

# Human Rights, Limitations and States of Emergency in the 1994 Tajikistan Constitution

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The Constitution of the Republic of Tajikistan which was adopted on 6 November 1994, following a short Preamble, contains a total of 100 Articles under 10 Chapters.

From the human rights perspective, the present Constitution may be improved.

The basic characteristics of the Constitution in respect to human rights may be listed as follows:

## I. List and Scope of Human Rights

### a. General Principles

In the Preamble of the Constitution, among others, it is provided that "We, the people of Tajikistan, (...) Recognizing the rights and freedoms of the person as sacred, ...", (parag.4).

According to (Art. 5, parag.1), "the life, honor, dignity and other natural rights of the person are sacred".<sup>1</sup> It is important to observe that "recognition, observance and protection of the rights and freedoms of man and citizen are the obligation of State", (Art. 5, parag.2). In order to strengthen the rule of law, which is recognized by the formulation that "The Republic of Tajikistan is a...democratic, law-governed...State" (Art. 1), it may be advisable to formulate the nature of the State as "based on human rights".

Rights and freedoms of individuals and citizens are protected by the Constitution, the laws of the Republic and international acts recognized by Tajikistan, (Art. 14, parag.1).

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<sup>1</sup> With regard to (Art. 5, parag.1), the formulation of "other natural rights" may invite further discussions on which rights should be considered within this term. For instance, could the "right to property" be accepted within this concept?

Also (Art. 10, parag.3) provides that "international legal acts"<sup>2</sup> recognized by Tajikistan are incorporated into national law and have the status of supremacy in case of contradiction between international and domestic norms. This is a very positive provision, but needs to be rewritten. Due to lack of any clarification to identify which international legal instruments could be considered as having the status of supremacy, the wording of (parag.3) of this provision may create serious legal problems.<sup>3</sup> "International human rights instruments" may replace it. Furthermore, even the original or the suggested formulation above could be accepted, it is important to note that, the terms "acts" or "instruments" or "documents" are so wide. It covers that, not only legally binding conventions/ treaties, but also declarations/resolutions (e.g., Universal Declaration of Human Rights/UN, 1948, etc.) and "soft law" or "law of non-binding character" (such as, OSCE Documents) instruments should be considered within the framework of those concepts.

The basic prerequisites such as the fundamentals of a democratic State based on human rights, the separation of State power (Art. 9), the principal of political and ideological pluralism (Art. 8), the prohibition of seizing State power by any social group or individual (Art. 6, parag.3), the principle of peaceful policy to be pursued at both internal and international level (Art. 11, parag.2 and Preamble, parag.5) and finally the duty imposed to the State and all authorities to be bound to observe and implement the Constitution and laws (Art. 10, parag.2) should be underlined in this context.

When the provisions "No social association, group of people or individual has the right to seize State power" and "The seizure of power is a specially serious crime"(Art. 6, parag.3 and 4) and "The establishment and functioning of social associations that...advocate the forcible overthrow of the constitutional structure and the formation of armed groups is prohibited" (Art. 8, parag.5) are read in conjunction, it may be commented that these provisions reflect the special conditions of the transition period of the Tajikistan.

### **b. The Place of Human Rights within the Systematic of the Constitution**

Human rights is mainly placed under Chapter Two, (Art. 14-47). This covers a total number of 34 Articles. The subheading of Chapter Two is "Rights, Freedoms and Duties of Man and Citizen".

2 Presumably, the term "legal acts" should be read as "instruments" or, as "documents" which is used in one of the other unofficial English version of the Constitution.

3 For instance, if the Republic of Tajikistan may sign a bilateral agreement containing a provision which contravenes a right or a freedom of citizens already stipulated even in the Constitution of Tajikistan, is the supremacy still given to this instrument?

It has to be noted that the placement of the "Rights and Freedoms" as the second chapter of the Constitution is in conformity with the constitution writing of the Western tradition and the system of liberal constitutions. In the socialist constitutions or the constitutions of the countries belonging to "traditional cultural circles", this systematic is different. Generally, the provisions and chapters on the structure of the State, its organs and powers are placed first, the chapter on the rights and duties follows.

One of the other concrete distinctions relates to the list and scope of the provisions on "duties" imposed to individuals and citizens. In the liberal constitutional models the list of duties provided for persons is, generally speaking, much shorter than, for instance, compared with the socialist constitutions.

These two different systems or methods of drafting in fact reflect consequence of distinct understanding and approach. Simply saying, the placement of basic/fundamental rights and freedoms in the preliminary chapters is the consequence of an understanding that, such rights has always the priority, they are inherent to human beings, so inviolable and inalienable and the State organs have to be formed in order to provide guarantees to human rights and what and which manner they have to be implemented. Contrarily, second approach is based on an assumption that, what is so called human rights could only be the rights and freedoms materialized and implemented following their recognition by the relevant State organs.

So, the Tajikistan Constitution of 1994, within this particular perspective, is close to liberal constitutional models. However, the formulations of rights and freedoms within various provisions of this text, on the other side, gives an impression of an influence of Soviet legacy.

### **c. The List of Human Rights**

The main shortcomings is that the rights and freedoms placed in the 1994 Constitution are not written in a systematic way and the Constitution does not provide a full list of human rights.

The Constitution also places the terms of "man" and "citizen" as the subjects of the rights and freedoms. Rights applicable to humans/individuals automatically apply to citizens, but not vice versa.

#### **1. Civil and Political Rights**

The list of human rights in the Constitution which may be categorized as "fundamental rights and freedoms" are as follows:

Right to citizenship (Art. 15); prohibition of extradition of citizen (Art. 16, parag.1); equality before law and courts regardless of any distinction (Art. 17, parag.1), equality between men and women (Art. 17, parag.2); right to life (Art. 18, parag.1); prohibition of torture and other forms of ill-treatment and personal inviolability (Art. 18, parag.3); right to judicial protection and partly right to fair trial (Art. 19, parag.1); right to liberty and security (Art. 19, parag.2); the principle of presumption of innocence (Art. 20, parag.1); principles relating to offences and penalties (Art. 20, parag.2-4); safeguard the rights of victim (Art. 21); inviolability of domicile (Art. 22), privacy of correspondence and ban on the storage and dissemination of information on private life (Art. 23); freedom to choose residence and right to leave and return to the country (Art. 24); right to access documents (Art. 25); right to freedom of religion (Art. 26); right to participate political life and right to elect and to be elected (Art. 27); equal rights to State service (Art. 27, parag.2); right of assembly, including establishment of trade unions, political parties and other social associations (Art. 28); right to demonstrations (Art. 29); freedom of expression and ban on the State censorship (Art. 30, parag.1 and 2); ); right to petition (right to apply to the authorities) (Art. 31); right to property and inheritance (Art. 32) (protection of intellectual property, (Art. 40, parag.3); right to marry and form family (Art. 33, parag.2).

Rights recognized for and duties imposed to foreigners are another issue which needs to be regulated separately. According to (Art. 16, parag.2), "foreign citizens and stateless persons are accorded rights and freedoms and have the responsibilities and duties of citizens of Tajikistan except in cases specified by law". And (parag.3) of the same provision provides that, Tajikistan will offer political asylum to foreign citizens whose human rights are violated.

There are no general and specific norms on, for example, "right to recognition as a person before the law", "right to name", "freedom of thought and opinion", "freedom of science and art", "freedom of communication", "freedom of conscience and conviction", "prohibition of discrimination", "protection of privacy of family life", etc.

## ***2. Economic, Social and Cultural Rights***

According to (Art. 1, parag.2) of the Constitution, "Tajikistan is a social State, its policy aimed at providing decent living conditions and free development of man."

In pursuance to the principle of "social State" the rights, opportunities and protection duties in relation to the economic, social and cultural rights category are listed by the Constitution as follows:

Protection of family and prohibition of polygamy (Art. 33); protection of women and children (Art. 34); right to work, right to equal wages for equal work (Art. 35, parag.1 and 2); with a reference to the exception provided by law, prohibition of forced labor (Art. 35, parag.3); prohibition of using women and child labor in heavy labor (Art. 35, parag.4); right to housing (Art. 36); right to rest and paid leave (Art. 37); right to health (Art. 38); right to social security (Art. 39); right to take part in cultural life (Art. 40); right to education (Art. 41).

There is no specific provision in the Constitution for the "protection of vulnerable groups". For instance, duty to protect "widows" and "aged" is not mentioned. Regarding this issue, the provisions of (Art. 34, parag.3) "the State provides protection...orphaned children and the disabled" and (Art. 39) "everyone is guaranteed social security in old age, sickness, disability, loss of ability to work and loss of a guardian and other instances" may be taken into consideration. However these provisions are not sufficient Constitutional norms for the protection of vulnerable groups.

Also there are no provisions in relation to "right to strike" and as a specific group, the "rights of youth". (Art. 34, parag.2) provides that "adult children of working age are responsible for care and provision of parents". This is the only norm referring to youth/adult children. The protection of youth, for example, from alcohol and drug addiction, etc. and from exposure to violence could also be included.

#### **d. Focusing on Particular Rights and Freedoms**

As some of the examples below demonstrate, in the present Constitution many of the rights which have distinct nature and scope were placed in the same Article. This may cause serious confusion with both understanding and implementing the Constitution.

Even though it is not an absolute necessity, the use of subtitles to clarify the scope of Articles should be considered.

##### ***1. Principle of Equality***

(Art. 17, parag.1/first sentence) provides that "All are equal before the law and courts." This norm refers to legislature and judicial powers. The equality before executive/administrative organ is also an indispensable part of it.

(Parag.2) of this Article underlines that "Men and women have the same rights." In the Draft text of the Constitution (see, Art. 18 of the Draft) this provision did not take place. It is understood that the inclusion of mentioned

second paragraph to the (Art. 17) of the final text of the Constitution was considered useful for guaranteeing woman rights.

As a consequence of men and women equality principle, (Art. 33, parag.2) provides that "In family relations and in divorce, husband and wife have equal rights. Polygamy is prohibited." All of these provisions reflect one of the Fundamentals of the Constitutional Structure which identifies the Republic as a "secular State", (Art. 1).

Also (Art. 27, parag.2) which provides "Citizens have equal rights to State service" and (Art. 35, parag.2/last sentence) which provides the rule of "equal wage for equal work" may be listed in the context of principle of equality.

Having equal rights and freedoms, receiving equal protection, benefiting equal opportunities and carrying out equal duties and obligations necessitates the prohibition of discrimination and/or distinction.

The Constitution of 1994 does not contain a specific norm which focused on the prohibition of discrimination. Particularly in the countries where ethnic, linguistic, religious, national, etc. groups are present a specific provision on the ban of discrimination would be functional.

(Art. 17, parag.1/second sentence) provides that "The State guarantees the rights and freedoms of every person regardless of nationality, race, sex, language religious beliefs, political persuasion, education, social status and property." Here, a total of 9 elements enumerated. For instance, the UN Covenant on Civil and Political Rights (Art. 2, parag.2) provides that "...the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The Inter-American Convention on Human Rights (Art. 1, parag.1) regulates that rights and freedoms recognized herein "...without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.". The problem of (Art. 17, parag.1/second sentence) is that, it does not mention some particularly important elements, such as "ethnicity" and omit to include the phrase "such as" or "others" which might be useful to provide a full list of possible discrimination grounds.

## ***2. Right to Life and the Problem of Capital Punishment***

Right to life is recognized in (Art. 18) of the Constitution. The rule is laid down in (parag.1) of this Article: "Every person has the right to life."

### i. Commencement of Right to Life

Within the scope of the right to life the first question is related to the determination of the commencement of this right. This question is, on the other hand, directly related to women rights. Neither in the provision on the right to life nor in that rights on the woman of the Constitution does this issue find any explanation.

If right to life is protected from the moment of conception, this then raises discussions on the subject of woman rights specifically and individual rights in general under which restrictions may be imposed on the inviolability of human beings physical integrity. As the "State guarantees the inviolability of a person" (Art. 18, parag.3, first sentence), it may be debatable, what the consequence of this norm is within the particular context of a woman's rights related to her full control on her physical entity.

### ii. Use of Lethal Force

With regard to right to life one of the other vital subjects is the use of force by the public authorities.

While considering the recognition of the authority to use of force by law enforcement officials some basic principles have to be taken into account. For instance, the use of force could be permitted "only when strictly necessary" and "to the extent required for the performance of the duty". Such formulation as it is the case in various Constitutions and international instruments<sup>4</sup>, restricts the use of force by officials in accordance with the principle of proportionality and clarifies the obligation that the application of force should be always limited to the legitimate objective to be achieved.

In any case, the use of firearms is considered an extreme measure and every effort should be made to exclude the use of firearms. For instance, the UN document entitled "Basic Principles on the Use of Force and Firearms by Law

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4 For instance, (Art. 3) of the "Code of Conduct for Law Enforcement Officials" which is adopted by the UN General Assembly Resolution 34/169 of 17 December 1979.

(Art. 2, parag.2) of the European Convention on Human Rights provides that,

"Article 2

1. (...)
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary;
  - (a) in defense of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Enforcement Officials" of 1990 (Chapter "General provisions", parag.4) provides that, "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before restoring to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."<sup>5</sup> Also (parags.5, 6, 7, 8, 9, 10, 14, 16) of the UN Basic Principles of 1990 should be carefully examined.

(Art. 18) of the present Constitution provides no provision on this issue. This is a serious and big gap. The exception recognized in (parag.2) of this Article is regulated specifically for death penalty and does not cover the exception of the use of force. On the other hand, the relevant legislation of Tajikistan recognizes the use of force, including firearms by the law enforcement officials.

Therefore, the restrictions on the possible use of force and firearms by the law enforcement officials should be precisely included into the (Art. 18) of the Constitution.

### iii. Capital Punishment

In the provision (Art. 18, parag.2) an exception is recognized: "No one can be deprived of life except by order of the court for a specially serious crime". This is the acceptance of "*capital punishment*" within the Tajikistan legal order.

According to the Criminal Code of Tajikistan, which is in force by the March 1998, a total number of 41 crimes meet with capital punishment.<sup>6</sup>

<sup>5</sup> The "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials" is adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>6</sup> The list of Articles of the Criminal Code punishable with death penalty are as follows: Art. 61-treason against the fatherland; Art. 62-espionage; Art. 63-terroristic act; Art. 64-terroristic act against the representative of foreign State; Art. 69-organizing activity directed on especially dangerous State crimes; Art. 74-banditry; Art. 76-contraband; Art. 85-preparing and selling of bad money or value papers; Art. 86-violation rules on currency operations; Art. 91-robbery with the aim to get State or public property; Art. 95-exortion of State or public property; Art. 104-murder; Art. 121-rape; Art. 135-false imprisonment; Art. 155-theft; Art. 156-robbery; Art. 186-getting of a bribe; Art. 206 (1)-offense against the life of a militiaman or combatant; Art. 227-steal of transport; Art. 228 (2)-steal of air transport; Art. 234 (1)-illegal carrying, keeping, buying and selling of guns and explosive; Art. 234 (2)-illegal carrying, keeping, buying and selling of poniards and Finnish daggers; Art. 240-illegal preparing, getting, keeping or selling of drugs; Art. 240 (1)-waste of drugs; Art. 241-sowing of growing prohibited crops, containing drugs; Art. 248-disobedience; Art. 250-resistance to the chief or forcing him to violate official



Recognition or abolition of death penalty is a highly contentious. It is true that, many States and some international instruments<sup>7</sup> recognize this penalty.

On the other hand a clear tendency towards abolition is undeniable. For instance, almost all West European countries have abolished it. Also many of the East European countries which have made applications for membership of the Council of Europe and being a party to the European Convention on Human Rights (ECHR) have either already abolished capital punishment or are in the process of doing so. For instance, the Georgian Parliament, on the proposal of the President, abolished the death penalty on 24 July 1997. In the new Penal Code of Poland which entered into force on 1 January 1998, death penalty has been replaced by life sentence. Ukraine was admitted to the Council of Europe in 1995. Its admission was conditioned on the abolition of death penalty. In May 1997, Ukraine signed Protocol No. 6 of the ECHR, but has not yet ratified it.<sup>8</sup>

Moreover, (Art. 22, parag.3) of the Constitution of the Republic of Romania (December 1991) provides that "the death penalty is prohibited."<sup>9</sup> (Art. 21, parag.2) of the Constitution of the Republic of Croatia (22/12/1990) provides that "in the Republic of Croatia there shall be no capital punishment."<sup>10</sup> (Art. 10, parag.2) of the Constitution of the Republic of Macedonia (17/11/1991) provides that "the death penalty shall not be imposed on any grounds whatsoever in the Republic of Macedonia."<sup>11</sup> (Art. 15, parag.3) of the Constitution of the Slovak Republic (03/09/1992) provides that "the death penalty shall be inadmissible."<sup>12</sup> (Art. 17) of the Constitution of the Republic of

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duties; Art. 251-threat of the chief; Art. 259-draft evasion; Art. 261-wilful destruction or injuring of military property; Art. 265-violation of fixed rules of guard duties; Art. 267-violation of rules of battle shifts; Art. 270-abuse, transgression, nonfeasance of authority; Art. 271-surrendering or leaving means of hostility to enemies; Art. 272-leaving of sinking military ship; Art. 273-wilful leaving of war place or rejection to use the gun; Art. 274-voluntary surrendering capacity; Art. 276-plunder; Art. 277-commit violence upon population in the districts of military actions.

7 cf., UN Covenant on Civil and Political Rights, Art. 6, parag.1-6; the European Convention on Human Rights, Art. 2, parag.1-2; the Inter-American Convention on Human Rights, Art. 4, parag.1-6.

8 OSCE Implementation Meeting on Human Dimension Issues, Warsaw, 1997, Report by the International Helsinki Federation for Human Rights, p:156-158.

9 *The Rebirth of Democracy: 12 Constitutions of Central and Eastern Europe*, Council of Europe Press, the Netherlands, 1995, p:429-493, especially 435.

10 *The Rebirth of Democracy*, p:67-113, especially 75.

11 *The Rebirth of Democracy*, p:333-378, especially 337.

12 *The Rebirth of Democracy*, p:497-551, especially 501.

Slovenia (23/12/1991) provides that "there shall be no capital punishment in Slovenia."<sup>13</sup>

Within the international sphere, specific Protocols on the abolishment of capital punishment have been produced and came into force. For example, the Second Optional Protocol to the UN Covenant on Civil and Political Rights aiming at the abolition of death penalty (1989)<sup>14</sup>; Protocol No. 6 to the European Convention on Human Rights concerning the abolition of death penalty (1983)<sup>15</sup> and the Protocol to the Inter-American Convention on Human Rights to abolish the death penalty (1990)<sup>16</sup> may be given under this category.

13 *The Rebirth of Democracy*, p:555-616, especially 560.

14 The Second Optional Protocol to the UN Covenant on Civil and Political Rights, aiming at the abolition of death penalty (adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989) (entered into force 11/07/1991) provides that,

"Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary General of the United Nations the relevant provisions of its national legislation applicable during wartime.
3. The State Party having made such a reservation shall notify the Secretary General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.
2. Without prejudice to the possibility of a reservation under Article 2 of the present Protocol, the right guaranteed in Article 1, paragraph 1 of the present Protocol shall not be subject to any derogation under Article 4 of the Covenant."

15 Protocol No. 6 to the European Convention on Human Rights concerning the abolition of death penalty (28/04/1983, entered into force 01/03/1985) provides that,

"Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Also OSCE documents which signatory States commit to refer to the abolishment of capital punishment. Relevant OSCE documents are as follows: The Concluding Document of the Vienna Meeting on the follow-up to the Conference (15 January 1989) (parag.24)<sup>17</sup>; the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) (parag.17.1 to 17.8)<sup>18</sup>; the Document of the Moscow Meeting of the

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Article 3

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4

No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol."

16 The Protocol to the Inter-American Convention on Human Rights to abolish the death penalty (08/06/1990, this Protocol enters into force on the date of the ratification by the each State Party) provides that,

"Article 1

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

Article 2

1. No reservations may be made to this Protocol. However, at the time of ratification or accession, the State Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.
2. The State Party making this reservation shall, upon ratification or accession, inform the Secretary General of the Organization of American States of the pertinent provisions of its national legislation applicable in wartime, as referred to in the preceding paragraph.
3. The said State Party shall notify the Secretary General of the Organization of American States of the beginning or end of any state of war in effect in its territory.

Article 4

This Protocol shall enter into force among the States that ratify or accede to it when they deposit their respective instruments of ratification or accession with the General Secretariat of the Organization of American States."

17 The Vienna Document of 1989, "Questions relating to Security in Europe", parag.24 provides that,

"24. With regard to the question of capital punishment, the participating States note that capital punishment has been abolished in a number of them. In participating States where capital punishment has not been abolished, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to their international commitments. This question will be kept under consideration. In this context, the participating States will co-operate within relevant international organizations."

18 The Copenhagen Document of 1990, Chapter II, parag.17 provides that,

"(17) The participating States

Conference on the Human Dimension of the CSCE (3 October 1991) (Chapter II, parag.36)<sup>19</sup>; the CSCE Helsinki Document 1992: The Challenges of Change (10 July 1992) (the section of the Document entitled as "Helsinki Decisions", Chapter VI/The Human Dimension, parag.58)<sup>20</sup>; the Budapest Document (06

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- (17.1)- recall the commitment undertaken in the Vienna Concluding Document to keep the question of capital punishment under consideration and to co-operate within relevant international organizations;
- (17.2)- recall, in this context, the adoption by the General Assembly of the United Nations, on December 1989, of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;
- (17.3)- note the restrictions and safeguards regarding the use of the death penalty which have been adopted by the international community, in particular Article 6 of the International Covenant on Civil and Political Rights;
- (17.4)- note the provisions of the Sixth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty;
- (17.5)- note recent measures taken by a number of participating States towards the abolition of capital punishment;
- (17.6)- note the activities of several non-governmental organizations on the question of the death penalty;
- (17.7)- will exchange information within the framework of the Conference on the Human Dimension on the question of the abolition of the death penalty and keep that question under consideration;
- (17.8)- will make available to the public information regarding the use of the death penalty."

19 The Moscow Document of 1991, Chapter II, parag.36 provides that,

"36. The participating States recall their commitment in the Vienna Concluding Document to keep the question of capital punishment under consideration and reaffirm their undertakings in the Document of the Copenhagen Meeting to exchange information on the question of the abolition of the death penalty and to make available to the public information regarding the use of the death penalty.

36.1 They note,

- i. That the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty entered into force on 11 July 1991;
- ii. That a number of participating States have recently taken steps towards the abolition of capital punishment;
- iii. The activities of several non-governmental organizations concerning the question of death penalty."

20 Helsinki Document of 1992, Chapter VI, parag.58 provides that,

"Capital punishment

The participating States,

(58) Confirm their commitments in the Copenhagen and Moscow Documents concerning the question of capital punishment".

December 1994) (Chapter VIII, parag.19)<sup>21</sup> and the Lisbon Document (1996) (parag.9).<sup>22</sup>

There are two options for abolition. The first is the abolition of capital punishment entirely and without exception. The second is abolition with recognition of exception in respect of crimes committed during a state of war. In the latter case, the State concerned may keep this penalty in force only for "gravest/(most serious) crimes" of a "military nature" perpetrated specifically in the period of officially declared state of war. International human rights instruments mentioned above recognize the dualism of "state of peace" and "state of war". Thus, these instruments give the opportunity to possible State Parties of these Protocols either to abolish capital punishment as a whole for both peace and wartime or to keep it only for a state of war exception.

#### iv) Limitations on the Application of Capital Punishment

Furthermore, if the death penalty is recognized, it has to be clearly limited by other substantial and procedural rules. One of the useful references in this regard might be the UN document of "Safeguards guaranteeing protection of the rights of those facing the death penalty" (1984).<sup>23</sup>

The provision of (Art. 18, parag.2) of the Constitution already mentions two such safeguards. They are the necessities to provide an "order of the court" and to satisfy the condition of "specially serious crime".

The conceptualization of "specially serious/gravest crime" invites the question of which crimes should be categorized under this category. It is true

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21 The Budapest Document of 1994, parag.19 provides that,

"Capital punishment

19. The participating States reconfirm their commitments in the Copenhagen and Moscow Documents concerning the question of capital punishment."

22 The Lisbon Document of 1996, parag.9 provides that,

"9. The OSCE's comprehensive approach to security requires improvement in the implementation of all commitments in the human dimension, in particular with respect to human rights and fundamental freedoms. This will further anchor the common values of a free and democratic society in all participating States, which is an essential foundation for our common security. Among the acute problems within the human dimension, the continuing violations of human rights, such as involuntary migration, and the lack of full democratization, threats to independent media, electoral fraud, manifestations of aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism, continue to endanger stability in the OSCE region. We are committed to continuing to address these problems."

23 "Safeguards guaranteeing protection of the rights of those facing the death penalty". This instrument was adopted by Economic and Social Council, (Resolution 1984/50 of 25 May 1984.)

that relevant international human rights instruments refer to this concept. But when focusing on the domestic legislation this term needs to be clarified. Presumably there is a need to refer to the Criminal Code of Tajikistan. In any case, the Constitution might provide at least a guiding norm on this issue. For instance, "capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences", (UN Document of 1984, parag.1).

It may be appropriate to recommend the inclusion of some more elements and clarifications to the Constitution (Art. 18) if capital punishment is to be kept in force. For instance, for the imposition of death penalty and execution the following safeguards must be regulated:

- there must be a "final judgement" rendered by a "competent court" in accordance with a "law establishing such punishment", "enacted prior to the commission of the crime";
- mandatory appeal to a court of higher jurisdiction;
- no execution during any appeal or other recourse;
- it shall not be imposed upon "persons who, at time the crime was committed, were under 18 years of age"<sup>24</sup> or "over 65 (or 70) years of age";
- it shall not be "inflicted for political offences or related common crimes";
- persons convicted to death shall have "right to seek/apply amnesty, pardon or commutation of sentence";
- it shall not be carried out on "pregnant women" or on "new mothers" or on "persons who have become insane", etc.

### 3. Freedom from Torture

#### i. Scope of Prohibition of Torture

According to (Art. 18, parag.3, second sentence) of the Constitution, "No one shall be subjected to torture, severe/harsh (punishment) and inhuman treatment".<sup>25</sup>

<sup>24</sup> The UN Convention on the Rights of the Child which is adopted by General Assembly resolution 44/25 of 20 November 1989 (entered into force 02/09/1990) (Art. 37, paragraph a/second sentence) provides that,

"Article 37

(a) (...) Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

<sup>25</sup> In the English version of the Tajikistan Constitution (Art. 18, parag.3, second sentence) it is

This formulation, in general terms, is in conformity with the relevant international norms. But it still has some omissions. This provision does not include the terms of "cruel and degrading treatment and punishment". However international instruments<sup>26</sup> and case law puts clear distinction between the concepts of "torture", "cruel treatment", "cruel punishment", "degrading treatment", "degrading punishment", "inhuman treatment" and finally "inhuman punishment". In other words, within international human rights law, the right to freedom from torture covers a total of seven distinct subcategories.

It is important to keep in mind that, "neither any exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, nor an order from a superior officer or a public authority may be invoked as a justification of torture".<sup>27</sup>

Regarding prevention of torture and ill-treatment also some of the OSCE documents may be taken into consideration. For instance, The Concluding

provided that "No one will be subjected to torture, punishment, and inhuman treatment", (see, *Constitutions of the Countries of the World*, Gisbert H. Flanz (editor), Section/Republic of Tajikistan, translation by Patricie Hermanska Ward, Release 95-7, Issued Nov. 1995, Oceana Publications, Inc., Dobbs Ferry, New York, p:27-46. This must be a wrong translation. Because, it provides that, "no one will be subjected to...punishment...".

26 For instance, the UN Covenant on Civil and Political Rights (Art. 7) provides that,  
"Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The UN Convention on the Rights of the Child (Art. 37, parag.a/first sentence) provides that,  
"Article 37

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment..."

The Inter-American Convention on Human Rights (Art. 5) provides that,  
"Article 5- Right to humane treatment

1. Every person has the right to have his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person..."

The European Convention on Human Rights (Art. 3) provides that,  
"Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The gap of the lack of the term 'cruel' in this Article is filled by the case law of the European Commission and the European Court of Human Rights.

27 See, (Art. 2, parag.2 and 3) of the UN Convention against Torture; (Art. 5) of the UN Document "Code of Conduct for Law Enforcement Officials"; (Art. 5) of the Inter-American Convention to Prevent and Punish Torture.

Document of the Vienna Meeting on the follow-up to the Conference, 1989 (Chapter entitled "Questions relating to Security in Europe", parag.23.1 to 23.6)<sup>28</sup>; the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990 (parag.16.1 to 16.7)<sup>29</sup>; Charter of Paris for a New Europe (21 November 1990) (Chapter, "Human Rights, Democracy and the Rule of Law")<sup>30</sup>; Budapest Document, 1994 (Chapter VIII, parag.20)<sup>31</sup> and the Lisbon Document (1996) (parag.9) are among them.

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28 The Vienna Document of 1989, parag.23 provides that,

"23. The participating States will;

23.4 prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices;

23.5 consider acceding to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, if they have not yet done so;

23.6 protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and take effective measures to prevent and punish such practices".

29 The Copenhagen Document of 1990, parag.16.1 to 16.7 provides that,

"(16) The participating States,

16.2 intend, as a matter of urgency, to consider acceding to the Convention against Torture..., and recognizing the competencies of the Committee against Torture under articles 21 and 22 of the Convention and withdrawing reservations regarding the competence of the Committee under article 20;

16.4 will ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;

16.7 will act upon the understanding that preserving and guaranteeing the life and security of any individual subjected to any form of torture and other inhuman or degrading treatment or punishment will be the sole criterion in determining the urgency and priorities to be accorded in taking appropriate remedial action..."

30 The Charter of Paris for a New Europe of 1990 provides that,

"... no one will be;

(...)

subject to torture or other cruel, inhuman or degrading treatment or punishment."

31 The Budapest Document of 1994, parag.20 provides that,

"Prevention of torture

20. The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination. They recognize the importance in this respect of international norms as laid down in international treaties on human rights, in particular the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. They also recognize the importance of national legislation aimed at eradicating torture. They



Also, common (Art. 3) of the Geneva Conventions of 1949 should be considered in this context.<sup>32</sup>

Moreover, experience shows that, torture and other forms of ill-treatment and severe punishment are not applied only to obtain information or confession. The motives are laid behind such actions varies. Due to observation of this fact, international human rights instruments produced and focused on this particular right provided a full definition regarding torture. Among them<sup>33</sup>, (Art. 1) of the UN "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment" (10/12/1984, entered into force 26/06/1987) has to be underlined.<sup>34</sup>

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commit themselves to inquire into all alleged cases of torture and to prosecute offenders. They also commit themselves to include in their educational and training programmes for law enforcement and police forces specific provisions with a view eradicating torture. They consider that an exchange of information on this problem is an essential prerequisite. The participating States should have the possibility to obtain such information. The CSCE should in this context also draw on the experience of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment established by the Commission on Human Rights of the United Nations and make use of information provided by NGOs."

32 Common (Art. 3) of the Geneva Conventions of 1949 provides that,

"Article 3

(...)

1. (...)

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment;..."

33 Beside the UN "Convention against Torture", in an chronological order, the following documents may be listed, the "Inter-American Convention to Prevent and Punish Torture" (09 December 1985, entered into force 28 February 1987) and "The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" (26 November 1987, entered into force 01 February 1989).

(Art. 2) of the Inter-American Convention provides a definition for "torture". The wording and formulation is almost similar to the (Art. 1) of the UN Convention against Torture. The European Convention for the Prevention of Torture has a distinct scope and no definition of torture is given. This Convention is mainly focused on the preventive activities and measures which are carried out by the European Committee for the Prevention of Torture.

34 The UN "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment" (adopted by the UN General Assembly Resolution 39/46 of 10/12/1984) (Art. 1) provides that,

"Article 1

## ii. Evidence Obtained by Torture

The other important problem in this context is the legal validity of the information and confession obtained under torture and ill-treatment. Both the UN and Inter-American Conventions, respectively in (Art. 15) and (Art. 10) clarify that, "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings". It means that, according to international human rights law, in no case a legal validity may be given to such evidence.

It may be noted that, according to international human rights standards, all law enforcement officials are under obligation not to inflict, instigate or tolerate any act of torture or ill-treatment, (see, UN instrument of "Code of Conduct for Law Enforcement Officials" of 1979, Art. 5).<sup>35</sup>

This rule has two basic functions. First; the judiciary has been put under an obligation and also encouraged simply to dismiss and invalidate illegal evidence, *inter alia*, produced by the use of torture and ill-treatment by investigation and prosecution authorities. Second; either investigation or prosecution authorities are discouraged from illegal investigation and interrogation methods as testimony obtained shall not be invoked by the court, but may only be used against a person accused of torture.

It is needless to add that the inclusion of above mentioned rule to the provision of "right to freedom from torture" strengthens "right to liberty and security" and "right to fair trial and due process of law".

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1. For the purposes of this Convention, the term 'torture' means any act by which severe pain of suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain of suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".

35 The "Code of Conduct for Law Enforcement Officials" adopted by the General Assembly Resolution 34/169 of 17 December 1979, (Art. 5) provides that,

"Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

From this specific point of view, the relevant norm in the Constitution should also cover a precise formulation on the principle of “no justification of torture”.

Under the light of above information, the (Art. 18, parag.3) of the Constitution should be rewritten. And then, the offences of torture and other forms of ill-treatment and the invalidation of evidence obtained by the use of this method should be precisely regulated respectively in the Criminal and Criminal Procedure Codes in accordance with the relevant provisions of the Constitution.

#### **4. Right to Liberty and Security**

##### **i. Scope of the Right**

In relation to the right to liberty and security, (Art. 19, parag.2) provides the condition of “legality” for the arrest and detention and entitlement to legal assistance. It is evident that the right to liberty and security has crucial importance when the massive scale of violations is taken into account.

The rule of legality plays a preventive role against possible arbitrary arrest and detention. Rule of legality may be complete by the following rights:

- Anyone who shall be deprived of his liberty shall be “promptly informed of any charges against him”,
- “promptly brought before a judge” (to set the custody period in the Constitution is highly recommended and the usual practice),
- “entitled to trial within a reasonable time or release”,
- “entitled to have a court decision on the lawfulness of his detention”,
- “entitled to have a compensation in the case of unlawful arrest and detention”,
- “entitled to access his lawyer”, and also
- these persons should have the right that notification of his situation be made to the next of kin.<sup>36</sup>

Most of these elements are not provided by the (Art. 19, parag.2). This is a big and concrete gap to be urgently filled.

The interrelationship and dependence between “right to liberty and security” and “freedom from torture and other forms of ill-treatment” and “right to fair trial and due process of law” may be once again underlined.

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<sup>36</sup> cf., UN Covenant on Civil and Political Rights, Art. 9, parag.1-5; the European Convention on Human Rights, Art. 5, parag.1-5; the Inter-American Convention on Human Rights, Art. 7, parag.1-7.

## ii. Banishment

(Art. 19, parag.2) also regulates that, "no one can be...exiled without a legal basis". The logical implication of this formulation is that the punishment or measure of "exile" is recognized in the Tajikistan legal order. The evacuation or ban on leaving certain places, for instance, in the cases of natural disasters, such as earthquake or epidemic diseases, is a different issue. Almost none of the democratic States recognize the institution of "exile" either as a preventive measure or punishment.

The term "exile" in the (Art. 19, parag.2) of the Constitution is in fact rooted in and borrowed from the Criminal Code of the Tajikistan. It may be assumed that more suitable English term would be "banishment". In deed, (Art. 21, parag.1/item 2) of the Criminal Code which is still in force recognizes banishment as a punishment among the list of penalties.

Whatsoever it could be, first, the term "exile/banishment" would be removed from (Art. 19, parag.2) of the Constitution and second, this institution recognized by the Criminal Code should be promptly abolished. The cancellation of this term from the relevant provision of the Constitution may encourage the process of the complete abolishment of this penalty from the penal legislation of the country.

## 5. Right to Fair Trial and Judicial Protection

### i. Items Provided regarding Right to Fair Trial

In relation to the right to fair trial and judicial protection, it is necessary to examine both (Art. 19, parag.1) and (Art. 20, parag.1-4). And also the principle of "equality before the courts" (Art. 17, parag.1) should be taken into account.

(Art. 19, parag.1), if it is possible to connect it with the right to fair trial, refers only to "competent and impartial court". The existence of a competent and impartial court is not enough to provide effective judicial protection.

On the other hand (Art. 20, parag.1-4) recognizes these principles:

- Presumption of innocence,
- Legality condition for criminal responsibility,
- Not to be tried or punished again for the same offence which has already been finalized by a court decision,
- Ban on the retroactive application of penal rules envisages heavier punishment,
- Principle on the retroactive application of penal rules if provides lighter punishment,
- Prohibition total confiscation of the property of a convicted.

In addition, the Constitution provides some other rights concerning the right to fair trial and due process of law, under not the Chapter Two on Rights and Freedoms, but under Chapter Eight (entitled as "The Courts"). The following rights and principles are listed:

- Independence of judicial power (Art. 84, parag.1);
- To be tried before a court established by a *constitutional law*<sup>37</sup> (Art. 84, parag.3);
- To be tried by an "ordinary court" or the ban on the establishment of "exceptional courts" (Art. 84, parag.5);
- To ensure equal rights to the parties in carrying out the court proceedings (Art. 88, parag.2);
- Public hearing with an exception provided by law (Art. 88, parag.3);
- To have an assistance of an interpreter if it needs be (the term "free" is omitted) (Art. 88, parag.3, second sentence) and
- Right to benefit from legal assistance (Art. 92, parag.1).

## ii. Gaps to be Filled

Either in criminal or civil law cases, the right to "fair trial and due process of law" is equipped by a series of particular principles and rights. For example, the existence of "independent court established by law", a "public hearing", to be tried "without undue delay", "right to appeal", "right to benefit from counsel". Especially in the criminal charges the following rights must be provided:

- Right to be informed promptly in a language which the accused understands of the nature and cause of the charge against him,
- to have adequate time and facilities for the preparation of defense,
- to be tried in his presence,
- to defend himself in person or through legal assistance,
- if necessary, to have free legal assistance
- if necessary, to have a free assistance of an interpreter,
- not to be compelled to testify against himself,
- not to be compelled to confess guilt, and also
- principle that criminal responsibility shall be personal.<sup>38</sup>

<sup>37</sup> The concept of "constitutional law" may attract some attention. According to the 1994 Constitution, the Parliament may adopt two different types of Laws/Codes. The first group of Laws may be classified as "ordinary laws" are adopted by majority vote of the total number of People's Deputies, (Art. 61, parag.1). The second category of laws are called as, "constitutional laws". Such laws are adopted by at least two-thirds of the total number of People's Deputies, (Art. 61, parag.2). So, the distinction between this two category of laws is mainly drawn by the procedure of their enactment

<sup>38</sup> cf., UN Covenant on Civil and Political Rights, (Art. 14; 15); the European Convention on Human Rights, (Art. 6; 7); the Inter-American Convention on Human Rights, (Art. 8, parag.1-5; Art. 9).

In addition the principle of "in dubio pro reo" must be included to the above list.

One may argue that some of these elements relating to "right to fair trial and due process of law" need to be regulated by relevant laws rather than being included in the Constitution. Due to the importance of strengthening Constitutional guarantees to human rights as guiding principles, placing fundamental elements of right to fair trial into the Constitution is to be recommended.

### 6. Freedom of Expression

With regard to right to freedom of expression, first, (Art. 30) has to be considered. "Everyone is guaranteed freedom of speech, publishing and the right to use means of mass information." The (parag.2) of this Article provides that "State censorship and prosecution for criticism is prohibited."

However, the Constitution also draws a framework to this basic right by limitations, exceptions and prohibitions.

#### i. Limitations

(Art. 30) contains no any specific limitation clause. But the general limitation clause provided in (Art. 14, parag.2) also covers the right to freedom of expression.<sup>39</sup> (Art. 14) enumerated four limitation criteria. They are applicable on the exercise of freedom of expression.

(Art. 14, parag.2) provides a very short list of limitation criteria. For example, "public health" or "public morals" are not among them.

The legal consequence of this lack may be clarified by giving an example. Suppose that someone is prosecuted because of publishing a book or writing an article or making a public speech or lecturing in a school to advocate child prostitute.<sup>40</sup> Such prosecution may find the ground of legitimacy by the protection of public morals. This person may simply raised the objection of unconstitutionality of his prosecution or any penalty or measure if applied to him. He may argue that, his freedom of expression guaranteed by the Constitution (Art. 30) can not be subjected to any limitation on the basis of public morals. Such an argument, from the strict legal interpretation perspective, particularly when the relevant international legal instruments are omitted, can not be simply dismissed.

<sup>39</sup> The scope and effects of this general limitation clause is analyzed below.

<sup>40</sup> It may be noted that, the present Criminal Code of Tajikistan recognizes a series of offences committed against public morals; see, especially, Chapter III "Crimes against Health and Dignity of Person".

In the light of present Constitutional norm, the legislation relates to freedom of expression has to be considered.

### ii. Exceptions

(Art. 30, parag.3) regulates the first exception. According to this paragraph, "the list of information constituting a State secret is defined by law." If this exception provided by the relevant legislation contain a long list it would be harmful for the freedom of expression. It is also important to have a precise definition of the term "State secret".

Within the context of exceptions also (Art. 6, parag.5) should be taken into account. It provides that "Only the President and the Supreme Assembly has the right to speak on behalf of all the people of Tajikistan". The purpose of this provision should be to provide a permanent legitimacy to the elected representatives of the people. However the formulation of this provision has a potential to result in possible restrictions to be imposed on the exercise of the right to freedom of expression.

### iii. Prohibitions

Three provisions of the Constitution, respectively (Art. 7), (Art. 8) and (Art. 11) provides propaganda and advocacy prohibitions. All of them is placed under Chapter One, "Fundamentals of the Constitutional Structure". It is clear that the purpose of these norms is to create special restrictions or fields of prohibited activities. The question arises in this particular context is that such prohibitions may have negative influence on the exercise of freedom of expression.

(Art. 7, parag.3/second sentence) regulates that "*Propaganda* and actions aimed at disunity of the State are prohibited."

According to (Art. 8, parag.5), social associations are prohibited to *encourage* racism, nationalism, enmity and hatred, or *advocate* forcible overthrow of the constitutional structure. This norm is directly related to right to freedom of association, but may also an effect on the freedom of expression.

(Art. 11, parag.2) of the Constitution provides that "*propaganda* of war is prohibited".<sup>41</sup> (Art. 11) is placed under Chapter One, "Fundamentals of the Constitutional Structure". As a State duty to avoid the agitation of war and to avoid the use of force for the settlement of disputes are in conformity with the international law and international humanitarian law.

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41 cf., UN Covenant on Civil and Political Rights, (Art. 20); the Inter-American Convention on Human Rights, (Art. 13, parag.5).

It has to be pointed out that, these type of propaganda prohibitions are potentially abused against political opponent circles. Such danger increases if the relevant provisions of the Criminal Code or other legislation (for example, Law on Press, Law on Associations, etc.) are not precisely formulated. Vague terms or concepts, unclear definitions, etc. may serve to impose antidemocratic and unfair sanctions or restrictions. Therefore, constitutional norms on the propaganda ban provide constitutional ground to repress political or social democratic opposition.

On the other hand, if such prohibitions is considered to be kept in force, it may be convenient to regulate these subjects by relevant legislation rather than the Constitution itself.

### 7. Freedom of Information

There is an inseparable linkage between rights to freedom of expression and freedom of thought/opinion and freedom of information. Freedom of information is a fundamental human right and requires as an indispensable element the willingness and capacity to employ its privileges without abuse.

(Art. 25) of the Constitution provides that, "every person has the opportunity to seek and see documents affecting their rights and interests except in cases anticipated by law." To access documents is a specific form of right to freedom of information and has a positive impact on freedom of expression.

The (Art. 25) raises two problems:

First, this right is also subjected to exception. This exception is perhaps related to "State secret" provided in the (Art. 30, parag.3). It is evident that, freedom of information also requires as a basic discipline the moral obligation to seek the facts without prejudice. In this connection, the information obtained should not be spread out with malicious intent.

Second, a right holder can not be benefited from right to access documents unless these documents *affect* his rights and interests. The term "affect" refers to the rule of "causality of interest". If causality of interest relationship will be considered in a strict and narrow sense, the application of this rule may cause serious restrictions on the enjoyment of right to access documents and so freedom of information.

But freedom of information has a wider scope and purpose. To access information sources is only a part of this basic human right. Free flow of information and opinion is an integral part of it.

It may be added that, "Access by the public to information should be guaranteed by the diversity of the sources and means of information available to



it, thus enabling each individual to check the accuracy of facts and to appraise events objectively. To this end, journalists must have freedom to report and the fullest possible facilities of access to information. Similarly, it is important that the mass media be responsive to concerns of peoples and individuals. Thus promoting the participation of the public in the elaboration of information".<sup>42</sup>

Especially (Art. 25) and as far as it is related to the subject (Art. 30) of the Constitution are not fully in conformity with the above mentioned scope and aim of freedom of information.

### **8. Freedom of Publishing**

Freedoms of publishing, press and mass media are special appearances of freedom of expression. Generally in the Constitutions these freedoms are regulated independently, rather than in the provision of freedom of expression.

If the term "publishing" would not be interpreted as covering the term "press", it is possible to conclude that the "freedom of press" is omitted in the Constitution despite the existence of the provision on "freedom of publishing and right to use means of mass information" (Art. 30, parag.1).

Within the context of freedom of press also "right to rectification and reply", "ban on seize and confiscation of printing and mass information facilities", etc. has to be considered. Present Constitution neglects such important rights and rules which are the key elements for a pluralistic society.

### **9. Right to Privacy**

(Art. 23, parag.2) which provides "The collection, storage, utilization and dissemination of information about a person's private life without his consent is forbidden." This norm only refers to the concept of "private life".

In most Constitutions and international instruments, the right to privacy contains both "private life" and "family life" concepts.<sup>43</sup> The reason for including these two concepts is that the term of "private life" mainly refers to the "privacy of individual life". Therefore the inclusion of the term of "family

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42 See, "Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War". This instrument was proclaimed by the General Conference of the UNESCO at its twentieth session in Paris, on 28 November 1978, (Art. 2).

43 cf., UN Covenant on Civil and Political Rights, Art. 17; the European Convention on Human Rights, Art. 8; the Inter-American Convention on Human Rights, Art. 11.

life" to the (Art. 23) might be useful in order to provide a full framework regarding the right to privacy.

(Art. 23, parag.2) also does not place the concepts of "business and commercial life". It is obvious that the protection of privacy of business and commercial life has vital importance for the formation and functioning of market economy/(liberalization of economy) (Art. 12) and for providing a ground to right to private ownership, (Art. 32).

There is a connection between right to privacy and inviolability of domicile. The latter right is regulated in the (Art. 22, parag.1).

On the other hand, "freedom of communication" has no place in the 1994 Constitution. (Art. 23) provides that, "privacy of...communication rights are ensured". As "freedom of communication" and "privacy of communication" are different subjects, it would be advisable to add the former right to the Constitution.

### ***10. Freedom of Religion***

(Art. 26) on the right to "freedom of religion and worship" does not contain the concepts of "freedom of conscience and conviction". The inclusion of freedom of religion and worship into the (Art. 26) is necessary.

The "right to not to profess any religion" is recognized in (Art. 26). There should be a linkage between freedom of religion and right to education. So the inclusion of the "freedom of religious education and instruction" to the (Art. 41, right to education) should be considered. It is essential when the principles of "secular State" (Art. 1) and the "separation of religious organizations from the State" (Art. 8, parag.4) and the ban on the "religious ideology as the status of State ideology" (Art. 8, parag.2) are taken into account.

### ***11. Equal Rights to State Service***

(Art. 27) is mainly on the subject of political rights. But in (parag.2) of this Article it is provided that "citizens have equal rights to State service". This is not related to political rights and has to be regulated independently.

Furthermore the existing formulation should be clarified as "right to enter public service" based on the principle of equality and without taking account any distinction. Also the provision "national service is the right and duty of every citizen" should be added to the relevant Article of the Constitution.

### ***12. Freedom of Association and Right of Assembly***

In the first sentence of the (Art. 28), according to English version of the Constitution, it is written that "every person has the right of assembly". One of

the other English versions provides that, "every person has the right to be united". This Article in fact regulates "right to freedom of association". This is evident when the second sentence of the Article is taken into consideration because it underlines "right to join and leave political parties, trade unions and other social associations". On the other hand, the formulation of "right of assembly" is used particularly for the right to take part in meetings, demonstrations, etc. which is especially recognized in the (Art. 29) of the Constitution. In short, "right to freedom of association" and "right of assembly" are different and have distinct scope and nature. In the light of above information, both (Art. 28) and (Art. 29) firstly needs a terminological clarification.

When we turn back to freedom of association, one of the problematic areas is that, it is not made explicit whether "prior permission" is needed for the formation of association. In democratic systems for the establishment of associations no prior permission is requested. Moreover, the possible dissolution of an association whose activities contravene the grounds laid down precisely in the relevant law, must be based on the "decision of a judge" in circumstances prescribed by law. These are the basic guarantees for freedom of association.

With regard to right to freedom of association, the standards provided by the International Labour Organization Convention of 1948 concerning "Freedom of Association and Protection of the Right to Organize" should be considered.<sup>44</sup>

It is also advisable to provide specific Constitutional norms on the right to form political parties, membership to political parties, etc., rather than to regulate this particular right within the scope of the Article relating to freedom of association.

One of the remaining problems within the context of freedom of association is whether it is permissible to impose special restrictions on security officials in their exercise of this right. If it is permitted by the relevant domestic legislation, then such an exception needs to be clarified by the Constitution.

### *13. Right to Apply to the Authorities*

It is debatable whether or not the "right to apply to the authorities" (Art. 31) also covers "right to petition" and is related to the "right to have effective

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<sup>44</sup> In relation to freedom of association and right of assembly, UN Covenant on Civil and Political Rights, Art. (21 and 22); the European Convention on Human Rights, (Art. 11); the Inter-American Convention on Human Rights, (Art. 15, 16) and also the relevant OSCE Documents, such as, the Copenhagen Document 1990 (parag.9.2, 9.3 and 10.3) and the Charter of Paris (1990) should be taken into account.

remedy before national authorities". The latter formulation of this right is widely used in the instruments of international human rights.

The term "remedy" as already made it clear by the case law, refers to not only a possible application to administrative and political authorities or entities, but also to judiciary as well. So, the formulation of "apply to the authorities" in (Art. 31) needs clarification.

Moreover, the subject of the right in the (Art. 31) is limited by the term "citizens". (Art. 16, parag.2) provides that "foreign citizens and stateless persons enjoy the rights and freedoms...of citizens of Tajikistan". When (Art. 16, parag.2) and (Art. 31) are read in conjunction, it is a logical conclusion that the right provided in (Art. 31) is also recognized for foreigners.

### **e. The Duties of Individuals, Citizens and State Organs**

There is a concrete need to rewrite the duties for individuals and citizens and State organs in a systematic way and with precise terms.

Duties for individuals and citizens are mainly related to the observance of the Constitutional order of the State and respect for the rights of others (Art. 42), performing military service (Art. 43), payment of taxes and other duties (Art. 45).

(Art. 43, parag.2) provides that "The procedure for military service is specified by law." This Article omits clarification on what would happen if someone may not enter military service on religious or other grounds. This lack may invite some discussions in the long run.

Also (Art. 44) which provides that "the protection of natural, historical and cultural heritage are the duties of every person" may be emphasized. This provision makes no reference to the State; it may be useful to add also the term "State" into the Article. Nevertheless (Art. 40, parag.2) which provides that the State has the duty to protect "cultural and spiritual treasures" may be considered within this context.

The duty of the State and citizens, as a public and private sector, to improve the natural environment and to prevent environmental pollution, the establishment of health and social assistance institutions find no place in the Constitution.

Generally speaking, State organs have to be in the position and under the obligation not only to recognize human rights, but also to respect them in the process of their implementation. This is in fact one of the elements of the definition of the fundamental principle known as "rule of law" or the

“supremacy of law”. As already mentioned above, (Art. 5, parag.2) of the Constitution put the State under a general “obligation” of the recognition, observance and protection of human rights. This norm has to be considered a positive step taken towards the formation of a democratic State based on human rights.

## **II. Limitations on Human Rights and the Limits of Limitations**

### **a. Limitations**

#### ***1. Are Human Rights Provided in the Constitution subject to Limitations?***

Rights and freedoms provided by the 1994 Constitution are subject to the limitations, (Art. 14, parag.2). For the application of limitations the Constitution makes no distinction between so called civil and political rights and economic, social and cultural rights.

#### ***2. What are the Legal Technicalities of Providing Limitations?***

With regard to technicalities of limitations two subtitles have to be examined:

- Regulation method of limitation clause,
- Rule of legality.

##### **i. Method of Regulation**

Possible limitations can be regulated either within the framework of each particular right and freedom or in the form of a “general limitation clause” which is written as a separate Article. In democratic constitutional systems the usual practice is the former. In other words, rights and freedoms which by their nature may subject to limitation shall be recognized first, and generally in the following paragraphs of the same Article, some limitation clauses and legal conditions shall be provided. The reason is that limitations are regarded as exceptional.

If a “general and separate norm” is provided for limitations, it means that the general grounds for limitations laid down by this specific norm shall apply for and have effect on all rights and freedoms. This method causes two main problems.

First; there are certain rights and freedoms which should not be a subject to any kind of restriction/(limitation or derogation) under any condition.

Right to recognition as a person before the law, right to name, right to freedom from torture and ill-treatment, prohibition of slavery or prohibition of arbitrary deprivation of life, prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation. These rights are neither in an ordinary nor in an exceptional regime shall be restricted. The presence of a general limitation clause obviously ignores the category of human rights that can not be limited.

Second; due to their characteristic differences, the rights and freedoms limited may not necessarily be subject to the application of the same limitation criteria. For example, the right to freedom of expression may be restricted, among others, by a reference to the limitation clause "territorial integrity". But this limitation criterion can not be used for the restriction of freedom of conscience and religion. While the clause "economic well-being of the country" is one of the criteria for the restriction of right to privacy, this clause can not be referred to in order to impose a limitation on freedom of association. So the existence of general limitation clause which foresees same limitation criteria for all rights and freedoms evidently neglects the distinct nature of each human right.

(Art. 14, parag.2) of the 1994 Constitution is a general limitation norm and results in the above mentioned problems.

## ii. Rule of Legality

The rule of legality is a pre-condition for the imposition of any limitation on human rights.

Many provisions of the Constitution express this legality condition using such references:

"In accordance with the law", "prescribed by law", "specified by law", "on the basis of the law", "foreseen by the law", "defined by law" or "anticipated by law". For example, Art. 15, parag.2, 3; Art. 16, parag.2; Art. 20, parag.1; Art. 22, parag.2, 3; Art. 23, parag.1; Art. 25, parag.1; Art. 30, parag.3; Art. 32, parag.3; Art. 35, parag.3, etc. This is a reference to the "rule or principle of legality".

This principle has to be completed by "limitation clauses" or "limitation criteria".

### 3. What is the Function of the Limitation Clauses?

Limitation clauses play the role of guidance to the State organs in the implementation of possible restrictions of human rights. The lack of such

limitation clauses may therefore cause possible abuse of power and give rise to judicial interpretation problems in the case of examination of allegations of misconduct by the State organs or agents.

If such limitation clauses are not clearly provided by the Constitution, in the long run, the judiciary may feel obliged to fill this gap by the case law. Such a process potentially invites conflict and tension between judiciary and both legislative and executive organs. In order to prevent such unnecessary tension and consequent possible damages on the credibility of judiciary and rule of law, it is advisable to place limitation clauses in the Constitution.

#### ***4. Which Limitation Clauses are Placed in the Constitution?***

(Art. 14, parag.2) lists four limitation clauses. They are, "rights and freedoms of others", "public order", "to safeguard the constitutional system" and "territorial integrity". These limitation clauses have an effect on all rights and freedoms unless otherwise is stipulated.

However, there is some other limitation clauses laid down in various Constitutions and international instruments. For example, "public safety", "public order" "national security", "protection of public health", "protection of public morals", "protection of the reputation of others", "prevention of disorder and crime", "economic well-being of the country", "maintaining the authority and impartiality of the judiciary", etc.

#### ***5. Which Additional Criteria is Needed for Limitations?***

##### ***i. Necessary in Democratic Society***

Any limitation imposed shall be "necessary in a democratic society".

This formulation has two basic functions. First, it refers to the democratic order of the State and the democratic nature of the society. So, any deviation from the essence of a democratic regime by the use of limitation is prohibited. Second, it clarifies the necessity of maintaining democratic standards in the process of imposing and applying limitations on human rights.

The inclusion of this formulation into the Constitution might be considered.

##### ***ii. Principle of Proportionality***

Limitations "shall not be imposed for any purpose other than those for which they are prescribed".

This formulation, on one hand clarifies the purpose of limitations and on the other hand plays a preventive role against to potential abuse of limitation power by the competent authorities.

It is universally recognized that the "principle of proportionality" must apply for all restrictions of human rights. The purpose to be pursued by a limitation shall be in each instance justified.

Including the provision regarding limitation, nowhere of the Constitution does the principle of proportionality find a place.

### iii. Conformity with International Law

Furthermore, possible limitations on rights and freedoms should meet the conditions required by international law and international human rights law. For instance, "general principles of law recognized by nations", "human rights standards laid down in the international instruments", etc.

One of the main advantages of such references to international standards is to provide the legal possibility to incorporate international human rights law into the domestic legal system. For full integration into the international community, these kind of legal tools play an important role.

In the Preamble of the Constitution it is declared that, "We, the people of Tajikistan, As an inseparable part of the world community...adopt...this Constitution". (Art. 10, parag.3) provides that "the international legal documents recognized by Tajikistan are a constituent part of the legal system of the Republic" and in the case of contradiction between domestic and international law, priority is given to the latter. (Art. 14, parag.1) makes a reference to international law only in the context of "protection" of human rights. Limitation is a separate subject and regulated in (parag.2) of this Article.

In the light of above norms, for the limitation of rights and freedoms, it is be necessary to rewrite the relevant provisions of the Constitution with a clear reference to international law.

## **b. Limits of Limitations**

### *1. Is There a Need to Regulate the Limits of Limitations?*

The clause of "limits of limitations" is provided for the determination of the maximum extent of limitations. In other words, limits of limitations are used to make certain exactly the point which a possible limitation may not exceed. The "limits of limitations" formulations are broadly used in international human rights instruments as well as in some of the Constitutions.



## 2. What is the Formulation of Limits of Limitations?

The general formulation of the limits of limitations is that, "grounds for restrictions of rights and freedoms shall not conflict with the requirements of the democratic order of society". This means that a limitation shall not contradict or violate what is necessary in a democratic society.

This clause may have several functions. First of all, it strengthens rights and freedoms. Secondly, it gives further opportunity for reference to international human rights law. Thirdly, it underlines the commitment to the principle of democracy.

## III. States of Emergencies or Exceptional Regimes

### a. Fundamentals of Emergency Regime

(Art. 46 and 47) of the Constitution provides a general framework for states of emergency.

#### 1. Which State Organ is Competent for the Declaration of State of Emergency?

Neither (Art. 46) nor (Art. 47) provides any clarification on the competent authority for the declaration of state of emergency regime.

But the provision which lists the powers of the President of the State provides that, "The President has authority, ... 19) to declare a state of emergency throughout the Republic or in separate parts of it...", (Art. 69, parag.19). According to (Art. 2, parag.1) of the "*Constitutional Law of the Republic of Tajikistan on Legal Regime for State of Emergency*" (Law No.94, dated: 03 November 1995) (hereinafter referred as, "Law on State of Emergency") "State of emergency is declared...by the decree of the President of the Republic of Tajikistan..."

As a logical consequence of this the President of the State is the sole competent authority to assess the gravity of the situation which may necessitate declaration of an exceptional regime.

The President of the Republic, at the same time, is the "Head of State and executive power (of the Government)", (Art. 64, parag.1). So, the "margin of appreciation" given to the President of the State to determine the necessity of emergency regime application is in fact a power handed over the Government.

The state of emergency comes into force at the time when it is declared by the President. "The decision of enforcement, prolongation or abrogation the

state of emergency comes into force from the moment of the decision is taken", (Art. 3, parag.3) of the "Law on State of Emergency".

It means that the declaration by itself is a completed legal act sufficient enough to create its legal consequences. To gain permanency is the following step and another issue depends on the approval of the parliament.

*2. Is the concept of "State of Emergency" placed in the (Art. 46 and 47) refer to only the Regime of State of Emergency or also to some other types of Exceptional Regimes?*

This type of regimes, as a general category, entitled "exceptional regimes" or "states of exceptions" or "emergency rule". Under this category, there are distinct sub-categories. For instance, "state of emergency", "state of alert", "martial law", "state of siege" and "state of war". Each category is created for distinct risks threaten the State, public life or cases of natural disasters.

When (Art. 46 and 47) are read in conjunction with (Art. 69, parag.18), it is evident that the 1994 Constitution in fact recognizes only two different types of exceptional regimes. The President of the State has the power either to declare a "state of war" (Art. 69, parag.18) or a "state of emergency" (Art. 69, parag.19).<sup>45</sup>

The declaration of any additional state of emergency regime forms requires amendment of the Constitution. But (Art. 13, parag.1) of the "Law on State of Emergency" provides that, "In cases when in the territories, where state of emergency is declared, the offices of State and government do not ensure appropriate functioning of their duties, or they lay possibility to anti-constitutional activity, the President of the Republic of Tajikistan may establish temporarily special form of government in the country or in certain parts of it...". (Art. 13-17) of the "Law on State of Emergency" provides provisions on the formation and implementation of "special forms of government".

Presumably the provisions of the "Law on State of Emergency" referred above are not in conformity with the Constitution. Because, neither the provisions of the Constitution related to emergency regimes nor regarding the powers of the President provide any constitutional ground for the establishment of a special form of government to deal with the exceptional situation.

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45 If the (Art. 46 and 47) is not particularly for the regime of "state of emergency" regime but also for the other forms of "exceptional regimes", the latter should be recognized separately by the Constitution.

In state of emergency situations if it is considered that the recognition of "direct government of the President" is a need, then a constitutional foundation of such category should be inserted into the Constitution.

On the other hand, the power given to the President of the Republic to declare "state of war", in general terms, is not in conformity with the usual practice. In many Constitutions, the power to authorise the declaration of the state of war is vested in the legislative power.

### *3. What Preconditions is required for the Declaration of either State of Emergency or State of War?*

#### *i. Conditions required and Contradiction between the Constitution and the Law*

According to (Art. 46) conditions laid down for declaration a state of emergency are as follows:

- "a real threat to the rights and freedoms of citizens",
- "a real threat to the independence of the State",
- "a real threat to the territorial integrity",
- "natural disasters",
- furthermore, "result of which [conditions] the constitutional organs are unable to function normally".

And also according to (Art. 69, parag.18) for the declaration of a "state of war", there must be a condition of "real danger threatening the security the security of the State".

It is important to underline that, the conditions required by the Constitution should be a limited list and none of the authorities will be in the position or have power to declare an exceptional regime unless the situation meet such conditions.

The conditions stipulated in the (Art. 46) of the Constitution are more precisely defined by the (Art.1, parag.2) of the "Law on State of Emergency" which provides as follows;

"State of emergency may be introduced under the following conditions:

1. natural disasters, accidents and catastrophe, epidemics, epizootic, which create danger to the life and health of the population;
2. mass violation of order, that create danger to rights and freedoms of citizens;
3. the attempts to seize the government's power and changing the constitutional structure of the Republic of Tajikistan by force;

4. encroachment on territorial integrity of State, which endangers changing its borders;
5. the necessity to restore constitutional order and activity of government power."

The fifth item of the listed conditions for the declaration of state of emergency in the "Law on the State of Emergency" necessitates special attention. The Constitution (Art. 46) refers four situations (threat to citizen rights, independence of the State, territorial integrity and occurrence of natural disaster). The appearance of enumerated four situations could not be enough for the declaration of state of emergency. In addition, they must result in the inability of the constitutional organs to function normally. However, (Art. 1, parag.2/item 5) of the "Law on State of Emergency" ("the necessity to restore constitutional order and activity of government power") is formulated as an independent and self-sufficient reason for state of emergency declaration.

Above mention contradiction between the Constitution and relevant Law necessitates consideration of the relevant Law provision.

#### ii. Duty to Explain the Grounds

The conditions required by the Constitution for the declaration of state of emergency is not only binding but also they provide ground of legitimacy to this regime. That is why (Art. 3, parag.1) of the "Law on State of Emergency" clearly provides that "When state of emergency is declared the motives/grounds for its declaration...is explained."

To explain the grounds of state of emergency declaration could be functional to provide transparency to the administrative act. Beyond that it has vital importance in examining the validity of this act either by the parliament or if it will be the case, judiciary.

In short, it might be useful to include the above rule also into the Constitution.

### ***4. What is the Procedure for the Declaration of Emergency Regimes?***

#### i. Role of President of the Republic

According to the 1994 Constitution only the President of the State is entitled to declare such a regime. This is evident in the light of (Art. 69, parag.18 and 19) of the Constitution and (Art. 2, parag.1) of the "Law on State of Emergency".

Nevertheless the Constitution provides some further procedural rules on this issue.

Firstly, in the case of the declaration of a state of emergency, the decree issued by the President of the State shall be "immediately submitted to the Supreme Assembly for approval", (Art. 69, parag.19).

The same procedure is also valid in the case of the declaration of a state of war, (Art. 69, parag.18).

#### ii. Immediate Submission to the Parliament

The phrase "immediately" placed in the (Art. 69, parag.18 and 19) needs some attention.

The rule of "immediate submission to the Parliament for approval" is provided mainly for two purposes. First, by the reference of this phrase, the Parliament will be in the position to recognize or to cease the "continuation of validity" of an exceptional regime in the shortest run. Second, the power of "margin of appreciation" given to the President of the State is balanced, at least, by a political review to be carried out by the Parliament shortly after the declaration.

(Art. 2, parag.1) of the "Law on State of Emergency" also regulates that "State of emergency is declared...by the decree of the President with immediate presentation to the Majlisi Oli..."

#### iii. Role of the Supreme Assembly

According to (Art. 49, parag.20) of the Constitution, the Supreme Assembly/(Majlisi Oli) has empowered to "ratify/(approve) decrees of the President on a state of war and a state of emergency".

(Art. 2, parag.1) of the "Law on State of Emergency" provides that "...Majlisi Oli of the Republic of Tajikistan...approves (in Tajik, "tasdik") the decree of the President on state of emergency in 3 days."

Above provisions only places the term "approve". This formulation may cast some doubt on whether the Supreme Assembly could only approve the decree or also power to reject, shorten and lift it.

It is debatable whether the Supreme Assembly might have power to extend the period fixed in the declaration by the President of the State. In principle, the competence of the legislative organ must be limited with the approval, rejection or reduction of the duration of the state of emergency.

In any case, if the Parliament is considered to have power to extend the period of a state of emergency shown in the declaration by the President, it must be precisely included into the relevant Article. But in this case, such a proposal

should need to be certain that, the Parliament may extend the period within the limits of maximum three months, which is the maximum period foreseen by the Constitution for such regimes.

In order to prevent any potential confusion, it may be formulated as follows: "The Supreme Assembly may, when it deems necessary, approve or reduce the period of emergency regime or lift it."

#### iv. Procedure applied within the Parliament

Following the submission of the decree to the parliament the procedure to be applied is not stipulated by the Constitution. Also, the Constitution does not provide any clarification what would happen if the Parliament is in recess. In such cases, "the Parliament shall be summoned immediately". This rule should also be added into the relevant Article of the Constitution.

(Art. 2, parag.1) of the "Law on State of Emergency" provides that "Majlisi Oli during 3 days from the moment when state of emergency comes into force convenes a session and approves/(tasdik) the decree of the President on state of emergency in 3 days." So, mentioned provision of this Law clarifies the scope of the term "immediate".

Furthermore (Art. 2, parag.2) of the "Law on State of Emergency" is as follows: "The decision of the Majlisi Oli on this issue is taken by open voting and by simply majority from the total number of the members of the Majlisi Oli."

#### v. Notification to be made to International Treaty Organs

(Art. 69, parag.19) of the Constitution stipulates that, when a state of emergency declared by the President, the United Nations Organization should be informed on such a declaration. Also (Art. 2, parag.1) of the "Law on State of Emergency" provides that "State of emergency is declared...by the decree of the President with immediate presentation to Majlisi Oli and informing about it United Nations."

International human rights conventions provide the same obligation of notification. As an example, the UN Covenant on Civil and Political Rights may be given. According to the (Art. 4, parag.3) of the UN Covenant:

"Any State Party to the Present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation." Similar

rules are also regulated in the European Convention on Human Rights (Art. 15, parag.3) and the Inter-American Convention on Human Rights (Art. 27, parag.3).

Among these Conventions, the Republic of Tajikistan is eligible to be a State Party only to the UN Convention. The provisions of (Art. 69, parag.19) of the Constitution and (Art. 2, parag.1) of the "Law on State of Emergency" are in conformity with the UN Covenant.

However, (Art. 69, parag.18) does not contain the same obligation of notification in the case of the declaration of state of war. As well as the other international instruments, the UN Covenant recognizes no exception in this regard. The obligation of notification is kept into force for all types of emergency regimes. So this rule should also be inserted to the (Art. 69, parag.18) of the Constitution.

### ***5. Is the Act of the Declaration of an Emergency Regime subject to Judicial Review?***

The key problem arises in the declaration of state of emergency regime is whether such an act of declaration shall be subject to judicial review.

This issue is widely discussed within legal doctrine and is subject to different Constitutional provisions throughout the world. One of the arguments raised is that the act of declaration itself must be subject to judicial review. Legal doctrine in favor of this argument based on the idea that, in a democratic regime is founded on the rule of law, non the authorities acts or actions shall be immune from judicial review. The consequence of this argumentation is that, either and preferably in the case of existence, the Constitutional Court or in the case of the existence of civil and administrative judiciary dualism, the Supreme Administrative Court shall examine the validity and legitimacy of the declaration of a state of exception. The opposition argument raised that, the judiciary could not be in the adequate and efficient position as much as the competent executive authority to appreciate risks of the situation which is an essential prerequisite for the opportunity of such a declaration. Thus, it shall not be subject to the judicial review. Moreover, the parliament in any case will examine the act of declaration. So, there is no a need for the judicial review on the declaration of state of emergency regimes.

Regardless of the type of exceptional regimes, they are very much open to abuse by the authorities. Experience shows that<sup>46</sup>, the authority (which is in

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46 For instance, in Turkey, in the last 20 years (1978-1998) exceptional regimes (either state of emergency or martial law) applied permanently in the South-East of the country. And none of the legal acts for the declaration or prolongation of this regime submitted to the Parliament by the Governments were rejected. In the United Kingdom, the application of emergency

essence, a kind of "opportunity supervision") given to the legislative organ to assess whether the Presidential power for such a declaration is used in a proper manner is incapable to provide an efficient check and balance mechanism against potential abuse. It is generally and simply because of the political balances within the parliament and the sensibility of the subject which may be easily used against the political opposition circles.

Under the light of these facts and particularly in a transition country where political stability and post-conflict recovery needs to be improved, the necessity of the judicial review on the acts of the declaration of state of emergency regime is a must. The decree on the prolongation of an exceptional regime must also subject to the same procedures.

In respect to judicial review on the declaration of a state of emergency, (Art. 46 and 47) of the Constitution and also the "Law on State of Emergency" provide no clarification. Nevertheless, (Art. 89, parag.3/item 1) of the Constitution provides that, the Constitutional Court is empowered "to determine the conformity of laws and legal acts of... the President...with the Constitution".<sup>47</sup> As a parallel line, (Law No. 84, dated 03 November 1995) on the "*Constitutional Law of the Republic of Tajikistan on the Constitutional Court*" stipulates that, "The Constitutional Court settles matters concerning conformity with the Constitution: a) laws, legal acts of...the President...", (Law No. 84, Art. 14, parag.1/item a).

The legal form and characteristic of the "declaration of a state of emergency" by the President obviously fall within the framework of the term "legal acts" referred in the (Art. 89, parag.3/item 1) of the Constitution and (Art. 14, parag.1/item a) of the Law No.84.

As a conclusion, the declaration of a state of emergency might be a subject to the judicial review under the present Constitutional regime of the Tajikistan.

## 6. What is the Duration of State of Emergency?

### i. Temporary Measure

According to (Art. 46) of the Constitution and (Art. 1) of the "Law on State of Emergency", a state of emergency is only declared as a "temporary

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legislation in Northern Ireland turns to a permanent regime. Especially in 1970's and 1980's exceptional regimes were implemented almost permanently in many of the Latin American, African and Asian countries.

<sup>47</sup> The two unofficial English versions of the 1994 Constitution regarding to (Art. 89, parag.3/item 1) are not proper translations and should be read with this reservation.



measure". This formulation is a logical and legal consequence of nature of the exceptional regimes. In democratic systems, ordinary/normal regime is the rule, state of emergency is the exception.

### ii. Maximum Period of 3 Months in Declaration and Prolongation

According to (Art. 46, parag.2), "the period of state of emergency is up to three months". (Art. 2, parag.4) of the "Law on State of Emergency" states that "The state of emergency on all the territory of the Republic may be introduced for the term of 3 months."<sup>48</sup> It means that, in each declaration of state of emergency, the foreseen maximum period shall not exceed three months.

The rule determines the maximum period of state of emergency 3 months may be considered to replace with 2 months.

Even though there is no clarification in the Constitution, the maximum period (3 months) should be also valid in the cases of the prolongation of this regime. (Art. 2, parag.4/second sentence) of the "Law on State of Emergency" provides that "When necessary"<sup>49</sup> this term (3 months, MSG) may be prolonged by the President of the Republic of Tajikistan."<sup>50</sup>

In the light of above provisions, a precise norm fixing the duration of prolongation of an exceptional regime should be included into the Constitution.

### iii. Duty to refer to Shortest Period

The President is not necessarily in the position to declare state of emergency reaching to its maximum duration. It is the duty of the competent organ to fix the period as shortest as possible.

The declared period of state of emergency is not necessarily be applied as long as it is determined. It is duty of the President to cease the application of

48 (Art. 2, parag.4) may invite hesitation. Because, it is provided that "The state of emergency on *all the territory* of the Republic may be introduced for the term of 3 months." This norm, contrary to (parag.1) of the same Article, omits a possible declaration only in certain regions, districts or cities. So, should the formulation of (parag.2) be interpreted in a way that, only the declaration of state of emergency in all of the territory of the Republic could let to refer the maximum period of state of emergency?

49 The term "necessary" in the (Art. 2, parag.4/second sentence) may be clarified by the provision of (Art. 3, parag.2). It says that, the President has the right to prolong the state of emergency, if the grounds for which it was declared were not eradicated. So, as long as the grounds are valid, the extension could be necessary.

50 (Art. 2, parag.4/second sentence) of the "Law on State of Emergency" needs a clarification by adding that "When necessary this term may be prolonged by the President of the Republic, in each case subject to the approval of the Supreme Assembly."

state of emergency in the shortest run. According to (Art. 3, parag.2) of the "Law on State of Emergency", "The President of the Republic has the right to annul the state of emergency before the declared time expires..." But the Constitution silent on this issue.

The parliament is under duty to provide a political supervision on the possible shortest application of state of emergency.

## **b. Consequences of Emergency Regime**

### **1. What is the Geographical Effect of State of Emergency?**

(Art. 69, parag.19) provides that, a state of emergency may be declared "throughout the Republic or in separate parts of it." As already mentioned (Art. 2, parag.1) of the "Law on State of Emergency" is in line with the Constitution.

The importance of rule regarding to "geographical effect" is to limit the application region/area of state of emergency if it is not declared throughout the country. When a state of emergency is declared in certain provinces and regions, the emergency regime measures shall only be effective within this area.

### **2. What is the Effect of an Exceptional Regime on Rights and Freedoms?**

It is obvious that, exceptional regimes have a negative effect on human rights. Under these regimes, rights and freedoms may not only be limited as it is the case of ordinary regimes, but also suspended or derogated. That is why state of emergency regimes, in a democratic country, despite its recognition, shall be classified as "exceptions". Ordinary regimes and the full exercise of and benefit from human rights is the rule, restrictions which goes further than limitations as suspension or derogation of human rights is the exception.

It is a very positive approach that the 1994 Constitution does not contain any provision in relation to the "suspension or derogation of rights". In the (Art. 47), the term placed is only "limitation" or "restriction".

Almost all of the Constitutions and international human rights instruments provide the terms of either "suspension" or "derogation" of rights in the context of exceptional regimes provisions.

The following questions may be raised:

Could ordinary regime limitations be accepted as the maximum restrictions applied in the exceptional regimes?

Is it possible to limit rights and freedoms under the ordinary regime, reaching to the extent of restrictions applicable under emergency regimes?

If there is no clear distinction between the applicable restrictions on the human rights in the cases of ordinary and exceptional regimes, then the necessity of any type of an exceptional regime should be open to discussion.

For instance, under the state of emergency, if the right to demonstration or right to movement will be limited as much as they are restricted in an ordinary regime, in practical terms, there should be no need to refer an exceptional regime.

Presumably it is not the case. Because, (Art. 47, parag.1) also refers to "non-derogable rights" by using this formulation: "During a state of emergency the rights and freedoms stipulated in Articles...of the Constitution are not limited/restricted".

### *3. What are the Non-Derogable Rights?*

The 1994 Constitution gives no place to the terms of "derogation" and "non-derogable rights". However, (Art. 47, parag.1) lists a total of eight Articles of the Constitution which are not subject to restrictions during a state of emergency. These rights are:

- (Art. 16) prohibition of extradition of a citizen to a foreign State;
- (Art. 17) equality before law and courts;
- (Art. 18) right to life and freedom from torture;
- (Art. 19) judicial protection, right to liberty and security;
- (Art. 20) presumption of innocence and freedom from Ex Post Facto Laws;
- (Art. 22) inviolability of domicile;
- (Art. 25) right to access the official documents and
- (Art. 28) right to freedom of association.

The list of non-derogable rights is exactly insufficient. For instance, "freedom of thought, religion and conscience", "rights of family", "right to nationality", "right to participate government", "right to recognition as a person before the law", etc. are not listed.

In order to make a brief comparison, the number of non-derogable rights in the international instruments may be given:

(Art. 15, parag.3) of the European Convention on Human Rights lists 4; (Art. 4, parag.3) of the UN Covenant on Civil and Political Rights lists 7 and (Art. 27, parag.3) of the Inter-American Convention on Human Rights lists 12 (including, "the judicial guarantees essential for the protection of such rights).

Furthermore, some of the rights, for example "freedom from torture and ill-treatment", are such rights that considered as a part of "jus cogens" or "law of nations" and respect to and non-derogate of these rights derives from their very nature. It means that, these rights in every condition and in everywhere has to be recognized and fully respected without necessitating a particular provision provided by national or international legal instrument. So, the inclusion of this kind of rights into the list of non-derogable or unrestricted rights has a priority.

(Art. 1, parag.1) of the "Law on State of Emergency" provides the following rule:

"State of emergency is...declared...in accordance with the Constitution of the Republic of Tajikistan...and in accordance with the present constitutional law provides restriction on the constitutional rights and freedoms of citizens, and rights of the legal entities and lays on them additional responsibilities."

Within this Law, except the reference made to the Constitution in general terms, there is no any norm which underlines the enumerated constitutional rights which are not subject to any restriction under state of emergency.

#### ***4. What is the Effect of State of Emergency Regime on the Function of the Parliament?***

According to (Art. 47, parag.2), "the Supreme Assembly is not dissolved during the period of a state of emergency". (Art. 2, parag.3) of the "Law on State of Emergency" provides that "During the time of declaration of state of emergency Majlisi Oli is not dissolved."

Permanent function of the Supreme Assembly is necessary not only for taking decisive role in the case of the Presidential Decree for the declaration and extension of state of emergency regime, but also for carrying out a political supervision in the process of the implementation of this regime. Especially when the lack of precise provision for the judicial review on the declaration of such regimes is taken into account, the continuance of the function of the Parliament gains more importance.

#### **c. Implementation of Emergency Regime**

##### ***1. Is there any Judicial Control on the Acts or Actions carried out by the State Authorities and Agents within the Process of Implementation of State of Emergency?***

This issue is different than the question of judicial review on the declaration of a state of emergency. In principle, any acts or actions carried out

by the authorities during the application of an emergency regime should be subject to judicial review. This is the natural consequence of the rule of law. Unless otherwise exceptionally stipulated in the Constitution, ordinary or emergency regimes within the democratic systems, none of the acts and/or actions of the State authorities should be immune from judicial review.

(Art. 1) of the Constitution, identifies the Republic of Tajikistan as a "democratic, law-governed State". The observance of the human rights is the obligation of State, (Art. 5, parag.2). And also, "the State and all its bodies, officials...are duty bound to observe and implement the Constitution and laws of the Republic", (Art. 10, parag.2).

It is important to note that, in Chapter Four entitled as "The President" (Art. 64-72), there is no any provision which creates an exception from judicial review. The same approach is valid also in the provisions of Chapter Three "The Supreme Assembly" (Art. 48-63), Chapter Five to Seven regarding to Government (Art. 73-83), as well as Chapter Eight on "The Courts" (Art. 84-92).

These provisions shows that the acts or actions carried out by the all State authorities and entities and agents not only during the emergency regime but also even under the ordinary regime should be subject to judicial review.