

Bulletin №1

31 March 2011

THE LEGAL POLICY RESEARCH CENTRE (LPRC) is a non-governmental, non-commercial organisation, established in the Republic of Kazakhstan in 2008. The goal of the Centre is to promote legal reforms based on rule of law and democratic values by way of conducting analytical research in the area of legal policy.

Since March 2011 the LPRC, with the assistance of the British Embassy in Astana and Royal Norwegian Embassy in the Republic of Kazakhstan, has been conducting the “Legal Assessment of the Election Process” project with the purpose of analysing the election legislation and practice in the Republic of Kazakhstan in the light of its international commitments. Within the framework of the project the LPRC will produce four bulletins containing a brief analysis of major legal issues raised by the expert community in connection with the preparation and conduct of the presidential elections in Kazakhstan, called prematurely in 2011.

Bulletin No.1 is dedicated to the legal notion of early presidential elections and evaluation of its “revival” in Kazakhstan’s constitutional law¹. The corresponding changes to the Constitution of the Republic of Kazakhstan have been adopted a day before announcing the date of early presidential elections.² This reform was carried out hastily, after the unsuccessful attempt to conduct a referendum on the issue of extending the powers of the current President up to 2020. This idea was sharply criticised by the international community. Despite the fact that the international community and the society of Kazakhstan positively welcomed the decision of the Kazakh authorities not to hold the referendum, no proper legal assessment was given to the issue of compliance of early elections with the established international principles of the democratic state.

This bulletin is distributed electronically in both Russian and English.

¹ The provision regarding early elections in Article 48 was removed from the Constitution by the Law of the Republic of Kazakhstan “The Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” of 07.10.1998 N 284-1.

² The Law “On the Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” and “On the President of the Republic of Kazakhstan” of 03.02.2011 No.404-IV-3RK.

Legal Analysis of Conducting Early Presidential Elections in the Republic of Kazakhstan

The next presidential elections in the Republic of Kazakhstan, in conformity with the Constitution, were due to take place in December 2012. However, as a result of the adoption of amendments to the Constitution of the Republic of Kazakhstan (furthermore “the Constitution”) and a number of constitutional laws in February 2011, the elections were set ahead of time for 03 April 2011. A number of events overtook the setting of the early presidential elections.

On 23 December 2010 a group of citizens from the Eastern Kazakhstan Oblast submitted the initiative to hold a national referendum to extend the powers of President Nursultan Nazarbayev up to 2020.³ More than 5 million signatures supporting the referendum were collected in a record-breaking space of time.⁴ This initiative later served as a political basis to set early presidential elections in Kazakhstan.

From a legal point of view the fact that a group of citizens could initiate the holding of a referendum precisely to extend the powers of the current President was debatable. The Constitution of the Republic of Kazakhstan did not provide for the grounds and mechanisms to extend the powers of the President. In connection with this a group of parliamentarians initiated the adoption of amendments to the Constitution with the purpose of formally securing the possibility of holding a referendum on this issue. On 29 December 2010 the Majilis of the Parliament unanimously voted for the draft Resolution to address the President, about introducing changes into the Constitution and setting up a referendum to extend his presidential powers up to December 2020. On 06 January 2011 the Senate of the Parliament in a plenary session supported the address by the Members of Parliament to the Head of State. On 07 January the President rejected these proposals.⁵

Despite the negative decision by the President, on 14 January 2011 Parliament unanimously adopted the amendments on the referendum to the Constitution. There was an extremely negative response by the international community and civil society of Kazakhstan to this legislative initiative.⁶ As a result, the President passed on the amendments adopted by

³ CEC (Central Electoral Commission) registered the initiative group of the referendum to extend the powers of the current President // Kazakhstan Today. 27 December 2010.

⁴ According to the Constitutional Law “On the National Referendum” of 02 November 1995 No.2592 it is sufficient to submit signatures of no fewer than 200,000 citizens of the Republic who have the right to participate in the national referendum, in quantitative proportion and equally representative of all Oblasts, the Capital of the Republic and the cities of national status.

⁵ The decree of the President of RK “On the rejection of the proposal by the Parliament of the RK to submit for national referendum changes and amendments into the Constitution of the Republic of Kazakhstan” was published on 07 January 2011.

⁶ On 17 January the Director of the ODIHR/OSCE, Janez Lenarcic, expressed his concern at the fact that the Parliament of Kazakhstan had adopted the amendments to the Constitution allowing a referendum to be conducted on the extension of the term of presidential powers. URL: <http://www.zakon.kz/195451-obse-obespokoeno-resheniem-parlamenta.html>. On 22 January the EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, made a statement on behalf of the European Union and called on Kazakhstan to guarantee the holding of presidential elections in conformity with the current Constitution. URL: http://www.zakon.kz/top_news/196190-evrosojuz-prizval-kazakhstan-provesti.html. At the talks with the Minister of Foreign Affairs of Kazakhstan, Kanat Saudabaev, the US Secretary of State, Hillary Clinton, especially emphasised the fact that the national referendum on the issue of extending the term of office of President Nursultan Nazarbaev up to 2020 could be a retrograde step for democracy. URL: <http://www.zakon.kz/197007-klinton-prizyvaet-ne-provodit.html>.

Parliament to the Constitutional Council in order for it to determine their compliance with the current Constitution. Representatives of the civil society submitted to the Constitutional Council legal analysis on the unconstitutionality of the proposed amendments. The main conclusion drawn in this analysis came down to the following: “Since the amendments proposed in paragraph 5, Article 42 of the Constitution, due to their legal nature and consequences, entail the deprivation of passive and active electoral rights of all citizens of the Republic of Kazakhstan, such amendments contradict Article 12 of the Constitution of the Republic of Kazakhstan regarding the inalienability of human rights, as well as the requirements of the Constitutional Law of the Republic of Kazakhstan of 02 November 1995 No 2592 “On the National Referendum” regarding the prohibition to submit for the referendum issues, which could entail violation of constitutional rights and freedoms of an individual and a citizen.⁷

The outcome of consideration of this issue by the Constitutional Council was the Resolution of 31 January 2011, in which the amendments to the Constitution providing the possibility of extending the presidential powers through a national referendum were declared unconstitutional.⁸ The Resolution of the Constitutional Council contained only one ground as to why the provisions on the referendum were unconstitutional: “evaluating this legal norm the Constitutional Council states that from Paragraph 1 of the law it is not clear for what period of time presidential powers of the First President (Elbasy) of the Republic of Kazakhstan could be extended. It is not specified whether such an extension would have a one-off or repeated character, or whether the proposal is to completely abolish elections for Head of State.”⁹ Meanwhile such ambiguity in the position of the Constitutional Council makes it possible in the future to return to the discussion of the issue on extending the powers of the First President.

After the decision of the Constitutional Council N. Nazarbayev announced that he could not ignore the will of the 5 million citizens and the Parliament of Kazakhstan, and in connection with this, stated the necessity to conduct early presidential elections.¹⁰ Since the Constitution did not provide for the option of calling early elections, the Parliament of Kazakhstan rapidly adopted amendments to the Constitution and a number of constitutional laws.¹¹ Thus Article 41 of the Constitution was amended by paragraph 3-1 which stated: “3-1. Early presidential elections are to be called by the decision of the President of the Republic and conducted according to the procedure and terms laid down in the constitutional law”. Thus a formal regulatory framework for holding early presidential elections in the Republic of Kazakhstan was established. It is worth noting that the new amendments to the Constitution do not contain a list of legitimate grounds empowering the President to call early elections.

⁷ “Opinion on the Draft Law of the RK “On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” regarding the issue of extending the powers of the First President of the RK by way of national referendum”. URL: http://www.bureau.kz/data.php?n_id=2589&l=ru (last accessed: 25 March 2011).

⁸ Review of the Law of the Republic of Kazakhstan “On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” regarding its compliance with the Constitution of the Republic of Kazakhstan. Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan of 31 January 2011 No.2. URL: <http://www.constcouncil.kz/rus/resheniya/?cid=10&rid=644>. (last accessed: 25 March 2011).

⁹ Ibid.

¹⁰ The address by the Head of State to the people of Kazakhstan. 31.01.2011. URL: http://www.akorda.kz/ru/speeches/addresses_congratulations/obraschenie_glavy_gosudarstva_k_narodu_kazahstana_31012011g. (last accessed: 25 March 2011).

¹¹ The Law of the Republic of Kazakhstan “On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” of 02 February 2011 No. 403-IV and the Constitutional Law of the Republic of Kazakhstan of 03 February 2011 No.404-IV “On Introduction of Amendments and Changes into Some Constitutional Laws of the Republic of Kazakhstan”.

It becomes the sole discretion of the acting president to decide on the need for early elections. It should be reminded that the early text of the Article 48 of the Constitution provided for the option of holding early elections only in case of removal of the President from the office “resulting from enduring inability to perform his duties on grounds of ill-health”. However, in 1998 changes were introduced into this provision, which excluded the possibility of holding early elections.¹²

International standards do not directly stipulate specific conditions when elections have to or can be held. At the same time there exist two criteria which should provide guidance in such situations. First of all, a reasonable frequency of holding elections, established in law, must be adhered to as closely as possible. Thus Paragraph 7.1 of the 1990 OSCE Copenhagen Document¹³ states: “To ensure that the will of the people serves as the basis of the authority of government, the participating States will hold free elections at reasonable intervals, as established by law”. Second, changes in the law which determine such intervals should be motivated by special circumstances. According to the best practices of conducting democratic elections in OSCE member states: “...amendments to the law may not be made during the period immediately preceding elections, especially if the ability of voters, political parties, or candidates to fulfil their roles in the elections could be infringed”.¹⁴ Principles of the European Commission for Democracy through Law also establish that: “The fundamental elements of electoral law should not be open to amendment less than one year before an election”.¹⁵ There may be exceptions in special cases: “...in which serious deficiencies have been revealed in the legislation or its application and when there is an effective political and public consensus on the need to correct them...”¹⁶

In Kazakhstan the fact of collecting five million signatures to support the extension of the powers of the current President was used as a political basis for holding early elections. It is obvious that this situation must not be viewed as one of the “special circumstances”, allowed by the international norms, when the deficiencies in legislation entail the acute necessity to change the norms regulating the process of presidential elections. Moreover, holding early elections virtually shortens the term of office of the current President by two years, which diminishes the meaning of the constitutional norm of the presidential term of office.

Subsequent process of introducing amendments into the Constitution and the electoral legislation, allowing the President to call early elections, clearly does not comply with the principles of the democratic state and the OSCE recommendations. First of all, changes to the main law of the country – The Constitution of the Republic of Kazakhstan - took place without serious public discussion. Second, the conditions under which early elections could be called must be directly provided for in the electoral legislation. The new provision in the Constitution, where early elections can be called by the current President at any time on the basis of his initiative only, contradicts the principle of foreseeability of the legal norm and

¹² The Law of the Republic of Kazakhstan “On Introduction of Changes and Amendments into the Constitution of the Republic of Kazakhstan” of 07.10.1998 N 284-1.

¹³ See the official site of OSCE URL: <http://www.osce.org/astana/73701> (last accessed: 25 March 2011).

¹⁴ The Existing Commitments for Democratic Elections in OSCE Participating States. ODIHR/OSCE. Warsaw, 2004. p.14.

¹⁵ Code of Good Practices in Electoral Matters, Regulatory Levels and Stability of Electoral Law, Article 65, page 26, Strasbourg 23, May 2003, (Adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002).

¹⁶ The Existing Commitments for Democratic Elections in OSCE Participating States. ODIHR/OSCE. Warsaw, 2004. p.14.

creates a potential and constant threat to the observance of the principle of conducting elections on a regular basis. Third, calling snap elections within a short space of time significantly deprived the potential candidates of the opportunity to properly prepare for their participation in the elections.

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