX.B, and IX.C) analyze the seemingly equivocal status of customary resource rights under the apparently conflicting customary and state legal regimes, and argue that customary resource rights have a legal basis under the Constitution of Bangladesh and the British-promulgated CHT Regulation of 1900. It is posited in this section that respectful co-existence between customary law and national law is quite possible, by drawing upon case law and statutes. The remaining part of section IX (Part IX.D) discusses the strengths and opportunities in, and the limitations within, international law with regard to customary and other juridical rights of indigenous peoples. Finally, Section X, discusses what the study identifies as the major challenges in protecting customary law, namely: (1) the

revival of autonomy; (2) the reduction of discrimination; (3) the strengthening of human resources and the facilitation of limited legal reform; (4) gender; and (5) efforts to find common ground between indigenous peoples, state agencies, and private actors in supporting socio-economic measures in favor of indigenous peoples without compromising their essential values and principles.

II. CHITTAGONG HILL TRACTS: LAND AND PEOPLE

A. Sub-Himalayan Hills and Forest Tracts

The CHT region is situated in the southeastern corner of Bangladesh. It shares borders with mountainous provinces of India and Burma (“Myanmar”) to its north and east. Similar geographical areas populated by traditionally swidden² or “shifting” cultivating peoples, such as in the CHT and the Indo-Burmese border are also to be found further eastwards in Southern China, Thailand, and Laos. (See maps in Appendix B).³ The CHT is somewhat of an anomaly within Bangladesh in that it is topographically, demographically, and culturally so very different from the rest of the country.

B. The Indigenous Peoples and Migrant Groups

There are eleven indigenous peoples in the CHT region, with their own languages, customs, and cultures.⁴ These are the *Bawm*, *Chak*, *Chakma*, *Khumi*,

2. Variants of this ancient mode of cultivation are also known as “slash-and-burn” or “shifting” cultivation or rotational agriculture. It involves the clearing of the ground with the cutting and burning of the vegetation (which functions as a fertilizing agent) and the sowing of multi-species seeds with the onset of the seasonal rains (April to August). No irrigation or terracing is involved. Such a form of cultivation is common in hilly and mountainous regions of northeast India and various countries of southeast Asia, Africa, and Central and South America. For the nature of swidden cultivation in the CHT, see Raja Devasish Roy, *Jum (Swidden) Cultivation in the Chittagong Hill Tracts*, in INDIGENOUS AFFAIRS, NO. 1, 34-37 (1997).

3. Absence of road links and the existence of international border controls have restricted, if not stopped, inter-indigenous travel and contact across the international borders. Had the concerned countries ratified ILO Convention No. 169 (which, apparently, the government of India is now seriously considering), the concerned indigenous groups would have had the right to travel across the border to visit peoples related to their own.

4. The indigenous peoples of the CHT are recognized as “indigenous” to the region by the CHT Regulation of 1900 and Act 12 of 1995. Some of the indigenous peoples of the plains regions are regarded as “aboriginals” by virtue of the East Bengal State Acquisition and Tenancy Act of 1950 (§ 97). Generally, the government prefers to use the term “tribe,” rather than “indigenous,” to refer to these peoples. Interestingly, however, both the Prime Minister of Bangladesh (Begum Khaleda Zia) and the Leader of the Opposition (Sheikh

Khyang, Lushai, Marma, Mru (Mro), Pankhua, Tanchangya, and Tripura. Together, the indigenous peoples of the CHT are also known as *Pahari* or “hill people” (or “hillpeople” or “hill peoples”), or as *Jumma* – from their common tradition of *jum* or swidden cultivation.⁵ It was officially estimated in the census report of 1991 that the total population of the region was 974,445, out of which 499,539, or a little over 51%, were regarded to be of “tribal” origin. (See Appendix C for details.) Those not regarded as being of indigenous or “tribal” origin are almost predominantly members of the Bengali people. Some of the indigenous peoples’ leaders consider the census figures for their concerned peoples’ numbers to be gross underestimates, and this seems to be supported by recent reports.⁶

Historically, the indigenous peoples are known to have lived in the CHT even before the arrival of the Portuguese in Bengal in the 16th century. On the other hand, Bengali people, who are the most populous and dominant ethnic group in Bangladesh, are not known to have settled in the region prior to the 19th century. However, the Bengali population has increased many fold since then, especially with the government-sponsored population transfer program of 1979-84 (See Appendix D). The population transferees are overwhelmingly Muslim Bengalis, while the shopkeepers and small traders in the region include both Hindu Bengalis and Muslim Bengalis. Today, the total Bengali population in the region is thought to be almost equal to that of the indigenous peoples. These changes in the population structure have, in turn, caused fundamental changes in the social, cultural, economic, and political spheres.

Until a few decades ago, non-indigenous people could not hold office in traditional institutions. Gradually, however, and especially since the 1960s and onwards, they have been restrictively allowed to hold the positions of *karbari* and headman in a few areas where they had built up large settlements over the years. In the case of the elective bodies, the situation varies depending on the institution concerned. In the case of the local government units at the sub-district and lower

Hasina) have used the Bengali equivalent of “indigenous” or “aboriginal” – *Adivasi* – in their goodwill messages to the indigenous peoples of Bangladesh on the occasion of the celebrations of the U.N.-declared International Day of the World’s Indigenous Peoples in Dhaka on August 9, 2003. While this may, and should, be regarded as growing respect for the indigenous peoples of the country, the overall political situation in the country suggests that formal acceptance of many of their basic demands on political, economic, and cultural matters, including constitutional recognition as indigenous peoples, is still a long way away.

5. From the British period onwards, a small number of migrants of indigenous descent from other parts of South Asia have also made the CHT their home. These include the *Gurkha/Nepali*, the *Ahomia*, and the *Santali*. These peoples have also claimed indigenous status, but the CHT laws do not recognize them as indigenous to the region. Their status of permanent residents of the region is not in question.

6. See, e.g., Chittagong Hill Tract Region Development Plan, ADB TA 3328-BAN (2001).

levels, there are no legal bars on ethnicity, and therefore, there presently are a growing number of elected non-indigenous officials. In the case of the district and regional councils, non-indigenous persons who qualify as “non-tribal permanent residents”⁷ may stand for one-third of the seats for each of these councils, except for the position of chairperson. One of the three members of parliament elected from the region is now a Bengali, as there are no legal bars on ethnicity for the parliamentary seats.

Trade and commerce in the region are controlled almost exclusively by Bengali traders and merchants.⁸ Therefore, the influence of the Bengali population has risen significantly over the years, commensurate to its growing numbers, economic clout, and its closer links with the social, economic, and political elite in the capital city of Dhaka. Although there is a growing middle class among the indigenous people, its economic and political influence is, in comparison, quite limited, especially where it concerns decision-making at the national level. Large sections of the indigenous population, therefore, remain socially and economically marginalized, especially due to displacement and land alienation on account of privatization, the imposition of inappropriate development and economic policies by the state, and state-sponsored population transfer of non-indigenous people into the region.

III. COLONIZATION AND THE EROSION OF AUTONOMY & CONSTITUTIONAL SAFEGUARDS

A. Pre-Colonial Chieftoms, Chieftaincies, and Tribal Confederacies

From about the beginning of the second millennium, most parts of what are now regarded as the “plains” of Bangladesh – excluding the CHT and other hilly portions of the country – were included within an empire, kingdom, or other highly formalized state or quasi-state polity. In contrast, the Hill Tracts was composed of largely decentralized and only partly formalized self-governing chieftoms and chieftaincies, and what might be regarded as “tribal” confederacies, until its colonization.⁹ At the time of the formal annexation of the

7. Rangamati Hill District Council (Amendment) Act, No. 19, § 2(1)(1) (1998).

8. P.B. Chakma, *The Economy of the Indigenous Peoples of the Chittagong Hill Tracts: Some Myths and Realities*, in DEVELOPMENT IN THE CHITTAGONG HILL TRACTS, FORUM FOR ENVIRONMENT AND SUSTAINED DEVELOPMENT IN THE CHITTAGONG HILL TRACTS 3 (1998).

9. For details of the history of the pre-colonial period, see BANGLADESH GROEP NEDERLAND, *The Road to Repression in Organizing Committee, Chittagong Hill Tracts Campaign, The Changes of Genocide: Human Rights in the Chittagong Hill Tract*, in PAPERS FOR THE CONFERENCE ON THE CHITTAGONG HILL TRACTS 23 (1986); CLAUD D. BRAUNS & LORENZ G. LOFFLER, MRU: HILL PEOPLE ON THE BORDER OF BANGLADESH 27 (Birkhauser Verlag 1990); Ratan L. Chakraborty, *Chakma Resistance to Early British Rule*,

region into Bengal in 1860, the economy, cultural norms, and political structures of the CHT resembled those of similar indigenous societies of the sub-Himalayan frontier tracts in nearby India and Burma far more than those within the lowlands of Bangladesh.

B. British Colonization and Promulgation of Special Regulations

During the British period (1860-1947), the region was ruled in accordance with special laws, including Act XXII of 1860, and the CHT Regulation of 1900 (Bengal Act 1 of 1900), that repealed the 1860 law. The 1900 regulation was strongly influenced by the *Chin Hills Regulation* of 1896 that was used in the Chin-inhabited areas in northwestern or “upper” Burma (“Myanmar”), a large part of which is now *Chin State*.¹⁰ Another law that influenced the Regulation was the *Damani-Koh-Rules*, which used to apply to parts of the Santal country now included within the Jharkand and West Bengal states of India. All three regulations provided flexible arrangements that allowed various combinations of administrative power sharing between mid-ranking civil servants, local princes and chiefs, and headmen of smaller geographical areas or clan groupings. These regulations were framed under special constitutional dispensations as mentioned below.

C. The Rise and Fall of the Special Constitutional Status of the CHT

Similar to most areas of upper Burma and northeast India, the CHT was classified by constitutional legal provisions as a “backward tract” (Government of India Act, 1919) or as a “totally excluded area” (see Government of India Act, 1935 and Constitution of Pakistan, 1956). The excluded area status was changed to that of “tribal area” in the 1962 Constitution of Pakistan, and finally repealed in 1964, against the wishes of the people of the CHT and contrary to stipulations in the constitution.¹¹

in BANGLADESH HISTORICAL STUDIES, JOURNAL OF THE BANGLADESH ITIHAAS SAMITI, VOL. II 133-56 (1977); R.H. SYNED HUTCHINSON, AN ACCOUNT OF THE CHITTAGONG HILL TRACTS (1906) (on file at Bengal Secretariat Book Depot, Calcutta); *The Chittagong Hill Tract: Militarisation, Oppression and the Hill Tribes*, in ANTI-SLAVERY INTERNATIONAL REPORT NO. 2 (Julian Burger & Alan Whitaker eds., 1984).

10. The Chin Hills Regulation of 1896 (Regulation No. V of 1896) was also used in modified form in several districts within the northeast Indian states of Assam, Meghalaya, Mizoram, and Nagaland. See, P. CHAKRABORTY, MIZORAM: COMPENDIUM OF LAWS, VOLS. I & II 151-53 (Linkman 1990).

11. Article 223 of the 1962 Constitution provided that the wishes of the people of the area concerned must be ascertained prior to the exclusion of the area from the list of tribal areas. This provision seems to have been disregarded when the name of the CHT was deleted from the concerned article through the Constitution (First Amendment) Act of 1963. See also, RAJA TRIDIV ROY, THE DEPARTED MELODY (MEMORIES) 195-96 (PPA

The aforesaid status implied two things. First, that supreme legislative authority over these areas was retained by the central executive authorities or their representatives, rather than the provincial authorities, where applicable. Second, it implied that central authorities ruled indirectly in these areas, through local princes, chiefs, and headmen, within the parameters set by the concerned administrative regulations (such as the CHT Regulation and the Chin Hills Regulation mentioned above), in which the provincial authorities usually had little or no input.

In the case of the CHT, this meant that major policy imperatives for the CHT were set by the central authorities in Calcutta, or Delhi, and later, Islamabad, rather than by the provincial authorities in Dhaka, unless by specific delegation. Such hybrid colonial and indigenous administrative structures both legitimized and explicitly subordinated the indigenous leadership to bureaucratically-controlled state structures that retained ultimate control over military, strategic, economic, and resource use matters in the hands of the central government. These arrangements may today be considered autonomous or semi-autonomous, but the philosophy behind them was, in its best light, rather paternalistic. Most of these regulations expressly or impliedly recognized the role of local custom. Thus, the aforesaid formal laws both acknowledged and circumscribed customary law.

Despite repeated demands for revival of the CHT's special status that was lost in 1964, the Pakistani government paid little heed. Former East Pakistan broke off from Pakistan in 1971 and became independent Bangladesh. In 1972, the first national constitution of the new "people's republic" was adopted, but the CHT people's demands for revival of their homeland's special constitutional status again was in vain. Thus, constitutionally, the special status of the CHT is no longer recognized. However, the CHT Regional Council Act of 1998 attempts to partially revive the region's special status by recognizing it as a "tribal-inhabited area."

The absence of constitutional recognition of the special administrative status of the CHT and of the cultural identities of its peoples has meant the absence of long-term and fuller commitments to the rights and needs of the peoples of the region. Similarly, the absence of direct constitutional backing for the CHT self-government system with its primacy to indigenous peoples also makes it susceptible to legal challenges in the High Court as a potentially unconstitutional arrangement.¹² In fact, the constitutionality of the Hill District Council Acts of 1989 and the CHT Regional Council Act of 1998 have been challenged in the Bangladesh Supreme Court through two separate writ petitions. Between the two cases, the petitioners have alleged that having a separate regional council for the CHT violates the unitary framework of the Bangladeshi republic.

2003).

12. For a CHT law that was struck down as unconstitutional after the region lost its special constitutional status in 1964, see *Mustafa Ansari v. Deputy Commissioner, Chittagong Hill Tracts and Another*, 17 DLR, 1965: 553.

They have also alleged that the reservation of the office of chairperson of the CHT Regional Council and that of the hill district councils solely for “tribals” and the authority of the circle chiefs to grant permanent resident certificates relegates the Bengali inhabitants of the region to “second class” citizens and thus, offends the equal rights or non-discrimination clauses of the constitution.¹³ The hearings of these cases are yet to be completed.

D. Marginal Voters Fail to Reverse Erosion of Autonomy

The part-bureaucratic and part-traditional system that was introduced or formalized during British rule was inherited by the Pakistani state. Successive Pakistani administrations largely retained its basic structure during their twenty-five-year rule (1947-1971), but they whittled away many of its important safeguard features, including constitutional protection. However, voting rights were introduced in the region for the first time during this period, for the legislative assemblies in the 1950s and for local government in the early 1960s. Nevertheless, the elected leaders of the CHT could do little within a state system that did not seem to have the requisite space and funds for people who were different. Even where development works were initiated, the perspective was colonialist, in the sense that the main benefits accrued not to the local people, but to outsiders, as was the case for the infamous Kaptai Dam.¹⁴ Similar patterns are also noticeable in the case of forest administration, which was also essentially colonialist, and remains so until today.¹⁵ The aforesaid structures and practices largely continued until the period immediately after the independence of Bangladesh from Pakistan in 1971. In all of this, the will of the functionaries of the Dhaka-based government reigned supreme.

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

14. The construction of the Kaptai Dam in 1960 displaced about 100,000 people or two-fifths of the local population, largely wet-rice farmers and swidden cultivators. For the nature and extent of the loss and damage inflicted by the dam, see David G. Sopher, *Population Dislocation in the Chittagong Hills*, in *THE GEOGRAPHICAL REVIEW*, VOL. LIII 416-30 (1963); MUHAMMED ISHAQ, *BANGLADESH DISTRICT GAZETTERS: CHITTAGONG HILL TRACTS* 42, 126-27 (1975); *BARA PARANG: THE TALE OF THE ENVIRONMENTAL REFUGEES OF THE CHITTAGONG HILL TRACTS* (Hari Kishore Chakma et al. eds., 1995).

15. For the forestry related problems, see Raja Devasish Roy & Sadeka Halim, *A Critique to the Forest (Amendment) Act of 2000 and the (Draft) Social Forestry Rules of 2000*, in *THE FOREST (AMENDMENT) ACT, 2000 AND THE (DRAFT) SOCIAL FORESTRY RULES, 2000: A CRITIQUE* 9 (Philip Gain ed., SEDH 2001); Raja Devasish Roy & Philip Gain, *Indigenous Peoples and Forests in Bangladesh*, in *FORESTS AND INDIGENOUS PEOPLES OF ASIA*, REPORT NO. 98/4 21-23 (Minority Rights Group Int'l ed., 1999); Rajkumari Chandra Roy, *Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh*, in *INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS DOC. NO. 99-179* (2000).

IV. THE STRUGGLE FOR SELF-DETERMINATION AND THE “PEACE” ACCORD OF 1997

A. The Internal Conflict (1973-1997)

From the 1930s to the 1940s, being somewhat encouraged by educational progress and rising freedom of expression, and faced with a rather static political and administrative system, the indigenous peoples of the CHT started to assert themselves through a campaign for revival of autonomy in the region. This movement received a fresh impetus in the early 1970s from the recent experience of the freedom struggle of Bangladesh. In 1972, the people of the CHT formally demanded regional autonomy and constitutional safeguards under the dynamic leadership of a shy and young left-leaning lawyer named Manobendra Narayan Larma, Member of Parliament, and head of the new political organization known as the Jana Samhati Samiti (JSS). These demands, however, were summarily rejected, and peaceful demonstrations in favor of autonomy were met with police brutality. Other acts of discrimination, reminiscent of the new days of Pakistan in 1947, followed, and it came as no surprise to anyone when the hitherto peaceful struggle for autonomy turned into an armed revolt in the early 1970s. Larma, unfortunately, was killed in an intra-party conflict in 1983, but the movement continued.

The intra-indigenous conflict between the rival JSS factions gradually subsided by 1985, following a truce between the renegade group and the Bangladesh Army, but the major conflict between the guerrillas and the government forces continued until 1997.¹⁶ Meanwhile, thousands of people were killed, gross human rights violations were perpetrated upon the CHT people, and thousands had to flee for their lives across the border into India.¹⁷ The combination of military operations and a population transfer program that brought in a few hundred thousand Muslim Bengali settlers into the CHT added ethnic and religious overtones to the conflict and helped spread the conflict among the non-combatant population. A settlement with “moderate” leaders in 1988, bypassing the underground movement, led to the introduction of three district-level councils, but failed to bring back peace or to win any hearts, which it had ostensibly sought to do.

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

17. For the human rights dimensions of the conflict period, see, among others, *The Chittagong Hill Tract: Militarisation, Oppression and the Hill Tribes*, supra note 9; The Chittagong Hill Tracts Commission (1991 and updates up to 1999).

B. The CHT “Peace” Accord of 1997

After several rounds of negotiations between the government and the underground movement from the 1980s onwards, a peace deal was finally struck on December 2, 1997. With the signing of the Accord, a partially autonomous self-government system has been re-established in the CHT, and the region has been officially recognized as a “tribal-inhabited area.”¹⁸ The primacy of the indigenous peoples’ legal status in the region *vis-à-vis* other population groups has been highlighted by the recognition of the legislative competence of the new CHT Regional Council, and that of the strengthened hill district councils, over customary law, and through the formal recognition of local “customs, practices, and usages” for purposes of resolution of land-related disputes by the CHT Land Commission (another creation of the Accord). Moreover, the office of chairperson of the regional and district councils has been legally reserved exclusively for “tribals.”

Another important feature of the Accord, with regard to customary laws, was the reiteration of the administrative roles of the chiefs and headmen (and indirectly, that of the *karbaries* as well). The existing authority of the headmen and chiefs to provide permanent resident certificates to both hillpeople and non-hillpeople has been formally and more directly acknowledged. Moreover, as an extension of their existing advisory prerogatives, the chiefs have been included among the members of the CHT Land Dispute Resolution Commission, a quasi-judicial body that is expected to provide expeditious remedies to cases of land dispossession and disputes.¹⁹ Likewise, the chiefs have been included among the *ex-officio* advisers to the new Ministry of CHT Affairs. The hill district councils (and indirectly, the CHT Regional Council) have been provided a legal basis to exercise supervisory authority over the headmen, a prerogative that was hitherto exercised only by the chiefs and the central government authorities. In other ways, however, the existing role of the traditional institutions in land, revenue, and judicial administration has remained unchanged.

The reaffirmation of the role of the traditional leaders in the reorganized CHT self-government system is quite an interesting development considering the

18. It is noteworthy that the special constitutional status of the CHT as a “tribal area” was revoked in 1964. *See Roy, supra* note 11, at 195-96. This provision therefore partially revives the indigenous territory or homeland status that was lost in 1964, but falls short of formal constitutional recognition because the recognition is done by an ordinary law (the CHT Regional Council Act of 1998).

19. This commission was created first through an administrative order and later formalized through the passage of the *CHT Land Disputes Resolution Commission Act of 2001*. Apart from the chiefs, the members of this commission include a retired High Court judge (chairperson), the chairperson of the CHT Regional Council (or his nominee), the chairpersons of the three hill district councils, and the Commissioner of the Chittagong Division (the senior-most civil servant of the administrative division that includes the CHT region).

ideological differences, and on occasion, tension, that existed between *some* conservative traditional leaders and *some* social reform-oriented autonomist activists. More importantly, there was tension because of their competing role in the administration of justice.

During the years of the internal conflict, and especially in the 1980s and 1990s, in many areas controlled by the then autonomist guerrillas, local dispute resolution was handled by a village council or *panchayat* formed under the auspices of the guerrillas that at times excluded the headman and *karbari*. In other areas, the headmen and *karbaries* had continued with their usual role in such matters. In the post-Accord situation, *panchayats* have not been formally recognized in the reformed CHT administrative system, although in some areas the former leaders of the *panchayats* may, in practice, play an influential role in village social institutions, including village judicial councils that are formally sanctioned by the *karbari* or headman. Thus, although there is occasionally some tension between them, on the whole, the traditional institutions and the leaders of the autonomy movement have learned to co-exist peacefully and work together.

C. The Crisis of Implementation

Although a reasonably positive working relationship has been established between the traditional leaders and the CHT councils, increased synergy in their work is, of course, possible and desirable. However, the more serious problem at the moment is the non-implementation of crucial land-related aspects of the 1997 Accord. These include devolution to the hill district councils, the resolution of land-related disputes by the CHT Land Dispute Resolution Commission, the cancellation of land leases granted to non-residents, and the proposed grants of land titles to landless indigenous people.²⁰ Unless these measures are addressed in the near future, meaningful reversal of the historical process of marginalization and dispossession will not be possible. The climate for early progress in this regard, however, does not seem very likely, given the differing perspectives on various aspects of the Accord between the indigenous peoples of the CHT and the government of the day.²¹

20. For details of the unimplemented provisions of the 1997 Accord, see Gauntam Kumar Chakma, *Parbattya Chattagram Chuktir Alope Bhumi Byabasthapana O Land Commission Ain* [Land Management and the Land Commission Law in the Context of the CHT Accord], in LAND LAWS, LAND MANAGEMENT AND THE LAND COMMISSION IN THE CHITTAGONG HILL TRACTS (Committee for the Protection of Forest and Land Rights in the CHT 2000). For a critical discussion of the land-related dimensions of the 1997 Accord, see Raja Devasish Roy, *The Land Question and the Chittagong Hill Tracts Accord*, in THE CHITTAGONG HILL TRACTS: THE ROAD TO A LASTING PEACE 31-54 (Victoria Tauli Corpuz et al. eds., 2000).

21. For a detailed discussion on the “crisis” in implementation of the 1997 Accord, see Raja Devasish Roy, *The Discord Accord: Challenges Towards the Implementation of the Chittagong Hill Tracts Accord in 1997*, 100 J. OF SOC. STUD. 4 (2003).

V. THE PARTIALLY AUTONOMOUS HILL TRACTS ADMINISTRATION

A. Institutional and Administrative Pluralism within a Unitary State

Formally, Bangladesh has a unitary system of government as opposed to a federal system of government. However, the legal and administrative system in the CHT is nevertheless separate and distinct from those in other parts of the country.²² Administrative authority in the region is shared by the central government – through its district and sub-district officers – the traditional institutions of the chiefs, headmen and *karbaries*, and elected councils at the district and regional levels. All of these institutions are supervised by a new ministry, the Ministry of Chittagong Hill Tracts Affairs. The officials of the district and sub-district civil administrations are almost exclusively of non-indigenous origin. In contrast, the majority of the members of the regional and district councils are members of the indigenous peoples. Therefore, the CHT may be said to have a semi-autonomous self-government system that is quite “pluralistic,” in that it combines traditional, bureaucratic, and elective regional authorities with separated, and sometimes concurrent, responsibilities.²³

1. The Traditional Institutions

The *karbari*, usually an elderly man, is the traditional head or chief of a hamlet or village. Although originally a leader that was elected by the villagers themselves (*Chakmas* say that they “raised a *karbari*”), the office has now become almost hereditary, although the final appointing authority is, by custom, the chief.²⁴ To this day, there are no women *karbaries*. The *karbari*'s main duty is to preside over social functions and to administer traditional justice in accordance with customary law. Several villages form a *mauza*. The *mauza* is a unit of land and revenue administration in Bangladesh that has fixed and demarcated geographical boundaries. In the CHT, the *mauza* is also a unit of civil and judicial administration, in addition to being a unit of revenue administration, under the

22. For a more detailed description of the CHT self-government system, see Raja Devasish Roy, *Administration, in THE CHITTAGONG HILL TRACT: LIFE AND NATURE AT RISK* 43-57 (Philip Gain ed., SEDH 2000).

23. Among the notable examples of autonomy arrangements in formally *unitary* states are South Tyrole (Italy), Catalonia (Spain), Isle of Man (U.K.), and Northern Ireland (U.K.). Among the highest forms of autonomy exercised in indigenous peoples' territories are Greenland (Denmark), Mizoram and Nagaland (India), and Kuna Yala (Panama).

24. Over the last few years, the deputy commissioners of the three hill districts have also purported to “appoint” *karbaries* concurrently with the chiefs. The chiefs and headmen, supported by the CHT Regional Council, have appealed to the Ministry of CHT Affairs to prohibit the deputy commissioners from appointing *karbaries*. The matter is still pending before the Ministry.

charge of a headman. While a headman may or may not be from the same ethnic group as the majority of the population of a *mauza*, the *karbari* usually comes from the same people as most of his fellow villagers.

The headman is responsible for resource management, land and revenue administration, maintenance of law and order, and the administration of “tribal” justice, including as an appellate authority over the *karbari*’s judicial functions. The vast majority of the offices of headmen are held by hillpeople and succession is usually regulated in practice through inheritance by male heirs. Formally, however, the Deputy Commissioners must appoint new headmen each time a vacancy occurs, usually through the death of the incumbent or in rare cases, when dismissal for misconduct or mal-administration takes place. The unwritten convention is that the circle chief’s nominee (who is usually a son of the late incumbent) is endorsed by the Deputy Commissioner, except on very rare occasions. The 380 odd *mauzas* in the CHT are part of one of the three administrative and revenue “circles” of the three chiefs or *rajas*,²⁵ besides being part of one or more of the three districts of Rangamati, Khagrachari, and Bandarban. The respective boundaries of the circles and districts are largely coterminous if not identical. The chiefs’ jurisdiction – at one time based upon “tribal” and clan divisions – was territorialized during British rule by defining their spheres of influence through the demarcation of fixed geographical areas. These areas were renamed “circles.”

The chiefs are the heads of their respective revenue and administrative circles and may perhaps be compared to “paramount chiefs” in other areas because of the extent of their jurisdiction. In fact, it is perhaps the headmen who may be compared to “chiefs” in other parts of the world, such as in northeast India, for example. All inhabitants of the circles, including non-indigenous residents, apart from government officials, are subject to the jurisdiction of the chiefs. Their positions are hereditary. Apart from supervising the activities of the headmen, the chiefs have the prerogative of advising the deputy commissioners, the hill district councils, the CHT Development Board (a statutory institution) and the Ministry of CHT Affairs. In the few instances where the office of headman and chief have been held by women, it is usually because they are the wives or daughters of the late incumbent. The offices of chief, headman, and *karbari* are generally held for life.

2. The District Councils, the Regional Council, and the Ministry of CHT Affairs

Perhaps the most powerful institutions with regard to day-to-day administrative functions in the CHT are the district councils. These councils – called hill district councils or HDCs – administer various “transferred” subjects at

25. The three chiefs are the *Chakma Chief* (a Chakma), the *Bohmong Chief*, and the *Mong Chief*, the latter two being *Marma*.

the district level, like primary education, health and public health engineering, fisheries and livestock, small and cottage industries, and so forth. According to the 1997 CHT Accord, land administration, law and order, secondary education, and some other matters are to be also transferred to these councils, but this has yet to happen. The HDCs are directly subordinated to the CHT Regional Council (RC), whose supervisory jurisdiction also includes elected local government bodies and the “general administration” of the region. In practice, however, the RC seems to exercise far less authority than was intended by the 1997 Accord. This is believed by many to be partly a result of the lack of political support behind the implementation of the CHT Accord and partly due to the absence of subsidiary regulations and guidelines.

3. The Civil Service

Another important administrative structure within the region is that of the civil bureaucracy, which is headed by a mid-ranking civil servant called the Deputy Commissioner (DC). The district administration under the DC is mirrored at the sub-district levels. These district and sub-district level officials exercise supervisory jurisdiction over the functions of the headmen and wield enormous revenue, land administration, judicial and quasi-judicial authority.

4. Governance and Co-Governance under Trial

According to the post-Accord Hill District Council (Amendment) Acts of 1998, the district councils are also to exercise supervisory authority over the headmen, but this law has not yet been acted upon. Therefore, the functional relationship between the headmen and these councils is yet to be tested. In addition, there are other combinations of formal and informal functional relationships between the traditional institutions and other administrative and developmental bodies in the CHT. All three of the administrative structures mentioned above are responsible to the Ministry of CHT Affairs, which, according to the CHT Accord of 1997, is to be headed by a hillperson, but is currently run by the Prime Minister herself as its cabinet level executive. An indigenous member of parliament, however, holds the office of a “deputy minister.”

The refusal or failure to appoint a CHT indigenous person as the CHT Affairs cabinet level minister is one dispute among a number of disputes between the government of Bangladesh and the JSS regarding the implementation of the CHT Accord of 1997.²⁶ Other Accord-related disputes concern matters of devolution, the rehabilitation of refugees and displaced people, demilitarisation of the region, administration of law and order, and the contents of the CHT Land

26. For a detailed analysis of the ongoing crisis over the implementation of the CHT Accord of 1997, see Roy, *supra* note 21.

Disputes Resolution Act, 2001 that purports to provide sweeping powers to the chairperson of the commission – a government appointee – in violation of the relevant provisions of the 1997 Accord. The recent passage of a law that introduces a new tier of elected local government at the village level, lower than existing levels, could have major implications for the way in which village-level disputes, including those concerning customary laws, are resolved. The influence of the village *karbari* generally, and with regard to indigenous justice administration particularly, could be further eroded. The aforesaid conflicts and tension have made the overall political climate of the region tense and laden with mistrust and suspicion. Administrative pluralism in the CHT is therefore, under severe trial in the CHT.

VI. LEGAL AND JURIDICAL 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 traditions of justice, litigation procedure, penal and reform systems, restitution and compensation processes, and so forth.

Custom-oriented personal laws of the indigenous peoples of the CHT are regulated substantively, if not exclusively, by the traditional institutions of the CHT. Likewise, and to a limited extent, these institutions also regulate the use of the natural resources of their respective jurisdictional areas or territories. However, it is important to remember that this is the substantive situation with regard to customary laws and the manner of their administration. There are, however, some exceptions to this trend. First, the government courts formally retain concurrent jurisdiction over indigenous justice administration, although this is seldom invoked in practice. Second, the post-Accord laws recognize the legislative competence of the district and regional councils over “customary law.” Third, *some* custom-based land and natural resource rights – albeit a very small number – have been formally recognized by written legislation.²⁷ In these cases,

27. The CHT Forest Transit Rules, 1973 provide an exception to the restrictions on the extraction and export of forest produce of the CHT, through the following qualification: “Members of hill tribes residents in the Chittagong Hill Tracts may cut and remove firewood and other minor forest produce (with the exception of such items as may be described as prohibited) free of royalty from the unclassified state forests for *bona fide* home consumption only.” Similar provisions on savings clauses for customary resource rights of indigenous peoples (“natives”) in otherwise restricted government-owned forests also occur in other countries. A comparable provision, for example, is section 41 of the Forest Enactment. FOREST ENACTMENT § 41 (Sabah No. 2 1968) (Malaysia).

the limits of the exercise of these rights have been formally defined by law, implying the extent to which the state will, or will not, interfere with the exercise of these rights. In practice, however, one usually sees the regulation of these rights through a combination of state law and customary law.

A. The Legal and Judicial System in the Chittagong Hill Tracts

The CHT has its own legal system that is separate from the rest of the country.²⁸ Although most laws that apply to the rest of the country also apply to the CHT, some do not apply at all – such as the Bengal tenancy laws governing land administration matters and the laws on the procedure for civil litigation – or apply to the region only in a limited manner.²⁹ On the other hand, some laws apply only to the CHT. The most singularly important of these laws is the CHT Regulation of 1900 (Bengal Act I of 1900), which “[l]ays down a detailed policy for the general, judicial, land, and revenue administration of the region and defines the powers, functions, and responsibilities of various officials and institutions [It] stipulates the manner and extent of the application of other laws to the region, many of which apply only to the extent that they are not inconsistent with the Regulation.”³⁰ Thus, the CHT Regulation functions in the nature of a constitutional legal instrument for the CHT.

The administration of criminal justice in the CHT is similar to that of the plains districts.³¹ The major difference with the plains is that the powers of a

28. For a more detailed description of the CHT administrative system, see Roy, *supra* note 22, at 43-57.

29. For example, the Income Tax Act of 1922 applies to the region, but not to the “indigenous hillmen” of the region. Similarly, the Court Fees Act of 1870 applies to the CHT region only “in for as it is not inconsistent with the CHT Regulation of 1900 or any rules made thereunder.”

30. See, Roy, *supra* note 22, at 44.

31. Exercised in practice by the Additional District Magistrate or “ADM.”

32. This power is exercised in practice by a subordinate official known as an “Additional Divisional Commissioner.” See CHT Regulation § 8 (1900). The Divisional Commissioner is the head of an administrative division that includes several districts.

33. CHT Regulation § 9 (1900).

34. At present, civil and criminal justice is administered by district civil administration (“civil servant”) officials, and not judicial officers under the Ministry of Justice, as in the plains. Customary laws of the indigenous peoples are administered, primarily by chiefs and headmen as courts of first instance, and by civil administration officials, and the Supreme Court on appeal or revision as appropriate. Under the changed system, the major change will be with regard to the vesting of authority upon judicial and not civil administration officers to try cases in civil and criminal courts, excluding customary law courts of the headmen and chiefs. In the future, these judicial officers will be deputed by the Ministry of Justice, who are usually trained judges, and not by the ministry of establishment (“civil servant” bureaucrats).

35. The Chittagong Hill Tracts Regulation (Amendment) Act of 2003, No. 38 §

“Sessions Judge” – who exercises appellate jurisdiction over the district magistrate and tries the more serious offences like murder, rape, etc. – in the CHT is vested, not upon a judicial official, but the senior civil servant known as the “Divisional Commissioner.”³² Similarly, the powers of a High Court are shared between the Divisional Commissioner, the national government, and the High Court Division of the Supreme Court of Bangladesh.³³ However, in accordance with the recently passed Chittagong Hill Tracts Regulation (Amendment) Act of 2003, the prevailing system is expected to change soon, and criminal sessions matters, along with civil justice, not including customary law matters, will, in the future, be tried by judicial officers seconded by the Ministry of Law and Justice, and not by civil servants as at present. The system of administration of customary law and other local laws and practices by the courts of the headmen and circle chiefs (who also try minor criminal offences), however, will remain unaffected by this new law.³⁴ The law is widely expected to come into operation in the winter of 2003-2004.

Despite the proposed changes, the nature of the work of the civil courts in the CHT will continue to be quite distinct from those of the plains districts, both with regard to the process of litigation and with regard to the content of the laws concerned. In the CHT, a simple system of adjudication is provided by the CHT Regulation of 1900, as opposed to the complicated system of litigation in vogue in the plains in accordance with the Code of Civil Procedure of 1908. However, as regards the laws that are to be applied, there is to be no change. The 2003 Act reiterates the existence of the separate legal system of the CHT when it obliges the new civil courts to exercise their jurisdiction in accordance with the “existing laws, customs and usages of the district concerned.”³⁵ Legal practitioners are technically forbidden to appear on behalf of their clients in the CHT courts except for a narrow range of sessions-level criminal cases and appeal cases involving large sums of money, and that may only occur before the Divisional Commissioner and higher courts. However, this restriction has been done away with, as a matter of fact, if not law, as lawyers have been allowed to plead before the district courts from the late 1970s onward.

Simple civil justice matters, family law matters of the indigenous peoples, and minor criminal offences are tried in the courts of the circle chiefs and

4(c)(4) (2003).

headmen.³⁶ These traditional institutions exercise powers of limited detention, of imposing monetary fines and of restituting property in accordance with customary law. The headmen's decisions may be appealed before the chiefs. Similarly, any party aggrieved by a judgment or order of the chief may file a review petition before the Deputy Commissioner.³⁷ The system of review of the chiefs' decisions by government officials was introduced after annexation in 1860. However, according to the concerned rules, the chiefs' decisions could not be appealed as they were regarded as the highest authorities of the indigenous customary law systems.³⁸ However, the Hill District Council Acts of 1989 have introduced the provision of appeal of the chiefs' decisions before the Divisional Commissioner for the first time.³⁹ In this regard, the distinction between appeal and review is important.

In practice, it is seen that an appellate court has a far wider mandate than a revisional authority to examine the challenged decision's legality. While the former can go into the "merits of the case" and look at all relevant facts and circumstances, the latter can only interfere where an obvious and major irregularity or a wrongful application of law or procedure has taken place. Revisional applications against the judgments and orders of the chiefs have always been extremely limited from the British period until today. Thus, it is hardly surprising that no appeals of the chiefs' decisions are known to have been filed before the Divisional Commissioner in spite of the 1989 amendment allowing such appeals. It seems, therefore, that the indigenous peoples of the CHT prefer to confine their conflict resolution processes to indigenous institutional set-ups. This perhaps is a clear indication that despite the increasing socio-economic plurality within indigenous society, traditional indigenous integrity on personal law matters is still strong.

B. Administration of Customary Law in the Traditional Indigenous Courts

As mentioned above, the administration of justice involving family law matters of the indigenous peoples is formally vested by law upon the headmen and the chiefs. In practice, however, most of the concerned disputes are taken before the village *karbari* and the same may never reach the headman or chief if they are resolved at village level. The *karbari* usually sits with a council of influential social leaders and other village elders – usually men – and tries to resolve the matter through informal hearings. Parties are not usually represented by others,

36. CHT Regulation Rule 40 (1900).

37. *Id.*

38. See BANKIM KRISHNA DEWAN, CHAKMA JATIYO BICHAR O UTTARADHIKAR PRATHA [Chakma National Adjudication System and Chakma Inheritance Law] 13-15 (2nd ed., Jum Aesthetics Council 2003); see *infra* Part VI.D; see *infra* footnote 49.

39. This conflict of appeal/revision is further discussed in Part VI.C, while discussing the implications of recent reforms to the court system in the CHT.

especially legal practitioners, and must plead for themselves. These deliberations may involve methods that are more in the nature of mediation and arbitration, than adjudication, as these terms are generally understood. The atypical case of a spouse-versus-spouse dispute not involving third parties may, on occasion, be rather adversarial,⁴⁰ with the parties trading arguments and evidence in front of the *karbari* and his council, who conduct themselves as neutral umpires or arbiters and try to bring about reconciliation between the parties, rather than trying to proactively “seek the truth.” In contrast, a dispute could sometimes involve a matter where there is a strong community interest in getting to the heart of the matter. In such cases, dispute settlement methods may be more inquisitorial than adversarial, that is, involving efforts to inquire into the truth of the matter, rather than mere neutral umpiring.

Matters reach the headman only if the dispute is complicated and cannot be resolved by the *karbari* and his council, or if one of the parties to the dispute is unable or unwilling to accept the decision of the *karbari*.⁴¹ Most disputes that are tried by the headmen are conducted in a similar manner to those before the *karbaries*, or perhaps slightly more formally. Complaints are generally initiated through a written petition, but may also be done orally, and without observing any particular formalities. Testimony is almost always oral, and only in very rare cases does an exchange of written pieces of evidence take place.⁴² The proceedings of the cases are not usually recorded unless they involve complicated matters and are expected to end up on appeal before the court of the circle chief. In such cases, the depositions of the parties and their witnesses, along with cross-examinations, if any, are written down, usually in Bengali, the national language.

In the vast majority of cases, there are no records at all, or merely a record of the judgment and decree, and the written petition, if there is one. There are no fixed formats for the case records, and formally, it is not obligatory for the *karbari* or headman to maintain written records. However, where records are kept that go beyond the bare judgment, such as in the courts of the circle chiefs, the

40. A typical, if somewhat oversimplified, example of an “adversarial” system of justice is the English Common Law system where traditional theories of jurisprudence regard the duties of the judge not to “inquire into the truth” – as is done in an “inquisitorial” system of justice – but to act as a neutral umpire in an “adversarial” contest between two active parties. On the other hand, in an “inquisitorial” system of justice, such as that in France, the judge or magistrate may actively inquire into the matter of litigation and “seek the truth” instead of merely acting as a neutral umpire.

41. The persons assisting the *karbari* in dealing with disputes (who are very rarely women), are being termed a “council” here for matters of easy comprehension but the former are neither a formal body, nor is the composition of such “council” fixed or pre-determined. In practice, the members of this “council” usually include all the influential village social leaders and elders who are invited by the *karbari* to attend or happened to attend the hearing and were too important as social leaders not to be specifically invited to be or accepted as a part of the dispute resolution group.

42. Under common law systems in vogue in the United Kingdom and Australia, for example, such exchanges of evidence are known as “discovery” proceedings.

records contain the information recommended in the CHT Regulation rules on justice administration (Rules 1-10), namely, information on the plaintiff and defendant, the nature of the claim, the basis of the claim along with supporting evidence, if any, the decision, and the grounds for the decision.

The nature of the setting of the chiefs' courts may vary from chief to chief, but the atmosphere is usually more formal than that of the headmen's courts, but far less formal than that of the government courts. Litigants may bring presents of fowl, fruit and vegetables, and the customary bottle of rice wine to the chief, and normally only a customary "court fee" is levied, which in *Chakma* is called a "*Khua Bhangani*," or literally "fog disperser."⁴³ Similar offerings are also made before the *karbari* and the headman. In both cases, the sums are usually nominal, and to the extent allowed by local custom. The CHT Regulation makes it strictly illegal for the judicial officer to accept any presents beyond what is customary.⁴⁴ Monetary fines are still low (the rates having been set during the British period and not reviewed since) and are usually payable to the wronged party or to the entire village community. In cases of elopement of an unmarried couple or adultery among the *Chakma*, *Tripura*, and *Tanchangya* peoples for example, the fine is usually a pig, to be paid to the entire village community. In most cases, efforts are made to facilitate reconciliation, and apportion the fault, if any, rather than to impute fault only on one or other of the two parties.⁴⁵ In the case of the latter, there is usually a clear "winner" and a "loser," a situation that has the potential to give birth to further disputes among the former disputants and their families.

C. Some Implications of Forthcoming Reforms to Administration of Justice

In comparing the initial draft of the Chittagong Hill Tracts Regulation (Amendment) Act of 2003 (Act No. 38 of 2003) that was framed by the CHT Regional Council with the contents of the Act that was eventually passed by

43. See ROY, *supra* note 11, at 100.

44. The system in the CHT has similarities and dissimilarities with "tribal" (or "native") courts in other parts of the world. An interesting comparison may be made with the courts of the headmen, chiefs, and paramount chiefs in Kawazulu-Natal in South Africa. See J.C. BEKKER, SEYMOUR'S CUSTOMARY LAW IN SOUTHERN AFRICA 28-35 (Juta & Co. Ltd. 1989). Another noteworthy comparison may be made with the native courts in Sabah, Malaysia, consisting of native chiefs and headmen, and non-native state judicial officials at higher levels. See Native Courts Enactment No. 3 (1992).

45. A review of the *Chakma* Chiefs' case records shows that a significant percentage of disputes between married couples in this court (e.g., in Misc. Case Nos. 1/1998, 7/1999, 1/2000, 6/2000 and 12/2000) was reconciled through informal inter-hearing "out of court" discussions. In one instance in 2001, while interviewing the *Bohmong* Chief in Bandarban district, the writer observed the chief resolve a dispute concerning the route to be followed by a funerary procession while sitting in his drawing room.

parliament, it seems that a number of suggestions of the Council were omitted.⁴⁶ This includes proposals: (1) to update the fining powers of the headmen and chiefs to keep pace with rising inflation; (2) to reiterate the practice of the government courts to assist the traditional courts in execution of their judgments and orders; and (3) to transfer the authority to revise the judgments and orders of the chiefs and headmen from the civil servants to the CHT Regional Council. In fact, other than to suggest that the chiefs' courts' revisional authority be the District Judge rather than the CHT Regional Council, the CHT Affairs Ministry and the Ministry of Law and Justice both endorsed the regional council's other proposals. The Cabinet, which has the final say on drafts of bills before they are presented to parliament, however, thought otherwise. The Cabinet's draft was accepted in parliament without any debate. It therefore seems that while the government does not seek to interfere with the system of adjudication by the chiefs and headmen, it is not interested in strengthening the indigenous system either. This is perhaps borne out by the careful avoidance of the word "court" when referring to the chiefs and headmen, although the Regional Council's draft had referred to the chiefs' and headmen's "courts."⁴⁷

The forthcoming changes consequent upon the 2003 law will most likely be welcomed in general, but it seems to have left another problematic area unresolved. This is the procedure of remedies against the judicial decisions of the circle chiefs. At present, revisional powers are vested upon the Deputy Commissioner and appellate powers are vested upon the Divisional Commissioner. The latter provision was introduced in 1989 during the rule of a regime under an army general that had little political legitimacy. This was a clear departure from the existing practices whereby the chiefs' courts were regarded as the highest authority on indigenous customary law matters, whose decisions were not to be unduly interfered with in the interests of maintaining "tribal" integrity. This seems to have been the policy during the late British and early Pakistan periods.⁴⁸ Since then, there appears to have been a clear decline in government

46. The author was among the lawyers who were involved in assisting the council to draft the proposed amendments.

47. Interview with officials of the CHT Regional Council, in Rangamati, Bangl. (Oct. 11, 2003) (interviewees wished to remain anonymous).

48. In Misc. Revision Case No. 13 of 1947, Mar. 3, 1947, the Commissioner of the Chittagong Division is on record as having ordered the following: "Read petition, Chakma Raja's judgment and the order of the Deputy Commissioner. This is essentially a tribal matter and I consider that the Chief's order should prevail. I, accordingly, set aside the order of the learned Deputy Commissioner and direct that the order of the Chakma Raja dissolving the marriage be restored." Similarly, in Resolution No. 4374-j, Oct. 2, 1951, the Secretary to the Governor of the Province, H.G.S. Biver, wrote: "With a view to preserving the social structure of the tribal people, the Governor has been pleased to set aside the order of the Board of Revenue dated March 2, 1948 and direct that the order of the Chakma Chief dated the 24th September, 1946 dissolving the marriage of Lakshmi Mohan Chakma and Sm. Pramila Chakma shall stand." DEWAN, *supra* note 38, at 15.

interest in maintaining indigenous integrity until the signing of the CHT Accord of 1997. Interestingly, a year after the signing of this Accord, the Bangladesh Supreme Court declared that the customary laws of the indigenous peoples could not be unduly interfered with.⁴⁹

D. The Comparative Strengths and Weaknesses of the Traditional and State Courts

The re-integration of the traditional court system into the reformed CHT administration and the patently low number of revision cases against the judgments of the chiefs suggests that many indigenous people regard the role of these institutions as useful and important in the current context.⁵⁰ There has been no systematic research into the causes of the absence or near absence of such revision, but this writer believes, on the basis of his administrative experience on such matters, that among the causes are: (1) confidence in the chiefs' decisions; (2) the atmosphere of a government revisional court, which may seem quite alien to most indigenous people; (3) culturally reinforced aversion to litigation, which is regarded as socially demeaning; and (4) the relatively complicated process of the revisional courts and the related expenses of litigation (litigation in the traditional courts is generally cost-free or low-cost). The coming years will show whether the above inferences have a strong basis or not.

In customary law matters, one advantage that the indigenous courts have over the government courts is that the concerned officials are indigenous people who are generally well versed in customary law. Other advantages of the traditional court system include the relative flexibility of court procedure and the higher possibility of reconciliation and compromise, for reasons mentioned in Section VI.B. Moreover, except in the case of the chiefs, who generally sit alone in court, the headmen and *karbaries'* courts are usually collective affairs involving a large number of people who assist the headman or *karbari* in conducting the hearings and reaching verdicts. These traditional judges have the advantage of seeking the counsel of wise and experienced elders. This advantage is also open to the chiefs, but is generally not invoked by government court judges.

Therefore, in many important respects, the traditional courts have a number of distinct advantages over the government courts in providing justice in cases involving customary law. However, there are some advantages that the government courts have over the traditional courts. These include: (1) the full

49. *Aung Shwe Prue Chowdhury v. Kyaw Sain Prue Chowdhury and Others* (Civil Appeal No. 8 of 1997) [1998] 18 BLD 41 (Bangl.).

50. The records of the Court of the *Chakma* Chief show that for the quinquennial period from 1997 to 2002, sixty-one cases were filed, that is about twelve cases per year. Among these, about one-third concerned cases of original jurisdiction (from within the Circle and district headquarter township of Rangamati) rather than appeal cases from the headmen of the *mauzas*. No appeal or revisional applications against the aforesaid decisions of the chief are known about.

sanction of the state powers and the logistical support of court and police personnel; (2) the greater amount of time that can be devoted by full-time judicial officers than by part-time traditional leaders; and (3) an absence of bias (no direct interest in outcome of litigation as the judge is from outside that clan/community/society, unlike the *karbari* and headman).

Despite the aforesaid advantages that the government courts may have over the traditional courts, the disadvantages would seem to outweigh these advantages. Moreover, some of the weaknesses in the traditional court system can easily be remedied. Most importantly, the state can easily offer its executive authority to facilitate the traditional courts' judgments or other processes as necessary. In fact, this provision does exist in the CHT Regulation of 1900, although it has seldom been invoked.⁵¹ Also, the problem of bias on the part of the indigenous judicial officials can be remedied through administrative guidelines. In any event, the remedy of judicial review by invoking the legal principal of natural justice would remain available to correct instances of bias.

In accordance with the CHT Regulation of 1900, the Deputy Commissioner has concurrent jurisdiction over all judicial powers of the headmen and chiefs, but only rarely, if ever, has this power been invoked by deputy commissioners since British times. The more common practice is to transfer the matter to the concerned headman or chief if a customary law matter appears before the Deputy Commissioner.⁵² In keeping with the right of self-determination of peoples, and the spirit of strengthened self-government in the Chittagong Hill Tracts, as partly embodied in the Chittagong Hill Tracts Accord of 1997, this concurrent jurisdiction needs to be terminated.

VII. CUSTOMARY PERSONAL LAWS UNDER TRIAL: BALANCING TRADITIONAL VALUES WITH CURRENT NEEDS

There is a popular saying in Bangladesh, and in many other parts of South Asia, that one carries one's personal law wherever one travels. Whilst this may not be true when one crosses international boundaries, it is true of intra-country situations for most parts of the South Asian sub-continent. Thus, the rules of Muslim Bangladeshis and Bengali-speaking Hindus on marriage, inheritance, and related matters are governed by Muslim law and Hindu law, respectively, in all parts of Bangladesh. Both Muslim and Hindu law are now regulated largely by codified law. In the case of the indigenous peoples, however, the personal laws are almost totally regulated by unwritten customs, practices and usages, both in

51. According to the CHT Regulation Rule 40, headmen and chiefs may apply to the Deputy Commissioner if they require assistance to execute their judgments.

52. For example, there was one case in 1997 (Misc. Case No. 1 of 1997 of the *Chakma Raja's Court*) and one in 2002 (Misc. Case No. 4 of 2002 of the *Chakma Raja's Court*), both of which were originally filed in the Court of the Deputy Commissioner but were transferred to the *Chakma Chief's court*, on the orders of the former.

the lowlands and in the CHT.

Although none of the CHT indigenous peoples have written provisions on personal law that could be regarded as a formal code, there are some limited exceptions. For example, the *Bawm* use a set of written rules that have attained a status akin to that of a formal written code, although they do not rule out the applicability of oral custom.⁵³ There are traces of influence of *Mizo* customary law from nearby Mizoram State in India upon some of these principles.

Marma customary law stands out in the CHT because of its provisions on inheritance of immovable property by women. Unlike women from the other indigenous peoples of the region, *Marma* women can inherit land as of right, although not on an equal basis with their men. A similar situation prevails in the case of Muslims in Bangladesh. Although the written code of Burmese Buddhist law has had a strong influence on *Marma* law for many decades, the latter still retains its distinctive identity based on oral traditions.⁵⁴ The *Tanchangya* have started a process of putting into writing their major customary law principles, but this is yet to be completed.⁵⁵ The case of the *Tripuras* is similar, they too are keen to reduce into writing their major customary law principles, whether or not they decide eventually to go for a fully formalized written code or not.⁵⁶

Literature on the customary personal laws of the indigenous peoples of the CHT has been growing steadily over the years, but highly authoritative texts have yet to emerge. A singular exception is a slender volume on *Chakma* law and justice written by a one-time bench officer of the Court of the CHT Deputy Commissioner in the 1970s and reprinted recently.⁵⁷ The strength of this study is its clear references to actual case law. Decisions of previous cases are among the best guides for contentious cases, especially where the subject matter of the two cases are analogous or similar. However, as mentioned above, the case records of the traditional institutions are not always compiled and archived, or stored properly, and there are no compilations or compendiums of the concerned laws in any easily accessible format. Therefore, it is strongly felt by most indigenous peoples today that this institutionalized memory needs to be reduced to writing, as much as possible, and properly archived.

Some of the available works on indigenous law in the CHT provide

53. Interview with Zuam Lian Amlai, President, *Bawm* Social Council, in Rangamati, Bangladesh (Oct. 24, 2003).

54. Interview with Pai Hla Prue Chowdhury, *Mong* Chief, and with Chaw Hla Prue, representative of *Bohmong* Chief, in Rangamati, Bangladesh (Oct. 29, 2003).

55. Interview with Sudatta Bikash Tanchangya, Secretary, Bangladesh *Tanchangya* Welfare Association, in Rangamati, Bangladesh (Oct. 24, 2003).

56. Dendoha Jolai Tripura, *Tripura Prothashiddha Ain o Dondobhi* [Tripura Customary Law and Criminal Law], in TRIPURA SHAMAJIK AIN BISHAYAK KARMASHALA [WORKSHOP ON TRIPURA CUSTOMARY LAW] 33-53 (Arunendu Tripura et al. eds., 2001) (proceedings of a workshop on Tripura Customary Law, organized by *Tripura* Welfare Foundation).

57. DEWAN, *supra* note 38.

reasonably accurate accounts of the substance of the major principles of law, but neither discusses the difficulties with regard to the areas not adequately covered by the concerned rules (the “grey” areas), nor otherwise discusses the difficulties with regard to their application in different socio-cultural and economic contexts.⁵⁸ Thus, there is an acute need for more detailed research into both the principles of law involved and the difficulties with regard to their application on the ground. Similarly, more representative studies on actual cases, including both cases where written records were kept, and cases where written records were not kept (although more challenging), need to be encouraged. Such studies can be quite helpful in guiding the traditional courts and in providing a sound basis for any future legislation.

Quite apart from the actual legal principles and their application, it is also important to develop a sound understanding of the cultural, social, economic, and political changes within the CHT and among its different peoples and their communities. Otherwise, the concerned research may only have limited value, since many of its premises, and consequently, conclusions, would be of only limited applicability in the changing context of CHT society. However, on some matters, such as the patently unjust discrimination against women with regard to existing customary law principles on polygyny and child custody, for example, appropriate legal reforms to outlaw these practices should not await further deliberation.

The most common issues of disputes concerning customary law are elopement, wife battery and divorce, and matters on maintenance, child custody, bride price, marriage expenses, restitution of jewelry, and so forth. Where the disputes concern relatively straight-forward matters like elopement of couples having “prohibitive decree relations” (the man and woman are uncle/aunt and niece/nephew, etc.), or a divorce is justified by clearly oppressive conduct of a habitually drunkard husband, or the intra-spousal dispute concerns relatively minor differences of opinion, for example, the generally known customary law rules are sufficient to guide the dispute-settlement body. Where, however, complicated questions of law or fact are concerned, such as where the eloping couple’s relationship shows both a prohibitive decree relationship and a marriageable type of distant cousinhood, or where the father withholds consent to marriage against the wishes of the community, the institutional oral memory of the traditional court or the community may be insufficient to guide the community.

A. Customary Personal Laws of the Indigenous Peoples

Most indigenous peoples of the CHT follow patrilineal family codes and practice endogamy or marriage within the people or “tribe.” On the other hand,

58. See, e.g., Karunamoy Chakma, *Sudom* (unpublished work on Chakma Customary Law) (on file with author); Tripura, *supra* note 56.

marriages between members of the same clan claiming descent through a common male ancestor is usually forbidden, or allowed only restrictively among most of the CHT indigenous peoples. Exogamy, marriage outside the people or “tribe,” was not allowed in previous times, but is nowadays restrictively allowed where it concerns an inter-indigenous alliance. Marriages with non-indigenous people, especially with those communities with whom there are political or resource-oriented conflicts, are usually strongly discouraged. The few exogamous marriages are largely restricted to urban centers outside the Hill Tracts region. Marriages with foreign people are generally not negatively looked upon as are marriages with lowlander communities, with whom there is a history of conflict. Polyandry, a woman having more than one husband at the same time, is not recognized, but polygyny, a man having more than one wife at the same time, is still practiced by the Buddhist and Hindu groups, although this practice is visibly decreasing. However, polygyny is not tolerated by the Christian peoples. Landed property cannot be inherited by women of almost all of the peoples, except to a limited extent in the case of the *Marma*.⁵⁹

Unlike in northeast India and in northern Bangladesh, where there are a few matrilineal societies in which women alone inherit landed property,⁶⁰ in the CHT, all the indigenous peoples are clearly patrilineal, and in many respects, rather patriarchal as well. However, rights of maintenance of indigenous women are recognized, and women in certain cases of separation or divorce, are entitled to one-time payments or regular payments of maintenance.⁶¹ Indigenous women in the urban areas are becoming increasingly vocal about demands to outlaw polygyny and to achieve equal inheritance and child custody rights for themselves.⁶² Some of these demands are also supported by men from different groups, but the implications of such reform upon trans-indigenous marriages (marriages between indigenous and non-indigenous persons) has divided indigenous society, as discussed in more detail in Section VII.E.2.

59. Susmita Chakma, *Inheritance & Customary Law*, in CHITTAGONG HILL TRACTS REGION DEVELOPMENT PLAN (1998) (Annex to Social Dimension Report).

60. See, e.g., Jeuti Barooah, *Property & Women's Inheritance Rights in the Tribal Areas of the North East*, in CHANGING WOMEN'S STATUS IN INDIA: FOCUS ON THE NORTHEAST 99-113 (Walter Fernandez & Sanjay Barboa eds., 2002).

61. For example, in Misc. Case No. 13 of 2000 of the Court of the *Chakma Raja* (Muri Bala Chakma v. Bidhu Mangal Chakma, 2000), the plaintiff secured a divorce, maintained the custody of her two children and was declared to be entitled to monthly payments of maintenance from her divorced husband.

62. These views have been reiterated by women activists in the CHT at several formal meetings in recent years, including at a meeting to observe a day on *Resistance of Oppression against Women* held at Rangamati on August 24, 2003.

1. Customary Indigenous Personal Laws and Conflict with Other Laws and Systems

In the usual course of things, customary family laws of the different indigenous peoples of the CHT have little reason to come into conflict with other laws or systems, because the region has its own partially autonomous indigenous-majority self-government system that acknowledges indigenous law and jurisprudence. Difficulties can arise, however, in different ways. One such area is where a couple attempts to circumvent the concerned customary rules on marriage and get themselves “married” through other non-traditional means. Another area, although not common, involves marriages between indigenous persons and non-indigenous persons.

2. “Court” Marriages

One of the more contentious social issues facing indigenous society today is the phenomenon that is generally known as “court marriage.” The usual situation involves a runaway couple that elopes and somehow affirms or swears an affidavit to the effect that they are legally married to each other before a government magistrate or notary public in a town or city within the CHT or in neighboring areas without having gone through an act of marriage in accordance with customary law by observing the concerned rites, rituals, and ceremonies. Had the couple actually been married to each other in accordance with their personal law, and then affirmed an affidavit, after having solemnized the marriage in the traditional manner, the matter would not be contentious. The difficulties arise because these so-called marriages are actually not sanctioned by customary law, but many *mauza* headmen and village *karbaries* feel reluctant to interfere in the mistaken belief that they would thereby be violating the law.⁶³ The problem may perhaps be attended to fairly easily, at least within the CHT, through advice or guidance to the magistrates or notaries public concerned, by the concerned authorities to refuse to allow such affidavits without the consent of the concerned indigenous authorities.

3. Conflict of Personal Laws

Conflicts between personal law systems are not very common, because the number of inter-ethnic marriages is still quite small. In the case of inter-indigenous marriages, there is usually little tension or friction. In most cases, the

63. Many such affidavits or so-called “court marriages” have been declared illegal and the couple separated by judgments of the circle chiefs. In Misc. Case 1 of 2001 of the Court of the *Chakma Raja*, the purported second marriage of the defendant husband conducted through an affidavit was declared null and void upon the prayer of the first wife whose marriage was conducted in accordance with customary law.

woman seems to adopt the personal law, customs and traditions of her husband. This also happens in the case of some marriages between indigenous and non-indigenous persons. The more complicated cases are those that involve religious conversion. For example, if a CHT indigenous person (usually a Buddhist, Christian, Hindu, or “animist”) chooses to convert to Islam, then it is usually seen that Muslim personal law is applied to that person, specifically regarding inheritance and last rites in the case of death. Conversion of an indigenous person to Islam usually takes place only in the context of a marriage with a Muslim. The possible nature of the conflict of laws and systems is perhaps best illustrated by the case of *Hasina Begum v. Shyamoli Chakma (Hasina)*.⁶⁴

In the *Hasina* case, after the death of a *Chakma* government employee, a succession certificate was issued in favor of the widow (also a *Chakma*), son, and daughter. The aforesaid successors obtained part of the late employee’s gratuities and benefits from the department concerned, but before they could draw the main pension payments their claim was contested by a Muslim Bengali woman who declared herself as the late employee’s widow and claimed his pension and other gratuities. She also claimed that the late employee had converted to Islam before she married him. Thus, there were two women claiming succession rights as a widow of the late employee, one under *Chakma* customary law and the other under Muslim Law.

Joymangal Chakma v. Mukhtar Hossain (1953), another well-known cross-ethnic couple case, involved a Bengali man and a *Chakma* woman, which ended up in the Court of the *Chakma* Chief. Unfortunately, the aftermath of the verdict – which decreed that the woman return to her father in accordance with *Chakma* law – erupted into violence and tension between the Bengali and *Chakma* communities in Rangamati.⁶⁵ Until today, such marriages across the ethnic and religious divide have largely been denied social legitimacy, whatever might be their status under law (which may also be unclear), by both the communities concerned. However, they do happen occasionally.

4. Accommodating Customary Law in the Bangladeshi Legal System

The Bangladeshi polity generally has very little “space” for the political aspirations and basic human rights of its indigenous peoples and other minorities. This is also the case with regard to the indigenous peoples’ custom-based land and natural resource rights. The situation is, however, somewhat different where it concerns their customary family law or personal laws. This may be so largely because the Bangladeshi legal system already has had for centuries past, and continues to have, a pluralistic approach to personal laws of its entire population.

64. *Hasina Begum v. Shyamoli Chakma* [2001] Civil Suit No. 75 (Chittagong, Bangl.).

65. *Joymangal Chakma v. Mukhtar Hossain* [1953] (Ct. of the *Chakma* Raja, Bangl.). For details, see ROY, *supra* note 11, at 141-47.

Before, during, and after the British period, personal laws of the different peoples were administered in accordance with different principles based largely, but not exclusively, on religion. Thus, the South Asian legal systems recognized different personal laws for the Muslims (Muslim Law) and for the Hindus (Hindu Law) in India, Pakistan, and Bangladesh. The accommodation of the separate personal laws of the indigenous peoples, frequently under the rubric of “tribal customary law,” did not oblige the South Asian states, including Bangladesh, to “stretch” themselves too much. These laws were seen to neither threaten the integrity of the existing system nor require the system to create any new “space.” In other ways hardly secular, the Bangladeshi state did not bother too much about the manner in which its indigenous peoples, or other minorities, conducted their marriages, or divided up their properties, and so forth. Presumably, therefore, the Bangladeshi administrative and legal system may be expected to continue to be accommodative of the indigenous peoples’ customary personal laws until such time as it adopts a “uniform family code” for all its peoples, or otherwise feels that these customary laws are a threat to the integrity of the majority groups.⁶⁶

5. Upholding Customary Law in the Supreme Court of Bangladesh

Ever since the British colonial period (1860-1947), only a very small number of disputes concerning the customary personal laws of the indigenous peoples has reached the government revisional courts. This trend continued through the Pakistani period (1947-1971) and after the independence of Bangladesh the numbers diminished even further. In the post-1971 period until the 1997 Accord, the decline was partly also a result of the internal conflict and dispute resolution by the village *panchayats* under the auspices of the JSS, the then underground party of the indigenous people. One of the rare instances where a CHT customary law case reached a higher level court concerned disputed claims

66. Progressive sections of Bangladeshi civil society have been campaigning for many years for the adoption of a “Uniform Family Code” that will apply to all Bangladeshi citizens, irrespective of their ethnic or religious backgrounds, and in which polygyny would be outlawed and women and men would have equal rights with regard to marriage, divorce, maintenance, child rights, inheritance, etc. At present, personal laws for Muslims, Hindus, and most indigenous peoples, tend to be discriminatory against women in varying degrees. Due to the prevalence of religious conservatism, the adoption of such a code as proposed does not seem likely within mainstream Bangladeshi society in the near future. On the contrary, the reform of personal laws of the indigenous peoples of the CHT to bring them in conformity with the current international norms on human rights may be relatively easier. This is because CHT indigenous society, irrespective of its members’ religious affiliations, is not as religiously conservative as its lowlander counterparts. In any case, it has been argued that the imposition of a uniform family code upon the indigenous peoples – without their prior informed consent – may amount to a violation of the self determination rights of the peoples concerned. See Sadeka Halim, *Insecurity of Indigenous Women: A Case From Chittagong Hill Tracts*, in ENSURE THE SECURITY OF INDIGENOUS WOMEN: SOLIDARITY 95-105 (2003).

over the succession to the chiefship of the *Bohmong* Circle between two members of the chief's family. While deciding that the Government's recognition of one member of the family was unlawful for not having been in accordance with the customary laws of the *Bohmong* circle, the Supreme Court declared:

The office of Bohmong Chief is a customary office and both the Government and the Court have to recognize the custom and not to introduce any other criterion or factor that will add to the customary requirements of that office. The High Court Division was manifestly wrong in holding that the office of Bohmong Chief is a political office and that the claimant is nominated by the Government on politico-administrative considerations. This finding is not based on any authority. It is an innovation which is an alien criterion contrary to the established usage and custom of the Bohmong Circle Government will also not deny that the susceptibilities of the tribal people should not be ignored.⁶⁷

The aforesaid decision may be regarded as one of the highest forms of formal recognition of customary indigenous law within the Bangladeshi legal system. It should therefore be regarded as a positive precedent in protecting customary law and used for lobbying and advocacy work. The big question is, of course, whether the Bangladeshi courts, or for that matter, the executive and legislative arms of the government, will be as sympathetic towards customary resource rights as they have been – to an extent – in the case of customary personal laws. Existing trends do not suggest that this likely.

B. An Agenda for Reform: Recognition, Codification, or Both?

Many people in the CHT have called for changes to the system. There are those who feel that the customary law regime should be totally replaced by written laws. On the other hand, there are those who feel that customary law should not be interfered with through legislation, but should be left to the peoples and communities concerned, to be dealt with through traditional methods. Then again, there are those who feel that a partial reform of some of the customary law principles is desirable in order to remove inconsistencies with basic human rights norms as recognized under national and international law. The author is of the opinion that the proposal for partial reform is the one that is likely to draw the strongest support within indigenous society, irrespective of ethnicity, religion, gender, class, and place of residence. The reform of such laws to bring them in conformity with human rights laws is implied in the Draft U.N. Declaration on the

67. Aung Shwe Prue Chowdhury v. Kyaw Sain Prue Chowdhury and Others [1998] 50 DLR (AD) 73, 80, 18 BLD at 41 (Bangl.) (J. Mustafa).

Rights of Indigenous Peoples.⁶⁸ Because the hill district councils and the CHT Regional Council have been formally provided with authority over customary law, any new law should of course be based upon their consent, but it is important that any proposed changes involve substantive consultations with the traditional institutions, and include dialogue with all levels of society and among all concerned peoples.

1. Oral Customary Law v. Total Codification

Customary law based upon oral traditions has the advantage of flexibility, in that local communities may craft their unique multi-dimensional approaches in dealing with personal law disputes and provide remedies to fit the situation. An important consideration is almost always the good of the community over that of the individual.⁶⁹ As is the general trend with customary laws worldwide, practices and usages change as more and more people indulge in, get used to, and accept new ways of doing things. The creation of a walking path through a grassy field or woods is one of the best metaphors describing how customs originate or change. This is usually done gradually, over periods spanning years, decades, and even centuries. For customary law, a century is not a very long period.

However, just as there are examples of gradual changes in customary law, there are also many examples indicating that customary law can adapt over short periods of time as well, such as a decade. For instance, the *Chakmas* relaxed the restrictions on the rules governing marriage between members of the same clan over a decade or two. There are also comparable changes regarding customary rules on natural resource management as well. Provided that the concerned people or community is forward-looking and dynamic, customary law can provide the necessary space for reform over short periods of time. Therefore, some indigenous people feel that the formal and direct recognition of customary

68. Article 32 of the Draft U.N. Declaration on the Rights of Indigenous Peoples reads: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards."

69. On the other hand, extreme cases of violation of individual human rights may also need to be guarded against. Sometimes, inflexible applications of customary law rules may prevent marriages of individuals whose relationship does not clearly fall within the prohibitive decree relations that are forbidden for the people concerned. For example, in the case of *Parul Chakma & Rupa Chakma v. Headman, 383 Khedarmara Mauza & Others* (Misc Case No. 2 of 2003 of the *Chakma* Chief's Court), a runaway couple was wrongly separated and even physically abused on the orders of the village council formed by the *mauza* headman (that also included members of the former *Panchayat*). On appeal, the court declared the marriage valid and criticized the harsh decision of the headman-appointed tribunal as being contrary to both customary law and basic national and international human rights law. Another similar case was that of *Aangochya Kisto Chakma & Sobha Rani Chakma's Case* (Misc. Case No. 8 of 2001 of the *Chakma* Chief's Court).

law, or parts of it, rather than its total replacement by a formalized regime of statute-based (written) laws may actually be the most appropriate development in this regard.

The total replacement of customary law by formalized legislation, at least at this crucial juncture of rapid socio-economic changes within indigenous society, is also fraught with other dangers. For one, this may lead to the erosion of many other strong traditions that protect the cultural integrity of the indigenous peoples. This is all the more relevant in today's age of globalization where cultural traditions from the richer countries and territories are threatening the cultures of peoples and nations with small populations and weak economic systems. This brings us to another major challenge within indigenous society, namely, the difficulties in accommodating the differing, and sometimes conflicting, needs of indigenous society based upon differences of ethnicity, religion, socio-economic class, place of habitation (rural v. urban), and gender, in formalized and written personal laws. Therefore, in some areas, formal reforms based upon the informed consent of the people concerned may be appropriate. In others, it would be better not to interfere with the customary laws, unless a major infringement of basic human rights is involved.

The CHT self-government system is perhaps ideally suited to achieve the desired results without having to face difficulties related to codification, and reform of codified laws, where necessary in the future. This would entail bringing about quasi-formal reform through the traditional institutions initiating councils and conventions, with the formal support of the district and regional councils. This would obviate the necessity of initiating formal enactments by the national parliament. This has the advantage of both keeping avenues open for further reform without following cumbersome procedures, and of respecting the self-determination rights of the indigenous peoples of the region.

2. A Case for Partial Reform

As mentioned above, while the total replacement of customary law with a codified system of personal laws may not be suitable at the present moment, in some areas of law, partial reform is necessary. The best example is for the total abolition of polygyny (i.e., one man having several wives at the same time).⁷⁰ Among some of the Christianized peoples (e.g., *Bawm*, *Lushai*, *Pangkhua*, and part of the *Tripura*), polygyny is already considered to be illegal according to their current practices. Amongst others, such as the *Chakma*, *Tanchangy*, and *Tripura*, who come from Buddhist and Hindu traditions, it survives in a limited manner, but is strongly discouraged. It is believed that the *Tripura* are also in favor of

70. Polygyny is to be distinguished from polygamy, which means many marriages. Thus, polygyny would include both polygamy (a system allowing a man to have many wives at the same time) and polyandry (a system allowing a woman to have many husbands at the same time).

outlawing it. Similarly, partial legal reform to outlaw gender-based discrimination, such as in divorce or child custody, are also most likely to be similarly welcomed, although it will require strong efforts for necessary mobilization, and eventual reform.⁷¹

In comparison, a far more difficult area of reform would be in the sphere of inheritance rights. At the moment, apart from the *Marma*, women from the other indigenous peoples of the CHT do not inherit property as of right. Even in the case of the *Marma*, the women inherit less than their men, as in the case of Muslim women. In the case of some urban *Chakma*, some widows, and a fewer number of daughters, are now inheriting landed property due to the special wish of the late estate holder, or due to the consent of the sons. This, however, is not the same thing as inheriting as of right. Most indigenous peoples, including the *Chakma*, seem to be divided on this issue, and while a large number of indigenous women in urban areas seek equal inheritance rights, supported by a small number of men from progressive political and socio-cultural groups, a large number of indigenous men, irrespective of their ethnic backgrounds, appear to be opposed to any such proposed legal reform. The resistance against such reform is based largely upon the assumption that lands belonging to the indigenous peoples would be lost due to marriages of indigenous women with non-indigenous men. This fear is perhaps partly based upon, or strengthened by, strong social opposition from Bengali people to permit marriages of their women with men outside their community, and, in the case of Bengali Muslims, to not accept inheritance of property of a Muslim by non-Muslims. Unfortunately, it is difficult to assess whether there is a reasonable basis behind the fear of loss of indigenous lands consequent upon such marriages. In any case, the author is of the opinion that these discriminatory laws need to be done away with. Research may be conducted to look into the matter, and if indeed the likelihood of the loss of indigenous lands through such marriages is a distinct possibility, this may be dealt with through land laws, rather than by preventing women from inheriting land as of right. This would otherwise be contrary to universally acknowledged human rights standards, including the Convention on the Elimination of Discrimination against Women (CEDAW).

3. Internal Challenges to Customary Law

Quite apart from the aforesaid challenges to customary personal laws, there are other challenges that need to be met by indigenous society in order to protect its cultural rights and integrity. Among these, the most difficult are those that come from within indigenous society itself. This is especially the case in the

71. This opinion is based upon numerous interviews with leaders of the indigenous peoples over the last decade and more, and which are too many to name. See also Sadeka Halim, *Human Rights & the Indigenous Women: A Case Study from CHT*, in STATE OF HUMAN RIGHTS IN BANGLADESH WOMEN'S PERSPECTIVE 131-49 (2002).

urban and peri-urban indigenous settlements where the influence of customary social rules based upon oral traditions, ritual, and ceremony are relatively weaker than in the rural areas. In more and more cases, the former practices of communities responding collectively to challenges facing them are giving in to responses by families and individuals.⁷² This is both weakening traditional social ties and making the youth more susceptible to cultural influences coming from outside, while providing no opportunity to them to learn about and practice their traditional indigenous culture.

Custom-oriented values espoused by the traditional leaders can hardly match the extra-indigenous cultural influences in terms of packaging, style, fashion, and entertainment value. In other words, to most indigenous youth, especially in the urban areas, many social rules have little value, leading to a growing number of runaway marriages between relations that are forbidden by customary law. This writer does not feel that such external influences should, or could, be blocked out, and is therefore, not suggesting any steps to attempt to do so. However, attempts can still be made to attract indigenous youth towards their own culture by promoting indigenous values in a proactive manner, and if necessary, by trying to portray such values in attractive and entertaining ways. Of course, this will only be possible, or desirable, in limited situations, and one must also guard that such efforts are not so reductionist that the essential matters are lost in the process of packaging.

Most urban indigenous people today do not observe the traditional rites and rituals with regard to ancestor worship, nature worship, and similar matters. Similarly, many among them also do not scrupulously follow the traditional rituals concerning marriage ceremonies. Does that mean that the concerned marriages are void according to indigenous customary law? Are those rituals merely a small part of a ceremony to give added legitimacy to the occasion, or does their non-observance deny total legitimacy to such ostensible act of marriage? While many members of the traditional school of village shamans – who, according to custom preside over certain indigenous marriage ceremonies – may disagree, most of such marriages have been socially accepted by the community concerned, except where the couple were within the prohibitive decree relationship of a close kind (e.g., the man was an uncle of the woman). This is of course the common sense way out of a situation. Where couples indulging in such irregular “marriages” have been living together for many years and borne children, who in turn have given birth to children of their own, there would be serious practical difficulties with regard to further marriage alliances with such families, or with regard to inheritance. In such cases, where society has largely refrained from doing anything substantive to prevent such alliances or to promptly bring them to justice, it is also conceivably immoral for society to raise any questions about the matter after a long time has

72. Raja Devasish Roy, *Occupations and Economy in Transition: A Case Study of the Chittagong Hill Tracts*, in *TRADITIONAL OCCUPATIONS OF INDIGENOUS AND TRIBAL PEOPLES*, 106-07 (ILO 2000).

passed.⁷³

Today, hundreds of indigenous couples are living normal lives without having gone through fully traditional marriages, and it would be practically difficult to suggest that these couples are not duly married to each other. A more practical, and perhaps sound, perspective would be to view these as isolated exceptions to the rule, and take measures to discourage occurrences in the future. Moreover, it may be necessary to distinguish between those rituals or other formalities that are essential, and those that are merely recommended, rather than obligatory. Many have asked that a system of registration be introduced, with the *mauza* headman acting as a registrar. Some of these matters may easily be dealt with through a participatory consultative mechanism involving the headmen and chiefs, the district and regional councils, and other members of the peoples concerned. As suggested earlier, the most reasonable approach would be to go for partial reform and only formalize those areas where customary law may be out of step with basic human rights standards. The rest is best left to be dealt with by the peoples concerned in the time-tested traditional manner.

VIII. CUSTOMARY RESOURCE RIGHTS AND CONFLICTS WITH STATE LAW AND POLICY AND PRIVATE INTERESTS

Unlike indigenous peoples' customary laws with regard to their family matters, which have by and large not been directly interfered with by national laws and state authorities, the legal status of indigenous peoples' customary laws with regard to lands and other natural resources is far more contested. The fact that most of these rights have never been defined by law or ancillary administrative regulations, orders, or guidelines has complicated the issue further. Thus, for all practical purposes, customary land and forest rights are usually enjoyed only where, and to the extent, they do not conflict with state law.

Customary resource rights of the indigenous peoples of the CHT need to be understood in the context of the prevailing legal and juridical system in Bangladesh, at least as far as their enjoyment through legal mechanisms is concerned. Thus, we need an understanding of the origins of the Bangladeshi juridical system in general and its land and forest laws in particular, which draw upon both the English common law system and the 1972 Constitution of Bangladesh. Ever since the formal annexation of the CHT into British Bengal in the 19th century, the two legal regimes of customary land law and formalized state laws on lands and forests have coexisted, but not without tension. This conflict is not surprising as the two systems originate from almost diametrically different

73. This is also the view of Raja Tridiv Roy, former *Chakma* Chief, and currently Federal Minister, Government of Pakistan, expressed to this writer in an interview conducted in 1997. Interview with Raja Tridiv Roy, Federal Minister, Government of Pakistan (1997).

worldviews and traditions; one oriented around communal and largely subsistence-oriented resource management patterns, and the other seeking to facilitate intensive, individually owned and exchange-oriented resource-use patterns. History is replete with examples of customary rights being subordinated to state or private interests. Needless to mention, the political clout and economic muscle of the private landowners almost always ensures that this is how the conflict is eventually “resolved.” The situation in the CHT also falls within this general pattern, although the region did not traditionally have a large or powerful land-owning class.

The CHT Accord of 1997 and the legal reforms thereafter have provided a strong impetus to the customary resource rights of the indigenous peoples. These developments, therefore, are somewhat out of step with the accelerated marketization and privatization of the CHT economy (an inevitable consequence of resumption of peace and regular activities like trade, commerce, investment, and so forth), which favor exchange relations rather than subsistence-oriented arrangements. Therefore, in the wake of the ongoing peace process, the indigenous peoples will have to struggle even harder to retain and sustain a substantive niche for their customary resource rights regime within the CHT and national juridical and economic systems. The challenge will be all the greater because experience in the Bangladeshi political and administrative system in recent times shows that there is almost always a wide gap between law and practice. The non-implementation of crucial aspects of the CHT Accord of 1997, and even laws passed in consequence thereof (e.g., on land and police matters) is a case in point.⁷⁴ Thus, a crucial lesson of the CHT case is that formal or near-formal recognition of customary resource rights needs to be backed by sound implementation mechanisms.

A. Customary Resource Rights and Conflict between Traditional Institutions and District Administration Authorities

The *mauza* headmen of the CHT have an important role in the regulation of customary resource rights. The headmen, and indirectly, the *karbaries* (through delegation by the headmen), and the chiefs (through their supervisory authority over the headmen and their advisory prerogatives in government) exercise authority over the management and administration of customarily held lands such

74. According to section 64 of the Hill District Council Acts of 1989, no lands may be settled, leased out, mortgaged, compulsorily acquired, or otherwise transferred, without the consent of the hill district council concerned. In practice, however, this provision has not been followed in the case of acquisition of lands for their re-categorisation as reserved forests. See INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS (IWGIA), THE INDIGENOUS WORLD, 315-16 (2002). Another test case will be the proposed acquisition of 9,560 acres of lands within Ruma sub-district of Bandarban district for the Ruma “Cantonment” (army garrison headquarters), which was reportedly advised against by the previous CHT Affairs minister, Kalpa Ranjan Chakma, MP.

as forest, swidden, and grazing commons. However, this authority is concurrently exercised along with state land and revenue administration officials at the district level. The authority of the latter is far more clearly defined than that of the traditional authorities. Thus, the authority of government officials over untitled and unrecorded lands is generally regarded in governmental circles to be of a higher status than that of the indigenous institutions. In contrast, if the letter and spirit of the Hill District Council Acts of 1989 had been followed, these councils would have had the primary say in land administration within the region, and the indigenous peoples' customary land rights would arguably have been far more secure than they are today. At least, this is the likely scenario regarding the indigenous majority in the district and regional councils, who would arguably have been far more susceptible to pressure from the indigenous peoples than the district civil bureaucracy.

The differences in the nature of the authority wielded on lands and other natural resources by traditional indigenous institutions on the one hand, and state bureaucratic officials on the other, is perhaps best reflected in the manner of regulation of swidden (*jum*) cultivation. The overall authority to control, regulate, or prohibit swidden cultivation within an administrative district is *expressly* vested upon the central government's representative in the hill districts, the Deputy Commissioner (Rule 41, CHT Regulation, 1900). In practice, the temporary allocation of swidden lands takes place in accordance with customary law and local practices and usages, and is done under the authority of the headmen. Therefore, the fact that swidden lands will be allocated by the headmen and cultivated on a rotational basis by the indigenous peoples is not expressly mentioned in the rules, but *implicitly* acknowledged by the CHT's legal system, among others, by having the traditional authorities continue to have a direct role in land and natural resource management and administration.

1. Different Forms of Customary Resource Rights

In addition to rights over swidden (*jum*) cultivation, other important customary resource rights of indigenous peoples in the CHT include those over grazing lands, water bodies, and forests. Some of these rights – including those concerning water bodies and hunting – are not directly acknowledged by legislation. Others are indirectly acknowledged, such as rights over grazing commons and grasslands, as in the case of the swidden lands mentioned above.

Then again, there are customary resource rights that are directly acknowledged by formal legislation. Among these are the right to “occupy” homestead land in rural areas (Rule 50, CHT Regulation) and the right to use timber, bamboo, and other “minor” forest produce for *bona fide* domestic purposes (Rule 41A, CHT Regulation of 1900; Forest Act of 1927 through CHT Forest Transit Rules, 1973), both of which are reserved exclusively for indigenous people. The table reproduced in Appendix E hereto contains a list of some of these rights, along with the identities of the right holders, the regulating law

and/or custom, if any, and the authority or institution that usually regulates the exercise of these rights. The following section describes how some of these customary rights have been de-recognized, ignored, or violated for the interests of the state.

2. State Laws, Settlers, and Private Owners threaten Customary Resource Rights

Despite various legal amendments to the land laws of the region starting from the period of British rule, through to the Pakistani period and after Bangladesh's independence in 1971, the pattern of land and forest management in the CHT has essentially remained somewhat "colonialist," in the sense that the major policy benefits have accrued not to the local population, but to the state. For example, a few major amendments to the CHT land laws in the 1970s facilitated the acquisition of long-term leasehold rights over large expanses of CHT lands for industrial estates and rubber plantations (in practice, almost exclusively held non-indigenous and non-resident people) while lowering the ceiling on the area of lands that could be acquired – without any lease or license fee – by indigenous and other local farmers.⁷⁵ Hardly any indigenous people could afford the rent or fee charged, which may not have been considered large for non-resident industrialists and entrepreneurs, but was a small fortune for most indigenous persons, and well beyond their reach. Thus, large areas of customarily and collectively held lands were lost to outsiders, almost overnight.

Some of these indigenous commons were also converted into privately held plots by indigenous persons themselves. While indigenous society in the CHT has never had a very large landowning class, over the years, more and more relatively well-to-do indigenous people have acquired private title over small homesteads and orchards. In other cases, the lands have come to be treated as private estates, irrespective of the fact that no formal title is held by the "owner-in-possession." Regarded together, it is a large part of the CHT land surface. This growing regime of privately held lands, combined with population dislocation has added to the already huge pressure upon customarily held swidden, forest, and grazing commons perpetuated by state forestry and settler in-migration.

Conflicts between indigenous people and the state, between indigenous people and private interests, and between rural indigenous farmers and wealthier city-dwelling indigenous landowners are, of course, not confined to regions such as the CHT alone, but are common in large parts of the 'developing' world. The threats posed by large-scale private corporate investors in logging, mining, or other commercially lucrative natural resource exploitation ventures are still not felt directly or acutely in the CHT, but the situation may change soon with the expected advent of drilling operations for natural gas, and perhaps even oil. If and when that happens, customary rights over swidden lands will be seriously

75. See in particular, amendment to Rule 34 in 1971 and again in 1979.

threatened, because swidden farming necessarily involves fire, and fire is not tolerated near gas or oil deposits.

B. The State's Forest Fiefdom and the Erosion of Forest, Grazing, and Swidden Commons

In the 1870s, hardly a decade after the formal annexation of the CHT into British Bengal, the colonial government took over the direct management of almost a quarter of the CHT consisting of dense forest lands and re-categorized them as “reserved forests,” effectively outlawing all rights of access to and use of the resources of such areas, other than by the Forest Department. Only limited access was allowed to the concerned forest dwelling and forest-adjacent communities, and that too was allowed as mere “privileges or “concessions.”⁷⁶ Until today, the inhabitants of these areas continue to be deprived of basic health care, education, and other needs, besides being harassed by baseless criminal prosecutions accusing them of theft of forest produce.⁷⁷ Similarly, many of the swidden commons of the indigenous peoples outside of these reserved areas were also regarded by the state as “forest” lands, and the indigenous peoples’ rights thereupon were at times regarded as “usufructs,” rather than as ownership rights.⁷⁸

This process of converting customarily held lands into “reserved forests” – which may quite rightly be regarded as the state’s “forest fiefdoms” – was to be continued by the Pakistani government (1947-1971) and by the Government of Bangladesh from independence in 1971 until today. Government notifications purporting to increase the area of these forests were issued and remain valid today. Wherever such “reserved” forests are declared, the government denies all claims based upon customary law, effectively stepping into the shoes of the colonial Forest Department, a stance that is quite ironic, since the Bangladeshi state was born out of an armed struggle for independence and has from the start declared its faith in principles of emancipating peasants, workers, women and its “backward sections of citizens” from all forms of exploitation.⁷⁹ This process of reservation has been vehemently resisted by the local people.⁸⁰ Even from the perspective of economic and environmental considerations, such “statist” approaches are hardly viable. In fact, the CHT indigenous peoples have a rich tradition of maintaining and protecting their naturally grown or regenerated village forest commons that would put to shame many a state forester with his formal knowledge on forestry and biodiversity.⁸¹ However, for reasons of the narrow self-interest of corrupt

76. Roy & Halim, *supra* note 15, at 9.

77. *See, e.g.*, Roy & Gain, *supra* note 15, at 21-23.

78. Roy, *supra* note 15, at 54.

79. *See, especially*, CONST. BANGLADESH arts. 14, 19, 26-29.

80. For more details, see Roy, *supra* note 15, at 179; *see also* DAILY JUGANTAR, Aug. 30, 2003.

81. For a sustainable model of forestry based upon indigenous traditional systems in the CHT, see Raja Devasish Roy, *Valuing Village Commons in Forestry: A Case from the*

government officials, among others, the forestry policies of the country remain top-heavy, impracticable, and contrary to basic human rights laws and ecological considerations.⁸²

1. Settlers' Titles v. Customary Rights

Apart from land dispossession caused by the Kaptai Dam, forestry projects, and land loss to commercial non-resident lessees, indigenous people in the CHT have also lost large tracts of their lands through fraudulent and coercive acts by non-indigenous settlers. Some 250,000 to 450,000 non-indigenous settlers were brought into the region through a government sponsored program that was started in 1979 and concluded in the early 1980s as a "counter-insurgency" measure and, some say, to make the indigenous people a minority in their ancestral homeland.⁸³

A large part of the lands on which the population transferees were resettled included both titled lands of indigenous people and large tracts that were owned by them in accordance with customary law. During the resettlement period (1979-1984), the district civil administration, prompted by the state military, chose to regard these lands in the same manner as state-owned lands in the lowland districts that the district collectorate was free to lease out in accordance with established criteria. However, the situation in the CHT was factually and legally quite otherwise. Therefore, quite rightly, the indigenous people considered these lands to belong to them according to customary law and the law of prescription, as they have been occupying and using these lands uninterruptedly for many generations, which may be regarded in the legal context as "since time immemorial."⁸⁴

Chittagong Hill Tracts, in CHITTAGONG HILL TRACTS: STATE OF ENVIRONMENT 13-43 (Forum of Environmental Journalists in Bangladesh, Quamrul Islam Chowdhury ed., 2001).

82. *Id.* See also, Roy & Halim, *supra* note 15; Roy & Gain, *supra* note 15.

83. For details of this population transfer program, see CHITTAGONG HILL TRACTS COMMISSION, LIFE IS NOT OURS: LAND AND HUMAN RIGHTS OF THE INDIGENOUS PEOPLES OF THE CHITTAGONG HILL TRACT 58-78 (1991); Raja Devasish Roy, *The Population Transfer Programme of 1980s and the Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts*, in LIVING ON THE EDGE: ESSAYS ON THE CHITTAGONG HILL TRACTS 167-208 (South Asia Forum for Human Rights, Subir Bhaumik et al. eds., 1997); Roy, *supra* note 15.

84. The principle of a people living within a territory since "time immemorial" has been explained thus in the context of the Indigenous Peoples Rights Act of 1997 of the Philippines or "Republic Act No. 8371" (section 3(p)): "A period as far back as memory can go, certain indigenous peoples are known to have occupied, possessed in the concept of owner, and utilised a defined territory devolved to them by operation of customary law or inherited from their ancestors, in accordance with their customs and traditions". According to the Swedish Code of Land Law, "It is immemorial right, when one has had some real estate or right for such a long time in undisputed possession and drawn benefit and utilized it that no one remembers or can in truth know how his forefathers or he from whom the rights were acquired first came to get them." Roy, *supra* note 15, at 54.

At the time of the population transfer program (1979-1984), the law necessitating the district councils' prior consent regarding land allotments had not been passed, but the CHT Regulation of 1900, read in conjunction with the customary laws and usages of the CHT, nevertheless obliged the government to respect native customary ownership rights and to consult the chiefs and headmen regarding their use and occupation. The government did not do this. The program led to much violence and the eviction of indigenous people, who are yet to be rehabilitated in their original homes and lands.⁸⁵ The 1997 Accord provides for the rehabilitation of these displaced people, among others, by returning their dispossessed lands to them through adjudication by a specially constituted *Land Disputes Resolution Commission* for the CHT. Although this commission has been formed, disputes about its work methods have prevented the start of its work. Meanwhile, the dispossessed indigenous people continue their miserable existence in makeshift settlements in remote forest and hill areas, while the government-sponsored settlers enjoy government rations and other state benefits.⁸⁶ The aforesaid situation illustrates the point that customary resource rights of indigenous peoples may be severely threatened by discriminatory government policies.

2. The Individual v. the Community

A major challenge in protecting the customary land rights of the indigenous peoples is the process of privatization that is leading to an increase in private landholdings of individuals – whether of indigenous origin or otherwise – on former commons used by rural villagers consecutively for swidden cultivation, or concurrently and collectively as forest, grazing, or grassland commons. The privatization process has produced mixed results within indigenous society. On the one hand, it has enabled many local farmers to obtain security of tenure and livelihood. On the other hand, the area of collectively used lands in the CHT is constantly shrinking, severing the access of the poorer sections of the rural indigenous population to much-needed bamboo, timber, thatch grass, and foodstuff. The recent “structural adjustments” to make the Bangladeshi economy a more integral part of the free market system, as espoused by the World Bank and its former Breton Woods partners, is further hastening the pace of privatization in the country, including in the CHT. Any long-term measures that seek to protect the customary land rights of the indigenous peoples of the CHT need to account adequately for this phenomenon. Writing elsewhere about the social impact of privatization and occupational changes in the CHT, which are closely related to the decline of indigenous people's customary resource rights regimes, the author

85. For the land rights dimensions of this program, see Roy, *supra* note 83.

86. Jyotirindra Bodhipriyo Larma, *The CHT and Its Solution*, Paper Presented at the Regional Training Program to Enhance the Conflict Prevention and Peace-Building Capacities of Indigenous Peoples' Representatives of the Asia-Pacific (Apr. 7-12, 2003).

has observed thus:

One of the most important consequences of changing occupational patterns has been the widening of the gap between the rich and the poor. One hundred years ago, there was little economic disparity and social distance between and among indigenous people. This is no longer the case. Class distinctions have become heightened. Along with this, there have been significant changes in the way that villages and other social groups deal with their everyday challenges. Traditionally, such challenges were always met by villagers from a community platform on a collective basis. Even today, in the rural areas, united community responses to such events as natural calamities, epidemics, misfortunes of impoverished families and so forth, are not uncommon, but it is not difficult to see that with the growing trend of privatisation, individual needs and wants are clearly dominating over those of the group. For example, the Chakma people have the custom of *Maleya*, in accordance with which, able-bodied villagers – usually men – assist their neighbours with such things as building, house repairs, crop harvesting, and so on. This custom would usually have been evoked by disadvantaged people, such as widows or others with an insufficient number of family workers, but its practice is no longer common.⁸⁷

IX. THE STATUS OF CUSTOMARY LAW ON NATURAL RESOURCE RIGHTS UNDER REGIONAL, NATIONAL, AND INTERNATIONAL LAW

The relative degree of formal state-recognition of indigenous peoples' customary resource rights, in particular, and of their juridical rights and systems, in general, may vary from country to country and even from region to region in different countries. Looking at the situation in neighboring south and southeast Asia, one can see a wide spectrum of situations, ranging from very strong to very weak recognition and protection. Among the strongest forms of such recognition are those in the Philippines,⁸⁸ India (especially Mizoram),⁸⁹ and Sabah⁹⁰ and

87. Roy, *supra* note 72, at 106.

88. See, e.g., David A. Daoas, *The Rights of Cultural Communities in the Philippines*, in VINES THAT WON'T BIND: INDIGENOUS PEOPLES IN ASIA 97-107 (International Work Group for Indigenous Affairs (IWGIA) Doc. No. 80, Christian Erni ed., 1996); Indigenous Peoples Rights Act of 1997 ("Republic Act No. 837") (Philippines).

89. Ratnakar Bhengra, *Indigenous Peoples' Juridical Rights and Their Relations to the State in India*, in VINES THAT WON'T BIND: INDIGENOUS PEOPLES IN ASIA 119-50

Sarawak⁹¹ – states of East Malaysia. Among the weakest examples are the situations of the *Orang Asli* in west Malaysia,⁹² that of the “hill tribes” in northeast Thailand⁹³ and those of the Garo (Mandi) and Khasi peoples within northern Bangladesh.⁹⁴

The status of customary resource rights in the CHT has been, and still is, hotly contested between indigenous peoples on the one hand, and state agencies and private corporate bodies on the other. In some cases, the rights are acknowledged by state law although there are difficulties with regard to their actual enjoyment. In other cases, there are disputes as to the status of the right concerned, or the question of its legal validity altogether. In comparison to the situations mentioned above, the author would put the situation of the CHT somewhere in between the systems that have strong recognition and protection and those that do not. It will be apparent from the examples cited above, that there may be situations of strong recognition of indigenous juridical systems and resource rights even in a formally “unitary” system, such as in the Philippines. On the other hand, the federal structure of a state does not necessarily guarantee either

(International Work Group for Indigenous Affairs (IWGIA) Doc. No. 80, Christian Erni ed., 1996). For the Mizoram case, see C. Nunthera, *Peace Accords as Instruments of Conflict Transformation: Arrangements that Work and Arrangements that Don't* (Mizo Accord, 1986, Assam Accord, 1985, Bodo Accord, 1993), Paper Presented at the Workshop on “Dimensions, Dynamics and Transformation of Resource Conflicts between Indigenous Peoples and Settlers in Frontier Regions of South and Southeast Asia” (Sept. 25-29, 2002). (Article 371-G of the Constitution of India provides the following: “Special provision with respect to the State of Mizoram – Notwithstanding anything in this Constitution, – (a) no Act of Parliament in respect of: (i) religious or social practices of the Mizos, (ii) Mizo customary law and procedure, (iii) administration of civil and criminal justice involving decisions according to Mizo customary law, (iv) ownership and transfer of land, shall apply to the State of Mizoram unless the Legislative Assembly of the State of Mizoram by a resolution so decides . . .”).

90. Jannie Lasimbang, *The Juridical Rights of Indigenous Peoples and Their Relation to the State and the Non-Indigenous Peoples: The Case of Sabah*, in *VINES THAT WON'T BIND: INDIGENOUS PEOPLES IN ASIA* 109-14 (International Work Group for Indigenous Affairs (IWGIA) Doc. No. 80, Christian Erni ed., 1996). For special constitutional safeguards for the “natives” of Sabah, see Articles 161, 161A, 161B, and 161E of the Federal Constitution of Malaysia.

91. See, e.g., the *Land Code of Sarawak* and the constitutional provisions referred to in note 89 *supra*.

92. See, e.g., COLIN NICHOLAS, *THE ORANG ASLI AND THE CONTEST FOR RESOURCES: INDIGENOUS POLITICS, DEVELOPMENT AND IDENTITY IN PENINSULAR MALAYSIA* (International Working Group for Indigenous Affairs (IWGIA) 2000).

93. Chayan Vaddhanuphuti, *The Present Situation of the Indigenous Peoples in Thailand*, in *VINES THAT WON'T BIND: INDIGENOUS PEOPLES IN ASIA* 173-78 (International Work Group for Indigenous Affairs (IWGIA) Doc. No. 80, Christian Erni ed., 1996).

94. Sanjeeb Drong, *Indigenous People in Bangladesh: Why Eco Park on Khasi and Garo Ancestral Land?* in *CONSTITUTIONAL RECOGNITION FOR THE INDIGENOUS PEOPLES: SOLIDARITY* 2001 37-40 (Bangladesh Indigenous Peoples Forum, Tanay Dewan ed., 2001).

the accommodation of legal or juridical pluralism or the political “space” required to tolerate such diversity, as is borne out by the case of the *Orang Asli* in Peninsular Malaysia within the federation of Malaysia.

The formal “unitary” character of the Bangladeshi state is not necessarily a hindrance towards the desired protection of the juridical, resource, and other rights of the indigenous peoples of the CHT, as long as the required political and humanitarian “space” can be created. Thus, there is room to argue that the relative strength or weakness of such recognition and protection depends not so much on the formal constitutional structure of the state – whether it is a unitary or a federal state – but its practice of accommodating cultural pluralism, including a spirit of tolerance towards the rights of the disadvantaged, including indigenous peoples. It is argued here that the Bangladeshi legal and juridical system can withstand the challenge of practicing political and juridical pluralism to absorb and accommodate the legitimate customary personal law and resource rights of its indigenous peoples, both in the CHT and elsewhere in the country.

A. Formally Recognized Customary Rights

We have seen that some resource rights of the indigenous people have been formally acknowledged by written laws, such as on homestead land and on “minor” forest produce.⁹⁵ These rights are backed by the full sanction of the state. Many indigenous people regard these as examples of the highest form of protection of such rights. At a more generic level, customary resource rights have also been acknowledged more directly by formal legislation in recent years, as a direct consequence of the CHT Accord of 1997. The most recent law in this regard is the Chittagong Hill Tracts Regulation (Amendment) Act of 2003 (Act No. 38 of 2003), which, while declaring the extent of jurisdiction to be exercised by the soon-to-be appointed civil judges in the CHT, refers to the “existing laws, customs and usages of the district concerned.” Another recent, and even more direct, reference to customary laws was through the CHT Land Disputes Resolution Commission Act of 2001 that obliges the CHT Land Disputes Resolution Commission to act “in accordance with the laws, usages and practices of the region,” thereby formally and unequivocally reiterating the full legal validity of customary law, including resource rights based upon such laws.

B. Indirectly Acknowledged Resource Rights

The aforesaid laws should no doubt act as a boost in raising the general status of customary resource rights, but where it concerns customary resource rights over forest, swidden, and grazing commons, many areas of conflict would still remain. Government officials have generally tended to regard these as mere “privileges,” which may be revoked at will by the state. This is especially the

95. See *supra* Part VIII.B.

case for the reserved forests (covering 24% of the CHT) that are administered centrally by the Ministry of Environment and Forest. The use of the word “resumption” to denote acquisition of lands (e.g., hitherto allocated to indigenous villagers for their homesteads) is an example of such a statist interpretation of the status of customary rights over untitled lands in the CHT.⁹⁶ Indigenous rights activists, including lawyers, have argued, on the other hand, that these are rights and not mere revocable privileges. Had they been mere revocable privileges or licenses, they point out, the laws would have clearly stipulated how such privileges or licenses may be granted, as in the case of licenses for timber extraction in state-owned forests, for example. However, a more compelling basis for the exercise of these rights is to be found in the national constitution of Bangladesh, which regards all state property as that belonging to the “people,” which certainly cannot exclude the people of the area concerned, including the people of the CHT. Moreover, it is also important to look at the way the concerned lands are being utilized in practice.

C. Customary Right or Revocable Privilege?⁹⁷

Considering the manner in which swidden cultivation, for example, is practiced and regulated in the areas outside the reserved forests, it is difficult to regard it as anything less than a right, however qualified or conditional its manner of exercise is. In accordance with the “mother law” of the CHT, the CHT Regulation of 1900 – which stipulates the extent and manner of the application of other laws to the region – the formal authority to regulate swidden (*jum*) cultivation is vested upon the central government’s district officer (Deputy Commissioner). However, in practice, other than receiving a part of the annual tax for swidden cultivation, the state seems to have little to do with the regulation of this practice. The indigenous peoples’ physical control and occupation of these lands is quite strong, and state officials seldom visit these lands, which are largely un-surveyed and un-demarcated. Therefore, the most practical way to regard the matter may be to consider that all entities, from the state to the indigenous peoples, have rights over the same piece of land, although the nature and extent of such rights may be different and competing and may be exercised concurrently or consecutively, individually or collectively, as the case might be.

We have seen that rights over lands categorized as “forests” are generally more contested between indigenous peoples and state agencies than other categories of commons. Such a situation is not unique to the CHT. Similar conflicting traditions were, and still are seen in many forested regions of south Asia, especially since the advent of the British in the 19th century and the adoption of extensive forest-related laws and policies. Although customary rights in the CHT and elsewhere in south Asia were freely exercised in the pre-colonial

96. CHT Regulation Rule 50 (1900).

97. A large part of this discussion is based upon Roy, *supra* note 22.

period, they began to erode with the evolution of the forest laws between the 19th to the early 20th centuries. A study on forest-related laws in Asia and the Pacific, while studying the evolution of the forest laws of south Asia, has described this process of erosion in the following manner: The government realized that it would not be feasible to simply eliminate all customary uses of forest resources, so the [Forest] Act established procedures for recognizing certain pre-existing rights. These often cumbersome procedures gave forestry officials wide discretion. As a result, the degree of community usage that was tolerated tended to depend on the value of the resources to outsiders and the capacity of communities to resist territorial encroachment. A careful assessment of local customs and needs, or the carrying capacity of the forest, rarely entered into the decision.

In practice, where local forest usage was allowed under the Forest Act, the government usually proffered little legal protection. Use was instead deemed to be a “privilege” granted by a benevolent sovereign – who could, of course, easily reduce, revoke, or revise it. The working assumption was that whatever rights or access communities had to forest resources ultimately depended on the goodwill of the colonial regime. Above all, government forest policy denied the legitimacy of community – based rules and institutions.⁹⁸

Thus, gradually, as described above, the indigenous peoples’ customary rights came to be regarded as mere privileges that could be revoked by the state at will, in the CHT and elsewhere in other parts of south Asia.⁹⁹ Such assertions have been backed by such colonial-era legislation as the (Indian) Forest Act of 1927, which still applies, in modified form, in India, Pakistan, and Bangladesh. We do not, however, live within a colony any more, but within an independent country with a constitution that regards all state property as “belonging to the people.” Thus, these colonialist laws of the pre-constitution era need to be re-interpreted in the light of the national constitution, which unequivocally declares that all laws that are contrary to the fundamental rights of citizens will be void to the extent of such inconsistency.¹⁰⁰ It is submitted that an interpretation that denied total legitimacy to the customary resource over forest lands by reducing them to mere revocable privileges is tantamount to discrimination and denial of property rights of the kind that is forbidden by the Constitution of Bangladesh.

While interpreting the relative status of competing rights and the nature of the legal status of the right holders, such as in this case, it is also pertinent to look into the background of the political and juridical system concerned. In this context, it may be recalled that the CHT region and its peoples have always enjoyed a special status under law. For example, in 1822 – between the period of

98. OWEN K. LYNCH & KIRK TALBOTT, *BALANCING ACTS: COMMUNITY-BASED FOREST MANAGEMENT AND NATIONAL LAW IN ASIA AND THE PACIFIC* (World Resources Inst. 1995).

99. *Id.* See also, Halim, *supra* note 71, at 320-21.

100. CONST. BANGLADESH art. 26. Important fundamental rights of citizens that are especially pertinent here are the right to equal protection of law, freedom from discrimination, and the right to property. *Id.* arts. 27, 28, 42.

the “tributarisation” of the CHT (1785 onwards) and its formal annexation (1860) – the indigenous people of the region were regarded by the British themselves as a “tributaries” only and not as ordinary “British subjects” as in other provinces or territories that were fully annexed or integrated into the colonies, such as lowland Bengal.¹⁰¹ After the CHT finally become fully annexed to the British empire in 1860, and formal laws provided for the administration of the region – including the Act XXII of 1860, and the CHT Regulation of 1900 that replaced it – the colonial state did purport to arrogate to itself the supreme authority over the CHT territory, to be succeeded by the nation states of Pakistan (1947-1971) and Bangladesh (since 1971). That, however, does not necessarily mean that all existing customary and other land-related rights were extinguished. Quite apart from the fact that no laws may now be contrary to the equal rights clause of the national constitution that forbids discrimination, it is important to bear in mind that the CHT Regulation of 1900 – which functions in the nature of a constitutional instrument and sets the parameters for the governance of the region – is essentially a regulatory law. The regulation sets down some principles for administrative exigencies. It does not, in any way, either explicitly or implicitly, deny legitimacy to the rights of the people of the territory, who may be regarded as having lived thereon “since time immemorial.”¹⁰² In this light, the status of customary rights vis-à-vis the CHT Regulation may be regarded thus:

[The CHT Regulation] was not intended to be a declaratory instrument that sought to identify, define and declare various customary rights and privileges but a regulatory law that sought to regulate already-existing rights In the case of the special land rights of the indigenous peoples of the CHT, these rights are not theirs because the [CHT Regulation] says so, but because [the indigenous people] have been exercising these rights uninterruptedly for so long. The [Regulation] merely contains the provisions relating to the control and regulation of already existing rights.¹⁰³

Therefore, there is a strong case for arguing that the indigenous peoples’ customary practices over land have full legal validity as rights, notwithstanding that the government exercises the privilege of qualifying the general manner in which such practices may be continued. Moreover, the CHT Regulation clearly stipulates (at section 4) that Acts of law that are included in the Schedule to the Regulation (including the Forest Act of 1927 and other laws that affect existing

101. ISHAQ, *supra* note 14, at 28.

102. *See supra* note 83.

103. Raja Devasish Roy, *Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts*, in *LAND: A JOURNAL OF THE PRACTITIONERS, DEVELOPMENT AND RESEARCH ACTIVITISTS VOL. I, NO. 1 11-25* (Shamsul Huda ed., 1994).

customary resource rights) will only apply to the CHT “so far as they are not inconsistent with the Regulation or the Rules for the time being in force.” Therefore, since the CHT Regulation and some of its rules explicitly or impliedly recognize various customary land-use practices of the indigenous peoples, their system of chiefship, and their personal laws, among other things, there is a strong case for arguing that the formalized CHT land laws are valid only to the extent that they are not inconsistent with the CHT Regulation of 1900, read with the relevant customary laws of the CHT indigenous peoples save where those are proven to have never existed or to have been extinguished. Such a position is not inconsistent with the basic principles of Bangladeshi law that recognize customary law as legal and valid until the contrary is proved, and regards state property as that belonging to the people, including the people of different regions within the country and thus the indigenous people of the CHT.

D. International Law and Customary Rights

As a member of the United Nations and as a member of the international community, Bangladesh is bound through the operation of international law and other international norms to follow and adhere to some minimum standards with regard to the basic rights and fundamental freedoms of all its citizens, including those of indigenous origin. In fact, a number of these instruments, or substantive parts of them, deal directly with discrimination, and the rights and freedoms of indigenous peoples and minorities. In addition, the government of Bangladesh is directly bound by its obligations under international law for treaties it is directly a party to. Among these is the ILO’s Convention on Indigenous and Tribal Populations, 1957 (No. 107).¹⁰⁴ In addition, the Convention on Biological Diversity is also relevant to the CHT indigenous peoples. This convention contains provisions dealing with indigenous peoples’ resource rights, although its relevant term of reference is “indigenous and local communities embodying traditional lifestyles,” which is somewhat reductionist in its scope.¹⁰⁵

Other international treaties ratified by Bangladesh that have a direct bearing upon indigenous peoples’ rights are the International Convention on the Elimination of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). In addition, a number of instruments that deals specifically with the rights of minorities may also be invoked to cover relevant situations of indigenous peoples, although indigenous peoples have generally not

104. Neighboring countries Pakistan and India are also party to this Convention, as are Argentina, Brazil and Panama. It is rumoured that India is considering the ratification of the less integrationist and more progressive ILO Convention on Indigenous and Tribal Peoples (Convention No. 169 of 1989). No Asian country has ratified ILO Convention 169 to date. The few countries that ratified it are from Northern Europe (including the Netherlands, Norway, Denmark and Finland) and in South America.

105. Convention on Biological Diversity, art. 8(j).

felt comfortable to promote their rights under the umbrella of “minority rights.”¹⁰⁶ Above all, general provisions advocating a non-discriminatory approach towards the enjoyment of basic human rights by all peoples and groups – including indigenous peoples – such as those contained in the International Covenant on Economic, Social, and Cultural Rights and in the International Covenant on the Elimination of Racial Discrimination, and a number of specific provisions in the Draft U.N. Declaration on the Rights of Indigenous Peoples, are especially pertinent to this issue.¹⁰⁷

Despite the applicability of numerous human rights instruments to Bangladesh – including both declarations and treaties – indigenous peoples in Bangladesh, like many other subjects of human rights, have not been able to exercise or enjoy the concerned rights and freedoms beyond a minimal level. A number of factors are responsible for this. This author recognises three main reasons: (1) the procedural shortcomings and weaknesses within international and national human rights implementation processes; (2) financial constraints and disadvantages with regard to access to necessary information on the part of indigenous peoples and other such groups; and (3) the organizational limitations of groups seeking to enforce the concerned rights, including indigenous peoples. One or other of the three factors mentioned above, or at times, all of the aforesaid factors, have impeded the enforcement of the rights concerned. The following discussion on some specific human rights instruments illustrates this point further.

E. ILO Convention No. 107

ILO Convention No. 107 has a number of strong provisions that seeks to protect the customary land rights and other economic, social, and cultural rights of indigenous (and “tribal”) peoples and populations. In particular, it obliges the state party to recognize customary land rights and protect indigenous or tribal people where land alienation takes place due to their ignorance of law. In this

106. Indigenous peoples have generally avoided invoking their rights as members of a minority group for a number of reasons, despite the fact that there is nothing in international law to suggest that the rights of indigenous peoples, or members thereof, will be prejudiced, just because indigenous peoples or members thereof invoke instruments relating to “minorities.” This is largely because of the weaknesses and gaps within the formal international human rights processes with regard to the implementation or enforcement of human rights that have induced human rights workers and activists to invoke implementation and enforcement strategies that are somewhat “political” in nature. Thus, reductionistically, it may make sense to invoke a particular human rights instrument that applies to “minorities” to protect the rights of indigenous individuals in specific situations, but in the larger context, it is feared that this may lead to political damage the indigenous peoples’ struggle for the direct recognition and acknowledgement of some of their most important collective rights like self-determination, and on self-government, lands, and resources.

107. *See, e.g.*, Draft U.N. Declaration on the Rights of Indigenous Peoples, arts. 9, 12-17, 21, 25-29, 31, 32.

respect, it is interesting to note that the CHT Accord of 1997, and legislation consequent thereupon, contain strong references to customary resource rights and customary personal laws of the indigenous peoples. It is natural, therefore, to ask whether the ILO Convention and its monitoring mechanism facilitated such inclusion. It is known that the JSS had invoked this convention in their pre-accord negotiations, and the fact that Bangladesh is party to this Convention, which it ratified in 1972, may well have influenced the government of Bangladesh into being reasonably receptive towards customary law matters. It is quite another thing, however, to consider whether the convention monitoring system, including the requests for information posed by the ILO Committee of Experts (that monitors the convention obligations) to the government of Bangladesh also had positive influence on the latter. For reasons discussed later, the author does not think that the ILO monitoring system had any impact of that nature. The inclusion of customary law provisions in the CHT Accord, like other matters wrangled out after tough negotiations, should rightly be regarded as the fruit of the CHT indigenous peoples' long-time struggle for self-determination, cultural integrity, and recognition of their custom-based juridical rights, among other things.

The reporting system of ILO Convention No. 107 obliges the government of Bangladesh to respond to the queries of the organisation. This is believed to lead to some pressure upon the government, but the extent of such pressure is not known. A basic analysis of recent ILO Reports on Bangladesh for this convention (for 1996, 1998, 2001) indicates that the government of Bangladesh has substantively managed to circumvent its reporting obligations under this convention by either repeating its earlier statements or evading the specific requests for information from the ILO Committee of Experts altogether.¹⁰⁸ The subject matters of these queries included the role of the hill district councils in land administration and other general measures on customary land rights (articles 11-14) and the general situation of indigenous peoples in areas outside the CHT. Specific questions related to customary land rights, which are one of the strongest pillars of the Convention, seem to be patently absent. The last report of the Government was due in 2003. This needs to be monitored closely by the indigenous peoples of Bangladesh, including those in the lowlands of the country, whose situation is sometimes even more neglected by the government.

The ability of the government of Bangladesh to continue such evasive conduct could be a direct result of the concerned ILO experts' lack of detailed knowledge of the CHT ground situation, or gaps in the ILO's system of investigation, inquiry, and reporting, or both. ILO Convention No. 107 and its more progressive successor, Convention No. 169, do not have any mechanism for a direct manner of lodging complaints by the subjects of the convention, namely, the indigenous-tribal people of the ratifying state. Had indigenous people been able to participate directly in the regular ILO decision-making meetings (for

108. The Government of Bangladesh was expected to report to the Committee of Experts in 2003.

example, the International Labor Conferences), this shortcoming might have been at least partly addressed. However, under the existing system, there is no scope for such participation as the concerned conferences are restricted to representatives of governments, employers, and trades unions, in which indigenous peoples may or may not be included. Unfortunately, the records suggest that very few indigenous people are indeed members of these three groups (usually groups from Central and South America), and even where they are, they have no opportunity to participate independently.

While such tripartite arrangements may be suitable for matters of labor law and related matters, this author is of the opinion that they are far from adequate or appropriate to deal with matters concerning indigenous peoples' rights. Indigenous peoples need to be directly represented at the ILO regarding violations of provisions of this Convention, as in the case of the later and more progressive Convention No. 169. At the first two sessions of the U.N. Permanent Forum on Indigenous Issues in 2002 and 2003, a number of indigenous participants raised this question of direct participation when the subject of the ILO was under discussion. Unfortunately, however, no representative of the organisation commented upon the issue.

Through the establishment of the U.N. Permanent Forum on Indigenous Issues in 2001, the United Nations (primarily an organization of independent states) has demonstrated that it can, and has, opened itself up to non-state entities at as high a level as is not specifically prohibited by the U.N. Charter. Half of the sixteen members of the Permanent Forum are indigenous persons themselves, representing indigenous constituencies, if not peoples, including the current chairperson of the forum. In the circumstances, it is only fair and just that the ILO, which is a specialized U.N. agency, should also open up in an appropriate manner following the example of its parent body. Needless to say, this should be so for both Conventions Nos. 107 and 169. Pending substantive change, the ILO should at the very least amend its communications and complaints procedures to facilitate the formal transmission of written communications to the ILO, and otherwise to enable indigenous peoples to have a significant role in monitoring the organization's investigative and reporting mechanisms on Conventions Nos. 107 and 169.

Given the lack of progress in the U.N. Working Group on the Draft Declaration on the Rights of Indigenous Peoples, it is difficult to predict when, if ever, there will be a Declaration on Indigenous Peoples' rights adopted by the United Nations. However, even if a declaration is adopted in the next few years, until and unless such declaration is transformed into a binding treaty, it will have moral force, but no binding authority in countries. In such circumstances, the ILO Conventions Nos. 107 and 169 will remain as the only legally binding treaties on the subject of indigenous peoples. It is therefore of added importance to consider much-needed reforms to the ILO system as discussed above. Perhaps the most immediate step would be to arrange a series of dialogues on the issue under the auspices of the U.N. Permanent Forum on Indigenous Issues and/or the U.N.

Working Group on Indigenous Populations.

F. The Convention on Biological Diversity

The Convention on Biological Diversity, which developed in tandem with the process leading to the U.N. Conference on Environment and Development (UNCED) in Rio, in 1992, deals primarily with the issue of conserving and protecting biological diversity. However, two of its provisions have a direct bearing upon the resource and other rights of indigenous peoples. These are Article 8(j), which deals with the protection of relevant traditional knowledge systems of indigenous peoples and local communities and the equitable sharing of their benefits, and Article 10(c), which attempts to protect and encourage the appropriate traditional use of biological resources. These are cited below:

Article 8(j):

Each Contracting Party shall, as far as possible and as appropriate: . . . (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Article 10(c)

Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

In fact, two working groups have been formed under the aegis of the Convention, one on Article 8(j) and the other on “Access and Benefit Sharing” and both have potential for facilitating the promotion of indigenous peoples’ customary resource rights, provided, of course, that the same are regarded as conducive towards the protection of biological diversity. Although imaginative use of this convention could be of benefit to indigenous peoples, such as in the CHT, as one more powerful tool to protect their customary resource rights, the limitations of the convention need to be borne in mind. For one, some of the most vital elements, of the convention have been subjected to the overriding prerogatives of the states parties and their national laws that usually facilitate exploitation of the concerned resources for the benefit of their majority population and/or private interest, at the expense of the rights and needs of the marginalized

indigenous peoples and needs of biodiversity and ecology.¹⁰⁹ Moreover, the attempted fossilization and reduction of indigenous peoples into “communities” embodying “traditional lifestyles” also has negative implications for the application of the convention to many communities and groups within indigenous peoples that are at risk of being excluded from the ambit of the convention.¹¹⁰

G. Other International Human Rights Processes

Among the different international human rights processes that are relevant for indigenous peoples in Bangladesh are the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), and the *Convention on the Elimination of Racial Discrimination* (CERD). In particular, the ICCPR and the ICESCR – together known as the “human rights covenants” – are of crucial importance to indigenous peoples. Bangladesh has ratified these two covenants recently.¹¹¹ It is important for indigenous peoples to monitor the aforesaid processes and to attempt to engage in dialogue on the concerned issues with the Bangladesh Government prior to the submission of the reports when they are next due.

The common article 1 of both of these covenants reiterates that the right of self-determination applies to all peoples (and impliedly, indigenous peoples as well), and further clarifies an important resource-related right, which states:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Although the interpretation generally given to the term “peoples” under these covenants is fairly conservative and restrictive, this right is of fundamental importance to indigenous peoples.

Closely related is Article 25 of the Economic, Social, and Cultural Rights covenant, which states: “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.” Thus, the fundamental ownership right of all

109. For a critical discussion of the Convention from an indigenous rights perspective, see, e.g., INTERNATIONAL ALLIANCE OF THE INDIGENOUS-TRIBAL PEOPLES OF THE TROPICAL FORESTS (IAITPTF), *INDIGENOUS PEOPLES, FOREST AND BIODIVERSITY* 112, 114-15 (1996).

110. *Id.* at 116-17.

111. The Government of Bangladesh acceded to the International Covenant on Economic, Social and Cultural Rights on Oct. 5, 1998 and its first report was due on June 30, 2000. Accession to the International Covenant on Civil and Political Rights happened on Oct. 6, 2000, and the first report was due on Dec. 6, 2001.

peoples to their lands and natural resources is affirmed by the covenant. The aforesaid provisions are particularly relevant in the context of the CHT as this article impliedly protects customary lands, including forests, that are used in traditional ways for hunting, trapping, and gathering or as forests, swidden (*jum*), or grazing lands. Thus, this article would restrict arbitrary acts of land alienation that threaten the subsistence base of the people concerned.

Discrimination based upon racial or religious backgrounds is a common ill suffered by indigenous peoples in Bangladesh. In a recent incident of arson perpetrated by non-indigenous settlers, more than three hundred indigenous people's houses in the Mahalchari sub-district of the region were affected, an incident in which non-indigenous state security forces are also alleged to have been involved.¹¹² Demands for an independent enquiry into the incident have been ignored. Similarly, indigenous people alleged discriminatory acts on the part of the government when it recently purported to stop the grant of rations to indigenous returnee refugees while continuing rations in the case of government-sponsored non-indigenous settlers.¹¹³ The CERD Committee, and a U.N. "Special Rapporteur on Religious Intolerance" who visited the CHT some years back, have criticized the Bangladesh Government for discriminatory acts of government servants. The aforesaid avenues need to be utilised more effectively, even though individual complaints may not be lodged in the CERD process.

H. The Future U.N. Declaration on Indigenous Peoples' Rights

The adoption of a U.N. Declaration on the Rights of Indigenous Peoples has been under formal deliberation within the U.N. system ever since Professor Erica-Irene Daes, the then chairperson of the U.N. Working Group on Indigenous Populations, tabled a working paper on a Draft Universal Declaration on Indigenous Rights at the sixth session of the Working Group in 1988.¹¹⁴ In 1993, the Working Group adopted a draft, in collaboration with a number of able and respected members of indigenous peoples and organizations from different parts

112. DAILY JUGANTAR, Aug. 27-31, 2003; *see also*, DAILY PRATHOM ALO, Oct. 19, 2003.

113. DAILY PRATHOM ALO, Oct. 19, 2003. At present, civil and criminal justice is administered by district civil administration ("civil servant") officials, and not judicial officers under the Ministry of Justice, as in the plains. Customary laws of the indigenous peoples are administered, primarily by chiefs and headmen as courts of first instance, and by civil administration officials, and the Supreme Court, on appeal or revision as appropriate. Under the changed system, the major change will be with regard to the vesting of authority upon judicial and not civil administration officers to try cases in civil and criminal courts, excluding customary law courts of the headmen and chiefs. In the future, these judicial officers will be deputized by the Ministry of Justice, who are usually trained judges, and not by the ministry of establishment ("civil servant" bureaucrats).

114. U.N. Draft Declaration on the Rights of Indigenous Peoples, 114 U.N. Doc. E/CN.4/Sub.2/1988/25 (1988).

of the world. Some of these indigenous participants attending the relevant meetings found the draft to be too weak, while others regarded it as the “lowest common denominator” of international standards on indigenous peoples’ rights that was acceptable to them. In 1994, this draft was adopted by the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (now known as the Sub-Commission on Human Rights), and submitted to the U.N. Commission on Human Rights. The Commission, in turn, set up a special “open-ended” Working Group to deliberate on the draft in 1995. The 9th session of this Working Group took place in the U.N. office in Geneva in September 2003. At the conclusion of the session, no visible progress seems to have been made beyond the provisional adoption of three articles some years ago.

Given the financial constraints within the U.N. system, and the strong resistance from a number of powerful countries towards the adoption of a declaration with strong provisions on such collective rights as self-determination, land and resources, cultural identity, and self-identification, the fate of this process is unclear. It is to be hoped, however, that representatives of indigenous peoples and progressive governments can find a way out of this impasse and adopt a declaration within the next few years, if not within 2004, as was hoped and expected. This will, of course, entail an extension of the mandate of the concerned working group, and indigenous peoples and their well-wishers would do well to start actively lobbying towards this end, since the few recalcitrant governments that are opposed to a strong declaration could otherwise invoke financial, time, and other constraints to prevent the birth of this declaration before it even reaches the Commission on Human Rights after adoption by the special Working Group. If and when the declaration is finally adopted, and provided no major changes are made to the current draft to weaken it further, customary rights of indigenous peoples will have a clearer and more unequivocal acknowledgement under international law, and hopefully, go beyond the trend set by ILO Conventions Nos. 107 and 169.

Numerous articles of the Draft Declaration have a direct bearing upon the customary rights of indigenous peoples. The most important among these articles is the right of self-determination, including, but not limited to, autonomy and self-government (articles 3, 31, 32). The draft also contains provisions on personal laws and juridical systems of indigenous peoples, and on indigenous peoples’ custom-oriented land and resource rights. Two of the most important provisions that are directly pertinent to the subject of this study – on personal laws and customary resource rights – are reproduced below:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights

standards (Article 33).¹¹⁵

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights (Article 26).

Unfortunately, the aforesaid articles, which concern some of the most vital and essential safeguard measures on indigenous peoples' resource rights and juridical systems, have met stiff resistance from a number of governments that wish to subject these rights to their considerably lower national standards. Such an exercise would defeat the entire purpose of having an internationally proclaimed declaration with aspirational values that went beyond narrow and parochial domestic considerations. Similar prejudicial views have been expressed in the case of the right to restitution of alienated lands, or fair compensation where restitution is not possible (DDRIP, article 27), and the freedom of indigenous peoples to decide their own development priorities on their lands and territories (articles 28 and 30). An understanding between these recalcitrant governments and indigenous peoples on these issues remains one of the biggest challenges facing the Working Group on the Draft Declaration.

I. International Customary Law on Indigenous Peoples' Rights

There is now a body of law, which many call "customary international law," pertaining to various issues of international concern, including general principles on indigenous peoples' rights, that is gaining growing support and moral, political, and juridical legitimacy at the international level. Some of these principles have been developed in the context of deliberations of international human rights treaty bodies or regional human rights courts and other judicial or quasi-judicial bodies having supra-national jurisdiction, or have evolved in the context of the standard-setting mechanisms within the U.N. system. Some have even arisen in the context of environment and development-related instruments

115. Article 33, Draft U.N. Declaration on the Rights of Indigenous Peoples as agreed upon by the members of the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The provisions of this article are similar to those in Article 6(1)(C) of ILO Convention No. 169. However, article 33 of the Draft Declaration subjects these rights to "internationally recognised human rights standards," while the ILO article subjects them to national legal standards as well.

and processes.

Among the most important of these principles are those that stress the close attachment of indigenous peoples to their land, which was perhaps first formulated in the context of the ILO Convention No. 107 but developed further in the pre- and post-Rio processes on environment and development, and strengthened by such authoritative studies on indigenous peoples as those by Professor Erica-Irene Daes¹¹⁶ and Professor Martinez Cobo.¹¹⁷ Similarly, there is the principle of “prior informed consent,” which was strengthened by the work of the World Commission on Dams, and is now regarded as a basic principle in relation to development, self-determination, and indigenous lands and territories. One may easily see many basic elements of this principle repeated in various articles on land in the Draft Declaration. Another important development is the principle of “ancestral domain,” which recognizes the inherent rights of indigenous peoples to their ancestral homeland. A recent expression of this principle is to be found in the Indigenous Peoples Rights Act of 1997 of the Philippines.¹¹⁸

Following from the aforesaid principles, and also the provisions of the existing draft of the proposed Declaration on the Rights of Indigenous Peoples, a good body of “soft” customary international law is now developing with regard to resource rights of indigenous peoples. Some of these developments have been influenced by court cases in national and international contexts. One of the best known of these is the *Mabo* case in Australia, which overturned the infamous doctrine of *terra nullius* that was invented by the colonists to deny the land and territorial claims of the *Aborigines*, *Mer Islanders*, *Torres Strait Islanders*, and other indigenous peoples of Australia to their ancestral domain.¹¹⁹ A comparable development, *Kayano et al v. Hokkaido Expropriation Committee (The Nibutani Dam Decision)*, a decision by the District Court of Sapporo in Japan, provided formal recognition to the Ainu as an indigenous people of Japan, and recognized their ancestral land rights while declaring that the construction of the Nibutani

116. Erica I. Daes, *Indigenous Peoples and Their Relationships to Land*, Indian Law Resource Center (2000), available at <http://www.indianlaw.org/body-un-land-rights-study.htm>.

117. Jose Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

118. Republic Act No. 8371. The Act defines “ancestral domains” as “all areas generally belonging to indigenous peoples comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by indigenous peoples, by themselves or through their ancestors, communally or individually since time immemorial.” A recent decision of the District Court of Sapporo in Japan has provided formal recognition to the Ainu as an indigenous peoples of Japan with customary land rights that cannot be ignored by the Government of Japan. While not as strong as in the Philippines, this decision is a landmark development for the Ainu who have long suffered from discrimination and land alienation.

119. *Mabo v. Queensland* [1992] 175 CLR 1 (Bangl.).

Dam within Sapporo district in Hokkaido was illegal.¹²⁰ While not as strong as in the Philippines, this decision is a landmark development for the Ainu who have long suffered from discrimination and land alienation. Another landmark supranational level court ruling in recent years is the case of *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua* in the Inter-American Court of Human Rights, which upheld the land rights of the Mayagna community's traditional land rights in accordance with their customary legal regime, highlighting the "communitarian" tradition and the material, spiritual, and cultural dimensions of its land rights.¹²¹

X. MEETING THE CHALLENGES

The protection of the customary laws of the indigenous peoples of the CHT needs to be understood in the broader context of the many challenges faced by them in protecting their cultural integrity and basic human rights. Like many other indigenous peoples from subsistence-oriented swidden farming societies facing rapid integration or assimilation into modern majoritarian state systems, in order to retain their basic cultural ethos as distinct peoples, the indigenous peoples of the CHT will need to struggle hard to defend their basic rights, including their customary laws, by making the best possible use of legal and political avenues open to them. It is up to the concerned peoples themselves to decide what is the best way to defend their rights, and the means may vary from country to country and from time to time. However, the author feels that the most viable means of such defence for the CHT indigenous peoples is through peaceful means. In this light, attention to the following five broad areas is considered especially vital. These are: (1) the revival of meaningful political and fiscal autonomy, including over juridical and land-related matters; (2) the prevention or reduction of racial and religious discrimination; (3) organizational strengthening and strategic and limited legal reforms to meet the changing needs of present-day indigenous society; (4) the prevention and reduction of gender-based discrimination; and (5) finding common ground with state actors and other existing and potential allies to take coordinated steps on matters that may not be directly related to the rights of indigenous peoples, but indirectly contribute towards their human development and strategic needs. All of the above five are connected in various ways and their inter-connectedness needs to be borne in mind to guide further action.

120. Judgment of the Sapporo District Court, Civil Decision No. 3, issued March 27, 1997, 1598 Hanrei Jiho 33; 938 Hanrei Times 75, 38 International Legal Materials 394 (1999); see also <http://www.asil.org/malevin.html>.

121. Inter-Am. Ct. H.R., *Caso de la Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, Sentencia de 31 de agosto de 2001.

A. Revival of Autonomy

The first matter is the meaningful revival of autonomy. This is required to attempt to reverse the historical process of colonization, land alienation, and socio-economic marginalization that has continued from the days of British colonization onwards. This will call for long-term strategies to negotiate with the Government of Bangladesh to bring forth further devolution in the spirit of the CHT Accord of 1997, including the demilitarisation of the region, transfer of land administration authority to the hill district councils, the just resolution of land disputes by the CHT Land Commission, and the rehabilitation of the internally displaced indigenous people. In achieving this, the indigenous peoples will need to build meaningful partnerships with not just the “progressive” section of Bangladeshi society, but with mainstream Bangladeshi society. This may entail the proactive promotion of indigenous issues within mainstream society, where appropriate with some “packaging,” even if this is somewhat reductionist in the short run. Of course, the indigenous peoples will first need to resolve their own inner differences and conflicts, along party, ideological, ethnic, and gender lines or at least reduce and contain them.

B. Reducing Discrimination

The second major challenge is to reduce discrimination against the indigenous peoples on the part of non-indigenous politicians, civil servants, and “mainstream” civil society. Without this, the enjoyment of basic human rights will remain out of reach for most indigenous peoples and members thereof. In some respects, this is perhaps even more difficult than achieving formal self-government rights, as the post-accord CHT situation clearly demonstrates. Therefore, in some areas, it may be prudent to invest a greater quantity of time, effort, and energy for long term sensitization of general Bangladeshi society through reforms in the education curricula and changes in the pattern of media coverage, in alliance with others, than to attempt to change the attitudes of a limited number of political leaders and government officials. Of course, both are necessary, but given limitations of fiscal and human resources, it is perhaps best to concentrate more on long term macro-level changes rather than short term micro-level changes.

C. Strengthening Human Resources

The third major challenge is to develop the indigenous peoples’ human resources. In comparison to inhabitants of most other neighbouring regions, the indigenous population of the CHT has attained reasonable progress in education over the past few decades despite acute poverty, political unrest, and limited state subsidies. The advances, however, have not been uniform in terms of ethnicity and gender. The members of the peoples with small populations, and those living

in more remote areas, have had relatively less progress than others. These gaps need to be narrowed. The relatively well to do and better off groups need to go out of their way to help the weaker and more disadvantaged groups. The status quo is not only morally wrong, but if such disparities remain or sharpen further, discontent too will rise, and reactionary anti-indigenous political groups will continue to divide and rule indigenous society through the old colonial tactic of *Divide et Impera*.

Intra-indigenous political rivalries that have recently spilled out into violence need to be settled. Unless and until the indigenous peoples are able to make some short cuts with regard to general and technical education, they will not be able to protect their basic rights. Indigenous society in the CHT therefore needs to be truly united so that it can put pressure on the Bangladesh Government through constitutional and peaceful means to implement the 1997 Accord in full. The indigenous peoples need a large number of well-educated, dedicated, hard-working, and efficient activists to lobby for their rights within the region, in the national capital, and in the international arena. On the whole, the indigenous people of the CHT seem to have fewer social and religious barriers against new ideas and novel ways of doing things than their counterparts in the lowlands. This cultural heritage needs to be taken advantage of.

The indigenous peoples of the CHT can be justly proud of their age-old traditions of consensual democracy and the good of the collective before the individual. These need to be optimally utilized in strengthening their organizational strategies and tactics. However, the indigenous peoples of the CHT need to realize that the growing integration of their region's economy into the national and world economy will most likely continue at about the same pace, if not faster, in the very near future. The same goes for the process of privatization of lands. If they are to sustain a strong voice in the governance of the region, the indigenous people will need to increase their economic clout. They have to learn market-oriented trades and professions that they had traditionally found themselves averse to. Otherwise, outsiders will continue to dominate the region's economy, and consequently, its politics as well.

In this difficult struggle ahead, indigenous society in the CHT will have to build up its organizational strength and take stock of what it already has in terms of legal, fiscal, and human resources, and mobilize it in an optimal manner. However, it is important to remember that, in the long run, however they might try, the indigenous peoples of the region will be unable to maintain a large number of their cultural traditions, including those on resource rights and personal law. This is both because of external factors and changes they themselves have made or will engineer out of choice or force of circumstances, as mentioned earlier. They will, therefore, have to be choosy. They need to provide a strong emphasis upon some of their most essential customary laws, such as their rules on marriage, divorce, child custody, and maintenance rights in the case of personal laws, and the rules on sustainable use of swidden and forest lands in the case of their resource rights. In the case of personal laws, limited reform for such areas as

discussed above (in section 7.5.2) is unlikely to be resisted by the state. The challenge here will be to build consensus within indigenous society, wherever possible.

D. Compendium of Customary Laws and Quasi-Formal Reforms

One of the best ways to preserve the existing body of indigenous customary laws and rules is to compile the same into compendia or other forms of formal and informal publications in easily comprehensible and available formats. Other combinations of quasi-formal codification through the traditional institutions, in association with the hill district councils and the CHT Regional Council, could also be explored. If the problem of gender-discriminatory laws can be adequately addressed through the above-mentioned mechanisms, formalized legislation through the national parliament or other state organs at the national level may not be necessary.

E. Gender

Apart from a few exceptions, indigenous peoples' struggles for self-determination have in most cases either totally bypassed gender considerations or de-prioritised them with a vague idea of somehow addressing them at some undefined future time. Consequently, the adoption, refinement and implementation of strategies and tactics to eliminate gender discrimination within their society and to combat external threats to the rights of their women have constantly been postponed on numerous grounds. The situation in the CHT is no exception. Although the self-determination struggle in the CHT over the past two decades has given much higher attention to the rights and needs of indigenous women than previously, the focus was nevertheless inadequate. This was what was felt by a female autonomy activist who disappeared and was never heard from again, allegedly a victim of state security forces. Things have not improved much since her sad disappearance half a decade ago. This woman was Kalpana Chakma, an indigenous college student from a small village community that was displaced by the Kaptai Dam in 1960, whose name has since become legendary in Bangladesh as a source of inspiration for all who believe in self-determination and human rights.¹²²

Women of the Chittagong Hill Tracts, particularly indigenous women, continue to face discrimination, both from the majority community, and from their own people. The customary personal laws and the land laws both discriminate against women. The situation is the same regarding representation of women in the leadership structures of the CHT, both in the traditional system and in the

122. See, e.g., Meghna Guhathakurta, *Overcoming Otherness and Building Trust: The Kalpana Chakma Case*, in *LIVING ON THE EDGE: ESSAYS FROM THE CHITTAGONG HILL TRACTS* 109-26 (South Asia Forum for Human Rights, Subir Bhaumik et al. eds., 1997).

elected local and regional government bodies, especially in the former. Thus, reforms are needed to ensure adequate representation in both systems, to remove discriminatory inheritance and other personal laws, and to ensure that women are always part of judicial councils, especially when matters of domestic disputes are being heard. Some of these reforms may be facilitated through legislation by the national parliament, but some may also be brought about through deliberations of the traditional institutions in conjunction with the district and regional councils. Without facilitating such reforms as suggested above, indigenous peoples in the CHT will not be able to defend themselves successfully against external onslaughts upon their identity and their rights. In such circumstances, the exercise of self-determination will remain reduced and incomplete.

F. Finding Common Ground

Despite the many ideological and other differences that the CHT indigenous peoples might have with the government of the day, and with other existing and potential development partners, they need to find common ground with the latter, not by compromising their principles, but by working together, at least in some areas that help the indigenous people achieve sustainable and equitable social and economic progress. This is also applicable to many other countries where indigenous peoples live, especially in developing countries, that is, of course, if a government is not too oppressive or undemocratic. In the case of the latter, there is of course, no moral or strategic compunction to continue a dialogue. Where, however, the situation is otherwise, dialogue needs to continue. Without socio-economic progress or even effective negotiations with governments and others, meaningful autonomy will remain as elusive as ever. This is because the absence of secure livelihoods, basic healthcare, access to education and other amenities are more than likely to render political or social work for the indigenous peoples' rights ineffective to a large degree. In such circumstances, customary law will become weaker and weaker, as will many of those traditions, usages and practices that give true meaning to the existence of a people along with its essential cultural traditions. This is especially true for those peoples that are proud to identify themselves as indigenous peoples at the turn of a century in which the pluriculturally nuanced ways of expressing thought, emotion, ritual, ceremony, and *joi de vivre* by different peoples, along with their traditions of sustainable management of lands and other biologically diverse resources are under threat of extinction. The alternative is too drab and distasteful to consider.



APPENDIX A

Glossary

CHT: Chittagong Hill Tracts.

Circle: An administrative and revenue unit headed by a chief or “circle chief.”

Circle Chief: Traditional head, also known as “raja.” According to the CHT Regulation 1900, the *circle chief* heads a revenue and administrative unit in the CHT known as a “circle.” The chief is responsible for the administration of “tribal” justice and customary laws of the hill people. Chiefs are ex-officio advisers to the deputy commissioners, the hill district councils, and the Ministry of Chittagong Hill Tracts Affairs.

DC: Deputy commissioner, mid-ranking civil administration official in charge of a district.

Headman: Head of a geographical unit known as a “mauza” and charged with revenue, land, and “tribal” justice administration. The headman supervises the work of the karbaries and is responsible both to the circle chief and the Deputy Commissioner.

HDC: Hill District Council.

Hillmen: Generic name for the eleven indigenous peoples as used by some people.

JSS (Jana Samhati Samiti): largest political party of CHT People that led the movement for autonomy in the CHT from 1973-1997.

Jum: Also known as swidden, “shifting,” “rotational,” or “slash-and-burn” agriculture. Involves burning of vegetation and planting of mixed seeds without irrigation, plowing, or hoeing.

Jumma: Generic name for the eleven indigenous peoples as used by supporters of the local political party, “JSS.”

Karbari: Village chief or elder, always male; an office that is largely hereditary. Traditionally nominated by the villagers and formally appointed by the chiefs.

Khas: Land belonging to the state.

Mauza: A mauza is composed of several villages. In the CHT, it is both a revenue and a land administration unit *and* a unit of general and indigenous justice administration. Average size is 10 miles square. The total number of mauzas in the CHT is 369.

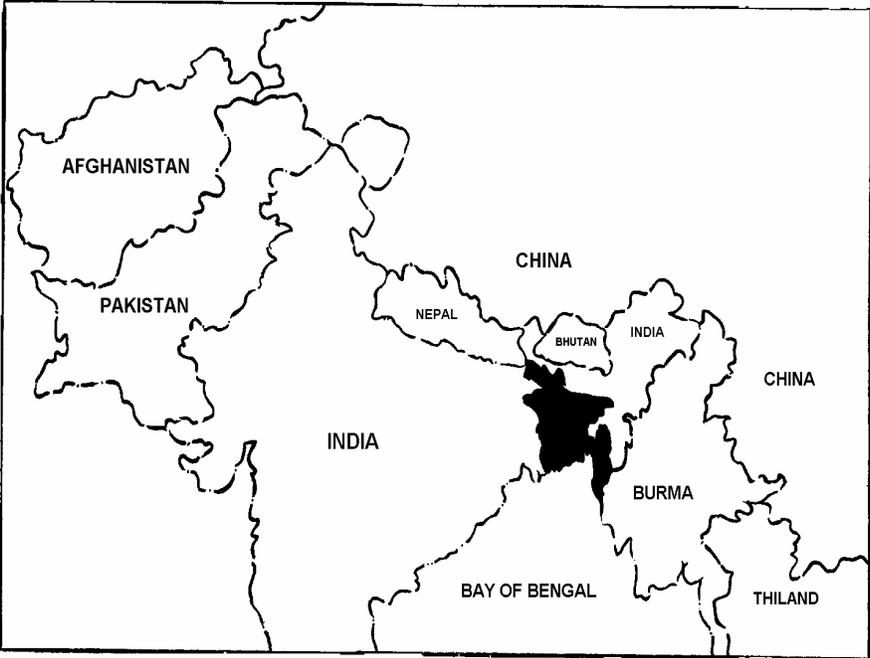
Settlement: Freehold grant of land.

USF: Unclassed state forest.

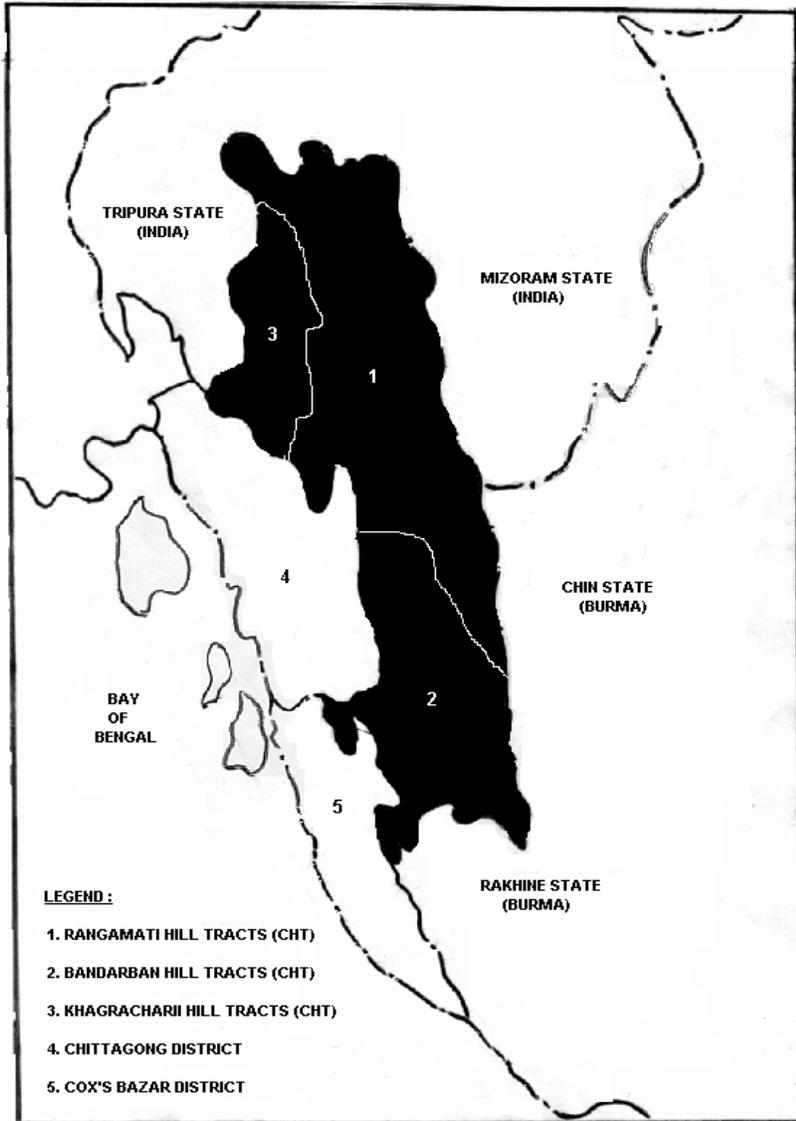
VCF (Village Common Forest): These forests are communally managed by indigenous village communities.

APPENDIX B

**Map - 1
Location of Bangladesh**



Map - 2
Location of Chittagong Hill Tracts



APPENDIX C**Ethnic Composition of Population, Chittagong Hill Tracts
(1991 Census)**

	Bandarban Hill Tracts	% of Dist Pop	Khagrachari Hill Tracts	% of Dist Pop	Rangamati Hill Tracts	% of Dist Pop	Total Pop CHT	% of Total Pop CHT	% of Ind Pop CHT
Bawm	6,431	2.78					6,431	0.65	1.28
Chak	1,681	0.72					1,681	0.17	0.33
Chakma	4,163	1.80	77,869	22.73	157,385	39.32	239,417	24.57	47.92
Khyang	1,455	0.63			525	0.13	1,980	0.20	0.39
Khumi	1,150	0.49			91	0.02	1,241	0.12	0.24
Lushai	226	0.09			436	0.10	662	0.06	0.13
Marma	59,291	25.70	82,183	23.99	40,868	10.21	142,342	14.60	28.49
Mru	21,963	9.52	40	0.01	164	0.04	22,167	2.27	4.43
Pankhua	99	0.04			3,128	0.78	3,227	0.33	0.64
Tanchangya	5,499	2.38			13,718	3.42	19,217	1.97	3.84
Tripura	8,237	3.57	47,072	13.74	5,865	1.46	61,174	6.27	12.24
Bengali	120,241	52.12	174,969	51.08	178,065	44.48	473,275	48.56	
Others	229	0.09	355	0.10			584	0.05	
Indigeno us	110,195	47.77	167,164	48.80	222,180	55.51	499,539	51.26	
Total	230,665		342,488		400,245		974,445		

Source: Revised Estimate of 1991 Census based upon records of the Hill District Council, Rangamati Hill Tracts.

APPENDIX D**Indigenous and Non-Indigenous Population
Chittagong Hill Tracts (1872 - 1991)**

Census Year	1872	1901	1951	1981	1991
Indigenous	61,957	1,16,000	2,61,538	4,41,776	5,01,144
Non-Indigenous	1,097	8,762	26,150	3,04,873	4,73,301
Total	63,054	1,24,762	2,87,688	7,46,649	9,74,445
Indigenous %	98%	93%	91%	59%	51%
Non-Indigenous %	2%	7%	9%	41%	49%

Source: B. H. SUHRAWARDY, *OUTLINE OF THE CHT ECONOMY: AN ANALYSIS* (in Bengali) 38 (Arunendu Tripura et al. eds., 1995).

APPENDIX E**Important Customary Resource Rights of CHT Residents**

Natural resource	Right-Holder	Regulatory Law/Custom	Regulating Authority
Homestead Lands	Indigenous Family	Rule 50, CHT Regulation	Headman
Swidden Lands	Indigenous Family	Rule 41, CHT Regulation	Headman, DC
Used Swidden Lands	Indigenous Family	Traditional Customs	Headman
Forest Produce	Mauza Residents	Rule 41A, CHT Regulation	Headman & Karbari
Grazing Lands	Mauza Residents	Rule 45B, CHT Regulation	Headman, DC
Grasslands	Mauza Residents	Rule 45, CHT Regulation	Headman, DC
Wild Game	Indigenous Residents	Traditional Customs/ Various Acts	Headman, Circle Chiefs/ Forest Department
Marine Resources	Mauza Residents	Undefined	Headman
Large Water Bodies	Mauza Residents/State	Undefined	DC
Smaller Aquifers	Mauza Residents	Undefined	Headman

Source: Adapted from Raja Devasish Roy, Land Laws and Customary Rights in the Chittagong Hill Tracts, Paper presented at a workshop on “Land Rights of Indigenous Peoples in Bangladesh”, organized by SAFHR in association with RDC, SEHD, and Taungya (Dec. 28, 2000).

APPENDIX F**DC's Standing Order on Prohibition against Timber Permit in USF without Approval of Chief & Headman Office of the Deputy Commissioner, Chittagong Hill Tracts**Order

Dated Rangamati, the 30th April, 1955.

In suppression of my previous order on the subject, no permit for felling trees in Unclassed State Forest will be issued by any authority (including myself) without the approval of the Mauza Headman and the Chief concerned.

Sd/-L. H. Niblett,
Deputy Commissioner,
Chittagong Hill Tracts.

Memo No. 1925 (21)/G Dated Rangamati, the 3rd May, 1955.
Copy to the Chakma Chief for information and guidance.

Sd/-Illegible
for Deputy Commissioner,
3/5/55
Chittagong Hill Tracts.

N.D.2.5.55