

Interrelation and Distinction between Legislative Drafting and Policy

Arjun Kumar Khadka, PhD*

Abstract

Drafting is part of the legislative process, which in turn is part of the policy process. It is even sometime compared or linked to a child's game of Snakes and ladders. Snakes and ladders are game of chance where legislative drafting is game of skill. Moreover, legislative drafting requires abundance of knowledge of the language, grammar, and the technical requirements of the form of legislation and perform the task in a non-partisan manner and keeping totally away from political controversies. On the other hand, a policy relates to government goal for achieve the methods and principles. But, policy document is not a law. Thus, policy sets out the goals and planned activities of a concern ministry and department, while laws set a standard procedures and principles that must be followed. If a law is disregard, the violator will punish as prescribed by the laws. Therefore, law is binding and mandatory compared to policy, which means that legislative process is more valuable in practice.

Keywords: Legislative, Legislative Drafting, Law Making Process, Policy

1. Introduction

Legislative Drafting is the process of constructing a text of legislation. The classification of a form of text of binding value as legislation is outside the scope of legislative studies. It must be distinguished from legal drafting, which involves the construction of a text used in the judicial process. It is a narrower concept to the civil law equivalent of law making. It is a constitutional issue and a part of the legislative process which in turn is the policy process (Stefanou & Xanthaki, 2008).

Drafting is part of the legislative process, which in turn is part of the policy process. It is even sometime compared or linked to *a child's game of Snakes and ladders*. Legislative drafting from sheer necessity due to well run the governing system of the country, the state activism led every aspect of human life. The state has to run with those need of the people, it has to carry functions to maintain peace and order, it has to protect weaker section of the society, it has to undertake trade and commerce, it has to run different system, security, health, education etc. All the functions of the state

* *Joint Secretary (Law), Ministry of Finance*
Email: khadka.arjun@gmail.com

become possible only by making law that is why legislation is necessary in every aspect of human life to every country. In fact, legislation is the source of law.

On the other hand, policy is government statements of what it intend to do or not to do. It is a more specific term, which refers to a long series of actions carried out to solve societal problems. Moreover, policies can be conceived of as the main output of political system. Likewise, a policy is a set of principles to guide actions in order to achieve a goal. So, a government policy describes an objective or course of action planned by the government on a particular subject.

The fact is that government may propose a new law or piece of legislation to give legal underpinning to some or all of a policy. It shows that legislative drafting and policy is interrelation. Similarly, a policy is a course or principle of action adopted or proposed by an organization or individual. Legislation sets out the law and therefore, the procedure or standard that people and organizations must follow. All new legislation must go through parliament before being passed into law. Thus, legislative drafting and policy is distinction in term of adoption and its nature.

The term legislation may be used in the wider and narrow sense. It may connote process of legislation that is the action, which results in the birth of law through Parliament procedure similar to other common law countries. Nepal has adopted common law practice in drafting, example of common law countries are United Kingdom, Australia, India, Bangladesh and Pakistan etc., which allows legislators to enact flexible statutes, instead of making complex legislation with difficult combination of facts and laws on a particular issue, as gaps can be filled by judges. Moreover, legislative drafting and law making process is in Nepal, similar to common law countries.

In this article, mostly deals about legislative drafting and policy issues including interrelation and distinction between policy and legislative drafting. Also, this article addresses the fundamental cause for legislation and basic tools for policy and drafting..

2. Legislative Drafting

Legislation is the means of carrying out a policy that must have the force of law. Policy is, however, a government's response to an issue or problem arising within the State it governs. On the other hand, legislative drafting is a general connotation, which means putting one's own ideas in writing. It is a matter of an art and requires greater skills and efficiencies. Also, it requires through knowledge of law, procedure, settled judicial principles, besides proficiency in concern language. Bentham's who derived the modern theory of legislative drafting in practice (Harvard Law School).

Former President of United State of America, Barack Obama stressed "A good compromise or good piece of legislation is like a good sentence. Or a good piece of music. Everybody can recognize it" . Napoleon Bonaparte stated that "A law should be clear, precise, and unambiguous- interpreting it means allowing distortion. A famous law maker C.W. Cream said legislative drafting "Genius is the ability to reduce the complicated to the simple".Sequentially, Winston Churchill said "Broadly speaking the short words are the best, and the old words when short are best of all " (Segal,2011). All these thought show that legislative drafting is varying task and widely concern with various affairs. The goal of a legislative drafting mainly two:

- To create legislation that gives legal effect to government policy and
- To communicate the law clearly and effectively.

Basically, legislation would comprise following two things:

- Acts passed by Parliament, and
- Subsidiary legislation, which are made up of rules, regulations, orders, notifications, proclamations and declarations which have legislative effective.

Finally, legislative drafting is primarily a technical exercise, which involves converting established policies and legislative objectives into a legal document.

3. Policy

Policy making is the first step in the legislative drafting, and one of the most important. So, Laws must be designed from the start to solve or prevent problems, by implementing policies in the form of norms (concerning what target groups must do, must not do or may do, under carefully defined circumstances). While policies originate in the government program, they must be refined in the context of specific laws. This is a complex process, with four stages, identifying the problem, analyzing and explaining its causes, proposing alternative solutions, and selecting the optimal one(s). The initiators or proponents of legislation have a crucial role to play in the process, in close cooperation with legislative drafters, who responsible for converting policy into law.

In fact, policy is a course of action adopted and pursued by government (Henery, 2007). It is a set of principles to guide actions in order to achieve a goal. A government policy therefore describes an objective or course of action planned by the government on a particular subject. Policies are usually developed by a government ministry, for instance ministry of water supply adopted water policy. Likewise, the processes of making laws and policies are in the different spheres of government. Opportunities for the public to participate in these processes are also identified. There are the following four steps for developing policy (Segal, 2011);

- Identifying the problem,
- Analyzing and explaining the causes of the problem,
- Proposing multiple solutions to the problem and
- Selecting the best solution(s) to the problem

Practically, making new laws and policies is usually a very slow process involving a number of stages during which key issues are debated and negotiated before being finalized as official government policy or before being passed as a law. It can take a few years before a proposed law or policy is implemented and before its impact is felt on the ground. Equally, government and parliamentary structures as well as the different branches of government all play very important role in this regard because policy and law are perceived, analyzed, and understood (Segal, 2011).

Additionally, Parliament constitutes the quintessential institution of democracy, in large part because it is the institution that most directly represents citizen preference in the political process. Despite this centrality, scholars of Parliamentary system have traditionally assigned legislatures only secondary importance in the policy process, arguing that major policy decisions are taken at the cabinet level rather than in the parliamentary arena (Lever and Shepsle, 1996). To the extent that scholars have argued for the policy relevance of Parliaments. They have done so primarily in the

context of opposition influence, arguing that strong committee systems can provide opposition parties with influence over government- sponsored legislation.

The elaboration of a policy proposal during the drafting process may produce a legislative scheme that those circumstances, further, second- level policy verifications may be appropriate after a draft is completed. Those verifications may also be needed for the purposes of completing the justification that typically accompanies primary legislation. Moreover, a policy relates to government goal for achieve the methods and principles. But, policy document is not a law.

4. Distinction Features between Legislative Drafting and Policy

Considering all these things drafting and policy have some distinction feature in practices, these could be mentioned as follows;

S.N.	Policy	Legislation Drafting
1	A policy is a course or principle of action adopted or proposed by an organization or individual.	Legislation sets out the law and therefore, the procedure or standard that people and organizations must follow.
2	Policies may also be adopted as a way of fulfilling legislative commitments.	Law after adopting legislation as laws can be used to enforce of action as set out within a policy.
3	Policies tend to evolve and adapt over time under review processes.	New laws may be developed to enforce part of all of a policy.
4	Policy may be shorter such as policy of COVID-19 in the context of Nepal.	Laws tend to be fixed for much longer periods of time.
5	Policy can review or amended within a short period.	Laws can be amended but this happens on a much less frequent basis.
6	A policy outlines what a government ministry hopes to achieve and the methods and principles it will use to achieve them. It states the goals of the ministry.	A policy document is not a law but it will often identify new laws needed to achieve its goals.
7	In the legal term policy is moral question and not creates a legal obligation.	Legislation set out standards, procedures and principles through law and that must be followed. For example, if a law is not obeying those responsible for breaking, they could be prosecuted in court.
8	Policy sets out the goals and planned activities of a ministry and department.	It may be necessary to pass a law to enable government to put in place the necessary institutional and to achieve their aims. Laws must be guided by current government policy.
9	A policy is a course or principle of action is proposed by an organization or individual.	On the contrary, legislation sets out the law and therefore the procedure or standard that people and organizations must follow.

S.N.	Policy	Legislation Drafting
10	Policy is a new pioneering in particular areas.	Laws can be used to enforce the course of actions as set out within a policy.
11	Policies may also be adopted as a way of fulfilling legislative commitments.	However, new laws may be developed to enforce part or all of a policy.
12	Policies tend to evolve and adapt over time under review processes.	Laws tend to be fixed for much longer periods of time. Laws can be amended but this happens on a much less frequent basis.

Finally, this is better appreciated when one imagines what happens in a lawless society- chaos, jungle justice, survival of the fittest. The mere facts that, legislation exist, the citizen know and machineries are established by it, law and order are easily maintained. Crabbe states government needs legislation, and it needs well drafted, readable and understandable form. Hence, legislative process is more valuable in compared with policy (Crabbe, 1993).

5. Fundamental Cause for Legislation

Not all policies require legislation (Cheu, 2003). Not all policies must have legislative effect or the force of law. Law should be used to carry out policy when it is most appropriate. Law- making is an expensive and time- consuming business, involving several human resources, hours of personnel from many agencies, ranging from the Cabinet to the concern ministry and department officials. Then, there is the time taken up in Parliament. There are also the printing and paper costs involved in publishing and printing legislation. At the final, there is the running cost of enforcement and ensuring compliance with the legislation.

Policy authorities should therefore carefully analyze all alternatives and be satisfied that no other ways are available to achieve the policy objectives effectively before they embark upon a legislative proposal. Points to note as follow(Cheu, 2003);

- (i) do not employ legislation solely to give publicity to any particular policy,
- (ii) Assess all subsisting laws and administrative processes for their adequacy to implement the policy. Take a whole of government perspective. Be prepared to consider laws administered by others,
- (iii) Consider how much legislation is actually required. While legislation may be needed to establish the legal framework for the new policy, not all details of the policy need to be legislated, and
- (iv) Consider non-legislative measure to implement policy where these are appropriate. It is perfectly acceptable for policy to be implemented through a combination of legislation and such alternatives.

6. Basic Tools for Policy and Legislative Drafting

There are certain essential instruments and tools in term of policy and legislative drafting process. These should list as follows;

Policy Drafting	Legislative Drafting
Recognized Problem.	Depend on Constitution and Rule of Law.
Agenda Setting.	Based on government policy.
Policy Formulation (known as Ex-ante).	Judicial decision as a guideline.
Decision Making.	Obligation of International Convention, if state is party and Intentional practice.
Policy Implementation.	Boundary on economic, social, custom and culture.
Policy Evaluation.	Parliament Acceptance (Bill passed).
Ex-Post of policy.	Act Implementation and post legislative scrutiny.

Furthermore, policy is the general principle by which a government is guided in its management of public affairs (Black's Law Dictionary). It is a means through which government usher in charge of any kind therefore, policy is the starting point for government to adopt a line of action (Daud,M.,2018). Basically, when governments adopt a policy, it has no effect until it is implemented and one of the major means through which that is done is through legislation. As Crabbed noted, government policy motivates legislation. The legislation policy expressed in an Act is first determined and settled by the government (Daud,M.,2018).

The policy processes, however, are stages a policy must go through to be complete. The stages are policy initiation, policy formulation, policy implementation, policy evaluation and policy decision (Stefanou and Xanthaki, 2008). Traditionally, the role of the drafter was restricted to policy formulation which covers the drafting process and the legislative process but because of the drafter skills, expertise and analytical mind, the need for a drafter outside the policy formulation stage has become increasing necessary (Stefanou and Xanthaki, 2008) .

Finally, fundamental legislative principles are an evolving set of principles for a representative democracy and fundamental rights of individuals established by the the basic law (which is the constitution) and is subject to the rule of law. Hence, the development of legislative proposals by government is constrained by various principles that underline a representative democracy with fundamental rights founded on the rule of law.

7. Legislative and Policy Actors

In modern democracies mostly valuable decisions are taken by politicians compared to the civil servant. The cause is that politician is elected from people so that they are sovereign and representative of citizen. On the other hand civil servants are limited authority and they need to follow rule as given. However, due to citizen mandate, politician has power to break the rule and formulate new legal frame.

The regular public administration is depended on civil servant, and they have limited authority, the authority is given by the politician through law. It means that unelected civil servant has not power to make law. So here comes the difficult question is that legislation task is depended on politicians or bureaucrats or both? The obvious answer is that it is the job of politicians but as we analyze and qualify what we mean by legislation the answer becomes more difficult to answer with certainty.

The cause is that only members of parliament has right to table a draft in Parliament. However, it is clear that such drafts tend to be of low quality. Very few, if any, politicians have had training in drafting legislation and drafting long and complex Bills is not really a task suited to untrained politicians. For example, even in the US, where legal aides are used to translating the wishes of parliamentarians into specific bills, it is those members of the Congress or the Senate who employ professional drafters who tend to produce “quality” proposals.

On the other hand, in the common law tradition, producing legislation is a joint task. The government (ninety percent of all bills originate from government) and the civil service join forces to produce legislation, each with their own professional tasks with parliament being the ultimate decision maker. So, the rule of thumb position is that policy belongs to the politicians (certainly initiation of policy), law to the lawyers and decision making to parliament. In contrast, the civil law tradition tends to see legislation as a continuous interaction between politicians and bureaucrats because the roles are not distinct. In many civil law jurisdictions legislation is produced by drafting committees which include bureaucrats, politicians, academics and even judges. Considering all jurisdictions the government is the main legislative and policy actor in broad sense (Costain and Costain).

8. Conclusions

Legislative drafting relates to making a draft of something. Drafting a document would imply making a rough copy of a document. Drafting requires knowledge of law and required ability to deal with abstract concepts and presence of mind, while policy is different thing, but policy is the guideline for the legislative drafting. In practice, legislative drafting and policy both have interrelation, and also distinctive nature. Basically, two type of legislation such as primary and secondary, while policy has various types such as regulatory, distributive and redistributive. Moreover, policy has also some cycles like agenda setting, policy formulation, policy adoption, implementation and evaluation. In this line, legislative drafting and law making has some similarities and distinctive. So, concern agencies need to work smoothly for harmonious and better solution for better legislation drafting and policy process.

In addition, legislative drafting is connotation and putting one's own ideas in writing. It is an art, greater skills and efficiencies. It requires through knowledge of law, procedure, settled judicial principles, besides proficiency in language. It is a part of the plain language, a form of communication and architecture skills. In legislative drafting, the words used must be simple, clear, accurate, consistent in style and free from ambiguity including efficiency, precision, and language gender neutrality. In fact, the process of legislative drafting is a lengthy, complicated and time-consuming one, and needs to follow certain process. One the other hand, policy deals a set of ideas or a plan of what to do in particular situation that has been agreed to officially by a group of people, a business organization a government or a political party. So, legislative drafting is seen as "Policy Translating".

Finally, policy tends to evolve and adapt over time under review processes, while laws tend to be fixed for much longer periods of time. Laws can be amended but this happens on a much less frequent basis. Furthermore, government is monitored and scrutinized by parliament, meaning all

new legislation must go through parliament before being passed into law. Parliament also scrutinizes existing legislation, government policies and their results. It means that legislative drafting and policy both are interrelation and distinction in nature. For instance, a draft piece of primary legislation is called a bill. When a bill is passed by parliament it becomes an act of parliament and part of statute law. The process by which a bill becomes an act will be covered in a separate policy guide. Thus, all these things show that legislative drafting and policy are interrelated and dependant. It means that drafting could not possible without policy and policy also not possible to implement without legal frame.

References

- A Guide to Legislation and Legislative Process in British Columbia (2013). *Principles of legislature drafting*, Office of Legislative Counsel, Ministry of Justice Province of British Columbia.
- A. Kiss, et al. (1987). *Law science and environment*. Lancers Books.
- A. Kiss, et al. (1991). *International environmental law*. Transnational Publishers.
- Adrian, J. Brad Brook et al. (2006). *The Law of energy for sustainable development, international environmental law* (fairness and effectiveness and world order). Cambridge University Press.
- Birnie, P. and Boyle, A. (2002). *International law and the environment*, Oxford University Press.
- Costain, W.D. and Costain, A.N.(1981). interest groups as policy aggregators in the legislative Process. 14 Polity.
- Crabbe, V. (1993). *Legislative drafting*. Cavendish Publishing.
- Daud, M., H. (2018). Policy and the drafter, the role of the drafter in influencing the substance of policy. *IALS Student Law Review*, 5 (1), 2-5.
- Government of Samoa (2008). *Legislative drafting handbook, legislative drafting requirements*. Office of the Attorney General.
- Harvard Law School (2016). A Beginner's Guide to Legislature Drafting. *Journal on Lagislation*.
Retrieved from <https://harvardjol.com/2016/10/24/a-beginners-guide-to-legislative-drafting/>.
- Henery, N. (2007). *Public administration and public affairs* (10th ed.), p.223. Pearson, Prentice Hall.
- Khadka, A.,K. (2020). Legislative drafting and law making process: an observation of Nepal, *Nepal Bar Council Law Journal*. Nepal Bar Council.
- Lever and Shepsle (1996). *Politics: General interest, political economy, politics and international relations, comparative politics*. Cambridge University Press.
- Segal, M. (2011). *Legislative Drafting, Principles and Materials*.

Stefanou, C. and Xanthaki, H. (2008). *Drafting legislation: A modern approach* (eds.). Ashgate.

Welch. P., H. (2012). *A brief guide to better legal writing skills*. City Law School. City University.

Xanthaki, H. (2013). Legislative drafting: A new subdiscipline of law is born. *IALS Student of Law Review*, 1(1).