

**THE FIFTH AND SIXTH SCHEDULE OF THE CONSTITUTION OF
INDIA: A COMPARATIVE ANALYSIS**

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I. Introduction:

The Government of India, after independence, decided to replace the British colonial policy of isolation and non-interference in the affairs of tribal people of North-East India (Assam) by a policy of integration and development. The framers of the Constitution, the Constituent Assembly, keeping in mind the special needs of these numerous ethnic groups, each having distinct ethnic, cultural and traditional identities, framed the most comprehensive, and the most elaborate Democratic Constitution with Federal Character, providing special safeguard to the custom, tradition, culture, language and, above all, their land. A part from these protective provisions, provisions are also made in the Constitution for the socio-economic, political and educational upliftment of these primitive indigenous tribes of the region (North-East). Special provisions, in the form of reservation of seats in the State Legislature, reservation of seats in government jobs and educational institutions run and maintained by the State and Central Government. The Constitution also made special protective provisions in the form of Fifth Schedule, Sixth Schedule, Scheduled Areas and Scheduled Tribes.

The Present discourse, therefore, is to discuss and analyse the constitutional framework and provisions under which Autonomous District Councils are created.

II. Constitutional Provisions of Fifth Scheduled of the Constitution

(i) Scheduled Areas: Meaning

People of North-East India, it is believed, are well familiar with the words, Scheduled Tribes and Scheduled Areas, but very few exceptional people really know the constitutional meaning of Scheduled Areas, Scheduled Tribes, etc.

The Constitution of India, under Part C of the Fifth Schedule, provides i) Scheduled Areas means such areas as the President may by order declare to be Scheduled Areas, ii) the President, may at anytime, by order-

- a) direct the whole or any specified part of a scheduled area shall cease to be a Scheduled Area or a part of such an area;
- a)(i) increase the area of any Schedule Area in a State after consultation with the Governor of the State;
- b) alter, but only by way of rectification of boundaries,
- c) on any alteration of boundaries of a state or on the admission into the Union or establishment of a new State, declare any territory not previously included in any State to be, or to form part of a Scheduled Area;
- d) rescind, in relation to any State or States, any order or orders, made under this paragraph and in consultation with the Governors of the State concerned, makes fresh orders redefining the areas which are to be Scheduled Areas and, any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph(i) of this paragraph shall not be varied by any subsequent order.

The Constitutional implication of the Scheduled Area, as mentioned above is that the President (Parliament) is the authority to create or make any area as a Scheduled Area. At the sametime, it is the President who has the power to declare a Scheduled Area or part of a Scheduled Area as a non-scheduled area. Also, it is to be noted that under certain circumstances, the President is obliged to consult the Governor of the concerned State of the Scheduled Area.

III. The Fifth Schedule: The Constitutional Provisions.

Part A

1. Interpretation: In this Scheduled, unless the context otherwise requires, the expression “State” does not include the ‘States of Assam, Meghalaya, Tripura and Mizoram.’

2. Executive Power of a State in Scheduled Areas – Subject to the provisions of this Schedule, the executive power of a state extends to the Scheduled Areas therein.
3. Report by the Governor to the President regarding the administration of the Scheduled Areas: The Governor of each state having Scheduled Areas therein, shall annually or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in the state and the executive power of the Union shall extend to the Schedule Areas or the concerned state shall exercise its executive power over the Schedule Areas of the State. Another important implication of Part A of Fifth Schedule is that it is mandatory for State to give to the President an annual report about the progress and development of Scheduled Areas of the State or the State Government through the Governor, is required to give a report on the above matter as and when asked to do so by the President.

PART B

Administration and Control of Scheduled Areas and Scheduled Tribes

4. Tribes Advisory Council:
 - i) There shall be established in each state having scheduled areas therein and, if the President so direct, also in any state having Scheduled Tribes, but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom as nearly as may be, three-fourth shall be the representatives of Scheduled Tribes in the Legislative Assembly of the State; provided that if the number of representative of the Scheduled Tribes in the State Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.
 - ii) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor.
 - iii) The Governor may by make rules prescribing or regulating as the case may be,
 - a) the number of members of the Council, the mode of their appointment and the appointment of Chairman of the Council and officers and servants thereof.

- b) the conduct of its meetings and its procedure in general; and
- c) all other incidental matters.

5. Laws applicable to Scheduled Areas

- i) Notwithstanding anything in this Constitution, the Governor may, by public notification, direct that any particular Act of Parliament or of the State Legislature shall not apply to the Scheduled Areas or any part thereof in the State or shall apply to the Scheduled Areas or any part thereof in the State, subject to such modifications as he may specify in the notifications and any direction given under this paragraph may be given so as to have retrospective effect.
 - a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
 - b) regulate the allotment of land to members of Scheduled Tribes in such area;
 - c) regulate the carrying on of business as money lenders by person who lend money to members of Scheduled Tribes in such area.
- ii) In making such regulation as is referred to in sub-paragraph (i) of this paragraph, the Governor may repeal or amend any Act of Parliament or State Legislature or any existing law which is for the time being applicable to the area in question.
- iii) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him will have no effect.
- iv) No regulation shall be made under the paragraph unless the Governor, making the regulation has, in the case where there is a Tribe Advisory Council for the State consulted such Council.

IV. Observation

Part B of the Fifth Schedule of the Constitution deals with the administration and control of Scheduled Areas and Scheduled Tribes, which provides for the establishment of Tribes Advisory Council. This provision clearly stated that any state having Scheduled Areas has the constitutional obligation to create Tribes Advisory Council, which shall function as an

advisory body to give advice to the State Government on matters relating to the welfare and advancement of Scheduled Tribes living in the Scheduled Areas of the State. However, no legislative power or law making power was given to the Council. Even on matter in which it was given the power to give advice to the Governor, the matter required to be referred to the Council by the Governor. With the exception of transfer of land, the Council is left with no power that it could exercise on its own.

The Fifth Schedule of the Constitution of India, as seen above, was created so as to pave the way for the creation of administrative institution, whether be it in the form of Tribes Advisory Council or Autonomous District Council, for the administration of Scheduled Areas and Scheduled Tribes in different parts of the country. In the North-East, Assam, Meghalaya, Mizoram and Tripura are excluded from the purview of Fifth Schedule as these States are included within the scheme of Sixth Schedule. On the other hand, Manipur, Nagaland and Arunachal Pradesh, though not specifically mentioned in the provision of the Fifth Schedule are, deemed to have been included under the purview of the Fifth Schedule as it was provided in the Scheduled that each state having Scheduled areas therein and, if the President so direct, also in any state having Scheduled Tribes, but not Scheduled Area (Part B4 of the Fifth Scheduled) Manipur along with the above mentioned North-eastern States are deemed to have been included under the scheme of Fifth Schedule as the word 'each state' could be interpreted as all States. District Councils established in the Hill Areas of Manipur by an Act of Parliament in 1971, though not specifically mentioned in the Act, are created under the provision of the Schedule of the Constitution. The only difference lies in the name of the nomenclature i.e. while the Fifth Schedule has provided for the establishment of Tribes Advisory Council, in Manipur, the Act provided the nomenclature of Autonomous District Council.

V. Evolution of Sixth Schedule of the Constitution

The origin of the Sixth Schedule of the Constitution of India could be traced back to the Government of India Act, 1935, under which the hill areas of Assam were divided into Excluded Area, and partially Excluded Area. The Mizo Hills (Lushai Hills by then), the Naga Hills and the North-Cachar Hills were included in Excluded Area, while the Khasi and Jaintia Hills, the Garo Hills and Karbi-Anglong (Mikir Hills by then) were included in the Partially

Excluded Area. The administrations of the Excluded Areas were entrusted to specially appointed officials (Superintendent), who administered the people loosely through Village Chiefs. The Village Chiefs administered each of their respective villages, with the least intervention of Superintendents with absolute power. This was particularly true in the case of Lushai hills, where the Sailo Chiefs who administered their respective villages with almost an unrestraint powers. There was practically no platform for the people to participate in politics and administrations and, nor was there, any platform through which the people could air their grievances and aspirations.

However, after India attained independence in 1947; policy makers of the newly-born India, sought to develop these backward and primitive hill tribes, while at the same time, ensuring safe-guard of their distinct identities and culture. It was, therefore, felt necessary to find out and introduce an administrative mechanism that would allow these hill tribes to have a sufficient political and administrative autonomy, which would ensure protection to their distinct culture, religious practices, language, etc.; while at the same time, provides them opportunities to develop themselves educationally, economically etc.

The Constituent Assembly in 1946, set-up an Advisory Committee on Fundamental Rights of Minorities which constituted a Sub-Committee called, "The North-East Frontier Tribal and Excluded Areas Sub-Committee". Under the Chairmanship of Gopinath Bordoloi which is also referred to as Bordoloi Committee, to study and investigate into the problems of hill tribes living in the Excluded Area; and to give suggestions for the formulation of administrative mechanism for the administration of the people through which they could economically, politically and educationally develop themselves in a more speedy manner. The Bordoloi Committee, being tasked with the responsibility to study and investigate into the causes of backwardness in the area, visited and interacted with the people and their representatives.

The Bordoloi Committee, after interacting with the people and their representatives, had submitted its two points of observations:-

1). The people of Excluded Area were sensitive about their land, forest, life-style and traditional system of justice: and therefore, needed safeguard and protections of their traditional system of Living and Lifestyle.

2). There were traditional self-governing institutions which functioned democratically and settled disputes according to their traditional life-style.

The Bordoloi Committee, apart from the above two observations, has provided another observation that there are also, in Excluded Areas, certain ethnic minorities having distinct culture, tradition, language etc. who needed a separate administrative mechanism for the protection of their ethnic and cultural identities from dominant tribal community.

Based on the observation and finding of the Bordoloi Committee, the Advisory Sub-Committee for North-East (Assam) submitted its recommendation to the Constituent Assembly for the creation of an Administrative Mechanism under Sixth Schedule of the Constitution of India. The Constituent Assembly, considering the distinct ethnic identities of the hill people of Assam and; to preserve their culture, tradition, language, and most importantly, their land, constituted Autonomous District Councils in 1952. With the exception of Naga Hills where, the NNC (Naga National Council) spearheaded independence from India, rejected the proposal for the creation of Autonomous District Council and boycotted the election, making the Council dysfunctional. However, Manipur, soon after joining Indian Union in 1959, was given the political status of Territorial Council, and the Scheduled areas in Manipur were excluded from the Scheme of Autonomous District Council under the provision of Sixth Schedule of the Constitution.

There are, at present, ten Autonomous District Councils in the 4 North-Eastern States of Assam, Meghalaya, Tripura and Mizoram constituted under the provision of Sixth Scheduled of the Constitution.

Part I (Assam)

1. The North-Cachar Hills Autonomous District Council (Dima Haolang)
2. The Karbi-Anglong Autonomous District Council
3. The Bodoland Territorial Council

Part II (Meghalaya)

1. The Khasi Hills Autonomous District Council
2. The Jaintia Hills Autonomous District Council
3. The Garo Hills Autonomous District Council

Part II-A (Tripura)

The Tripura Tribal Autonomous District Council

Part III (Mizoram)

1. The Chakma Autonomous District Council
2. The Mara Autonomous District Council
3. The Lai Autonomous District Council

The Sixth Schedule, sometime, also referred to as, a mini-Constitution of the main Constitution of India, was included in the Constitution for the establishment of Autonomous District Council (ADC) with extensive legislative, administrative and judicial functions. It is provided in the provision of the Sixth Schedule that no law of the State and of the Centre shall applies in any autonomous region without the approval of the District Council. It should also be noted that the Autonomous District Councils under this Schedule have the power to establish Village Councils and Village Courts.

Under the provision of Sixth Schedule, the Governor of the State has the power to determine the administrative areas of the Council; and he is also authorized to create a new Autonomous District Council, alter or change the existing territorial jurisdiction of the Council. However, the nature of power and jurisdiction of Autonomous District Council differ from state to state. In Assam and Meghalaya, District Councils are established at the district level whereas in Mizoram, District Councils were being created at both the District and Sub-Divisional levels.

1. Nature and Composition

Regarding the composition of District Council under the provision of this Schedule, with the exception of Bodoland Territorial Council having 46 members, it was provided that number of members shall not exceed 30 out of which not more 4 members shall be nominated by the Governor of the concerned state on the advice of the Chief Executive Member from minority communities, who otherwise, have no sufficient voters to elect their own representatives in the Council. The Governor, on the advice of the Chief Executive Member, appoints other Executive Members who are also members of the Executive Committee of the Council. Other members are called Member of District Council (MDC). MDC are elected from single member constituencies on the basis of adult franchise. There are also a few

nominatives seats in each District Council; and the Governor of the State is empowered to nominate members from minority communities, who otherwise, could not be represented in the Council. It should, however, be noted that the Governor could nominate members of the Council on the advice of the Chief Executive Member. The nominated member shall hold offices at the pleasure of the Governor. Regarding the term of office, the term of District Council, unless otherwise, dissolved by the Governor before the expiry of 5 years or extend not exceeding a period of one year at a time, due to national emergency, shall be 5 years.

The rules regarding qualifications varies from District Council to District Council, all those who attained the age of 18 years have the right to vote in District Councils in Mizoram; while in Karbi Anglong District of Assam, right to access to traditional land and length of stay in the District Council also determine the eligibility to vote in the election. Autonomous District created under Sixth Scheduled have Chief Executive Member (CEM), the Chairman, and the Deputy Chairman of the Council, who are elected from among the members by the elected members of the Council. Other members of the Executive Committee are selected by the Chief Executive Member. Regarding the function performed by the Chairman and the Deputy Chairman, they perform the function of the Speaker and the Deputy Speaker of a State Legislature.

Executive Committee of the Council

The Sixth Schedule of the Constitution provides for the formation of Executive Committee of the Council consisting of the Chief Executive Member (CEM) and some other important members of the Council. As mentioned earlier, the CEM is elected by the elected members of the Council. Other member of the Executive Committee are appointed by the Governor of the State on the advice of the CEM. The Executive Committee is similar to a Cabinet of a State or Central Government. The District Council is a miniature parliament at the district level. When the CEM (Chief Minister at state level) resigns, the Executive Committee stands dissolved automatically. A new Chief Executive member should be elected within 48 hours of his resignation and; if a new CEM could not be elected within this period, the Governor shall exercise his discretionary power to appoint a new CEM.

The Executive Committee is shouldered to issue all executive orders and policies as well as implementation of all developmental schemes within the District Council area. The Executive Committee makes rules and regulations; and also makes appointment with the

approval of the District Council. It also prepares budget of the District Council and gets it passed in the District Council.

2. Legislative function

One of the most important features of District Council established under the provision of Sixth Schedule is 'the provision for Legislative power'. The Sixth Schedule empowered the District Councils to make laws on a wide ranging issues covering land, agriculture, primary education, health, establishment of village councils and town committees, appointment and succession of Chief (Village Chiefs) or headman, inheritance of property, marriage and divorce, money lending, trading by non-tribals and so on, within their territorial jurisdictions.

However, if any legislation or law passed by the District Council is in contravention to any provision of Sixth Schedule, the Governor of the concerned State has the power to alter or modify such legislation of the Council. On the other hand, the Deputy Commissioner is given the right to approve and alter State and Cabinet law before allowing their application in their areas. In other words, State or Central laws do not automatically become laws within the jurisdiction of the District Council, unless otherwise, they are approved by the District Council.

Executive and Judicial Function

The District Council established under the provision of Sixth Schedule, has also been endowed with extensive executive power which includes among others; construction and management of primary schools, dispensaries, markets, cattle, pounds, ferries, road and waterways. The District Council and Regional Council are also being given the power to prescribe the medium of instruction and; to prepare syllabus for primary school within the jurisdiction of the Councils. Also, the Councils are given the authority to form village and District Council Courts to try cases according to the customary law of the people where both the parties are tribals. However, the Councils are not given the power to decide cases involving offences, punishable by death or imprisonment for five or more years. The District Council Court and the Regional Council are court of appeal for all subordinate courts. It is only the High Court and Supreme Court that have the jurisdiction over suits and cases decided by the Council Court.

3. Financial Power

The District Council and the Regional Councils, within their respective jurisdiction may, collect land revenues, collect taxes on lands holding, entry of good into the market and toll, etc. But the District Council has the concurrent power on professions, trade, employments, animals, vehicles and hut, toll on passenger and goods carried in ferries and maintenance of school, dispensaries or roads. It is also provided in para 9 of the Sixth Schedule, the royalty on licenses or leases for the extraction of mineral resources shall go to the District Council. However, taxes on vehicle are collected by the State Government on behalf of the District Council. Other sources of income of the District Council and Regional Council includes grant-in-aid, loans and advances from the State and Central Government.

Under Article 244A of the Constitution, there is also a provision for the formation of an Autonomous State comprising certain tribal areas in Assam and for the creation local legislature or Council of Minister or both within the State of Assam.

4. Critical Observations

As seen in the preceding discourse on the constitutional provision under Sixth Schedule of the Constitution, District Council created under the provision of the said schedule enjoyed extensive executive, legislative, judicial and financial powers. Their powers are given to the Council with the aim to facilitate a faster development in the areas of health care, primary education, culture, social custom, social welfare, forest, land, agriculture, water management, village administration, economic and rural upliftment, etc. It is, however, to be observed that the performances of these District Council are, as a whole, not satisfactory. The blame for this unsatisfactory performances of District Council, it could be observed, be equally shared by the District Councils and the concerned Ministers who were seen to have abused power of nomination on political consideration rather than the smooth functioning of the Councils. It is to be noted here that though the Governor is given the power to nominate members from lesser and marginalized community, it is the Minister who actually done the work. It could also be observed that many ethnic minorities hardly find representation in the Council either by election or nomination.

It has also been noticed that some District Councils failed to constitute Village Courts. Karbi-Anglong District of Assam could not perform its judicial function as the Government

of Assam refused to release funds for the same. It has also been observed that most of the courts at the District level are manned by those rejected seasoned politicians or people who have no judicial background as a result of which there have not been modification of customary laws in the District Councils. Regarding service rule framed by the Council, on many occasions these service rule were not followed, qualification and suitability is not the criteria followed, rather political patronage, nepotism, money power and favoritism are rather the consideration for selection of staffs.

It has also been observed, during the last 64 years of its creation, there are numerous instances of financial irregularities contributing to the inefficient and malfunctioning of District Councils. Grant-in-aid received from the State government are misused by diverting under different heads, particularly in Non-Plan-Expenditure. Even certain basic financial rules are not being observed in most of the District Councils. Most of the District Councils could not prepare a balanced budget resulting in overspending as over draft. There was widespread financial mismanagement in most of the District Councils, particularly before 1969, when the system of audit was introduced by Auditor and Comptroller General. The ineffective performances of District Council could also be attributed to their financial dependence on State Governments for financial assistance in the form of grants aid. Though the District Councils have the power to levy and collect taxes, the money collected by way of taxation was far from sufficient resulting in heavy over draft.

It is also to be observed that the District Councils alleged State Government of not paying its share of royalty from licenses and leases from extracting mineral resources within the jurisdiction of the District Councils. Again, the major source of income of the District Councils is grant-in-aid as provided under Article 275 of the Constitution. Most of the District Councils under the Scheme of Sixth Schedule alleged that State Governments practiced a routine delay in releasing grant-in-aid, which directly effected the smooth functioning of District Councils. In some cases, however, the delay in release of grant-in-aid could be because of the delay in submission of utilization certificates by the District Councils. In education sector, District Councils are empowered to establish and maintain primary schools and also prescribe medium of instruction. Despite these, the rate of literacy in Karbi-Anglong, North-Cachar Hills, and Chakma District Councils are extremely low, making one to believe that District Councils in these Districts are incompetent to look after primary education.

One of the major causes of inefficient functioning of the District Councils is that there is no provision for co-ordination of works between District Councils, Regional Council and State Government. There is no co-ordination of work for development between these three political entities, working in the same area and for the same purpose. This, sometimes, created a kind of confusing and embarrassing situation, thereby, instead of serving the purpose of development, created mis-understanding between them.

The Sixth Schedule under para 3(1) 8 and 10 lays down that no law passed by the Parliament and State Legislature should not apply within the jurisdiction of District Council, unless the District Councils approved the legislations. This provision has been changed in the case of Meghalaya and Mizoram by inserting para 12-B in the Sixth Schedule which gives an overriding character to the acts passed by State Legislature. It is, therefore, to be observed that the Sixth Schedule seems to be self-contradictory in the sense that while providing that State and Central legislation shall not apply within the territorial jurisdiction of the District Council without the approval of the Council, it at the same time, provided an overriding power to the State Government of Meghalaya and Mizoram over District Councils in their respective State.

The Constitutional provision under the Sixth Schedule relating to Chieftainship is vague and ambiguous in that, while it is clearly mentioned in the para 3(g) of the Schedule that the District Council shall have the power to appoint succession of Chiefs, it has not clearly mentioned as to whether the District Council has been given the power to abolish the institution of Chieftainship. In 1954, the government of Assam passed an Act for abolition of Chieftainship without any valid constitutional sanction. The lands under the Chiefs are also under the control of District Council. When Mizo Hills District was given the status of Union Territory in 1971, and Statehood in 1986, the land under District Council came directly under the control of State Government and; after the abolition of District Council, the land became Non-Scheduled.

5. Concluding Observations

District Councils under Sixth Schedule, as compare to District Council or Tribes Advisory Council under the Fifth Schedule, is a powerful political institution, drawing its power and function directly from the Constitution. The Sixth Schedule is also, sometimes

referred to as a Constitution within a Constitution. While District Council under the Fifth Schedule is the creation of state legislature, District Councils under the Sixth Schedule are the product of Constitution, drawing all their powers and functions from the Constitution itself. Being the creator of District Council, under the Fifth Schedule, the State Legislature has the power to amend any provision of the Act under which it is created. District Councils under the Sixth Schedule enjoy extensive powers including executive legislative and judicial powers, all derived from the Constitution. On the other hand, District Councils under the Fifth Schedule enjoy limited power which are all executive in nature and legislative powers are being denied to them.

Again, regarding financial matter, the Constitution, under the provision of Sixth Schedule, has clearly mentioned the sources from which the District and Regional Councils would receive finances. As per the provision of the relevant part of the Sixth Schedule, District and Regional Councils within their respective jurisdiction may collect land revenue, collect taxes on land holdings etc.; and also they would be given grant-in-aid, loan and advances from the State. The Constitution has made this provision, mandatory for the state to give grant-in-aid, loan and advance as required by the Councils.

District and Regional Councils are also given the power to prepare budget for their respective Council. On the other hand, District Councils established under the provision of the Fifth Schedule, are not given the financial power for preparing budget for themselves. There was no mentioning of sources of income and; there was no mentioning of grant-in-aid advances from state. However, since District Council or Tribe Advisory Councils are created by the State Government, it is the moral duty of State Government to give finances for the Council it has created.

Again, regarding delegation of power, District and Regional Councils under Sixth Schedule, it has been clearly mentioned in the relevant provision of the Schedule as to what are the powers and functions to be delegated and what are to be retained by the State. The Sixth Schedule provides long list of items on which the Council could exercise power. On the other hand, regarding delegation of powers, being created by State Government, powers to be delegated to District Council and Tribes Advisory Council under Fifth Schedule are decided by the State Cabinet.

It is the evident from the above discussion on the provision of Fifth Schedule and Sixth Schedule that District Councils established under the Sixth Schedule have much more powers. The Sixth Schedule, being referred to as a mini-constitution within a Constitution, has given wide ranging executive, legislative, judicial and financial power to District and Regional Councils. District and Regional Councils under the Schedule could also be referred to as 'mini-state' as the composition, structure and functions are near similar to that of State.

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