



ODIHR Brief:

Guiding Principles of Democratic Lawmaking and Better Laws



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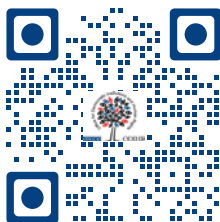
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Designed by Dejan Kuzmanovski

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Introduction

Given the ongoing erosion of democratic and constitutional standards and the rule of law across the world, and declining public trust in democratic institutions, it is essential to strengthen democratic institutions and processes by promoting openness, transparency, inclusiveness and accountability in lawmaking. Contemporary lawmaking displays a number of weaknesses, including a lack of proper policy discussions, impact assessments or public consultations before drafting a law and the practice of sidelining democratic institutions throughout the legislative process. In principle, lawmaking procedures and practices should follow democratic principles, adhere to the rule of law and comply with international human rights obligations and standards. A democratic lawmaking process not only leads to better laws but usually improves the implementation of the adopted laws, ultimately enhancing public trust in democratic institutions and processes.

To address these weaknesses, ODIHR is developing the *Guidelines on Democratic Lawmaking for Better Laws*, which consists of an overview of the guiding principles of democratic lawmaking followed by concrete and practical recommendations on how these guiding principles can be adhered to at each stage of the legislative cycle to achieve good quality laws, based on key rule of law and human rights standards.

The need for open and democratic lawmaking procedures is clearly set out in relevant OSCE human dimension commitments, which also emphasize the importance of inclusive and participatory public decision-making processes. The Guidelines build upon the work carried out by ODIHR in assessing the legislation and legislative processes of individual OSCE participating States over the past 20 years and the recommendations made. Based on the observation that the quality of laws is a direct consequence of the manner in which they were developed and consulted, the main

goal of the Guidelines is to provide concrete and practical recommendations on how to draft good quality laws by enhancing the quality of lawmaking processes. This Brief highlights some of the key concepts contained in the forthcoming Guidelines and provides an overview of **ODIHR's Guiding Principles of Democratic Lawmaking and Better Laws**.

The Guidelines are aimed at anyone involved in lawmaking at the state, regional or local levels. These include government officials and decision makers, parliamentarians and parliamentary staff, policymakers and legislative drafters and experts involved in, or mandated to improve legislation. They are also addressed to wider audiences, such as independent institutions, notably national human rights institutions (NHRIs), as well as civil society organizations (CSOs), academia, human rights defenders and all other people and entities engaged in the legislative process.

Recognizing that key elements and stages of policy- and lawmaking often follow similar patterns in the majority of OSCE participating States, the Guidelines aim to apply to all democratic states, regardless of whether they are presidential or parliamentary democracies, or whether their parliaments are unicameral or bicameral. At the same time, the Guidelines recognize the diversity of local traditions, historical, political, social, judicial or geographical contexts of specific countries, as well as different legal systems and mechanisms.

Box 1 - Definition of Democratic Lawmaking

The process whereby laws are developed, drafted, consulted and discussed, scrutinized, amended, adopted and published, and later monitored and evaluated following key democratic principles. The process is carried out by democratically elected or designated bodies that adhere to the principle of the separation of powers and checks and balances. The process is compliant with the rule of law and human rights obligations. It is open, transparent, accessible, non-discriminatory, gender-responsive, inclusive, representative, participatory and sensitive to the needs of diverse groups of society.

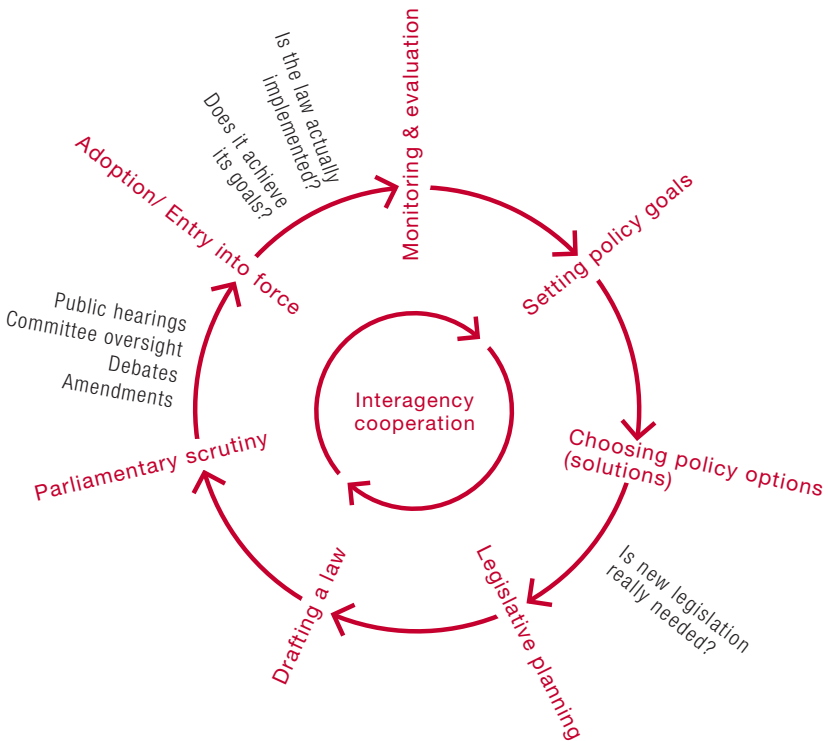
Box 2 - Definition of Good Quality Laws

Laws are of good quality when they are clear, intelligible, foreseeable, consistent, stable, predictable, accessible, compliant with rule of law and human rights standards, gender- and diversity-sensitive, and non-discriminatory, in both content and practice, while being proportionate and effective.

The Legislative Cycle

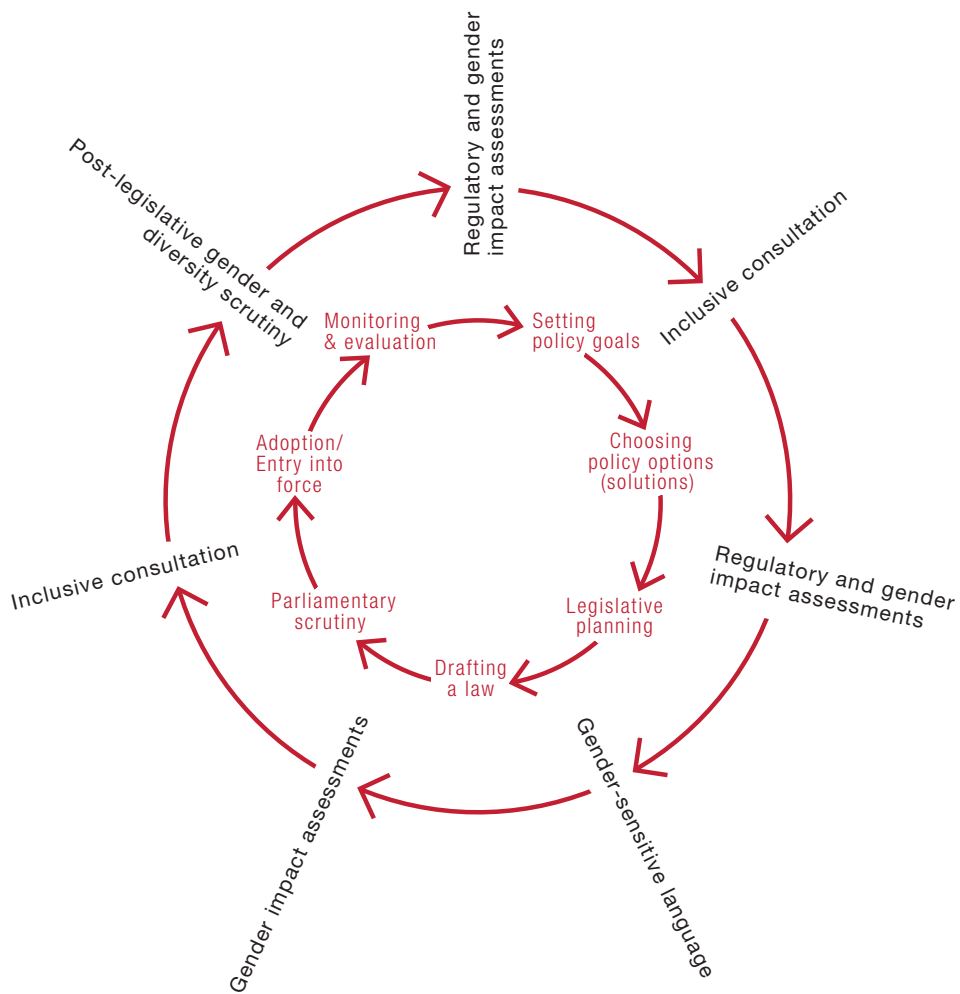
The lawmaking process should be approached as a cycle. This cycle consists of the following stages: **policy setting; law drafting; parliamentary scrutiny; adoption, publication and consolidation; monitoring and evaluation**. The evaluation stage may point to gaps and inadequacies, which may, in turn, lead to new policy debates that set off a new policy and legislative cycle. The management of legislative projects — how this cycle is conducted in practice — depends on the laws and procedures adopted in each country. In certain countries, different stages of the cycle may happen simultaneously, or they may be repeated several times.

Figure 1. The Process of Making Laws — the Legislative Cycle



The life cycle approach to lawmaking allows legislators to integrate other perspectives, such as gender and diversity or environmental and economic assessments, systematically throughout the legislative process.

Figure 2. Mainstreaming Gender and Diversity throughout the Legislative Cycle



Guiding Principles of Democratic Lawmaking and Better Laws

ODIHR has developed a set of core principles for democratic lawmaking and how to achieve good quality laws, based on key rule of law and human rights standards. These principles form the backbone of the *Guidelines on Democratic Lawmaking for Better Laws*, and underlie the entire process of developing, drafting, consulting and discussing, scrutinizing, amending, adopting, publishing, implementing, monitoring and evaluating laws. The key principles guide how laws are made (the process of making laws), which standards the substance of a law should adhere to (the content of the law) and what form a law should take (the form of legislation). The *Guidelines* further elaborate on how the main actors of the lawmaking process put the Guiding Principles into practice and give detailed, concrete and practical recommendations on how these can be adhered to at each stage of the legislative cycle.

Prerequisites for democratic lawmaking and better laws

Principle 1. Compliance with Democratic Principles

The procedures and practices of lawmaking, as well as the contents of laws, should adhere to democratic principles. This means that they should emanate from the democratically elected or designated bodies that adhere to the principle of the separation of powers and the ensuing necessary checks and balances between state institutions, as set out clearly in a country's constitution. Legislation should also be prepared, debated, verified, adopted, enforced, monitored and evaluated following participatory and representative procedures that are set out in a stable, clear, foreseeable, open and transparent legal framework. Legislative power should normally be vested in a democratically elected parliament and laws should not delegate or allow for the delegation of unlimited lawmaking powers to the executive. Where this occurs, the delegation of power from parliament to the executive should be minimal and should only be possible in certain circumstances. These circumstances should be explicitly and precisely defined in constitutions or constitutional legislation, along with the objectives, content and scope of the delegation and details of parliamentary control or scrutiny and judicial review of the delegated legislation. Routine use of such 'exceptional' lawmaking powers by the executive should be avoided, or phased out where such practice exists, or at least circumscribed by the mechanisms of effective parliamentary control.

Principle 2. Adherence to the Rule of Law

The process and contents of laws should adhere to the rule of law. This means that public institutions, individuals and legal entities are accountable to laws adopted in compliance with democratic principles (see Principle 1); laws that are consistent, clear, and human rights-compliant (see Principle 3), as well as equally and transparently applied, and subject to oversight, including control by independent and impartial courts. The rule of law also requires that both the procedure and substance of laws comply with higher-ranking law, including applicable international legal obligations, which should be assessed at different stages of the legislative process. As a rule,

legislation should not have retroactive effect; exceptions to this rule need to be clearly outlined in constitutions or constitutional legislation and strictly limited to compelling public-interest reasons. Under no circumstances shall detrimental retroactive effect be possible in the case of criminal legislation. Legislation should set out rules for future behaviour and may not be designed to apply *ad hominem* (i.e., to a particular person or group). Moreover, while legislation needs to be able to adapt to changing economic or social circumstances, it should not interfere with the principle of *res judicata* (i.e., respect for final court decisions rendered under previously existing rules).

Principle 3. Human Rights Compliance

Legislation must be human rights-compliant, meaning that it must be compatible with applicable international human rights obligations and standards, and rights and freedoms guaranteed by national constitutions. This also means that legislation must not be directly or indirectly discriminatory and should be gender- and diversity-sensitive. To that end, the legislative process should be inclusive and integrate gender and diversity perspectives throughout the legislative cycle to ensure fair results and a positive impact on gender equality, diversity and human rights (see especially Principles 6, 7 and 12). The human rights implications of laws should be identified at the stage of policy development or pre-drafting of new legislation. Policymakers and legal drafters should scrutinize legislation from a human rights, gender and diversity perspective throughout the legislative cycle, to see whether it addresses the different needs of women, men and different societal groups, especially groups that are historically marginalized or under-represented. To ensure such results, the process of legislative design, drafting, consultation, discussion, implementation and evaluation should be inclusive and participatory throughout. Different state and non-state actors — notably independent NHRIs, parliamentary committees, other bodies with a human rights focus and CSOs — should be able to exercise their important oversight functions independently and effectively throughout the lawmaking process, including after the adoption of legislation. Where a piece of legislation may infringe on a right, the state is required to demonstrate that the proposed interference is in accordance with higher-ranking law (including principles set down in the constitution and in international law), pursues a legitimate aim, is necessary to achieve that aim, and is proportionate and non-discriminatory.

The Process of Making Laws

Principle 4. Necessity to Legislate

State intervention by legislation should only take place where state action is necessary and other, non-legislative interventions are not feasible or unlikely to have a successful outcome. For this reason, and to avoid unnecessary and unimplementable laws and frequent substantive amendments to legislation, the need to legislate should be assessed at the beginning of every lawmaking process. The starting point should be the proper identification of a problem or need at the initial policymaking stage. This should be followed by an extensive and open-ended discussion on how best to resolve the issue in line with the established policy objectives, evaluating all potential alternative solutions, including non-regulatory ones, to determine whether legislation is the appropriate route (see also Principle 5).

Principle 5. Evidence-based Lawmaking

In general, laws and public decision-making should be prepared, discussed and adopted on the basis of well-founded arguments, scientific evidence and data, including information deriving from impact assessments and consultations with the public and other stakeholders. Evidence-based impact assessments should be made early in the process of preparing a law or an amendment. These should evaluate the likely economic, environmental, social, human rights, equality, gender and other impacts, as well as the budgetary, regulatory and bureaucratic implications of the planned legislation. Once adopted, implementation of the legislation should be monitored and its effects/impacts evaluated to assess whether a law adequately met its intended aim and achieved the desired results. Reviews such as these complete the cycle that began with pre-legislative impact assessments. This type of evaluation should include reviews of both the enactment of law (including secondary legislation) and its impact on society and human rights (see also Principle 3). The evaluation should be conducted by different entities, including government, parliament, civil society and other experts, after an agreed period of time from adoption. The evaluation results should then inform the next legislative cycle.

Principle 6. Openness and Transparency of the Lawmaking Process

The entire legislative process — whereby policies and laws are designed, drafted, debated, adopted, implemented, monitored and evaluated — should, as a rule, be open and transparent. Openness means that all relevant information and documents relating to the lawmaking process are made available to the public and involve the public in the process, ensuring that the legislative process is as accessible as possible to all. Information on draft laws should include, at a minimum, documents setting out the background and rationale behind a draft law. These should explain why the law is necessary and refer to evidence and impact assessments. They should also include an overview and analysis of the results of consultations and explanations of the draft law's compatibility with the constitution and other laws, as well as with international legal and human rights obligations. Transparency means that public authorities promote the disclosure and accessibility of the data and information to foster a general understanding of the lawmaking process and make individuals aware of how they may get involved in the process. Draft laws, all information about draft laws (including updated versions) and the lawmaking procedures should be shared proactively and published, both online and in hard copy and, as far as non-governmental stakeholders and the public are concerned, in a simple and comprehensible manner. This will help ensure that all stakeholders, within public administration and beyond, are informed about the need for the law and the planned and ongoing lawmaking activities as early as possible.

Principle 7. Participation and Inclusiveness

All interested parties and stakeholders should have the opportunity to access the lawmaking process, be informed about it and be able meaningfully to participate and contribute. Different groups and individuals, especially those who may be affected by the draft law, as well as stakeholder organizations should be identified early and included; from the initial policymaking phase and throughout the lawmaking process. They should be empowered to be able to take part adequately in the process. Wide-ranging, proactive outreach measures by government and parliament should help to identify and include all interested and relevant counterparties, including organizations promoting gender equality and representing historically marginalized or under-represented groups. States should address the needs of different groups and overcome specific challenges preventing individuals or groups

from participating in the same way as others. At the same time, states should ensure that representatives of groups that are disproportionately targeted by a law are adequately informed about the legislative initiative and directly involved in the design and drafting of the legislation. In parallel, states should manage and diversify the structures, methods, mechanisms, tools and types of public participation, as well as their outcomes, adapting them to the needs of different stakeholders and reaching out to a broader audience. States should inform about the modalities of participation and how the outcomes will inform the legislative process. Participation tools should be user-friendly and may include new technologies, but should not be limited to online tools. All participants should have sufficient time to prepare and provide their input to draft policies or laws. This input should be evaluated diligently, equally and proportionately, and the initiating institution should provide meaningful and qualitative feedback in due time on the outcome of every public consultation, including giving clear justifications for including or not including certain proposals. The feedback may also be published online.

Principle 8. Organized and Timely Legislative Planning

Government and parliament should ensure proper advance planning of policies and legislation to help keep the workloads of government and parliament at reasonable levels and to allow for realistic and responsive preparation and budgeting. To ensure proper coordination, the legislative plans and strategies of government and parliament should be aligned. The government's annual legislative programme should be planned and published in advance and deviations from the programme should remain exceptions. Sufficient time should be allocated within the programme for each stage of the lawmaking process to allow for impact assessment, public consultation, discussion and effective scrutiny of draft laws, as well as for parliamentary consideration, without unnecessary gaps between the different stages of the legislative process. Important legislation that significantly impacts large parts of the population, or the human rights and fundamental freedoms of individuals, should be debated at length (see Principle 7). The planning measures should avoid situations where multiple draft laws are drafted or debated at the same time or where the time available for consultation and debate is unreasonably compressed. Legislative programmes should contain spare time to allow for unplanned events, such as urgent laws, that may come up during the legislative year.

Principle 9. Adaptability and Stability of the Legal Framework

Laws reflect the societal, political, economic and other priorities of a country and therefore should be able to adapt to new developments, changing circumstances and priorities. Legal systems should be sufficiently flexible to allow for adaptation, while retaining the necessary degree of stability and consistency of the legislative framework. This stability can be safeguarded via open, inclusive, well-planned and evidence-based lawmaking, accompanied by scrutiny and oversight. Overly frequent amendments to laws, due to lack of planning and prior research into policy topics, undermine the stability of the legislative framework and legal certainty in general, and should be avoided.

Principle 10. Accountability of Institutions and Individuals

There should be effective mechanisms and institutional frameworks in place to ensure that public institutions involved in the legislative process are accountable to the public. Oversight, monitoring and public reporting throughout the lawmaking process are essential for ensuring effective and meaningful institutional and political accountability in cases where individuals or groups are adversely impacted during the legislative process or once a law is implemented. Parliament and its committees should exercise oversight over government bodies and agencies involved in lawmaking. In parallel, strong independent oversight bodies, including NHRIs and the judiciary (in particular constitutional courts, where they exist), should assess whether key elements of the democratic lawmaking process are in place and of the necessary quality. In addition to the judicial avenues that exist for cases of human rights violations, effective mechanisms should be available for reviewing the compliance of lawmaking processes with key procedural requirements, either as a part of the review conducted by constitutional courts, or by specialized parliamentary bodies, or by other means of oversight. These reviews may result in draft laws being suspended or returned to the initiating bodies prior to adoption, or to adopted laws being annulled. Disciplinary or other violations by responsible officials may also result in individual liability, as determined by a competent disciplinary or other body.

Principle 11. Accelerated Legislative Procedure and Lawmaking in Times of Emergency

The legal framework may provide for an accelerated legislative procedure. However, this should be used rarely and only in exceptional cases of genuine urgency to pass a specific law, as the process entails a lack of legislative planning and less or no time for in-depth consultations on draft laws, nor for adequate parliamentary scrutiny. The legal framework should define precisely and narrowly the circumstances in which fast-track procedures may be applied and should require proper justification. Accelerated lawmaking procedures should only be possible if they are based on a formal request submitted in accordance with the relevant legislation. They should not be applied to introduce important and/or wide-ranging reforms, such as constitutional reform, legislation introducing major changes to the functioning of the democratic institutions or legislation significantly impacting the exercise of human rights and fundamental freedoms. Laws passed by accelerated procedures should be subjected to special oversight and should ideally contain a review clause. In times of emergency, emergency legislation passed through an urgent procedure, or via government decree and related measures, should be limited to what is strictly required by and proportionate to the exigencies of the situation. Emergency laws and other measures should only remain in force for the duration of the emergency situation. In times of emergency, states should refrain from considering legislation that is not urgent in nature. They should not adopt or amend constitutional provisions or legislation that may impact fundamental freedoms and human rights, nor change the balance of powers, nor the system of checks and balances. Measures taken need to be assessed on a regular basis and adequate safeguards and oversight should be in place, including judicial review, to ensure that the rules are followed. Emergency laws should contain a sunset clause and, if other laws have been adopted during times of emergency, they should ideally contain a review clause and be reassessed by parliament once the emergency situation has ended.

The Content of Laws

Principle 12. Equality and Non-Discrimination

All individuals are born free and equal and must have equal access to and be equally protected by the law. Consequently, legislation must not discriminate, directly or indirectly, intentionally or unintentionally, against any individual or group (see also Principle 3). Where discrimination does happen, there should be a clear mechanism in place to offer redress. Additionally, legislation should proactively promote substantive equality, as well as ensure equality of outcomes or results for different groups of society. Specific anti-discrimination laws and laws promoting gender and other forms of equality should be in place to serve as a guide and touchstone for the development of all legislation. This is essential for ensuring that individuals are not arbitrarily denied their rights on the basis of characteristics such as their national or ethnic origin, colour, religion or belief, language, sex, sexual orientation, gender, gender identity, disability, social origin, property, health, birth, age or other status. Care should be taken to ensure that the legislative process is inclusive (as set out in Principle 7). This will involve reaching out to a variety of different groups and individuals, so that legislation is not drafted from the viewpoint, or in the sole interests of the majority or dominant population.

Principle 13. Proportionality

Legislation should be proportionate to its aims, which presupposes that it is also necessary (see also Principles 4 and 14). More specifically, the law should employ the least intrusive measures to reach the policy objective. Additionally, there should be a reasonable relationship between the public interest pursued by the legislation and the possible private interests or rights of individuals. Laws that are neither necessary nor proportionate should not be pursued.

Principle 14. Effectiveness

Legislation should be effective, meaning that it should be implementable and capable of achieving the desired results. To ensure this, laws should have a clearly stated purpose that individuals and implementing bodies know and understand. Legislation should include appropriate and realistic implementation and compliance mechanisms and should communicate the rules clearly to all those affected by, or who are in charge of implementing them. Laws should also be integrated smoothly into the body of existing laws, by repealing, amending or complementing existing legislation. Legislation further requires prompt and proper implementation; often, this will depend on the swift adoption of secondary legislation with appropriate orders and procedures to ensure the execution of the primary law. Once adopted, the implementation of legislation should be monitored and its impact evaluated to assess both its effectiveness and possible unintended consequences.

The Form of Laws

Principle 15. Clarity and Intelligibility

Laws must be drafted in a clear, precise and unambiguous manner. They must be easy to understand, even when they involve complex topics. To the extent possible, legislation should avoid excessive or unnecessary detail, and the quality and impact of existing laws should be monitored regularly to ensure they remain necessary, effective and proportionate (see also Principles 4, 13 and 14). To ensure the clarity and intelligibility of legislation, the overall legal framework of a country should be coherent and consistent. This means that laws should complement and not contradict each other. It also means that no inconsistencies or conflicts should exist within a law. One of the requirements for clear and unambiguous legislation is consistent drafting and structure, with terminology always used in the same way, definitions added where necessary and relevant cross-references provided to other provisions or laws. For this purpose, drafters should follow clear and unified drafting instructions, and sufficient funds should be invested in training and capacity-building for legal drafters to ensure high quality, written legislation. Well-drafted and clear legislation clarifies the aims and overall contents of a law, while avoiding legal loopholes, or vague, contradictory or ambiguous wording, which can undermine legal certainty and public ownership of, and trust in legislation.

Principle 16. Foreseeability

Laws must be foreseeable, meaning sufficiently clear, such that an average person can predict what kind of consequences a given action may entail, at all times and to a degree that is reasonable in the circumstances, where necessary with the assistance of a lawyer. Laws should include clear definitions and should not permit excessive state discretion, which may result in arbitrariness. Adopted laws that require significant efforts from the institutions responsible for implementing them should not enter into effect immediately, but should give those institutions a certain period of time to prepare for implementation (*vacatio legis*).

Principle 17. Publication and Accessibility

Laws, draft laws and secondary legislation should be published — both online and offline —and should be easy to find. Draft laws, as well as adopted legislation and their supporting documents, should be easily and publicly accessible for the entire population. This includes timely publication on publicly accessible official websites and official gazettes, availability in the national languages (including minority languages) and, to the maximum extent possible, in formats accessible or adapted for persons with disabilities (including individuals with visual impairments or intellectual disabilities). As new technologies develop, accessibility may be enhanced by ensuring that laws are made available online. Nevertheless, laws should also continue to be available in print, to mitigate the risk of a digital divide (i.e., the exclusion of certain categories of the population that may not have access to, or know how to navigate the Internet and new technologies). All additional materials (such as court judgments on the law, secondary legislation and amendments) should be accessible in the same place. To enhance accessibility, the websites and official gazettes should contain consolidated legal texts, reflecting the latest amendments to legislation, as well as previous versions of the laws. There must also be proper and secure backup in place for online official gazettes.

