V. JUDICIAL REFORM

Corruption in any institution impedes its operation and distorts its objectives. However, corruption in the Judiciary is particularly damaging for several reasons. The Judiciary is one of the fundamental pillars of a market economy whose role as arbiter of the law encompasses both the formulation and implementation of public policy. In addition to deciding criminal cases, the courts are responsible for upholding property rights, enforcing contracts, and settling disputes. As a result, corruption in the Judiciary can display aspects of both state capture and administrative corruption. Failure in any of these roles can be costly and reduce incentives to invest by forcing firms to resort to more costly private means of contract enforcement and protection. In addition to these direct economic costs, a corrupt legal system has a wider impact, undermining the credibility of the state and making the implementation of public policy more difficult. In particular, since the legal system will be the ultimate arbiter of any anti-corruption program, a corrupt Judiciary will fundamentally undermine anti-corruption efforts themselves.

The process of reforming judicial systems in many Southeast European countries is monitored and measured by international organizations and institutions as well as by national civic organizations and initiatives:

- Evaluation of conducting judicial reform in EU applicant countries by the **European Commission** as reflected in its "**Regular Reports"**

- **EU Accession Monitoring Program of the Open Society Institute** initiated in 2000 to encourage independent monitoring of the process by which the EU is considering applications for membership from the ten candidate States of Central and Eastern Europe and to complement the EC Regular Reports – edition "Judicial Independence in the EU Accession Process", 2001

- The **American Bar Association – Central and East European Law Initiative (ABA/CEELI**) developed its Judicial Reform Index (JRI) for Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Romania and Serbia.[31] The objective of the JRI is to assess a cross-section of factors important to judicial reform in emerging democracies.

As the various evaluation and monitoring instruments show, the Judiciary was once again ranked among the most corrupt institutions while judges, lawyers, prosecutors, police officers and other law enforcement professionals are among the most corrupt occupation groups.

The legislative measures, already implemented or planned for the future, target objectives in different areas, namely improving the substantive and procedural laws (legislative reform in the strict sense), reforming the organization and operation of courts and court administration reform and raising the criteria for the appointment of magistrates and their professional qualifications – training of both magistrates and court administrators.

The fundamental objectives of the judicial reforms in the countries in transition are to create conditions for the quick and efficient sanctioning of corrupt practices and to preclude any possibilities for corruption in the judicial system.

This chapter contains reviews on the most significant problems in the sphere of judicial reforms in the Southeast European countries:

- Structure, Organization and Governance of the Judiciary. Independence and Relations with the Executive;

- Status of the Magistrates – Independence, Appointment, Promotion, and Removal Procedures. Qualification and Training;

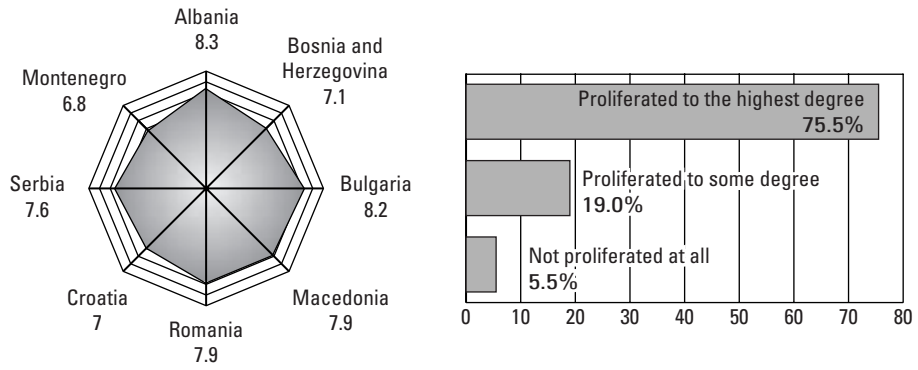
- Judicial Administration – Legal Basis, Status and Organization;

- Working Conditions. Modernization and Computerization.

[31] http://www.abanet.org/ceeli/publications/jri/home.html

[32] In September 2000 the project was successfully launched as part of the *Southeast European Legal Development Initiative (SELDI* - www.seldi.net). *SELDI* was created by the International Development Law Institute and the Center for the Study of Democracy in April 1999 with the overall goal to contribute to the building of the rule of law and democratic institutions in the countries of SEE through the institutionalization of regional public-private cooperation in anti-corruption and judicial reform.

Chart 11: Spread of corruption in the judiciary



Source: SELDI Corruption Monitoring System. Scores close to 1 correspond to low spread of corruption, those close to 10 to highest degree of proliferation.

5.1. Structure, Organization and Governance (Independent Governing Bodies). Independence and Relations with the Executive

The structure and organization of the Judiciary and the governance of the judicial system are vital for the successful anti-corruption efforts of the Judiciary. The main principles, concerning the structure of the Judiciary, its organization and governance, as well as its relations with the other powers are contained in the countries' Constitutions, adopted after the change of the political system in Southeast Europe. They are developed in details in the structural and procedural laws, most of which are elaborated and adopted in accordance with the new social and political reality in the region.

One of the principles, proclaimed in the new Constitutions and current legislation of the countries in transition is that of the independence and autonomy of the Judiciary. This can be achieved by different means, but the most important is the creation and functioning of independent institutions, which determine the composition and carry out the organization of the judicial system, and play the role of policy–making bodies. Such institutions already exist in most of the countries in Southeast Europe, but most of them still need fundamental institutional strengthening.

The system of justice in **Albania** consists of District Courts with general jurisdiction, Appellate Courts and the High Court. Each level deals with civil, criminal, commercial and administrative cases. The system of military justice is also included in the criminal justice system.

Albania has six Appellate Courts and one Military Appellate Court, which review the decisions of the first instance courts. The procedural competencies of the High Court are provided for in the *Codes of Criminal and Civil Procedure*. Competencies of a substantive nature are provided for in the *Law on the Organization and Functioning of the High Court and the Administration of Judicial Services*. Following the adoption of the new Constitution in November 1998, the High Court now needs further regulation (a new organic Law), which is almost completed.

By virtue of Albanian *Constitution* of November 1998 the **High Council of Justice (HCJ**) was established. HCJ is the state authority in charge of appointing, dismissing, transferring and instituting disciplinary proceedings against judges of primary and secondary instance in the Republic of Albania. Its aim is to ensure judicial independence, competence and impartiality. HJC does not belong to any of the classical branches of government. The *Constitution* makes this independent position clear by dedicating a separate chapter to the HCJ and distinguishing its responsibilities from the Legislative, Executive and Judicial branches of government. Although the role of the HCJ is focused mainly on disciplinary issues it exerts also quasi-regulatory powers, such as giving preliminary opinions on the proposals of the Minister of Justice to the President for the establishment of the territorial jurisdiction of the courts and the determination of the number of judges as well as announcing and organizing exams for judges jointly with the school of magistrates and School of Law at the Tirana University.

HCJ therefore has the potential to play a decisive role in judicial affairs. The organization and functioning of the HCJ's inspectorate is perhaps the hottest issue regarding the HCJ. The **Judicial Inspectorate** monitors and controls the Judiciary on behalf of the HCJ. Its competencies

are extremely vague. As a consequence, there are serious uncertainties about what procedures the inspectorate must follow in its investigative and decision-making capacity regarding the misbehavior of judges. The rules governing the Inspectorate must be clarified for it to carry out its work better and more efficiently.

Many legal experts plausibly argue that the poor performance of the Judiciary can be ascribed, to a great extent, to the inefficiency of the HCJ. Some of this inefficiency can be traced to the HCJ's organizational volatility, exemplified by the fact that it meets only periodically. However, as the HCJ currently stands, it cannot be transformed into a permanent committee with full time members because it includes members that have other governmental duties such as the President of the Republic, the Minister of Justice, the President of the High Court, etc. Several "moderate" proposals have been put forward. One of these proposals is to have the mandates of judges who become members of the HCJ suspended when they are called upon to serve on the HCJ. Another idea is for the deputy chairman of the HCJ to serve on full time basis. An increase in honoraria for the HCJ members has also been considered as yet another means to make members of the HCJ more devoted to the institution. Another proposal is for the HCJ to split into specialized sections. In theory, specialization would allow the HCJ to review more cases with greater expediency at a higher level of professionalism. Of course, there would be no impediment for the HCJ to review cases in plenary sessions when such an action is deemed appropriate.

The relationship between the Judiciary and the Executive is strained because each maintains a certain degree of control through a separate inspectorate. Distinctions between these inspectorates are blurred. The first inspectorate was created by the *Law on the Organization of the Judiciary* and is attached to the HCJ. The other consists of a number of inspectors attached to the Minister of Justice (some argue that this is not a real inspectorate).

The issue whether the parallel existence of two inspectorates is beneficial or detrimental is a subject of debate in the legal community. One view is that the existence of the ministerial inspectors is an unnecessary vestige of the communist era – when the interference of the executive power into the affairs of the Judiciary was legitimate (the Albanian constitutional doctrine at the time was that of unity of government powers). Another argument, which is practical in nature, is that the parallel existence of two inspectorates causes serious communication difficulties and in the long run can lead to the failure of the HCJ's supervisory role. The supporters of this view would advocate for the abolishment of the office of ministerial inspectors and therefore for the concentration of supervisory powers in the HCJ's inspectorate. However, this view remains a minority view. Most legal experts argue that concentrating all of the supervisory powers in the HCJ's inspectorate alone is a bad idea because most of the HCJ's members are judges. If the only check on judges were other judges, there might be a tendency towards supporting judicial independence to the point of virtual unaccountability. Such a situation would undermine the rule of law and the constitutional doctrine of checks and balances. Ministerial inspectors, on the other hand, are seen to be in a constant state of "institutional tension" with the Judiciary, and should, in theory, be more likely to criticize the Judiciary. Ministerial inspectors are also more accessible and, as a consequence, constitute a better advocate for individuals whose rights have been allegedly violated by the Judiciary. Finally, the performance of the HCJ inspectorate is arguably diluted by the fact the HCJ is not a standing organism but rather meets only periodically.

The new *Constitution*, by strengthening the political control over the Judiciary through a politically selected HCJ, has only nourished the tendency of politics to misuse the Judiciary and to effectively abolish its independence. Even the law amendments have only served to strengthen the position of the prosecution in respect to the position of the court, to diminish the rights of the accused, to prolong the terms of preliminary detention, rather then to provide for independence, impartiality, protection from political pressure etc.

After the political changes of 1997 in Albania, there was a strong movement towards changes within the Judiciary which resulted in an intolerable politicization of the Judiciary. This had considerable negative effect on its independence. The Head of the Constitutional Court and the President of the High Court, as well as other courts throughout Albania were dismissed and replaced with people pertaining to the Socialist Party.

The failure of the courts in punishing notorious criminals, murderers and terrorists, known also for their links to politicians in power, as well as the misuse of the Judiciary for the punishment of opposition party leaders, have severely compro-

mised the independence and impartiality of the courts. Furthermore, they have damaged the constitutional and legal guarantees for the rule of law, and eroded the faith of the public in justice.

In the last three years the state prosecution, especially the Attorney General's Office, has compromised itself with absurd accusations against the leaders of the opposition. The Judiciary in Albania is therefore clearly an instrument of political oppression.

The examples of such political oppression were the arrests and detention of thousands of opposition supporters, because of their participation in protest rallies organized by the opposition in the aftermath of the disputed October election. Numerous people were arrested and detained for periods varying from 48 hours to two months in a clear violation of the law. Many victims of unlawful detention and mistreatment were minors.

Using the courts as an instrument of political oppression has obscured their constitutional status and functions. Political pressure has made judges vulnerable towards any other kind of pressure. Bribery, threatening, corruption, incompetence have become main features of the Judiciary.

Albanian courts are filled with Socialist Party supporters. They feel that their positions are secure, because of their political affiliation. In such a situation reports about the release of notorious criminals and the failure of the courts to punish real crime have become normal.

The system has failed to pursue organized crime, and especially corruption and trafficking, related to the highest political level in the country. Recently severe accusations have been raised against the Attorney General of the country for his involvement in the international drug-traffic, as well as for his efforts to protect famous criminal organizations. These accusations resulted in the Parliament discussion whether to lift his immunity. The socialist majority protected him and thus hindered his prosecution.

The corrupt and inefficient justice system is one of the most serious obstacles to democratic governance. The Judiciary has failed in two aspects: 1) it has failed to be independent, and 2) it has failed to fulfill its constitutional mission and legal obligations.

There is an open tendency on the politicians' side to blame the Judiciary for the failure of the anti-crime policy of the Government. By accusing the Judiciary of unprofessional behavior and corruption, the Government wants to hide its political failure to reform the police and the prosecution, which are really to blame for this precarious situation.

Corruption in itself cannot be fought without a functioning and clean Judiciary. Corruption has become a malaise of the Albanian system, widespread at all levels of the administration and a serious obstacle to efficiency. As such, it undermines legitimacy of the system. Public trust in the Government and state institutions is very low. Combined with the above mentioned corrupt and dysfunctional state institutions, this undermines the efficiency of the state in collecting revenues, and in implementing and making policies.

Bosnia and Herzegovina (BiH) is currently reviewing all judges and prosecutors. The current judges and prosecutors are required to reapply for their positions and undergo a comprehensive evaluation – by the newly created **High Judicial Councils (HJC**). This review started in June 2000, when the Entities' new laws on judicial and prosecutorial service established independent commissions (in the Federation of BiH) and councils (in the Republika Srpska). These bodies were charged with determining incumbents' professional and moral suitability for continued service, albeit under the close supervision of the Independent Judicial Commission (IJC), which was initially created under the auspices of the High Representative and his office (OHR) in early 2001 to assist in the process of guiding and coordinating a comprehensive judicial reform strategy in BiH. As part of this task, it provides assistance to domestic judicial and prosecutorial commissions and councils that deal with matters related to the appointment, discipline, and review of judges and prosecutors. The International Crisis Group (ICG) carries out its pivotal role in close co-operation with both local and international partners.

Both Entities have local courts that operate at the municipal level and only in those municipalities that are sizeable enough to require one. Each of the ten FBiH Cantons operates a cantonal court and in RS there are five regional courts to cover only the largest centers. These are the first appellation instances, above which there is only the Supreme Court. Notwithstanding the level of the magistrates, the new appointment procedures, as well as the verification of promotion, are now subject to the HJC's decisions. Removal procedures as described below again require the ultimate decision of the HJC.

In addition to the parallel judicial system in the two Entities that is being harmonized, the BiH District of Brcko, having become a non-Entity territory and directly subordinated to the State institutions, organized its own administration including Judiciary. This has very much been an exercise of the International Community (IC), primarily a US-led effort. While there has been much criticism over state-building in a town of 30,000, most of the work related to making the courts professional and independent has been successful.

The major outstanding issue is the organization of the Judiciary. In the complex BiH judicial environment, now certain motions exist on formation of the BiH Supreme Court and the BiH State Prosecutor. They currently exist solely at the Entity level. If they were to be established at the joint level, they would focus on the international and inter-Entity commercial crime and organized crime. Regardless of the judicial system, any interference of political and government structures must be eliminated. For the purpose of ensuring a more efficient resolution of disputes, it will be necessary to establish alternative institutions, for instance, in the area of business arbitrage and mediation. The possibility of re-establishment of commercial courts in the resolution of commercial disputes or an establishment of specialized commercial departments within the existing courts should be considered. This decision will be based on general strategy of judicial system reform.[33]

The Executive cannot directly influence the work of the judges. Ministries of Justice in both Entities and in the Cantons of FBiH cater for the supporting staff to the courts and other expenditures for Judiciary. They also pay for investigation processes and all external staff associated with the courts on a case by case basis.

However, this has presented the courts with another problem. Any investigation is pending a prior authorization of the Government, by the means of funding the experts, evaluators, etc., and this way may indirectly disable courts in their decision-making. Much of the current magistrates were appointed by the previous administration and now refuse to review their mismanagement, fraud and criminal activities and the current Government has no means to influence a greater efficiency and impartiality. This vicious circle is likely to extend for as long as there can be some influence, exercised on the judges by the Executive.

Bulgarian *Constitution* provides that judicial branch of Government is independent and has three parts (a) the courts (b) the prosecutor's office and (c) investigating bodies which are responsible for performing the preliminary investigation in criminal cases.

Three-instance proceedings were introduced, namely: first instance, appeal-on-the-merits and cassation proceedings. The current system includes 112 regional courts (courts of first instance), 28 district courts (of both first and second instance), five courts of appeal (which operate as courts of second instance with respect to the regional courts' judgments only), five regional military courts, one military court of appeal, a Supreme Court of Cassation and a Supreme Administrative Court.

When evaluating the Judicial system's efficiency in curbing corruption, one usually underscores the court's administration of justice. Under the existing Constitution, the other units of the judicial system (the investigation and the prosecution) should also be taken into account, as the efficiency of their work is a prerequisite for better and more efficient administration of justice. The proper place and role of the prosecution in the judicial system including the status of the Attorney General has been the subject of serious discussions. Different and often controversial approaches have been suggested: to preserve the status quo; to amend the Constitution and transfer the prosecution to the Executive, in particular to the Ministry of Justice; to give it greater independence from the Supreme Judicial Council; to impose parliamentary control over the Attorney General, etc. According to the *European Commission Regular Report 2001* the fact that criminal investigators with the functions they

[33] The WB survey data show that businessmen use courts much more often than informal channels – courts were used by 41 percent of those interviewed and informal channels only by 10 percent. Most of those who did not use the court system to resolve these problems cite as the main reason complicated court procedures. Another reason mentioned by several respondents is when the issue concerned "was not substantial". Those who used courts for resolving relevant business matters were asked about their experience. As many as 66 percent of respondents in the enterprise survey who dealt with courts considered them fair, unbiased, and objective. At the same time, 46 percent of the same group of people (those who dealt with courts) said that the courts are corrupt. Courts are regarded as not fast, with unnecessary delays by 77 percent of the respondents who dealt with them. Moreover, firms that felt the process was unfair were also very likely to declare it corrupt. (WB, ibid. pp. 49-50) http://www1.worldbank.org/publicsector/anticorrupt/Bosnianticorruption.pdf

exercise in Bulgaria (some of which are exercised by police elsewhere), are members of the judiciary, is unusual, and the inter-agency co-operation is weak and complicated. The issues related to the judicial system's composition are subject to discussion in the context of the recently launched debate on constitutional amendments.

The governance of the Judiciary is a key factor for the efficient fight against corruption both inside the Judicial system and throughout the rest of the society. A pressing issue is the delineation and redefinition of the authority and functions of the **Supreme Judicial Council (SJC)** as a governing body which makes decisions on personnel and organization, and the Ministry of Justice as a unit of the Executive.

The SJC has the main representative function in the Judiciary as well as broad powers in its administration. Unfortunately, there are serious weaknesses in its activities. Some of these are created by constitutional provision on its composition, responsibilities and powers while others can be corrected within the current constitutional framework. These weaknesses are generally due to the lack of transparency in the work of Judiciary, lack of clear procedures for a number of aspects of its activities, outdated internal rules, insufficient administrative capacity and a lack of feedback mechanism with the branches of the Judiciary. The unclear division of roles between the SJC and Ministry of Justice is an issue, which contributes to the poor functioning of judicial system and was also pointed out in the last *Regular Report* of the European Commission.

Under the pressure of criticism regarding the shortcomings of judicial reform both from the Bulgarian civil society and European Commission as well as from other evaluations missions of international or foreign organizations, the Government in its recent reform efforts tried to address the problems of the Judicial system by starting the implementation of the following measures:

- Using the experience of nongovernmental organizations and their initiatives to reform the Judiciary and developing partnerships with these organizations – among them the *Judicial Reform Initiative*[34] and *Coalition 2000;*

- Adopting a *Strategy for Reform of the Judicial System in Bulgaria* (SRJ) on October 1st, 2001. Its aim is to develop European Standards in justice by determining the political and legislative priorities in the reform of the judiciary, thus contributing to the preparation for European Union membership. The Strategy and the Action plan cover a five-year period. Although the Strategy does not deal with issues where in fact constitutional change will be required, the implementation and the monitoring of the effectiveness of the institutional and legislative measures proposed remain a high priority.

In the course of the implementation of the *Strategy for Reform of the Judicial System in Bulgaria*, the *Law on the Judiciary* was amended by the National Assembly in July 2002. The principal changes regarding the structure and governance of the Judiciary are as follows:

- The Law extends the competencies of the Supreme Judicial Council with regard to creating capacity to perform governing functions for Judicial system - strategy, financing, governance and to removing magistrates. One fifth of the members of the Supreme Judicial Council may also demand that the Chief Prosecutor be divested of immunity.

- Regional prosecutor's offices will be required to regularly submit reports on their activities. The Chief Prosecutor will also submit the report to the Minister of Justice who will include it in the yearly report on the work of the judicial system.

- The National Investigation Service shall be re-established to manage administrative and financial matters relating to the investigators.

[34] The *Judicial Reform Initiative (JRI)* was launched in March 1999 as a joint endeavor of eight Bulgarian non-governmental organizations, including the Center for the Study of Democracy (CSD) acting as a Secretariat to the Initiative, and representatives of the Legislature, the Executive, and the Judiciary. Within the framework of JRI (www.csd.bg/jri) a *Program for Judicial Reform in Bulgaria (PJR)* was drafted, benefiting from the combined efforts of influential non-governmental organizations, representatives of State authorities and experts. Since July 1999 the Draft program has been open for discussion and suggestions from the major stakeholders in the reform process such as the Ministry of Justice, the Supreme Judicial Council, associations and guilds of the legal profession, concerned non-governmental organizations, representatives of the media, independent legal experts and the Bulgarian citizenry. The amended and revised Program, incorporating the comments, suggestions and notes provided, was endorsed at a Policy Forum in May 2000. The Program represented the state of the Bulgarian Judiciary and the legislation as to May 2000 and pointed out the priorities to be followed during the next steps of the reform process.

Its independence from the prosecution shall be enhanced.[35]

- The Law provides for the establishment of an Uniform Information System. This System should link the data on crime from the Ministry of Interior, the Ministry of Defense, the Agency Financial Intelligence Bureau, the customs authorities, the investigation, courts and public prosecution offices and make much easier the interaction between the above mentioned institutions in curbing corruption.

In order to achieve better co-ordination of the governance of the Judicial system and protect the independence of the Judiciary, it is of particular importance to establish **a model of interaction and at the same time delineation of the responsibilities of the Executive and the Judiciary**. Strengthening the independence of the Judiciary also requires that the Executive, i.e. the Ministry of Justice does not restrict the creation of the necessary material conditions for its efficient functioning. These conditions include the management and maintenance of court buildings, providing the required materials and equipment etc.

The **Croatian** *Constitution* stipulates that the rule of law is one of the *Constitution's* fundamental values. The government is divided into legislative, executive and judicial branches along the principle of separation of powers in order to foster "mutual cooperation and reciprocal checks and balances provided by the *Constitution* and law."

According to the constitutional principle of separation of powers, the Judiciary is independent and autonomous.

Croatia's legal system follows the principles of civil law. Thus, the primary sources of law are the Constitution, laws enacted by Parliament, and other written legal provisions enacted pursuant to statutory provisions. Court decisions are generally not viewed as precedents, and – although lower courts tend to follow the opinion of the higher courts – there is no legal obligation for judges to follow the legal interpretations of higher courts. A practical problem is the current lack of access to many court decisions. Only decisions of the highest courts are published, and even then only in short excerpts, and only those selected by anonymous administrative services of the courts.

Court hearings are open to the public and judgments pronounced publicly (Article 119). Croatia is also committed to equality and the equal treatment of citizens before the law.

Although basic procedural norms govern the system, they do not reflect how it actually functions. Legal disputes often drag on for years without resolution, raising costs for businesses and increasing uncertainty for investors. Instead of solving problems, the legal system often prolongs them, and creates a fruitful environment for corruption. The criminal justice system is also inefficient, and criminals – both white-collar and violent offenders – have little fear of effective punishment.

There is currently a satisfactory legal framework for effective co-operation between the prosecution and the police; however, this co-operation must be reinforced in practice. The prosecutors must become involved in police investigations at an earlier stage in order to improve the quality and effectiveness of the investigations, especially in the more important and more serious cases.

This shortcoming is especially obvious in regard to the lack of coordination between the different bodies engaged in combating corruption and organized crime: the police carries out investigations on their own without contacting the district attorney's office for necessary legal backup, the district attorneys cannot thoroughly examine the evidence in the mere 48 hours of custody prescribed by the law, and as a result the public prosecutor refrains from instituting charges against the detainee, since there is no way for him to establish in such a short period of time whether the evidence submitted by the police is strong enough to uphold the indictment in a court of law.

Both experts and practicing lawyers agree that the intentions of the law are not being achieved. Judges have not yet been appointed for many judicial positions (an estimated 1/5). Croatia's judges are also relatively young – almost 40% are

[35] Previous experiments in reforming the investigation reflected in confrontation between the short-term particularistic interests and resulted in ineffective cases of preliminary investigation, including cases on corruption. Over the course of the last 10 years several attempts to re-organize the investigation have been made. They have varied from transferring investigation services back to the Ministry of Interior (1997) to closing down the National Investigation Service and creating 28 independent district investigation services and one Specialized Investigation Service (1998). As a result, the Specialized Investigation Service was deprived of organizational, financial and administrative means of influencing district investigations. In 2001, an attempt was made to subordinate administrative of investigation to the prosecutor's office

younger than 35 years old. That can be a positive trait, but it also means that they do not have adequate life and professional experience. In municipal courts, 61.5% of all judges have fewer than 6 years of working experience in the courts. Despite the lack of judges, efficiency concerns do not favor the alternatives of raising or lowering the number of judges. In the late 1990s, it became evident that the Judiciary was not able to cope with either its new functions or a fast growing caseload consisting of many complex cases. Understaffed courts with highly centralized and inflexible management do not allow for a quick and adequate response to the pressures created by market. As a result, since 1998, the courts have been continuously swamped by a backlog of over one million cases – in a country of only four million people (the figure more than doubled from 1996 – 2000). An example of the reasons for this backlog is a new system of land cadastre registry where the situation is almost chaotic. Croatia chronic economic instability also accounts for the increase in the volume of court cases. Each of the successive economic reforms enacted by the government completely changed the rules. The confusing rules enacted have resulted in an enormous number of disputes between parties with different understandings on how to adjust to a certain obligation. The volume of court cases coincides with a very weak and inefficiently managed court system. The courts have not yet designed and implemented a uniform policy or internal management system that would guarantee more efficient results.

The management crisis also affects criminal justice and the law enforcement system, which have been extremely inefficient in effectively prosecuting and punishing those who commit a crime. The volume of criminal cases also exceeds capacity, and controls over judges and court clerks, if any, are also very weak. Consequently, judicial proceedings are slow and sometimes useless.

As a result, corruption seems to be widely spread in the sphere of Judiciary as some examples show. For instance, there were publications in the media revealing documentation that owner and director of the First Artisan Savings Bank (FASB) bribed the highest judicial officials by paying for their summer holidays, air tickets and by granting them favorable loans. The former President of the Administrative Court and current member of the Constitutional Court, the head of the Criminal Section of the Supreme Court, a judge from the Commercial Court, a judge from the Administrative Court and a judge from the High Commercial Court were all connected with the controversial banker.

Crime statistics are not reliable. Many people report activities that are not criminal, and many criminal activities go unreported. Nevertheless, it is interesting to note that only 17.2% of reported offences in Croatia result in a conviction, and only 0.0392%, end with a non-suspended prison sentence. This does not necessarily reflect the actual extent of the frequency of certain criminal acts, but tells more about the efficiency of the detecting bodies, which occasionally fail completely and leave the perpetrator of the criminal act undiscovered.

Indeed, the Croatian judicial statistics are alarming. The penalties associated with the violation of rules that regulate economic activities are extremely low. The total number of persons legally prosecuted is negligibly small and the number of those actually convicted is even smaller. The perpetrators are exposed to very low risk, since the courts of law are overloaded; employees are too busy and court decisions take years to become effective. The main problem is still the slowness of the judicial process, particularly in the criminal field. There is also a lack of judges and support staff. The direct result of this situation is the low number of charges pursued. It is disturbing that only a small number of people were charged and convicted for the criminal acts of accepting or giving bribes. This does not reflect the frequency of individual criminal offences, but rather the lack of effectiveness of the bodies that investigate these crimes.

The impact of law and the courts on society is much greater today than ever before. During the socialist era, most of the social and political problems were resolved outside the legal system, in the bodies of the party bureaucracy. With the transition to a market economy and multi-party democracy, many heated issues are being submitted to courts, which are often unprepared for such hard tasks. Virtually all the major issues of social and political life are resolved by the courts – from privatization and economic restructuring to organized crime, corruption, and the consequences of ethnic conflicts and war. In response, the Croatian judicial system has improved its capabilities. Despite its slowness and inefficiency, it is finally assuming the responsibility of guaranteeing that new laws do not violate the *Constitution* or other conflicting legislation. Reflecting the growing pains of a new democracy, the executive and legislative branches have passed huge amounts of new legislation. The accomplishments of the transition period should not be entirely overshadowed by the presence of corruption.

The judicial system has also been subjected to improper executive and political influence. Unfortunately, although progress is hoped for, cooperation between the Croatian Judiciary and foreign experts in carrying out anti-corruption activities remains weak.

Macedonian *Constitution* adopted in 1991 created an independent Judiciary – subject only to the *Constitution* and the various laws and regulations. Judicial independence was further developed in 1995 by the *Law on the Judiciary* and the *Law on the Republic Judicial Council* as well as laws to regulate judicial procedures. Although Macedonian Judiciary is nominally independent several improvements are necessary for it to become more effective and truly independent.

The organization of the courts is uniform, irregular courts are forbidden. Judgments should be made on the basis of the *Constitution*, laws and international agreements are ratified in accordance with the *Constitution*. The Supreme Court is the highest court in the country and is responsible for providing a uniform implementation of the laws. Publicity of both trails and of the court's rulings is guaranteed by the *Constitution*. However, the public may be prevented from attending trials in some circumstances. The court council executes trials. In some cases, the sole arbiter is a judge. In other cases, there may be three judges. In yet other cases, there is a right to a jury. Juries cannot be held responsible for the opinions or decisions made in the procedure of rendering a verdict.

The Republic Judicial Council (RJC) consists of seven members. Members of the RJC are elected by Parliament and consist of respectable lawyers. Each member of the RJC is granted tenure of 6 years, with the right to pursue one additional term on the RJC. The members of the RJC enjoy immunity. The functions of the RJC are incompatible with any other public duties or professions or with membership in a political party.

There are several practical problems regarding the relationship between the Judiciary and the executive power. The most serious issue concerns the financing of the Judiciary. In Macedonia, the Judiciary receives its entire budget from the Ministry of Finance, a state institution. This total reliance on state resources has serious implications because it can jeopardize the Judiciary's independence. For this reason, the Macedonian Judges Association has advocated for the creation of an independent judicial budget. A special study was conducted by the Government. It concluded that such a law is necessary since financial independence is a precondition for judicial independence.

Another practical issue is the abuse of political influence. There are often indications of serious problems regarding the influence of political parties on the election of judges. Some judicial candidates proposed by the RJC were not elected judges after several votes in the Parliament, without any explanation being given. This creates an unfavorable picture of the Judiciary and of the RJC as a competent body. The executive power is also known to interfere with the Judiciary's power, disputing the legality of judicial decisions and court sentences. The Judiciary opposes all such interventions and indeed any influence that might jeopardize its independence.

However, real judicial independence has not yet been achieved. Due to the lack of effective internal mechanisms and procedures the Judiciary is still not in a position to prevent internal corruption and combat corruption in the society.

Although some improvements were made over the last decade, the independence of the Judiciary in **Romania** is still severely hampered by legal, institutional and practical obstacles. Judges' career depends to a large extent on the executive branch. The Minister of Justice is granted recommendation powers in the process of appointment, promotion, transfer and removal of judges. The Minister may easily avoid appointment or promotion by keeping uncomfortable names off the agenda. Equally, the Minister may decide not to initiate disciplinary proceedings leading to sanctions or even removal of judges. The **Superior Council of Magistracy (SCM**), which controls the selection, promotion, transfer, removal and sanctioning of judges is formed of both judges and prosecutors although the latter are subordinated to the Minister of Justice. The executive branch is also influencing the Judiciary through the budgeting process.

In addition, judges' professional activity and conduct is subject to verification by inspectors in the Ministry of Justice, in the courts of appeal and by court presidents. Although the law provides that such verifications may not interfere with judges' decisional independence, the controlling process includes assessments of the application of laws in particular cases. Reportedly, judges suffer interference and pressure in the course of the verification process, the results of which are essential for their career. High political officials in the current Government have repeatedly attempted – during the first months of the year 2001 – to influence the judicial decisions in particular matters and to

hamper the independence of the Judiciary. Many, including judges, see this issue as raising very serious concerns with the **Government's intentions in the area of judicial independence**. In many respects, judges' status is equal to that of prosecutors. Law calls them both "magistrates" and provides similar ways of appointment, transfer and promotion, similar salaries and even a unique code of ethics. In addition, prosecutors continue to perform judicial like functions, and the Attorney General enjoys the power of filing extraordinary appeals against final judgments. The powerful role of the prosecutors has been guarded through political obstruction of institutional reforms that propose diminishing prosecutorial power in favor of increasing the powers and independence of judges. The military justice system continues to exist, deciding, *inter alia*, on allegations of police mistreatment.

The public perception is that the Judiciary is corrupt. As suggested by the 2001 World Bank's survey,[36] corruption should be treated in a systematic way, including the legal profession and education as well as the public at large in addition to courts system. The lack of legal culture contributes to the corruption or to the image of a corrupt Judiciary. Judges' associations are few and weak, lacking a voice strong enough to defend and promote judges' rights and independence. Professional capabilities and integrity is not seriously evaluated during the appointment and promotion process. In addition, the training of judges is still at the beginning and it does not have the force to include a large number and to provide extensive knowledge on constitutional law and reasoning, international and in particular EU law, court management and ethics. The public as well as the large majority of judges is unaware of the EU assessments and recommendations in all areas, including the judicial system, and therefore their support to reforms is merely declarative.

The current court system in Romania follows a four-tiered pyramid structure. The lowest level consists of District Courts, the next level is comprised of Regional Courts, and the Courts of Appeal occupy the third level. At present, there are 186 District Courts, 41 Regional Courts and 15 Court of Appeal. The Military Courts are divided into military tribunals, military territorial tribunals and military appellate courts. The Supreme Court of Justice is at the top of the system and it is distinctly regulated. Constitutional matters are handled by the Constitutional Court, which acts as an independent institution.

Although the independence of judges is constitutionally guaranteed, some judicial decisions prove that a number of judges continue to operate as they had under the communist regime, particularly by defending state property to an extreme, and dutifully following the bureaucratic chain of command. For example, in cases where state civil liability is at stake, some judges provide little redress since they feel a duty to protect the state budget.

In addition, many of the judges that had served under the previous political regime remained on the bench, particularly in the higher courts. However, it should be also emphasized that many judges do indeed understand and defend their independence. During the 1990s, judges had strengthened their attempts to lobby for legislation that would ensure their economic independence and grant them substantial incentives. The implementation of such legislation was seen necessary in order to deter corruption and further stop the exodus of magistrates into the private sector. Judges' salaries (as well as prosecutors') and other financial benefits were substantially increased during the last five years, in particular in 1997. Nevertheless, the Romanian Magistrates Association claims that judges' income is disproportionately low in comparison with the income of some private lawyers. Yet, this comparison seems dubious, since the competition among judges is not nearly as high as it is among private lawyers and many judges value job stability more than a high income.

Public trust in courts and other law enforcing institution is low. The public perception is that the Judiciary is corrupt. A 2000 survey of the World Bank shows that between 53% and 65% of those interviewed believe that the judges and prosecutors engage in corruption. Journalists do bring into the public discussion matters within the administration of justice and allegations of corruption. In response, many judges say that the way media reports on the Judiciary contribute to the low public trust. Some journalists and politicians joined in expressing an overall criticism of the Judiciary. At present, the development of liberal institutions, such as an independent Judiciary, has strong support among intellectuals and professional elites rather than among the majority of the population and the government officials. According to a survey performed by the non-governmental organization *"Pro Democratia,"* the public believes that the courts, the prosecutors and the police are the most corrupt institutions in the country.

[36] 2001 World Bank Anti-corruption Survey http://www1.worldbank.org/publicsector/anticorrupt/Bosnianticorruption.pdf

International organizations do not perceive the Romanian Judiciary as fully independent and very effective. The *European Commission 2000 Regular Report*[37] provides the image of a Judiciary facing a real risk of political influence and having a low administrative capacity. The World Bank survey shows a significant lack of public trust in the Judiciary and a domestic overall perception of corruption within the judicial system. In addition, the 2000 US State Department's report on Romania states that the Judiciary remained subject to the executive branch influence.[38]

Corruption is a major obstacle to judicial independence and continues to be a widespread and systemic problem in Romania. Corruption in the Judiciary goes largely uninvestigated and unpunished. However, there have been some cases where corruption was identified and sanctioned. In 1999 the SCM handled 14 disciplinary actions against judges and of the eight actions accepted, six judges received disciplinary sanctions and two were removed from office.[39] However, any form of corruption is a crime requiring criminal investigation and court hearings. By applying disciplinary sanctions, the SCM avoided the courts' jurisdiction and the public debate over such cases.

The information provided by the Ministry of Justice showed, for example, that during the first 6 months of year 2000, the prosecution requested approval to investigate six judges and the Minister had only approved three. This process is not transparent, and it seems that officials are more concerned with the public image of the Judiciary than with bringing the allegedly corrupt judges before the courts and face media reporting.

A series of procedural shortcomings in the judicial system encourage corruption and prevent judges from being punished. For instance, court proceedings are not recorded. In practice, the leading judge uses his/her own words to summarize the parties' and witnesses' statements and dictates these summaries to the clerk. The oral debates between the parties or between the court and the parties, as well as the questions asked during the interviews are never recorded. In addition, there is no record of the questions rejected by the court. The lack of recording applies to all cases at all levels of jurisdiction. Under these circumstances, a corrupt judge may easily distort what the parties and witnesses have stated in the court. Moreover, the appeal proceedings lack the instruments of identifying eventual wrongs in the previous proceedings. The right to a fair trail is seriously limited.

The Judiciary in **Serbia** is regulated by two *Constitutions* – that of Serbia and that of the Federal Republic of Yugoslavia (FRY). Although the two *Constitutions* are not identical, there are no major differences regarding judicial issues. The *Constitutions* of both Serbia and the FRY define the states as democratic states and provide for the separation of power into legislative, executive and Judiciary branches of government. The Judiciary is regulated by the Republic, and it will remain the same regardless of any future agreements on the principles of the relationship between Serbia and Montenegro. The Serbian Constitution provides that Serbia is established on the basis of the rule of law.

The *Constitutions* cited above were drafted in 1990 (Serbian) and 1992 (FRY). However, both were largely disregarded during the turmoil that engulfed the region in the 1990s. Indeed, under the previous regime, the Judiciary was highly dependent on executive power, or more precisely on the personal networks close to Milosevic and his cronies. The period since the fall of Slobodan Milosevic's regime has not been characterized by comprehensive and radical judicial reform. A new set of judicial laws has been proposed, but in the meantime, judicial reform has been confined to some personnel changes. New laws have come into force, but time is needed to assess how the new institutional solutions will function. Since application of the law depends on the proficiency and moral integrity of the judges and magistrates, good personnel are of great importance for the quality of the Judiciary. For this reason, the Ministry of Justice launched an initiative to discharge 69 magistrates. Of this number, 21 judges were dismissed, and it is suggested that the rest should not be reelected. This was all done before December 2001, under the old laws, which permitted the Ministry of Justice to exert influence on judges.

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[37] European Commission *2000 Regular Report on Romania's Progress towards Accession*, Chapter on Political Criteria and Rule of Law. http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/ro_en.pdf

[38] US Department of State, *Country Reports on Human Rights Practices – 2000, Romania*; February 2001. http://www.usis.usemb.se/human/2001/europe/romania.html

[39] European Commission *2000 Regular Report on Romania's Progress towards Accession* http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/ro_en.pdf

The Serbian Parliament adopted five new laws to regulate the Judiciary in November 2001, and they came into force on January 1, 2002. The five laws are: *Law on Court Organization, Law on Judges, High Judiciary Council Law, Public Prosecutor Law, Law on Placement of the Courts and Public Prosecutors.* The new laws are aimed at bringing Serbia in accord with some of the norms and standards of modern European judicial systems. The Law on Judges provides for an independent Judiciary, lifetime appointments, the immovability of judges, livable salaries, the right to form a union, freedom of thought, and a certain degree of immunity.

The basic division separates the Judiciary into general courts and special courts. The general courts are: Municipal Courts,[40] District Courts,[41] the Appeals Court[42] and the Supreme Court of Serbia. The special courts include the Trade Court,[43] the Higher Trade Court,[44] and the Administrative Court.[45]

The Supreme Court decides the competence of the courts, controls the courts, defines uniform rules for court practice, gives advice on legislation concerning judicial power, elects judges and members of the **High Judicial Council (HJC),** defines criteria for assessing the judges' activities and performs other duties concerning the Judiciary.

The general impression is that the Judiciary in Serbia would not be independent enough even if legislation provided for fairness and court independence. One of the key questions is how citizens and businesses evaluate the Judiciary. Surveys carried out by the Center for Liberal-Democratic Studies (2001)[46] demonstrate that citizens have an extremely bad perception of the Judiciary. Less than thirty percent of the population (28.4%) rates the case courts as being just and unbiased whereas three fifths (60.3%) believe that this is only rarely or never true. Thus, the citizens of Serbia believe that the courts deny justice and impartiality, as they, also, deny fairness (65.8%), speed and efficiency (74.3%), accessibility (57.8%), reliability (67.1%) and the ability to carry out their own decisions (58.1%). The courts did even worse in a survey of entrepreneurs, who were evidently concerned about the court's problems settling business disputes fairly.

The creation of truly independent Judiciary in Serbia is impeded by a number of factors: courts have no real influence on the election of judges (particularly of the presidents of courts), many courts do not have presidents but interim presidents, the commercial courts are almost all resistant to change, salaries in the Judiciary are lower than in legislative and executive branches. These problems still remain unsolved thus creating favorable conditions for the continuing attempts of exercising political pressure over the Judiciary.

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Country review reveals the necessity of further institutional and organizational strengthening of the Judiciary in Southeast European countries and improvement of the judicial systems' structure and governance. Achieving judicial independence also remains a priority of the reforms and the anti-corruption efforts.

5.2. Status of the Magistrates (Independence, Appointment, Promotion, and Removal Procedures). Qualification and Training

The progress made towards the creation of an independent and stable Judiciary in Southeast European countries depends to a great extent on the status of magistrates. Some of the most important provisions in the new laws concerning judicial systems are related to the problem about the status of the magistrates, including their appointment, promotion, immunity, removal procedures and criteria, as well as protection against removal and disciplinary proceedings. The profes-

[40] Municipal Courts are the courts of first instance and try cases involving less serious crimes, including legal and citizens' disputes and labor and residential issues.

[41] The jurisdiction of the District Courts has increased under the new laws. In addition to hearing the appeals of municipal court verdicts, they now serve as the courts of first instance for more serious crimes, such as those involving violence, bribery, commercial law offences, trafficking, deeds against individual rights, criminal offences committed by judges, deeds against national integrity and sovereignty and so on.

[42] The Appeals Court is an intermediate court based in Belgrade that also hears cases in Kragujevac, Nis and Novi Sad. This court decides appeals from the municipal and district courts.

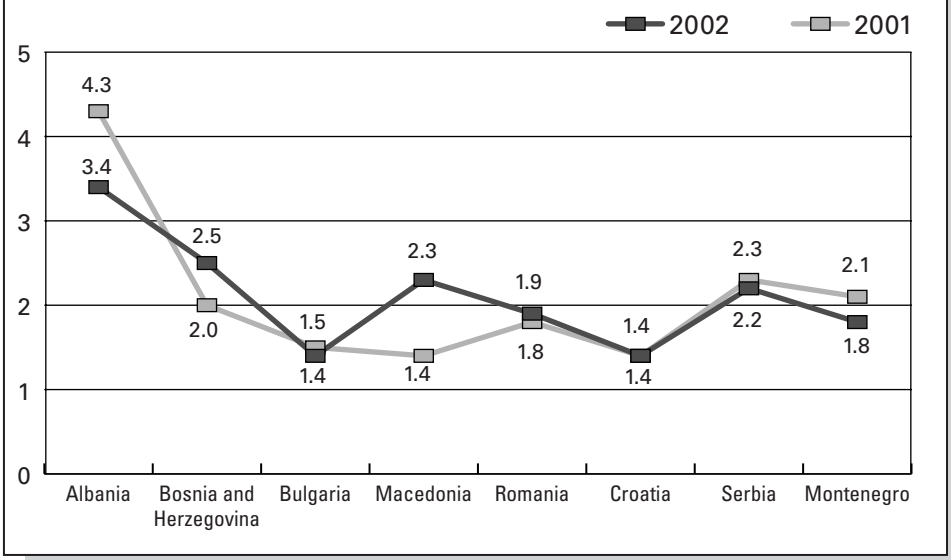
[43] The Trade Court assumes the competence of the old Commercial Court and judges disputes between business enterprises or other economic subjects.

[44] The High Trade Court decides appeals from the Trade Court.

[45] The Administrative Court is a new institution created by the *Law on Court Organization*. Its competence is to settle disputes that arise within Government institutions. This court is conceived to encompass a wide range of activities, including banking, finance, foreign trade, intellectual property, etc.

[46] Center for Liberal-Democratic Studies, *Corruption in Serbia.* http://www.clds.org.yu/html/e0.html

Chart 12: Corruption pressure



Source: SELDI Corruption Monitoring System

sional training of magistrates is one of the indisputable priorities in the judicial reform so many efforts should be made to raise the professional qualification of those, working within the system in the countries of Southeastern Europe.

Details on issues of selection, recruitment, appointment, career progress or termination of office of a judge, as well as of disciplinary proceedings against judges in **Albania** are set out in the *Law on the Organization of the Judiciary*, and in the upcoming *Law on the Organization and Functioning of the High System of Justice.* At present, one can only anticipate the outcome after these new forms of controls of the Judiciary are adopted and speculate on how effective the controls will be in fighting corruption in the Judiciary.

However, it must also be noted that inconsistencies between the *Constitution* and laws that have already come into force make it difficult to determine which body actually has which power. Namely, the *Law on the Organization of the Judiciary (Law no. 8436)* stipulates that the HCJ nominates judges for the courts of first instance and the courts of appeals (Articles 20 and 24). On the other hand, the new *Constitution* stipulates that the nominations of judges are made by the President of Republic based upon the proposal of the HCJ. In this case, the hierarchy of norms is clear - the constitutional text is to prevail. However, the Parliament passed the aforementioned *Law on the Organization of the Judiciary* after the new *Constitution* came into force, clearly contradicting it. However, although the problem is a very serious legal issue it still remains unsolved neither by the Parliament nor by the Constitutional Court.

Improving the level of legal education is imperative. It is also urgent that regulations ensure that judges have the requisite specific judicial knowledge and qualifications. With the establishment of the magistrates' school in 1997, the government undertook an important step in this regard. Although much remains to be done to upgrade its faculty and curriculum, this school presently functions as the sole institution for the education of new judges. The main problems concern the level of legal education and the lack of training opportunities.[47]

An examination of all sitting judges was administered by the Organization of Security and Cooperation in Europe (OSCE) and the Council of Europe in May 1999. The purpose of the examination was to weed out judges weak in legal knowledge, so the examination questions were very basic. Only four judges failed the exam. Several judges refused to take the exam and as a consequence were dismissed by the Supreme Council of Justice.

The School of Magistrates was established to train judges and thereby combat the Judiciary's lack of proficiency. The School of Magistrates' mandate comprises:

- Teaching regular students;
- Providing ongoing training for sitting judges with fewer than five years of experience;
- Providing ongoing training for court administrators.

[47] Currently there are only three law schools in Albania (Tirana, Elbasan and Shkoder). The Law School in Elbasan no longer enrols students, and will close in two years, so this need is urgent. The Faculty of Law in Tirana is the largest law school in Albania with 3,300 students. Its environment has improved recently, but it remains fraught with problems.

The school is designed to be a two-year program and is currently attended primarily by recent law school graduates.

However, the main shortcomings in the implementation of judicial reform in Albania remain:

- The lack of democratic procedures for appointing, assigning, remunerating and removing judges and prosecutors, in order to insulate them from political influence and pressure;
- The insufficient publication and dissemination of legal information, including judicial decisions, necessary to increase transparency in the fight against corruption;
- The lack of recruitment standards based on professionalism;
- The corruption within the Judiciary.

In **BiH** the period designated for the judicial review expired in FBiH at the end 2001 and in the beginning of 2002 in the RS. The RS agreed to prolong the review until June 2002, but the FBiH rejected any extension. Consultations with international and local agencies also provided information on the work of the Judiciary. Both OSCE and the Ombudsmen's offices supplied valuable material on judges' and prosecutors' adherence to and implementation of the laws.

Only five incumbents were removed (two more are pending) and 32 disciplinary procedures were initiated. Another 30 individuals resigned rather than face appraisal. (Five of these resignations were directly attributable to the review process.) Thirty-three new judges and prosecutors were appointed, while twenty judges and prosecutors (in the Federation only) were reappointed when their mandates expired. The review process, therefore, resulted in less than a 2.5 per cent rate of replacement.

This judicial review process does not apply to appointments to the Constitutional Court of BiH, the Constitutional Courts of the FBiH and the RS, the Human Rights Chamber, to judicial and prosecutorial appointments in the Brcko District altogether, nor to the nomination process for appointments to the Court of BiH.

Following the adoption of the federation *Criminal Code* and *Criminal Procedure Code* in 1998, special training on the new legislation was provided to members of the legal professions, including the Judiciary, prosecutors and defense lawyers, as well as police officers. In the meantime a series of specialized study visits, seminars and training on anti-corruption measures have also been organized mainly for prosecutors and police officers. However, in general, more sustainable training structures should be established; this could be one of the tasks of the new Training Institute for Judges and Prosecutors.[48]

With regard to the selection and appointment of magistrates in **Bulgaria** during 2001 the need for competition based on detailed criteria defined in the *Law on the Judiciary* and overseen by the SJC gained further support and provisions on such a procedure are included in the *Law on the Amendments to the Law on the Judiciary*. The *Law* introduces mandatory competitions for the selection of junior judges, junior prosecutors and regional judges, regional prosecutors and investigators.

Regular assessments for each magistrate's work were also introduced. Magistrates may be demoted as a result of these assessments. Magistrates will also be required to undergo an assessment before acquiring irremovable status. The procedure for such assessments lies within the power of the Supreme Judicial Council. The objective criteria are clearly defined by the Law, thus reducing the possibilities for subjective judgments and corruption to minimum.

With regard to the magistrates' further training in the year 2001 the Magistrate Training Center (MTC)[49] continued to function successfully, earning a deserved reputation as a unique institution to provide training for already appointed magistrates. In the beginning, training programs targeted mainly judges, but in 2001 prosecutors, investigators, civil servants at the Ministry of Justice, and university lecturers were also included. Training curricula already includes general courses in European law and the Institutions of the EU and specialized courses in international co-operation on criminal cases.

The new amendments to the *Law on the Judiciary* envisage the establishment of a National Academy of Justice as a public institution for professional training of magistrates and clerks, and create a legal framework for magistrate's qualifi-

[48] Stability Pact Anti-Corruption Initiative, *Anti-corruption measures in South-eastern Europe - Country reviews and priorities for reform*, Council of Europe, September 2001, p. 76 ,http://book.coe.int/GB/CAT/LIV/HTM/I1780.htm

[49] The existing Magistrate Training Center was set up in 1999 as a non-governmental entity and has been a unique institution providing training for already appointed magistrates.

cation and its consequences for the magistrate's movement in the professional hierarchy.

In **Croatia** the Judiciary's independence is safeguarded by a number of protections. Judges can be suspended only for the reasons enumerated in the *Constitution*, judicial positions carry lifetime tenure and judges cannot be transferred against their will. Judges can be discharged only if permanently incapacitated or if sentenced for a criminal offence that makes it impossible for them to hold a judicial position. The latter case requires a specific disciplinary procedure before the State Judicial Council. A judge must not be a member of any political party and has to avoid any kind of political engagement. Law prescribes the salaries of the judges. All these measures are intended to secure the autonomy and independence of the courts.

The provision granting judges lifetime tenures has been extended only to judges appointed since the new Constitution came into effect. Making lifetime tenure available only to judges appointed by (and loyal to) the new Government was a clear message to others to withdraw from the function. Thus, it is not surprising that in the years immediately following the passage of the new *Constitution* (until 1997) there was an unprecedented flow of judges to other legal professions (mostly to become lawyers and notary publics). This long period of insecurity had a far-reaching impact on the quality of the Judiciary and contributed to the present crisis in the state justice system. The court system has suffered from such a severe backlog of cases and shortage of judges that the right of citizens to address their concerns in court has been seriously impaired.

Better training and specialization would be beneficial to both the efficiency and the quality of the justice system. Detecting unlawful activities in certain fields of business and finding additional evidence in support of previously available facts often requires specialized economic or criminalistic knowledge and expertise. At present, judges working in the criminal and investigative departments of the Croatian courts do not specialize in either economic crimes or any other individual branch of criminality. The solution is to appoint specialized law enforcement personnel and specialized judges – people who know about what they are fighting against. This would significantly increase the efficiency of courts. More importantly, judges would be able to properly evaluate the often complex financial and book-keeping reports of the court experts and other evidence that requires detailed knowledge of the economic and business administration issues. Training police officers and inspection services personnel is equally important, since they are the ones who must discover delinquency and uncover it in the initial phases. To sum up, in order to better combat economic crimes and corruption, specialized training of all the personnel involved in detection and enforcement is required.

Students who want to become judges and state attorneys begin to prepare for their professional responsibilities immediately after graduating from law school. Up until 2000, every Croatian citizen who completed studies at a faculty of law and passed the state Judiciary exam was eligible to be appointed as a judge at the municipal or petty crimes courts. Since 2000, appointment has required two years of practice after the examination. For promotion to higher courts, a longer period spent practicing law (mostly at the first-instance courts) is required.

The judicial and law enforcement authorities are constrained by the lack of resources. Attracting qualified judges is difficult because of low wages. The judicial system also suffers from a massive case backlog. Cases involving average citizens drag on for years, while criminal libel suits or other cases affecting high-level government officials are heard within weeks under "urgent proceedings." Salaries have also been increased. The *Law on Judicial Salaries*, passed in 1999, raised the salaries of judges on the lower courts by an average of about 50% and judges on the Supreme Court by 200%. Still, courts remain poorly equipped and the basic equipment they have is often not properly maintained. For example, it is not uncommon that judges are forced to use their own computers or to work at home. The same applies to other types of office supplies and basic working tools.

Inadequate training, together with low salaries and poor working conditions, results in an inefficient law enforcement system that is vulnerable to corruption. Corruption also results from the lack of effective control over the activities of law enforcement agents, such as public attorneys, police officers, advocates, states advocates, etc.

Croatia suffers from a problem common to many transition countries – a weak Judiciary suffering from inadequately trained judges and the lack of procedural reforms aimed at overcoming excessive delays in court cases.

Judges elected in **Macedonia** are granted lifetime tenure. They may not be removed against their will. A judge is dismissed only:

- at his/her own request;
- if he/she permanently loses the capability to perform judicial functions, which is defined by the Republic Judicial Council;
- if he/she retires;
- if the judge is found guilty of a criminal offense that entails a minimum incarceration of 6 months;
- if he/she commits a disciplinary infraction that makes him/her unsuitable to perform judicial functions, as defined by the Republic Judicial Council

The Republic Judicial Council (RJC) proposes the election and dismissal of judges to the Parliament. It also decides the disciplinary responsibilities of judges, evaluates their competence and conscience and proposes two judges to the Constitutional Court. The Constitutional provisions related to the Judiciary are further refined by the *Law on the Republic Judicial Council*, which also provides for the de-politicization of judges. The RJC bases its proposals on the recommendations of the applicant's current colleagues as well as from the superior court and the Supreme Court. RJC bases its proposal for the election of judges to higher courts on the basis of an objective evaluation of the experience, professional competence, skills and ethics of the candidate. The RJC proposes an equivalent number of persons to the number of judges that need to be elected. When a candidate for judge does not get the required majority of votes in the Parliament, the RJC nominates a new candidate. If the RJC does not support the nomination of any of the proposed candidates, it must inform the Parliament, which then shall announce again the need for election of a judge to the respective court. The RJC proposes dismissal of judges when certain conditions are fulfilled. Aside from the RJC, judicial evaluations of incompetence may also be addressed by the president of the court, the president of the superior court and by a plenary session of the Supreme Court. For this reason, the RJC has adopted rules of operations. The RJC has also adopted general criteria for the election and dismissal of judges.

According to the *Law on the Judiciary*, judges are obliged to have professional training. However, no state system for the education and training of judges currently exists in Macedonia. For this reason, the Center for Continuing Education (CCE) was formed by the Macedonian Judges Association with the aim of establishing a permanent educational institution for judges. The Center educates the judges by creating annual programs in order to educate judges from the Basic courts, the Appeals courts and from the Supreme Court. The educational program is administered by respectable lawyers, primarily judges from the Appeals courts and the Supreme Court. It is also necessary to establish regular and effective anti-corruption training programs for prosecutors, the police, the Judiciary and financial intelligence officers.[50]

Romanian legislation provides for a number of legal guarantees aimed at maintaining the impartiality and independence of individual judges. The 1991 *Constitution* states that the position of a judge shall be incompatible with any other public or private office, except for academic teaching activities. In addition, the *Law on the Judiciary* prohibits magistrates from acquiring membership in political parties and engaging in public political activities. Consequently, judges may not attend political meetings and they are not allowed to write political articles or be involved in any political debates. Judges are allowed to write articles in legal, literary, academic, or social journals and take part in broadcasting programs except where the context is political.

Judges are not allowed to perform, by themselves or through agents, commercial activities, or be active in the leadership and management of trading companies, civil partnerships or autonomous economic administrations. Consequently, judges may not engage in entrepreneurial activities. However, some believe that judges have the right to acquire shares and other securities, and to become stockholders, but only at levels below that of a controlling share.

In accordance with the law, judges must submit statements on their assets at the beginning and the end of the term they serve. In practice, however, their statements are never verified, neither at the beginning of the term, nor at the end. While at present such statements are confidential, some believe that judges' ownership statements as well as those of the parliamentarians and other officials should be made public. The law regulates judges' conduct in cases of conflict of interests in order to ensure their impartiality in individual cases. Judges either disclose the conflict refraining from the case or risk that the parties disclose

[50] Stability Pact Anti-Corruption Initiative, *Anti-corruption measures in South-eastern Europe - Country reviews and priorities for reform*, Council of Europe, September 2001, p. 122, http://book.coe.int/GB/CAT/LIV/HTM/I1780.htm

it and require them to step down. In addition, judges are not allowed to give legal advice, orally or in writing, even in cases pending before other courts. They must also refrain from publicly expressing their views on lawsuits that are pending.

Judges may set up professional associations or other organizations for representing their interests, improve their professional skills and protect their status. They may also join international professional organizations. However, judges are not entitled to form or join trade unions. At present, there are two associations, neither strong enough to represent judges' interest before the other branches of power. The Association of the Romanian Magistrates includes judges, prosecutors and civil servants of the Ministry of Justice. Although judges' interests are not similar to those of prosecutors and other officials, some continue to place them on equal foot. The Association of the Romanian Magistrates has been quite active, but not necessarily successful, in defending the financial interests of its members. Another organization is the Union of Judges' Association, formed exclusively of judges. It claims that half of the existing judges are its members. However, the Union mainly focuses on professional training, and it has not been a voice defending judges' rights and independence. Apparently, the two associations compete for representativness. None of them had reacted publicly against the recent political interference with the Judiciary independence.

Although there are some legal guarantees for judges' individual independence and impartiality, the institutional guarantees are not satisfactory. In addition, some high officials have failed to support judicial independence and the Governing Program for the next four years is ambiguous in this respect, mixing up the needs of independence and controlling. While at present judges are irremovable, some high officials have recently placed this status into questions. Both the Minister of Justice and the President publicly expressed doubts with regard to judges' irremovability. At the same time, judges' associations are week and have failed to represent judges' interests, rights and independence against the other branches of power.

Judges' disciplinary liability[51] falls under the jurisdiction of the Minister of Justice, the Superior Council of Magistracy and the Supreme Court, each playing different roles. The Minister of Justice fulfils the role of the disciplinary prosecutor, except in cases concerning the justices of the Supreme Court, where the disciplinary action may only be initiated by the Deputy Chief Justice. Prior to Minister's decision, an inquiry takes place. The inquiry commission is formed by judges or by general inspectors of the Ministry of Justice following the Minister's order.[52]

In **Serbia** a new institution called the Great Personnel Council (GPC) was created to handle disciplinary procedures. The GPC is composed of 9 judges from the Supreme Court. The President of the Supreme Court, who cannot be a member of the GPC because of potential conflicts of interest, initiates dismissal procedures and the GPC decides the cases on their merits. The Presidents of the lower courts may also propose dismissal proceedings against members of their courts.

The GPC must follow clear criteria and procedures for dismissals. Judges may be dismissed only for one of the following reasons: they are sentenced to six months or more in prison, convicted of a crime that makes it inappropriate for them to be a judge, guilty of the nonperformance or unreliable performance of judicial duties, permanently lose the ability to carry out judicial duties, delay the process or act against the rules of the judicial system, or perform other jobs that conflict with judicial duties. Dismissed judges may appeal their discharge to the Constitutional Court.

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Achieving the stability of the institutions that guarantee the supremacy of law is impossible without an independent Judiciary consisting of independent, objective, highly qualified magistrates possessing impeccable moral standards. The independence of the Judiciary is a major democratic achievement. It should not be regard-

[51] The grounds for disciplinary proceedings are: frequent delay in the paper work; unjustified absence from work; interference with the activity of another judge or persuasion for unlawfully solving personal or family demands; offensive attitude in the office; violation of the deciding process or of other confidential activity or document; public political activities; activities affecting the professional integrity and honour; unjustified denial of fulfilling the duties; violation of the taxation rules; repeated violations of the celerity requirements; repeated work negligence; violation of rules of judges' incompatibilities; major misbehaviour breaking the rules set forth in the Code of Ethics.

[52] When a judge is found guilty, the Council can apply one of the following disciplinary sanctions: warning; admonition; reduction of the basic salary up to 15 percent, for a period of one to three months; transfer for a period of one to three months to another court; suspension from office for a maximum of 6 months without pay; dismissal from a leading position; or expulsion from the magistracy

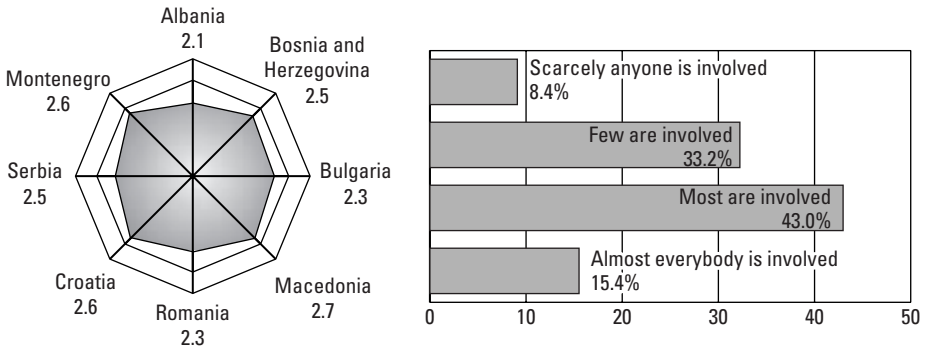
ed as a privilege of the magistrates but as a guarantee for establishing order and the rule of law in the states and for a fully-fledged protection of citizens' rights. Judicial independence is also an important precondition for preventing internal corruption as well as combating corruption in the society.

5.3. Judicial Administration – Legal Basis, Status and Organization

The professional competence of magistrates is an essential, though insufficient, prerequisite for the efficient operation of the Judiciary. Equally important is the good organization of their work, generally denoted as "court administration."

Administrative staff working in the courts as well as in other units of the Judiciary is responsible for the performance of all non-judicial tasks necessary to process cases through the system. The level of efficiency with which administrative staff performs has a profound impact on the administration of justice. The want of qualified administrative staff deteriorates the quality of the administration of justice and the public assessment of the work of the Judiciary. Any improvement of the work of that staff would certainly benefit the operation of the whole system. Addressing the needs of administrative staff for continuing professional education and acknowledging their role in improving the operations of the courts is therefore essential to improving the judicial system. However, according to the public opinion, corruption in the sphere of court administration seems to be widely spread.

Chart 13: Spread of Corruption within the Court Administration



Source: SELDI Corruption Monitoring System. Scores close to 1 correspond to low spread of corruption, those close to 10 to highest degree of proliferation.

The Western concept of judicial administration is not really known in **Albania**. The Chief Judge is responsible for assigning cases randomly. Judges have secretaries who record hearings and type the decisions. Many judges, particularly at the Tirana District Court, complain that their secretaries and clerks are unprofessional.

The few people who serve as court administrators do not have a clear understanding of their role in a judicial system. This means that most Albanian judges serve as both judges and court administrators, leaving them with little time to focus on their caseloads.

Moreover there is no clear definition of the term "court administrator" which often results in its very broad interpretation. Thus for instance court administrators are the court messengers, the security personnel/police, the court secretaries, the chief secretaries/chancellors, the archive personnel, the budget staff, the execution office staff, and the company register staff.

There is a great need to train court administrators to perform tasks that they do not presently perform. Training programs teach employees how to assist with monitoring the workflow and budget, manage cases and assist in managing the dockets, develop an annual court budget, manage other court employees, such as secretaries and filling clerks, ensure that decisions and other orders are disseminated to the right parties, collect filing fees, compile and compute statistics, assign cases, and develop courtroom procedures.

However, Albania still lacks the necessary institutional and regulatory prerequisites for the establishment of an anti-corruption environment in the area of court administration.

Some basic training has been organized for the supportive staff in **BiH** primarily in the use of information technology, which is non-specialized. Several tests are being taken by the staff upon hiring, to ensure their general judicial knowledge and the basic understanding of the system, but there is lit-

tle training preparatory work, let alone any follow-ups.

There was notable progress on several priorities of the reform in the field of court administration during 2001 in **Bulgaria**.

The newly created automated system for case management throughout the entire Judicial system was presented at the first annual assembly of the Bulgarian Court Clerks' Association in November 2001 and is expected to begin functioning soon. However there is still no adequate regulation of the court administration, including the rights and obligations of the different categories of the court administration staff as well as the position of a court administrator. Court administrators' positions have already been created within the Supreme Court of Cassation, the Supreme Administrative Court and the Attorney General's Office. In addition to the amendments to the Law on the Judiciary the respective secondary legislation is necessary to be adopted in order to overcome the inefficiency of court administration (poor procedures for case management, lack of central coordination of management practices, etc.).

In **Macedonia** the president of the court is responsible for managing the judicial administration, organizing the work of the judicial administration and undertaking measures to perform the Judiciary's activities in a timely and orderly fashion. The president also implements the judicial rules of procedure, which regulate the internal functioning of the courts. The courts, in which the number of judges exceeds seven, have a secretary. The secretary's job is to help the president perform the duties of judicial administration. The laws to ensure that the Judiciary gets adequate funding and that the judges and their staffs are properly compensated are necessary.

In **Romania** the judicial administration consists of independent judicial counselors, judicial counselors, beginning judicial employees and other clerks who perform administrative, technical and other activities, depending on the scope of the activities and the needs of Judiciary. It also includes persons responsible for the security of the courts, premises, property and persons. The judicial police have the task of keeping order in the court.

Cases are assigned to judges by court presidents. The assignment process is not transparent. The assignment of a case to a particular judge may be a deciding factor in the outcome of a trial. For example, in cases involving the nationalized property, the practice proved that most judges have strong personal opinions on the matter – as to return it or not to the former owners – and therefore the assignment becomes decisive for the judicial outcome. The law does not provide for criteria in cases assignment, leaving the court presidents with a wide discretion. Corruption had also been connected with the assignment process. A World Bank survey found that one of the most cited reasons for bribery was "to assure that a certain person would be assigned to the case." There have been some attempts to develop formal rules for case assignment to judges, but software for distribution of cases has not been introduced.

The rules on tracking the case files have not been modified in the recent years and reveal a number of shortcomings: limited identification of the individual judge, clerk or other administrative staff working on a particular case file; uncontrolled access to the case files by members of the registry or other administrative staff as well as by the court's presidents or vice-presidents; insufficient control over the handing of case files leaving open the possibility of documents' disappearance without any chance of identifying the moment or the responsible person. Although there is a judge in charge with the supervision of the court's registry in each court, permanent and effective control is still inadequate.

Following a verification of the registry and notification offices of some of the lower courts, the Ministry of Justice issued a press release in June 2000, noting the large number of malfunctions in the process of tracking the case files. Some staff members were dismissed while others received disciplinary sanctions.

In addition, it is common knowledge that many of the staff in the registry and judicial clerks are involved in petty corruption on a daily basis. When asking for information or case files, the parties or their lawyers bribe the staff. As this has become a notorious practice, the bribe is often offered automatically.

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To reduce everyday ("petty") corruption in the interaction between the court administrative staff and the citizens ***a new approach to administration in the courts must be adopted,*** *including a system of management of the court's records, human resources, distribution of cases among judges and their progress through the courts, automation, and a database for judges. Also, additional institutional capacity of the inde-*

pendent governing bodies, including setting up a National Coordination Offices for the Court Administration, has to be built, and a Code of Ethics for the Administration of the Judicial system needs to be prepared. All of these measures should lead to the creation of clear, transparent and logical rules, which will facilitate fair administration of justice and prevent opportunities for corrupt practices to arise.

5.4. Working Conditions, including Modernization and Computerization

A very important issue as regards to judicial reform in all Southeast European countries is the problem with the poor working conditions and the inadequate or completely missing technical equipment in the courts. Although of great significance, this issue was until recently unreasonably ignored by most of the countries.

However, efficient distribution and maintenance of electronic data within courts, between courts, and between courts and other actors inside the government and legal community is a necessary component of improving judicial administration, as well as improving the condition and utilization of the physical space in courts for the convenience of employees and the public. Facilitating the communication between the staff and the citizens and allowing more rapidity and transparency in the work of the court administration, would play an important role in curbing corruption. This cannot be done without the introduction of modern information technology.

The poor working environment is a major concern of the judges in **Albania**. Buildings are not adequate, and there are not enough telephone lines, computers, etc. When improvements are made, judges are often not consulted. For example, the Tirana District Court judges did not know about plans to build a new court and they were not given a voice in planning the new building to accommodate their practical needs.

Security is also a major concern of the courts. The judges have requested that non-police security guards be placed in the courts. They complain that the police have no respect for the Judiciary and will only take instructions from the Ministry of Public Order.

Meanwhile, many judges think that the government has been trying to shift the blame for lawlessness to the Judiciary. The poor conditions of the courts, insufficient support at all levels and an overall lack of respect for the Judiciary are ongoing problems. For instance, the Attorney General of Albania has assented some publicly accused high government officials, including three ministers, for corruption, financial abuses and other major economic crimes. He declared that no investigation will be conducted since his office did not have the means, the necessary staff and the ability to conduct such an investigation.

Finally, two years ago, the government accepted the appeal of the Tirana District Court Chief Judges and put a special police force at their disposal that was under direct authority of the Chief Judges themselves. This was a good precedent and it has improved the situation.

The courts have very few computers and little, if any, practical experience in using them. Approximately 270 computers were bought by the government and given to the courts. The government was not able to fund training classes in computer skills for the court administrators. However, the USAID Judicial Training and Strengthening Project (East-West Management Institute) stepped in and provided the necessary training. Computerization is essential to improve the efficiency of operations in the administrative offices that support the Albanian Courts.

Some degree of modernization and IT has penetrated the courts in **BiH**, but virtually none in RS. There the courts still operate on typewriters with no databases other than the large registers and file folders.

A large sum of donor money is now scheduled to enter the court system through various judicial reform sub-projects. One such case is the register of enterprises and the register of pledges which will both be run and maintained by the cantonal/regional courts and will consist of an integrated public database that will be harmonized across the Entity lines and in Brcko. This should provide the commercial sections of the courts (perhaps to become separate commercial courts in the future) with the brand new equipment and the related training, not only in IT, but also in the application of the new laws to govern this area, as well as the procedures in processing the matter and other technicalities of the process.

There are also plans to modernize other parts of the courts and such efforts will be streamlined and coordinated by the IJC in collaboration with the Ministries of Justice and the Entity budgets and the HJCs throughout the country.

In **Bulgaria** the administrative staff within the judicial system works in a primitive environment. The level of modernization of the working environment and the conditions of work are still comparatively low. For instance numerous registries are kept mainly by hand, causing great difficulties to citizens and attorneys alike when they are making inquiries. There are also unsolved problems as regards to court buildings.

The following measures could be pointed out as marking some progress in the field of court administration. Reforms were made in the administration of 11 pilot model courts, including:

- More than 400 judges and court administration servants underwent judicial administration training.
- Office re-organization aiming at "one-stop shop" system was initiated.
- More than 400 PCs and other equipment were installed.
- An automated system for case management was created, developed especially for Bulgarian courts.

The working conditions are absolutely inadequate for the needs of the Judiciary in **Croatia**. Problem areas include the rooms, tools, communications equipment, computers, and registers. Only in the commercial courts is the digitization of information routine. In all other courts, old-fashioned machines continue to predominate. In contrast, it is not rare for judges and administrative staff to have their own private computers at home. The poor status of the facilities and resources includes other paradoxes. For the sake of cost reduction, the Supreme Court was not able to purchase works discussing the independence of the Judiciary. Simultaneously, however, huge renovations of many court buildings were being carried out, including renovations involving the Supreme Court's own building.

In **Macedonia** the Judiciary is making huge efforts to modernize its administration and upgrade its facilities. A committee has recently been established to digitize the workings of the Supreme Court, including creating computer programs for the first level procedure, the second level procedure and the judicial practice of the Supreme Court. The process should be completed soon. It is anticipated that the incorporation of these programs will improve the general environment of the Judiciary as well as assist the judicial staff in performing their functions. Other investments include constructing new buildings and modernizing current buildings and premises.

Courts in **Romania** suffer profoundly from underinvestment, due to the limits of the state budget resources in general, and to the courts' small budget in particular. It is interesting to note that the budget for the Judiciary has constantly been lower than the budget for police, armed forces or secret services. The quality of the courts' activity is clearly influenced by the low level of financial resources. The small number of staff, the lack of electronic registration of the archives and court hearings, the poor conditions for studying case files contribute to the low quality of services. District courts, in particular, face permanent resource shortages.

Judges endure rather difficult working conditions. Many of the courts' buildings are inappropriate, in particular in Bucharest. The equipment is old, the archives and hearing rooms are small and overcrowded, in particular in the district courts which hear the large majority of cases. In many of the district courts in Bucharest 4-6 judges share an office. There are no legal requirements on office space or standard technology. Court presidents are left to deal with these problems, although many of the tools needed to resolve them are out of their hands.

Court hearings take place in rather precarious conditions. They are not registered by electronic means. In practice, judges dictate the clerks summaries of what the witnesses, defendants or others say in the court, and the clerks write these down by hand or by using old manual typewriters. Quite often, the clerks' written reports differ from what the judges have said, due to the low judicial knowledge and training of the clerks. Obviously, the lack of full registration of the courts' hearings as well as of the electronic registration and distribution of the case files has a strong negative impact upon the way justice is done.

Courts receive legal journals and the Official Gazette, together with printed collections of laws. However, many courts receive a reduced number of copies, and therefore a large number of judges do not get free individual copies. The legal materials, including the Official Gazette are usually kept by the courts' presidents. Digests of case law are not freely available to most of the judges. Under these circumstances, many judges have to pay for copying or buying the legal materials. All

these constraints and limitations might constitute entry points for corruption in courts.

* * *

Achieving legal stability and confidence in the Judiciary, providing conditions for greater efficiency, quality and transparency in the administration of justice, creating internal control mechanisms to combat abuse of power and corruption within the Judiciary and creating a system for improving the professional qualifications of magistrates remain the major issues on the agenda of judicial reform in the countries in Southeastern Europe.

The necessity of counteraction against corruption not only by the administration of justice but also by high morality evokes the need of preparation and implementation of the codes of ethics for magistrates, and rules of ethics and standards of conduct for court administration employees. In most countries of the region such either do not exist or their implementation is very limited. It is very important that moral rules of conduct are adopted and internal check-up and control mechanisms set up, disciplinary procedures for non-compliance with the law and the rules of ethics improved in order to raise the reputation of the Judiciary and to create among the magistrates an atmosphere of intolerance to any conduct damaging the reputation of the profession.