Electronic Support for the Legislative Consultation Process: Theoretical Concepts and Practical Requirements

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Abstract: *The paper outlines the theoretical concepts of (legislative) consultation and describes the practical requirements of electronic support for consultation processes. It suggests that new electronic tools, in particular Social and Semantic Web tools, might have a sound potential to increase within civil society the interest in being involved in consultation processes, to improve the quality of argumentation within such processes, and to make more efficient the evaluation of their results.*

Keywords: legislative process, consultation, electronic support, electronic tools, Social Web, Semantic Web, argumentation improvement, results evaluation, e-participation

1.   Theoretical Concepts

1.1.   The Case for Participatory Democracy

With Luhmann, we can see the contribution of the political system to stabilizing the societal system in providing legitimization for the binding decisions that have to be made in order to ensure the framework of communication and interaction of the society's members. If, as it is the case in modern democratic societies, it is the function of the "parliamentary complex" (Habermas, 1992), i.e. the legislative organs in association with the administrative organs supporting them in law-making and usually even initiating legislative processes, to provide legitimization for the rules to be established, what are the options to achieve this aim? Traditionally, this question has been answered by referring to Parliament being legitimized to represent the people by democratic election of its members. The legitimizing instrument of representation has, however, more and more become a target for scepticism; a "democracy deficit" identified by critics of representative democracy has diminished the capacity of the democratic decision-making bodies to fulfil their legitimizing function.

That is why there is and has to be another source for providing legitimization to the norms established, namely referring to opinion-making processes anteceding and accompanying the decision-making process: opinion-making processes involving civil society and basing on interaction between civil society and the "parliamentary complex". This less formalized means for providing legitimization has been described by Habermas as what he calls "deliberative politics", which he defines as the "interplay of the public sphere based on civil society with the institutionalised structures of opinion-making and decision-making in the parliamentary complex" (Habermas, 1992, p. 448, translated by the author). A type of democracy that relies on both columns of democratic legitimization, namely on representation and on "deliberative politics", is what we may define as "participatory democracy".

Democratic participation, i.e. substantial involvement of civil society in the opinion-making processes anteceding and accompanying democratic decision-making, is based on two columns, as well:

- if the initiative towards such involvement is taken top-down, we may call such interaction "consultation";
- if it is taken bottom-up, we may call it "petition".

Needless to point out we are using both terms in a structural meaning, regardless of the labelling of the respective instruments really established: Within really existing constitutional environments, the structural functions of consultation and petition may appear in a wide variety of more or less formalized procedures, under different names. A feature these procedures must have in common, in order to make them appropriate to fulfil their legitimizing function, is what we may call transparency: To make the model of "legitimization by procedure" (Luhmann) work, procedure must not be a "black box"; only if the actors involved in opinion-making and decision-making processes, and those subordinate to the latter's outcome, are able to recognize that the procedural requirements have been observed, they may be willing to accept this outcome, even if they are not in line with its notion. Legitimization, therefore, can only be provided by transparent procedures.

If democratic participation, in accordance with what has been said, is to be considered as the substantial involvement of civil society in the opinion-making processes anteceding and accompanying democratic decision-making, "e-Participation" might be defined as any kind of electronic support for such involvement. Electronic means would, however, be more than just "technical" support: Indeed, since the beginning of the "world wide web era" in the 1990s, a new quality of procedural transparency has been achieved by making procedural information, which until then had only been accessible at a few spots and, in practice, to a few actors, universally available, by providing everybody (availing of the required technical infrastructure) with space-independent access (and, intentionally, time-independent access, as well). A further qualitative step towards democratic participation is to be made by making use of the interactive capacity of the new technologies within opinion-making processes.

1.2. Concepts of Consultation

1.2.1. Definition

We may define "consultation" (as a procedural instrument) as a (more or less) formalized way of obtaining the opinions of the (organized and/or non-organized) public on a policy issue or field.

As a participatory instrument, consultation is to be distinguished from polling (though some authors would include the latter in their respective concept of consultation): Consultation is based on a political decision on the range of the consultees or on free participation, but not on the representative sample approach that opinion polls are applying. Moreover, consultation, as a participatory instrument, is to be embedded in transparency, whereas polling traditionally has often been performed in quite an intransparent manner, including the option of concealing unwelcome results at all. Though administratively initiated, consultation is based on the concept of civic activism, of citizens actively intending to influence policy decisions, and it implies citizens' demands to be informed not only about the outcome of the consultation process, but also about its impact. Let us keep in mind it was the National-Socialist government in Germany that for the first time made systematic use of polling in order to survey people's attitudes, but without any notion of involving citizens in political decision-making!

As a participatory instrument, consultation is also to be distinguished from other kinds of watching people's opinions, as articulated in whatever way: Traditionally, such opinions have been expressed, e.g., orally at party events or at the "regulars' table", or in writing in the "letters to the editor" section of popular newspapers, or in direct mailings to politicians. Though it might be deemed one of the important tasks of politicians to listen to all these expressions of the "people's voice", this is not the kind of intentional, and deliberative, opinion-making process as triggered within a consultation procedure. Needless to mention that the new media are offering a wide range

of new instruments for publicly expressing personal opinions which may be of political relevance, too, such as the "blogosphere".

When trying to classify the types of consultation procedures, we may do so in accordance with different criteria, such as the respective issue to be dealt with, the form in which the consultation procedure takes place, the interests to be involved, and the participants admitted:

- A consultation process may deal with
    - legislative issues (this kind of process is what this paper is focusing on)
    - administrative issues.
- Within a consultation process, opinions may be given
    - in writing
    - orally.
- A consultation process may involve
    - organized interests
    - non-organized (individual) interests.
- A consultation process may be open to
    - selected participants
    - everybody.

Evidently, different combinations and hybrid forms are possible, and would regularly occur in political practice.

Consultation, as defined above, and in accordance with the introductory remarks on political theory, is to complement, but not to replace, representative democracy (and indeed consultation procedures have been implemented in most political systems of representative democracy). That is why the objective of consultation is opinion-making but not decision-making. Thus, even if a voting procedure is included in a consultation process (which may occur in some cases), voting may only be on the outcome of the opinion-making process, as sort of a joint recommendation to the decision-making structures, in order not to leave divergent opinions collocated, though this will be the usual feature at the end of a consultation process.

When in the late 1960s, under the impression of the new social movements of the time (and their lack of impact on the real political decisions made), Sherry Arnstein developed her famous "ladder" (Arnstein, 1969, fig. 2) as a description of the different possible degrees of "participation", she put "consultation" on the fourth of her ladder's altogether eight rungs, thus indicating that to her it seemed associated with a medium degree of participation only. From a "realistic" point of view, however, one might obtain the impression that the lowest and highest degree within her classification, namely what she calls "manipulation" and "citizen control", might easily coincide with each other – les extremes ses touchent.

1.2.2. Objectives and tools

Legislative processes would follow a cyclic procedural pattern:

- Awareness (agenda setting)
- Specification (policy modelling)
- Drafting (normative modelling)
- Consultation
- Deliberation
- Decision
- Promulgation
- Consolidation
- Evaluation

Though within this model pattern consultation is ascribed a particular stage, i.e. the stage of putting draft legislation to consultation with civil society, as it is implemented in most legislative procedures, consultation processes may take place on other stages, too:

- There may, e.g., be two rounds of legislative consultation; even if there is a pre-parliamentary process of this kind, there may be a second one associated with the stage of parliamentary deliberation, which may differ from the first one in its form (it may, e.g., be in the form of a hearing, whereas the first round was performed in writing).

- Whereas traditionally it was draft legislation that was put to consultation, in the past years there has been a tendency towards involving civil society in the very early stages of agenda setting (raising awareness) or policy modelling (specifying the outlines of normative solutions to be developed), as well.

- Evaluating legislation in force, or its execution, is another field for consulting with civil society.

The objectives of a particular consultation process therefore would depend on its setting within the legislative cycle, and so would the decision on what methods and tools to use, and who to involve. If, e.g., at an early stage, the consultation process aims at outlining political agendas or specific policies, the methods and tools chosen are to enhance a more general discussion, if, at the "classical" consultation stage, after legislation having been drafted, the consultation process is to concretely adapt the particular piece of draft legislation, the methods and tools chosen have to zoom in the discussion on the particular draft bill in question; if, in the case of evaluative consultation, the process is aiming to identify possible lackings and deficiencies in the normative model, the methods and tools are to give assistance in surveying and analyzing application cases.

Likewise, the choice about who to consult with would depend: A consultation process aiming at policy modelling might rather involve the general public, whereas the "classical" consultation process dealing with draft legislation often is addressing particular groups able to give "expert" opinions, such as public administrative bodies and organized societal interests (NGOs); evaluative consultation will focus on "user groups" particularly affected by the norm in question. However, it may also be decided to address a particular consultation process to one particular societal group, for reason of strengthening the political involvement of this particular group; thus, most efforts have been taken in the past years to make use of consultation instruments to enhance political engagement of the youth, taking into account that political disengagement of the young generation might contribute to disintegrating the political system at large.

The number of consultation methods and tools is large, and it has been substantially augmented by the new technologies. This is only a non-exhaustive listing:

- An in-depth consultation process, in particular when aiming at improving the way of drafting a particular piece of legislation, traditionally has been conducted in writing, mostly by submitting the piece of draft legislation in question to the consultees and obtaining written comments. Whereas in former times this was done by letter mail, meanwhile mostly "snail mail" has been replaced by e-mail, and the documents exchanged are being produced by electronic text processing. Nonetheless, these documents mostly still would be "non-intelligent" Word or pdf files, not making use of structural or even semantic mark-up.

- The exchange of documents nowadays might also be supported by a portal solution, providing an overview of ongoing consultation processes, facilitating the mapping of documents (but at the document level only, not going deeper into their content), and even supporting the process of writing comments by making available additional explanatory resources. Thus, through its additional functionalities, a portal solution is more than just replacing paper and letter mail by electronic documents and delivery.

- Oral consultation traditionally has taken place in the form of two different structural patterns, which we may call the "meeting" type and the "hearing" type. The "meeting" type, as well-represented, e.g., by the famous "town-hall meetings" in the old New England local communities, would potentially involve all members of a particular community, in whatever way defined (though it best fits the municipality type of community) and give them the opportunity to freely exchange opinions, whereas the "hearing" type, as well-known, e.g., in the form of the "parliamentary hearing", would involve selected individuals only (mostly selected for reason of personal expertise and/or of representing organized interests) and would restrict the discussion to the agenda set by the body organizing the hearing, or even to questions put by its members. Mixed types, of course, would occur.

- The new media, of course, have made available instruments supporting, or rather acting as surrogates for oral consultation methods, as well. Web conferences, or "webinars", may be held instead of meeting in person, thus enabling people to meet, or orally present their opinions, even over a distance in space, while at the same time making use of the information capacity of the electronic media to improve their respective argumentation.

- The new media, however, are also offering a lot of new "intermediary" instruments overcoming the separation of oral and written consultation: A chat, e.g., would, as to the depth of argumentation, resemble an oral exchange of opinions (even though most people are typing more slowly than they would be able to speak, so that argumentation might even be somewhat more reductionist), but indeed it is in writing; participation in a chat is space-independent but not time-independent, though the archived record may be accessed time-independently. Another main group of the new instruments, the forum or bulletin board type of discussion support, is based on written exchange of opinions, as well, but is to allow deferred reactions to contributions, thus making participation in the discussion time-independent, too. By providing the debaters with more time to prepare their contributions, such tools might also enhance the quality of argumentation, though in practice this is not always to be observed.

- If a discussion is aiming at jointly formulating a text, the wiki type of software designed for the purposes of information management seems to be more appropriate than a forum: Whereas forum discussions, even if moderated, are rarely leading to results agreed upon, the wiki starts from a draft text and, in a well-documented and transparent manner, would promote further development of said text, until the text being accepted by the participants in the wiki process. However, whereas there are lots of fora being used within consultation processes, so far there have been just a few experimental cases of wiki use.

2. Practical Requirements

2.1. Processes to be Supported

Participatory democracy, as outlined above, is characterized by the involvement of the (organized and non-organized) public in opinion-making processes anteceding and accompanying political decision-making, civil society thereby substantially influencing the political decisions made, which usually would assume the form of legal regulations. Participatory processes in the narrower sense of the word may be called "consultation" if the initiative is taken by government and "petition" if it is taken by civil society. These terms, in this connection, are used in an abstract meaning, whereas the really existing procedural instruments within different political/legal systems may be labelled differently.

Whereas legislative petitioning, due to most members of civil society lacking legislative drafting capacity, usually will be done in the form of legislative suggestions but not of well-formed and professionally formulated draft regulations, even though in exceptional cases it would also take on such form, legislative consultations, the other way round, regularly would be initiated once a particular piece of draft legislation has been formulated; indeed, in most European political systems there is a formal consultation procedure to be followed, which would offer at least the organized interests but in many cases the individual citizens, too, an opportunity to comment on the respective draft regulation sent out by the competent body (i.e. usually an administrative body like a ministry, but in some cases a parliamentary body) for public consultation.

For preparing such a comment, some knowledge of the subject matter but also of legislative drafting technique and legal language would be required. That is why in such processes, when it comes to effectively formulating comments on draft regulations, organized interests availing of expert staff will always have an advantage over individual citizens. Moreover, consultation processes of this kind will in advance delimit the argumentation space: once a detailed regulatory model, in the form of a piece of draft legislation, has been developed, argumentation will have to reflect on this particular model, by supporting it, or by opposing it, or even by formulating alternatives, which however always would refer to the model at the outset.

Thus, this type of consultation procedure, which always will play an indispensable role within legislative processes, may be complemented by another type that might be called "pre-consultation" because it would take place at a very early stage of the legislative cycle, at a stage in advance of a concrete regulatory model being developed. At this stage, consultation would not yet concern a concrete draft regulation but a general outline that might be called "policy", which only then would have to be concretized in a formal regulatory model. At this stage, the argumentation space would, of course, be much wider yet, because the starting point was located on a much more general level, being, e.g., a general question about the regulatory demands in a specific policy field. On the other hand, evaluation of the results of such a "pre-consultation" process would be more difficult, too, since there was no formal structure to be followed, like that of a detailed regulatory model, which the comments would refer to. The statements made in such a "policy modelling" process would rather cover a wide space of different options, and working out the structures of such space would require some effort.

Anyway, processes of the latter kind, for the time being, are less wide-spread than the traditional consultation processes dealing with particular pieces of draft legislation; however, they may gain more importance in the future, with civil society increasingly demanding to obtain more substantial influence on policy-making.

Any framework or system to support consultation processes, therefore, will have to support both fundamentally different process types, with their different functional requirements:

- the more common consultation processes proceeding from a formalized regulatory model, i.e. a piece of draft legislation, and
- "pre-consultation" processes devoted to "policy modelling".

2.2.   The Users

Within the framework of participatory democracy, it is the interplay between government, or (in Habermas' terminology) the "parliamentary complex", and civil society that keeps alive its specific dynamics. Based on this concept of interaction, we may distinguish between three different kinds of users, with their different needs and demands to a future tool, which we may call an integrated consultation platform:

The administrative users will be the public bodies responsible for maintaining consultation processes, and operating the platform or system to support these processes, or, on an individual level, the officers performing the respective administrative functions, on behalf of their respective authorities. Their particular advantage in applying an integrated consultation platform will be in the replacement of tasks so far to be performed intellectually by automated tasks, first of all by the automatic generation of a synopsis of the well-structured comments provided within a legislative consultation process, and above that by support in the content analysis of (larger numbers of) comments, or of statements made within a policy modelling process.

The participative users will be the institutions and individuals involved in consultation processes, i.e. being entitled to submit their comments to draft regulations put to consultation, or to make policy statements within "pre-consultation" processes. Since institutions like public authorities, chambers, trade unions, etc. have other requirements, in particular with regard to supporting their regular internal decision-making processes (to be perceived as workflows), than individual citizens, who would rather need support in ad-hoc associating themselves with others within a drafting process, an integrated consultation platform will have to offer different functionalities for supporting

- institutional and
- individual (participative) users.

Thus, the three fundamentally different roles of users to be defined will be:

- the administrative user,
- the institutional participative user, and
- the individual participative user.

From the perspective of user requirements, in particular as to different information needs, there may also be made another but related differentiation:

- The expert user will be someone directly involved in legislative processes or at least aware of their procedural framework, and will have some knowledge of legislative drafting technique as well as the respective substantial matter in question. Such a typical user may be a legal expert of public authorities or of organized interests (NGOs) commenting on draft legislation. Expert users would regularly be aware of important repositories containing resources for arguing against or in favour of a particular regulatory model, but would nevertheless need support in putting together and evaluating relevant material from different repositories, or, more generally spoken, different sources.

- The non-expert user will be someone interested in contributing to policy modelling, or in commenting on draft legislation, but will not be aware of most of the procedural features in the underlying legislative processes, or of legislative drafting technique. This non-expert user may be an individual citizen but may in some cases, e.g., also be responsible for legal issues within a (less well-equipped) NGO. Citizens may be seen as a very diverse user group with regard to their respective knowledge on specific topics, but they may generally be deemed non-expert in legislative processes and legislative drafting technique. Thus, they would need much more basic information support in how to deal with legislative drafting, and in getting access to the existing legal framework which the respective piece of draft legislation is to be embedded in.

Thus, when mapping the two user concepts, they would be partly but not totally congruent. In particular, there will not be full congruence of institutional participative users and expert users on the one hand, as well as individual participative users and non-expert users on the other hand: In most but not all cases institutions will employ experts to deal with commenting on draft legislation, and in many but not in all cases individual citizens interested in commenting on draft legislation will not have expertise in legislative drafting. Thus, whereas the functional workflow requirements of institutional and individual users will clearly to be separated, the information requirements may be overlapping. That is why an integrated consultation platform to be developed will have to offer opportunities to combine different role aspects, e.g. to combine the use of the workflow functionalities of the institutional user with different levels of knowledge management facilities.

2.3. Technical Functionalities

2.3.1. Structure

In order to better structure the opinions given in the course of a consultation process, it will be required to already embed the draft regulation, in the case of a "classical" consultation, in a structure-oriented format; XML is the obvious choice (though in case of using semantic mark-up the XML structure will just be sort of a subset of the RDF/OWL representation of the document). XML would allow automated structuring of a template to be provided for formulating and submitting the comments in accordance with the structure of the draft (though general comments will have to remain admissible, too), thus enabling the automated generation of a synopsis of the various comments given (or subsets to be specified). Writing such synopsises currently is one of the main tasks of administrative staff responsible for operating consultation processes, and it is quite a time-consuming one. Such a synopsis, however, is a necessary instrument for political decision-makers to evaluate the results of a consultation process, and to prepare the political decision on to what extent suggestions made in the course of said process are to be followed.

Structural functionalities, however, also might improve the quality of the process itself, and the substantial quality of the comments, by supporting access to accompanying material, in particular by linking the structural elements of a draft bill to the respective sections of explanatory notes, and a text concordance, if provided. Finally, such structural functionalities would enhance providing structured feedback (if there is political readiness to give feedback at all), and thereby improve the quality of process responsivity.

2.3.2. User Interface

As long as processing XML files would require generic XML processing capacity, there might be a client-based or a server-based editing solution, or a user interface substituting the structural functionalities, i.e. a web application allowing to assign the comments (or, more specifically, narrative comments as well as possible alternative text proposals) to the related structural elements of the draft regulation. Even in case of a "pre-consultation" process, the user interface will have to aid the participative users with keeping clear the progress of discussion, and thereby the administrative users with keeping it manageable.

Needless to stress that "usability" is of utmost importance to any interface of the kind, thus lowering participation thresholds. Within the framework of the portal functions available through the user interface, not only technical aids but also knowledge resources may be made available.

2.3.3. User Services

In accordance with the different groups of users identified, user management will be performed: Whereas usually there will be a user register at least for the institutional participative users, which will regularly participate in consultation processes and therefore be assigned specific user rights, it will depend on the legal framework and on political decisions to be made in what way to manage

the individual participative users, in particular whether they will be admitted and/or assigned particular rights (like that of writing comments) only on the basis of personal identification; privacy protection requirements, of course, will have to be taken into account anyway. For institutional users, an actor/role concept will have to be established, which, e.g., will offer the option of separating different functions like those of drafting and of authorizing comments. Moreover, the internal workflow processes of the institutional users in the course of drafting comments might be supported, too.

Special attention will have to be paid to the needs of the individual participative users when it comes to collaboratively writing comments: Whereas institutional users avail of expert knowledge traditionally advantaging them over individual citizens within policy-making, the latter might compensate for their lack of individual legal expertise by collaborating in such processes, or more specifically by associating in an ad-hoc network and combining their respective individual knowledge, thus generating what James Surowiecki calls the "wisdom of crowds" (Surowiecki, 2004). Social Web tools, like wikis, might support such ad-hoc networking of individual citizens separated in space and time but joined by a common basic approach towards a particular policy matter, and thereby enhance developing comments in an equally discourse-oriented and efficient way.

2.3.4. Semantic Tools

If the mark-up of draft legislation was not restricted to structural but would include semantic features, discussion might be enhanced and commenting facilitated by promoting the "understanding", i.e. the interpretation, of the respective draft regulation, e.g. by resolving the implicit references contained, to start with. Doing so in an automated way would, however, require a considerable extent of semantic coverage of the legal system.

Semantic tools made available to the participative users would support access to relevant (online) information resources, such as documents available within legal information systems and popular (life event oriented) educational sites, or political party or mass media sites, and thereby help defining one's own position towards a policy issue or a piece of draft legislation, and even help improving the quality of argumentation. To that end, specific argumentation support systems aiming at rectifying the structure of argumentation might be used, too[1].

Semantic tools available to the administrative users would support the automatic clustering and evaluating of less structured or even non-structured comments, this being a functionality that might be of particular importance in case of large-scale policy modelling processes, with large numbers of opinions provided. Methods to be applied might include, e.g., knowledge discovery and text mining, while visualization methods, like structuring opinions within topic maps, might be used to provide decision-makers with a quick overview of the public opinion landscape.

3. Conclusions

Between representation-based autonomy of the legislature and the need for material legitimization of legislation, consultation has a double mediatory function:

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[1] Usage of such systems is discussed (and promoted) by Macintosh, Gordon and Renton, 2009. In this connection, I remember a vivid discussion with Tom Gordon, one of the co-authors of the paper, at IRIS 2006 about whether democratic decisions ought to be rationally based rather than emotionally based, and I feel free to summarize my position as follows: If democratic decisions were to be based on what might be called rationality of argumentation only, it might be difficult to argue for the "one man, one vote" principle elementary to the concept of modern democracy, whereas this principle more easily can be argued for by ascribing an equal political will to everybody, regardless of education, knowledge, intellectual capacity and even rhetoric skills facilitating "rational" argumentation within decision-making processes. Moreover, there are different kinds of rationality, and behind a "rational argumentation" model there is often hidden a concept of something like a "bonum commune", of maximizing the benefits for the community (but for what community, e.g. a local, regional, national, European, or global one?). Nevertheless, there are other rationalities, too, like that of individual benefit, or that of the benefit of a societal group of any kind, and any individual or group interest may be tabled and pursued politically. Finally, a compromise is to be reached, and its acceptance will be the greater the more it is also borne emotionally.

- Its "information function" enables law-makers to optimize public acceptance of legislation by exploring the societal interests.
- Its "legitimization function" provides legislation with additional "legitimization by procedure" through involving civil society in the law-making process.

An integrated consultation platform will have to support mass cooperation and utilizing shared knowledge in formulating policy principles as well as more detailed comments on draft legislation; at the same time it will enable public administrations to efficiently keep track of public discourse on policy issues and its outcome, and to integrate the latter within draft legislation. Thus, it will also facilitate transparency of policy-making by making traceable the way of arguments and political positions in the decision-making process. In supporting interaction and dialogue between societal groups and individual citizens, on the one hand, and between them and governmental structures, on the other hand, it will take into account the requirements of security and identity control, as well as the needs for privacy.

An integrated consultation platform will include tools

- making available relevant public knowledge resources, and facilitating the sharing of knowledge, in the processes of policy modelling, as well as drafting comments on draft legislation,
- empowering co-operative action in these processes aiming at producing aggregated and well-structured opinions,
- providing the public discourse with a more transparent setting by visualizing the distribution of arguments and opinions, and
- structuring the outcome of policy modelling and consultation processes in a way enabling government to process and take into account even large quantities of contributions from civil society's side.

Thus, new electronic tools, in particular Social and Semantic Web tools, show a sound potential to increase within civil society the interest in being involved in consultation processes, to improve the substantial and even the formal quality of argumentation within such processes, and to make more efficient the evaluation of the results of consultation processes, which in the end might even increase their impact on political decision-making.

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