

# *Territorial autonomy in India*

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## 1. Introduction

Before giving an overview on territorial autonomy in the Indian Union, it is useful to recall a suitable definition of territorial (in Europe also “regional”) autonomy as used in the present essay: “Autonomy can be defined as a means of internal power-sharing aimed to preserve the cultural and ethnic variety, while respecting the unity of a state. It consists in permanently transferring a certain amount of powers suitable for those purposes to a certain territory, giving its population the possibility of self- government, and leaving only residual responsibilities to the central state.”<sup>1</sup> As a general rule, autonomous territories possess no international character, and are not treated as states for the purposes of international law. Thus, autonomy can be defined as a means of internal power-sharing aimed at preserving cultural and ethnic variety, while respecting the unity of a state. According to another scholar, who has been a consultant for autonomy issues around the world including Nepal, autonomy is “... a device to allow ethnic or other groups that claim a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers that cover common interest”.<sup>2</sup>

Autonomy is a special device designed to accommodate a particular part of a state if its population differs from the majority population of that state. It should be remarked that territorial autonomy, as today operating in about 60 regions in 20 states in all continents, has been established also in federal states in two forms: on sub-state-level (as a unit of a federated subject of that state as in India and Belgium) or as a special category of territorial power sharing along the ordinary federated units of that federation (as in Canada). Ethnic-linguistic or national minorities are the classic population to demand autonomy, especially when settling homogeneously in their original homeland, but autonomy has been accorded also due to geographical (“islandness”) and historical reasons.<sup>3</sup>

This above given definition focuses on the fundamental purposes of autonomy of a legally defined scheme of territorial power sharing, mostly established to protect minority groups, in which legislative and executive – and sometimes jurisdictional - powers are attributed to a territorial community (region, province, district) endowed with a freely elected regional assembly. A clear

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1 See Thomas Benedikter, *The World's Modern Autonomy Systems*, EURAC Bozen 2009, p. 19, available at: <http://www.eurac.edu/Org/Minorities/IMR/Projects/asia.htm>

2 See Yash Ghai, *Autonomy and ethnicity: negotiating competing claims in multiethnic states*, Hongkong 2000, p. 484, and Joachim Heintze defines territorial autonomy as follows: “In international law autonomy means that a part or territorial unit of a state is authorised to govern itself in certain matters by enacting laws and statutes, but without constituting a State of their own.“; furthermore: H.J. Heintze, “On the legal understanding of autonomy” in Markku Suksi (ed), *Autonomy: Implications and Applications* (Kluwer Law International, 1998) p.7

3 For the complete list of working territorial autonomies and further definitions see: Thomas Benedikter, *The World's Modern Autonomy Systems*, p. 16-20

distinction has to be drawn with regard to other concepts and forms of power-sharing and self-rule such as reservations for indigenous peoples, asymmetrical federalism and associated statehood. Moreover, the criteria by which a regional autonomy can be considered to be a “genuine autonomy” must be clarified from the very outset, as they clearly distinguish this particular democratic and ethnically non-exclusive form of self-government under the full sovereignty of a central state, from some hybrid or non-perfect arrangements that can also be found under the label of “autonomy” in some states. Under this approach both non-democratic autonomous areas or autonomies operating in a non-democratic state cannot be regarded as “genuine working autonomies” (e.g. the F.A.T.A. and the Northern Areas of Pakistan, Uzbekistan's, Tajikistan's or China's autonomous entities). Furthermore a minimum standard of legislative and executive powers is required in order to be qualified as a genuine autonomy. Sub-state entities not vested with legislative and executive powers cannot be branded as autonomies (e.g. the Union Territories in India and the Chittagong Hill Tracts in Bangladesh, Corsica in France, Rodriguez in Mauritius). To put it bluntly, there is a minimum standard of powers and democratic procedures of self-government of a regional polity, without which talking about “autonomy” becomes meaningless.

## 2. Jammu and Kashmir's lost autonomy

The first territorial autonomy established in the Indian Union has been the one of the formerly princely state of Jammu and Kashmir. The instrument of accession of Jammu and Kashmir's last Maharaja and India's government of 1947 agreed to grant this Muslim dominated State special, far reaching autonomy. This occurred apart from the territory's quest to obtain a self-determination referendum under the aegis of the UN, which was ultimately never held. This form of autonomy, originally in 1950 enshrined in Article 370 of the Constitution<sup>4</sup>, left the Centre with only powers of defence, foreign affairs and communication on the territory of Jammu and Kashmir. But beginning in 1953 these provisions were eroded step by step. Finally Jammu and Kashmir was transformed in a normal member state of the Indian federal state without abolishing Article 370 of the constitution, which was *de facto* outdated. Curtailing Kashmir's special autonomy and interfering heavily and

4 Constitution of India - Part XXI - *Temporary, transitional and special provisions.*

Article 370. Temporary provisions with respect to the State of Jammu and Kashmir.-

(1) Notwithstanding anything in this Constitution,-

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to-

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.-For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948; (c) the provisions of article 1 and of this article shall apply in relation to that State; (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order \_358 specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon. (3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

constantly in its internal affairs later brought about an escalation of the political crisis, popular unrest and protest, and the President's rule. Eventually full-fledged civil war and armed militancy broke out in 1990. To date Jammu and Kashmir has not found a stable solution and a peace that does justice to the claims of the Muslim population. The issue of self-government lies unresolved, and after the traumatic experiences of repression by India's security forces over the last 18 years, a majority of the valley no longer favours Kashmir's membership in the Union at all. Abolishing the special autonomy, originally granted to Kashmir by Delhi, as in similar cases elsewhere, caused long lasting political contention, military conflict and alienated the Muslim population from the rest of India.<sup>5</sup> Apart from Jammu and Kashmir India's constitution embraces some more special provisions with limited scope for certain states Nagaland (371A), Sikkim (371F), Assam (371B), Manipur (371C), Arunachal Pradesh (Art. 371H) etc., without neither *de jure* nor *de facto* configuring its federal system as an “asymmetrical federal system”.

### 3. Territorial (sub-state) autonomy in India

India is the only South Asian state that has enshrined some forms of regional territorial autonomy in its Constitution for some few districts and regions at the sub-state-level (5<sup>th</sup> and 6<sup>th</sup> schedule).<sup>6</sup> Some of these provisions of speciality are no longer applied, as it is the case with article 370 with respect to Jammu and Kashmir; others are an expression of India's “asymmetrical federalism.” This concept, beyond the Union and the centre, provides for some additional rights to single states, based on their special character and interests. In India, apart from the federated states with special features, there are also Union territories and autonomous districts on a sub-state-level known as “entities with a limited autonomy.” Moreover, the 73rd and 74th Amendments to the Constitution ensured the devolution of some limited powers at the village and town level defined *Panchayati Raj*.

Under the special protection clause in Art. 371 Constitution, tribal customary laws, procedures, and land rights are protected. Part XVI of the Constitution ensures special provisions for scheduled castes, scheduled tribes and other under-developed classes, which are usually not linked to territories, but to specific social groups.<sup>7</sup> Some of them can be compared to concepts of “cultural autonomy” applied in Europe, while some are established on a territorial basis. Under the 5th Schedule some provisions for “local autonomy” are provided in order to protect the interests of smaller tribal groups who are placed within larger units of a state.<sup>8</sup> This annex to the Constitution provides a limited platform by way of formation of “Tribes Advisory Councils”, which can articulate the aspirations of the indigenous communities. Yet, neither the Council has any executive power nor does it enjoy any legislative or judicial powers in administering the justice within the scheduled areas. The legislative power is vested with the Governor and the Council has the duty to advice him on his desire. The Governor is empowered to apply his discretion regarding the applicability of any law passed by the parliament or the State legislature in the scheduled areas. In consultation with the “Advisory Council” he can make laws for the scheduled areas

- prohibiting or restricting transfer of land;
- regulating the allotment of land;
- regulating money lending business.

The Union President should assent to all these regulations. Thus, the 5th schedule, although

5 See Sumantra Bose, “*Kashmir – Roots of Conflict, Paths to Peace*”, (Harvard University Press, Cambridge, Mass. and London 2003); and Thomas Benedikter, “*Il groviglio del Kashmir*”, (Editori FRILLI, Genova 2005).

6 The 5<sup>th</sup> and 6<sup>th</sup> schedule of India's constitution is to be found at: <http://www.constitution.org/cons/india/shed05.html> and <http://www.constitution.org/cons/india/shed06.html>

7 See the full text at: <http://www.constitution.org/cons/india/p16.html>

8 See Article 244A on the scheduled and tribal areas at: <http://www.constitution.org/cons/india/p10244a.html> as well as the 5th schedule of India's Constitution at: <http://www.constitution.org/cons/india/shed05.html>

envisaging to protect tribal interests, does not assign any concrete right of territorial autonomy to the tribal peoples.<sup>9</sup>

Territorial autonomy as defined in the introduction has been established in India since 1951 under the 6th schedule of her Constitution. The 6th schedule contains detailed provisions for “Autonomous District Councils” (ADC) in districts dominated by so-called tribal peoples. The main purposes of these provisions are to preserve the distinct cultures of tribal peoples, to prevent economic exploitation of such peoples by non-tribal peoples, and to allow them to develop and administer themselves. This scheme, although termed “Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram”,<sup>10</sup> departed from a mere concept of “ethnic reservations” as provided by the 5th schedule, establishing autonomous territories with mixed populations and fully democratic institutions based on general suffrage. Although limited in its scope, the legislative councils of the autonomous districts established by the 6<sup>th</sup> schedule are based on very elaborate legislation and safeguarded by the Union government. They were tasked with granting sufficient autonomy to prevent radical secessionist claims and movements and thus the further splitting up of the States, especially in the Northwest and the Northeast of the country.

10 out of 13 ADCs have been established in the four Northeastern States of Meghalaya, Assam, Mizoram and Tripura, one in West-Bengal and two in Jammu and Kashmir (Leh and Kargil). The latter three have been established under State law, not under the 6th schedule. In the rest of the country, however, no such district autonomies have been created, although India has 330 districts, many of which host ethno-linguistic or tribal minorities. About 50 of these districts have an ethno-linguistic majority different from the majority population of their respective State and thus would be eligible to a certain degree of cultural or territorial autonomy in order to preserve the particular cultural character of the concerned area.<sup>11</sup> As far as genuine territorial autonomy is concerned, the 6th schedule of the Constitution is India's present standard. On the other hand, the regional councils constituted by the Northeastern States by State Act do not enjoy all the powers available under the 6th schedule. Even within this schedule, certain autonomous councils, like Bodoland, Karbi Anglong and North Cachar managed to obtain greater powers granted by specific constitutional amendments made to this schedule. Hence, there is a certain flexibility in the application of the Constitution's provisions concerning district autonomy.

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9 The denial of substantial autonomy to India's Adivasi peoples is described by Bosu Mullick, “*The Jharkhand movement – Indigenous peoples’ struggle for autonomy in India*”, (International Work Group for Indigenous Affairs (IWGIA) document, Copenhagen 2003).

10 For the full text of the 6<sup>th</sup> schedule of India's constitution see: <http://www.constitution.org/cons/india/shed06.html>

11 The author has elaborated such issues in his recent research: T.B., “Language Policy and Linguistic Minorities in India” (LIT Berlin/Münster, 2009)

### India's Autonomous Districts and Autonomous Hill Districts\*\*\*

<i>Autonomous District</i>	<i>area (in km<sup>2</sup>)</i>	<i>population (2001)</i>	<i>capital</i>	<i>ethnic composition*</i>	<i>year of constitution</i>
1. Bodoland	8.970	2.631.289	Kokrajhar	ST: 1.354.627 SC 137.594	07.12.2003
2. Karbi Anglong	10.434	813.311	Diphu	ST: 452.963 SC: 29.200	17.11.1951 14.10.1976
3. North Cachar	4.890	186.189	Haflong	Dimasa, Kuki, Hmar, Zemei, Hrangkhawls	17.11.1951 2.2.1970
4. Garo Hills	8.167	865.045	Tura	Garo, smaller groups	22.02.1972 (1979 division)
5. Jaintia Hills	3.819	295.692	Jowai	Pnar, Jaintia, Khasi	22.02.1972
6. Khasi Hills	7.995	1.060.923	Shillong	Khasi, smaller groups	22.02.1972
7. Tripura Tribal Area	7.132	679.720**	Khumwng	ST: 679.720	
8. Chakma ADC	k.a.	k.a.	Chawngte	Chakma	1987
9. Lai ADC	k.a.	k.a.	Lawngtlai	Lai	1987
10. Mara ADC	k.a.	55.000	Siaha	Mara	1987
11. Darjeeling Gorkha Hill Council	3.144	1.609.172	Darjeeling	ST: 179.153 SC: 209.856	22.08.1988
12. Aut. Hill Devel. Council Leh	45.110	117.232	Leh	ST: 92.200 (Ladakhi)	28.08.1995
13. Aut. Hill Devel. Council Kargil	14.086	119.307	Kargil	ST: 105.377 (Purigba, Balti, Brokpa)	01.07.2003

Source: official websites of the Autonomous District Councils.

\* SC= scheduled caste; ST= scheduled tribe

\*\* This figure accounts for the tribal population of the district only, which accounts for at least 90% of the total population, which is more than 700.000. Ethnic groups in the Tripura Tribal District: Bhil, Bhutia, Chainel, Chakma, Garo, Holan, Kuki, Lepcha, Lushai, Mog, Munda, Moatia, Orang, Rieng, Santal, Tripura, Uchai.

\*\*\* The Darjeeling Gorkha Hill Council, and the Autonomous Hill Councils of Leh and Kargil have been established by state laws of West Bengal and Jammu and Kashmir respectively, and are not enshrined in the 6<sup>th</sup> schedule of the Constitution.

The legislative powers of these autonomous districts include:<sup>12</sup>

- land transfer;
- forest (other than reserved forest);
- water bodies (for the purpose of agriculture);
- regulation of shifting cultivation;
- village or town committees and administration;
- appointment or succession of chiefs or headmen;
- inheritance or property;
- marriage and divorce;
- social customs;
- money lending and trading activities of non-residents or non-tribal people living in the area;
- primary education;
- dispensaries, markets, cattle pounds, fisheries;
- roads, road transport, ferries and waterways.

The District Council is allowed to levy and collect taxes on land and buildings as well as tolls on

12 See Article 3 of the 6<sup>th</sup> schedule of the constitution at: <http://www.constitution.org/cons/india/shed06.html>

persons. Moreover it can collect taxes on professions, trades, callings and employment, animals, vehicles, boats, entry of goods into the local markets, goods carried on ferries, the maintenance of schools, dispensaries and roads. The ADCs are also entitled to get a share of royalties accruing to the State annually on account of extraction of minerals. The management of these revenues is guided by rules and regulation set by the Governor.

### The Autonomous Districts in Northeast India



All the matters on which district council is empowered to legislate are also enumerated in the so-called “State List”. In order to ensure the legislative autonomy of the district council, the 6th Schedule provides that no act of the State legislature shall apply to any autonomous district unless the respective district council adopts and approves the same.<sup>13</sup>

13 As an example of such provision p. 12 of the 6<sup>th</sup> schedule may be quoted:

[Application of Acts of Parliament and of the Legislature of the State of Assam to autonomous districts and autonomous regions in the State of Assam].- (1) Notwithstanding anything in this Constitution-

- (a) no Act of the 2[Legislature of the State of Assam] in respect of any of the matters specified in paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the 2 [Legislature of the State of Assam] prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region 3[in the State] unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit;
- (b) the Governor may, by public notification, direct that any Act of Parliament or of the [Legislature of the State of Assam] to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region [in that State], or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.

Similar articles are in force for Meghalaya (p. 12A), Tripura (p. 12AA) and Mizoram (p.12B of the 6<sup>th</sup> schedule)

Regarding the judiciary the 6th schedule provides for a two-tier-system at the district and village level.<sup>14</sup> At the village level, the village council is empowered to trial suits and cases between the parties belonging to scheduled tribes. At the district level the district courts are empowered to act as a court of appeal in respect of all suits and cases triable by a village court. This differentiation in the judiciary mirrors the original “tribal character“ of the 6th schedule autonomy. Originally, it has created a legal framework specifically for tribal communities, allowing self-administration on social and economic fields deemed most relevant for tribal communities, as agriculture, forests, fishery, local markets. But it is highly questionable whether this form of autonomy really covers all relevant powers required by such peoples for the preservation of their ethnic and cultural identity and for acting as comprehensive agency for the economic and social development of their homeland.

For their financial funding the ADCs are mostly depending from grants-in-aid, coming from the central government in New Delhi, but mainly routed through the State government. This mechanism provides a leverage which is being often used to bring the ADC in line with State policies. The resulting financial dependence and the instrumental use of dependency of State decision-makers remain a major bone of contention in the relation between the district council and the state governments.

Under the autonomous councils, constituted under the 6th Schedule, there is no adequate devolution of powers to the village level and most power is concentrated at the district level itself. Instead, if there are different scheduled tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.<sup>15</sup> Whereas in other States of India a certain amount of administrative power has been attributed to the institution of *Panchayati Raj* under the new 11th Schedule of the Constitution, the areas covered by the 6th schedule are not encompassed in this form of decentralization.<sup>16</sup> In these mostly tribal areas there are traditional systems of governance at the village level, ranging from autocracy or semi-autocracy to full participative democratic procedures and institutions. Thus, there is a certain discrepancy between autonomy at district level and the denial of municipal or local administrative autonomy of the village bodies. The village development boards in Nagaland offer one example of the models that can be adopted. Even in Arunachal Pradesh and in the plain areas of Assam, Manipur and Tripura, where *Panchayati Raj* have been established, more powers need to be devolved to these institutions.

The role of the Governor, appointed by the Union’s president for each federated State of India, is considerable also vis-à-vis the 6th schedule-autonomies. Apart from the matters on which the district council has legislative powers, the Governor has the discretionary power in deciding whether the laws, made by the State legislature on matters not covered by autonomous legislation of the district, will be directly applicable to the autonomous district or not.<sup>17</sup> The applicability of the laws made by the parliament in these areas is also put under the discretion of the Governor, in case of Assam, and the President, in case of other Northeastern States. The Governor is also entitled to nominate a certain number of the members of the Autonomous Councils and to suspend the legislation if he deems them no longer effective. Thus the district councils have been provided with a certain legal shield against encroachment by the respective State, but they are fully exposed to the discretionary power of the Governor.

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14 The administration of justice in the autonomous districts and autonomous regions is regulated by p. 4 of the 6<sup>th</sup> schedule. See <http://www.constitution.org/cons/india/shed06.html>

15 Article 1 (2) of the 6<sup>th</sup> schedule. Article 2 (2) reads: “There shall be a separate Regional Council for each area constituted an autonomous region under subparagraph (2) of par (1).” See <http://www.constitution.org/cons/india/shed06.html>.

16 See: <http://www.constitution.org/cons/india/shed11.html>; The Bodoland Memorandum in point 4.8 abolishes the *Panchayati* regime on the autonomous territory. See <http://www.bodolandcouncil.org>

17 The Governor's powers to annul, suspend acts and resolutions of District and Regional Councils is provided by Article 15 of the 6<sup>th</sup> schedule, his power to dissolution of ADCs in Article 16 of the 6<sup>th</sup> schedule. See: <http://www.constitution.org/cons/india/shed06.html>

The limited form of autonomy provided by the 6<sup>th</sup> Schedule of the Constitution could not quell the quest for self-determination of the Naga peoples, who in 1963 achieved “statehood” in India without giving up military resistance for full independence. Nor could such a form of autonomy granted in the form of ADC meet the widespread demand of some smaller peoples of India to have their own federated state, especially in the Northeast; full “statehood” was eventually accorded to Meghalaya, Mizoram, Arunachal Pradesh and Tripura. Later, and with the creation of the Bodoland Territorial Council in 2003,<sup>18</sup> a range of further clauses were added to the 6th schedule, extending the scope of their autonomy. Nevertheless some of the Autonomous Districts went on claiming for full statehood in India could not be accommodated. In 2009 the territory of Telengana, hitherto a part of Andhra Pradesh, has achieved the status of a federated state of the Indian Union, without having before experienced any form of territorial autonomy.

Hence, in India the pattern of combining ethnicity – regarding small peoples or national minorities - with exceptional autonomies remains quite contradictory. The Indian Constitution emphasises republican values and fundamental human and civil rights standards throughout the whole territory, and in principle does not allow “ethnic autonomy”. In practise, in order to solve local and regional conflicts, forms of limited territorial autonomy had to be created, admitting implicitly that on a state level the majority rule of a liberal democracy generates a permanent threat to every minority representation and participation in politics and power. On the other hand, new indigenous elites dominating autonomous districts have been tempted to transform such autonomous region in “ethnic spaces”, as some Indian scholars assert.<sup>19</sup>

#### **4. India's sub-state autonomies: new "ethnic spaces"?**

Such scholars warn of the risk that the concept of autonomy might lead to new ethnically biased states and sub-state entities by vesting their indigenous peoples with special privileges but leaving out other “denizens,” in other words, recent immigrants not members of the titular ethnic groups or not members of “scheduled tribes.”<sup>20</sup> They warn against the creation of autonomies with two or three classes of citizens:

- Citizens members of the titular ethnic group;
- Indian general citizens;
- Foreign immigrants.

Similar scenarios are sometimes envisaged in some European autonomous regions, leading to legal action by EU-citizens, not belonging to the “indigenous population” against alleged violations of the principle of equality and discrimination on the grounds of residency and language. In India's Northeast, a large share of the population is registered under Scheduled Tribes (STs)-status, and some groups and individuals not belonging to such STs appear to be excluded from some benefits of the territorial autonomy provided by either the States listed under Article 371 of the constitution or by the 6<sup>th</sup> schedule-to autonomous districts. Non members of Sts, for example, may be excluded from exercising some trades and business,<sup>21</sup> and they are partly excluded from political representation as both in the States of Assam, Meghalaya, Tripura and Mizoram seats are reserved

18 See the Bodoland Accord at: <http://www.bodolandcouncil.org>

19 See Sanjay Barbora, “*Experiences of Autonomy in the East and North East – A report on Third Civil Society Dialogue on Human Rights and Peace*”, (Calcutta Research Group (CRG), Kolkata 2003); and Chaudhury/Das/Ranabir Samaddar (eds.), “*Indian Autonomies – Keywords and Keytexts*”, (Kolkata 2005).

20 See Sanjib Baruah, “*Durable Disorder – Understanding the Politics of Northeast India*”, (Oxford India, 2005), Section V on “Citizens and Denizens,” 183-210; and Sanjay Barbora, “*Experiences of Autonomy in the East and North East – A report on Third Civil Society Dialogue on Human Rights and Peace*”, (Calcutta Research Group (CRG), Kolkata 2003).

21 According to Article. 10 of the 6<sup>th</sup> schedule the ADCs have the power to make regulations on money-lending and trading by non-tribals. See <http://www.constitution.org/cons/india/shed06.html>



for SCs and STs in the Legislative Assemblies of the states and of the ADCs.<sup>22</sup>

New social injustices are brought about that carry the potential for social and ethnic conflict. At this point, the very rationale of territorial autonomy has to be recalled: autonomy is a modern democratic sense cannot allow for new discrimination (reverse, e.g. against the members of the national majority population living in the area), privileging just one group at the expense of smaller groups. Modern autonomies are incompatible with the idea of indigenous reservations as existing in the Americas.<sup>23</sup>

Autonomy exists to give ethno-linguistic communities the chance to preserve their identity in their traditional homeland, but within a democratic setting inclusive of all legally resident people, with and without citizenship. In a region where these communities are compactly settled, it exists to redress the structural disadvantages of ethnic minorities in states with a different titular majority. In India this also refers to federated states' linguistic majorities. The national majority's implicit power in all domains of life, from culture to media, from economy to politics, from public jobs to military careers, remains largely unquestioned. Territorial autonomy should not create a similar "ethnic space" that allows reverse discrimination, but a legal space wherein substantial equality of opportunity is ensured for all groups sharing the same region.<sup>24</sup> If conceived as a common democratic space with consociational power sharing, territorial autonomy is not exclusive, but inclusive by nature, as long as the necessary institutional safeguards are provided. Regional democracy, however, must not mirror the structural ethnic dominance of a group on national level, if necessary precautions are taken.

This is a normative statement against which working autonomies must be measured. Neither in Europe nor on other continents do autonomies always coherently act in accordance with such principles. Several autonomous regions have been brought before the European Court of Justice for violating fundamental rights enshrined in EU-treaties. Why should it be different in India? Thus, the challenge lies in making arrangements to ensure that full civil rights are granted to all legally resident citizens irrespective of ethnic affiliation as well as arrangements for protecting internal minorities. Thus, the concept and the scope of powers of the 6<sup>th</sup> Schedule autonomy obviously is too narrow for both enhancing and stabilizing the position of the "titular" tribal or indigenous or minority peoples of a given area and ensuring the consociational participation of all ethnic groups sharing the same territory. The titular majority itself is called upon to strike a balance between the interests of indigenous peoples and non-tribal resident citizens who contribute to regional welfare. Or in other terms: internal minority protection has to be reconciled with democracy.

If the 6<sup>th</sup> Schedule no longer offers such a scheme of regional autonomy, and, in the absence of other constitutional options (e.g. Union territory with legislation), it is little wonder that some regional communities seek full statehood (in India: Telengana, which achieved this goal in 2009, and Gorkhaland). Discrimination on ethnic grounds is detrimental to autonomous communities in an additional sense. If persons living in such regions, belonging to the majority population in the rest of the country are victimised by autonomous institutions or just perceived and presented as victims by national media to the general electorate, this will prevent central states from both

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22 See Part XVI, article 332 of the Constitution, on "Reservation of Seats for SC and ST in the Legislative Assemblies of the States, on See <http://www.constitution.org/cons/india/p16.html>. Such reservation of seats, however, will cease after 60 years from the commencement of the constitution (Article 334).

23 For the distinction of ethnic reservation to territorial autonomies see Thomas Benedikter, "*The World's Modern Autonomy Systems*", (EURAC Bolzano/Bozen 2009), section on "America's reservations for indigenous peoples", 202-211, available at: <http://www.eurac.edu/Org/Minorities/IMR/Projects/asia.htm>

24 Substantial equality means not only the absence of individual discrimination, but equal opportunities: a regime of full public bilingualism, official recognition of minority languages and religions, provision of equal means for cultural services and institutions for all groups, an education system in mother tongue, no discrimination on ethnic grounds in recruitment for public jobs, same opportunities in achieving political charges, affirmative action for historically discriminated groups.

enlarging the existing autonomy and establishing new autonomies. On the other hand, India's constitution ensures to every citizen the same right of free movement and mobility, and - unlike European states – has no clear regulations concerning internal migration and the right of settlement. Against the background of huge internal social and economic divides between various areas, the absence of efficient means of control on internal migration becomes a factor undermining the substantial autonomy of autonomous regional communities.

## 5. A burning issue of territorial autonomy in India: immigration

Smaller regional communities and areas that are home to indigenous peoples are vulnerable to demographic change. Several examples around the world show drastically how state-sponsored migration or even systematic population transfer (*transmigrasi* in Indonesia) has undermined the ethnic-social equilibrium of a region and threatened the very existence of minority peoples (other cases: Bangladesh and the Chittagong Hill Tracts, Indonesia and Borneo, Philippines and Mindanao, China and Xinjiang, Nicaragua and its Atlantic Coast Autonomous Region, Sri Lanka and its Northeast etc). Such smaller regional communities need some control over migration flows if they are to avoid being outnumbered by non-indigenous or non-autochthonous populations. Political stability in the region, social equilibrium between groups, the control of regional resources, and ultimately peace and cultural identity cannot be achieved if demographic development is completely left to external dynamics. This issue must again be sharply distinguished from alleged “internal discrimination,” which excludes resident citizens who are not members of regional majorities (or scheduled tribes in India) from certain rights and resources. In Bodoland it makes a difference whether one speaks about a non-scheduled Santal immigrant from West Bengal arrived yesterday, or a Rajbongshi settling there since many generations. The phenomenon of uncontrolled migration is perceived as a threat not only by ethnic minorities in the Northeast (the Bodos in the BTC, the Karbi in Karbi Anglong, the Kokborok in Tripura etc.), but also by State majority peoples (the Assamese of Assam, the Manipuri of Manipur, Garo and Khasi of Meghalaya). Uncontrolled migration, by reversing ethnic majorities, undermines the social position of resident peoples, the general cultural framework, and in the long run, the very legitimacy of an autonomy. Incidentally, no sovereign state tolerates free migration under similar arguments: why should autonomous communities not refer to the same arguments?

Hence, devices must be established to enable autonomous regions to control migration to a certain extent, setting provisions consistent with general rules on citizenship and fundamental freedoms of their country. Regions in Europe and South Asia are adopting various means for the same purpose. The Aland Islands have established an “Island citizenship,” preventing non-Swedish speaking Finnish citizens to run a business on Aland. South Tyrol has a strict regime of bilingualism requiring each public servant to be fluent in both official languages; furthermore some social benefits and political rights are granted only to persons with legal residency in the region.<sup>25</sup>

Karbi Anglong and Bodoland, as aforementioned referring the regulations of seat reservation in four states' assemblies of India's Northeast, have a regime of seat reservations in the political bodies for STs, which ensures a certain control of the indigenous peoples on legislation and administration. Furthermore some ADCs apply restrictions on land property and land transfer to non-tribal and non-resident people.<sup>26</sup> This has also been a traditional right of the State of Jammu and Kashmir. The

25 The active voting right is regulated by Article 25 of the Autonomy Statute of South Tyrol. See: [http://www.provinz.bz.it/lpa/autonomy/autonomy\\_statute\\_eng.pdf](http://www.provinz.bz.it/lpa/autonomy/autonomy_statute_eng.pdf)

26 See point 4.2 of the Memorandum of Settlement on Bodoland Territorial Council, which reads: “A provision will be made in para 2(1) of the Sixth Schedule for increasing the number of members for BTC up to 46 out of which 30 will be reserved for Scheduled Tribes, 5 for non-tribal communities, 5 open for all communities and 6 to be nominated by Governor of Assam from the unrepresented communities for BTC area of which at least two should be women. Nominated members will have the same rights and privileges as other members, including voting rights. Election from the 40 constituencies of BTC shall be on the basis of adult franchise. The term of the elected members

Tripura Tribal Area District as well as Arunachal Pradesh move a step further: the “inner line permit” regulation is a kind of internal border to prevent the free influx of settlers into indigenous areas. The means may vary, but the request of autonomous communities is a common one: although a territorial unit of a major state, covered by its legal constitutional order, they do not accept being fully exposed to arbitrary migration movements.

Autonomy in a normative perspective must empower regional communities, not create local fiefdoms with indigenous leadership just replacing foreign dominance. Moreover, autonomy must be meaningful in its scope and material basis. If the number and kind of powers devolved to autonomous bodies is scarce and the powers of control and interference of both superior levels (State and Governor) is too large, real autonomy cannot unfold. If the financial means are too scarce and come too late, and no sources of revenue are assigned to the autonomous governments, they cannot really act as major agents of local development. The division of powers has to be as clear as possible and neutral institution – the Supreme or Constitutional Court – must be the place of negotiation and settlement for any kind of dispute under the rule of law. Finally, in ethnically mixed regions a consociational form of regional government is a must, if stability, the inclusion of all major groups, and interethnic peace is to be achieved. This is the real key to longterm sustainability of regional autonomy established mainly to accommodate an ethnic minority or a smaller tribal people: if the titular ethnic group of an autonomy is not able to include both the members of the state's majority people and other smaller indigenous minority groups in a common project of regional welfare and development, the whole construction is at risk. New violence will trigger counterviolence by victimised groups. Arbitrary discrimination of weaker groups by autonomous legislation and administration will provoke a backlash by the Centre and the groups concerned; violence will eventually bring about new constraints on real autonomy.

Hence, autonomy does not exist to create new discrimination and ethnic cleavages, but to redress the structural imbalance present in nation states or in federated states with a single dominant culture and ethnicity. It is there to create a legal-political space for efficient minority protection, for substantial equality of opportunity, and for consociational self-government of a common home. Ultimately, it is an issue of justice and of quality of democracy, bringing the political power closer to the people.

## **6. Conclusion: Transcending the “6<sup>th</sup> Schedule-autonomy”**

India's federal system in its 62 years of history was repeatedly reshaped: it was first reorganized along linguistic lines, and later further states were carved out from existing ones. In addition India adopted forms of sub-state autonomy or special autonomy, in which smaller ethnic groups were to be accommodated or “minor conflicts” to be settled, but without a coherent scheme. Whereas all major linguistic groups during the linguistic reorganisation of the Indian Union in the 1950s and 1960s were granted their own state, the smaller peoples in the Northeast were not, or at least, only much later (Manipur, Meghalaya, Arunachal Pradesh) or only after protected military violence (Mizoram, Nagaland); while the 6<sup>th</sup> schedule autonomy was applied to some areas in the Northeast, in order to avoid the further division of Assam, other States in central India including West Bengal refrained from granting such autonomy even to numerically very sizeable regional or tribal communities (Gorkhaland, Santals, Bhili, Gondi, Ho, Kurukh/Oraon and others).

Thus both the basic constitutional principles of territorial power sharing in India appear far from being coherently applied: on the one hand there is federalism for equal or symmetric power sharing between the centre and all federated units, and on the other territorial autonomy to meet requirements for territorial power sharing at the sub-state level has been established only exceptionally. This is a serious problem as India's federalism is marked by strong centralism: the

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of BTC shall be for 5 years.” For the full text of the memorandum see: <http://www.bodolandcouncil.org>

federal government is vested with unusual powers for a federation, while at State level most powers are concentrated in the hands of the State administration. Local democracy is provided only by the institution of the *panchayats* – the democratic councils in villages and municipalities. We have to keep in mind that European federations and regional states are not bigger than West Bengal (Germany, the most populous European state after Russia, has 82 million citizens), but are articulated in federal units or autonomous communities with the size of Indian districts. Therefore there is still a great need and potential for further decentralization to the lower units that make up the single federated states. This can occur in a symmetric form, including all sub-state entities, or in an asymmetric form, reserved for some districts with special needs and interests, such as those inhabited by ethnic minorities and tribal peoples. Territorial autonomies can be established even outside the federal units, as claimed by concerned political organizations from Ladakh and Gorkhaland. But if regional autonomy on a sub-state level does not match the people's expectations, demands for a full-fledged federated state will reappear on India's political agenda.

The institution of India's "Autonomous District Councils," under the 6<sup>th</sup> Schedule of the Constitution, was originally conceived as a solution for tribal peoples and ethnic conflicts in the Northeast during the initial period of nation building. Established by the fathers of the Constitution to avoid splitting up the multiethnic Northeast, which was faced with a variety of self-determination claims by tribal peoples, the ADCs in their current form cannot meet the political requirements on the ground. It worked as a temporary painkiller, but the pain was to remain.<sup>27</sup> Assam was split up, and four resulting states (Assam, Meghalaya, Manipur and Tripura) adopted the 6<sup>th</sup> Schedule autonomy to accommodate sub-state self-government demands by smaller ethnic communities and peoples. The very ethnically homogeneous Northeast remained conflict ridden. After many uprisings, violent rebellions, and years of low intensity warfare and military resistance by guerrilla groups and "national liberation fronts", some ethnic groups and peoples managed to obtain their own federated states, including Mizoram, Nagaland and Meghalaya. Other states, such as West Bengal, Jammu and Kashmir, and Assam, had to accord territorial district autonomy to their own minorities (Leh and Kargil, Karbi Anglong and North Cachar Bodoland). The smaller Northeastern States, such as Tripura and Mizoram, had to come to terms with their internal ethnic heterogeneity. Nevertheless, the existing legal setting and scope as given by the 6<sup>th</sup> Schedule does not offer sufficient political space for a fully autonomous cultural and language policy or for the comprehensive range of powers needed to allow the ADC to be the most important agent for social and economic development in the area. The State government and the Union governor of the respective State exert major hierarchical control, while neither has a sufficient or autonomously controlled financial base.

In addition to the limited scope of the 6<sup>th</sup> Schedule-autonomy, there is a need to focus on the quality of democracy and governance allowed by these territorial autonomies. The population of some ADCs in the Northeast sees autonomy as just an institutional process, and do not feel sufficiently involved. The participation of the people and civil society of some ADCs remained very low. This is due to both the weak institutional design and the particular form of the elite-determined political setting at the sub-state level in India. The mere decentralization of power to local elites – as was the case in Darjeeling - is not enough. There must be provisions to ensure good governance, accountability of the politicians, minority protection and consociational mechanisms of power sharing.

Some other features of the 6<sup>th</sup> Schedule autonomy, however, no longer appear appropriate for genuine autonomous legislation and decision making: relying on the Governor's strong role in surveillance rather than giving the judiciary the main responsibility for dissolving disputes, financial dependency on the respective state, the ADCs' lack of power to create their own revenues,

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<sup>27</sup> See Ranabir Samaddar, "Minority Rights and Forms of Autonomy in South Asia", in: Zelim A. Skurbaty (ed.), *Beyond a one-dimensional state: an emerging right to autonomy?*, (Martinus Nijhoff Publishers: Leiden/Boston, 2005), 551.

gaps in the application of official language policies, the need for fair regulations for recruitment on territorial basis, and the need of forms of immigration control to the autonomous area that are compatible with fundamental rights of all citizens.

The 6<sup>th</sup> Schedule has implicit limitations, as unrest in several autonomies such as Karbi Anglong, North Cachar and Mizoram's ADCs demonstrates. Some features of this autonomy were extended in 2003, when the 6<sup>th</sup> Schedule was amended to accord greater autonomy to Bodoland. But the Gorkhaland issue can no longer be met with the means of limited self-governance offered by the 6<sup>th</sup> Schedule. The political evolution of India's Northeast clearly shows that continuous pressure from the ground, political organization and popular pressure led first to serious negotiations between the regional communities and the Centre, then to the establishment of autonomies, and eventually to an increase in territorial autonomy. The complex power sharing settlement in the Northeastern states has not yet come to an end, nor has the Kashmir issue been resolved. The majority of tribal peoples still live in States like Madhya Pradesh, Orissa and Jharkhand, while several peoples, such as the Santhali, Gonda, Munda, and Ho are mostly scattered across several states, but often form a majority on the district level. Lacking political organization and influence they could generate movements for territorial or cultural autonomy, although it is high time they do so, if they want more attention and a real commitment for the protection of their minority rights. The 6<sup>th</sup> schedule autonomy might not be enough to meet this demand of autonomy, let alone reservations and tribal councils under the 5<sup>th</sup> Schedule.

#### **Autonomy provisions and information on India's autonomies:**

Tripura Tribal Areas: <http://tripura.nic.in/ttaadc>

Darjeeling Gorkha Hill Council: <http://darjeeling.gov.in>

Jaintia Hills Autonomous District Council: <http://jaintia.nic.in>

Khasi Hills Autonomous District Council: <http://khadc.nic.in>

West Garo Hills Autonomous District Council: <http://westgarohills.nic.in>

Ladakh (Leh) Autonomous Hill Development Council: <http://leh.nic.in>

Ladakh (Kargil) Autonomous Hill Development Council: <http://kargil.nic.in>

North Cachar Autonomous District Council: <http://nchills.nic.in>

Karbi Anglong Aut. District Council Ex. Comm.: <http://karbianglong.gov.in>

Karbi Anglong Autonomous District Council: <http://karbianglong.nic.in>

Mara Autonomous District Council (Mizoram): <http://www.maraland.net>

Maraland (Mizoram): <http://samaw.com/maraland>

Bodoland Territorial Council: <http://www.bodolandcouncil.org>

Bodoland general: <http://www.bodoland.org>

Darjeeling's most important weekly magazin: <http://darjeelingtimes.com>

Gorkha major political party: <http://www.gorkhajanmuktimorcha.org>

Kokborok of Tripura: <http://www.boroksite.co>

Northeastern Council: <http://necouncil.nic.in/>

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