



Draft Law on Elections to the Majlisi Oli
of the Republic of Tajikistan

OBSERVATIONS AND RECOMMENDATIONS
28 November 1999¹

Elections for the lower chamber of the parliament (Majlisi Oli) of Tajikistan are expected to take place in February 2000. The upper chamber is likely to be elected shortly thereafter. This document presents comments on a draft text of the Law which will regulate both elections. At the time of writing a final draft had not been agreed for approval by the present parliament. The recommendations are designed to assist in bringing the Law into conformity with OSCE standards, in particular the commitments for free elections under the Copenhagen Document. The comments are based on an unofficial English translation of the original Tajik text.

Summary of observations

1. Past criticisms of the conduct of elections and the referendum in Tajikistan have centred primarily on failures to implement the legislation rather than the legislation itself. However, most agents in the political process are now actively engaged in debating the content of a new parliamentary election Law. In recent weeks the draft Law has been the subject of extensive negotiations between the government of Tajikistan and the United Tajik Opposition. There appears to have been substantial compromise on both sides. Concessions reportedly granted by the government side at the request of the UTO appear to have improved the text.
2. However, substantial defects remain. The issue of the balanced composition of electoral commissions and the independence of election administration is unresolved. So are a number of core issues on the composition of the Assembly of Representatives and the timing of elections to the National Assembly. Considerable confusion surrounds the provisions on campaign finance and access to the media. In the absence of practical regulation of these issues and at least some clear principles in the Law itself, it is highly unlikely that the participants will compete on equal terms. Finally, whilst the absence of domestic observers may not be fatal to the proper conduct of the coming elections, there are far too few structural guarantees of transparency to deter further instances of serious malpractice.

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Recent political developments

3. The General Agreement on the Establishment of Peace and National Accord in Tajikistan envisaged negotiations on amendments to the 1994 Constitution. These were subsequently prepared by President Rakhmonov and the Commission of National Reconciliation (CNR), comprising representatives of the Tajik government and the United Tajik Opposition (UTO). The draft amendments were subsequently approved by a referendum on 26 September 1999 and are reviewed below. The most significant change was the introduction of a second chamber of parliament, the National Assembly. It is hoped that this will introduce an element of cohesion between the disparate regions and ethnic groups within Tajikistan.
4. On 6 November Imamali Rakhmonov was re-elected as president for a seven-year term. He polled a remarkable 96% of the vote in a 98% turnout.
5. Both the referendum and presidential election were subject to serious defects, both in the legal framework and in the conduct of the voting and counting of ballots. However, neither vote was marred by significant acts of violence, which by recent standards represents a substantial advance for Tajikistan.
6. The term of the present unicameral parliament, which has met only intermittently and with little effect, is due to expire in early 2000. Elections to the Assembly of Representatives are due to take place on 27 February 2000.
7. Under the Protocol on Political Guarantees for the Preparation and Conduct of Elections of the Majlisi Oli, signed by President Rakhmonov and the chairman of the CNR on 5 November, a draft law on parliamentary elections was supposed to be agreed by 20 November. However, it is understood that, at the time of writing, several key disagreements remain. The author understands that the text reviewed in this report is the draft prepared by the government side.
8. The Protocol expressly asserts the principle of the independence of the Central Commission for Elections and Referendums and provides that new representatives of the UTO shall be included in it. It also states that 20% of seats in the constituency and precinct electoral commissions will be secured for representatives of the parties and movements within the UTO.
9. According to a special report of the OSCE mission in Dushanbe,² a number of amendments to the present draft put forward by the UTO have now been conceded by the government. These concessions are noted where appropriate in the text below.
10. As a general comment it would seem that the government and UTO have recently shown a considerable degree of constructive engagement and co-operation in resolving outstanding differences over the election law.

Constitutional order

11. The Constitution was adopted by the government of Tajikistan on 6 November 1994. It proclaims Tajikistan to be a rule of law and unitary state comprising the Bakakhshan Autonomous Mountainous Oblast, oblasts (regions), towns, rayons (districts), settlements and villages.
12. Tajikistan is a secular state.³ Religious organisations³ are separate from the state and may not interfere in its affairs.⁴

² Undated but apparently distributed on 26 November.

³ Art. 1

⁴ Art. 8

13. International legal documents recognised by Tajikistan are a constituent part of its legal system.⁵ The Constitution recognises the state's obligation to protect human and civil rights and freedoms.⁶ Citizens are guaranteed freedom of association in political parties and other social associations,⁷ freedom to take part in meetings and demonstrations prescribed by law,⁸ and freedom of speech and to use the mass media (state censorship and prosecution for criticism is prohibited).⁹ Agitation and actions aimed at the promoting disunity of the state are expressly prohibited.¹⁰

14. The Constitution also recognises the separation of legislative, executive and judicial power. The executive branch is headed by the president, who appoints and dismisses the prime minister and other ministers. The president also:

- calls parliamentary elections;
- appoints and dismisses the heads of the oblasts, cities and rayons;
- enjoys the exclusive power to nominate members of the Constitutional and Supreme Courts (who are approved by the National Assembly);
- appoints and dismisses other judges on the petition of the Justice Council;
- signs and promulgates laws.¹¹

1. Judges are appointed for a term of just five years,¹² although required to be subordinate only to the Constitution and the law; interference in their activities is prohibited.¹³

2. Under the recent constitutional amendments the provisions on the structure and functions of the parliament have been significantly changed. Article 48 now establishes a bicameral parliament, the Majlisi Oli. The parliament has a five-year term and comprises the National Assembly (in effect, the lower chamber) and the Assembly of Representatives (the upper chamber). Article 49 provides that:

- the Assembly of Representatives is elected by universal, equal and direct suffrage by secret ballot;
- it is a professional and permanently functioning body;

1. Article 49 also makes provisions on the National Assembly:

- one quarter of its members are appointed by the president;

⁵ Art. 10

⁶ Art. 5

⁷ Art. 28 as amended. The amendment to this article was one of the most controversial changes introduced by the constitutional referendum. The effect of the amendment was to permit the operation of parties of a religious character. This was largely regarded as a concession to the Islamic Revivalist Party faction of the UTO.

⁸ Art. 29

⁹ Art. 30

¹⁰ Art. 7

¹¹ Art. 70

¹² Art. 84

¹³ Art. 87

- three quarters are indirectly elected by joint assemblies of people's deputies of the Bakakhshan Autonomous Mountainous Oblast, oblasts, cities and rayons with republican status.
1. These constitutional provisions underline the strong influence of the president over the upper chamber of parliament. He appoints one quarter of the members directly and appoints the heads of the local authorities which nominate the remaining members. Given the president's powers in the appointment of the judiciary, such provisions give rise to serious questions about the effective separation of powers in Tajikistan.
 2. The two chambers of parliament generally conduct separate sessions. The Assembly of Representatives has exclusive power to adopt laws. Both the National Assembly and the president have the power to return laws adopted by the Assembly of Representatives for further consideration. Constitutional laws must be approved by two thirds of the members of both chambers of parliament.
 3. The Constitution does not indicate the number of members of the Assembly of Representatives. The present draft Law proposes 55 members for the lower chamber and 45 for the upper chamber.
 4. The Central Commission for Elections and Referendums (CCER) is appointed and dismissed by the Assembly of Representatives on the basis of proposals of the president.¹⁴

The draft Law

Election administration

5. Elections of the Assembly of Representatives are administered by the CCER, the constituency, or district, electoral commissions (DECs) and precinct electoral commissions (PECs). Elections of the National Assembly are administered by the CCER and (different) DECs. The CCER appoints members of the DECs, which in turn appoint members of the PECs. The membership and independence of the CCER is therefore of paramount importance. When forming DECs for elections to the Assembly of Representatives the CCER accepts proposals from local executive organs 'with the consideration' of suggestions by political parties.¹⁵
6. Members of the CEC are appointed by the Assembly of Representatives on the proposal of the president. Unfortunately the Law makes no indication whatsoever of the basis on which candidates should be nominated or appointed. There is no attempt in the Law to incorporate the commitments contained in the Protocol on Political Guarantees to increase UTO representation in electoral commissions generally and in the CCER in particular (see above). The election Law is an act of general application for this and future elections. It would therefore be inappropriate to incorporate expressly such one-off political commitments. However, it is very regrettable that the draft Law envisages no general structural mechanism to ensure broad political representation within electoral commissions. The president's right to nominate candidates cannot be removed without amendment to the Constitution. However, it would be possible to provide, for instance, that each registered political party should be permitted to nominate a member with either full voting rights or at least observer status to the CCER and lower electoral commissions. Political parties are already permitted to nominate members of the DEC but this provision has not been extended to the CCER or the PECs.
7. The draft Law makes appropriate provision for appeals against the decisions of electoral decisions by voters, political parties and others. Appeals may be made to the superior electoral commission or directly

¹⁴ Art. 57(1)

¹⁵ Art. 13

to a court. Although no special procedure is identified, sensible deadlines are imposed for the consideration of such appeals.

Voters abroad

8. Polling stations may be formed at representative offices of Tajikistan abroad.¹⁶ The Law does not stipulate the basis on which citizens of Tajikistan who are outside the country are to be included in voter lists for such polling stations. There are some 24,000 Tajik refugees in Russia, Kyrgyzstan, Kazakhstan and Turkmenistan.¹⁷ The Law should clarify the rights and procedures to be followed with such potential voters. Most importantly, it should clarify whether such voters are entitled to vote only for party lists or also for single mandate candidates. It is recommended that the latter right should be allowed, if at all, in relation to the constituency where the voter last lived within Tajikistan.

Composition of the Assembly of Representatives

9. As indicated above, the amended Constitution does not stipulate the number of seats in the lower chamber. During work on the amendments to the Constitution the CNR agreed that there would be 91 seats in the Assembly of Representatives. The government now cites financial constraints in arguing for the number to be reduced to 55, as indicated in Art. 28 of the draft Law. Of the 55 seats, 45 (82%) would be elected from single mandate constituencies on a majority basis and ten (18%) would be elected by proportional representation (PR) on the basis of party lists in a single national constituency.
10. The UTO rejects the current government proposal on the basis that a high proportion of seats filled from single mandate constituencies will afford the executive branch stronger control over parliament. However, this is an objection which appears to be based on proportions rather than the actual number of seats. Given the autonomous powers and functioning of the lower chamber, the relative size of the upper chamber (45 members are proposed in the draft Law) does not appear to provide any particular guidance on the proper size of the lower chamber.
11. A stronger argument for increasing the number of deputies in the Assembly of Representatives would be the size of the resulting constituencies. Given a population of about six million, 55 seats equates to one seat per 109,000 citizens, which in turn probably equates to about 60-70,000 voters. There is very substantial variation on constituency sizes across the world varying with population, geography and political organisation. However, smaller countries generally have higher ratios of representatives to voters.¹⁸ Thus for a small country like Tajikistan, and notwithstanding financial constraints, the proposed 55 constituencies do appear to be large in terms of the number of voters they serve.
12. Whilst the sides have not been able to agree on the actual number of seats, according to the OSCE mission report the government has conceded that the proportion of seats filled by party lists should be increased to 35% (19 seats if the total number remains at 55), and the number elected from single mandate constituencies reduced to 65% (36 seats). This would obviously mean that the number of constituencies would be reduced to 36, making an even larger number of voters for each single constituency mandate.
13. Tajikistan appears to have reached a stage where multiparty politics is seen as providing a path away from civil war. Emphasis has been placed on bringing as many political players into legitimate and

¹⁶ Art. 22

¹⁷ See the report of the first Joint UN-OSCE Election Assessment Mission to Tajikistan, 21-28 May 1999, p. 5. Presumably the large majority of these migrants remain citizens of Tajikistan and therefore retain the right to vote in principle.

¹⁸ e.g. For the 1990 Latvian elections there was one constituency mandate for every 10,000 voters.

peaceful political activity as possible. Such considerations tend to favour an increased role for PR, which allows a greater voice for smaller parties than a majority system. Moreover, it is probably more difficult to manipulate or falsify results in a PR system than with a majority system because with PR, every vote counts. Given recent experiences, this is a very important consideration. For these reasons an increased use of PR is probably a positive measure. However, there is no international standard on the appropriate balance between single mandate seats and those filled by PR. How the balance is achieved in the Assembly of Representatives is ultimately a political matter to be resolved between the various sides. Again, perhaps the most important feature of this process is that the issue is being resolved by negotiation.

14. On this point it must be noted that the present minimum threshold for seat allocation for party lists is very high, at 10%.¹⁹ The recent OSCE mission report indicates that the government has agreed to reduce this threshold to 5%. Given the present dangers of excluding political participants from the electoral process, this appears to be a very welcome compromise. If anything, it may be that 5% is still too high.
15. The draft Law adds little of substance to the constitutional provisions on the formation of the National assembly.

Nomination and registration of candidates for election to the Assembly of Representatives

16. The text of the draft Law permits nomination of candidates for election to the Assembly of Representatives by

- political parties;
- meetings of at least 500 voters by place of residence, work or study, at which at least half the participants must vote in support of the candidate;
- candidates themselves (self-nomination), supported by at least 500 signatures.

1. According to the recent OSCE mission report, the government has now agreed with the UTO not to permit nominations by meetings of voters.²⁰ Such nomination procedures have been introduced in a number of Central Asian states (such as Turkmenistan and Uzbekistan) where there are no significant political parties. In theory at least, this mechanism promotes the nomination of genuinely independent candidates (i.e. those not approved by the authorities). In contrast, Tajikistan has a number of established political parties which constitute a genuine if disparate opposition. The justification for allowing nominations by voter meetings is accordingly diminished, particularly given the danger that in practice such meetings can easily be manipulated by the local authorities. The reported decision to remove this nomination mechanism therefore constitutes an improvement in the Law. The fact that individual candidates can still participate if they are able to gather 500 signatures in support preserves a role for independent candidates.
2. The OSCE mission report also indicates agreement that the minimum period for which a political party must be registered before it can nominate candidates has been reduced from six to three months. A proposed provision preventing parties from setting up new local structures after the date of the election has been set²¹ has also been removed. These are clearly positive steps in ensuring that political parties are able to develop their legitimate and essential political activities.

¹⁹ Art. 48

²⁰ Art. 30

²¹ Art. 30 of the draft Law

3. Party candidates for single mandate constituencies in elections to the Assembly of Representatives must be nominated at city and regional organs of the political parties.²² The UTO has apparently suggested that parties should also be able to nominate candidates by any other means permitted under the party's charter. This appears to be a reasonable suggestion: as long as it conforms with necessary legal restrictions and the party's internal rules, the procedure for nomination of candidates should be an internal matter for the party in question.
4. A party list must contain not more than 10 names (the number of seats allocated by party list under the present Draft). Clearly this provision will require amendment if the number of party list seats is increased.
5. The draft Law imposes various bars to nomination. These include:
 - 'citizens who have been sentenced for the committing of not very grave or average crime, or by their own imprudence, and they still have blemish of being imprisoned;
 - citizens who are suspected of committing of crimes against the principles of Constitutional system and against state security and committing of other intentionally grave or especially grave crimes or wanted by investigation organs.'²³
1. Clearly there may be problems with the translation of this part of the text. However, there are obvious concerns. The first is that imprudence cannot be a basis for restricting the enjoyment of any civil right. The second is that excluding persons from running for election on the basis that they are wanted in connection with a suspected criminal offence directly violates the presumption of innocence.
2. Nominated candidates must submit details of their resources and income certified by the tax authorities before they can be registered.²⁴ It is far from clear how such a requirement could be justified in the best of circumstances. Citizens are entitled to participate in elections irrespective of their property status. In a country such as Tajikistan where tax collection is in a state of complete disarray, it is difficult to see how such a restriction could be made to operate at all. The obvious danger is that this restriction will be used as a pretext to exclude candidates who cannot be excluded by other means. It should not remain in the Law.
3. It is recommended that the provision allowing for the cancellation of candidate nominations,²⁵ if retained at all, should be subject to a deadline, so that candidates cannot be withdrawn beyond a certain date. The existing provision is discriminatory to the extent that it is extremely unlikely that a candidate nominated by a meeting of citizens or by a list of signatures could be removed in the way proposed.

Timing of elections of the National Assembly

4. According to the recent OSCE mission report, disagreement remains over the timing of elections to the National Assembly. As indicated above, members of the upper chamber of parliament are indirectly elected by local representative bodies. The government has taken the view that the new National Assembly should be elected by the existing local representative bodies; local elections would then take

²² Art. 31

²³ Art. 33

²⁴ Art. 35

²⁵ Art. 36

place two weeks later. The UTO seeks election of the local bodies first. The draft Law leaves the issue unresolved.²⁶

5. It should be noted that the General Agreement on the Establishment of Peace and National Accord envisaged a new law on elections to local assemblies. The OSCE report indicates that the CNR is now due to discuss a draft text of such a law.
6. The recent political history of Tajikistan shows a concerted effort to implement a comprehensive renewal of state institutions at all levels by constitutional and legal means. The president has just been re-elected, both chambers of the new parliament are about to be elected, and it is agreed that local authorities must be re-elected. It is presumably hoped on all sides that elections conducted in accordance with the law will help to instil much greater confidence in state bodies. Within this context it seems wholly expedient that the new upper chamber should be subject to the same process of revitalisation. If the local authorities are to be re-elected in any event, those elections should proceed first before they proceed to elect their part of the National Assembly. It would therefore seem appropriate to hold elections to both the Assembly of Representatives and local assemblies on 27 February to be followed by elections of the National Assembly shortly thereafter.

Transparency of the election process

7. The recent OSCE mission report indicates that neither side in the present discussions sees a role for independent domestic observers. There is no reference to such observers in the present draft.²⁷ The absence of domestic observers may be unsurprising where civil society is at a very early stage of development; there are probably few, if any, NGOs which might provide a source of truly impartial observers. However, the absence of domestic observers in the draft Law raises the importance of other establishing other mechanisms to increase transparency in the election process.
8. It is to be welcomed that the draft law includes the right of party and candidate representatives, journalists and international observers to attend meetings of electoral commissions and to attend voting premises.²⁸ However, further provisions to enhance transparency in the administration and conduct of the elections are highly desirable. These include provisions to ensure:
 - broad representation of political parties on electoral commissions (see above);
 - that observers, proxies and candidate/party representatives have the express right to
 - check that ballot boxes are empty at the beginning of polling day;
 - check the ballot box seals before the boxes are opened;
 - check any ballot papers deemed to be invalid;
 - append written comments or complaints to the protocol of results;
 - that election results are immediately announced and displayed at precincts and DEC;

²⁶ Art. 27

²⁷ There is an isolated reference to observers and foreign observers in Art. 12(11). This may be a drafting oversight.

²⁸ Art. 8

- that certified copies of result protocols at all levels are issued on request to party and candidate representatives;
- that the full detailed results are published by a fixed deadline.

Finance

1. The draft Law provides that all campaign finances must be distributed by the CCER 'with a view to ensure equal conditions for each candidate'.²⁹ Political parties and candidates are forbidden to spend their own funds. Unfortunately there is no attempt to define what 'equal conditions' will mean in practice. Nor is there any attempt to define how the CCER will distribute funds, e.g. to ensure that every candidate or participating party is fairly provided with campaign literature. Given the very close relationship between the PDP (and, to a lesser extent, the Communist Party) and state institutions, there is an established disparity between the amount of resources available to different participants in the election contest. Unfortunately the present draft appears to make no progress in addressing this problem.
2. It is recommended that the Law, or at least regulations promptly produced by the CCER, establish clear entitlements to financial resources and any limits on their use. Clear principles are required in the Law itself on how financial resources will be distributed and how the PDP will be prevented from exploiting its established advantage. In the absence of such provisions it would be much better to permit parties and candidates to spend their own resources subject to proper and transparent accounting procedures and appropriate restrictions on donations.

Media

3. As in every election, campaign finance is closely related to media issues, and in particular to methods of guaranteeing equal access on an appropriate basis to television, radio and the press. As it stands, the Law raises more questions than it answers on access to the media. It provides that candidates and parties may give one talk on the radio and television free of charge. Given the abovementioned controls on campaign spending, this raises the question of whether broadcasters have a duty (or indeed the right) to offer broadcasts for money. If so, how much is to be spent? If additional free coverage can be provided, how is it to be distributed between individual candidates and political parties? There are numerous private broadcasters in Tajikistan. The draft Law provides little guidance on their rights and duties during the campaign. Regulations of the CCER will be needed to regulate any paid advertising (presumably paid for by the CCER), the length and content of campaign broadcasts and advertisements and further practical details to ensure fair access to the media.
4. One important defect in the present draft ought to be remedied in the Law rather than any regulation. This is the obligation that at least the state media must show complete impartiality in their coverage of the campaign; they must refrain from campaigning for or against any party or candidate.

Voting and counting

5. The exceptionally delicate security situation in Tajikistan makes it particularly important that the function of the security services during voting and counting is carefully regulated. There is no justification for security personnel to be present inside polling stations unless invited in by the PEC to restore order. They should be required to leave immediately once order has been restored.

²⁹ Art. 9

6. The presence of unauthorised personnel in polling and counting premises, in particular representatives of the local authorities and the Ministry of Security, can be simply and should be strictly prohibited.
7. The level of turnout for the recent presidential election was suspiciously high (98%). Inevitably this gives rise to concerns about the reliability of the results. The turnout figure gives rise to the following recommendations:
 - the Law should contain an explicit provision that participation in elections is voluntary (assuming, given the absence of any requirement to vote in the Constitution or draft Law, that this correctly reflects the present position);
 - the process by which the mobile ballot box is used (Art. 42) should be closely regulated by either the Law or CCER regulations to ensure, for instance,
 - that observers are permitted to follow the box;
 - that members of precinct commissions only take out a number of ballot papers corresponding to the number of requests received to use the mobile ballot box.
1. The following recommendations apply to voting procedures.³⁰
 - Voters who require assistance should be allowed to have someone help them to complete the ballot paper. The person assisting should be another voter, not a member of the electoral commission, candidate or party proxy etc.
 - The Law should make allowance for spoiled ballots. A voter should be permitted to return a ballot paper if a mistake is made and to be issued with a new one.
 - It is strongly recommended that the system of crossing names of ballot papers is replaced by placing a mark in a box. The latter system gives rise to far fewer spoiled ballots. On any ballot paper where only one candidate is included, the latter system affords much better secrecy: all voters have to mark the ballot one way or another.
 - Ballot stuffing has been a very serious problem in recent elections which severely undermines confidence in the election process. It is strongly recommended that all ballot papers are numbered as a means of improving controls over the distribution of ballot papers.

³⁰ Art. 42