

**ANALYSIS OF TWO DRAFT
CONSTITUTIONS PROPOSED FOR THE
REPUBLIC OF ARMENIA**

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At the Request of
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Mr. Tembeckjian has never belonged to or favored any Armenian political party, either in Armenia or in the Diaspora. The professional judgments and opinions expressed in this memorandum belong to Mr. Tembeckjian alone. He does not speak on behalf of the Fulbright Scholarship Board in the US, or the Government of the United States, or the American University of Armenia, or Yerevan State University, or any political party, or any public official, or any other person or organization.

SUMMARY OF THE MAJOR FINDINGS IN THIS MEMORANDUM

While both versions have some important strengths, neither the so-called "President's Draft" Constitution, nor the so-called "Six-Party Draft" Constitution, is a well-balanced constitutional model. The former places extraordinary power in the hands of the President, and the latter places too much authority in Parliament. Neither draft creates a truly independent judiciary. While both drafts organize government into three branches -- executive, legislative and judicial -- in neither draft are these three branches even remotely equal; thus, neither draft has an adequate system of "checks and balances."

However, there are good features in both documents, and a well-balanced constitution is potentially very near. If the best parts of each draft were combined into a single document, the result would be a good constitution for the Republic of Armenia -- a constitution with three separate and equal branches of government, each with the flexibility to carry out its duties, but each "checked and balanced" by the other two branches so as to prevent the unhealthy and potentially totalitarian concentration of excessive power in any single branch. This memorandum identifies some of those good features and suggests a way to combine them into one document.

The process whereby the constitution is adopted is as important as the document itself. There are several possible processes outlined in this memorandum. Whichever process is chosen, it should be chosen soon, and it should be widely announced, so that everyone will know the rules and no one can rightfully claim to have been excluded.

FUNDAMENTAL QUESTIONS

What is a government? Is it a *guardian* of the people, or an *instrument* of the people's will, or both? Should a constitution provide strong government for the people, or protect the people from strong (and potentially intrusive) government? If a government is too strong and does too many things for the people, can the people ever flourish and become self-reliant and learn to do certain things for themselves?

Must a government have the consent of the governed if it is going to exercise authority legitimately? Is a government that operates according to a constitution presumed to have the consent of the people? How is the consent of the people manifested -- by referendum, by decision of elected representatives, or by a combination of the two?

In some respects, these are very broad but profound philosophical questions that are at the heart of any serious constitutional debate. They underlie the more practical questions that go into the drafting of a constitution, such as (1) whether to have a strong presidential versus a strong legislative model of government, (2) whether to have regional governors elected by the local people or appointed by a central authority, and (3) whether to have a system of "checks and balances" so that no single branch of government can operate completely independent of the other branches.

The Purpose of a Constitution

The essential purpose of a constitution is to provide a *framework* of government -- to outline those things which the government can do and those things which the government cannot do. A constitution may also include a "Bill of Rights"

which sets forth certain rights of the people which government must not only respect but also protect.

A constitution is not intended to solve political questions. Nor is it intended to solve the practical problems confronting the country today. It *is* intended to provide a government mechanism for dealing with the issues facing the country today, and tomorrow. The more detailed a constitution is -- the more identified it is with particular political or social issues -- the less flexible government will be to solve the country's problems, particularly those problems that are not even contemplated today but which will arise after the constitution was created. The most ideal as well as practical kind of constitution is one that is flexible enough to be useful in the future, long after it is adopted, long after the problems facing the country have changed, and long after the people who drafted it are gone.

Ideally, therefore, a constitution would be limited to (1) defining the powers and duties of the various branches of government, and (2) outlining those rights of the people which government cannot infringe. Then, over time, the various branches of government would deal with and resolve particular issues -- taxes, energy, the environment, military matters, food distribution, foreign relations, etc. -- in a *process* defined by the constitution. The constitution itself would not and could not provide answers to specific policy questions.

The Type of Government Established by a Constitution

There are three basic forms of government that may be established by a constitution.

(1) A strong executive form of government, in which the president has substantial powers. This may be typified by giving the president the power to dissolve parliament, the power to appoint cabinet ministers without the consent of parliament, and the power to appoint local officials.

(2) A strong legislative form of government, in which the legislature has substantial powers. This may be typified by giving parliament the power to appoint the president or prime minister, the power to dissolve the presidency by voting "no confidence" and scheduling new elections, and the power to regulate executive branch agencies by forcing the resignation of cabinet ministers.

(3) A system of "checks and balances" in which the executive and legislative branches must work together. In this model, (a) the president has more power than parliament in some areas, (b) parliament has more power than the president in other areas, (c) both the president and the parliament must work together on most matters and (d) a third branch of government, an independent judiciary, has the power to review the work of both the president and parliament to determine whether they are acting in accordance with the constitution.

Of course, depending on the particular country and circumstances, there may be variations in these three models. For example, models (1) and (2) may make provision for a judiciary, but it may not be independent. That is, it may be controlled by the president or the parliament. *The mere division of government into three branches does not automatically mean that those three branches will be equal.*

The Method of Adopting a Constitution

One of the most difficult issues to resolve in devising a constitution is the manner in which the constitution will be adopted.

What makes a constitution legitimate? Must there be some meaningful participation by the people in the process of establishing a constitution, in order for that constitution to be legitimate? In other words, must the people consent to the *form* of their government in order for the *decisions* of that government to be legitimate, even if the people might disagree with some of those decisions?

If participation by the people in creating the constitution is important, how should that participation be implemented?

There are many ways to draft a constitution. A constitutional scholar can go off to a secluded place and draft one all alone. A president or presidential committee can draft one. Parliament can draft one, or more than one. A constitutional convention can be organized, with delegates elected by the people or appointed by the major political parties or jointly appointed by the president or parliament.

There is no guarantee that any one of these methods would work better than the others. In fact, some combination may be tried. For example, a constitutional convention can be organized, with a mandate to produce one draft, which would then go to the parliament for approval.

The next question would be whether the people, by referendum, should have the opportunity to approve or disapprove the final draft. This gets to the heart of the question as to what constitutes the consent of the governed. For example, is it enough that the people elected the members of parliament, who then approved the constitution? Or is the matter of developing a constitution so fundamental to the structure of a democratic society that the people should vote on it directly?

This is a great and difficult philosophical issue, with many important secondary questions to which there are no right or wrong answers. For example, would the government trust the people to make an informed and wise decision on approving or rejecting a proposed constitution? Could the people trust the government to rise above partisan politics and personal motives in order to make an informed and wise decision?

Regardless of the particular method actually chosen, however, one procedural consideration would be most helpful. The *procedure* for drafting and approving a constitution should be decided upon and announced before the merits of

a particular version are debated. That way, everyone would know the rules of the game, no reasonable person or political party would feel cheated or pushed aside, and the people would at least have some confidence that an orderly process had been established to complete this fundamentally important task.

A PRELIMINARY WORD AND WARNING

Both the "President's Draft" and the "Six-Party Draft" contain some fundamentally sound constitutional principles, including a bill of rights and an attempt at separation of powers. Both drafts also have some fundamental flaws. These strengths and weaknesses are discussed in the following sections.

Both drafts have a similar fatal weakness. Each one concentrates so much power in one body as to invite totalitarianism.

The "President's Draft" places that power in the President and essentially creates one-man rule. This concept is relatively easy to understand. By putting so much authority in one person, the constitution all but makes it irresistible for that person to rule like a king. A benevolent president would not abuse that power. A power-hungry president would easily abuse that power, and there is little in the "President's Draft" that could stop it. If Parliament tried to curb the President, for example, the President could dissolve Parliament!

The "Six-Party Draft" invites totalitarianism from a different source. By making the President so weak, and by placing so much executive authority in a legislative body which is not designed to exercise such authority -- no Parliament that I am aware of has as much presidential-like authority as this draft would allow -- the "Six-Party Draft" is certain to result in government paralysis. Executive branch agencies would literally dissolve under this plan every time Parliament rejected a budget; Armenia's government might become like Italy's, repeatedly changing hands and becoming more and more unstable. At the same time, military discipline and deployment might break down while Parliament decided which officers to promote and how to deploy troops; such military affairs are usually not a legislative function, and military promotions or deployments should not be held captive by the political fighting typical of legislatures. The resulting paralysis might well invite aggression

by a hostile state, or a military coup d'etat from within the Republic by an angry and frustrated army acting in the name of an angry and frustrated populace.

ANALYSIS OF THE "PRESIDENT'S DRAFT" CONSTITUTION

Among the strengths of this proposal are the provisions protecting individual rights, such as the presumption of innocence (Article 20¹), the right not to self-incriminate (20), the protection against the arbitrary taking of property (21) and the right to privacy (21).

However, the overriding theme of this proposed draft is the substantial concentration of power in the President.

The Concentration of Presidential Power

For example, the President has the power to appoint regional governors, rather than allowing the people to elect their own regional governors, and those regional governors can dissolve the locally elected municipal government (103, 107). This reposes enormous power over local affairs in the President, and it all but insures that local government activity will be controlled by governors whose allegiance is not to the people of the region but to the President, who hires and fires them.

The President can appoint members of the Constitutional Court and the Supreme Court, and the President can also suspend them (70.7). This defeats the concept of an independent judiciary. What judge would rule against the President, and thereby incur the President's displeasure, knowing that the President could suspend him or her at any time?

The President has considerable advantages over Parliament in this version. For example, the President can dissolve Parliament at any time (70.17), but

¹A number in parenthesis indicates the draft constitution's Article Number, followed by a specific paragraph number, if any.

Parliament can only vote "no confidence" within a particular 40-hour period in connection with a bill to pass the budget (84), or it can impeach the President in the highly unlikely event of treason, bribery or "serious crime" (75). Serious malfeasance or nonfeasance in office that does not amount to a serious crime cannot result in impeachment.

The President can not only go "over the head" of Parliament to the people in a referendum (70.3), but Parliament has only five days to override the President's veto of a bill (70.4). Five days is an exceedingly short time for a deliberative legislative body to act on any matter of importance, let alone a Presidential veto.

Parliament does not have the power to approve high-level Presidential appointments, such as ambassadors or government ministers.

While Parliament can adopt the President's budget (56.2), there is no meaningful indication that Parliament can amend it or adopt its own budget in lieu of the President's proposal.

Parliament is specifically prohibited from voting "no confidence" on the most sensitive issue of power in any democratic state: the President's declaration of martial law (57.9).

The foregoing concentration of serious powers in the President, set forth without meaningful parliamentary or judicial restraints, could well lead to a dictatorial state. A benevolent "philosopher-president" who would exercise these extraordinary powers with wisdom and restraint might well be followed by a malevolent "power-president" who abused these powers for personal and political advantage. Or, as often happens in history, the benevolent president becomes intoxicated with the powers of office and gradually or even quickly turns malevolent.

Some Ambiguities and Contradictions

The "President's Draft" declares that "the people" are the sovereign (2). Yet it is the President, through appointed governors, who can dissolve the municipal authorities elected by the supposedly sovereign people (103, 107).

This proposal declares that "only bills not in contravention of the Constitution and amendments shall be put on referendum" (3). While this provision allows for amendments that raise new issues, it makes it impossible to change an already-existing provision. If, for example, the people wanted to require a 15-year residency requirement for President instead of 10 years, they could not do so, for such an amendment would be "in contravention" of the Constitution, which already calls for a 10-year rule.

This draft declares that citizens of Armenia outside the borders of the Republic "are under the protection of the Republic of Armenia" (12). This may be contrary to international law (which Article 8 purports to respect), in such cases as the arrest of an Armenian citizen abroad for a crime such as murder or robbery. Matters of this sort are usually determined in treaties of extradition between countries, not in a constitution.

Certain important rights are given in one phrase and limited in another. For example, freedom of expression is guaranteed (26); while it may be restricted for certain legitimate reasons such as national security, it is also limited for certain unreasonable ones, such as "protection of the reputation" of others (26, 21). Thus, telling an unpleasant, embarrassing, reputation-damaging truth about a politician would probably be forbidden. This kind of provision is not unusual in a state whose leaders are afraid of the truth, or of the people knowing the truth. If a government is so fragile that it is afraid of what people will say, then there is probably something more fundamentally flawed in its structure than might be saved by silence.

ANALYSIS OF THE "SIX-PARTY" DRAFT CONSTITUTION

This draft has similar provisions in the nature of a "bill of rights" as the "President's Draft," including certain new features such as the right to free legal aid, without the kind of ambiguous and contradictory restrictions included in the presidential draft. There are certain significant ambiguities in this version, too, however, which are discussed below.

Strong Parliament, Weak President

In this version, the President coordinates certain government activity but does not exercise real power (63.2). The Parliament elects the President, who must be neutral (64.1, 64.2). Thus, the President is without an independent political base, either from the electorate or from a political party apparatus, and he or she can be impeached by a mere 25% vote of Parliament (68).

Article 71 gives the Parliament extraordinary powers, including those which are normally reposed in the executive branch. For example, Parliament names the President and Prime Minister. It controls military deployment and determines military rank. (Who is the commander-in-chief in such a system? Will deployments be delayed as Parliament debates where and how many soldiers should be sent to particular regions?)

Parliament affirms the *staff* of the court system (71). This virtually kills the concept of an independent judiciary and true separation of powers.

Parliament can force the resignation of the government by rejecting the annual budget (85). This virtually kills the concept of an independently functioning executive branch and likewise undermines true separation of powers. Moreover, this provision is a prescription for government paralysis, as a multi-party Parliament

debates and delays, and vast public dissatisfaction with government inevitably results. Such paralysis, coupled with the absence of an identifiable, disciplined military chain of command with an unequivocal civilian commander-in-chief (*i.e.* the President) answerable to Parliament, is all but an open invitation to a military coup d'etat by a fed-up military acting in the name of the angry and frustrated citizenry.

Some Ambiguities and Contradictions

There is a declaration that citizens will not be given up to foreign states (11.3). This sort of provision is usually determined in extradition treaties between countries, not in a constitution. (In any event, would not Armenia want to have a foreigner accused of murder returned to Armenia for trial? Would not the same be true of another country in which an Armenian was charged with murder?)

There is another provision which seems to guarantee every worker the weekend off (41). Would this result in the country's virtual shut-down on Saturdays and Sundays?

The right of asylum is "guaranteed" (53.2), but to whom, and under what circumstances? Can anyone who requests asylum have it, including common criminals as well as political refugees?

These are the kinds of issues that are usually debated and decided by parliament, over a period of time, in consultation with the president, with changes in the law being made from time to time to reflect changing social and political conditions. Stating these kinds of non-procedural issues in a constitution makes it more difficult to change government policy as necessary.

The structure of Parliament itself is confusing. Sixty-one members are elected country-wide, and sixty are elected from particular districts (69.3, 69.4). There is no apparent difference in the function between the two types of legislator.

Why have such a difference? If this draft intends to have the benefit of a bi-cameral legislature in a uni-cameral system, this provision does not do it.

"Hye Dat" -- The Armenian Question

Perhaps the most sensitive and enduring political issue in Armenian political life is Hye Dat. But precisely because it is a political issue, it should not be in a constitution. A constitution provides a *mechanism* or *form* of government. It provides a means for governing and deciding political issues. It is not itself the arbiter of particular political issues, even ones as fundamental as Hye Dat.

Introducing highly passionate political issues into the process of adopting a constitution will complicate both the process and the constitution itself, raising troublesome international issues. For example, if Hye Dat were part of the constitution, would the government of Armenia be constitutionally permitted to enter a treaty with Turkey, or join an organization like the United Nations if Turkey were a member? To do so might implicitly concede that Turkey had territorial claims to ancient Armenian lands. Similarly, would the government of Armenia be constitutionally permitted to do business with countries that had not formally denounced the Genocide?

Moreover, introduction of Hye Dat into the process of constitutional deliberations is only certain to slow down and divert the constitutional process, not resolve Hye Dat.

Armenia is a complicated Republic with many voices and points of view. Basing an entire constitutional state on the political goal of Hye Dat -- or any other particular political goal -- would not only be contrary to constitutional precedent, it would paralyze Armenia in its relations with the rest of the world. It would subject Armenia to the compelling (if simplistic) criticism that, in its most

fundamental document, its constitution, the Republic of Armenia demonstrated its aggressive territorial aims.

This is not to suggest that Hye Dat is unimportant, or that it should be forgotten. On the contrary, Hye Dat is an extremely important matter and has been a compelling subject in Armenia and throughout the Diaspora for generations. This memorandum simply suggests that the forum for debating and deciding Hye Dat is not the constitution, but the agencies of government created by the constitution.

MERGING THE BEST FEATURES OF BOTH DRAFT CONSTITUTIONS

Notwithstanding the weaknesses of both draft constitutions, there are elements in each that, when taken together, would make for a well-balanced system of government. Such features would include:

1. A President, either independent or from a political party, who is elected by the people in a general election; who is the unequivocal military commander-in-chief, but who is subject to policy guidelines from Parliament, not specific decisions on deployment or promotion or rank; who cannot be impeached except by at least a majority vote of Parliament, for crimes or serious malfeasance or nonfeasance of office; who can conduct foreign policy subject to guidance by Parliament; who can negotiate treaties subject to approval of Parliament; who presides over an executive branch that executes the laws passed by Parliament but which cannot be dissolved; who cannot dissolve Parliament; who cannot go over the head of Parliament by public referendum; whose major appointments must be approved by Parliament; whose budget, including the military budget, must be approved and may be amended by Parliament.

2. A Parliament which is responsible for debating and declaring national policy; which levies taxes; amends and approves the annual budget, including the military budget; regulates commerce, banking and currency; adopts and amends penal and civil law, either on its own or on recommendation of the executive branch (through the Justice Minister or other minister); has the power to declare war; approves major presidential appointments; ratifies treaties and performs other similar legislative powers.

3. A truly independent judiciary, whose members are nominated by the President, approved or rejected by Parliament, but who cannot be impeached or

suspended except for crimes or gross dereliction of duty; whose decisions are final (upon completion of the judicial appeals process) and must be observed by the President and Parliament; who cannot be removed or suspended by anyone for having rendered decisions unfavorable to the President or Parliament; whose power to interpret the constitution is final, and whose final declaration of a law as unconstitutional is binding on all branches of government.

CONCLUSION

Notwithstanding some of the sharp criticisms in this memorandum on both draft constitutions, there are fundamental elements of a sound, manageable system of democratic government evident in each draft. The best elements of both must be merged into one workable document. For all the debate and seemingly endless preparation, I believe the Republic is close to achieving a laudable constitution. It will require some more hard work, and some difficult compromises. No one will be or should be happy with every feature of the new draft. But for the good of the Republic, and the people, this last courageous step must be taken.

Dated: Yerevan, Armenia
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Respectfully submitted,

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