

How should we make laws

 newindianexpress.com/opinions/2011/Jul/07/how-should-we-make-laws-269350.html



THE NEW INDIAN EXPRESS

Opinions

UPA did set up the NAC as its link to the people and diagnosed the problem correctly, but prescribed the wrong medicine.

The controversy triggered by Anna Hazare's fast over the Lokpal Bill stirred three important debates. The first debate was the shape that the legal response to corruption in India must take. The second was about the legitimacy of hunger strikes as a mode of protest in a democracy, and the third was on how we make laws, and the role of Parliament, civil society and citizens in the legislative process.

On the one hand, activists like Hazare and Baba Ramdev claim that their intervention is legitimate. On the other, politicians have asserted the primacy of the constitutional framework where the legislative task is entrusted to Parliament and state legislative assemblies. Both sides have a valid point. No democracy can function without vesting ultimate legislative power in certain specific bodies. Subject to constitutional checks and balances, Parliament and state assemblies have the final say in what will be law. This finality is not premised on some supposed expertise of their members. It is instead based on the fact that these members are periodically elected by, and therefore, represent the people.

While we have, on the whole, ensured popular representation, the democratic project is far from over. Democracies should not merely be representative, they also need to be deliberative and participative. A participative democracy facilitates public participation in law-making through consultations, transparency and public debates. Citizens engage with politics on a daily basis, rather than merely to cast their votes in elections. A deliberative democracy follows a system of political decision-making that relies on public deliberation to make laws, which must be justified on 'public reasons'. The requirement of public reasons is that decisions must be justified by reasons that can be acceptable to all citizens, rather than based on sectarian grounds.

Anna's movement represents a democratic deficit in our system which can be cured by greater deliberation and participation, without detracting from Parliament's legislative primacy. Under the current arrangements, the government can draft bills in secret, and get parliamentary approval before the public has had adequate chance to scrutinise them.

Openness and deliberation depend on the magnanimity of the concerned government department. To be fair, the first UPA government did set up the National Advisory Council (NAC) as its link to the people. In doing so, it diagnosed the problem of democratic deficit correctly, but prescribed the wrong medicine. It is true that at least some members of the NAC have proved their expertise in the relevant areas of policy-making over the years. Anna may be incorruptible himself, but his understanding of regulatory structures is far from confidence-inspiring. About the Baba's views, the less said the better.

And yet, the flawed institutional set-up of the NAC entails the same twin dangers as extra-institutional interventions like those of the Anna and Ramdev: the danger from selection and the danger from competing representation. To the question 'Who should make laws?' the founders of our constitution rightly answered, 'The people, through their directly elected representatives'. The question we are asking now is: 'Who should be consulted while making laws?' The answer to this question is: Those who will be affected by these laws, and experts who have special knowledge of the issues involved. Unlike direct elections, however, there isn't any impartial selection process which helps us identify those affected and those with expertise. Allowing power to make this selection may facilitate the elite, corporate and sectarian capture of the state.

To guard against the danger from selection, participation in the law-making process must be transparent, universal, deliberative and institutionalised. Every interested citizen must be able to comment on draft bills, give evidence before legislative committees and offer suggestions. Transparency in the participative process facilitates decisions based on public-reasons rather than corporate or sectarian interests. Officials must be able to demonstrate that they have applied their minds to suggestions: participation without deliberation can easily become a box-ticking bureaucratic exercise. Institutionalisation is necessary to ensure universality, transparency and deliberation. It also generates institutional learning and history, which ad hoc processes like the joint committee on the Lokpal Bill do not. Such an institutionalised participatory process will enable experts and those affected to feed their views into the law-making process, while the danger of elite capture is mitigated somewhat.

The danger from competitive representation is equally pernicious. When Ramdev claims to live in the hearts of millions of citizens, he is claiming representative legitimacy without having demonstrated it in the only constitutionally recognised manner: winning an election. Similarly, a body like the NAC which presents itself as an interface between the state and civil society will inevitably begin to compete with Parliament for representative legitimacy. If our democracy is to survive, elected legislatures alone should be able to claim representative legitimacy. So long as politics — through the universal right to stand for elections — is open to everyone, there should not be any compromise on this principle. Admittedly, there is a strong case for dismantling the barriers of money, muscle and ménage that currently prevent ordinary citizens from entering politics.

The solution, clearly, lies in strengthening Parliament by augmenting its democratic credentials, rather than weakening it by extending legitimacy to competitive claimants of popular representation. The existing legislative process can easily be reformed to require public consultation and deliberation over draft bills, without the need to create parallel systems. We can require that all major legislative interventions must start in public policy documents. Draft bills should normally remain in the public domain for a reasonable period before they are enacted. Parliamentary committees should become more open, consultative and effective.

Such reforms of the existing legislative institutions can ensure that participation in the law-making process is universal, deliberative and transparent. It is in this context that one must welcome the decision taken by the NAC last month to ask its working group on transparency to 'evolve a policy on pre-legislative consultative process'. Ironic though it is, the most important contribution of the NAC to Indian politics will be to chart the path to its own irrelevance. As it scripts its suicide note, we should wish it the very best.

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