PART ONE

REFORM IN THE ORGANIZATION OF THE JUDICIARY. REFORM IN THE ADMINISTRATION OF JUDICIAL BODIES. TRAINING OF MAGISTRATES AND COURT CLERKS

I. REFORM IN THE ORGANIZATION (STRUCTURE AND MANAGEMENT) OF THE JUDICIARY: CONSTITUTIONAL, LEGISLATIVE AND INSTITUTIONAL ASPECTS

1. General

The debate about the failed or implausible proposals to reform the Judiciary so as to make it more efficient in combating corruption has revealed the prevailing view that the key impediment is the existing constitutional model which regulates the most essential aspects of the structure, organization, operational principles and functions of the third power.

Moreover, a disturbing trend has been perceived within the Judiciary, namely that the bodies of the system deny responsibility and incriminate each other for the spread of corruption. This is a demonstration of serious flaws in the understanding of the place and role of the different units and of the relationships in which they engage.

ASSESSMENT OF THE SPREAD OF CORRUPTION WITHIN THE THREE GROUPS OF MAGISTRATES (PER CENT)

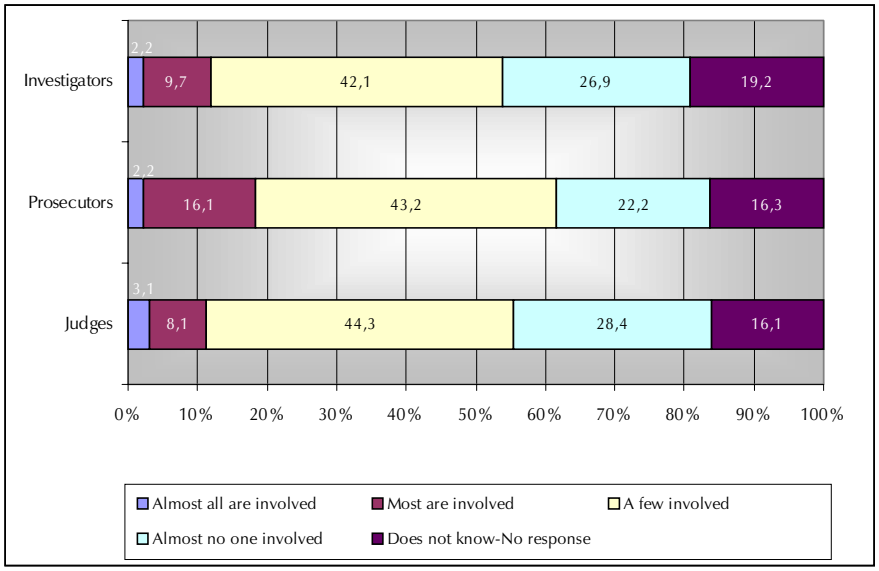
	Spread of corruption among: (relative share of responses *„Most or all magistrates are involved"*)		
Magistrate	**Judges**	**Prosecutors**	**Investigators**
1. Judge	2.8	17.4	19.0
2. Prosecutor	11.9	7.9	10.3
3. Investigator	20.8	28.2	4.7

Source: Corruption Monitoring System (CMS) of *Coalition 2000*

The trend to attribute the responsibility for corruption to a branch of the Judiciary other than your own is also visible from the assessments of the stages of criminal and civil proceedings. One out of four **judges** states that corruption is most widely spread at the stage of preliminary proceedings, while one out of five judges believes the same about police investigation. And *vice versa*, **prosecutors and investigators** identify the court stage as the key stage of criminal proceedings where corrupt practices abound.

The practice so far, *viz*. piece-meal reforms and the lack of satisfactory results of the efforts made, are indicative of the need for a **comprehensive approach** that should cover all the required constitutional, legislative, organizational and institutional reforms. With that approach, **the *Constitution* will be expected to regulate solely the general aspects of**

SPREAD OF CORRUPTION WITHIN DIFFERENT GROUPS OF MAGISTRATES (PER CENT)



Source: CMS of *Coalition 2000*

the structure, principles and functions of the Judiciary, whereas the details should be elaborated on in the legislation adopted within the framework of the respective constitutional model.

On the other hand, issues such as the introduction of standards for timeliness and good quality, of the required degrees of transparency and openness in the work of the Judiciary, of effective anti-corruption measures in general, and especially in the branches of the Judiciary, the improvement of the criteria for recruiting professionals and for regular evaluation of their performance, the improved efficiency of disciplinary proceedings against magistrates, etc. could be resolved by way of Acts of Parliament even within the current constitutional model.

Expert opinions on judicial reform

During the survey held in July-August 2002 and devoted to the *Proposed Amendments to the Constitution* of Bulgaria, expert opinions were received from 120 Bulgarian professionals with a legal background (MPs, legal experts, judges, attorneys, in-house lawyers, prosecutors, investigators and professors). The most frequent suggestions concerned possible amendments in relation to the Judiciary, for example:

- bringing down the number of prosecutorial warrants which produce effects similar to court judgments (66.4%);
- limiting the immunity of magistrates only to the steps they undertake in court (69.2%);
- introducing terms of office for magistrates in managerial positions (86.7%);
- providing reasonable restrictions on the absolute irremovability of magistrates (80.6%);
- introducing two-instance proceedings for some groups of civil and criminal cases (73.3%).

The respondents also emphasized the need to reduce the length of

court proceedings in almost all cases, and the need to change the work and the structure of the Supreme Judicial Council.

At the same time, the views on whether or not **public prosecution and investigation should be moved out** of the Judiciary are split almost fifty-fifty.

Source: National Public Opinion Center with the National Assembly

The structure of the Judiciary usually kindles opposing opinions and evaluations: professionals on the one extreme of the scale believe that the status quo should be preserved at any rate, while those on the other extreme invoke reasons for various forms of restructuring some of which require serious constitutional amendments, moreover ones to be enacted by a Great National Assembly (according to Judgment of the Constitutional Court No. 3 of 10 April 2003 on constitutional case No. 22 of 2002).

Regardless of the understanding that structural changes cannot in themselves resolve all problems the Judiciary is faced with, and even less so the problem of corruption, the introduction or the failure to make such changes would largely predetermine the decisions to be made with respect to the management, functions and organizational principles of the Judiciary. A long-term anti-corruption program in the Judiciary should therefore take into consideration any discussed options for structural reforms, be those introduced sooner or later. The *Judicial Anti-Corruption Program* tackles the specific anti-corruption measures and proposals in the short run against the backdrop of the current structure and organization of the Judiciary, while the long-term proposals take account of the possible options for restructuring the Judiciary in future.

Expert opinions on the possible amendments to the Constitution with respect to the Judiciary

While 71.1 per cent of respondent lawyers back the need to amend the *Constitution*, nearly 40 per cent of them believe that the *Constitution* needs no amendments as far as the Judiciary is concerned. The reason advanced is that the „Judiciary is not obstructed by the *Constitution* but by the alleged poor performance and corruption of some magistrates."

Source: National Public Opinion Center with the National Assembly

In the short run, if the current structure of the judicial branch intact, the measures proposed below - constitutional, legislative and organizational - should be undertaken to address the management of the Judiciary, the capacity building and reinforcement of its branches (court, public prosecution and investigation), their major functions and organizational principles. Steps should also be made to decentralize the system of public prosecution.

In the longer run, two alternative options of amending the Constitution with regard to the Judiciary are also put forward for discussion (as mentioned, the judgment of the Constitutional Court referred to earlier has clarified that such steps could only be made by a Great National Assembly).

2. Proposed reforms

2.1. Organizational principles underlying the operation of the Judiciary

The efficient fight against corruption in the Judiciary requires that the fundamental organizational principles on which the system is based and operates be specified in the Constitution and in the legislation in force, *viz*. **independence** of the Judiciary, **immunity** and **irremovability** of magistrates, fixed **terms of office** and rotation of magistrates in managerial positions. It should not be forgotten that **any re-examination of those organizational principles is largely conditional on the option to be chosen for the restructuring of the Judiciary, in general, and on the measures aimed at decentralizing public prosecution, in particular**. It should be borne in mind, however, that if some of those principles (immunity, independence) were changed ahead of all other major reforms, that would entail new risks and nourish the attempts for unlawful pressure, thus provoking instability.

- The constitutional principle of **independence** of the Judiciary should be maintained. It should not, however, be an end in itself or amount to irresponsibility but should be the precondition for the fully-fledged fulfilment of the tasks of the Judiciary, *viz*. to ensure lawfulness and fairness, to defend the laws and protect the rights. In other words, lucid mechanisms of mutual control (checks and balances) of the three powers should be introduced. The lack of such mechanisms in the existing model, including its constitutional framework, is one of the reasons why independence is sometimes perceived as unapproachability. Therefore, the purpose of the proposed options for changes in the management and structure of the Judiciary, public prosecution and the investigation, for making their powers more specific and redefining their fundamental organizational principles is to prevent the threats of concentrating too much power in the same hands and of abuse, while establishing a balance of powers that would not affect the essence of the principle of independence.

- The proposed reforms look at the principle of independence of the Judiciary in the context of the overarching **principle of separation of powers** and the ensuing relationships among those powers. Motivation along these lines may be found in Judgment No. 1 of the Constitutional Court of 14 January 1999. The judgment draws attention to the „required link between the Legislature and the Executive", while emphasizing that „the separation of powers does not imply that those powers should not interact or function consistently with each other. On the contrary, the three powers are bound by relations of mutual control and deterrence embedded in the *Constitution*." In that context, it is suggested to consider amending the *Constitution* so as to introduce a requirement that **the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General be elected by the National Assembly** for a term of office exceeding four years. Likewise, the National Assembly should have the power to remove those individuals earlier from office and to decide on lifting their immunity, though solely on conditions and under a procedure strictly defined in the *Constitution*. A logical follow-up to that idea would be to provide a possibility for the Presidents of the Supreme Court of Cassation and of the Supreme Administrative Court,

and for the Prosecutor General to answer questions raised by MPs, in cases strictly defined by the legislation and under a well-established procedure. This way, the National Assembly could play a vital part in ensuring the checks and balances among the three powers, without interfering with the independence of the Judiciary.

- An issue that is especially important for the independence of the Judiciary in the context of the separation of powers is the one about the **status and structure of public prosecution**. Moreover, magistrates cherish quite opposing views on whether or not the existing unified and centralized structure of public prosecution is beneficial to the growth of corruption - many of them (judges and investigators) would answer that question in the affirmative, while prosecutors find themselves on the other pole.

IMPACT OF THE EXISTING UNIFIED AND CENTRALIZED STRUCTURE OF PUBLIC PROSECUTION ON THE GROWTH OF CORRUPTION WITHIN THE PROSECUTION, IN THE VIEW OF MAGISTRATES (PER CENT)

	%
Yes	20.5
Rather yes	24.7
Rather no	27.1
No	20.3
Does not know/No response	7.5

Source: CMS of *Coalition 2000*

IMPACT OF THE EXISTING UNIFIED AND CENTRALIZED STRUCTURE OF PUBLIC PROSECUTION ON THE GROWTH OF CORRUPTION WITHIN THE PROSECUTION, BY CATEGORY OF MAGISTRATES (PER CENT)

	Yes	Rather yes	Rather no	No	Does not know / No response
Judge	26.3	29.1	27.4	8.4	8.9
Prosecutor	5.6	10.3	30.2	50.0	4.0
Investigator	26.2	31.5	24.2	9.4	8.7

Source: CMS of *Coalition 2000*

In any case, however, carefully weighed measures aimed at a reasonable **decentralization of public prosecution** are needed and possible within the frame of the current constitutional model, and that could be achieved by amending and supplementing the organic law. The present centralized and hierarchical model of the prosecution system is not predetermined by the *Constitution* whose provisions would not be affected if the legislation in force limits the opportunities of the Prosecutor General and of superior prosecutors to interfere with the work of prosecutors at lower levels. Legislative amendments coupled with organizational and structural changes can and must result in:

providing guarantees for the independence of prosecutors of any superior prosecutor or of the administrative head of the respective prosecution office when deciding on specific files and cases (*e.g.* written instructions, a recognized right to object against the instructions by superior prosecutors or to step out of the case in the event of disagreement, etc.);

refining the grounds for disciplining individual prosecutors for their deci-

sions on specific files and cases; „attaching" the prosecution offices to the corresponding courts; introducing terms of office, not exceeding three years, for the administrative heads of prosecution offices. The need for comprehensive measures is prompted by the fact that some of the proposed guarantees exist in the legislation even now but are not always implemented. For example, the mandatory written form of instructions and the possibility to object against such instructions are not sufficient an obstacle to the unlawful practice of issuing instructions orally. That practice exists primarily because of the powers of the Prosecutor General and of the heads of the respective prosecution offices to make proposals for the appointment, removal from office, relocation, demotion or promotion of individual prosecutors.

A much-needed corrective to be introduced through constitutional amendments is the position of **public officials who should be endowed with prosecutorial functions by the law** (similar to independent counsel in the US). Such officials should be elected by the National Assembly to fulfil certain functions (*e.g.* **to investigate inside corruption in the Judiciary**) or *ad hoc*, and they should enjoy the immunity of magistrates. Their powers should relate to investigation, bringing and maintaining indictments in cases strictly listed in the *Constitution*.

As long as the Prosecutor General is currently not bound to report to anyone, and his accountability, including that to the National Assembly, solely depends on his willingness, it is compelling to insert in the *Constitution* the principle of **regular and *ad hoc* reporting by the Prosecutor General to the Supreme Judicial Council (SJC)** and to enable a reasonably defined number of members of SJC to seek lifting his immunity in exhaustively enumerated circumstances.

- As regards **immunity**, the constitutional solution should be based on a general review of the immunity provided to a wider spectrum of individuals (Members of Parliament, members of the Constitutional Court, individuals in senior positions in the Executive). In addition, the limitation of the immunity of magistrates by transforming it into a **functional immunity** (*i.e.* for acts undertaken in their official capacity, as opposed to their private endeavors and steps outside the context of their direct activities) should not be isolated from the rest of the reforms. Unless there are thorough guarantees and well-thought procedures and mechanisms, any hasty decision could entail the opposite effects, *e.g.* unreasonable persecution, pressure, defamation, obstructing the fulfilment of the functions of justice and investigation. Therefore, it is worth analyzing the opinion of magistrates the majority of whom (49.3 per cent) do not believe that the move to a functional immunity would reduce corruption in the Judiciary, compared to 37.2 per cent supporting the idea and 13.4 per cent without an opinion on the matter[3].

The future constitutional solution possibly extending the number of persons able to make a reasoned request for **lifting the immunity** of magistrates should provide for a reasonably determined number of

[3] Source: CMS of *Coalition 2000*.

members of SJC able to seek that, and should be linked to the possible introduction of a **public official empowered by the law to perform prosecutorial functions** or to a team of such officials outside the hierarchical system of public prosecution in its present form. This would make it possible to overcome not only the monopoly of the Prosecutor General to initiate the lifting of immunity but also his monopoly over the prosecutorial function and over the subsequent monitoring of investigation. In implementation of the constitutional principle that all are equal before the law, the *Constitution* should also tackle the immunity of the Prosecutor General so as to do away with the perception that he is unapproachable.

The introduction of a higher quorum for the lifting of immunity should be given careful consideration.

- It is indispensable to adjust the principle of absolute **irremovability**. The *Constitution* should lay down the general parameters, the content of and the correctives to irremovability, and these should be further specified by the legislation by defining clear criteria and rules, together with the specific conditions for obtaining or losing the status of irremovability. It is proposed that irremovability should only benefit magistrates who efficiently work in the authorities of the Judiciary (*i.e.* it should not apply at times where those individuals occupy elected positions such as Members of Parliament, mayors, or where they are on leave). Likewise, the time period that has to lapse before a magistrate becomes eligible for irremovability should be longer, the eligibility requirements should become stricter, and there should be a higher quorum for depriving a magistrate from that status. The principle should be expressly proclaimed that irremovability does not imply irremovability from the managerial position occupied.

- A constitutional principle of **terms of office** should be introduced for the presidents of courts and for the heads of prosecution offices and of investigation services, similar to the principle of terms of office for the presidents of the two supreme courts and the Prosecutor General. It is suggested that those terms should not be in excess of four or five years. Regular alternation of the managerial approach would bar the possible „degradation „ of the mentality of termless leaders and the rooting of corrupt practices. It would also influence positively the aspirations of a larger number of magistrates to occupy managerial positions. It is therefore worthwhile to consider the proposal to introduce a **special procedure for an earlier termination of office** which should develop on substantive grounds defined in the *Constitution*.

Restricting absolute irremovability and introducing terms of office

„The proposed amendments that are most welcomed concern the reduction of absolute irremovability for magistrates and the introduction of terms of office for magistrates in managerial positions. These proposals are designed as tools to combat corruption in the Judiciary and to prevent political appointments in the courts. The fact that over 80 per cent of the lawyers interviewed are supportive of such amendments is a recognition that such problems exist in the Judiciary and serious preventative

action is called for ... Also largely supported is the proposal to confine immunity solely to the actions magistrates undertake in court. This is also geared towards thwarting the sense of impunity among magistrates and Members of Parliament."

Sources: National Public Opinion Center with the National Assembly

- Special attention should be given to the hierarchical relationships inside the different systems - superior magistrates should control and monitor magistrates at lower levels only by way of providing methodological instructions and without any interference in the resolution of cases, let alone any unlawful pressure from top to bottom.

- The number of instances in court proceedings should be revisited as well and two-instance proceedings should be introduced for some or for all categories of criminal and civil cases. As the detailed rules should be listed in the criminal and civil codes of procedure, the specific proposals are set out in Parts Two and Three of this Program.

2.2. Ensuring professional and corruption-free management of the Judiciary

To effectively combat corruption, the management of the Judiciary should be streamlined to the optimum extent. Likewise, the functions and the powers of the Supreme Judicial Council, being the body of the Judiciary in charge of recruiting magistrates and providing for the organization of the system, and of the Ministry of Justice (MoJ), as an executive authority, need to be distinguished between and redefined.

The Supreme Judicial Council is endowed with the key representative and advisory functions in the Judiciary and with extensive powers as to the administration of the judicial system. Its operation suffers serious deficiencies some of which are predetermined by the approach of the *Constitution* to the composition, duties and powers of SJC. Others, though, may be rectified even within the existing constitutional framework.

Those drawbacks are most generally attributed to the lack of transparency (even with respect to the structures of the Judiciary itself), the incidental nature of its work, the lack of clear procedures for some of its activities and the inadequate internal regulations, the insufficient administrative capacity, and the non-existing feedback from the bodies of the Judiciary.

Required measures for the institution-building of SJC

- developing its capacity to fulfil the duties inherently linked to the administration of the Judiciary: strategy, staffing policy, including selection, appointments, evaluation, acquiring and lifting the magistrates' irremovability, financial issues;
- putting in place a well-developed system of **rules and regulations** governing the operation and the administration of the Judiciary, including norms on the suppression of corruption;
- promoting the **openness and transparency** of SJC's work;
- detailing SJC's powers in the context of disciplinary cases against

magistrates, and ensuring the fully-fledged exercise of those powers;

- developing an information system for co-ordination and control;
- improving the internal rules on the proceedings of SJC, including decision-making procedures;
- establishing a dialogue and co-operation with the Executive and the Legislature, especially in view of addressing the problems of the Judiciary;
- bringing the status and the formation of SJC in line with any possible adjustments to or future changes in the structure of the Judiciary.

The possible changes in the **status of SJC, its powers and formation** (number of members, election and term of office, eligibility criteria) must be effected through the *Constitution* and should be carefully considered and connected with the possible future changes in the structure of the Judiciary. Along these lines, it is worth noting and examining further the following suggestions:

DOES MORE EFFICIENT SUPPRESSION OF CORRUPTION IN THE AUTHORITIES OF THE JUDICIARY NECESSITATE REFORMS IN THE SUPREME JUDICIAL COUNCIL?

	%
Yes	61.2
No	30.2
Does not know / No response	8.6

Source: CMS of *Coalition 2000*

WHAT ARE THE REFORMS NEEDED IN THE SUPREME JUDICIAL COUNCIL?

	Yes
Change in the manner of forming SJC	60.8
Promoting wider transparency and openness in the work of SJC	54.0
Extending SJC's powers / enhancing its capacity in disciplinary proceedings against magistrates	37.4
Strengthening SJC's administrative and managerial capacity	19.1
Building up a control and co-ordination information system	48.2
Other	4.3

Source: CMS of *Coalition 2000*

• **The possibility that SJC members be elected solely by the branches of the Judiciary** which nominate a member of the Judiciary as president. The president should be elected by the National Assembly and report to the Assembly regularly or *ad hoc*. That structure matches the proposal to have the President of the Supreme Court of Cassation, President of the Supreme Administrative Court and the Prosecutor General elected by the National Assembly. This would indeed deprive the Parliament from having a say in the composition of SJC but the Parliament would still have its role in operating the mutual checks and balances among the branches of power. Quite a few magis-

trates believe that, if the parliamentary quota is to persist, such elections should be by a qualified majority.

The prevailing number of magistrates recognize the need for reforms in SJC with a view to more efficiently combating corruption in the Judiciary (61.2 per cent). Some of the required changes that have been identified concern the way in which SJC is composed, including the abolition of the parliamentary quota, the promotion of wider transparency and openness in the work of SJC, the extension of its powers and capacity in disciplinary proceedings, the implementation of a system of control and co-ordination, etc.

- Transforming **the Supreme Judicial Council into a permanent body** with reduced membership in view of making its work more operational and efficient. The reasons in support of that proposal state that under the existing pattern (SJC meets once a week) much of the meeting time is used for staff matters rather than for discussing other, major problems faced by the system of justice. This, in the end of the day, affects the very process of selecting members of the Judiciary as there is no time to inquire into the nominations made and every proposal submitted by a president of a district court is in fact voted on *tel-quel*. The arguments against such a change emphasize that the best magistrates would not give up their work to become SJC members and to get stuck in its operation, that SJC members may risk to see their professional aptitude weakening, that the isolation of the Judiciary from the other two powers could be deepened and its administration could become more bureaucratic, etc.

It is beyond doubt, however that changes are needed in the status of SJC members who must be independent of their superiors and able to uphold fair and substantiated views in their work at SJC.

- The **supervisory powers** of SJC should also be developed so as to cover the essence of the work of the Judiciary. Special attention should be attached to the powers of SJC to make recommendations, including to the Supreme Court of Cassation to provide interpretation if that is needed to make court case-law consistent.

To co-ordinate the management of the Judiciary and to ensure its independence, it is particularly important to devise a mechanism whereby the Judiciary and the Executive would interact but remain clearly separate, based on the interaction and distinction between their administrative bodies. The powers of SJC should focus on the management and administration of the Judiciary. Any extension beyond that remit may well entail a duplication in the functions of SJC and the Ministry of Justice and finally make one of the two institutions redundant. At the same time, the reinforcement of the independence of the Judiciary necessitates a careful refinement of the functions of SJC and of the Inspectorate with MoJ, of the interaction between them. The managerial powers of the Executive, *i.e.* the Ministry of Justice, *vis-a-vis* the Judiciary, should be confined to providing the organization and equipment indispensable for its effective operation (*i.e.* MoJ should check the progress of cases, unjustified delays, unwarranted remittal of cases and the like, while fully refraining from any interference with the merits of the cases; contribute to the additional qualification of magistrates; manage and maintain the

buildings; provide the needed equipment and materials; provide for security staff and facilities, etc.).

2.3. Anti-corruption measures to promote the status of magistrates

Putting in place a **sustainable anti-corruption environment for the operation of the Judiciary** requires not only changes that would democratize its administration but also measures aimed at:

- enhancing the responsibility of individual magistrates;
- refining the access to the profession of magistrates;
- improving the qualification and enhancing public control;
- introducing elections and terms of office for managerial positions in the Judiciary;
- refining the powers of SJC;
- making the competitions for access to the profession of magistrates dependent on clear criteria that exclude any improper acts;
- providing rules on the professional qualification of magistrates;
- improving the procedure of disciplining magistrates, *inter alia* by introducing summary procedures for some cases.

Many of the magistrates interviewed are in favor of such changes.

MEASURES TO BE UNDERTAKEN TO CURB CORRUPTION WITHIN THE JUDICIARY

	Yes (%)
Increasing the salaries of magistrates/ court clerks	69.4
Introducing more stringent criteria for the selection of magistrates	68.7
Making changes in the structure of the Judiciary and providing wider opportunities for accountability, monitoring and disciplining	35.0
Introducing regular evaluations of professional performance and linking the career development of magistrates with the result of such evaluations	32.8
Introducing an efficient system to improve the professional qualification of magistrates	33.9
Encouraging magistrates to report to the public on any deficiencies in the work they have come across	25.1
Other	4.4
Does not know / No response	0.7

Source: CMS of *Coalition 2000*

As regards the competitions for becoming a member of the Judiciary and the evaluations of magistrates before they become irremovable or before their promotion in position or in rank, it is of the essence for SJC to organize and monitor the rigorous and transparent / corruption-free implementation of any new rules. Otherwise they would be pointless and only serve as a shell for the reform.

It is necessary to bring the **rules on professional ethics**, which have been or are to be adopted by the organizations of the legal professions and approved by SJC, more into line with the requirements for professionalism, with the

definition of offences and with the corresponding statutory mechanisms for monitoring and disciplining.

The laws should also determine the nature of the „employment" relationship in which a magistrate is involved, *i.e.* is it really employment or is it a civil service relationship. Rules should be provided to settle the disputes in this area which have arisen in recent years in practice, as well as in legal theory.

2.3.1. Selection and appointment criteria applicable to magistrates

The staffing policy in the Judiciary needs to be carefully revisited - both as regards the initial election of magistrates and as regards their promotion in the same position or hierarchically, while *inter alia* ensuring a more balanced representation of both genders within the community of magistrates. The current widespread practice of the presidents of the respective courts or prosecution offices to make a sole proposal (*i.e.* submit a single nomination) more often than not results in subjectivity, lobby pressures and other unlawful influences. Therefore:

- the **principle of competition** should be the only one when a magistrate is to take a position at a higher instance or to be moved to another job or another town. The first step was made with the first centralized competition for the appointment of junior judges held at the end of 2002 on grounds of the Interim Regulations issued by SJC. *Ordinance No. 1 laying down the conditions and the procedure for carrying out competitions for magistrates* adopted by SJC provides for that every applicant for a magistrate position should sit for a written and oral exam, and these requirements should be abided by consistently and objectively. To ensure maximum objectivity, transparency and stability in this area, the principle of competition and the guarantees for its observance should be envisaged in the law;

- applicants for the Judiciary should undergo a careful scrutiny for, *inter alia*, their mental fitness and character so that different forms of dependence or negative features could be barred (suggestibility, instability, etc.). The existence of any kinship or other connections or interests should also be taken into consideration, if that is likely to produce a conflict of interests or any privileges.

2.3.2. Mechanisms of control of the activities of magistrates. Evaluation

The efficient administration of justice depends to the highest extent on the competence and professionalism of magistrates but this does not imply that no control is possible of their work. The review of court acts by higher instances is not sufficient to achieve a lasting improvement of the system of justice and fails to contribute essentially to bettering the competence and the qualification of magistrates. It is therefore compelling to devise and start implementing mechanisms for reviewing the work of magistrates, other than the review of court judgments by higher instances.

- It is necessary to expand the rules on **evaluation** which were introduced by the 2002 amendments to the *Law on the Judiciary* by setting up a permanent body with SJC referred to as an Evaluation

Commission. That body should assess the work of magistrates regularly (every two years), upon the expiry of the term for obtaining guaranteed tenure and upon any nomination for promotion in rank or in salary or in position. The composition of that Commission (number of members, which professional groups they should belong to, etc.) and the mechanism for its formation that should guarantee its independence should be laid down in law in clear and stable terms[4].

Proposed evaluation procedure

The evaluation of a magistrate should be set in motion by an interview of the competent authority under s.30, Law on the Judiciary, with the magistrate being evaluated. Thereafter, the authority under s.30 would draft a written opinion where it shall describe the magistrate's work, provide an overall assessment of the interviewee, list the functions and activities that the magistrate can successfully perform, and determine, if necessary, the need for any additional training. The opinion should be accompanied by a written presentation by the magistrate in which he or she would describe the work performed, the types of cases he or she has been involved in, and any forms of training they have undergone.

After the magistrate becomes familiar with the assessment of his or her professional activity drawn up by the authority under s. 30, they may refer the matter, within a reasonable time limit to be set by SJC, to the Evaluation Commission if they disagree with the assessment made. Where the specific circumstances so dictate, the Commission would appoint an official review of the assessment. The Commission would also be empowered to appoint such a review wherever the circumstances of the case evoke a reasonable doubt that the evaluation was not objective or justified. The Commission shall serve the above documents, representing the evaluation, on the magistrate who would be able to appeal before SJC. SJC would then pass a decision upholding or modifying the evaluation.

The final evaluation of the Commission would be enclosed to the magistrate's personal file.

The work of any junior judge (prosecutor) should be evaluated under the general rules and a positive assessment should result in nominating the person in question for a regional (first-tier) judge or prosecutor.

An appropriate procedure should also be provided for the evaluation of investigators if the system of investigation is to remain part of the Judiciary.

- All decisions concerning the professional career of magistrates, including their evaluation, should be based on objective criteria listed in the *Law on the Judiciary. Recommendation No. R/94/12 of the Committee of Ministers to Member States of the Council of Europe on the Independence, Efficiency and Role of Judges of 13 October 1994* is along

4 Similar legislative approaches to the evaluation of magistrates' work, as a mechanism of public and professional scrutiny of the judicial system, exist in France, Italy and other European countries.

these lines. The *Law on the Judiciary* should include the following **indicators** that should be used as **evaluation criteria** in respect of magistrates:

- competence, which should cover elements such as the quality of work, the number of cases closed, and promptness;
- integrity;
- experience, based on the length of professional record and on qualification;
- willingness to improve one's professional knowledge and skills by way of additional specialized training.

2.4. Internal anti-corruption monitoring mechanisms within the bodies of the Judiciary and at other institutions linked to the operation of the Judiciary. Introducing an efficient system of reporting

The importance of in-house anti-corruption monitoring mechanisms in the Judiciary cannot be questioned. This is also true for the institutions whose operation is linked to the work of courts, investigation services and prosecution offices, *e.g.* the Bar and the Ministry of Interior, as corrupt practices there could „export" corruption to the Judiciary or fuel „chain" corruption that is hard to detect.

It is noteworthy that magistrates identify „the lack of an efficient internal monitoring and sanctions machinery" as the fourth most important factor benefiting the spread of corruption in the Judiciary.

FACTORS BENEFITING THE SPREAD OF CORRUPTION IN THE JUDICIARY (PER CENT)

Low salaries of magistrates / court clerks	55.3
Moral crisis during the period of transition	43.2
Imperfect legislation	36.1
Lack of efficient internal monitoring and sanctions mechanism	35.7
Interweaving between the official duties of magistrates and their private interests	31.1
Aspiration toward quick enrichment	25.1
Political connections and dependence of magistrates / court clerks	16.1
Sense of unapproachability / immunity	15.0
Other	*2.6*
Does not know / No response	*4.2*

Source: CMS of *Coalition 2000*

The majority of magistrates believe that setting up **specialized units** within the Supreme Prosecution Office of Cassation, in courts, in the investigation and in the Ministry of Interior to inquire into reported inside corruption, and the promotion of such units would help reduce corruption in the Judiciary.

To curb inside corruption in the Judiciary and to resist the diverse forms of „chain" corruption, the following measures are recommended:

- Putting **specialized units** in place within SJC, the courts, with the

CORRUPTION-REDUCING POTENTIAL OF SOME MEASURES IN THE JUDICIARY (PER CENT)

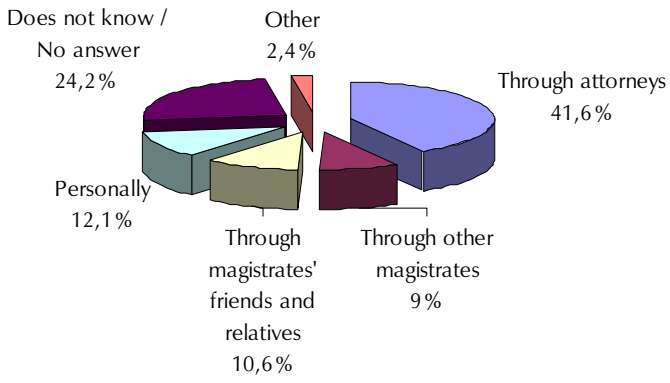
	Yes	No	*Does not know/ No response*
Setting up a specialized unit within the structure of the Supreme Prosecution Office of Cassation to inquire into alleged instances of corruption	49.6	39.6	10.8
Setting up similar units to inquire into alleged instances of corruption in the courts	48.7	41.0	10.4
Setting up similar units to inquire into alleged instances of corruption in the investigation	46.0	42.7	11.2
Setting up similar units to inquire into alleged instances of corruption in the bodies of MoI	48.0	40.5	11.5

Source: CMS of *Coalition 2000*

leaderships of the public prosecution and of the investigation in charge of preventing and combating corruption in the Judicia0ry. There should be an obligation to gather **statistics for corruption-related offences committed by magistrates**.

• Introducing **an efficient system of regular reporting** aimed at enhancing the work of the authorities and units of the Judiciary and of any other institutions whose day-to-day work is connected with the functioning of the Judiciary. It is also intended to promote transparency, due account being taken of the specificity of every sphere of activity. Regular reporting (monthly, quarterly) to SJC through the leaderships of court, prosecutorial and investigative authorities should rely on trustworthy statistics gathered by those authorities and by MoI, on uniform criteria and on a unified information system. After the reporting mechanisms and procedures have been regulated by law, secondary legislation should provide for the mandatory indicators to be used in gathering and maintaining statistics, and set out the procedure for their systematizing and centralization.

METHODS USED BY INTERESTED PARTIES TO IMPLEMENT CORRUPT PRACTICES



Source: CMS of *Coalition 2000*

• In addition to the decisive legislative amendments to be made (introducing stricter criteria for access to the profession of attorney, expanding the scope of statutory duties of every attorney who should comply with **a number of ethical rules in order to uphold the trust and respect necessary for the profession to exist**, refining the disciplinary proceedings for failure to fulfil the statutory duties and the ethics

code), specific guarantees would be necessary for the observance of professional ethics and discipline on behalf of attorneys, **and that obligation of attorneys should even be proclaimed in the Constitution**. The debate on the anti-corruption dimensions of judicial reform has revealed the ever more prevailing opinion that some members of the Bar at times facilitate the spread of corrupt practices in the judicial system and in the public administration by acting as **intermediaries** or by deriving unlawful benefits under the pretext of pretended corrupt intermediation.

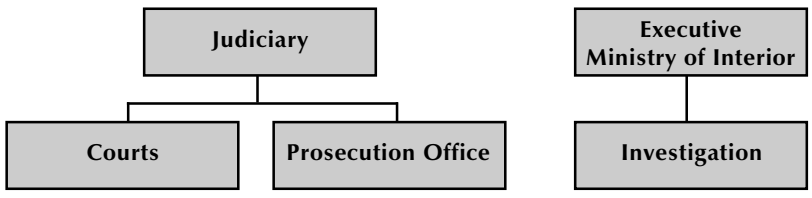
The seriousness of that problem in that particular case derives not only from the unlawful and morally reproachful conduct of such attorneys but especially from its consequences which contribute to a real growth of corruption among magistrates and civil servants - the fundamental symbols of statehood and of the public opinion of statehood. To counter those adverse trends, the bodies of the Bar should apply stricter controls.

- It is also high time to regulate the status of in-house lawyers working at government agencies or at private legal entities. It would suffice to have a general Constitutional provision similar to that on members of the Bar, taking account of the proposed amendments, and the detailed rules should be contained in a special law.

2.5. Suggested options for restructuring the Judiciary

It would be a self-evident possibility to endeavor to suppress corruption in the Judiciary, while preserving the current structure of the third power with some adjustments. In addition, two alternative options are suggested for discussion that entail essential structural changes. Should any of those alternatives, or some of their elements, be approved, the fundamental organizational principles of the Judiciary should be fully preserved with respect to those bodies that will remain part thereof, and should be accordingly modified with respect to the bodies that will move to the Executive. In the event of any structural changes, the functions of managing and administering the Judiciary should be clearly set apart from any other function.

First option



- Judiciary (court and prosecution)

The Constitutional model of the Judiciary should comprise the authorities that administer justice, *i.e.* the courts, plus the prosecution offices. With respect to judges and prosecutors, the principles of independence, functional immunity, and irremovability should apply, though under stricter conditions and criteria than before. While in that case public prosecution will form part of the Judiciary, it is mandatory to implement the **principle of regular reporting and *ad hoc* reporting by the**

Prosecutor General to SJC, and a reasonably determined number of SJC members should be given the right to seek to lift the immunity of the Prosecutor General under circumstances listed exhaustively.

In addition, in the context of the proposals to decentralize the system of public prosecution and to introduce the position of public officials entrusted by law with prosecutorial functions (with respect to instances of inside corruption in the Judiciary or *ad hoc*) outside the system of the Supreme Prosecution Office of Cassation, the Supreme Administrative Prosecution Office, the appellate, district and regional prosecution offices, it is suggested to discuss whether prosecutors from the system of public prosecution could work in the specialized authorities carrying out investigation at the Ministry of Interior or outside MoI (*e.g.* National Service for Combating Organized Crime, Financial Intelligence Agency, customs authorities, etc.). This matter should be governed in more detail by relevant acts of Parliament.

- Investigation

Under this option, the National Investigation Service (NIS) should be preserved but should move to the Ministry of Interior and have the status of a specialized service there. The head of NIS should be appointed by the Minister of Interior for a term of office exceeding that of the Government. In particular, it is suggested that investigators should exercise their functions in the structure of NIS either directly or at the corresponding district services of MoI / at the specialized structures in charge of some investigations outside the system of MoI (*e.g.* National Service for Combating Organized Crime, Financial Intelligence Agency, customs authorities, etc.), under conditions laid down by the leadership of NIS (a collective governing body composed of the head of NIS, a Deputy Minister of MoI and three investigators elected by the community of investigators in the country). All investigators should be directly subordinate to the leadership of NIS. As to the day-to-day work of investigators, their independence of the structures of MoI or of any other authorities to which they are attached should be guaranteed, as should be their lead role in the investigation conducted by such authorities.

The idea behind the change proposed above is to ensure the required immediate link between the police authorities which detect crime, and the investigative authorities - a link that is sadly missing from the current framework. The organizational link between police and investigative authorities within the same institutional mechanism would enable the formation of joint teams of investigation and benefit interaction throughout the process of investigation. The police would thus be responsible for the final result (a successful completion of the investigation), whereas the investigative authorities as a major unit of MoI would be involved more actively in the fight against and the prevention of crime, and would provide immediate assistance to police inspectors with their knowledge and experience.

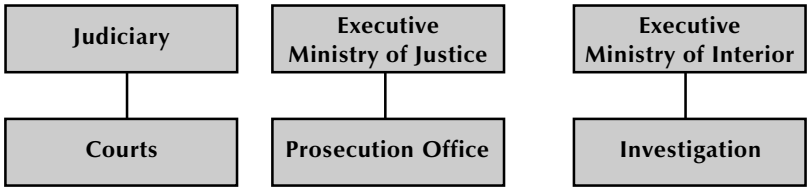
The division of competencies and the relations between investigators and prosecutors, including the powers of the public prosecution *vis-a-vis* the investigation, should also be carefully re-examined and specifically regulated by the procedural rules.

In future, one may think about abolishing the investigation and fully entrusting the operational activities to the police. In that scenario some

police officers could be assigned with carrying out the urgent investigative steps that would produce fit evidence.

This having been said, any change in the investigative function and in the underlying structure should be undertaken in the context of a well-thought reform in criminal proceedings, while taking due account of the need to strictly distinguish between and regulate the powers, the duties and the responsibilities of the authorities involved in that process, and to root the relations in which they engage in a sound and unambiguous legislative basis.

Second option



- Judiciary (the courts)

The Constitutional model of the Judiciary should only comprise those authorities that administer justice, *i.e.* the courts. The principles of independence, functional immunity, and irremovability would only apply to judges, subject to stricter requirements and criteria.

As regards the investigative and prosecutorial authorities, and the exercise of investigative and prosecutorial functions respectively, it is proposed that the legislation should introduce the following organizational and institutional changes (after the Constitution has been amended accordingly):

- Public prosecution

A **National Prosecution Office** should be set up within the Ministry of Justice[5]. Within the framework of that Office, a **Managing and Administrative Board,** or **a High Council for Prosecutors** should be created (more or less similar to the Supreme Judicial Council) to include the Prosecutor General as the head of the Prosecution Office, three prosecutors elected by the community of prosecutors and having terms of office equal to the term of office of the Prosecutor General, and the

5 Public prosecution in many countries forms part, in one way or another, of the structure of the Ministry of Justice. In **Austria**, prosecutors with first instance courts are subordinate to superior prosecutors who, along with the Prosecutor General with the Supreme Court, are subordinate to the Federal Ministry of Justice. Public Prosecution in **Belgium** has a dual nature as prosecutors represent at the same time the Judiciary and the Executive. The Prosecutor General with the Supreme Court of Cassation has a prosecutorial function only in cases that are resolved on the merits by that court. The Prosecutor General with the Supreme Court of Cassation is assisted by prosecutors. The prosecutors general with the courts of appeal, who are also assisted by prosecutors of various ranks, support the indictment in all cases before the different courts coming within the territorial jurisdiction of the respective court of appeal. The prosecutors-general of all courts of appeal form a board which is subordinate to the Minister of Justice. Public prosecution in **Denmark** is subordinate to the Ministry of Justice. Public Prosecution in **the Netherlands** has three levels: with the Supreme Court, with the courts of appeal and with the district and regional courts. All prosecutors, save for those with the Supreme Court, are subordinate to the Minister of Justice. Public prosecutors in **Spain** are managed by a Prosecutor General's Office which is outside the Judiciary, and the Prosecutor General is elected by the Government. Public prosecution in **Poland** forms part of the structure of the Ministry of Justice and the Minister of Justice acts as a Prosecutor General. In the **Czech Republic**, prosecutors are appointed by the Minister of Justice, whereas the Prosecutor General is appointed by the Government on a proposal from the Minister of Justice. The experience of **Hungary** deviates somewhat from that trend as the Prosecutor General is elected by the Parliament on a proposal from the President of Hungary and reports to the Parliament.

Minister of Justice (by operation of law). To avoid the threat of the Executive taking the lead with respect to the Prosecution Office and its governing body, the Prosecutor General should be nominated by the Minister of Justice but elected by the National Assembly for a specific term of office (longer than 4 years), and the National Assembly again should have the power to remove him from office under conditions strictly provided for in the Constitution.

The Prosecutor General should report to the National Assembly regularly (annually) and *ad hoc*. That structure, where the public prosecution would be a separate institution with the Legislature or in the Executive but the Prosecutor General would be elected by and accountable to the Legislature, is expected to result in a more balanced separation of powers and in a refined mechanism of checks and balances.

The new Office should comprise all prosecution offices existing at present plus the prosecutors working in the specialized authorities in charge of investigations inside or outside the Ministry of Interior (*e.g.* National Service for Combating Organized Crime, Financial Intelligence Agency, customs authorities, etc.) if this proposal is implented.

The Managing and Administrative Board/High Council for Prosecutors should handle the staffing of, and provide methodological guidance to, the prosecution offices and the prosecutors or public officials with prosecutorial functions working outside the Prosecution Service. Public prosecutors should be independent, enjoy functional immunity and obey only the laws when performing their basic functions. That would be necessary to avoid any risk of interference by the Ministry of Interior or by any other authority where prosecutors fulfil their duties.

- Investigation

In that respect, the proposal is the same as in the first option, *i.e.* the investigation should be moved to the system of MoI.

2.6. Constitutional regulation of out-of-court mechanisms concerning the rights of citizens and the better functioning of the Judiciary

2.6.1. The institution of the Ombudsman

In a number of countries, the institution of the ombudsman has proven its potential and role in resisting corruption and preventing the violations of human rights by using out-of-court tools, thus *inter alia* substantially relieving the courts from some of their workload (especially from administrative cases). Practice has shown that in order for such an institution to be more effective and to enjoy independence and efficient powers, it should better be provided for in the Constitution of the country. That way, the ombudsman could be elected by a qualified majority and be endowed with the right to legislative initiative and to make references to the Constitutional Court. All these objectives could not be attained by way of ordinary legislation.

2.6.2. Individual constitutional complaints and proposed changes in the formation of the Constitutional Court

Another issue deserving of discussion is whether individual citizens should be given the right to lodge complaints with the Constitutional Court. It is not really necessary to replicate the successful foreign examples, *e.g.* those of Germany or Spain. In the circumstances, in Bulgaria it might be more appropriate to enable individuals to refer grievances indirectly, *e.g.* via an authority entitled to seize the Constitutional Court. Given the expected introduction of the institution of an ombudsman in the Constitution, with the powers described above, it may prove suitable for the ombudsman to act as a *sui generis* intermediary between the citizens and the Constitutional Court in cases where the intervention of the ombudsman has not yielded results or if it is clear from the outset that the Constitutional Court should be involved. As the ombudsman would specialize in protecting fundamental rights, he or she would be the most appropriate shield against the unwarranted flooding of the Constitutional Court with a vast number of complaints.

In order to further promote the role of the Constitutional Court as a guardian of the constitutional consensus and a guarantor for compliance with the *Constitution*, it is proposed to consider a possible change in the formation of that authority: the current quota-based principle should be replaced with the principle that the members of the Constitutional Court should be elected solely by the National Assembly by the same qualified majority which is required to pass the *Constitution* (the involvement of the Judiciary and of the President would be preserved as they would be able to nominate some members of the Constitutional Court). A solution along these lines would help boost the independence of the Constitutional Court and would serve as a guarantee against the possible politicization of its work.

2.6.3. Methods of alternative dispute resolution (ADR)

The excessive workload of the courts often results in delaying the pronouncement or compromising the quality of justice, and in resorting to corrupt techniques to speed up the procedure. Regretfully, alternative dispute resolution is not widely used yet. In countries with established democratic traditions and well functioning systems of justice, some 40 to 60 per cent of the disputes are settled by way of ADR. In those countries, ADR methods have not only become part and parcel of administrative justice but are also widely used in civil, criminal and labor cases.

Most magistrates in Bulgaria believe that the use of alternative dispute resolution would help reduce corruption in the Judiciary.

CORRUPTION-REDUCING POTENTIAL OF SOME MEASURES IN THE JUDICIARY (PER CENT)

	Yes	No	Does not know/ No response
Use of methods of alternative dispute resolution	52.2	33.3	14.5

Source: CMS of *Coalition 2000*

The courts should be freed from dealing with disputes that may be handled more speedily by arbitrators or through mediators. This philosophy un-

derlies the measures to promote the peaceful out-of-court resolution of disputes prior to or in the course of court proceedings, listed in *Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe to Member States Concerning Measures to Prevent and Reduce the Excessive Workload in the Courts of 16 September 1986*. The Recommendation is based on the understanding that *to improve the administration of justice, it is necessary to limit the number of non-judicial tasks falling on the shoulders of judges, and also to reduce any workload of the courts*. An Annex to the recommendation provides an indicative list of non-judicial tasks from which judges could be relieved, depending on domestic peculiarities and features. These include a number of issues of family and commercial law and, *inter alia,* the keeping of commercial and land registers.

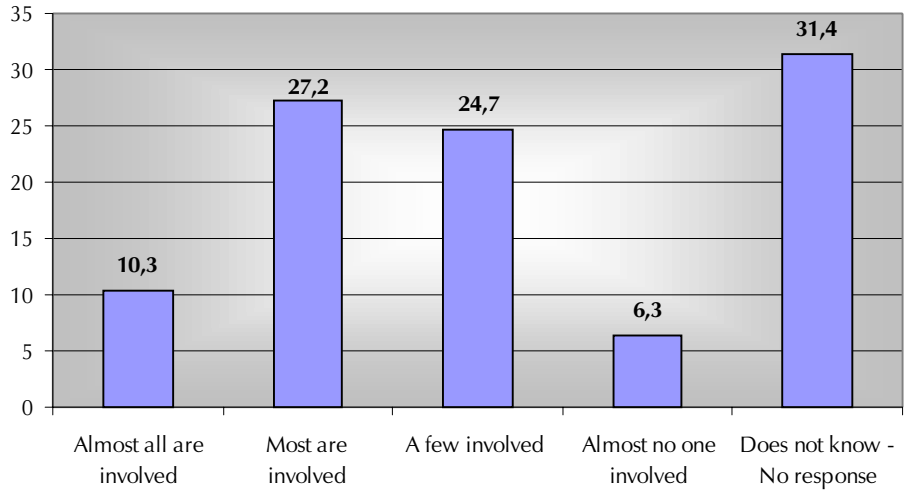
To promote the methods of out-of-court dispute resolution that are more easily accessible, efforts should be made to raise the public awareness thereof, and to include more detailed rules on them both in the legislation in force and **in the *Constitution***.

II. REFORM IN THE ADMINISTRATION OF JUDICIAL BODIES

1. General

Good organization of the work of magistrates, generally referred to as „administration of judicial bodies", is crucial for the successful suppression of corruption and for ensuring the efficient operation of the Judiciary. The concept covers the administration of the following bodies: Supreme Judicial Council, Supreme Court of Cassation, Supreme Administrative Court, Prosecutor General, Supreme Prosecution Office of Cassation, Supreme Administrative Prosecution Office, National Investigation Service, and all the courts, prosecution offices and investigation services. The term is used to denote the system of structures intended to support the work of magistrates and to stay in contact with citizens seeking the intervention of the Judiciary, as well as with other institutions that interact with the Judiciary.

PUBLIC OPINION ON THE SPREAD OF CORRUPTION AMONG COURT CLERKS (PER CENT, MAY 2003)



Source: CMS of *Coalition 2000*

The organization and the work of the administration of judicial bodies, hereinafter referred to as „court administration", are linked to the management of the Judiciary and to the mechanisms guaranteeing its independence and self-governance. On the one hand, the per-