



THE POLICY FORMULATION PROCESS

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INTRODUCTION

- The ideal and recommended position in the legislative process is that policy precedes the formulation of a Bill or any other legislative instrument.
- The importance of developing a policy framework first is intended to amongst other salient features to allow the executors to determine a clear road map, conduct an assessment of the problem and possible solutions, and define the opportunity to be embraced and the modalities or approaches to realize the benefit, prior to proposing the necessary legal framework.

WHAT IS A POLICY?

- A policy is a course or a principle of action adopted or proposed by government, party, business, or individual.
- It is defined by Black's Law Dictionary as "the general principles by which a government is guided in its management of public affairs."
- In the context of legislation, a policy is a document which outlines what a government or an individual aims to achieve for society as a whole. All policies start off as an idea. It may be the idea of a member of the executive, a bureaucrat, legislator, a stakeholder group or an individual citizen.

- Essentially, a policy sets out the goals and activities planned to achieve a certain purpose. Policy discussions resolve whether or not a law is needed to achieve the aims set out in the policy or the most appropriate approach to resolve a problem or embrace the opportunity at hand. For governments, in this case the National Government or County Government, policy-making is the process by which they translate their vision into programs.

LAW v POLICY

- Policy outlines what a government is going to do and what it can achieve for the society as a whole. It also evolves the principles that are needed for achieving the goal. Policies are only documents and not law, but these policies can lead to new laws.
- Laws are set standards, principles, and procedures that must be followed in society.
- While a law is binding and is framed for bringing justice to the society, a policy is framed for achieving certain goals.”

THE CONSTITUTION AND POLICY MAKING

- The Constitution recognizes in several instances the necessity to formulate, debate, approve and implement policies. In fact, Parliament is obligated to discuss and approve a number of policies, for example, the national land policy, economic policy, health policy and several others, mentioned in the Fourth Schedule to the Constitution.
- The Constitution recognizes the need for all arms of Government to engage the public in the formulation of policies. Further, all State organs, State and public officers and all persons are obligated by Article 10 of the Constitution to apply and respect values and principles enshrined therein when making or implementing public policy decisions. These values and principles include inclusiveness, equality, good governance, integrity, transparency and accountability and sustainable development.

WHO INITIATES POLICY?

- Policy ideas may originate from the Executive and the Executive entities, political formations such as parties, business associations, organized groups or individual citizens.
- Any person may originate a policy idea since, according to the Constitution, any person has a right to petition Parliament or County Assembly to consider any matter within its authority. Parliament or County Assembly may, upon consideration, translate the idea into a policy. This may be done by the Speaker referring the matter to the relevant Committee for consideration and action.
- It is always appropriate for the person who originates a policy idea to prepare a policy brief. The brief combines research synthesis and strategy recommendations. It sets down the methods and principles that will be followed in attaining the identified purpose.

PUBLIC PARTICIPATION IN THE POLICY MAKING PROCESS

- One of the most important features of our constitutional framework is the requirement of public participation in governance and other administrative activities - See Articles 10, 27, 35, 118 and 119.
- Public participation as the premise on which devolution is anchored is addressed under section 87 of the County Governments Act (“CGA”) which among other things provides for—
 - (a) access to information and data relevant to and related to policy formulation;
 - (b) reasonable access to the process of formulating policy and other government programs;
 - (c) protection and promotion of minorities within counties; and
 - (d) recognition of non-state actors in formulation and implementation of policies.

CONSULTATION WITH AFFECTED STATE ENTITIES AND ACTORS

- Consultation in the process of policy making is critical. The idea here is that problems to be addressed or opportunities to be embraced may be interrelated thus requiring solutions and input of various State and non-State actors. To this end, the Government and its entities must work as a whole. Consultation ensures that all affected entities or persons likely to be affected by the policy contribute to the process in its formative and influential stages for value addition and to avert possible delay, fiscal and other implementation constraints. That the Constitution underscores this principle of consultation cannot be overemphasized.

FACTORS TO CONSIDER IN THE POLICY MAKING PROCESS

◦ The policy maker must consider the following—

(i) Necessity to formulate a policy based on a need, emerging or possible change that may be anticipated (commonly known as the needs- based analysis);

(ii) How the proposed policy will be managed and resourced from formulation to the point of implementation. This includes the personnel and specialized resources necessary for the full implementation of the policy;

(iii) The time it will take to formulate the policy, work out its means of implementation and factor in the period it may need to develop the enabling legislation if necessary;

- (iv) Information requirements for the full understanding and implementation of the policy. In other words, analytical information on the situation if available, official surveys and data on population and other factors form a necessary background to policy formulation;
- (v) Pay attention to the model and process of devolved government as a requirement of policy initiatives;
- (vi) Public participation, debate or input as a new variant in the policy arena and a consideration of where and how to involve the public in developing policy;
- (vii) The principle of subsidiarity: meaning that policy development must be devolved to those at the frontline of service delivery. For example, in addition to involvement of the executive at the national or county headquarters, the other officers in the departments thereunder should also have a say in policy formulation;

(viii) The practical aspects of policy implementation;

(ix) The connection between the expected outcomes (goals) and public policy. For example there is need to balance the sustainability of the ecosystem of a lake and the policy regulating access and fishing;

(x) Tailor the policy framework to local needs by ensuring the policy answers to local questions and dilemmas and is not an imposition from outside the community. For example in developing a Wildlife Policy, communities in surrounding areas must be consulted to propose solutions that are best suited for the area;

(xi) The constitutional and legal underpinning and authority for whichever level of government to initiate the process of policy formulation; and

(xii) The functional assignment to the two levels of government.

SALIENT FEATURES OF A POLICY FRAMEWORK

- A policy framework should amongst others reflect the following features—
- (i) Be forward-looking, that is, it must have a long-term view of the problem and offer a long-term solution;
- (ii) Benefit from the experience of others who have resolved similar situations;
- (iii) Seek new solutions to old problems by being clear on objectives and outcomes;
- (iv) Be based on a study or current analysis of the problem at hand;
- (v) Offer an inclusive solution to all the segments of the community in which it will be implemented;

- (vi) Fit into the current policies being implemented by other agencies;
- (vii) Borrow from best practices and learn from implementation mistakes and successes elsewhere;
- (viii) Must have an in-built communication strategy for dissemination to the public and all stakeholders;
- (ix) Should have evaluation and review mechanisms as one of its features; and
- (x) Provide a pre-legislation impact assessment statement

POLICY FRAMEWORK

◦ Therefore, a generic policy framework must comprise—

1. Introduction; 2. Situation analysis;
3. Challenges or problem or issues to be addressed;
4. An analysis of the existing legal framework, including international law governing the matter, if any;
5. Strategies for its implementation;
6. Actors or stakeholders including their roles and responsibilities;
7. Targeted audience and their role and obligations;
8. Monitoring and evaluation mechanism; 9. Review measures;
10. Conclusion and way and way forward; and
11. Provision of a legal instrument to for its operationalization

POLICY APPROVAL

- The Constitution recognizes not only the role of the National Government in policy formulation but also as executive responsibility at both levels of Government
- A policy framework must at the national level be proposed or sponsored by the respective Cabinet Secretary, approved by the Cabinet, passed by Parliament, adopted as a Sessional Paper and finally assented to by the President. The Sessional Paper is then numbered and published.
- A County Government may, pursuant to the functions assigned to it under the Fourth Schedule, formulate and adopt a policy. Such a policy must be proposed or sponsored by the respective County Executive Committee Member, approved by the County Executive Committee, debated and passed by the County Assembly in accordance with the Assembly Standing Orders, and assented to by the Governor. Similarly such a policy document may be published by the County Government.

- It is important to note that although members of the public, private sector, professional bodies, Civil Society, Non-Governmental Organizations (NGOs), Community-Based Organizations (CBOs), Faith-Based Organizations (CBOs) and International Development Partners may propose and even facilitate the formulation of policies, such policies may be adopted or implemented only if the above processes of adoption are strictly adhered to.
- It is incumbent upon the Executive to streamline public involvement in this process. As already evident in many judicial decisions, absence of adequate public participation in the formulation of a policy may render the final product patently unconstitutional and challengeable in a court of law.

STAGES IN THE POLICY FORMULATION PROCESS

1. Policy initiation
2. Research
3. Negotiation and public participation
4. Finalization of the policy
5. Cabinet or County Executive Committee approval
6. Parliamentary or County Assembly approval
7. Assent
8. Publication
9. Draft Bill

1. POLICY INITIATION

Policy initiation is a function of a number of players, e.g. Government Ministries, Department and Agencies; citizens; institutions; stakeholder groups; etc. These players inform the National or County Executive concerned who propel it to the ministerial level.

2. RESEARCH

- During this stage, it is expected that the proponent of the policy will undertake comprehensive and comparative research on the matter to be regulated
- The proponent may undertake study visits, within or outside the country to ensure that the policy benefits from best national and international policies and practices. Expert opinions should also be sought.
- Task forces, committees and other consultative machineries may be consulted with a view to ensuring that all entities that are likely to be affected by the policy contribute to the policy process at the formative stages

3. NEGOTIATION AND PUBLIC PARTICIPATION

This stage is the longest one in the legislative process. The substantive contents of the draft policy are debated and negotiated with various stakeholders, e.g. opposition parties, the public, NGOs and all other interest groups.

4. FINALISATION OF THE POLICY

This comes after the draft policy has been properly debated, whereupon the proponent crystallises the issues and options available and draws up a final policy document

5. CABINET/COUNTY EXECUTIVE COMMITTEE APPROVAL

Once the respective Cabinet Secretary (in the case of National Policy) or County executive Committee Member (in the case of a County Policy) is satisfied that proper analysis has been conducted, different approaches have been identified and discussed, and that the policy document is the best option available to redress a situation, he/she shall submit the policy to Cabinet or the County Executive Committee for approval.

The Cabinet Secretary or County Executive Committee Member must ensure to highlight salient features of the Bill and bring out all constitutional, fiscal and other implications the policy will/is likely to have

6 PARLIAMENTARY/COUNTY ASSEMBLY APPROVAL

- Upon approval by the Cabinet or County Executive Committee, the Policy document is published and tables in the resected Houses for debate and approval
- The policy document may be approved with or without amendments
- Where significant changes are likely to be made, the House invites the views of the Executive for value addition and further clarification
- The House may also subject the policy to public and stakeholder consideration

7. ASSENT

- Upon passing by the respective House at either level of Government, the Speaker of the respective House submits the approved policy to the President (in the case of the National Government) or the Governor (in the case of the County Government) to formally endorse by affixing the National or County Seal and signing the policy
- This is also known as 'assent'

8. PUBLICATION

- Upon assent, the policy is published as a White Paper (i.e. a statement of intent and detailed policy plan, which often forms the basis of legislation)
- The Executive is expected to widely circulate the policy and keep the public informed of its effects

9. DRAFT BILL

The policy (White Paper) often forms the basis of legislation. If it is determined at the ministerial level that a new law is necessary to achieve its objectives and aid implementation, the concerned proponent will commence the process of drafting the Bill to give full effect to the policy directives. In its early stages before a new law is tabled in the House, it is called a legislative proposal. Once it has been so tabled it is called a Bill.

◦ QUESTIONS?