



Office for Democratic Institutions and Human Rights

REPUBLIC OF KAZAKHSTAN

REVIEW OF THE ELECTION LEGISLATION FOR ELECTION DISPUTES,
APPEALS AND PENALTIES



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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	EXECUTIVE SUMMARY : RECOMMENDATIONS	1
III.	HIERARCHICAL STRUCTURE OF “ELECTORAL JUSTICE”	2
IV.	DISPUTES RELATING TO SEGMENTS OF THE ELECTORAL PROCESS	3
	<i>A. Voter registration.....</i>	<i>3</i>
	<i>B. Registration of candidates and certification of elected candidates.....</i>	<i>3</i>
	<i>C. Election results.....</i>	<i>5</i>
V.	ELECTORAL OFFENCES AND VIOLATIONS.....	5
VI.	INVOLVEMENT OF PROCURATORS IN ELECTION DISPUTES.....	7
VII.	THE ROLE OF THE CONSTITUTIONAL COUNCIL IN ELECTION MATTERS.....	8

REVIEW OF THE ELECTION LEGISLATION FOR ELECTION DISPUTES, APPEALS AND PENALTIES

I. INTRODUCTION

This report reviews key issues on the resolution of election disputes, appeals against election decisions and election offences and administrative violations under the law of Kazakhstan. It draws extensively on a detailed assessment prepared by Denis Petit, Legal Expert.¹

The report also draws on other OSCE/ODIHR election reports on Kazakhstan, in particular the Review of the Legal Framework for the Parliamentary Elections (29 June 1999), supplemented by recommendations contained in the Needs Assessment Mission Report (25 August 1999), the Final Report on the October 1999 Parliamentary Elections (20 January 2000) and the Review of the Election Legislation for Parliamentary Elections (18 January 2001).

The legal framework for the conduct of elections is provided by the Constitution, the Constitutional Law of 28 June 1999 on Elections in the Republic of Kazakhstan, provisions on election offences and violations contained in the Criminal Code and the new Administrative Violations Code, regulations adopted by the Central Electoral Commission (CEC) and other acts. The principal source of election rules is the 1999 Law and chapter 11 of the new Administrative Violations Code.

Th.² They also draw on the specific guidance provided in the ODIHR document “Generic Electioe recommendations set out in this report flow from standards and commitments set out in the 1990 Copenhagen Documentn Disputes Resolution Guidelines”.³

II. EXECUTIVE SUMMARY : RECOMMENDATIONS

The following key recommendations emerge from the present analysis of the legal framework.

- The rules on challenging the decisions of an electoral commission to a superior commission and/or to a court should be refined to prevent unduly protracted appeal processes. Such rules should also ensure that a final and definitive resolution is achieved as soon as practicable.
- Time limits on making such challenges should be introduced. In particular, challenges to voter lists should be dealt with and any appeal exhausted at an early stage, at any event before polling day.
- Clear time limits are also required for the determination of all appeals. Electoral commissions and courts should be required to communicate the result of such determinations without delay.
- All restrictions on those seeking to participate in the election process must be justified and proportionate. In particular, the prohibition contained in article 4 of the 1999 Law, which prevents those who have committed an administrative violation in the preceding 12

¹ Denis Petit, “Review of the Legal Framework Regulating Election Disputes Resolution Mechanisms in Kazakhstan and Recommendations”, Warsaw, February 2000.

² Final Document of the CSCE Conference on the Human Dimension, Copenhagen, 29 June 1990.

³ Denis Petit, 12 December 1999.

months from standing for election, amounts to a disproportionate restriction on the right to be elected.

- The provisions in the new Administrative Violations Code should be expanded to provide more comprehensive sanctions for breaches of election rules.
- Violations in the Code must be clearly defined so as to minimise the risk of arbitrary proceedings and enhance predictability.
- The level of fines and the imposition of other sanctions should adequately reflect the seriousness and significance of election violations.

III. HIERARCHICAL STRUCTURE OF “ELECTORAL JUSTICE”

A decision, action or omission of an electoral commission may be protested to the superior electoral commission or to a court. It can be challenged in court whether or not it has been appealed to the superior commission. Protests against decisions or actions of electoral commissions of a particular level should be made to the court at the corresponding level.

These provisions satisfy an important objective: in principle, citizens should be able to challenge unlawful acts of electoral commissions to the judicial branch. However, these arrangements may give rise to recurrent complaints on already adjudicated cases with no finality in the process. For instance: the election results in a given constituency are challenged in Court A by a candidate (A); the Court cancels the results and calls for re-run elections; this decision is then appealed by candidate B to an appellate court which overturns the ruling and reinstates the election results; instead of this ending the cycle, the candidates registered for the re-run may file a complaint with Court A or another Court, starting the cycle of complaints and appeals over again.

More specifically, article 20.6 of the Elections Law does not specify to which level court challenges brought before the CEC may be appealed. While in presidential elections CEC decisions may only be appealable to the Supreme Court, this is not the case in a number of instances during Senate and Majilis elections. For instance, CEC decisions on certification of the elected candidates to the Senate and registration of candidates to the Majilis may be appealed to an unspecified court (see articles 82.2 and 98.2).

Finally this mechanism may overburden the Courts and election commissions with minor complaints or with complaints that should have been determined earlier in the electoral process.

Recommendations

The law should:

1. Set out a clear hierarchical procedure for the handling of election-related complaints. These should correspond to and take into account relevant parts of the Civil and Civil Procedure Codes.
2. Clarify the stage at which decisions become final and no longer subject to appeal. In particular, the law should ensure that matters which have already been finally adjudicated or resolved are not re-opened, save in defined exceptional circumstances.
3. Provide that cases referred to the Central Election Commission are only reviewable by the Supreme Court.

4. Provide clear time-limits for the submission and consideration of all appeals and challenges; both electoral commissions and courts should be required to notify the parties to any appeal of the result of their determinations without delay.

Related issues

5. The determination of a complaint or an appeal should not be enforced until all remedies have been exhausted. Furthermore, the second round of an election should not be ordered before all remedies have been exhausted and final decisions thereon have been reached (this applies in particular to article 96.2).
6. The consideration of cases contesting the decisions, actions or inactivity of lower level election commissions by local Courts and the Supreme Court should be carried out exclusively in a collegiate manner.
7. The Law should define those subjects who are entitled to file complaints and appeals to election commissions and courts.

IV. DISPUTES RELATING TO SEGMENTS OF THE ELECTORAL PROCESS

A. Voter registration

Every citizen has the right to appeal non entry, incorrect entry on or exclusion from the voter list as well as inaccuracies in the list in the data about a constituent (article 26.4). Applications on introducing of corrections in the list are to be examined by the corresponding election commission within three days, or immediately on election day or the day before it. The decision can be appealed in the corresponding court which considers the complaint within three days or immediately if it is election or the day before it and pass a final decision.

Voter lists are required to be drawn up no later than 10 days after the calling of the election. However, accuracy of these lists may be challenged at any time up to the day of the election. This is detrimental to the required transparency in the development of voter lists. Voter list inaccuracies should be examined and resolved prior to polling day so that the resources of electoral commissions and the courts are reserved for matters arising in the course of voting. The election law should therefore impose a deadline well before polling day by which applications for amendments should be made.

Recommendations

8. The law should expressly stipulate that voter lists shall be subject to changes under strict conditions according to administrative correction and voter petition for corrections only as provided by law.
9. The law should set a deadline after which applications, objections or complaints on the voter list are no longer admissible.

B. Registration of candidates and certification of elected candidates

Violations of the election law on the part of candidates that incur the ultimate penalty of rejection of candidacy or de-registration are not accurately defined in the law. Additionally, the sanctions applied must be proportionate to the seriousness of the violation. The extreme sanctions of de-registration or refusal to register must be reserved for clearly defined and very

serious abuses. Otherwise, these can be used selectively as a political tool to eliminate certain candidates. A more flexible approach could be achieved through “warnings” as an intermediate sanction. While such measures are foreseen in article 50, paragraph 3 for any violation of the election law by candidates or political parties, the type of violations set out in the first paragraph of that same article mostly refer to offences or infractions that would incur criminal prosecution and therefore do not leave room for any alternative sanction. Additionally, this is not consistent with articles 29.2 and 34.10, which refer to breaches of certain campaign finance and election campaigning rules, and do not provide any sanction other than refusal or de-registration of candidates or invalidation of the election within a two-week term after the election.

Recommendations

10. The law should develop a graduated scale of penalties to ensure that sanctions can be appropriately matched to the severity of the violation. Alternative penalties could involve fines, forfeiture of filing fees, reduction of or disqualification from using free air time. Another option is also to publicly release or disclose a finding of violation on the part of a candidate or party. The issue of administrative penalties is considered further below.
11. The provisions relating to violations or infractions committed by candidates need to be reconciled throughout the law so as to avoid discrepancies or loopholes. In particular, articles 34.10, 29.4 and 50.3 ought to be made consistent.
12. The mere fact that a potential candidate has previously committed an administrative violation should not be a ground for preventing that person from registering as a candidate (Article 4). The law should enumerate more narrowly those violations which may be the grounds for revoking the registration of a candidate so as to avoid abuses and arbitrary decisions.
13. The grounds for registration refusals or de-registration of a candidate should be clearly and precisely circumscribed. They should be limited to the absence or improper execution of the documents or procedures required to sustain a candidature. A mere reference to the Constitution may be subject to misinterpretation or abuse.
14. Reference in article 89.7 to “disciplinary responsibility for infringement of the corruption law within one year prior to the registration” ought to be either deleted or refined so as to preclude abuses and misinterpretation. This also applies to “administrative punishment for a premeditated infringement of the law”.
15. A deadline should be set in the electoral law after which the validity of candidatures may no longer be challenged. The timeframe for the verification process of the candidatures should be adjusted accordingly.
16. The law should specify when time-limitations to file complaints and appeals on registration of candidates and certification of elected candidates start to run.
17. In cases of refusal to register or de-registration of a candidate, election commissions should be expressly required to make motivated decisions.
18. Articles 82.2, 89.10 and 98.2 of the election law should be revised to provide that CEC decisions regarding registration of candidates or certification of an elected candidate may only be appealed to the Supreme Court.

C. Election results

The results of parliamentary and presidential elections are determined by the CEC and released in the media 10 days after the elections while results of elections to the Malishkats and local elections are determined by territorial election commissions and released in the media respectively 7 days and 4 days after the elections (article 44).

The grounds on which an election may be declared invalid are not clearly set out. Also, provisions in the Law which automatically disqualify certain candidates from participating in a repeat election are excessively restrictive and disproportionate.

Recommendations

19. The law should give a precise definition of the grounds for invalidating the elections, in particular (1) at what stage of electoral process the violation was committed, (2) who committed the violation (election commissions, voters, candidates, or their authorized persons), (3) whether the violation bears the features of a crime, (4) whether the violation influenced or might have influenced the outcome of the elections, (5) whether the quantity of the same type violations committed at a polling station is significant (polling stations-by-polling-station or country-wide assessments), etc.
20. Articles 64.1, 80.4, 96.4, 110 and 124.4 should be amended in so far as they disqualify candidates to compete in run-off elections even if the election are declared void because of illegal or fraudulent actions on the part of election officials.

V. ELECTORAL OFFENCES AND VIOLATIONS

In a rule-of-law state, the enforcement component of the election disputes resolution mechanisms is crucial. However, during the recent parliamentary campaign and elections in Kazakhstan, there was little indication of how these legitimate roles of the law enforcement agencies were carried out. Very few decisions which required enforcement were ever taken by the courts and election commissions and on the other hand, few investigations by the law enforcement agencies (if any) resulted in the substantiation of alleged violation.

Yet, reports on the 1999 elections point to the existence of substantial and serious violations, including illegal interference by local authorities in the election process, campaigning by local government officials for “favoured” candidate, and intimidation against opposition parties, candidates, and their supporters, and the media by tax inspectors and officers of the Committee for National Security (KNB).

There is consequently an acute need for credible enforcement mechanisms containing administrative, civil and criminal penalties should be established. Some progress in this respect has been achieved with the adoption of a new Administrative Violations Code in February 2001. Chapter 11 of the Code sets out 13 violations pertaining to the conduct of elections. These range from failing to provide civil servants with necessary information to failing to provide or publish the results of voting.

A number of issues arise as a result of these provisions. The first is that some of these violations are poorly defined. Poor definition makes for broad discretion which in turn entails uncertainty.

It also raises the risk of the arbitrary application of administrative sanctions as a political tool. For instance, article 99 punishes election campaigning at times when it is prohibited, yet provides not definition of activities which would amount to campaigning. The term is far from self-explanatory. Similarly, article 103 imposes penalties for violating the rights of electoral commission members and observers, without specifying precisely which rights are envisaged.

A second concern is that these 13 articles provide only a selective range of sanctions. For instance, article 102 imposes penalties for violating voters' rights to familiarise themselves with voter lists, but there is nothing to punish other violations of voters' rights in the election process. Similarly, article 108 punishes a failure to publish campaign accounts but not the publication of late, incomplete or false campaign accounts.

The Code does not punish unauthorised presence of any person in the polling station; nor does it punish attempts, whether successful or not, to influence the activities of an electoral commission. Both matters were serious problems in recent elections.

The new Code includes provisions to punish acts which obstruct the rights of observers (article 101). However, the Elections Law has not yet been amended to incorporate the CEC regulations which detailed those rights, although this was expressly recommended in the final report on the last parliamentary elections.

The penalty for all of the violations set out in chapter 11 of the Code is a fine, defined as a multiple of the "monthly counting standard", which presently approximates to about \$5. Most violations carry penalties between 5 and 15 times the monthly standard, or \$25-75. Despite what may be relatively low standards of income in Kazakhstan, the level of these fines raises obvious concerns. They are so very low that it seems highly improbable that the threat of a fine will deter officials from violating the election rules. Moreover, the imposition of very low fines may well be taken as a signal that violating election rules and voters' rights is a trivial matter of little public significance.

There is nothing in the content of the new Code which diminishes the concerns discussed above about the rule in Article 4 of the Elections Law, which prevents potential candidates from registering if they have committed an administrative violation in the preceding 12 months.

Furthermore, decisions taken by election commissions, primarily the CEC, have no enforcement mechanisms which limits considerably their efficiency. This is particularly the case with regard to complaints against actions and decisions of the state institutions, mass media and state officials over whom the CEC has no authority. There is no general provision in the new Administrative Code to remedy this problem. As no mechanism of implementation for election commissions decisions are foreseen in the law, the only option available to them is to state in their decisions that they found violations to have occurred and to request the body violating the law to rectify the violation or to abide by the law.⁴

⁴ See section 4.3 of the OSCE/ODIHR Final Report for the Republic of Kazakhstan Parliamentary Elections – 10 and 24 October 1999, Warsaw, 20 January 2000.

Recommendations

21. Where appropriate, the scope of election violations in the Administrative Code should be more clearly defined so as to minimise uncertainty and ensure that citizens can predict the consequence of their conduct.
22. The existing chapter of the Administrative Violations Code should be expanded to provide more comprehensive sanctions for a wider range of violations.
23. The level of fines imposed for election violations and the use of additional sanctions, such as prohibiting officials from election administration for a particular period, should be given further consideration in the light of the above concerns.
24. The CEC should also have a role in monitoring and publicising the number and result of proceedings for election violations and offences. Such information would reassure citizens that abuse in the administration elections is not met with impunity.
31. Aggravating features of election violations should be clearly set out in the law, including the use of coercion or threats of coercion or of forgery, deception, theft, bribery, or fraud.
32. The Elections Law should specify the role of the Counting Committee for Control over Performance of the Republican Budget (article 36) as a law enforcement agency and its specific jurisdiction (as distinct to the jurisdiction of the electoral commissions) in matters of campaign funding.

VI. INVOLVEMENT OF PROCURATORS IN ELECTION DISPUTES

The functions of the Procurators, who are directly accountable to the executive, are exceptionally extensive. With regard to election disputes their role is also ambiguous, except in cases where the violations were of an allegedly criminal nature. The Procurators play a crucial role in different phases of the electoral process. They may bear significantly on the registration of candidates, given their supervisory role and enforcement capacity in the administrative legal sphere. Their functions permit them to impact over the adjudicative process in courts by the right to bring a cassation or separate appeals against the decisions or rulings of the courts.

The law is somewhat unclear regarding the role of the court and the judge, as opposed to that of the procurator, as illustrated in article 49 of the Elections Law, which mentions Procurators together with the Courts as the authorities entitled to receive and process complaints and appeals. In general terms, the uncertainty surrounding the degree and scope of involvement of the Procurator's General Office in the electoral process is a concern common to most judicial systems modelled upon the legal structures of the former Soviet Union.

Recommendations

33. The scope of the Procurator General Office's involvement should be clearly regulated by the Elections law with cross-references to the relevant provisions of the framework legislation.

VII. THE ROLE OF THE CONSTITUTIONAL COUNCIL IN ELECTION MATTERS

Under the current Constitution, Kazakhstan is characterised by a mixed system with a Constitutional Council exercising a restricted judicial review limited to laws not yet promulgated or promulgated laws referred by a court (article 78 of the Constitution). The current Council has fewer powers than the Constitutional Court which existed under the previous Constitution. It may not check on its own initiative the conformity of a draft law with the Constitution and is not allowed to review the constitutionality of sub-legislative or regulatory acts. Moreover, three, including the Chairperson, of the seven members of the Council, are directly appointed by the President of the Republic who holds a right of veto over decisions rendered by the Council. Although the veto may be overruled by the Council, the two-thirds majority required for it makes it extremely difficult to achieve, given the composition of the Council.

The control over the regularity of the electoral process is exercised in keeping with the general rules governing the constitutional review. Therefore, this control may not be considered as a cassational appeal from decisions made by either the Courts or the electoral bodies on election related cases. This is a separate venue, which is not available to citizens, candidates and political parties, but to a restricted number of prominent political actors, including the President of the Republic.

The weaknesses of the Constitutional Council may be even more tangible with regard to a political process as sensitive as an election or a referendum.

Recommendations

34. The President of the Republic should not be entitled to challenge before the Constitutional Council the regularity of Parliamentary and Presidential Elections. Article 68 should be amended in this regard as well as article 72 of the Constitution. Considering that the President may veto the decision reached by the Constitutional Council and that his veto requires a two-thirds majority in the Council to be overruled, the President has therefore the power to obstruct the electoral process on a scale that may virtually invalidate the elections, be they Parliamentary or Presidential.
35. The Election law should set out the methods and standards of review by the Constitutional Court of election related cases. A mere reference to the Constitution does not suffice in the absence of any judicial precedents on these issues.
36. Neither the Constitution nor the Election law set deadlines for submission of appeals to the Constitutional Council as regards the regularity of the Presidential, Senate and Majilis elections. These lacunae should be addressed by amending articles 68, 84 and 100 of the Election Law.