

Pre-legislative Consultation Is Key to Democratic Legitimacy in India?

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Abstract

In this paper, I want to argue that pre-legislative consultation is necessarily required in democratic decisions for the reason that the recent debates on democratic theory and practice all over the world, and especially in India, has an immense challenge from the citizens to have legitimacy and inclusiveness. The law-making process becomes more authentic and deliberative when it follows that free and equal participation among citizens as to what can count as a genuinely democratic outcome through the process of public consultation. It is keenly observed now that in India the pre-legislative consultation has been very low compared to the liberal democracies of the west. Multiple factors may be responsible for this, for example, lack of constitutional mandate, legislative intent of government, partisan differences, lack of mechanism and strong civil society, lack of time, majoritarian politics, and so on. However, I am concerned with the normative implications of pre-legislative consultation for strengthening deliberative and inclusive democracy. Why is legislative consultation, essentially deliberative (in the lower cases) in nature, required for the stability and legitimacy of the democratic polity? To find the answer, this paper is divided into three sections; and the first section focuses on the fact that in India, in the last two decades, the rate of consultation is not found reasonably high. The second section highlights in a comparative perspective that western democracies are advantageous in terms of public consultation as compared to India. Looking into empirical evidences pointed out in the first section, the third section underlines the normative arguments of the efficacy of legislative consultation to strengthen the authenticity, legitimacy, and inclusiveness of democracy. To conclude, I mention, the participatory and deliberative modes reflected in public consultation of

democratic decision-making is effectively binding, genuinely prospective, and democratically legitimate.

Keywords: Public consultation, participation, deliberation, Legitimacy, Authenticity, Effectiveness, Inclusion

1. Introduction

The pre-legislative consultation is a very old idea on the path of legislative functions of democratic government. The development of parliamentary democracy in the west as well as in other parts of the world, as a law-making institution, in tandem with the provisions of the constitution has evolved over the years to claim its legitimacy as a representative institution. Since the democratic practice in modern times follow mostly the representative model of democracy and its feasibility, the great liberal thinker, Mill (1867) suggested in the nineteenth century that the true and original meaning of democracy is a government by all people and equally represented. However, he utterly claimed that the government would be by the majority people, and the rights of the minority should be protected. Since democracy is broadly an idea which inculcates values of self-rule with liberty and equality of all citizens, the utmost and intriguing question remains – how can it be feasible in modern parliamentary democracies which represent millions of citizens and their right to representation. Being a complex conception, representation is understood as Pitkin (1967) suggests is the representation of interests, wishes, and welfare. The theories of representation, both independent and mandatory, in a subtle way highlight the importance of the ways in which people’s interests and preferences are to be satisfied in the representative system. Parliamentary democracies being the highest institution of law-making ensure the interests and preferences of citizens in the process of making law and policies that bring outcomes which fulfil the rights of the people as a whole.

Vision of the policy maker when translated into law-making indicates a wider spectrum of government’s policy that accounts to a holistic development of citizens in a democratic society. The formulation and implementation of laws to perform policy development is an index by which a government’s successes and failures are measured. The evolution of parliamentary democracy in India is stabilized by the practices of representation through the formulation of various laws to protect the rights of the citizens. Drafting a law after the cabinet’s call is the entire responsibility of a particular ministry and the drafting department of the Ministry of Law and Justice. The broad outline of any legislation is highlighted by the Cabinet and followed by it the process of legislation undergoes a serious trial to make the legislation more authentic and legally and constitutionally sound. In this process what happens is once the draft is ready the Ministry concerned presents it in the House of the Parliament as the case may be with prior permission of the chairperson of the House. Either the Minister or the Chairperson may refer this bill to the parliamentary standing committees for a comprehensive analysis and review. Pre-legislative scrutiny comes in between and the purpose of this is to make citizens, stakeholders, communities, or groups and so on to provide their opinions, suggestions, and comments on the proposed legislation. ‘Thus, in many countries it becomes a central aspect in the legislative process because it allows an opportunity to the public to provide a real input to the proposed legislation’ (Ntaba, 2008). To make better laws it is anticipated that the pre-legislative scrutiny through variety of modes on the legislative proposal should be carried on to ensure the legitimacy of laws and policies. The process of pre-legislative scrutiny is far more open to analysis of legislative proposal and debate, and consequently makes for a far better law. The current trends of pre-legislative

consultation vary from country to country according to their own set of practices and procedures.

2. Methodology

I have followed mixed methods to an extent because this method basically presents the comprehensive and integrated views of a particular research problem. The challenge of this method is the data linkage or integration at an appropriate stage in the research process. The availability of data of different Lok Sabha elections in India viewing it from different angles and viewpoints as well as through diverse research lenses helped me to have a wider panoramic view of the research domain, that is, pre-legislative consultation. The advantages of mixed methods helped me to engage with different and multiple comparative perspectives, that is, building comprehensive understanding of different parliamentary democracies in the world to develop value judgements as to how in a representative democracy the peoples' trust can be built on democratic system and somehow paves the way to legitimate outcome of democratic decisions. Looking into the simple data analysis of pre-legislative consultation of the liberal democracies in the west helped me visualize to make research very much contextualized. I find it more interesting the context of consultation in the west to a level of stability and legitimacy in the functioning of democracies and add richer detail for the conclusions.

3. Review of Literatures

Rosti (2019) highlighted the right to consultation of the indigenous peoples of Argentina before making legislation and policy formulation. The constitutional provisions in Argentina empower these people by guaranteeing citizenship as a recognition of legal personality that allow to exercise certain rights like, territorial claims and consultation.

Argentina being a federal polity consists of over 40 million people out of which 2.4 percent constitute 35 different officially recognized indigenous people. These people are scattered in many provinces and they are entitled to certain rights guaranteed by the federal and the provincial constitutions. Additionally, these constitutional rights are also aligned with some international treaties which are also ratified by the country. However, the real tension arises out of the territorial disputes that stem out from the police formulation by the government. This is in a way seriously affects the rights to consultation and the exercise of Free, Prior and Informed Consent (FPIC). Due to the growing complexities of globalization, the Argentina government of late, has not incorporated these rights into national law for the protection of the indigenous peoples' rights.

Rosti pointed out a case study of Salinas Grandes-Laguna de Guayatayoc, a region which is divided into Salta and Jujuy inhabited by the Kola and Atacama Indigenous peoples. This region is filled with lithium that became a tension between the local community and the exploration by the multinational companies. This process breeds a violation of community rights in many ways like, community ownership of the land, public consultation and community mobilization.

Rosti concludes by highlighting the lapses in the process of prior consultation to the locals,

which is a part of their legal personality guaranteed by the constitutional provisions of the country. As it is observed today in the growing context of globalization and liberalization all over the world, a sense of insecurity and lack of trust in the government is made obvious. For the protection of basic rights people mobilize themselves against any such violation of rights. Contesting the process of bypassing the constitutional guarantees paved the way for indigenous self-organization and recovery of identity in Argentina showed new avenues for social cooperation, interaction and negotiation. To believe in good life in democratic societies by bridging the gap between the government and the citizens in terms of trust and legitimacy of decision making actually strengthens the democratic culture of the country.

Thananithichot's (2020) working paper on Public Consultation maps out how public consultation is helpful for better regulation. He identifies the process of implementation of public consultation in European Commission, the UK, and the USA, and testifies in the case of Thailand as a case study to follow the process of public consultation for better regulation.

The author defines the concept of better regulation not in terms of regulation or deregulation. According to the European Court of Auditors, 2018, the better regulation constitutes ideas that help political decisions taken by an open and transparent manner, supported and backed by comprehensive involvement of stakeholders. European nations develop better policies in accordance with the set principles not only to improve legislation but also create sustainable developmental policies.

The author intends to focus on various administrative measures specifically required for legislative decision-making process to improve the procedures and outcomes. This process emphasizes on the intent of government to establish a system through which people's participation strengthens the stability and legitimacy of the polity. Better regulation makes an impact on policy cycle as a whole through different sorts of measures like evaluation, revision, planning, impact assessment, stakeholder consultation and implementation. The stakeholders' consultation makes a bridge between public and private interests.

Thananithichot does not advocate a universally applicable regulation concept. He emphasized on framing different regulatory concepts for different countries so that the uniqueness can specifically fill the purpose. However, one country's experience can be a learning process for other countries too.

'The importance given to public consultation in these three illustrations reflects a belief that public consultation at all stages of a law- or rule-making process not only improves the resulting rules, but can legitimize the resulting laws and regulations after enactment' (p. 15). The advantages of a successful implementation of public consultation engaged through public participation bring out the stakes involved and pave the way for an amicable consensus.

Highlighting the public consultation process in case of Thailand, Thananithichot believes that the constitutional provision (Section 77, Paragraph 2) for consultation through the government website (www.lawamendment.go.th) has been a failure caused by low public awareness and problem of website design. Lack of information among the stakeholders leads to insufficient interaction between the government and the citizens and hence a problem of better regulation.

The essay concludes by two steps of recommendation. First, a strong step should be taken by the central agency, that is, the Prime Minister Office or the Cabinet to support, monitor and supervise the suggestions provided by the stakeholders through public consultation for better policy and law implementation in flexible and transparent ways. Second, a strict guideline should be made by the government to hear opinions on draft laws in consonance with the principles of public consultation.

Urteaga-Crovetto (2018) in ‘Implementation of the right to prior consultation in the Andean countries: A comparative perspective’ develops a comparative study of pre-legislative consultation in the Andean countries. It focuses on the human rights and the basic freedoms of the indigenous people that is violated from the ground of international standard of prior public consultation and prior free and informed consent due to the reluctant government and powerful vested interests.

“The Expert Commission on the ILO Covenant 169 warned that including regulations to develop the right to consultation in the national legislation was a crucial challenge for governments” (ILO, 2009a, 64; OIT and CEACR, 2011).

The author underlines the importance of the adoption of the process of prior consultation in Andean Countries and interrogates the political and legal rights to self-determination of the indigenous people. Drawing on Legal Anthropology and Comparative Law, Urteaga-Crovetto ‘explains how the incorporation of the right to prior consultation in the national legal system implied the technicalization of the consultation, which strengthened the autonomy of the law and depoliticized the right to consultation’ (Urteaga-Crovetto, 2018, p. 1).

This, in turn, contributed to disempower indigenous peoples and communities by reshaping their right to self-determination as a prerogative of the state under the national law. Urteaga-Crovetto finds out the problem inherent in the procedimentalization of the right to consultation when the right to consultation is transplanted from the international law to national law, and the responsibility of international institutions to pressurize state obligations to enforce international standards.

This paper also maps out a comparative study of four Andean countries, Bolivia, Colombia, Ecuador and Peru from 1990 to 2015 to regulate and implement the right to prior, free and informed consultation. The findings of his comparative study, though differs in many angles, but they present a trend which shows the reluctance of the state to admit a strong implementation of the right to consultation that can cope of international standards. The transplantation took the shape of procedural emphasis before substantive content that assumed the political significance of the right to autonomy of law.

The follow up of the consultation process in four Andean countries highlights the tension that sprouts when a bottom-up legal transplant potentially changes the status-quo. There has been a relentless struggle between neoliberal onslaught which seeks resource accumulation from the indigenous people and the latter’s claiming for autonomy to self-determination. In such a situation, the indigenous people develop an effective participation to mastering the legal technicalities to pursue effectively the right to consultation.

Various international declarations on indigenous people like, ILO Covenant 169 and the United Nation's Declaration about the Rights of Indigenous Peoples have been ratified by Bolivia, Colombia, Ecuador and Peru but unfortunately, they are not implemented in practice. In spite of consistent international institutions' pressure to prioritize the obligations on the part of the states to empower the indigenous people the states have declared their failure on the surface. The constitutions of Bolivia and Ecuador have constitutional provisions regarding the right to consultation but its implementation on grounds of legal subterfuges and technicalities undermined the substantive aspects of effective participation of the indigenous people. In Colombia and Peru, both Executive and Legislative branches tried to redefine the course and contents of the right to consultation regardless of the international standards. The Colombia constitutional court delivered mandatory compliance that defied the proceduralization behaviour developed by the Executive branch.

The ultimate finding of the author suggests that legislation in the Andean countries has minimized the importance of the substantive aspects of the right to consultation and the role of right to consent as part of democratic legitimacy of decisions. In the complexities of legal technicalities adopted by Andean countries, the real and substantive values of democratic deliberation are depressed and thereby those indigenous people who have mastered on national laws feel helpless.

The analysis of the right to consultation in the Andean region demonstrates that the proceduralization of consultation has deprived it of international and political content to assert indigenous self-determination.

Rangone's (2020) 'Effective consultation as a tool for trust' is a step to enrich the pre-legislative consultation as part of legislative decisions to accommodate stakeholders' concerns to legitimize democratic outputs. It is indeed a democratic process which warrants the principles of procedural justice. Effective consultation is considered to be a crucial aspect in all life-cycles of law and regulation. Rangone points out two important outcomes of consultation. First, consultation is considered as a recognized improvements in law and regulation because of wide range of data collected from the end-users. Second, in a very subtle manner, consultation fertilizes the ground for increased acceptance of law and policy as well as builds trust in the government. The process of consultation ensures the involvement of stake-holders' interests in effective way into the policy matters. Most importantly, trust in public authorities in substantive way increases compliance and reduces enforcement costs.

The author contextualizes the consultation process in case of the European and international institutions and examines its relevance for democracy and justice. It is also pointed out that mere consultation is not enough if data collection is biased and weak interests are under-voiced. The main motive of consultation is to shape better rules, acceptance, compliance and trust. The effectiveness also gets reflected not only in consultation but also in implementation. Rangone highlights five important core criteria of consultation mostly adopted at international levels. These include accessibility of the process, early-stage consultation, accessibility of the documents, reasonable time to intervene and feedback and justification of final rules. Apart

from these criteria and effectiveness of consultation, it is also cautioned that there is a negative aspect of it which accrues from massive participation and overloading of data.

Rangone's analysis of legislative consultation is mainly contextualized in the case of Italy in a particular by drawing on various provisions from the European and international contexts. It is obligatory on the part of nation-states to follow and abide by provisions fixed by the European Union as well as other international organizations like, for example, OECD in the context of consultation and compliance.

Rangone's argument is pointed to the concept of public trust or "trust in the motives of authorities" to improve effective consultation. She stimulates the essence of trust as a crucial part of fairness and transparency in democratic decision making. The normative concern is that trust in public institutions strengthens the bond between citizens and government and thus creates conditions that empower an individual citizen's sense of responsibility and involvement in governance. The lack of effective consultation has multiple side effects. For example, laws and policies made by the government without proper consultation can fail to the stakeholders' problem which can lead to contestation and litigation. It is also observed that there have been mass protests and movements worldwide due to lack of trust among people in laws and policies of the government. Hence public authorities must stick to people's trust in legislation to be perceived as legitimate. The real intent is not to show up bureaucratic design and eyewash but the need of real acceptance of people's opinion and interests in the outcome of democratic decisions. It is noticed in liberal democracies worldwide that the elected governments become reluctant to strictly follow the consultative procedures due to the pressure of internal as well as external factors. The compulsory and hard regulations of consultation are stringent but its outcomes are pleasant. The real motive is consensual and hence productive and progressive. The advantage is actually to improve the decision-making process and creating a space for cooperation and belief. Ultimately the concept of trust in decision making is accepted as a sentiment, a public value, and a consensus to achieve legitimacy in democratic decision making.

4. Pre-Legislative Consultation in India

The process of law-making in India is becoming more and more controversial for not seeking public consultation before the upshot of its enactment. Bills are secretly drafted by the particular ministry and subsequently getting the cabinet approval and then passed in the parliament without consulting the stakeholders. The process is highhandedly managed by the government without even consulting the opposition parties (Jha, 2010). What is commonly seen is that these secretly drafted bills are getting open to public after the introduction in the parliament. The data suggests that 'in 2009, only sixteen percent of the total Parliamentary time was spent on legislative business' (PRS Legislative Research). Twenty seven percent of the total bills passed in the same year by Lok Sabha were discussed for less than 5 minutes. Even in the ongoing Monsoon session of the Lok Sabha, the Indian Medical Council Bill was passed without any discussion, prompting a novel protest from the Opposition parties (*The Indian Express* 20 August 2010). Only five Bills passed by the Lok Sabha in 2009 were debated for more than three hours. The section 4(1)(c) of the Right to Information Act views

that to ‘publish all relevant facts *while formulating* important policies public’ (Ibid.). In the case of *Venkatesh Nayak vs Chief Secretary, Government of Delhi*, it was the central information commission which ordered the respondent government to suitably find mechanisms in all the departments for actively being involved in time for the transparency in draft legislations or even policies and if any amendments to existing laws or policies in the public domain, as required under Section 4(1)(c) of the RTI Act, during the process of their formulation and before finalization. It may be noted that the commission made this direction: using the recommendatory powers available to it under section 25(3)(g)14 read with section 25(5)15 of the RTI Act. It is submitted that in order to implement the proactive publication duty under section 4 of the Act, the commission should have used its mandatory power under section 19(8)(a)(iii) of the Act instead. Under this provision, the central or state information commission has the power to – require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including...by publishing certain information or categories of information (Khaitan, 2009).

In the case of Torture Bill, a large-scale dissatisfaction was seen from many sections in the society, including members of the opposition parties in Rajya Sabha. The content of the Prevention of Torture Bill was made open to public when it was introduced in Lok Sabha in the 2010 Budget Session and had a brief discussion in the evening in which no single Member of Parliament from the Opposition was present. Khaitan (2010) argues: instead of providing a comprehensive mechanism for dealing with torture in India, not only does it fall way short of its stated objective of enforcing international obligations under the Convention Against Torture, it effectively establishes an impunity regime for public servants accused of torture (Khaitan, 2010).

It is strongly felt by the citizens that any kind of act which is enacted without people’s consultation and that affects intensely their interests by the reckless design of the parliament would not be acceptable as legitimate. For instance, Lok Sabha passed the Code of Criminal Procedure (Amendment) Bill, 2008 as one of the eight Bills passed in a matter of a few minutes in December 2009. Similarly, the Whistleblowers Bill was introduced in Parliament after an unnecessary secret and closed drafting process, not taking on board the obvious suggestions many anti-corruptions and RTI activists have regarding the safety and security of whistleblowers.

With the growing discontent from the public and civil society organizations, the UPA government introduced an executive order of pre-legislative consultation to be followed by the particular ministry before drafting a bill. The National Commission to Review the Working of the Constitution and National Advisory Council emphasized on the pre-legislative consultation policy (both principal and subordinate legislation) in India was adopted in 2014. The recommendations of these commissions provide the impetus to proactively formulate a policy document that underlines the importance of pre-legislative consultation that the concerned Ministry would publish through different means as a part of furnishing information to the wider public the intent of specific legislation. It broadly contains “financial implications”, “impact on environment”, “fundamental rights”, “the livelihood of people”, and other estimated “costs of legislation” so that there can be opportunities for the public to

respond within a stipulated period of at least thirty days. In case those who would be specially affected, the provision of wider advertisement and publicity should be done. Every draft legislation in the public domain must contain explanatory note of legal aspects of the proposed law and simultaneously if any law is existing prior to this, so that the difference has to be pointed out between the present and earlier laws. The transparency of feedbacks and comments received from stakeholders should be briefly displayed in the website of concerned Ministry. Further it is ascertained that various feedbacks of consultation should be tabled before standing committees of the concerned Ministry for its reference before being tabled in the parliament. The Department Related Parliamentary Standing Committee of the Ministry concerned overlooks the summary of pre-legislative documents before the legislation is brought to the Parliament and followed by a referral to the Standing Committee.

Followed by the policy recommendation, the empirical evidence suggests that there have been no changes in the way of legislative consultation. It is observed that during June 2014 to May 2019, a total number of 186 bills got introduced out of which 142 did not have any prior consultation. We have also noticed that there is a deep fall of public consultation referred by the parliamentary committees from 60 percent in the 14th Lok Sabha, 71 percent in the 15th Lok Sabha, 27 percent in 16th Lok Sabha to a meagre eleven percent in the current Lok Sabha. The most important bills like Abrogation of Article 370 and the inflexible and inimical working atmosphere between the Lieutenant Governor of Delhi and the elected Chief Minister of Delhi profoundly lack public consultation thereby bypassing the public consultation and deliberation from the stakeholders. Most importantly the two controversial laws, Citizenship Amendment Act and Three Farm Laws, got huge public resistances when unilaterally enacted by the government. Even though the legislative intent of the government is to legitimize the democratic rights of the people, bringing the draft law to the public forum is inevitably recommended for the people's consent and opinions.

The consultation process is desirable and inevitable in the sense that it provides a background for deliberation on the proposed law among the people so that not only the “public reason giving” (that the justification should be acceptable in reciprocity) would be coming up to accept the legitimacy of the law but at least people should have a sense of entitlement to democratic right. In the recent incident of public consultation regarding the Environment Impact Assessment (EIA), the citizens appealed to the court for getting the deadline extended for the submission of their views due to insufficient time provided by government and a demand for all scheduled languages notification. The government failed to implement the Delhi High Court order and thus citizens further appealed to the Supreme Court of India. In another case of New Education Policy (NEP) the government sent the notice in twenty-three languages to be consulted all over the country. The Ministry of Environment got huge responses from people regarding the draft EIA in multiple languages. This huge initiative among the citizens is glaring example of the spirit of participation in law making. This is a collaborative approach to policy making which ensures the “dignity, agency and capabilities of individuals”. The fate of the Data Protection Law for India also witnesses the travesty of public consultation. An expert committee under the chairmanship of former Justice Srikrishna was constituted to seek expert report on the matter; however, it was not accepted due to the

lack of adequate participation among the citizens, groups, and the stakeholders was the opinion of the government. In this case, RTIs were not also entertained by the government. To bypass the parliamentary standing committee's scrutiny of the Personal Data Protection Bill which was based on confidential feedback introduced in the parliament, this was sent to a Joint Parliamentary Committee to review it. This was perhaps due to Opposition member chairmanship of the PSC. It became transparent latter when the JPC only consulted eighteen corporate groups and no citizens and civil society organizations.

5. Comparative View of Pre-legislative Consultation

The democratic legitimation in the law-making process is sought through the process of pre-legislative consultation all over the liberal democracies. A wide-ranging survey of different countries suggests unambiguously that through public consultation laws are accepted with easiness and effectiveness among different stakeholders. We can see few examples of the consultation process set by liberal democracies. What happens in the United Kingdom and other commonwealth countries is that the reflect upon the process of legislative consultation and following that the drafting of the law takes place with the nitty gritty of the process of parliament to the final stage of the enactment of law with efficiency (Rush, 1993). The common practice that the Government follows every time is to publish a list of bills to be ready for the public consultation at the beginning of every parliamentary session. The published draft bills are known as “command papers” and are successfully presented for the purpose of scrutiny by all those committees as required by either of the houses of the parliament. The committee invites external expert panelists to register their oral and written opinions, evidences, and experiences about the draft. The facilitating process of pre-legislative consultation is an important intake from the public to enhance the legitimacy of the act.

In Case of South Africa, the constitutional provision allows pre-legislative scrutiny of bills under Sections 59 (1) and 79 (1) by which it is mandated that National Assembly and National Council of Provinces can seek the public involvement in the process of law making in very transparent manner (22 South African Constitution 1996, section 59(1) for National Assembly.) In furthering the case of public consultation, the Supreme Court of South Africa cancelled two legislations that had failed to consult the public (*Doctors for Life International v. Speaker of the National Assembly, et al.* [2006] ZACC 11.). The importance of the Supreme Court judgment was an impetus for those who were disadvantaged, marginalized, silenced and who had no voice to be heard in the law-making process should have chance for inclusion and participation (Czapanskiy & Manjoo, 2008).

However, in the case of Netherlands, pre-legislative consultation and scrutiny, known as the *ex-ante* appraisal, is facilitated to ensure transparency in the law-making process. It is conceived to be an opportunity on the part of concerned government to collect different expert opinions to measure future impacts of new sets of legislation on the stakeholders. The benefit of *ex ante* evaluation caters to the consistency of policy process in an early stage so that its usefulness can be compared to other kind of alternatives. The *ex-ante* evaluation of policy is not merely followed in the Netherlands but the European Union also espouses this

process considerably in order to reach the advanced stage of policy formulation (Gestel & Menting, 2011).

The pre-legislative consultation in France is something different from the experiences of the Commonwealth countries. The responsibility of consultation is vested with the “Conseil d’Etat” and it provides advice on the administrative matters, more importantly in drafting and regulating bills, when the government requires these from time to time. When the “Conseil d’Etat” receives a bill then it is dispatched to one of the four sections based on the ministerial initiator. Now it is the President of the section who sorts out one of the section’s members to act as a “rapporteur” to analyze the details of the bill with no less than four weeks for proper scrutiny. Before the scrutiny is made it is mandatory on the part of the “rapporteur” to check the file whether it contains “all obligatory documents” as part of mandatory need of having preliminary consultation. The process of examining a bill is adjourned so long as the complete consultation is not received by “Conseil d’Etat” (Massot, 2001).

The European Union’s concern to secure the people’s needs and demands seek expert consultation before a draft becomes an act. The commission further enhances its role in furnishing with different information in case of an international issue where it is not widely discussed among the member states nor the people. The responsibility of the Commission reflects upon the warning system at the earlier stage as to what really is required for the socio-economic development in terms of concrete policy recommendations for action so that any sort of conflict and challenge can be controlled (Xanthaki, p. 54). The importance of consultation in the European Union, for instance, is mandatory under the treaties and noncompliance to it can lead to “a material break of irregularity leading to termination” (Greenberg, p. 821). The importance of pre-legislative consultation is coincided with people’s right and first and foremost considered as a precondition to democratic legitimacy (Ntaba, p. 119).

In case of India, the pre-legislative scrutiny is taken as a part of transparency in law-making. The process followed is that the draft legislation is scrutinized by a select committee consisting of different members from different political parties before the bill is finally presented in the parliament (Surie, 2012).

The purpose of public policy is aimed at finding solutions to divergent and conflicting interests which can be reconciled with public giving reasons to be accepted as consensus. Policy is broadly conceived as a principle that guides decisions and achieves rational output. The rational outcome of any policy decision thus requires the legitimacy of consultation from citizens publicly given through various forums to make consensus to improve upon the legislative proposal and weed out major anonymity and inessential aspects in the early stage. The efficacy and legitimacy of policy outcome is proven successful provided it is accepted practically on the ground. In New Zealand, for example, not to follow preliminary inquiry before being introduced into the Parliament in 1989 the Broadcasting Bill led to the problem of late inclusions of people’s concerns (Zander, p. 15, 8). Due to lack of quality in legislation many thought that policies are irrelevant and people became sceptic of its success.

The task of legislative effectiveness lies on the pre-legislative scrutiny in an earlier stage of

drafting that takes into account the opinion and interests of the people. The need of public consultation followed in different parts of the world in representative democracies is primarily to show respect to the citizens and their sentiments that would be reflected upon the law and policy. The basic idea of legislative consultation is to enhance the quality of legislation which is effectively meant to furnish policy decisions through the legitimacy and accountability of representative institutions. The domain of implementing new legislation always bears the brunt from people if it is not properly consulted in earlier stage finally being introduced into the formal process of legislation.

6. Normative Implications

The democratic aspirations of the citizens involve the admissibility of the opinions which count to legitimacy in terms of participation and inclusion in the affairs of the government, most particularly, in the decision-making process. The pre-legislative scrutiny entails every common citizen to have a voice or concern to be counted as equal with any other that would affect the legislation. The process of involvement in legislative function from the outside for the citizens by pressing for their experiences and outlooks as to how the law or policy ought to be for the common wellbeing. The essence of public consultation is to build some sorts of informal consensus among the free and equal citizens that provides strength to the authority of parliamentarians to the legitimacy of law. Habermas argues that law-making process is an aspect of democratic legitimacy that derives from the assent of people and law reflects the will of the people (Habermas, 1990). The legitimacy is primarily considered ‘as the pre-eminent theoretical explanation for requiring pre-legislative consultation’ (Bell & Etherington, 1999). In the world of representative democracy, the constituents’ interests, wishes, and welfare must be discernable in the laws and policies made by their representatives. Thus citizens’ participation in law-making process ensures a strong sense of inclusion, democratic accountability, and transparency (Dhawan & Sebastian, 2018). The International Association for Public Participation believes in public participation in the law-making process which has a direct consequence on them (International Association for Public Participation). As far as the legitimacy of democratic government is concerned Jain (2019) points out that: in order to have meaningful laws, the content of these laws ought to be arrived at by the people through processes of community consultation, feedback, cross-sectoral negotiation, and consensus. Democratic governance gains legitimacy and credibility when laws on the books are responsive to the lived experiences and technical expertise of all stakeholders.

According to Karpowitz and others (2009) the proper consultation and deliberation guarantee the law and policy as an upshot of a broader acceptance of interests and values of a wider and inclusive public. It not only ensures the legal proximity but also a sense of faith in the effectiveness and stability of democracy. The democratic legitimacy to a larger extent requires human rights of citizens to be protected by inclusive participation. Carolyn and Simon Evans (2006) emphasize on human rights perspective of democratic legitimacy through distinct functions of democratic states. It includes citizens’ participation in public affairs and government, accountability of elected governments, public deliberation in law-making bodies. Therefore, we see that incorporation of wider public opinion through a

transparent pre-legislative procedure is critically significant for a modern democratic government (Shreyaskar, 2013). Bell and Etherington (1999) lucidly add some of the qualitative aspects of legitimacy in following:

(i) efficiency: consultation ensures that obstacles to the policy are identified at an early stage and are addressed, leading to greater understanding and implementation; (ii) expertise: relying on expertise of stakeholders outside the government enhances credibility of the policy, particularly when it involves technical aspects; (iii) elicitation of values from the public: the policy will thus be in accordance with public priorities and values; and (iv) negotiated consensus: negotiations between the stakeholders and the government to ensure that the final outcome is one which is most acceptable to the broadest range of interests.

The necessity for having pre-legislative consultation is also felt among the institutions and agencies over the period of time. In fact, pre-legislative consultation is bound to make Parliamentary Committee debate far more enlightened (Choudhry, 2008). The House of Commons (UK), (Select Committee on Modernisation of the House of Commons, The Legislative Process, 23 July, 1997) aptly summed up the benefits of pre-legislative scrutiny thus:

There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by legislation. At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed should, lead to less time being needed at later stages of the legislative process; Above all, it should lead to better legislation and less likelihood of subsequent amending legislation.

The Supreme Court of India emphasized on the people's interest to be protected by their representatives in the celebrated case of Peoples' Union of Civil Liberties vs. Union of India:

The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large.

To consider the fact that consultation is essentially an important factor of legislative process due to the reason that the focused and specialized inputs from experts add to the substantive aspects of legislation to improve upon the stakeholders' interests and preferences. Xanthaki (2010) puts the point very clear when she argues that the expert advice at the early stage of legislative process helps improve the standard of legislation. The early consultation apparently provides the momentum among the public to become aware about the content of

law and thereby try to build consensus among themselves by measuring the impact of benefits and burdens. The innovation of the idea of public consultation regarding a law or policy helps to stabilize the efficacy of government's concern to include people's participation and deliberation. Public consultation with a time bound manner from various citizens, groups and experts is never easy as a process. Unless it is done within a stipulated time frame, it becomes difficult to enforce it and achieve the policy goals of the government. It is simply considered as a task to be performed to justify the government's concern about people's interests and preferences in the inclusive mechanism of government. Smookler (2012) views that the crux of pre-legislative consultation is to make a better law. And in the process more opportunity is given to detailed considerations of inputs received from the various stakeholder groups on proposed legislation which in a way is thought to be legitimate for the reason that the space that is guaranteed actually makes sense to the perspectives and views in the content of the legislation if it is sought in an earlier stage of legislation.

It is pointed out that consultation is the strong key to the arena of policy-formulation and legislation for the reason that as Archbold (2005) articulates 'when it works well, it builds democracy and makes for open, accountable and effective legislation'. We should note it very clearly that the whole exercise of the task of pre-legislative scrutiny is not to stall and barricade the policy agenda of the government but rather its purpose is to make better laws by seeking widely people's views and preferences into the content of the law. A strong suggestion is that the public's intervention into legislative scrutiny guarantees procedural hearing of the concerns and issues not merely the content of the proposals (Miers & Page, 1982, p. 58).

The hidden and authoritarian characters of law-making are seriously criticized today, and it is highly demanded of the transparency of the process of legislation. The fundamental practice of public consultation in the legislative process is solely sought to improve the "quality of legislation." The democratic government's inability to shed light on its agendas much early in consultative ways before it becomes law is accused of "lack of transparency." So the broader context that justifies the public consultation is to bring transparency and public accountability of any jurisdiction through participation and deliberation. Xanthaki (2008) highlights the importance of consultation when it improves decision making by incorporating variety of evidences, views and concerns of those affected, experimenting innovative and creative suggestions. It provides opportunity to openness and accountability of government where everybody feels she has a say in it.

Blackburn and Kennon (2003) further suggest that public consultation is highly appraised as an effective way to improve upon the quality of legislation due to its requirement that external expert view-points and arguments are taken seriously on the details of the proposed legislation. Xanthaki claims similarly that public consultation has its own supreme values for it improves the quality of legislation. The challenge before any sort of legislation is its deeper value of effectiveness which is defined as the capacity of the law to produce intended effects and, in this sense, efficiency is measured to achieve the set targets within a fixed period of time with minimum of costs. Hence, the quality of law becomes analogous with the effectiveness of legislation. The effectiveness maintains the ability of law to achieve goals of

target-oriented individuals and groups. Achieving the target-oriented goals thus is considered as the cornerstone of legislative effectiveness that binds the attitudes and behaviours of such groups and individuals. For instance, Peter Ziegler upholds that “legislation is regarded as effective if it appears capable of satisfying the legislative policy, and becomes ineffective if it does not achieve the purpose of policy”.

Further, as far as the quality of legislation is concerned, Xanthaki endeavors to differentiate quality in terms of quality in the substance of the law and quality in the form of law. The quality in the substance of the law suggests: law refers mainly to issues of legislative policy and covers tests of subsidiarity and proportionality, choice of appropriate instrument, duration and intensity of the intended instrument, consistency with previous measures, cost/benefit analysis and analysis of the impact of the proposed instrument on other important areas of Policy. Quality in the form of the law concerns accessibility, namely transparency in the decision-making process, and dissemination of the law..... For making guidance in European Union, the same author argues that ‘quality legislation takes into account the views of interested parties, all of which must be consulted before the proposed measure is put forward in compliance with the Regulatory Policy Guidelines of the commission (Xanthaki, p. 54).

The aim of policy maker is truly to bring in good legislation that can be implemented effectively with ease. The concern is to hit the target with legal certainty thereby reducing the gap of implementation with the quality of legislation. The genuine interests of the individuals are protected by legal certainty over frequent possibilities of change. It builds a sense of confidence and trust on new legislation which can bind and protect the interests and preferences. The importance of pre-legislative consultation not only enhances effectiveness of legislation but also the quality of legislation. Burrows and Carter (2009) uphold: a well-designed and implemented consultation programme can contribute to higher quality legislation, identification of more effective alternatives, lower administration costs, better compliance, and fast regulatory responses to changing conditions. Just as important, consultation can improve the credibility and legitimacy of government action, win the support of groups involved in the decision process, and increase acceptance by those affected.

The involvement of citizens ipso facto in the pre-drafting stage ensures public sentiment on specific matter and help to strengthen the drafting process, which in a way reduces the burden of the government because the process of representation legitimizes allowing the citizens to include their opinions and stakes. The consultation of the various stakeholders empowers the policy to be easily acceptable to the larger community and effectiveness of implementation. The making of consensus is broadly argued in contemporary legislative initiatives to authenticate the legislative bond between the citizens and representatives.

The wide-ranging public consultation all over the democratic countries confirms the fact that the value of legislative consultation is highly required of citizens because it creates conditions for deliberation and required feedbacks in the law making. This is basically to provide opportunities to the stakeholders who would be affected by the law and thus allowing them to participate in the process can strengthen the bond and trust with their elected government. Transparency and accountability of a particular law through public disclosure in the

government websites from the beginning clears the doubt among the people of the sinister interests of the governmental projects and policies. Above all, it is open public sphere which should be fairly communicated to the citizens who constitute the very principle of self-rule and autonomy. However, the legitimacy question in public consultation is broadly consensual today which demands the civil society's participation in law and policy making process 'as passive players and using advocacy strategies of persuasion, education and awareness building within sanctioned and invited spaces' (Singh, 2014).

7. Conclusion

The most basic idea of legislative consultation and deliberation is a requirement of democracy today to present its laws and policies as part of decision making which is legitimate and accountable. The distinctiveness of a democratic decision is to reflect upon the opinions and consent of the people broadly termed as "the will of the people". The theoretical contours of democratic thinking have moved far ahead of a mere majoritarian bargaining model of decision making because of its lack of inclusions of voices who are marginalized for some reasons or others. The legislative intent of the parliament following the spirit of the constitution endeavors to make avenues for facilitating the deliberation and consensus of laws and outcomes to strengthen the legitimacy of its institutional hegemony. It is observed in contemporary times that in most of the liberal democracies in the world because of partisan inclinations, parochial interests, short term gains, and party agendas, the ruling party due its majority number, does not care for the inclusiveness of a deliberative decision. The participatory model of democratic decision making through the public consultation and deliberation not only legitimizes the representative institutions but builds a trust among the representatives and the people. The ideal of democracy in true sense is self-rule which implies that democratic rights get wedged in laws imposed from above by patrons chosen by the consent of the majority people. In that scenario too it also binds the legislators to consult people for wide scale view-points and makes people realize the freedom and equality in the democratic structure.

Without opinions, debates, consultation and feedbacks from the citizen stakeholders, legislation seems to be an exercise of power to dominate and subordinate those who have given their consents at times of election. The law making in simplest form is to protect, prohibit and control the citizens. Does then it mean that it goes without recognizing the epistemic, ethical and democratic values of deliberativeness of democratic decisions? Deliberative virtues of legislation, it is deeply emphasized, have long lasting impact on policies.

In India democracy attained through the developmental agendas needs to incorporate the legitimate consent of those who would be affected by the outcome. In some cases, we have seen popular resistances frequently hurdle the legislative intent of the government. However, the government should not bypass the popular sentiments to impose its designs upon the people.

Legislative consultation provides epistemic advantage of legitimacy and effectiveness of law. Legislative consultation and deliberative model of decision making through robust

participation of citizens and civil society organizations build trust between the government and the people. It helps the wider citizenry to check the authoritarian tendency of the democratically elected government. The purpose of law-making is related to policy implications for the development of economy and progress toward a more transparent, accountable and legitimate society. Pre-legislative consultation is deliberation with public reason that ensures freedom and equality of citizens.

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