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SOME LEGAL ISSUES OF ENSURING EQUAL RIGHTS AND OPPORTUNITIES FOR PRESIDENTIAL CANDIDATES IN THE REPUBLIC OF KAZAKHSTAN

In the course of the campaigning period preceding the day of voting during the 2011 Presidential Elections in Kazakhstan, the Election Observation Mission of the OSCE Office for Democratic Institutions and Human Rights (hereinafter, the OSCE/ODIHR) repeatedly stated about the absence of equal opportunities for all the registered presidential candidates. In particular, the Mission noted that during the election campaign no clear separation was made between the exercise of official duties and campaign activities of the incumbent President.¹ In this bulletin, we consider the issues of appropriate legal regulation of the status of presidential candidates from the viewpoint of the principle of equality.

The international standards establish requirements in relation to the equality of candidates. Thus, in particular, Article 25 of the International Covenant on Civil and Political Rights² proclaims that every citizen, without unreasonable restrictions, should have the right and opportunity to be elected at genuine periodic elections and to have access in his/her country on general conditions of equality to public service.

OSCE standards indicate that the participant states shall guarantee universal and equal suffrage to adult citizens and shall ensure that the law and public policy permit political campaigning in an atmosphere of freedom and fairness.³

The Venice Commission Code of Good Practice in Electoral Matters says that all candidates should be guaranteed equal rights and opportunities. This implies a fair attitude of public authorities to electoral campaigns and coverage in mass media, including in public media, and equal access to public financing of election campaigns.⁴

The electoral legislation in the Republic of Kazakhstan proclaims equal rights and conditions for participation in elections for all candidates⁵ but at the same time puts presidential

¹ See: Interim Report No. 1 (1-14 March 2011) by the OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan. URL: <http://www.osce.org/ru/odihr/76207> (hereinafter, OSCE/ODIHR Interim Report No. 1). URL: www.osce.org/ru/odihr/76237 (hereinafter, OSCE/ODIHR Interim Report No. 2).

² Adopted by the General Assembly Resolution 2200 A (XXI) dated 16 December 1966. Ratified by the Republic of Kazakhstan Law No. 91-3 as of 28.11.2005 "On Ratification of the International Covenant on Civil and Political Rights." URL: www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml

³ Paragraphs 7.3 and 7.7, Document of the Copenhagen Meeting of the Conference on the Human Dimension (*Copenhagen, 29 June 1990*). URL: www.osce.org/ru/odihr/elections/14304

⁴ Paragraph 2.3(a), Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report (adopted by the Venice Commission at its 52nd Session, Venice, 18-19 October 2002). Conclusion No. 190/2002, CDL-AD (2002) 23. URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.asp) (hereinafter, Code of Good Practice in Electoral Matters).

⁵ Part 3, Article 5 of the Republic of Kazakhstan Constitutional Law "On Elections in the Republic of Kazakhstan" No. 2464 as of 28.09.1995 (hereinafter, the Election Law).

candidates at disadvantage with the incumbent President participating in the elections as a candidate. The privileged position of the incumbent President is first of all due to his special constitutional status. According to Paragraph 5 of Article 42 of the Constitution of the Republic of Kazakhstan, one and the same person may not be elected President of the Republic more than twice in a row. This restriction, however, does not apply to the First President of the Republic of Kazakhstan⁶, who may be nominated an unlimited number of times as opposed to other citizens of Kazakhstan. In addition, the incumbent President, in accordance with Paragraph 3-1 of Article 41 of the Constitution of Kazakhstan, has the authority to call early elections. The election legislation, however, contains no list of grounds necessary for calling early elections. Combination of the right to stand for elections an unlimited number of times with the authority to hold early elections at any time gives the First President of the Republic of Kazakhstan a significant advantage over any other presidential candidates.

In addition, the provision of equal rights and opportunities for candidates to the Office of the President of the Republic of Kazakhstan is negatively impacted by the lack of a proper degree of independence of the Central Election Commission (hereinafter, the CEC), the unclear separation between the institutional responsibilities of the incumbent President and his activities within the framework of election campaign in the capacity of a presidential candidate, and by the fact that presidential candidates have no effective opportunities to challenge election results.

Lack of Independent Procedure to Form the Central Election Commission

The Election Law stipulates that the CEC shall be composed of a chairman and six members of the commission.⁷ In pursuance of Paragraph 7 of Article 44 of the Constitution of Kazakhstan, the President shall appoint the chairman and two members of the CEC, and the other CEC members shall be appointed by either of the two Chambers of the Parliament of the Republic of Kazakhstan (two CEC members from each Chamber).⁸ In a situation where the incumbent President is also the Chairman of the Nur Otan Party, whose members constitute an overwhelming majority of the Parliament, the outcome of such appointment procedure is that the key body regulating the electoral process is formed by one political party. The Legislation of the Republic of Kazakhstan has no system of checks and balances to prevent occurrences of such situations.

The international standards say that where there are no longstanding traditions of independence of administrative authorities from political bodies at all levels, from national to the level of individual polling stations, there must be established independent and impartial election commissions.⁹

The Venice Commission specifically emphasized that only transparency, impartiality, and independence from politically motivated manipulations would ensure proper management of electoral processes from the start of election campaign to processing of election results. In countries where administrative authorities are traditionally independent from political bodies, state administration would apply election laws without being subjected to political pressure. However, in countries without extensive experience of organizing pluralistic elections, there

⁶ The Constitution of the Republic of Kazakhstan (adopted at the nation-wide referendum on 30 August 1995) amended on 02.02.2011 (hereinafter, the Constitution of the RK).

⁷ Part 2, Article 11 of the Election Law.

⁸ Paragraph 1, Article 5 of the Constitution of the RK.

⁹ Paragraph 3.1, Code of Good Practice in Electoral Matters.

are substantial risks that the authorities will put pressure on administrative agencies to act at their own convenience. This applies both to central governments and to local authorities.¹⁰

Thus, the fundamental requirement to ensure the equality of parties in election campaign is an independent electoral commission formed by all political parties, free from pressure on the part of the governing power. In Kazakhstan, where the CEC is currently formed essentially by one political party, there are reasonable doubts that such setting would ensure unbiased election processes, without jeopardizing the free and fair character of elections.¹¹

Separation between the President's official duties and Campaign Activities in the Course of 2011 Elections

Article 47 of the Election Law allows presidential candidates, from the date of their registration and until publication of election results, to be released from their direct official duties. Nevertheless, in the history of presidential elections in Kazakhstan the incumbent President has never exercised this right.

During the 2011 Presidential Elections, the un-registered presidential candidate, Salim Oten, by referring to the equal rights of candidates and violations of Articles 12 and 14 of the Constitution of the Republic of Kazakhstan, and Article 50 of the Election Law, addressed the President with the offer to go on vacation for the period of the election campaign. The CEC Chairman responded that the President Nursultan Nazarbayev was the acting President of the country and that there were no violations whatsoever in his actions.¹²

At the same time, the OSCE/ODIHR Election Observation Mission noted that the mass media actively covered the incumbent President's activities in his official capacity. In all major cities, ODIHR observers recorded large numbers of campaign posters and billboards of the incumbent President mounted on public and private buildings.¹³

With regard to the election campaign issue, the CEC stated that on the first day of the campaign the incumbent President announced his decision not to pursue active campaigning in person but instead he decided to focus on important issues of state policy implementation. Such position did not mean that the President completely abandoned the election campaign. All the campaigning activities were carried out by his election agents.

According to the CEC, the President's decision created additional opportunities for other presidential candidates to conduct election campaigns in their favour. Commenting on this issue, the CEC also stressed that the Election Law did not prevent the candidates from exercising their official duties as public servants, and the media coverage about the acting President does not relate to elections, but has informative nature, covering his activities of a public official fulfilling his direct responsibilities. The CEC decided that in this context the OSCE/ODIHR would be more correct and logical to note the incumbent President's personal

¹⁰ Paragraphs 68-70 of the Explanatory Report to the Code of Good Practice in Electoral Matters (adopted by the Venice Commission at its 52nd Plenary Session, Venice, 18-19 October 2002).

URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus) (hereinafter, the Explanatory Report).

¹¹ Paragraphs 58-59, Explanatory Report.

¹² The Kazakhstan presidential candidate Salim Oten requests exclusion of Nursultan Nazarbayev from the number of participants in the election campaign.

URL: http://panorama.kz/index.php?option=com_content&task=view&id=11330&Itemid=1

The self-promoted candidate requests exclusion of Nazarbayev from presidential candidates//24News.kz. Source: KazTAG. URL: <http://24news.kz/politics/58537.html>

¹³ See: OSCE/ODIHR Interim Report No. 1 and OSCE/ODIHR Interim Report No. 2.

withdrawal from the election campaign rather than the lack of clear distinction in the status of the incumbent President from his status of a presidential candidate.¹⁴

In our opinion, these arguments of the CEC are invalid because the fact of withdrawal of the President from the election campaign in no way provided for additional favourable environment for other candidates. In fact, the resulting situation extremely limited the implementation of the principle of equality of candidates. In practice, the campaign activities for the President were held both by his election agents during the official election campaign and by way of propaganda in the state media, which unquestionably supports the policies and activities of the President in his capacity as the Head of the State. Therefore, the OSCE/ODIHR rightly pointed out the need for a clear-cut separation of the status of the incumbent President from his status of a presidential candidate.

The issue of separation between the functional responsibilities of state officials and the activities of presidential candidates within the framework of an election campaign is relevant not only for Kazakhstan but also for other countries of the region where the tradition of democratic elections has not yet emerged as the primary means of political struggle.

For example, during the 2008 Presidential Elections in Russia, the First Deputy Prime Minister Dmitry Medvedev, after his official registration as the candidate for the Office of the President of the Russian Federation, did not go on vacation although he could well exercise that right. The Russian Federation CEC gave the following explanation in that regard: the requirement to leave for vacation applies to state and municipal employees as well as mass media, but not to persons holding public offices.¹⁵ The candidates registered by the Russian Federation CEC to participate in the election campaign, who held public offices, also included the LDPR leader V. Zhirinovskiy, the incumbent Vice Speaker of the Duma, and the leader of the Communist Party faction G. Zyuganov. With regards to these candidates, the Head of the Russian CEC V. Churov stated that since they held public offices they had obvious advantages.¹⁶

During the election campaign at the 2010 Presidential Elections in Ukraine, the Prime Minister Timoshenko was reproached by mass media that she did not take advantage of the opportunity to go on an unpaid pre-election leave and abused her official position during the campaigning events.¹⁷ In March 2011, President V. Yanukovich of Ukraine introduced a draft law on public service to the Verkhovna Rada. The proposed changes included the granting of special pre-election leave to presidential candidates.¹⁸

The above examples of the Russian and Ukrainian politics illustrate the problems of the emerging constitutional democracies, to which Kazakhstan also belongs. We believe that one of the most effective measures to ensure the principle of equality of all presidential candidates in Kazakhstan can be the mandatory suspension of the incumbent President from

¹⁴ Comment by Central Election Commission of the Republic of Kazakhstan to Interim Report No. 2 OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan (15-21 March 2011).

URL: http://election.kz/portal/page?_pageid=73,1581865&_dad=portal&_schema=PORTAL

¹⁵ CEC of Russia: Medvedev, Zyuganov, and Zhirinovskiy are not required to take leaves for the time of the presidential campaign//Prime-TASS, 17 January 2008. URL: <http://www.kreml.org/news/171067693>

¹⁶ The presidential candidates will not leave for pre-election vacation//Pravda.Ru, 23 January 2008.

URL: <http://www.pravda.ru/news/politics/23-01-2008/252934-zik-0/>

¹⁷ Mikhail Podolyak. Yu. The Buyer-up//Observer, 31 December 2009.

URL: <http://www.obozrevatel.com/news/2009/12/31/342445.htm>

¹⁸ The Law on Civil Service is to be amended// Femida Centre, 30.03.2011.
URL: <http://femidacenter.info/novosti-saieta/v-zakon-o-gosudarstvennoj-sluzhbe-budut-vneseny-popravki.html>

the exercise of public duties, for the period of election, so that he would participate in an election campaign on an equal footing with other candidates.

Powers of the Incumbent President of the Republic of Kazakhstan to Review the Election Results

In conformity with Article 49 of the Election Law, courts and prosecution authorities are required to accept claims by members of election commissions, citizens, and representatives of legally registered public associations on the issues of electoral rights, including on violations of the electoral legislation. Chapter 25 of the Civil Procedure Code of the Republic of Kazakhstan provides for the general procedure of judicial protection of electoral rights of citizens and public associations participating in elections and referendums.¹⁹ Court decisions shall be the basis for restoration of violated electoral rights but they do not provide for annulment of election results.²⁰ Whereas the international standards require that a body to review complaints should have the authority to annul the election results in those cases where there exists a danger that the committed violations could have affected their outcome.²¹ Thus, presidential candidates have no effective mechanisms to challenge election results.

The right to challenge the results of counting of votes in the presidential elections along with other authorized agencies is vested with the incumbent President, which can be exercised by way of applying to the Constitutional Council.²² Furthermore, under certain conditions, the incumbent President can veto the decisions of the Constitutional Council.²³

Since the legislation does not clearly separate the powers of the incumbent President from his rights of a presidential candidate, as far as the issue of challenging election results is concerned, the President has an equal position as compared with other contenders for the Presidential Office.

In general, the reasons to revise the voting results should be clearly specified in the legislation both for the President and for candidates and political parties thereby avoiding future political manipulation of election results.



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¹⁹ The Civil Procedure Code of the Republic of Kazakhstan as of 13 July 1999 7. No. 411 (hereinafter, CPC of the RK).

²⁰ Article 274, CPC of the RK.

²¹ Paragraph 3.3, Code of Good Practice in Electoral Matters.

²² Article 68 of the Election Law.

²³ Part 4, Article 73 of the Constitution of the RK.