

EVALUATING THE GAPS IN PRE- LEGISLATIVE CONSULTATION POLICY: A CASE FOR DELIBERATIVE DEMOCRACY

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ABSTRACT

The basic idea of representative democracy which implies law making through elected political authority is no longer considered adequate as people are demanding a larger role in the law-making process. Democratization of the law-making requires public participation in the law-making thorough deliberations, leading to laws which are acceptable to the society. Indian Constitution predominantly envisages a representative democracy; however, government made an attempt to instill elements of deliberation within the law-making process by initiating the Pre-Legislative Consultation Policy (PLCP). India, despite having PLCP has failed to shift towards a more deliberative democracy. Repeal of farm laws after almost a yearlong protest by the farmers, agitation against the enactment of the Citizenship Amendment Act, 2019 are some examples reflecting the dissatisfaction of the public towards the enacted laws. Lack of public participation in the law-making process has led to severe consequences and hence, there is a desperate need to move towards deliberative democracy from a mere representative democracy. The paper aims to highlight the need and prospect of deliberating democracy in the recent times, assess the deliberative mechanism present in the Indian Constitutional and legal system and lastly to identify the lacune within the system which incumber public participation in law-making.

Keywords: Pre-legislative Consultation Policy, Deliberative Democracy, Good governance, public participation, law-making process.

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I. INTRODUCTION

The famous words of Abraham Lincoln describing democracy as “government of the people, by the people, for the people”¹ is inadequate without qualification of the term ‘majoritarianism’ and ‘representation’.² The law-making power does not reside directly in the people, but their ‘representatives’; and law-making is not contingent on the approval of all representatives but a majority of them. Representative democracies derive their legitimacy and authority from equal distribution of voting power amongst the citizens.³ Representative democracies are justified on the footing of political equality “with the principle of one person one vote”.⁴ Hence, representative democracy does not “claim giving agency to the people that can directly translate into political action”.⁵

This basic idea which implies the imposition of laws made through elected political authority has now become inadequate as the governed are demanding a larger role in the law-making across different political societies. Such a form of democracy is no longer considered adequate as it keeps “ordinary citizens at arm’s length of the real site of decision and power”.⁶ It has been rightly pointed out that representative democracy “is in a state of crisis”.⁷

There is a growing demand for the democratization of the law-making process which requires that laws are an outcome of thorough deliberation and involve public participation. This is often linked to the idea of deliberative democracy which is based on equitable access to law and policy-making and the exchange of information and justification supporting varying perspectives as opposed to competition between conflicting interests. Democracies around the globe have made several attempts to incorporate a system of deliberation and public participation in the law-making process to accord larger acceptability of the laws.

¹ Abraham Lincoln, *Gettysburg Address (19 NOVEMBER 1863)*, VOICES OF DEMOCRACY: THE U.S. ORATORY PROJECT (Apr. 12, 2022), <https://voicesofdemocracy.umd.edu/lincoln-gettysburg-address-speech-text/>

² Hans Rosso Kern, *Omnilegitimacy: From Representative Democracy toward Emerging Alternatives*, SENIOR PROJECTS SPRING, BARD COLLEGE, 2014 (Feb 20, 2022) https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1239&context=senproj_s2014

³ See Nadia Urbinati, *Representative Democracy & its critics*, in, THE FUTURE OF REPRESENTATIVE DEMOCRACY 23-49 (Sonia Lonso, John Keane, & Wolfgang Merkel, eds., 2011).

⁴ Peter McLaverty, *Is Deliberative Democracy the Answer To Representative Democracy's Problems A Consideration of The UK Government's Programme Of Citizens' Juries* 45(4) REPRESENTATION, 379–389 (2009).

⁵ Hans Rosso Kern, *supra* note 2 at 16.

⁶ Hélène Landemore, *Deliberative Democracy as Open, Not (Just) Representative Democracy*, 146 (3) DÆDALUS 51(2017).

⁷ See HAROLD JOSEPH LASKI, DEMOCRACY IN CRISIS (1935).

India is also a representative democracy. Laws enacted by the legislature may reflect the majoritarian view, but it has now become harder to accept the same as the 'public opinion'. The dissatisfaction of the different sections of the society towards the laws enacted by the legislature has been observed in the past decade, with the agitation of the civil society on issues of corruption, Jan Lok pal Bill etc.⁸ To democratise the law-making process, a Pre-Legislative Consultation policy (PLCP) was initiated by the Government. It was aimed at making the legislative process more transparent and accountable by seeking public participation before the introduction of a Bill in the parliament.

However, recent instances of protest and agitation on the enactment of farm laws, abrogation of Article 370, Citizenship Amendment Act etc. have not only portrayed the inadequacy of representative democracy but also lacunae of the PLCP and its implementation. This paper is an attempt to assess the element of deliberation present in our constitutional and legal framework and re-assess the PLCP to identify and eliminate the lacunae which hinder its proper implementation.

II. DELIBERATIVE DEMOCRACY: ITS NEED AND PROSPECTS

The concept of deliberative democracy emerged as an alternative to fill the vacuum generated by representative democracy. Even though the concept of deliberative democracy has been traced back to the Greece philosophers,⁹ it gained importance in the 20th century by the famous philosophers, John Rawls and Jürgen Habermas who popularized it and identified with the concept and characterized themselves as deliberative democrats.¹⁰

Deliberative democracy in general parlance, refers to a form of democratic government wherein public participation forms the foundation of legitimate decision-making, wherein people have a direct

⁸ K.M. Sajad Ibrahim, *Indian Democracy in a Changing World: A Case of Civil Society Intervention*, in , DELIBERATIVE DEMOCRACY: UNDERSTANDING THE INDIAN EXPERIENCE 75 (Teresa Joseph, Siby K. Joseph eds., 2018).

⁹ See AMY GUTMANN AND DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 8 (2004)

¹⁰ See generally John Rawls, *The Idea of Public Reason Revisited*, 64 U. OF CHI. L. REV. 765 (1997), JOHN RAWLS, POLITICAL LIBERALISM. NEW YORK: COLUMBIA UNIVERSITY PRESS (1993) and J. HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

say in the policy decisions which ultimately impact and influences their lives.¹¹ James Fishkin perceives that the concept revolves around the “will of the people” which should be based on the consideration of competing arguments about the merits of each political decision.¹² Active involvement and participation of the public and not merely the elected or appointed representatives in the political decision-making process forms the very foundation of deliberative democracy.

This form of democracy is primarily different from representative democracy, wherein people generally vote for representatives, who in turn then formulate, and deliberate on the laws and policies of the country. In blunt terms, the role of the voters is restricted to deciding on one candidate amid different candidates, who they want to be governed.¹³ People of the country have no or minimal intervention in policy decisions, instead, their ultimate power lies in not electing the representatives whose policies have not been able to meet the standard of the public. Hence, deliberative democracy is different from **representative democracy as it shifts the focus from polling, votes, majority, minority to conversation, diverse perspective around actual policy issues.**

Deliberative democracy gained acceptance and popularity amongst scholars for it furthers various political and social goals. Mansbridge *et. al.* purports three functions of deliberative democracy i.e epistemic function, ethical function and democratic function.¹⁴ The epistemic function primarily incorporates different kinds of opinions based on due consideration of a variety of factors and information, reasons, and logic. Ethical function promotes due regard for every person’s opinion and encourages mutual respect among citizens. Lastly, democratic functions, as it encourages “inclusive political process on terms of equality”. Maeve Cooke justifies deliberative democracy by suggesting that the process of public deliberation has an educating impact on the people, it creates a community sentiment amongst the people, it maintains procedural fairness, brilliant quality of the outcomes and the congruence of the ideal

¹¹ Teresa Joseph, Siby K. Joseph , *Introduction, in DELIBERATIVE DEMOCRACY: UNDERSTANDING THE INDIAN EXPERIENCE* *supra* note 8 at 8-14.

¹² James Fishkin, *Deliberative Democracy*, in, *EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES 1* (Robert A Scott , Stephan M Kosslyn eds., 2016).

¹³ *Id.*, at 2.

¹⁴ Jane Mansbridge *et.al.*, *A Systemic Approach to Deliberative Democracy* , in, *DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE*, 10- 13 (John Parkinson, Jane Mansbridge eds., 2012)

of politics.¹⁵ Some scholars have even suggested that public deliberation can lead to effective enforcement of human rights.¹⁶

Evidently the notion of ‘deliberation’ is central to the idea of deliberative democracy and hence requires a deeper understanding. Rawls considered ‘public reason’ as the foundation of deliberation, which implies that arriving upon a conclusion or making a certain decision should be justified to the people.¹⁷

Fishkin exhaustively describes five elements essential for legitimate deliberation, *information, substantive balance, diversity, conscientiousness* and *equal consideration*.¹⁸ Information implies that participants of the deliberation process i.e. people are given access to relevant information which has a direct connection with the subject matter. *Substantive balance* calls that the perspectives and concerns of each party are noted and countered by the others with different or opposite perspective. *Diversity* means to what extent different groups have been allowed to give representation in the discussion. *Conscientiousness* implies the extent to which different groups and participants honestly weigh the merits of the arguments and *equal consideration* implies that arguments and perspectives put forward by all participants ought to be considered on the merits with no regard to the identity of the person offering them. Hence, deliberative democracy is not simply about an accumulation of ideas, and views from different sections, but aims to bring about change in the decision-making process by free deliberation.¹⁹

The concept of deliberative democracy, even though appears immaculate theoretically, there are large concerns over its practical implementation, especially in large nations. Robert Dahl has argued that direct citizen engagement is only feasible at a small scale like councils and for large countries, the only practical and feasible form of democracy is a representative democracy. Hence, he considers deliberative democracy

¹⁵ Maeve Cooke, *Five Arguments for Deliberative Democracy*, 48 POLITICAL STUDIES 947–969 (2000).

¹⁶ C Evans and S Evans, *Evaluating the Human Rights Performance of Legislatures*, 6 HUMAN RIGHTS LAW REVIEW 545, 548 (2006)

¹⁷ See, John Rawls, *supra* note 10. Pluralism for Rawls is a very foundation of democratic and free societies. Public reason according to him is when the government authorities and officials including the political candidates, act in such a manner that they explain to the citizens the reason for taking a political decision.

¹⁸ James Fishkin, WHEN THE PEOPLE SPEAK. 160 (2009).

¹⁹ John S. Moolakkattu, *Deliberative Democracy: A Conceptual Overview* in DELIBERATIVE DEMOCRACY: UNDERSTANDING THE INDIAN EXPERIENCE, *supra* note 8 at 16.

as impractical and representative democracy in one form or another, is inevitable.²⁰

Similarly, Blaug argues that any efforts to ‘engineer democracy and emphasis on public participation are not going to be successful, as “people doing the engineering will be unwilling to relinquish power”.²¹ Whereas, others argue that the process of public participation can be redundant, especially in time-restricted situations.²²

Lippman similarly argues that direct citizen engagement is not feasible owing to complexities in political issues, ideas and views which are inherent in the idea of democracy itself.²³ He considers that the only solution can come from improving the ways through which people make their opinion and choose their representatives.²⁴ Another drawback of public participation has been said to be the political ignorance of the people. Many a time people are not aware of political issues or public policy and their views and opinion may not be based on information and reason. Jason Brennen while referring to the referendum on Brexit said that “Perhaps it would have been better if the Brexit question were decided by Parliament, whose members, on average, know more than the voters do, and who overwhelmingly oppose Brexit.”²⁵

Undoubtedly, deliberative democracy does not imply or mean that every person’s opinion, preferences or ideas would be necessarily incorporated or implemented in policy decisions. Deliberation simply implies an unimpeded exchange of opinions and ideologies based on practical and logical reasoning which potentially leads to an alteration of preferences or perspectives. Hence it aims to reach a “rational agreement” and not a complete consensus.²⁶

Gutmann and Thompson²⁷ in their work have highlighted deliberative characteristics in the law-making firstly, in deliberative democracy decision making authorities are expected to justify the laws they impose, meaning thereby, leaders or authorities should therefore give logical and justified reasons for their decisions, and respond to the reasons that people give in return, secondly, “the reasons given in this process should be accessible to all the citizens to whom they are addressed”²⁸, both citizens and their representatives must give reasons must

²⁰ ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

²¹ Richard Blaug, *Engineering democracy*, 50(1) *POLITICAL STUDIES* 102–16 (2002).

²² PP Biribonwoha, *Efficiency of Legislative Process in Uganda* 7 *EUROPEAN JOURNAL OF LAW REFORM* 142 (2005)

²³ LIPPMANN, *THE PHANTOM PUBLIC* (1925).

²⁴ *Ibid.*

²⁵ Ilya Somin, *Brexit, “Regrexit,” and the impact of political ignorance*, *THE WASHINGTON POST*, June 26, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/26/brexit-regrexit-and-the-impact-of-political-ignorance/>

²⁶ Maeve Cooke, *supra* note 15 at 948.

²⁷ *Supra* note 9 at 3-5

²⁸ *Ibid.*

be comprehensible to each other, Thirdly, the process aims at producing a ‘binding decision’, deliberation is not merely for exchange of ideas, but for implementation, lastly, even though the deliberation aims at producing a balanced outcome, it should be open to challenge.²⁹ It is also worth mentioning that many successful models have been evolved and created by scholars for effective implementation of deliberative mechanisms not just in the law-making process but also in the working of the different institutions.³⁰

Despite contrasting opinions, it cannot be doubted that even if deliberative democracy cannot be wholly incorporated, some important elements of deliberative democracy ought to be incorporated in a representative democracy to democratise the decision-making process. It has been rightly observed that the inculcation of deliberative mechanisms within the representative democracy, would be in the better interest of the society and governance.³¹

III. INDIAN CONSTITUTION, LAW MAKING AND PRE-LEGISLATIVE CONSULTATION POLICY

The Indian Constitution provides for parliamentary democracy. The legislature has been entrusted as the representative and the law-making body. The representatives are directly answerable to the electorate and citizens of this country. This representativeness and principle of accountability reflect the spirit of representative democracy ingrained within the Constitution.³²

²⁹ What Deliberative Democracy Means, <http://assets.press.princeton.edu/chapters/s7869.pdf>

³⁰ Scholars have studied and analysed different models evolved for larger public participation. See generally, Tanja Aitamurto & Hélène Landemore, *Democratic Participation and Deliberation in Crowdsourced Legislative Processes: The Case of the Law on Off-Road Traffic in Finland*, 8(2) P& I 174-196 (July 2016), Cass R. Sunstein, *Deliberative Democracy in the Trenches*, 146(3) DÆDALUS (“THE PROSPECTS & LIMITS OF DELIBERATIVE DEMOCRACY”) 129-139 (2017), James S. Fishkin, Roy William Mayega *et. al.*, *Applying Deliberative Democracy in Africa: Uganda’s First Deliberative Polls*, 146(3) DÆDALUS (“THE PROSPECTS & LIMITS OF DELIBERATIVE DEMOCRACY”) 140-154 (2017), Baogang He & Mark E. Warren, *Authoritarian Deliberation in China*, 146(3) DÆDALUS (“THE PROSPECTS & LIMITS OF DELIBERATIVE DEMOCRACY”) 155-166 (2017).

³¹ *Supra* note 4.

³² See generally D. Kyritsis, *Constitutional Review in a Representative Democracy* 32 (2) OXFORD JOURNAL OF LEGAL STUDIES 297-324 (2012).

A bill becomes law once the same is passed by both the houses of the parliament and assented by the President.³³ Prima facie, the constitutional provisions do not entail any deliberative element in the law-making process.³⁴ However, closer scrutiny points out the presence of inherent deliberative mechanisms within the parliament, as the bill is deemed to be passed once it has been “agreed” by both Houses of the Parliament.³⁵ It has been highlighted that the use of the term ‘agreed’ in contrast to terms like ‘voted upon’ or ‘approved’ denotes some level of consensus which is obtained through discourse and deliberation.³⁶ Scholars refer to this as ‘elite deliberation’, where deliberation takes place amongst the representatives and not amongst the people.³⁷

Further, the Indian Constitution does not have any provision which indicates an encumbrance to incorporate public participation/consultation at any stage before or during the introduction of the Bill.³⁸ Some elements of public participation during the stage of legislative scrutiny came to be incorporated in the Parliamentary procedures with the constitution of Department Related

³³ Passage Of Legislative Proposals In Parliament, Seventeenth Lok Sabha, Parliament of India, <http://164.100.47.194/Loksabha/Legislation/Legislation.aspx>

³⁴ Referring to the intention of the Constituent Assembly, Supreme Court in *Rajiv Suri v. Rajeev Suri v. Delhi Development Authority*, 2021 SCC OnLine SC 7, observed that participatory model was intentionally avoided as they were not clear about their vision for the nature of democracy. Moreover, they were apprehensive of the challenges, especially administrative challenge which excess democratic procedure might inculcate.

³⁵ See Constitution of India, Art 107.

Provisions as to introduction and passing of Bills.—(1) Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament. (2) Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been **agreed** to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses. (3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses. (4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People. (5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

³⁶ Dhruva Ghandhi, Unnati Ghai, *The Erosion of Deliberative Democracy in India*, STATECRAFT (March 12, 2022) <https://www.statecraft.co.in/article/the-erosion-of-deliberative-democracy-in-india>

³⁷ *Supra* note 19.

³⁸ Each house has own procedure in terms of introduction and passing of Bill. Each bill must pass through three readings in each house. See, Rules Of Procedure And Conduct Of Business In Lok Sabha, Sixteenth Edition, 2019 and Rules Of Procedure And Conduct Of Business In Rajya Sabha, 2016. <http://164.100.47.194/Loksabha/Legislation/Legislation.aspx>

Standing Committees in the year 1993.³⁹ There are 24 DRSCs that cover all ministries of the central government.⁴⁰ The important function of these committees is to scrutinize the Bills as referred by the Chairman of Rajya Sabha or Speaker of Lok Sabha.⁴¹ These Committees have the discretion to take opinion and evidence from associations, public bodies or experts who are stakeholders and public opinion on the subject matter.⁴² However, it is not mandatory for the house to refer the bill to them nor is there any binding value of their report.⁴³ Moreover, it has been reported that the level of public engagement with standing committees varies with different Bills.⁴⁴

On the statutory front, there is nothing substantial which mandates public participation before the law-making process either. A substantial step was taken to incorporate public deliberation and engagement in the legislative process with the ‘Pre-Legislative Consultation Policy’ (PLCP) in 2014.⁴⁵ Pre-legislative consultation policy is a process of eliciting public opinion and perspectives on Bills/Rules before initiating the legislative process.

Pre-legislative consultation policy was conceived because of the recommendations of the National Advisory Council of the National Commission to Review the Working of the Constitution (NCRWC).⁴⁶ The policy mandates the Government departments/Ministries to follow the procedure mentioned in the policy before any bill is submitted to the cabinet for approval for the enactment of central law. The policy was envisaged as a mechanism to support the “growing expectation of transparent and better-informed government”.⁴⁷

The policy lays down several steps which ought to be taken before the bill is introduced in the parliament. It includes proactive publication of the proposed bill

³⁹ An Introductory Guide, Departmentally Related Standing Committees, Lok Sabha Secretariat, [http://loksabhaph.nic.in/Committee/INTRODUCTORY_GUIDE\(ENGLISH\).pdf](http://loksabhaph.nic.in/Committee/INTRODUCTORY_GUIDE(ENGLISH).pdf)

⁴⁰ *Ibid.*

⁴¹ Except Ordinance replacing Bills; Bills of innocuous nature and Money Bills.

⁴² *Ibid.*

⁴³ The report has to be submitted within three months. See, Public Engagement with the Legislative Process, PRS LEGISLATIVE RESEARCH (May 22, 2022) https://prsindia.org/files/parliament/discussion_papers/1370586595_Public%20Engagement%20with%20the%20Legislative%20Process.pdf

⁴⁴ *Ibid.*

⁴⁵ D.O. No. 11(35)/2013-L.I. dated Feb., 5, 2014, Legislative Department, Ministry of Law and Justice, Government of India (May 22, 2022), <https://legislative.gov.in/documents/pre-legislative-consultation-policy>

⁴⁶ Report of the National Commission to Review the Working of the Constitution (May 23, 2022) <http://lawmin.nic.in/nerwc/nerwreport.htm>

⁴⁷ *Supra* note 44.

both on the internet as also through other means, further, it requires that the concerned department/ministry to place the bill in the public domain for at least 30 days along with important information relating to the proposed law like brief reasoning for the new law, essential features of the proposed legislation, its financial consequences, and an estimate of the impact of such law on various aspects like environment, fundamental rights, lives and livelihoods of the concerned/affected people, etc.⁴⁸ The policy seeks to give wider publicity to the proposed law especially when a specific group is likely to be affected. Another important aspect of the policy is putting in the public domain the comments/feedbacks received from the public in addition to holding consultation and public hearings with the stakeholders.⁴⁹ Any department failing to conduct pre-legislative consultation policy will be required to give its reasons in writing.⁵⁰ However, the policy is not mandatory and has not been incorporated in the Manual of Parliamentary Procedures.

It would also be relevant to add that deliberation and public participation have been incorporated in the governance scheme though not at the pre-legislative or legislative stage but at local level and executive decision-making. For instance, the 73rd Constitutional Amendment, 1992 included Gram Sabha as a deliberative body of decentralized governance and enables people of the village to participate in decision-making at the local level.⁵¹ However, its efficacy in establishing a deliberative political system is only restricted to the local level.⁵² In addition to this, public involvement has been incorporated at regulatory levels in different areas of executive decision-making. Different rules and regulations mandate eliciting public opinion and consultation before making executive decisions affecting rights like environmental impact assessment⁵³, land acquisition⁵⁴, determination of electricity tariff⁵⁵ etc.

Some jurisdictions have developed Constitutional mechanisms for incorporation of public opinion and a proper deliberative law-making process. A notable example of the same is South African Constitution which mandates public participation in the law-making process.⁵⁶ In fact,

⁴⁸ *Id.* at pt. 1, 2.

⁴⁹ *Id.* at pt. 7

⁵⁰ *Id.* at pt. 11

⁵¹ D. Jeevan Kumar, *Gram Sabha and Deliberative Democracy*, in *supra* note 8 at 134

⁵² *Id.*, at p 142.

⁵³ Naveen Thayyil, *Public Participation In Environmental Clearances In India: Prospects For Democratic Decision-Making* 56 (4) JOURNAL OF THE INDIAN LAW INSTITUTE 463-492 (October-December 2014).

⁵⁴ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, section 16(5).

⁵⁵ Regulations notified by the Central/State Electricity Regulatory Commissions require a mandatory public hearing before the revision of electricity tariff.

⁵⁶ Constitution of the Republic of South Africa, 1996,

in a notable judgment, the South African Constitutional Court struck down laws which failed to full fill the mandate of public participation provided in the Constitution.⁵⁷ Countries like Australia, the United Kingdom, Scotland, Ireland *etc.* have made significant legal measures to establish a deliberative mechanism in place.⁵⁸

IV. INDIAN LAW MAKING AND STATUS OF DELIBERATION

A very important step taken in the direction of deliberative democracy was the enactment of the Right to Information Act, 2005. Tarunabh Khaitan in his article “Reforming the Pre-Legislative Process” considered the enactment of The Right to Information Act, 2005 as a small step toward the incorporation of deliberative democracy within our existing system.⁵⁹ Information forms a crucial element of deliberation, as it allows people to generate opinions and views based on the relevant information.⁶⁰ As discussed previously, some elements of deliberation have been incorporated within the law-making process through PLCP, Standing Committees *etc.* However, it is relevant to gauge the performance of such mechanisms and their contribution in establishing a deliberative democracy.

As far as deliberation within the parliament is concerned (elite deliberation), the statistics are extremely discouraging. Despite the constitutional indication, elite deliberation seems to be vanishing in the current times. It has been highlighted that bills on important issues having serious consequences on rights and liberties are passed in the parliament with little or no discourse.⁶¹ As per a report, The J&K Reorganisation Bill was passed in a time period of 3-4 hours in both Houses, whereas The Muslim Women (Protection of Rights on Marriage) Bill was the

Section 59: Public access to and involvement in National Assembly

1. The National Assembly must
 - a. facilitate public involvement in the legislative and other processes of the Assembly and its committees; and....

⁵⁷ Doctors for Life v. Speaker of the National Assembly, [2006] ZACC 11

⁵⁸ Dipika Jain, *Law-Making by and for the People: A Case for Pre-legislative Processes in India*, 41(2) STATUTE LAW REVIEW 189 (2020).

⁵⁹ Tarunabh Khaitan, *Reforming the Pre-Legislative Process*, 46(25) EPW 27 (2011).

⁶⁰ See Fishkin, *supra* note 18.

⁶¹ *Supra* note 35.

most debated with 12 hours.⁶² In fact, it has been highlighted that in the Monsoon session of 2021, 12 Bills were passed in merely 10 days, averaging seven minutes on each bill.⁶³ Even Constitutional Amendments are enacted without much deliberation. 103rd Constitutional Amendment Act, 2019 which incorporated Articles 15(6) and 16(6) in Part III was passed in two days in the Parliament.⁶⁴ The data is reflective of a lack of deliberative spirit even within the Parliament.

The absence of deliberative features within the parliament has been called out by the C J., C.V. Ramana by stating that “We see legislations with a lot of gaps, lot of ambiguities in making laws. There is no clarity in [the] laws. We don’t know what [is] the purpose of the laws, which is creating [a] lot of litigation, inconvenient, and loss to the government as well as inconvenience to the public.”⁶⁵

In addition, Department Related Standing Committees which were constituted to act as a mechanism for deliberations beyond the members of the Parliament have not been used for that purpose. In the 16th Lok Sabha, only 25% of the bills introduced were referred to committees as compared to the 15th Lok Sabha, when 71% and 60% bills were examined by committees.⁶⁶ Even the three Farm Bill of 2020 were not referred to any committee leading to bitter aftermath.⁶⁷

Moreover, PLCP is highly problematic when it comes to testing its efficacy as a model of implementing deliberative democracy. The policy is primarily a ‘consultation’ policy, which is not synonymous with deliberation. Consultation is primarily a one-way communication process, where views and opinions of the public are solicited without any obligation to consider the same or justify the decision taken. Whereas, deliberation is active two-way communication between decision-makers and the public, as they explore the issues in-depth and develop an agreed position together.⁶⁸ Dipika Jain in her article stated that even though the

⁶² *Ibid.*

⁶³ Sobhana K Nair, *Opposition cries foul as 12 Bills were passed in 10 days of monsoon session*, THE HINDU, Aug 3, 2021, <https://www.thehindu.com/news/national/opposition-cries-foul-as-12-bills-were-passed-in-10-days-of-monsoon-session/article35707105.ece>

⁶⁴ Chakshu Roy, *The Faults in India’s Law-Making Process*, PRS LEGISLATIVE RESEARCH (May 23, 2022) <https://prsindia.org/articles-by-prs-team/the-faults-in-india%E2%80%99s-law-making-process>.

⁶⁵ House debates are key to clear laws, but now a sorry state of affairs: CJI Ramana, THE INDIAN EXPRESS, (Aug.16,2021), <https://indianexpress.com/article/india/sorry-state-of-affairs-lots-of-gaps-in-laws-due-to-lack-of-debates-in-parliament-cji-ramana-7454817/>

⁶⁶ *Supra* note 63.

⁶⁷ *Ibid*

⁶⁸ Anna Dziedzic, *Consultation, Deliberation and Decision-Making: Direct Public Participation in Constitution-Building*, MELBOURNE FORUM ON CONSTITUTION-

consultation process was carried out for the Transgender Rights Bills, there was a lack of proper deliberation since none of the recommendations made by the transgender group was incorporated in the Bill.⁶⁹

The policy lacks any mechanism where the government is required to deliberate upon the information received or to justify their decision. It has been rightly pointed out that they can ignore the information received in its entirety. Further, the policy has no mandatory basis and has been completely neglected by the Government Departments in a majority of cases.

It has been reported that since the inception of the Policy, merely 74 out of the 301 bills introduced in Parliament have been introduced with prior public consultation. Further, even the ones which were placed in public domain for comment, more than half did not comply with the thirty-day deadline.⁷⁰ Violation of PLCP is extremely frequent. Instances include failure of the government to publish the Draft Coastal Zone Law 2019 and ignoring most of the objections raised by affected groups, inadequate time for the stakeholders to submit comments on the Draft Transgender Persons (Protection of Rights) Rules 2020, which was later on extended after objections from people.⁷¹

Protests over Citizenship Amendment Act, 2019 and three Farm Laws have reflected the unwanted outcomes of neglecting public participation in the law-making process. Enactment of the CAA has shown that laws enacted without prior consultation and deliberation can lead to absolute discontent within the masses causing serious consequences. It has been rightly contented “it is so vital for constitutionalism to exist, live, and thrive, outside the domain of institutions. The CAA protests have shown us what a dynamic and evolving conversation about the Constitution, and

BUILDING, Constitutional INSIGHTS No.4, Sep. 2020 (June3, 2022), <https://www.idea.int/sites/default/files/publications/consultation-deliberation-and-decision-making.pdf>

⁶⁹ *Supra* note 57 at 15-16.

⁷⁰ Arun PS, *The need for a proper Pre- Legislative Consultation Policy*, THE HINDU, (Nov. 26, 2021) <https://www.thehindu.com/news/national/the-need-for-a-proper-pre-legislative-consultation-policy/article37677558.ece>

⁷¹ Ritambhara Singh, *India Needs An Institutional Framework For Pre-Legislative Consultations*, CENTER FOR LAW & POLICY RESEARCH (June3, 2020), <https://clpr.org.in/blog/india-needs-an-institutional-framework-for-pre-legislative-consultations/>.

about constitutional values, can look like. It is for us, now, to take this conversation further”.⁷²

The controversial Farm Laws had to be repealed by the government owing to almost a year-long struggle and agitation from the farmers. RTI query to the concerned department concerning the fulfilment of PLCP mandate on the three farm laws revealed that no consultation took place.⁷³ Consultation with the stakeholders before the enactment of such laws would have led to different results and saving of time, money and resources of the government and the farmers. In fact it has been asserted that the government has not learnt from its mistake and there was no pre-legislative consultation on the bill to repeal the farm laws.⁷⁴

PLCP is inadequate and has failed to achieve any of the objectives which were sought to be achieved. The major issue is the absence of a statutory or constitutional provision enforcing public consultation. The effective implementation of the policy requires statutory implementation of PLCP and subsequent amendments in different parliamentary documents like the Manual of Parliamentary Procedures etc. and any attempt to incorporate changes in such documents has failed miserably.

V. CONCLUSION & SUGGESTIONS

To incorporate elements of deliberative democracy in India’s representative democracy, it is of utmost importance that concrete steps towards institutionalising PLCP. Public participation as an essential element of the democratic decision-making process must be recognised through statutory measures. Research has shown that a strong statutory requirement of public participation by regulators leads to better public responsiveness.⁷⁵ Hence, there is a need for a law which mandates deliberation at the pre-legislative stage.

⁷² Gautam Bhatia, *It’s everybody’s Constitution*, THE HINDU, Jan. 1, 2020, <https://www.thehindu.com/opinion/lead/it-is-everybodys-constitution/article30446190.ece>

⁷³ Anand Patel, *In RTI reply, Centre says no records to show for pre-legislative consultations over farm laws*, INDIA TODAY, JAN 10, 2021 (June 5, 2022) <https://www.indiatoday.in/india/story/in-rti-reply-centre-says-no-records-to-show-for-pre-legislative-consultations-over-farm-laws-1758479-2021-01-12>.

⁷⁴ [Gaurav Vivek Bhatnagar](#), *No Lesson Learnt From Farm Laws, Centre Forgoes Prior Consultation for 17 of 29 Scheduled Bills*, THE WIRE, Nov. 26, 2021 (June 4, 2022) <https://thewire.in/government/winter-session-parliament-farm-laws-consultation>.

⁷⁵ [Anirudh Burman](#), Bhargavi Zaveri, *Measuring Regulatory Responsiveness in India: A Framework for Empirical Assessment*, (June 13, 2022) <https://carnegieindia.org/2019/04/02/measuring-regulatory-responsiveness-in-india-framework-for-empirical-assessment-pub-78871>

An attempt was made in 2019 by a private member of the Lok Sabha to introduce Pre-Legislative Consultation Bill, 2019 for a mandatory pre-legislative consultation mechanism to promote public participation. However, the Bill did not get tables due to paucity of time.⁷⁶

Moreover, there is a need to reform the existing PLCP mechanism for the same is inadequate and needs to be suitably amended to incorporate a deliberative approach rather than a simple consultation approach. The views and recommendations of the public ought to be duly considered and in the case of non-incorporation, the government should justify the same by giving proper reasons and more importantly with clear data and statistics.

Further, there ought to be stress on the proper dissemination of information. Apart from the internet, other sources of dissemination of information need to be explored like collaboration through civil society organisations, associations *etc.* In addition to the mode of dissemination, there ought to be an emphasis on language of communication as well, considering the diversity of the nation and the impact of laws on different sections of the society, public participation should be in the most simple and comprehensive language.⁷⁷

Since the government itself will always be sceptical of binding itself with such kind of statutory mandate, Supreme Court can play a major role in incorporating deliberative elements in the law-making process. The right to public participation in law-making has been recognised as an element within Article 21 and Article 19 by the Supreme Court. Recent judgments of the Supreme Court recognised participatory democracy as a strong element of the Indian representative democracy, embedded in the Constitution itself.⁷⁸ The Court rightly said that:

Citizens' right to know and the government's duty to inform are embedded in democratic form of governance as well as the fundamental right to freedom of speech and expression... Transparency and receptiveness are two key propellants as even the most competent and

⁷⁶ The Pre-Legislative Consultation Bill, 2019

<http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/337%20of%202019%20as.pdf>

⁷⁷ The Delhi High Court in *Vikrant Tongad v. Union of India*, W.P. (C) 3747/2020 & CM APPL. 1342/2020 June 30, 2020, the government was directed to publish Draft EIA in 22 scheduled language to effective communication and dissemination of information.

⁷⁸ **Rajeev Suri v. Delhi Development Authority**, 2021 SCC OnLine SC 7, *Kamil Siedczynski v. Union of India*, WP No. 4432(W) of 2020, decided on 18-03-2020, **Hanuman Laxman Aroskar v. Union of India**, 2019 SCC OnLine SC 441.

honest decision-makers require information regarding the needs of the constituency as well as feedback on how the extant policies and decisions are operating in practice. This requires free flow of information in both directions.

However, there is no precedent to invalidate the constitutionality of any law simply because the public participatory process was not followed in the law-making process. Most of the judgments are evaluating the validity of executive decision-making.

Inclusion of the spirit of deliberative democracy has become a *sine qua non* for a government based on the ideal of political equality. The existing legal and constitutional framework is inadequate in its current shape to incorporate deliberation in the law-making process. Hence, either through statutory measures or through judicial interventions there is a desperate need to allow elements of deliberation to become an integral part of the legislative process, commanding legitimacy not only from the Constitution but from the public as well.