

THE PRE-LEGISLATIVE CONSULTATION PROCESS

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ABSTRACT –

The paper discusses the idea of pre-legislative consultation process and its prime importance in making society legally better. It argues in favour of the consultation process and its significance in making laws better and inclusive. Our country consists different arms of government for managing society through – The Legislature, Executive and Judiciary. These arms and their work need to be transparent. Thus, this transparency is brought in by consultation policy. The paper comments on the implementation of pre-legislative consultation policy. It argues and analyse the reasons for policy's irregular implementation. The Policy has left to be a mere piece of paper and has still not gained any practical substantivity. Deficient implementation is the cause of people questioning the idea behind a democratic country. Insufficient or no consultation boosts up the situation of wide-level protests, ferocity, and hatred towards the government. This could go along with politicizing law for personal factors of ruling government. With country's urge for better laws, it has become equally important for engaging our discussions for building efficient laws and law-making process. The pre-legislative consultation process is a reflection of democracy in the country and its ineffective role challenges the democratic structure in which we live, and we desire to make. To prove how non-implementation of policy affects, the paper tries to bring in some views on recently passed legislations such as on Government of National Capital Territory of Delhi (Amendment) Bill, Citizenship Amendment Act and Farmer's bill. The paper finally tries to explore better ways for its implementation and provides some recommendations for causing policy's effective application.

PROCESS OF MAKING LAW EFFICIENT: PRE-LEGISLATIVE CONSULTATION

INTRODUCTION

Pre-legislative consultation is a democratic step of indulging country people in the formulation process of legislations. The inclusion of insights of people or affected community sets a foundation stone for better and inclusive laws in the country. The major reason behind debating over the issue is because of its poor implementation by government and unproductive utilization by the public. Even the larger sector of our society is unaware about the existence of pre-legislative consultation policy and this is one of the sole reasons why neither the government nor the people bother about its implementation. We live in a democratic society, but the idea of democracy is understood with mere contesting elections. Thus, we must start working on democratizing every process in the country, one of which is democratizing the process of formulating legislations. The process will thereby help in making laws broad and inclusive.

WHY PRE-LEGISLATIVE CONSULTATION?

Pre-legislative consultation is a negotiation process with the public taken prior the passing of a legislative decision. The process is to be made before the bill goes for final drafting and prior to its introduction in the parliament¹. The procedure of pre-consultation is necessary for increasing transparency in the law-making system. Laws are foundation for organised society and are key source for orchestrating everyday activities of people. Laws are for the well-being of society and its people and therefore, the needs, interests, requirements of the people must be taken into consideration. However, who knows better than the affected person/group for whose benefit the law is framed? Obviously, the people themselves. Those who have experienced certain drawbacks in carrying out daily or common chores can bring in valuable suggestion in framing legislations. These experiences help in making law more inclusive. For making law more societal friendly and compounded with realistic approaches rather than with mere assumptions, pre-legislative consultation is a major prerequisite which requires a major attention before we as people lose our basic democratic right of questioning and suggesting our own elected representatives who are also an integral part of legislature. For transformation of India absolutely into a participatory democracy, pre-legislative consultations should become compulsory. The evidence of just and fair consultation process leading to better and positive result are Right

¹ P.K. Malhotra, 'Pre-legislative consultation policy' (*Legislative department*, 5th February 2014) <<https://legislative.gov.in/documents/pre-legislative-consultation-policy>> accessed 19th March 2021

to Information Act 2005, Kerala Police Legislation 2011, and the Lok pal Bill 2011². Thus, the pre-legislative consultation procedure is a necessity for bringing and implementing insightful and impactful legislations.

PRE-LEGISLATIVE CONSULTATION POLICY AND ITS IRREGULAR IMPLEMENTATION

“The Committee of Secretaries formulated the pre-legislative consultation policy on the advice of National Advisory Council, the National Commission to review the working of constitution and the practice followed in another countries”³. The policy puts forward guidelines for strict adherence by all the ministry of central government. It clearly laid down the details for proper compliance of the policy prior the submission of bill or legislative proposal to the cabinet. On 10th January 2014, decisions taken for the procedure of implementation of the policy in the meeting of Committee of Secretaries under the Chairmanship of Cabinet Secretary laid down few ways of implementing the proposed legislation. The policy mentions the publication through internet or other means, at public places, through print or electronic media or in certain cases consultations with the stakeholder⁴. Although, the policy is clear on its aspect of publication which should be attached with brief explanation of the legislation along with its after-effects on lives of concerned group. However, the policy is framed in an unilateral approach. It provides guidelines for conducting the consultation process by several means, but it does not put forward the process of filing comments and advice from the public. There is no well-organised method of conducting procedure. Neither there exists an official means of keeping a record of people indulging actively in the consultation process, nor a track on how many percentages of people have qualified to submit the comments or advice. Lack of official records hint towards the mismanagement in implementation procedure. “A recent India Spend, investigation suggests that the government did not publish the Draft Coastal Zone Law 2019 and ignored 90% of the objections raised by the fishing community and environmental groups. It also appears that the government of India does not adequately maintain systematic records of the public consultation process”⁵. On what basis will the Ministry of Law and Justice claim that the concerned ministry has successfully completed the pre-legislative consultation policy? Lack of records, lack of information to public about where and how to comment, lack of knowledge regarding the policy shows a neglected behaviour towards its implementation. There is neither valid assurance whether the advice and comments given in pre-legislative consultation process is taken into consideration nor any specific comment

² Ritambhara Singh, ‘India needs an institutional framework for pre-legislative consultations’ (*Centre for Law and Policy Research*, 5 May 2020) <<https://clpr.org.in/blog/india-needs-an-institutional-framework-for-pre-legislative-consultations/>> accessed 20th March 2021

³ P.K. Malhotra, ‘Pre-legislative consultation policy’ (*Legislative department*, 5th February 2014) <<https://legislative.gov.in/documents/pre-legislative-consultation-policy>> accessed 19th March 2021

⁴ *ibid*

⁵ Singh (n.2)

after vetting of the bill by Ministry of Law and Justice is attached as to why certain suggestions are discarded and on what basis. Therefore, such irregular implementation displays that pre-legislative consultation policy is yet to gain practical substantivity.

The leniency over the matter of pre-legislative consultation is the very cause of mass-agitation, protests, rise in charges of sedition, ferocity against the government etc. In fact, we can deliberately prove the same with regards to recent protests and agitation caused in the society because of non-agreement of people in the matters of Citizenship Amendment Act 2019, Farmers Bill 2020, Article 370. These are some of the nation-wide protests led by people. Protests are caused because of dissenting opinion of the people with regards to proposed legislation and thus, it is extremely necessary that we put the legislation forth for consultation so that disagreement of people do not take a violent face. Failure by the ministries to do so is the very reason for generation of conflicting environment between public and the government in the society. At several instances we end up having an unpopular law even if the idea of government is kind because the acts are dissented and protested by affected class after its enactment. Passing of Code of Criminal Procedure (Amendment) bill, 2009 led lawyers to protest as they became aware of the provision after its enactment of government exercising veto over the enacted act by denying its enforcement and returning to parliament to consider the objections, although the notion of government was friendly. The situation would have never arisen if the lawyers were consulted before the enactment of legislation⁶. The whole idea of making law in India is so mysterious that it does not bothers about people's stance or comment. Thus, every time with an enactment of even benign legislation we end up protesting. This shows that a nation with a democratic framework should just not keep the pre-legislative consultation policy in paper but must bring the policy into play with strict scrutiny and implementation.

Another major reason behind improper implementation of the said policy is politicization of law by the government in power. Nothing can deny the fact that law is one of the most powerful weapons of society. One can take the most efficient control over the society by the means of law and party in power does the same thing, in order to place their rule. If, the party in power would have consulted prior the passing of legislations, few of the recent decisions on farmers bill, Citizenship bill, s.377 and s.497 of IPC could have been framed with wider and better approach without causing so much of debate for the same. The availability of freedom in

⁶ Tarunabh Khaitan, 'Reforming the Pre-legislative Process' [2011] 46 Economic and Political weekly 27

the hands of executive in framing legislation had at times caused formation of the bill without proper research and at several instances availing legislations for the purpose of political advantage⁷.

ARE WE DEMOCRATIC?

The Preamble of our constitution provides with basic ideals which is to be deliberated by the Constitution of India. These goals set by the Preamble is what makers of the constitution intends to achieve through constitution⁸. One of the ideals set is constituting India into a democratic country. Democracy is a kind of political association in which the people of the country determine the control and direction of commonwealth in congruence with understanding and procedures that provides for maximum participation and consent⁹. The will of people is of the utmost consideration around which the concept of democracy works. Improper or no implementation of the pre-legislative consultation process puts forward a genuine question that are we really advocating will of the general public in making of the legislations? To be democratic, people's advice, consultations and opinions must be given a considerable voice in the country and should be reflected by the law of land. With no pre-legislative consultations, we are directly or indirectly infringing other ideals and elements of the Preamble. We are not ensuring justice to the people by making and implementing legislations without including and considering their grievances by seizing democracy from people in law building process. Also, we are not providing liberty to the people in expressing their thoughts, beliefs and expressions in developing provisions and legislations for the country. Thus, denying pre-legislative consultation process is denying people from basic goals of the Preamble. Therefore, pre-legislative consultation procedure is one of the most effective keys for better society which ensures that we are truly democratic.

FAILURE OF IMPLEMENTATION

Government of National Capital Territory of Delhi (Amendment) Bill, 2021¹⁰ is leading to yet another major debate over the existing power of the Delhi government. The bill passed makes "Lieutenant Governor" the government of Delhi and prescribes that the elected government must take the approval from the lieutenant governor before issuing any executive action¹¹. Even after the larger disagreement from opposition, the Bill

⁷ Arvind Kurian Abraham, 'Need of the Hour: Why Pre-legislative Consultation will make laws better and more inclusive' (*The Leaflet*, 11 June 2018) <<https://www.theleaflet.in/need-of-the-hour-why-pre-legislative-consultation-will-make-laws-better-and-more-inclusive/#>> accessed 20th March 2021

⁸ V.N. Shukla, *Constitution of India* (Mahendra Pal Singh ed, 13 edn, EBC 2019)

⁹ Charles E. Merriam, 'The Meaning of Democracy' [1941] 10 *The Journal of Negro Education* 309

¹⁰ Government of National Capital Territory of Delhi (Amendment) Bill Rajya Sabha

¹¹ Bobins Abraham, 'what is the GNCTD Amendment Bill 2021 and how is it going to affect the governance in Delhi' (*India Times*, 23 March 2021) <<https://www.indiatimes.com/news/india/gnctd-amendment-bill-2021-delhi-governance-impact-explainer-536829.html>> accessed 28th March 2021

was passed by Rajya Sabha and got sanctioned by the President of India. According to Article 239-AA provisions made in respect to Delhi mentions that lieutenant governor will act as the administrator of Delhi; also, laws made by legislature will prevail in case assent of the President is received¹². But, after the implementation of pre-legislative consultation policy, our motive here is to conclude whether people or the community of Delhi was consulted prior passing of the bill? The government in power is elected by the people of Delhi and giving maximum power to the lieutenant governor will undermine Delhi public's democratic authority. Therefore, consultation from Delhi's population is of major need. ▮

Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020¹³ commonly called as Farmers Bill brings in three new farm laws allowing farmers to sell their produce to whoever they wish to outside the 'mandis' of Agricultural produce marketing committee. Additionally, it allows them to enter a contract with large retailers or large corporate firms on an agreed price and the third law calls for removing cereals, pulses, oilseeds, edible oils, potatoes and onions from the criteria of essential commodities¹⁴. This is a case where the focus of legislation is on a particular community of the society; thus, in simpler terms the legislation framed must act in favour and benefit of the farmers community. However, the bill was widely criticized by farmers and is widely protested. Farmers opposed the bill fearing that the bill will pull apart minimum support price system and the corporate firms will soon take over them providing lower prices for their produce. Distance from commission agents who sometimes act as their loan giver's might also cause threat to their loan sources. NDTV query asking details of consultation received a response from Chief Public Information Officer that government holds no record on the said matter¹⁵. This is one of the most recent examples of irresponsible attitude of government towards the pre-legislative consultation policy. Instead of flustering farmers, government could have had taken up the suggestions, experiences, grievances and concerns of them prior the passing of bill.

Citizenship (Amendment) Act, 2019 provides for calling off illegal migrants to the religious minorities belonging from Afghanistan, Bangladesh, or Pakistan from the following religion – Hindu, Sikh, Jain, Buddhist, Parsi or Christian who has entered India on or before 31st December 2014 and has been exempted

¹² Constitution of India 1950, Art 239-AA

¹³ Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act 2020

¹⁴ Jyoti Prakash Sahoo, Kailash Chandra Samal and Dibakar Behera, 'Impact of India's New Farm Act, 2020 on Farmers and Market' (*Biotica Research Today*, October 2020) <<https://bioticainternational.com/ojs/index.php/biorestoday/article/view/475>> accessed 28th March 2021

¹⁵ Mariyam Alavi, 'Were Farmers consulted before farm laws? "No record", says RTI response' (*NDTV*, 29 December 2020) <<https://www.ndtv.com/india-news/were-farmers-consulted-before-farm-laws-no-record-says-rti-response-2345287>> accessed 9th April, 2021

by central government under s.3 (2)(c) of Passport (Entry into India) Act,1920 or from application of Foreigners Act, 1946¹⁶. However, the act faced a massive protest in all over the country because of non-inclusion of Muslim religion in the said act. The notion of country's people that the act deliberately targeted Muslims is of great significance. This national-wide protests and international criticism would have never taken place if prior passing of the bill by Parliament, pre-legislative consultation process would have implemented. This is one of the recent cases where we can judge government's seriousness towards the policy. With the implementation of the process, the act could have become much more inclusive.

Additionally, implementation of the policy gives a sense of assurance to citizens that they have been consulted before making legislative decision. Mere assurance builds faith and a sense of justification for passing the bill which eventually becomes a good step for preventing the situations of conflict in the society. The act was subsequently passed without providing any justification for non-inclusion of Muslims which infuriated public. The sudden formulation of the bill seems to hinder basic integrity of the society.

RECOMMENDATIONS –

To make the procedure of pre-legislative consultation consistent and crystal clear, I believe in use of 3Ts. These 3Ts are – Technology, Tally and Tools.

Technology – With dynamism in the performance of society, it is necessary we not only work on increasing technology in technical sector, but we must include the use of different technology in working of the legislature. To have a better and fast access to the procedure of legislature and judiciary in India, technology is one such key which will not only help people to easily participate in the pre-legislative consultation process but will also update and spread awareness related to the legislations and provisions on which the legislature is working upon. This will lead to establishment of crystal-clear platform in the law-making process leaving behind no ambiguity between the general-public and legislature. Defaults in proper knowledge and spread of fake news is a constant threat to the society which in several cases lead to ferocity against the government. Therefore, in the time where technology is a better source of updating people, government should work upon bringing a personalised technology wherein it becomes easy for each and every individual in the society to participate in the consultation process and contribute in making laws better and inclusive.

Tally – There must be a better platform for tallying all the consultations taken. Tallying will aid better participation and will make it clear how democratic the process was. It will help in maintaining records of

¹⁶ The Citizenship (Amendment) Act 2019, s 2

advice and grievances raised by the people. These records can further help in formatting another legislation with similar motive. Another benefit of tallying and recording the consultations is that we can easily get to know the exact percentage of people participating in the process. Below the bare minimum percentage of participation will show that consultation procedure requires more rectification.

Tools – After considering inclusion of better techniques and tally processes in the working of legislature, another step for improving the process is usage of tools in increasing transparency i.e., by publishing the survey of consultation process through different means of media. This will thereby enhance the level of process by which people will get a better idea about how the procedure has taken place and what is the result of the process. To increase more transparency in the process, people's opinion and consultation should be made public so that we get to know how important and effective is one's advice. In case if government does not include the consultation without justification, we can easily claim for corruption of the process. Media, Newspaper, social media are better tools for making the process thorough and comprehensible.

CONCLUSION –

Pre-legislative consultation process is a need now in order to stop the corruption of law-making process by authorities in power. The procedure is essential for having democratic legislation process in the country. To better abide by the needs and desires of the people, it is necessary that we include this process as a part of law-making process in India. The procedure is imperative to protect the country from everyday protests and mass violence against the law of land. The procedure is a proof of better democracy. It is one of the methods through which we can create an interlocking system of thoughts and desires between society and lawmakers. Laws are made in view for benefiting society and thus, it is necessary that it should be consulted prior its enactment. The lack of knowledge about the pre-legislative consultation policy does not make people voice against the already injustice happening to them. For no corruption in the consultation process, it is equally necessary that people get acquainted with the procedure. The three Ts will somehow make it easy for the country people to engage and understand the procedure. We are now on the urge for better implementation of pre-legislative consultation process because of everyday rise in contentions and discords in the society. These mass protests are the beginning of imbalanced life structure in the country which will soon perish the harmony maintained till date. We must now start resolving this issue by making sure that there exists a crystalline structure between people and authorities at parliamentary level. Thus, one of the best resolutions to this is pre-legislative consultation process which will make laws encompassing and broad.