

CONSTITUTIONALISM IN TAJIKISTAN: TOWARD DEMOCRACY OR GREATER AUTHORITARIANISM?

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ABSTRACT

This article examines how constitutionalism is taking shape in present-day Tajikistan and analyzes its main development stages in 1994 (the drawing up and adoption of the first RT Constitution), 1999 (the constitutional reform), and 2003 (the introduction of amendments and additions to the current RT Constitution).

This study defines the general features of constitutionalism of the transition period, which include the following:

1. The broad reception of foreign law, as well as implementation of the international legal provisions of human rights, the democratic foundations of statehood, the separation of

powers, and the rule of law while retaining the regulations passed down from Soviet times.

2. The general contradictoriness and inconsistency of the constitutional rulemaking.
3. The transformation of certain provisions of the Constitution into a declaration of intentions, relating to their lack of correspondence to the real political and socioeconomic situation in the country.

It reveals the lack of correspondence between the content of the Constitution and the old legislation largely inherited from the

Soviet past and presents the content of the constitutional reform carried out in 1999 within the framework of executing "The General Agreement on Establishing Peace and National Consent in Tajikistan."

The author analyzes the amendments and additions to the Constitution, the adoption of which was brought up at the 1999 referendum. The article presents an appraisal of the constitutional reform of 2003

and examines the problems of carrying it out, during which favorable conditions were created for the emergence of authoritarianism in the country.

It also notes that Tajikistan's sociopolitical reality creates prerequisites for differences between the de jure and de facto constitution. This usually leads in practice to a certain shift from democracy to authoritarian methods of executing state power.

KEYWORDS: *Tajikistan, constitutionalism, the Constitution, the Parliament (Majlisi Oli), form of rule, referendum.*

Introduction

Authors who write about constitutionalism in post-Soviet countries believe that it began with the policy of perestroika and glasnost pursued in the last days of the Soviet Union's existence. This was when values of the transition period relating to West European and American liberalism that found their juridical expression in the principles of the law-based state, democracy, and the separation of powers began to filter into the public consciousness.

Constitutional commissions responsible for enforcing the foundations of a new political and legal system and model of state power organization that differ from the previous have been forming in the Soviet republics since the summer of 1990. Constitutionalism during the transition period is distinguished by recognition of the universal standards that presume a democratic way of drawing up and adopting the constitution, constitutional control, stability of constitutional provisions, and recognition of universal human values.

However, each of the new sovereign states took a different approach to drawing up its constitution; numerous social factors and national traditions had an effect on it. So, despite their common past and simultaneous start to building real constitutionalism, the republics of the former Soviet Union are distinguished by distinct specifics.

Constitutionalism is being established in states that are becoming increasingly authoritarian and, consequently, bear the stamp of this form of rule.

This article aspires to present an analysis of how constitutionalism has been emerging and developing during the transition period using Tajikistan as an example.

The First Constitution of Independent Tajikistan (1994)

As we know, constitutionalism in Tajikistan is directly related to the place the country once held in a larger state (first the Russian Empire and then the Soviet Union). Constitution-building in the

republic during Soviet times had its own special features. First, this was a process manipulated from above, that is, by the Union Center. Second, Tajikistan did not have its own traditions of constitutionalism. And, third, the Tajik S.S.R. can be described as an insert in the larger structure of the Soviet Union and under the political supervision of the C.P.S.U.; so until the beginning of perestroika it was Soviet-style constitutionalism that reigned there, the parameters of which were determined by the Union constitutions in effect at the particular time.

When it acquired its independence, Tajikistan was faced with the need to draw up its own Basic Law for the first time. The adoption of the Constitution of the Republic of Tajikistan (hereafter, the RT Constitution) on 6 November, 1994 became a milestone event for RT constitutionalism. It became the first Constitution of independent Tajikistan that enforced essentially new (differing from the Soviet) foundations of the social and state system envisaged by the provisions included in it. In this case, it is important that the new stage in the development of RT constitutionalism began immediately from the time the Constitution was adopted, and not from the drawing up of the relevant theoretical doctrine, as was the case at one time in the West and Central European countries, as well as the U.S.

This “rearrangement of components” was in no way explained by the fact that the new Constitution was adopted along the lines of the old, that is, Soviet constitutionalism. It was primarily explained by the emergency situation that had developed in the republic after the collapse of the Soviet Union, during which a civil war broke out. This greatly slowed drawing up a new Basic Law in the country, which was in dire need of constitutional and legal regulation of its statehood and public relations. The situation in which Tajikistan found itself required broad reception of the constitutional legislation of today’s developed countries.¹ In so doing, it should not be forgotten that in pre-Soviet times Tajikistan did not have its own constitutional tradition.

The 1994 RT Constitution became a kind of a bridge between the Soviet and new real constitutionalism based on borrowing regulations and principles from the legislations of the inveterate developed democracies. This circumstance initially predetermined its profound internal contradictoriness, which could not help but be manifested at a systemic level (since the constitution is the main regulatory legal act enforcing the systemic projection of society). The matter concerns not so much the text of the Constitution as the insufficient compliance between the elements of the legal and political systems of society (the content of the Constitution, on the one hand, and the nature of sociopolitical and legal consciousness and the practical implementation of constitutional provisions, on the other).

We will try to reveal this contradiction through the prism of the systemic approach.

The sufficiently high level of legal technicality of the Tajikistan Constitution is explained by the fact that it is based on the broad reception of foreign law (including international legal human rights regulations). Many of the provisions contained in it are clichés typical of the constitutions of developed countries, as well as of international legal acts on human rights; the same can also be said of its structure.

The RT Constitution consists of a Preamble and 100 articles divided into ten chapters.² The first chapter is devoted to the fundamental principles of the constitutional system, the second to human and citizen rights, freedoms, and basic obligations. The next three chapters contain provisions about the formation, structure, and competence of the higher bodies of state power and administration—the Parliament (Majlisi Oli), President, and Government. The sixth chapter is devoted to local power, the seventh to the status of the Gorno-Badakhshan Autonomous Region; the eighth and ninth discuss the organization and main principles of the activity of courts and public prosecutor’s office, respectively.

¹ See: Kh. Khamidov, “Nekotorye voprosy gosudarstvenno-pravovogo razvitiia Respubliki Tadjikistan,” *Vestnik mezhpaplamentskoi assamblei* (St. Petersburg), No. 1, 1993, pp. 55-56.

² See: *RT Constitution*, Dushanbe, 2003, 86 pp. (in Tajik, Russian, and English).

Of course, resolution of the problems relating to execution of the Constitution largely depends on the further development of national law. In this sphere, it is important to primarily reinforce the guarantee of unhindered realization of citizen rights and freedoms, elaborate efficient mechanisms for preventing and eliminating violations, and prevent the possibility of past procedures being restored.

As we noted above the parameters of the RT Constitution do not entirely correspond to the country's cultural and historical reality. It can be called the matrix of a new political and legal culture, which, as in other CIS countries, is imposed from above and has certain contradictions. One of them is that the people who compose the state apparatus are called upon to be bearers of this new culture, but they are not distinguished by a high capacity for assimilating it. So, after being refracted in their minds, the European principles, institutions, and provisions enforced in the Basic Law sometimes acquire a local interpretation that reflects the poor development and traditional organization of civil society, as well as the existence of authoritative trends (inevitable in these conditions) in power execution.

This results in a certain gap emerging between the meaning of several important terms and the content they acquire when executing the RT Constitution; this kind of difference can be found in the provisions of many of its chapters.

For example, Tajikistan is described as a social state (Part 2 of Art) and each person in it has the right to employment (Art 35); but this provision is carried over from the Soviet Constitution and does not correspond to the socioeconomic changes that have occurred in the country since the collapse of the Soviet Union.

Recognition of the equality of different forms of property (including private) reflects the state's course toward creating a market economy, of which crises of reproduction and unemployment are characteristic. However, the extremely low initial level of the country's economic development is forcing Tajik citizens to leave the country in order to realize their constitutional right to employment (there are more than one million citizens in this category today).

Nor are those articles of the Constitution that envisage citizens' socioeconomic rights in full effect; the matter concerns Art 38 (on the right to health care ensured through free medical assistance in governmental health care institutions), Art 39 (on the right to social assistance in old age, in the case of illness, disability, or loss of ability to work), and Art 41 (on the right to education, which should be free in governmental educational institutions).

Art 30 of the 1994 RT Constitution reads: "Each person is guaranteed the freedoms of speech and the press, as well as the right to use information media." But this article does not sufficiently define the right of citizens to receive information. Consequently, it can be said that citizen rights are not fully observed. So the right of each person to receive information and guaranteed access to it should be enforced in the Constitution. Furthermore, this means real access to all types of information without exception, including visual, printed, and electronic. The information provision system can play an important role in this.

This problem has two levels; on the one hand, daily receipt of information through the available means and methods, and on the other, the drawing up and introduction of a real mechanism of access to its global sources.

The 1994 Constitution does not contain provisions about the election system, not to mention defining its basic sources and mechanisms (in particular, realization of election rights). It does not envisage the creation of a professional and permanent Parliament, although it is the constitution that should regulate issues concerning its formation and forms of activity.

The fact that Soviet constitutional institutions still hold sway is shown by the provisions on the formation of the institution of the Presidium of the Majlisi Oli with broad regulatory-legal and monitoring-administrative powers (Art 50) in the structure of the Tajik Majlisi Oli and the definition

of the constitutional status of the Chairman of the Majlisi Oli. These provisions were in effect until 26 September, 1999, that is, until amendments and additions were made to the 1994 Constitution and a new two-house Parliament was instituted with a permanent professional lower house—the Majlisi namoiandagon.

The significance of any constitution (including the 1994 RT Constitution) is primarily defined by its place in the national legal system. Possessing supreme legal force, it is the summit and at the same time foundation of the entire system of legal sources. In this sense, the principles and regulations of the Constitution act as the fulcrum holding up the structure of national law. Reading the 1994 RT Constitution creates the impression that its authors were very well aware of this.

For example, Art 10 reads: “The Constitution of Tajikistan possesses supreme legal power, and its norms have direct application. Laws and other legal acts that are contrary to the Constitution do not have legal force. ...International legal acts recognized by Tajikistan are a constituent part of the legal system of the republic. In the case of a discrepancy between the laws of the republic and recognized international legal acts, the norms of the international legal acts are applied.” However, there are many factors hindering the execution of this provision.

Let us begin with the fact that a new legal system essentially began to emerge in Tajikistan when the Constitution was adopted. As mentioned above, this is precisely what explained the lack of correspondence between its content and the old legislation carried over from the Soviet past (it should be noted that the same thing was also seen in post-Soviet Russia). In this context, we should also remind you of the contradiction existing between the regulations ensuring citizens’ social rights (for example, the right to free education and health care) and the real level of Tajikistan’s development that prevents them from being realized.

Moreover, as noted at the beginning of the article, some ideas of West European and American liberalism expressed in the Constitution (for example, regarding political and ideological pluralism) do not coincide with the cultural regulations and ideas of Tajik society.

As we know, the differences between a *de jure* and *de facto* constitution lead to a certain shift toward authoritarianism. The authors of the RT Constitution, as though foreseeing this development of events, repeatedly place it on a level with current legislation (thus violating the principle of the supremacy of the Constitution).

For example, according to Part 3 of Art 35 of the RT Constitution, no one may be subjected to forced labor, except in cases anticipated by law. So the law makes an exception from the constitutional provision. Furthermore, the Constitution does not set forth either the content of the law or the nature of these exceptions.

Similar legal technicalities are also used when defining the powers of the Majlisi namoiandagon. For example, Art 54, which lists the powers of the Majlisi namoiandagon, ends with a provision, according to which the country’s Parliament exercises other powers determined by the Constitution and laws (Para. 8). This same formulation is also found in Art 69 regarding the powers of the President of the Republic of Tajikistan (Para. 26).

I would like to note that this practice of placing the Constitution on the same level as the regulations of current legislation is not always obvious. For example, according to Part 2 of Art 14, limitations of the rights and freedoms of citizens are only allowed for the purposes of ensuring the rights and freedoms of other citizens, ensuring social order, and protecting the constitutional system and territorial integrity of the republic.

In this list of reasons for limiting rights and freedoms of citizens, the provision about ensuring social order appears insufficiently clear and legally vulnerable, mainly because this article does not refer to Art 46, which envisages the procedure for declaring a state of emergency. In so doing, the rendition of this provision leaves free rein for the subjective assessments of law-makers. In addition, this kind of rendition presumes the limitation of citizen rights and freedoms based on a special act for

ensuring social order, which also erases the boundary between the Constitution with its supreme legal force and current legislation.

In compliance with Para. 2 of Art 49 of the RT Constitution, the Majlisi Oli has the power of “interpreting the Constitution and laws.” This provision gives rise to objections regarding a whole series of positions. First, it contradicts the principle of separation of powers, since responsibility for interpreting the laws is placed on the body that adopts them. Nor does the Constitutional Court of the Republic of Tajikistan have the right to interpret the Constitution or laws; endowing it with such powers could be an important restraining mechanism ensuring control over legislative power (since provisions of the law deemed unconstitutional are no longer applied).

On the other hand, this regulation contradicts Part 1 of Art 98 of the Constitution, according to which amendments and additions to the Constitution are introduced through general referenda. Meanwhile, official interpretation of the regulations of the Constitution endowed the supreme legislative body in practice turns into a masked form of introducing amendments and additions to it. Official interpretation of the law by the supreme legislative body (which logically also adopted these acts) will also be a hidden form of law-making (since the act of official interpretation will essentially have the force of law); Professor G. Shershenevich spoke out against this practice.³

The Constitution declaring Tajikistan a republic did not clarify the question of form of rule. Elements of building a presidential republic can be found in the constitutional provisions, but it is impossible to clearly define the form of rule of the Tajik state.

For example, according to Art 64, the President of the Republic of Tajikistan is the head of state and of the executive power (Government). The President is the guarantor of the Constitution and laws. However, the interrelations among the supreme bodies of Tajik state power (the Parliament, Government, and head of state) do not correspond to the classical presidential model of rule. For example, according to Art 73 of the Constitution, the Government is responsible to the President and also under the control of the Majlisi Oli with respect to the execution of the law.

However, the last provision is carried out extremely inconsistently. For example, although the Majlisi Oli approves the country’s budget presented by the Government, it does not have the authority to supervise its execution. On the one hand, the Government is responsible to the President (as is customary in a presidential republic), while on the other hand, the Government and any of its members may present its resignation to the President, which is not typical of a presidential republic.

Nor is it clear to what extent the supreme executive body of state power (the Government) is responsible for what goes on in the republic, what the boundaries of its power are, and in what cases it may raise the question of no-confidence in the Government.

The post of prime minister, the powers of whom are not envisaged in the Constitution, shows the “non-standard” form of rule in Tajikistan; this essentially turns him into a nominal figure.

According to Arts 71 and 72 of the Constitution, the Majlisi Oli may bring up the question of terminating the President’s power (in the event of his incapacity or committing state treason, and so on). However the President does not have the authority to disband the Majlisi Oli.

In the context of the separation of powers, the independence of the courts acquires the greatest significance. Only independent courts can execute real control with respect to the executive power. In this respect, the provision of Art 87, which says that judges are independent and subordinate only to the Constitution and law, and interference in their work is forbidden, seems entirely logical. But this provision loses its significance somewhat due to the provision in Art 84, according to which, judges have terms of five years, and after the amendments and additions to the RT Constitution of 22 June, 2003, ten years (Part 3, Art 84). So judges become dependent on those power structures that compile the list of candidates to court posts for a specific time.

³ See: G. Shershenevich, *Obshchaia teoriia prava*, Issue 4, Moscow, 1912, p. 726.

Until 26 September, 1999, this function was performed by the Ministry of Justice, which was also responsible for material and technical provision of the courts. Judges of the Military Court, the court of the Gorno-Badakhshan Autonomous Region, and regional, Dushanbe city, city, and district courts were appointed and dismissed by the President on the petition of the Minister of Justice (Art 86).

At present, these powers have been transferred to the newly formed Justice Council, which, from the viewpoint of control over the activity of the executive power, has greatly weakened the courts and limited their functions. This is mainly happening because the current judges are trying to find favor with the powers that be in the hope of acquiring a new appointment.

The 1994 Constitution left a large part of Tajik society dissatisfied; the matter primarily concerns the status of languages and ambiguous approaches to regulating citizenship matters. It has also “essentially closed off the way to gradual differential development in Tajikistan of the right to private ownership of land and the drawing up and adoption of the law on mortgages.”⁴

Constitutional Reform of 1999

As already noted, between 1992 and 1997, a civil war was going on in Tajikistan. A General Agreement on Establishing Peace and National Consent in Tajikistan was signed on 27 June, 1997 in Moscow between the Government of Tajikistan and the United Tajik Opposition (UTO) with the assistance of the U.N. Security Council and the guarantor states.⁵ In order to monitor and implement the terms of this Agreement, a National Reconciliation Commission (NRC) was created, in which representatives of the Government and UTO were equal members. Chairman of the NRC was UTO leader Said Nuri. If necessary, the decisions adopted on the basis of a consensus in the NRC were presented to Tajik President Emomali Rakhmonov. In compliance with his constitutional powers, he issued decrees, presented drafts of resolutions at Government sittings for making fundamental decisions, and submitted law drafts to the country’s Parliament.

A decision on the need to carry out constitutional and legal reforms was made within the framework of implementing the peace process. The Tajik President came forward with this initiative at the 12th session of the Majlisi Oli on 30 June, 1999. In compliance with Art 99 of the Constitution, he submitted a draft of amendments and additions to the 1994 Constitution prepared by the National Reconciliation Commission for the Majlisi Oli’s perusal.⁶

Introducing amendments to the Constitution was motivated by the need to enhance democracy and ensure stability in Tajikistan. But both the content of the amendments and the procedure for introducing them into the Constitution largely contradicted the declared motivation.

For example, according to the Constitution, proposals for its amendments and additions are published in the press three months before the referendum. This provision was violated since Resolution No. 816 of the Tajik Majlisi Oli of 30 June, 1999 “On Proposals of the President of the Republic of Tajikistan for Amendments and Additions to the RT Constitution”⁷ and Resolution No. 817 of the Tajik Majlisi Oli of 30 June, 1999 “On Holding a Referendum of the Republic of Tajikistan for In-

⁴ See: Sh. Gaiurov, “Novaia Konstitutsiia Respubliki Tadjikistan i nekotorye voprosy sobstvennosti,” in: *Konstitutsiia Respubliki Tadjikistan i puti ee realizatsii*, Dushanbe, 1995, pp. 48-49.

⁵ See: *General Agreement on Establishing Peace and National Consent in Tajikistan. What Is It?* Prepared by the U.N. Observer Mission in Tajikistan, Dushanbe, 1997.

⁶ See: *Sadoi Mardum*, 2 July, 1999.

⁷ See: *Akhbori Majlisi Oli Respubliki Tadjikistan*, No. 6, 1999, Art 168.

roducing Amendments and Additions to the RT Constitution”⁸ were published on 2 July, 1999, while the referendum was supposed to be held on 26 September, 1999.

Moreover, Art 49 of the RT Constitution listed one of the powers of the Majlisi Oli as “introducing draft legislation and other important governmental and social issues for popular discussion.” There can be no doubt that these issues include introducing amendments and additions to the Constitution. But Resolution No. 816 of the Majlisi Oli prescribed publishing proposals of the President of the Republic of Tajikistan for amendments and additions to the Constitution within three days “for citizens to make their general acquaintance with them.”

Nor was the technique for holding the referendum very democratic. For example, the draft of the amendments and additions consisted of 28 Paras: formation of the upper house of Parliament; extension of the President’s powers from 5 to 7 years; subsequent presidents being elected to one term, and so on.⁹ However, the citizens who were to participate in the referendum had to answer only one question: “Do you accept the amendments and additions to the RT Constitution?” It stands to reason that it was extremely difficult to give an unequivocal answer to this question, particularly since the proposed amendments and additions were largely contradictory.

The amendment on parties can serve as a vivid example of this contradictoriness; according to the new version, Art 28 of the Constitution read: “...citizens have the right to create political parties, including those of a democratic, religious, and atheist nature...” The party headed by the president was considered democratic; first it was called National, and later renamed National Democratic. The Party of Islamic Revival was religious, while the Communist Party was atheist.

Nevertheless, classification of the political parties only partially reflected the situation that had developed at the time in Tajikistan. The thing was that in addition to the above-mentioned, the country’s political system included several other parties, such as the Party of Political and Economic Renewal, the Agrarian Party, the Party of Justice and Development, and so on. A justified question arises in this respect, “To which of the different types should they be related?” Moreover, this classification clearly lacks logic: it implies that religious or atheist parties cannot be democratic.

In this rendition, Art 28 contradicts Part 1 of Art 8, according to which “in Tajikistan, social life develops on the basis of political and ideological pluralism.” It also contradicts Part 2 of Art 17, in correspondence with which “the Government guarantees the rights and freedoms of every person regardless of ... political beliefs.”

The amendment that envisages the creation of a two-house Parliament also arouses serious objections. For example, in keeping with the amendments and additions (Art 49), the upper house is elected at joint meetings of deputies of the local representative bodies (the election procedure is directed at strengthening executive power). Meanwhile, at the local level, the principle of separation of powers is not observed: the same person, who may be a regional, city, or district chairman, also heads the representative and executive power branches. It is the chairmen of local power bodies who arrange the elections to the upper house, electing 75% of the members of the Majlisi milli suitable for executive power, while 25% are appointed by a decree of the Tajik President. Since all the chairmen are appointed by the president, these amendments give him an effective lever of influence on legislative power. What is more, the creation of the upper house requires additional material expenses, thus increasing nepotism, protectionism, and bureaucratism.

According to the rendition of Art 56, brought up at the referendum, the upper house is responsible for electing, recalling, and making decisions regarding the immunity of the chairman, his dep-

⁸ Ibid., Art 169.

⁹ See: *Draft of Amendments and Additions to the RT Constitution*, Sharki Ozod, Dushanbe, 1999, 29 pp. (in Tajik and Russian).

uty, or judges of the Constitutional Court, Supreme Court, and Higher Economic Court, as well as appointing and dismissing the Prosecutor General and his deputies.

It should be noted that Part 5 of Art 27 of the RT Constitution reads: "Elections and referenda are carried out on the basis of general, equal, and direct voting rights by secret ballot." This provision is a general regulation and inviolable principle, and there may be nothing to the contrary.

It follows from this that the amendments and additions to Part 2 of Art 49 contradict Art 27 of the RT Constitution, since they envisage elections to the upper house on different principles. Moreover, during elections every citizen may only have one vote. But in this case, it turns out that the deputies of the local Parliaments will have two votes each. Furthermore, the deputies of the local Parliaments are in no way an electoral college (if elections are considered to be indirect). The principles of voter equality and directness of elections are also violated.

So extending the president's term from 5 to 7 years and limiting his time in power to one term were unjustified. It should be noted that the initiators of these amendments aimed to extend the current president's term in power.

Moreover, the new rendition of Art 28 and the question of the upper house of the Majlisi Oli, as well as the amendments to Art 65, brought up at the referendum, were not really that necessary.

The proposals for introducing amendments and additions to Part 3 of Art 61, which reads, "the Majlisi Oli may interpret the Constitution in the same way as constitutional laws are adopted," deserves particular attention. Before introduction of the amendments, the Majlisi Oli, that is, the one-house Parliament, had this right. The Parliament became a two-house structure after the amendments were adopted. In both cases, a procedure for interpreting the Constitution and laws was envisaged that was to be carried out within the framework of adopting constitutional laws. This idea of the referendum initiators was not only anti-constitutional, but also absurd.

So the president limits the Parliament's powers, as well as its opportunity to act effectively. In turn, the Parliament limits the powers of the judicial bodies, including by assuming judicial and regulating power. As a result, the President and Majlisi Oli violated the principle of separation of powers and essentially reduced the system of checks and balances that was just beginning to form in present-day Tajikistan to naught.

Another gross violation of the Constitution and the principles of democracy on the part of the Majlisi Oli was appropriating the people's powers of authority (in matters concerning constitutional law). The legal regulation of certain issues became problematic; for example, it was not clear who should execute constitutional powers before new constitutional bodies were elected and how.

It is a well-known fact that when introducing amendments to the Constitution, the status of a particular body changes, and, as a result, the question arises of its legitimacy and the scheduling of new elections (regardless of when the body's powers run out). So these matters are usually regulated by transitional or concluding provisions that are an integral part of the Constitution. The meaning of these provisions lies in the fact that they regulate matters relating to the implementation of the new regulations of the Constitution.¹⁰

It should be noted that by adopting resolutions No. 816 and 817 of 30 June, 1999, the Majlisi Oli usurped the people's powers of authority. According to Para. 4 of Resolution No. 816 of the Majlisi Oli that came into force on the day it was published, "after amendments and additions come into force ... the Majlisi Oli executes all powers endowed by the Majlisi milli and Majlisi namoiandagon

¹⁰ For more on this, see: I. Starostina, "Referendum v sisteme konstitutsionno-pravovoi otvetstvennosti," in: *Konstitutsionno-pravovaia otvetstvennost: problemy Rossii, opyt zarubezhnykh stran*, ed. by Prof. S. Avakian, MGU Publishers, Moscow, 2001, pp. 461-469; Kh. Khamdov, "The Role and Place of Referendum in the Modern Constitution," *Gosudarstvo i pravo* (Dushanbe), No. 2, 2001, pp. 1-10 (in Tajik); B. Gadoev, *Problemye voprosy instituta referendum, Pravovye problemy instituta referendum v Respublike Tadjikistan*, ed. by Associate Professor A. Imomov, Dushanbe, 2003, pp. 7-76.

on its chairmen, members of the Majlisi milli, and deputies of the Majlisi namoiandagon...” In other words, the powers of the Majlisi milli and Majlisi namoiandagon envisaged in the draft of the amendments and additions to the Constitution were passed on to the current one-house Parliament without holding elections; such law-making does not stand up to scrutiny.

In actual fact, according to the RT Constitution, the amendments and additions to it were introduced by holding a general referendum (Part 1 of Art 98). In this case, among other things, a proposal only to create a two-house Parliament was brought up at the referendum. The question of transferring the powers of the Parliament functioning at that moment (which doubtlessly had constitutional significance) was decided by deputies in a general act of Parliament, so to speak. In fact, it was an amendment to the Constitution adopted beyond the scope of the established procedure; by adopting this resolution, the Parliament deputies were in fact extending the term of powers of the Majlisi Oli, the President, and other state bodies.

The nature of the amendments made to the Constitution show that transitional provisions relating to the need to create a new system of state bodies should also have been brought up at the referendum. But this was not done; as a result, the Parliament, having assumed constitutional powers, essentially became an illegitimate body after the referendum.

Summing up the constitutional reform of 1999, the following conclusions should be drawn:

1. When holding the referendum, the Majlisi Oli of the Republic of Tajikistan permitted several gross violations of the Constitution.
2. Resolutions No. 816 and 817 of 30 June, 1999, adopted by the Majlisi Oli, contradicted Para. 6 of Art 49 and Art 99 of the Constitution, since the draft of the amendments and additions to the Basic Law of Tajikistan were published not for general discussion, but only for general acquaintance.
3. The Majlisi Oli violated the constitutional deadlines for holding the referendum. So in accordance with Art 10 of the RT Constitution, the provision of the Majlisi Oli on scheduling of referendum day was deemed invalid.
4. The content of the draft of the amendments and additions to the RT Constitution on the whole contradicted the foundations of the constitutional system of Tajikistan.
5. The Majlisi Oli appropriated the people’s powers of authority, particularly with respect to the execution of constitutional powers by state bodies after the referendum. These matters should have been included in transitional or concluding provisions of the Constitution and brought up at the referendum.

Reform of the Constitution of 2003

The last stage of constitutional and legal development of present-day Tajikistan began in 2003. Proposals of the Majlisi milli (upper house) and Majlisi namoiandagon (lower house) “On Introducing Amendments and Additions to the RT Constitution” were examined. On 5 March, 2003, the lower house of the Parliament adopted the resolution “On Forming a Coordinating Commission to Introduce Amendments and Additions to the RT Constitution.”¹¹

¹¹ See: *Akhbori Majlisi Oli Respubliki Tadjikistan*, No. 3, 2003, Art 95.

In accordance with the instructions of the Majlisi namoiandagon, the Coordinating Commission summarized and presented the proposals of members of the Majlisi milli and deputies of the Majlisi namoiandagon “On Introducing Amendments and Additions to the RT Constitution” to the Majlisi namoiandagon for examination, keeping in mind the opinions and conclusions of other entities having the right to initiate legislation.¹²

After examining these proposals, on 19 March 2003, the Majlisi Oli adopted the provision “On the Proposal of Members of the Majlisi milli and Deputies of the Majlisi namoiandagon of the Majlisi Oli of the Republic of Tajikistan On Amendments and Additions to the RT Constitution.”¹³ It said in particular that “...for the purpose of further improvement of the country’s political and state system, strengthening democracy in society, improving the procedure for ensuring guarantees of human and citizen rights, guaranteeing the constitutional foundations for further development of a free economy and entrepreneurship, and keeping in mind the deep-cutting changes in socioeconomic and cultural-political life expressed in maintaining peace and stability in the republic, in accordance with Art 98 of the RT Constitution and Art 12 of the Constitutional Law of the Republic of Tajikistan ‘On Referendum of the Republic of Tajikistan,’ ... we resolve:

- “1. To adopt the proposal of the members of the Majlisi milli and deputies of the Majlisi namoiandagon of the Majlisi Oli of the Republic of Tajikistan “On Amendments and Additions to the RT Constitution” (according to the appendix) and bring it up for discussion at a general referendum.
- “2. To publish the proposal “On Amendments and Additions to the RT Constitution” in the press within three days.
- “3. To ensure that this resolution comes into force from the day it is published.”

The same day, the resolution of the Majlisi namoiandagon “On Holding a Referendum of the Republic of Tajikistan for Introducing Amendments and Additions to the RT Constitution” was adopted.¹⁴ In the resolution adopted it was noted that “in accordance with Para. 6 of Art 57 of the Constitution of the RT and based on Art 8 of the Constitutional Law of the RT “On Referenda in the Republic of Tajikistan,” the Majlisi namoiandagon of the Majlisi Oli of the Republic of Tajikistan resolved:

- “1. To schedule a general referendum “On Amendments and Additions to the RT Constitution” on 22 June, 2003.
- “2. To bring up the following question at the general referendum: “Do you accept the amendments and additions to the RT Constitution?”

This resolution appears to have been violated by a whole series of different constitutional provisions. For example, Part 1 of Art 6 of the Constitution reads: “In Tajikistan, the people are the possessors of sovereignty and are the only source of state power.” But the people (from whom all state powers proceed) did not authorize the Majlisi namoiandagon to determine the content of the amendments and additions to the Constitution. Moreover, the Majlisi namoiandagon did not have the right to act on behalf of all the people. This is confirmed by Art 6 of the Constitution and the proposed addition to Para. 3, which said that “general referenda and elections are the highest direct expression of the power of the people.”

¹² See: “Report of Chairman of the Coordinating Commission A. Dostiev, ‘On Introducing Amendments and Additions to the RT Constitution,’” *Sadoi Mardum*, 20 March, 2003 (in Tajik).

¹³ See: *Akhbori Majlisi Oli Respubliki Tadjikistan*, No. 3, 2003, Art 97.

¹⁴ See: *Ibid.*, Art 98.

I would also like to note that, in addition to everything else, the powers of the Majlisi namoiandagon include “bringing law drafts and other important state and social questions up for general discussion (Para. 2, Part 1, Art 57), as well as scheduling referenda. So, the Majlisi namoiandagon did not have the right to adopt the final text of the amendments and additions to the Constitution of the RT, or to schedule the day for holding the referendum without ensuring openness, transparency, and participation of the institutions of civil society, or without bringing these matters up for general discussion.¹⁵ Entities that put forward proposals for amendments and additions to the Constitution only have the right to endow them with legal form, but not to determine their content, which should be clarified only after a general discussion (in the procedure that is envisaged and adopted by the 1994 Constitution).

Arts 98-99 of the RT Constitution specifically set forth only the procedure, entities, and legal form of submission, as well as the procedure for scheduling a referendum. Since bringing draft laws and other important state and social issues up for general discussion (Para. 2 of Art 57), as well as scheduling a referendum (Para. 6 of Art 57) are the exclusive powers of the Majlisi namoiandagon (that is, its rights and obligations), failure to exercise them without a good reason is a breach of law. In our opinion, in this case, by ignoring Para. 2 of Art 57 of the RT Constitution, the supreme legislative and representative body abused their rights and limited the power of the people.

It should be noted that the resolution of the Majlisi namoiandagon of 19 March, 2003 primarily envisaged the forms of response to the proposed amendments and additions to the Constitution. The draft of the amendments and additions to the RT Constitution essentially applied to the following paragraphs:

- 1-5 (Preamble and Fundamental Principles of the Constitutional System);
- 6-22 (Human and Citizen Rights, Freedoms and Obligations);
- 23-36 (the Majlisi Oli);
- 37-45 (the President and the Government);
- 46-50 (the Local Power and Self-Government Bodies, including the Gorno-Badakhshan Autonomous Region);
- 51-54 (Judicial Power);
- 55-56 (Introducing Amendments to the Constitution and Transitional Provisions).

A total of 122 amendments and additions were brought up at the referendum (keeping in mind that the items brought up for voting sometimes included more than one question). Around 80% of the proposed amendments and additions were of a technical, clarifying, and stylistic nature. For example, certain articles of the Constitution were amended structurally; in some cases, the matter concerned the replacement of separate figures, words, phrases, or entire sentences. Moreover, two articles (55 and 63) were rewritten in full, as well as 20 parts or sentences in specific articles of the Constitution.¹⁶ This of course was difficult for even scientists and specialists to understand.

Therefore, from the viewpoint of logic and common sense, it would be simply impossible to give an unequivocal “yes” or “no” answer to the set questions.

¹⁵ For more details on this, see: M. Fedotova, “Institut vsenarodnogo obsuzhdeniia i rol sredstv massovoi informatsii v ego realizatsii,” in: *Osnovnye napravleniia razvitiia gosudarstvenno-pravovykh institutov na sovremennom etape*, Moscow, 1986, pp. 201-204; I. Churina, “Dalneishee sovershenstvovanie protsedury provedeniia vsenarodnykh obsuzhdenii,” *Vestnik MGU*, Series 11, *Pravo*, No. 5, 1988, pp. 75-80; M. Pisotkin, “Politicheskie igry vokrug referendumov,” *Narodny deputat* (Moscow), No. 7, 1993, pp. 49-54; V. Kapitsyn, Iu. Roldugin, “Obshchechelovecheskaia demokratiia (sotsiologicheskii aspekt),” *Vestnik MGU*, Series 12, *Sotsialno-politicheskie issledovaniia* (Moscow), No. 72, 1992, pp. 39-45.

¹⁶ See: *Draft of Amendments and Additions to the RT Constitution*, TASFETO, Dushanbe, 2003, 30 pp. (in Tajik and Russian).

Some of the proposed amendments of course deserve support. Worth mentioning in this respect are the additions to Part 1 of Art 5 on the supreme value of man, his rights and freedoms, to Part 2 of Art 6 about how the general referendum and elections are the highest direct expression of power of the people, and to Part 2 of Art 30 on prohibiting propaganda and agitation that incite social, racial, national, religious, and linguistic hostility and enmity.

However, some the amendments brought up at the referendum deserve criticism. The new renditions of Parts 2 and 4 of Art 65 of the Constitution draw attention to themselves. They are clearly aimed at creating conditions for reelecting the current President. Whereas in the past, a candidate for the post of president should be no younger than 35 and no older than 65, now it is proposed that only the lower age limit be preserved. Moreover, Part 4 of Art 65 of the Constitution envisaged only one term in power for the President, whereas the new rendition reads that the same person shall not occupy this post for more than two terms in a row.

Part 3 of Art 8 of the RT Constitution read: "Social associations are formed and operate within the framework of the Constitution and laws. The state provides them with equal possibilities in their operations." It was proposed in this respect, to add "and political parties" after the words "social associations," and to exclude the second sentence ("the state provides them with equal possibilities in their operations") entirely from the text of the Constitution.

This amendment is clearly aimed at creating privileged conditions for the ruling party and pro-government social associations (within the framework of the political system of the country's society).

It was proposed to render Part 2 of Art 8 as follows: "The ideology of not one party, social association, religious organization, movement, or group can be recognized as state." It appears that a significant terminological imprecision is permitted here that is impermissible for a constitution. For example, on the one hand, parties, religious organizations, and movements are types of social associations. While on the other, the meaning of the word "group" is not clear (does it mean groups of people, social associations, or something else?).

The amendments brought up for the referendum were not always logically consistent. For example, on the one hand, addition to Art 14 read that "human and citizen rights and freedoms are realized directly. They determine the goals, content, and application of laws, activity of the legislative, executive and local powers, and local self-government bodies, and are ensured by the judicial power body." But the analysis we carried out of the other proposed amendments and additions (with respect to ensuring human and citizen rights and freedoms) shows that some of them worsened the position of people and citizens.

For example, Part 2 of Art 45 said that "laws establishing new taxes or worsening the economic position of the citizen do not have retroactive force." The draft of the amendments and additions to the RT Constitution envisaged the words "position of the taxpayer" instead of the "economic position of the citizen." There can be no doubt that this kind of "correction" significantly diverges from the observation of citizen rights. First, the "economic position of the citizen" is a much broader concept than "taxpayer." Second, the conjunction "or" means that the words "economic position of the citizen" apply not only to laws establishing new taxes, but also to any other laws (including customs, financial, civil, family, labor, pension, and other legislation).

Part 1 of Art 42 of the Constitution read: "On the territory of Tajikistan, each person is obligated to comply with Tajikistan's Constitution and laws, as well as to respect the rights, freedoms, honor, and dignity of other people." It was proposed that "in Tajikistan" replace the words "on the territory of Tajikistan." According to the new rendition, this means that embassies, representative offices, consulates, trains, and airplanes of Tajikistan located outside the country, but which are still considered its territory, do not have to observe (including foreign states and their citizens) the Constitution and laws of the Republic of Tajikistan.

The amendments introduced to Arts 38 and 41 of the Constitution have significantly lowered the level of social guarantees the state offers the country's population. In the past, according to Art 38, each RT citizen had the right to health care through free medical assistance in governmental health care institutions. In accordance with the amendments, however, this right may only be enjoyed within the framework determined by the law.

Before introduction of the amendments, Art 41 of the Constitution envisaged that general secondary education is obligatory. The Government guarantees free general secondary education in the state educational establishments. In the new rendition, the word "secondary" has been replaced with "basic," which means 9-grade, that is, incomplete secondary education.

Keeping in mind the abovementioned amendments, a justified question arises: "How can something of this kind even be possible in a social state?"

The provisions applying to election law, local self-government bodies, rendering legal help to citizens, status of the public defender's office, and so on also contained disputed aspects and contradictions.

For example, it was proposed that Part 3 of Art 27 be rendered as follows: "Upon reaching the age of 18, a citizen has the right to participate in a referendum, vote, and be elected upon reaching the age set forth by the Constitution, constitutional laws, and laws." So, to be elected, the only requirement made of a citizen is that he or she has reached a certain age. But when defining the conditions for election or appointment to Parliament, the amendments added a provision on the need for a candidate for Parliament deputy to have a higher education (Parts 1 and 5 of Art 49). This requirement contradicts not only the provisions of the Constitution itself, but also the international acts on human rights recognized by Tajikistan.

In the current rendition of Para. 1, Part 3, Art 89 of the Constitution, one of the powers of the Constitutional Court was indicated as "determining whether laws and legal acts of the Majlisi Oli ... are in accordance with the Constitution." In the new rendition, it is proposed that the words "joint legal acts of the Majlisi milli and Majlisi namoiandagon" replace the words "legal acts of the Majlisi Oli." This means that if either of the houses adopts acts contradicting the Constitution, the Constitutional Court cannot examine them for their constitutionality.

The nature of the amendments brought up at the referendum shows the clear inconsistency of their authors with respect to the role of constitutional law in regulating state institutions. For example, on the one hand, according to the Constitution, the procedure for establishing, performing the activity, and executing the powers of the Government, local power bodies, courts of all levels, public prosecutor's office, and public defender's office is determined by constitutional law (Arts 74, 78, 83, 84, 92, 95). But the new rendition of Part 5 of Art 78 envisages that "the self-government body of a settlement and village is the jamoat, the procedure for establishing, executing the powers, and performing the activity of which is regulated by the law." This approach seems to contradict logic, since local self-government, which is a direct expression of the grass-roots power of the people, is the basis for developing the state and civil society.

So the results of the analysis we carried out make it possible to conclude that due to violation of the procedure for drawing up and bringing the proposed amendments and additions to the RT Constitution to a national vote, the legitimacy of the referendum held on 22 June, 2003 and its results are subject to doubt.

Instead of being brought up for national discussion, a whole series of issues was resolved bureaucratically, hastily, and very contradictorily. In our opinion, the proposals for amendments and additions to the Constitution should be adopted in the first reading with submission for general discussion and only then the results summarized and the final text adopted. If this had been done, it could then be confirmed that the referendum was held with adherence to all the democratic regulations.

Conclusions

So it can be stated that processes are going on (although slowly) in Tajikistan aimed at establishing constitutionalism. Furthermore, the clear insufficiency of the country's own experience is made up for by borrowing from the constitutional legislation of countries with developed democracies. This has made it possible to reflect world experience of constitutional development in the RT Constitution and ensure a sufficiently high level of legal technicality. Many ideas (law-based state, rule of law, and so on) and the basic trends of world constitutional development have been set forth in the RT Constitution.

Nevertheless, the reality of the transitional process turned several provisions of the 1994 RT Constitution into a declaration of intentions. After the end of the civil war and reconciliation of the conflicting sides, a Tajik state was formed that is increasingly acquiring the features of authoritarianism; the trends of its legislative execution have been developing against the background of inconsistency, contradictoriness, and incompleteness of the constitutional processes.

Political will is required for constitutionalism in Tajikistan to become a reality. This is precisely what is needed to carry out constitutional reform. Despite the fact that amendments and additions have been introduced twice to the 1994 RT Constitution (in 1999 and 2003), it still requires further improvement.

In our opinion, for successful advance of the democratic processes in the country, the following amendments and additions should be made to the RT Constitution:

- (1) The mechanism for implementing the separation of powers, as well as the system of checks and balances in executing state power should be reexamined.
- (2) The Constitutional Court should be endowed with the right to officially interpret the Constitution and laws.
- (3) The question of the permanent status of the Majlisi milli should be resolved or it should be eliminated.
- (4) The powers of the Government (including the powers of the Prime Minister) should be determined, as well as its place in the state power system.
- (5) The organizational and legal principles should be determined for the representative and executive local power bodies to operate on an independent basis.
- (6) The electability and independence of local self-government bodies should be ensured on the basis of decentralization principles.
- (7) The Majlisi namoiandagon should be endowed with the right of parliamentary control over the executive power branch as a whole, including with respect to executing the state budget.
- (8) The establishment of an institution of parliamentary Human Rights Ombudsman should be envisaged.
- (9) The fundamental principles and goals of the country's socioeconomic development, including state support of private business, should be enforced.
- (10) A mechanism should be established for ensuring the direct effect of and principles for executing the Constitution, and so on.

A system of RT law sources should also be enforced in the Constitution. Cooperation with Russia within the CIS is making it urgent to improve translation of the Constitution from Tajik into Russian. Today, around 150 terminological inaccuracies have been found in the current text of the RT Constitution during its translation into Russian.

Implementation of Part 4 of Art 10 of the Constitution, which says that “international legal acts recognized by Tajikistan enter into force after their official publication,” must be urgently resolved.

The right of citizens to information is not enforced in the RT Constitution; it should be reflected in Art 30.

The characteristics of the Tajik state (legal, democratic, social) and main principles of the constitutional system (rule of law, national sovereignty, separation of powers, recognition of different forms of property, and creation of equal conditions for them, etc.) envisaged in the Constitution are the content of the contemporary theory of constitutionalism. But the declared constitutional principles and provisions do not always correspond to Tajikistan’s present-day reality.

Today, academic discussions are being held on a wide range of topics regarding the nature of the country’s constitutional development that encompass matters from reform of the Constitution to its complete revision. The most acceptable, in our opinion, are proposals for further enhancing the law within the framework of the current Constitution. As the most important regulator of social processes and the main legal system, the RT Constitution should keep in mind the political and legal reality and constitutional traditions of the country’s past. Only on this basis can values of domestic constitutionalism be formed. Furthermore, the accumulated experience should become the basis both for a critical analysis of the mistakes made and for further development.
