

The Process of Labour Code Commentary: Possible Mechanisms for Administration

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Background: The Commentary System in Armenia

The process of “commentary” on laws in Armenia has a long history dating back to Tsarist times, as the first standardization of Russian law in 1833 came with its own commentary and interpretation to aid subjects of the Russian empire in following the edicts issued in Moscow. It wasn’t until the Soviet era, however, that legal commentary, a volume compiled by experts that interpreted laws and offered advice on their implementation, was refined into a standard procedure that accompanied lawmaking. The commentary system in the Soviet Union relied on specialists that were effectively under the purview of the relevant Ministry, allowing for Moscow to both create and interpret Labour laws and have the courts enforce them accordingly. This system fit with the Soviet need to lessen the burdens of central planning through a standardized legal interpretation.

The process of commenting on labour laws in the Soviet Union, including decisions on when such a commentary would be produced, was driven by the needs of the Soviet Labour Ministry and was not formally institutionalized within the daily processes of the Ministry. Despite the ad hoc nature of the decisions surrounding timing of the commentary, in reality the process itself followed a specific sequence within government. While the Soviet Labour Ministry in Moscow had ultimate responsibility for the Code, it utilized between three and four Scientific Research Institutes to create analyses of labour-related laws, secondary legislation, and party or court decisions. These institutes had a large number of scientists from the fields of labour economics and labour law, fields that were favored by the Soviet government as essential for organizing the political system and accordingly the central planning of the economy. After being tasked by the Ministry with creating a commentary, the Institutes would then organize thematic groups internally to work on different parts of the labour legislation, interpreting each article or portion of the code to provide a concrete legal interpretation for citizens and state-run businesses to follow. These interpretations were finalized and edited by the senior scientist at the institute, and then presented to the Ministry for approval (they were also sometimes put forward by the Ministry for approval by the Peoples’ Congress).

Current Process in Armenia

A Commentary has not been issued in Armenia since the days of the Soviet Union, meaning that over 15 years of independence have passed without any formal commentary process or mechanism within government. In Armenia, the issue of commentaries and explanations are regulated by the Law on Legal Acts adopted in 2002. This Law explains that any Commentary that is created is not binding on legal and physical entities and state bodies, but it can serve as an additional source of information in case of disputes and disagreements regarding implementation of certain issues and aspects of Labour Code. Unlike the monopoly that the Soviet state had on legal interpretation, currently private consulting firms or educational institutes also do comparative analysis of specific codes and create their own collection of commentaries. Much like official commentaries, these private collections are not legally binding and are for educational or law awareness raising processes. Unfortunately,



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no information is available at present on the extent of these private commentaries and their usage among Armenian businesses.

Towards an Official Commentary Process

The initiative to create a formal commentary on the Labour Code in Armenia comes from both the Ministry of Labour and Social Issues (MLSI) and the National Institute on Labour and Social Research (NILSR). Under this new initiative, the NILSR is the taskmaster in producing the commentary in a manner similar to its precursors in Moscow, and all work on the commentary would be produced within the Institute with no input at this stage from external experts.

The Armenian proposal is thus similar to but at the same time strikingly different from the Soviet system; while in both the Soviet system and Armenia today, the commentary would be tasked to an Institute exterior from (but subordinate to) the Ministry, in Soviet times the specialists and experts were housed within the Institute, while today the Institute is creating the commentary with a small team **before** involving a larger set of experts. Indeed, only once this process is completed within the Institute will the Ministry then roll-out the draft commentary in a working group format. Separate working groups will consist of experts in various fields of labour, and they will discuss the interpretation offered by the Institute and refine them before publishing the results as a coherent commentary on each Article of the Labour Code.

This plan for producing the commentary has run up against the largest difference from the old Soviet system, and that is the availability of resources. While Moscow had scientific institutes consisting of hundreds of employees, Armenia currently has one person tasked with the interpretation of 266 articles. This lawyer, technically a consultant employed by the Institute, is analyzing the articles himself and creating a body of interpretation in conjunction with Mr. Simonyan at the Ministry (described as the current “working group”). As currently practiced, it has been estimated by the Institute that the entire commentary process, from start to finish, with 4 people working on it at the Institute, would take about a year to complete. The Institute realizes that the current system is not optimal, and has pushed for more resources to help expedite the review of the 266 articles of the Labour Code solely within the NILSR.

Is an Official Commentary Necessary?

This proposal of an expansion of work within the NILSR begs the question if an official commentary is even necessary within Armenia. An official and government-created commentary is a rare process outside of the former Soviet Union, where legal precedence and case law are utilized to interpret regulations and codes.¹ One of the reasons that a commentary system is so rare is that it tends to concentrate both authority and interpretive power in the hands of the executive branch rather than dispersing it across the executive, legislative, and judicial branches (Armenia does avoid this somewhat through the Law of 2002 that notes that commentaries are not binding). And in a country with a weak judiciary

¹ Russia, Belarus, and Kyrgyzstan currently utilize the Labour commentary system; of these, only Russia has a thriving private sector system that also offers its own legal interpretations in addition to official commentaries.



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such as Belarus, commentaries are not taken as helpful interpretations of the law, they **are** the law

The National Institute has noted that a Commentary is necessary in order to raise awareness of the Labour Code among Armenian businesses and increase understanding of the Code's provisions. Their stated belief is that the audience for the hardcover Commentary will be the average citizen (presumably businessman) and that such a document will "facilitate usage of the Labour Code." However, there are several other avenues that can increase awareness of the Code, including through Ministry outreach efforts, increased efficiency of the Labour Inspectorate, and consistent judicial and executive application of the Code. There has also been no study undertaken of the extent of misperception of the Labour Code (work is currently being done by the SPSS project on this subject), nor has there been a demand study to ascertain how many firms actually desire and would use a Commentary.

In sum, there are arguments both for and against an official commentary: such a process may represent a contribution to a country that doesn't have an established body of case law or legal precedence, but on the other hand, the country has gone 15 years without such a commentary to guide businesses and has seen its main problems in Labour law relate to the minutiae of contracts more than anything else.²

Possible Solutions

Given the Institute's desire to produce a commentary, there are several ways to achieve this goal over the short-term:

- *Continue working within the Institute*

This will keep the single lawyer writing the Commentary himself, a process that the Institute remarked could take "2-3 years." The commentary then produced inside the Institute would go through the working group mechanism as proposed, with some other mechanism designed within the Institute and the Ministry in order to refine the commentary process as amendments and changes are proposed to the Code. Given the state of flux that transition economies go through, this may be too long a timeframe to be relevant once the commentary is produced. The fluctuations, on the other hand, may mean that attempting to write and keep current a commentary will always be futile.

- *Continue working within the Institute with more personnel*

The preferred option of the Institute, this would involve, preferably with SPSS funding, hiring 2-3 more lawyers to speed up the process within the Institute and then go to the working group process. This option is constrained by the amount of money allocated to the Institute by SPSS and in the budget, and also must be weighed against other pressing needs that the Institute has identified that SPSS can help with. This option also pushes back the idea of institutionalizing the mechanism for legal interpretation in favor of producing the commentary now.

² Noted by Artsvik Minasian, MP, during a June 27th, 2007 press conference.



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- *Outsource the Commentary process: Public Sector*

Given the amount of expertise that already exists within the government on the Labour Code, there is the option of seconding or detailing employees of the Ministry to the Institute as part of a rotation; in this manner, the competencies of Ministry workers in their particular fields can be harnessed with less effort on the part of the Institute. This rotation would be institutionalized and part of the regular duties of the employees of the Ministry, and will be scheduled so as to cause minimal disruption to the functioning of the Ministry. The difficulty with this option is that there is a belief that workers in the Ministry already do not have enough time, and so this may meet with some resistance from Ministry employees. There also will be problems in having to rewrite job descriptions in order to allow employees to undertake this new duty.

- *Outsource the Commentary process: Private Sector*

To overcome the problems of outsourcing within the public sector, it may be easier for the Institute to outsource to the private sector. While experts and specialists are theoretically involved within the Institute's process through the working group mechanism, this option would move up their involvement so that the Institute would contract with academic centers, legal faculties, and think tanks (whether in Armenia or abroad, such as in Russia) to create their own interpretations that could then be debated within the Institute. Similar to the Soviet system, but without the expertise actually located in the Institute, this option would harness the private sector and cultivate its legal acumen without burdening government workers unduly. It would also alleviate the burden of creating an institutional mechanism within the Institute or Ministry, as contracts (supported by SPSS grant mechanisms) could just be issued for commentary as necessary. Finally, the work that would be produced would be owned by the Ministry and the Institute, and so would be presented as official and have the imprimatur of the government.

- *Privatize the Commentary process*

Finally, given the debatable merits of an official commentary and the lack of evidence on the demand for such a process, the Institute could allow private institutions to create their own interpretations, much as has happened in Russia, and provide assistance or training to the private sector in this activity. Under this option, there would be no official commentary with the imprimatur of the government, merely competing interpretations that would be decided through the legal system. This method would also encourage the growth of the business law sector in Armenia; however, its success would be dependent on consistent judicial procedures and rulings from the bench.

Conclusion

Of these options, outsourcing to the private sector appears to be the most reliable given the lack of resources within the Institute and the timeframe that the NILSR wishes to target. Moreover, the delivery vehicles that can be used in this contracting mechanism should be cheaper than hiring full-time employees at the Institute (fixed-fee contracts can be negotiated



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at a fraction of the cost of bringing on board new staff). If the private sector option is found to be infeasible by the Institute, serious consideration should be given to an institutionalized system of detailing or rotation (of no more than two weeks) within the public sector. Both of these solutions will fully utilize knowledge that already exists within Armenia or elsewhere, while proving to be sustainable and cost-effective.

If neither of these solutions is desirable to the Institute, a final option, not discussed above, is to delay the commentary process until more information is available. Given that there is no hard evidence regarding the public perception (or misperception) of the Labour Code, and only scant evidence from the Labour Inspectorate on where businesses need commentary and clarification on the Labour Code, the commentary process could be postponed until more public outreach and information gathering is undertaken. Through this approach, a full commentary might not be the correct solution, but rather the Institute would produce a targeted commentary hitting the areas of most relevance to Armenian businesses. Selected commentaries could be published as needed by the Institute in a series of bulletins, providing a cumulative and current body of targeted commentaries. Other commentaries could then be incorporated from the private sector or outside experts, while the Institute focuses its resources on only points identified as crucial to firms and employers.



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