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Reform of electoral legislation in the Republic of Kazakhstan

This article considers the issue of reforming the electoral legislation of the Republic of Kazakhstan. One of the actual directions within the framework of the organizational and legal measures being carried out in the Republic of Kazakhstan is the improvement of the electoral legislation. It should be noted that for the years of independence in the Republic of Kazakhstan, a solid legal basis has been created for the implementation of the electoral right stipulated in Article 33 of the Constitution of the Republic of Kazakhstan. What was, in my opinion, the main drawback of Western models of the modernization of the twentieth century as applied to the realities of our time? That they transferred their unique experience to all peoples and civilizations without taking into account their characteristics. That is why the first condition for the modernization of a new type is, as the Head of State notes, «the preservation of its culture, its own national code. Without this, modernization will turn into an empty sound». The new modernization should not, as before, look arrogantly at historical experience and traditions. On the contrary, it must make the best traditions a prerequisite, an important condition for the success of modernization. The centuries-old history of Kazakhstan contains an invaluable historical experience of legal regulation of various aspects of society. With regard to the electoral law and process worthy of attention the study and analysis of the institutions of the Kazakh customary law as: the election khans, election management bodies and local self-government, etc.

Keywords: electoral law of the Republic of Kazakhstan, electoral process, Constitution of Kazakhstan, political reform, elections.

In the program article of April 12, 2017, the President of the Republic of Kazakhstan, «Course towards the future: modernization of Kazakhstan's identity», the Head of State noted: «we launched two most important processes of modernization - the political reform and the modernization of economy. The goal is to join the world's 30 most developed countries. Both modernization processes have crystal-clear goals along with the tasks, priorities and methods to achieve them».

Within the framework of political reform, one of the priority areas is to improve the legislation of the Republic of Kazakhstan, ensure the rule of law in all spheres of life of our society.

The Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan», adopted on September 28, 1995, determines that this Constitutional Law regulates the relations that arise in the preparation and conduct of presidential elections, deputies of the Senate and Mazhilis of the Parliament, maslikhats and members of other bodies of local self-government of the Republic of Kazakhstan, and also establishes guarantees that ensure the freedom of expression of the will of citizens of the Republic [1].

The experience of the conducted election campaigns for the election of the President of the Republic of Kazakhstan, the Parliament, local representative bodies, assessment of the legal community, including authoritative world organizations and experts, polls show that, in general, the current Constitutional Law «On Elections in the Republic of Kazakhstan» and the process of exercising the electoral rights of citizens is comprehensively regulated. This, however, does not mean that the electoral legislation of the Republic of Kazakhstan does not need further improvement. This circumstance prompts the need to further search for the optimal legal forms of the current legislation and law enforcement practice. In the development strategy of the Republic of Kazakhstan until 2050, the program article of the Head of State «A look into the future: the modernization of public consciousness» clearly identifies benchmarks for improving the legislation of the Republic of Kazakhstan, to which the improvement of the electoral law and process can be fully included.

At the meetings of the research institute of «Legal Studies and State Studies» at the Faculty of Law of the Karaganda State University named after Ye.A. Baketov, issues related to the constitutional and legal framework for regulating the electoral process in the Republic of Kazakhstan, modern problems of implementing Kazakhstan's electoral legislation, gaps and collisions in the legislation of the Republic of Kazakhstan, a comparative legal analysis of the legislation R republics of Kazakhstan, international legal acts and the foundations of law of foreign countries in the field of electoral law and process, analyzes the current electoral law of the country in the field of regulatory consolidation of international principles of electoral law.

1. 1. The 1995 Constitution of the Republic of Kazakhstan needs amendments and additions.

1.1 The general legitimate trends in the development of modern constitutionalism dictate the need for a political and legal consolidation of the principle of political pluralism in the Republic of Kazakhstan. Effective functioning of the political system is inconceivable without the active participation of political parties in state and public life. The legislator should take into account the tendency of increasing the role and importance of non-state organizations, citizens, their associations in the political life of the state, and the expansion of their rights and freedoms.

Ideological and political diversity, multi-party system are a substantial characteristic of democracy, as it is enshrined in the Constitution of the RK, and the political parties themselves are an institution necessary for its functioning within the framework of the rule of law. It is the parties that are called upon to ensure the stability of the state's political system of the country, to include broad sections of voters in the process of managing the affairs of the state. Strengthening the role of parties in the political life of countries is a general trend in the development of the country's political process [2].

At the same time, during the constitutional reform, it did not adequately reflect the issue of civil society and its institutions, parties and public associations in the Constitution of the Republic of Kazakhstan. Elaboration of these issues at the constitutional level would exclude the possibility of the state, if necessary, to ignore the institutions of civil society, which would create prerequisites for a correct attitude to their representatives.

These changes and additions to the constitutional and legal legislation will serve as a stabilizing factor and will allow us to quickly establish in the life of our society the various forms of political pluralism and developed democracy.

It is necessary, in our opinion, to supplement Kazakhstan's Constitution with the following provisions:

- 1) to consolidate in the Constitution of the Republic of Kazakhstan provisions on the role and significance of political parties in society and the state;
- 2) on the inclusion in the Constitution of the RK of such principles of the principle of political pluralism, as competition, competition of parties.

1.2 The 1995 Constitution of the Republic of Kazakhstan does not mention the role of election commissions in the organization and conduct of elections. This approach seems to be erroneous, because in Kazakhstan, a new system of state bodies is formed, which does not belong to any of the three branches of power and has a number of features.

The consolidation and development in the Constitution of the issues of the organizational design of the will of the people, giving it a normative and binding character to all state bodies, officials, public associations, citizens would, in our opinion, create clear legal bases for the establishment in our society of various forms of political pluralism and developed democracy. The constitutional status, in our opinion, deserves the function of election commissions.

Thus, further reform of the constitutional legislation is advisable. In the Constitution of the Republic of Kazakhstan, we should, in particular, in our view:

- 1) to consolidate the principles of adversarial and alternative elections;
- 2) determine the place and role of election commissions as bodies that ensure the legitimacy of the formation of the will of voters.

2. The Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» needs to be improved.

2.1. We believe that the court extensively interprets the provisions of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» [2]. In this regard, we propose to amend Part 2 of Article 27 of the Constitutional Law «On Elections in the Republic of Kazakhstan» in the following wording: «Election agitation begins on the next day, after the termination of the registration of candidates and ends at zero hours at the local time of the day preceding the election day».

2.2. To supplement clause 4 of Article 50 of the Constitutional Law «On Elections in the RK» with the provision that in the event that it is proved that the candidate for deputies destroyed the propaganda materials of political competitors, the decision to register such candidature must be abolished immediately.

2.3. It is necessary to differentiate the bases of the «administrative» and «other» responsibilities, which is mentioned at the beginning of Part 2 of Art. 50 of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan». Remove the words «and other responsibility» in Part 2 of Article 50 of the Election Law.

2.4. It is necessary to regulate in detail the issue of establishing the responsibility of election commissions for violating the norms of Kazakhstan's election legislation, as this violates the electoral rights of citizens guaranteed by the Constitution of the Republic of Kazakhstan. In addition, such violations of the electoral law may entail the recognition of the invalidity of the results of voting in the respective territory. Forms of such liability may be administrative penalties for members of the election commission, the dissolution of the election commission in whole or in part, and others.

3.1. In order to guarantee equal representation of political parties participating in elections in election commissions, we believe that the composition of election commissions should include equally representatives of all political parties. It is necessary to amend the Election Law to ensure a broader representation of parties in election commissions and to ensure the independence of the commissions. Thus, it is necessary to reform Kazakhstan's electoral legislation, in particular, to change the procedure for the formation of election commissions with the participation of all participating political parties. To this end, the number of election commissions should be legislatively expanded, indicating the number of members of election commissions in the Election Law, or without specifying such.

The number of commission members should be proportional to the number of voters at polling stations and be no less than the number of registered political parties.

3.2. In order to ensure a democratic procedure for the formation of election commissions with objective criteria not related to political considerations, as well as the independence of election commissions, it is necessary to modernize the system of election commissions in the direction of establishing a system of permanent election commissions. In this regard, it is possible to establish either a single term for all election commissions in Kazakhstan, which is equivalent, for example, to the term of office of the deputies of the Majilis, the President, or a single term of office, but divorced in time intervals for various sections of election commissions (first a central election commission, for the next year — territorial election commissions, then - district election commissions, Precinct Election Commissions).

3.3. In order to ensure the re-representation of the party with the replacement of the relevant commission members, one can turn to the experience of foreign countries. Thus, in the Russian Federal Law No. 157-FZ of 2012 «On Amendments to the Federal Law» On Political Parties «and the Federal Law» On Basic Guarantees of Electoral Rights and the Right to Participate in the Referendum of Citizens of the Russian Federation, «provision is made for the formation of a pool of candidates, proposed to the precinct election commission, but not appointed by the members of the commission. The appointment of a new member of the precinct election commission instead of the retired will be made from this reserve. Such a mechanism also makes it possible to ensure the training of the personnel reserve of electoral commissions [3].

3.4. In order to give greater organizational transparency and validity to the formation of the composition of election commissions, one can use the institution of an alternate member of the election commission (electoral body) operating in some foreign countries, which also makes it possible to give continuous work to the commissions, but also to conduct targeted training and increase the professional qualifications of members of commissions.

4. In order to ensure legal protection of participants in the electoral process, the Election Law should clearly establish procedures for handling complaints, provide for the provision of written, informed and publicized responses.

4.1. We believe that it should be in Art. 49 of the Constitutional Law «On Elections in the Republic of Kazakhstan» establish a provision stating that citizens or public organizations can apply to election commissions with proposals, statements, complaints, requests or responses and give definitions to these concepts. This will make it possible to delineate complaints from other types of appeals to election commissions. In the final report of the OSCE mission, complaints about violations of electoral rights are subjected to analysis.

4.2. It is advisable in the Constitutional Law «On Elections in the Republic of Kazakhstan» to regulate in more detail the procedure for consideration by the electoral bodies of appeals from individuals and legal entities, including complaints about violations of electoral legislation. As an initial option for amending the Constitutional Law «On Elections in the Republic of Kazakhstan», it would be possible to recommend the basic procedures for considering petitions of individuals and legal entities, laid down in the Law of the Republic of Kazakhstan «On the Procedure for Considering Appeals from Individuals and Legal Entities», taking into account the specifics established in Constitutional Law «On Elections in the Republic of Kazakhstan».

4.3. With a view to registering and analyzing incoming appeals to election commissions of appeals and, first of all, complaints from citizens and public associations, it is necessary to establish in the Constitutional Law «On Elections in the Republic of Kazakhstan RK» the provision that accounting in the statistics bodies and special accounts be subject to citizens' the implementation of the electoral law, coming to all election commissions. Through this account, you can create a complete and objective picture of all appeals, identify the nature and dynamics of violations of electoral rights of citizens. The data of these reports would be an objective and complete picture of the nature and number of violations of electoral rights for the OSCE mission.

4.4. We believe that in Article 49 of the Constitutional Law «On Elections in the Republic of Kazakhstan» it is necessary to establish the duty of election commissions to provide objective, comprehensive and timely consideration of appeals from individuals and legal entities, if necessary with their participation, to inform individuals and legal entities about the adopted decisions in writing or in the form of an electronic document.

5. In order for voters to make an informed choice, it is necessary to provide the public with information on candidates in party lists.

The right to nominate candidates for deputies of the Majilis elected by party lists belongs to political parties registered in accordance with the established procedure (Article 87 of the Constitutional Law of the Republic of Kazakhstan «On Elections»). At the same time, parties can only include party members in party lists.

In Kazakhstan, the election of 98 deputies of the Majilis of the Parliament is carried out through a system of closed party lists. Political parties make lists on the territory of a single national constituency in alphabetical order. Inclusion in the party list of persons for election to the Majilis deputies is made by a majority of votes of the total number of members of the supreme body of the political party. Political parties may not include in the party lists persons who are not members of this political party. The party list is submitted to the Central Election Commission by a representative of a political party at the same time as an extract from the protocol of the supreme body of a political party on the nomination of a party list (Article 87 par. 2-3 of the Constitutional Law of the Republic of Kazakhstan «On Elections»). The nomination of candidates to the Majilis deputies elected by party lists begins two months and ends forty days before the election, unless otherwise established in the appointment of elections (art. 87 para. 5 of the Constitutional Law of the Republic of Kazakhstan «On Elections»).

Registration is allowed only one list from one political party with the number of candidates not exceeding the established number of deputy mandates distributed among political parties by thirty percent. Thus, voters vote for political parties, and not for specific candidates for deputies, since the principle of closed lists operates. Voters choose this or that party, not having ideas about who exactly will enter the Parliament. The mechanism of inclusion in party lists remains unclear for the bulk of voters.

If the list of candidates compiled by the party does not make any changes to the voter, it is hard, closed lists. If you can make changes, then such party lists are open. Free lists are used in combination with preferential voting. The Institute of Preferential Voting (Belgium, Holland, Sweden, etc.) enables voters to vote not only for the list of candidates of a certain party, but also to give their preference to certain candidates within this list. We consider it possible to use the system of free party lists with preferential voting, in which case the voter can facilitate the election of a candidate placed at the beginning, middle or end of the list.

The distribution of deputy mandates after the elections is not carried out in accordance with the location of data on the candidate on the party list, as was the case with a mixed proportional-majority electoral system, but in accordance with the decision of the party's governing body. In particular, Article 97-1.5 of the Constitutional Law of the Republic of Kazakhstan «On Elections» stipulates that the priority of the distribution of deputy mandates is determined by the governing body of the political party from among those included in the party list of candidates not later than ten days after the publication of election results. If in the established time the governing body of the political party does not determine the order of distribution of the obtained deputy mandates, the CEC decides to distribute the deputies' mandates received by the party according to the registered lists in the alphabetical order of the state language [5].

Under the previously existing mixed majority-proportional system of elections to the Majilis, the order of distribution of deputy mandates was decided at the party congress, thus the electorate had a clear idea of the elected deputies. This procedure of drawing up party lists was quite optimal.

With the introduction of a proportional electoral system and closed (rigid) party lists, new problems have appeared. The main disadvantage of the proportional system is the partial loss of the votes of voters, the loss of communication between deputies and voters. Closed party lists enable the leader of the party to de-

termine the order of candidates, which can influence the distribution of mandates, and lead both to the undemocratic internal organization of the political party and to internal split due to unfair competition among party members. In addition, when forming party lists and distributing deputy mandates, it is necessary to take into account and ensure the regional representation in the Majilis of the Parliament of the Republic of Kazakhstan.

The corresponding norms on the compulsory registration of the regional representation in the compilation of party lists, as well as in the distribution of deputy seats, should, in our opinion, be included in the Constitutional Law of the Republic of Kazakhstan «On Elections».

5.1. We consider it expedient to study the experience of foreign countries, including in terms of the possibility of using a system of free party lists with preferential voting, since in this case a voter can facilitate the election of a candidate placed at the beginning, middle or end of the list.

5.2. It is necessary, in our opinion, to include in the Constitutional Law of the Republic of Kazakhstan «On Elections» the relevant norms on the compulsory registration of the regional representation in drawing up party lists, as well as in the distribution of deputy mandates.

6. Judicial decisions of republican courts were studied during the preparation and holding of early elections of deputies of the Mazhilis of the Parliament of the Republic of Kazakhstan and maslikhats - local representative bodies of the Republic of Kazakhstan in 2016. The purpose of the analysis is to study the practice of the courts applying the legal norms of the election legislation, investigating the causes and conditions that lead to a violation of the law in the consideration of civil cases on applications for the protection of the electoral rights of citizens and public associations participating in elections, identifying problematic issues in the application of substantive and procedural law, which regulate the protection of citizens' electoral rights.

The analysis showed that the courts of the republic, basically, correctly apply the rules of law when considering cases of this category. At the same time, on various issues there is a different interpretation and application of the law.

6.1. The study of cases in this category showed that in some cases courts allow for broad interpretation of the law.

It is necessary, when resolving these cases, to strictly follow the norms of law governing disputable legal relations, to resolve cases of this category taking into account the circumstances in each case, applying the principles of justice and reasonableness, legality [4].

6.2. The analysis of judicial practice showed that when considering applications for the protection of electoral rights of citizens and public associations participating in elections, there is no uniform judicial and law enforcement practice.

In order to ensure the correct application by the courts of electoral legislation, it is necessary to adopt the normative Resolution of the Supreme Court of the Republic of Kazakhstan «On the practice of consideration by courts of civil cases on applications for the protection of the electoral rights of citizens and public associations participating in elections, the republican referendum».

In this Resolution it is necessary to consider the following issues: delineation of the basis for administrative and other liability; clarification of the provisions on the timing of the start of election campaigning. They require interpretation of the provisions of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» regarding the possibility of appealing to the election commission in the conditions of an alternative: to a higher election commission, to a court or to the prosecutor's office. There are ambiguities in the application of the rules governing the procedure for making decisions by election commissions, in particular, on registration, cancellation of registration, restoration of registration of candidates.

It is necessary to eliminate gaps in the interpretation of the provisions of the law regarding the drafting of a protocol in which all decisions of the election commission are fixed: on registration, refusal to register or restore candidates for deputy, and others. Actually, the protocols are only referring to decisions on registration (clause 8 of Article 14 of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan»). Decisions on registration, on refusal of registration, on refusal to restore the list of candidates are categories of one series. Therefore, it seems that they require official registration, despite the absence of a direct indication of this in the law. For today, courts are forced to make decisions based on their own interpretation of the articles of the law.

6.3. It is desirable to create, under the auspices of the Central Election Commission, an electronic basis for the legal positions of election commissions. The legal positions of election commissions are understood as the documented formal system of judgments of the collegial body (election commission) on the validity of

the application of legislative provisions in the sphere of implementation and protection of the electoral rights of citizens of the RK, organization and conduct of elections, as well as other activities to implement the competence of the election commission. The legal positions of election commissions fulfill an important function with regard to giving real guarantees to electoral rights, their limitations and conditions of implementation, when organizing and conducting elections in the Republic of Kazakhstan, when considering cases on the protection of electoral rights of citizens.

You can also think over and implement a mechanism for automatic monitoring of the legal position of election commissions. Such a mechanism could include the automated processing of all decisions of electoral commissions on the characteristics of an electoral dispute and the decision taken on them; automated processing of all decisions of election commissions to identify a problem for a particular model and to compare it with the decision adopted by this model by a higher-level election commission.

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А. Божқараұлы, К. Цомплак

Қазақстан Республикасындағы сайлау заңнамасын реформалау

Мақалада Қазақстан Республикасының сайлау заңнамасын реформалау мәселесі қаралды. Қазақстан Республикасындағы ұйымдастырушылық-құқықтық шаралар шеңберінде нақты бағыттардың бірі сайлау заңнамасын жетілдіру болып табылады. Қазақстан Республикасында тәуелсіздік жылдарында Қазақстан Республикасы Конституциясының 33-бабында көзделген сайлау құқығын жүзеге асыру үшін берік құқықтық негіз құрылды. Біздің ойымызша, XX ғасырдың модернизациясының Батыс үлгілерінің басты кемшілігі біздің уақытымызға байланысты. Өздерінің бірегей тәжірибесін барлық халықтар мен өркениеттерге олардың сипаттамаларын есепке алмастан берген. Сондықтан жаңа модернизациялаудың алғашқы шарты, Мемлекет басшысы атап өткендей, «өзінің мәдениетін, меншікті ұлттық кодын сақтау болып табылады. Онсыз жаңғырту бос дыбысқа айналады». Жаңа модернизация бұрынғыдай тарихи тәжірибе мен салт-дәстүрге бойұсынбай көрінуі керек. Керісінше, ол жаңғыртудың сәттілігі үшін маңызды шарттардың ең жақсы дәстүрлерін қажет ету керек. Қазақстанның ғасырлық тарихында қоғамның түрлі аспектілерін құқықтық реттеудің баға жетпес тарихи тәжірибесі бар. Сайлау заңнамасына және процесіне қатысты әдеттегі қазақ заңнамасының осындай институттарын: хандарды сайлау, мемлекеттік органдардың және жергілікті өзін-өзі басқаруды және тағы басқа сайлау және талдау мәселелеріне ерекше назар аудару керек.

Кілт сөздер: Қазақстан Республикасының сайлау құқығы, сайлау процесі, Қазақстан Республикасының Конституциясы, саяси реформалар, сайлау.

А. Божқараұлы, К. Цомплак

Реформа избирательного законодательства в Республике Казахстан

В данной статье рассматривается одно из актуальных направлений в рамках проводимых в Республике Казахстан организационно-правовых мероприятий — совершенствование избирательного законодательства. Необходимо отметить, что за годы независимости создана прочная правовая основа для реализации избирательного права, закрепленного в ст. 33 Конституции РК. В чем был, на наш взгляд, главный недостаток западных моделей модернизации XX в. применительно к реалиям нашего времени? В том, что они переносили свой уникальный опыт на все народы и цивилизации, без учёта их особенностей. Именно поэтому первым условием модернизации нового типа является, как отмечает Глава государства, «сохранение своей культуры, собственного национального кода. Без этого модерниза-

ция превратится в пустой звук». Новая модернизация не должна, как прежде, высокомерно смотреть на исторический опыт и традиции. Наоборот, она должна сделать лучшие традиции предпосылкой, важным условием успеха модернизации. Многовековая история Казахстана содержит бесценный исторический опыт правового регулирования различных сторон жизни общества. Применительно к избирательному праву и процессу заслуживают пристального внимания изучение и анализ таких институтов обычного казахского права, как выборы ханов, выборы органов управления и местного самоуправления и т.д.

Ключевые слова: избирательное право Республики Казахстан, избирательный процесс, Конституция РК, политическая реформа, выборы.

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