CDL(1994)030e-restr
Strasbourg, 21 July 1994

Comments on the Draft Constitution of the Republic of Tajikistan

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Comments by Prof. Ergun Ozbudun

Article 1 of the Draft Constitution establishes Tajikistan as a "sovereign, democratic, law-governed, secular, and unitary Republic." Under Article 100, "the form of republic's administration, territorial integrity, democratic, law-based and secular nature of the state are irrevocable." Article 10 establishes the supremacy of the Constitution, and further states that "international legal documents recognised by Tajikistan are a constituent part of the Republic's laws. If the Republic's laws do not conform with recognised international legal documents, the norms of the international documents shall apply" (i.e., the supremacy of international law). Articles 17 to 44 recognise fundamental rights and freedoms commonly found in democratic constitutions. Particularly commendable as a safeguard of a secular system of government is Article 31 which states that "each person has the right to freely determine his position toward religion, to profess any religion individually or together with others, or not to profess any, and to take part in religious customs and ceremonies." Also commendable is Article 97 which declares that "during the state of emergency the rights and freedoms stipulated in Articles 17, 18, 19, 20, 21, 22, 24, 27, and 31 of the Constitution would not [sic] be limited." All these provisions manifest on the part of the Tajik people the resolve to establish a democratic and secular system of government based on the rule of law.

Article 9 establishes the principle of separation of powers. The legislative power is exercised by the Supreme Council, the executive power by the President and the government (Council of Ministers), and the judicial power by the courts. The President is elected by the people on the basis of universal, direct and equal suffrage (Art. 66). Article 67 states that "the election of the President is only deemed valid if more than half of the electorate takes part in it. A candidate who wins the votes of more than half of the voters taking part in the election shall be the President. The procedure for the election of the President is specified by law." Thus it is not clear what would happen if less than half of the voters takes part in the election, or if no presidential candidates receives the absolute majority of the votes cast. Presumably, these matters are to be regulated by law. However, these issues are too important to be left to ordinary legislation; rather, they should be specified in the Constitution itself.

The Constitution requires the cooperation of the President and of the Supreme Council for the smooth functioning of the system. For example, the Prime Minister, First Deputy and Deputy Prime Ministers, other Ministers, Chairmen of the State Committees, the Chairman, Deputy Chairman, and Judges of the Constitutional Court, Chairman, Deputy Chairman, and Judges of the Supreme Economic Court, the Procurator General and his Deputies, as well as the President of the National Bank are nominated by the President (Art. 70) and ratified by the Supreme Council (Art. 50). Also, the President proposes socio-economic programmes and the State budget to the Supreme Council for approval (Art. 70(8)). It is not clear what will happen if on any one of these vitally important matters the President and a majority of the Supreme Council disagree. In other words, the Draft Constitution seems vulnerable to deadlocks and foresees no mechanisms to resolve them. The President has no power to dissolve the Supreme Council, and the latter has no means to remove the former from office, except for the difficult and exceptional procedure of impeachment if the President breaks his oath or commits a crime (Art. 73). Furthermore, in cases of impeachment, it is not clear which court is competent to try the President.

The provisions on the independence of the judiciary (Arts. 81, 85) as well as those on the Constitutional Court, which is an indispensable safeguard for the supremacy of the Constitution, are welcome. It seems, however, that the Presidents and Judges of the High Courts can be removed from office (presumably before the end of their constitutional 10-year term) by the Supreme Council on a proposal from the President (Art. 50(10)). This is hardly compatible with the independence of the judiciary. Furthermore, the President has the power to appoint and dismiss the Judges of lower level courts on a proposal from the Minister of Justice (Art. 70(7)). In the interests of the independence of the judiciary, it is preferable to give such powers of appointment and dismissal to a neutral judicial body such as a Supreme Council of Justice.

Finally, Article 62, in stating that laws must be adopted by the majority vote of the total number of people's deputies, seems too stringent. In practice, it may not be easy to obtain such majorities for ordinary legislation. The presidential veto on legislation and the requirement of a two-thirds majority to override it provide further ground for potential conflicts between the legislative and executive branches.

Comments by Prof. Sergio Bartole (Italy)

The analysis of Chapter 1 of the draft (Fundamentals of the constitutional structure), as well as that of the entire text, could be deeply imperilled by misunderstandings due to its translation into English from Tajik-Farsi. In any case the prohibition of the encouragement of separatism (Article 7) and of some social associations (Article 8) should also be interpreted in the present difficult political situation of Tajikistan as affecting positive individual and collective actions aimed at forbidden purposes only, such positive actions being distinguished from the mere exercise of freedom of expression.

It may be useful to consider whether Article 11 is sufficiently open to allow for those possible limitations on the sovereignty of the Republic of Tajikistan implied by its membership of the Commonwealth of Independent States.

If Tajikistan intends to establish a free market economy, it may be useful to specify in Article 13 that freedom of economic activity extends to private economic activity.

Sub-Chapter 2

Article 15 should imply that limitations of rights and freedoms can be adopted by law or regulated on the basis of law only. Article 18 should require the extension of equality of all people also in their relations with public authorities, and not with the legislature and the courts only.

Usually the principle of legality, covered by Article 22, implies that the punishment of a crime should be foreseen in a law which was in force when the crime was committed. Provisions of the third paragraph of Article 22 are mere consequences of this more general principle.

When the Constitution allows the law to provide for limitations of rights and freedoms (Articles 24-25), it must mention explicitly the reasons which can justify such limitations. Limitations "in cases prescribed by the law" will be justified only when the "cases" have a direct connection with the reasons stated in the Constitution. Otherwise the law - notwithstanding the restriction of the limitations to specific cases only - will be unconstitutional as having no basis for justification in the Constitution, that is to say because the specific cases will not have a direct connection with the reasons stated in the Constitution. These remarks can also be extended to Article 30.

Likewise the Constitution should explain which are the gravest crimes (or which is the gravest crime) allowing the criminal law to provide for the

deprivation of life "by order of a court" (Article 19).

In Article 36 the rule concerning the taking away of the property of an individual would require that the law specifies in general terms the cases when that measure is allowed and the reasons why it can be adopted. Furthermore, according to Western European Constitutions, whereas such measures are taken against the will of the owner, the law should provide for judicial protection of the person concerned.

Two main provisions which are present in all democratic Constitutions are missing in the draft :

- the rule of *habeas corpus* according to which a person can be deprived of his/her personal freedom by a judicial order and only on the basis of the law. If he/she is arrested by the police, his/her arrest has to be submitted to a judge within 24/28 hours for confirmation of its validity;

- the protection of minorities which does not imply the protection of their different language only - as in Article 2 - but also requires the protection of their ethnic, cultural and religious identity and historical characteristics.

Sub-Chapter 3

A misunderstanding could arise from the English text, giving the impression that Article 50(1) and (2) provide for powers of the *Majlisi Milli* overlapping in some way with the powers of the Constitutional Court. Actually it is not clear if Article 50(1) relates to the abrogation of the laws or to their annulment (which falls within the powers of the Constitutional Court which has the power of invalidating unconstitutional acts before their entry into force). Likewise it should be clear that the interpretation given by the legislative body to the Constitution and the laws has to comply with the decisions of the Constitutional Court, even if the *Majlisi Milli* is entrusted with the power of interpreting the Constitution.

According to the principle of legality (that is to say the rule of law) the parliamentary powers deriving from Articles 50(4), 8, 11, 12, 13, 14, 15, 17, 18 and 21 should be exercised through parliamentary Acts having the form and effects of law. From this viewpoint, the provision of Article 75, last paragraph, has to be welcome.

I interpret Article 61 as giving the people's deputies, the President, the Government (that is to say the cabinet) and the Council of the People's deputies of Gorno-Badekshan the power of submitting bills to the *Majlisi Milli* (not the power of legislating). I share the opinion of Professor ?zbudun that Article 62 is "too stringent" in requiring that laws must be adopted by the majority vote of the total number of the people's deputies. Even if the people's deputies are not allowed to be members of the cabinet and, therefore, cannot be distracted from the parliamentary work by other public tasks (Article 74), the *Majlisi Milli* could have some difficulties in complying with the rule concerning the presence of its own members and the required majority of votes in favour of a bill.

Sub-Chapter 4

Likewise Prof. ?zbudun is right in emphasising the difficulties in the implementation of Article 67.

Article 70(2) should comply with the observance of the principle of legality (that is to say the rule of law) which implies that the organisation of the State executive, of the ministries and State committees has to be provided for by law: only in this way can the rule of law be insured. Likewise the adoption of orders and edicts by the President (Article 71) has to be controlled by the law, to prevent the growing up of an authoritarian and arbitrary power.

Does Article 73 mean that the President can be removed from his office because he committed a minor crime too? Perhaps it could be useful to restrict the scope of this provision to the gravest crimes.

I share the opinion of Prof. ?zbudun on the danger of a political deadlock because of the form of government adopted by the drafters.

Sub-Chapter 6

The provisions of Article 78 on the appointment of *Mirs* apparently conflict with the establishment of local representative powers, which have to be elected. The appointment of the *Mirs* by superior authorities or on the basis of a recommendation of these authorities appears to limit the scope of the freedom of political choice given to local government by the establishment of representative government. Perhaps a solution could be found providing for a power of nomination of the candidates by the elected assemblies and a later approval by the superior authorities.

Sub-Chapter 7

There is a contradiction between Article 81 providing for the independence of the judicial power and Article 83 which gives the President or the *Mir* of the Gorno-Badakshan Autonomous Oblast the power of appointing or dismissing judges. This inconsistency would not necessarily be avoided by establishing a Supreme Council of Judiciary if - in the opinion of the drafters of the Constitution - the incumbent judiciary cannot be trusted and is not in a condition to become in some way a self-governing power. The independence of the judicial power as a whole is aimed at ensuring the independence of individual judges, and such independence is therefore intimately connected with the question as to whether its individual members have political or personal links with the political establishment. Perhaps a solution could be adopted, taking into consideration the examples of some Western legal systems where the appointment and dismissal of judges by the executive authorities (whose activity is inspected by the elected assemblies) have to be adopted on the basis of advice from judicial bodies and, in any case, submitted for confirmation to superior judges. But is the President really subject to parliamentary inspection? Article 84 could give a further guarantee to the independence of the judges if it provided for a ban on the re-election of judges at the end of their term of office. Article 88 has to be welcome from the same point of view. Article 89 could endanger the position of judges in giving a free hand to the authorities which have elected them if the previous remarks are not taken into account in providing also for the immunity of judges.

Sub-Chapter 9

I interpret the last sentence of Article 96 as relating to both the decree declaring a state of emergency and the decree which prolongs the ordinary period of the state of emergency.

Sub-Chapter 10

Does the reference in Article 100 to "the form of the Republic's administration" refer to the form of government of the Republic?