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ARMENIA: CHALLENGES FOR JUDICIAL REFORM

JUDICIAL ASSESSMENT REPORT

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ARMENIA: CHALLENGES FOR JUDICIAL REFORM

SUMMARY OF KEY RECOMMENDATIONS AND PRIORITIES OF JUDICIAL REFORM IN ARMENIA

- In civil matters, to limit the role of the Procuracy in civil litigation to that of a litigant with equal rights as the other party. Also, in no instances should the prosecutors have the power to appeal civil judgments that have entered into force.

- To clearly define the areas of authority of the Council of Court Chairman and the Administrative Body: the Administrative Body should be staffed with persons specifically trained in management who would concentrate mostly on the administrative matters while leaving judges to make policies and oversee the overall administration of courts.

- To establish an independent judicial training institute with professional management where committees of judges would determine the curricula and judges would also participate in the teaching process, especially in the area of developing judicial skills.

- To increase the competency and credibility of the cadre of new judges, the appointment process needs to be carried out in a transparent manner. To this end, prior to the selection of nominees by the Minister of Justice, clear standards and criteria (including fair examinations) for the selection of judges should be determined and applied. Also, the list of nominees should be prepared by an independent body, with adequate representation of judges, prior to its submission to the Judicial Council.

- To develop specific rules for disciplinary procedures that would define the process that leads to the Judicial Council's involvement in the disciplining of judges.

- To adopt a code of ethics by Armenian judges that would set standards for their conduct on and off the bench. To create a self-administered body that would monitor the compliance of judges with these ethical rules and sanction any non-compliance.

- To conduct a public education campaign about the role of law and legal institutions, including the judiciary, in a modern society.

- To establish a legal framework for and support the development of alternative dispute resolution (ADR), especially commercial arbitration, mediation and conciliation.

I. INTRODUCTION

Armenia is a landlocked country of 3.7 million people surrounded by Azerbaijan, Georgia, Iran and Turkey. It declared its independence from the Soviet Union on September 23, 1991. With few natural resources, Armenia depends for its economic growth on its highly educated population and strong entrepreneurial traditions. The negative impact on the Armenian economy of the breakdown of trade, payments and financial systems of the former Soviet Union was compounded by the Nagorno-Karabakh conflict and the resulting blockade of Armenia by Turkey and Azerbaijan. Between 1991 and 1993, GDP dropped by approximately 60 percent. The inflation in the last two month of 1993 reached 900%. Since 1994, the macro-economic situation has improved. After the introduction of a national currency (the Dram) in November 1993, the authorities tighten financial policies. Inflation has since fallen rapidly; in 1996, cumulative monthly inflation totaled only about 3%.

The Government of Armenia (GOA) has recognized the need for a reform program that would set the way to economic recovery. It has launched an impressive program of reform combining stabilization policies, structural adjustment and privatization. The program has four goals: (i) consolidation of the new role of the state and reduction of the size of the government; (ii) creation of an enabling environment for private local and foreign investment and for the development of competitive markets; (iii) attainment of macro-economic stabilization; and (iv) divestiture of state owned means of production through privatization.

Economic reforms, however, cannot flourish and private investors and entrepreneurs cannot prosper without a legal system which can effectively protect private property, enforce contracts, defend economic rights against infringement and establish a secure environment for local and foreign investment and market relations. Also, economic reforms are seriously hampered by misallocation of resources and allegations of corruption, especially in the public sector.

To implement the economic reform program while at the same time reforming the legal system is an immense challenge, especially from a capacity and institution-building point of view. One of the institutions most affected by this challenge is the judiciary. In 1995, Republic of Armenia has decided to launch, and make it its priority, a judicial reform program to strengthen the judiciary to help it meet the challenges stemming from the economic and social changes in the society.

II. THE LEGAL FRAMEWORK FOR THE JUDICIARY

Over the last two and a half years, the GOA has made a clear commitment to reforming its judiciary. The two documents that lay the groundwork for this reform effort are the Constitution of 1995 and the 1997 Concept Paper entitled *Legal and Judicial Reform Program* (Concept Paper). These documents subscribe to the principle of the independence of the judiciary and set as their goal the transformation of the Armenian judiciary from the old Soviet style bureaucracy to a modern functioning institution with the capacity to resolve disputes among private parties, protect property rights, enforce contracts and protect the individuals against the arbitrariness of state actions. Their overarching goal is to make the Armenian judiciary -- an institution with little importance in the Soviet system -- an independent branch of government, equal to the executive and legislative branches.

The three concrete policy objectives which are explicitly stated or are implicit in the texts of the two documents are (i) the aspiration to establish an independent judiciary system in Armenia; (ii) desire to have a judiciary that is a smoothly functioning and effective system which is also (iii) well regarded by the government and the general public. To prepare a strategic plan on how to implement these objectives, in February 1997 the President established a State Commission on Judicial and Legal Reform (State Commission), headed by the Prime Minister[1]. The transition process has a strict, constitutionally mandated, deadline for the adoption of enabling legislation for the reform of its judiciary. Article 116(9) of the transitional provision of the Constitution sets a deadline of July 5, 1998, three years after the adoption of the basic law. The Armenian Government estimates the cost of the reform at 12 mill. US$.

1. THE CONSTITUTION OF THE REPUBLIC OF ARMENIA

The Constitution is the basic law of the Republic of Armenia. It declares the establishment of: (i) a state based on the Rule of Law; (ii) three branches of government: executive, represented by the President and the Government headed by the Prime Minister; legislative, represented by the National Assembly; and the judiciary branch. The President is the head of the state and pursuant to Art. 49 of the Constitution, the President "ensures the normal functioning of the legislative, executive and judicial authorities." The Constitution further determines: (iii) the interaction among the branches of government; (iv) fundamental rights and freedoms of citizens; and (v) the essential features of a new judiciary system.

[1] Later, Mr. Gagik Haroutunian, the Chairman of the Constitutional Court, became a co-chairman of the State Commission on the Judicial and Legal Reform.

KEY EVENTS IN THE REFORM OF THE JUDICIARY

1995

July 5: The Constitution of the Republic of Armenia was adopted.
November 14: The Law on the Judicial Council was adopted which outlines the rights and responsibilities of this new institution vested with carrying out judicial reforms.
November 20: The Law on the Constitutional Court was adopted.

1996

February 6: The Constitutional Court has started functioning.
October: The first Concept Paper on Legal and Judicial Reforms was prepared under the leadership of the Committee on State and Legal Affairs of the National Assembly. The Concept Paper, which outlined the main principles of a new judiciary, became the basis for internal political discussion and domestic and foreign expertise.
November 8: A Decree of the President commissioned the Cabinet with introducing a proposal for judicial reform within three months. The main agencies involved in the preparation of the proposal were the Constitutional Court, the Committee on State and Legal Affairs of the National Assembly, the Supreme Court and the Office of the Prosecutor General.

1997

February 5: A Decree of the President created a State Commission responsible for the preparation of a final document based on the Cabinet's judicial reform proposal and its implementation. The Commission consists of eight members: the Prime Minister (Chairman), the Deputy Chairman of the National Assembly, the Chairman of the Committee on State and Legal Affairs of the National Assembly, the member of the Constitutional Court, the Chairman of the Supreme Court, the Prosecutor General, the Minister of Justice, and the Chief Legal Advisor to the Prime Minister.
February 27: A Decree of the President, pursuant to a proposal of the State Commission, outlined a list of laws and a timetable for their adoption. These laws will enable the implementation of the reform of the judiciary. The Decree mandated the Cabinet to create financial and material conditions for a successful implementation of the reform program.
May 5: Personnel changes were made within the State Commission: the Chairman of the Constitutional Court became the co-chairman of the Commission and the former Prosecutor General became its member.
August 2: The State Commission adopted a final version of the Concept Paper entitled *Legal and Judicial Reform Program*. The document was approved by the President of the Republic.

1998

March 14: The draft Law on the Judiciary passed the first reading in the National Assembly.
April 22: The draft Law on Procuracy passed the first reading in the National Assembly.
April 1: The draft Law on the Status of Judges passed the first reading in the National Assembly.

The Constitution devotes Chapter 6 and several articles in other chapters to the judiciary. It outlines the contours of the new judiciary which includes the Constitutional Court and three instance courts of general jurisdiction. It leaves the issue of economic and military courts to ordinary legislation. It further establishes a Judicial Council to function as the appointment and disciplining body for the new judiciary. Chapter 6 also encompasses the Office of the Procuracy.[2]

There is a number of important provisions in the Constitution aimed at establishment of a truly independent judiciary. Article 5[3] declares that "state power shall be exercised based on the principle of the separation of the legislative, executive and judicial powers." Article 91 of the Constitution states that "justice shall be administered solely by the courts *in accordance with the Constitution and the laws*." Further, Article 95 sets up principles regulating appointment and removal of judges, as well as taking disciplinary actions against judges - the principles which are essential for securing personal independence of judges.

The Constitution provides for a new body - the Judicial Council - which is given the power to select and nominate judges, to oversee the disciplinary process and promote judicial training (Article 95). Establishment of judicial councils as independent bodies representing the executive and judicial branches, as well as legal scholars in many countries proved to be an effective way of maintaining transparent appointment and supervision systems for the judiciary. The composition of the judicial councils, however, must be carefully considered because of the conflict between judicial independence and accountability. In this respect, the fact that, according to the Constitution of Armenia, the Judicial Council is headed by the President and co-chaired by the Minister of Justice and the Prosecutor General, i.e., two representatives of the executive branch, might raise concern about the ability of the Judicial Council to act as a body independent from any political influence.

Similarly, the Procuracy, which in most Western countries belongs to the executive branch, is given broad powers in the judicial process, including the right to appeal "sentences, verdicts and decisions entered into legal force" (Article 93), which might also be viewed as not entirely consistent with the principle of separation of powers as declared in Article 5 of the Constitution. The role of the procuracy in the judicial process is further discussed in Chapter 2, Section (b).

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[2] The Procuracy is roughly equivalent to the prosecutorial service. The terms prosecutor and procurator will be used interchangeably in this report.

[3] Constitution of the Republic of Armenia, Chapter I., *The Foundations of the Constitutional Order*, Art. 5.

2. 1997 CONCEPT PAPER ON LEGAL AND JUDICIAL REFORMS

The Concept Paper, prepared by the State Commission under the Chairmanship of the Prime Minister, is a well thought-out and drafted policy document. From reviewing it, it is clear that since the Paper's first version in 1996, Armenian policy makers have made significant progress in defining the goals and process of judicial reform in Armenia. The Concept Paper reiterates the policy goal of the Constitution -- the establishment of an independent judiciary as a separate branch of government. It also calls for a judiciary that would be a functioning system staffed with professionals that would command a high regard in the society.

While the Concept Paper still envisions the creation of separate economic courts, at the writing of this report a discussion is going on at the political level about abolishing the State Arbitrazh system and transferring their jurisdiction over commercial disputes to the courts of general jurisdiction. **This report strongly supports this development**; it would not be wise to create separate commercial courts for a number of reasons:

First, there is no legal necessity to maintain a separate venue or separate procedural rules for economic, as opposed to other civil cases. In a market economy, where economic activity is conducted by a variety of entities -- state and private enterprises, small entrepreneurs or individuals -- such a distinction is without merit for the determination of jurisdiction. Second, Armenia currently lacks the human and financial resources to build a parallel judicial system. Third, if the Armenian judiciary wants to be a genuinely independent branch of government, then it should "speak with one voice" and not dilute its power and prestige by creating multiple institutions. The necessity to have judges with sufficient skills and expertise in commercial matters can be addressed by Armenian policy makers by establishing economic chambers/panels in courts of general jurisdiction or assigning specially trained judges to commercial cases. This should be coupled by the development of alternative methods of dispute resolution (ADR) for commercial and other matters.

The Concept Paper will be implemented through the adoption of a whole series of laws and regulations that are pending in the National Assembly at the time of the writing of this report:

A. Draft Law on the Judiciary[4]

The draft law sets up the institutional structure of the new judiciary, including the first, second and third instance courts. (The institutional structure of the new judiciary is being discussed in the next Chapter.)

The Bank mission which visited Yerevan in February 1998 was asked to review the draft and provide the comments. The mission's comments were summarized in the Aide-

[4] This report discusses the draft Law on the Judiciary which was prepared by the Ministry of Justice and which was approved by the National Assembly in the second reading in March 1998. The draft will be submitted to the National Assembly for the third and final reading at the end of April.

Memoire which was forwarded to the Government and the members of the State Commission on the Judicial Reform. The most significant comments are outlined below:

1. One of the main features of the draft Law on the Judiciary is the creation of a Council of Court Chairmen (Article 28) with a "special structural body" (the Administrative Body), an entity within the judiciary branch which would overtake the responsibility for court administration from the Ministry of Justice. An important principle for ensuring an independent and effective judiciary is the separation of the judicial and administrative functions within the judiciary. To this end, the Council of Court Chairmen and the Administrative body should have clearly defined areas of authority: the Administrative body should be staffed with persons specifically trained in management who would concentrate mostly on the administrative matters while leaving judges free to make policies and oversee the overall administration of courts.

2. The Law should clearly state the principle of independence of the judiciary as a third branch of the Government[5];

3. The staffing levels of the Administrative body should not be limited by the Law. Presently, the staff of the Administrative Body is limited to five people which is not an adequate number in view of the functions of the Body as outlined in paragraph 1. Since amending laws is a complex process, it is not advisable to make the law so specific as to require the involvement of the National Assembly for each change in the staffing of the Administrative Body.

4. The Administrative body should have an executive director, supported by an adequate number of support staff, who will be appointed by and accountable to the Council of Court Chairmen.

5. The responsibilities of the Administrative body should be defined in the Law to include the preparation of budget proposals, subject to approval by the Council of Court Chairmen; management of the financing of the court system; strategic planning proposals and administrative rules development; preparation of program proposals, such as for case management and implementation of computer technology within the court system; proposals on personnel management; collection, evaluation and maintenance of court statistics prepared by the chairmen of individual courts for the purposes of budgeting and court financing and staffing levels in the courts.

6. The responsibilities of the Council of Court Chairmen should include the development and approval of rules on court procedures.

7. The staffing of each court should include a professional court administrator who would cooperate directly with the Administrative body.

[5] In fact, a draft Law on the Status of Judges is more articulate in this matter providing that "while administering justice, a Judge is not responsible to any government agency of official" (Article 5).

8. The President of the Republic of Armenia should determine the number of judges in each court (Art. 11 of the draft Law) only on the basis of a recommendation of the Council of Court Chairmen.

9. The current wording of Article 25 seems to indicate that the Court of Cassation's exclusive jurisdiction is the reopening of judicial decisions that have entered into force. During the discussions, Armenian officials explained that the Court's jurisdiction would be broader. The Mission indicated that the definition of the specific jurisdiction of the Court of Cassation should be defined in the respective procedural codes and not in the Law on the Judicial System which, in essence, deals with institutional aspects of the judiciary.

10. The second instance judiciary should consist of one appellate court with several chambers (civil, criminal/military, and economic), rather than creating specialized appellate courts; this is important not only because of administrative efficiency, but also to eliminate the uncertainty in the spheres of jurisdiction among the courts.

RECOMMENDATION: To clearly define the areas of authority of the Council of Court Chairmen and the Administrative Body: the Administrative Body should be staffed with persons specifically trained in management who would concentrate mostly on the administrative matters while leaving judges free to make policies and oversee the overall administration of courts.

B. Draft Law on the Procuracy

As mentioned above, under the Constitution, the Procuracy is considered an integral part of the Armenian judiciary. Prosecutors are responsible for initiating criminal prosecution; overseeing the legality of preliminary inquires and investigations; defending the interest of the state in courts; appealing the sentences, verdicts and judgments of courts; and overseeing the execution of sentences and sanctions (Article 103 of the Constitution). The existing Procuracy is an outcome of a transformed old Soviet model. That model understood the Procuracy as a universal supervisor over legality in the entire society. Under the prosecutor's supervision and oversight were citizens, enterprises, municipalities and the government, except for the Cabinet of Ministers and the National Assembly. Prosecutors dominated over the judicial branch in both criminal and civil process.

The Concept Paper contemplated significant reforms in this institution. In criminal matters, the primary function of the prosecutor would be to defend the position of the prosecution on behalf of the state. In civil matters, prosecutors involvement would be limited to defending the interests of the state in civil litigation.

However, the draft Law on Procuracy that was reviewed by the writers of this report[6], still gives prosecutors the power to appeal any civil judgment that entered into force. Article 26 of the draft law provides:

> "The Prosecutor General, as well as his subordinate prosecutors within their jurisdiction, appeal court verdicts, sentences and decisions in accordance with the procedures defined in the Civil Procedural Code and the Criminal Procedural Code.
>
> The Prosecutor, within the limits of his constitutional authority, has the right to demand from the court every case with respect to which the verdict, sentence, or decision has entered into legal force.
>
> The Prosecutor, deeming the court's verdict, sentence, or decision illegal or groundless, brings an appeal to a superior court or, if that is beyond his jurisdiction, applies to a superior prosecutor to bring an appeal."

The power of the prosecutor to appeal civil judgments entered into force would still allow him to exercise a supervisory oversight over the judicial process which is incompatible with the principle of independence of the judiciary. The fact that the prosecutor can challenge the court's decision in the civil case not only based on the alleged violation of law, but also if he considers it "groundless" (Article 26 cited above) significantly jeopardizes the court's exclusive authority to administer justice based on "law and the principles of objectivity, justice and humanity" as it is proclaimed in the draft Law on the Status of Judges (Article 14).

The involvement of a prosecutor in civil proceedings also has the potential of increasing legal uncertainty in civil litigation: to have legal certainty, one of the cornerstones of the Rule of Law, it is important in a civil dispute to have a clear end point to the litigation. Furthermore, the power of the prosecutor general to appeal decisions in civil cases violates the principle of equality of parties in the judicial process.

RECOMMENDATION: To limit, through the adoption of a new Law on the Procuracy, the role of the Procuracy to that of a litigant with equal rights as the other party in civil matters. Also, in no instances should the prosecutors have the power to appeal civil judgments that have entered into force.

C. Other Draft Laws Relevant to the Reform of the Judiciary

The Presidential Decree No. 705 of February 27, 1997, approved a list of "priority" laws essential for carrying out of the judicial reform in Armenia, as well as a timetable for their preparation and adoption. The list includes the Civil and Criminal Procedural Codes, the Law on Court Administration, the Law on Procuracy, the Law on the Judiciary, the Law on Advocate Services, the Law on the Status of Judges, and the Law on the Preliminary Investigation Activities. This report only refers to three drafts: the Law on the Judiciary, the Law on the Procuracy and the Law of the Status of Judges which have been reviewed by the World Bank team upon request of the Government. The deadline for adoption of all "priority" laws is summer 1998.

[6] The draft Law on the Procuracy of the Republic of Armenia dated March 25, 1998.

III. THE JUDICIAL SYSTEM

The current Armenian judiciary consists of the Constitutional Court; first courts of general jurisdiction and the Supreme Court; the State Arbitrazh;[7] and the Procuracy. Additionally, there are two new bodies involved in judicial reforms: the Judicial Council, envisioned by the Constitution, and the State Committee, created by a Presidential Decree.

1. INTERRELATIONS OF THE JUDICIARY WITH THE OTHER BRANCHES OF THE GOVERNMENT AND THE PUBLIC

During the Soviet era, the judiciaries throughout the Soviet Union were reduced to obedient executors of the instructions and policies of the government and the Communist Party. The Procuracy and the Ministry of Justice dominated the nominally separate judicial system. Now Armenia is aspiring to break with the past and establish an independent judiciary where judges would issue decisions based on the law and exercise discretion within its limits. Taking into account the legacy of the Soviet times, it is important to balance the power of the three branches of government. The institutional guarantees for the independence of the Armenian judiciary from the other branches of government are, therefore, of paramount importance. The judicial system needs to contain structures that can effectively administer the court system and fulfill the following functions: strategic planning for the judiciary; administration and management of the courts; appointments and promotions of judicial and other personnel; unification of case management techniques; preparation and training of judges and other personnel; distribution and assignment of professional and support staff among the court districts. In addition, disciplinary procedures for judges need to be adequately insulated from the executive branch.

Currently, the executive branch is in a dominant position vis-à-vis the judiciary. The Ministry of Justice is directly responsible for all administrative, management, planning, financing, personnel and training issues related to the first instance courts. (The Supreme Court is administered and financed independently.) Even under the reform program, the Minister of Justice has broad authorities in the areas of the selection of nominees for judicial appointments, especially as one of the Deputy Chairpersons of the Judicial Council.

Judicial independence requires a transparent and merit-based judicial appointment system. Establishment of the Judicial Council entrusted with reviewing credentials and nominating qualified lawyers for the President's approval was the first step towards establishment of a new judicial appointment system independent from the control of the Ministry of Justice. However, the role of the Minister of Justice in providing the recommendation on judge nominations to the Judicial Council, as well as its position as Co-Chairman of the Judicial Council (Article 94 of the Constitution) contradicts the purpose of this institution which was originally created in many European court systems

[7] According to the Transitional Provisions of the Constitution, both the Supreme Court and the State Arbitrage will continue to operate until the establishment of a new court system outlined in the Law on Judiciary.

specifically with the objective to free the judiciary from the traditional powers of the Ministry of Justice.

Under the Reform Program: during the preparation of the initial draft Law on the Judiciary, the current administrative and management authority over the court system was envisioned to be transferred from the Ministry of Justice to the individual courts, without creating an administrative and management entity for the courts. Thus, the individual courts were envisioned to acquire a budgetary and administrative autonomy. During its visit to Armenia in December 1997, the World Bank mission argued that this might not be feasible in the short term. First, the court system needs to function as a unified administrative and management system, in order to function effectively and be able to prioritize the use of budget and human resources, and coordinate and unify administrative procedures throughout the court system. Second, especially in the courts of first instance, there is not sufficient capacity to be able to take on the planning, management and budgetary authority. Budgeting is an area where it is impossible to avoid the connection between judicial and executive power. The suggested model would expose each court to the executive branch directly instead of using an intermediary.

Different countries use different models of court administration: in some countries the administrative functions are highly centralized and exercised either by the Supreme Court or an administrative agency, whereas in other countries most of the administrative and budgetary responsibilities are handled by the lower courts. Based on the above, the Bank mission recommended that, given the geographic and administrative characteristics of the court system in Armenia, creation of a special body responsible for court administration seemed to be the most viable model. In the meantime, the judicial reform program should concentrate on providing training for court personnel to manage and prepare judicial budgets, conduct financial accounting, to do the planning and caseflow evaluation, etc.

This recommendation was reflected in the new draft Law on the Judiciary which is discussed in Chapter II, Section 2(a).

In Armenia, the respect for the judiciary among the public is critically low. People do not trust the courts system and, therefore, avoid it. Unless this attitude changes and until the public trusts and respects the judiciary, it will not use the court system and would resort to extra-judicial mean, often illegal, to resolve disputes. A meaningful judicial reform needs to focus, as one of its priorities, on educating the public and changing its attitudes to the law and legal institutions.

RECOMMENDATION: To conduct a public education campaign about the role of law and legal institutions, including the judiciary, in a modern society.

2. INSTITUTIONAL SET UP OF THE JUDICIARY

A. Constitutional Court

The Constitutional Court has been established pursuant to the Constitution and the 1996 Law on the Constitutional Court. The Court decides in a chamber of nine judges under the leadership of the Chairman of the Court. The Chairman and five judges are appointed by the National Assembly and four judges by the President[8]. The Constitutional Court has two types of jurisdiction: abstract and concrete review. In the abstract review proceedings, the Court reviews the constitutionality of normative acts and international treaties. Under the concrete review procedure the entities listed in the Constitution have the right to challenge the constitutionality of a specific procedure or act.

Until now, a restrictive interpretation of the Constitution has prevailed under which individuals do not have the right to petition the Court and vindicate their individual rights. At the time of the writing of this report, a discussion is taking place in Armenia about the possibility of interpreting the Constitution to allow individual petitions to the Constitutional Court. One should keep in mind that only once individuals do have the right to petition the Court will the highest judicial instance in the country be able to achieve the prestige and importance it deserves and take root in the Armenian society.

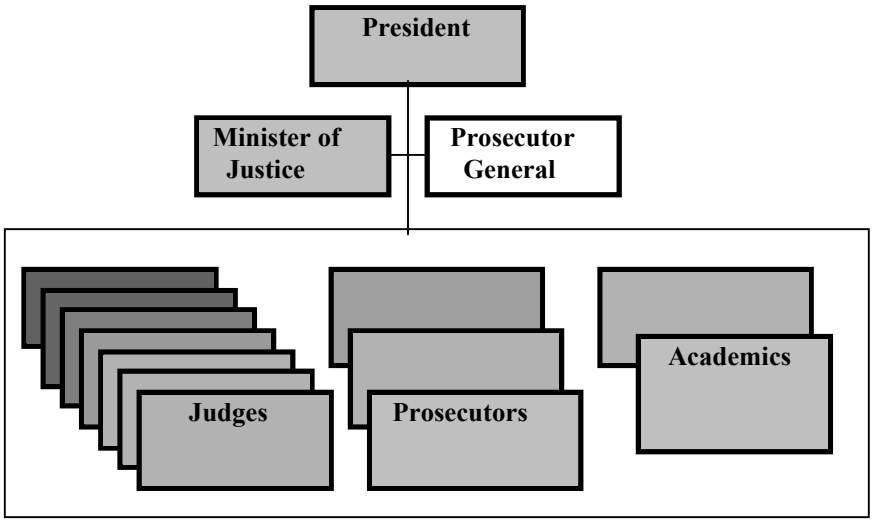
B. Judicial Council

The establishment of the Judicial Council in November 1995 was an important step in the undergoing judicial reform. The Council envisioned as a center of personnel policy in the judicial and prosecutorial systems. The main competencies of the Council include the preparation of proposals (through the Minister of Justice) for candidacies for judicial appointments and prosecutors (through the Prosecutor General) to the President and disciplinary actions against judges.

The President of Armenia heads the Council; the Minister of Justice and the Prosecutor General are the two Deputy Chairpersons. The Council consists of other 14 members (nine judges, two academics and three prosecutors). The judges will be nominated by the General Assembly of Judges. The President appoints all members. (The Council's organizational chart is in Figure 1).

[8] If within thirty days of the formation of the Constitutional Court the national Assembly fails to appoint the Chairman of the Constitutional Court, he will be appointed by the President of the Republic (article 83(2) of the Constitution).

Figure 1: Judicial Council



While the Council is a body with a significant number of representatives of the judiciary, it should be noted that the decisive role in it belongs to the executive branch, with the Chairman, and two Deputy Chairpersons being the President and the Prosecutor General and the Minster of Justice, respectively.

C. Courts of General Jurisdiction

Courts of general jurisdiction currently consist of 50 first instance courts (regional and city peoples courts) corresponding to the old system of administrative divisions (oblasts); and the Supreme Court. The first instance courts hear all civil and a great majority of criminal cases. (The Supreme Court hears the most serious crimes in the first instance.) The Supreme Court acts as a court of first instance in cases prescribed by law, as an appeal court and has also a "supervisory jurisdiction" over the lower courts. The Supreme Court has a Military Chamber whose jurisdiction is prescribed in the criminal procedural laws.

Under the Reform Program: a three-tier system of courts of general jurisdiction will be established. There will be 14 first instance courts with a total of 109 judges. The geographical districts, envisaged in the draft Law on the Judiciary, follow the current administrative division of the country into ten "marzes" and the capital city, Yerevan. Each marz will have at least one first instance court. The jurisdiction of local courts will cover criminal, civil, economic, and military matters. Three **Courts of Appeal**,[9] with 72 judges, will: (i) hear cases in the second instance; (ii) review appeals against decisions of administrative agencies.[10]

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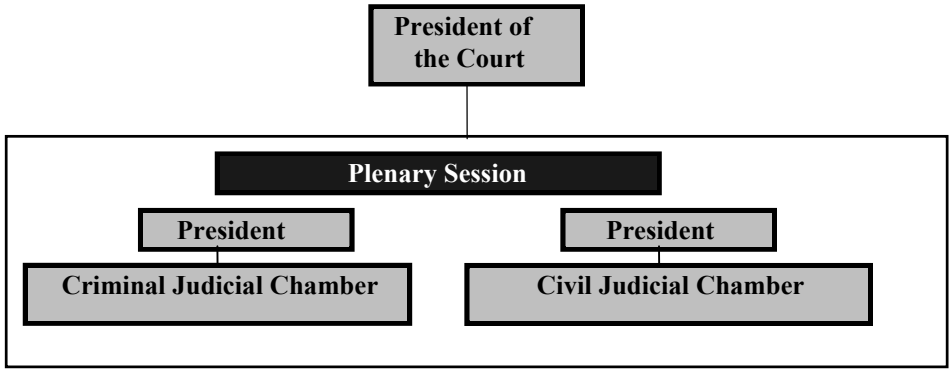
[9] The appeal courts will be located in the Yerevan, Vanadzor, and Artashat.

[10] The exact division of subject matter jurisdiction among the courts is not clear at the moment. It will be determined in the criminal, civil and administrative codes that are under preparation.

The third, highest, instance court will be the **Court of Cassation** with 26 judges. This court will have no original jurisdiction; it will hear appeals from the Courts of Appeals and the first instance courts. The Court of Cassation will have some of the functions of the current Supreme Court. The principal difference between the Court of Cassation and the Supreme Court is that the Court of Cassation has more decision - making power[11] but will not interfere with the independence of judges at the lower level through binding instructions on adjudication. The organizational chart of the Court of Cassation is in Figure 2.

Figure 2: The Court of Cassation



a. JUDICIAL APPOINTMENT AND DISCIPLINARY SYSTEM

(i) Appointment and Removal of Judges

The President appointed all judges in 1995.[12] Pursuant to the Constitution, their mandate expires on July 5, 1998. Therefore, it is vitally important that a transparent and merit-based judicial appointment procedures are established in Armenia before the appointment of a new cadre of judges.

Under the Reform Program: the President, the Council of Justice, the Minister of Justice, and the Prosecutor General are envisioned to carry out the decisions on personnel policy for the judiciary.

According to the Constitution, all the judges and the members of the Constitutional Court are appointed by the President. Under Art. 95(1), the Judicial Council, upon recommendation of the Ministry of Justice, prepares and submits to the president for his approval a list of judges, in view of their competence and professional advancement, which will be used as the basis for appointments. Similarly, the Council of Justice recommends candidates for the positions of Chairmen of courts of first instance, courts of appeals and the Cassation Court. The appointment process will be further specified in the law on Judicial Council which is currently under revision. It is important that preparation

[11] The number of subjects that can petition the Court of Cassation will no longer be restricted to the Prosecutor General. Licensed lawyers and the prosecutors will be able to petition the Court.

[12] The judges of the Constitutional Court have been appointed by the National Assembly and the President in 1996 for life.

of the list of candidates for judges must be based on clearly defined qualification standards. To this effect, an independent body should be established outside of the executive branch which would be entrusted with examination and certification of judges and other legal professionals.

According to the Constitution and a draft Law on the Status of Judges, new judges will be appointed to the bench with no specific time period; they will be able to serve until the age of 65. This is an important provision, since the tenure of office is the key element of the judicial independence[13].

As a general rule, judges should not be removable from their office in connection with the discharge of their judicial duties. The only proper grounds for the removal of judges -- and only after following clear and transparent procedures with specific criteria -- is their violation of laws or ethical rules, commission of crime and a gross neglect of their judicial duties.[14]

The present draft Law on the Status of Judges sets forth thirteen grounds for the termination of the authority of a judge, including the reasons for removal of a judge from office (Article 30). It might be advisable to separate the cases when the authority of a judge terminates due to the fact of reaching the age of 65, or due to his death or resignation, from the cases when a judge is removed from the office. In the first instance, it does not require deliberations of the Council of Justice and the judge's position simply becomes vacant. On the contrary, the removal process should be based on clearly defined grounds for removal and be subject to well-defined procedural rules. In this respect, some of the provision of Article 30 should be further refined. For example, the provision that a judge can be removed from office if "he/she committed an act damaging the prestige of a judge" can be interpreted very broadly: the word "prestige" has several meanings and can be perceived very differently by the members of the Judical Council, by judges themselves and by the general public. In this context, the reference should be made to violation by a judge of ethical rules and standards which, in turn, should be clearly defined in a code of ethics for judges. It is suggested that the Law on the Status of Judges authorize either the Council of Court Chairmen or the Union of Judges to develop such a code which should be published and be avilable for every judge and a general public. Violation of ethical rules and standards should lead to either disciplinary actions against a judge or his removal from the office.

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[13] Judges whose terms are substantially longer are less likely to be influenced by political concerns. In the US, the highest degree of judicial independence is found in the federal system. All federal judges hold office during good behavior and can be removed only through impeachment by Congress. At the other end of spectrum, affording the smallest degree of independence, are those state judicial systems in which judges hold office for short terms (four or six years), at the end of which they must stand for reelection by the voters. A judge with a term as short as four or six years, no matter how conscientious he may be, can hardly be unaware that his judicial decisions could become a political issue in the next election, never more than a few years away.

[14] Federal judges in the US can only be removed from the office through the impeachment process. In an impeachment proceeding the House of Representatives must prefer charges against the judge by a majority vote, and the Senate must try the judge on those charges. The judge can be removed only if the Senate finds him guilty by a two-thirds vote. Impeachment is a formidable procedure, not easily invoked.

Under Article 95(6) of the Constitution, the Council of Justice can make recommendations regarding the removal of a judge from office, as well as the arrest of a judge, and the initiation of administrative or criminal proceedings throughout the judicial process against a judge. This provision is also duplicated in the draft Law on the Status of Judges (Article 11). However, the same article provides that "upon arrest or search of a judge, the corresponding body shall immediately advise the president of the Republic, the Minister of Justice and the Counsel of Court Chairmen of the fact". This is inconsistent with the earlier stated principle since it implies that the judge can be arrested without a prior consent of the President or the Council of Justice.

While under the Constitution and the Law on the Judicial Council the appointment of judges consists of three steps, involving the Minister of Justice, the Judicial Council and the President, in reality the most important part of the appointment process belongs to the Minister of Justice who is responsible for the wetting and selection of nominees for judicial posts.

RECOMMENDATION: To increase the competency and credibility of the cadre of new judges, the appointment process needs to be carried out in a transparent manner. To this end, prior to the selection of nominees by the Minister of Justice, clear standards and criteria (including fair examinations) for the selection of judges should be determined and applied. Also, the list of nominees should be prepared by a body, with adequate representation of judges, prior to its submission to the Judicial Council.

(ii) Disciplinary Actions

Currently, the disciplinary actions against judges may be initiated by the Chairperson of the Supreme Court against the judges of the Supreme Court, and the Minister of Justice against the judges of the first instance courts.

Under the Constitution, the Judicial Council is the entity responsible for taking disciplinary actions against judges. Under Art. 95(7), the President, the Minister of Justice ad the Prosecutor General do not take part in the deliberations of the of the Judicial Council on individual disciplinary actions against judges. However, according to a draft Law on the Status of Judges, the Minister of Justice is given the right to initiate disciplinary proceedings against a judge and bring a case in front of the Council of Justice. It is not clear, however, if this system allows any citizen to file a complaint against a judge based on which the disciplinary proceedings can be initiated.

RECOMMENDATION: To develop specific rules for disciplinary procedures that would define the process that leads to the Judicial Council's involvement in the disciplining of judges.

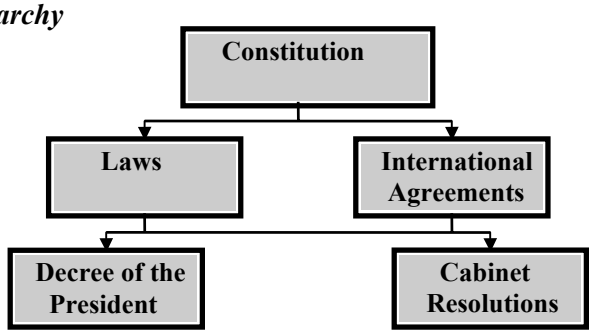
RECOMMENDATION: To adopt a code of ethics by Armenian judges that would set standards for their conduct on and off the bench. To create a self-administered body that would monitor the compliance of judges with these ethical rules and sanction any non-compliance.

IV. OTHER CHALLENGES FOR JUDICIAL REFORM

1. LAW HIERARCHY AND THE LAW-MAKING PROCESS

The Constitution refers to several types of normative acts which have been further classified in the Law on Publication and Entry into Force of the Laws of the Republic of Armenia and Other Normative Legislative Instruments adopted on May 13, 1996. These acts include: the Constitution, international treaties[15], laws, resolutions of the National Assembly, presidential orders and decrees[17], normative resolutions of the Cabinet and the Prime Minister, and resolutions of the Constitutional Court. Besides the above normative acts, the President and the Cabinet issue decisions for the implementation of their decrees. The Prime Minister and Ministers also have the right to issue decisions.

Figure 3: Law Hierarchy



As most of the laws consist of general principles, their implementation strongly relies on the issuance of regulations. Regulations, however, are often issued with great delay and are not always consistent with the underlining laws. This is exacerbated by many agencies not differentiating between normative acts and specific administrative acts (decisions)[18]. Most of the ministerial decisions and regulations are not codified or indexed and are not available in any public depository. Copies of decisions and regulations must be requested on an ad hoc basis from the Ministry of Justice or the ministry responsible for the subject matter of the regulation. Thus, the Ministry of Justice is not capable of tracking all the implementing decrees and ministerial resolutions and

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15 International treaties are an integral part of the Armenian legal framework . In a case of conflict, the international treaty prevails.

17 Articles 56 of the Constitution gives the President the right to issue decrees which are executed throughout the Republic. The decrees cannot contradict the Constitution and laws.

Articles 78: In order to ensure the legislative basis of the Government's program, the National Assembly may authorize the Government to adopt resolutions that have effect of law; that do not contravene any laws are in force during a period specified by the National Assembly. The socialist countries were run rather through decrees for two reason: elimination of the private law and domination of the executive branch.

18 Normative acts are generally binding legal acts which regulate unspecified areas of social interaction. In a civil law system, only normative acts are a source of law. Decisions are legal acts which regulate specific area of social interaction among specific subjects. Thus, decisions are not generally binding.

ensuring their compatibility with the laws. All this creates enormous problems for judges in applying the laws, particularly, in the areas of legal research and interpretation of legal provisions.

In Armenia, there is no specific law or regulation which describes the principles for developing law. According to the Constitution, the deputies of the National Assembly and the Cabinet have the right of legislative initiative. The vast majority of laws have been initiated by the Cabinet. To come in force, a law has to be signed by the President and be published in the Official Bulletin. The President has the right to return the law passed by the National Assembly with objections and recommendations requesting new deliberations (article 55 of the Constitution). However, if the National Assembly rejects the objections presented by the President, it can approve the law with a simple majority of votes. Then the president has to sign and publish the law within five days.

The normative acts of the Government Council are signed by the Prime Minister and approved by the President. The law making process by itself is closed; the public is not provided with timely and accurate information either during the law making process or after the process.

Definition of legal framework with its hierarchy and precise lines between the norms and decision, and the transparent law making process, strengthening the capacity of the legislators, increasing the public involvement in the law-making process, and public information and education about laws are imperatives for the judiciary reform.

2. BINDING INSTRUCTIONS OF THE SUPREME COURT

Many Armenian judges and lawyers oppose elimination of the instructions issued by the Plenum of the Supreme Court. They fear that without instructions the judges will not interpret laws correctly. Having **binding instructions** is, however, **incompatible with judicial independence in their decision-making.** To provide support to new judges, other measures should be taken, including: (i) training that would include law-interpretation practices; (ii) preparation of commentaries on the main codices of Armenian laws, both substantive and procedural; and (iii) easier access to general legal information, laws, legal texts and court decisions.

3. LEGAL INFORMATION

As one of the fundamental elements of the rule of law is that in order to expect people to abide by certain rules contained in laws and other normative acts, the texts of these rules need to be easily accessible and available to people. This is especially important for judges whose task is to implement and enforce these rules. Unless they have access to all normative acts, they cannot be expected to properly do their job.

In Armenia, the Constitution connected the legal power of the laws with their official publication (Article 55 of the Constitution). Adoption of the Law on Publication and Entry into Force of the Laws of the Republic of Armenia and other Normative

Instruments dated May 13, 1996 was an important step towards codification and improvement of public accessibility of laws. According to the Law, all laws and other legislative and normative acts (which include decrees and orders of the President, the normative resolutions of the National Assembly, the normative resolutions of the Government and the Prime Minister, as well as the resolutions of the Constitutional Court) must be published in the "Official Bulletin of the Republic of Armenia". The "Official Bulletin" must be published by the Government at least twice a month, and subscription for the bulletin is unrestricted. In practice, however, the laws are published with great delay and the dates in the bulletin are not systematically organized. The main source of legal texts for judges remain daily newspapers or publications sold by the private sector.

In January 1996, the National Assembly published a chronological list of laws which had been adopted in the first five years of the Armenia's independence. These laws are indexed by subject. While this was a significant step, a similar index does not exist for the Government decrees and orders, as well as ministerial acts and administrative decisions. To obtain decrees and decisions, one must visit the ministry which published the particular regulation.

Another issue which needs to be urgently addressed is the establishment of a legal database which would facilitate systematization and dissemination of legal information to judges, other legal professionals and the public, and which would facilitate a legal research. Currently, there are several projects under way to construct a "Nexis"-type legal database, based upon a "key word search" method. None of this is yet complete. Before committing any resources to any specific undertaking in this area, especially electronic dissemination, it is important to address the following issues:

(i) necessity to prepare a nationwide legal information strategy (plan), guided by the principle of achieving greater and easier public access to legal information. The plan would be based on analysis of the needs of the Government and non-governmental users.

(ii) the plan would need to balance electronic and non-electronic solutions to legal information dissemination needs. This is of particular importance in Armenia where the communications network does not operate reliably throughout the country and where computer literacy is not very high. Any electronic system needs to be developed in parallel with strengthening the dissemination of hard copy versions of legal texts.

(iii) any decision whether or not to finance and build a Government sponsored electronic legal information system, should be based on a determination on how would this system interact with the existing, as well as a future, legal information systems and databases created and disseminated by the private sector.

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[20] In the US, approximately seventy-five percent of commercial disputes are settled privately through arbitration and mediation.

RECOMMENDATION: A comprehensive system of codification of laws, other normative acts and administrative regulations should be developed and made accessible to the public and legal professionals through legal databases. The choice of particular methods in developing legal information systems should be based on the principles of efficiency, easy access by the general public and availability of computer equipment to judges and other legal professionals.

4. JUDICIAL EDUCATION AND TRAINING

The Armenian Government recognizes the importance of the training and education of judges in this period. This issue is addressed in the Concept Paper. The document differentiates the "initiating educational" program and the specific training program for judges.

In October 1997 the first comprehensive training program for approximately 600 participants has started. This program targets current judges and other lawyers aspiring to become judges. The program focuses on the main components of the Armenian legal framework, international agreements, and basic judicial skills. A certificate from this program will be a condition for being appointed as judge in July 1998. The training is partially sponsored by US AID and is taking place under the auspices of the State Commission on Judicial and Legal Reform and is held on the premises of the Yerevan State University.

Although short-term training programs are important to address the current need in preparing a new cadre of judges to replace the judges whose mandate expires under the Constitutional deadline in July of this year, a long-term strategy is also needed for providing a continuing legal education for practicing judges. Judges need to be informed of the changes in the law and legal doctrine, common practices used by other courts in the country, as well as to update their legal and administrative skills. For this purpose, establishment of a separate training institution for judges is critically important.

Under the Concept Paper, the Ministry of Justice is supposed to be a leading agency in organizing the training for judges and court staff in cooperation with the Judicial Council. However, only judges themselves know the skills and competencies they need in the discharge of their judicial duties. Therefore, the determination of the curricula and faculty for judicial training should be done by judges themselves. Control over these by those outside the judiciary threatens judicial independence.

The creation of a cost effective judicial education resource center for use of all courts is an important national objective. Judicial education programs not only enhance the competency, efficiency, accountability and impartiality of judges, but also seek to cause the attitude changes essential to support judicial reform.

The following guiding principles should be taken into consideration in establishing a judicial training body:

(1) *Division in training programs*. There should be a clear distinction between the training programs designed for judges and programs for the court administrators and other personnel. Also, different principles and methods apply to judicial education for potential, or newly appointed judges, and to continuing judicial education throughout the careers of judges.

(2) *Common topics studied*. An analysis of the role and function of the judge indicates a need for judicial education in the following areas: judicial independence; judicial accountability, judicial ethics and conduct; judgment writing and delivery; assessment of damages; the science of fact-finding; judicial skills (chairmanship, sensitivity to the needs of witnesses, litigants, and the public); judicial reasoning; computer training; commercial law subjects; bankruptcy law; labor law; competition law; commercial law; environmental law; case-flow management; time management; management skills' stress management and adapting to change; judicially exercised discretion; impact of judicial decisions - judicial activism.

(3) *Long-term strategy for judicial education*. A long-term strategy should be developed for judicial education which will: (i) adopt objectives and standards for such education; (ii) network with regional and international legal education bodies to share human and material resources; (iii) develop a judicial education curriculum that responds to community perceptions of a weaknesses in the justice system; and (iv) develop performance indicators for regular assessment of the judicial education programs.

(4) *Management of the judicial training institution*. The training institution should be managed by professional administrators , but judges should be actively involved in preparing the curriculum and the teaching process.

(5) *Training of trainers*. Judicial trainers (educators) -- mostly judges -- will be trained to teach judges substantive and commercial law and the concepts of an impartial and accountable judiciary, judicial discretion, culture of service, their practical applications and necessary support mechanism. To do this they will be taught substantive subjects including commercial law as well as pedagogical techniques useful to achieve the changes in thinking process and attitudes required to create a judiciary able to support a market economy.

RECOMMENDATION: To establish an independent judicial training institute with professional management where committees of judges would determine the curricula and judges would also participate in the teaching process, especially in the area of developing judicial skills.

5. ORGANIZATION OF THE LEGAL PROFESSION

The main role of the bar associations in all countries is to regulate the profession through entrance requirements and the disciplinary system, to provide legal training for its members, and provide basic legal service to the community. In addition to bar associations which usually include all practicing lawyers, in many countries there are various organizations and entities which are outside of the judicial branch but provide essential support to courts in judicial education, collecting statistical data and disseminating the information between the courts, promoting professional conferences and symposiums for judges, etc.

In Armenia, the *Union of Judges* of the Republic of Armenia is the most powerful organization and includes about 99% (130) of judges. The main goal of this organization is help judges in the transition period; to assist the Government in the preparation of the laws; to organize training and seminars for judges; and to help in the interpretation of laws by publicizing specific decisions. The Union would like to react to the most sensitive issues, identified by judges. These are a lack of materials, as laws; and an absence of the interpretation rules.

The *Union for Law and Policy* is a NGO organization with about 3 000 members - mostly lawyers and "politologists". The organization has a headquarters in Yerevan and 10 regional offices. The main focus is publicizing the laws and legal papers.

In December 1997, a new association of lawyers was created - *Bar Association* of the Republic of Armenia. It held its first Congress on January 10, 1998 where about 400 lawyers participated. The Congress elected the President and the Board comprising of judges, law professors and government officials. The following are the main projected activities of the Association: preparation of the code of professional ethics; contributing to the improvement of the legislative process; strengthening the rule of law; provision of professional support to practicing lawyers, organization of seminars and conferences and promoting of legal publications.

Many of the judicial reforms will affect the legal profession, thus it is important that they become participants and supporters of the reform process. More importantly, an active participation of non-governmental organizations of lawyers and judges in monitoring the legal profession as well as the judiciary through establishment of ethical standards and effective disciplinary system will eliminate the remaining supervising role of the executive organs over the judiciary, which would in turn strengthen the independent status of the judiciary vis-a-vis the executive branch.

6. ALTERNATIVE DISPUTE RESOLUTION

In virtually all countries with developed market mechanisms, courts are not able to handle all commercial disputes among entrepreneurs. Many countries have resorted to extra-judicial, alternatives methods of dispute resolution (ADR), especially commercial arbitration, mediation, conciliation and negotiation[20]. By this method a commercial dispute is heard in a non-judicial forum, but the decision of the private forum is usually enforceable by the public court system. These procedures are frequently less costly than

litigation in courts, take less time, and provide an opportunity to bring commercial expertise to the resolution of disputes.

At the moment, Armenian courts are not overloaded with commercial cases. As the economic activity will develop, however, there will be an increase in this type of cases.[21]

The following are the primary benefits of private commercial arbitration:

1. *Faster results*. An arbitration process usually takes much less time than the formal hearings in the State court.

2. *Availability of special legal expertise*. State court judges may lack experience with particular areas of commercial law and lack regard for precedent. ADR arbitrators tend to be more knowledgeable about commercial matters than judges sitting in courts of general jurisdiction. ADR also allows the parties to choose arbitrators which, in their view, would provide an impartial and competent resolution of a commercial dispute.

3. *The parties choose applicable law*. ADR procedures allow the parties to agree at the time they enter into a transaction upon which law will be applicable to such transaction, and the method of resolving prospective disputes. This has an effect of reducing uncertainty of an investment or contract. This is particularly useful in countries which have yet to adopt a full body of commercial laws.

4. *Disputes involving foreign investors*. Private arbitration is often the preferred forum of disputes involving foreign investors because it provides participants with a neutral forum.

It is important to note that private arbitration does not substitute for a well-functioning judicial system. Even if a contract includes an arbitration clause, state courts may be called upon to interpret the arbitration clause or rule on the proper forum. Moreover, state courts must be available to enforce an arbitration award. It is therefore important that the law clearly defines the scope of jurisdiction of arbitration courts and other ADR institutions, as well as the role of state courts in enforcing arbitration decisions.

RECOMMENDATION: To establish a legal framework for and support the development of alternative dispute resolution (ADR), especially commercial arbitration, mediation and conciliation.

[21] The draft Law on Mediation Courts and Mediation Court Procedures has been recently submitted to the National Assembly, but the authors of this Report have not had an opportunity to review it.

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