

SEVEN
PRINCIPLES
FOR
DRAFTING
SOUND
LEGISLATION
IN
KAZAKHSTAN

By Mark Segal, Esquire

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This Brochure is Published
With Support From
The European Union



This Project is Implemented by
IBF International Consulting

*This Brochure has been prepared and published under the European Union-sponsored Project **“Support to WTO Accession of Kazakhstan: Approximation of Technical Regulations and Standards”**. It is the third Brochure in a series, following previous editions in Kyrgyzstan (May of 2004) and Georgia (April of 2005), also prepared under European Union-sponsored Projects. The statements and opinions in this document are those of the Contractors and Legal Consultants listed herein. They do not reflect the official position or views of the European Union, the Delegation of the European Commission, or any other party.*

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N.B. In this Brochure, the term “legislation” is used in an expansive sense to include both primary laws and secondary regulations. Generally speaking, but ultimately in accordance with the specific circumstances in each jurisdiction, the principles that apply to laws are also relevant to regulations, decrees, orders, and other legal instruments.

INTRODUCTION

Laws and legislative drafting processes vary between countries. Key variables include governmental structures, the legal system, historical conditions, cultural traditions, and the nature of the legal profession. Nonetheless, there are many policies and practices that are intrinsic to the preparation of sound laws under most circumstances. Furthermore, innovation and diversity are increasingly limited by Globalisation and a modern trend towards applying universal principles and procedures. These arise from international treaties (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms), international organisations (like the United Nations, World Bank, and Organisation for Economic Cooperation and Development), supranational institutions (like the European Union), and international markets (structured by the World Trade Organisation and commercial laws). Modern technology and computerised information resources also affect the content of legislation and drafting processes.

It is widely accepted that legislation must be “soundly drafted” in order to achieve its goals, and promote important objectives such as democracy, economic development, human rights, and the Rule of Law. This means that laws and regulations must be:

- Designed to effectuate well-founded policies and objectives,
- Part of a coherent Constitutional, legal, and legislative framework,
- In accordance with international standards and obligations,
- Practical, implementable, effective, and enforceable (in light of financial resources, administrative capacity, and socio-economic conditions), and
- Well-written and technically correct.

Otherwise, laws and regulations cannot and will not be fully implemented or meet their goals. When legislation is ineffective, it becomes an obstacle to democratisation and development. It generates disrespect for authorities at all levels, and creates dissatisfaction with the legal system.

Drafting legislation is a special skill that is both art and science. Legal skills are valuable, but not all drafters are lawyers, and there must be substantive expertise. In fact, sound laws require a combination of legal expertise, drafting expertise, substantive expertise, and political guidance. Exact proportions vary. Thus, best results are achieved when various governmental and non-governmental parties play an active role in open and participatory legislative drafting processes.

This Brochure presents Seven Principles for enhancing the quality of legislation and strengthening the legislative drafting process. It makes specific references to Kazakhstan. Information is provided in summary form, without excessive detail. The goal is to show the importance of the Principles, and provide basic guidance for their application. This is intended to inspire efforts to obtain more information and gain greater understanding. For obvious reasons, this Brochure does not address specific or substantive areas of law.

Generally speaking, countries that are restructuring their governmental institutions, re-orienting their economies, or transforming their legal system need to take special account of the Seven Principles. And particular attention is required when legal expertise, administrative capacity, and civil society are still being developed. However, the Seven Principles are also fully applicable in countries with well-established governmental institutions and a developed system for drafting and implementing legislation.

PRINCIPLE NUMBER ONE
LEGISLATION SHOULD EFFECTIVELY
CONVERT POLICY INTO LAW



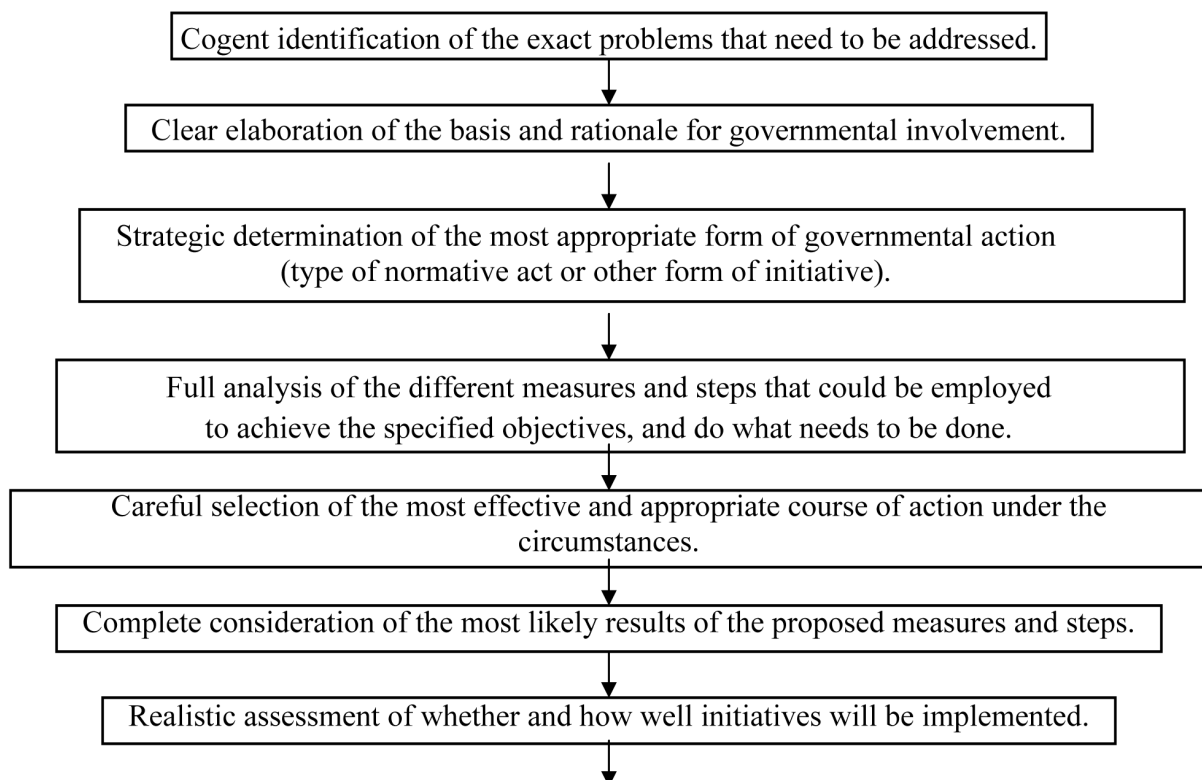
PRINCIPLE NUMBER ONE

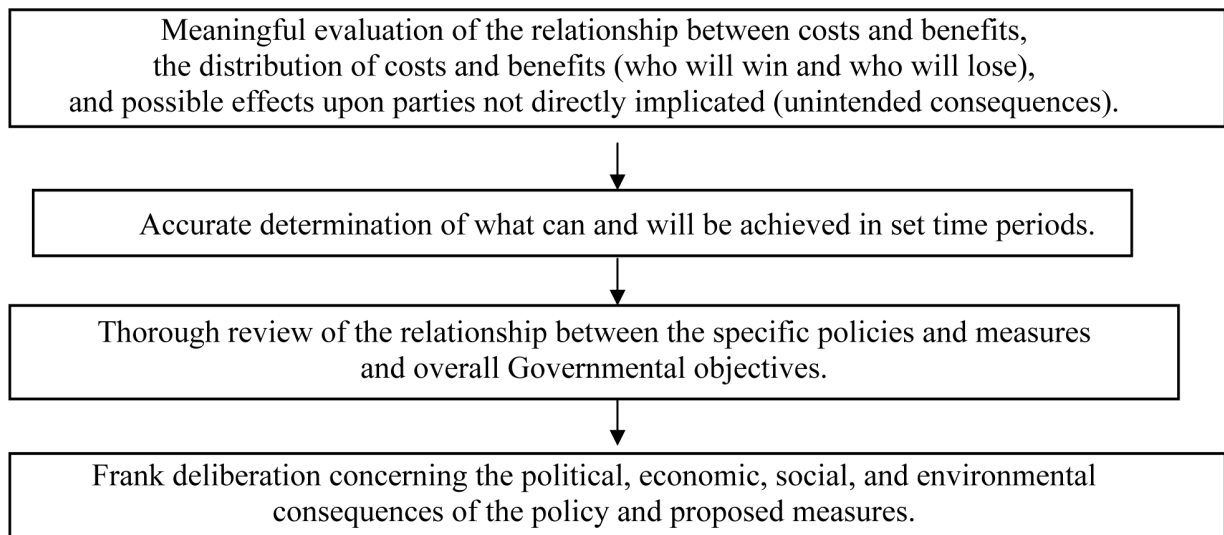
LEGISLATION SHOULD EFFECTIVELY CONVERT POLICY INTO LAW

Laws are tools for ordering legal, economic, and social relationships in a country, and for implementing policies concerning what target groups should or should not do. Therefore, the first step in the legislative drafting process is identifying the policies to effectuate and the objectives to achieve. Accordingly, the parties that initiate or sponsor legislation should decide what the law will and should do, and why this is necessary. In addition, they should determine that a law (as opposed to another kind of legal instrument or a different type of governmental action) will be most appropriate and effective.

Policies and objectives for major legislation should originate in a Governmental Programme. This is usually elaborated through electoral and political processes, and based upon a far-reaching assessment of the needs of the society. Many Governments develop and issue a comprehensive legislative agenda, often on an annual basis, which sets forth the content and timing of legislative initiatives. This serves as a reference and calendar for institutions and parties responsible for preparing and approving legislation. Naturally, laws may be required to address priorities that arise or exigent circumstances, on a special or ad hoc basis. However, it should not be standard practice to legislate piecemeal, without a coherent programme.

Policy development is a complicated process that requires serious analysis and thorough consultation. Policy development should be based upon:





The initiator or proponent of legislation should play a key role in these activities.

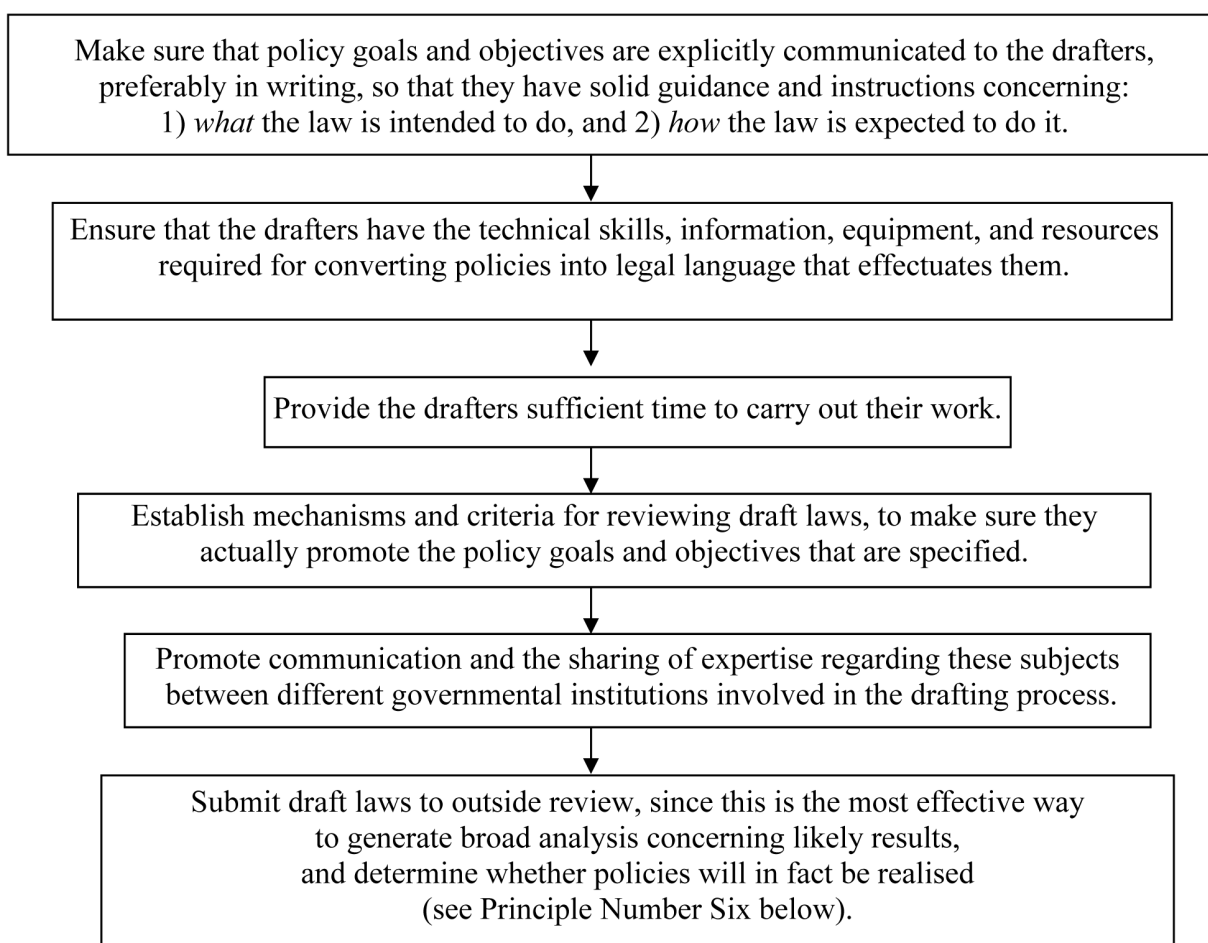
Sometimes the policy development stage of the legislative drafting process does not receive sufficient attention. Key institutions may not be ready to exercise their proper role in policy development, and technical skills may not be sufficient. The multi-faceted and demanding nature of this task may not be fully appreciated. Or it may be assumed that the objectives of the legislation are well settled and clearly understood, and that they do not really need to be documented. This is a particular problem in countries in transition, which often have a pressing legislative calendar and face constraints in institutional capacity.

In any event, insufficient attention to policy development is short-sighted, counterproductive, and likely to have negative consequences both during and after the drafting process. If policies are not fully developed or consistent with the best interests of the society, or if measures chosen to realise objectives are not well-founded, then it is not possible to draft sound legislation that can be properly implemented. Thus, taking extra time and devoting sufficient resources to develop and communicate policies and objectives before laws are drafted is actually a very sound investment that pays off greatly in the long run. This significantly increases the chances that laws will accomplish what they are supposed to, and yield positive results. Also, laws that effectuate sound policies are easier to enforce, and do not require frequent amendment. The final result is a considerable *saving* of time and resources.

Once policy is developed and the objectives of legislation are settled, communication is the next step. One of the main functions of legislative drafters is to convert policy goals into legal reality. This is done by preparing the appropriate text and selecting the optimal wording. Unless there is a hidden agenda or surreptitious goal, the drafting work and legislative process will proceed much more successfully and expeditiously if the policies and objectives of the new legislation are clearly set forth, and known/understood by the drafters. In addition, drafters must have the time, resources, and skills to make the law do what it is meant to. Whether they are attached to a Governmental Department, Ministry, Working Group, Parliament, or independent body, legislative drafters are the focal point for successfully turning policy into law. Their assignment is to create a single document with enforceable norms and clear guidance for all parties who will be responsible for compliance, administration, interpretation, enforcement, and adjudication.

There are two different perspectives regarding the role of legislative drafters. Some experts believe that drafting is primarily a technical exercise, converting a policy or policy document into a legal document. However, the preferred view is that drafters play an active role in transcribing legally binding norms/instructions that effectuate policy objectives. These written norms set the parameters for permissible and/or prohibited behaviour on the part of the governed, and create incentives and disincentives for target groups. Under such circumstances, accurate and effective drafting must be based upon clear instructions concerning the specific policy goals and purposes of the legislation. In the absence of policy decisions, or without guidance concerning their nature, drafters cannot produce legislation that fulfils its intended goals.

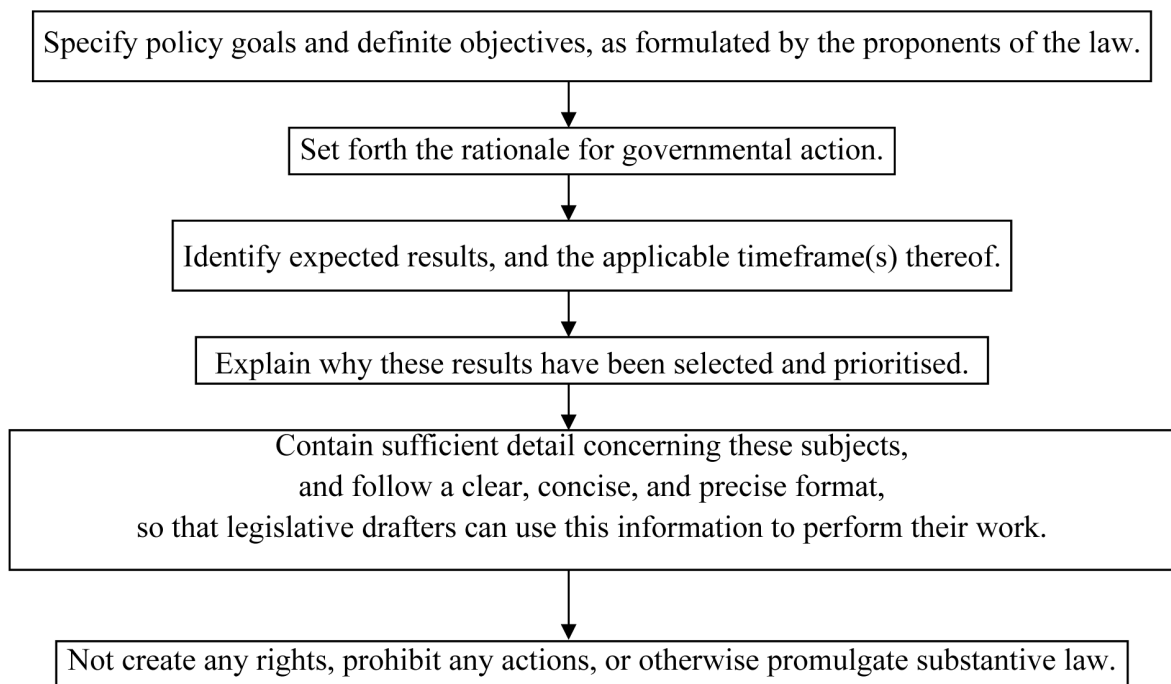
Clearly, the initiators and proponents of legislation have a large role to play in the development, articulation, and communication of policies and objectives. Thus, to effectively convert policy into law, it is incumbent upon the initiators and proponents to:



It is appropriate and indeed advisable to formally include these principles in organic documents regulating the legislative drafting process and the form and content of legislation, such as Parliamentary Rules of Procedure, Administrative Instruments, or a Law on Normative Acts.

In some jurisdictions, particularly those following Common Law or Anglo-Saxon traditions, draft laws are accompanied by a formal Statement of Legislative Intent. This is especially important and valuable because the policy making and legislative drafting functions may be completely separated, and divided into two distinct phases. In Civil Law countries, where officials at Line Ministries can be both policy makers and drafters, expertise tends to be more centralised, and both functions may be performed simultaneously. In countries reforming their legal system or employing Legislative

Working Groups, it is highly advisable to prevent deviations from policy mandates by using a formal Statement of Legislative Intent, or incorporating required information in an Explanatory Note or Memorandum. With regard to converting policy into law, this document should:



It is important to understand that the Explanatory Note is not an end in and of itself. Rather, it is a tool that serves as a guide and reference point throughout the drafting process. Accordingly, it is advisable to create mechanisms and channels for addressing questions about the Explanatory Note that arise during drafting and legislative review. These could take the form of meetings/briefings or written requests for clarification or further information. Proceeding in this manner makes the Explanatory Note a “living document” that can be amended or expanded.

Abbreviated Statements of Legislative Intent are sometimes included in legislation. Preambles are the best place for preliminary and background information. Citations (in the form of “Having regard to...”) set forth the legal basis. Recitals (“Whereas...”) are useful for explaining the background, rationale, and goals, and sending a message to those responsible for administration or adjudication. This format is common in treaties and conventions (see Article 10 of the Joint Practical Guide of the European Parliament, Council, and Commission for drafting EU legislation, described in Appendix Two). However, it must be understood that preambles are not part of legislation, and can not create enforceable norms. Thus, no matter how cogently preambles are formulated, the body (enacting terms) must still contain all required provisions, and be precisely drafted to implement the designated policies and objectives.

In a number of countries, linguistic issues (such as the existence of more than one official or working language) can complicate legislative drafting and the conversion of policy into law. One language may be more suitable for legal purposes and terminology, and thus favoured by legal professionals. This can create challenges during the drafting process. And translation will be required if the law is completed in one language first. Questions may arise regarding the accuracy of the translation, and there may be delays in preparing official versions. Accordingly, linguistic issues should be carefully considered, and settled as soon as possible. In this regard, Canadian practice is exceptional. In Canada, the entire legislative drafting process proceeds simultaneously

in both official languages, English and French. Skilled experts knowing each language conduct drafting activities virtually side by side.

It is important to determine the most advantageous timing for the start of drafting work. In some countries, drafters are involved from the start of the legislative process. They provide advice to initiators and proponents concerning how to best formulate the law in order to meet policy objectives, and what to include in the Statement of Legislative Intent. In other countries, drafters wait for instructions before starting their work. While the early involvement of drafters is advantageous, the key is to guide their work via clear expressions of policy objectives and legislative intent. This is the only way to ensure that drafters effectively communicate the correct message to those who must obey, administer, interpret, enforce, or adjudicate legislation.

In certain jurisdictions, particularly those employing a Civil Law approach, laws may be partially utilised as statements of policy, with more details provided in regulations prepared and implemented by administrative agencies. This has been denominated “General Principles Drafting”. It is distinguished from the more detailed and prescriptive “Traditional Approach”, which is generally followed in Common Law jurisdictions. However, in modern practice, depending upon the subject matter, the two approaches often converge as much as they diverge.

Courts are not the optimal place to debate the intention of legislators or the powers of administrative institutions. Therefore, legislative drafters are tasked with settling the respective roles of their primary legislation (laws) and any subsequent secondary legislation (regulations or bye-laws). At issue is the degree to which regulatory authority should be delegated. Generally speaking, laws should set forth important norms, cover key legal issues, and specify taxes, fines, and penalties. They should also define the parameters for handling subsidiary issues and details in secondary legislation. Secondary legislation cannot supersede a law or exceed its mandate. This would constitute usurpation of Parliamentary powers. However, the exact balance depends upon specific circumstances, including the nature of the subject matter and the level of administrative capacity. Details concerning highly technical subjects are probably best left to experts who have knowledge, capacity, and time to regulate. But regulatory discretion is less advisable when administrative institutions lack the capacity, resources, or staff to properly prepare and efficiently administer regulations. If administrative machinery is less developed, laws that primarily express policies or contain “declarative” features are less likely to be effectively implemented, and more likely to end up in court.

Therefore, in countries where the legal system is in transition, or where administrative institutions are still developing and building capacity, it is counterproductive to delegate excessive regulatory discretion. The policies and objectives of the drafters are less likely to be realised. Implementing regulations may be deficient, and administrative machinery may not be up to the task. In addition, disproportionate discretion gives administrative agencies and personnel more power than they can responsibly manage. Improper practices such as manipulation, inconsistent/selective enforcement, and corruption can result. Accordingly, the best practice in countries that are reforming their legal system is to very precisely define the relative roles of laws and regulations, and make sure that laws contain sufficient detail concerning 1) rules and norms, and 2) how, concretely, they should be effectuated.

The relationship between policy objectives and legislation in Kazakhstan was fundamentally altered when Independence was obtained in 1991. Actually, this new dynamic began in 1990, with the Law on the Establishment of the Post of President and the Declaration of Sovereignty of the Kazakh Republic. The new Constitution, approved in 1995 (replacing the 1993 version), was the

highlight of a period of rapid and extremely successful legal and legislative reform. Hundreds of new laws and Presidential Decrees were adopted. These legal acts for the first time reflected policy goals related to the creation of a strong, stable, and independent country, with a market economy that is integrated into the international trading system, and a legal system that respects the Rule of Law. Other important highlights during this period were the Partnership and Cooperation Agreement with the European Union (which was signed in 1995, and entered into effect on 1 July 1999), and Kazakhstan's application to join the World Trade Organisation (in 1996). Since that time, significant legal developments reflecting new Kazakh policies include the Budget Code, Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code, Customs Code, Land Code, Tax Code, Transport Code, Water Code, etc.

One of the first major attempts to structure and rationalise the legislative process and ensure that legal acts fulfil their intended policy objectives was the "Concept on the Legal Policy of the Republic of Kazakhstan". This was adopted by Presidential Decree on 20 September 2002. The key objectives of this initiative include legislative planning, expanded use of legal expertise, standardising legal language, ensuring sufficient funding for the implementation of laws, and systematising the legal framework through consolidation and codification. Additional initiatives include an Order by the Ministry of Justice on 25 September 2002 "On Approval of Instructions for the Preparation, Documentation, and Coordination of Legal Regulations", and Governmental Decree Number 598 of 30 May 2002 "On Measures for the Improvement of Legal Drafting-Rules of Scientific Appraisal of Draft Laws".

Under Article 61 of the Constitution and Article 21 of the Law on Normative Acts (Number 213-1 of 24 March 1998, amended in 2004), the Government and Members of Parliament (Majilis and Senate) enjoy the right of legislative initiative, which takes place in the Majilis. All laws must be approved by both the Majilis and Senate, and signed by the President. Each house of Parliament has its own Rules of Procedure, which structure the legislative process. Drafts can be prepared by Inter-Ministerial Working Groups under the direction of the Government, or by Members of Parliament. After being submitted to the Parliamentary Bureau, they are transferred to the relevant Committee(s), and worked up. The main discussion of draft laws takes place at the Committee level, often with the participation of Working Group members. After this, draft laws receive a final plenary hearing, and may be amended, before being subjected to a final vote.

The first stage of the policy making process is carried out by the Government. This takes place in the context of formulating its work (under Article 66 of the Constitution), and establishing the Annual Legislative Drafting Programme (specified in Articles 10-11 of the Law on Normative Acts). The Ministry of Justice has a key role in elaborating and implementing the Annual Legislative Drafting Programme.

The first step in drafting a law is preparing a Concept Paper. It should be in accordance with Cabinet Decree Number 840 of 21 August 2003 "On Rules for Organising Legislative Drafting Work in Authorised Bodies of the Republic of Kazakhstan". In the Concept Paper, proponents must justify the proposed law, describe its goals and objectives, and explain how results will be achieved. The Concept Paper has to be submitted to the Interdepartmental Commission under the Cabinet of Ministers, and reviewed by the Ministry of Justice, to ensure that the proposed law is necessary, appropriate, in the correct format (type of normative act), and does not contravene existing law. Compliance with policy pronouncements by the President and Constitutional Council is examined. Also, conformity with existing/related laws is assessed. For example, Technical Regulations are limited by law to specific enumerated purposes, such as protecting the life and health of humans, animals, and plants, and preventing deceptive trading practices.

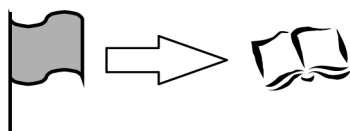
The Concept Paper is analogous to a Statement of Legislative Intent. Once approved, it sets guidelines for the legislation, and serves as “terms of reference” for the drafters or Working Group. Thus, it helps preserve and effectuate policy objectives during the drafting process.

There are no provisions in Kazakh laws or decrees (including the Parliamentary Rules of Procedure) that specifically mandate *how* or *when* policy development should take place, or *how* policy should be converted into law. Nonetheless, a number of procedures are in place. For example, Articles 13-15 of the Law on Normative Acts mandate Working Groups and consultative drafting procedures, which can serve as an extremely appropriate venue for policy analysis. Perhaps more importantly, Article 21 of the Law on Normative Acts requires an Explanatory Note, which has to include the justifications and “aims and tasks” of the draft law. This follows upon the Concept Paper, but becomes part of the legislative package. Also, Article 17 of the Law on Normative Acts requires that preambles be included whenever appropriate, to explain the “targets and motives” of the draft law. The preamble could also include vital information about the basis, context, and objectives of the draft law. Under the Parliamentary Rules of Procedure, Members of Parliament who initiate a draft law must also submit a justification paper, and the process cannot move forward until this is approved by the Parliament.

With respect to language, it is noteworthy that Article 21 Paragraph 1 of the Law on Normative Acts requires laws to be drafted and submitted to the Parliament in both the State language and the Russian language. The Kazakh Law on Languages contains similar requirements. However, it appears that drafting in both Russian and Kazakh sometimes presents challenges.

The basic parameters for successfully converting policy into law are in place in Kazakhstan. However, consequences arise from the accelerated preparation and passage of numerous laws and Decrees, their frequent amendment, and the strict time limits imposed upon Parliament by Article 61 of the Constitution. Working Groups and drafters have limited time to consider policy issues and determine how well they are implemented in draft legislation. Ultimately, there is a greater chance of legal inconsistencies that impede achievement of policy objectives. Fortunately, the dual role of Kazakh Ministry Officials in both policy development and legislative drafting can promote continuity and reduce the time required for drafting, in contrast to systems where drafting specialists work independently on the basis of instructions received from policy makers. Nonetheless, issues can arise concerning monitoring and quality control, and special measures are necessary to ensure transparency.

In the final analysis, responsibility for obliging proponents and drafters of legislation to perform serious policy analysis and document objectives (through Concept Papers, Statements of Legislative Intent, and Explanatory Notes) rests with the Parliament. This is an important part of the process of working up and passing legislation. Thus, it is best practice to have and enforce appropriate measures that secure meaningful compliance. This helps ensure that thorough policy analysis and the documentation of legislative objectives play an integral role in the preparation and passage of legislation, and that policy is more effectively converted into law.

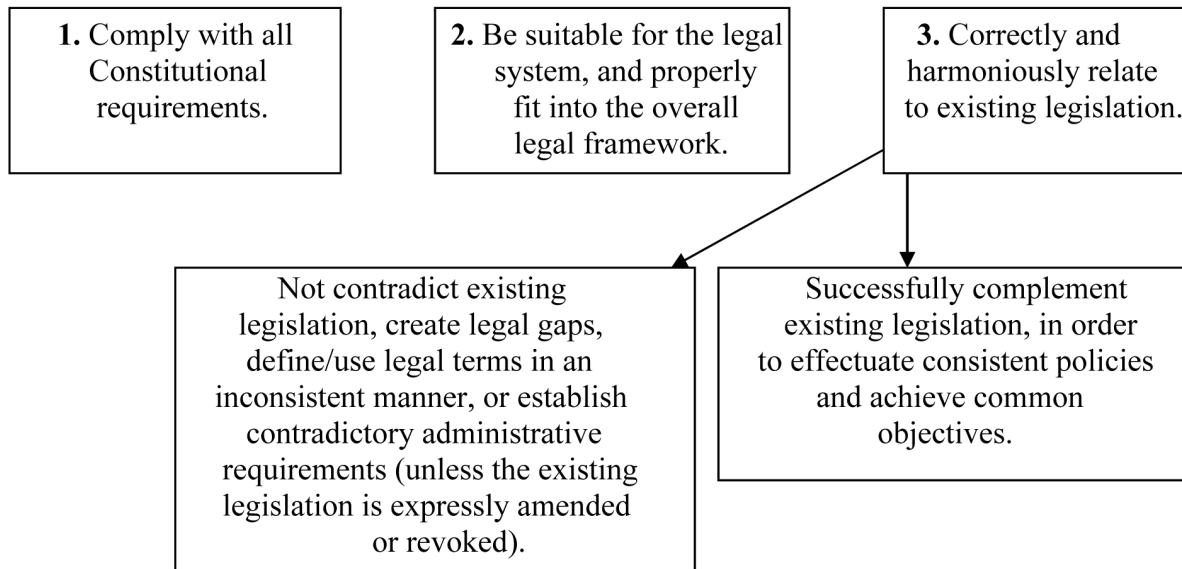


PRINCIPLE NUMBER TWO
LEGISLATION SHOULD COHERENTLY FIT
INTO THE CONSTITUTIONAL, LEGAL, AND
LEGISLATIVE FRAMEWORK



PRINCIPLE NUMBER TWO
LEGISLATION SHOULD COHERENTLY FIT
INTO THE CONSTITUTIONAL, LEGAL, AND LEGISLATIVE FRAMEWORK

In order to create a coherent legal system based upon the Rule of Law, it is important that new legislation (laws and regulations) fit into the existing Constitutional, legal, and legislative framework. Accordingly, new legislation must:



The first and foremost requirement is for new legislation to comply with the Constitution (supreme organic law). Compliance may ultimately need to be determined by a Constitutional Court or Supreme Court (depending upon the jurisdiction). But this is a long and complicated process that is best avoided in the first place, even if there are mechanisms for obtaining an expedited or advisory opinion. In many countries in transition, constitutionality is a very topical issue, with respect to both new and existing legislation. This is because the Constitutions are new, and subject to amendment. In addition, jurisprudence concerning Constitutional interpretation and application may be limited. Under such circumstances, Working Groups and legal experts need to assess the constitutionality of new legislation very carefully. Sometimes, after Constitutional Amendments, Working Groups and legal experts are called upon to perform a comprehensive review of the continuing constitutionality of existing laws, and identify/propose revisions if they are required.

The second requirement is for new legislation to comply with the legal system and legal framework in the country. The key issue is how new legislation fits into the overall legal structure. This is a broader question than constitutionality, because there are numerous requirements that originate from diverse sources. For example, the structure and roles of governmental and legal institutions must be respected, key aspects of the administration and enforcement of justice must be considered, and the traditional functions of different legal professionals must be taken into account. Such issues need to be addressed by looking at the “big picture”. In addition, there may be a Law on Normative Acts, or comparable framework law, which classifies legal instruments in a “typology” with a hierarchical order. Thus, new legislation should be in the correct form, and respect differences between codes, laws, decrees, resolutions, regulations, and other types of normative acts. Meeting these kinds of requirements is actually an intermediate step between conformity with the Constitution and harmoniously relating to specific legislation.

The third requirement is for new legislation to properly relate to existing legislation. This must be meticulously investigated by all parties engaged in the legislative drafting process, but most particularly legal experts and those with substantive knowledge of the subject matter being

addressed. The following eight questions should be asked:

1. Is new legislation necessary at all, in light of existing legislation and conditions, or is a different type of normative act or initiative more appropriate?
2. Are policies, goals, or provisions of the new legislation going to be affected by existing legislation?
3. Does the new legislation replace, amend, or affect existing legislation?
4. Are the definitions and usages of legal terms in the new legislation consistent with existing legislation and administrative practices?
5. Will any new terms conflict with those in existing legislation or cause confusion?
6. Will any complications arise concerning the interpretation or implementation of the new legislation in conjunction with existing legislation?
7. Are all provisions in the new legislation that repeal or amend existing legislation carefully drafted and technically correct?
8. Are all provisions concerning the timing and effective dates of the new legislation correct, or will there be contradictions or gaps that create uncertainty?

It is necessary to address each of these three requirements before legislation is passed. This can be achieved by thorough technical analysis during various stages of the drafting process. Expertise is required from the time drafting begins (in the Government, Line Ministries, or Parliament) until the legislation is finalised and passed by the Parliament. Working Groups and drafters can make a significant contribution to the process by identifying and analysing deficiencies in existing legislation. Conclusions concerning the status of existing legislation, the specific laws that need to be amended or revoked, and how proposed drafts fit into the existing legislative framework need to be provided to all parties engaged in the legislative drafting process. Ideally, this information should be included in the Explanatory Note.

Research and analysis to make sure that legislation fits into the Constitutional, legal, and legislative framework is often carried out by Legal Departments staffed by specialists. They may be attached to the Government, Ministries, Parliament, and/or President (depending on the legal system). Therefore, it is not necessary for all parties involved in drafting legislation to have special legal expertise. It is sufficient if they:

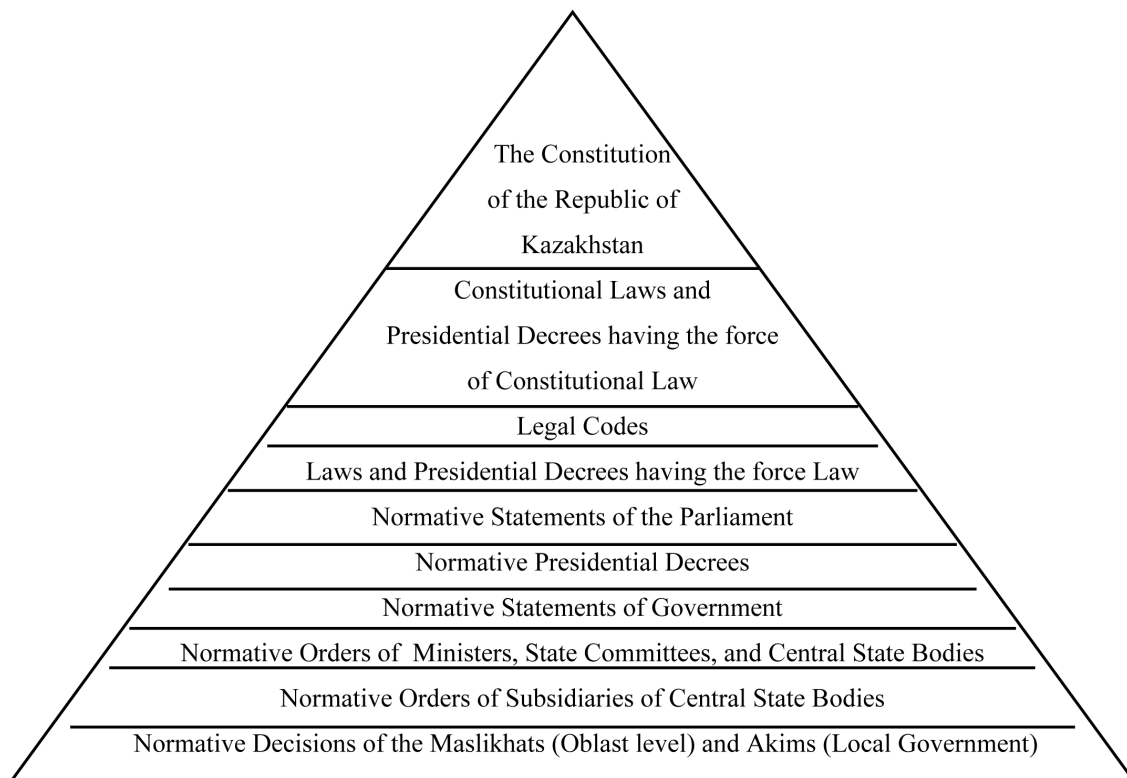
- Fully respect Constitutional requirements and the legal framework.
- Recognise the importance of coordinating new and existing legislation.
- Accept and value legal expertise in this regard.
- Make sure that legal expertise is obtained, shared, and utilised at different times during the drafting process, and whenever required. Computer networks are useful in this regard.

The final point merits elaboration. It is not enough for a preliminary draft to undergo expert legal analysis. Amendments must also be evaluated, to determine their relationship to the rest of the draft and to all existing legislation. The legislative process must be structured and timed so that increasingly finalised versions of the draft can be reviewed, and so that supplemental legal expertise is taken into account. It does not make sense to have legal experts perfect the first version of a draft law, only for it to be amended and subsequently approved by the Parliament in a form that is not legally correct.

The pace of legislation can significantly affect efforts to promote compliance with the Constitutional, legal, and legislative framework. Many countries in transition produce numerous new codes and laws, and maintain an extremely aggressive schedule for their passage. Under such circumstances, there is a greater chance of passing insufficiently harmonised or inconsistent laws. This problem

may be compounded by uncertainties concerning the role and function of different kinds of legislation (for example primary vs. secondary).

In Kazakhstan, the Constitution is the supreme law of the land. Pursuant to Article Four, it has precedence over any and all other legal acts. Under this Article, ratified international treaties have precedence over national laws, and must be given immediate effect (unless implementing legislation is required). The Law on Normative Acts further codifies the hierarchy of legal instruments. Under Article 3, there are two general classifications, Main Acts and Subordinate Acts (that must be implemented through a Main Act). Article 4 sets forth the following hierarchy:



The schema is most noteworthy for the important lawmaking role of the President, who can issue Decrees that take precedence over regular laws, and Decrees that have equivalent status to regular laws. There is no mention of international treaties (whose status is settled by the Constitution, as stated above). In accordance with sound practice, laws take precedence over all secondary legislation, and subordinate acts cannot contradict those of a higher order.

Kazakhstan is currently in the process of establishing a system of Technical Regulations. This is being done in accordance with the Law on Technical Regulating (passed in November 2004, and effective in May 2005). A number of laws are being amended to include a delegation of authority for the preparation of more detailed (secondary) legislation that promotes the health and safety of humans, animals, and plant life. The traditional practice in Kazakhstan has been for laws to address only the most important issues, avoiding excessive detail. The exact placement of Technical Regulations in the hierarchy of normative acts is not fully settled. Naturally, the content of Technical Regulations must take into account requirements of the World Trade Organisation, and in particular the Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). Thus, it is necessary to perform risk assessments, designate legitimate objectives, and base all protective measures on scientific justification. There are also procedural requirements for preparing, adopting, and implementing Technical Regulations.

Full compliance with the hierarchy of legal acts, as set forth in the Constitution and the Law on Normative Acts, is the first requirement for a sound legal framework in Kazakhstan. Thus, it is important to classify legal acts as Constitutional laws, codes, laws, or secondary legislation. The Constitution enumerates sixteen specific priority subjects that should be treated in legal Codes (mentioned in Principle Number One above). Laws resolve important issues (involving property rights, human rights, taxes, the State budget, etc.). Steps are currently underway to make the regulatory system more effective, through the design and standardisation of practices for secondary legislation.

Which Kazakh institution is assigned responsibility for harmonising draft laws with the existing legal framework depends upon the type of law and the identity of the proponent. Government initiated draft laws require an expert assessment from the Ministry of Justice. In addition, pursuant to Cabinet Decree Number 840 of 21 August 2003 “On Rules for Organising Legislative Drafting Work in Authorised Bodies of the Republic of Kazakhstan” (discussed above), Legal Departments of interested Ministries should be involved in Working Groups. Draft laws submitted to the Parliament by the Government, or initiated by a Member of Parliament or Parliamentary Committee, must be assessed by the Legislative Department of the Majilis. The Legislative Department provides official conclusions concerning how draft laws relate to the Constitution and existing laws. The Department of Legislation and Legal Expertise under the Office of the President also reviews and assesses legislation. The Constitutional Council, upon presentation of a request by an authorised party, has the ultimate word concerning whether draft laws and international agreements comply with the Constitution. It renders a decision before signature by the President (see Article 72 of the Constitution).

The proponents and drafters of new legislation have initial and primary responsibility for making sure that it coherently fits into the Constitutional, legal, and legislative framework. However, Parliament has final and ultimate responsibility. Therefore, it is important that:

- Members of Parliament and Parliamentary Staff have full access to high quality and timely legal expertise from a wide range of official and non-governmental experts, and well developed channels for communicating with and obtaining information from all parties involved in the legislative drafting process.
- Members of Parliament, Parliamentary Staff, and the Parliamentary Legal Department maintain required capacity for drafting and analysing legislation, and rigorously appraise its compliance with the Constitutional, legal, and legislative framework.
- Members of Parliament appreciate the importance of legal expertise, and give it due consideration.
- Members of Parliament oblige other parties to document and include all required legal information, analysis, and conclusions in the Explanatory Note for draft legislation.

Correct performance of the analysis required under Principle Number Two takes time. Thus, accelerated legislative calendars containing excessive drafting activities are not conducive to the development of compliant/harmonised legislation. Further, difficulties are compounded by even the slightest uncertainty concerning the distinctions between different kinds of normative acts and their proper roles. Therefore, it is advisable to take the measures specified above, and ensure that legal analysis is carefully performed and fully shared, in order to promote a coherent relationship between new legislation and the existing Constitutional, legal, and legislative framework in Kazakhstan.



PRINCIPLE NUMBER THREE
LEGISLATION SHOULD BE HARMONISED
WITH INTERNATIONAL AND EUROPEAN
LEGAL STANDARDS



PRINCIPLE NUMBER THREE LEGISLATION SHOULD BE HARMONISED WITH INTERNATIONAL AND EUROPEAN LEGAL STANDARDS

“Harmonisation” is the process of bringing a legal system and/or legislation (laws and regulations) into strict compliance with external requirements. The term “transposition of law” is also used. In contrast, “legal approximation” is the process of gradually bringing legislation closer to certain defined external standards, without any immediate need to make it identical. They are distinguished by the degree of compliance required and the applicable timeframe.

Legal harmonisation is not a new process. In fact, many legal systems throughout human history have borrowed, copied, or been forced to accept codes of law or individual laws originating elsewhere. For example, the re-introduction of Roman law (as codified by Justinian) was at the heart of the Renaissance. After gaining their independence, the American colonies closely followed British law (as set forth in Blackstone’s *Commentaries*, which were owned and consulted by most lawyers). Modern maritime law can be traced back to ancient Greece, particularly Rhodes. And the French *Code Civil* has been transplanted to dozens of countries across Europe and around the world. Many legal systems and institutions have been built upon principles introduced by historical “Law-Givers” such as Moses, Hammurabi, Solon, Justinian, Mohammed, Confucius, and Napoleon. In many instances, “Legal Borrowing” is carried out by prominent leaders (such as the Meiji in Japan and Mustapha Kemal Ataturk in Turkey) or by legal professionals who wish to introduce prestigious, coherent, or accessible laws that have proven effective in other jurisdictions.

However, the situation in the twenty-first century is fundamentally different. Every country in the world faces a multifaceted international system with a virtually endless array of mutual and shared obligations that are not under the control of any single party. Requirements can be found in a vast number of international, multilateral, and bilateral conventions, treaties, and agreements. They are formulated and upheld by institutions as diverse as the United Nations and its numerous agencies, the European Union, the Council of Europe, the World Bank, the International Monetary Fund, and the World Trade Organisation, to name just a few. In some instances, international obligations are self-executing, and result from the simple fact of membership in an organisation or ratification of a legal instrument. Other international obligations, while not mandatory, are still a precondition for important economic or political benefits. In such cases, countries have the right to opt out, but do so to their own detriment.

Many countries are currently in the process of bringing their legislation into compliance with international principles concerning democracy, a free market economy, and human rights. For example, when a country joins the Council of Europe and ratifies the European Convention for the Protection of Human Rights and Fundamental Freedoms, a complete regime of legal rights is extended to its citizens. These rights can be enforced through national courts, which must often modify their practices, or at the European Court of Human Rights in Strasbourg, which has appellate jurisdiction. Membership in the World Trade Organisation creates a series of multilateral and reciprocal rights and obligations relating to trading practices, Technical Regulations, and product standardisation. Membership in the European Union entails transposition of the *Acquis Communautaire* and participation in Community institutions. For countries in transition, a large number of international and supranational rules need to be considered and applied in an abbreviated time frame. This places significant demands upon legal and administrative systems.

The ten countries that joined the European Union in May 2004 were required to transpose the entire *Acquis Communautaire* and harmonise their legal systems in a very short time period.

There was limited flexibility, and for the most part specific national circumstances could not be accommodated. The main issue was how to achieve required objectives as quickly as possible.

Countries such as Kazakhstan that were previously Soviet Republics face different circumstances. Legal approximation is a longer and more variable process than harmonisation, and depends upon the specific sphere of activity. For certain endeavours, rapid compliance is required. For others, the process is more flexible, making it possible to take different models into account, consider local conditions, and design a more tailored approach. The keys to ultimate success are determining the level of compliance required, establishing the correct pace of reform, setting the proper foundation for the work, and maintaining commitment over time.

The distinction between harmonisation and approximation can be highlighted through two contrasting examples.

With respect to membership in the World Trade Organisation, the process for Kazakhstan is closer to harmonisation (within specific parameters). Kazakhstan is required to rapidly apply numerous principles such as Most Favoured Nation and National Treatment, and expeditiously bring its legislation into compliance with international requirements set forth in the Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). This requires Kazakhstan to amend numerous laws, establish new institutions with international functions, create a new regulatory regime for accreditation and conformity assessment, and modify commercial practices to promote product standardisation and safety. While there is a certain degree of flexibility concerning timing, the issues subject to negotiation are circumscribed.

With respect to the European Union, Kazakhstan's ratification of the Partnership and Cooperation Agreement (PCA) in 1999 is an intermediate step that is very distinct from applying for membership. It can be characterised as a commitment to approximation, because of the absence of absolute promises under a strict timetable. Nonetheless, the PCA contains a wide range of important obligations that are major priorities for Kazakhstan's development and its relationship with the European Union. They cover economic/commercial relations, trade and investment, taxation, the movement of capital, transportation, political relations, democratisation, agriculture, energy, the environment, scientific and cultural cooperation, legal mechanisms to protect commercial interests and participate in the common market, and legal approximation. With respect to the latter, Article 43 contains a commitment by Kazakhstan to "ensure that its legislation will be gradually made compatible with that of the Community".

At first glance, having a longer time frame and more flexibility may seem advantageous. However, the process of legal transformation is in some respects easier when it is clear what has to be done, and it is only necessary to determine how and when. Much can be learned from the accession process in the countries that joined the European Union in May 2004. However, the gradual approximation required from Kazakhstan under Article 43 is fundamentally different.

Therefore, it is necessary to identify and prioritise the essential areas for approximation, while carefully justifying any deviations. This involves complicated choices that affect diverse national interests (benefiting certain target groups while causing disadvantage to others). As a result, the process takes on new parameters and a more dynamic rhythm. Mistakes can be made, since legal provisions which are effective and perhaps even essential under certain socio-economic conditions and administrative structures may be less productive or even counterproductive in a different context. The *Acquis Communautaire*, for example, is best understood as a system. Laws are often inter-related and interdependent, and their provisions and procedures are designed for a specific institutional context. Significant difficulties can arise when parts of a system, or specific policies

and laws, are transplanted in isolation. Finally, timing must be taken into consideration. There can be significant differences between short-term and long-term results. Thus, unlike harmonisation, legal approximation requires concerted and comprehensive analysis, the careful balancing of interests, and a strategic long-term approach.

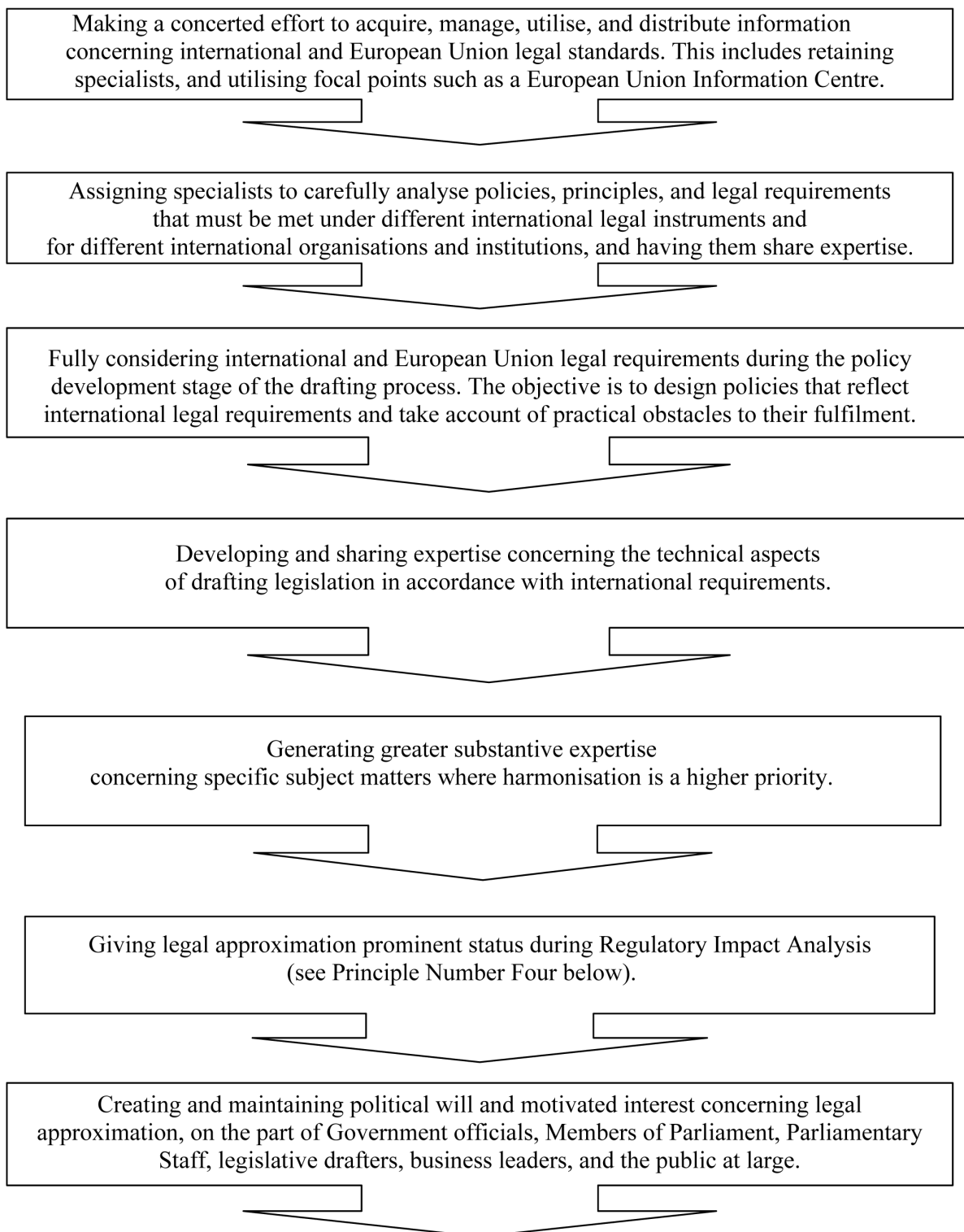
In Kazakhstan, many of the institutions involved in determining whether draft laws fit into the Constitutional and national legal framework are also involved in assessing compliance with international and treaty obligations. The Ministry of Justice plays a key role on behalf of the Government, while several institutions within the Parliament have related responsibilities.

The Ministry of Justice, in accordance with provisions approved by the Cabinet of Ministers on 28 October 2004, reviews draft legislation to assess compliance with Kazakhstan's international and treaty obligations, the provisions of relevant foreign legislation, and accepted international norms. Pursuant to the Law on Normative Acts and the Partnership and Cooperation Agreement, the Ministry of Justice (particularly its Department of Legislation) carefully assesses compliance with requirements under European law and procedures. In fact, consideration of international commitments and foreign experience starts with the Concept Paper prepared at the start of the legislative drafting process.

In Parliament, the Legislative Department and Legislative Committee play leading roles. Other Committees may be involved, depending on the subject matter. Scientific expertise concerning international aspects of legislation can be obtained, and hearings can be held when required. In light of the current emphasis upon rapidly bringing Kazakhstan into the ranks of developed countries, the international implications of legislation often receive significant attention.

The distribution of responsibilities for legal approximation throughout official structures demonstrates Kazakhstan's strong commitment to fulfilling its international obligations in a comprehensive fashion. However, diffusion of responsibility can lead to uncertainty concerning roles and responsibilities, and raise issues of coordination and communication. Therefore, it may be helpful to strengthen overall plans and guidelines that comprehensively identify the responsible parties and set forth procedures for their operations and relationships. In addition, each Governmental institution needs to ensure that it has sufficient expertise and capacity to meet its responsibilities. Finally, it is important to fully address issues relating to funding and access to information.

Several practical steps can be taken to further enhance approximation of the Kazakh legal system and legislation to international and European Union legal requirements:



From the preceding, it is clear that all key parties involved in the legislative drafting process must have a basic understanding of the importance of bringing national legislation into compliance with international and European Union requirements. Further, special expertise in this regard needs to be solicited and heeded during the legislative drafting process.

Finally, it is important to note that legal harmonisation and legal approximation involve much more than simply drafting laws that contain provisions required by international conventions or supranational institutions. Therefore:

1. Strong political support at all levels of government must persevere well after the laws are passed.
2. There must be sound implementing regulations.
3. Administrative institutions need to have the commitment and capacity required for carrying out new mandates and supervising compliance. This includes a) an effective, professional, and well-trained civil service, b) necessary facilities, equipment, and resources, c) sufficient inter-institutional linkages, and d) communication/information sharing practices.
4. Courts must be able to adjudicate and set the stage for enforcing international legal obligations.
5. There must be awareness and acceptance of new legal standards on the part of businesses, civil society, the legal profession, and the general public.

In other words, legal harmonisation and legal approximation are much more than criteria for legislative drafting. They are part of a complicated and extended process that only begins with the passage of legislation. The realisation of international commitments is ultimately a question of implementation.



PRINCIPLE NUMBER FOUR
LEGISLATION SHOULD BE PRACTICAL
AND EFFECTIVE



PRINCIPLE NUMBER FOUR

LEGISLATION SHOULD BE PRACTICAL AND EFFECTIVE

In a system built upon the Rule of Law, where transparent institutions apply accepted principles in a fair and impartial manner, laws play an active role in the life of citizens. In other words, laws are real, accessible, implemented, and enforced. Laws are also taken seriously by those responsible for implementing them, complying with them, enforcing them, and adjudicating them. When laws are not practical and effective, they are difficult to administer and adjudicate. This leads to disrespect for the law. Under the worst-case scenario, laws may appear to be applicable only to a select few, or to exist only on paper.

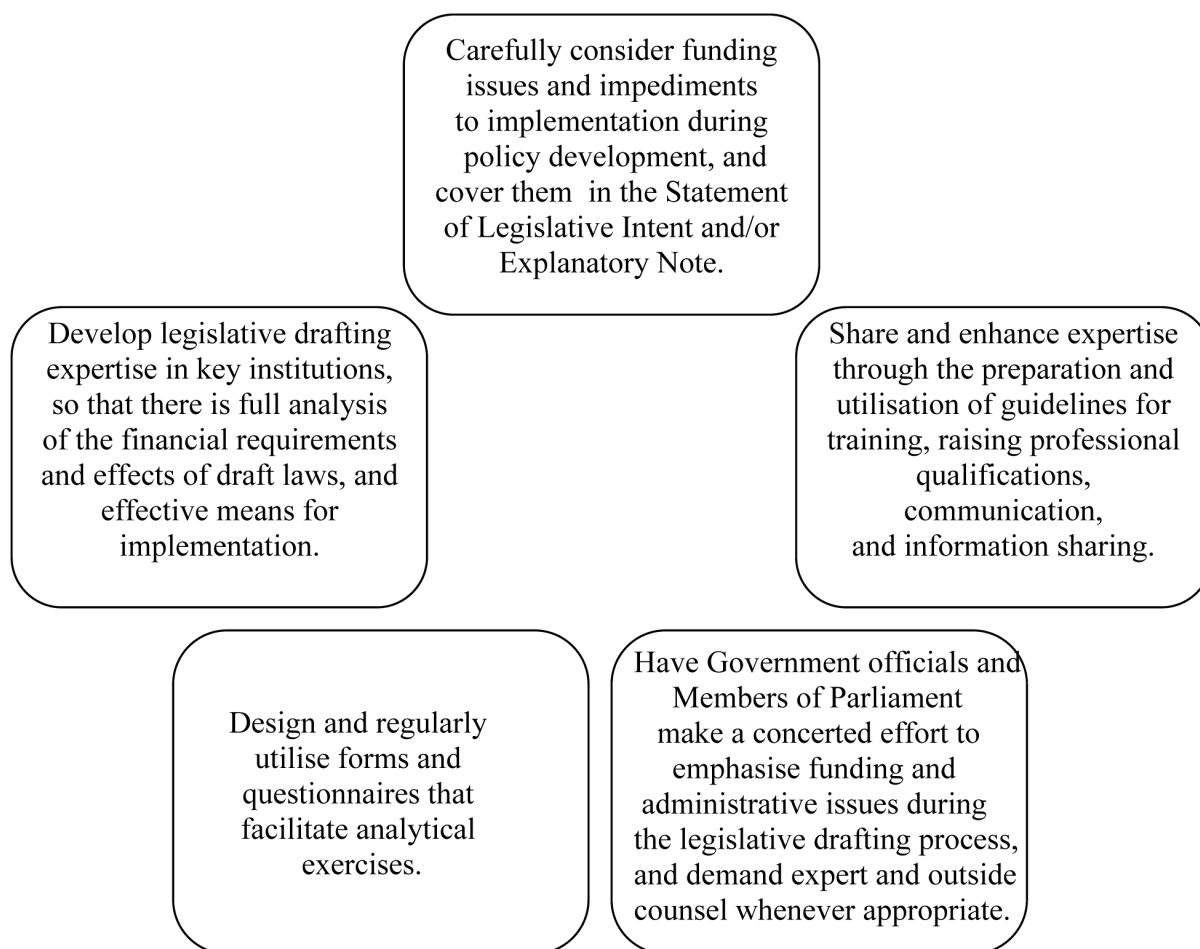
The effectiveness of laws is diminished when they do not take full account of:

- Their financial impact on the State budget and/or different target groups.
- Limitations in funding or resources that can impede or interfere with implementation.
- Actual levels of institutional/administrative capacity and human resources.
- Challenges and difficulties related to enforcement.
- Complications that may arise during adjudication by the courts and the enforcement of court judgments.

Drafting and passing laws that will not fully meet their goals due to insufficient financial or administrative capacity is counterproductive, and a waste of limited legislative resources. It creates an impression that the legislative process is not serving the interests of the country. Furthermore, when laws cannot be properly implemented and enforced, governmental institutions and the legal system are discredited. This engenders cynicism.

When a law falls short of requirements and expectations after it is on the books, it is often in significant measure a consequence of the way the law was written. In order to be practical and effective, laws must take into account and address the realities and difficulties associated with implementation. Legislative drafters need to know if a Ministry or Department lacks trained staff or the physical means to implement a law, or if there will be reluctance to carry the law out because it is mandated by international obligations but contrary to national practice. Similar considerations also apply to the preparation and implementation of secondary legislation (regulations or bye-laws).

In order to make laws more practical and effective, it is considered best practice to:



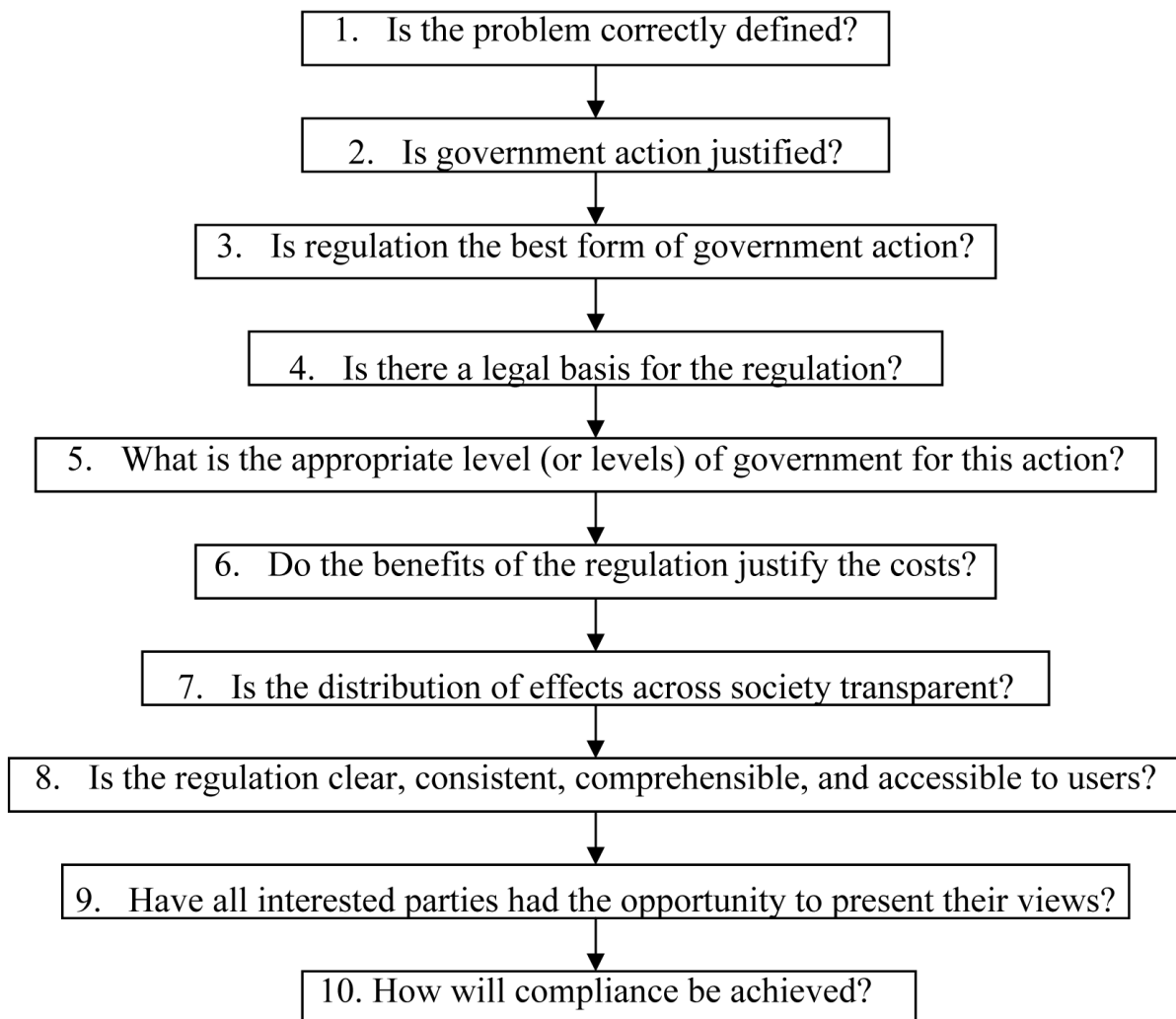
“Sunset Provisions” are an extremely effective technique utilised in some jurisdictions. Select laws are given fixed/limited duration, after which they expire automatically. Thus, after the indicated period, they must be extended or re-authorised. This technique necessitates periodic assessment and analysis of the actual effects and results of laws. Furthermore, any extensions or amendments must take full account of what has been achieved, and what is working best. Unfortunately, Governments, Parliaments, and legislative drafters often focus primarily on the preparation and passage of legislation. They may not have the time or the opportunity to fully consider the actual results, and feedback may not reach them. Sunset Provisions can automatically alter this dynamic.

One of the key tools for determining the effects of legislation is Regulatory Impact Analysis. Regulatory Impact Analysis (RIA) can be defined as a systematic effort to determine the probable effects of legislation *in advance*. The main purpose is to guide drafters and legislators towards the most effective means and mechanisms for achieving policies and objectives. In other words, RIA is a decision-making tool that helps policy makers, drafters, and legislators determine the most appropriate course of action to achieve political, economic, and social goals.

Regulatory Impact Analysis was originally based on econometric forecasting, and used to determine the costs and benefits of legislation, and its relative impact on different social sectors. The approach was for the most part quantitative. However, RIA has gradually been expanded to cover a much wider range of issues. At this time, it is appropriate and often mandatory to consider how proposed legislation will affect the economy, the State budget, the environment, international obligations, human rights, the courts, administrative agencies, enforcement bodies, the society,

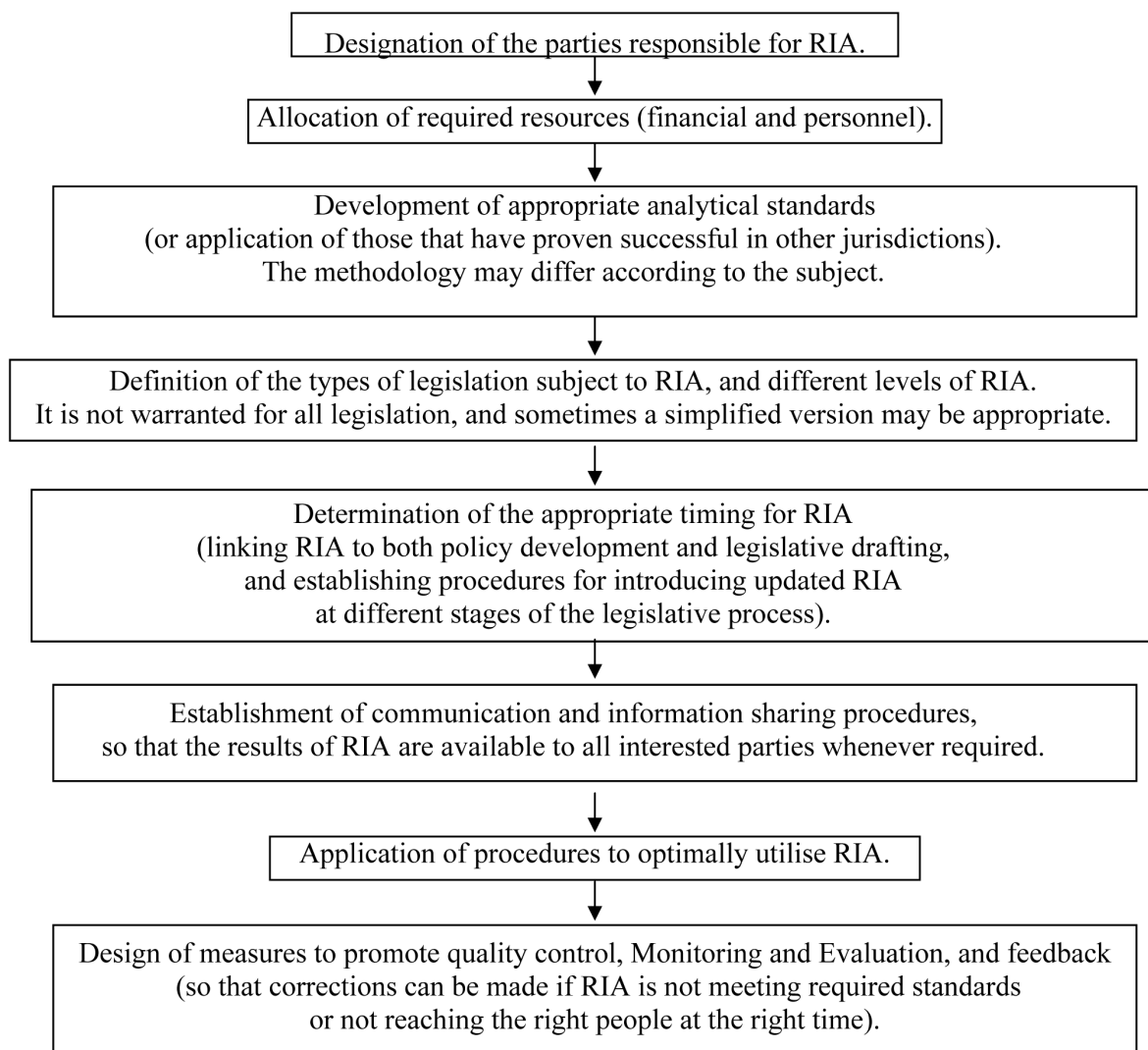
specific organisations and target groups, and existing laws and regulations. Both short-term and long-term effects need to be identified and evaluated. Long-term effects may need to be discounted to their current value. In order to carry out this exercise, legislative drafters and analysts require precise skills and techniques covering a number of subject matters.

The Organisation for Economic Cooperation and Development (OECD) has developed a Checklist for assessing the efficiency and effectiveness of legislation. According to the OECD Checklist, ten key questions should be asked:



Regulatory Impact Analysis is best viewed in context, as a useful tool for one part of the larger process of carefully considering legislative acts. The overall process works best when different mechanisms (resolutions, guidelines, work plans, and institutional arrangements) place RIA and comparable analytical exercises on the agenda of key parties. Institutional arrangements should accommodate the work that needs to be done, and designate responsible parties. Since several institutions and parties can be directly involved in the legislative drafting process (including the Government, Ministries, the Parliament, the Office of the President, and Legal Departments within them), channels of communication and mechanisms for building consensus are important for RIA. It is best practice for Ministries that are interested in particular legislation to coordinate their work, and share the results with the Parliament. While it may be optimal for many institutions to have a certain level of capacity to analyse legislation, the costs and inefficiencies that result from duplication must be considered.

Ideally, there should be an official and documented Strategy for Regulatory Impact Analysis. The key elements of such a Strategy are:



Perhaps the most significant and practical step is to make Regulatory Impact Analysis a mandatory and major component of the Explanatory Note that accompanies draft legislation. Then, it can be distributed to all parties engaged in the legislative drafting and approval process. In addition, this would schedule Regulatory Impact Analysis during the early stages of the legislative drafting process, or as part of policy making, which is considered sound practice.

One of the most difficult aspects of Regulatory Impact Analysis is determining the actual costs or budgetary affects of draft laws, particularly when the specific provisions and details are not finalised. A number of valuation techniques have been developed. They include market analysis of the “willingness to pay for and willingness to accept” additional costs, “revealed preferences” through the behaviour of social actors, “stated preferences” through responses to surveys, and “estimates of alternative values” (such as the cost of replacing resources or the funds that are saved through improved health and well-being). It is helpful to adopt a common sense and wide-ranging approach. If precise figures are difficult to develop, estimates or ranges, with explanations concerning the factors that will affect them, are perfectly acceptable. Generally speaking, these techniques are most effective when non-official parties are involved.

As mentioned in Principle Number One, Article 21 of the Kazakh Law on Normative Acts sets forth requirements for the Explanatory Note, and the materials that should accompany draft laws. These include the identity of the proponent, the members of the legislative Working Group, the

results of “expertise”, and the anticipated consequences of the law (financial, economic, social, legal, and environmental). Articles 26 and 68 of Governmental Decree Number 190 of 1 March 2005 “On the Rules of the Government of the Republic of Kazakhstan” require an Explanatory Note for laws, Government Decrees, and Prime Ministerial Orders. The content of the Explanatory Note includes the goals, justification, costs, consequences, and context of the act.

Scientific expertise is given a prominent role in the preparation of Kazakh legislation. Pursuant to Article 62 of Governmental Decree Number 190, scientific analysis must be performed. Legal, economic, and financial factors should be considered, and environmental factors must be considered. The drafters have to choose between accepting the results of the analysis and making any required changes, rejecting the results of the analysis and setting forth their reasons, or requesting supplemental analysis. In recognition of the emphasis on environmental protection in Kazakhstan, negative findings in this area have an obligatory nature, and must be directly addressed.

Articles 22–24 of the Law on Normative Acts specify who can authorise “scientific expertise”, who can carry it out, and the content. Under Article 24, various governmental officials and agencies, as well parties engaged in the legislative drafting and approval process, have the right to request scientific expertise. Under Article 23, a wide range of experts, scholars, scientists, and specialists can be assigned analytical tasks, including foreign individuals and international organisations, as long as they were not involved in preparing the legislation. Under Article 24, expertise covers the quality of the draft, its rationale, effectiveness, timeliness, legality, compliance with the Constitution, and whether or not there are likely to be any negative consequences. These are key aspects of Regulatory Impact Analysis.

Governmental Decree Number 598 of 30 May 2002 “On Measures for the Improvement of Legal Drafting-Rules of Scientific Appraisal of Draft Laws” reiterates many of these requirements. Experts are given thirty days to produce a “well-reasoned, science-based, objective, and complete opinion”. Several kinds of scientific appraisal are identified. They include comprehensive appraisal (covering several different aspects of the law), stand-alone appraisal (covering a single aspect of the law), commission appraisal (performed by a group of experts examining a single aspect of the law), repeated appraisal (when supplemental opinions from a different expert are required), and additional appraisal (when revisions to the draft law require further analysis).

Special provisions apply when draft laws affect the State budget. Under Article 61 Paragraph 6 of the Constitution, laws that will reduce State revenues or increase State expenditures may only proceed following affirmative approval by the Government in the form of a Resolution. The Law on Normative Acts also establishes special procedures when private entrepreneurs will be affected. In such cases, the Explanatory Note must contain calculations showing how implementation of the law will affect their costs of doing business.

Technical Regulations in Kazakhstan should be based upon an assessment of risk, including the costs and consequences of inaction. In addition, protective measures should be carefully designed so that they are no more restrictive or costly than absolutely necessary in order to achieve the required objectives. This variant of Impact Analysis is mandated by Article 18 Section 1 of the Law on Technical Regulation (discussed in Principle Number Two above).

“Sunset Provisions” are specifically authorised by the Law on Normative Acts. Under Article 39 Paragraph 2, a temporary time period may be established for all or part of a normative act. In line with standard practice, Paragraph 1 provides that laws have unlimited effect, unless otherwise specified. But there are no further details. Thus, it is not clear when or under what circumstances Sunset Provisions might be warranted, and how they should be structured. Therefore, it may be

advisable to develop parameters for more frequent use of Sunset Provisions, put in place procedures for closely monitoring the actual effect of laws, and take other measures to ensure that laws do not outlive their usefulness.

In many countries in transition, the timing for performing Regulatory Impact Analysis has proven problematic. In Kazakhstan, the requirements for in-depth Impact Analysis are generally applicable *after* laws are drafted. The legislative calendar is extremely demanding, and the time allotted for scientific analysis is limited. This creates obstacles to thorough analysis. In addition, contrary to the general trend, Impact Analysis is carried out exclusively by parties who were not involved in preparing the legislation. While this promotes objectivity and reduces chances for conflicts of interest, it excludes the parties who are most familiar with the draft legislation. Consequently, there may be ways to strengthen Regulatory Impact Analysis, and thereby make legislation more practical and effective.

In spite of the significant advantages of Regulatory Impact Analysis listed above, and the importance of continuing to institutionalise this exercise in Kazakhstan, a certain degree of scepticism is warranted. First of all, anticipating the future repercussions of laws depends upon developing factual premises based upon accurate assumptions, and using them for projections and conclusions. This can be difficult when it comes to the financial consequences of legislation. Second, the world is constantly in motion, and it is difficult to anticipate changes in circumstances that can influence the results of legislation (new technology, natural phenomena, changes in market conditions and prices, etc.). Finally, once legislators finish their work, target groups apply their resources and energy to finding loopholes and ways to manipulate the system to their advantage. Every new tax law is an opportunity for good tax lawyers to serve their clients by reducing their taxes. Every new criminal statute is an invitation to clever outlaws to find novel ways to get ahead. Compared to the people who draft and pass legislation, those who make their living by dealing with it have all the time in the world.

Nonetheless, and taking these limitations into account, it is still imperative to undertake sound Regulatory Impact Analysis. The financial, environmental, and international consequences of legislation must always be fully considered. No law should be passed until its effects on the State budget and the possible reaction of international partners are assiduously assessed. The same holds true for administrative capacity for implementation. If a draft law requires additional staff, equipment, or training for proper implementation, inadequate funding will soon prove to be a significant obstacle. If a new law imposes obligations upon the staff of an agency or department that diverge from existing practice, it is necessary to include provisions for training and monitoring/oversight. Naturally, it is beneficial to address these issues at the earliest possible stage of the drafting process, preferably during policy development and preparation of the Statement of Legislative Intent or Explanatory Note.

Finally, it is important to understand that when it comes to making legislation practical and effective, and performing Regulatory Impact Analysis, some of the most capable resource people can be found through non-official sources. These include businesses, Non-Governmental Organisations (NGOs), professional associations, syndicates, think tanks, and other independent institutions. Thus, opening up the legislative process in accordance with Principle Number Six is an important step towards making laws more practical and effective.



PRINCIPLE NUMBER FIVE
LEGISLATION SHOULD BE TECHNICALLY
SOUND



PRINCIPLE NUMBER FIVE

LEGISLATION SHOULD BE TECHNICALLY SOUND

To be sound, legislation must be properly written and technically correct. It must comply with all linguistic requirements and drafting rules, and follow the form and format required in the jurisdiction. This is the *sine qua non* of good legislation. Accordingly, most countries have laws or guidelines that set forth principles concerning drafting style and rules concerning technical requirements.

Excellent policy analysis, legal expertise to ensure compliance with national and international legal requirements, and full Regulatory Impact Analysis will come to naught if legislation is not well written and technically sound. In other words, it is not sufficient to follow the first four Principles, without paying explicit attention to Principle Number Five. Accordingly, the Selected Rules for Drafting European Union Legislation start with a requirement that wording should be “clear, concise, and unambiguous” (see Appendix One). Also, the Joint Practical Guide starts with a requirement that Community legislative acts be drafted “clearly, simply, and precisely” (see Appendix Two).

The key characteristics of well-drafted and technically sound legislation are:

- The legislation is succinctly and accurately titled.
- The legislation contains only binding norms, without suggestions or political declarations. Norms and rules are directly and explicitly stated.
- The legislation clearly specifies its scope, from the outset, so that it is possible to accurately determine for whom and under what circumstances it is applicable.
- The format of the legislation is correct, and it follows the appropriate order (for example preamble, subject matter and scope, definitions, rights and obligations, provisions conferring implementing powers, procedural provisions, and transitional and final provisions).
- The structural subdivisions of the enacting terms of the legislation (Parts, Titles, Chapters, Sections, Articles, Paragraphs, Points) are properly and consistently organised, correctly numbered, and in accordance with all requirements. Indeed, issues concerning structure, the order of provisions, and groupings of like provisions are best handled at an early stage.
- The language is clear and precise, and legally correct.
- All terms are defined, and consistently used in accordance with a single definition.
- There is no slang or vernacular, and idiomatic expressions are avoided.
- Abbreviations and acronyms are used sparingly, and always defined or written out the first time.
- There are no errors in diction, or improperly used terms.
- There are no redundancies, repetitive statements, unnecessary words or phrases, or extraneous materials.
- There are no errors in punctuation, syntax, or grammar.
- Sentences are short and to the point, and generally express a single idea. Separate sentences are utilised whenever possible. Sentences have simplified structures, and avoid the use of subordinate clauses, superfluous phrases, extra punctuation, or excessive parentheses.
- Normative provisions are always complementary and never contradictory. There are no gaps, unanswered questions, or inaccurate references.
- When a law is multilingual (required in two languages), there are no terms or legal concepts that are specific to only one language.
- References to other legislation are clear, accurate, and correctly formatted. Circular references (referring back to the original reference) and serial references (referring to another reference) are avoided. References to non-binding acts clearly specify what

portions are being given legal force. (See Articles 16-17 of the Joint Practical Guide).

- Provisions revoking or amending existing legislation are accurately written, follow the correct format, explicitly state their legal implications, and can be inserted into the act being amended.
- Transitional clauses and final provisions concerning issues such as timing, entry into force, and duration are clear and correct.
- Annexes and supplemental materials are correctly and sparingly used.

Failure to fully comply with any of these requirements can severely undermine legislation.

Thus, parties responsible for drafting work (as opposed to analysis or review) require legal expertise concerning stylistic and technical issues. Many Governments and Parliaments rely upon Legal Departments for drafting support and compliance checks. In Common Law countries with Parliamentary systems, a specialised Department is often responsible. Noteworthy examples include the Parliamentary Counsel Office in the United Kingdom, the Office of Parliamentary Counsel of the Office of the Attorney General in Ireland, the Department of Justice in Canada, and the Office of Parliamentary Counsel in Australia. In France, the Conseil d'Etat performs this function. The key common feature of all of these institutional arrangements is that preparing legal text is the province of experts who have developed special skills.

A number of practical steps can be taken to make legislation technically sound. It is considered best practice to:

- Prepare, approve, and put into effect a law, standard reference (handbook), guidelines, and/or checklists covering drafting requirements. These materials are most useful when they are straightforward, practical, and carefully tailored to the national context. Examples include Parliamentary Rules of Procedure, Administrative Instruments, and Laws on Normative Acts (or comparable legislation). In the United States, where legislative bodies are primarily responsible for drafting laws, many State Legislatures have their own comprehensive guidelines covering State laws. They contain a wealth of information, and can usually be obtained via the Internet.
- Make sure that all parties engaged in legislative drafting (Ministry officials and Experts, Members of Parliament, Parliamentary Staff, Participants in Working Groups, independent experts, and Presidential Advisors) have access to, understand, and follow the guidelines and reference materials.
- Regularly develop and share drafting skills, through formal events and informal communication, involving all the different institutions and individuals participating in the drafting process. This is particularly valuable at the working or technical level.
- Ensure networking and meaningful communication between all parties involved in drafting specific legislation. This prevents technical problems, and obviates the redrafting of laws to redress formatting or technical issues. Computer networks can be extremely useful for this purpose.
- Provide information to Members of Parliament, so that they fully understand the importance of technical drafting requirements, and give due regard to legal advisors and experts when working up and approving legislation.
- Incorporate drafting expertise in all stages of the legislative process, including amendments and revisions of draft legislation. In this regard, the Government may be allowed to comment on or assess amendments proposed in Parliament.
- Establish and carry out verification procedures relating to technical drafting issues.

In some countries, one institution (such as the Ministry of Justice) plays a coordinating role or takes the lead with regard to verifying the quality and technical correctness of draft legislation. When drafts are initiated in the Parliament, the Legal Department or a special Committee usually assumes these duties, and their work is likely to be reviewed by the Government. Another model involves the creation of a special institution dedicated to drafting activities. In some countries, this takes the form of a semi-public or Non-Governmental Organisation, or even a Parliamentary Department. This approach can improve overall management of the drafting process, and promote consistency. However, there may be limitations in capacity, difficulties in prioritising numerous demands for drafting assistance, and obstacles to accessing expertise concerning specific subject matters.

It is important to emphasise that the technical soundness of legislation is also a function of who it is written for, and the way that it will be enforced and adjudicated. There are different approaches concerning optimal target groups. In some countries, there is a trend towards the “plain use” of language, so that laws can be understood by the general public, or those without a legal education. Nonetheless, legislative drafters generally target officials who will implement laws, and Judges, Prosecutors, and lawyers who will interpret them. In this context, legal terminology that accurately formulates norms is usually favoured.

This raises a number of questions:

- Should the language be straightforward or detailed? Can plain language provide the required degree of legal certainty? To what extent should “everyday language” be used? (See Article 1.4.1 of the Joint Practical Guide).
- What is the correct balance between simplicity and precision?
- To what extent and how should laws leave technical questions or details open, for resolution by the parties charged with their administration?
- Should laws be written to provide guidance to Judges or to limit their discretion?

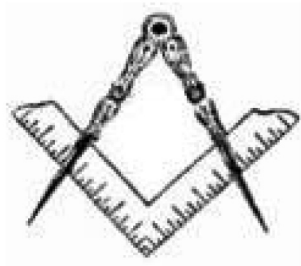
These questions need to be addressed at the start of the drafting process, in light of the subject matter, the jurisdictional context, the type of legislative act, and the nature of the target group(s). Certain subjects apply to a larger constituency, and may be more effective without “legalese”. Other subjects are inherently technical and more likely to involve specialists. Nonetheless, all laws need to be straightforward and clear, and follow the requirements for technical soundness discussed above. This enables target groups to better understand their rights and obligations. The result is greater compliance, more effective implementation and adjudication, and the Rule of Law.

In Kazakhstan, the Law on Normative Acts establishes principles for drafting, systematising, amending, and repealing legislation. Technical issues such as paragraphs, headings, numeration, preambles, and appropriate terminology are covered in Article 17. Drafting style is covered in Article 18, which requires compliance with literary rules and legal terminology, and prohibits the use of metaphors, abbreviations, obsolete terms, and words with multiple meanings. Other issues addressed include Amendments (Article 27), conditions for entry into effect (Articles 36-40), and referencing other acts and sections of the same act (Articles 19 and 20). In addition, the Order of the Minister of Justice Number 142 of 25 September 2002 “On Approval of Instructions for Preparation, Documentation, and Co-ordination of Legal Regulations by Central and Local Government Agencies” contains technical requirements concerning the structure and content of Regulations. It covers preambles, numeration, legal terminology, references to other legal acts, amendment of other legal acts, appendices, etc.

While the Law on Normative Acts adequately covers the basic elements of format and style, it does not specify how to organise and order legal provisions, how to effectively employ legal language (and maintain linguistic consistency between different laws), and how to correctly employ syntax and punctuation. The Law on Normative Acts also does not contain any checklist or inventory of issues that should be addressed. These can be helpful tools for maintaining quality control. Some countries very strictly enforce the use of checklists covering issues that need to be addressed, and institutions/parties that should be consulted. In addition, some of the Articles are extremely summary and terse in nature (do not provide sufficient detail).

Nonetheless, the Law on Normative Acts serves as the starting point for legal experts and other parties involved in the legislative drafting process, and legal practitioners (Judges, Prosecutors, and lawyers) dealing with legislation. Therefore, it is advisable to increase familiarity with and understanding of the Law on Normative Acts. This would strengthen the capacity of the legal profession to draft and assess legislation, in accordance with Principle Number Seven below.

By proceeding as outlined herein, it is possible to standardise and improve the form and format of Kazakh legislation, and make it more technically sound. This will streamline the legislative drafting process, and promote legal clarity. Also, reducing formatting problems and technical issues makes laws easier to administer, and more likely to achieve their intended results. Finally, this facilitates the work of legal practitioners (Judges, Prosecutors, and lawyers) who interpret, enforce, and adjudicate laws.



PRINCIPLE NUMBER SIX
THE LEGISLATIVE DRAFTING PROCESS
SHOULD BE OPEN AND CONSULTATIVE



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The participation of citizens, civil society, Non-Governmental Organisations (NGOs), professional bodies, independent experts, and business representatives in governmental processes is an integral aspect of representative democracy. In addition, the participation of non-governmental parties in the drafting process is crucial for the preparation of sound and effective legislation. While consultation between different governmental institutions and officials is necessary for the preparation of sound and effective legislation, it is not sufficient. The most productive way to refine policies, make sure that legislation is harmonised with the national legal system and international requirements, make legislation practical and effective, analyse the potential results of legislation, and avoid unintended consequences, is to solicit input from the people who are most interested in and most likely to be affected by the laws. Specialists and organisations dealing with particular issues are in an excellent position to inform and advise officials and drafters about a wide range of issues *before* legislation is passed.

There are several pre-requisites for establishing open legislative drafting processes:

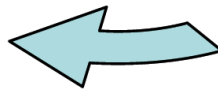
Non-governmental parties must have access to information about lawmaking, such as the agenda, the schedule/time frame for working up draft legislation, the identity of key parties who are involved, etc.



Non-governmental parties must be able to obtain current/updated copies of draft legislation, and in a timely fashion.



Non-governmental parties must have meaningful access to officials, through viable channels of communication, utilising different mechanisms and media.



There should be systematic and settled procedures for arranging consultations and providing input. These could take the form of written comments on draft laws, proposed legal texts, testimony at open hearings, and other similar interactive measures.

Generally speaking, the legislative drafting process is most effective when it is transparent, open, accessible, and participatory.

A number of methods can be used to achieve these goals, and the choice should be based upon the specific circumstances and exact requirements. The possibilities include Websites and electronic communication, publications, media outreach, encounters between officials and constituents, and open/interactive legislative drafting procedures. Legislative Working Groups with wide representation are particularly effective mechanisms for accessing and incorporating independent expertise, and bringing interested parties together. While Governments and Ministries can play an important role in opening the legislative process, Members of Parliament have a specific mandate to

liaise with their diverse constituents, and determine how they are likely to be affected by proposed legislation. In addition, Parliaments have been the traditional focal point for open and participatory governmental processes for hundreds of years.

Perhaps the best-known type of open legislative process is the open or public hearing. Open hearings are formal and structured events arranged by a governmental body to give official and non-governmental parties an opportunity to present their views, in the form of statements and testimony. They can be used by all levels of government to solicit input from different parties concerning any important issue, but are particularly effective for considering draft legislation. Open hearings allow for many aspects of an issue to be addressed by a variety of interested parties. Through interaction and the presentation of diverse opinions, officials and citizens become better informed.

Appendix Three contains sample “Guidelines for Holding Open Hearings”, which have proven useful in several jurisdictions.

It is important to appreciate that open legislative drafting processes require time, energy, and commitment. Thus, it may seem comfortable and expeditious to draft legislation in a closed environment, with fewer parties to consult and less criticism. However, this contravenes the basic premises of participatory government. Further, and most importantly in the current context, this is less likely to produce good legislation. Indeed, legislation is less likely to meet the goals that the proponents espouse when outside access to the drafting processes is limited. Clearly, the future consequences of proposed legislation are best analysed in a meaningful exchange between the drafters and parties who will have to live with the final result, and who know the subject well.

The above discussion focuses primarily on open legislative drafting processes. However, this is just one category in a larger class, namely open governmental processes. For example, open Parliamentary processes can be utilised for developing policies, gathering information, investigating key issues, conducting oversight of Governmental activities at the national and local levels, scrutinising the efficacy or behaviour of officials, etc. Governmental agencies can find ways to include citizens in their work. And with the exception of special kinds of cases, court proceedings should be open to the public. Generally speaking, open governmental processes strengthen democracies because they inform citizens, enable citizens to better understand how government works, increase dialogue between officials and citizens, create networks and coalitions, empower citizens to participate in governance, and increase confidence in democratic institutions and governmental initiatives.

In Kazakhstan, under Article 6 of the Law on Normative Acts, Non-Governmental Organisations and individuals have the right to make suggestions concerning draft legislation, and to submit proposed texts. Draft legislation is also subject to public review and comment under prescribed circumstances. For example, as mentioned previously, draft legislation that affects the interests of private entrepreneurs should be submitted to accredited business associations, and their opinions should be attached to the legislation. As discussed in Principle Number Four above, outside input in the form of scientific expertise is often solicited.

Drafts of Technical Regulations have to be published and made available before they are adopted, to facilitate review and comment. In accordance with World Trade Organisation requirements, interested foreign parties must be informed about Technical Regulations that affect their trading interests, through the Information Centre under the Kazakhstan Institute for Standardisation and Certification, and the WTO Secretariat. In addition, unless there are emergency circumstances, interested foreign parties are entitled to a period of at least sixty days to provide comments. These

comments should be addressed through modifications in the Technical Regulation, or bilateral channels. In effect, this creates an additional mandatory consultative phase in the drafting and approval process. It also establishes a new constituency, including trading partners and economic operators that export their products to Kazakhstan, who will actively protect their commercial interests in the event that Technical Regulations create unnecessary or unjustified barriers to trade. Finally, the Law on Technical Regulation also requires that drafters explain their reasons for rejecting any suggestions (upon request).

Modern technology, especially computers and the Internet, has created a number of mechanisms for information generation and sharing in Kazakhstan. For example:

- The Website of the Parliament offers information concerning Members of Parliament, Parliamentary procedures, the Parliamentary Agenda, the Annual Legislative Drafting Programme, Protocols from Committee Meetings, and sometimes copies of draft laws.
- The Website of the Ministry of Justice publishes information concerning the legislative drafting process and copies of some draft laws, once they are submitted to the Parliament.
- The Website of the Committee for Technical Regulation and Metrology provides information about laws and regulations.

Many positive initiatives are being implemented in Kazakhstan, and they are creating important precedents for sustainable progress. However, generally speaking, the procedures for generating and accepting public comment are informal and ad hoc. In the absence of standardised procedures and channels of communication, the results in specific cases depend upon the interests of officials, and initiative from motivated private parties with official access.

Accordingly, it would be helpful if:

The Government/Ministries and Parliament

- Prepare and adopt strategies for expanding the use of open legislative drafting processes. The strategies should be implemented and institutionalised through organic documents such as Rules of Procedure, and operational documents such as Guidelines. All interested official parties should be familiar with these organic and operational documents, and copies should be made widely available to non-governmental parties.
- Ensure that full information is available concerning the legislative calendar, legislative drafting activities, the status of draft laws, and the scheduling of Hearings and other major events.
- Provide full access to current/updated versions of drafts laws. This should be accomplished through different but complementary communication channels, including but not limited to electronic means.

The Parliament

- Takes special measures to establish open and participatory legislative drafting procedures that consistently give non-governmental parties opportunities to review draft laws and make comments and proposals. This includes establishing focal points for outreach to civil society, assigning/training staff to assume responsibility for outreach and communication, and documenting the work performed.
- Structures its schedule for working up and approving legislation to provide opportunities for public participation. In the case of significant legislative initiatives, open hearings are particularly appropriate.
- Increases its geographical and regional outreach, by engaging in activities such as open hearings in different cities of Kazakhstan, outside of the capital Astana.

Citizens

- have full access to plenary hearings in the Parliament building.

Information Technology can serve many of these objectives. “Electronic Governance” involves rapid communication with a wide range of parties, and the instantaneous sharing of information resources. A few minutes on a computer are sufficient to send a draft law to hundreds of people. It is possible to telephone them or even hold video conferences with them over the Internet, and at virtually no cost. Computerised Databases, particularly those containing laws and legal materials, give legal professionals and non-governmental parties all the resources they need to perform a solid assessment of draft legislation. However, no matter how effective, rapid, and inexpensive electronic communication becomes, it should never be used to avoid or be allowed to replace personal contact.

In order to have the meaningful dialogue concerning draft legislation that is described above, the Parliament needs partners. As mentioned, they can be found amongst a number of non-governmental parties. However, the capacity of these parties to define policy, analyse draft laws, prepare constructive comments, network, testify, and otherwise guide legislative drafters has to be developed. Through experience, non-governmental parties can enhance their level of expertise, and become more adept at their new roles. Increased skills and professionalism will render them more valuable for legislative drafters and Members of Parliament, and enable them to make a greater contribution to the legislative drafting process.

Appendix Four contains information concerning “How to Testify in Parliament”, which has proven useful for non-governmental parties in several jurisdictions.

While the preceding comments primarily concern laws, participatory procedures should also be employed for the preparation of secondary legislation (such as regulations, bye-laws, or administrative orders). Techniques that have proven effective in many democratic countries include the dissemination of drafts, notice and comment procedures, and even open meetings. In some countries, draft regulations must automatically be subjected to a defined period of public comment before they can take effect. Clearly, regulations can also benefit from non-governmental and expert commentary.

By proceeding as suggested, it is possible to further open legislative drafting processes in Kazakhstan, and utilise consultative procedures to strengthen democracy and improve laws and regulations.

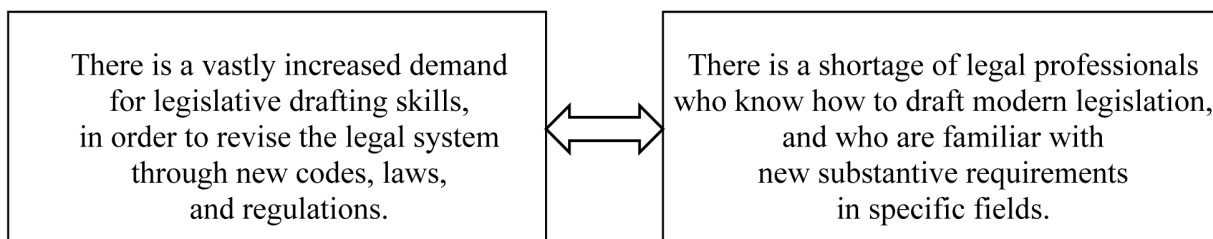


PRINCIPLE NUMBER SEVEN
THE LEGAL PROFESSION SHOULD MAKE A
SIGNIFICANT CONTRIBUTION TO
LEGISLATIVE DRAFTING



PRINCIPLE NUMBER SEVEN
THE LEGAL PROFESSION SHOULD MAKE A
SIGNIFICANT CONTRIBUTION TO LEGISLATIVE DRAFTING

The capacity for drafting sound legislation in a country depends very much upon the contribution made by the legal profession. The quality of legislation is enhanced when different kinds of legal practitioners with a range of skills and experience are able to become meaningfully involved in different stages of the legislative drafting process. In established democracies, even though the level of general legal expertise is sufficient, there can be difficulties accessing and focusing legislative drafting expertise. Countries in transition, or which are reforming their legal systems, face a double challenge:



Broadly speaking, there are three main focal points where legal skills relating to legislative drafting and interpretation are particularly essential.

First of all, there must be enough lawyers with legislative drafting and interpretation skills to meet the needs of governmental and official institutions. This applies to a variety of institutions that prepare, administer, and enforce laws. Obviously, the availability of expertise is not sufficient in and of itself. Official institutions need to find ways to effectively *utilise* expertise. This means organising the appropriate departments and agencies, hiring and remunerating skilled lawyers, giving them all of the tools required to work effectively, and paying attention to their legal counsel. It is also important to establish communication channels and information sharing mechanisms that link different official institutions. Finally, remuneration issues must be addressed, due to the perennial disparity between wage levels in the public and private sectors.

Second, there must be enough lawyers with legislative drafting and interpretation skills to work for businesses, Non-Governmental Organisations, professional/trade associations, think tanks, social agencies, and other institutions interested in the legal system. Skilled lawyers can represent the interests of these parties during the legislative drafting process by preparing and commenting on draft laws, carrying out Regulatory Impact Analysis, and offering expertise or testimony. While due account must be taken of any bias or vested interests, this kind of legal expertise can often be obtained by the public sector at no cost. This is in accordance with Principle Number Four and Principle Number Six above.

Third, the legal profession itself must have capacity, particularly to evaluate laws. Judges need to interpret and understand laws in order to apply them and adjudicate cases. Prosecutors need to interpret and understand laws in order to properly enforce them, and decide whether to indict. Private lawyers need to interpret and understand legislation in order to advise their clients and represent them in court. While these skills are different from those required for drafting laws (see below), and play a different role in the legal system, they are an important component of the Rule of Law.

For practical purposes, it is useful to further distinguish drafting skills and interpretative skills:

- Active legislative drafting skills. These skills are required for *creating* new legislation. This means sitting down with an international treaty, European Union Directive, or Statement of Legislative Intent, and turning a blank computer screen into a new law or regulation. Active skills are extremely necessary for converting policy into law, preparing practical and effective laws, and ensuring that legislation is well written and technically sound.
- Interpretative legislative skills. These skills are required for *reviewing, analysing, and assessing* draft legislation prepared by others. They are crucial for oversight of the drafting process, and approval, implementation, and enforcement of legislation. In addition, they are extremely useful for determining the consequences of legislative provisions. As a result, many legal practitioners require such skills to carry out their work, and effectively represent the interests of their clients (including the State, businesses/institutions, and natural persons).

Active legislative drafting skills are developed through specialised training and experience, and require significant time and commitment. Generally speaking, people with such skills are concentrated in specific institutions dedicated to producing legislation, such as Legal Departments of Governments, Ministries, or Parliaments, and prominent think tanks or trade associations. Interpretative legislative skills are developed through analytical exercises and practical experience, often coupled with specific substantive knowledge. They are more widely dispersed amongst governmental institutions, economic operators, Non-Governmental Organisations, and private law firms.

Naturally, the legislative drafting process is more effective when there are:

- Sufficient numbers of practitioners with active legislative drafting skills, whose services are accessible to the key institutions and parties charged with preparing legislation, and
- Sufficient numbers of practitioners with Interpretative legislative skills, who are actively engaged in the review and assessment of draft legislation on behalf of a wide range of governmental and non-governmental institutions.

Further, the final outcome of the legislative drafting process is enhanced when:

- Active legislative drafting skills are *concentrated* in select institutions with a mandate to draft laws, and
- Interpretative legislative skills are *dispersed* throughout a wide array of institutions that can bring different perspectives to the oversight and approval process, and contribute to an informed and pluralistic debate concerning the soundness of draft legislation and its probable consequences.

In order to generate greater capacity for legislative drafting in Kazakhstan, the following steps can be identified:

- Specialists with legislative drafting and interpretation skills should be given opportunities for further professional development, through seminars, international contacts, and full access to information.
- Lawyers with an interest in this subject should be able to obtain specialised Continuing Legal Education, or In-Service Training, channelled through Bar Associations and other institutions providing training and information.
- Governmental institutions should generate information on this subject and their drafting work, and make it available to all interested parties.

- Legal practitioners and non-governmental parties who are interested in supporting and becoming engaged in the legislative drafting process should be given ample opportunities.

It is also very important to generate legal drafting and interpretation skills amongst the next generation of legal professionals in Kazakhstan. Accordingly, Law Faculties need to play a positive and long-term role by:

- Generating greater awareness and understanding of these subjects through introductory presentations and the provision of informational materials to all law students.
- Providing mini-courses and specialised educational opportunities on these subjects, in cooperation with legal experts.
- Setting up internship programmes that offer practical experience in legislative drafting and interpretation, in partnership with governmental institutions, NGOs, legal clinics, think tanks, international organisations, and Donors.

In Kazakhstan, several Law Faculties are now becoming more engaged in the legislative drafting process, most particularly the Kazakh State University of Law.

Official institutions have a very significant role to play in increasing the capacity of the legal profession and law students to engage in legislative drafting and interpretation. There will be more lawyers and students interested and engaged in this work if:

- There are more opportunities to become involved, through participatory legislative drafting mechanisms and open legislative processes.
- There are more exchanges of expertise through Initial Professional Formation and Continuing Legal Education, led by expert lawyers working with governmental institutions.
- There is more information about how this work is done, and why it is important for the legal profession and for development of the legal system.

Until recent years, the demand for legislative drafting skills in Kazakhstan was relatively limited. Now, there is insufficient supply to meet the demand. However, changes in the composition and skills of the legal profession do not take place overnight. A large number of new Law Faculties have opened in Kazakhstan in recent years. While this will greatly increase the supply of lawyers, issues have arisen concerning quality control and the level of professional skills. Not enough law students receive coursework on legislative drafting and interpretation, and there are simply not enough opportunities for practical education and internships. Also, salary incentives draw legal professionals to the private sector. This reduces the availability of legal services for official institutions, and also makes it harder for Law Faculties to retain the most qualified teachers. Nonetheless, in spite of these obstacles, progress can be achieved through the steps outlined above.

It is appropriate here to repeat and expand upon a point that was made in the Introduction. Sound laws require a combination of legal expertise, drafting expertise, substantive expertise, and political guidance. Legal education, familiarity with the legal system and legal traditions, experience working as a lawyer, and knowledge of international best drafting practices are very valuable. And people who have specialised legal drafting skills and understand the legal methodology for preparing legislation (usually as a result of experience) need to be included. But not all drafters are lawyers, and it is a mistake to overlook other professionals who can make a major contribution to drafting work. The optimal proportion of different kinds of expertise depends upon the type of

legislation, the subject matter, and specific circumstances. Combining all these elements in the right proportions can be a major challenge. For this reason, it is extremely important to diligently solicit and incorporate diverse kinds of expertise for drafting legislation in a democratic society, in accordance with Principle Number Six.

Nonetheless, in spite of the importance of access to diverse kinds of expertise, the legal profession requires special attention. Thus, governmental institutions, businesses, non-official parties, and the legal system in Kazakhstan would benefit from specific measures to generate interest in drafting and interpreting legislation on the part of the legal profession. Further, measures should be taken to raise the capacity of the legal profession to make a meaningful contribution to the legislative process.



APPENDIX ONE

SELECTED RULES FOR DRAFTING EUROPEAN UNION LEGISLATION

FROM THE COUNCIL RESOLUTION OF 8 JUNE 1993

1. The wording of the Act should be clear, simple, concise, and unambiguous; unnecessary abbreviations, “community jargon” and excessively long sentences should be avoided.
2. Imprecise references to other texts should be avoided, as should too many cross-references which make the text difficult to understand.
3. The various provisions of the Acts should be consistent with each other; the same term should be used throughout to express a given concept.
4. The rights and obligations of those to whom the Act is to apply should be clearly defined.
5. The Act should be laid out according to the standard structure: (chapters, sections, articles, paragraphs).
6. The preamble should justify the enacting provisions in simple terms.
7. Provisions without legislative character should be avoided (wishes, political statements).
8. Inconsistency with existing legislation should be avoided, as should pointless repetition of existing provisions. Any amendment, extension, or repeal of an Act should be clearly set out.
9. An Act amending an earlier Act should not contain autonomous substantive provisions but only provisions to be directly incorporated into the Act to be amended.
10. The date of entry into force of the Act and any transitional provisions which might be necessary should be clearly stated.

APPENDIX TWO

Comprehensive guidelines concerning principles for sound drafting of European Union legal acts can be found in the “Joint Practical Guide”, known as the “**Guide of the European Parliament, the Council, and the Commission for persons involved in the drafting of legislation within the Community Institutions**”. In addition, the Council has a **Manual of Precedents**, the Commission has a **Manual on Legislative Drafting**, the Office for Official Publications has published an **Inter-institutional Guide**, and various models are available in **LegisWrite**. The Joint Practical Guide can be found at:

http://europa.eu.int/eur-lex/en/about/techleg/guide/index_en.htm

APPENDIX THREE

SAMPLE GUIDELINES FOR AN OPEN HEARING

- 1) Quorum. It is not necessary to have a quorum for Open Hearings if no official action is taken.
- 2) Rulings. The Chairperson of the Committee is empowered to make Rulings concerning all procedural issues that arise both before and during the Open Hearing. For a joint Open Hearing involving two Committees, the Chairpersons can a) designate one of them as leader for all or part of the Open Hearing Rulings, or b) make Rulings jointly, after consultation. In exceptional cases, Rulings may be appealed to the full Committee(s), which may over-rule the Chairperson(s) by a majority vote. In these Guidelines, the use of the singular term “Chairperson” shall be interpreted to include the plural term “Chairpersons” whenever appropriate.
- 3) Opening Statements. The Chairperson of the Committee has the right to make a brief opening statement. Members of the Committee can only make an opening statement with express approval from the Chairperson of the Committee.
- 4) Participation. All Members of Parliament can attend Open Hearings. Members of Parliament who are not Members of the Committee can ask questions either by submitting them in advance in writing, or orally if recognised for that purpose by the Chairperson of the Committee.
- 5) Public Announcements. The Chairperson of the Committee shall prominently announce the location and exact time of the Open Hearing at least one week in advance. The Chairperson of the Committee shall announce the identity of witnesses at the Open Hearing and the order of their testimony at least three working days in advance. All witnesses should also be notified directly.
- 6) Testimony. The final identification of witnesses who will testify, the final determination of the order of testimony, and decisions concerning whether witnesses will testify individually or as part of a panel are the responsibility of the Chairperson of the Committee, after full consultation with Committee Members and other appropriate parties. Additional witnesses will be scheduled if they are requested by no less than one-third of the Committee Members.
- 7) Testimony. The order of witnesses should generally be: a) representatives of Ministries which have had a role in drafting the legislation, b) members of the Working Group which has drafted the law, c) Members of Parliament who wish to testify d) independent experts or representatives of interested organisations. Factors that should be considered in the selection of witnesses from the latter category include status, level of expertise, interest in the subject matter, and diversity of viewpoint.
- 8) Testimony. Each witness is allotted a maximum of ten minutes to present his/her testimony.
- 9) Questions. Each Committee Member shall have a maximum of five minutes with each witness for questions and answers.
- 10) Questions. Committee Members will be allowed to question witnesses in order, based upon their seniority on the Committee, with the Chairperson of the Committee having the right to go either first or last.
- 11) Testimony. The Chairperson is entitled to limit the testimony and the question and answer session of any one witness to an overall total of forty-five minutes, if this is necessary to ensure that all scheduled witnesses have an opportunity to testify. In such cases, the witness may be called back at the end of the Open Hearing, if there is sufficient time, or may be given a chance to answer additional questions in writing.
- 12) Time Management. The Chairperson of the Committee is empowered to enforce all time limits.
- 13) Record Keeping. The Administrative Office of the Parliament is responsible for stenography, taking minutes, preparing a transcript, and designating an individual who will monitor/track the time taken by each witness.
- 14) Decorum. No interruptions of Members of Parliament will be allowed, except by the Chairperson of the Committee, to enforce an expired time limit or to maintain order. Witnesses can only be interrupted by the Chairperson of the Committee or the Member of the Committee questioning

them.

15) Decorum. The Chairperson of the Committee has the right to exclude any individual who is acting in an unprofessional manner or who disrupts the Open Hearing.

16) Written Statements. All interested parties are entitled to submit a written Statement before or at the Open Hearing, provided that they comply with all requirements concerning its format and length, and follow all procedures concerning its submission.

17) Written Statements. Written Statements shall be no more than five pages long, double-spaced, with a one-page cover sheet that clearly states the law or subject matter being commented upon and the professional background and contact information of the author. An electronic version of the Statement should be submitted, if possible.

18) Written Statements. All witnesses who testify, with the exception of Members of Parliament, must present a written Statement at least 48 hours before commencement of the Open Hearing. Witnesses who fail to fully comply with this requirement will not be permitted to testify. Witnesses are strongly encouraged to bring extra copies of their Statement.

19) Written Statements. Written Statements shall be submitted directly to the Chairperson of the Committee holding the Open Hearing. The Chairperson is responsible for making and distributing copies for all Members of the Committee.

20) Hearing Record. The Hearing Record shall consist of a verbatim transcript of the entire proceedings, all written Statements, and any other relevant materials presented at the Open Hearing. The Chairperson of the Committee has the right to exclude materials that are inappropriate or irrelevant.

21) Hearing Record. The Hearing Record shall be available to Members of Parliament within seven days after the Open Hearing, but in no event less than two days before final consideration of the draft law by the Committee.

22) Hearing Record. The Hearing Record shall be made available to all interested parties. It should be provided free of charge to Members of Parliament and witnesses who testify. Other parties may be requested to pay a nominal fee corresponding to the actual costs of reproduction.

23) Hearing Record. Testimony presented at Open Hearings, and copies of appropriate written Statements submitted in electronic form, should be made available on the Parliamentary Website.

24) Delegation of Responsibilities. The Chairperson of the Committee has the power to delegate responsibilities to another Committee Member in the event of necessity. This should be done only after consultation with other Committee Members.

APPENDIX FOUR

HOW TO TESTIFY IN PARLIAMENT

ADVANCE PREPARATIONS

1) Understand the purpose of the hearing. It is extremely important to understand why Members of Parliament are holding the hearing, and what they are looking for. What legal, economic, and social issues are being addressed, and what are the positions of the key parties? Further, what are their motivations? Find out the context for the hearing. Relevant information can be obtained from the invitation or announcement for the hearing, public statements, party platforms, and reference documents. The most effective testimony is that which answers the questions that Members of Parliament want answered.

2) Consult with officials such as Parliamentary Staff in advance of the hearing. Contacts with Parliamentary Staff in advance of the hearing can yield valuable information concerning which issues are most important and for whom, the personalities and political considerations involved, the identity of other witnesses, the Guidelines/format for the hearing, and how to communicate most effectively. No attempt should be made to intrude into confidential or internal Parliamentary matters. However, Parliamentary Staff should legitimately share much of this information. After all, they have an interest in making the hearing valuable and efficient for the Members of Parliament.

3) Prepare a written statement or summary of testimony in advance. Written statements or summaries of testimony must often be submitted prior to the hearing, so that they can be reviewed in advance. If not, it may still be very useful to provide a statement or summary to Members of Parliament at or even after the hearing. Even if not formally submitted, they help the speaker prepare, by organising thoughts and focusing testimony to improve advocacy.

4) Written statements or comments should be concise, precise, and well organised. Simplicity, brevity, and clarity are necessary. Organisation is key. It should be easy to determine at a glance what the writer sees as the main problems, and the most effective solutions. State the position being advocated, and explain why. The introduction should be short, and express the author's position. Bullet points and tightly written phrases should cover the key subjects. Details, when necessary, should be separated into attachments. Use bold print and/or underlining to highlight key phrases with compelling data and conclusions. Use concrete facts, but make sure they are summarised and accurate. It is acceptable to use illustrative examples, but they should be short, on point, and not distract the reader.

5) All administrative requirements should be fulfilled. All Parliamentary Guidelines concerning the format and timing of written submissions and oral testimony should be carefully followed. All rules and procedures for testimony should be understood and adhered to. In case of any doubt, ask.

PRESENTING TESTIMONY

1) Be thoroughly familiar with the contents of the testimony. Rehearse the testimony until every point is known by heart. It should be possible to give the testimony without written notes. Never read anything more than a few sentences, such as a short quote. Use a one-page summary/outline with bullet points and key themes in large type for organisational purposes, and to be sure to cover the main ideas without getting lost. Organise materials carefully, and do not waste time going through documents to find something. Know exactly how long the testimony will take, and how much

leeway there is. Avoid going off on tangents. One of the most common mistakes witnesses make is wandering off-track and getting behind in timing.

2) Pay strict attention to the audience, and how you are perceived. The witness is like an actor on stage, but with a very special audience and a very concrete message. Being a good advocate is important, but all aspects of communication should be carefully considered. This includes dress, manner, posture, body language, facial expressions, tone of voice, and eye contact. In fact, it is estimated that as much as half of all communication occurs through body language. Therefore, it is important to know which gestures communicate understanding, confidence, and authority. Speak clearly, at a reasonable pace, and avoid monotones. Be assertive without being overbearing. Maintain interest by being animated and enthusiastic, and using examples and imagery. Avoid technical language, jargon, gimmicks, and planned jokes. Be sure to adjust the style of testimony to the characteristics of the specific audience.

3) Utilise audio-visual materials sparingly and with great care. It can be cumbersome and time-consuming to set up and use audio-visual aides. “Technical difficulties” can disrupt the hearing and create a negative impression. Be very attentive to logistical issues. Carefully consider the benefits and alternatives. A multi-coloured chart handed to each Member of Parliament may work better.

4) Prepare for an effective dialogue, and use the statement to set the stage. A major part of advocacy in open hearings is effectively answering the questions that are presented. A cogent and forceful statement, which is precise and brief, can provoke serious questions, which enable the witness to sway opinions. It is a good idea to anticipate and prepare for the questions in advance. Listen very carefully to the questions, and respond concisely and on-point. Leave time for follow-up questions. If uncertain about the answer to a question, say so, or give the parameters for the answer, without being overly equivocal. As all good salespeople know, the substance and tone of questions/objections reveal exactly what must be done to convince the customer to buy. Be sure to make eye contact when answering questions.

5) Arrive at the hearing early. Use the time to talk to any officials who may be available, become familiar with the set-up, and read all available documents. Be sure to attend the testimony of prior witnesses, to hear what they have to say. It may be necessary to refer to prior testimony, or to refute it. If so, this should be done in a respectful manner. Listen carefully to the questions presented to prior witnesses, for clues concerning the interests/perspectives of Members of Parliament.

FOLLOW-THROUGH AFTER THE HEARING

1) Pay attention to important post-hearing measures. It may be necessary to submit additional information, or answer supplementary questions in writing. Be prepared to promptly review the hearing transcript, if this is allowed. Follow the further progress of the legislation or issues addressed. Do not be afraid to contact Parliamentary Staff for their appraisal of how things went. Carefully consider the results, so that adjustments and improvements can be made. Remember that by improving your skills, you increase your capacity to effectively advocate a position, provide more assistance to Members of Parliament, and enhance your chances of being invited to testify again.

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Тираж 1000 экз. Объем п/л 44. Заказ №111.