

Policy making and legislative drafting in France

Charles-Henri MONTIN¹

DEFINITION OF SUBJECT

We will study policy making in the specific case where the main instrument is the use of regulation. There are other ways of achieving substantive policy goals: programme management, incentive schemes are the other most employed tools besides regulation².

We will study policy making from an organisation and method point of view, rather than from a legal one, with the purpose of seeking practical solutions for the production of *good* policy and regulation, i.e. one that is simple, effective, and transparent (understood and accepted by stakeholders).

The issues discussed are presented for training purposes and do not represent the official point of view of French authorities, but a personal contribution to the understanding of a governance issue, with a view to assisting reflexion in other central administrations faced with similar quality management questions.

OVERVIEW: THE ACTORS OF CHANGE, INSTITUTIONS AND COMPETENCES

In France as in other countries, policy is produced at the interface between the political and administrative powers, hence the complexity of the issue. Both legal texts (like the Constitution) and usage have a determining role in setting the ground rules.

- **origins of policy change**

- as in all democracies, policy changes are often formulated in the programmes of political parties before the elections. Technical issues are often handled by administrators advising party chiefs on a voluntary basis, in the hope of being put in charge in case of success;
- once invested, the new minister will be judged on his capacity to move the administrations and get them to produce and implement the necessary changes; it is an unfortunate trait that success is often measured by the number rather than the quality of new legislation. Policy making is therefore the main activity of the senior circles of administration.

- **the launch of a policy initiative**

The political impetus

- both government and parliament can initiate policy change, but government has more resources and parliament's domain is limited in the Constitution (articles 34 and 37) to major principles except in selected areas; consequently, only 4% of new legislation originates in Parliament;
- to a certain extent, the policy cycle accommodates both long term reform, which has been prepared at length within the administration, and the "spur-of-the-moment" reform in response to a crisis or a sudden shift in public opinion.

The support by central administration

- in their policy making, ministers are supported by a wealth of services, providing both information and advice on current affairs. All ministries maintain "inspection" staffed with numerous high level experienced civil servants engaged in writing in-depth reports about

¹ A graduate from the Ecole Nationale d'Administration, the author has acquired management and governance experience in 4 ministries in France and 4 international organisations in Europe. All opinions expressed in this article are his own and not those of current or past employers.

² Throughout this document, "regulation" refers to all types and levels of norms (legislative and executive) and does not correspond to the French "*réglementation*" or "*règlement*"; when referring exclusively to executive measures, the French nomenclature ("*décret*", "*arrêté*") is used.

(evaluating) all aspects of government. Three prestigious administrative jurisdictions are a source of high quality advice, as well as the roster of experts of change management: Conseil d'Etat, Inspection des Finances, Cour des comptes. For the development of approved orientations into new policy, ministers can count on the full support of several thousand highly trained "civil administrators", whose statute expressly mentions their role as that of "supporting government policy making". These very competent officials conduct the investigations, formalise the policy options, and more recently draw up the impact assessments. Once the reform is clear, they will also do the legal drafting (another French peculiarity).

- These senior levels of government and administration are in constant touch with "civil society", by way of a dense network of consultative bodies (3000), representing stakeholders, on a permanent or ad hoc basis.

- France is sometimes presented as the model of a centrally organised modern state. This is apparent in the policy making process. Even though the Prime minister does not exercise the full extent of executive powers, shared with the president of the republic and the other ministers, there is a strong coordinating administration to manage policy and law making: the Secrétariat général du gouvernement (**SGG**). A more detailed presentation of the role of this lynchpin in the process will be given later.

Implementation issues

- to achieve its purpose, policy needs to be applied throughout the territory, by the local services, decentralised (locally elected) and "deconcentrated" (local representatives of central government) authorities. But there is a certain distance between the inspirers and the appliers of policy, and the implementation levels do not always communicate well with the regulators;

- the constraints of running the centralised model have been a factor in the development of a predominantly legalistic system, which may appear to some, in the modern world, as less than optimal. We now require regulators to have a good knowledge about grass root realities, and to be highly sensitive to economic impacts, which some argue, is not fully the case in France.

ISSUES OF PROCESS AND QUALITY

- **Elaboration of the first draft of the policy**

The "note au ministre"

Generally the first draft of a new policy would appear in the form of a memorandum addressed to the minister for endorsement. This key document would be prepared in the office in charge and sent via the line management to the cabinet. It defines the current situation, the reasons for change, and possibilities. It examines the means to achieve the goal, and the legal changes required.

The "note au ministre" as the main policy making tool in France

All through their studies, future officials are trained in this typically bureaucratic achievement, also called "*note sur dossier*": how to present a complex policy issue and possible solutions in a few pages, for discussion and endorsement at high level. The training rests on a kind of case study, where all the relevant documentation is provided: extracts from official reports, press articles, stakeholder interventions and of course the relevant existing regulation. There is however no indication of the solution, which must be developed by the candidate.

Qualities sought in the selection are: understanding of the background, logic in the presentation of facts and solutions, clarity of language, legal expertise to insert the reform into the existing legal corpus. This preparation to real administrative life is generally considered interesting and highly effective. Once appointed the new civil servant gets plenty of practice.

Discussion within the ministry

All levels in the line management must approve the policy options as outlined in the *note au ministre*. Other services need to be consulted and legal advice collected on the feasibility and appropriate legal instruments (law, *décret*, *circulaire*).

At this stage there may be some communication of the projected policies and reforms to the stakeholders and the public, but they would be rare and are not consistent with tradition.

Integration into the government's legislative programme

At an early stage, the SGG is informed of the projected reform, for insertion into the planning of the government's activity. This step also feeds the communication to the public on upcoming reforms, when appropriate.

Production of the impact assessment on the policy change, with options

At this stage, the SGG decides whether an impact assessment is necessary, in which case the ministry will need to set up the necessary resource.

• **Production of the first legal draft**

There is a seamless passage from the policy document to the draft legislation, once the preferred option has been selected by the minister (his cabinet)

The insertion of the reform into the current corpus of regulation is a major item for discussion: a good deal of work goes into the maintenance of the voluminous body of legislation in anticipation for precisely such situations:

- *Légifrance*: the online access tool to the corpus, particularly efficient by international standards;
- Collections of official documents and brochures ("bulletin officiel") or internal guidance (ex: ministry of Finance) concerning implementation;
- Dossiers in the central administration, including correspondence with citizens, and result of litigation
- - finalisation of draft: it is the prerogative of the minister's "cabinet", or circle of close advisers.

• **Discussion with other ministries (at service and cabinet level)**

- Informal sharing of the draft: it is rare that a ministry could single-handedly dominate all the aspects of policy reform. Even the simplest change would require participation of the ministry of finance, and the ministry of interior;

- once there is a degree of agreement, the consultation is generally formalised by official correspondence once the main lines are agreed between chef de file and interested ministries.

• **External consultation**

In the French policy making system, great emphasis is placed on "prior consultation" of stakeholders. This process is very formally organised: consultative bodies are numerous (3000), and they are all established by a legal text which determines their competence. Failure to comply with a consultation requirement can be a cause of annulment of the resulting text.

Consultation may be obligatory or optional. In some cases, agreement of the consulted body is required. Usage distinguishes clearly between this "formal" consultation and prior concertation or discussion with ad hoc partners. The consultation need not necessarily be on the draft legislation itself, but it must raise all relevant questions (about the policy). It is more prudent however to present the draft itself, as recommended in the guide de légistique.

- **Final agreement at Prime minister (PM) level**

In case of conflict between various ministries, arbitration is ensured by the Prime Minister's office and the Secrétariat général du gouvernement (SGG) to reach government policy: the SGG is a highly efficient machinery, not limited to solving interministerial disagreements, and it often monitors programmes or keeps pressure on to achieve important reforms.

All draft regulations must be agreed at PM level in a formal meeting, before it can proceed to the next step, which is the submission to the Conseil d'Etat or to the Council of Ministers. There are well over 1000 such meetings a year to finalise draft regulation.

- **(If applicable), scrutiny by the Conseil d'Etat (CE)**

- This is a constitutionally required step in the procedure for certain matters of greater legal complexity, or when specifically designated in the current primary legislation. The government can also ask for advice even if the consultation is not formally obligatory;

- the control is mainly over the legal consistency, but can at times extend to relevance/efficiency issues (which is of course ;

- the CE can edit the draft, in which case the government will be able to use the new text or revert to its project (no mixing of versions);

- services may be invited to "defend" their draft and supply technical information.

In general, the text is much improved formally after its passage in CE. This high jurisdiction has also been known to successfully resist shallow or hastily prepared reforms. The "avis" of the CE are only exceptionally published. Citizens cannot ask for their release, as they are considered "preparatory documents".

- failure to comply with the obligation to consult the CE can result in the repeal of the text by the constitutional court.

- **Approval by the Council of ministers**

This is the final stage before publication in the Official Journal, which is, barring specific exceptions, the condition for a *décret* to enter into force, or transmission to Parliament, in the case of draft laws.

The presentation of the text in the council of ministers is planned some 5 to 6 weeks before the date. All policy divergences must of course be sorted out before the matter may be put to the Council for approval.

ENACTMENT

- It takes place immediately for *décrets* (executive acts signed by the Prime minister and "countersigned" - underwritten by ministers) as required for implementation and monitoring of application;

- For primary legislation, it naturally requires discussion and adoption by the legislator (two chambers). This case is defined by the constitutional respective spheres of competence *ratione materiae* of government and parliament.

- **Parliamentary stage**

- This is considered as a very important for the definition of content of reform, but as in other countries it contains an inherent risk (from a Better Regulation point of view) of opening discussion on any related legislation;

- The approval of new policy can be hampered by the difficulty of obtaining inscription on the agenda of each of the two chambers;

- The chances of success of the new policy is largely determined by the relations between government and parliament, between ministers and MPs (government party or opposition). The risk of unexpected additional clauses ("riders) is always present;

- The services support the minister during the discussions, supplying the necessary information to defend the reform;

- A way to circumvent the difficulties of the parliamentary process and obtain speedier enactment: a clause in the Constitution allows government to seek a temporary derogation from the need to submit the full text to discussion, and thus regulate in the legislative sphere: this is the “*ordonnances*” procedure employed for urgent, or particularly complex subjects, such as simplification.

- **Implementation of new legislation**

The new law generally requires more detailed texts to be applicable: these are the “*décrets d’application*”. A reform will not become effective before these implementation texts have been enacted by the government (example: conditions for granting an allowance created by a law).

There is no time limit for government to come up with the *décrets*, endangering effective implementation or compliance with the law. There have been attempts by Parliament to put some pressure on government, for instance by introducing into the law a clause asking for regular reports on the production of *décrets*, but with little success. Some major reforms, such as a restructuring of local authorities’ powers, required more than 100 *décrets*.

A CRITICAL LOOK AT THE POLICY MAKING PROCESS IN FRANCE

This section does not constitute an indictment of the system, which is comparatively effective, but a pointer to institutional and historical factors that affect quality of regulatory management, and can be found, *mutatis mutandis*, in other national administrations:

- the French policy making is not evidence-based enough: impact assessments are still a new technique, difficult to implement because of lack of information and statistics on the issues at stake; the culture of impact assessment may not come naturally in a predominantly legalistic system;
- bias in favour of new legislation instead of other forms of government action, hence “inflation normative” (rapid increase in the number of regulations produced annually), a fault regularly denounced by the *Conseil d’Etat* as one of the main ills (if not the worst) of the French regulatory management system;
- drafting and circulation of new regulation could be considered premature, before full discussion and study of policy options;
- perceived poor involvement of citizens;
- official consultation of stakeholders generally limited to the “institutional” partners; poor lobbying;
- insufficient emphasis on implementation difficulties: little effort to manage the introduction of the changes;
- emphasis on legal security of process rather than on economic efficiency; little attention to the burden imposed on civil society;
- great complexity and formalism of the different types of legal texts, according to which authority is entitled to take them, with specific procedures, that take up a fair amount of time and effort which is channelled away from
- poor “after sales” evaluation of public policies, in spite of abundant literature on the issue: ministers are bent on new projects, rather than perfecting existing policies; there is a marked preference for creating new schemes (or entitlements) instead of improving of existing instruments;
- no official overall “Better Regulation” strategy to correct these general trends, though impact assessment has recently been made compulsory as a condition for regulation to be valid, under the control of the constitutional court.

A ZOOM ON LEGISLATIVE DRAFTING IN FRANCE

- **A well supported concept**

Legislative drafting is highly considered in France. A "*guide de légistique*,"³ available on the web for all francophones, provides a wealth of advice, ranging from the collection of legal data to drafting rules. The scope is however limited to drafting of new legislation, which is the most technical part of the topic, and does not include policy making. Indeed, it appears from the guide that there is little effort at perfecting policy making as a step that may influence the quality of regulation. As has been shown above, policy making is however the core-competence of senior officials and has been developed over centuries of central administration, and it is well taught in graduate studies.

Only the recent wider implementation of impact assessment can be said to be reversing this well established rather conservative approach to regulation.

Content of guide de légistique

It is worth taking a look at this key document, written for officials drafting regulation, which contains both theoretical insights and practical tips on how to write good (legally secure) texts. It contains the following parts:

- Conception of draft legislation: describes the various types of norms and their hierarchy from constitution to standing instruction ("*circulaire*"). It purports to encourage regulators to question the "usefulness and efficiency of the projected new norm";
- Stages in the preparation of the new text, "described on the basis of current rules published by the Prime minister";
- Drafting of regulation: includes rules and examples of good practice, as well as solutions to common issues met when dealing with new legislation, presented as a series of practical fiches.

It would be worthwhile comparing this document with similar foreign models (if they exist).

- **Initial training for high officials**

- As has been stated above, students in several academic courses develop policy making skills throughout the academic course on the basis of the "*note sur dossier*" (see box page 2) similar to case study with an emphasis on legal outcome, rather than management issues;
- Training for the more advanced art of legislative drafting is provided to trainee senior civil servants (at the national school of administration ENA) and places great store on legal expertise; young officials handle real cases where reforms systematically lead to new legislation;

- **Resources available to officials to improve drafting quality**

- Full access of the existing legal corpus through Legifrance, with a powerful online search tool, is a highly effective tool, but limited to the text itself;
- Codes, which considerably help retrieval of texts: they exist for all areas of legislation and are continuously updated by "dynamic" codification (integrating a simplification dimension) or static (no changes to content of existing texts); there are two parts in each code, legislative and "regulatory" (governmental) (*décrets* and *arrêtés*). Articles are designated by letters L and R (corresponding to the level of the norm), and the numbering is the same in each part for the same content;
- Reviews of legislation are frequently undertaken, with ensuing simplification (or complication) of the legal corpus.

³ http://www.legifrance.gouv.fr/html/Guide_legistique/accueil_guide_leg.htm

Tips to draft good legislation, according to the French tradition

Detailed advice from the guide de *légistique*:

- pay scrupulous attention to the presentation of the new text: learn how to write the introductory report; how to situate the new rules in the legal corpus; the rules for organising the subject matter and the use of annexes;
- carefully quality control the language: vocabulary, syntax, use of acronyms, etc;
- provide a logical and clear technical layout, especially for texts modifying existing regulation;
- do not forget specific legal regimes (such as overseas territories);
- respect specific procedures which differ according to the type of text (implementation of international conventions or EU Law, individual measures), or call for different consultation processes (compulsory or not), approval procedures and formal presentation rules.

COMPARISON WITH OTHER POLICY MAKING SYSTEMS

Policy formulation mechanisms depend closely on the type of institutional setup. We have just examined a national system, where a sovereign state introduces policy changes in total independence, within the bounds of its international commitments.

More complex procedures are required when policy must be agreed by more than one government:

- intergovernmental negotiation of policy, whether occasional (conference) or via an international organisation (NATO or UN): policy needs to be achieved consensus, using if necessary the "silence procedure" where the draft passes if no Member State (MS) objects; secretariats can play an important role in preparing the draft likely to meet consensus;
- supranational: in this case, MS have agreed by treaty to delegate policy making competencies to a common organ, among which (in the case of the Commission) the power to initiate policy. The policy discussions take place within the secretariat, but for more important decisions, enactment requires a formal decision by a council of MS.

Legislative drafting skills are, on the other hand, less influenced by national values and international procedures. Impact assessment systems, legal quality standards are in constant progress at both national and international levels.

FURTHER READING

- **OECD Documents on line**

[Regulatory reform in France](#) (2004)⁴ : Pages 14 to 18 give a description of the regulatory management system, the role of various actors and the procedures.

["Charter a clearer way forward"](#) (2004) Chapter 2 "Regulatory governance", pp. 85 – 106 : this report provides an evaluation, set within a macroeconomic context, of regulatory reform including government capacity to produce high quality regulations.

- **Documents from /about France**

[Guide de légistique](#) (2005)⁵ : this is a practical handbook every French senior civil servant involved in drafting legislation keeps on his/her desk. It has been extensively used in this article.

[Rapport Warsmann](#) (2008)⁶ : this is the most recent report on the current situation of quality of policy and regulation in France. It contains a critical analysis of the regulatory cycle and a number of proposals which are under scrutiny.

Other [major documents on the French approach](#)⁷ to quality of legislation, all hyperlinked.

⁴ <http://www.oecd.org/dataoecd/50/4/Chart2/32910612.pdf>

⁵ http://www.legifrance.gouv.fr/html/Guide_legistique/accueil_guide_leg.htm

⁶ <http://www.gouvernement.fr/premier-ministre/rapport-warsmann-sur-la-simplification-du-droit-remis-au-premier-ministre>

⁷ <http://regplus.eu/introduction.html>