LAW MAKING PROCESS IN INDIA: A STUDY OF THE SCHEDULED TRIBES (RECOGNITION OF FOREST RIGHTS) BILL, 2005

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DECLARATION

July 28, 2006

I declare that the dissertation entitled " **LAW MAKING PROCESS IN INDIA : A STUDY OF THE SCHEDULED TRIBES (RECOGNITION OF FOREST RIGHTS) BILL, 2005**" submitted by me for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other University.

DURGESH VERMA

CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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Chairperson, CSLG

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Supervisor

TO MY PARENTS

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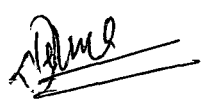

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CONTENTS

Chapter-One

Introduction

With the advent of the modern democratic State legislation has become the primary source of law. The emergence of legislation as a prime source of law in India can be traced back to the Charter Act of 1833 which set up the Central Legislative Council, separating the legislative functions of the State from its executive functions. This Act empowered the Governor-General-in-Council to legislate for the whole of the British territories in India and introduced "an element of institutional specialization in Government in differentiating the law making meetings of the Council from its executive meetings".[1] The Court of Directors devised the principles of legislation and instructed the Governor-General-in-Council to follow these principles and provisions of the 1833 Act while legislating for a community. These principles emphasize on[2]:

(a) mature deliberations and discussion on every legislative proposal,

(b) the passing of every legislative proposals through the same stages in the Council and discussion at each stage,

(c) opportunity of enquiry to each member of the Council, and,

(d) Publication of the draft legislative proposal in order to get the comments and opinion of the public.

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[1] Subash C. Kashyap (2001) Parliamentary Procedure: Law Privileges, Practice and Precedents Vol.1. New Delhi: Universal Law Publishing Company Pvt. Ltd p.10

[2] Ibid P.11

A more decisive differentiation of the legislative functions and executive functions of the Legislative Council was made by the Charter Act of 1853 by changing the composition of the Council. The number of members was increased from six to twelve with the addition of four representatives (members of the civil services) from the provinces and the Chief Justice and one of the Judges of the Supreme Court. These additional six members were allowed to take part in meetings for law making only. Legislative proposals were processed through three stages, that is, first reading, second reading and third reading, and were referred to a select committee. Legislative proceedings of the Council were held in public and debates and discussion on the Bill were officially published.

The Indian Councils Act of 1861 reconstituted the Legislative Council. For purposes of legislation, the Governor-General was given the power to nominate additional members, not less than six nor more than twelve, for two years, of whom half or more than half were to be non-officials. The power of the Council to legislate was extended but was subject to certain restrictions and limitations. It could make laws and regulations for all persons whether British or Indian, foreigners or others, all Courts of justice and all places and things within the Indian territories under the dominion of Her Majesty, and for all British subjects within the dominions of the Princes and States in alliance with Her Majesty. The Act also authorized the Governor-General to make and promulgate ordinances which could remain in force for six months.

The functions of the Governor-General-in-Council were confined exclusively to legislation. It was not allowed to transact any business except the consideration and

enactment of legislative proposals put before it by the Governor-General, or to entertain any motion except a motion for leave to introduce a legislative proposal, or having reference to legislative proposals actually introduced. The Act also put restrictions on the legislative power of the Council. The legislative proposals (i.e. the Bills) passed by the council were subject to the assent of the Governor-General. They could not become law without the assent of the Governor-General who could veto the Bills or else reserve them for consideration of the Crown.

The Indian Councils Act of 1892 relaxed the restrictions and limitations and enlarged the composition and power of the Council. The numbers of additional members were increased by five, one member to be nominated by the Bengal Chamber of Commerce and one to be nominated by the non-official members of each of the four provincial Councils. The Council had the power of discussing the annual statement of revenue and expenditure and of addressing questions to the executive. The demand for a more representative character of the council led to the Minto-Morley Reforms, which was implemented by the Indian Councils Act of 1909, was for the first time that the Council was given a really representative character by electing twenty seven non-official members. The numbers of additional members in the Indian Legislative Council were increased from sixteen to sixty – twenty eight officials and twenty seven non-officials. The twenty seven non-officials were to be elected; thirteen members by the non-official members of the Provincial Legislative Councils. two by the Chambers of Commerce of Calcutta and Bombay, one each by the larger land owners in six provinces, and six Muslims by their own community. The Act increased the deliberative functions of the Council by giving members the

power to influence and move resolutions on any matter of public interest except on foreign affairs and the armed forces.

The Government of India Act 1919 replaced the Indian Legislative Council by a bicameral legislature consisting of the Council of States and the Legislative Assembly. The legislature was made more representative[3] by increasing the number of elected members. This Act was followed by the Government of India Act, 1935 which created a federal legislature consisting of His Majesty and two chambers- the Council of State and the Legislative Assembly. The legislative power of the federal legislature was increased but was subject to the Governor-General's power of veto. The Constituent Assembly of Independent India borrowed heavily from the Government of India Act, 1935.

As such, India adopted the western democratic system with a parliamentary form of government. Theoretically the parliament is vested with the power of law making, while in practice it is created by governing elites and professional specialists. That is, law creation is concentrated and centralized in specific institutions (governmental bureaucracy) and processes. Due to heavy technocratic influence from the time that India embarked upon its strategy of planned and economic development, the public and its representatives had little say in wider deliberations about its future.[4]

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[3] Durga D. Basu (2000) *Introduction to the Constitution of India,* New Delhi: Wadha and Company p. 7

[4] kuldeep Mathur (2003), *Battling for Clean Environment: Supreme Court, Technocrats & Populist Politics in Delhi*, CSLG Working Paper, Jawaharlal Nehru University, 2003 New Delhi: CSLG p 4

Professionals and technocrats tend to influence the course of governmental action, and policy and lawmaking whether individually or in concert with others.[5]

The membership of government appointed committees is the major means through which professionals and technocrats acquire influence over policy formulation and the law making process[6]. In recent times, social complexity has increased and research and policy institutes have intervened to identify various flaws in laws and policies, and the government has begun to acknowledge the importance of these actors also in the enactment of laws. Thus, experts have been given a place in committees to formulate advice.

Therefore, the enactment of any law involves different actors having radically differing aims, interest and backgrounds and representing various social groups. The acts of these actors are structured and related to one another through certain institutional procedures and decision-functions. There are areas of both agreement and disagreement. Under these conditions, the specific provisions of a particular law are often the result of compromise and line item voting. Given all this, this study looks at the biography of a law as it comes into being. The main focus of study is on the technical steps involved, and the actors who actively participate in law making activities, or debates around proposed legislation.

Chapter Two presents an overview of the theoretical perspectives on law creation found in mainstream political and social traditions. The main theorists here discussed are Bentham, Dicey, Allen and Freund from the political tradition, and Durkheim, Ehrlich, Sawer, Pound, Quinney, Chambliss and R.J. Davis and Akers

[5] James W. Bjorkman & Kuldeep Mathur (2002) Policy, Technocracy and Development: Human Capital Policies in the Netherlands and India, New Delhi: Manohar P.15
[6] Ibid

from the sociological traditions. In the third section an attempt is made to delineate the theoretical inputs provided by Habermas and Maarten Hajer in understanding the role of the non-state actors in devising policy and formulating law.

Chapter Three describes the rules of legislative procedure in India that are to be followed while enacting a law, and a general description of the steps that are taken to formulate legislative proposals. Chapter Four examines the variety of forces that shaped the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. The main focus is here on the consultative processes that were followed to shape this Bill. Chapter Five concludes the study by reviewing the points discussed in previous chapters.

The study is both exploratory and descriptive. It is based on primary and secondary sources of data from various governmental and non-governmental publications. Primary among them are the reports and evidence and verbatim proceedings of the Joint Committee on The Scheduled Tribes (Recognition of Forest Rights) Bill, 2005; legislative proposal released by the Ministry of Tribal Affairs for inviting views and comments from various organizations, associations, NGOs and experts etc.; the final Bill, that is the Bill as introduced in the Lok Sabha on December 13, 2005 and the Bill as amended by the Joint Parliamentary Committee.

Various books and articles were also consulted in order to get a better insight into and understanding of the law making process. Various news papers were also consulted to follow the evolution of the Bill.

Chapter - Two

Socio-political and Legal Aspects of Law Making: A Theoretical Background

Laws are not self-producing. These are either the sovereign's command or the legislative enactment. As opposed to the traditional idea of laws as a set of commands, in the modern democratic societies, laws are enacted by the authorized legislative body. They are the outcome of a long process of discussion, debate and deliberation. Legislators discuss and debate about the appropriate provisions and statutes of a law and the best mechanism to enact a law. Debate about the form and realm of legislation is thus an important feature of political deliberation. Legislature therefore has become the primary source of law. It defines the ideal state of affairs for 'the mobilization of social resources through the exercise of power'.[7]

However there are certain forces and constraints that shape legislative endeavor as well as legislative practices. Though there is no such theorization which embodies the total socio-political and legal context of legislation, there are certain elements which are inherent to the understanding of legislative practices in the writings of some eminent political and social theorists. Among them, the most notable theorization on legislation is in the works of Bentham. Others like Allen, Dicey, Freund, Ehrlich, Pound, Durkheim, and Sawer have also made significant contributions in understanding the finer aspects of law making.

Given all this, this chapter seeks to explain the theoretical inputs on legislation that exists in the social and political traditions. Political theorists like Bentham and

[7] Harry C. Bredemeier (1969), "Law and the Social Structure" in V.Aubert (ed.) Sociology of Law : Selected Readings.Harmondsworth: Penguin Books p.57

Freund calls for a science of legislation, while Dicey and Allen try to delineate the extent to which public opinion plays role in bringing legislation in society. This is the essence of the first section. The second section deals with the nature of the value and interest group intervention that finds place in the theories of the sociologist of law. The shift from the concept of administration to governance has recognized the role of the citizens and civil society organizations in defining public policy. It gives primacy to political deliberation. It is in this context that the third section delineates the discursive theory of law developed by Habermas and Haajer's concept of policy making in the network society.

Section –I

Bentham repudiated the classical legislator's view of law as a custom or religious decree and spelled out the doctrine of utility - consisted in procuring the greatest happiness of the greatest number - as cardinal principle of legislation. In *Introduction to the Principles of Morals and Legislation* Bentham upheld his utilitarian principles that pleasure and pains are the main motive of human conduct. Utility is to prevail over traditions, if traditions come in the way of utility.[8] Further, he pointed out in classical thought the existence of opposition between theory and practice in the form of dualism between knowledge and politics.[9] He criticized this

[8] Jeremy Bentham(1982), *Introduction to the Principles of Morals and Legislation* .London: Methuem
[9] Nancy L. Rosenblum(1978) *Bentham's Theory of the Modern State* , Massachusetts: Harvard University Press p 11

notion of 'good in theory and bad in practice' and tried to reconcile knowledge and politics in the field of law. This effort resulted in his "theory of legislation".[10]

As opposed to the classical legislators, Bentham conceived legislation as an 'ordinary act.' According to him law is a product of identifiable men and its source lies both in knowledge and politics.[11] That is, in the modern state legislation is a political and more precisely parliamentary process.[12] Further, he suggested that laws must be enacted by legislators and political men (i.e. administrators). As such the modern state is a political entity, and is characterized by 'diversity and constant flux', its main objective is to articulate and satisfy changing and conflicting desires.[13]

The legislation is the classic means of exercising power and social control, and thereby law making is a recurrent practice to accommodate diverse and varying desires.[14] Political law makers should be acquainted with these desires and must take utility as a criterion to consider diversity and adjust change.[15] The legislator's role in law making is to provide knowledge about men's desires to the administrators and to enunciate formal rules. Politics is therefore an instrument to amend, adopt, produce and give content to law.[16]

Further, he insists that the validity and robustness of law is not drawn from the author's character but from the reason of the law makers.[17] 'The public good', declared Bentham 'ought to be the foundation of the legislator's reasoning'.[18] The

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[10] Ibid p 12
[11] ibid p 13
[12] Ibid p. 20
[13] Ibid p.17
[14] Ibid p. 9
[15] Ibid p. 17-18
[16] Ibid p.20-23
[17] Ibid p.16-17
[18] Supra note 8 p. 12

legislator should keep in mind the circumstances that have produced customs and habits at any given time, the only limitations upon him being of ethical and psychological factors[19]and should gather 'local information about expectations'. Thus law, for Bentham, is the 'reflective of the state of a people'.[20]

Dicey's account of English legislation gives primacy to public opinion in the enactment of law. In his celebrated work *Lectures on the Relation between Law and Public Opinion in England During Nineteenth Century* (1920) tried to establish a causal relationship between English legislation and legislative opinion in England. He concluded that public opinion determines the legislative endeavor. "For countries such as Britain", claimed Dicey, "the assertion that public opinion governs legislation in a particular country, meant that laws are then maintained or repealed in accordance with the opinions or wishes of its inhabitants".[21] Further, he recognized class based interests and made law the subject of 'opinion'.[22]

The role of public opinion in legislative enactment finds more explicit and practical expression in Allen's *Law in the Making* (1958). He points out that legislation is most often not the direct outcome of public opinion[23]; government might legislate without considering public opinion particularly the opinions of minorities.[24] Further, he writes:

> Legislation represents a process of action and reaction between constitutionally organized initiative and spontaneous social forces. While it can not be said of a great deal of modern legislation that it is in any real sense

[19] George H.Sabine (Fourth edition) *A History of Political Theory*, New Delhi: Oxford &IBH Publishing Co. Pvt. Ltd. p.617
[20] Supra note 9 p. 19
[21] A.V. Dicey(1920) *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*, London: Macmillan p.30
[22] Ibid Pp. 12-14
[23] C.K Allen. (1958) *Law in the Making*, London: Oxford University Press p.591
[24] Ibid pp. 416-19

> a direct product of 'popular consciousness' or 'the will of the people', and while it is true, in the phrase of Dicey, that laws foster law-making opinion, yet there is in society a prevailing current of opinion which necessarily and fundamentally influences the spirit of legislation. For the efficient working of the machinery of government, there should always be a harmony between legislative enactment and this dominant trend of public opinion. In contemporary societies, however, there are many different degrees and varieties of public opinion and of sections of it, and numerous influences both of an expert and of a popular kind, enter into the consultative process which precedes a great deal of modern legislation of the 'social' type.[25]

Thus, public opinion can have significant impact[26]; it may be considered as sufficient, but not a necessary condition for bringing legislation in society. In *Standards of American Legislation* (1965), Freund agrees with Dicey on relationship between public opinion and legislation, but he further points out that public opinion can not always be considered as a determinant factor of the evolution of legislation; as in several instances legislation is the outcome of "the legislators' free choice between a number of different possible and perhaps equally reasonable provisions".[27] Freund devised certain 'principles' to guide and control the making of statutes. As he says:

> Principle as applied to legislation, in the jurisprudential sense of the term, thus does not form a sharp contrast to either constitutional requirements or policy, for it may be found in the both; but it rises above both as being an ideal attribute demanded by the claim of statute law to be respected as a rational ordering of human affairs; it may be a proposition of logic, of justice, or of compelling expediency; in any event it is something that in the long run will tend to enforce itself by reason of its inherent fitness, or, if ignored, will produce irritation, disturbance, and failure of policy. It cannot, in other words, be violated with impunity, which does not mean that it cannot be or never is violated in fact.[28]

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[25] Ibid p. 591
[26] E. Freund (1965) *Standards of American Legislation.* Chicago: University of Chicago Press. pp.104-105
[27] E. Freund (1965) *Standards of American Legislation.* Chicago: University of Chicago Press. p 215
[28] Ibid pp.215-16

The foundation of the principle lies in the rational agreement of the reasonable person on the feasibility of any provisions of legislation.[29] Thus he appeals that statute law should conform to principle if it is to have authority and be able to function as a sanction.[30]

Freund insisted upon the adoption of two fundamental principles - principles of correlation and of standardization - in order to have legislation as a 'rational ordering of human affairs'. The principle of correlation means the harmonization of different provisions or augmentation of a statute by other statutes which is essential for its proper and satisfactory functioning. Altogether, it means the joining of correlative rights and obligations.[31] Moreover, obedience to this principle would mean more carefully measured justice. Further he argues that:

> The correlation of distinct and separable provisions makes a system out of a conglomerate of rules, while the correlation of necessarily interdependent provisions is an imperative requirement of logic, the violation of which must nullify the offending statute in whole or part[32].

Freund's principle of standardization prescribes four technical steps in the drafting of legislation – "conformity to undisputed scientific data and conclusion, the working out of juristic principles, the observance of an intelligible method in making determinations, and the avoidance of excessive or purposeless instability of policy".[33] This principle helps to promote the certainty, uniformity, stability and objectivity of law. Thus, Freund, like Bentham, demanded a 'science of legislation'.[34]

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[29] Ibid p. 218
[30] Ibid pp.215-16
[31] Ibid pp.224-25
[32] Ibid p. 225
[33] Ibid p.249
[34] Ibid p. 250

Section –I

Sociology of Law and the Conceptualization of Law Enactment

Sociology of law theorists have also tried to conceptualize the social and legal context of law creation. They have adopted a number of basic conceptual devices in an effort to explain law making processes. Some adopt the conflict model and others the consensus model of law making.[35] The nature of interest group intervention - which could be either pluralistic or elitist – often occupies a central place in these two models. While conflict theories are class based, consensus theories are often pluralistic in nature. Consensus theories maintain that laws are the product of normative consensus in society and serve the broad interests and functions of society as a whole. Moreover law expresses those societal values which eclipse the immediate, narrow interests of different individual and groups, demonstrating the consciousness of the whole society.[36]

Conflict theories, on the other hand, state that laws come into being as a result of the conflict of values and activities among different groups in society. Law, on this account, serves the narrow interests of powerful socio-economic and political

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[35] William Chambliss(ed.)*Criminal law in Action*, Santa Barbara, California: Hamilton Publishing company,1975 pp. 5-6 ; Ronald Akers and Richard Hawkins(eds.)*Law and Control in society*, Englewood cliffs, New Jersey: Prentice Hall ,1975, pp. 43-44 ; Robert Rich ,(1971) *The Sociology of Law : An introduction to its Theorists and Theories*, Washington D.C.: University Press of Americana ;George Ritzier,(1975), "Sociology : A Multiple Paradigm Science' The American Sociologist, Aug. 10 , pp.162

[36] Stuart Hills,(1971) *Crime ,Power and Morality: The Criminal Law Process in the United States*, Scranton, Pennsylvania: Chandler Publishing Company pp.3-4

groups in society. Moreover, it does not reflect the community's normative value system, but is created by the state to serve the interest of the elite.

Consensus Model of Law Making

Durkheim sees law as an expression of solidarity - repressive law corresponding to the mechanical solidarity found in homogenous societies and restitutive law corresponding to the organic solidarity found in more heterogeneous and modern societies, as a consequence of the division of labour.[37] Thus, law in a homogenous society is *conscience collective*.[38] Further, he points out that the duty of state officials is to carry out collective moral sentiments. They administer and decode social representation as law. In heterogeneous and modern societies law does not manifest 'shared beliefs but a distinct form of social organization'.[39] The restitutive law created by the state, though its foundation is in social facts, does not necessarily conform to individual 'sentiments' or 'states of mind'.[40] As society becomes more complex and differentiated, the state stretches its activity mightily. Thus, in heterogeneous societies, Durkheim perceives law as an expression of 'government

[37] Emile Durkheim (1969), "Types of Law in Relation to Types of Solidarity" in Vilhelm Aubert (ed.) *Sociology of Law: Selected readings*, Harmondsworth: Penguin Books. pp.17-29
[38] Ibid pp.24
[39] Roger Cotterrell (2001), "Durkheim on Legal Development and Social Solidarity" in Roger Cotterrell (ed.) *Sociological Perspectives on Law* I: *Classical Foundations*, Dartmouth: Ashgate. pp. 293
[40] Ibid

consciousness'.[41] In his lecture translated as *Professional Ethics and Civic Morals*, he holds that:

> It is not accurate to say that the state embodies the collective consciousness, for that goes beyond the state at every point. In the main, that consciousness is diffused: there is at all times a vast number of social sentiments and social state of mind of all kinds, of which the state hears only a faint echo. The state is the centre only of a particular kind of consciousness, of one that is limited but higher, clearer and with the more vivid sense of itself..... we can therefore say that the state is a special organ whose responsibility it is to workout certain representation which hold good for the collective. These representations are distinguished from the other collective representation by their higher degree of consciousness and reflection.[42]

And Durkheim now and then speaks of these representations in terms of government consciousnesses. These are manifested in the law making practices of the modern state.[43]

Apart from Durkheim, Pound, Sawer, Ehrlich and Friedman are also proponents of the consensual model of law creation. The legislative practices of the state find little space in Ehrlich's delineation of sources of the law. In his book *Fundamental Principles of Sociology of Law (1936)*, he states that "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decisions, but in society itself".[44] Law is derived from social facts and determined not by the state but by social compulsion.[45] Society consists of many associations and the inner order of these associations represents true law (i.e. living

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[41] Ibid pp. 294
[42] As quoted in supra note 39 p. 294
[43] Supra note 39 ,pp. 294
[44] As quoted in Klaus A. Ziegert (2001), "The Sociology behind Eugen Ehrlich's Sociology of Law" in R. Cotterrell (ed.) *Sociological Perspective on Law I: Classical Foundations*, Darthmouth: Ashgate p 157
[45] M.D.A. Freeman (2001) *Lloyd's Introduction to Jurisprudence*, London: Sweet & Maxwell Ltd. pp. 670

law).[46] He recognizes the state as just, but distinct from other associations and gives a higher place to state-enacted law (he calls it legislative law).[47] As such the state is just one pressure group among many, "albeit most powerful, for the introduction of norms into the legal system in its own self-interest".[48] Thus state law is the manifestation of political power.[49]

A heterogeneous and pluralistic society, opined Ehrlich, is characterized by the prevalence of many living laws, and of numerous claims and demands. These claims and demands are ranked in order of priority by the living law.[50] The role of the state, or legislator, or jurist is, the 'balancing of interests', and it is the task of society to give weightage to these interests.[51] By minimizing the primary role of legislation[52] in the enactment of law, Ehrlich provides the important insight that law creation is not only the exclusive domain of the state but also of authorized social groups.[53]

For Pound, in a modern democratic society, there exist a number of human wants, claims and demands .These claims and demands are interests - individual, social and public[54]- which exist independently of the law and exert pressure for "recognition and security".[55] The law recognizes and establishes some of these inside

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[46] Ibid
[47] Ibid
[48] Klaus A. Ziegert (2001), "The Sociology behind Eugen Ehrlich's Sociology of Law" in R. Cotterrell (ed.) *Sociological Perspective on Law I: Classical Foundations*, Darthmouth: Ashgate p 243
[49] Ibid p. 171
[50] Supra note 45 pp. 671
[51] Ibid
[52] Ibid pp.671 & 672
[53] Roger Cotterrell (2001), "Introduction : Classical Traditions in the Sociological Study of Law in R. Cotterrell (ed.) *Sociological Perspective on Law* I": *Classical Foundations*, Darthmouth: Ashgate pp.xvii
[54] E.K.Braybrooke, (1961) "The Sociological Jurisprudence of Roscoe Pound", in Geoffrey Sawer (ed.) *Studies in the Sociology of Law*, Canberra: The Australian National University Press. pp 72-80
[55] M.D.A. Freeman (2001) *Lloyd's Introduction to Jurisprudence*, London: Sweet & Maxwell Ltd. pp.673

the limit enforced by effective legal action and law itself.[56] Further law is a setting out of practices in a way that satisfies the maximum of claims (individual or social) with the minimum of tension and waste.[57] Pound, thus, drawing upon Jhering, conceives law as "adjusting and reconciling conflicting and competing interests".[58]

Sawer draws upon the interest approach[59] and tries to establish a relationship between the law and societal institutions.[60] In a politically organized society, argues Sawer, legislation evolves due to the claims[61] put forward by determined individuals, groups or collectivities. And these claims and demands are deliberated over and attended by the established agents of the society (i.e. legislative bodies).[62] The legislative body always maintains symmetry amidst all competing interests. It ranks interests in accordance with the prevailing societal norms and values as a measure to express best one in to law. Thus, law, according to Sawer, is determined by Interests.[63]

Conflict Model of Law Creation

As mentioned earlier, the conflict approach to law making tends to explain the role of interest groups in influencing and shaping the law to serve their own requirements and perspectives. As Hills, in his book *Crime, Power and Morality* (1971) points out:

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[56] Supra note 54, pp. 64-71
[57] Ibid pp. 83-88
[58] Supra note 45, pp.673 & 678
[59] Interest approach here refers to Kohler's theory of jural postulates, Ihering's theory of social interest, and application of these two theories by pound in his Interest Theory.
[60] Geoffrey Sawer (1965), *Law in Society*, London: Oxford University Press. pp. 30-31
[61] Sawer refers these claims in terms of interest.
[62] Supra note 60, pp. 46-47
[63] Ibid, pp. 147-50

> The exponents of the interest group approach emphasise the ability of particular groups to shape the legal system to serve their needs and safeguard their particular interests ..... power, coercion, and constraint rather than the sharing of common values, are the basic organizing principles in the interest group perspective.[64]

Among the conflict approach theorists, Quinney and Chambliss have adopted the interest group approach to explain law enactment in capitalist societies. Quinney developed a sociological theory of interests which states that law is enacted by interests. Moreover it adopts a conflict power model of society and provides a theoretical outline of law enactment and the law-interests relationship. In *Crime and Justice in Society* (1969) he perceives law as a social product having some specialized statutes that are formulated in a politically organized society raised on structure of interests. This structure is marked by conflict and the unequal distribution of power. The law is enacted and conducted within the interest structure of society. Thus, laws are determined and shaped by powerful interest groups.[65] Quinney's theoretical outline as enumerated in his another book *The Social Reality of Crime* (1970) contains the following propositions:

1. Society is 'divisible into segments which are broad statistical aggregates containing persons of similar age, sex ,class, status, occupation, race ethnicity, religion and the like'.[66]These segments are

[64]as quoted in supra note 45 p.677
[65] Richard Quinney (1969), *Crime and Justice in Society*, Boston: Little Brown and Company. pp. 5-30
[66] Richard Quinney (1970), *The Social Reality of Crime*. New York: Little Brown p. 39

'the loci of interest and interest groups', i.e. groups 'organized to promote the common interests'.[67]

2. 'The interest structure is characterized by the unequal distribution of power and conflict among the segments of society'.[68]
3. 'Power..... is the ability of persons and groups to determine the conduct of other persons and groups.'[69]
4. There is always an 'unequal distribution of power in formulating and administering public policy.'[70]
5. 'Any interest group's ability to influence public policy depends on the group's position in the political power structure.'[71]
6. Laws 'are formulated according to the interests of those segments.....of society which have the power to translate their interests into public policy.'[72]

In his later writings, Quinney presents a critical theory of law based on the Marxist understanding of and orientation towards the legal order. He conceives of law as 'the tool of the ruling class',[73] maintaining that law in capitalist society gives political recognition to powerful social and economic interests. The state manifests and carries out the interests and needs of the ruling class and the legal order furnishes

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[67] Ibid. 39
[68] Ibid p. 39
[69] Ibid p. 11
[70] Ibid p. 13
[71] Ibid p. 12
[72] Ibid p. 11
[73] Richard Quinney (1974) *Criminal Justice in America*, Boston: Little Brown and Company. pg. 10

the instrument for the coercive and violent control of the majority in society as well as for maintaining the existing social and economic order.[74]

Another significant theorization of the conflict perspective on law creation is provided by Chambliss. In his early writings, he conceived of law as the product of the interference of 'status groups'.[75] Powerful groups acquire and control over the legislative course of action and mould law in accordance with their own interest. A particular interest group easily gets a hold over legislation with the help of the rules and norms which control the process of the legislature and of the elections of legislators.[76]

However, in his later writings after his conversion to Marxism, Chambliss assumed that in a modern capitalist society, legislative changes emerge out of the prevalent 'dilemmas and contradictions within capitalism'. To inhibit the 'dilemmas and contradictions' from intimidating the capitalist system, legal rules require regular readjustment.[77]The various existing competing social classes and groups in modern industrialised society, with a high degree of variation in 'wealth, power and prestige', strive for the 'favor of the state'. The high degree of variation in wealth power and prestige makes the occurrence of conflict between these classes inevitable. The law takes its shape and form while going and living through such conflict which is fought between unequals.[78]Thus, Chambliss argues:

> Those who control the economic and political resources of the society will inevitably see their interests and ideologies more often represented in the law

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[74] Ibid pp 13-20
[75] W.J. Chambliss (1969) "The Law of Vagrancy" in W. Chambliss (ed.), *Crime and the Legal Order*. New York: McGraw Hill. pp. 62-63
[76] W.J.Chambliss & R.B. Seidman (1971), *Law Order and Power*. Reading Mass: Addison-Wesley
[77] R.Tomasic,(1982) *The sociology of Law*, London: Sage Publications p 178
[78] W.J. Chambliss (1976), "The State and Criminal Law" in W.J.Chambliss and M.Mankoff (eds.), *Whose Law, What order?* , New York: John Wiley pp.100-101

than will others. So long as class conflicts are latent, those who sit at the top of the political and economic structure of the society can manipulate the criminal law to suit their own purposes. But when class conflict breaks into open rebellion, as it often does in such (modern industrialised) societies, then the state must enact .....laws which appear to alleviate the conditions which are seen as giving rise to the social conflicts.[79]

Each of the conflictual and consensual models of law making discussed above is appropriate in some circumstances but not in others. Thorough law making involves elements of both the approaches.[80] This type of theoretical development is seen in the writing of Akers (1975) which modifies the conflict model. In his attempts to examine the correlation between law, societal institutions and other normative systems in the political state,[81] Akers analyses both models of law making - conflict and consensus – to comprehend the politically organized society. After analyzing the literature, he concludes that law reflects the norms of politically successful groups in society and is often the product of group conflict. The nature of group conflict can be determined in terms of power elites or pluralism. Both the concepts (i.e. power elites or pluralism) acknowledge the importance of power domination and conflict in society which closely fits the reality. To a certain extent, the consensus model also has a place in society. Thus, although law is a blue print of dominant social groups, it also bears the impressions of all of society at any given time.[82]

Another theoretical modification in the area of the interest group and value conflict perspective on law creation is seen the writings of R.J. Davis. He echoes Akers, insofar as he holds that the explanation of the role of the interest group and

[79] Ibid pg. 101
[80] supra note 77 p 178
[81] R. Akers and R. Hawkins (1975)*Law and Control in Society*, Englewood Cliffs, New Jersey: Prentice Hall p. 41
[82] Ibid pp.46-49

value conflict in the law making process in terms of either pluralistic or elitist conceptions is not an appropriate technique. It can be best understood in terms of group power and group commitment to legal norms. Therefore, Davis suggests a new model of power distribution in society and its ultimate impact upon legislation, asserting that groups having the best knowledge and legal advice are more readily able to influence the legislative endeavor and legislative practices.[83] Further, he analyses the role of pressure groups in enacting legislation in society, and concludes that most often legislation 'is the result of lobbying and other pressures exerted by groups'.[84] It shields the interests of the more powerful groups in society and thus promotes prevalent class and status system in society. Therefore, the extent of the protection of the interests or facts and values of a particular group by legal norms is totally dependent on the amount of power that it possesses.[85]

It is not only class interests and the interests of powerful groups that determine legislative enactment; there are other actors like professional organizations, apart from bureaucracies and governmental agencies which also play an important role in the legislative enactment.[86] In every modern democracy, the law making process takes place within a more complex structure, comprising both the state and non-state actors. With the emergence of the concept of governance and participatory democracy, various non-state actors such as experts, think tanks and research institutes have gained a more significant role. This trend finds expression in the theoretical and conceptual framework of Habermas and Maarten Hajer.

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[83] R.J. Davis (1978), "Towards a Theory of Law in Society", *Sociological Focus*, No. 11. p 136
[84] Ibid
[85] Ibid Pp. 137-39
[86] M.D.A Freeman. (2001) *Lloyd's Introduction to Jurisprudence*, London: Sweet & Maxwell Ltd Pp.677-78

Section - III

Recent trends in conceptualization of Policy making and Law enactment

The discursive theory of law developed by Habermas seeks to involve citizens directly in defining state policy and practice. His description of how legitimate law is formed puts emphasis on discourse as indispensable criteria to the creation of legitimate law. He writes that "under post metaphysical conditions the only legitimate law is the one that emerges from the discursive opinion of and will formation of equally enfranchised citizens".[87]He envisages the informal sphere of civil society as the locus of unrestrictive political debate and exchange.[88] Formal legal institutions not only deliver decisions and produce laws, but they also perform the essential functions of taking up input from the public sphere and translating it in to binding law. Hence legal legitimacy is determined in terms of a "decentered, civil society based theory that focuses on the forms of communications between the unrestricted, but weak, societal sphere and the necessarily restricted, but relatively strong, public political spheres".[89] In a sense, "procedural law becomes, above all law of ..... civil society.[90]

In the discursive model of democracy, civil society acts as the trough for disseminating the input of the public to state institutions. Thus he emphasizes

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[87] Jurgen Habermas, (1996) *Between Facts and Norms: Contributions to a Discourse theory of law and Democracy*, Tr. by William Rehg, Massachusetts: MIT Press. p 408

[88] William E. Scheuerman, (1999) 'Between Radicalism and Resignation: Democratic Theory in Habermas's Between Facts and Norms' in Peter Dews (ed.)*Habermas : A Critical Reader* p 156

[89] Andrew Arato(1996) "Reflexive Law, Civil Society and Negative Rights", *Cardozo Law Review* 17, pp. 785-87

[90] Ibid

adequate procedures of public communication, and gives centrality to civil society in law making process.

> The discourse theory of law conceives constitutional democracy as institutionalizing- by way of legitimate law (and hence also by guaranteeing private autonomy) – the procedures and communicative presuppositions for a discursive opinion and will formation that in turn makes it possible (the exercises of political autonomy and)legitimate law making.[91]

The emergence of governance as a defining feature of modern democratic society has changed the 'nature of politics and policy making'[92] and has brought in 'new sites, new actors and new themes'.[93] Further Hajer argues that in a network society, policy making is the platform of political deliberation and political participation. It is more integrated or area oriented, not a sectorally oriented approach.[94] Moreover, it is a public domain where people of different origins deliberate over 'their future and mutual interrelationship and their relationship with the government'.[95]

Conclusion

Hence multiplicity of notions exist surroundings the theory of legislation. There are spatial and temporal factors responsible that account for the variations in these ideas, in addition to socio-political conditions. The law making process is thus a composite phenomenon which includes within itself such diverse factors as utilitarianism, accommodation of diverse and varying interests, reflections of the

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[91] Supra note 87 p 437
[92] Maarten Hajer & H. Wagenaar (2003) "Introduction" in same (eds.) *Deliberative Policy Analysis: Understanding Governance in the Network Society.* Cambridge: Cambridge University Press. P.2
[93] Ibid.P.3
[94] Maarten Hajer (2003) 'A Frame in the Fields: Policy Making and the reinvention of Politics' in[94] Maarten Hajer & H. Wagenaar (eds.) *Deliberative Policy Analysis: Understanding Governance in the Network Society.* Cambridge: Cambridge University Press. Pp 89-94
[95]Ibid P.95

existing state of affairs on ground , public opinion, and ideas about the common good and the rational ordering of human affairs. The conflict model and the consensus model have been used as fundamental frameworks for understanding the process of law making. In recent times, the primacy of citizens and other non-state actors have had a considerable impact on the law making process. These factors have to be viewed as complementary to each other, not least because the present day legislative process is a complex affair which involves a host of different ideas and interests.

Chapter -Three

Legislative Procedure in India

The popular view about law making in India is that Parliament makes law, even though Parliament is not 'only the actor in the drama of law making'[96] All major players in the Indian Political System- Parliament, the Government, the Courts, and the bureaucracy- are deeply involved in law making and in each of its dimensions. They influence the formation and interpretation of law, and many are politically active. Each is either actively involved in or trying to influence the law making process. Therefore, law has become primarily legislation created by governing elites or professional specialist.

In India, law making is a complex activity which is subject to variety of legal, political and bureaucratic constraints. Although the role of the Parliament in law making is of 'immediate value', but the legislative initiative has 'passed almost completely to the Executive and to the Departments of Administration'.[97] Though the key actors in law enactment are legislators, administrators and the judiciary, non-state actors have also gained importance with "political overtones and widespread participation.[98]

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[96] Subash C. Kashyap (1999) *Our Parliament: An Introduction to the Parliament of India* , New Delhi: National Book Trust of India p. 156

[97] Subash C. Kashyap (2001) *Parliamentary Procedure: Law Privileges, Practice and Precedents* Vol.1. New Delhi: Universal law Publishing Company Pvt. Ltd p.104

[98] Kuldip Mathur (2003*) Battling For Clean Environment: Supreme Court, Technocrat &Populist Politics in Delhi* Working Paper, New Delhi: CSLG p5

In actual practice the functions of making law and policy are conducted by the executive. The 'Government makes legislative proposals'[99] and the Parliament only debates 'discusses, scrutinizes and by putting its seal of approval legitimatize legislative proposals formulated by the executive.' [100] Therefore, the role of Parliament is 'more of a legitimatisational role than a law making one'.[101] The executive discharges legislative function through some constitutionally established procedures which are to be followed while enacting a law. These procedures provide the parameters within which political forces contend for influence.

A proposal for legislation is introduced in either house of Parliament in the form of a Bill. It can be introduced either by the government or private members in either house of Parliament. Thus Bills are broadly classified as Government Bills and Private Members' Bills. Despite that, there is a virtual executive monopoly over legislative initiatives and considerations. Private members (i.e. non-ministerial members) have minimal opportunities to legislate on their own initiative; and the House has passed few Private Members' Bills. Apart from above these two categories, Bills can also be classified on the basis of their contents, as Ordinary Bills, Money and Financial Bills, and Constitutional Amendment Bills.

This chapter seeks to describe and explain the procedures for drafting legislation, and the provisions of the rules that are to be followed while enacting a law. It primarily discusses the legislative processes of Government Bills, mainly ordinary Bills that are introduced in Lok Sabha.

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[99] Supra note 96 p.156
[100] Supra note 97 p.104
[101] Ibid

Preparation and Drafting of Bills

Before its introduction in Parliament, a Bill is prepared and framed. This process of Bill preparation is called the drafting of the Bill. Though the responsibility for drafting the actual language and format of the proposed Bill is of the Ministry of Law and Justice (Legislative Department), the legislative proposal is initiated in the Ministry/Department concerned. Decision about the principles of policy and legislation is taken at ruling political and administrative level. However it is the prerogative of the Prime Minister to assign the task of drafting the legislative proposals to a particular Department or a Ministry. The Ministry constitutes a drafting committee (Support Group) which consists of both state and non-state actors. The non-state actors are generally the experts on the subject of the proposed legislation. The drafting committee holds various meetings and deliberates over the provisions that are to be included in the proposal. The committee formulates the legislative proposal in discussion with all the interests, as well as the relevant authorities from the administrative and financial points of view. It discusses the requirement of the proposed legislation and the provisions that are to be incorporated. If required, it also consults professionals and various interest groups such as business, labour, agriculture and industry. The process of revising and improving the proposal or outline continues until the minimal consensus is reached.

When a legislative proposal is ready, it is sent to the Law Ministry and Attorney General of India for advice regarding the legal and constitutional applicability of the proposal. Meanwhile the proposal is also released for the

suggestions and comments of the individual, experts and public bodies etc. The Drafting Committee also prepares a memorandum in consultation with the Law Ministry and other concerned Ministries and submits it for the approval of the Cabinet. The Cabinet usually discusses the memorandum through its relevant committee. This memorandum states the legislative proposal bringing out noticeably the need, scope, object, and all the implications of the proposed legislation.

After the Cabinet's approval, all the relevant papers are sent to the Law Ministry for drafting the Bill. An official memorandum, defining precisely the subject of the legislation, is also sent to enable the Ministry to draft the required Bill. This office memorandum sets out the complete details, the entire background material relevant for the proposed Bill. After examining the official memoranda the draftsman in the Law Ministry prepares a draft for the Bill in consultation with the officers of the Ministry. If necessary, experts and specialized bodies are also consulted on the various aspects of the Bill. After preparing the draft of the Bill, the Law Ministry sends to the Ministry. The Support Group prepares a Statement of Objects and Reasons, notes on clauses, a memorandum regarding Delegated Legislation explaining the scope of the proposals and stating whether they are of a normal or exceptional character[102], and a Financial Memorandum in consultation with the Ministry of Finance, in case the Bill involves expenditure from the Consolidated Fund of India, outlining the objects and clauses involving expenditure and also giving an estimate of the recurring and non-recurring expenditure involved[103] and submit it for the Cabinet's approval.

[102] Rule 70
[103] Rule 69

After fulfilling the above criteria, these documents are shown to the Ministry of Law and Justice (Legislative Department) before finalization. The Law Ministry scrutinizes the documents in the light of information provided by the Ministry.

Preparation for Introduction of the Bill

After the drafting of the Bill is over, the Ministry, if required, obtains the recommendation of the President for the introduction of the Bill. The recommendation of the President is required, if the Bill relates to the formation of new states or the alteration of the boundaries, areas and or name of the existing states (Art. 3), or formulation of Money, Financial, and Appropriation Bills (Art.110 (1),and Art. 117(1)) and imposition of taxes in which States are interested (Art. 274(3)); and creation of the provisions for the use of a particular language for any subject that falls under article 348(1) of the constitution. The recommendation of President is also required if the Bill involves expenditure from the Consolidated Fund of India.[104]

The recommendation or prior assent is obtained by the Ministry by submitting a copy of the Bill and a self contained note, with a copy of the note of the cabinet and its decision, to the president. Further the Minister communicates the recommendation of the President to the Secretary General of the House in which the Bill is decided to introduce in writing.[105] This recommendation letter is reproduced exactly in the Bill after the Statement of Objects and Reasons and is further indicated in the proceedings of the House in the form of a footnote.

[104] In this case recommendation is obtained separately for each House
[105] Rule 68

The Department distributes the finalized draft Bill to the members of the cabinet.[106] Further it is sent to the Ministry of Parliamentary Affairs one month in advance of the commencement of the session, in order to enable it to draw the legislative programme of a session. The Department in consultation with the ministry of Parliamentary affairs decides in which House the Bill[107] is to be introduced.

The final draft of the Bill is sent to the Government of India Press, by the Ministry of Law and Justice, for getting the proof copy. It sends two proof copies (each of English and Hindi[108] versions of the Bill) to the Secretariat of the House in which the Department concerned has decided to introduce the Bill and to the Ministry of Parliamentary Affairs; and returns the file to the Department.

For the introduction of the Bill, the Ministry/ Department sends a notice of the motion to the Secretary General concerned. The Speaker or the Chairman issues a seven days' notice to introduce the Bill. The copies of the Bill are distributed to the members at least two days in advance of the introduction date.

In Parliament, a Bill, before it becomes an Act, goes through first reading, second reading with or without the recommendations of changes in the Bill made by the committee to which it was referred; and subject to amendments proposed by members, third reading and assent by the President which converts the Bill into an Act.

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[106] This is not required for the Money and Appropriation Bill, and also Bills appended to the note for the cabinet.
[107] Except Money Bill
[108] The Official Language wing of the MOL&J Translates the Bill in to Hindi.

FIRST READING

Introduction and Publication of the Bill

For the introduction of a Bill, the Minister or member in charge gives a notice of the motion for leave of seven days to the Secretary General of Lok Sabha or Rajya Sabha as the case may be. The Speaker or the Chairman, however, is authorized to allow this to be made at shorter notice[109]. The copies of the Bill are distributed to the members at least two days in advance of the introduction date. However, some Bills are introduced without prior circulation on the request of the minister. The Minister give reasons in the memorandum for the consideration of the Speaker as to why the Bill is sought to be introduced without copies being made available to the member.

On the appointed day, the Minister in charge of the Bill on being called upon by the Speaker to do so introduces the Bill. If the motion for leave to introduce a Bill is opposed, the Speaker, after permitting it, if he thinks fit, brief explanatory statement from the member who moved and from the member who opposed the motion without further debate put the question.[110] However a full discussion is permitted when a motion is opposed on the basis that the Bill initiates legislation outside the legislative competence of the House.[111] On December 22, 1998 when the Home Minister moved a motion for leave to introduce Uttar Pradesh Reorganisation Bill, 1998 was opposed on the basis of legislative incompetence of the House, the

[109] Dir. 19A
[110] Rule 72
[111] Rule 72 & Lok Sabha Debates, December 22, 1998

Speaker permitted full discussion by the member who had given notice of objections before 10:00 hrs and by the Minister.[112]

Conventionally, there is no debate on the Bill at the introduction or First reading stage. The motion is seldom opposed. If any member intends to oppose the introduction of a Bill it is necessary to give advance notice to the Secretary General by 10:00 hrs on the day the Bill has been included in the Business for introduction.[113] When a notice to oppose the Bill is received, the Secretariat informs the Minister in charge of the Bill and Minister of Parliamentary Affairs. If there is more than one notice of intention to oppose the Bill, the names of the members are balloted.[114] There is no restriction on the number of Government Bills which may be introduced on any particular day or by any one minister.

Publication of Bills

All Bills as soon as possible after then, if they have not already been published, are published in the Gazette Ex. (II-2) of the same date on which Bills are introduced in Lok Sabha. In case Bills have been introduced on the recommendation of the President, a footnote to that effect is printed in the Gazette.[115]

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[112] Ibid
[113] Supra note 110
[114] LS Debate 22.7.1975 cc 15-33 as cited in Supra note 97
[115] Rule 73

SECOND READING

First Stage

Motion after Introduction of Bill

When a Bill is introduced or on some subsequent occasion, the member in charge moves any of the following motions in regard to his Bill.[116]

(i) that it be taken into consideration; or

(ii) that it be referred to Select Committee; or

(iii) that it be referred to a Joint Committee of the Houses with concurrence of the council; or

(iv) that it be circulated for the purpose of eliciting public opinion thereon.

Any Bill if it contains only provisions dealing with all or any of the matters specified in sub-clauses (a) to (g) of clause (1) of Art. 110 of the Constitution are not referred to a Joint Committee of the Houses with the concurrence of the council.[117] Any motion referred to above is made after copies of the Bill have been circulated to the members. If copies of the Bill are not made available to the members two days in advance of the motion, members object such motion. In that case the member in charge of the Bill on being asked by the Speaker gives reason and normally he is allowed to make the motion. Bills are also referred to the Departmentally Related Standing Committees of the two Houses in accordance with the subject matter of each Bill.[118] These examine Bills pertaining to the concerned Ministries or Departments as

[116] Rule 74
[117] Ibid proviso I
[118] Rule 331C

are referred to them by the Speaker or the Chairman.[119] When the Bill has been referred to the Departmentally-Related Standing Committees and it is being considered by the same, and the report is awaited, the Bill is also re-introduced in the House with the recommendation of the President under Article 117 (1) and 117 (3). In these types of cases the motion for re-introduction is opposed. The member who opposes the motion asks the question to the member-in- charge of the Bill. A member, who does not give a notice of his intention to oppose the motion, is also allowed to ask the questions. Despite the opposition from the members, the motion for leave to introduce the Bill is adopted. On December 22, 1998 when the Minister of Law and Justice and Company Affairs moved the motion for introduction of the Companies (Amendment) Bill, 1998 in Lok Sabha, a member opposed the Bill stating that the Bill was already introduced in the House and was being considered by the Departmentally- Related Standing Committee . After hearing the views of the Minister on the point raised, the Speaker allowed to move the motion. An explanatory statement containing the reasons for immediate legislation was also laid on the table by the Minister.[120]

Motion for Consideration

On the day on which the motion for consideration of the Bill is made, there is only general discussion on the principles and provisions of the Bill. No amendments to the Bill are made at this stage except the amendments to the motion. When making

[119] Rule 331E (b)
[120] Lok Sabha Debates December 22, 1998.

such a motion the Minister normally seize the occasion to explain the purpose and merits of the Bill and rationale to introduce it. Members question the validity of the Bill instantly after the questions proposed by the Speaker. When the motion for consideration is adopted there is discussion and voting over clauses and schedules. Members who want to give their opinion and views over the principles of clauses or schedules are invited by the Speaker to speak on the subject. While debating members try to influence the house by giving historical evidences, precedents, and possible consequence of the Bill if it gets or does not get passed. When debate is over the Speaker or the Chairman puts each and every clause and schedule to vote either one by one or together. Clauses are either adopted or rejected by simple majority of members present and voting.

Motion for Eliciting Opinion

When the motion for eliciting opinions is carried, the Bill is circulated to the State Governments who are asked to forward in duplicate their opinion on the provisions of the Bill, and the opinions of members of State Legislatures and of such public bodies, selected officers and any other persons as the State Governments think fit to consult before the expiry of the date for circulation of the Bill specified in the motion.[121] After the opinions have been received the motion in respect of such Bills is essentially for reference to Joint or Select committee of the House.

[121] Dir. 20

Motion for Select or Joint Committee

When the Bill is referred to a Joint Committee, the Minister specifies the number and names of the members of the House to be appointed to the committee and also the number of members from the other House. The proportion of the members from the Lok Sabha and Rajya Sabha on the Committee is 2:1. The minister also specifies the quorum needed for the meeting of the Committee and rules of procedure which should govern the functioning of the Committee. The Minister sends a request to the other House to nominate the names of its members in the Committee. The Speakers appoints the one of the members of the Committee as Chairman of the Committee.

The Committee in its various sittings consults the concerned Ministries regarding the Bill and asks them to tender evidence and records. It also invites the memoranda from various organizations, associations, NGOs, individual and experts on the concerned subjects.

It asks the Ministry who has introduced the Bill to present before it reasons, scope and rationale of the Bill. It also invites the above said non-state actors to put forth oral evidences and suggestion before the Committee and a verbatim record is kept. The committee considers and examines the clauses and schedules of the Bill on the basis of evidence tendered by the said actors. When detail consultation with experts in the sector is over the Committee invites the notice of amendments from the members as well as non members of the committee. Each and every clause and amendments suggested by members are put to vote. Amendments from non-members

of the Committee are also put to vote. After the clauses and amendments have been considered and voted upon, the Committee prepares report and presents it before Parliament. The decisions incorporated in the report are arrived at by the majority of the members present and voting. The Bill as amended by the Committee is further considered at the ruling party level and administrative level before it is introduced in the House.

Motion after Presentation of Select/ Joint Committee Reports

After the presentation of the Final Report of a Select Committee of the House or a Joint Committee of the Houses, as the case may be, on a Bill, the member-in-charge moves any one of the following motions:[122]

(a) that the bill as reported, be taken into consideration; or

(b) that the bill as reported, be re-committed to the same Select Committee or to a new Joint Committee, or to the same Joint committee or to a new Joint Committee with the concurrence of the Council, either without limitation or with respect to particular clauses or amendments only, or with instructions to the Committee to make some particular or additional provisions in the Bill, or

(c) that the bill as reported be circulated or recirculated, as the case may be, for the purpose of eliciting opinion or further opinion thereon.

[122] Rule 77 (1)

SECOND STAGE

Clause by Clause Submission of Bill

After the Motion that the Bill as reported by the Select Committee or Joint Committee has been adopted the Bill as amended is taken for consideration. At this stage full discussion over the Bill or over the clauses is allowed.[123] The debate is confined to a consideration of the report of the Committee and the Matters referred to in that report or any alternative suggestions consistent with the principle of the Bill.[124] Firstly, the Minister explained the salient features, and sum and substance of the Bill and commends to pass the Bill with all the inputs included by the Committee and accepted by the Government. Thereafter the Speaker invites the members to speak on the subject. Those members who are in support of the Bill debate and discuss the demerits and inadequacy in the existing system and how effective is the present Bill in addressing those problems while the member who opposes the Bill revolves around rationality of opposing the Bill.

In 1998, the Minister of power put before the House the Electricity Laws (Amendment) Bill, 1998 as amended by the Government on the basis of recommendations made by the Standing Committee; a heated discussion took place with members arguing for and against the Bill. Members who were in support of the House tried to convince the House by pointing out the inefficiency and malfunctioning of Government Power Projects, comparing this with other countries where power was privatized, and various committees and Experts Group set up by the

[123] Lok Sabha Debates Session II July 20, 1998.
[124] Rule 78

Government and their recommendation for the privatization of the Power Sector and shortage of power in the country. Members against the Bill pointed out the problems faced by the farmers due to privatization of the electricity. Pre-conceived notions appeared to dominate minds of those opposing the Bill. One of the members while debating the Electricity Laws (Amendments) Bill, 1998, on being interrupted by the Minister, said that:

> He is not listening because he is sure that he can get it passed without listening to what we say. We are all proposing certain things. He must at least show the courtesy of listening to what we say.[125]

After the debate and discussion over the Bill, the Speaker submits the Bill or any part of the Bill to the House for clause by clause consideration. The Speaker calls each clause separately for discussion, and when the amendments relating to particular clause are dealt with, he puts the question:[126]

> "That this clause (or, that this clause as amended, as the case may be) do stand part of the Bill".

It is at this stage that members suggest amendments to the clauses, and these amendments are discussed in the order of the clauses of the Bill to which they respectively relate. All the motion for amendments are put to vote and adopted or rejected by a simple majority of Members present and voting.

The consideration of the Schedules or Schedules, if any, is conventionally followed by the consideration of clauses. However sometimes they are amended before the Clauses, or with the clauses. On request being made by any member to put any clause or Schedules separately the Speaker puts that clause or schedule, or clause

[125] Supra note 123.
[126] Rule 88

or schedule as amended, separately.[127] Schedules are put from the chair, and are amended, in the same manner as clauses, and the consideration of new Schedules follows the consideration of the original Schedules. Clause One, the enacting formula, the Preamble, if any, and the Title of a Bill are not submitted until the other clauses and schedules (including new clauses and new schedules) have been disposed of. They are submitted and amended in the same manner as any other clause of the Bill. The Speaker thereafter put the question: "That clause one, or the Enacting Formula, or the Preamble or the Title (or, that clause one, Enacting Formula, Preamble or Title as amended, as the case may be) do stand part of the Bill".[128]

Admissibility of Amendments

The following conditions govern the admissibility of amendments to clauses or schedules of a Bill.[129]

(a) An amendment should be within the scope of the Bill and relevant to the subject matter of the clause to which it relates.

(b)An amendment should not be inconsistent with any previous decision of the House on the same question.

(c) An amendment should not be such as to make the clause which it proposes to amend unintelligible or ungrammatical.

(d) If an amendment refers to, or is not intelligible without a subsequent amendment or schedule, notice of the subsequent amendment or schedule should be given before

[127] Ibid Proviso
[128] Rule 92
[129] Rule 80 (i) to (vii)

the first amendments is moved, so as to make the series of amendments intelligible as a whole.

(e) The speaker determines the place at which an amendment should be moved.

(f)The Speaker may refuse to propose an amendment which is, in his opinion, frivolous or meaningless.

(g)An amendment may be moved to an amendment which has already been proposed by the Speaker.

President's Recommendations Regarding Amendments

Prior recommendation or sanction of the President is required to move amendments of clauses or schedules attracting provisions of Arts. 117(1), 274(1), 317(1) and 349 of the Constitution; if any member desires to move an amendment of such clauses or schedules, he has to annex to the notice given by him, the sanction or recommendation conveyed through a Minister and the notice is not treated as valid until this requirement is complied with.[130] However, no previous sanction or recommendation of the President is required, if an amendment seeks to abolish or reduce the limits of the tax proposed in the Bill or amendment, or seeks to increase such tax upto the limits of an existing tax.[131]

Members send their applications of request for getting sanctions or recommendation of the President in regard to their notice of amendment, to the Secretariat of the House, and Secretariat forwards their request to Ministry concerned

[130] Rule 81
[131] Ibid Proviso

for further necessary actions. The Minister concerned communicates the order of the President granting or withholding the sanction or recommendation to such requests, to the Secretary-General in writing.[132]

Selection of New Clauses or Amendments

The speaker has the power to select the new clauses or amendments to be proposed, and may thinks fit, call upon any Member who has given notice of an amendment to give such explanation of the object of the amendment which enables him to form a judgment upon it.[133] When an amendment for the insertion of a new clause in a Bill is adopted by the House, the Speaker puts the question thus:[134]

'The question is: That clause (quoting the number of the new clause) be added to the Bill.'

Arrangements of amendments

Amendments of which notice has been given are, as far as practicable, arranged in the list of amendments, issued from time to time, in the order in which they may be called. In arranging amendments raising the same question at the same point of a clause, precedence is given to an amendment by the member-in-charge of the bill. Apart from notices of member-in charge, other notices of amendments are arranged in the order in which they are received.[135]

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[132] Rule 82
[133] Rule 83
[134] Dir. 31
[135] Rule 84

Consideration of Amendments

Amendments are ordinarily considered in the order of the clauses of the Bill to which they respectively relate. The Speaker put the amendments one by one to vote and thereafter put the question: "That this clause do stand part of the Bill."[136]

THIRD READING OF THE BILL

Motion for passing of Bill

When a motion that a Bill be taken into Consideration has been carried and the clause by clause submission is over (with or without amendments), the member-in-charge move that the Bill be passed.[137] Where a Bill has undergone amendments the motion that the Bill as amended be passed cannot be moved on the same day on which the consideration of the Bill is concluded, unless the Speaker allows the motion to be made.[138]However, to such a motion no amendment can be moved except formal, verbal or consequential upon an amendment made after the Bill was taken into consideration.[139] At all stages explained above motions are put to vote and adopted or rejected by a simple majority of members present and voting.

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[136] Rule 85 (1)
[137] Rule 93 (1)
[138] Rule 93 (2)
[139] Rule 93 (3)

Scope of Debate on Motion for passing of Bill

The discussion on a motion that the Bill or the Bill as amended be passed is confined to the submission of arguments either in support of the Bill or for the rejection of the Bill. Members while making a Speech must not refer to the details of the Bill further than is necessary for the purpose of their arguments that should be of a general character.[140]

Transmission of Bills to Rajya Sabha

After the Bill is passed by the House (Lok Sabha), it is sent to the Council with a message stating that the Bill has been passed.[141] The Secretary-General certifies, on top of the first page of the Bill so sent to the Council, in the following form:

> "This Bill has been passed by the house of the people on the ....19....Dated the....200..... Secretary-General":

However, if it is a money Bill within the meaning of Article 110 of the constitution, the certificate by the speaker is endorsed at the end of the Bill in following form:

> 'I hereby certify that this Bill within the meaning of Article 110 of the constitution of India.
> Dated 200... Speaker

The Bill undergoes the same stages of consideration and passing.

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[140] Rule 94
[141] Rule 96 (1)

RS Message regarding Bills other than Money Bills

If a Bill other than a money Bill passed by the House and transmitted to the Council is passed by the Council without amendment, the message received from the Council to that effect is reported by the secretary- General to the House if in session or published in the Bulletin for the information of the members if the House is not in session.[142]

Bills other than Money Bill returned with Amendments

If Bill, other than a Money Bill, passed by the House and transmitted to the Council is returned to the House with amendments, it is laid on the Table.[143] After the amended Bill has been laid on the Table, any Minister in the case of a Government Bill, or in any other case any member may after giving two days' notice, or with the consent of the Speaker without notice, move that the amendments be taken into consideration.[144] When a notice of motion regarding consideration of amendments is received, it is included in the List of Business and circulated to members.

If a motion that the amendments made by the Council be taken into consideration is carried, the speaker puts the amendments to the House in such manner as he thinks most convenient for their consideration.[145] An amendment relevant to the subject matter of an amendment made by the Council may be moved but no further amendment can be moved to the Bill unless it is consequential upon, or

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[142] Rule 97
[143] Rule 98
[144] Rule 99
[145] Rule 100 (1)

an alternative to, an amendment made by the Council.[146]If the House agrees to the amendment made by the Council, it sends a message to the Council to that effect, but if it disagrees with that amendment or proposes further amendment or an alternative amendment, the House returns the Bill or the Bill as further amended to the Council with a message to that effect.[147]

If the Bill is returned to the house with a message that the Council insists on an amendment or amendments to which the House has disagreed, the Houses are deemed to have finally disagreed as to the amendment or amendments.[148]Under these circumstances, the President may call a Joint Sitting of both the Houses.[149] The President may also notify, if more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it, to the Houses by message or by public notification, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill, provided the Bill has not been lapsed by reason of dissolution of the House of the People.[150] When the President has issued notification of his intention to summon the Houses to meet in a joint sitting, neither House can proceed further with the Bill.[151]

At the joint meeting, if the Bill has not been passed by the Council with amendments and returned to the House, no amendment can be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the

[146] Rule 100 (2)
[147] Rule 101
[148] Rule 102
[149] Article 108 (1) (a) & (1) (b)
[150] Article 108 (1) (c)
[151] Article 108 (3)

passage of the bill.[152] In case the bill has been passed by the council with amendments and returned, only such amendments can be proposed to the bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed, and the decision presiding as to the amendments which are admissible under this clause is final.[153] If the Bill, with such amendments, is passed by a majority of the total number of members of both houses present and voting, it is deemed to have been passed by both Houses.[154]

Authentication of the Bill and Assent of the President

Authentication of the Bill

After a Bill has been passed by the Lok Sabha and which is in possession of the House, it is signed in duplicate by the Speaker and presented to the President.[155] In the absence of the Speaker from New Delhi, the Secretary-General, in case of urgency, authenticates the Bill on behalf of the Speaker.[156] A copy is sent to the Draftsman, Ministry of Law, for scrutiny before it is presented to the President.[157]

If, in the opinion of the draftsman, the Bill is not likely to be assented in the same year in which the Bill is passed, and he makes a suggestion that the year in the title clause be changed, the Speaker may accept the suggestion and make the consequential change in clause 1 and other clauses of the Bill wherever necessary.[158]

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[152] Art. 108 (4) (a)
[153] Art. 108 (4) (b)
[154] Art. 108 (4)
[155] Rule 128 (1)
[156] Ibid Proviso I
[157] Dir. 34 (1)
[158] Dir. 34 (2)

In such a case the Bill is authenticated in the same year in which it is likely to be assented to.[159]One copy of the

Bill so assented to by the President is preserved for verification and record, and is not allowed to pass out of the custody of the House without the permission of the Speaker.[160]

Assent of the President

When a Bill has been passed by the Houses of Parliament, it is presented to the President for his assent. The President may either assent to the Bill, or withhold his assent.[161] He may also return the Bill if it is not a Money Bill to the Houses with a message for reconsideration of the Bill, or any specified provision thereof, or and for considering the desirability of introducing any such amendments as he may recommend in his message.[162]

If the President returns the Bill to the Lok Sabha with a message requesting that the House should reconsider the Bill or any specified provisions thereof or any such amendments as are recommended in his message, the Speaker reads the message of the President in the House if it is in session; otherwise message is published in the Bulletin for the information of the members.[163] Thereafter the Bill is laid on the Table.[164]

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[159] Dir. 34 (3)
[160] Rule 128 (2)
[161] Art. 111
[162] Ibid Proviso
[163] Rule 129 (1)
[164] Rule 129 (2)

When the Bill has been so laid on the Table, any Minister in the case of a Government Bill, or, in any other case, any member may give notice of his intention to move that the amendments recommended by the President be taken into consideration.[165]

On the day on which the motion for consideration is included in the list of business the member who has given notice may move that the amendments be taken into consideration. Unless the Speaker otherwise directs, such a motion of consideration cannot be included in the List of Business of the House earlier than two days of the receipt of the notice.[166]

The debate on such a motion is confined only to consideration of matters referred to in the message of the President or to any suggestion relevant to the subject-matter of the amendments recommended by the President.[167] No further amendments can be moved to the Bill unless they are consequential upon, incidental or alternative to, amendments recommended by the President.[168]

After all the amendments have been dealt with, the member who has given notice of motion may move that the Bill as originally passed by the Houses be passed again, or passed again as amended.[169]If the motion that the amendments recommended by the President be taken into consideration is adopted, the Speaker puts the amendments to the House in such manner as he thinks most convenient for their consideration.[170]

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[165] Rule 130
[166] Rule 131
[167] Rule 132
[168] Rule 134
[169] Rule 135
[170] Rule 133

If the motion that the amendments recommended by the President be taken into consideration is not carried, the member who has given notice of motion may at once move that the Bill as originally passed by the Houses be passed again without amendment.[171]

After the Bill has been passed again by the House with or without amendment, it is transmitted to the Council for concurrence with a message to that effect.[172] Thereafter the Bill goes through same process as in the case of any ordinary Bill until the Bill is passed by the two Houses or Both the Houses deemed to have finally disagreed as to the amendment or amendments.[173]

When the Bill so returned by the President has been reconsidered by the Houses accordingly, and is passed again by the Houses with or without amendment and presented to the President for assent, the President cannot withhold assent there from.[174] And thereafter the Bill becomes law.

After a Bill has again been passed and when it is in possession of the Lok Sabha, the Bill is signed in duplicate by the Speaker and presented to the President in the following form.[175]

> 'The above Bill has been passed again by the Houses of Parliament in pursuance of the proviso to Article 111 of the Constitution'.
>
> Dated ..... Speaker'

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[171] Rule 136
[172] Rule 137
[173] Rule 143
[174] Art. 111 Proviso
[175] Rule 154 & Lok Sabha Debate May 28, 1998

In the absence of the Speaker from New Delhi, the Secretary –General in case of urgency, authenticate the Bill on behalf of the Speaker.

When the bill is passed by the Houses of Parliament and assented to the President under Article 111 of the Constitution it is laid by the Secretary –General on the Table.[176] If the assent of the President is obtained by the Rajya Sabha Secretariat, it is duly authenticated by the Secretary-General of Rajya Sabha before being laid on the Table.[177]

Conclusion

In India, law making in all its aspect is a Governmental process. All Bills go through basically same procedure before introduction while after introduction the process of legislation is open to a variation. The actual political discussion about the contents of a law occurs before it is introduced in parliament and much important political activity takes place before a bill becomes a law. As at all the stages motions are put to vote and adopted or rejected by a simple majority of Members present and voting. Thus, all the government Bills get passed in parliament with the aid of majority those government posses. Legislative procedure provides little space to members to legislate on their own. Although members can bring Bills on their own, there is little chance of them being passed.

[176] Dir. 35
[177] Ibid Proviso

Chapter- Four

The Scheduled Tribes (Recognition of Forests Rights) Bill, 2005

Legislation is the product of a political decision, frequently based on a manifesto commitment of the ruling party or consensus among coalition partners in government. Though private members may initiate a draft bill, legislation is generally the preserve of the party in power, and to that extent a government-led exercise. As such, it is an aspect of state control over society. Politics is reflected in any legislative endeavor and practices, with different actors (state and non-state) trying to influence the details of proposed legislation in order to shape the law according to their own perception of the existing problem, and for which government has introduced the legislation.

With the election of the United Progressive Alliance (UPA) Government in May 2004, P.R. Kyndiah the new Minister for Tribal Affairs brought before Parliament the draft Scheduled Tribes (Recognition of Forests Rights) Bill, 2005 on December 13, 2005, as a part of the commitment made in the Common Minimum Programme (CMP). The CMP of the UPA Government states:

> The UPA will urge the states to make legislation for conferring ownership rights in respect of minor forest produce, including tendu patta, on all those people from the weaker sections who work in the forests.[178]

It further states:

> Eviction of tribal communities and other forest-dwelling communities from forest areas will be discontinued. Cooperation of these communities will be

[178] Common Minimum Programme of the Congress led United Progressive Alliance, May 2004, New Delhi.

sought for protecting forests and for undertaking social afforestation. The rights of tribal communities over mineral resources, water sources, etc as laid down by law will be fully safeguarded.[179]

In pursuance of the CMP, the Ministry of Tribal Affairs set up a consultative group in mid-2004, which came up with the basic framework of the Bill. This was circulated to different ministries in early 2005. The formal announcement to draft the Bill came on January 19, 2005 when at a high level meeting the Prime Minister decided to draft the Scheduled Tribes (Recognition of Forest Right Bill) 2005 and table it in the budget session of Parliament in response to lobbying by a broad based campaign against evictions in Madhya Pradesh. The PM assigned the task of drafting the Bill to the Ministry of Tribal Affairs which constituted a Drafting Committee, known as Technical Support Group (TSG), under the chairpersonship of Secretary (Tribal Affairs) to formulate the Bill. The TSG comprised representatives of the ministries concerned, as well as some reputed experts having rich experience and deep association with the cause of environmental protection and the welfare of tribal peoples.

Composition of Technical Support Group

The technical Support Group consisted of both state and non-state actors. These are:

State Actors:

1. Director General of Forest — Ministry of Environment and Forest

[179] Ibid

2.	Joint Secretary & Legal Advisor	Ministry of Law and Justice
3.	Joint Secretary	Ministry of Panchayati Raj
4.	Joint Secretary	Ministry of Land Reforms and Rural Development
5.	Advisor	Planning Commission
6.	Joint Secretary	Ministry of Tribal Affairs
7.	Advisor	Finance Commission

Non-State Actors:

1. **Vandana Shiva** is a social activist and environmentalist and author of many books on environmental movement. She was deeply involved with the Chipko Andolan.
2. **Madhu Sarin** is a Chandigarh based social activist working for the cause of tribals. She is also associated with the Compaign for Survival and dignity. She actively participated in Teh compaign for survival and dignity organized in 2000.
3. **Pradip Prabhu** is a senior fellow, National Institute of Rural Development, Hyderabad. He was the chief organizer of the Teh Campaign for Survival and Dignity.
4. **Prashanto Sen** is a lawyer in the Supreme Court of India.
5. **Sanjay Upadhyaya** is a Lawyer who has been engaged in a major Public Interest Litigation (PIL) on the settlement of rights of forest tribes.

6. **Dhrupath Chaudhary** educated from Oxford College of Forestry and a leading expert in Jhum policy.

Nature of Discourse around the Bill

A first draft of the Bill was released for public views and suggestions by July 10, 2005. With this publication it came under examination and attack which prompted the Government to put its enactment on hold. The controversy over the Bill is not, given its subject matter, surprising. It attempts to set a national standard for vesting and recognizing 'forest rights' to Scheduled Tribes. Critics, including officials of the Ministry of Environment and Forest, as also environmentalists and conservationists challenged the substance of the Bill, arguing that it constitutes a threat to biodiversity and the conservation of wild life.

The Bill deals with two types of rights, the first is land rights, land inhabitation land related rights and the second is non- land rights like access to minor forest produce, access to forest products placing duty on the tribal population to protect and conserve the forest resources. The central area of conflict between the MoEF led conservationist lobby and MoTA led tribal activist lobby is over sub-section (1) of section (3) which states[180]:

"the rights of the forest dwelling Scheduled Tribes to hold and live in the forest land under their occupation for habitation or for self-cultivation for livelihoods needs...."

The second area of conflict is regarding sub-section 4 (5) which states:[181]

[180] Government of India (2005) The Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 , Ministry of Law
[181] Ibid

" no such land rights .....in no case would exceed 2.5 ha per nuclear family".

The conservationists lobby claims that the provision of 2.5 ha of land would ultimately lead to 2/3rd extinction of forest area. It would also bring land mafia and naxalites in the forest.[182] There are 20 million tribal families; to hand over 2.5 ha of land would mean loss of 50 million hectare out of 68 million hectare land. Thus it would lead to the privatization of ownership of forest to the 8 percent of the Indian population.[183] They also claimed that only 8 percent of the country's land is covered with dense forest and the tribes i.e. wilderness constitutes 7 or 8 percent of the population, so by "no account is this definition of wilderness, and by all account it is a recipe for disaster".[184]

Another central area conflict was sub-section 2 of section 4 of the Bill which states:

> "The recognition and vesting of forest rights to forest dwelling Scheduled Tribes .....shall be subject to the condition that such Scheduled Tribes or tribal communities had occupied forest land before the 25th day of October, 1980"[185].

Tribal rights activists wanted to brought forward the date to avoid the mass eviction that would take place after the enactment of the law, defying the main purpose for which legislation was brought in. They also demanded to include other forest dwellers within the ambit of the Bill which, obviously, was against the interest of forest department and conservationists. As the Bill also kept the Protected Areas,

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[182] Himraj Dang (2005) "Cutting Down Forest for Votes" The Indian Express, 6 May, New Delhi.
[183] Malvika Singh (2005) " May I Dwell in The Forest" The Indian Express, 7 May, New Delhi
[184] Vikram Soni (2005), "Tribal People and Preserving Prime Forest" The Hindu, November 29, New Delhi.
[185] Supra note 180

National Parks and sanctuaries in its purview which was another bone of contention for the MoEF and conservationists.

The tribal rights activist wanted ceiling to go, arguing that the fixation of maximum 2.5 hectares per family means that the already meagre land of the tribals would be confiscated. This will further deteriorate their position, and would strengthen other moneyed groups of people further. They also argued that it is possible to protect the forest only with the help of local communities. It has been a failure on the part of the forest officials to do so without their support.[186]

In an effort to challenge the provisions of the Forest Rights Bill, the Ministry of Environment and Forest (MoEF) prepared a Minor Forest Produce Bill. Unlike the Bill prepared by the MoTA, Minor Forest Produce Bill kept the Protected Areas, National Parks, Sanctuaries and other notified areas outside of the scope of the Bill. A meeting of the committee of secretaries was convened on 19 August 2005 to discuss the Minor Produce Bill, but was inconclusive.

Apart from the disagreement between the two ministries over the Forest Rights Bill, a lack of consensus over the Bill became also visible within the Congress Party, when the Prime Minister, *"the brain behind the idea of giving land rights to forest dwelling tribes told Left MPs in the second week of the August that the Congress is a divided house"*.[187] The former Chief Minister of Madhya Pradesh Digvijay Singh added to the politics over the Bill by demanding that SCs and OBCs should also be given land rights in forest villages. The officials of the Ministry of Tribal Affairs described this development as a "*sure shot recipe for killing the*

[186] Madhuri Krishnaswamy (2005) "One step Forward, two Steps Back" ,*Economic and Political Weekly* Vol. XL No.47

[187] The Times of India, August 12, 2005 New Delhi.

Bill".[188] As far as party politics are concerned there was no opposition to the Bill. The left parties of the UPA insisted on the introduction of the Bill, while other allies left it to the discretion of their Scheduled Tribes MPs. The CPI (M) pressurized the government to include in the Bill provisions regarding infrastructural facilities like schools, drinking water, health care and roads.

To resolve the dispute between the MoTA and MoEF, the eight member Cabinet Committee on Tribal Affairs (CCTA), chaired by Home Minister met on 24 August, 2005. The CCTA permitted the MoEF to prepare an alternative draft on Forest Dwellers' Rights within two months, and agreed to discuss it along with the revised Scheduled Tribes (Recognition of Forest Rights) Bill drafted by the MoTA. In response to this, the MoTA on Sept.5, 2005 invited Scheduled Tribes MPs to get support for the Bill.

The CCTA also set up four sub-committees on broader tribal issues without any specific reference to the contentious Bill. The first sub-committee, with Tribal Minister P.R.Kyndiah as its Chairman, and Environment Minister A. Raja and the Panchayati Raj Minister M.S. Aiyar as its two other members, was constituted to study resource ownership and economic development vis-à-vis environmental considerations. The second sub-committee, headed by Home Minister Shivraj Patil, was to study the tribal sub plan and conditionalities in centrally-sponsored schemes, with the deputy Chairman of Planning Commission M.S. Ahluwalia and Kyndiah as members. The third sub-committee was headed by Rural Development Minister Raghuvansh Prasad Singh to deal with resettlement and rehabilitation of project-affected ST families, with Water Resource Minister P.R. Dasmunsi and Health

[188] Ibid

Minister Anbumani Ramadoss as members. And the Fourth committee was headed by M.S. Aiyar to look at Panchayati Raj in scheduled areas, with P.R. Kyndiah and A.Raja as members. The sub-committees were asked to give their reports in the next two months.

The demands of the North-East based civil society groups, NGOs, and citizens brought fresh challenges to the formulation of the Bill. In an open letter[189] to the Prime Minister they expressed their apprehensions regarding the inadequacy in the 'statement of objects and reasons', and demanded the inclusion of separate and special provisions for the areas administered under Article 371 and the Sixth Schedule of the Constitution.

The letter stated that "the Bill needs to be developed in consonance with the objectives of the National Policy on Tribals, which itself is under formulation". Other objections that the groups raised were to the "restricted and hurried manner" in which the Tribal Affairs Ministry had drawn up the Bill, and sought suggestions and comments on the Bill. As it reads "we simply cannot accept the existing deadline for comments from concerned citizens, when the Bill is only accessible on the Ministry website and only to a privileged few". Thus, it upheld the need for a wider and more egalitarian consultative process which involves state-level and regional consultations.

The signatories to the letter included the Arunanchal Citizens Right, the Centre for Organisation Research and Education (Manipur), the Indigenous Tribal Peoples Development (Tripura), the Bhumiputra Bhumi Adhikar Suraksha Mancha (Assam), Grassroots Options (Meghalaya), Kuki Indigenous People, The Centre for

[189] Published in The Hindu, July 27, 2005 New Delhi.

Social Development (Imphal), the Bethesda Youth Welfare Culture (Nagaland) and the National Centre for Advocacy (Pune).

Inter-Ministerial Conflicts

After preparing the basic framework of the Bill, the MoTA, in January, 2005, circulated it amongst the concerned Ministries for their comments. The draft Bill was accepted with suggestions by the concerned Ministries, except for the MoEF.[190] Conflicts between the MoTA and MoEF are about the definition of the "ownership rights" for forest dwelling scheduled tribes. The Bill made provisions for granting Scheduled Tribes farming rights as well as rights over minor forest produce. It recognizes and vests land rights over 2.5 ha to each nuclear family for bonafide livelihood needs. The MoEF wants to grant only "traditional rights" or legally enforceable rights" which may or may not, involve physical occupation of land.

In 2004 the MoEF had issued guidelines for regularising the "traditional rights" of tribals on forest land. This guideline sought to give tribals in continuous occupation of forest land since December 1993 "heritable but inalienable" rights. But this was stayed by the Supreme Court.

One of the strong criticisms of the Bill also came from the National Forest Commission, a body of the MoEF. In its report, submitted to the Government in March, 2005, it recommended the enactment of another law which provides "the forest-dwelling communities a right to a share from the forest produce on an

[190] Government of India (2005) Circular No.17014/4/2005 released by the Ministry of Tribal Affairs for inviting views and suggestions from the public on the draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. P. 8

ecologically sustainable basis". The Commission termed the proposals of provisional rights for a period of five years in the core and protected areas as a suicidal attempt.

> the politically motivated and ecologically suicidal proposals of temporary rights in these protected areas for a period of five years and if they are not relocated in that period that rights to become permanent, is a mere facade, and considering the past record and political motivations will never be achieved and the grant of such rights will irrevocably impair the ecological viability of protected areas.[191]

The report also said:

> none of the recommendations of the commission (on the draft bill) have been taken into account (in the Bill which was introduced in Parliament in December 2005) except that the cut-off date for consideration of settlement of encroachment has been fixed as October 25, 1980 and the clause 'on such other date as the Central Government may, by notification in the official gazette, notify' has been dropped.[192]

When the Bill was in a formative stage, the Chairman of the Commission wrote a letter[193] to the PM and UPA chairperson, objecting to some of provisions of the Bill. The Chairman had particular objection to the proposals regarding the power of the Gram Sabha in taking cognizance of offences of tribals, and to proposals providing a separate system of jurisprudence for the tribals on the basis that it would deprive the courts of their power. The chairman also pointed out the existence of two laws and punishments for the same offence, one under the IPC, and another as envisaged in the Bill, was a rationale for opposing the Bill. His letter stated:

> We in the NFC are of the considered opinion that the proposed legislation is going to be harmful to forests and the ecological security of the country, and that it is going to create a social divide and animosity among the communities

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[191] The Indian Express June 19, 2006 New Delhi

[192] Ibid

[193] Published in The Indian Express, June 19, 2006 New Delhi.

themselves. It would be bad for law and will be in open conflict with the rulings of the Supreme Court.

The Commission also expressed its dissatisfaction at not having been consulted before the drafting of the Bill.

Role of the PMO

The controversy over the Bill persisted to the extent that the PM had to intervene in it. The Prime Minister Manmohan Singh called two meetings, the first on September 30 and the second on October 28, 2005, to resolve the disputes between the MoEF and MoTA on the one hand, and between the tribal activists and environmental activists on the other. On September 30, the PM invited 10 activists from both fields to discuss the issue. After discussion and debate between the two sides the meeting ended in a conflict between the MoEF and MoTA. As a result the PM decided to give time to both ministries to reconcile their differences and asked the MoEF to draft its own version of the Bill that addressed the problems.

The PMO held the second meeting of a larger group of 26 environmentalist and tribal rights activists on October 28, 2005 to discuss the implications of the controversial Bill. The PMO rejected the draft Bill prepared by the MoEF and gave an assurance to reconsider the views of both the tribal rights and environmental activists in a revised draft of the Bill. Thus, sanctuaries, national parks and protected areas were excluded from the ambit of the Bill and tribals of these areas were given provisional rights of five years after the enactment of the law.

Introduction of the Bill in the Lok Sabha

After wide consultations and a series of meeting the final draft of the Bill was made ready and introduced in the Lok Sabha on December 13, 2005. The motion of introduction was adopted without any opposition and the Bill was referred to the Joint Parliamentary Committee on December 23, 2005. In response to suggestions and comments from the members of the public, the social activists, academicians, anthropologists, experts working for the cause of environmental protection and welfare of tribal people and other stakeholders, numerous provisions were incorporated in the final Bill which are as follows:

1. Defined words "competent authority" to make clear the adjudicator in case forest rights is disputed by state government or any local authority.

   Sub-section (a) of section 2: "competent authority" means any officer or authority appointed by the Central Government, by notification, to deal with disputes referred to in sub-section (7) of section 4.

   Sub-section (7) of section 4: In any case forest right recognised and vested by sub-section (1) is disputed by any state government or local authority, the competent authority shall consider the records prepared at the time of declaring the area as Scheduled areas, and while notifying any tribe to be or deemed to be a Scheduled Tribe under Art 342 of the constitution along with evidence and then pass an appropriate order in the matter:

   Provided that no order refusing to grant any forest right shall be passed unless the aggrieved member or members of the community are given an opportunity of being heard.

2. Defined the core areas to exclude it from the ambit of the forest rights.

   Sub-section (b) of section 2: "core areas" means such areas of National Parks and Sanctuaries required to be kept as inviolate for the purposes of wildlife conservation as may be determined by notification, by the ministry of the central Government dealing with Environment and Forests.

3. Defined word "habitat" to exclude the other forest dwellers from the scope of the Bill.

   Sub-section (h) of section 2: "habitat" includes the area comprising the customary habitat and such other habitat in reserved forests and protected forests of primitive tribal groups and pre-agricultural communities and other forest dwelling Schedule Tribes.

4. Defined word "nodal" agency to ensure the non-interference of the Forest Department in implementation of the provisions of the Bill.

   Sub-section (j) of section 2: "nodal" agency means the nodal agency specified in section 12.
   Section 12: The ministry of the central Government dealing with Tribal Affairs or any other officer or authority authorized by the central Government in this behalf shall be the nodal agency for the implementation of the provisions of the Act.

   Sub-section (k) of section 2: "notification" **means** a notification published in the Official Gazette.

   Sub-section (n) of section 2: "sustainable use" shall have the same meaning as assigned to it in clause (a) of section 2 of the Biological Diversity Act, 2002.

5. Defined Gram Sabha to ensure the equal participation of all adult in conserving forests.

   Sub-section (g) of section 2: "Gram Sabha" means a village assembly which shall consist of all adult members of a village and in case of states having no Panchayats, the traditional village institutions.

6. Defined "wild animals" to conserve the species of animals specified in Wild life (Protection) Act, 1972.

   Sub-section (p) of section 2: "wild animal" means any species of animal specified in schedules I to IV of the Wild Life (Protection) Act, 1972 and found in nature.

7. Protected areas, National Parks and Sanctuaries were excluded from the scope of permanent forest rights.

   Proviso 1 of sub-section (1) of section 4: provided that the forest rights determined under this Act for vesting in the core areas of the national parks

and sanctuaries shall be granted on provisional basis for a period of five years from the date of coming into force of this Act.

Proviso 2 of sub-section (1) of section 4: Provided further that such provisional rights in such core areas shall become permanent if the holder of such rights are not re-located within said period with due compensation.

Proviso 1 of sub-section (4) of section 6: provided that no petition shall be preferred directly before the District Level Committee against the resolution of the Gram Sabha unless the same has been preferred before and considered by the Sub-Divisional Level Committee.

Sub-section (8) of section 6: The sub-divisional level committee, the District level committee and the state level monitoring committee shall consist of officers of the department of revenue, forest and tribal affairs of the state Government at the appropriate level as may be prescribed.

8. Imposition of penalty to ensure the sustainability of the forests.

   Proviso of sub-section (v) of section 7: provided that the penalties under this section shall be the in addition to and not in derogation of imposition of any penalty under any other law for the time being in force.

9. Recognition of rights before the eviction.

   Sub-section (2) (b) of section 15: The procedure for and the manner of recognition and verification of forest rights under sub-section (4) of section 4.

Joint Committee on the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005

After introduction, the Bill was referred to a Joint Parliamentary Committee (JPC) consisting of twenty members of Lok Sabha and ten members of the Rajya Sabha. and, suggesting numerous amendments. The motion for reference of the Bill to a Joint Committee of both the Houses of Parliament was moved in the Lok Sabha on December 21, 2005 by the member-in-charge of the Bill P.R. Kyndiah, and was adopted by the House. The Committee held 14 sittings from January 19, 2006 to May

19,2006 and the JPC heard the views of the representatives of the MoEF, MoTA, Ministry of Social Justice and Empowerment, Ministry of Rural Development (Department of Land Resources), and Ministry of Panchayati Raj on various provisions of the Bill.

The Committee also invited memoranda from experts, organizations, associations, NGOs and the general public and took oral evidence of their representatives. The Committee undertook a clause-by-clause consideration of the Bill on the basis of suggestions; views and evidences put forth by the ministries and representatives of various organizations, associations, NGOs and experts on the subject, and finalized the report with numerous amendments in the Bill. The Committee submitted its reports on 23 May, 2006 with wide ranging recommendations aimed at recognizing Forest Rights to all forest dwellers.

In a discussion with the Committee, representatives of the concerned ministries presented their views on various issues of tribals and forests. The Ministry of Social Justice and Empowerment provided estimates of the number of STs, SCs and OBCs living in forests and welfare schemes for their empowerment, violations of human rights of the tribals and their victimization by forest department officials, data related to atrocities against forest dwelling tribes and schemes for the compensation and rehabilitation of such victims. The Ministry also presented its contingency plan to deal with the issues of rights of non-tribals in the case of their eviction after the enactment of the Bill into law, and the scope of inclusion of non-tribals in forests within the ambit of the Bill.

The MoTA presented legal, constitutional and historical reasons for the exclusion of SCs, OBCs and other non-tribal communities from the ambit of the Bill. The Ministry clarified that there is need for distinction between STs and other communities due to the preponderance of ST population in the forests. Although Indian Forest Act had provided for the determination of the rights, the traditional rights of Forest Dwelling Scheduled Tribes were not adequately recognised even in Independent India. The forest (Conservation) Act, 1980 further aggravated the problem. Another reason that the Ministry put forth was poor implementation of the provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996. The Ministry of Rural Development (Department of land Resources) pointed out the need for the need for a proper survey and recording of land rights of tribes, as also amendments in the Land Acquisition Act 1894 and Forest Act 1927, compensatory afforestation, and schemes for rural employment in tribal areas.

The Ministry of Panchayati Raj suggested amendments in the title and preamble of the Bill to include STs living and dwelling in and around forests, amendments to the commencement clause, the definition of core areas, forest villages and the cut off date for the recognition and vesting of forest rights, and amendments related to the constitution of committee by Gram Sabha, sub- divisional, and district level committees and state level monitoring committees in the matter of procedure for vesting of rights. The Ministry also discussed the importance of Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA) in the context of the Bill and suggested to provide adequate recognition, vesting and recording of rights.

The committee took oral evidences of 44 individuals, representatives of various organizations and NGOs, and experts on the subject from February 3, 2006 to April 19, 2006. These non-state actors expressed their views on various provisions of the Bill, with suggestions for inclusions in the Bill. They suggested incorporating provisions which would address the following issues:

1. The extension of rights to non-tribal forest dwellers within the scope of the Bill and to people living in marginal area developmental agency in the states like Rajasthan.
2. Enhancement of the role and powers of the Gram Sabha in recognizing and vesting the rights, and also in the process of verification, identification and conflict resolution.
3. The composition of Committees, comprising representatives from civil society, forest department and Panchayati Raj institutions.
4. Decentralization of the system at different levels viz. Gram Sabha level, state-level, sub-divisional Level and the adequate representations of women in sub-divisional level/district level/state level committees.
5. Settlement of displaced people due to diversion of forest land for mining industry and dams and giving back land to those who had been evicted from government project areas and from the merger of lands in the state forest areas.
6. Amendment to the definition of 'village' in the context of the Bill to make it clear that it is applied to non-scheduled areas also.

7. Vesting of permanent rights to people living in the core areas of sanctuaries and national parks.
8. Removal of the ceiling of 2.5 hectares of land and ceiling of land keeping in view the quality of land, soil irrigation facilities, geological and other situations prevailing in the tribal areas.
9. Inclusion of provisions regarding development of infrastructure like schools, roads, hospitals and hand pumps etc.
10. Specification of the nature and rules of evidence in the proposed legislation.
11. Offences and imposition of penalties in case of violation of provisions of the proposed legislation,
12. Removal and extension of cutoff date of 1980 for recognition of rights and inclusion of any date after year 2001.
13. Granting of nistar rights to all forest dependent people.
14. Conflict between some provisions of this Bill and Wildlife Act.
15. Transfer of tribal lands.
16. Role of PESA to strengthen the Gram Sabha.
17. Protection of grazing rights.
18. Setting up of a commission for rehabilitation.

Besides these suggestions, one expert, Sanjay Upadhyaya, who was also a member of the drafting committee,[194] defended the provisions of the Bill. He disputed all the concerns of the pro-conservation lobby that the Bill sought to hand over all the

[194] Three non-official members of the drafting committee appeared before the Committee to tender oral evidences

forest land to the tribal communities and the argument that the Bill contradicts the Wildlife Act and Forest Conservation Act. Terming this as myth, he argued:

> There is no provision in the Law which talks about the handing over forest to tribal communities. There is fresh myth that there will be fresh allocation of forest lands.[195]

He also stressed to frame the importance of framing the rules to ensure representation of various stakeholders in district level and sub-divisional level committees.

At its sittings on May 8 and 9, 2006, the JPC undertook a clause-by-clause consideration of the Bill on the basis of seven lists containing notice of amendments given by the members of the committee and two lists of notice by non-members. The committee presented its report before the Lok Sabha and the Rajya Sabha on 23rd May, 2006 and recommended the following important amendments to the Bill.

1. Inclusion of other traditional forest dwellers and people residing in close proximity to forests within the scope of the Bill.
2. One-third representation for women in all the committees with full and unrestricted participation.
3. Bringing forward the cut off date for recognition of rights to December13, 2005 i.e. the date of introduction of the Bill in Lok Sabha.
4. Inclusion of the definition of "village" as contained in clause (b) of section 4 of the Panchayats (Extension to the Scheduled Areas) Act, 1996 regardless of whether the area is a Scheduled Area or not.

   Clause (b) of section 4 of the PESA defines village as:

[195] Lok Sabha Secretariat (2006) Evidence and Verbatim proceedings of the Joint Committee on the Scheduled Tribes(Recognition of Forest Rights) Bill, 2005 , April 17 P.3

"a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs".[196]

5. Addition of new definitions in regard to 'community forest resource' and 'critical wild life habitat'.
6. Expansion of the definition of 'forest dwelling Scheduled Tribes' to include such scheduled tribes who resides in or in close proximity to forest land to protect their rights to livelihood and other rights.
7. Implementation of the PESA in non-scheduled areas.
8. Inclusion of the right to collect, transport and dispose of minor forest produce within the ambit of 'right of ownership'.
9. Inclusion of stones, slates and boulders, the product from water bodies including fish and weeds, and also fuel wood within the definition of minor forest produce.
10. Substitution of 'law of the concerned tribes of any state' for the words 'law of any state' to avoid ambiguity in the interpretation of customary law.
11. Inclusion of provisions for developmental requirements, such as food, fibre, education, health, communication and facilities like hospitals, roads, community centres, anganwadis, vocational training centres, fair price shops etc.
12. Removal of the ceiling of 2.5 hectares and restriction of this ceiling to the area under actual occupation of an individual or family or community.

[196] Government of India (1996), *The Panchayats (Extension to the Scheduled Areas) Act,* Ministry of Law and Justice, New Delhi.

13. Gram Sabha as a primary authority for determination and recognition of forest rights.
14. Omission of penal provisions of fine and suspension of forest rights for violation of any provisions of the Bill.
15. Extension of rights such as nistar, to all forest dwellers.

The committee also made recommendations for the setting up of a Forest Produce Price Commission, and placing of the bill after its enactment in the Ninth Schedule of the Constitution. The Bill, as amended by the JPC, is still being considered by the Group of Ministers, headed by the Defence Minister Pranab Mukherjee. A meeting was held in July 2006 to finalise the changes in the Bill to make it more comprehensive. The GoM consisted of Home Minister Shivraj Patil, Environment and Forests Minister A. Raja, Tribal Affairs Minister P.R.Kyndiah and Social Justice and Empowerment Minister Meira Kumar.

To sum up, the Scheduled Tribes (Recognition of Forest Rights) Bill was initiated to fulfill the commitment made by the government in its Common Minimum Programme. The provisions of the Bill were formulated by a committee consisting of both state and non-state actors and modified over time as a result of wider consultations with experts on the subject as well as the representatives of concerned ministries. The statutes and provisions of the original Bill and Bill as amended reflect the contestation over the provisions by the society as whole.

Chapter- Five

Conclusion

This dissertation, though a close examination of the trajectory of the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005, has sought to illuminate the various principles that govern the law making process in practice. These are socio-political, economic and cultural in nature. Laws cannot exist in a vacuum. They need to be understood against a background, which also indicates their usefulness to society. They are built on a framework made up of people as basic units. Law making process is thus deeply ingrained in the human psyche. It is important to understand that laws are made to better the living conditions of people and to create a level playing field which is the ultimate responsibility of the government.

In this context, the law making procedure of Indian democracy draws special attention. A very comprehensive process is followed consisting of three readings which include different stages. Such a process is recommended so that every aspect of the law which is likely to affect the lives of millions of people is thoroughly analysed. It is a complex process involving not only state actors comprising of parliamentarians, the permanent and the political executive but also requires the knowledge, experience and expertise of professionals, Non-Governmental Organizations, citizen groups etc.

This aspect of law making has assumed importance in recent times due to the enormous increase in professionalism in every field of administration and governance. It is no longer feasible for the parliamentarians to understand the fine intricacies in every piece of legislation.

In a country like India, where there is also a diversity of people in terms of race, caste and ethnicity, it becomes the responsibility of the Government to protect the interest of every group. This is all the more important if they are unable to protect themselves.

The Scheduled Tribes population is one such group of people. In order to preserve their traditional rights which they have cherished for a long period of time, concrete steps in terms of legislation need to be taken. This is because with a legal backing, there is more security and authority for any practice.

It is this endeavour that the Scheduled Tribes (Recognition of Forest Rights) Bill 2005 was introduced in the Parliament, following the commitment made in the Common Minimum Programme of the UPA Government in 2004. Following the stipulated procedure a drafting committee, known as Technical Support Group, was set up by the Ministry of Tribal Affairs. The democratic process makes down the principle that every Act of the Government has to be critically analysed in order to bring out its merits and so rectifying its demerits.

The criticism of the Bill under study came from within the Government, from the Ministry of Environment and Forests, along with environmentalists and conservationists outside the government. These groups perceived the Bill in its original form as a threat to biodiversity and conservation of wild life. Events have been moving in line with what is demanded as per rule book. Committees, Joint Committees, civil society activism, inter-ministerial meets, PMO, have all been part of the design. Various issues have been brought forth and amendments have been suggested. The Bill is yet to be finalised.

The most important observation in this discussion is that whether the means have been utilized to achieve ends. The entire process of law making was initiated to give a legal sanction to government decisions. In a sensitive issue like that of the rights of Scheduled Tribes, a well thought out plan has to be adopted. This is so because it is important to preserve the rights of the indigenous population while still trying to bring them into the main national framework.

A concerted effort of all state and non-state actors is required to achieve this. Therefore, to give meaning to Bentham's doctrine of utility - procuring the greatest happiness of the greatest number - in the process giving due importance to public opinion, a consensus has to be arrived at in making laws. This requires the harmonization of the heterogeneous interest groups found in a multiple, diverse society. In the 21st century world, it would be fatal to ignore the voices of people. People today are well informed. Participatory governance is replacing representative governance. Networks of citizen group have come into existence.

With a multiplicity of actors, the law making process is bound to become complex and time-consuming. The levels, nature and numbers of deliberations will increase manifold. If this will result in betterment of the quality and standard of living of masses, in addition to democratizing decision making, it is only to be welcomed.

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