

The Constitution and the Tribal Areas

Because of the wide contrast between the life and outlook of the tribal people of Assam and the people in the rest of the country (particularly the plains) and having regard to their distinct civilisation, the Constitution recognises the necessity of separate political and administrative structures for the tribal people. Relevant provisions of the Constitution are primarily to be found in Articles 244 and 244A and the Sixth Schedule.

Position before the Constitution

Even before the commencement of the Constitution, the necessity of protecting the tribal people against exploitation and exposure to laws that are not suitable to them, and of ensuring their economic and educational advancement, was kept in view and, therefore, the administrative status contemplated by the governmental set-up was different from the rest of the provinces. The Government of India Act, 1935 had made special provisions for these areas. The Governor was given a special responsibility in respect of these areas. These areas were to be known as Excluded Areas or Partially Excluded Areas. No Act of the Federal Legislature or the Provincial Legislature applied to such an area unless the Governor so directed. The Governor could make Regulations for the peace and good government of these areas. In the exercise of his functions in relation to these areas,¹ the Governor was to act in his discretion (without ministerial advice).

The Constituent Assembly and tribal areas

Report of the sub-committees of the Advisory Committee

At the time of the framing of the Constitution also, the necessity to have special provisions for these areas was realised. The Advisory

1. For a history of the constitutional developments in these areas, see Hidayatullah, *The Fifth and Sixth Schedules to the Constitution of India* (1979); Shiva Rao, *The Framing of India's Constitution : A Study* (1968); *Report of the Scheduled Areas and Scheduled Tribes Commission* (1966).

Committee on Fundamental Rights, Minorities, Tribals, etc., of the Constituent Assembly appointed two sub-committees, namely, the North-East Frontier (Assam) Tribal and Excluded Areas Sub-Committee and the Excluded and Partially Excluded Areas (other than Assam) Sub-Committee to examine the matter in detail, and the two sub-committees had constantly before themselves the special needs of these areas. Dealing with the social and economic life of the tribal people, the joint report of the two sub-committees stated² :

The areas inhabited by the tribes, whether in Assam or elsewhere, are difficult of access, highly malarial and infested also in some cases by other diseases like yaws and venereal diseases and lacking in such civilizing facilities as roads, schools, dispensaries and water supply. The tribes themselves are for the most part extremely simple people who can be, and are, exploited with ease by plain-folk, resulting in the passage of land formerly cultivated by them to money-lenders and other erstwhile non-agriculturists. While a good number of superstitious and even harmful practices are prevalent among them, the tribes have their own customs and way of life with institutions like tribal and village panchayats or councils which are very effective in smoothening village administration. The sudden disruption of the tribals' customs and ways by exposure to the impact of a more complicated and sophisticated manner of life is capable of doing great harm. Considering past experience and the strong temptation to take advantage of the tribals' simplicity and weaknesses, it is essential to provide statutory safeguards for the protection of the land which is the mainstay of the aboriginal's economic life and for his customs and institutions which, apart from being his own, contain elements of value. In making provisions, however, allowance could be made for the fact that in the non-excluded areas the tribals have assimilated themselves in considerable degree to the life of the people with whom they live and the special provisions concerning legislation in particular are therefore proposed largely for the Scheduled Areas in Provinces other than Assam.....and the autonomous districts (Assam)...³

In regard to the special features of the Assam Hill Districts, as compared with the other tribal areas, the joint report of the two sub-committees said :

Certain features are common to all these areas, yet the circumstances of the Assam Hill Districts are so different that radically

2. For the Report of the Committee and the Sub-Committees, see Shiva Rao, III *The Framing of India's Constitution* 681-782 (1967).

3. *Id.* at 774

different proposals have to be made for the areas of this Province. The distinguishing feature of the Assam Hills and Frontier Tracts is the fact that they are divided into fairly large districts inhabited by single tribes or fairly homogenous groups of tribes with highly democratic and mutually exclusive tribal organisation and with very little of the plains leaven which is so common a feature of the corresponding areas, particularly the partially excluded areas of other Provinces. The Assam hill districts contain, as a rule, upwards of 90 percent of tribal population whereas, unless we isolate small areas, this is generally not the case in the other Provinces. The tribal population in the other Provinces has, moreover, assimilated to a considerable extent the life and ways of the plains people and tribal organizations have in many places completely disintegrated. Another feature is that some of the areas in Assam like the Khasi Hills or the Lushai Hills show greater potentialities for quick progress than tribes in the other Provinces. They may also be distinguished by their greater eagerness for reform in which they have a dominant share than the apathy shown by the tribals of some other Provinces. Having been excluded totally from ministerial jurisdiction and excluded also from the rest of the Province by the Inner Line system, a parallel to which is not to be found in any other part of India, the excluded areas have been mostly anthropological specimens; and these circumstances together with the policy of officials who have hitherto been in charge of the tracts have produced an atmosphere which is not to be found elsewhere. It is in these conditions that proposals have been made for the establishment of special local councils which in their separate hill domains will carry on the administration of tribal law and control the utilization of the village land and forest. As regards the features common to tribal areas in other Provinces, the Assam hillman is as much in need of protection for his land as his brother in other Provinces. He shares the backwardness of his tract and in some parts the degree of illiteracy and lack of facilities for education, medical aid and communications. Provision is necessary for the development of the hill tracts in all these matters and we have found it necessary to recommend constitutional safeguards of various kinds.⁴

About the political experience of the Assam tribes, the Assam Tribal Areas sub-committee mentioned :

Except for the Municipality of Shillong, there are no statutory local self-governing bodies in any of the Hill Districts. The partially excluded areas have elected representatives in the Provincial

4. *Id.* at 771-772

Legislature but in the Garo Hills the franchise is limited to the Nokmas and in the Mikir Hills to the headmen. Generally, however, the tribes are all highly democratic in the sense that their village councils are created by general assent or election. Chiefship among certain tribes like the Lushai is hereditary (although certain chiefs have been appointed by the Superintendent) but among other tribes appointment of headmen is by common consent or by election or, in some cases, selection from particular families. Disputes are usually settled by the chief or headman or council of elders. In the Naga Hills what is aimed at is general agreement in settling disputes. Allotment of land for *jhum* is generally the function of the chiefs or headmen (except in the Khasi and Jaintia Hills) and there are doubtless many other matters pertaining to the life of the village which are dealt with by the chiefs or elders, but while this may form a suitable background for local self-government the tribes altogether lack experience of modern self-governing institutions. The "District Conference" of the Lushai Hills, the Tribal Council of the North Cachar Hills and the Naga National Council are very recent essays in organizing representative bodies for the district as a whole and have no statutory sanction. While there is no doubt that the Naga, Lushai, Khasi and Garo will be able to manage a large measure of local autonomy, the North Cachar tribes and the Mikirs may yet want a period of supervision and guidance.⁵

Factors justifying separate treatment

It was felt that there were three factors which necessitated a separate treatment for the tribal people :

- (a) The distinct social customs and tribal organisations of the different tribal peoples as well as their religious beliefs;
- (b) the fear of exploitation by the people of the plains on account of their superior organisation and experience of business;
- (c) necessity to make suitable financial provisions for these areas, for unless suitable provisions were made or powers conferred upon the local councils themselves, the provincial government may not, due to the pressure of the plains people, set apart funds for the development of tribal areas.

Recommendations of the sub-committee

Some of the recommendations of the sub-committee were :

- (a) The local customary laws should be interfered with as little as possible and the tribal councils and courts should be maintained and, accordingly, the hill people should have full powers of administering their own social laws.

5. *Id.* at 691-692.

(b) There should be local councils with powers of local boards and of legislation and administration over land, village forest, agriculture and village and town management in general, in addition to the administration of tribal or local laws and primary education.

Decision of the Constituent Assembly

The Constituent Assembly adopted the recommendations of the two sub-committees, with minor modifications, without much of a discussion. The Constitution sought to protect the autonomy of the tribal areas in four basic ways:

- (i) by creating district councils for autonomous tribal districts;
- (ii) by giving administrative and legislative powers in specified matters to district councils;
- (iii) by providing for the non-application of the laws of the State of Assam to these areas unless the district council decided to apply an Act; and
- (iv) by empowering the Governor not to apply any Act of Parliament or an Act of the Legislature of the State to an autonomous district. Thus, the idea was that in certain important matters the autonomy of the tribals should be maintained.

Post-Constitution developments

However, in the course of time, those provisions of the Constitution failed to satisfy the tribal people, and a move was made for these people for creating a full-fledged State. The post-Constitution developments culminated in the birth of the State of Meghalaya.

The State of Meghalaya and its genesis

A graphic account of how the State of Meghalaya came to be created is given by Hamlet Bareh.⁶ According to him, the consciousness for tribal solidarity rather than individual existence took roots in the first decade of Independence. The agitation for a separate Hill State had its climax in 1954-55 when the States Re-organisation Commission visited the area. The movement gained ground in June, 1954 at a conference of the Executive Councils of Autonomous Hills Districts held at Tura. The emergence of tribal rivalry owing to the cultural identity of different tribes was ruled out. The detailed plan about the Hill State was contained in a Memorandum prepared by the late Rev. J.J.M. Nichols Roy in 1960. The move to recognise Assamese as the State language of Assam gave a fillip to this movement, as it was felt that such a measure would :

- (a) place the Assamese people in a more dominant position which would lead to the assimilation of all the Hill peoples into the Assamese

6. Hamlet Bareh, *Meghalaya* 160-161 (1974).

community, and disintegrate altogether their identity which had been given protection by the Constitution ; (b) over-burden the Hill people with too many languages ; (c) adversely affect the prospects and opportunities of the Hill people in Government services notwithstanding the safeguards provided in the Constitution ; and (d) discriminate the non-Assamese, as less than 50 percent had Assamese as their mother tongue.⁷

An All Party Hill Leaders' Conference (hereafter referred to as APHLC) was convened at Shillong in 1960. Subsequently, these Conferences were held in August and November, 1963, to work out the plan for a separate State. In the General Elections of 1962, the candidates of the APHLC swept the polls. In course of time, several APHLC were held.

Several alternative proposals put forth by the Central Government were not acceptable to the APHLC. The 18th Conference at Tura in January/June, 1968 "expressed great resentment at the continued delay caused in the formation of a separate State which was held to be the best, simplest and final solution....."⁸

Developments after 1969

In 1969 an autonomous State of Meghalaya was created within the State of Assam by the Constitution (Twenty-second) Amendment Act, 1969 and the Assam Re-organisation (Meghalaya) Act, 1969. These measures, however, did not meet "the full aspirations of the people, as the Assam Government has been placed in position to exert higher powers for which none could question over the subjects assigned to the State Government of Assam"⁹. In 1970, the demand for full Statehood for Meghalaya mounted up. The Twenty-second APHLC held in September 1970 adopted a resolution in favour of a full State. The decision of the Central Government to grant Statehood to Manipur and Tripura, taken in 1970, encouraged the demand for full Statehood for Meghalaya also. Ultimately, the Central Government conceded the demand for a full Statehood for Meghalaya and the North-Eastern Areas (Re-organisation) Act, 1971 was enacted. In the final arrangement, 50 out of 60 seats of the Legislative Assembly of Meghalaya were reserved for Scheduled Tribes (Garos, Khasis and Jaintias) and 10 were to be filled up by open contest.¹⁰

This completes the story of the formation of the State of Meghalaya. It is now time to revert to the special constitutional provisions relevant to tribal areas in the State.

7. *Ibid.*

8. *Id.* at 169.

9. *Id.* at 178.

10. *Id.* at 185.

The Constitutional Scheme for the Tribal Areas

The Sixth Schedule and the District and Regional Councils

As stated above, the Sixth Schedule to the Constitution contains special provisions for the administration of the tribal areas of Meghalaya. The tribal areas (mentioned in the table to the Sixth Schedule) are to be autonomous districts. If there are different Scheduled Tribes in an autonomous district, the Governor may divide the district into autonomous regions. For the administration of an autonomous district, there is to be a District Council and for the administration of an autonomous region, there is to be a Regional Council. Both the Councils (District and Regional) are incorporated bodies, having a perpetual succession. In an autonomous district with a Regional Council, the District Council shall have only such powers as may be delegated to it by the Regional Council, in addition to the powers specifically conferred by the Sixth Schedule with respect to the area within its jurisdiction. The District Council is to consist of not more than 30 members, out of whom not more than four shall be nominated by the Governor and the rest to be elected on the basis of adult suffrage. The term of elected members of the District Council is five years, while the term of nominated members is at the pleasure of the Governor.

Legislative powers of the District and Regional Councils

The District Council for an autonomous district and the Regional Council for an autonomous region are given powers to make laws with respect to the following matters:

- (a) the allotment, occupation or use, or the setting apart of land ;
- (b) the management of any forest, not being a reserved forest ;
- (c) the use of any canal or water-course for the purpose of agriculture ;
- (d) the regulation of the practice of *jhum* or other forms of shifting cultivation ;
- (e) the establishment of village or town committees or council and their powers ;
- (f) any other matter relating to village or town administration, including village or town police and public health and sanitation ;
- (g) the appointment or succession of chiefs or headmen ;
- (h) the inheritance of property ;
- (i) marriage and divorce ;
- (j) social customs.

The laws made by the Regional Council or the District Council shall, however, have no effect unless assented to by the Governor.

If any law or regulation made by the District Council or by the Regional Council is repugnant to any law made by the State Legislature, it will be void to the extent of repugnancy.

The President of India may direct that any Act of Parliament shall not apply to an autonomous District or Region.

These provisions were inserted in the Schedule by the North-Eastern Areas (Reorganisation) Act, 1971. Prior to that, an Act of the Legislature of the State of Assam with respect to matters on which the District Council or the Regional Council had the power to make law did not apply to an autonomous district or region, unless the District Council or the Regional Council so directed. Further, the Governor of the State could exclude the operation of any Act of Parliament or of the State Legislature in these areas.

Status of the District Council

The District Council is both an administrative and a legislative body.¹¹ However, the District Councils have no plenary legislative powers, unlike Parliament or State Legislatures.¹²

While on the subject of legislative power for the areas in question, it would be of interest to mention that an oft-cited decision of the Privy Council¹³ on the topic of delegated and conditional legislation related to the Garo Hills, involving, as it did, the validity of the Garo Hills Act, 1969. As is well known, the validity of the Act was upheld by the Privy Council.

The Constitutional scheme as to the judicature in tribal areas

Village Councils

There are certain special provisions concerning the judicature also. The Regional Council and the District Council may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within the areas of their jurisdiction. These councils may create a court of appeal and, in the absence of this, the Regional Council or the District Council is to act as the court of appeal.

The Judiciary

In suits and cases decided by the tribal courts the provisions of the Civil Procedure Code and the Criminal Procedure Code do not apply.

11. *T. Cajee v. U. Jormanik Siem*, A. I. R. 1961 S. C. 276.

12. *District Council, United Khasi & Jaintia Hills v. Miss Sittmon*, A. I. R. 1972 S. C. 787. (The judgment also traces history of the protection to tribals.)

13. *Queen v. Burah* (1878) 5 Ind. App. 178 (P. C.).

These courts do not try cases arising out of special laws or cases relating to offences of a serious nature (punishable with death, transportation for life or imprisonment for a term of not less than five years). The Governor may, however, extend the jurisdiction of the tribal courts to decide such cases by conferring the powers under the Civil Procedure Code and the Criminal Procedure Code for these cases. The High Court is to exercise such jurisdiction over suits and cases as may be specified by the Governor. The jurisdiction of the Supreme Court has been retained as in other cases.

What has been stated above, is the purport of paragraphs 4 and 5 of the Sixth Schedule to the Constitution, though the latter is ambiguously worded. The matter becomes clear by reading the report of the North-East Frontier (Assam) Tribal and Excluded Areas Sub-Committee.

In 1969, certain amendments were introduced in the Sixth Schedule with a view to (i) extending the jurisdiction of the tribal courts to non-tribals, (ii) taking away the appellate powers of the Regional Council and the District Council, and (iii) also curtailing the powers of the Governor to confer the powers under the Civil Procedure Code and Criminal Procedure Code to these courts. The object of these amendments was to enable these courts to function more or less like *Nyaya Panchayats* as in the rest of the country and to make provisions for appeals from these courts to regular courts.¹⁴ These amendments were to come into effect on dates to be fixed by the President of India.

Regulations as to Village Councils

Prior to 1969, the Regional Council or the District Council had been given the power to frame, with the approval of the Governor, regulations for the constitution of village councils and courts, the procedure to be followed by them and the enforcement of their decisions and orders etc. However, after 1969, the power to frame these regulations was given to the Governor (the provision was to come into effect on such date as the President of India might fix).

Miscellaneous

The District Council and the Regional Council have been given certain powers of taxation also.

Article 275 of the Constitution makes provision for paying grants-in-aid by the Centre to the States for the welfare of Scheduled Tribes. Part XVI of the Constitution also makes a few special provisions relating to Scheduled Tribes.

14. See the Statement of Objects and Reasons to the Assam Reorganisation (Meghalaya) Bill, 1969, *Gazette of India, Extraordinary*, Part II, section 2, dated December 15, 1969, page 1101.

Under Article 339(1) of the Constitution, the President may, at any time, and shall, on the expiration of ten years from the commencement of the Constitution, appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes. The Commission is to be known as the Scheduled Areas and Scheduled Tribes Commission. Such a Commission was appointed in 1960. It submitted its report in 1961.