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# Accessing Justice: Legal Aid in Central Asia and the South Caucasus



UNDP Regional Centre For Europe And The CIS

## Accessing Justice: Legal Aid in Central Asia and the South Caucasus

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## Dear Readers,

Access to Justice is a critical element of Rule of Law and Democratic Governance Agenda. And it is not about mere involvement of and engagements with lawyers and existing free legal aid schemes. In fact, the administration of justice is a process involving a chain of decisions by several actors. Therefore, the system needs to be addressed as a whole, from the entry point to the end point of the process. Support must be provided to all elements and actors of the process and the linkages between the various actors must be strengthened to ensure a smooth coordination and avoid “bottlenecks” that hamper and slow down the process of justice.



UNDP defines access to justice as “the ability of people, particularly those belonging to poor and disadvantaged groups, to seek and obtain a remedy through formal and informal justice systems, in accordance with human rights principles and standards”. As part of our **Legal Aid for Justice (LAJ)** Initiative, we strive to capture and analyse knowledge on both formal and informal process and institutions. We also support our country offices in their efforts to develop new projects, and, to foster knowledge-based partnership. This comparative report outlines the status of access to justice in six countries – Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. Using data (as of end 2011) from national reports, it describes the status quo, successes and challenges for access to justice. There are significant numbers of complex historical, geographical, legal and socio-economic bonds between the six analyzed countries. A little over than two decades ago, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan were part of the former Soviet Union. Therefore, the legal systems of each of these independent countries still experience the influence of the specific legal order of the former Soviet Union. Some of the legal provisions, especially in the area of criminal legal aid, bear a certain degree of similarity and challenges.

The present inquiry looks at the international and national regulation, demographic and geographical barriers, supply of legal services, structure of legal and court fees, alternative means of delivery of legal services, and funding and quality of access to justice mechanisms. I hope this regional study will be directly helpful for our country/field offices and national partners in their continued endeavour for widening access to justice for everyone.

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## Executive summary

This comparative report outlines the status of access to justice in six countries – Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. Using data from 2011 national reports it describes the status quo, successes and challenges for access to justice. Conceptually, access to justice is contemplated beyond the mere involvement of lawyers and existing free legal aid schemes. The inquiry looks at the international and national regulation, demographic and geographical barriers, supply of legal services, structure of legal and court fees, alternative means of delivery of legal services, funding and quality of access to justice mechanisms.

At the **legislative** level, Georgia has by far the most advanced framework for state-guaranteed access to lawyers across the six analysed countries. Georgian Legal Aid Act (LAA) of 2007 is a progressive legal instrument which sets out an extensive system of publicly-funded legal assistance in criminal, civil and administrative matters. Legislative reforms in the field of access to justice have been also commenced in Kyrgyzstan with the Law on Publicly-Funded Legal Assistance adopted in 2009. Legal Aid Bill was introduced in 2007 in the Armenian Parliament but was not voted. The pace of the **institutional** reforms is most advanced in Georgia where a designated institution - Legal Aid Service has broad authorities with regard to criminal and civil legal aid. Progress has also been made in Kyrgyzstan where a National Legal Aid Council was established to co-ordinate the provision of legal aid in criminal matters. In the other countries the responsibility for providing timely and qualitative legal advice and representation to the people who cannot afford it is scattered among various stakeholders and organisations - courts, police, prosecution service and Bar councils. This inevitably leads to lack of political priority and support for access to justice policies, gaps in quality and limited to non-existent data regarding the demand and supply of legal services. The non-existence of affordable mechanisms for access to justice is particularly harmful for the people in vulnerable positions - indigent, ethnic and language minorities, women and children. Underfunding of the existing legal aid schemes is a common phenomenon across Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. Lastly, the potential of traditional justice and its revival in some Central Asian countries must not be neglected. Traditional justice can be a powerful mechanism for increasing access to justice, and there are already examples of integration of formal and informal justice mechanisms into countries' justice systems: the aqsakal courts in Kyrgyzstan or the Mahalla committees in Tajikistan.

This report offers directions for action under each identified challenge area, and calls for further policy level discussion on the improvement of access to justice for the people of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.

## Introduction

The main objective of this comparative report is to outline the status of access to justice in six countries – Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. The document is based on comprehensive national reports from 2011, which outline different dimensions of access to justice in the analyzed countries. This report summarizes and presents the most important findings from the study. The international and national regulation of access to justice is briefly summarized, but the primary focus of the report is directed towards estimating the actual implementation of the legal norms. Instead of engaging in in-depth analysis of the normative framework, the report will rather investigate the extent to which the people in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan can actually access justice to protect their legitimate rights and interests. It will look for availability of legal services and specifically for access to legal professionals for underprivileged people and disadvantaged groups. Access to justice will also be analyzed from the perspective of the different barriers, which people face on their paths to justice. Attention will be paid to the specific problems with access to justice experienced by the people belonging to vulnerable groups.

The findings from the national reports will be analyzed from the prism of good practices from the region, but also from other countries with innovative policies and arrangements in the field of access to justice. Following the findings and the assessment of applicability of good practices, concrete directions for policy and programmatic actions will be suggested. The purpose of this part of the report is to initiate discussion about the improvement of the access to justice for the people of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.

# 1. Access to justice

Before addressing the main questions of the study the meaning of access to justice<sup>1</sup> needs to be clarified. Despite its intuitive character, access to justice is immensely difficult to define, operationalise and assess. Different perspectives and reference points offer varying strategies to the inquiry of access to justice. What this report seeks to understand is whether, and to what extent, the people of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan have adequate mechanisms to vindicate their legitimate rights and solve their disputes and grievances in a fair manner. Are there institutions to make justice a real possibility? What type of support can people find when they face a legal problem, and are these support structures sustainable? These are the most important questions that will be explored below.

There are numerous but also complex historical, geographical, legal and socio-economic bonds between the six analyzed coun-

tries. A little over than two decades ago Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan were part of the Soviet Union. Inevitably, to one degree or another, the legal systems of each of these independent countries still experience the influence of the specific legal order of the former Soviet Union. Some of the legal provisions, especially in the area of criminal legal aid, bear a high degree of similarity, and it is easy to trace their roots to the Soviet system of safeguarding the rights of the accused and defendants in criminal proceedings marked by a discernible inquisitorial style. For instance, the grounds for the *ex officio* appointment of a lawyer in criminal proceedings are almost identical in several of the criminal procedure acts analyzed, and point to the criminal procedure law dating back to Soviet times. Despite the fact that the six analyzed countries are at different levels of economic and legal development they all can be classified as tran-

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<sup>1</sup> In this report, the term “access to justice” is used only with the reference to legal aid and legal counseling.



sitioning countries which are still coping with the challenges of replacing the planned economy with market mechanisms, institutions and practices. Clearly all of the six countries are still searching for institutional designs, which can accommodate the institutions of the market economy into a structured, coherent and predictable legal framework.

As will be discussed below, many side effects of the transition period are very noticeable in the field of access to justice. The developmental similarities between Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan reinforce the validity of the thesis that access to justice is not an isolated legal policy, but a function of the overall legal, social and cultural paradigms present in a given society. Therefore, the common historical, legal and socio-economic factors shared between the six analyzed countries explain, and perhaps predict, to a large extent, the abundance of similarities in the public attitudes towards access to justice.

On the other hand, each of the countries from the region follows its distinct social, (geo)political, economic and legal pathway. Armenia and Georgia are members of the Council of Europe and aspire for membership in the European Union. After the Rose revolution, Georgia applied for NATO membership and consequently saw a rapid deterioration in its relationships with neighbouring Russia. Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan are the backbone of a region known as Central Asia. Economically, the six countries are far from a homogeneous set. Kazakhstan's nominal GDP per capita is more than five times higher than that of Kyrgyzstan. Also, in terms of geography and population, the compared countries are very diverse. Armenia's population is 3,2 million whereas

Uzbekistan has 27,6 million inhabitants. Kazakhstan is the world's largest landlocked country with an extremely low population density of 5,2 people per square kilometre. In comparison, Armenia's population density is 108 people per square kilometre. Each of the countries has rich geography and severely unequal population distribution.

### **1.1. Access to justice through access to lawyers and legal advice**

Traditionally, access to justice is contemplated as access of an individual to legal assistance provided by a lawyer in the discourse of a dispute or other grievance, which can be solved by legal means.<sup>2</sup> Access to legal advice provided by lawyers, however, can be obstructed by numerous barriers. Certainly, in every country in the world there are fewer lawyers than legal needs. There is also a relationship between the number of lawyers, legal needs and development. A higher preponderance of lawyers or other providers of legal advice does not necessarily mean less unmet legal needs. Development is not only positively correlated with the number of lawyers, but also leads to a more diverse and recognizable structure and patterns of legal needs.

The mere presence of lawyers in a given jurisdiction is not a valid indicator of equal access to justice for all. Everywhere legal services are expensive and their usage is uneven across social class and income groups. Conventional wisdom is that those who are better off have greater access to justice than those who have less social, political and economic resources. Through the filters on its gateways the justice system is increasing, rather than decreasing social coherence. What

<sup>2</sup> Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, *Loyola of Los Angeles Law Review* 913 (2009).

the societies of all countries belonging to the former Eastern Bloc have experienced in the past 20 years is the interlinked effect of dramatically changing and increasing legal needs and the transformation of legal services into a sort of luxury private good, available predominantly to those with money and power.

Geographical barriers might also pose challenges – it is easy to imagine what might be the problems with access to justice if the closest court, legal aid provider, or legal service are located more than 200 kilometres away from those who need them. Justice is accessible when those who need it can easily reach solutions without the need to expend disproportional resources.

In the paradigm of access to justice (understood as access to a lawyer) the typical intervention is to organize some sort of subsidized scheme for the delivery of public services. This could be a public *Judicare* model scheme,<sup>3</sup> in which tax payers' money is allocated to purchase the services of private attorneys on behalf of people who otherwise cannot afford it. Access to legal advice and legal representation can be valuable in itself, but its major importance is as a mechanism guaranteeing that unequal parties in a dispute will enjoy equality of arms in a dispute resolution forum. In such a way legal aid is seen first as a mechanism for vindicating rights, and second as a guarantee that justice will not be suppressed by the inevitable power and resource inequalities existing among individuals and social groups. Such schemes for subsidized legal aid could take different forms and cover different scopes of legal needs. As will be demonstrated in the country reports, the most prevalent intervention in the region is state-funded legal

advice to certain categories of defendants in criminal procedures. However, there are also innovative examples of provision of legal aid through public defenders' offices (Georgia) or a centralized public service (Armenia).

A related paradigm is the interpretation of access to justice as inputs (namely financial) into the existing schemes for subsidizing legal advice or dispute resolution processes. Using money as a common denominator of public preference, this approach estimates the level of access to justice based on the public resources invested in the analyzed scheme. Better funded legal aid schemes are assumed to provide wider access to justice. Of course, this proposition is purely normative, and in real life the results are not a linear function of the invested resources. The existence of functional management systems, proper quality assurance mechanisms and qualified providers of legal services is a more essential predictor of the success of any subsidized legal aid scheme than the sheer volume of invested resources.

## 1.2. Methodology

The methodological question which arises is: how to measure access to justice? Following the definition above, access to justice can be defined as the extent to which the people of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan can employ legal means to solve their legal problems in a fair manner. Numerous approaches are possible to shed light on the questions regarding access to justice. At the core of the question is the availability of valid and reliable data. A complete picture of access to justice

<sup>3</sup> A model of publicly-funded legal services delivered by independent providers such as lawyers, law firms and sometimes paralegals. Within the general term "*Judicare*" there are significant variations and differences between the many national and regional schemes for legal aid.

necessitates a wealth of information regarding the existing legal institutions, practices sustained by these institutions, shared understanding regarding the role of law, awareness of people regarding their rights and level of empowerment with regard to exercising the rights. The evaluation of the access to justice status quo also requires thorough knowledge regarding the legal needs of the people and the strategies to respond to these needs, as well as understanding of the courses of action undertaken. It is also important to know something about the reasons for preferring one or another strategy. If an individual experiences a legal problem and decides to do nothing as response, there could be different motivations behind this decision. In one scenario this person might have decided that conflict is needless, given the social mores and a dispute-avoidance culture. For another person experiencing the same situation, the motive for inaction could be lack of practical knowledge of what to do. Or it could be that the opposing party is perceived as more powerful, and thus it is useless to mobilize resources. Knowing what makes people act in certain ways when legal problems arise is crucial for assessing the level of access to justice in a particular society.

The difference between the approaches to studying access to justice has both conceptual and practical (i.e. data availability, etc.) considerations. In the real world, data is a scarce and expensive resource. This scarcity is particularly noticeable in the areas of justice and access to justice. A more practical approach requires a multi-layered understanding of access to justice. It can be observed through numerous proxies – normative regulations, access to lawyers and other legal professionals, available legal infrastructure and barriers to justice.

### 1.3. Research approach

Thorough assessment of access to justice requires a significant amount of data reflecting various parts of the concept. Empirical data in the form of official statistics, surveys of experts and laypeople, regulatory or project impact evaluations or cost benefit analyses are scarce in the countries investigated. Little is known about the types of legal problems experienced by the people. With one recent exception,<sup>4</sup> there is no rigorous study exploring the prevalence of legal problems and the strategies that people use to answer to the legal problems. As we will discuss below, perhaps with the exception of Georgia, there is very little information regarding the operation of the existing national schemes for facilitating access to justice.

Despite the data vacuum, access to justice can be analyzed through investigation of its directly observable facets. Firstly, the legal framework will be assessed to estimate the degree to which the existing legislation recognizes and guarantees access to justice in specific areas of life. Both international and national instruments will be included in the scope of the analysis. Secondly, the availability of legal services will be used as a proxy for estimating the degree of accessibility of legal advice. Above it was stated that the presence of providers of legal services, and namely lawyers, is just an indication of availability. Unaffordable fees, long distances or language barriers might give different meaning to the fact that there is a specific number of legal providers practice in a particular country. Thirdly, the analysis will look at the structure of legal and court fees. The analysis will also look at the existence of legal fees arrangements which can allegedly impact

<sup>4</sup> See section 1.5 for the outline of a study of the Caucasus Research Resource Centres.

access to justice. Yet another aspect is the effect of the cost-shifting rules in civil and administrative dispute resolution procedures. Traditionally, the Soviet civil procedure law was based on the so-called “English Rule” according to which the losing party pays the legal fees of the winning party. What is of interest here is whether the rule has transcended the legislation of the independent states.

Along with the legal services provided by lawyers for remuneration, the report will assess alternative means for delivery of legal aid, namely, pro-bono schemes, student legal clinics and civil society organizations. Certainly, the taxonomy of non-traditional providers of legal aid is much more varied, but for practical reasons we will focus on these three types.

Closely related to the normative analysis is the focus on existing legal aid schemes. In the general report as well as in the country reports such schemes will be reviewed and analyzed. Of particular importance are aspects such as the scope of the legal aid scheme, its coverage, affordability, operation, and funding. We will pay special attention to one aspect – the quality of subsidized legal services. Again, without sufficient data it is difficult to make value judgements about the actual effect of such subsidized schemes. The analysis will be mostly based on the perceptions and attitudes of experts. Such evidence inevitably has an anecdotic character and cannot be used for definitive conclusions. However, the experts’ opinions might be good indicators of the real functioning of the analyzed schemes.

Alternative Dispute Resolution (ADR), as well as traditional paths to justice, might be important entry points for access to justice.

Historically, ADR is not popular in the region. Under the ideology of state socialism the official dogma was that the relationships in the society are harmonious. Different unofficial mechanisms were in place to suppress or solve problems. Also, in the limited space of the planned economy, many problems which are prevalent today were unknown, or at least were on a smaller scale. In the shadow of omnipresent state, traditional justice had a rather limited role. After the collapse of the totalitarian regimes, the independent states face the challenge to institute appropriate dispute resolution mechanisms to respond to the requirements of the market economy. ADR and traditional justice might be solutions, but it is interesting to analyze to what extent people have equal access to justice.

#### 1.4. Access to justice in country contexts

In the quest to study access to justice in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan one has to bear in mind a complex framework of factors which define similarities in some areas and peculiarities in others. Shared history and the inevitable legacy of the legal ideas and doctrines from the Soviet times predetermine to a large extent the mechanisms used to respond to the challenges of access to justice. As will be discussed below, the shared legacy is most visible in the clear demarcation between access to justice in criminal matters, on the one hand, and in civil and administrative matters, on the other. With the exception of Georgia,<sup>5</sup> in all of the countries legal aid exists as a procedural guarantee for vulnerable defendants in criminal proceedings. This con-

<sup>5</sup> It should be noted that provision of legal aid in civil and administrative cases is not yet operational in Georgia.

strained role of legal aid as leverage for access to justice is a direct legacy of the Soviet times when the legal needs had a thoroughly different structure. Moreover, the political and social structures at the times provided formal and informal remedies to many problems, although this does not mean that the system was always fair and inclusive. Many examples of such discontinued institutions could be listed. People used to remedy injustice at local level through sending complaints to higher level party officials or the mass media. Comrade courts were intended, at least in theory, to solve small level, mostly domestic disputes. Police officers were responsible and actively involved in the maintenance of the public order and were expected to get involved in conflicts and disputes which could potentially escalate. Nowadays, most of these mechanisms are gone or severely dysfunctional, but the legal systems are still based on the assumption that people somehow will manage to solve their problems in a fair and just manner.

Along with the shared history and legal traditions, there are significant diversities in the analyzed countries which affect access to justice. Sheer differences in geography and population size cause different challenges in terms of access to justice. For instance, the huge distances in Kazakhstan seem to be a significant factor in terms of access to legal advice or dispute resolution forums.

Economic development is in many ways related to good governance, rule of law and effective and efficient justice. Again, there is a huge variation between the analyzed countries. The World Bank classifies Kyrgyzstan and Tajikistan as low income countries. Their gross national income per capita is significantly lower than the other four countries (see Table 1). Armenia, Georgia and Uzbekistan are in the group of lower middle income countries. Kazakhstan is the

apparent outlier – it has been classified by the World Bank as an upper middle income country. Despite the lack of recent data it is obvious that the economic development of Kazakhstan is related to the significantly lower proportion of people living below the national poverty line.

The relationship between access to justice and economic development, however, is far from linear. The availability of public resources is essential for the establishment of functioning legal institutions which at the same time are accessible for the people. Wealth alone is not sufficient to guarantee equal access to justice. Public policies which acknowledge the significance of access to justice for the social order and rule of law are equally important. As will be discussed below, the constitutions of each of the six analyzed countries pronounce the right to legal advice in certain areas of law, but it is questionable to what degree the constitutional provisions take place in reality.

Another question which arises from Table 1 is the relationship between access to justice and social inclusion. Equal access to justice for all can be seen not only as an individual right but also as a central value of societies in which access to economic means is not the main condition for active participation. In this perspective, justice is seen rather as a public good or service necessary for social inclusion. In a similar vein, education and health care are essential for inclusion and are deemed as public goods which should be available and accessible to everyone, even though this could require cost transfers and transaction costs. If there is a consensus that social inclusion is valuable social norm, then access to justice is one of the means towards that end.

The question is to what extent social inclusion is a social norm and ideal in the countries studied. In-depth analysis is out-

**Table 1: Country level indicators**

	Poverty <sup>6</sup>	GNI per capita <sup>7</sup>	WB classification	Income Gini Coefficient <sup>8</sup>	HDI value <sup>9</sup>
<b>Armenia</b>	50,9% (2001)	\$3,100	Lower middle income	30,2	0,695
<b>Georgia</b>	54,5% (2003)	\$2,530	Lower middle income	40,8	0,698
<b>Kazakhstan</b>	15,4% (2002)	\$6,920	Upper middle income	30,9	0,714
<b>Kyrgyzstan</b>	43,1% (2005)	\$870	Low income	33,5	0,598
<b>Tajikistan</b>	53,5% (2007)	\$700	Low income	32,6	0,580
<b>Uzbekistan</b>	27,2% (2003)	\$1,100	Lower middle income	36,8	0,617

side the scope of this study, and also every country has its own specifics. A common pattern is that in the last 20 years the structure of the societies of the analysed countries has undergone a deep transformation. The previous structure with existing, but suppressed and not tolerated inequalities was replaced by an inroad of market economy forces and reconsideration of the role of the state. Income inequalities increased and a quite significant proportion of the population is described as living below the national poverty line (see Table 1).

Inevitably, these trends created visible and tangible segregation between “haves” and “have nots”. Justice is one of the many areas in which the “have nots” experience limited access. Comprehensive social inclusion policies target the structural causes of in-

equalities and provide remedies. Access to justice is deemed as critical for the ability of the “have nots” to pursue active participation and inclusion. Therefore, economic development is just a moderator in the quest for equal justice for all. The question is, to what extent is social inclusion a valid social and political goal in the analysed countries? And what if social inclusion is not part of the political agenda? Then access to justice certainly has a different dimension. If social inclusion is not a shared aspiration, the ideal of access to justice will be difficult to transform into coherent and accepted societal value and public policy. It still has a place as a value on its own, but most importantly as a safeguard for numerous rule of law principles such as the right to a fair trial, equality of arms, separation of powers, etc. Pervasive

<sup>6</sup> Headcount ratio at national poverty line (percentage of population). Source: The World Bank.

<sup>7</sup> Data for 2009. Source: The World Bank, <http://data.worldbank.org/country/> (last visited on 12/03/2011).

<sup>8</sup> Measure of the deviation of the distribution of income (or consumption) among individuals or households within a country from a perfectly equal distribution. A Lorenz curve plots the cumulative percentages of total income received against the cumulative number of recipients, starting with the poorest individual or household. The Gini index measures the area between the Lorenz curve and a hypothetical line of absolute equality, expressed as a percentage of the maximum area under the line. A value of 0 represents absolute equality, a value of 100 absolute inequality. Source: UNDP, International Human Development Indicators, <http://hdrstats.undp.org> (last visited on 10/03/2011).

<sup>9</sup> A composite index measuring average achievement in three basic dimensions of human development – a long and healthy life, knowledge and a decent standard of living. Year of data – 2010. Source: UNDP, International Human Development Indicators, <http://hdrstats.undp.org> (last visited on 10/03/2011).



acceptance of access to justice as a value and goal flourishes on shared aspirations towards social inclusion.

In light of the common developments in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan one can assume that social inclusion and equal participation are far from a mature and shared social and political priority. One can reasonably expect that access to justice in transitioning countries is mainly posited as a more technical mechanism for the protection of vulnerable members of society. Therefore, it is mostly confined to courtrooms and official procedures. In this paradigm, access to justice is more prominent in criminal law than in the civil and administrative domains. The national reports confirm this assumption. Another corollary of the interplay between access to justice and social inclusion is the reduced role of the empowerment function of access to justice. Only when justice and access to justice are constructed as elements of a larger programme for social inclusion can we make progress to legal empowerment, defined as: "a process of systemic change through which the underprivileged and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors."<sup>10</sup>

To a large extent access to justice is dependent on functioning legal institutions. Legal norms, case law, dispute resolution processes and providers, legal aid and public services are just a few examples of the many institutions which affect access to justice. Well-functioning institutions are necessary for the delivery of justice to which people have access. It is outside the scope of this

study to assess the quality of the relevant institutions in the observed countries, but still is important to provide some information.

Data from cross-country indexes which measure certain aspects of the relevant institutions show significant variation. Table 2 suggests that Armenia and Georgia can rely on more effective justice institutions than the other countries. Georgia, for instance, in the last couple of years has been praised by the World Bank and its Doing Business project as one of the leaders in streamlining business regulation. The country shows a significantly higher score on the Transparency International Corruption Perception Index, which implies lower levels of corruption. On the other hand, Uzbekistan, Tajikistan and Kyrgyzstan have low scores on the aggregated Rule of Law indicator of the World Bank Governance Indicators. Kyrgyzstan, for instance has a score of 7.1 on the Rule of Law indicator, which means that about 93 per cent of all other countries covered in the index have higher scores. In general, Uzbekistan, Tajikistan and Kyrgyzstan have lower scores on the indicators which reflect the strengths and viability of the institutions which maintain the rule of law. Kazakhstan is developing on its own way. The largest, and presumably richest, country of the six has somewhat more effective justice institutions as well as relatively positive corruption marks.

Drawing on the excerpt of data from cross-country indexes the six analyzed countries can be classified into three categories according to the quality of their institutions. Georgia and Armenia lead the tables, although the advantage is neither clear nor particularly strong. Kazakhstan follows on most indicators, and outperforms Armenia

<sup>10</sup> Commission on Legal Empowerment of the Poor, *Making the law work for everyone*, 3 § I (United Nations Development Programme. 2008).

**Table 2: Effectiveness of institutions**

	Rule of Law, WB <sup>11</sup>	Government effectiveness, WB <sup>12</sup>	Corruption perception index, TI <sup>13</sup>	Business environment, WB <sup>14</sup>
<b>Armenia</b>	42,9	57,1	2,6	48
<b>Georgia</b>	50	61,9	3,8	12
<b>Kazakhstan</b>	34,9	48,1	2,9	59
<b>Kyrgyzstan</b>	7,1	17,1	2	44
<b>Tajikistan</b>	11,3	12,4	2,1	139
<b>Uzbekistan</b>	10,8	16,7	1,6	150

significantly on the Transparency International Corruption Perception Index. Kyrgyzstan, Tajikistan and Uzbekistan experience significant difficulties to demonstrate the strength and effectiveness of the institutions that maintain the rule of law. Indeed, the World Bank's Rule of Law Index is a somewhat eclectic aggregation of measures which are difficult to interpret meaningfully. The between-country variation cannot be taken as any sort of evidence, but can only serve as an indication that the six analyzed countries are far from being a homogenous group.

Access to justice policies could be legitimized within two broader ideologies – social inclusion and rule of law. Of course, the two are highly intertwined and there are multiple interactions and reinforcements. The reason for the analysis was to provide an outline of some indicators which highlight the current developments in the fields of social inclusion and rule of law in the six investigated countries. Since the fall of the Soviet Union and the establishment of the independent states there is a significant process of social stratifi-

cation in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan. Market forces, political processes and geo-economic developments rapidly delineated the gaps between "haves" and "have nots". It is the role of law and justice to ascertain that those who are less privileged do not find themselves in inferior positions in terms of their abilities to access justice. In transitioning countries this pressure on the justice institutions is significantly stronger than in societies with more experience with democracy, political pluralism and the market economy. Memories from the times when societies were more homogeneous and life more certain raise many doubts about the fairness of the current system. In such times people need much more access to mechanisms which promote justice and fairness. Obviously, the paths to justice and access-promoting mechanisms cannot respond to the social demands. Thus, the first and central question of the inquiry is to assess the extent to which the existing justice mechanisms and their accessibility promote or inhibit social inclusion.

<sup>11</sup> *Worldwide Governance Indicators. Data for 2009*, <http://info.worldbank.org/governance/wgi/index.asp> (last visited on 05/02/2011).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Corruption perceptions index 2010 results*, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results) (last visited 08/02/2011).

<sup>14</sup> *Doing Business 2011 rank*, <http://www.doingbusiness.org> (last visited on 05/02/2011).



Second, the social, economic and political changes in the former Eastern bloc, and particularly in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan, brought profound institutional changes. Political pluralism and market economy aspirations require different “rules of the game” as the institutional economists call the institutions that maintain social order. Mechanisms for holding the public authorities accountable have to be formulated and implemented. Minority groups have to be provided with a voice and participation, and at the same time have to be guaranteed that they can freely exercise their rights. With the proliferation of the free market consumers have to be protected against unfair practices. In all these processes people need more avenues towards justice. However, unlike in past times there is a less and less powerful state to step in for ideological reasons and provide justice. In the new reality people and their associations have to be active in guarding their rights. Therefore, effective institutions have to provide sufficient grounds for civic activity. Too many barriers on the paths to justice can discourage even the most dedicated and pro-active stakeholders. All too often one can hear a complaint from civil society organizations, advocacy groups or donors that “people do not know their rights” or “people are not active enough”. It is the mission of the institutions which maintain the rule of law that people can focus their energies on protecting their individual and collective rights and interests. Instead, the reality is that most of these energies are spent in attempts to access justice. Properly functioning rule of law institutions provide wide access to justice and therefore the second fundamental question of the analysis is to reveal the patterns in which institutional designs interact with access to justice.

### 1.5. Legal problems and legal needs in everyday life

Before looking at the status quo of access to justice provisions and mechanisms in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan, a brief review of the existing legal needs will be conducted. Unfortunately, little empirical research is available on the legal problems which the people in the six countries face in their everyday life. A 2011 survey by the Caucasus Research Resource Centers (CRRRC) in Kazakhstan, Kyrgyzstan and Tajikistan is by far the most comprehensive effort to explore and document how legal problems affect people and what strategies are mobilized in response.

A survey of almost 2,000 randomly selected respondents from Kazakhstan, Kyrgyzstan and Tajikistan shows that problems with theft, divorce, document registration and different forms of violence are the most frequent legal problems faced in the last five years (Table 3). There is a remarkably similar pattern in the legal problems reported by the respondents in the three countries. In Tajikistan, however, the respondents report problems significantly less frequently. For instance, the most frequent legal problem, divorce, is described as very common or common by just 17 per cent of those interviewed. In comparison, 60 per cent of Kazakh respondents and 53 per cent of Kyrgyz respondents stated that the most prevalent problem (theft) is either common or very common. The authors of the report do not rule out that the different pattern in Tajikistan might be due to more conservative cultural attitudes and self-imposed censorship: “it is also possible that people are simply less prepared to complain openly about problems”.

There is no clear evidence that women in the three countries experience signifi-

**Table 3: Types of problems**

Rank of problem	Kazakhstan	Kyrgyzstan	Tajikistan
1 <sup>st</sup>	Theft	Theft	Divorce
2 <sup>nd</sup>	Problem divorce	Document registration	Document registration
3 <sup>rd</sup>	Violent crime	Divorce	Violence in the home
4 <sup>th</sup>	Document registration	Dispute with official over land or property	Theft
5 <sup>th</sup>	Violence in the home	Violent crime	Dispute over land or property (with neighbour or officials)

Source: CRRC study on Access to Justice in Central Asia, 2011

cantly more frequently than the overall sample family-related problems such as domestic violence, divorce and family-related disputes (except for, perhaps, Tajikistan). However, abundant data from semi-structured interviews provides a deeper insight into the problems that women face when they have to deal with legal problems. Victims of domestic violence from all three countries shared with the researchers that the biggest obstacle to just and fair resolution of problems is resistance from family members. Social norms and stereotypes tolerate domestic abuse and reinforce the patterns through a culture of dispute avoidance. There is little access to just and fair dispute resolution processes available to the victims. The more distant and isolated the settlement is, the fewer mechanisms abused women have for finding redress outside the surrounding social network. Victims of domestic violence from urban centres also report that abusers enjoy impunity. Police and local public authorities are seen as corrupt and controlled by people who support, or at least tolerate, domestic violence as a normal pattern of family relationships. This finding from the CRRC study reveals how little access to justice people in the three countries have when they need it. None of the answers from the semi-structured interviews

and focus groups suggest that victims try to solve problems using legal advice or a structured path to justice.

Where do people go when they experience a legal problem? Drawing from the data from the CRRC we can outline two trends. First, just like in many other societies, a very low number of legal problems are steered to formal or informal dispute resolution mechanisms. For instance, 6 per cent of the respondents in Kazakhstan referred the problem to a court of law, 4 per cent went to a head of village or local government official and 1 per cent relied on village or community elders. None of the interviewed Kyrgyz reported experience with using the formal justice system to solve a problem, and just 2 per cent of Tajiks had filed a claim in court when they experienced a legal problem in the last 5 years. Apparently, most of the disputes and conflicts are solved outside the existing justice system. The study does not elaborate on how many people leave their problems unresolved, but one can assume that the percentage is substantial.

The second trend that can be derived from the data regarding the response to legal problems is the substantial variation between the studied countries. People in Tajikistan and Kyrgyzstan rely more on informal providers of justice. One in every five re-

spondents from Tajikistan reported use of some sort of informal justice mechanism to solve a legal problem.<sup>15</sup> Kyrgyz respondents reveal similar preferences, although they are less reliant on informal dispute resolution methods.<sup>16</sup> On the contrary, the Kazakhs either have less developed informal justice mechanisms or have less trust in them.<sup>17</sup> Various factors can be interpreted to explain the difference. Kyrgyzstan adopted in 2002 a special Law on the Aqsagal Courts, which provide a sort of communal justice. Tajikistan has a system of Mahalla committees to solve various types of problems. Such informal dispute resolution providers are less developed and less popular in Kazakhstan. Kazakhstan is also the richest and most urbanized of the three countries. Above we saw that the people in Tajikistan, and to some extent in Kyrgyzstan, are supposedly more conservative, and this impels them to refer to informal justice mechanisms more frequently.

Furthermore, the CRRC study identifies six barriers to access to justice experienced by the people in Kazakhstan, Kyrgyzstan and Tajikistan:

- Unwillingness to involve others in solving disputes;
- Poor knowledge of the law;
- Lack of resources;
- Practical hurdles to using the courts;
- Corruption and perceived corruption;
- Structural biases in the legal system.<sup>18</sup>

This list of barriers to justice shows an amalgamation of perceived and objective hurdles, institutional inefficiencies and cultural beliefs and patterns. As the authors of the report point out, the barriers are mutually reinforceable. If the closest provider of dispute resolution is distant or unreachable for some other reason, people tend to solve problems themselves, or simply accept the negative consequences that unresolved problems might have. Lack of resources, whether they be knowledge, financial or social, inevitably results in poor knowledge of the essential legal provisions, as well as an unwillingness to involve others. Structural biases in the legal system, such as power asymmetries between disputants or unfair processes<sup>19</sup> further restrain the willingness of people to use the law as a tool for solving their problems.

<sup>15</sup> Which institution would you address in case of a dispute? 9% head of village or local government official, 8% village or community elders and 4% local religious leaders.

<sup>16</sup> Which institution would you address in case of a dispute? 9% head of village or local government official, 5% village or community elders and 1% local religious leaders.

<sup>17</sup> Which institution would you address in case of a dispute? 4% head of village or local government official, 1% village or community elders and 0% local religious leaders.

<sup>18</sup> Caucasus Research Resource Centers, *Access to Justice in Central Asia 7* (Caucasus Research Resource Centers 2011). Unpublished work, on file with the author.

<sup>19</sup> Examples of structural biases are the privileged position of the police/investigator/prosecutor in criminal procedure; lack of judicial independence, an unclear distinction between administrative and criminal offences and unfair processes employed, in particular in informal dispute resolution procedures.

## 2. Legal frameworks for access to justice

### 2.1. The international legal framework of access to justice

Access to justice can be pursued in many different ways. Most often access to justice has been associated with a set of public policies generally aimed to provide subsidized legal aid and dispute resolution services to people who cannot reach or afford justice. Non-public actors also can have a distinctive role in the endeavour to make justice processes equally accessible for all. In many countries pro-bono legal services are part of the professional ethos of the legal profession. Paralegals in both developed and developing jurisdictions provide legal services to people who otherwise would not be able to afford legal advice or representation. Quangos<sup>20</sup> and civil society organizations can provide access to justice to vulnerable groups which are particularly difficult to reach through public mechanisms. Community le-

gal clinics in Canada are a great example of the role of civil society organizations in making the law accessible.

Two decades after the fall of the Soviet Union, in all six of the analyzed countries the state continues to play a central role in access to justice. This does not mean that domestic and international civil society organizations, informal and traditional justice providers, law schools and professional associations of lawyers do not play a role. The survey data cited above shows that a significant proportion of the population would trust a community or religious dispute resolution procedure if the need were to arise. As we will see below, major reforms in the field have been triggered by international agencies and non-governmental organizations. These mechanisms and efforts have their role as paths to justice, but in their present form do not suffice. Also one may question whether in the current state of social, political, economic

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<sup>20</sup> Quasi governmental organizations.

and technological development a society can achieve sufficient access to justice without the mechanisms of the state. Still, as it is in many other countries, access to justice in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan is largely dependent on state interventions.

This section summarizes the policies of the six states in the field of access to justice. To understand the level of access to justice we will look at the legal provisions and their institutional implementation. Black letter law is not sufficient to guarantee that the people have access to processes and institutional mechanisms which can adequately meet their legal needs. The idea that everyone is entitled to equal access to justice or legal services alone has no impact on access to justice. Therefore the analysis will focus also on the institutional framework set in place to guarantee equal access to law. The priority of access to justice in the overall public policies in a given country may be assessed by the robustness of the institutional framework and the resources dedicated to achieve the goal.

All of the six analyzed Caucasian and Central Asian countries have ratified the major international instruments in the field of human, social and political rights. Article 14 of the International Covenant on Civil and Political Rights<sup>21</sup> postulates the right to a fair trial and equality of arms in criminal proceedings. Paragraph 3 specifically recognizes a package of procedural guarantees, which among other things, grants everyone charged with a criminal offence the right “to have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his own choosing.”<sup>22</sup> Furthermore, ICCPR proclaims the right to

publicly-funded legal assistance “in any case where the interests of justice so require” and the accused does not have sufficient means to pay for it.<sup>23</sup> Armenia was the first to accede to ICCPR in 1993, followed by Georgia (1994), Kyrgyzstan (1994), Uzbekistan (1995) and Tajikistan (1999). Kazakhstan ratified ICCPR in 2006 after signing it in 2003. It is important to note that none of the discussed countries made any declarations or reservations with regard to the ICCPR and all recognize the competence of the Human Rights Committee (Article 41).

Armenia and Georgia ratified respectively in 2002 and 1999 the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ETS No. 5 ). Similarly to the guarantees recognized in Article 14 of ICCPR (ECHR), the European Convention on Human Rights (ECHR) guarantees particular fair rights standards. Article 6 (3)(c) recognizes the right of the suspect and defendant in a criminal trial to “defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” In the same way as the ICCPR, the European Convention on Human Rights treats the criminal process as a source of increased risk for the rights of the accused.

As part of the ratification of the European Convention on Human Rights Armenia and Georgia also recognize the jurisdiction of the European Court of Human Rights (ECtHR). ECtHR has developed a significant body of case law, which interprets the abstract rule of Article 6 (3)(c) and applies it to contexts which are not implicitly envisioned in the European Convention on Human Rights. The specific im-

<sup>21</sup> *United Nations, Treaty Series*, vol. 999, p. 171 and vol. 1057.

<sup>22</sup> *Article 14 par. 3(b).*

<sup>23</sup> *Article 14 (3)(d).*

portance for the development of the institute of legal aid as part of the fair trial principle is the doctrine of effectiveness of legal assistance. In *Daud v. Portugal* ECtHR explicitly recognized that the right conferred in Article 6(3)(c) is instructive, i.e. it has to materialize into legal assistance, which guarantees a fair trial through equality of the parties, and active and competent participation in the proceedings.<sup>24</sup>

*“While it has frequently observed that the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective, assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal-aid scheme or privately financed. The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.”*<sup>25</sup>

*Daud* is a landmark decision in the areas of fair trial, legal assistance and access to justice in general. ECtHR recognized that when provision of legal aid is stipulated by law, this assistance has to meet certain standards of quality in order to contribute to the interests of the defendant and to the interests of jus-

tice. With jurisdiction over 47 countries ECtHR refrains from defining the minimum quality of legal assistance. Whether the standard has been met or not is a matter of case-specific interpretation. What is important, however, is that the ECtHR recognizes the concept of quality of legal assistance and guides the national courts of the Council of Europe member states in how to interpret whether the standard has been met in the specific circumstances of the case.

In its earlier case law the ECtHR elaborated the concept of “interests of justice”, which is the central criterion for the appointment of a publicly-funded lawyer to a defendant who does not have sufficient means to pay for legal assistance. Examining various criteria for objective determination of what “interests of justice” means in *Quaranta v. Switzerland*, ECtHR justified two additional criteria – the seriousness of the offence and the severity of the sentence asked for in the particular case.<sup>26</sup> Discussing the circumstances of the case, ECtHR recognizes that the possibility of imprisonment as result of the sentence justifies *ex-officio* appointment of a lawyer.

ECtHR developed further the meaning and application of legal assistance in criminal cases. In the case of *Saldus v. Turkey* the court held that “practical and effective” safeguarding of the right to a fair trial requires that access to a lawyer should be provided from the first police interview of a suspect unless there are compelling reasons not to do so.<sup>27</sup> In any case the right of access to a lawyer in the early stages of the investigation is irrevocable when the accused has made incriminating statements during police interrogation and

<sup>24</sup> *Daud v. Portugal* [1998] ECHR 22600/93, (21 April 1998).

<sup>25</sup> *Czekalla v. Portugal* [2002] ECHR 38830/97, (10 November 2002).

<sup>26</sup> *Quaranta v. Switzerland* [1991] ECHR 12744/87 (24 May 1991) Cf. *Imbrioscia v. Switzerland* [1993] ECHR 13972/88 (24 November 1991).

<sup>27</sup> *Saldus v. Turkey* [2008] ECHR 36391/02 [Grand Chamber] (27 November 2008).



these are used for a conviction. The doctrine of early involvement of a lawyer in police proceedings has been confirmed by the court in the following cases: *Panovits v. Cyprus*,<sup>28</sup> and *Çimen v. Turkey*.<sup>29</sup>

Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan are not member states of the Council of Europe and thus the European Convention on Human Rights is not applicable to them. Besides ICCPR, the six countries on which the report focuses have ratified a number of international instruments protecting basic human, socio-economic and political rights:

- UN Convention on the Discrimination of All Forms of Discrimination against Women, 1979;
- International Convention on the Elimination of All Forms of Racial Discrimination, 1966;
- UN Convention on the Rights of the Child, 1989;
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984;
- Convention on the Rights of Persons with Disabilities, 2006.

Tajikistan and Kyrgyzstan are the only two countries of the group of six which have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990). On the other hand, Armenia, Georgia, Kazakhstan and Uzbekistan have ratified the recent Convention on the Rights of Persons with Disabilities.

It is difficult to establish the impact of the international instruments on the normative and empirical level of access to justice in any of the analyzed countries. On the one hand, there is an apparent trend to ratify the major

international instruments and integrate them in national legislation. However, as the Kazakhstani national report warns, without effective monitoring, implementation and enforcement mechanisms the abstract international norms have a limited effect on the national legal systems. An exception is the ECtHR's jurisdiction over the European Convention on Human Rights. Over 1,500 applications have been filed against Armenia since 2002 when the country ratified the ECHR.<sup>30</sup> In 24 of these applications the ECtHR found violation of the convention and ruled against the state. More than 4,500 applications have been submitted against Georgia since 1999 and in 32 cases ECtHR found violations of different provisions of ECHR. What is more important is that the case law and doctrines developed by the court in Strasbourg have the significant potential to transform the practices and standards in the field of fair trial and access to a lawyer in criminal proceedings. Focusing on basic human rights and freedom, the European Convention on Human Rights does not provide remedies for the myriad of legal problems of non-criminal character. Therefore, despite international instruments, the actual level of access to justice is a matter of political, legislative and implementation priorities at national level.

## 2.2. Constitutional access to justice provisions

The texts of the national constitutions are an important starting point for analyzing the role of the state in providing access to justice. All of the constitutions of the analyzed countries apply a narrow understanding of access

<sup>28</sup> *Panovits v. Cyprus* [2008] ECHR 4268/04 (11 December 2008).

<sup>29</sup> *Çimen v. Turkey* [2009] ECHR 19582/02 (3 February 2009).

<sup>30</sup> See <http://www.echr.coe.int>, last visited on 5/03/2011. The data is valid as of 01/01/2011.

to justice as access to courts and provision of publicly-funded legal advice and representation. For instance, Article 42 (1) of the Constitution of Georgia reads: “Everyone has a right to access to the court for the protection of his or her rights and freedoms”. Further Article 42 (2) sets a guarantee that the right to access courts will be realized: “Right to defence is guaranteed”. Similarly, the Constitution of Uzbekistan states that the right to professional legal assistance is guaranteed at every phase of the court proceedings (Article 116). There is no further elaboration of how the right is guaranteed except the reference to the role of the bar as provider of legal services. In the Tajik Constitution the right to a lawyer is regulated relatively economically in Article 19 (3). Its second proposition declares that everyone has the right to legal services from the moment of detention.

Article 13 (2) of the Constitution of Kazakhstan declares that “Everyone shall have the right to protect his rights and freedoms” followed by the norm of Article 13 (3) which states that everyone can receive qualified legal aid in the circumstances provided for in the primary legislation. Similarly, Article 20 (1) of the Constitution of Armenia proclaims: “Everyone shall be entitled to legal aid. In certain cases foreseen in the law, the provided legal aid is funded by the state.” The new Constitution of Kyrgyzstan proclaims in Article 40 (1) that everyone is empowered to seek judicial protection of his or her rights and freedoms as set out in the constitution, national legislation and applicable international instruments. Using standard wording Article 40 (3) establishes the principle of availability of qualified legal aid and stipulates that, in certain circumstances foreseen in the national legislation, legal aid can be subsidized. Article 103 of the new Constitution of Kyrgyzstan provides for a waiver of the court fees when the primary legislation provides

this, and in any case when the disputants produce evidence that they cannot afford it.

In summary, the constitutions of each of the six states recognize the importance of access to justice and regulate it in various degrees. It is important to note a terminological difference. The right to legal aid as specified in the constitutional provisions should be interpreted as the right to legal assistance. Two meanings could be derived from the right to legal assistance. Some constitutions emphasize the right of an accused or defendant to be advised and represented by a lawyer at a certain stage of the criminal proceedings (see Article 19, Constitution of Tajikistan and Article 20 (2), Constitution of Armenia). On the other hand, the primary legal acts of Armenia, Kazakhstan and Kyrgyzstan recognize the right of the entitled individual to request publicly subsidized legal assistance and the duty of the state to provide it. As usual, the elaboration of the scope, eligibility and content of the publicly-funded legal assistance is referred to the primary legislation.

A second finding that can be made from the cursory assessment of the constitutional provisions with regard to access to justice is that the right to legal assistance has been functionally bound to the rights of judicial protection and fair trial. In this narrow perspective the right to legal advice and representation is posited as a fair trial guarantee. Below, the report will explore to what extent this limiting view might have influenced the availability of legal advice and representation in situations of legal necessity which develop outside official judicial proceedings.

Inevitably, the legal culture and traditions in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan are largely influenced by the legislation, case law and legal doctrine inherited from Soviet times. In that respect, the last Soviet Constitution from 1977 sets a pattern of positing legal assis-



tance as a fair trial institute in criminal matters. Article 158 of the Soviet Constitution reads “The defendant is guaranteed a right to legal assistance”. Abstracting from the more technical question of how the rights of the accused and defendants are regulated and protected, this tradition has far-reaching consequences. The political, social and economic structures of the Soviet times presupposed that individuals might need assistance only in the settings of the criminal proceedings where the defendant is in an inherently weaker position. In fact, the more pronounced reason for the existence of legal assistance was the interests of justice. Outside the criminal domain individuals and organizations were deemed as possessing equal powers and capabilities. The state was also supposed to have policies and objectives aligned to the individual needs of citizens and their organizations. Therefore, non-criminal legal needs were largely discounted, and the focus of the access to justice policy was on guaranteeing the rights of certain categories of defendants who were deemed to be in a specifically vulnerable position.

Now, 20 years after the collapse of the Soviet Union, many of the paradigms underlying the legal system have changed dramatically. An important question is whether the legal needs have been reconsidered and prioritised in accordance with the current realities. It is difficult to find an answer to this question in abstract constitutional provisions which outline principles and values. Indeed, the Constitution of Tajikistan directly links the right to legal assistance to a procedural role in criminal proceedings. The other constitutional texts, however, deviate (at least at face value) from the philosophy that people

might need legal assistance only within the boundaries of criminal proceedings. A closer look at the primary legislation reveals the scope of the policies which guarantee access to legal services.

### 2.3. Normative regulation of access to lawyers

It is the role of primary legislation to regulate the implementation of the constitutional provisions. Access to justice in the form of access to judicial procedure and accessibility of legal advice has been promulgated in different forms in the constitutions of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. The analyzed countries can be split into two groups based on the selected approach to implement the constitutional principles. Kazakhstan, Tajikistan and Uzbekistan do not have a special law to regulate the delivery of legal aid. Armenia also has to be added to this group, but it must be noted that in 2007 the Legal Aid Bill was introduced in the parliament but was not adopted. Publicly-funded legal assistance has been detailed in the criminal procedure laws of these countries and some aspects are dealt with in the acts regulating the legal profession.

In the other group are Kyrgyzstan and Georgia, which both have adopted relatively recently specialized laws with regard to the provision of subsidized legal services. The Kyrgyz act from 2009 is entitled the Law on Publicly-funded Legal Assistance,<sup>31</sup> whereas the Georgian law from 2007 bears the title Law on Legal Aid.<sup>32</sup> There are a number of similarities between the two laws, particu-

<sup>31</sup> Law No. 227, adopted on 17 July 2009.

<sup>32</sup> Adopted on 19 June 2007.

larly in the institutional framework for delivery of subsidized legal aid. Most importantly, both acts extend the provision of legal aid to underprivileged people and establish some mechanisms for setting and monitoring quality standards. Despite the similarities, there are also substantial differences between the legal aid schemes in Kyrgyzstan and Georgia. Following the legal tradition in the region the Kyrgyz law limits the scope of subsidized legal aid to criminal proceedings. On the contrary, the Georgian Law on Legal Aid recognizes the need for legal advice in civil and administrative matters.<sup>33</sup> Furthermore, legal aid in Georgia can be requested and respectively delivered not only in court proceedings, but also in the form of representation in administrative proceedings.<sup>34</sup> Another substantive difference is the scope of the providers of legal services. In an innovative way the Georgian law stipulates that providers of publicly-funded legal services could be legal aid bureaux as well as private lawyers selected on the basis of a tendering procedure. As is discussed below, there are rather more differences than similarities between the legal aid acts of Georgia and Kyrgyzstan.

This section will proceed through outlining the existing regimes of access to legal services. For the sake of brevity the legal aid systems will be reviewed as groups according to their approach to regulation of legal aid. The focus of the sections below will be on the scope of the legal aid systems, eligibility criteria and providers. Next, the report will outline the existing providers of legal aid in the six analyzed countries, institutional mechanisms and quality assurance schemes.

Lawyers are an essential part of the functioning of the justice system and play an important role in sustaining its accessibility. In an ideal world everyone who experiences a problem of a legal character should be able to contract a lawyer and receive professional advice, assistance and representation. In reality, only a small proportion of the problems that can be solved with legal means are referred to lawyers. Numerous reasons could explain why the vast majority of people with legal problems never consult professionals. First, there may be too few lawyers practicing in a given country or territory. Then, the legal fees are often unaffordable for a significant proportion of the population. Third, low levels of legal awareness might interact with the tight and unaffordable market for legal services. Fourth, paradoxically many problems with legal dimensions cannot be solved by lawyers (or solely by lawyers). Lawyers also might be perceived as ineffective means of resolution of legal problems – other solutions such as legal insurance, advice from paralegals or self-help might be seen as more appropriate. In conclusion, people may have concerns about the integrity and impartiality of legal professionals.

Although it is difficult to bring all these possible explanations together into the analysis we can deliberate on the supply side of the legal markets in the studied countries. There is a significant variation in the supply of legal services. Whereas in Georgia there are 65 lawyers per 100,000 citizens, in Tajikistan and Uzbekistan there are respectively 10 and 13 lawyers serving the same number of people (Table 4). Clearly, such a low num-

<sup>33</sup> *Making a difference between legal consultation and legal aid*, Article 1 (4) states that “Legal consultation in accordance with this Law is provided on any legal matter, whereas legal aid is provided in criminal, civil and administrative proceedings.” Further, Article 2 (a) defines legal aid as “preparation of legal documents, representation before the court and administrative bodies on administrative and civil cases, as well as in criminal proceedings, at the expense of the State.”

<sup>34</sup> Article 3 (e), Georgian Law on Legal Aid.

**Table 4: Number of practicing lawyers per 100,000 citizens. Data on the number of practicing lawyers has been taken from the national reports**

Country	Population	Number of practicing lawyers	Number of practicing lawyers per 100, 000
Armenia	3, 262, 200	1, 050	32
Georgia	4, 636, 400	3, 024	65
Kazakhstan	16, 455 000	3, 849	23
Kyrgyzstan	5, 482, 000	2, 600	47
Tajikistan	7, 995, 754	800	10
Uzbekistan	27, 606, 007	3, 591	13

ber of legal professionals explains why only a handful of all legal problem experienced by the people in Tajikistan and Uzbekistan are brought to legal professionals. Another aspect with regard to the accessibility of lawyers is the fact that they are mostly clustered in the national capitals and the larger-sized cities. For instance, in Kazakhstan more than a quarter of all practising lawyers are concentrated in the two major cities – Astana and Almati. On the other hand, just 76 lawyers provide legal services to the almost 700, 000 people living in the Kyzylorda region. In Tajikistan about half of the practicing lawyers are located in the capital city Dushanbe, meaning that for the rest of the country on average there are about 5 lawyers serving 100,000 people.

Geographical factors together with the overall shortage of legal professionals, pose significant challenges for access to justice. The shortage of lawyers is particularly acute in Tajikistan and Uzbekistan where less than 15 lawyers are available per 100,000 inhabitants. A special case is Kazakhstan, where communities scattered across the vast territory of the country are, in fact, deprived from access to lawyers and official dispute resolution processes. One might think that the limited number of lawyers in the smaller cities is a direct result of fewer legal needs. There is no

empirical data to shed light on this issue, but it is more plausible that in the smaller cities there are plenty of legal needs in areas such as poverty law or family law. These are not particularly profitable legal domains and despite the expected large volume of needs there is little likelihood of adequate supply. The few available lawyers most probably focus on areas and clients that can sustain financially their practices. Another effect of the scarcity of lawyers is that in the smaller cities and villages it is less likely that the practicing attorneys would specialize in a specific area of law. Instead, general legal practices are more frequent, whereas in the bigger cities the larger market facilitates specialization and the setting up of law firms.

How the legal profession is organized can have a significant impact on the access to legal services. In many countries only organized and registered bar members can provide legal services. As a professional body, the Bar usually has a mandate to formulate, monitor and enforce professional and ethical standards. It is also contended that the Bar is an institution which safeguards the independence, impartiality and quality of legal advice and legal representation. On the other hand, the monopoly of the Bar is a mechanism which can easily distort the supply and stifle innovation of legal services.

Alternatively, the lack of organization and the statutory monopoly of the Bar on legal services deprives the legal profession of important self-regulatory mechanisms. The positive side effect of a non-organized legal profession is the relative ease of introduction of alternative providers of legal advice, such as legal clinics, paralegals and legal expenses insurers.

Different regimes for registration and licensing of lawyers exist in the six countries analysed. Despite the provisions in the Constitution of 2010 that the legal profession is organized as a self-regulated professional entity, there is no central Bar in Kyrgyzstan. In Armenia and Uzbekistan all practicing lawyers have to be registered as members of the respective national Bar. Similarly, the practicing attorneys in Kazakhstan have to be members of the national Bar, but the difference is that the admittance to the Bar is preceded by licensing by the Ministry of Justice. The members of both the Armenian and Kazakh Bars have a monopoly only on legal representation in criminal cases, although they have some privileges (such as the right to call a witness) in civil and administrative cases. The relative lenience of the monopoly of the Bar in some countries, namely Armenia and Kazakhstan might be considered as an opportunity for the introduction of alternative forms of legal advice, such as paralegals, public providers of legal advice, liability insurance schemes and advice via dedicated telephone lines. In Uzbekistan, there is no statutory monopoly of the Bar on legal advice and representation. Procedural rules, however, in practice make it difficult for non-members of the Bar to participate in formal adjudication procedures.

Different arrangement exists in Tajikistan, where lawyers can practice either as organized members of one of the four functioning Bars or like commercial providers of legal

services after obtaining a licence from the Ministry of Justice. Apart from representation in criminal cases there is no formal monopoly on the provision of legal services.

There is a lively debate about the role of legal fees and the affordability of legal services. Front-loading of legal fees is a barrier which can discourage many people from contacting a lawyer. In this regard, the proponents of contingency and conditional fees claim that they play a positive role in access to justice in some categories of dispute resolution processes, where the claimant expects compensation. Instead of paying in advance, the party pays legal fees only if there is a positive result. However, the relationship between contingency and conditional fees and access to justice is not straightforward. Numerous studies demonstrate that the providers of legal services who operate on a contingency or conditional basis reduce risks through rigorous screening, resulting in a significant proportion of potentially meritorious cases being turned down.

In Armenia, legal services are remunerated in several different ways. According to the national report, monthly fees or fixed fees per procedural phase are the most frequent arrangements for billing for criminal work. Conditional fees as well as tariff-based fees are used in civil and administrative cases. In Kazakhstan, in general, contingency and conditional fees are not permitted. Also, in Tajikistan most often the legal fees are not contingent on the outcome of the case. Minimal fees are applicable to the legal services provided by the members of the Tajik Bars. Interestingly, minimum fees are not applicable to those lawyers in Tajikistan who operate on the basis of a licence.

The six analysed countries belong to a legal tradition which follows the so called British rule of shifting the legal expenses –

that is, the legal costs associated with the dispute resolution are shifted to the losing party. There are some nuances, however, in the application of the rule. In Armenia the legal costs are shifted to the losing party only to a reasonable extent. The Armenian courts have wide discretionary powers to interpret the reasonableness criterion. It is believed that the British rule stimulates action on meritorious claims, given that the party can expect that the legal costs, or at least part of these costs, will be recovered through the shifting rule. Still, the effects of the cost shifting on access to justice have to be studied further, taking into consideration the specific contextual factors.

Administrative law is one area where the arrangement of the payment of legal fees might have a considerable impact on access to justice. Appeals against acts and decisions of administrative bodies make up a substantial part of the legal problems of everyday life. The involvement of expensive legal professionals is inevitable in the more complicated and demanding administrative disputes. Application of the cost-shifting rule in administrative disputes could considerably discourage the possibilities for challenging unlawful acts and decisions of the public authorities. A good practice is to waive the rule for claimants in administrative disputes to prevent them from running the risk of having to cover the legal fees of the public authority if their claim is unsuccessful. In some jurisdictions, one-way shifting schemes are used in order to mitigate the inequality of arms between individuals with claims against corporations or governmental authorities. The one-way cost-shifting scheme allows the prevailing individual claimant to recover legal fees but protects him or her from the risk of paying the other party's fees if the claim is unsuccessful.

Access to justice is not tantamount to access to lawyers, but legal professionals are important part of the quest for justice. As the national reports demonstrate, there is a wide variation in the prevalence of lawyers in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. Relatively few lawyers are available in Tajikistan, Uzbekistan, and Kazakhstan. In all of the studied countries the people living in rural and remote areas are significantly more likely to face greater challenges in reaching a lawyer or formal dispute resolution mechanisms. What this means is that many disputes are solved without referring to the formal law. Informal resolution of disputes could be more accessible since it involves less costs and takes place in the community. On the other hand, informal mechanisms often do not contain safeguards of procedural and outcome fairness. Another negative effect of the meagre availability of lawyers, however, is that when a serious and difficult to resolve problem arises the parties have to overcome significant barriers in order to receive professional advice and representation. It is reasonable to expect that, given the scant provision of legal advice, underprivileged people, older citizens, women, children and minority groups are less likely to be able to access professional advice and representation.

In summary, the legal profession in the six analysed countries is organized at various levels. The fact that the national Bars are in a rather formative stages of their development could be seen as an opportunity. The strict monopoly on the provision of legal services which exist in other countries is not yet well established in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. From an access to justice perspective this means that innovation in the field of provision of legal services is not stifled by existing regulatory and organizational monopolies.

## 2.4. Legal aid legislation in Kyrgyzstan and Georgia

In 2007 a Legal Aid Bill was introduced in the Armenian Parliament but was not voted into law. From the six studied countries only Kyrgyzstan and Georgia have legal acts dedicated to promoting access to justice, and particularly access to legal advice and representation. Despite their titles, the two acts have a completely different approach to legal aid. The Kyrgyz act can be seen as a systematic attempt to structure criminal legal aid. On the other hand, the Georgian act sets out the basic rules of a modern system for access to legal assistance envisaging, among other things, broad coverage, policy making and a managerial structure, and competition between providers of legal advice. Most importantly, the Georgian Legal Aid Act of 2007 is the first harbinger in the region to recognize the importance of and need for legal assistance in civil and administrative matters.

### Law on publicly-funded legal assistance in Kyrgyzstan

Regulation of criminal legal aid is at the core of the Kyrgyz Law on Publicly-Funded Legal Assistance (LPFL). The act recognizes the right of underprivileged defendants to state-funded legal advice and representation and sets out the conditions, mechanisms and procedures for delivery of legal aid. Besides the grounds for appointment defined in the Criminal Procedure Code, LPFL recognizes two additional categories – juveniles and defendants identified as being underprivileged. According to Article 6 (1) poverty is estimated against a standard of minimum income adopted by the Government of Kyrgyzstan. Certain groups of defendants are entitled to state-funded legal defence without having to prove the condition of poverty – juveniles,

disabled people, unemployed and those drafted into military service.

Besides the grounds for appointment of an *ex officio* defence counsel, LPFL establishes an institutional framework for planning, delivery and evaluation of legal aid in criminal matters. Article 11 establishes the National Legal Aid Council (NLAC) under the auspices of the presidency. NLAC has the broad authority to set out the legal aid policy in the country. For instance, NLAC prepares and submits to the Ministry of Justice the annual legal aid budget, drafts normative acts, selects legal aid providers and reports annually to the President with regard to the functioning of the legal aid system. To a certain extent the authorities of NLAC are backed up by the Ministry of Justice. NLAC is a non-permanent body which convenes “at least once in a quarter” (Article 13 (1) and this inevitably hinders its operational capabilities. Therefore LPFL doubles some of its functions, leaving uncertainty as to how the two public bodies – NLAC and Ministry of Justice, will cooperate in the formulation and implementation of the policy of legal aid in criminal matters.

LPFL also establishes the functions of coordinators who are foreseen as an interface between the judiciary and the providers of legal aid. Police officers (although not part of the judiciary), investigators, prosecutors and judges contact the legal aid coordinators when the need for appointment of an *ex officio* defence counsel arises. Besides coordination functions, the coordinators are entitled to “monitor the activities of the attorneys in the course of delivery of publicly-funded legal aid” (Article 15(6)). There is little reliable information on whether this mechanism for quality control is actually applied, but it is a step ahead of the legal aid systems which rely on the exercising control of the police officers or judges as a guarantee for the quality of legal aid.



Providers of legal aid are members of the Kyrgyz Bar, who are registered as such and have signed a service contract with the Ministry of Justice. Registration as a provider of legal aid is itself deemed to be a quality control mechanism. The applicants have to demonstrate their qualifications in accordance with standards set out by NLAC. Under certain conditions providers of legal aid can be suspended from the register or their registration can be revoked.

### Legal Aid Act of Georgia

Georgia has by far the most advanced system of state-guaranteed access to lawyers across the six analysed countries. The Legal Aid Act (LAA) of 2007 is a progressive legal instrument which sets out an extensive system of publicly-funded legal assistance in criminal, civil and administrative matters. It must be noted that relatively few western countries recognize in a comprehensive way the right of the underprivileged and other vulnerable groups to legal advice and representation in civil and administrative cases. Article 1(4) of the LAA states: “Legal consultation in accordance with this Law is provided on any legal matter, whereas legal aid is provided in criminal, civil and administrative proceedings.” LAA makes a difference between legal consultation (primary legal aid) and legal aid (secondary legal aid). Legal consultation has been defined as “legal advice on any legal matter”, whereas legal consultation is “preparation of legal documents, and representation before the court and administrative bodies on administrative and civil cases, as well as in criminal proceedings, at the expense of the State”.

The conditions for benefiting from state-funded legal aid in criminal matters are provided in the Criminal Procedure Code (see Table 5). More interesting is the arrangement of access to legal aid in civil and administrative

matters. According to Article 5 (2) “In civil and administrative cases, legal aid shall be provided if a person is underprivileged and provision of Legal Aid is in the interest of justice”. The particular means test is elaborated in an order issued by the Ministry of Justice. LAA says nothing about the second criteria – interests of justice and, more specifically, whether it is a cumulative or alternative condition. In its present wording the interests of justice condition is formulated as a merit test which should complement the means test. As it is case-specific, LAA leaves the interpretation to the courts and the implementing authorities.

The institutional design of the legal aid system in Georgia differs significantly from the arrangements in Kyrgyzstan. Instead of being a quasi-independent body, the LAA provides broad powers in the field of state-funded legal aid to the Ministry of Corrections and Legal Assistance. The ministry appoints the director of the National Legal Aid Council (NLAC), approves the bylaws of NLAC and oversees the various aspects of the delivery of publicly-funded legal aid. NLAC was originally established within the structure of the Ministry of Justice, and at a later stage was reorganized as part of the newly created Ministry of Corrections and Legal Assistance. Although LAA establishes NLAC as an independent body, in fact, it is subordinate to the Ministry of Corrections and Legal Assistance and lacks many characteristics of a truly independent legal entity.

The LAA also establishes a monitoring and coordinating authority – the Monitoring Council of the Legal Aid Service, which has similar functions as the Kyrgyz NLAC. The council is a non-permanent body appointed entirely by the Ministry of Corrections and Legal Assistance and given responsibilities to monitor the implementation of the law and advise the Ministry on matters related to legal aid policy.

Two types of institutional providers of legal aid are foreseen in the LAA. Legal aid bureaux and consultation centres are structural units of the legal aid service and play inter-related roles. The legal bureaux are counterparts of the well-known scheme of public defenders' offices, but with a mandate to provide legal assistance also in civil and administrative cases. As of 2010, due to institutional uncertainties, the legal bureaux are still largely focused on delivery of legal assistance in criminal cases. In December 2010 the members of the Monitoring Council of the Legal Aid Service were appointed, which opens up opportunities to implement the civil and administrative parts of the LAA.

Compared with the legal aid bureaux, the consultation centres provide limited scope for legal assistance. Article 17 of the LAA stipulates that the consultation centres should provide legal consultations for up to one hour in length. Consultations are provided by fully qualified lawyers employed by the respective consultation Centres. In 2010 18 consultants were employed by the LAS. In comparison, the number of lawyers employed by the legal aid bureaux is 97, 30 of whom are based in the capital Tbilisi. The national report questions the adequacy of that

number, given the existing need for legal advice and representation. There will be even more pressure once the legal aid system has been extended to non-criminal matters.

As a mechanism to cater for the demand for legal aid and the fixed resources of the institutional providers of legal aid, the Georgian LAA provides for contracting out cases to law firms, civil society organizations and individual private lawyers. In order to be appointed as *ex officio* counsels, private lawyers are invited to be registered by the NLAC. Following the example of some of the most developed legal aid schemes, the law stipulates that larger chunks of legal aid work should be procured through a procedure of competitive tendering. For 2009 there were about 400 cases of legal assistance by non-institutional providers. According to the national report most of these cases were diverted from the legal aid bureaux on the basis of conflict of interest. It is a matter of policy development whether the legal aid system expands to cover new categories of legal problems and/or further groups of individuals who cannot afford private legal services. Attracting more non-institutional providers of legal aid is an option which can be explored further.



### 3. Access to justice in criminal matters

With the exception of Georgia, whose LAA was discussed above, all other countries generally limit their legal assistance schemes to certain categories of defendants in criminal proceedings. Even in Georgia the extension of the legal aid system to civil and administrative matters has been delayed by an institutional standstill. The expansion of legal aid to civil and criminal matters required appointment of the members of the Monitoring Council of the Legal Aid Service as well as mobilization of the required budget. Leaving Georgia aside, one of the most notable findings of the study is that access to justice is largely based on the legacy from the Soviet era, when legal aid was recognized predominantly as a procedural safeguard in criminal proceedings. Interestingly, the Kyrgyz law from 2009 sticks to this narrow conception and does not extend the scope of legal aid beyond the domain of criminal law.

Table 5 summarizes the grounds for appointment of publicly-funded defence counsels in criminal proceedings. All of the countries have established circumstances

in which the defendant is deemed to be in a particularly disadvantaged position with regard to the powers of the public prosecutor. Juveniles, defendants with physical or mental disabilities and those who do not speak the language of the criminal proceedings are entitled to a mandatory appointment of defence counsel. Kyrgyzstan guarantees the provision of *ex officio* legal advice and representation to minors as well as other vulnerable defendants in Articles 6 and 7 of the Law on Publicly-Funded Legal Assistance. In all of the countries, except Armenia, the defendants are entitled to an *ex-officio* defence counsel when the indictment is for serious felonies for which the material law foresees punishment above a certain threshold. Despite being member of the Council of Europe and a contracting party to the European Convention on Human Rights, Armenia does not recognize explicitly the seriousness of the charge as a ground for the compulsory appointment of a defence counsel. A possible explanation is Article 69 (1) of the Armenian Code of Criminal Proce-

dure, which entitles the accused or defendant in criminal proceedings to request the appointment of a lawyer.

In the remaining countries there are significant variations in the standards for protection. For instance, in Uzbekistan state-funded legal aid is only provided to defendants charged with crimes for which the foreseen punishment is life imprisonment. This means that a defendant who risks a prolonged period of imprisonment will not be deemed as qualifying for the appointment of a defence counsel paid by the state. Similarly, in Tajikistan an *ex officio* defence counsel is only appointed to defendants charged with offences punishable with life imprisonment or capital punishment. In Kazakhstan and Kyrgyzstan legal assistance is mandatory to defendants charged with crimes punishable with more than 10 years of imprisonment, life imprisonment or capital punishment.

Public and private prosecutors are an essential part of almost every criminal proceeding. Therefore, the participation of prosecutors in criminal proceedings is a somewhat unusual ground for appointment of a defence counsel. The criminal procedure laws of Kazakhstan, Kyrgyzstan and Uzbekistan stipulate that the defendant is entitled to request legal assistance in such cases. It is not difficult to estimate that this provision opens up access to lawyers for defendants in criminal proceedings. In reality, the overly liberal provision of legal aid is counterbalanced by underfunding of the legal aid system and other non-normative filters to the provision of legal aid. Another example of access to legal advice and representation which seems to be unrestricted is the right of the defendant in Armenia, Kazakhstan and Tajikistan to request the appointment of defence counsel. In practice the broadly-defined right is restricted by different procedural filters. For instance, the

Armenian national report lists several such mechanisms – in police stations there are no lists of lawyers, but police officers usually offer to contact a private attorney for the defendant or leave the defendant to explore the mechanism for appointment of *ex officio* defence counsel alone.

Poverty is a ground for appointment of a defence counsel paid by the state only in Georgia and Kyrgyzstan, the two countries which have recently adopted specialized legal aid laws. In Kazakhstan, Tajikistan and Armenia the defendants can request the appointment of a lawyer, but the decision is vested in the authority which is in charge of the conduct of the particular phase of the criminal proceedings. In Tajikistan the authority (police officer, investigator, prosecutor or judge) can also request the appointment of a defence counsel on its own initiative if the circumstances of the case suggest that the defendant will not be able to exercise his or her right to defence properly.

With the exception of Armenia and Georgia, all other criminal legal aid schemes are based on the Judicare model, where private lawyers are contracted to provide legal assistance on an *ad hoc* basis. The defendant is allowed to retain a private lawyer, but if he cannot do so and legal representation is compulsory in the particular case, the authority conducting the criminal proceedings appoints a defence counsel. In Kazakhstan, for instance, at the pre-trial stage *ex officio* counsel is appointed by the Bar on initiative of the respective police officer or investigator. Similarly, in Tajikistan the procedural authority has to guarantee the appointment of a defence counsel in the cases of mandatory representation. In Kyrgyzstan the selection of a defence attorney is carried out by a coordinator – a public official empowered with administrative functions by Article 15 of the Law on Publicly-funded Legal Assistance.

**Table 6: Grounds for appointment of an *ex-officio* lawyer in criminal proceedings**

	Armenia	Georgia	Kazakhstan	Kyrgyzstan <sup>35</sup>	Tajikistan	Uzbekistan
Defendant wishes to have lawyer	x		x		x	
Juvenile defendant	x	x	x		x	x
Physical disability	x	x	x	x	x	x
Mental disability	x	x	x	x	x	x
Does not speak the language of the proceedings	x	x	x	x	x	x
Defendant is in military service	x			x		
Conflict of interests between co-defendants	x		x	x		x
Underprivileged defendant		x <sup>36</sup>				
Crime for which the foreseen punishment is:		Life imprisonment	More than 10 years, life imprisonment or capital punishment	More than 10 years, life imprisonment or capital punishment	Life imprisonment or capital punishment	Life imprisonment
Defendant is in pre-trial detention			x			
Victim is constituted as party in the criminal proceeding			x	x		x
Public prosecutor takes part in the court proceedings			x		x	x <sup>37</sup>
Trial by jury	x				x	
Trial in absentia	x		x			
The authority conducting the criminal proceedings decides that the right to defence has been jeopardized						x
Defendant is in a plea-bargaining process	x					

<sup>35</sup> In Kyrgyzstan the Law on Publicly-funded Legal Assistance, which is discussed below, provides for additional grounds for appointment of an *ex-officio* lawyer.

<sup>36</sup> Article 46 (1) (a) of the Criminal Procedure Code of Georgia provides underprivileged defendants with the right to request the assignment of a defence counsel regardless of the merits of the case.

<sup>37</sup> Article 51 (1) (6) of the Criminal Procedure Code of Uzbekistan: the participation of an *ex-officio* lawyer is compulsory if a public or private prosecutor takes part in the proceedings.

Series of concerns arise from the practices of appointment of *ex officio* defence counsel. First, the authority of police officers, investigators or prosecutors to make decisions about the need for appointment of a lawyer is a direct breach of the principle of equality of arms. In Tajikistan and Uzbekistan the authorities conducting the criminal proceedings have been given broad powers to select which particular attorney should be appointed in the case. In the absence of mechanisms for checks and balances it is possible to appoint attorneys who are “soft” to the prosecution. In order to secure further appointments, the defence attorneys are motivated to be loyal to the authority who is appointing them than to the particular defendant. Another serious shortcoming of the mechanism is the lack of feedback with regard to the performance of the defence counsel. The quality assessment has been left to process parties who might be systematically interested that the interests of the defendants are not fully safeguarded.

Armenia deviates from the Judicare model. Legal representation in criminal proceedings is provided by staff attorneys organized by the Office of Public Defence (OPD). The public defenders are fully qualified lawyers who are OPD employees and only provide legal representation in criminal proceedings. Legal consultation is not provided by the public defenders. The head of the office is authorized to allocate public defenders to each case. OPD is completely funded by the State. As of 2010 the OPDs across Armenia employ in total 36 public defenders. In comparison, there are about 1,500 private attorneys in the country. Apparently, the number of public defenders is not enough to adequately meet the existing needs for legal assistance in criminal matters. Another limitation is the exclusive focus on criminal matters and neglect of

non-criminal legal needs. On the other hand, the model of ODP is a step ahead of the Judicare system practiced in the other countries (except Georgia). The staff attorneys are independent from the police, investigators, prosecutors and judges, and at least in theory have incentives to provide high-quality legal representation. This form of organization also facilitates specialization in specific categories of cases as well as in representation of defendants who very often have similar needs.

Under-financing of the legal aid system is perhaps prevalent in every modern legal system which aims to guarantee effectively the right to a fair trial and the empowerment of the people who need justice. In Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan, where legal aid in criminal matters has been provided by private attorneys, the remuneration of *ex officio* appointments is much lower than the market rate. As a result, legal aid work is not attractive for those attorneys who have a sufficient private client base. Lack of financial resources also restrains the appointment authorities – police officers, investigators, prosecutors and judges – from interpreting the legal provisions more broadly. The decision about whether to appoint a defence counsel or not includes deliberations on the needs of the defendant, merits of the case but also assessment of resources.

A different aspect of the underfunding is visible in Armenia, and perhaps to a lesser extent in Georgia. The public defenders are remunerated at a fixed monthly rate, which must provide greater motivation than the irregular and allegedly insufficient income that private lawyers generate from legal aid work. Despite the lack of data on the workload of public defenders, it is clear that the present staff numbers are not sufficient. This is especially true for Armenia where the OPD employs 36 attorneys.

Another problem in the countries which rely exclusively on the Judicare model is the possible interdependence of the defence counsel and the prosecution. When police officers, investigators and prosecutors are given the authority to decide on eligibility for legal aid and the appointment of a particular provider, it is easy to spot the danger of unethical practices.

A related problem is the lack of appropriate quality control mechanisms. A common feature of criminal legal aid in the countries which practice the Judicare model is the allegation that publicly-funded legal aid is *de facto* second class legal assistance. In cases when a private attorney has been engaged the client is motivated to exercise as much control as possible on the quality of the legal services. A different relational structure exists in cases of publicly-funded legal aid. The person advised and/or represented does not pay from own pockets and in most cases has only limited experience and frame of reference. Ultimately, the service is paid with tax payers' money and it is within the responsibility of the public authorities to assure accountability and quality. However, with the exception of Georgia and Kyrgyzstan, there are no dedicated institutional actors who have the power, capacity and resources to exercise such control. In Armenia, the director of the OPD can exercise such quality control, but the arrangement could be questioned from a perspective of independence. It could be of interest for the policy makers in Armenia, Kazakhstan, Tajikistan and Uzbekistan to study the institutional models of quality control existing in Georgia and Kyrgyzstan and perhaps other countries outside the region. As it was discussed above, the legal aid acts of the two countries place special emphasis on the need to monitor and safeguard the quality of legal assistance funded with public resources.

## Directions for action

### – Quality of publicly-funded legal services

*Ex officio* appointed defence counsels are paid only a fraction of the fees they charge their private clients. Not surprisingly, the national reports note concerns about the quality of publicly-funded legal services. In addition, the beneficiaries of publicly-funded legal aid have little incentive and capability to control the quality of the services provided. In the countries where there is a functioning authority responsible for the criminal legal aid system (Armenia, Georgia and Kyrgyzstan) there is an institutional actor who is motivated to control quality and guarantee that the tax payers' money is spent efficiently. Without such oversight the issue of quality control is effectively relegated to the ethical provisions of the Bar, which, as a rule, are lenient with respect to the quality of *ex officio* appointments. What can be done is to rethink and refine quality standards in consultation with the involved stakeholders and organize a process of systemic monitoring of the quality of publicly-funded legal services in criminal matters.

### – Policy reform

In Kazakhstan, Tajikistan and Uzbekistan the responsibility for planning, funding and providing legal aid in criminal matters is divided among different stakeholders. As a result there is no identifiable body or organization responsible for managing the system of criminal legal aid. Different stakeholders have diverging interests and there is no institutional interest in promoting access to justice with guaranteed high-quality legal services for those who cannot afford it. On the other hand, the examples of Armenia, Georgia and Kyrgyzstan demonstrate the advantages of managing criminal legal aid as a public service.

- **Poverty as a ground for appointment of legal counsel in criminal proceedings**

Both the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms recognize poverty as a ground for appointment of a publicly-funded legal counsel in criminal matters. As was discussed above, only Georgia and Kyrgyzstan have explicitly regulated the right to legal advice and representation of underprivileged defendants in their national legislation. Policy action is necessary to recognize the right of underprivileged defendants to be adequately advised and represented in criminal proceedings.

- **Protection of the rights of victims of crime**

Victims of crime have to overcome as many barriers to access justice as the accused and defendants. Balanced criminal justice requires that victims of crimes enjoy an equal level of protection and assistance to the accused. A good example of this is the 2009 Victims of Crime Assistance Act of the Australian state of Queensland. According to this law victims of crime are entitled to different types of assistance ranging from financial assistance to practical support during court proceedings. In the European Union, a directive from 2004<sup>38</sup> stipulates that each member state should put in place a national scheme which guarantees fair and appropriate compensation for victims of crime.

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<sup>38</sup> Council Directive 2004/80/EC of 29 April 2004, relating to compensation to crime victims.

# 4. Access to justice in civil and administrative matters

Publicly-funded legal aid in civil and administrative matters has significantly lower priority than legal aid in criminal proceedings. In fact, one of the main findings of the report is the missing notion of legal assistance in civil proceedings. Every day hundreds of thousands of people in Armenia, Georgia, Kazakhstan, Kyrgyzstan and Tajikistan experience disputes in their families, workplaces or neighbourhoods. People argue with vendors over defective goods and services, with landlords or municipal authorities over housing conditions or with welfare agencies over social benefits. In many respects, the consequences of civil and administrative problems affect people's lives to a no lesser extent than criminal proceedings. In the course of civil or administrative legal problems, people face risks, such as loss of housing, parental rights, income or social benefits. More importantly, research in other countries conclusively shows that the probability of experiencing a

civil or administrative legal problem is significantly higher than the risk of being accused of committing a crime. For example, research from Bulgaria revealed that about 45 per cent of the general adult population reports at least one serious and difficult to resolve legal problem experienced in the last three years.<sup>39</sup>

What are the available options for the people of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan to respond adequately when they have to solve a legal problem? First the affected parties need reliable information, advice and referral. Only a small proportion of all civil and administrative legal problems reach the official justice system. Most problems are discussed, negotiated or simply neglected. There are, however, legal problems which necessitate action. Eviction from the family home, domestic violence or unfair dismissal could have lifelong impact on the life of the affected individuals and their families. In serious situations people

<sup>39</sup> Gramatikov, *Multiple Justicable Problems in Bulgaria*.



need to take action and protect their interests. Access to professional legal advice and eventually to legal representation is the most important step towards securing a fair outcome to legal problems.

Traditionally, the legal systems of the analyzed countries do not recognize the idea of a universal scheme for subsidized legal advice and representation in civil and criminal matters. Georgia is the first and only country whose legislation recognizes the right of underprivileged people to state-funded legal assistance in civil cases. In Kazakhstan, Tajikistan and Uzbekistan some categories of parties in civil and administrative proceedings are entitled to state-funded legal aid. In the first two countries disabled people and war veterans can request publicly-funded civil legal aid. Refugees in Tajikistan are also entitled to free legal advice and representation. Claimants in limited categories of cases can also request the appointment of an *ex officio* counsel. In Tajikistan this option is available in disputes over alimony as well as in cases for unfair dismissal. Survivors of victims of wrongful death can request state-funded legal assistance if the victim was the family breadwinner. In Uzbekistan civil legal aid might be assigned to disputants who cannot participate properly in the proceedings, such as minors. In Kazakhstan the Civil Procedure Law entitles judges to appoint *ex officio* counsel to parties who do not have sufficient financial means to appoint private counsel. There is no valid data on the frequency with which the judges invoke this option. According to the Kazakh national report this happens rarely due to financial considerations.

*De jure* the Georgian LAA recognizes the right to legal aid in civil cases, but due to administrative and financial problems, as of the end of 2010 the legal aid system was still not

operational in its non-criminal part. What this means is that even in Georgia, individuals who experience civil and administrative legal problems have little alternative but to procure legal advice and representation from private attorneys.

The parties in administrative proceedings face similar problems. In none of the countries covered in the report exists a functional scheme for the provision of legal aid in administrative matters. This might be a particular threat to human rights, given the sometimes blurred line between criminal and administrative law and procedures.

The waiver of court fees is a mechanism for facilitating access to judicial proceedings. In all of the analyzed countries the court has discretionary powers to exempt underprivileged claimants from paying court fees. Although it might offer crucial support in individual cases, the mechanism is unlikely to have a significant impact on access to civil justice. Firstly, the parties have to prepare and file an admissible law suit before being considered for applying for the waiver. Secondly, the waiver test does not apply automatically – the plaintiffs must file an implicit motion. It is questionable to what extent the underprivileged non-repeat parties in civil procedures will be aware of the right and the conditions for its application. Thirdly, the judges have broad discretion in deciding whether the eligibility criteria have been met. Therefore, the application of the waiver is an uncertain condition and its effect on access to justice is probably not profound.

### Directions for action

#### – Expand access to justice to cover legal aid in civil and administrative matters

All people, regardless of their income, gender, social position, education or ethnicity should have equal access to civil and ad-



ministrative justice. Access to justice in civil and administrative issues is not a policy priority in the region, with the exception of Georgia. In compliance with the international human rights instruments the national constitutional provisions proclaim the importance of access to legal advice and representation only in criminal proceedings. What is needed in Armenia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan is to bring forward the crucial importance of legal aid in civil and administrative cases. The experience of other countries suggests that there are certain steps that can facilitate the policy development process. First, the potential policy stakeholders have to be consulted and involved in the early stages. National and regional Bars, judges and their organizations, human rights and law reform NGOs, academics of different backgrounds and public organizations have to be engaged in the process. Second, documentation of the existing civil and administrative legal needs will detail the acuteness of the problem. Empirical studies can also provide evidence about the costs of different ways of expanding the legal aid scheme. Such studies can also play the role of base-line assessments against which the effects of pilot projects as well as national policies can be measured. The third, and perhaps the most important, step is to win political support for expansion of the existing legal aid schemes towards civil and administrative problems.

- **Designate an institutional champion for civil legal aid**

Successful and sustainable implementation of the access to justice policies in both the criminal and civil/administrative domains is dependent on constant political and organizational support. The current picture of access to justice, and more specifically the subsidized legal aid schemes, only reiterate how

important it is that a vibrant public body with sufficient authority and funding has access to justice as its primary organizational goal. In the countries where legal aid has been left to service providers to manage themselves there are plenty of examples of how access to justice becomes a burden rather than a priority. On the opposite side is the example of Georgia, which already demonstrates the benefits of having an institutional driver of the legal aid policy. LAS as a semi-independent body with an increasing organizational capacity and political clout faces significant challenges in the process of implementation. The difference is that in Georgia one sees an organizational structure to cope with the challenges of constant improvement of access to justice.

Organizational leadership is a matter of policy reforms garnered with genuine belief in the value of access to justice. It does not happen overnight but there are certain steps which can be taken with regard to the establishment of effective access to justice. Studying the good practices of other countries, and specifically practices from similar jurisdictions, might be a good starting point. Armenia, Georgia and Kyrgyzstan already have some form of organizational structure. Other countries, such as Bulgaria, Croatia, Lithuania and Moldova have relatively recently passed new legal aid acts and their positive and negative experiences can be summarized and studied.

- **Experiment with innovative access to justice approaches**

Since the 1970s, civil and administrative justice has undergone many experiments and innovations targeting improved access to justice.<sup>40</sup> Small claims procedures, collective redress procedures, specialized courts and tribunals, and ADR are just a few of the many approaches to make justice more af-

fordable and accessible. The simplification of adjudication procedures is a recent trend. The Canadian province of Alberta introduced on 1 November 2010 new rules of court procedures, which are specially worded to be comprehensible for self-represented litigants.<sup>41</sup> In a similar vein, many courts publish

simplified and standardized templates of documents, which can be downloaded and used by disputants who are not advised and represented by legal professionals.<sup>42</sup> Self-help forms and instructions might be powerful access-to-justice instruments especially in frequent, low-value disputes.

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<sup>40</sup> See a global summary as well as national reports in Cappelletti and Garth.

<sup>41</sup> See <http://www.albertacourts.ab.ca/Home/Spotlight/tabid/310/Default.aspx>

<sup>42</sup> See, for example, the websites of the courts in New Jersey and Utah respectively at: <http://www.judiciary.state.nj.us/prose/index.htm> and <http://www.utcourts.gov/selfhelp/>

# 5

## 5. Access to justice for vulnerable groups

Every individual and social group has to have access to justice without restrictions. In practice, some people are less likely than others to receive just resolution to their legal problems. The distribution and frequency of legal problems is not random. Some individuals and groups experience specific legal problems more frequently. One of the main social purposes of the law is to guarantee social inclusion through levelling off the existing inequalities between disputing parties. When specific social groups defined by gender, ethnicity, income, religion or other factors enjoy different levels of access to justice, the law ceases to perform its inclusion function and actually creates or exacerbates inequalities.

It is difficult to infer from desk research who are the vulnerable groups in terms of access to justice in each of the analyzed countries. Not surprisingly, underprivileged people and marginalised communities are those who are most deprived of access to justice. Indigent people are unlikely to overcome the many barriers on the paths to justice. They are less aware of their rights and entitlements

than those who are more affluent. The tangible and intangible costs of justice are much higher for underprivileged people. As we have seen, only in Georgia operates a scheme for the provision of comprehensive legal assistance for underprivileged people. However, for numerous reasons the system is not operational in its non-criminal part. In general, the overall conclusion is that the poor people in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan are particularly vulnerable in terms of access to justice.

People living in rural and remote areas face specific problems regarding access to justice in all of the countries in the region. The long distance from providers of legal services and dispute resolution procedures are a considerable barrier. Those living in rural and remote areas in general have lower incomes, and as a result can mobilize little in the way of resources to respond adequately to their legal problems. They also have less access to other basic public services and can rely on narrower social networks to help them cope with their difficulties. All these factors interact

and lead to greatly restricted access to justice for the people living in rural and remote areas.

Ethnic and linguistic minorities face specific challenges. For instance, about 70 per cent of the population of the Murghob district, in the eastern part of Tajikistan, is mostly Kyrgyz. According to the national report, this ethnic group has a significant problem with understanding the Tajik language, in which all laws are written and official dispute resolution processes conducted. In each of the six analyzed countries there are ethnic and language minorities which experience problems to different degrees.

Little empirical data is available about access to justice for other disadvantaged groups, such as disabled people, the elderly, children, sexual minorities, migrant workers and refugees. In all of the six countries, some targeted legal assistance is provided through local or international NGOs. This assistance is, however, limited in terms of scope and coverage. Taking into account the limited support mechanisms provided to the general population it is reasonable to expect that people from vulnerable groups face greater challenges to using the law to protect their rights and interests in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.

### Directions for action

#### – Legal assistance for vulnerable groups and marginalised communities

People belonging to vulnerable groups and marginalised communities are in greater need of legal assistance. Simple legal aid in the form of legal advice, preparation of legal documents or representation could provide an immediate response to the legal problem of the most vulnerable. Legal empowerment,

however, is believed to be a more sustainable model for increasing access to justice. People not only need assistance, but lasting knowledge and skills to deal with their legal problems. Access to justice could be targeted through pilot projects which promote empowerment and bottom-up approaches to access to justice, such as microjustice<sup>43</sup> and the dissemination of information promoting legal awareness among women, minorities and other vulnerable groups.

#### – Representation in the policy debates

Sustainable access to justice must be addressed by a coherent set of public policies. In general, vulnerable groups are estranged from policy-making processes. Their voices and interests should be represented in this process.

#### – Needs assessments

People from vulnerable groups and marginalised communities experience different legal problems from the general population. The impacts of some legal problems on their lives are much more serious. There is also a distinction between the various groups although there will be many overlaps. In order to design effective interventions these needs have to be carefully assessed (following a human rights-based approach), documented, studied and analysed. For instance, people living in remote and rural areas might need radically different types of interventions to experience improvements in terms of access to justice than the urban underprivileged. The limited public resources available in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan should provide optimal access to justice remedies to a maximum range of social groups and legal problems.

<sup>43</sup> Maurits Barendrecht and Patricia Van Nispen, *Microjustice*, <http://ssrn.com/abstract=1022936>.

# 6. Trends and challenges in access to justice in the region

## **6.1. Legal aid and access to justice as part of the criminal justice system**

One of the biggest challenges in the region is the dominant legal culture according to which legal aid and, in general, access to justice, is a concept closely bound to the functioning of the criminal justice system. Regardless of whether legal aid has been seen as a guarantee for the interests of justice or a safeguard of basic human rights, the concept of legal aid is firmly rooted in criminal law. This observation is not intended to question the need to provide certain categories of defendants with a publicly-funded defence counsel. Criminal legal aid is and should be the first priority of any modern public system of legal aid. However, civil and administrative legal problems might have no less vital importance for people's lives, relationships and development. People who are deprived of the possibility to work or study, risk eviction from their houses, have to navigate complex administrative labyrinths in order to obtain basic public services, or

need protection from abusive partners, are often in desperate need of competent legal advice and representation. The greatest challenge of access to justice in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan is that the millions of people who have to deal with serious and difficult-to-resolve legal problems cannot rely on any form of safety net.

Georgia has set a positive example with its LAA, which recognizes the importance of civil and administrative legal needs. Despite the fact that the application of the law in its non-criminal part has been postponed until the establishment of a Monitoring Council of NLAC and increasing the legal aid budget, it is a good example for the countries in the region. At the time of the compilation of this report the Georgian system of civil and administrative legal aid is still in its embryonic phase. Its implementation, however, will provide important insights regarding the existing needs for legal advice and representation in civil and administrative matters. It will also demonstrate the impact of increasing access

to advice and representation on official and unofficial dispute resolution mechanisms.

### Directions for action

- Extend the focus to civil and administrative legal needs;
- Showcase the potential and benefits of access to justice.

## 6.2. Underfunding of national legal aid schemes

The issue of funding of access to justice, and namely the systems of subsidized legal aid, is related to the history of the institution and reflects its policy priority. In the previous Soviet “order”<sup>44</sup> system the members of the Bar were expected to take a certain number of cases per year on a kind of mandatory *pro bono* basis. This thrifty approach to legal aid speaks eloquently about the public values attached to access to justice and legal aid. Access to justice does not come cheap and requires investment of social resources. As discussed above, there will probably never be a balance between the need for and supply of justice. Underfunding is a challenge for every modern legal system. What the national reports show, however, is that insufficient funding is part of the accepted status quo. Moreover, in combination with the dubious quality of the legal services delivered by underpaid legal providers, underfunding of the subsidized legal aid schemes is a major challenge to the accessibility of justice in the reviewed countries.

Most of the shortcomings of the existing schemes for subsidized legal aid are attributed to funding shortages. It is also true

that without a public body responsible for implementation of the access to justice policies there is little transparency with regard to what the actual costs of the system are. Again, the developments in Georgia and, to more limited extent, in Armenia and Kyrgyzstan, signify the importance of a reliable overview of the costs of the system. Conversely, in Kazakhstan, Tajikistan and Uzbekistan there is no clear idea of how much the existing legal aid systems cost the tax payer. From a systemic point of view, the lack of accurate data affects negatively the process of maturation of the legal aid policies.

The lack of transparency of national legal aid budgets makes it difficult to campaign for reforms in the field of access to justice. When there is reliable information about current spendings as well as a detailed breakdown by procedural type and groups of beneficiaries, different stakeholders might start to give access to justice higher priority.

### Directions for action

- **Make the current spending on subsidized legal aid more transparent**

Relatively simple research design can quantify and monetize current and historical public expenditure on legal aid. Often, such a figure reveals the level of underfunding and lack of policy priority. The involvement of different stakeholders, such as national and local bars, officials from the respective ministries of justice, judges, NGOs and academic researchers can give the issue greater priority and encourage further reform initiatives. A detailed assessment of what is being spent on legal aid will also serve as baseline for future policy amendments.

<sup>44</sup> Ордерная система (command system).

- **Consider alternative sources of funding**

All contemporary systems for delivery of subsidized legal aid are almost entirely reliant on public funding. As a result, chronic underfunding is more or less a condition of legal aid schemes. Diversification of the sources of funding has to be considered from the early stages of policy development and implementation. It could be a useful exercise for the Georgian LAS to assess prospective alternatives or complements to the public funding alternative. For instance, some legal systems foresee contribution from the beneficiaries based on their financial means (i.e. Lithuania, Netherlands, New South Wales in Australia). Thus, the poorest beneficiaries receive legal assistance free of charge whereas those with higher incomes pay part of the cost of the services. In the United States additional income for civil legal aid is generated by the Interest on Lawyer Account Fund (IOLA).<sup>45</sup> These are deposit accounts in which attorneys deposit the qualified funds of their clients. The interest rates accumulated on these accounts are used to fund legal aid work. Yet another example are the so-called Cy Press Awards practiced in collective redress cases in Canada and the United States. When compensation is recovered from the tortfeasor but for various reasons cannot be distributed among the plaintiffs in the case, the undistributed amount (Cy Press Award) is donated by the court to provision of legal aid to people who cannot afford it.

### 6.3. Lack of access to justice data

In all of the analyzed countries there is little reliable data about the demand and supply of the basic ingredients of access to justice – le-

gal assistance and fair dispute resolution processes. In Georgia, the newly-established NLAC is making its first steps in collecting data and using it for the purpose of policy design and service delivery. In Kyrgyzstan, the NLAC is responsible for collecting and analyzing data regarding the criminal legal aid system. However, the body does not have administrative structure and its members gather a couple of times per year. This makes unclear who will put in place a complex mechanism for monitoring the supply and demand of criminal legal aid. As a general rule, there is no valid and reliable data about the actual demand for legal aid, the proportion of disputants who are advised and represented in the different dispute resolution procedures, or the quality of the provided legal services. Lack of valid and reliable data is often portrayed as a technical problem which does not affect significantly access to justice. Indeed, it has little to do with the routine delivery of access to justice services, but the overall implications for the processes of formulation and implementation of access to justice policies are profound. Without an objective overview of the existing gaps it is difficult to formulate effective and efficient actions for reform and improvement. Mobilization of political support is also more challenging when the justice needs are not well documented. These perils are particularly visible in the fields of civil and administrative legal aid, where human rights concerns have less leverage for the cause of access to justice.

### Directions for action

- **Standards for definition and measurement of indicators for access to justice**

As was discussed earlier, access to justice has different meanings and conceptualiza-

<sup>45</sup> *Interest on Lawyer Accounts.*



tions. A comprehensive reform initiative in the region might benefit from the identification and operationalization of access to justice indicators. Such indicators might have a significant role not only in monitoring the progress within a particular country, but also in comparing access to justice developments between countries.

#### – **Estimate legal needs**

One-off or longitudinal assessments of the existing legal needs in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan could be an important catalyst for change. Studies to estimate the met and unmet legal needs in the civil and administrative domains could be particularly valuable. Data on the prevalence of legal problems and the strategies that people invoke to respond to these problems will provide insights about the structure and extent of the demand for legal information, legal advice, and representation and referral services. Methodologically sound and robust studies can reveal patterns of exclusion and the specific legal needs of particular social groups.

#### – **Measure the costs and quality of paths to justice**

Legal aid is only one of the components of access to justice. In the end, people need legal processes which can solve their problems in a fair and just manner. There are methodologies to estimate how the users of justice experience the costs and quality of formal and informal dispute resolution processes.<sup>46</sup> The application of such measurement approaches can provide valuable information regarding the perceived experiences of the users of the justice systems in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.

#### – **Train academics, NGOs and administrative authorities in measuring access to justice indicators**

The collection, analysis, dissemination and use of access to justice data and indicators is normally perceived as the task of the public authorities. Without a doubt, when there is an institutional structure mandated to steer the access to justice policy, data collection should be one of its primary goals. When no such institution exists, or its capacity is still underdeveloped, there is a substantial need to nurture data collection skills and abilities among a broad range of national stakeholders. Academic researchers, civil society organizations, but also public bodies trained to collect, analyze and disseminate access to justice data and indicators, might be powerful initiators of the reform processes.

### **6.4. The quest for institutional models**

Access to justice is not a legal aid programme or a project for raising legal awareness. It is an integral part of the legal culture and an essential component of a number of public policies, such as human rights, justice and social inclusion. In modern societies, sustainable access to justice for all can be achieved only if there is a coherent public policy which recognizes its importance and commits different resources and stakeholders. Access to justice also needs an institutional champion with vested interests and motivation to constantly develop, challenge and assess the status quo. What exists in Georgia, and to lesser extent in Armenia and Kyrgyzstan, is the effect of having an institutional driver of access to justice. Indeed, there are many political, administrative and financial

<sup>46</sup> Martin Gramatikov et al., *A Handbook for Measuring the Costs and Quality of Access to Justice*, Maklu, 2010.

problems in the functioning of the LAS in Georgia, the NLAC in Kyrgyzstan and the OPD in Armenia. All of the three institutions are restricted in their decision-making powers. The scope of their legislative mandates varies significantly. In Georgia the LAS is entrusted with the implementation of a broad access to justice policy aimed to respond to various legal needs regardless of their legalistic classification. In Armenia and Kyrgyzstan the institutional framework is restricted to legal representation in criminal cases.

An institutional champion of access to justice is needed. Entrusting a body exclusively with the implementation of access to justice policy changes the balance and creates a positive dynamic. Kazakhstan, Tajikistan and Uzbekistan are just three of the many countries where access to justice has been locked between the non-transparent and dynamic interests of various stakeholders. With the establishment of a separate body responsible for access to justice the interests of the people who need justice are aggregated and are at least given a chance to be represented in the broader policy dialogue.

It is not the purpose of this section to review in detail the institutional arrangements for implementing the access to justice policy but it must be mentioned that the institutional design of the bodies responsible for access to justice matters. Setting up a permanent entity and providing it with political influence and administrative and financial resources is a condition for its development as access to justice champion.

### Directions for action

- Exchange good practices with other countries where access to justice is part of the institutional framework;
- Make comparative studies and analyses of applied models/systems

## 6.5. Dispute resolution processes

Little data is available about the quality of the dispute resolution processes used by those who seek justice in the six analyzed countries. People need accessible, predictable and fair processes in order to solve their disputes. In reality, people who need justice often stumble into difficult to navigate, over-legalized and lengthy justice procedures. As was discussed above, relatively few can rely on some form of subsidized legal assistance, and this applies mainly to criminal proceedings. The vast majority of those who experience legal problems have to choose between private legal assistance or navigating the legal system on their own.

The question here is: how user-friendly are the dispute resolution processes available to the people of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. Several common problems appear as cross-cutting issues in the national reports. First, there are few good examples of initiatives to redesign dispute resolution processes to make them more accessible in the region. A telling example is the judicial reform which took place in 2005 in Armenia. Specialized courts as well as fast-track criminal procedures were introduced with the objective of delivering justice in a faster and more accessible manner. Due to implementation hurdles the reform initiative was revoked three years later. This failed example can be perceived from two perspectives. Indeed, it failed to deliver the intended results and can be seen as unsuccessful. On the other hand, the Armenian experience demonstrates that access to justice is not only a matter of organizing a subsidized legal aid scheme. It is also about designing and providing accessible dispute resolution processes. In general, there is little indication in the national reports of coherent large-scale initiatives addressing the affordability and accessibility of the existing justice processes.

Another recurring trend in the national reports is the over-reliance on formal dispute resolution processes. Adjudication seems to be only one of the many instruments available for responding to the legal disputes and grievances experienced by the people in the analysed countries. Of all problems experienced, only a tiny proportion of disputes end up being addressed or resolved by courts of law or administrative tribunals. The vast majority of legal problems are solved or abandoned long before they reach an official dispute resolution forum. In that respect, people need alternative processes which can provide fair and just outcomes at a fraction of the price. ADR has significant room for further development and improvement in the region. For the time being the countries in the region are mainly experimenting with the introduction of the regulation of arbitration procedures. The process takes place not without challenges. An interesting example is Tajikistan, where arbitration was introduced in 2008, but since then arbitral awards are being recognized inconsistently by the courts of law.

Mediation, expert assessment and evaluation as well as other forms of ADR are still not very popular in the region. Before calling for ADR to be embraced as a dispute resolution tool there must be a thorough overview of the factors which might facilitate, but also impede the process. ADR is largely a voluntary process and is contingent on effective official justice processes. Disputants have to agree to submit their disagreements to arbitration, mediation or another form of non-coercive resolution. When the “shadow of the law” is negligible the opponents are more likely to be opportunistic and avoid dispute resolution. Of course, an alternative line of reasoning could be that when official dispute resolution processes are inconsistent people will resort to ADR. Interesting examples are the developments in the field of traditional justice in

some of the countries in the region, namely Kyrgyzstan and Tajikistan (see below).

### Directions for action

#### – Mapping out bottlenecks in dispute resolution processes

Adjudication, arbitration, mediation and negotiation processes can be thoroughly observed and analyzed with the objective of identifying access to justice bottlenecks. Such mappings will provide crucial information with regard to the redesign of dispute resolution processes. Training local NGOs, academic researchers and public authorities to conduct the mapping will create dynamics for the constant assessment and search for more accessible justice processes.

#### – Promotion of ADR

The success of ADR is contingent on a host of context-specific factors. Simply regulating an ADR process in the law will have little impact on the use of this process or on access to justice in general. What can promote the developments of ADR in Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan is a detailed study of the factors which facilitate but also impede the use of ADR. Following on this knowledge, ADR can be tried on a pilot basis as an alternative to specific forms of adjudication. An interesting example in that respect are the Dutch and English legal aid authorities who are experimenting with the provision of mediation services in family matters.

### 6.6. Revival of traditional justice mechanisms

Traditional/indigenous justice was generally not tolerated during the Soviet times when the state assumed an omnipresent role in almost every aspect of personal and social

life. Justice and dispute resolution were considered to be the exclusive territory of the sovereign state. After the establishment of the independent states in the beginning of the 1990s there was a trend to reintroduce traditional justice mechanisms. The empirical data presented above show that a significant proportion of respondents in Kyrgyzstan and Tajikistan rely on informal providers of justice resolution processes. Mahalla committees, aqsaqal courts, village elders or local public officials provide resolution of legal disputes and problems on a daily basis.

An interesting example of integration of elements of traditional justice into the justice system is the aqsaqal courts in Kyrgyzstan. Since 2002 this voluntary community-based dispute resolution system has been recognized and regulated in the Law on Aqsaqal Courts.<sup>47</sup> Each community can establish an aqsaqal court through public selection of a panel of between five to nine lay aqsaqal judges. According to the law, the members of the Aqsaqal court have to be respected members of the local community.

Unlike the ordinary courts of law the aqsaqal courts have their jurisdiction limited to several categories of problems which are believed to occur most frequently at local level. Citizens can address the aqsaqal courts with complains about specific categories of property-related disputes, family issues, disagreements between employees and employers over allegedly unpaid wages, as well as disputes related to irrigation of farmland (Article 15). There are no court fees in the aqsaqal procedure and the parties do not have to be represented. Within 15 days of receiving the claim the aqsaqal court has to review the case, conduct hearings, collect additional evidence if needed and issue a

decision which is binding on the parties. The members of the aqsaqal court are expected to solve disputes through the application of moral and ethical rules, established usage and traditions which comply with Kyrgyz legislation (Article 2 (2)). Each disputant can challenge the decision of the aqsaqal court in front of the regular courts of law.

There is no precise data on the use of the aqsaqal courts in Kyrgyzstan or the Mahalla committees in Tajikistan. As we have seen, study results demonstrate that a small but identifiable proportion of the respondents in Kyrgyzstan and Tajikistan envisage traditional justice institutions as possible sources of dispute resolution (see footnote 15-17). Aqsaqal courts have many advantages which facilitate access to justice. The involvement of respected members of the local community as neutral decision makers, relatively few formalities and legalistic hindrances, low costs and rapid procedures make aqsaqal courts a suitable supplement to the official justice system. Moreover, the decisions of the aqsaqal courts are recognized and can be enforced just like the acts of ordinary courts of law.

Traditional and communal forms of justice must be promoted with caution. On the one hand, they are a potent mechanism for increasing access to justice. Apart from the advantages discussed above in the context of the aqsaqal courts in Kyrgyzstan, traditional justice mechanisms strengthen the respect for fairness and legal order. On the other hand, informal justice is not immune to systemic problems, such as the tendency to maintain social norms, which might not always comply with the highest standards of human rights. Equal representation, procedural fairness and other fair trial principles might also be problematic in some instances. With all these chal-

<sup>47</sup> Law No. 113, 5 July 2002.

lenges in mind the potential for traditional justice mechanisms as an access to justice platform has to be explored creatively. There are already examples of integration of formal and informal justice mechanisms into countries' justice systems. This does not mean that the informal justice mechanisms are to be contemplated as ready-made solution, but rather as a call to recognize the potential of traditional justice and its revival in some Central Asian countries.

### Directions for action

- **Promotion of traditional justice mechanisms within the framework of international human rights standards**

The role of traditional justice mechanisms and their integration into the overall systems of justice have to be further explored. Different forms of traditional justice might con-

tribute to better access to fair procedures and outcomes. At the same time, the introduction and promotion of traditional justice mechanisms has to consider existing cultural, social and legal practices within the framework of international human rights standards. Remote and rural communities will benefit more from traditional justice mechanisms.

- **Monitoring traditional justice**

Traditional justice mechanisms might have low sensibility to specific human rights, such as the right to a fair trial, the right to full and equal representation, etc. Another challenge is the tendency to protect communal values and interests at the expense of the interests of ostracized groups or individuals. In that respect, the implementation of traditional justice mechanisms has to include explicit monitoring tools that guarantee that they do not exacerbate the existing inequalities and exclusion.

# 7

## 7. Conclusion

In closing, several findings can be validated based on national reports and consultations. Firstly, it is clear that, because of the historical tradition, access to justice in the region has been conflated narrowly to legal aid in criminal cases. With the notable exception of Georgia, the countries from the region focus predominantly on the access to legal aid in criminal procedures. This trend is visible also in some of the constitutional provisions regarding access to justice. In each of the six countries, access to justice has been recognised as a value but the particular provisions point to criminal justice. This leads to the second conclusion that access to justice is not seriously present in the area of civil and administrative justice. The relatively new Georgian Law on Legal Aid sets a good example with regard to expanding legal aid to civil and administrative problems, setting up an institutional framework to support the delivery and quality assurance of various levels of legal services.

Finally, there are interesting developments in the regions with regard to access to justice outside the standard legal aid schemes. Kyrgyzstan and Tajikistan witness increasing role for informal providers of justice resolution processes. Mahalla committees, aqsaqal courts, village elders or local public officials provide resolution of legal disputes and problems on a daily basis. One can assume that these paths to justice are more accessible and trusted by the members of the local communities. However, quality and compliance with international human rights standards remain as a concern.

As part of UNDP BRC's Lessons Learned and Good Practices Series, the report shed light on the challenges of existing models and paths in accessing justice. However, it aims to initiate discussions at the policy levels on the improvement of access to justice for the people of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.



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