

E-Governance in Lawmaking and Judicial Decision Making

Some Practical Steps toward the Rule of Law and Due Process in Armenia

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In his landmark study, *The Determinants of Economic Growth: A Cross-Country Empirical Study* (1997), Robert Barro found that the primary factor that consistently correlated with economic development was the rule of law. While elective democracy is desirable, the predictability, consistency, and fairness secured by the rule of law have been shown to be more important for economic development. At the core of the rule of law is due process. Like the rule of law, due process is an abstraction. The purpose of this paper is to make these abstractions concrete and propose specific steps toward achieving and institutionalizing due process and the rule of law in Armenia.

Due Process as the Basis of the Rule of Law

Due process is the basis of the rule of law. Due process requires that any state action that affects people's rights meet certain criteria. Those criteria are designed to assure that the state action promotes a legitimate state interest in the most efficient way possible and with the least burden on the rights of the citizens. This is the international standard to which Armenia has bound itself. For example, the International Covenant on Economic, Cultural, and Social Rights, article 4, reads:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by the law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

This provision is paralleled in the constitution of Armenia, article 44: “Fundamental human and civil rights . . . may be restricted only by law if necessary for the protection of state and public security, public order, public health and morality, and the rights, freedoms, honor, and reputation of others.” [For the full text of the constitution, see *Armenian Forum 2*, no. 1.]

On both a practical and theoretical level, international experience has shown that the following are essential for due process:

(1) Notice/Petition: People need to know what state actions are being proposed before they are enacted. People also need to have a way to propose state actions. Notice can be given by publishing a list of such proposals on an Internet site, along with a deadline for comments. Petition rights can similarly be afforded by designating an Internet bulletin board (forum) or office where proposals and recommendations can be made.

(2) Opportunity to be heard: Once a proposal is made, the proposal needs to be discussed publicly. In particular, the people who will directly be affected by the proposal need to explain why it is good or bad for them. This is an essential ingredient for quality assurance in lawmaking. No lawmaker or decision maker can possibly foresee all the implications of a proposed state action. Opportunity to be heard can be effected through public hearings or written submissions that are published or publicly available. Once again, an Internet site could be an inexpensive way to provide an opportunity to post comments and make them part of the public record.

(3) Standard of Decision: The proposal should be adopted only if it bears a rational relationship to a legitimate state interest. The end must be legitimate and the means must be well suited to achieve that end without unnecessarily restricting citizens’ freedom and rights and without imposing a burden that outweighs the good to be achieved. State choices need to be reasoned, like judicial opinions. The application of standards is a discipline to prevent bad laws and regulations from being adopted and to provide a basis for later review and correction. The International Covenant on Economic, Cultural, and Social Rights, article 4, quoted above, gives an international standard for any law, regulation, or decision.

(4) Review/Appeal: No one is perfect. Circumstances change. Any law or decision must be subject to review or reconsideration to correct problems with the law itself and to correct faulty applications of the law. For regulations, this is usually done through administrative proceedings at ministries, or through the courts; for laws, through the political process of hearings and lobbying; for court decisions, by appeal to the court of higher instance.

Justice and the rule of law are not static objects. They are processes. No law,

regulation, or decision can foresee every situation. But there is a better chance that it will cover most needs and foreseeable situations if it is reviewed from a number of different perspectives. The role of the state in lawmaking and decision making is to create a process that will produce good state actions. Good laws and good decisions are an essential duty that a society owes itself. No one can do this for the society. This cannot be achieved through consultations with groups of foreign or local experts. The four steps above are the cornerstones of the rule of law.

E-Governance as an Means for Institutionalizing Due Process

The essence of the rule of law is due process and equal protection. As noted above, due process requires (1) notice, (2) an opportunity to be heard, (3) rational/reasoned decision making, (4) meaningful appeal. Equal protection requires consistent application of rules and equal access, both of which are grounded in access to information. The legal and administrative framework has proved to be one of the most intractable impediments to economic development in many emerging markets, including post-Soviet countries like Armenia. The following five nonintrusive proposals aim to empower individuals, attorneys, and public-interest groups by promoting clarity, transparency, equal access to information, and meaningful opportunities to engage the legal and administrative system in a system-changing way. They are meant to be noncontroversial measures that public and private sectors can work to develop together, fostering confidence while making a concrete contribution to developing the tools and processes required for a sustainable business climate and good governance.

Judicial Opinions Web-Site

Well-reasoned, objective, consistent, predictable decision making is at the core of the rule of law. Similar cases should be decided in a similar way. If judicial opinions were fully reasoned and published on a Web site, investors, attorneys and the public at large could see how similar cases are being handled and how gaps, conflicts, and ambiguities in the law are being resolved by the courts. This would be a major step toward the independence of the judiciary, due process, and the rule of law.

The goal would be to promote transparency and to give attorneys and the public at large guidance on how the law is being applied by the courts. It would also give lawmakers important data on laws and regulations that need repair because they are ambiguous or causing unintended problems. It would promote judicial independence and reduce corruption since judges could use the require-

ment of posting and publication as a shield to resist pressure and influence, as their decisions would be subject to public scrutiny. Similarly, litigants could use the database to remind judges how similar cases have been decided and to urge consistency, if there is a threat of a special deal. Finally, for the bodies that appoint and remove judges, a public database of the objective output of the judicial system would provide a basis for making informed choices supported by facts and patterns of judicial behavior in connection with appointments, promotions, training, reprimand, or removal of judges.

Since virtually all decisions are currently public, as required by the European Convention on Human Rights, the main purpose of this site is to make these decisions more widely available and more easily accessible. Indeed, since 1996 the Constitutional Court has been publishing most of its opinions on the Internet. To build on the Constitutional Court's current practice, Economic Court decisions, Cassation Court decisions (from the court's inception), and such Appeals Court decisions as are relevant to the economic sphere can be posted on the Internet. For these courts, existing practice is to issue written opinions to the parties, and therefore, posting these decisions on the Internet would not impose much of a new or unfamiliar burden on judges. The Judges Association may be an appropriate organizer and host for this site.

Draft Law and Regulation Web site

Currently, few people if any are aware of proposed laws and regulations. This could be remedied if all draft laws and regulations, including markups and comments resulting from hearings, were posted on a Web site with a reasonable comment period. In this way, those whose rights are directly affected would have a meaningful opportunity to shape the environment in which they must live, work, and invest. This would help to produce better laws, since few people are better positioned to identify how changes in the law will affect them than the people who are actually using the laws and subject to them in various contexts.

No matter their intelligence or good will, few, if any, experts, legislators, or regulators are able to anticipate how a change in one law will impact practice in the context of other laws and regulatory practices. Moreover, without broad participation it is virtually impossible to build the consensus required to foster a culture of voluntary compliance with the law, which is the foundation of a law-based society. Thus, a database of proposed laws and regulations would promote good governance, reduce risk in the legal environment, create a public forum for deliberation and a record for reconsideration and review, and improve the quality of the laws.

The establishment of such a Web site would require a small but essential legislative enactment, which will promote public engagement and transparency in the legal and administrative process. Since draft laws are now available to all members of Parliament and are considered public documents, this proposed procedure would merely mandate that the public documents, along with draft regulations, be posted on the Internet for a public review and comment period. There is precedent for this kind

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of site. The Armenian government Web site's international assistance database (IADA) has feedback and discussion features. In order to foster neutrality and increase accessibility, the library system, led by the State Library and National Academy of Sciences, may be an appropriate host for this Web site. They are developing a union catalog and other kinds of Internet access upgrades through a grant from the Open Society Institute and have regional access through such programs as Project Harmony and the Libraries As Civic Communication Centers program of the Eurasia Foundation.

Law Web site in Armenian, Russian, and English

After adoption, all laws need to be publicly available on the Internet in Armenian with reliable Russian and English translations. Access to laws on for-pay Armenian law databases is not sufficient to keep the public well informed or to make Armenia an attractive place for foreign investment. The information barrier is currently too high. The prospect of investing or operating a business in Armenia in a difficult-to-understand environment is a major deterrent to economic development. Serious investors are reluctant to put money into a country whose laws international attorneys cannot understand or at least access in the form of reliable and readable English translations.

Much of the Armenian text of Armenia's laws already exists in computer-readable form at the *Official Gazette* and other sources. The site proposed here would not compete with the for-profit IRTEK value-added service, which would still be demanded by attorneys and other professionals for its indexing, classifications, links, and collation of legal texts and amendments. One possibility is for the *Official Gazette*, which is a state-owned for-profit company, to provide the

text for posting on a Web site maintained by the State Library or National Academy of Sciences.

While Russian-translation capacity currently exists (although issues of consistency and new terminology are a problem), English-translation capacity needs to be created. The development of a school of translators under the mentorship of bilingual, native English-speaking attorneys, and the design of computer tools for translation, including concordancing, phraseological dictionaries, and so on, could be a joint project of Yerevan State University (which has a translation center and a law faculty) and the American University of Armenia (which can provide legal terminology, English-language, and computer expertise for this project). This is a living, group-based capacity that Armenia needs to develop in order to be globally competitive. It is also sustainable, since a center with these skills could also do for-profit legal and technical translation.

On-Line Government Handbook/Directory

A complete directory and organization chart of all government bodies and their subdivisions and staff, with names, titles, addresses, telephone numbers, fax numbers, and E-mail addresses, would contribute greatly to the transparency of decision making and access to the government. The directory should also list citations to the statutory basis upon which the governmental body operates, the regulation that sets forth its procedures, and the name of the bureau or office that handles citizen inquiries and complaints. This would substantially demystify the governmental apparatus, red tape, and runarounds that cost investors and the public at large so much time and effort and tarnish Armenia's reputation in global competition.

The President's office, the government Web site, the National Assembly Web site, and certain ministry and other governmental body Web sites have already made some of this information more accessible on the Internet. However, there is currently no comprehensive directory that is up to date and centrally maintained. The Armenian Gateway Project also has a general structure for this project; however, due to a lack of funding, it has not yet completed the directory.

Frequently Asked Questions (FAQ) Web Site

The idea behind a "frequently asked questions" web site is to provide step-by-step guidance on how to navigate the most common situations involving governmental bodies and major life events in a legal manner. Currently, administrators are dealing with a system in transition, where it is difficult to keep up with changes; individuals and businesses, because by nature many of these transactions

are one-time, rather than repeated transactions, do not have the resources to hire an expert to handle the transaction or become experts themselves.

A great help to both citizens and officials would be a guide to the basic steps for common transactions. Although each person may only do these transactions infrequently, in aggregate they are the everyday fabric of the interaction between private-sector businesses and citizens and the public sector. If these interactions are positive, governance is perceived to be and is in fact good. If they are not, then the general perception and reality is that governance is bad. Thus, clarity and a common reference point would be of benefit for both public and private sectors.

For example, the site would provide step-by-step guidance for renting and selling real property; buying and selling cars; paying taxes; seeking assistance with utility disruptions, trash collection, and condominium issues; making a will; probating an estate; registering a company; making reports for nongovernmental organizations, tax filings, tax audits, and tax exemptions for nonprofit transactions; giving gifts; pledging property; obtaining a driver's license, a building permit, other business licenses, a telephone line, and a package from overseas via post; clearing a package or shipment through customs; carrying out motor-vehicle inspections; handling motor-vehicle tickets and violations, voter registration, marriages, births, adoptions, divorces, and burials; applying for a government job; bidding for a government contract; obtaining emergency medical service, preventative health care, and prenatal care; knowing what to do if you or someone is arrested, and where to apply for legal assistance; receiving pensions, veterans', disability, and unemployment benefits; applying for a small loan; opening a bank account; reporting stray dogs; reporting health hazards; applying for schools and universities; reporting for military service and applying for exemptions; running for public office; knowing one's rights and obligations during tax audits, fire inspections, and sanitary inspections; reporting vandalism, administrative abuses, school-related problems, military-related problems, police abuse, child abuse, and spousal abuse.

The "frequently asked questions" site would be a natural adjunct to the laws database. There are a number of internationally funded projects, such as the International Foundation for Election Systems (IFES) and the Central and East European Law Initiative (CEELI), as well as local nongovernmental organizations—such as Information Systems Development and Training Center, Project Harmony, Junior Achievement, Libraries As Civic Communication Centers, and bar associations—that can help with content, interconnectivity, outreach, dissemination, and promotion of access.

Why E-governance?

Using the Internet is the easiest and cheapest way to get information out to the public, in particular that segment of the public that is in a position to engage the system and engage in systemic reform. It is easy to update. It is relatively easy to search. Information can be accessed everywhere, whereas printed material is costly to prepare and disseminate, becomes out of date quickly, is difficult and costly to index, and quickly disappears from public circulation.

E-governance is particularly well suited to Armenia, with its initiative and competitive edge in information technologies. While the digital divide is a reasonable concern, access to the Internet, even with the high cost and restricted service brought about by the telecommunications monopoly, is much greater by an order of one hundred to one thousand times than access to the law-, rule-, and decision-making processes and fora or printed versions of laws and administrative materials.

The E-Readiness Armenia study by the Information Technologies Foundation shows that Armenia is well ahead of other post-Soviet countries in E-readiness and therefore ripe for E-governance. The study estimates between sixty thousand and one hundred thousand Internet users in Armenia, which translates into direct access by one in ten active adults, many more in Yerevan, where there are Internet cafes and institutions with Internet access, plus many more with indirect or intermediated access, probably reaching 25–30 percent of the population. While connectivity rates are lower outside Yerevan, various programs, such as Project Harmony and the Eurasia Foundation Library Program, are bringing connectivity to scores of schools and libraries around Armenia.

Also, the efficiency of traditional mass media, such as television and print, as well as other channels of information diffusion, including meetings, offices, and consulting firms, will be dramatically increased by the ease of access to information, permitting them to devote greater resources and attention to content, analysis, and deliberation. By having information more easily accessible, the media and decision makers will also be more accountable to the public, which has easier access to information that was formerly in the hands of a few.

Finally, the use of new technologies will encourage inclusion of the younger generation in policy and decision making, helping to close the generational divide and accelerating diffusion of innovative ideas and helping Armenia develop the adaptive capacity to meet the demands of dynamic global economic processes.

Sustainability

Each of these projects is properly a public function that should be supported by government grants, private-sector donations, and income-generating services of the information providers. For this reason, it makes sense for them to be housed in institutions that have the ability to derive revenues from all these sources in the most efficient way possible. Nonprofit public foundations are well suited for this purpose.

For the foreseeable future, government financing will be limited and directed to more pressing social needs; thus the government cannot be the primary or even substantial source of support for these projects. At the same time, turning this public service into a for-pay service unduly limits access without any substantial projected revenue. Thus, there will be a continuing gap between the cost for these Web sites and the government financing available. Initially, this gap, especially during the setup stage, could be covered by international donors and public foundations, funded by investors, diasporan organizations, and others who are dedicated to the promotion of the rule of law, media, transparency, anti-corruption, harmonization with international and European standards, and other reforms.

At a later stage, each may find an income-generating function in the society. These may include, for example, publication of judicial opinions with commentaries and analysis, provision of electronic text to commercial organizations, translation services, and other value-added subscription services. The growth of this revenue-generating capacity is correlated with the rise in Armenia's standard of living and market demand and purchasing power for higher quality and more sophisticated information.