Poland and Armenia: Comparative note: Lessons learned on the Forfeiture in Favor of the State of Illegally Acquired Assets

by Arthur Martirosyan and Rafał Kierzynka

This is an opinion piece by negotiation and conflict management specialist Mr Arthur Martirosyan about the anti-corruption measure, arguing while well-intentioned, the Armenian law in its current articulation can be applied to anyone, not just former public servants. Considering some behavioral culture aspects, the unreformed and still questionable judiciary, the law in its current articulation may be turned into a political tool for silencing the opposition on a slippery road to semi-authoritarianism. A comparative note by Polish judge Dr Rafał Kierzynka regarding Poland's history lessons on forfeiture of illegal assets are adding value for a better understanding of similarities and differences in theory and practice of forfeiture law.

Post-communist transitions are generally thought to be a part of the past. However, it is apparent that the processes of transition in the countries in Central and Eastern Europe and the Former Soviet Union are far from over. Instead of reaching a point where all countries converge towards democracy based on market economy, the experiences of the countries from the region are extremely diverse. The case of Armenia despite many similarities stands out as its transition is still clouded with uncertainties.

After securing independence in 1991 the post-Soviet Republic of Armenia launched three large-scale, simultaneous, interconnected socio-economic and political transformation processes under adverse conditions of war and blockades by Azerbaijan and Turkey: (1) the nation-state building aimed at installing a republic with institutions providing the separation of powers and checks and balances; (2) transition to a rule of law based market economy producing the middle class, and (3) democracy promoting political equality; the latter two purportedly following the prescripts of the Washington Consensus on reforming political and economic institutions. 27 years down the road, the country went through yet another

political change in April 2018 when Prime Minister Serzh Sargsyan and the ruling Republican Party of Armenia (RPA) were ousted from power.

The events of April–May 2018 came to be known as the Armenian "Velvet Revolution", a term that connected Armenia's experience to the civil disobedience movement in Czechoslovakia in November-December 1989, rather than the historically and geographically more proximate 'color revolutions' in Ukraine, Georgia, Moldova, and Kyrgyzstan. The Armenian "Velvet Revolution" marked the second attempt at a transition from authoritarianism to a market economy and liberal democracy based on rule of law.

The success of the "Velvet Revolution", by and large, was predetermined by the fatigue of sizable segments of the population with the oligarchic structure of the economy, pervasive corruption, disrupted separation of powers, rigged elections, abusive practices of the one-party rule, failed legal system and judiciary producing vast and deep social injustices. By their promises to fix all wrongs of the former powers that be the new elites essentially recognized the failure of the Washington Consensus in Armenia in the previous decades of transition. Yet after four years in power, they explain the shortcomings in bringing to justice all previous wrong-doers and returning to the state's coffers all allegedly illegally obtained assets due to the stiff opposition from the unreformed judiciary and lack of legal instruments to deal with the past malpractices of illegal wealth creation.

To that end the "Civil Contract" recently introduced Armenian law on the forfeiture in favor of the state of illegally acquired assets, 16.04.2020, (the Law) based on the principle of the rebuttable presumption. The Law in its current articulation of the recourse going back to 1991 and under the current political circumstances of essentially a one-party rule will make the consolidation of democracy in Armenia untenable and a reversal to semi-authoritarianism unavoidable. In fact, this Law will give a carte blanche to Pashinyan's

regime to use it selectively to silence any opposition, in the true sense of the Orwellian notion of "who controls the past, controls the future: who controls the present, controls the past."

A recent study of Armenian values (May 2021, Breavis) testifies that on Geert Hofstede's framework for behavioral culture Armenia is a small power distance culture. To quote Pashinyan, "Armenia is a nation of three million prime-ministers". This means that political equality has been in high demand and its absence has caused societal distress through inadequately designed political institutions of the fake representative democracy.

There's a broad consensus in Armenia that political equality has been impaired since 1991 when the government launched several waves of privatization schemes resulting in severe social disparity. 355 small businesses were privatized in 1991-1992 and by 2000 more than 7,000 small entities, 86% of the total, were privatized. The mass privatization of the state enterprises began in the spring of 1995. The privatization replicated the scheme used in Russia and several other former centrally planned economies, particularly through the use of privatization vouchers (certificates). The program of voucher privatization was adopted in 1994. Every citizen received a voucher with a face value of 20 000 AMD (USD 48.30 at the exchange rate as of January 1995). The vast majority of the financially distressed population sold their vouchers in the secondary markets for as little as five times less than the nominal value, viewing them as means of temporary alleviation in the dire economic conditions caused by the policy of "shock therapy", aggravated by war and blockades.

As a result, the distribution of privatization vouchers intended to provide equal conditions for all citizens turned out its opposite – the vouchers were accumulated in the hands of "the few". Sociologically, "the few", who had financial means of dubious origin, were members of the new and old bureaucratic class, Soviet days shadow economy "entrepreneurs", and

organized criminal groups. Thus, the national wealth created by several generations of Armenians through the Soviet modernization was redistributed to serve as the initial capital for "the few" nouveau riche to get in control of the economy. In the second wave of privatization (1997 – 2000) 1,546 state enterprises were privatized for cash or through international tenders.

By 2013 Armenia became the most monopolized economy among former Soviet Union and Eastern European countries. According to a World Bank report, monopolies and oligopolies controlled more than two-thirds of Armenia's economy. Furthermore, the economic and financial clout allowed the newly emerged group of "oligarchs" to buy political influence causing major disruptions of social justice, rule of law, and political equality

Can this condition be repaired to provide social justice and political equality? Theoretically, there are three possible paths: (1) a sweeping revision of the privatization process; (2) an amnesty for all, going back 8 or 10 years, except state officials, who enriched themselves while in office; (3) a partial revision with a selective application of legal instruments.

Policy option (1) may have a high populist appeal but practically is untenable without plunging the nation into a protracted period of social and political instability, devastating the economy, and bringing the state to the brink of a failure. This option (2) will not establish full social justice as perceived by certain segments of the "Civil Contract" electorate, but it is from the realm of pragmatic "art of possible". The current choice of the Armenian government, policy option (3) is pregnant with significant systemic challenges and high risks of turning the legal instrument into tools of political repression and silencing opposition.

For the Armenians with the culture of small power distance and high uncertainty avoidance another disappointment with the lack of political and social equality may jeopardize the very survival of the nation-state. To avoid the uncertainty many are highly likely to opt for "the

exit" by immigration rather than "the voice" of participation in the stifling political environment of the political inequality[1]. In addition, changing the behavioral culture of nepotism where family ties and relationships among politicians, public servants, and businesspeople have historically influenced policy and contributed to selective application of law is a daunting task for any political leadership and may require years of extensive civic education.

In April 2021, the National Assembly adopted legislation providing for the creation of an anticorruption court. The government also established a new agency to investigate cases of corruption; the Anti-Corruption Committee (ACC) began operating in October of the same year.

However, despite such developments, international bodies, including the UN Human Rights Committee (OHCHR) and the Council of Europe's anticorruption monitoring unit, the Group of States against Corruption (GRECO), have found that serious shortcomings remain in the government's anticorruption strategies; as of 2021, GRECO has deemed the Armenian government's compliance with global corruption prevention standards unsatisfactory.

While law enforcement agencies have initiated a number of high-profile corruption investigations, including cases against former president and subsequently prime-minister Serzh Sargsyan; Armen Gevorgyan, a former chief of staff of ex-president Robert Kocharian and deputy prime-minister under Serge Sargsyan; former prosecutor general Aghvan Hovsepyan; former police chief Vladimir Gasparyan; and former minister of defense David Tonoyan, the court proceedings have been extremely slow and to the date a modicum of verdicts have been reached.

[1] Albert Hirschman, "Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States", 1970.

Public discussion of draft legislations, including of the Law in the National Assembly had, however, remained inconsistent, the use of "urgent procedures" was excessive and evidence of draft legislation provided to the public at an early stage not available. GRECO reiterated that a code of conduct for MPs containing appropriate guidance on conflicts of interest and integrity matters is still not in place.

Meanwhile, Armenia has witnessed countless court cases adjourned because of selective justice during Pashinyan's premiership. The political affiliations of offenders often make them more or less vulnerable to the investigative process and the media hype around certain criminal cases makes the investigative and judiciary process an ordeal for law enforcement agencies and courts.

The legitimacy of the new regime and the Pashinyan government was subsequently confirmed in what have widely been recognized by international observers as free and fair elections to the National Assembly on 10 December 2018 and in the snap elections on June 20 2021. As a result of these elections, the relative majority of the electorate voted in favor of Pashinyan's "Civil Contract" faction and its control of the legislative and executive branches of power of the parliamentary system.

On the second campaign trail the incumbent prime-minister Pashinyan claimed to have obtained an "iron-hammer mandate" to bring about the policies he had espoused since 2018. The claim to a "mandate" persists even though it rests on two wholly dubious assumptions. 1) Without scientific survey of a large random sample of voters who were representative of all voters, how could anyone know what a majority of voters intended as they cast their ballots? The second snap electoral campaign was too short to give even the voters who cast their votes for the ruling party an opportunity to acquire more information, more time to reflect on the implications of the proposed policy, and an opportunity to discuss it with their fellow

citizens and independent experts. Even more so that on the campaign trail Pashinyan's electoral promises were about what he intended to do ("bring all plunderers to justice", "return every single plundered cent to the people"), not how he was going to do that, i.e., policy and legal instruments. 2) Although in both elections the turnout was below 50% (48.62% and 49.37%) and the ruling party garnered 70.44% and 53.95% of votes or 36.17% and 26.16% of all eligible votes respectively. The relative majority gave the ruling party the absolute power of a constitutional majority in the National Assembly where the opposition has the right of *parler* but no power to influence any decisions made by the ruling party. Although the "mandate from the people" produced by elections is a myth, belief in that myth greatly enhances the authority and influence of the Armenian "super prime-minister", particularly in crisis. The principle of majority rule in representative democracies cannot reasonably justify actions that may inflict harm on rights necessary to a democratic system.

Axiomatically, it is not enough to simply usher in democracy by running one or two sets of fair and free elections. As the literature on democratic consolidation has highlighted, new democracies face an array of challenges before their new regimes are likely to endure. The most urgent task in the transition period for prime-minister Pashinyan is neutralizing the 'authoritarian reserves', the residual political actors, institutions and networks, particularly in the judiciary, still connected to and operating by the rules of the previous regime. Pashinyan made it clear to the Armenian public that the authoritarian decline had not been final, and the peaceful transition of power within legislative and executive branches should not lull reformers into a sense of complacency. From his perspective, the 'authoritarian reserves' still posed a significant risk to Armenia's ability to transition into an open, market based liberal democracy:

> "But today we have a situation where law enforcement agencies are working under pressure, and besides there have been events that raise questions about whether our current judicial system is not only physically but also morally able

> to combat corruption. People are voicing increasingly much concern that a considerable part of our judges have been serving the corrupt system for many years. Today, more and more citizens are saying that many judges in Armenia have been part of the corrupt system, and in this sense, there is strong distrust towards the judiciary. Indeed, this is a very delicate subject, but in any case we should not be tempted to interfere in the affairs of the judiciary." (Official Website of the Prime Minster of Armenia, "Prime Minister Nikol Pashinyan's Speech at Rally Dedicated to 100 Days in Office," 17 August 2018.)

However, without a thorough analysis of the causes of these failures, the "Civil Contract" promulgated a populist slogan of starting institutional reforms *ab ovo* without introducing any systemic constitutional changes. Moreover, if before "the Velvet Revolution", when in opposition, Pashinyan and his cohorts severely criticized "the super-prime-ministerial" regime of the predecessor, they are now, as of writing of this article, the ardent supporters of strengthening the grip of the prime-minister on the political power by re-stablishing the Interior Ministry (the National Guard Ministry, the Police, the Rescue Service, and the Migration Service) directly reporting to him. This system won't differ from the previous regime or the super-presidential regimes of Russia, Belarus, and Central Asian countries. In a super-presidential regime, the head of the executive branch and his administration (the 'administration') control political decision-making while the parliament and courts are only nominally independent. In other words, while the trappings of democratic government remain in place, with parliament, courts, and press, with a civil society and with elections, they do not, in fact, counterbalance the authority of the super-executive, be it president or prime-minister, do not make his power open to a real contest, and do not enforce accountability.

Given the current state of the unreformed Armenian judiciary and the level of trust it is enjoying[2]; behavioral culture and values of the Armenian society[3], the best policy option is (2) an amnesty for all, going back 8 or 10 years, with a possible exception for public servants, who enriched themselves while in office. Not only the Law in its current articulation may allow the practice of selective justice but it may open the pandora's box of retaliations if and when the power changes in Armenia. Even if various political analysts evaluate the probability of the change of power as low at this moment, power change is envisioned by the iron rule of democracy. The same legal instrument may be used to settle political scores as the Law goes all the way back to 1991 in its applicability clause and given the method and form of privatization the acquisition of assets of a significant number of people, even if inherited, can be questioned. To avoid this trap and will be politically savvy to look for the best practices in tackling the past wrongdoings by successful transitional societies.

One of the best studied cases is that of the post-Franco Spain where the politically adroit handling of the triangular relationship among state-building, nationalism, and democracy has been seen to be essential to the success of the transition and consolidation of democracy. The failure to negotiate this triadic relationship has been crucial in the failure of democratic transition in many post-Soviet countries, including Armenia. In 1976 the Spanish prime-minister Adolfo Suarez and opposition moderates initially crafted a pacted reform, also known as the Moncloa political pact. Eventually, negotiations led to a pacted rupture that allowed the dismantling of the nondemocratic elements of the Franco state and the creation of new democratic structures. This overall process is called *reforma pactada-ruptura pactada*. Not unlike in the Armenian case, Franco's authoritarian regime of thirty-six years had

[2] According to the public opinion study (Breavis, May 2021) law-enforcement, courts, and the National Assembly enjoy the lowest ranking (7% and 8%) among Armenian state institutions (for a comparison, the office of the ombudsman enjoys 36% of positive evaluations).
[3] The same study confirmed that at the top of the Armenian value system are the family (86% of respondents), irrespective of age, gender, education, and social status and well-being; and justice (50.3%).

created a complex interdependent institutional structure. Yet the successful dismantling of that structure required political patience in building a broad coalition and sufficient consensus in support of democracy.

It was long after consolidation of democracy was out of question that the Spanish society turned to the controversial issue of the dictator's legacy and memorial, historical grievances going back to the days of the Spanish Civil War (1938 -1939), and illegality of assets obtained by Franco's family members and cohorts.

Learning from the Spanish case is going to be crucial for the Armenian political class. Its main lesson, despite many differences, is that the strategic sequencing matters and following the populist demands for the immediate restoration of social justice may create a vicious cycle where the past turns the future into a hostage.

Recommendations

1. The opportunity to have the Law revised through the review by the Constitutional Court of Armenia cannot be missed as in its current form it is likely to become a tool for the political vendettas, silencing the opposition and squandering the chance to consolidate democracy in Armenia. The judges of the Constitutional Court should deliberate this issue having in mind the potential political unintended consequences of the Law.

2. There's a need to have broader public debates to inform citizens about implications of the Law for the future of political and social equality in Armenia. It is not sufficient to have the Law discussed at the website for publication of legal acts. This Law requires more than an "electoral mandate" to become acceptable for an absolute rather than a relative majority as it may have long-term consequences for the development of the nation.

3. In revising the Law it is important to heed to the behavioral culture and value system of the Armenian society. Despite its short-term populist appeal of re-establishing social justice, the Law needs to be safeguarded against the risks of selective application for the narrow political agenda of score settling and silencing the opposition. Even with the slightest chance for such development, the danger for democratic consolidation will need to be prioritized.

4. Learning from the lessons of other successful transitions to inform the policy design and revisions of the Law may postpone its implementation but this process will be rewarding eventually as it may reduce the number of errors in decision-making.

Comparative Note by Dr Kierzynka

Dr Martirosyan's very interesting text shows how much the manner of the socio-economic transformation of the real communist systems, which began in the late 1980s, now influences the way we perceive the world, the legal order and standards of the rule of law. The Polish reader is not unaware of the discussions on the manner of transformation carried out in our country and the profound diversity of the presented assessments, often depending on one's worldview or even personal experiences. A reading of Dr Martirosyan's text clearly shows that the experiences of Armenia and Poland are, on the one hand, similar and, on the other, quite different. Three elements belonging to completely different areas may serve as points of reference: the socio-economic environment of declining real-communism, so-called voucher privatisation and the approach to extended confiscation.

1.

By comparison to Armenia, the political transformation in Poland of the second half of the 1980s, formally kicked off by the so called Round Table talks, led to many significant changes in Poland in the political, economic and social spheres. The year 1989 has become a kind of

symbol, which makes it possible to divide Poland's recent history into a time before 1989 and a time after 1989.

Far-reaching changes took place within a few years after the 1989 Round Table talks - above all, it should be emphasized that there was a peaceful transfer of power from the Polish communistic party, which had been in power for more than 40 years, to opposition groups. The political changes were due to - among other things - the need to take swift action in the economic sphere, as Poland's centrally planned economy had brought the country to the brink of economic collapse by the end of the 1980s.

The Republic of Poland after 1989 was a new political organism, a completely new quality, however, plagued by huge internal problems (which manifested itself, inter alia, in a considerable quarrels between the groupings of the former democratic opposition), economic challenges (unprecedented pursuit of the transition from a centrally planned economy to a free market economy) and social dramas (inter alia, revealed unemployment of several percent, controversial issues of settling accounts with the communist past).

Having said this, it must be underlined, that Polish problems after 1989 could not be even compared with Armenian or other post-USSR states. Poland has never had fully oligarchic structure of the economy, despite many well-known irregularities in this field. All elections since 1989 have been generally deemed fair. As for now no political party has ruled longer than 8 years. If concern corruption, it is considered to be malfunction of the system rather, then its immanent part. Therefore the social expectations pertaining to the possibility of the confiscation of illegal assets, acquired thank to all these irregularities and malfunctions, are definitely on lower level.

2.

In Poland, the voucher privatization has not played a big role. However, this does not mean that it has not occurred at all.

In the so-called Universal Privatization Programme - implemented from December 1994 to 1998 - participated 512 state-owned enterprises, representing between 2 and 5% of the the national assets at that time, with the involvement of almost all adult Polish citizens.

The main declared objective of the programme was to give state-owned enterprises access to wider markets, capital and newer technologies. This was to improve their competitiveness and efficiency.

The programme was considered Poland's most expensive failure after 1989 (https://biznes.interia.pl/gospodarka/news-nfi-najdrozsza-porazka-iii-rp,nId,3484192, access 9.3.2023). Substantial assets became the subject of scandals, corruption and illegal transactions, on which pseudo-businessmen and politicians enriched themselves. During their 7 years of operation, the 15 so-called National Investment Funds managing the privatized assets succeeded in listing only about 10 companies on the stock exchange. Meanwhile, each management company received approximately USD 3.2 million (plus an unspecified remuneration in PLN) every year. The costs were covered by the Treasury from citizens' taxes. The remuneration contracts with the management companies did not make the remuneration dependent on the financial performance of the funds.

Former Polish Prime Minister Kazimierz Marcinkiewicz said that "It was a high-profile privatisation programme, 500 of the largest Polish companies were privatized, and today it is known that almost nothing is left of this programme, there is only one big unknown left: where the money went" („Władza to znaczy służba. Z prezesem Rady Ministrów Kazimierzem Marcinkiewiczem rozmawiają Małgorzata Goss i Julia M. Jaskólska", GONIEC, 11–17 listopada 2005.) .

On the other hand, the fact is that there were many irregularities during the privatization processes in the 1990s, mainly involving the sale of existing state-owned enterprises to foreign entities. These were partly due to the low level of merit of Polish politicians and officials in charge of the process, but undoubtedly - to some extend – also due to corruption. The best-known Polish academic dealing with these phenomenon was Prof. Witold Kieżun, to whose works interested parties should be referred (e.g. W. Kieżun, Patologia transformacji, Warszawa 2012).

3.

The extended confiscation, featured by shifting to the accused the burden of proving the legality of his assets, has been known to Polish law since 2003. However, in its original version, this mechanism only provided for the examination of the legality of property acquired by the perpetrator at or after the commission of the crime. At that time, there was no opportunity to verify legality of the property acquired before the crime was committed.

One of main reason of such legal framework was the Polish doctrine of criminal law, applied those days. The legal science took the view that forfeiture, called in Poland a "criminal measure", was a purely repressive means, serving to deprive perpetrators of the instruments and proceeds of crime. Later on however, mainly under the influence of the legal concepts of the Council of Europe, including in particular the ECtHR jurisprudence and the instruments of European Union law, the Polish science departed from this traditional reasoning. It recognized the preventive role of the forfeiture, manifesting by depriving the perpetrators the property, variously connected with the commission of a criminal act, which could be otherwise used for further criminal activity. The Polish doctrine noted also the recovery function of confiscation, resulting from the undoing the order from before the crime. Recently, it is also considered the possible restorative role of confiscation, which can enable the collection of funds to compensate and redress victims of crime.

This change in the perception of forfeiture has had an impact on legislation. Since 2015, forfeiture is no longer exclusively a criminal measure in Poland, but a specific legal means. The new legal environment and the nature of this instrument has opened up new possibilities for its use. What is the most important issue for this paper, now in Poland it is possible to examine the legality of the assets acquired by the perpetrator during last 5 years before the crime was committed.