



**Organisation for Security and Co-operation in Europe
Office for Democratic Institutions and Human Rights***

OSCE ODIHR and the European Commission Joint Programme for Advancing Human Rights and Democratisation in Central Asia

International Election Standards Program

**REVIEW OF THE LEGAL FRAMEWORK
REGULATING ELECTION DISPUTES RESOLUTION MECHANISMS
IN KAZAKHSTAN
AND RECOMMENDATIONS**

PHASE I

REPORT¹

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I. EXECUTIVE SUMMARY

The present report, which includes 47 recommendations on the Kazakhstani legal framework governing the election disputes resolution mechanisms, constitutes the first phase of the OSCE ODIHR International Election Standards Programme in Kazakhstan.

Initially, due to the late passage of the new election law, which did not permit to plan the review process (phase 1) and the training activities (phase 2) separately, it was intended to merge both phases in a single one, by organising a workshop based on the review process of the overall election related legal framework undertaken by our Election Section². However, due to the heavy workload of the Central Election Commission (CEC) in the run-up to the elections, it was agreed, in consultation with the OSCE Mission in Almaty and the local authorities, not to implement the workshop but revisit its concept following the elections.

The election disputes resolution system of the Republic of Kazakhstan has many and considerable defects, not least among which is the fact that the definition of the irregularities and their legal consequences is evasive and ambiguous. Furthermore, it lacks efficiency as can be discerned from the number of complaints left unresolved in the aftermath of the elections. As reported by the OSCE ODIHR Election Observation Mission, around 1.476 complaints, of which 1.056 media-related complaints, have been filed with the Central Election Commission (CEC) in connection with the two rounds of the elections. An additional unverified number of complaints and appeals have been filed with the courts. No report on the outcome of these cases have been published neither by the CEC or the Supreme Court.

The Parliamentary elections held on 10 and 24 October 1999 have shed light on recurrent problems that judges and election officials are confronted. Of particular concern is the lack of clear provisions on the necessary mechanisms to enforce the decisions taken by the election commissions and the absence of sanctions for non-compliance.

Ultimately, the shortcomings observed during these elections lie with the fundamental lack of trust by complainants in due process of law in Kazakhstan, specifically in the independence of the justice system from the will of the government and the local authorities. No just and credible election disputes resolution system may be contemplated unless the "prerequisites" to an independent judiciary as identified in the OSCE Document of the Moscow Meeting of the Conference on the Human Dimension (October 1991) are attained. The credibility of election disputes resolution system is also contingent upon the independence and impartiality of election commissions.

The main areas of concern addressed by the recommendations may be summarised as follows:

- a clear hierarchical procedure for the handling of election-related complaints and appeals should be established;
- in accordance with the due process of law, complainants and respondents should be given the opportunity to present and hear all the evidence considered in determining complaints and appeals ; decisions should be notified to all parties in interest and the standards of review needs to be clarified;
- the authority of election commissions to enforce their decisions should be consolidated. The law should include specific provisions on the mechanisms to enforce resolutions

² The report finalised on June 29th, 1999, contains a section on the complaints and appeals procedures supplemented by recommendations thereon.

passed by the CEC, particularly as regards complaints against actions and decisions of the state institutions, mass media and state officials. In addition the laws should go into greater details as regards referrals of complaints to the law enforcement bodies;

- the overall election related legislation, including the criminal law and criminal procedure code, should provide substance for the definition of the categories of irregularities and infractions that may corrupt the electoral process;
- the laws should provide for a clear delineation of prosecutorial discretion. The role of the Prosecutors in the electoral process should be clarified;
- the separate control over the regularity of the elections exercised by the Constitutional Council should be reframed.

II. ELECTION DISPUTES: A TEST FOR THE PERFORMANCE OF THE JUDICIARY AND THE INTEGRITY OF THE ELECTORAL PROCESS

There are four traditional democratic elections criteria: elections should be universal, equal, fair, secret, free, transparent and accountable. Judges and election officials who are faced with election disputes are bound to take legally binding decisions grounded in an appreciation on whether these criteria have been fulfilled in keeping with the electoral laws and regulations.

The involvement of the judiciary in the adjudication of election disputes is an integral part of the election cycle being essential to the integrity and impartiality of the whole electoral process. For different reasons among which its independence as a branch of the state powers, the judiciary is rarely involved in the administration of the elections (in some countries, as presiding members of election commissions or by appointing some or all of the election authorities); its function is restricted to that as impartial courts of law in hearing the cases of disputed election results or procedures.

On the other hand, the judicial oversight of the electoral process is exercised in accordance with the legal principles that underlie and structure the administration of justice in a particular country. However, there are strong arguments (time, one-time occurrence, direct impact on the democratic process, judges' involvement in a political process, etc.) in favour of having specific rules and procedures on the level of primary and constitutional legislation to govern election-related disputes. Likewise electoral matters give rise in most democratic countries to a significant case-law whereby standards of review are gradually adjusted and specified (techniques of interpretation, principle of "legality", concept of proportionality, concept of constitutionality, etc.).

Furthermore, in approaching thorough analysis of a review mechanism as mixed (administrative and judicial) and intricated as that of election disputes resolution, it is useful to be clear about the definition of the mechanism under inspection. The following combination of requirements or characteristics requires particular scrutiny as they affect the process of law by which timely redress is sought by complainants:

- (1) the status of the election Commissions (its required independence reflected primarily a multi-party composition)
- (2) their authority to take decisions or actions in an administrative capacity
- (3) the parties entitled to challenge these decisions or actions (including failures to act)
- (4) the time-limitations for filing complaints and appeals

- (5) the administrative review of these decisions or actions (including failures to act) by a higher level election commission
- (6) the principle by which no prerequisite for a review by an election commission is required prior to the admissibility of a challenge in court
- (7) the time-limitations for hearing and determining a case
- (8) the cases where further investigations may be required and the bodies to which such requests may be addressed
- (9) the interference of Public Prosecutors in election disputes
- (10) the authority to impose sanctions (fines or penalties)
- (11) the enforcement of these measures (whether and to what extent Election Commissions may enforce their own decisions)

Narrow legal or procedural considerations, though crucial, are not sufficient to ensure that election disputes are resolved according to election and rule of law standards. This is because rules and procedures (adjudicative time-limitations, deadlines set for each sequence of the electoral cycle, accuracy of the provisions describing the adjudicating process, etc.) are only a part of the output of the election disputes resolution setup and ultimately their actual enforcement is subject to the independence of both the Election Commissions within the electoral process and the judiciary within the organisation of the state powers.

Therefore, resolving electoral disputes is a test to the overall performance of the judiciary as well as the integrity of the voting process.

III. PRESENTATION OF THE OSCE ODIHR INTERNATIONAL ELECTION STANDARDS PROGRAMME

The adjudication of election-related grievances is among the most fundamental issues in the electoral process of any country. Governments and electoral authorities use a variety of approaches and mechanisms to settle electoral disputes, including the courts, electoral tribunals or Election Commissions with a quasi-judicial power. Whatever the approach used may be, ensuring that complaints are handled in a professional way is particularly challenging where the legal systems and election administration are still developing.

Therefore, the ODIHR launched in 1998 the “International Election Standards Program”. This program pursues in **Ukraine, Kazakhstan and Kyrgyzstan** the following interrelated objectives:

1. To develop and conduct training activities aimed at outlining “good practices” in the field and increasing the level of understanding by judges and election officials of election appeals procedures and methods in the light of international standards;
2. To make recommendations on possible improvements in the legislation and the judicial practice so as to ensure that electoral complaints and appeals be handled in a consistent, fair, impartial and timely manner ;
3. To encourage the establishment by the relevant authorities of an evaluation process of the performance of the judiciary and Election Commissions in the enforcement of election appeal provisions and rules.

The focus of this program falls within the scope of the commitments espoused by OSCE participating States to hold accountable and transparent elections as prescribed by the paragraphs 7.6 and 7.9 of the Copenhagen document.

IV. INTRODUCTION TO THE KAZAKHTANI COURT SYSTEM AND THE PROKURATURA

Under the new Constitution, judicial power is carried out through constitutional, civil, administrative, and other types of judicial procedure established by law. It is exercised within the framework of a unitary court system divided into three tiers: local Courts, Oblast (provincial) Courts and the Supreme Court, which operate according to civil, administrative and criminal procedures, depending on the subject matter.

The Supreme Court is the Supreme judicial body for civil, criminal and other cases, which are under the Courts' general jurisdiction. It is a court of general appellate jurisdiction and in certain instances a court of original jurisdiction with power to review all judicial decisions handed down by lower courts including those of the military courts. The Supreme Court may also issue normative resolutions based upon court practice. These normative resolutions form binding precedents for courts subsequently considering similar cases. The Chairperson of the Supreme Court, the Chairpersons of the Collegiums and judges of the Supreme Court are elected by the Senate on the nomination of the President based on the recommendations of the Highest Judicial Council³.

Below the Supreme Court are the Oblast courts, the Astana and Almaty City court and the Military Court of Troops. The Oblast and Astana and Almaty City Courts are courts of general jurisdiction, which may operate as courts of original or appellate jurisdiction depending upon the gravity or importance of a case assessed according to rules of civil and criminal procedure. For instance, in criminal matters, the District courts try petty offences like theft whereas Oblast Courts holds original jurisdiction over serious crimes. Moreover the Oblast Courts exercise powers of appellate review over the decisions of District courts. The Chairpersons and judges of the Oblast and equivalent courts are appointed by the President at the recommendation of the Highest Judicial Court of the Republic.

Unlike the Supreme and Oblast courts, the District Courts are exclusively courts of general and original jurisdiction. Judges of District courts are appointed by the President at the proposal of the Minister of Justice based on recommendations of the Qualification Collegium Justice⁴.

The appointment mechanisms show clearly that the Constitution concentrates power in the presidency. Additionally as it appears from article 79 of the Constitution, the President has sole control over lifting the immunity of the judges with respect to arrest, detention or punishment.

The role of the Judiciary is also hampered by an almost unlimited power of the Prokuratura, which is directly accountable to the President exclusively. The Prosecutor General is appointed for five years and dismissed by the President with consent of the Senate. The Prokuratura has a vertical structure with the Prosecutor General on the top. The lower level prosecutor's offices are Oblast, city, interrayon, rayon Prokuraturas and military and other special Prokuraturas.

³ Headed by the President of the Republic and consisting of the Chairperson of the Constitutional Court, the Chairperson of the Supreme Court, the Procurator General, the Minister of Justice, deputies of the Senate, judges and other persons appointed by the President of the Republic.

⁴ Composed of deputies of the Mazhilis, judges, public prosecutors, teachers and scholars of law, and personnel of the bodies of justice.

The Decree “on the Prokuratura” was adopted by the President of Kazakhstan within the powers conferred to him under Article 83 of the Constitution and of Article 1 of the Law “On temporary delegation of additional powers to the President of the Republic of Kazakhstan and heads of local administrations”. This Decree has the power of the Law.

According to the Constitution the Prokuratura exercises “the highest supervision over exact and uniform application of law”. The current legal set-up does not dramatically depart from the procuracy as it results from the socialist law tradition where it was an institution, very close to being a fourth branch of the government.

Judging by the scope of his powers the Procurator General wields more authority than the chief justice of the Supreme Court. Measured by the extent of its functions, the Procuracy has no counterpart in any modern Western legal system. Its powers are multi-faceted and looms over virtually all legal proceedings. The Procuracy performs numerous clearly distinguishable but sometimes overlapping functions, acting as criminal investigator, grand jury, criminal prosecutor and judicial supervisor, prison “ombudsman” and military “ombudsman”. He also asserts and protects the public interest in civil litigation and oversees all activities performed by agencies of the executive department of government.

Its functions include not only criminal law, but administrative and executive legal procedure as well. More specifically, the recent Decree on the Prokuratura provides for the following competencies:

- prosecution in court on behalf of the State ;
- representation of the interests of a citizen or of the State in court in cases determined by law (even in civil actions where the state is not a party in interest) ;
- supervision of the correct and uniform application of the law by courts (which extends to the right to protest any Court’s ruling) ;
- supervision of the observance of laws by bodies that conduct detective and search activity, inquiry and pre-trial investigation (which includes the right to discontinue investigation and to protest legal acts that regulate the investigative activities);
- supervision of the observance of laws in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of personal liberty of citizens ;
- oversight of the administrative legal actions (uniform application of legislation on administrative offences, initiate administrative proceedings, check enforcement of decisions in administrative cases).

V. RULES AND PROCEDURES GOVERNING ELECTION DISPUTES RESOLUTION MECHANISMS: ANALYSIS AND RECOMMENDATIONS

The legal framework of the Kazakhstan Parliamentary, Senate and Presidential Elections is based on the Election Law of the Republic of Kazakhstan, which came into force on 6 May 1999, and was later amended on 21 June 1999. This law replaces the 1995 Presidential Decree, which in itself is an improvement, as underscored in the ODIHR Report on the Legal Framework of the Parliamentary Elections (29 June 1999).

The comments hereafter relate to the provisions governing election disputes exclusively. They are complementary to the findings of the above-mentioned ODIHR Report as well as the

Final Report of ODIHR Election Observation Mission (20 January 2000). With regard to the complaints and appeals process, these reports contain the following recommendations.

1. ODIHR Report on the Legal Framework of the Parliamentary Elections :

- *Of key importance is a clearly defined system of addressing complaints, both during the campaign and after the voting and count, understood by those who take part in the election process. This would add to the public acceptance of decisions made by the Central Election Commission and courts. Information about the appeal procedures should therefore be enhanced.*
- *Creating a more detailed framework for the processing of complaints within the election commission structure, preferable with a hierarchical structure of dealing with complaints as the main rule. Such regulation should impose strict time-limits on the commissions' consideration of complaints. Regulations could be introduced by the Central Election Commission, without amendments to the election law.*
- *Amending the provision in the law on the involvement of the courts in the handling of complaints in order to clarify which courts handle, which cases. An issue that should be addressed is what level of courts system should handle complaints on decisions of commissions at different levels.*

2. Final Report of ODIHR Election Observation Mission :

- *The Election Law should be amended to prohibit strictly any interference by local authorities in the electoral process and provide severe criminal penalties for any such interference.*
- *The Election Law should be amended to provide fully transparent procedures for the processing of electoral complaints and appeals filed with the CEC.*
- *The Election law should define penalties for violations of the Election law.*

The present section is divided into five parts, each devoted to a separate issue or cluster of issues. Each part contains a series of recommendations.

A. HIERARCHICAL STRUCTURE OF THE “ELECTORAL JUSTICE”

The Elections Law of the Republic of Kazakhstan provides for a dual complaint and appeal process, with the possibility of channelling disputes through the election commissions and/or the judiciary. Basically, any decision, action or omission of a commission may be protested to the next higher electoral commission or a Court. No pre-requisite for a review by an electoral body is required prior to the admissibility of a challenge in court. A court challenge is always available as an option, irrespective of whether a protest has first been made to an electoral commission. The law provides that protests against decisions or actions of electoral commissions of a particular level should be made to the court at the corresponding level.

The law lays down the principles governing the demarcation of jurisdictions among Courts and election Commissions. In light of the common provisions and specific articles relating to the various facets and segments of the electoral process, the courts' involvement in the adjudication of election disputes may be summarised as follows:

- Generally speaking, courts hold appellate jurisdiction concurrently to higher election commissions on decisions made by election commissions (article 20.6).
- They hold original and appellate jurisdiction on alleged violations of the electoral legislation pertaining to the conduct of the ballot, including the election campaign, the voting and the count (a decision of a lower election commission may be directly appealed to a Court) (article 49).
- They hold appellate jurisdiction on decisions of relevant election commissions regarding voters' registration (article 26.4).
- They hand down final rulings on Central Election Commission's decisions to refuse registration or de-register a candidate to the Presidency as well as decisions to deny certification of or de-certify the elected candidate to the Presidency (article 59.8 and 66.3).
- They share appellate jurisdiction with the Central Election Commission on decisions to refuse or de-register a candidate to the upper House or to the lower House (Majilis) (articles 73 and 82.2).
- They deliver final rulings on Central Election Commission's decision to deny certification of or de-certify an elected candidate to the upper House or to the lower House (Majilis) (articles 89 and 98.2).
- They share appellate jurisdiction with the Territorial Election Commission on decisions to refuse or de-register a candidate to the Malishkats (article 104.7).
- They deliver final rulings on Territorial Election Commission's decision to deny certification of or de-certify an elected candidate to the Malishkats (article 118).

These provisions may be subject to abuses and misinterpretation that would provide room for "forum shopping" and allows recurrent complaints on already adjudicated cases with no finality in the process. Without further specifications, a plaintiff may bring an action on the same subject matter in a court and an election commission, in different courts or in different election commissions at different levels. An illustrative example of the confusion such a provision is likely to generate may be summarised as follows: 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 another candidate 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 Election 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 fortuitous or minor complaints or with complaints that should have been addressed earlier in the electoral process.

Recommendations

The Election law should:

1. Set out a clear hierarchical procedure for the handling of election-related complaints and appeals in accordance with the framework legislation governing the judiciary and the civil proceedings (notably, Civil and Civil Procedure Codes);
2. Determine courts competence in regard to consideration of cases contesting the decisions, actions or inactivity of Election Commissions, and determine jurisdiction as well as the subject of such judicial consideration;
3. Eliminate duplication in consideration of cases contesting the decisions, actions or inactivity of Election Commissions simultaneously by Election Commission of higher level and respective court;
4. Indicate which decisions are final and binding;
5. Provide for mechanisms and procedures in the law so that complainants may not be permitted to file complaints and appeals over already adjudicated or resolved disputes;
6. State that if a complaint has been accepted for consideration by a court and, at the same time, has been submitted to an election commission, the election commission shall suspend consideration of the complaint until the court decision comes into legal force. The court shall notify the election commission of a submitted complaint;
7. Set forth that the cases deferred to the Central Election Commission are only reviewable by the Supreme Court;
8. Article 49 needs to be clarified as regards the scope of the courts' jurisdiction and the subject matters enumerated. Furthermore, a time-limitation for filing complaints ought to be indicated;

Other related issues:

9. Decisions upon a complaint or an appeal may not be enforced until all remedies have been exhausted. The principle should be set in the law. Furthermore the law should specify that the second round of an election may not be ordered before all remedies have been exhausted and final decisions thereon have been reached (this applies in particular to article 96.2);
10. The law should determine that the consideration of cases contesting the decisions, actions or inactivity of lower level Election Commissions by local Courts and the Supreme Court is to be carried out exclusively in a collegial manner;
11. The law should establish equal enumeration of subjects who are eligible to file complaints and appeals to election commissions and courts;
12. The law should provide substance on a number of crucial components of the process by which complaints and appeals are heard and determined, such as the amount and standards of evidence to be presented by complainants and respondents as well as appropriate notice requirements;

B. DISPUTES RELATING TO SEGMENTS OF THE ELECTORAL PROCESS

1) Voters Registration

- Article 26.4 : Every citizen has the right to appeal non entry, incorrect entry on or exclusion from the list as well as inaccuracies in the list in the data about a constituent.

- Applications on introducing of corrections in the list are to be examined by the **corresponding election commission** within three days, or immediately if is election day or the day before it.
(...)
- According to the location of the election commission, 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.

In case of a court's decision in favour of the applicant, correction in the voters list or inclusion of a constituent who has not entered on additional voters' list is to be immediately effected by the election commission.

While the relevant authorities are required to have prepared complete and final voter lists no later than 10 days after the calling of the election, the electoral law permits the accuracy of these lists to be challenged at any time and up to the eve of the election. This is detrimental to the required transparency in the development of voters' lists. The election law fails to provide a date certain before the election by which the voters' lists must be prepared and presented as final, subject to change only by established processes of administrative correction and voter requests for corrections. Moreover and as a result of the mechanism established, the time-limitations are not realistic: should a claim be taken to an election commission on election day, the latter would be required to pass a decision on the same day and the claimant then be still entitled to appeal that decision to the court. The court would then be required to deliver a ruling on the same day. When necessary, the election commission would be still expected to implement the court's final and binding decision before the voting takes place.

Recommendations

13. The election law should expressly stipulate that voters' lists shall be subject to changes under strict conditions according to administrative correction and voter petition for corrections only as provided by law;
14. The law should set a deadline after which applications, objections or complaints on the voters' register may no longer be admissible. The law should further specify that changes may not be made to the lists within no less than 2 days before election, except by court order or decision of the appropriate election commission;
15. In addition to the benefits in terms of clarity and consistency, this would ensure that electoral bodies and the judiciary not be diverted from the urgent complaints and appeals relating to the voting and counting process and drawn into resolving disputes that could have been addressed earlier;

2) *Registration of candidates and certification of elected candidates*

Three interrelated issues must be considered:

- (1) relevance and assessment of the grounds for registration refusals or de-registration of candidates ;
- (2) candidates' status once registered ;
- (3) timeframes for complaints and appeals thereon.

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 need to be differentiated and weighted against the magnitude and essentialness of infractions or violations committed by candidates or their proxies. The “live or die” approach (de-registration or refusal to register) leaves the process vulnerable to abuse if selective application becomes a political tool to eliminate certain candidates to the advantage of favoured 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 do 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 that refer to breaches of certain campaign finance and election campaigning rules and do not foresee any other sanction than refusal or de-registration of candidates or invalidation of the election within a two-week term after the election.

Recommendations

The following recommendations point out the lacunae and suggest ways to consolidate or revise the existing provisions:

16. 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;
17. 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 mutually consistent. For the sake of clarity and certainty, all grounds for refusal to register or de-registration of a candidate could be exhaustively indicated in a separate provision. The same approach could be followed with regard to grounds for invalidation of the election;
18. The grounds for registration refusals or de-registration of a candidate should be clearly 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 abuses as broadening the scope of the requirements to undetermined elements;
19. 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”;
20. The law should exclude administrative charges or convictions as a means of disqualification of potential candidates;
21. The law should enumerate violations which may be the grounds for overturning of a decision to register a candidate;
22. The law should indicate that a registered candidate may not be subject to criminal prosecution, arrested and sentenced, except in case of flagrant violations;
23. 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;

24. the law should specify when time-limitations to file complaints and appeals on registration of candidates and certification of elected candidates start to run;
25. in cases of refusal to register or de-registration of a candidate, election commissions should be expressly required to make motivated decisions;
26. election commissions should be liable to issue to the candidates or his/her authorized parties a written note acknowledging receipt of all documents submitted in support of their candidature as prescribed by the law;
27. articles 82.2, 89.10 and 98.2 of the election law should be revised so as CEC decisions regarding registration of candidates or certification of an elected candidate may only be appealed to the Supreme Court;

3) *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 law is vague and evasive as regards the grounds upon which an election may be declared invalidated. Also, some provisions abusively disenfranchise candidates by making them automatically ineligible to compete in a repeat election.

Recommendations

28. 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 features of crime, (4) whether committed 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), (6) whether the violations were committed for objective reasons, (7) what were the motives of the violations, etc.
29. 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;

C. ELECTORAL OFFENCES: VIOLATIONS, SANCTIONS, ENFORCEMENT

The election law fails to define penalties for violations of the law. There are no specific provisions of law (or regulations) that address illegal activities of election officials, state officials and local authorities in the context of the election period. The law does not define those activities that constitute “taking advantage of an official position or status.” Consideration should be given to expanding the provisions to cover not only those officials who happen to be candidates but also other officials who improperly misuse their offices in the support of a political campaign or to grant favour to a particular candidate or party to the disadvantage of others.

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. 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 law⁵. This limited jurisdiction is further compounded as regards lower level commissions by the fact that, unlike the CEC, they do not have the national standing which enhances the CEC's authority. As regards the latter, the only sphere where its authority is legally unquestioned is in the resolution of disputes related to lower level commissions. Finally, unlike the courts, the election commissions have no established relationships with the law enforcement agencies. However, referral of complaints to the responsible state bodies is a normative prerequisite for quasi-judicial bodies such as election commissions.

Clearly, in a rule-of-law state, the enforcement component of the election disputes resolution mechanisms is crucial. A just and credible resolution of elections disputes relies on a proper and timely implementation of the decisions taken by elections commissions and courts. Therefore the state authorities and the law enforcement agencies have an important role to play in the whole legal process and in particular in the pre-trial phase of criminal investigations, which include the most serious election disputes. Courts and prosecutors rely on the law enforcement agencies to gather evidence, arrest suspects, and to execute numerous other services, which are essential to a fair trial. Their role is also essential once a court has decided upon a sanction since it is the law enforcement agencies, which execute them.

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.

Conversely, in a number of:

1. illegal interference by local authorities in the election process with the intent to influence the outcome
2. the abuse of power to obstruct the independent media and the campaigns of opposition parties and candidates
3. campaigning by local government officials for "favoured" candidates
4. co-mingling of official election activities with distribution of campaign materials for the a particular party
5. intimidation against opposition parties, candidates, their supporters, and the media by tax inspectors and officers of the Committee for National Security (KNB).

Credible enforcement mechanisms containing administrative, civil and criminal penalties should be established. In the regard, Chapter 9 of Part I of the Election Law needs to be strengthened and specified. Alongside a definitional section that contains detailed definitions of the offences and prescriptions of the penalties associated with these offences should be embodied either in the

⁵ see section 4.3 of the Final Report for the Republic of Kazakhstan Parliamentary Elections – 10 and 24 October 1999 (Warsaw, 20 January 2000).

election law or in separate chapters of the relevant administrative, civil and criminal framework legislation. The enforcement mechanisms should be tailored to fit the varying dimensions and magnitude of offences and enforced through impartial and independent agencies. This requires that the authority and control of election commissions, particularly the CEC, over the procedural and administrative aspects of the elections be consolidated.

Recommendations

30. The law should proclaim the obligation of the CEC to control the enforcement of legal norms on elections and, whenever necessary, to refer a case to either a law enforcement body for further investigation or to a court for adjudication;
31. The law should provide that non-execution, improper, untimely execution of the election Commission decisions or of the requirements of its officials entail legal responsibility;
32. The law should set specific deadlines for consideration by law enforcement bodies of referrals for investigation submitted by election commissions;
33. Provisions should be made in the event that the law enforcement body to which the complaint is referred fails to act;
- 30 The law should specify accountability of the election officials, the candidates and their proxies for violations of the electoral legislation;
31. The law should clearly define the grounds for imposing punishment for violations of electoral legislation taking into account their seriousness, in particular (1) if the violation occurred using coercion or threats of coercion against an individual or property (2) if this occurred through forgery, deception, theft, bribery, or fraud, (3) if respondent persuaded, extorted, received, agreed to receive anything valuable for the voting;
32. In particular, article 27.5 of the Election Law and article 16.4 of the Law on Political Parties should be reconciled so that “charity” may be not be permitted as a means of obtaining support for candidates;
33. The Law should contemplate the imposition of administrative or civil penalties for public officials who violate the rights of candidates or parties, or take advantage of their offices to exert undue influence over the media, or to influence the outcome of the elections;
34. The law should determine that the appeals about the violations of campaign publicity are to be considered by court or Election Commission only before the election results are publicized;
35. The law should specify accountability for the financial violations of the legislation: (1) when forming election funds (2) refusal by the banks to open accounts for election funds, (3) refusal to announce through the press the amount received for campaigning, (4) failure on the part of appropriate state bodies and election commissions to exercise control over contributions to and utilization of election funds (5) failure on the part of Political Parties or candidates to submit to the corresponding election commission the data and financial statements regarding the amounts, sources and utilization of moneys of their election funds;
36. The law should prohibit the making or receipt of contributions from funding sources considered to present particularly acute corruption risks to the society. In addition to the bodies enlisted in article 34.3, should be included government contractors, corporations, unions, banks and donations made in currency;
37. Various sections of the law (articles 33 through 36, articles 91 and subsequent) related to campaign funding are not consistent: only departures from the common rules embodied in article 33 through 36 should be subject to specific provisions in other parts of the law;
38. With regard to the funds allocated from the state budget for campaigning, the law should specify a timeframe for the transfer and distribution of funds and in the event the funds have not been transferred in due time or in full, provide for facilities for the elections commission

- to obtain credits from banks on a competitive basis. The state authorities should be held accountable for having missed the deadlines set in the law for the transfer of the funds;
39. The law should specify the role of the Counting Committee for Control over Performance of the Republican Budget (article 36 of the Election Law) as a law enforcement agency, how it demarcates from that of the election commission in the area of campaign funding;
 40. The law should be supplemented with a reference to the standards by which to determine whether charges shall be brought or whether the criminal defendant should be convicted. Grounds for institution of criminal proceedings should be clearly set forth in the law or in the Criminal Code and the Criminal Procedural Code.

D. INVOLVEMENT OF THE PROSECUTORS IN ELECTION DISPUTES

Within the whole of the Kazakhstani legal system, the functions of the Prosecutors, which are directly accountable to the executive, are almost unlimited. 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 prosecutor, as illustrated in article 49 of the Elections Law, which mentions Prosecutors 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 Prosecutor'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

41. The scope of the Prosecutor General Office's involvement should be regulated by the Elections law with cross-references to the relevant provisions of the framework legislation;
42. As a matter of principle, its involvement should be limited to cases where the constitutional right to vote is at issue. This should apply to the criminal prosecution of any conduct aimed at denigrating the right of each citizen to vote for the candidates of his or her choice. This would involve offences perpetrated with a view to corrupting the processes by which ballots are obtained, marked, cast and counted, by which election results are canvassed, tallied and certified, and by which voters are registered to vote;
43. Except in cases of flagrant violations, the Prosecutor General Office should not be entitled to institute criminal, administrative or civil proceedings or to impose administrative sanctions upon registered candidates in any cases involving offences that arise either out of activities which take place during the electoral campaign, or the process by which candidates qualify for ballot status. Such departures from the ordinary rules and procedures should apply to electoral matters exclusively and be regulated in the framework legislation.

E. THE ROLE OF THE CONSTITUTIONAL COUNCIL IN ELECTION MATTERS

Generally speaking, the involvement of Constitutional courts in the adjudication of election disputes of necessity derives from the choice of method of securing constitutional supremacy over all inferior legal acts, which depends on the legal culture of each country. Socialist countries have typically preferred a political control device over the constitutionality of state actions rather than the judicial control method. This could take the form of a continuing constitutional control by the legislature over its own legislative activities.

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 far less powers than the Constitutional Court, in place 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

44. 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;
45. 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;
46. 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;
47. The discretion of the Constitutional judge should be defined, structured and confined so as to avoid abuses or inconsistencies. Its jurisdiction should be clearly delineated.

F. RECOMMENDATION ON EVALUATION OF THE JUDICIARY'S PERFORMANCE IN ELECTION LITIGATION

The following recommendation outlines the concept of a Court self-assessment project which purpose is to help determine the performance of the court system in election litigation.

Such assessment has never before been done in Kazakhstan. The assessment should focus on the courts only. It should not attempt to study how the overall judicial system is performing but how it does operate within the limited framework and short timeframe of an election process. This would however be indicative of the overall performance of the judiciary so much as the promptness of proceedings where election-related cases are heard is a test to the capacity of the system to fulfil its functions.

The court assessment might touch on the external problems that prevent courts from functioning effectively and achieving timely decisions on cases relating to election disputes.

A number of types of persons should be involved in the assessment process. Besides key court judges, these persons typically should include members of the Prosecutor's General Office and Defence attorneys.

There are also advantages to involving in the assessment process non-governmental bodies who work closely on election related issues. First, these groups can help identify issues that may need to be addressed. Second, they can help ensure the accuracy of the assessment. Third, they may be able to help with the implementation of the assessment process (or in later implementation efforts). Fourth, if they are kept involved, they are less likely to use the results of the assessment to criticize the courts.

Basic Assessment Strategy

The following is an overview of how assessments are typically conducted.

Since the assessment is to examine how the state is implementing certain laws (e.g., elections law, penal and civil codes, code of civil procedure, code of criminal procedure, etc.), a logical first step is to assemble and prepare summaries of state laws, court rules, and court forms addressing these issues.

- After the laws, rules, forms, and procedures are assembled, state-wide surveys are conducted and existing data on the state as a whole is assembled.
- Detailed information about a few selected sites is collected (e.g., through interviews, file reviews, and court observation). While it would be valuable to be able to interview persons and conduct site visits throughout the target geographical area as a means of determining how cases are being handled, that strategy is financially prohibitive for most states.
- A set of sample questionnaires and instruments and a manual with which to conduct the assessment need to be put together.

Methods of Gathering Information

The following are more details concerning typical ways state courts have gathered self-assessment information in a state court system self assessment.

a) Questionnaires

Questionnaires are mailed throughout the targeted area, both asking questions and requesting data. While questionnaires can be a means for obtaining answers to a wide range of questions, their answers must lend themselves to tabulation. Thus, such questions mostly should ask for numerical answers ("How many...?"), yes or no answers, or multiple choice answers.

b) File reviews

Court delays

Judicial case files have been used as a precise source of information concerning **court delays**. For example, case file review has revealed the frequency of continuances, the average length of time from the filing of a petition to adjudication. It can measure the average time from the filing of a petition to the court ruling.

Adherence to procedural protections

File review also reveals information concerning **adherence to procedural protections**. It can be used to measure the completeness and timeliness of court reports. It can be used to evaluate the completeness of court orders and the use of findings. It can also provide information as to whether parties receive timely notice of proceedings.

In most court systems this technique is only used in a few selected courts. File review can be relatively time consuming and expensive.

When reviewing files, for the sake of accuracy, court systems systematically select a sample of cases. For example, it is not appropriate to select cases that happen to be easily accessible or that have moved through the court process relatively quickly. For statistical purposes, it is desirable, when possible, to review a sample of 100 or more files.

c)•Court observations

Another useful self-assessment technique is direct observations of court proceedings. This can be used, for example, to evaluate the depth of the hearings (which issues were addressed and how thoroughly) and the apparent preparation of parties. To analyze pre-hearing preparation of the parties, very brief supplemental interviews may be helpful.

Court observations are also a means for evaluating the physical attributes of the facilities and court atmosphere (quiet in the courtroom).

An alternative to first hand observation is to obtain and review transcripts of the hearings but this might prove difficult owing to the translation constraints. Because the observer is not present during the hearings, this may provide a more accurate picture in some ways than first hand observation.

d) Interviews

Interviewing is the best method to obtain in-depth information on a wide range of subjects. Interviews can be flexible. Among other things, they can be used to reconstruct how the system actually operates.

The key difficulty with the use of interviews flows from their flexibility. That is, it can be difficult and time consuming to accurately record and assemble the results. Computer assisted techniques to help in that matter would be needed.

For the court system self-assessments, the use of interviews is probably most practical for the in-depth look at a limited number of courts in the state.

Sequence of Assessment

The following is the most typical sequence of state court self assessments.

- After the statutes, case-law, court rules, written policies, and forms are assembled (see above), the next step is to determine what types of data are already available.
- After relevant data have been identified, it is then possible to determine what additional information is needed.
- After available data are identified and assembled, the next step is the design of instruments such as survey questionnaires, interview questions, file review sheets, and court observation forms.
- After initial instrument design, pre-testing is strongly recommended. This means trying the instruments out and making necessary revisions before they are widely used.
- The next step is the collection of information, mailing questionnaires and beginning to interpret the results from those questionnaires.
- Next are the site visits.
- The next step is to assemble and analyze the information that is gathered.
- Next comes the preparation of a report on study findings.
- Finally, and possibly separately from the report, policy recommendations are prepared, based upon study findings.

Who Conducts Interviews and Gathers Information

The quality of information gathered for site studies, particularly from interviews, is dependent upon the knowledge and insight of those persons gathering the information. Typical examples include experienced attorneys.

The Program Instruction is to describe how these persons/organisations will be involved in the court assessment and improvement activities. It should be specified what form their involvement must take.

**OUTLINE OF THE RULES AND PROCEDURES GOVERNING ELECTION
DISPUTES RESOLUTION MECHANISMS**

Hereafter are described the procedures provided for making election complaints and appeals, whether through litigation or otherwise. These procedures are outlined in the form of question – answers schemes, which shed light on the various phases and facets of the process by which election related disputes are adjudicated.

In particular, the following aspects are addressed:

- the complaints and appeals process (which includes the demarcation of jurisdictions among election commissions and Courts) ;
- time-limitations to file and determine complaints and appeals ;
- grounds upon which complaints and appeals may be made ;
- grounds upon which Courts or election commissions may pass decisions on complaints and appeals heard before them ;
- parties entitled to lodge complaints and appeals.

1. Common provisions governing all election types

A/ General rules and procedures

Precinct Election Commissions consider and decide on complaints regarding “issues of preparation of elections and conduct of voting” (article 18.9).

District Election Commissions may consider and decide on complaints and appeals regarding decisions and actions of **Precinct Election Commissions** (article 16.3).

Territorial Election Commissions may consider and decide on complaints and appeals of actions or decisions taken by **District Station Election Commissions** and **Precinct Election Commission** (article 14.3).

The **Central Election Commission** may consider and decide on complaints and appeals of actions or decisions taken by **Territorial Election Commissions** and **District Election Commissions** (article 12.5).

Either a **Court** or the **higher level Election Commission** may consider and decide upon decisions and actions of a **Territorial Election Commission** or a **District Election Commission** or a **Precinct Election Commission** (article 20.6).

Although there may be a general expectation that protests will be addressed to an electoral commission first before the complainant initiates litigation, **this is not a pre-requisite for judicial consideration of a complaint** (Article 20.6).

Who is entitled to file complaints and appeals to a Court (or Public Prosecutor's Office) ?

- Members of Election Commissions
- Representatives of registered public associations
- Citizens

Article 49

What is the time limit for considering and deciding on a case ?

- Within 5 days
- Or
- Immediately, if the complaint or the appeal is filed on election day

Article 49

B/ Rules and procedures relating to voters registration

Who is entitled to file complaints and appeals ?

- Any **citizen/voter**

Article 26.4

What is the time limit for an election commission considering and deciding on a complaint ?

- Within **3 days**
- Or
- Immediately, if the complaint or the appeal is filed on the day before or on election day.

Article 26.4

What is the time limit for a Court deciding on an appeal to a decision of an election commission ?

- Within 3 days
- Or
- Immediately, if the complaint or the appeal is filed on the day before or on election day.

Article 26.4

2. Rules and Procedures governing Presidential Elections

A/ Registration of candidates

Who is entitled to file complaints and appeals ?

- **Candidates**
- **Public associations** (which nominated the candidates)

Article 59.8

What is the time limit for filing a complaint on decisions of the Central Election Commission to register or refuse registration of nominees for candidacy to Presidential elections ?

- Within **10 days** from the day the decision challenged is adopted.

Article 59.8

What is the time limit for considering and deciding on a case (by the Supreme Court) ?

- Within **10 days** from the day the decision is challenged.

Article 59.8

B/ Registration of the elected Presidential candidate (article 66)

Who is entitled to file complaints and appeals ?

The elected candidate may be refused registration “**upon submissions of the corresponding election commissions or appeals of citizens**”.

Article 66.2

On what ground may the registration of the elected candidate be refused by the CEC ?

- If in no less than one-fourth of the total number of precincts of administrative territorial units elections are recognised invalid or violations of the Election law take place in the course of the elections or in the counting process

Article 66.2

What is the time limit to register or refuse registration of the elected candidate (by the CEC) ?

- Within **7 days** from election day the decision challenged is adopted.

Article 66.1

What is the time limit for appealing to the Supreme Court ?

- Within **10 days** from the day the decision is taken by the CEC.

Article 66.3

Who is entitled to appeal the decision of the CEC ?

- The elected Candidate.

Article 66.3

What is the time-limit for the Supreme Court to make a final decision ?

- **10 days** from the day of filing of the appeal.

Article 66.3

The President of the Republic, the Chairperson of the Senate, the Chairperson of the Majilis or no less than one-fifth of the total number of Deputies are entitled to challenge the outcome of the elections in the **Constitutional Council**. Were the Constitutional Court to rule that elections were conducted in violation of the Constitution in some precincts the CEC would be due to pass a resolution declaring the election invalid and calling for a second voting in those precincts.

3. Rules and Procedures governing Elections of the senate

A. Registration of candidates

Who is entitled to appeal against a decision of the election commissions (Oblast and City) to refuse or to annul registration of a candidate ?

- the candidate affected by this decision
- the Malishkats that nominated the affected candidate

Article 73.7

Which bodies may decisions of election commissions to refuse or annul registration of a candidate be appealed to ?

- the CEC
- a Court

Article 73.7

On what ground may the registration of the elected candidate be refused by the election commissions ?

- in cases of violation of the requirements of the Constitution and the present law as well as in other cases established by the “present decree”

Article 73.6

What is the time limit to challenge a decision to refuse or annul registration of candidates by election commissions ?

- Within **7 days** from the decision challenged is adopted.

Article 73.7

What is the time limit for either the Courts or the CEC to make decisions on these appeals ?

- Within **7 days** from the day the appeal is filed.

Article 73.7

B/ Challenging election results

Who is entitled to challenge in the CEC the election outcomes so that the election may be declared invalid?

- Oblast or City Election Commissions
- “appeal of electors”

Article 82.2

Who may appeal the decision of the CEC which declares the election invalid ?

- the elected candidate

Article 82.2

To which entity may the decision of the CEC be appealed ?

- a Court

Article 82.2

What is the time limitation for filing an appeal against the decision of the CEC?

- 10 days (from the day the decision of the CEC is passed)

Article 82.2

The President of the Republic, the Chairperson of the Senate, the Chairperson of the Majilis or no less that one-fifth of the total number of Deputies are entitled to challenge the outcome of the elections in the **Constitutional Council**. Should the Constitutional Court rules that elections were conducted in contradiction with the Constitution in some precincts, the **CEC** would be liable to pass a resolution declaring the elections invalid and calling for a second voting in those precincts within a period of two months.

Article 84

4. Rules and Procedures governing Elections of the Deputies of the Majilis of the Parliament of the Republic

A/ Registration of candidates

Which bodies may decisions of election commissions to refuse or annul registration of a candidate be appealed to ?

- the CEC
- a Court

Article 89.10

On what ground may the registration of the elected candidate be refused by the election commissions ?

- in cases of violation of the Constitution and the present law.

Article 89.9.3

What is the time limit to challenge a decision to refuse or annul registration of candidates by election commissions ?

- Within **7 days**

Article 89.10

What is the time limit for either the Courts or the CEC to make decisions on these appeals ?

- Within **7 days** from the day the appeal is filed.

Article 89.10

B/ Challenging election results

Who is entitled to challenge in the CEC the election outcomes so that the election may be declared invalid?

- District Election Commissions
- Citizens

Article 98.2

Who may appeal the decision of the CEC which declares the election invalid ?

- the elected candidate

Article 98.2

On which grounds may the CEC decide to refuse registration of a candidate ?

- “violations of the present Constitutional Law (...) in the course of the elections or the in the vote counting and determination of the results of the elections”

Article 98.2

To which entity may the decision of the CEC be appealed ?

- a Court

Article 98.2

What is the time limitation for filing an appeal against the decision of the CEC?

- 10 days from the day the decision of the CEC is passed

Article 98.2

The President of the Republic, the Chairperson of the Senate, the Chairperson of the Majilis or no less that one-fifth of the total number of Deputies are entitled to challenge the outcome of the elections in the **Constitutional Council**. Should the Constitutional Court rules that elections were conducted in contradiction with the Constitution in some precincts, the CEC would be liable to pass a resolution declaring the elections invalid and calling for a second voting in those constituencies within a period of two months.

Article 100



Office for Democratic Institutions and Human Rights

International Election Standards Programme

**GENERIC ELECTION DISPUTES
RESOLUTION GUIDELINES**

Denis Petit

12 December 1999

INTRODUCTION

1. The following guidelines are not intended to describe in detail a model system of election disputes resolution. They seek only to set out what is generally accepted as being good principle and practice in addressing election related disputes.
2. Subject to adjustments required as a result of the great variety of legal and electoral systems in the world, the core principles displayed hereafter should serve to stimulate a constant endeavour to overcome practical difficulties in their application, in the knowledge that they represent, as a whole, the minimum conditions which are commonly accepted by the international community.
3. These principles cover a field in which theory and practice are constantly developing. They are not intended to preclude experiments and practices, provided these are in conformity with their spirit and seek to further the purpose of consolidating the rule of law and free and fair elections.
4. The principles displayed hereafter have been formulated and articulated in reference to a dual complaint procedure specifically involving electoral bodies and courts. In some countries, alternative procedures are being considered such as the creation of specialized courts to adjudicate election complaints and appeals, or the development of an administrative justice with jurisdiction over election disputes. However these alternatives have so far been considered as having little chance of being endorsed and implemented mainly for financial reasons.
5. Finally, these principles stand at the crossroad of international rule of law and election standards. Some of them are principles of justice or related to fundamental rules embodied in international instruments, others are practical. They all have as their foundation the rules relating to the right to a fair trial, particularly as laid down in paragraphs 5.10 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE⁶, in paragraph 13.9 of the CSCE Concluding Document of Vienna⁷ as well as in article 6 of the European Convention on Human Rights⁸. This includes the independence of the judiciary⁹ as further prescribed in paragraphs 19, 20 and 21 of the Moscow Document of the Conference on the Human Dimension of the CSCE.¹⁰

⁶ Copenhagen, 29 June 1990.

⁷ Third Follow-Up, Vienna, 19 January 1989.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

⁹ Should also be taken into consideration the “Basic Principles on the Independence of the Judiciary”, Adopted by the Seventh United Nations On the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹⁰ Moscow, 3 October 1991.

GENERAL PRINCIPLES

1. Every individual and every political party has the right to the protection of the law and to a remedy for violations of their political and electoral rights.
2. Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to address their grievance within a competent jurisdiction.
3. Where a violation has been found, the competent authority within the appropriate jurisdiction should provide for redress in a prompt manner within the timeframe of the electoral process.
4. The effectiveness, impartiality and independence of the judiciary, including the office of the prosecutor, and that of electoral bodies, is a pre-condition for the fair, effective and impartial handling of election related disputes in conformity with the commonly accepted international standards on elections and the rule of law.
5. The decisions made by independent and impartial authorities which are responsible for supervising the conduct of elections and other public consultations, including the preparation and periodic revision of the electoral roll, shall be subject to appeal with an independent and impartial judicial authority.
6. The electoral law shall secure a clear demarcation of the respective jurisdictions of the courts and the electoral bodies so as to exclude the possibility for courts or electoral bodies to be served with repeated or concurrent complaints on the same matters.

HIERARCHICAL APPELLATE PROCEDURE

7. The electoral law should set out a clear hierarchical appellate procedure for the handling of election-related complaints and appeals in accordance with the framework legislation governing the judiciary and the civil proceedings.
8. The electoral law should at least provide for one appeal procedure to ensure that a higher Court or electoral body reviews all cases. The law should clarify which decisions are final. When a decision is reviewable, it should be stated to which court or electoral body it may be appealed to.
9. No pre-requisite for a review by an electoral body should be required prior to the admissibility of a challenge in court and a court challenge should always be available.
10. For all types of election disputes, decisions of the higher electoral body should be reviewable by the highest body of the judiciary whose ruling should then be final.
11. Should the law foresee that decisions of the highest electoral body are reviewable by lower level courts, this should be stated as an exception to the general rule and be strictly defined in the law. Unambiguous indications should be included in the law so as to identify the court to which such decisions may be appealed.

12. Complainants should not be permitted to file complaints and appeals over already adjudicated disputes. Therefore, the electoral law should stipulate which decisions are final and binding. This implies that decisions upon a complaint or an appeal may not be enforced until all remedies have been exhausted
13. The highest body of the judiciary or the Constitutional court should not be entitled or compelled to release an election related case to a lower level court.

ACCESSIBILITY AND TRANSPARENCY

14. The complaint procedure should be transparent and easily understandable. Appropriate forms should be readily available for filing complaints and appeals in the language(s) used in the country. Election officials should be acquainted with the rules and procedures for filing complaints as well as with the standards governing election disputes and related to the scope of their involvement in these matters. Finally, civic education campaigns should include basic information on the complaint procedure.
15. The relevant authorities should take the necessary policy and institutional steps to ensure those with election related responsibilities are trained on election disputes rules and procedures in accordance to the election law of the country and international standards.
16. The complaint procedure should be free from unnecessary obstacles, especially as regards the cost of bringing an action in a Court. Wherever possible the complaint procedure should be accessible without charge to the complainant. Where costs are unavoidable, they should be kept at a minimum so as not to deter citizens from bringing a complaint.
17. An effective, fair and transparent complaint procedure requires that potential complainants be informed of the means by which the complaint should be made, by which body it will be considered and the time frame of its resolution. In addition, complainants should be aware of the type and amount of evidence needed to sustain their allegations with sufficient factual and legal materials.
18. Decisions taken by the electoral bodies, in particular those related to voters' and candidates' registration, should as a rule indicate the remedies available.¹¹
19. Election dispute resolution mechanisms should be governed by a coherent body of legal norms preferably in a distinct chapter or section of the law. The terms, wording and legal scope of the election disputes provisions on the different subject matters should be mutually unified so as to secure their consistency and completeness. The language used throughout the law should be clear and consistent so as to eliminate arbitrary interpretation.

¹¹ This principle is in line with paragraph 5.10 of the Document of the Copenhagen Meeting of the CSCE, 29 June 1990, which has a broader scope.

PROMPTNESS OF THE PROCEEDINGS: TIME LIMITATIONS AND DEADLINES

20. Considering that the conduct of an election requires prompt decisions and actions within a pre-determined timeframe, the procedures governing the election disputes should differ from those provided for general civil disputes. This could be reflected in shorter deadlines and a single appeal process, which can be justified so long as sufficient time is provided to file complaints and appeals.
21. When setting time limitations a balance should be struck between the imperatives relating to the administration of justice in a timely manner within the electoral timeframe and the right to challenge decisions, actions or omissions of the electoral bodies in the fulfilment of their mandate.
22. In particular, the time-limitations should allow for courts and electoral bodies to have sufficient time to process, review and make decisions upon the complaints and appeals submitted to them. The fact that some complaints or appeals, especially those related to election funding or campaigning, may require further investigation should also be taken into consideration.
23. For each phase or facet of the electoral process, the electoral law should expressly and systematically set deadlines after which applications, objections, complaints and appeals may no longer be admitted by courts and electoral bodies alike. Specific time-limitations may be prescribed for complaints and appeals on the voters' registers or the validation of candidates.
24. For each phase or facet of the electoral process (such as the voters' registration or the validity of the candidatures), the electoral law should expressly and systematically set deadlines for filing complaints and appeals by which either the courts or the electoral bodies must reach a decision. Specific time-limitations departing from the general rules may be prescribed for complaints and appeals pertaining to the voter's registers or the validation of candidates.

VOTERS' REGISTRATION

25. Any citizen should be entitled to file complaints and appeals on the accuracy of the voters' register.
26. The electoral law should not permit the accuracy of the voters' register to be challenged at any time and up to the eve of an election. The law should set a deadline after which applications, objections or complaints on the voters' register may no longer be admissible. This would ensure that electoral bodies and the judiciary not be diverted from the urgent complaints and appeals related to the voting and counting process and drawn into resolving disputes that could have been addressed earlier.
27. The electoral law should set out an exclusive venue for filing complaints and appeals regarding the accuracy of the voters' register or, where applicable, the electoral cards. The complaint procedure should be designed so that courts not be unnecessarily burdened with minor disputes.

VALIDITY OF CANDIDATURES

28. 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.
29. The electoral law should establish the procedure for the verification of signatures collected in support of candidates.

ELECTION RESULTS

30. The electoral law should provide for a mechanism of invalidation of the election results. In both parliamentary and presidential elections, the decision to partially or fully invalidate election results should be assigned to the highest electoral body. This decision should be reviewable by the highest body of the judiciary or the Constitutional court.
31. The electoral law should specify whether the entities vested with the power to invalidate the election results may take no action unless presented with a formal complaint and whether their decisions should be made on a polling-station-by-polling station basis. It should be clear from the law whether a general invalidation mechanism applies or a restricted one, conditional upon the fulfillment of special conditions as regards evidentiary matters and the admissibility of complaints and appeals.
32. Both the overall preliminary and the final results should be subject to challenges. This does not include partial reports or results but refers exclusively to the official publication of the overall results by the body expressly designated in the law. The electoral law should differentiate the procedures, deadlines and time-limitations, applicable to both phases (preliminary and final). The principles hereafter are based on this assumption.
33. Where lower level electoral bodies are mandated to publish the preliminary results of the election, they should not be entitled to declare the results void but could make a non-binding recommendations in that sense to the highest electoral body.
34. The final results should not be published before all challenges of the preliminary results have been decided upon by the highest body of the judiciary or the Constitutional court.
35. The challenges pertaining to the preliminary results of the election within the mandate of lower level electoral bodies should be filed with the highest electoral body so as to secure a coherent and hierarchical procedure. The time limitation for filing and deciding upon such challenges should not exceed one month so as to enable the publication of the final election results no later than this deadline (taking into account the deadline for publication of the preliminary results).
36. All complaints pertaining to the overall final results or the declaration of election results partially or fully void should be filed with the highest body of the judiciary, the Constitutional court or with the court where the highest electoral body is located. In the latter case, the ruling delivered by the court may be further appealed to the highest body of the judiciary.

37. Whatever the procedure prescribed by the law and in consideration with all time limitations for publishing the preliminary and final results and for filing and deciding upon the challenges thereon, all complaints and appeals should be determined once and for all within a maximum of two months.
38. The electoral law should clearly state the grounds upon which the election results may be partially or fully invalidated. A mere reference to the Constitution should not be held as providing sufficient basis for adjudicating such cases. Also, the law should specify the amount and type of evidence required to for the review of the results. In the absence of clear and unambiguous standards of evidence, the determination of what evidence would satisfy these standards would vary on a scale that may undermine the whole process.
39. Where a polling-station-by-polling-station resolution mechanism applies, the invalidation of the voting in a particular polling station should be considered through an evaluation of the way the alleged irregularities or violations have affected the outcome of the election.

ADMISSIBILITY OF COMPLAINTS AND APPEALS

40. The electoral law should lay down the grounds upon which complaints and appeals are admissible. Any complainant should be duly notified in the form of a written and motivated decision whether his petition was considered admissible or not.
41. The grounds of appeals should be strictly defined in the law, preferably for each phase involving an election dispute mechanism, so that courts and electoral bodies may not be burdened with irrelevant or fortuitous challenges.
42. The parties authorized to bring election related complaints or appeals before a court or an electoral body should be strictly identified in the electoral law.
43. Time-limitations and procedures governing the admissibility of complaints and appeals should be designed so as to preserve the right of aggrieved parties to seek for redress.

ENFORCEMENT

44. The bodies having jurisdiction over election disputes should be vested with the power to have their decisions enforced within a reasonable time. The laws should include clear provisions on the mechanisms to enforce resolutions passed by the CEC, particularly with regard to complaints against actions and decisions of the state institutions, mass media and state officials. In addition, the laws should go into greater detail as regards referrals of complaints.
45. The electoral legislation and/or the framework legislation governing the administration of justice should expressly indicate the legal consequences associated with the decisions taken by the various bodies having jurisdiction over election disputes. However, when the cases in question entail criminal offenses the proceedings should be conducted within the criminal courts jurisdiction in accordance with the rules and procedures applicable in such matters.

CONSISTENCY IN THE INTERPRETATION AND APPLICATION OF ELECTION DISPUTES PROVISIONS

46. Election Laws should expressly bestow upon the highest body of the electoral administration the authority to pass regulations or instructions aimed at securing a uniform interpretation and application of the election law by the electoral bodies.
47. The highest body of the judiciary should ensure that all election-related legislation, including framework legislation (such as Civil and Penal Codes, as well as Criminal and Civil Procedure Codes) generally considered as having primacy over other legislation, are not flawed with discrepancies, loopholes or gaps.
48. The highest body of the judiciary should also take the necessary steps to ensure the constitution of a coherent set of governing judicial precedents and that judges be acquainted with these precedents and the reasoning behind them.
49. Well in advance of the elections, the highest entity within the hierarchy of the election commissions and the highest body of the judiciary responsible for issuing final and legally binding decisions on election related cases, should jointly develop instructions, guidelines or resolutions on the various matters involved in election disputes. Where a dual complaint and appeals process applies, both institutions should clarify their respective areas of competence and those of the lower level courts and election commissions. They may also play a crucial role in fostering reforms of the electoral legal framework or the judicial practices and standards in the consideration of election related cases. Conflicts between the institutions or mutual misunderstandings may seriously undermine the uniform interpretation and application of election laws and regulations at lower levels and could threaten the certainty of the law as well as confidence in the electoral process.

ELECTORAL OFFENSES, IRREGULARITIES AND VIOLATIONS OF THE ELECTORAL LAW

50. The electoral law should enumerate in a separate paragraph or article the categories of irregularities and infractions together with their possible consequences upon the electoral process.
51. Should be listed and defined all categories of irregularities and infractions that may corrupt the electoral process so that the election may not be considered universal, equal, secret and free, as well as fair, transparent and accountable. A mere reference to violation of the law and/or the constitution should be avoided.
52. The electoral law should further specify the standards by which the impact of these irregularities or violations upon the electoral process should be determined.
53. The electoral offenses, which entail a criminal prosecution, may either be enumerated and defined in the electoral law or in the criminal and criminal procedural codes. The provisions relating to irregularities, infractions and the electoral offenses should be consistently drafted so as to avoid any confusion over the legal consequences associated with them.

CRIMINAL PROSECUTION AND THE ROLE OF PROSECUTORS IN ELECTION DISPUTES

54. The cases, which give rise to criminal prosecution, should be conducted without exceptions through the venues and following the rules and standards prescribed in the law governing criminal proceedings. Such cases should be investigated and prosecuted in accordance with the due process of law requirements as laid down in the international human rights instruments. This does not preclude the determination by either the courts or the election commissions of the impact of alleged violations on the electoral process.
55. The laws should clearly set forth the standards for the institution of criminal proceedings in election related cases. Specifically, the laws should indicate the standards to be used by the prosecutors in deciding whether there is sufficient evidence to prosecute. These standards should be established in the election law and/or by criminal legislation. All laws and other legally binding statutes, which govern this particular issue, should be unambiguously cross-referenced so as to ensure a uniformity and consistency.
56. The scope of the Prosecutors' involvement in election disputes matters should be limited to cases raising a criminal liability. This should involve offences perpetrated with a view to corrupting the processes by which ballots are obtained, marked, cast and counted, by which election results are canvassed, tallied and certified, and by which voters are registered to vote.
57. The laws should provide for a clear delineation of prosecutorial discretion. In particular, the terminology used to define this discretion should be strictly determined by law. Where the law limits this discretion, the limitations should not be left unspecified. The grounds for not prosecuting an electoral offence should be clearly stated and not merely referred to as the interests of the state or society. The provisions, which set out limitations on prosecutorial discretion, should not conflict with other provisions. Finally, the law should provide for standards for the exercise of prosecutorial discretion.