

JUST ADMINISTRATIVE PROCEDURES AS END RESULT: CASE OF KAZAKHSTAN

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Abstract

The aim of this paper is to outline some important trends and features of public administration development in Kazakhstan. Specifically, Kazakhstan has been preoccupied by developing a new model of relationship with its citizens which emphasizes the role of the state as provider of public services through extensive reliance on automation and technologies, corporate governance, and final result. While these developments indeed may foster efficiency, transparency and accountability of public officials before politicians, this is done at the expense of administrative procedural principles and fairness that have tremendous effects upon interests and freedoms of citizens.

Points for Practitioners

This paper aims to:

- Demonstrate the potential breadth of administrative law as a subject area
- Encourage understanding the importance of administrative procedural principles
- Emphasize the significance of fairness of administrative process as an outcome

Key

Public administration, administrative law, rule of law, procedural fairness, principles of administrative procedures.

Introduction

The aim of this paper is to examine the extent to which rights and interests of citizens¹ are ensured by public administration bodies in Kazakhstan. In other words, to what extent the country's public officials are *servicing above all its people and the state* (Nazarbayev 2017) and in doing so, to what extent they balance the interests of individuals against interests of the state through procedural fairness and administrative principles?

This paper concludes that the focus of corporate governance on automation of government decisions, technological tools, focus on outcomes and on treatment of citizens as consumers of public services and goods, effectively overrides the duties of public officials to uphold procedural fairness in individualized administrative decisions. In their acts public authorities predominantly make emphasis on the decision itself. The fact that “fairness of process is itself part of the outcome to be expected from good government” (Leeson 2006, 11) is absent from the public and political discussion. The procedural side of administrative actions becomes scrutinized mainly in the context of internal bureaucratic activities, as part of the internal organizational procedures arising among various structures of executive bodies and their officials (Abbasov 2014). However, the external side of administrative procedures that regulate interactions and relations between the citizen and the public administration body is viewed as circumstantial. Administrative procedures receive low levels of attention not only from public officials, legal practitioners and legal scholars, but also from Kazakh citizens themselves. By procedural fairness we mean among others: duty to disclose relevant information, duty to provide reasons, duty to consider all relevant information, and duty to hear before deciding an issue. Furthermore, when lawmakers give public official a discretion, he/she should act not only within the professional competency but also within the framework of guiding principles of administrative procedure.

Methodology

This paper is based on a review of laws, publicly available policy documents and analytical expert positions. While we also reviewed court cases related to disputes between citizens and public officials, this evidence in the paper is used only contextually. The objective is to provide detailed analysis of this evidence in later discussion.

¹I use the term ‘citizens’ as shorthand for all the categories of persons (including legal entities) who are affected by decisions of public bodies.

In the first part of the paper we review recent public service reforms in Kazakhstan with specific focus on trade off between service provision and protection of citizens rights and interests in public officials decisions. Further, we review state of procedural law in Kazakhstan. Finally, we draw possible implications with respect to the value that procedural fairness and principles of administrative justice play in Kazakhstan.

Public service reform

Since securing national independence in 1992 Kazakhstan, like other former Soviet Republics in Central Asia, has undergone major political, economic and social transformations. The changes have included reforms of constitutional order, state organization and management system as well as adoption of new civil and economic laws. Kazakhstan in particular, with its advanced economic position, is considered by international observers as an active reformist state which has shown the greatest progress in the development of effective public administration relative to other countries in the region. Kazakhstan has been appraised more positively relevant to other states in the region even in terms of its adherence to the rule of law (OECD 2014, 2017; Depp and Pudelka 2014).

Concerns with economic development of the country, provision of favorable investment climate and investor confidence led Kazakhstan rather quickly to initiate reforms of public administration within the framework of fashionable service oriented state. This came about through the introduction of standards for public services and procedures (public service charters) for all government organizations, as well as one-stop shops and an e-government system (OECD 2014, 72). Within the framework of corporate management, in 2013 Kazakhstan adopted rather briskly the Law on Public Services and established the state corporation “Government for Citizens” through the merger of several state enterprises (Janenonva and Yesdaulatov 2017). In the last several years parliament also made changes to 40 laws and 10 codes with altogether 578 amendments which, government projects, should lead to reduction of 100 million documents in a year for clients of public services (Parliament. KZ 2019). It is further envisaged to increase the effectiveness and cost-efficiency of public administration bodies through a unified system that would regulate the process of delivery of quality public services and eliminate contradictions in documents (rules, standards, regulations) and thus decrease any violations of law and scope and level of corruption; by 2020 90 percent of public services are expected to be delivered in electronic form² (Parliament. KZ 2019; Kazakhstan 2018).

In light of these developments, also became a norm in the last several years for the

²Presently 446 out of 746 public services are delivered on-line via e-government portal (Kazakhstan 2018)

overnment of Kazakhstan to conduct performance review of public administration bodies. Highlighting values such as professionalism and patriotism, the organizational culture of civil service in Kazakhstan is formally “oriented toward outcome and innovative approaches.” According to the government, “the fast paced culture of civil service” does not support “the tradition of controlling the process, which generates red tape and lowers the efficiency of public administration” (CSA-AC 2018).

Using infographics, government reports provide quick and easily digested updates about trends and outcomes achieved by individual public administration agencies as well as government as a whole. It appears that major problems in public administration are focused around issues of time for consideration of citizens’ complaints (requests); demands for unnecessary documents from citizens; unjustified refusals to provide service; failure to conform to standards in service provision. Individual public agencies on central and regional levels are also ranked based on their effectiveness in interactions with citizens in provision of public services, consideration of complaints, and transparency and openness. A recent report (Kazakhstan 2018) provides an example of the performance result paradigm when, in evaluating the interaction of public administration organizations with citizens, it underlines a decrease of about 14 times (from 23 million in 2007 to 1.7 million in 2017) in citizens’ complaints and claims to public administration bodies.

In a short period of intensive implementation and strong political support, these policies, inspired by corporate governance (a.k.a. New Public Management) resulted, as claimed, in more transparent information about public services; improvement in customer service environment; accessibility of public services both through face-to-face interaction, and e-government application, and increased professionalism of public service staff (Janenonva and Yesdauletov 2017, 37-38). Yet, all these policy reforms bypassed serious discussions and so the presumed advantages of a service-oriented state were not questioned (Podopriogora 1n.d).

Public officials as protectors of citizens rights and interests

Obsessed with technologies designed to process standard situations, with decisions that would otherwise be left to human, public officials in many public administration systems including Kazakhstan, now programmed into software. Services that are delivered via web-platforms, without human interference may hardly leave any margin “for the arbitrary exercise of power in implementing rules and regulations” (Bovens and Zouridis 2002, 180-181). However, these developments subdue the question of what might happen outside of standard situations when technologies fail? On one hand e-government excludes participation of a citizen in the action or decisions of public administration bodies and thus corruption may be reduced. On the other hand, exactly because of this exclusion, citizens are deprived of the possibility to be heard and

participate in the procedures (Podoprigora 3n.d.). Furthermore, there is a great potential for an increase in risks of mistakes or premature decisions on part of public officials. “Blind application of the law may lead to arbitrariness, exactly “because no account is taken of the circumstances of the case” (Bovens and Zouridis 2002, 182).

Promotion of the image of public administration as a corporation, or else, as a “supermarket delivering a wide variety of public services” (Olsen 2005, 6) including licensing, registration, and issue of permits and certificates puts emphasis on revenue generation and commercialization of public administration functions. Meanwhile questions of administrative justice and fairness of procedures in the course of adoption of official decisions are obscured. It is easy and convenient then to omit the crucial point that public services are only *external standardized* forms of administrative procedures by means of which administrators adopt further administrative acts (Podoprigora 2 n.d.; Podoprigora 3n.d.).

Could those acts be part of performance results if at all? To date, it appears, there are only few studies of public management (service) reforms that explicitly take into account the outcome of procedures. Majority of those studies consider administrative procedures as “complex and cumbersome” and essentially constituting a “rule burden” aka red tape, a source of inefficiency and ineffectiveness (Kaufmann and Feeney 2014, 179, 181). Meanwhile, the argument that red tape is not about rules and procedures per se but more has to do with “relative (in)effectiveness of rules” is buried in the discussion of public service reforms (Idid).

Snapshots of performance results create a sense of citizens’ control of administrative bodies and transparency. It is also an appealing way of presenting complex government activities and policies to those who would like to check up on what government has achieved. But on the other hand, quantified and measured performance outcomes provide no information of how they were achieved nor about what happens when citizens seek redress arising from decisions that affect their rights. For example, Kazakhstani government report identifies a decrease in number of citizens’ complaints in the last several years and that there is a room for even further decrease of the volume because only “on 46 percent of requests there were given clarifications.” In other words, public administration bodies need to reach a further 54 percent increase in production of clarifications. (Kazakhstan 2018). Ye, the report does not address whether consideration of citizens’ claims was handled fairly nor whether the review process relied on administrative procedure principles.

“Public-service workers occupy a critical position” in the system of corporate governance. “Making numerous decisions on a daily basis through application of regulations and administrative routines to concrete situations they also make choices that can have an enormous impact and consequences on the lives of ordinary citizens”

(Bovens and Zouridis 2002, 175). These public officials by way of their action or inaction (e.g. alteration of initial decision, or keeping administrative silence on citizens appeals) are “significant and salutary drivers of constitutional implementation” (MacDonnell 2015, 386). Administrative procedures make constitutional provisions concrete. Almost any constitutional norm, especially those that regulate rights and freedoms of citizens, presumes existence of administrative norms that one way or another promote or limit constitutional guarantees (Podoprigrora 2010, 50,52). Therefore, constitutional norms remain purely symbolic when the mechanism of their implementation, the procedural side, is absent or disregarded. Specifically in this area conflicts arise more often among citizens and public officials (Ibid). The performance results, as presented earlier, do not address this dimension of public administration. The infographics inadvertently show an optimistic non-litigious relationship between citizens and public administration as if obscuring frequently very painful and extremely unequal relations between citizens and state administration (Podoprigrora 2n.d.; Gabbasov 2014).

Administrative procedures in Kazakhstan

More is known, both in Kazakhstan and beyond its borders about institutional reforms to promote the country’s quest to join the top 30 global economies by 2050 (CSA-AC 2018), than about administrative procedural reforms. Kazakhstan, like some other states in the region, introduced its law of administrative procedures significantly later than civil service laws or various other civic and economic laws in general (Depp and Pudelka 2014). It appears that the fundamental administrative laws were not a high priority during the transition to a market economy nor are they are a priority at the present time.

Procedural fairness

The basic requirement for a good administrative decision is that it is based on “a correct understanding of the law, and a correct view of the facts” (Mullen 2016, 71-72). This all then underlines good initial public decision-making while “poor decision-making can undermine confidence in public bodies, which may itself lead to higher rates of complaints and appeals.” Therefore, for citizens it is important “that decisions are right first time, since not only would it mean better results for individuals, it would also speed up decision-making and reduce costs” (Nelson 2015, 48).

However, the legality of a decision is only one element of a good decision. “Not only should the decision be lawful, it should be the best possible decision in the circumstances. Apart from generic objectives of economy and efficiency, the sound decision is also consistent, transparent and respectful for human rights” (Mullen 2016,

72). This all forms administrative procedure which is about following “sound” rules that should bring “a fair decision” (Flood and Sossin 2013, 29).

Administrative decision making in Kazakhstan is regulated by the *Law on Administrative Procedures* (2000, LAP). This is a framework law that supposed to regulate administrative activities of all public administration bodies. There is also the *Law on Considerations of Complaints Brought by Persons and Legal Entities* (2007, LCC) which covers the procedural side of the consideration of citizens complains, appeals and requests. However, because these two legal documents contain substantial redundancies, we primarily review here LAP provisions relevant to procedural fairness and principles.

In the LAP relevant Chapters are 4 and 4-1, respectively titled as “Procedures for protection of rights and lawful interest of citizens” and “Appeals of actions (inactions) of public officials and normative acts (decisions) of public administration bodies.” Among important procedural fairness obligations that are owed by public officials to the citizens are:

- duty to give formal notice about decision, time and place of when the decision is going to be made;
- duty to consider all relevant information;
- duty to hear, including face to face presentation of the case by the affected citizen;
- duty to provide access to information relevant to the citizen’s case;
- duty to give reasons underlying the decision;
- duty of impartiality and unbiased consideration of citizens’ cases including prevention of possibility of involving in the consideration of complaints those officials who may have conflict of interest, or redirection of cases to those officials whose actions (inactions) are appealed, or prevention of abuse of complaints to harm complainer,
- duty of confidentiality

The LAP states that the responsibility of public officials is to adopt lawful and reasoned decisions. In cases of a citizen’s appeal of a decision, public officials are required to make a comprehensive review of the complaint (appeal) and “if necessary” request additional materials that have relevance to the case. The law also requires the decision maker to produce a reasoned written response. This means that the decision maker in his/her decision should include reference to the legal provision on the basis of which the decision was adopted. The law also states that “In the decision other information which has relevance to the substance of the decision and which also served as a basis for its adoption *could be* indicated” (LAP, Article 20-7: 2). The wording “could be” is indicative of discretion. However, granted discretion is not absolute and should be used within the prescribed general principles of administrative procedures. Principles of

administrative procedure should not contradict constitutional principles but on the contrary should make them concrete.

General procedural principles

In general implementation of normative acts should be understood in coordination with general principles of administrative law. Otherwise, no matter how clear those administrative norms are, in each concrete situation and in the absence of principles of administrative law, those normative acts will be understood discretionally by each administrator (Porokhov 2010). Once set in the text of a law, these principles have binding legal significance in administrative practice that guarantee stability and predictability of public administration bodies (Ametistova and abbasov 2010, 262).

Therefore in the context of constant reforms of public administration and civil service, changes in their functions and responsibilities, adoption of new forms and methods of administrative activities, role of principles of administrative procedure which anchor and stabilize activities of public administration bodies in the relationship with citizens, cannot be overestimated (Ametistova and abbasov 2010, 270).

The LAP contains 11 principles of administrative procedure. (The LCC contains only six). Those are:

1. Rule of law;
2. Vertical hierarchy of accountability of public administration bodies;
3. Equality before the law;
4. Priority of rights and freedoms of citizens and prevention of bureaucratization;
5. Obligation for all citizens and public organizations and their officials to follow administrative procedures;
6. Mutual responsibility and balance of interests of individuals, society and state;
7. Consideration of public opinion and transparency with due consideration of state secrets;
8. Support of state authority and prevention of actions that could discredit the Republic of Kazakhstan, including corruption, limitations and prohibition;
9. Unified requirements of administrative procedures for public administration bodies of all levels;
10. Division of competencies and coordinated functions of state bodies and public officials,
11. Economy and effectiveness

The LAP principle of mutual responsibility and balance of interests of a person, society and state is linked to the principle of priorities of rights and freedoms of a citizen. In essence, the principle of mutual balance is a principle of proportionality which officials of public administration bodies should employ in making decisions so that rights and interests of citizens are balanced against societal, public objectives. In accordance with the Constitution of Kazakhstan (Article 39), rights and freedoms are not absolute and

may be overridden to protect the constitutional regime, societal order, public health and morality. However, this can be done only by balancing societal interests with those of an individual. Principle 8, support of the state authority, however, paradoxically could and does in practice (see cases) effectively override principle 6, balance of interests, society and state. The Soviet tradition of seeing the role of the state as guardian or protector of its citizens (and not as answerable to them) continues in post-Soviet Kazakhstan. The tendency of legislators to maintain the status quo is especially obvious in principle 8 which is contrary to the democratic values of the right of citizens to require lawfulness of activities and normative acts of public administration bodies (Ametistova and abbasov 2010; 214).

Implications

The review points out that in Kazakhstan formally public officials are guided in their actions and decisions by procedural principles and requirements for procedural fairness. Both are expressed in the text of the LAP. However, its overall evaluation and effect are low. The LAP, as per principle 9, is supposed to provide a basis for other laws, rules and standards regulating various activities of public administration bodies of central and local levels. However, in reality, the LAP fails to be a systemic, core framework law for administrative procedures. It lacks direct effect, and is principally, as some critics emphasize, contains a set of declarations and overabundance of blanket norms (abbasov 2015, 2014; Podoprigora 2012) . It is even emphasized that the LAP is “so empty, that its application or non-application is hardly noticeable” (Depp and Pudelka 2014, 1).

While many provisions of the LAP are duplicated in other laws including LCC, there is divergence in wording and emphasis, and even difference in the list of general principles as those are contained in other laws, rules, regulations. For example, LCC lists only six principles of which rule of law and prevention of red tape principles coincide with those in the LAP. Other principles could coincide but need careful interpretation. In another example, the LAP requires a duty to hear and yet the law on Special Social Services that regulates provisions of services for special category of citizens in difficult life situations does not contain any provision that would adhere to this aspect of procedural fairness (abbasov 2014). In other words, there is no duty to hear and to be heard before deciding an issue in the law on Special Social Services.

Administrative procedures in Kazakhstan are considered by practitioners and legal scholars as secondary and unimportant (Podoprigora 2012; abbasov 2012) . It is not surprising then that general principles of administrative law have not attracted sufficient attention of Kazakhstani scholars of administrative law either. Partially this could be explained by the fact that administrative law traditionally is considered one of the most conservative branches of public law and in Central Asian Soviet legislative

tradition, if the general principles are not set in the text of a norm, the less the likelihood that they will be applied in practice and if applied could be considered as frivolous administrative behavior (Depp and Pudelka 2014, 19; Porokhov 2010, 88). However, given that principles are actually outlined in the legal provisions, there could be some other reason why they are disregarded.

The dominant principle upon which public officials rely is rule of law in the literal sense. However, paradoxically, sole reliance on this principle defeats the purpose of other principles including proportionality, fairness or equality before the law, and transparency. When slavishly following rule of law, public officials disregard general principles of administrative procedures. As a result, not all the circumstances of the case are investigated, and decisions are made on the basis of incomplete evidence. Inevitably the principle of legality or rule of law suffers and “good law” is substituted for “beautiful law” (Sherstoboyev 2017, 77-78).

Many experts in the field of administrative law argue for revision of the LAP and adoption of a comprehensive consolidated Administrative Procedural Code as opposed to the current law. Some suggestions are quite progressive especially in the enforcement of administrative principles. For more than a decade now following the “2010-2020 Legal Policy Concept” which was confirmed by president executive document and which partially dealt with the question of administrative law, the work on administrative procedure code is not completed. The draft of the code is available but has failed to get on the parliamentary agenda as promised in 2018.

Not everything can be resolved only by improving sources of law. There are still provisions (as discussed) that could be used even in the context of the current problematic law. In this case, professionalism of public officials, albeit within the limits, could be an important factor in the absence of quality laws. After all, discretion in the action of administrators is a function of their professional competency (Sherstoboyev 2017, 82). However, while political elites (high -ranking officials) are praised for developing “good programs”, the rest of Kazakhstani bureaucracy, predominantly young, with an average of just 10 years of service, is continuously blamed for lacking those essential professional qualities (Emrich-Bakenova 2019).

Thus, notwithstanding the significance of automation of government services and focus on final result, the current developments in public administration cannot effect the quality of administrative justice in Kazakhstan without radical changes in public officials mentality and their focus on citizens' interest (Podoprighora 2n.d.). This, coupled with an exceptionally low level of legal administrative culture among the majority of participants of administrative procedures including citizens and officials (abbasov 2014), would require more work than an adoption of the revised legal document.

In this context, political will to deal with procedural fairness in relationship between citizens and public administration is even more decisive. Consider this in the context of balance between results as and the process:

In 2013, a national test resulted in 30 percent of higher ranking civil servants failing to show the most basic knowledge of administrative law (Emrich-Bakenova 2019). However, the resulting criticism focused not on the failure rate but on the substance of the tests, and on the need to abolish such kind of tests since lack of knowledge of laws does not preclude a public administrator from being a good manager. As one expert emphasized failure to show knowledge of the law should not cast doubt onto the professionalism and decency of the administrator, "If this person is able to manage an entire sector of the economy or a region, what is the point of testing him on the knowledge of the law especially if it is not relevant for his area of expertise?" (Ashimbayev 2013). What matters in the work of public managers is not the "letter of the law but its quintessential value and meaning" (Ibid). However, what should be done if public managers fail to recognize the value of legal principles? In any event, discussion boils down to a problem with the law, and the importance of yet again measuring actions of officials by final results.

Conclusion

This paper provided an overview of public administration reforms in post-Soviet Kazakhstan. Unfortunately, while Kazakhstan was quick to adopt an international managerial approach in public administration, that essentially let it skip the stage of development of traditional law-based and procedure-oriented administrative culture; the international examples and models of administrative procedural fairness and principles are generally ignored. We also argued that despite assuming the role of a modern service-oriented state and within that a niche of competitive provider of public services to customers, Kazakh public administration nevertheless demonstrates substantially the same perspective on the relation between citizen and administration as in its Soviet past. The state continues to dominate citizens with its informational, material and human resources, corporate solidarity and bureaucratic instruments (Podoprighora 3n.d.). The *fast paced result oriented* culture of public administration could hardly be appreciated when public officials disregard administrative justice and procedural fairness in making decisions that may have high impact on citizens' rights and interests.

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