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# EFFICACY OF TRIBAL GOVERNANCE: A CRITICAL ANALYSIS OF THE WORKING OF THE GOVERNING BODIES UNDER THE FIFTH AND SIXTH SCHEDULE OF THE INDIAN CONSTITUTION

Ananya Sharma<sup>1</sup> &  
Jayanti Jaya<sup>2</sup>

### ABSTRACT

*The indigenous people referred to as 'tribals' have time and again made insurgent movements for the preservation of their identity and culture. The Constitution makers in order to uphold the individuality of these primitive people incorporated the fifth and sixth schedule which would work independently for the tribal population taking into account even their slightest concern. But the most important question which needs to be addressed is whether this tribal governance has been able to ameliorate the state of the tribals or not. This paper thus aims to critically analyze the working patterns of the administrative bodies functioning in the Scheduled Areas. The issue of constant conflict between the State Governments and the Local bodies of governance for power is also well highlighted through this paper. The authors seek to question the degree of autonomy granted to the governing bodies constituted under the fifth and sixth schedule and whether these powers are sufficient to efficiently work towards the welfare of the tribal population. The tribal population inhabiting the mainland and the hilly areas has often been subjected to exploitation by the State and hence it is crucial for them to be governed by an independent body which would selflessly help them develop but unfortunately the efficacy of such bodies still remains in question.*

**Keywords:** Governance, administrative bodies, tribal population, efficiency

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<sup>1</sup> Student, National Law University Odisha

<sup>2</sup> Student, National Law University Odisha

## **INTRODUCTION**

The Central and the State Governments cannot be expected to promptly work at every stratum of a huge country like India with enormous population which is quite diverse and also indulges in following various traditions and cultures. Thus the concept of Decentralized Governance was introduced and conceived in an attempt to promote development at every layer. The Constitution of India considering the tribal rights and problems of people residing in villages areas has laid down provisions for special administrative structures at the grass root level.

The fifth Schedule, Sixth Schedule and 73<sup>rd</sup> Amendment providing for Panchayati Raj Institutions were incorporated in the Constitution to provide autonomy to these local bodies of governance. In this paper, the authors aim to scrutinize the decentralized system of governance and its efficacy in governing the designated areas.

The tribal population is spread over the entire nation but there are certain areas which are majorly inhabited by the tribal population and thus are categorized under the fifth and the sixth schedules. The fifth Schedule on one hand administers the “partially excluded areas” inhabited by tribals in the mainland whereas the Sixth Schedule governs the “excluded areas” inhabited by tribal in the North Eastern region. The Constitution recognizes separate administrative structures for these areas to compensate them for the historical injustice and exploitation they have faced at the hands of the plains people and colonial rulers.

The tribals have always been kept separate and isolated from the rest of the population giving them a sense of inferiority which has also led them to becoming socially and economically backward. The truth is that the tribals have a unique lifestyle and their extraordinary association with nature in physical as well as spiritual way makes their traditions and customs all the more special. We need to acknowledge the distinct livelihood without isolating them from the society and also help them build themselves up.

The Fifth and Sixth Schedules were incorporated in the Constitution for the preservation of the uniqueness of the indigenous people and at the same time for their upliftment but the sad reality is that the autonomy granted under these provisions remain a dead letter with little implementation on land. The efficacy of the governing bodies under the Fifth Schedule is barred by the constant interference of the State Government which works more towards the interest of the political parties than the indigenous people. Similarly, the autonomous bodies

under the Sixth Schedule face also encounter issues impeding their financial autonomy. In both the provisions, it is evident that the autonomy and powers granted to the governing bodies are at stake and thus it becomes imperative for the Parliament to look into these matters and take actions accordingly.

## **1. EVOLUTION OF THE TRIBAL GOVERNANCE**

What is tribal governance? Is it important? Is tribal governance a reality? Tribal governance is empowering tribes on financial, social and infrastructural front without consuming their inherent character. It is important so that their culture could be preserved from extinction. The paper tries to probe how fifth and sixth schedule have administered the tribal region, the existing lacunae and a comparison between both the schedules. The concepts of schedules in Indian constitution evolved for giving autonomy to tribes which they were devoid of for a long time.

### **1.1 History of Incorporation of the Fifth Schedule**

It can be said that laws for ‘Backward Tracts’ and ‘Partially Excluded Areas’ of the colonial era became the origin of fifth schedule. The fifth schedule has been the kernel of two contrasting themes of debates one which advocated the assimilation of tribes in the mainstream and other which supported the policy of isolationism or protection. But in order to strike a balance the Indian policy maker chose the meeting ground and proceeded with the policy of ‘controlled integration’. During the making of constitution a committee known as the Advisory Committee on Fundamental Rights and Minorities by the Constituent Assembly, 1947 was formed which carefully analyzed the position of tribes at that time. Albeit all the recommendation of committee was not adhered with, schedule Five and Six were added to the Indian constitution.<sup>3</sup> Schedule Five (Article 244(1) ) discerned schedule tribes residing in the schedule area of nine state of Andhra Pradesh, Jharkhand, Chattisgarh, Himachal Pradesh, Madhya Pradesh, Gujarat, Maharashtra, Odisha and Rajasthan. The fifth schedule was designed to function through the president, governor and tribal advisory council. But tribal governance has undergone a sea change through new legislations, amendment and due to the arising

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<sup>3</sup> MINISTRY OF TRIBAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE ON SOCIO-ECONOMIC, HEALTH AND EDUCATIONAL STATUS OF TRIBAL COMMUNITIES OF INDIA (May 2014).

problem.

The Indian constitution granted a special place in the form of schedule five and six for the welfare and development of tribes. Schedule five covers tribal areas other than the tribes of north-east India and authorizes Tribal Advisory Council and Governor to make laws or amend for the tribes. Schedule six authorizes the legislature, the judiciary or the parliament to make laws for the north-east India and is also administered by independent institutions like Autonomous District Council. But it is felt that over the years tribes have not been treated the way our constitution visualized instead on the contrary many acts were implemented ruthlessly in these areas<sup>4</sup> which have a negative impact on tribes. As many state governments while enacting the Panchayati law does not takes into consideration the peculiar need of the scheduled areas. But what about the tribes that exist outside these scheduled areas as there are struggles going on like the *Muthanga Struggle* in Kerala to be included in the scheduled areas. States like West Bengal, Uttar Pradesh, Jammu and Kashmir, Karnataka and Tamil Nadu are also striving hard to get themselves marked as scheduled areas in order to screen their tribes from exploitation and protect their right. The paper in its quest of finding loopholes succinctly analyses the role of governor, Tribal Advisory Council and impact of PESA [The Provision Of The Panchayats (Extension To The Scheduled Areas) Act].

## 1.2 History of Incorporation of the Sixth Schedule

The idea behind setting up of the Sixth Schedule was to provide an efficient and simple administrative set up to safeguard the customs, identity and ways of lives of the inhabiting primitive people. This Schedule was a tool to provide autonomy and a sense of individuality to the tribes residing on the hilly tracts of the North Eastern States. The term tribe is often replaced with the term ‘jana’ or ‘communities of people’.<sup>5</sup> These people though considered to be backward, follow a primitive way of life which is unique in its way and needs to be protected from getting eroded. Our Constitution recognizes the term ‘scheduled tribe’<sup>6</sup> and has also incorporated a list of ‘backward tribes’<sup>7</sup> acknowledging their presence and placing them on a special footing.

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4 Mukul, Tribal Areas: Transition to Self-Governance, 32 ECONOMIC AND POLITICAL WEEKLY,(1997) ,<[www.jstor.org/stable/4405361](http://www.jstor.org/stable/4405361)> .

<sup>5</sup> Jagannath Ambagudia, *Scheduled Tribes and the Politics of Inclusion in India*, 5 ASIAN SOCIAL WORK

<sup>6</sup> INDIA CONST. art. 366(25).

<sup>7</sup> INDIA CONST. art. 342.

### 1.2.1 Brief History of ADCs in North East

The North East during the colonial rule was burning with protests against the suppressive rule and demanded for autonomy. The hilly areas of North East were malignantly alienated from the plains so that the Colonial rulers could easily administer and control the tribals. Moreover, the colonial rulers intended to isolate the tribal groups from the “main currents of Indian civilization.”<sup>8</sup>

Back in the Government Acts of 1919 and 1935, there were separate provisions for the hills of Assam<sup>9</sup> and prior to that the Scheduled District Act of 1874 as well as the Assam Frontier Tracts Regulation of 1880 were devised to govern the various Districts of Assam. But these governing systems were led by crude feudal lords who became agents of British rulers to “act as liaison between Government and the general public.”

The Government of India Act of 1935 became the primary source for drafting the Constitution of India. The Constituent Assembly on the issue of inclusion of the Sixth Schedule in the Constitution, devised an Advisory Committee on the Rights of Citizens, Minorities and Tribal and Excluded Areas which further set up two sub-committees: one led by GN Bordoloi and the other led by AV Thakkar. The Bordoloi sub-committee submitted its report recommending the formation of distinct policies for the people inhabiting tribal areas.<sup>10</sup>

Some members of the Constituent Assembly like Kuladhar Chaliaha disagreed with the idea of treating the aspirations of the indigenous people as a separate issue as this approach would keep the tribals isolated. The other members like Bordoloi, Lakshminarayan Sahu and Nichols Ray on the on the other hand supported the formation of Autonomous District Councils and the incorporation of the Sixth Schedule.

The main motive behind a separate form of governance was to preserve the socio-

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<sup>8</sup> RK Bhadra, *Administrative Responses to the Identity Problems and Social Tensions of the Tribal Communities in North-East India*, 48 IIPA 390-399, (2002), <https://journals.sagepub.com/doi/pdf/10.1177/0019556120020311>.

<sup>9</sup> Government of India Act 1919, s 52-A.

<sup>10</sup> COMMISSION ON CENTRE-STATE RELATIONS, LOCAL SELF GOVERNMENTS AND DECENTRALIZED GOVERNANCE Vol. 4 (March 2010).

cultural and religious beliefs of the tribal people and also emancipate them from the fear of being exploited by the people of the plains. The Bordoloi sub-committee also recommended certain discretionary powers of the Governor which would work both to preserve the autonomy of the ADCs and also to safeguard the indigenous people from oppression at the hands of the ADCs. Unfortunately, the original intention of the Constitution makers could not sustain for long as the reality is far from the dream which we shall critically analyze in this paper.

## **2. ADMINISTRATION IN SCHEDULED AREA THROUGH FIFTH SCHEDULE**

### **2.1 GOVERNOR'S ROLE:**

Fifth schedule assigns the governor with a special role in legislating laws pertinent with the progress of the tribes and blocking the legislation which will hinder their growth or violate their rights. Governor is expected to do independent assessment of administration and implementation of welfare schemes in scheduled areas. And this had to be further presented before the Tribal Advisory Council for recommendations. This report caps the degree of development or exploitation occurring in a tribal region including matters of land alienation and brutality suffered by them.

Governor's role in governing the schedule areas has been criticized because his office seems to protect the interest of state more and that of the tribes less. The gubernatorial office has been awarded a special place in the constitution for van guarding the interest of tribes but instances like Bauxite mining in Andhra Pradesh or in cases like *Nilgiris v Vedentaa*, *BK Manish v State of Chattisgarh*, *BhuriNath v state of Jammu and Kashmir*, *Samatha v State of Andhra Pradesh* have questioned the credibility of governor's office.<sup>11</sup> The transformation of governor's office from a constitutional office to a political post has made the governor's report a quantitative analysis and not a qualitative one and therefore impact of insurgency continues to be absent from this report. BR Ambedkar said that the governor may take decisions according to his discretion.<sup>12</sup> But this discretionary power has

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<sup>11</sup> Sonum Gayatri Malhotra, *Governors' Role and Tribal Areas*, 49 ECONOMIC AND POLITICAL WEEKLY, (2014)

,[www.jstor.org/stable/24481146](http://www.jstor.org/stable/24481146).

<sup>12</sup> Constitutional Amendment Debates of India, Vol. IX, 5th September 1949.

been blatantly misused which is becoming detrimental to tribes and favorable to Multi-national Corporations.

## **2.2 TRIBAL ADVISORY COUNCIL:**

Tribal Advisory Council (herein after TAC) is established under schedule five Para 4(1). Tribal Advisory Council is ought to be an autonomous body which can keep in check the decisions of state and governor. But the role of tribal advisory council has been reduced to an advisory body whose advises are not even bounding, it can recommend only when asked for and cannot intervene in any decision. During the constitutional assembly debates its role was seen not only limited to the welfare and development of tribes but was extended to the administration of the scheduled areas. Fifth schedule has enfeebled the TAC's by making its position subordinate to governor which in itself is not an empowered post. Tribal advisory council has become a state run institution as three fourth member are the member of legislative ,rest are appointed by the state with chief minister as its chairperson. In this way the independence of this council is compromised. The other problem associated with TAC is that they do not hold regular meeting and the resolution which are passed are not followed.<sup>13</sup> Then what role does TAC actually play? Has it become a redundant institution?

## **2.3 BHURIA COMMITTEE:**

The need and condition of tribes differ from each other and also from the plainsman therefore the governance should be moulded to suit their necessities. Bhuria Commission was constituted before the enactment of (The Provision of the Panchayats (Extension to the Scheduled Areas) Act), 1996. Its suggestion were pivotal in shaping the legislation and in bringing to surface the many issues of tribes. Tribes should be governed in such a manner which helps them to progress on the all the three fronts i.e. social (through education), economical (through jobs) and infrastructural (through good road and transportation). Financial provisions should be made by states considering the geographical uniqueness, development, state services and population of tribes.

The fragile local government did not contribute much as they lacked autonomy and

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<sup>13</sup> The Tribes Advisory Councils: Time to be replaced by the Autonomous District Councils (2012 Asia Tribal Nrtwork).

awareness as the Panchayats in tribal regions were inadequately informed. The panchayats were unable to secure tribal land (as with the increase in population the patch of land per tribal individual has drastically decreased), in restoring the land of tribes, and providing them with documentation of lands. Bhuria commission recommended that Gram Sabha should have control over land acquisition, use of natural resources, protecting cultural identity and anything which will affect the future of tribes. And this led to the enactment of PESA. PESA gave autonomy to Gram Sabhas and several other power like restoration of land under section 4 (m) (3) of the act.

#### **2.4 PESA (THE PROVISION OF THE PANCHAYATS (EXTENSION TO THE SCHEDULED AREAS) ACT):**

It was in the year 1996 that schedule nine or Panchayati Raj institution was extended to schedule areas. According to Article 243 of Indian Constitution general provision could not be implemented in area covered under schedule five and six of the constitution. PESA as an act which extended the institution of Panchayats to scheduled areas for giving them the power of self-government by empowering the local institution and to uproot the problem of lack of implementation of provision of fifth schedule, misuse of the principle of eminent domain, land alienation and for protection of customary rights. The Provision of The Panchayats (Extension To The Scheduled Areas) Act, 1996 was a revolutionary step towards the governance of tribes through Gram Sabhas. It bolstered Gram Sabhas to a great extent. This amendment was brought in to give more rights in the hands of tribals so that they can have more say in the management of natural resources, governance and in other words giving them more autonomy. It has benefitted both the minority as well as the majority tribes by reserving half the seats to tribes in the elected local government PESA has been no doubt been a radical legislation as it helped in democratic decentralization and in alleviation of poverty.

#### **2.5 GRAM SABHA:**

Gram Sabha was empowered through PESA to revive the institutions of self- governance and establish it as a guardian for the tribes. Gram Sabha were targeted in this act as local bodies lost their independence due to red-tapism and corruption in bureaucracy. The Gram Sabha was legally and operationally empowered to conduct social audit of Tribal Development programmes to ensure transparency, accountability and people's participation.

Gram Sabha was given the power even to reverse state's decision and authenticate them.<sup>14</sup> Some of the important provisions of PESA were that every village shall have Gram Sabha and they will be accountable for the following:

The gram Sabha will approve all the economic and social projects and will also find out the beneficiaries. The Gram Sabha has to be consulted for acquisition of land in scheduled areas or for exploitation of minor minerals.<sup>15</sup>

In matters regarding land the views of Panchayats cannot be simply brushed aside otherwise the action of state government will be considered invalid. Consultation has to be prior and informed when talked about land acquisition.<sup>16</sup> As land is not only an economic resource for tribes but is a communitarian symbol for them.

Given the importance of PESA every state should make immediate legislation as only sixteen percent of the districts out of the total number of districts in the scheduled areas of nine states<sup>17</sup> have enacted them. The report of Mungekar Commission recommended that dissonance between Gram Sabha and PESA should be rectified by adopting significant provisions of PESA through laws passed by Governor's notification, bestowing ownership of minor forest products to tribals, issuing guidelines for specifying role, responsibilities and functions of Gram Sabha to honor their competence. The tussle between the state and the central government should be solved because even though Gram Sabha is given power but states like Maharashtra have initiated Village Forest Rules<sup>18</sup> which is different from this act. There should be uniformity in adopting PESA as erroneous deviation can ruin the fundamental unit of governance i.e. village. Therefore definition of village is important

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<sup>14</sup> THIRD REPORT OF THE STANDING COMMITTEE, INTER-SECTORAL ISSUES RELATING TO TRIBAL DEVELOPMENT ON STANDARDS OF ADMINISTRATION AND GOVERNANCE IN THE SCHEDULED AREAS, 2009.

<sup>15</sup> The Provisions Of The Panchayats (EXTENSION TO THE SCHEDULED AREAS) ACT 1996, s 4(e)

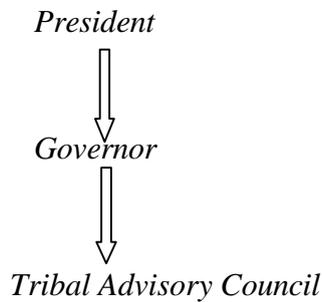
<sup>16</sup> 126Anupam Chakravarty, Rights overruled:States are making their own rules to reclaim the authority over forests from tribes, derailingcommunity forest rights ,Down The Earth (30 May 2016),<https://www.downtoearth.org.in/news/forest-management/rights-overruled-53977>.

<sup>17</sup> 127NayakaraVeerasha, Governance Of The Fifth Schedule Areas: Role of Governor ,INDIAN JOURNAL OF PUBLIC ADMINISTRATION, (2017) , <[https://journals.sagepub.com/doi/pdf/10.1177/0019556117720614?casa\\_token=srnxr0r-2zcAAAAA:W5obBNSP1TD9X0wwqzg7SV6TcHWUoSeBYfXQnfpHzFa3uSxnTAJF9oVVM\\_11SknMCjRNQcIw](https://journals.sagepub.com/doi/pdf/10.1177/0019556117720614?casa_token=srnxr0r-2zcAAAAA:W5obBNSP1TD9X0wwqzg7SV6TcHWUoSeBYfXQnfpHzFa3uSxnTAJF9oVVM_11SknMCjRNQcIw)> .

<sup>18</sup> 128Pawan Dahat, Villagers protest mining in Gadchiroli, THE HINDU , Jan. 26, 2017 ,<https://www.thehindu.com/news/national/other-states/Villagers-protest-mining-in-Gadchiroli/article17094501.ece>.

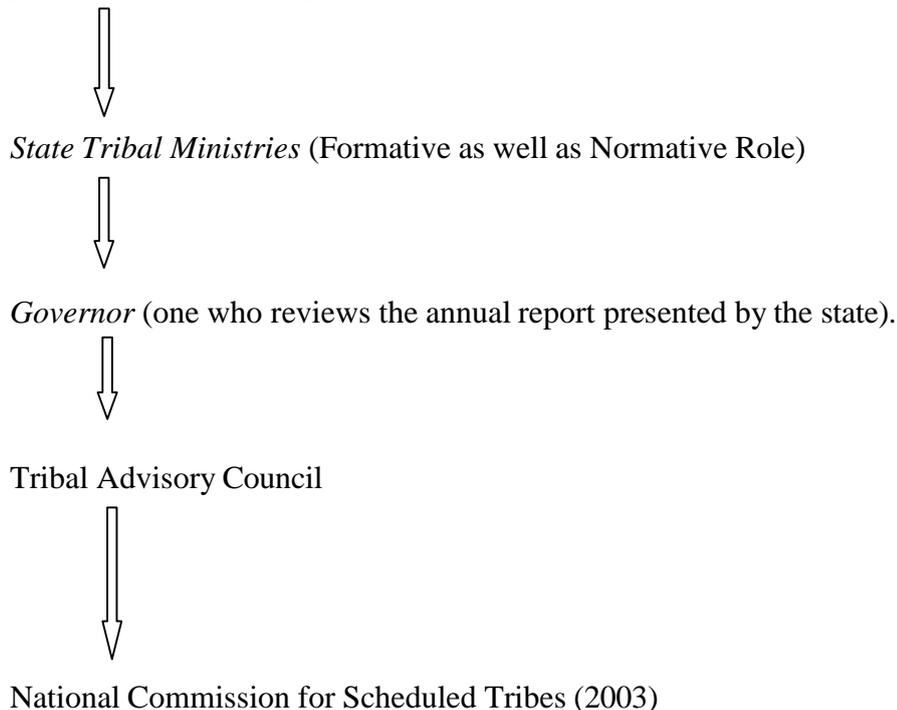
given under section 4 (1) of PESA. But PESA gives only right of recommendation to Gram Sabha. And eventually Panchayats become an extension of state and does not act as an independent institution. The state has empowered the tribal community on one hand through PESA and when they protest through Gram Sabhas in places like Surja Gardh where they are protesting against mining their voice is gagged by another state machinery i.e. the police and are termed as naxalites or insurgents. Now here we have shown the administrative apparatus existing before and after PESA.

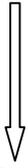
BEFORE PESA:



AFTER PESA:

*Ministry of Tribal Affairs 1999* (a link between president and governor which will keep the political interface at bay).





Gram Sabhas.

The paper here has tried to show the trajectory of administration which existed before PESA and how after PESA the administrative check post have increased. The new development has definitely led to some positive changes in the domain of tribal governance but there are umpteen number of problems which remains unaddressed. The reason for continued exploitation of tribes is the delayed advent of administration for resolving the issues of tribes which is proved by the aforementioned trajectory check of governance. We see that ministry of tribal affairs or commission of scheduled tribes is formed almost after four decades after independence but the problems of tribes is age old as their exploitation can be traced back to landlords then to British rule and now continues to democratic India.

The extension of Panchayati raj to tribal areas has given them opportunity for self-governance. It will help to integrate the marginalized section of the society.<sup>19</sup> Governance means different things to different people and is defined differently by different institutions. The race to establish ones ethnic identity and hegemony has increased the conflicts in places like Assam which is a multi-ethnic state consisting of tribes such as Kukis, Nagas and Meitei. It has been seen that the excluded and the partially excluded group were not given the autonomy to rule them. The parameters relying on which the government decides whether autonomy should be given to a particular tribe or not is still not transparent.

Need of resources and metals such as Aluminum, Bauxite or any other mineral by multinational companies is pressuring the government to mine in tribal areas. Araku region of Andhra Pradesh is an speaking example of it. When mining was initiated in the ecologically fragile area such as the one happening in Araku<sup>20</sup> it not only infringes the land rights of tribes but also make their way of earning livelihood difficult, by polluting the environment and resources by radioactive waste of mining. Politicians have used their popularity to build a consensus. This

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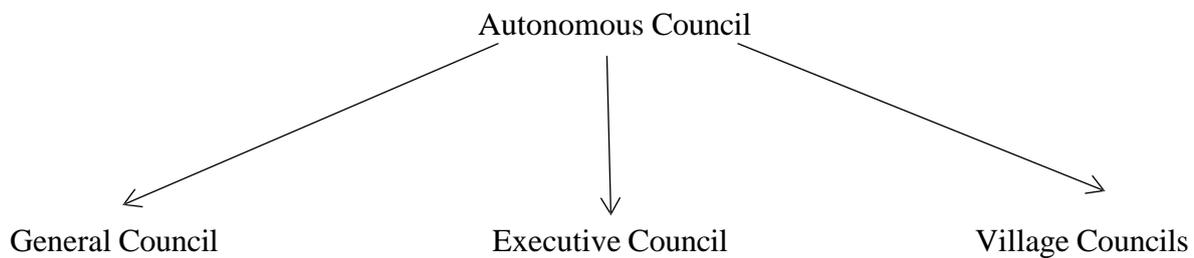
<sup>19</sup> 129Sekholal Kom, Identity And Governance : Demand For Sixth Schedule in Manipur ,71 THE INDIAN JOURNAL OF POLITICAL SCIENCE , (2010) ,<https://www.jstor.org/stable/42748389> .

<sup>20</sup> N Purendra Prasad, Vamsi Vakulabharanam, K Laxminarayana and Sudheer Kilaru, *Tragedy of the Commons Revisited (II): Mining in Tribal Habitats of Araku Valley*, 47 ECONOMIC AND POLITICAL WEEKLY, (2012), <https://www.jstor.org/stable/41720260>

leads us to a series of question like *Has land distribution among tribes actually happened? If land is not redistributed among tribals then how can they claim right over it?* They are pertinent but are not answered in this paper as they are beyond the scope of this paper. The constitutional framework has fallen short in coping up with tribes which borne the problems of Naxalism and Maoism.

### **3. STRUCTURE OF THE AUTONOMOUS DISTRICT COUNCILS**

The Autonomous District Councils are composed of a General Council, an Executive Council and Village Councils which are vested with legislative, executive as well as judiciary powers.



The General Council remains in function for a period of 5 years and is endowed with Executive powers in certain subjects. The Executive Council on the other hand is responsible for executing all the functions of the General Council which is composed of Executive Councilors elected by the General Council and is headed by a Chief Executive Councilor. Lastly, the Village Councils constitute the lowest form of governance which comprises of 10 members directly elected by the people working within the Autonomous Council.

### **4. ADMINISTRATION OF THE NORTH-EAST AS PER THE SIXTH SCHEDULE**

The North Eastern part of India has been the home to a variety of ethnic groups and from the era of the British colonial rule, the tribes residing in the North Eastern areas were subject to isolationist policies devised by the British Government. These areas of hilly tribal tracts were labeled as “wholly excluded areas” which in today’s time is governed by the sixth schedule of the Indian Constitution. This schedule<sup>21</sup> was incorporated in the constitution with three major purposes:

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<sup>21</sup> INDIA CONST. sch 6.

- a. For the maintenance of the distinct identities of the tribal people;
- b. For the prevention of social as well as economic exploitation; and
- c. For the development of the tribal people through their indigenous ways.<sup>22</sup>

The North Eastern region is not only governed by the sixth schedule but also other constitutional provisions like the Article 371 and various other statutes like the Manipur (Hills Area) District Council Act. The administrative structure of the North-East can be briefly explained through the following table:

STATE	ADMINISTRATIVE STRUCTURE
ASSAM	Sixth Schedule, Article 371-B, Primary Governance Through Three Autonomous Councils- Dima Hasao District Autonomous Council (Dhdac), Karbi Anglong Autonomous Council (Kaac) And Bodoland Territorial Council (Btc).
MANIPUR	Article 371-C Of Constitution, Manipur Hill Village Authority Act As Well As Manipur Hill Areas District Council.
MIZORAM	Governed By Sixth Schedule And Article 371-G Through Three Autonomous District Councils- Chakma Autonomous District Council (Cadc), Mara Autonomous District Council (Madc) And Lai Autonomous District Council (Ladc).
MEGHALAYA	Sixth Schedule Through Three Autonomous District Councils- Khasi Hills Autonomous District Council (Khadc), Garo Hills

	Autonomous District Council (Ghadc) And Jaintia Hills Autonomous District Council (Jhadc).
TRIPURA	Sixth Schedule And One Autonomous District Council- Tripura Tribal Areas Autonomous District Council (Ttaadc)
NAGALAND	Governed By Article 371 A And Article 371 Aa Of The Indian Constitution, Institution Of Village Councils In Major Villages And No Autonomous Councils.
ARUNACHAL PRADESH	Governed By Article 371 H Through Panchayati Raj Institutions, No Autonomous Councils

<sup>22</sup> L.S. GASSAH, THE AUTONOMOUS DISTRICT COUNCIL (New Delhi: Omson Publications 1997).

The institutions of governance in such Scheduled Areas are not restricted to these Constitutional provisions and Autonomous Councils but there are other institutions like Syiems among Khasi, Nokma among the Garos, Pachong for the Kukis of Manipur and many more.<sup>23</sup>

#### **4.1 FUNCTIONS AND POWERS OF THE AUTONOMOUS DISTRICT COUNCILS**

The Sixth Schedule was devised for the administration of the tribal areas of North Eastern states with the assistance of Autonomous District Councils by vesting them with legislative, executive as well as judiciary powers. This form of decentralization was adopted to promote development in various sectors like health, infrastructure and education.<sup>24</sup> It is thus imperative to analyze the impact of decentralization on the factor of development in such isolated areas and also whether the inclusion of the Sixth Schedule has been successful in providing autonomy to the local institutions of self-governance in these areas. The Sixth Schedule facilitates administration in the designated areas through Autonomous District Councils (ADC) in Autonomous Districts as well as Regional Councils in autonomous regions.<sup>25</sup> The ADCs can be said to possess legislative powers over the following matters:

- For the allotment and distribution of land excluding the reserved forests to the people for their livelihood through agriculture and also for the promotion of the interests of the residing people;
- For the use of canal water in irrigation and agriculture;
- For the setting up of town or village committees;
- For health and sanitation related issues;
- For the inheritance of property; and
- For various other social customs

The powers of the ADCs are not restricted to the above points but they are also responsible for the promotion of primary education and construction of roadways as well as waterways to facilitate trading by the non-tribal people residing in such areas. There is an exception to

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<sup>23</sup> C.R. Bijoy and Tiplut Nongbri, *Country Technical Note on Indigenous Peoples*, REPUBLIC OF INDIA IFAD,(2013).

<sup>24</sup> PRANAB BARDHAN&DILIP MOOKHERJEE, *DECENTRALIZATION AND LOCAL GOVERNANCE IN DEVELOPING COUNTRIES: A COMPARATIVE PERSPECTIVE* (MA: MIT Press 2006).

<sup>25</sup> INDIA CONST. art. 244(2) &.275.

the first point regarding the allotment and distribution of land to the natives which is that the land should not have been mandatorily reserved for public purpose.

The Constitution and Central Government tries to paint a flowery picture of the administration in such tribal areas by conveniently obscuring the flaws in the devolution of powers. There are numerous restrictions imposed on the powers bestowed on such governing bodies though the list seems a lot. The autonomy furnished to these local bodies do not seem sufficient to preserve the traditions, cultures and customs of the indigenous people taking into consideration the immense interference on the part of the Central and State Government.

#### **4.2 IMPACT OF GOVERNOR'S DISCRETION OVER TRIBAL AUTONOMY**

The Governor purports to be a bridge between the State Government and the ADCs but this may seem a little paradoxical considering the fact that the Governor is an agent of the Centre but is also endowed with the responsibility of bolstering the pillars of tribal autonomy.<sup>26</sup> It is quite evident that the Governor has a say in almost every aspect of the administration of ADCs as was also pointed out by Justice Hidayatullah in a 1966 case.<sup>27</sup>

The Governor is the head of the district till the constitution of ADCs and is responsible for the institution of regional or district councils till the ADCs become functional.<sup>28</sup> The Governor is also entitled to make the first constitution of these local governing bodies.<sup>29</sup> Furthermore, the Governor is authorized to nullify or suspend any act of the District or the Regional Council if it appear to affect the security of the nation or is against public order<sup>30</sup> and can also exercise his discretion to enforce or not to enforce a certain law passed by the State Legislature in these autonomous areas as no Act of the Parliament or State Legislature can automatically apply to such areas. An important question which needs to be addressed is whether the Governor is able to exercise his discretion in these areas or not.

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<sup>26</sup> J.K Patnaik, *Autonomous District Councils and Governor's Role in the Northeast India*, IJP, (2017) <https://journals.sagepub.com/doi/pdf/10.1177/0019556117720594>.

<sup>27</sup> *Edwingson Bareh v State of Assam*, (1966) 2 SCR 770(India).

<sup>28</sup> INDIA CONST. sch 6, para 19.

<sup>29</sup> 139INDIA CONST. para 2(6).

<sup>30</sup> 140INDIA CONST. sch 6, para 15(1).

There have been amendments time and again pertaining to the discretionary powers of the Governor but this has led to the erosion of the original intention which to provide autonomy to the tribal people inhabiting in the hilly tracts of North East. A clause<sup>31</sup> was inserted in the Sixth schedule which listed a number of functions on which the Governor may exercise his discretion and also seek the advice of Council of Ministers on these matters.<sup>32</sup> Though the said clause makes it optional for the Governor to implement the advice of the Council, it is a well-known fact that he usually acts on the advice of the Council which in turn defeats the whole purpose of vesting the Governor with discretionary power and also impedes the autonomy of the ADCs. The Schedule in some fields of conflicts lays down that the decision of the Governor shall be deemed to be final and shall prevail over the decision of the District Council.

It is therefore imperative that the Governor takes the decision taking into account the interests of the tribal people and for the preservation of their culture. For instance, in a matter if a dispute arises with regards to the share of royalties, the matter is referred to the Governor and his decision shall be deemed to be final.<sup>33</sup> The bills which the ADCs intend to implement are also to be assented by the Governor. It is conspicuous that the actions of the ADCs have to be approved by the Governor and the Governor despite the provisions of his discretionary powers acts on the advice of the Council of Ministers. We can thus infer that that the legislative power of the ADCs is drastically weakened due to lack of independence of the Governor. The purpose of appointing the Governor as the head of these autonomous areas is absolutely defeated due to the constant interference of the State Government.

Another important power vested with the District Councils and the Village Courts is administration of justice where the District Councils act as the appeal court but here too the power and autonomy seems ambiguous as the Governor has the authority to direct the High Court of the respective states to perform the same functions.<sup>34</sup>

As we have already discussed that the ADCs have broad administrative powers like establishing and managing “primary schools, dispensaries, markets, ferries, fisheries, roads and many more” but all these functions have to be approved by the Governor which acts as

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<sup>31</sup> INDIA CONST. sch 6, para 20BB.

<sup>32</sup> INDIA CONST, *amended by* The Constitution (Sixty first Amendment) Act, 1988.

<sup>33</sup> INDIA CONST, sch 6, para 9(2).

<sup>34</sup> David Stuligross, *Autonomous Councils in Northeast India: Theory and Practice*, ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 497- 525,(1999)

a check on the powers of the ADCs and hampers their autonomy.<sup>35</sup> In most of the cases, the decision of the Governor is the decision of the State Government which defeats the original intention of the Constitution makers to make the Governor the head in these tribal areas. The Constitution makers aimed at facilitating autonomy in the areas under the Sixth Schedule through the Governor but the current situation speaks volume to the contrary.

#### **4.3 IS THE DEVOLUTION OF POWERS IN THE AREAS UNDER SIXTH SCHEDULE SUCCESSFUL**

The Constitution lays down various provisions to provide autonomy to the local governing bodies but there are noticeable discrepancies between the formal rules and the actual implementation of the same. The ADCs though vested with the power to draw up budgets for development of the areas, they are enormously dependent on the State Government for their approval and granting of funds. If we take the example of Leh Council, in 1997-98, the Council requested for a grant of 36 crores but was provided only 27 crores with a later addition of another 5 crores which was still insufficient for the year.<sup>36</sup> It would not be wrong to say that there is no significant shift from the paradigm of centralized structures as there is sheer dominance of State Government which even has the power to amend or reject the Council's programmes. Furthermore, the legislation passed by the State Government shall prevail over the legislation passed by the Council if they pertain to the same subject.<sup>37</sup> The various ADCs appointed in the States of North East face different problems. For instance, in 1987, the Autonomous State Demand Committee (ASDC) expressed its resentment that the Karbi Anglong District Council "was made and unmade four times within a span of three years at the whims and fancies of the State Government."<sup>38</sup> It is thus imperative to critically analyze the working of the ADCs or other local institutions governing the areas under the Sixth Schedule and it would be more effective if the working of ADCs in each of the areas is analyzed.

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<sup>35</sup> Vijay Hansaria, *B.L.Hansaria's Sixth Schedule to the Constitution*, 2 JILI 391, (2011).

<sup>36</sup> Martijn van Beek., *Hill Councils, Development, and Democracy: Assumptions and Experiences from Ladakh* (1999) ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 444.

<sup>37</sup> INDIA CONST, sch 6, para 12(A).

<sup>38</sup> Bethany Lacina, *The Problem of Political Stability in Northeast India: Local Ethnicity Autocracy and the Rule of Law*, 49 ASIAN SURVEY 998,(2009).

### 4.3.1 LADAKH REGION

The Ladakh region is governed by two district Councils, Leh Council and Kargil Council functioning in their respective districts. The first issue faced by the Councils in the Ladakh region is that the State Government causes unnecessary delay in the release of funds due to which all the activities of the Council come to standstill. Another issue within the Council is that the members are representatives of various political parties and thus the manifesto of the Council is shaped considering the National and State political interests.<sup>39</sup> It is thus important that the composition of the Council is done taking into consideration people with neutral political perspectives who would primarily work for the tribals. But this has not been the case as despite continuous attempts to ensure representation by only locals, the Ladakh Council has seen domination of elite groups whose decisions have often elicited outrage from the local people.<sup>40</sup>

### 4.3.2 ASSAM

The various districts of the State of Assam is governed by a number of ADCs which have been instituted not only as per the Schedule 6 of the Constitution but also other statutory provisions. The State Government has been playing the blame game with the ADCs accusing them of embezzlement of Government funds. The Deputy Chief Executive Member of the Bodoland Territorial Council (BTC) in 2015 expressed his frustration regarding the delay in granting of funds by the State Government and said “every year the Assam Government releases funds at the end of the financial year which makes it impossible for the Council to utilize the money on time.”<sup>41</sup> The Deputy Chairman further added that the first installment of the funds is released during September while the second installment is released in January or February leaving little or no time for the implementation of the schemes. The Council head further complained that their discretion over spending the funds was also taken away as the State Government made an amendment and specified areas where money was to be spent.

The efficacy of the the Dimsa Hasao District Autonomous Council (DHDAC) is hollowed

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<sup>39</sup> Martijn van Beek, *Beyond Identity Fetishism: “Communal Conflict” in Ladakh and the Limits of Autonomy*, CULTURAL ANTHROPOLOGY 545,(1999).

<sup>40</sup> Martin Van Beek. *Hill Councils, Development, and Democracy: Assumptions and Experiences from Ladakh*, ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 449, (1999).

<sup>41</sup> ‘Functioning of Autonomous Councils in Sixth Schedule Areas of North Eastern States, Natural Resource Hub, ActionAid India, 2016.

by the increasing instances of corruption and misappropriation of funds.<sup>42</sup> Furthermore, another issue faced by the people inhabiting the Dimaraji is that the members representing them in the Council hardly interacted with the locals and therefore could not work for the interests of the people.

### 4.3.3 MEGHALAYA AND MIZORAM

The issues with the ADCs working in these two States are similar to most of the issues which have already been discussed like the shortage of funds and delay in release of funds but certain specific issues need to be addressed too.

In Mizoram, the constituted ADCs cover only 15% of the State's population due to which the State Government is ignorant towards these Councils. Moreover, there are constant frictions between various tribal communities due to lackadaisical governance.<sup>43</sup>

In Meghalaya, the ADCs have been deprived of their power through the constant interference of the State Government. This is quite evident from the regulation from forests which is one of the major areas entrusted to the ADCs as all the forest-related activities are carried out as per the directions and policies approved by Forest

Department thus superseding the powers of the ADCs.<sup>44</sup> Furthermore, a number of executive as well as judicial functions of the Councils are taken over by the District Magistrate and Deputy Commissioner.<sup>45</sup>

### 4.3.4 TRIPURA

Tripura is governed by the Tripura Tribal Areas Autonomous District Council (TTAADC). The Expert Committee on Decentralized Planning in the Sixth Schedule observed that the

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<sup>42</sup> Triveni Goswami, *Autonomous District Council a tool for diversity management: A boon or bane?* **Institute of Social Change and Development** (2006).

<sup>43</sup> Subir Bhaumik and Jayanta Bhattacharya, *Autonomy in the Northeast: The Hills of Tripura and Mizoram* in, **THE POLITICS OF AUTONOMY: INDIAN EXPERIENCES** (New Delhi: Sage Publications 2005 Ranabir Samaddar (ed.)).

<sup>44</sup> Robert Tuolar, *Autonomous District Councils and Tribal Development in North East India: A Critical Analysis* 7(2) IJOART, (2013).

<sup>45</sup> *supra* note 3.

division of TTAADC into the specified zones overlapped with the blocks, tehsils and the Block Advisory Committees (BACs) which led to a tug of war for power between the State Government and the Council because the BACs on one hand were headed by MLAs whereas the advisory committees in the zones and sub-zones were led by members of the TTAADC. This also led to clarity in the roles of the governing bodies and intervened with the autonomy exercised by the Council.<sup>46</sup>

## **5. HAS GOVERNANCE REACHED THEM?**

Governance should result in something. The major fault of our governance has been that since independence tribes have seen governance only in the form of police or brutal repression. The creak in governance has now widened to a gulf in the governance as big companies are claiming their illegal right on the lands of tribes.

The biggest problem in our constitutional mechanism is that it eventually makes the state powerful and clamps down on independence of institution like tribal advisory council. Democracy is all about decentralization of power and not about centralization of power. The flaw in the problem arises when Gram Sabha is weakened by Tribal Advisory Council which is further weakened by Governor as it controls the decision taken by TAC, Governor itself is a weak institution as it is controlled by the state. It was difficult for tribes to participate in democracy due to lack of awareness but even when they follow this route then their voice remains unheard. Therefore tribes have to take to street when operation like is Green Hunt is carried on.

## **COMMON LACUNAS IN THE GOVERNANCE AS PER SIXTH SCHEDULE WHICH NEED ATTENTION**

There are some major lacunas pertaining to the constitution of the ADCs which impede their efficacy and hence require immediate attention. The most important and common issue the ADCs face is with regards do their autonomy as they are not furnished with enough powers to cover the entire gamut of issues pertaining to the preservation of tribal identities and development of the inhabitants. Furthermore, the Governor is vested with a lot of powers to decide which laws legislated by the State Legislature shall apply to the Autonomous Districts.

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<sup>46</sup> Gadadhara Mohapatra, Decentralized Governance and Tribal Development in Scheduled Areas of North East India: A Case Study of the Tripura Tribal Areas Autonomous District Council, 63 (3) IIPA 475-494, (2017).

The Governor's assent is also mandatory for the implementation of the laws legislated by the ADCs. Such overriding powers of the Governors affect the autonomy of the ADCs.

The second important issue lowering the efficacy of ADCs is that no mandatory time limit has been provided for the reconstitution of the ADCs after dissolution due to which election remains postponed for an indefinite period. Furthermore, the election for ADCs is conducted by a separate Autonomous Agency which is not very active and hence an improvement in this field is highly required.

The third issue deals with the lack of representation of minorities (Women and small tribal groups) in the Council. Most of the ADCs working in the North East do not have any provision regarding reservation of seats for women in the Council. Though the 73<sup>rd</sup> Amendment provides for one-third reservation policy, the Sixth Schedule remains silent on this issue. It is disturbing to notice the absence of women from such governing bodies. The Bodoland Territorial Council as well as the Autonomous District Councils of Mizoram are the only ones with provisions of reservation for women, though the proportion is very low.<sup>47</sup>

Similarly, there is lack of representation of the small tribal groups in the Council and their voice remains suppressed. These small groups despite being indigenous to the region remain neglected and unheard. In order to ensure more vibrant functioning of the ADCs, it is important to incorporate women and members of small tribal groups in the ADCs.

The final and major issue faced by ADCs is with regards to financial autonomy. It has been previously discussed at various instances that the State Governments do not initiate the flow of the funds allotted to the ADCs on time and the funds released are usually meager and much lesser than the grants allocated. In order to ensure the execution of the schemes legislated by the ADCs, it is imperative to furnish them with the requisite funds but that is far from reality.

## **6. COMPARITIVE ANALYSIS OF THE FIFTH SCHEDULE, SIXTH SCHEDULE AND THE 73<sup>RD</sup> AMENDMENT:**

The paper has discussed both the schedules extensively along with the problem persisting in both the schedules. We find that both the schedules confront problems of corruption and red-

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<sup>47</sup> *supra* note 3.

tapism. On comparing the provisions of the fifth and sixth schedule, it is evident that the sixth schedule has been conferred with much greater autonomy. The Tribal Advisory Councils along with the Governor on the other hand has failed miserably in performing its constitutional functions. It won't be wrong to say that the protective mechanisms for the tribals devised in the fifth schedule have failed to meet its stated goals. Attributing to these reason the Bastar District of Chattisgarh is demanding to be included in the sixth schedule and removed from the fifth one.<sup>48</sup>

An important lacuna in both the fifth and sixth schedule is that they remain silent on the issue of reservation of women. This provision for reservation of women was introduced in the 73<sup>rd</sup> Amendment of the Constitution and should be incorporated the two schedules too for better representation.

This comparison shows that the less is the state intervention more is the autonomy and development. Both the schedules can function properly only when there is an exchange of administrative learning from both sides.

## **7. RECOMMENDATIONS**

The problem of alienation has been inherent in the Indian society and they have somehow penetrated in the administration as well. And this is the reason that problems like tribes continue to confront problem such as land alienation. Scheduled tribes Bill, 2005 which was passed to distribute the forest land among i.e. 2.5 Hectares among each nuclear family. This act endeavored to fill the lacunae created by previous legislation by giving them natural resources. Forest communities such as tribes and villagers can create a system of checks and balances for schemes of forest department and vice versa the forest department can keep in check the conditions of forest by the tribes who depend on it for subsistence but due to hunger and poverty often collide with poachers. The issue of rights over forest product could be resolved by Lease forestry. Lease Forestry is a good experiment for conserving the forest as well as the community which depends on it which is successfully practiced in Nepal. Tribes should be given rights as well as responsibilities for protecting forest where they can conflate their traditional knowledge

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<sup>48</sup> SomyaGaytriMalhotra, *Right Place Wrong Arrangement*, THE HINDU, June 18, 2013, <https://www.thehindu.com/opinion/op-ed/right-place-wrong-arrangement/article4823988.ece>.

with the practical knowledge of the experts and forest department.<sup>49</sup> And these laws should be the prerogative of Governor and assisted by tribal advisory council which can assist in assessing the ground reality. Governor should be allowed to work independently. In case of abuse of discretionary power the judiciary should keep a check.

Tribal Advisory Council should have more say in the decision making process. It should be given similar power to District Council and Register Council. The recommendation of the council should be bounding.

Law should come out of its doctrinal hood to know the realities and protect them from increasing corporate globalization. Problems like naxalism cannot be eliminated by law which is made without knowing the ground reality and is used only for crushing them or detaining them.

Governance is created to cure the social evils and strive towards positive development but due to malfunctioning of the government tribes took weapon and became naxalites. The problem of tribes is more of a sociological issue and then a political and further an economic issue. And all this attributes to the poor implementation of the few schemes made for tribes.

Though the Sixth Schedule provides for considerable autonomy and independence to the governing bodies, there are certain impediments in this Schedule as well and thus need to be looked into. We thus propose certain recommendations for the Sixth Schedule which can make administration more efficient:

The State Government is often seen giving a cold shoulder towards the financial needs of the ADCs and delays the release of such funds too. Hence, it is required that the Autonomous Councils are brought within the ambit of the State Finance Commission so that the financial grant is not left to the discretion of the State Governments. Furthermore, the financial needs of the ADCs must be reviewed on a regular basis.

Currently there is no provision limiting the period within which the ADCs must be constituted. Thus, a time period like 6 months must be laid down for the reconstitution of the ADCs from the date of dissolution. Moreover, the election must be conducted by the State Election Commission instead of Autonomous agencies.

There must be a provision for reservation of minorities like women and small tribal groups in the ADCs so that they can be well represented and their problems are highlighted.

The State must formally recognize these local political institutions which function at the village and district levels.

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<sup>49</sup> S Upadhyay , *Scheduled Areas Need a Fresh Legal Perspective*, ECONOMIC AND POLITICAL WEEKLY, (2010), [www.jstor.org/stable/25742172](http://www.jstor.org/stable/25742172).

## **7.1 125<sup>TH</sup> AMENDMENT BILL**

In 2019, the Parliament in an attempt to ameliorate the current state of governance as per the Sixth Schedule came up with the 125<sup>th</sup> Amendment Bill.<sup>50</sup> This Bill tries to cover most of the grey areas and also incorporates most of the recommendations we have proposed but the issue once again remains with respect to its implementation. The Bill was introduced in the Rajya Sabha on 6<sup>th</sup> February 2019 after which it was referred to the Standing Committee on 18<sup>th</sup> February 2019 and report on the same was received on 5<sup>th</sup> March 2020. The Bill may prove to be an effective piece of legislation but it remains hanging to become an Act. We cannot assure when this bill will become an Act and even if it does whether it will be well implemented on the land or not.

## **8. CONCLUSION**

Tribes whose custom, culture and lifestyle differ from us today are one of the oldest communities in the world. Tribes initially were not an isolated community but due to system of alienation they were gradually pushed to the fringes of jungle. Keeping the prevailing conditions in mind, the doyens of constitution added schedule five and six to the Indian Constitution. The two schedules are called as ‘constitution within constitution’ as they were incorporated to safeguard the rights of tribes. Over the years we have seen that the constitutional framework under the schedules has failed to function as was originally envisaged. And this is due to the interventionist approach of the state towards governance. This centralized the axis of power by debilitating the autonomous agencies such as the tribal advisory council. The centralization of power ignored the ground and led to problems like insurgency. Insurgency is a problem borne out of land alienation which is primarily caused due to lack of governance. In order to deal with the issue of autonomy the reformative phase started in tribal governance which led to enactment such as PESA (The Provision of The Panchayats (Extension to the Scheduled Areas) Act) and many other legislations. The reports of commission which gave grass root realities, their recommendation should be instilled in the policies. The Indian democracy is entering that era where laws should not be politically driven but instead need driven which addresses the problems of tribes. There is an immediate need of amendments in functioning of governor. The democratic set up comprising of elections, policies have not been the culture of

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<sup>50</sup> The Constitution (One Hundred and Twenty-Fifth Amendment) Bill, 2019.

tribes but it has been after a lot of effort that they have started raising their voices through Panchayats and now it is the government's duty to listen to them. Tribes might constitute a small percentage of our population but their contribution in preserving forest, rivers and other natural resources has been more than the rest of the population. Hence tribal identity should be preserved by governance.

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