JUDICIAL ANTI-CORRUPTION PROGRAM

CENTER FOR THE STUDY OF DEMOCRACY

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The present *Judicial Anti-Corruption Program* has been developed by eminent Bulgarian lawyers, including magistrates, and has resulted from the combined efforts of influential non-governmental organizations, representatives of state institutions, and experts.

In the course of the work the Program was presented to a number of state institutions, non-governmental organizations, professional associations, the media, experts and citizens so that they could provide their opinions, recommendations and proposals. A draft version of the document was discussed at a workshop attended by representatives of the stakeholders.

The presented *Judicial Anti-Corruption Program* draws on most of the remarks and proposals received and is aimed to prompt a further debate on the discussed issues.

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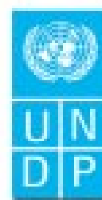

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INTRODUCTION

Judicial reform in Bulgaria started in the beginning of the nineties as part of the process of political, economic and social transformation in the context of transition to democracy. As it has very specific functions and a peculiar place within the system of State power, the Judiciary is believed to have a paramount role for the successful completion of that transition in general, for the promotion of the rule of law by ensuring institutional stability and protecting fundamental rights, and for the efficient suppression of corruption as a major problem of the transitional period that is still to be resolved. The progress in reforming judicial branch of power will largely predetermine the successful accession of Bulgaria to the European Union and the country's future membership. Therefore, the level attained in reforming the legal system and the system of the Judiciary are perpetually monitored and regularly assessed by numerous international organizations and institutions, as well as by domestic civic organizations and initiatives whose basic instruments and programmatic documents also contain proposals as to how judicial reforms should proceed further. From among those, the following could be singled out:

- the European Commission, via its annual Regular Reports;
- *Coalition 2000* (www.anticorruption.bg), the most influential anti-corruption initiative in Bulgaria, via its *Clean Future Anti-Corruption Action Plan* and its *Corruption Assessment Reports* (provided on an annual basis since 1999, in particular their sections on the legal, institutional and judicial reforms analyzed against the background of the status and dynamics of corruption), and via the corruption indexes which form the major product of the *Corruption Monitoring System* (the levels of those indicators are updated every quarter based on empirical data);
- *Judicial Reform Initiative* (www.csd.bg/jri) which brings together the efforts of eminent Bulgarian professional associations and non-governmental organizations involved with the problems of judicial reform, and representatives of government agencies, via its *Program for Judicial Reform in Bulgaria* drafted in 1999-2000 and its follow-up initiatives;
- The *EU Accession Monitoring Program* of the Open Society Institute, via its reports on the capacity of the Judiciary in accession countries (www.eumap.org);
- Central and Eurasian Law Initiative of the American Bar Association (www.abanet.org/ceeli) via the *Judicial Reform Index* which is based on the assessment of a set of factors and criteria;
- United Nations Development Program (UNDP), Bulgaria, via the

projects *Comprehensive Review of the Administrative and Commercial Justice Systems in Bulgaria* (1 June 2002 to 31 March 2003) and *Improving Juvenile Justice* (October 2002 - March 2004), implemented in partnership with the Ministry of Justice of Bulgaria (www.undp.bg/bg/projects/projects.php);

- Research by and the Country Assistance Strategy of the World Bank, especially with respect to legal and judicial reforms and the suppression of corruption (www.worldbank.bg).

Irrespective of some shadings, all those assessments and reports mirror the shared understanding that a number of important issues are still on the agenda of judicial reforms in Bulgaria, such as the need to achieve legal stability and confidence in the Judiciary, to provide conditions for a more efficient and transparent administration of justice, to put internal monitoring mechanisms in place to resist corruption and the misuse of powers within the Judiciary, to provide for guarantees against any possible politicization of the Judiciary.

The problems of corruption affect most painfully the perceptions of the Judiciary in the country and the assessment of its work. The key units of the Judiciary are called upon to investigate, and impose penalties for, corrupt crimes. Any failure to fulfil, or to fulfil on time, those functions therefore perturbs public confidence in the Judiciary. Even worse, the existence of corruption with the Judiciary brings harm to the society and to the State, and perverts the very nature of the Judiciary, while preventing it from carrying out the functions vested in it by the Constitution and by the laws, namely to protect the rights and the lawful interests of citizens, legal entities and the State.

In addition to the prevailing impunity of corruption that is widespread in all spheres of society, the instances of corruption inside the Judiciary are so much more demoralizing as they undermine the very ideas of justice, democracy and the rule of law. Simultaneously with the pressure of civil society in Bulgaria for serious measures for judicial reform to be undertaken, including *inter alia* an effective fight against corruption in the Judiciary, and given the numerous critical evaluations of the Bulgarian judicial system (*e.g.* the regular reports released by the European Commission and other forms and instruments of international monitoring), a growing number of magistrates come up with specific ideas and suggestions as to how the Judiciary should be reformed and how corruption should be resisted.

The *Judicial Anti-Corruption Program* has been developed by lead members of the legal professions in Bulgaria, including magistrates, and has emerged from the joint efforts of influential non-governmental organizations, representatives of Government agencies and experts to ensure the successful implementation of judicial reform in Bulgaria. The Program builds on the suggestions made in the *Program for Judicial Reform*, on a number of measures from the *Government Strategy for Reform of the Judiciary in Bulgaria* and on the steps proposed within the framework of various civic anti-corruption initiatives and international instruments for monitoring and evaluation of judicial reform in Bulgaria, while focusing on the prevention and suppression of corruption inside the Judiciary. In the drafting process, the results have been taken into consideration of the public opinion polls on judicial reforms, on the amendments to the

Constitution and on corruption in the Judiciary, in particular the survey by the National Public Opinion Center with the National Assembly (July-August 2002), *Proposed Amendments to the Constitution of Bulgaria*[1], and the survey *Corruption and Anti-corruption: The stand of magistrates* (April - May 2003), conducted by the Vitosha Research Agency within the framework of the Corruption Monitoring System of *Coalition 2000*[2].

The *Judicial Anti-Corruption Program* **delineates the parameters for a comprehensive crackdown on the problems faced by the Judiciary and for a radical change inspired by a long-term objective**. The specific short-term measures and suggestions also form part of that broad context and are consistent with its fundamental goal, *i.e.* building up a working, stable, corruption-free Judiciary which is the most efficient tool to promote the rule of law and to rein in corruption in society.

It becomes increasingly important to address the problems in the Judiciary, including those that require the implementation of anti-corruption measures, on the basis of consensus among the political forces in Bulgaria, on the one hand, and between those political forces and the civil society, on the other hand, moreover with the active involvement of all bodies of the Judiciary. The *Declaration on the Guidelines to Reform the Bulgarian Judicial System* signed on 2 April 2003 by the political forces represented in Parliament could well serve as a point of departure in search of a genuine, broad consensus to achieve the stated objectives of judicial reform.

The present Program aims to support that process and to contribute to arriving at social and political consensus on the overarching guidelines and principles, as well as on the urgent measures and the long-term goals of judicial reforms.

[1] The survey was conducted within the framework of the fifth round of the research project *The Expert Opinion of Bulgarian Lawyers* and covers expert opinions from 120 Bulgarian professionals with a legal background (MPs, legal experts, judges, attorneys, in-house lawyers, prosecutors, investigators and university professors).

[2] The survey involved 454 magistrates from all over the country. The individual respondents were selected accidentally within three main groups, namely 179 judges, 126 prosecutors and 149 investigators.

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)

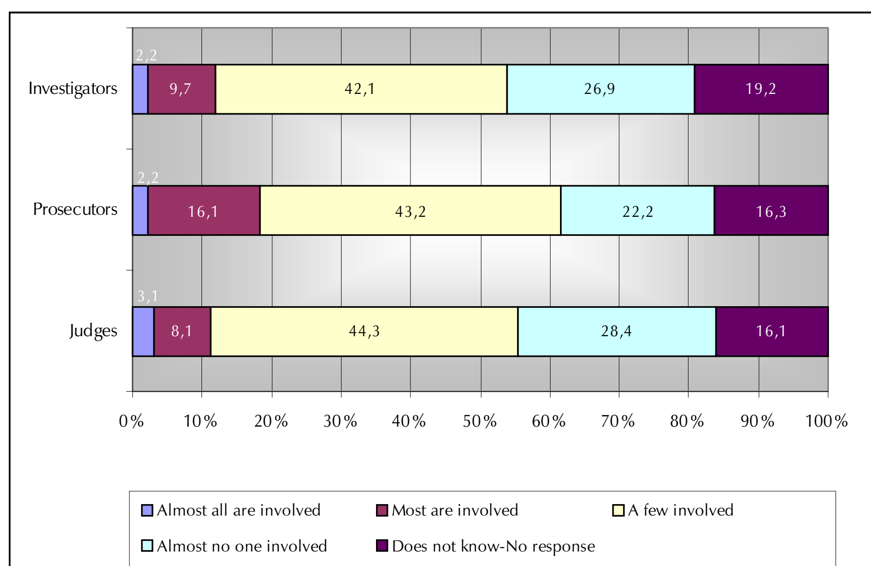
	Spread of corruption among: (relative share of responses „*Most or all magistrates are involved*")		
Magistrate	**Judges**	**Prosecutors**	**Investigators**
1. Judge	2.8	17.4	19.0
2. Prosecutor	11.9	7.9	10.3
3. Investigator	20.8	28.2	4.7

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)

Factor	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)

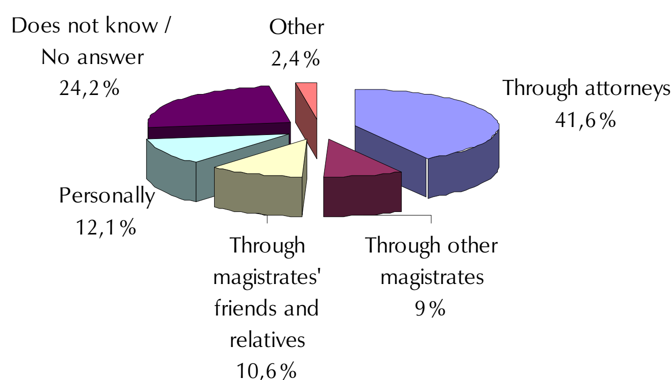
	Yes	No	*Does not know/ No response*
Setting up a specialized unit within the structure of the Supreme Prosecution Office of Cassation to inquire into alleged instances of corruption	49.6	39.6	10.8
Setting up similar units to inquire into alleged instances of corruption in the courts	48.7	41.0	10.4
Setting 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.

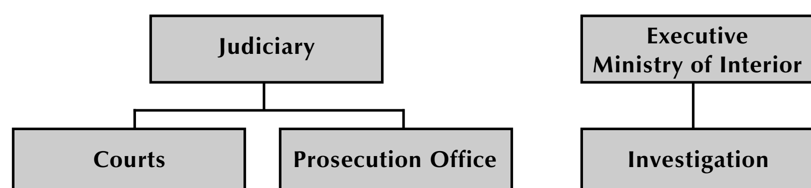
The seriousness of that problem in that particular case derives not only from the unlawful and morally reproachful conduct of such attorneys but especially from its consequences which contribute to a real growth of corruption among magistrates and civil servants - the fundamental symbols of statehood 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.

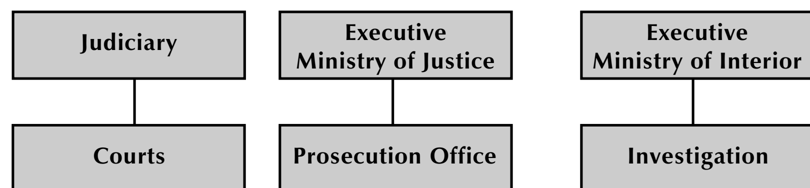
The division of competencies and the relations between investigators and prosecutors, including the powers of the public prosecution *vis-a-vis* the investigation, should also be carefully re-examined and specifically regulated by the procedural rules.

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.

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

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*

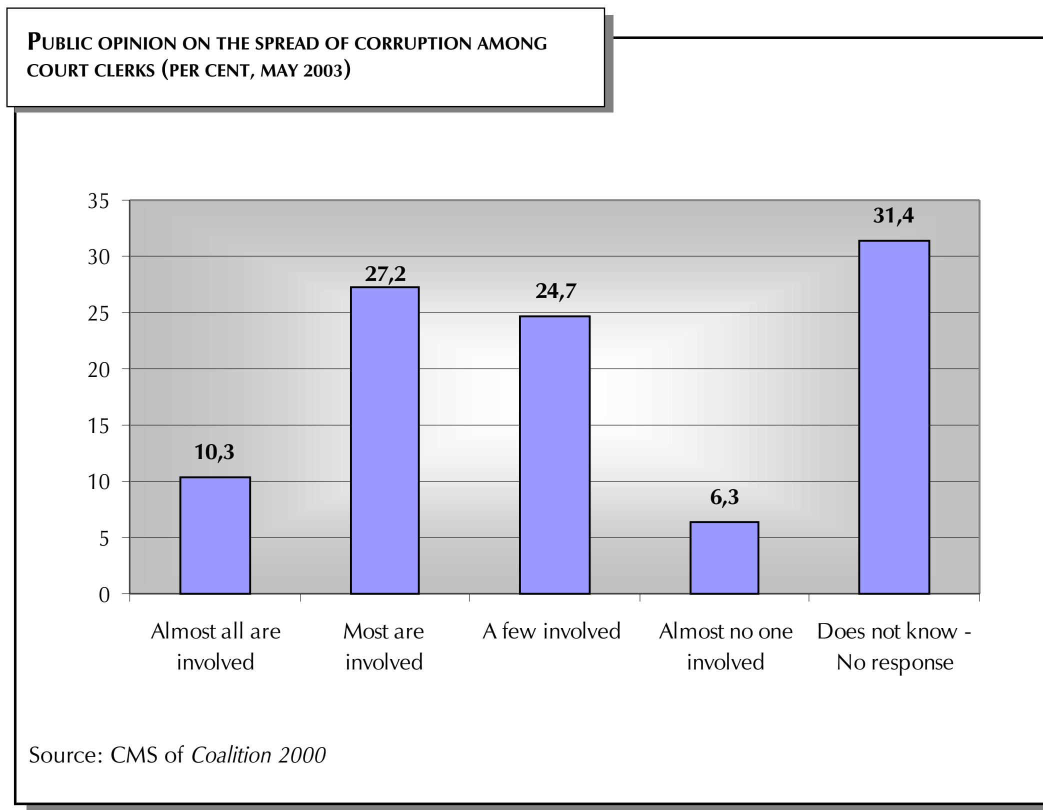
derlies the measures to promote the peaceful out-of-court resolution of disputes prior to or in the course of court proceedings, listed in *Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe to Member States Concerning Measures to Prevent and Reduce the Excessive Workload 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.



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-

sisting problems in the administration of the Judiciary and corruption in its branches largely precondition the shortcomings of court administration. On the other hand, the malfunction of court administration and the corrupt practices involving court clerks bear directly upon the quality of work of judicial bodies and affect adversely the public opinion about the judicial branch of power. There is a very impressive discrepancy between the opinions of the population and the views of magistrates when it comes to the spread of corruption among the employees working in the administration of judicial bodies whom the legislation refers to as „court clerks“.

Although growing attention has been attached in recent years to the need to reform court administration, the efforts made so far have materialized primarily in the drafting of strategic and programmatic documents. Even today, court administration remains founded on obsolete organizational principles, clerks operate in unsuitable, frequently primitive, conditions of work, no unified standards or practices exist, and the system is generally far from modern management technologies. There are no uniform and detailed rules of secondary legislation regulating the operation of administrations in the courts, prosecution offices or investigation services.

Spread of corruption among court clerks at the branch where respondent magistrates work

	%
Almost all court clerks are involved in corruption	0.2
Most court clerks are involved in corruption	2.2
A few court clerks are involved in corruption	18.7
Almost no court clerks are involved in corruption	32.4
No court clerks at all are involved in corruption	30.0
Does not know / no response	16.5

Source: CMS of *Coalition 2000*

Corruption-generating problems in the organization and operation of court administration

The current organization of work of court administration, the extremely poor setting in which the bodies of the Judiciary, and their administrations, operate, the scarce budget of the Judiciary and, hence, the low pay of court clerks, produce an environment conducive to corrupt acts. The latter, in turn, could result in delaying or obstructing investigation and court proceedings, including the investigation and prosecution of corruption offences. Irrespective of the prevailing opinion of magistrates about a low degree of corruption among court clerks in general, most magistrates are able to identify the specific objectives of corrupt acts, and only 7.7 per cent believe that no corruption exists in that group.

The following could be identified as major problems relating to the organization and work of court administration:

- **case management** procedures and **insufficient control** of document management within the branches of the Judiciary

Case management procedures (most generally those relative to the filing and receipt of papers with and from the court and the prosecution, access to information, the security of document circulation, the progress of court cases) are typically **opaque, awkward and subjective**. Under those conditions, myriad unpredictable local administrative practices emerge

CORRUPT PRACTICES (*E.G.* OFFERING BRIBES, TRAFFIC IN INFLUENCE, ETC.) ARE EXERTED ON COURT CLERKS FOR THE FOLLOWING PURPOSES:

Court clerks	Yes %
To carry out / to refrain from carrying out specific steps in processing court papers and documents	55.9
To knowingly violate the rules on serving summonses and other court papers	53.7
Other	3.1
No corrupt acts take place	7.7
Does not know / No response	16.5

Source: CMS of *Coalition 2000*

which frustrate even more the efficient administration of justice and sow the seeds of distrust of the Judiciary. Such practices eat up much of the time and efforts of judges, and of the insufficient number of court clerks most of whom are not well trained and lack motivation.

No clear rules exist on the access to documents and records in courts, investigation services and prosecution offices, on the issuance of documents and the delivery of copies by the court, on how the files should be accessed and used, or who should be held liable for the disappearance or destruction of individual documents or parts of files.

- **summonsing** procedures

The incorrect, inaccurate or late serving of writs of summons and the errors possibly contained therein can turn into major factors contributing to dawdling the cases and manipulating the process.

No remedy is available against the inaccurate serving of summonses - for example, a writ of summons may be served on and accepted by a neighbor to the party to a case; thereafter the neighbor in question might fail, for purely objective reasons, to deliver the writ to the party summoned; as a result that party would fail to appear in court and crucial time limits would lapse but the court would accept that the party was duly summoned.

- **assignment of cases** to individual judges and court chambers

The assignment of cases to individual judges or to different court chambers is not always well-founded, adequate and objective. Objective criteria, such as qualification, experience and workload, are not used often enough to decide on the assignment of cases and files. This paves, directly or indirectly, the way for corrupt practices. Not only citizens, but magistrates as well are typically convinced that if a specific outcome is sought for a case, that case would be assigned to specific chambers or judge-rapporteurs - for instance, the practice exists for the presidents of courts to assign cases involving well-known personalities or large companies to magistrates „trusted" by the respective president so that they would decide in line with the „instructions" received.

On the other hand, the assignment of cases is not always reasonable, justified or adequate in terms of the number of cases assigned or the complexity of the matter. Inappropriate assignment, however, may result in some judges being overworked while others are unduly relieved. More often than not, more work is assigned to those magistrates who work more, better and more expeditiously, rather than to those lawyers who have poorer qualification or are slower.

- imperfect **mechanisms of recruitment, career development and disciplining** of court clerks

No objective criteria or adequate procedures exist for the recruitment, special training and professional qualification of court clerks. In addition, court administration, which is a body of court clerks, is too much absorbed by its own problems and established practices. Court clerks tend to behave unfriendly to customers who are normally perceived as a nuisance.

As long as court clerks do not avail of any special status, they are subject to the rules of the *Labor Code*, including those on disciplinary sanctions and the mechanisms of disciplining. The inefficiency of those provisions greatly inhibits the disciplining of court clerks. Given that clerks are normally to be disciplined by the head of the body of the Judiciary where they work, and he or she is extremely busy, *inter alia* with a number of strange tasks, there is clearly no working mechanism that makes it possible to discipline court clerks. In that situation, those rule of the Code of Ethics of Court Clerks which provide that disciplinary sanctions should be imposed for any violation of the Code are not but a dead letter.

- **impeded access** to the work of the court administration

The practice is established that all contacts with court administrative services should be in person, by way of visiting the court building. Mailing is unsafe and entails substantial risks, especially where the papers sent by post involve compliance with statutory time limits. The working hours of the different administrations fail to match the needs of the visitors. No obligation exists to provide information by phone or on the Internet.

- the inefficient work of **company registration divisions** in courts

These are the most overloaded divisions in district courts and their inefficient work organization, which is due to the non-automated processing and use of information, offers a fertile ground for corrupt practices to flourish. The primitive conditions of keeping and maintaining company registers, the clumsy system of providing information from those registers, the lack of any linkage among the different company registration divisions, etc., obstruct the work of both judges and court clerks, and also of anyone who has to contact magistrates or court administration.

2. The objective of reforms. The need to build up a novel, modern structure and organization of work for the administration of judicial bodies on the basis of new principles

The reform of court administration is intended to put in place, via the corresponding legislative and organizational changes, an efficient mechanism of administration that should improve the work and reduce to a minimum the possibilities for corruption in this area. That could be achieved by building up a new, modern structure, organization and management of court administration based on new principles. For that purpose, it is necessary to devise **an entirely new concept for organizing the work of court administration and to provide it with the required legislative framework and technical equipment**.

First of all, serious discussions should be held with representatives of the Judiciary and of court clerks and, due account being taken of the problems court administration faces at present, the required specific changes in the operation of court clerks should be identified.

The main aspects and principles of reform could be depicted as follows:

- clear and unified rules whose application should bring in transparent and uniform practices;
- simplified procedures ensuring the necessary swiftness and integrity of relationships and curbing the possibilities of citizens, parties to the cases, other bodies of the Judiciary or other institutions with which the Judiciary interacts to impact on the outcome of proceedings by use of corrupt means;
- automating and providing the necessary technical equipment to ensure work with and the exchange of information, *inter alia* by introducing a Unified Case Number Classificator (*i.e.* affixing a code to each case that should facilitate the search for and the tracing of any instituted proceedings);
- exercising administrative supervision and empowering efficient civic control over the work of court administration.

3. Proposed reforms

3.1. Proposed improvements in the legal framework

In order to successfully modernize the operation of court administration and to fasten it to corruption-free pillars, the following amendments should be made to the legislative framework:

- the **fundamental general principles** of the operation of court administration should be refined, as should be the **status of court clerks**. This should happen by improving and elaborating on the provisions of Chapter Fifteen, *Law on the Judiciary*;
- on the basis of an agreed and unified conceptual and legislative framework, all **instruments of secondary legislation and the internal regulations on the work of court administration**, prescribed by s. 188 *Law on the Judiciary*, should be drafted; these should govern in detail and with precision the structure and the organization of court administration, the requirements thereto, the recruitment criteria, the specific rights and duties of court clerks, as well as the aspects of continuous training and professional improvement;
- requirements should be introduced, in line with the new conceptual and legislative framework, towards the **categories and number of court clerks** in all groups of judicial bodies, and detailed **job descriptions** should be prepared for them;
- the importance of **ethical rules** should be reiterated, and compliance therewith must be ensured through appropriate controls and sanctions;
- thorough rules should be introduced on **access to the information** handled by court clerks (who should be entitled to have access, parameters of official secrecy, procedures);
- a system of **random assignment of cases** should be introduced. Assignment could be based on the sequential number of a case or

made in an alphabetical order or follow another pattern established in advance (even by virtue of internal regulations);

- **time standards** should be introduced for the management of each category of cases;

- amendments should be made to the two procedural laws (*Code of Civil Procedure* and *Code of Criminal Procedure*) with respect to the **serving of court papers** (summonses or others);

Even a more radical change in civil procedure could be contemplated, namely **to require a preliminary exchange of papers between the parties**. This should be coupled with a pre-hearing conference to help sort out many of the issues relating to the development of the procedure and to its framework, in law and in fact, so as to speed up and improve the administration of justice in civil cases (see below for details, Civil Law and Procedure, 3.4.3). Another idea has also been advanced for a public debate, namely that **structures outside the court** might serve court papers under strictly negotiated contractual terms and conditions (a method that turned out to be successful in the United Kingdom and in France). The court would thus be relieved of the enormous technical work currently incumbent on it, while contractors would be motivated and interested in performing well and on time.

- the fulfilment of some tasks and their transfer to bodies outside the courts should be given due consideration, *e.g.* the incorporation of legal entities. Should that happen, many judges and court clerks would be freed from piles of work that is purely technical (see below for details, Civil Law and Procedure, 3.2).

3.2. Organizational changes needed to further reform in the administration of judicial bodies

3.2.1. Financial resources, equipment and facilities for administrative work

- It is necessary to provide court administration with **sufficient funding, equipment and facilities**, within the budget of the entire Judiciary, in order to overcome the existing disparities in that respect between the Judiciary and the other branches of power, on the one hand, and among the separate branches and bodies inside the Judiciary, on the other hand. This should be furthered by an equitable allocation of resources among the branches of the Judiciary, while *inter alia* striking a fair balance between Sofia and the countryside, between central and local bodies.

- To modernize court administration, **more funds** should be earmarked in the budget of the Judiciary for the work of that administration in general, and for case management, in particular.

- **The conditions of work should be improved** through the optimum use and management of the Court Houses Fund which should be relied on to expand and improve the existing buildings of the Judiciary and the equipment at the work places of court clerks.

- **Competitions** should become the standard practice of appointing court clerks, as envisaged in s. 188a *Law on the Judiciary* and in the *Rules on the Organization of Court Administration, on the Functions of Services at Regional, District, Military and Appellate Courts, and on the Status of Court Clerks*.

- A mechanism should be devised for the **recruitment of new court staff** trained in specialized schools, while appointed clerks should be involved in **continuous training**.

- **New mechanisms of management and control** of court clerks should be elaborated.

3.2.2. Changing the work with and the provision of information. Automating administrative work

To ensure a speedier and more transparent processing and provision of information, so as to enhance the work of court administration and reduce to a minimum the chances for corrupt practices, the following measures should be implemented:

- transferring any case-related information and operations from paper to electronic medium and storing all cases in electronic form, provided that **all courts use the same software product**;

- **connecting the information systems** of the different courts into a common network and linking the latter to the information networks of other institutions to ensure the exchange and use of information, on the model of the Unified Information System for Combating Crime that must become operational as soon as possible;

- further to the above steps, introducing new **statistical report** forms on the work of courts, and providing those forms to the institutions concerned, *i.e.* the Supreme Judicial Council, the Ministry of Justice, etc.;

- introducing a new mechanism to search for and retrieve **case-related information** from the files by devoting several work stations solely to this activity that should be carried out through a software program; that would enable the other members of court staff to work at ease and concentrate on the cases themselves and on the orderly processing of court papers;

- court services should **provide, in electronic form, any public information** to outside agencies and institutions, as well as to private individuals (notaries, law firms, etc.), in return for a fee and under strict information security arrangements embedded in the software used.

3.2.3. Changing the structures of and the corresponding positions in the administration of judicial bodies

In order to upgrade court administration and ensure its smooth operation, the adoption of legal rules should be speeded up, as should be the

introduction of some new positions and the review of the functions associated with certain existing jobs:

- setting up **administrative services** with certain bodies of the Judiciary identified by law; those services will have to assist the respective bodies in their operation;

- introducing the position of **court administrators**, as required by the *Law on the Judiciary*, in the courts and in public prosecution offices. Those officials should plan, organize and manage court clerks, be in charge of managing the administrative operations of the court, implement programmatic decisions relative to long-term planning, budget policy, finance and automation, and ordering equipment supplies. For the fulfilment of those duties, court administrators should be provided *inter alia* with the right to organize tendering procedures and to enter into contracts for the upkeep and repair of court houses, purchase tangible assets for the respective court or prosecution office, after prior approval by its head official, organize contests and identify persons suitable to become court clerks, relocate already appointed clerks to other places, define the specific obligations of every court clerk at his or her workplace and monitor their performance, make proposals to discipline clerks, monitor court security arrangements and good order in the court house, etc.;

- promoting the role of **court police** who should maintain order and security in the court houses and assist with court execution and enforcement, the serving of court papers, the forcible bringing in of witnesses, etc. These functions are to be fulfilled now by the **specialized security unit** envisaged in s. 36e of the *Law on the Judiciary* but, due to poor funding, that unit would hardly be able to meet in the near future the expectations it faces;

- reconsidering the functions of and the requirements towards **court registration clerks**, depending on the features of the information system to be implemented. Those clerks should load and control any case-related information into the system and facilitate the exchange of and access to the information sought. Likewise, new types of court registers and new methods of keeping them should be devised, in line with the would-be automated system;

- introducing the position of **court statisticians** who are expected to improve substantially the quality and accuracy of the information provided and to free the court secretaries and registration clerks from functions that are inconsistent with their positions;

- improving the performance of **court secretaries** in recording and keeping the records of court hearings by way of software products.

The above steps, if undertaken, should considerably improve the work of various clerks and of the administration of judicial bodies as a whole, and would allow the heads of different bodies within the Judiciary to rid themselves of countless atypical functions they are bound to perform now. The clear distinction between the responsibilities of different officials would contribute to a speedier, more transparent and efficient ministration of justice.

III. EDUCATION, TRAINING AND CAREER DEVELOPMENT OF MAGISTRATES AND COURT CLERKS

The training and career development of magistrates should be an unquestioned priority of judicial reform. Even the most perfect legislation would be lifeless unless it is enforced by competent and uncorrupted individuals of impeccable integrity. Laws are binding on each and every citizen of a state but the bodies of the Judiciary have a key part to play once the laws are violated. Similarly crucial are the professional qualification and the integrity of court clerks, as is the responsibility they have in ensuring a high-quality performance of the whole judicial branch of power.

1. Education and training of magistrates

1.1. The status quo and the problems

The standards of efficient performance and high professionalism and integrity dictate not only that judges, prosecutors and investigators have law degrees: they must also undergo initial training, *i.e.* one provided before they have taken office, and on-the-job training, which should take place on a continuous basis throughout their professional lives.

As regards law degrees, ten law schools at different higher education institutions across the country now offer law degrees and issue diplomas whereby the qualification of a *lawyer* is recognized. A **unified state standard** for university law degrees has been introduced which is laid down in the *Ordinance on Unified State Requirements for Obtaining University Degree in Law and the Professional Qualification of Lawyer* (published, SG, issue 31 of 12 April 1996; amended, SG, issue 96 of 24 November 2000; issue 59 of 3 July 2001; issue 117 of 17 December 2002, in effect as of 17 December 2002). Although education at all those law schools has been formally brought into line with unified requirements, its results have not yet improved materially.

Law students are given training in all branches of law and no specialized practical training exists. The training of lawyer-apprentices is also far from being satisfactory. As regards practical training and the future choice of profession by law graduates, reliance is placed on the compulsory post-graduate apprenticeship. There is a virtually unanimous opinion, though, that the apprenticeship is formalistic, inefficient and fails to hit its expected targets, and even more so after it was substantially shortened some time ago. Tutor judges are overworked and unable to spare enough time for the practical training of lawyer-apprentices who are scattered unevenly across the district (second-tier) courts in the country. Apprentices, in turn, are not sufficiently interested in their practical training. The test they have to pass to prove their theoretical background and practical skills and to qualify to practice as lawyers is equally formalistic and futile. The amendments to the *Law on the Judiciary* made in 2002 and furthered by the amendments of July 2003 reduced the duration of compulsory apprenticeship from one year to three months and that could hardly better the knowledge or the skills of future magistrates.

The need to improve the training and to permit regular improvements of the qualification of magistrates was identified a long time ago and has been mentioned in a number of documents and papers, including the *Government Strategy for Reform of the Judiciary in Bulgaria*. Nonetheless, the

current situation is characterized by the following black spots:

- poor professional knowledge and practical skills;
- insufficient funding earmarked for training in the budgets of both the Ministry of Justice and the Judiciary;
- magistrates are overloaded, so they have lesser opportunities to engage in self-education or in organized training events;
- there is no system linking the training undergone with the right to career development, or the attained degree of qualification with professional promotion.

1.2. Proposed reforms

With respect to **higher education**: in order for law students to have the opportunity to choose a specific profession already at university, it is required:

- to use adequately all available optional and elective courses, as they allow for some specialization of education;
- to emphasize the link between theory and practice in the process of teaching, by involving eminent magistrates; seminars should not merely replicate the lectures but serve to give practical knowledge and skills to the students, *inter alia*, by way of moot court exercises, drafting warrants, indictments, verdicts, judgments in civil cases, rulings, etc.;
- to make the apprenticeship periods in the course of university studies more efficient and to improve the link between law schools and the institutions where apprentices are placed;
- to refine the form and the procedure of the final exam, which is the last stage of education;
- to develop a working system of post-graduate specialization, open to practicing magistrates, at the universities.

As regards the **practical training of apprentice-lawyers**, a change in the duration of apprenticeship would hardly be successful *per se*. Two options are suggested to resolve that problem. In the **first scenario**, apprenticeship should be given a completely new basis, especially in relation to future magistrates. In order to ensure a fully-fledged apprenticeship, it is advisable to make the following amendments to the legal rules that lay down the procedure and the conditions for becoming a qualified lawyer:

- the number of apprentice-lawyers at district courts should be limited and all apprentices should be seconded evenly throughout the country;
- a system should be introduced for paying tutor judges;
- the exam whereby graduates become qualified lawyers should be revised, while emphasizing on its practical aspects.

The **second scenario** is to abolish apprenticeship completely but enhance

instead the practical orientation of university studies so that graduates could become qualified to practice any legal profession already when they obtain their diplomas. It is proposed to introduce at the law schools **additional, practice-based, training** for future judges, prosecutors, investigators, notaries, bailiffs, real estate registration judges, and other professions, and the exam for obtaining qualification to practice should form part of the final exams. It is conceivable to introduce additional selection criteria (scores during the studies, specific exams passed, etc.) in order to provide for additional specialized training for future magistrates within the frame of the basic university curriculum. If legislative rules, criteria and guarantees are introduced to that effect, education obtained at law schools would be linked with the right of access to the profession and with the right to career development thereafter.

In order for the Judiciary to be able to fulfil their mandate to promote the rule of law and to successfully resist corruption, attention should be given to the need to **improve continuously the professional qualification** of judges, prosecutors and investigators working within the Judiciary, as the very dynamic changes in the legal framework entail myriad problems in terms of law enforcement and often result in discrepant case-law. It is necessary to extend the number of individuals who should undergo compulsory training at the future National Institute of Justice (NIJ)[6] by introducing **compulsory training upon every first appointment to the position of a president and/or vice president of a regional or district court, regional or district prosecutor or director of a district investigation service**, as well as on every reappointment from a lower to a higher court and whenever a magistrate changes the subject matter dealt with.

The following steps should be undertaken for that purpose:

- linking the future appointments of magistrates and their career development with the results of education and training;
- developing modern forms of continuous training (*e.g.* distance learning and other forms based on new information technology); these should cover *inter alia* the enforcement of newly-enacted provisions and, in the immediate future, European Community law;
- providing for an opportunity that specialized public benefit non-profit entities could also provide continuous training courses in future, with the approval of the Supreme Judicial Council.

[6] The amendments to the *Law on the Judiciary* of 2002 provided that a National Institute of Justice (NIJ) should be set up with the Ministry of Justice. As those amendments were declared anti-constitutional by the Constitutional Court (see Judgement of the Constitutional Court No. 13 of 16 December 2002), the law was amended again in July 2003 and now provides that the future Institute should be set up with the Supreme Judicial Council. In view of those amendments, the *Rules of Organisation and Procedure of the National Institute of Justice* are in preparation. Further to the relevant decision passed by SJC, NIJ shall be developed on the basis of the existing Magistrates Training Center with its attainments, curricula and training materials, body of lecturers, officials and assets. NIJ shall offer compulsory training courses for all junior judges and prosecutors immediately after they have been appointed in the Judiciary.

In any case, account should be taken of the fact, that there is no other organization successfully engaged in the training of practicing magistrates yet but the Magistrates Training Center (MTC) which was set up as a non-profit organization in April 1999. With MTC, training was for the first time placed on a systematic basis and involved the joint efforts of the Ministry of Justice, various NGOs (*e.g.* the Union of Bulgarian Judges and the Legal Interaction Alliance which were co-founders of MTC, the Union of Bulgarian Jurists, the Legal Initiative for Training and Development (PIOR), the Association of Prosecutors, the Association of Court Clerks, the American Bar Association /Central and Eurasian Law Initiative, etc.) and some foreign donor entities (the involvement of the United States Agency for International Development deserves to be singled out) dealing with the problems of training.

The further development of the curricula prepared by MTC during its four-year existence and their implementation in the initial and continuous training of court candidates and magistrates after NIJ starts its operations should take place on the basis of continuity and stability of the training offered, thus enabling members of the Judiciary to maintain and upgrade their professional knowledge.

The curricula currently existing at the Magistrates Training Center extend to the following areas:

- initial training of all newly-appointed judges immediately after they take office;
- compulsory training of newly-appointed magistrates during the first three years of their working experience; this includes courses in the administration of the relevant court activities, drafting court acts, keeping contacts with other bodies of the Judiciary and with institutions related to the Judiciary, professional ethics, etc.;
- continuous training of magistrates at different levels in topical legal and professional issues, law of the European Union, the European Convention on Human Rights, language proficiency and computer skills, etc.

In addition, the following new curricula are being drafted and are to be implemented soon:

- initial training of all newly-appointed junior prosecutors immediately after they take office;
- compulsory training of newly-appointed prosecutors;
- training in the event of moving from one instance to another and from one branch of the Judiciary to another;
- training in administration and planning (for the heads of bodies in the judicial system);
- training of bailiffs and real estate registration judges.

The future curricula of MTC/NIJ should also mandatorily include **training in the enforcement of anti-corruption legislation**.

The development of the requirement to undergo professional training, the provision of legislative rules to that effect and the linking of hierarchical promotion to the fulfilment of that requirement (*e.g.* taking into

consideration the results of the training exercise when evaluating the professional performance of magistrates) would capacitate magistrates to enrich continuously their knowledge of the law and to develop a sense of professional self-confidence, independence and responsibility, so as to match the rigorous expectations the public has of the system of justice. That should also contribute to deploying uniform and efficient practices in the administration of justice.

In more general terms, training should help to uphold in the behavior of magistrates values and principles such as **impartiality, independence, intolerance to corruption in general and to any of its forms within the Judiciary**.

2. Education and training of court clerks

So far, the activities of the Magistrates Training Center have focused primarily on the training of judges. The development and implementation are forthcoming, with the support of the Judicial Strengthening Project of the USAID, of training programs intended to improve the qualification of court clerks, in line with s. 188b *Law on the Judiciary*. Therefore, once the *Rules of Organization and Procedure of the National Institute of Justice* are approved, the following priority measures should be undertaken at national level to kick off the training of court clerks:

- using the results of the existing survey of training needs with respect to court administration;
- identifying the target groups (magistrates and court clerks) and subgroups;
- selection and training of trainers;
- drafting curricula and training materials;
- developing manuals for each position in the court administration;
- including a compulsory course in court administration in the initial training curriculum of MTC/NIJ (such courses already exist for judges);
- introducing specialized training in professional ethics and conduct.

Besides, on the basis of programs developed and agreed on at national level, the training of magistrates should be decentralized by court district and the responsibility for training court clerks in each district should be entrusted to the corresponding head of judicial body or to a magistrate appointed thereby.

In the longer run, the improvement of the knowledge and the professional qualification of those working in court administration and of future appointees would require that efforts be made to introduce and provide:

- compulsory training upon any initial appointment as court administrator, to be gradually replaced by **specialized training** as a requirement to start working in the court administration[7];

7 Established European legal systems generally require administrative officials for the judicial system to be trained in advance at specialized schools or institutes, and courts recruit their clerks from among the graduates of such specialized institutions.

- continuous training to improve the qualification on a regular basis;
- training in ethics and anti-corruption.

For the general purpose of training magistrates and court clerks, it is necessary and especially important to provide **sufficient funding** to the Judiciary and to the Ministry of Justice for training initiatives. Since 2000, no funds have been earmarked for that purpose.

While training should be generally intended to advance professional qualification, special attention should be attached to its components that are designed to ensure **knowledge of and compliance with ethical norms and rules, including those aimed to ensure corruption-free behavior**. The survey by *Vitosha Research* referred to earlier has shown that 46.7 per cent of magistrates believe the adoption of ethics codes would result in reducing the level of corruption in the Judiciary.

Ethics codes represent a *sui generis* guidelines for legal professionals and for court clerks working in a specific branch of the Judiciary and instruct them how to respond to unforeseen situations or to circumstances barely addressed by the legislation in force, and how to cope with issues of conflict in their day-to-day practice or with the „grey areas“ in a rapidly changing environment. Those codes mainly inspire motivation and make it possible to discipline the members of the respective profession. The criteria and the responsibility for failure to abide by the ethics codes are essentially moral. **Strong and reputable professional organizations of magistrates and of court clerks** are therefore needed which should have sophisticated internal mechanisms to respond adequately and efficiently to any instance of unethical behavior by their members. This is also a *sine qua non* for the enforcement of the new rule in the *Law on the Judiciary* (s. 168, subs 1(3)) which provides that failure to abide by the moral rules enshrined in ethics codes shall form a ground to discipline defaulting magistrates and court clerks.

PART TWO

REFORM IN CRIMINAL LAW AND PROCEDURE

1. General

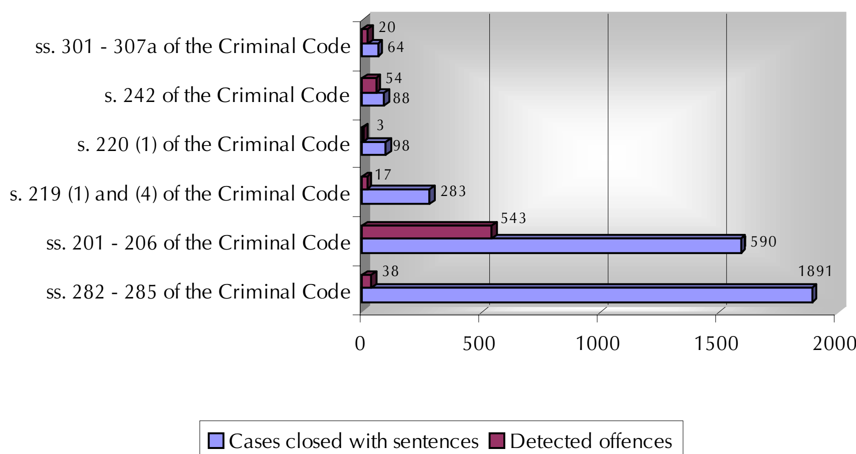
Criminal law, along with criminal procedure and the execution of penalties, is among the strongest instruments a state has at its disposal to suppress crime in general and corruption in particular. The major role attributed to criminal law in combating crime derives from the fact that, when implementing its criminal justice policy, any state pursues at least two objectives: to punish the perpetrators of criminal acts, including corrupt acts, on the one hand, and to deter and rehabilitate the perpetrators, and educate all other members of society, on the other hand.

The current system of criminal prosecution is in the main slow, unwieldy and inefficient. The crimes and the penalties provided for in the *Criminal Code* fail to mirror adequately what is a growing economic and conventional criminality in the modern setting of a market economy. The framework of criminal procedure, as embedded in the existing *Code of Criminal Procedure*, fails to provide sufficient mechanisms and guarantees for the swift and efficient closure of criminal proceedings with effective criminal judgments which, in turn, opens the door for exerting corrupt influences.

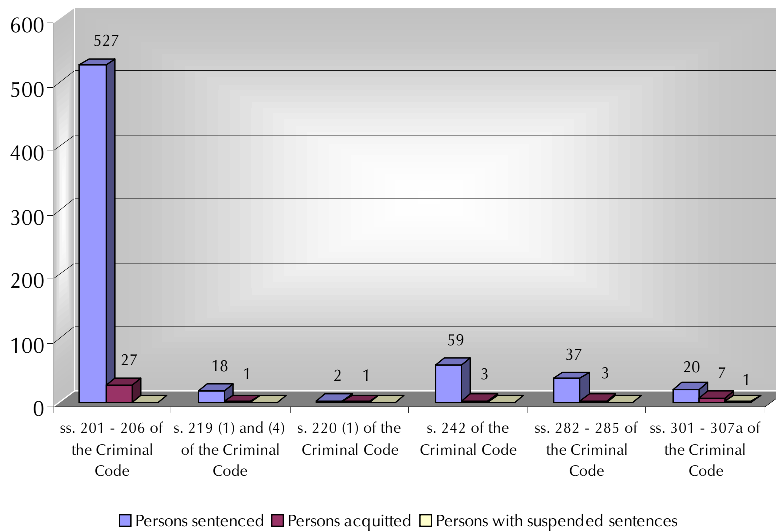
Over the past years, numerous legislative amendments have been made in an effort to modernize criminal law and procedure. Some of those amendments, however, were piecemeal and were often detached from any clear and consistent philosophy underlying criminal justice reforms. The major concern behind those amendments was to modernize domestic legislation and to bring it into line with the European requirements to respect human rights, while offering a swift and efficient administration of justice. Those objectives, though, have mostly remained unattained and this fuels the need to go on with reforms.

Reform in criminal law and procedure is preconditioned primarily by the constitutional

NUMBER OF CASES CLOSED WITH SENTENCES AND NUMBER OF PERSONS SENTENCED FOR OFFICE-RELATED CRIMES (SS. 282-285 OF THE CRIMINAL CODE), EMBEZZLEMENT (SS. 201-206 OF THE CRIMINAL CODE), GENERAL ECONOMIC CRIME (SS. 219-220 OF THE CRIMINAL CODE), SMUGGLING (S. 242 OF THE CRIMINAL CODE), AND BRIBERY (SS. 301-307A OF THE CRIMINAL CODE): YEAR 2002



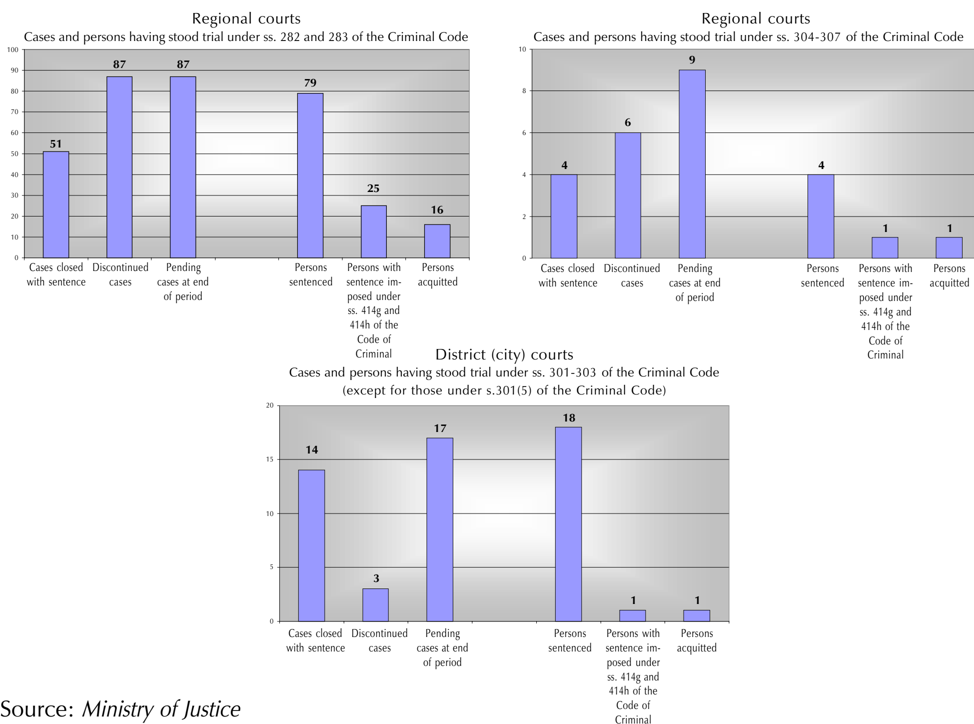
Source: *Supreme Prosecution Office of Cassation*



Source: *Supreme Prosecution Office of Cassation*

framework set out by the *Constitution* of the Republic of Bulgaria of 1991. A great portion of the legislative amendments in the area of criminal law, criminal procedure and the execution of penalties would depend directly on any ideas that might be drafted for future amendments to the basic law of the land, especially to its chapters on human rights and on the Judiciary.

NUMBER OF CASES AND NUMBER OF PERSONS SENTENCED FOR OFFICE-RELATED OFFENCES (SS. 282 AND 283 OF THE CRIMINAL CODE), AND BRIBERY (SS. 310-307 OF THE CRIMINAL CODE): YEAR 2002[8]



Source: *Ministry of Justice*

1.1. Problems in substantive criminal law

During the last few years, substantive criminal law has seen fundamental changes aimed at improving the prevention and prosecution of corruption-related crimes. Further to a series of amendments to the *Criminal Code*, the substantive criminal rules on corruption offences now seem to be very close to the relevant European standards. Along with the improvement of the legal framework of **bribery**, which is the most typical corruption crime, a number of other major

[8] Before the last amendments to *Code of Criminal Procedure* made in 2003 (SG, issue 50 of 30 May 2003), proceedings for office-related offences under ss. 282-283 of the *Criminal Code*, and for bribery under ss. 304-307 of the *Criminal Code* were within the competence of regional (first-tier) courts at first instance. After the amendments, the proceedings for those crimes have come under the jurisdiction of district (second-tier) courts at first instance.

corrupt practices have been incriminated as well, *e.g.* **trade in influence, bribes in the private sector**, etc. The rules on some offences that are often found to be directly linked to genuine corruption crimes have been improved as well, for instance **office-related offences, tax-related offences**, etc.

In spite of the essential legislative amendments to substantive criminal law intended to penalize corruption crimes, a significant number of magistrates still believe that the *Criminal Code* reveals serious gaps and drawbacks in that respect. 61 per cent of the magistrates interviewed think that the latest amendments have failed to provide full coverage of all social relations where corruption might occur, whereas 76.4 per cent are of the view that legislation in this area needs further improvement.

ASSESSMENT OF THE LATEST AMENDMENTS TO THE CRIMINAL PROVISIONS IMMEDIATELY INCRIMINATING VARIOUS TYPES OF CORRUPT PRACTICES (CRIMINAL CODE, SPECIAL PART):

	Yes	No	*Does not know/ No response*
The rules cover in full all social relations where corruption might occur	20.9	61.0	18.1
The penalties envisaged are proportionate to the incriminated offences	39.2	39.6	21.1
The legislation needs improvement in that respect	76.4	11.7	11.9

Source: CMS of *Coalition 2000*

- A pronounced weakness of the *Criminal Code* is the existence of numerous provisions, both in its General Part and in its Special Part, which have been **overturned** in whole or in part by the Constitutional Court **as anti-constitutional**. Although they are not applied, those provisions have neither been explicitly repealed, nor have they been modified to match the reasoning of the Constitutional Court.

- A topical issue that has been lingering for some time is **the accurate definition of the concept of „public official“**. This is of the essence in the context of corruption offences, as public officials form a major group of perpetrators for that category of crimes. While the latest amendments to the *Criminal Code* have extended the concept of public official in response to the *Criminal Law Convention on Corruption*, some groups of individuals from the private sector still come within the ambit of the definition.

- The fundamental weaknesses of the General Part of the *Criminal Code* relate to the **system of penalties**. That matter is currently discussed not only in Bulgaria but in a number of other countries as well, and recent developments have brought to the fore new forms of impacting on perpetrators, other than traditional criminal sanctions. An adequate system of penalties is crucial for the efficiency of criminal justice policy in any state, and even more so with respect to corruption offences.

It is notorious that Bulgaria is among the countries with most severe sanctioning systems in Europe and the law-maker mainly relies on **the penalty of imprisonment**, a method that fails to yield the much-hoped personal or general prevention. Foreign domestic laws exhibit a general trend to limiting the scope of that penalty, while giving priority to

pecuniary sanctions and to some new forms of engaging the criminal liability of offenders.

At the same time, the current system of sanctions includes some penalties that are far too outdated and inefficient. One example is correctional labor that could be imposed at times, on an alternative or cumulative basis, for some corruption offences (embezzlement by public officials, office-related offences, offences against the system of justice, etc.). As it was coined in a completely different social environment, that penalty is currently inapplicable for any practical purposes. Almost the same holds true for public reprimand: it lacks any state-related coercion, so its efficiency as a sanction is more than doubtful.

With the latest amendments to the *Criminal Code* (in force as from 1 October 2002), partial efforts were made to improve the system of penalties for corruption-related offences. With respect to the different forms of bribery and the new provisions on completely novel crimes, *e.g.* trade in influence, criminal fines were introduced and must be imposed as an alternative to, or on a cumulative basis with, imprisonment. The law-maker, though, failed to bring that approach to its logical end. Imprisonment therefore still remains the only possible sanction for many other offences that are connected in one way or another with corruption.

- Serious drawbacks impair the rules on the **criminal liability of juveniles**. No clear philosophy exists for a government juvenile delinquency policy that should be implemented through specific sanctions apt for the age of juvenile offenders. The existing sanctions for juveniles under the *Criminal Code* rather result from a merely mechanical adjustment of the general system of sanctions to offences committed by juveniles.

- The rules on **probation** introduced in the *Criminal Code* are fairly unsatisfactory and, moreover, their consistency with the *Constitution* could be reasonably questioned. Those rules make it possible to treat defendants unequally and unfairly when that penalty is imposed with the sentence and when the specific probation measures are individualized. In other words, under the existing provisions two persons having received the same sentence can actually be subjected to restrictions that differ in scope. That would nurture corrupt practices and risks to entail attempted manipulations of judges when they opt for probation, especially in the case of lighter sentences against which no cassation appeal lies.

When the rules on probation were in the process of adoption, a purely mechanic approach was applied of substituting probation in the Special Part of the *Criminal Code* for the penalties of compulsory resettlement or deprivation of the right to reside in a given village or town. That move was at odds with the fundamental principles underlying the individualization of penalties by the court and left open the question of how penalties other than probation should be applied, especially where the *Criminal Code* provides another penalty as an alternative to, or on a cumulative basis with, probation.

- **The system of the Special Part of the *Criminal Code* is inaccurate and inconsistent**. The numerous recent amendments to the Code reflect plenty of compromises in that respect and many offences are in

clearly unsuitable chapters. This is largely true of bribery which now falls under the heading of *Offences against the Operation of Government Agencies and Public Organizations*. Placing bribery in that chapter of the Code prevents the prosecution of corruption offences in the private sector, in public enterprises or even in municipalities. This finding is only confirmed by the imperfect rule of s. 225c of the *Criminal Code* which represents a rather underdeveloped framework of anti-corruption in the economic sector.

- The major changes in the legal framework of bribery brought about by the latest amendments to the *Criminal Code* consisted in introducing some new forms of *actus reus*. Their content, though, remains basically unclear. This could seriously inhibit the development of case-law and open the door for arbitrariness.

- Bulgarian criminal law still fails to address the issue of **corporate criminal liability**. Many corruption offences are committed exactly to the benefit of legal entities which, nonetheless, cannot be efficiently sanctioned under any piece of existing legislation in Bulgaria.

1.2. Problems in criminal procedure

The existing pitfalls in investigating and prosecuting crime in general, and corruption in particular, are mainly due to the low efficiency of criminal procedure which prevents the state from pursuing its criminal-law claim on time.

In the last years, a series of legislative amendments have been undertaken in criminal procedure and many of them have divided the legal community in their opinions. Although some of the amendments to criminal procedure have been incoherent, the red threads of the reform are visible and can be said to mirror the established international standards, the progress made in different legal systems and the experience of practitioners involved with criminal procedure. The major goal of the amendments to the *Code of Criminal Procedure* was to draw the right balance between the reliable guarantees for human rights and the efficient administration of justice. That goal, however, remains largely unattained, so reforms should continue. The most desirable approach would be to draft an entirely new *Code of Criminal Procedure*, although the Bulgarian law-maker has generally stuck to the right ideas in the

SPREAD OF CORRUPTION AT VARIOUS STAGES OF CRIMINAL PROCEEDINGS

	%
Preliminary police inquiry (steps undertaken outside the context of formal criminal proceedings)	15.9
Police investigation	19.6
Preliminary proceedings	15.6
Trial	19.4
Other	1.1
Equally spread at all stages	10.6
No corruption exists in criminal proceedings	4.4
Does not know/No response	13.4

Source: CMS of *Coalition 2000*

amendments to criminal procedure throughout the years. A new Code would help overcome the inevitable difficulties of implementing a fundamental reform in a piece of legislation adopted in 1974 and based on a philosophy other than that underlying the reform itself. Those problems are illustrated by the existence of contradictory, mutually exclusive procedural structures, the difficult „co-existence" in the same law of ideas of rather different natures, the inaccurate system of the Code, to name but a few. Hence, a new *Code of Criminal Procedure* would be the best approach to reform in criminal procedure. On the other hand, though, that should not be regarded as an absolute precondition for the success of reforms. It is indeed more important to enshrine in domestic legislation the right ideas than to have a new law at any price. The laws of many European countries, such as Germany, France, Belgium, etc., whose procedural rules are centuries-old, incorporate the most progressive ideas of effective criminal justice and offer genuine guarantees for the protection of human rights.

In May 2003, the National Assembly passed the next-in-a-row *Law on Amending and Supplementing the Code of Criminal Procedure* with a number of provisions intended to speed up the development and completion of criminal cases. The most important of those amendments could be summarized as follows:

- Further to earlier 2002 amendments to the *Criminal Code*, the so-called **mixed proceedings** (public-private proceedings) were introduced. In those cases, for some offences under the *Criminal Code* the criminal procedure is initiated by the victim's lodging a complaint with the public prosecution, but once the public prosecution decides to prosecute, the proceedings can no longer be discontinued at the request of the victim. For other offences, the proceedings are discontinued if the victim requests so prior to the start of inquiry by the court of first instance. This approach certainly serves two fundamental objectives: while the will of the victim is taken into consideration, the criminal justice system is partially relieved from its enormous workload.

- The possibility was abolished to bring civil claims at the pre-trial stage of criminal proceedings.

- The **preliminary police inquiry** was abolished, so it is no longer a prerequisite for instituting preliminary criminal proceedings where no sufficient data exist that an offence was committed. Under the amendments, when urgent investigation steps have to be made, the preliminary proceedings shall be deemed instituted as from the date of the official warrant stating that the respective investigative step has been undertaken.

The preliminary police inquiry, which was an extra-procedural activity, had virtually gone away from the initial idea of the law-maker to allow for an operational, quick check as to whether or not sufficient data exist to institute formal criminal proceedings. In a number of instances, the preliminary police inquiry took longer than the formal criminal procedure itself. In that way inquiries not only became an impediment to the timely start and closing of criminal proceedings but turned into a tool to discredit citizens and torment them, or even to exert corrupt pressure.

- The original rules on **plea bargaining** were restored by repealing the improvident earlier amendments made in 2001.

The instrument of plea bargaining was introduced with the amendments to the *Code of Criminal Procedure* in force as of the beginning of 2000 and quickly grew into a flexible procedural method accelerating criminal prosecution and barring corrupt practices in the relationships between accused and magistrates. The information about the criminal cases closed in 2000 shows that 36.6 per cent, or more than one third of the total number of cases resolved in that year ended by plea bargaining. The amendments to the *Code of Criminal Procedure* made in 2001 narrowed beyond reasonable limits the possibilities to use that vehicle and actually made it inapplicable as a means to quickly satisfy the criminal-law claim of the state towards the offender and to meet the victim's demand for redress. The rules were therefore changed again and the texts repealed in 2001 were reinstated.

- The right of the accused was introduced to request the court, after the expiration of a certain statutory time limit from the submission of the indictment (two years in the case of indictment for a serious offence, and one year in any other case), to hear his case on the merits.

- The **original rules on police investigation** were restored by repealing the pointless amendments made in 2001.

After police investigation was initially introduced, in 2000 nearly five times more police procedures ended with opinions to refer the matter to court, compared to the year before, and the time of investigating the offences was reduced about five times on average. Criticism of the new legislation was mainly generated by the fact that many of the police officers empowered to conduct those proceedings lacked the required legal background which sometimes affected adversely the quality of police investigation work. The amendments to the *Code of Criminal Procedure* made in 2001, however failed to address the problems identified but, on the contrary, reinforced the sort of procedural formalism which seriously hindered police investigation, while depriving it of its inherent operational nature, quickness and efficiency.

- The possibility of the judge-rapporteur and of the court of first instance to **discontinue the trial and remit the case to the public prosecutor** for further investigation on grounds of serious procedural violations is now solely confined to those cases where the violations in question has resulted in limiting the procedural rights of the accused or of counsel for the defense.

- The amendments enabled the court to impose a fine of up to 500 Levs on any party, witness or expert whose failure to appear without good reason has resulted in adjourning a hearing.

- The possibility was abolished for public prosecutors to bring a new indictment for the first time before the court of appeal.

- **The possibility of public prosecutors was abolished to appeal at three instances against the order of the court to remit a case to the pre-trial stage, and the possibility to appeal at three instances**

against the warrants of the public prosecutor to discontinue the criminal proceedings. That provision, which was introduced with the amendments to the *Code of Criminal Procedure* in 2001, virtually blocked the criminal procedure and its abolition was a must so that the development and completion of criminal cases could be accelerated and, hence, corruption be suppressed.

The most recent amendments to the *Code of Criminal Procedure* display some shortcomings as well. First of all, the change of jurisdiction for some categories of cases did not match the competence of the investigative authorities supposed to deal with those cases. Thus, smuggling cases were placed within the competence of district (second-tier) courts at first instance but the power of customs inspectors to investigate such cases was also retained. An explicit rule of the *Code of Criminal Procedure* provides that all cases falling within the jurisdiction of district courts must be investigated by investigators through the machinery of preliminary proceedings. To rectify that inconsistency, a new *Law on Amending and Supplementing the Code of Criminal Procedure* was passed (SG, issue 57 of 2003). The same law addressed the problems that had arisen in practice further to the changes in jurisdiction for some cases. Regardless of the well-known principle that newly-adopted rules of criminal procedure must apply to all pending cases, the law-maker expressly provided that the cases pending before the courts should be completed under the previous procedural rules. Another problematic issue was the impossibility of the „corresponding bodies of MoI" (which are not police inspectors) to undertake urgent procedural steps that could formally launch the procedure and remain relevant at all subsequent stages of the proceedings. Nonetheless, it cannot be reasonably argued that the authorities in charge of combating crime are deprived of the rights to use special investigation techniques. The *Code of Criminal Procedure* and the *Law on Special Investigation Techniques* invite the opposite conclusion: any possibility exists to use special investigation means and even a step forward has been made as demonstrative evidence obtained in compliance with the *Law on Special Investigation Techniques* can now be used in criminal procedure.

Pre-trial proceedings are not a problem-free area either, as the public prosecutor has the power to take the criminal case over from the investigator for an indefinite period. This results in delaying the investigation and even in futile investigations as some procedural steps are precluded when a substantial period of time has lapsed. As the public prosecutor is the master of pre-trial proceedings (*dominus litis*), he or she can either give instructions that are binding on the investigative authorities or conduct investigative steps himself or take over the investigation case. The unlawful practice referred to earlier may be rectified through the interference of a superior prosecutor, and this is actually the idea behind a strictly hierarchical structure for the prosecution office. The newly-introduced norm of s. 239a of the *Code of Criminal Procedure* which enables the accused to seek, after the expiration of a certain time as of the bringing of the indictment, that his case be heard in court on the merits, is another legal ground that might be used, in combination with efficient disciplinary arrangements, to rectify such illegal practices.

The existing *Code of Criminal Procedure* is flawed in that **the public prosecutor is able to modify the charges at first instance**. It is quite right for the public prosecutor to be the *dominus litis* at the preliminary, pre-trial stage where evidence is gathered and the prosecutor should decide on

WHY ARE CORRUPT ACTS (OFFERING BRIBES, TRAFFIC IN INFLUENCE, ETC.) UNDERTAKEN *VIS-A-VIS* THE FOLLOWING CATEGORIES OF OFFICIALS?

Public prosecutors	**Yes %**
To discontinue the criminal proceedings	63.4
To institute / to fail to institute pre-trial proceedings or preliminary police inquiry	49.3
To bring / to fail to bring an indictment before the court	27.8
To remit the case for further investigation without good reason	23.3
To fail to carry out certain procedural steps where under an obligation to undertake them	19.8
To exert improper influence	17.0
Other	1.5
No corrupt acts are carried out	4.6
Does not know/No response	12.3

Investigators	**Yes %**
To carry out or to fail to carry out certain procedural steps relative to investigation	59.5
To suspend the investigation or to propose its discontinuance	56.2
To exert improper influence	28.0
Other	2.2
No corrupt acts are carried out	6.2
Does not know/No response	13.2

Source: CMS of *Coalition 2000*

whether or not to bring an indictment against the offender before the court. In court proceedings, however, the public prosecutor is not but a party placed on an equal footing with other parties to the proceedings. The possibility for prosecutors to modify at trial the indictment they have brought themselves places them undeservedly in a privileged position, provides an incentive to investigate inattentively and to refrain from efficiently monitoring the objectivity, comprehensiveness and completeness of the investigation and, finally, results in submitting ill-founded indictments to the court. In addition, the prosecutor is put *ex lege* above all other parties to the proceedings, and this sometimes benefits the exertion of corrupt influences.

Another major reason for the procrastination of criminal procedure, already at trial, is the introduction of **three regular court instances** and the impossibility to „skip“ any of them. This turns the challenging of court acts into a sluggish and complex process which prevents the timely entry into force of criminal judgments, inhibits unduly the progress of cases, and invites frequent resorts to corrupt pressure.

1.3. Problems in the rules on the execution of penalties

The latest amendments to the *Law on the Execution of Penalties* enacted in 2002 introduced numerous changes, so as to better the legal framework of the execution of penalties. The law now covers a number of instruments and methods previously governed by secondary legislation. Substantial portions of the law were brought into line with the requirements of European and international law.

In spite of the recent amendments, the current legal provisions suffer a number of weaknesses which prevent the efficient execution of sentences and are often conducive to corruption.

Firstly, problems exist with the rules on serving **the sentence of imprisonment** and these could be summarized as follows:

- Inaccurate rules on the rights and obligations of convicts and of prison administration. This provides incentives to attempt to corrupt prison staff at lower levels.

- Deficiencies in the rules on health care services to be provided in prison facilities which make it possible for the stays at medical rooms and accommodation at hospitals to be frequently related to the use of corrupt influences.

- Inefficient monitoring of the work of prison administration.

As regards the arrangements for the execution of penalties other than imprisonment, particular attention is warranted by the **lack of any rules on the execution of the new penalty of probation**, recently introduced with the amendments to the *Criminal Code* of 2002. The provisions of the *Criminal Code* on probation must enter into force on 1 January 2004 but the non-existing framework for the execution of that penalty will block its efficient use, as both the procedure and the conditions for its enforcement remain obscure.

2. The objective of reforms in criminal law and procedure

Reform in criminal law and procedure is aimed at **building up a modern and efficient system for the investigation and prosecution of criminal offences, including corruption, and introducing efficient legislative mechanisms that enable the prevention of corruption in the context of criminal prosecution itself**.

A prerequisite for the successful attainment of those objectives is to root the reform of criminal law and procedure in **a conceptually sound philosophy underlying a new criminal justice policy, and in modern crime-deterring strategies**. That new philosophy should form the basis to adopt novel ***Criminal Code, Code of Criminal Procedure*** **and** ***Law on the Execution of Penalties*** which should provide for new legal structures, use uniform terminology and have coherent systems.

Meanwhile, given the complexity of that process and the lengthy period of time it needs, reforms could continue even within the framework of the existing pieces of legislation. It is indeed more important to have a law with a modern and up-to-date philosophical background, than to have a brand new law. Good examples here are furnished by the legal systems of many contemporary countries where legal instruments passed more than two centuries ago impress as they look completely modern and adequate. Priority, therefore, should be given to the urgent inclusion in the Bulgarian legal system of those ideas and structures which reflect the existing general trends of reform in criminal law, criminal procedure and penitentiary work world-wide. In that way, reforms will gradually

take place in the existing legislation, while the new legislative instruments are in the making.

3. Proposed reforms

3.1. Proposed reforms in criminal law

To uproot the existing problems in the field of criminal law, the following measures should be undertaken:

- Carrying out a **thorough review of the case-law of the Constitutional Court that concerns either the General or the Special Part of the *Criminal Code***. The provisions which have been found anti-constitutional must either be amended in light of the reasoning offered by the Constitutional Court or else be repealed, should their fixing prove impossible.

- **Refining the definition of „public official"** in order to adjust the inconsistencies in its content.

- **Extending the scope of the penalty of fine** so as to cover a number of office-related offences driven by self-interest which could, in essence, represent acts of corruption.

- Reconsidering whether or not the penalty of **correctional labor** should remain in the system of sanctions, and devising new content for the penalty of **public reprimand**.

- Inserting a completely new **system of penalties for juveniles** who are not seldom the perpetrators of corrupt offences. This could be achieved through the required amendments to the *Criminal Code* or through a separate piece of legislation addressing the delinquent acts (criminal or other offences, misconduct) committed by juveniles. The emphasis here should be on rehabilitation measures and on the concern to reform juvenile offenders, while the idea of punishment should move to the background.

- The concept of **probation** should be refined in terms of both theory and legislation. It should be clarified if probation is to be regarded solely as a penalty and what content it should have exactly, or should it rather be extended and also become applicable to individuals released earlier or to parolees or to those conditionally sentenced, or even be used as a measure for non-absconding.

- **A completely new structure for the Special Part of the *Criminal Code*** should be developed. That part should bring to the fore the priorities of criminal-law protection and the system of its chapters should be structured by object of assault.

- **Bribery** in Bulgarian criminal law should be given a **better location**.

The inclusion of bribery in a separate chapter of the *Criminal Code* would make it possible to provide extensive rules on that offence which could be applied to the fullest extent, regardless of whether or not the offences have been committed within state bodies and public organizations. In parallel to defining the systematic location of the rules on bribery, the title of the division (or chapter, if there is a separate one on bribery)

where those rules will be inserted should be revised, as those provisions should cover not only bribery but also trade in influence.

- Improving further the legal framework of bribery by **clarifying the elements of the new forms of *actus reus*, *i.e.* „requesting a gift", „accepting an offer of a gift", „accepting a promise of a gift"**. Although these forms of *actus reus* have been taken over from the *Criminal Law Convention on Corruption*, they are not entirely novel in Bulgaria and most of them existed already at the time of the first Bulgarian *Criminal Law*, back in 1896.

- Introducing **a clear and accurate definition of the concept of „benefit"** so as to avoid any suspicion that criminal repression is extended unreasonably. The new understanding of the object of bribery also necessitates that s. 307a of the *Criminal Code* be reworded, while specifying that any object of bribery shall be forfeited where it constitutes a tangible benefit.

- **Adding police inspectors to the group of officials who are deemed to occupy responsible positions**, so as to regulate their criminal liability accordingly.

- **Updating the rules on some other offences (*e.g.* document-related crimes)** which often times are connected with or conceal the commission of genuine corruption offences.

- Providing statutory rules on **corporate criminal liability**.

To resolve that matter, one of two paths might be followed. Firstly, due to the notable specificity of corporate liability which differs a lot from the criminal liability incurred by individuals, instead of amending the *Criminal Code* to introduce corporate criminal liability it might be better to draft **a separate law on corporate liability** that would enable the easy forfeiture of benefits derived from or received through criminal activity. That approach might be especially fruitful in suppressing the financing of terrorism and would have a substantial preventative effect with respect to tax- or securities-related offences, etc. The second option is to envisage, **within the *Criminal Code* itself, specific administrative liability for legal entities**, while defining in parallel those individuals who would incur criminal liability for the unlawful activities in which a legal person is involved.

- While the existing legal rules on corruption crimes in the *Criminal Code* largely match modern standards, there is no decisive will yet to apply the new criminal legislation and to improve the capacity of courts and law enforcement to suppress corruption. Some possible measures along these lines might be to timely introduce training programs for police officers and magistrates, and to align the interpretation the courts give when enforcing the new legislation with the explanatory reports attached to the relevant international instruments.

3.2. Proposed reforms in criminal procedure

Reform in criminal procedure should be governed by several **principles**: promoting trial as the central stage of criminal procedure; accelerating the development and completion of proceedings in criminal cases; respect for the mandatory international standards that ensure the efficient administration of justice, while providing reliable guarantees for the rights of citizens.

To attain the objectives of reform in criminal procedure, the following measures should be taken:

- Accelerating criminal proceedings by **extending the number of cases where no pre-trial proceedings take place** but the procedure is initiated and develops under the rules on criminal cases prosecuted on complaint by the victim.

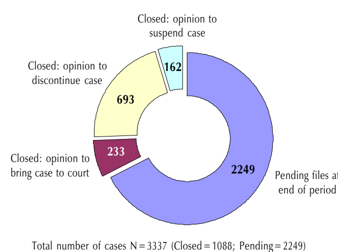
- Regulating **preliminary proceedings** (which are one form of pre-trial proceedings) on the model of police investigation, while keeping the procedural formalities only to the extent necessary to guarantee the rights of the individuals concerned and the reliability of evidence.

- Introducing additional **measures to ensure the quick development of investigation** by reducing to a minimum the number of pre-trial procedures lasting for years.

Some of the possible measures to speed up investigation would be to introduce deadlines the expiry of which would bar the submission of the case to court (a solution that is found in a number of foreign domestic legal systems) or to shorten the duration of coercive measures. The law-maker has already made an important step on the right track with the new section 239a of the *Code of Criminal Procedure* which entitles the accused to seek that his case be heard in court on the merits.

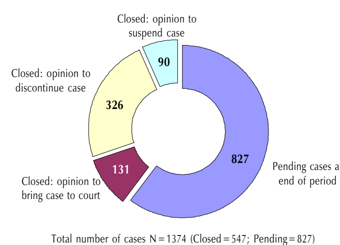
NUMBER OF INVESTIGATION FILES FOR OFFICE-RELATED OFFENCES (SS. 282-285 OF THE CRIMINAL CODE), GENERAL ECONOMIC CRIME (SS. 219-227 OF THE CRIMINAL CODE), AND BRIBERY (S. 301-307A OF THE CRIMINAL CODE): YEAR 2002

Office-related offences ss. 282-285 of the Criminal Code



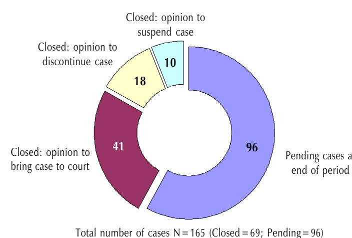
Total number of cases N = 3337 (Closed = 1088; Pending = 2249)

General economic crime ss. 219-227a of the Criminal Code



Total number of cases N = 1374 (Closed = 547; Pending = 827)

Bribery ss. 301-307 of the Criminal Code

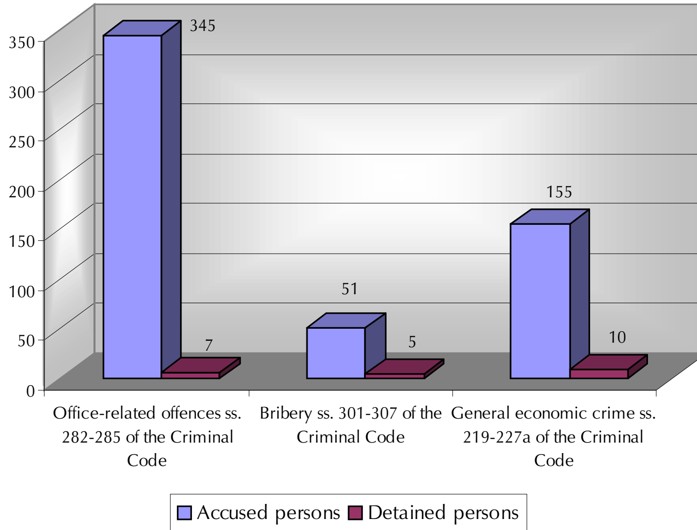


Total number of cases N = 165 (Closed = 69; Pending = 96)

Source: *National Investigation Service*

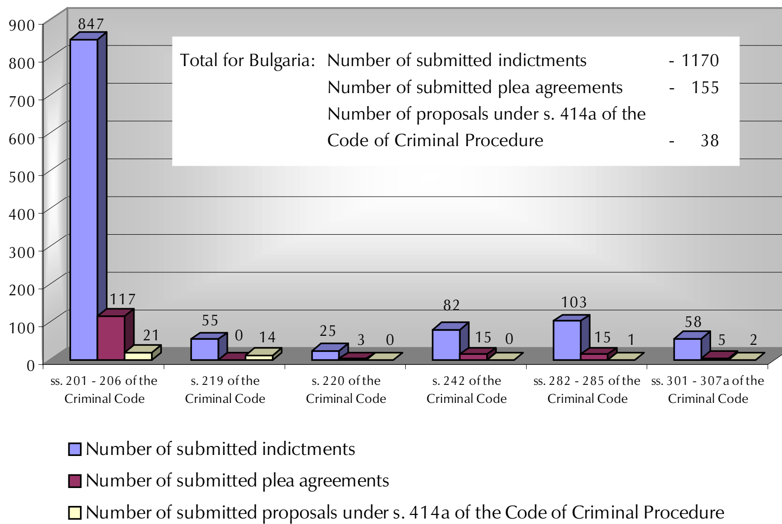
- Improving the rules on the other form of pre-trial proceedings, *viz.* **police investigation**.

Number of accused and detained persons in proceedings for general economic crime (ss. 219-227a of the Criminal Code), office-related offences (ss. 282-285 of the Criminal Code) and bribery (ss. 301-307a of the Criminal Code): year 2002



Source: *National Investigation Service*

Number of indictments, plea agreements and proposals under s. 414a of the Code of Criminal Procedure in proceedings for embezzlement (ss. 201-206 of the Criminal Code), general economic crime (ss. 219-220 of the Criminal Code), smuggling (s. 242 of the Criminal Code), office-related offences (ss. 282-285 of the Criminal Code), and bribery (ss. 301-307a of the Criminal Code): year 2002



Source: *Supreme Prosecution Office of Cassation*

As to police investigation, it is compelling to limit the opportunities of public prosecutors to transform police investigation into preliminary proceedings. As a matter of practice, this is sometimes a disguised means to procrastinate the pretrial procedure beyond any reasonable limit. Such practice fails to benefit the victim or the accused, does not contribute to finding out the real facts or achieving the objectives of criminal procedure, and finally invites attempts to exert corrupt influences.

Amendments are also needed to the rules on **trial**. Bulgaria complied with the requirements of the *European Convention fot the Protection of Human Rights* and *Fundamental Freedoms* as regards „fair trial" a long time ago. Reforms are therefore needed at this stage primarily to ensure the quick development of trials, along the following lines:

- **Keeping at a minimum the instances where the court remits the case to the prosecutor**. This should help speed up the proceedings and their completion, and to reign in corruption.

- **Changing the rules on summoning** so as to relieve the court from the duty to summon and provide for an obligation on each party to ensure the appearance of its own witnesses. Such a change would promote the

adversarial nature of trials and the equality of arms.

- Introducing stricter requirements to parties to invoke their evidence on time provided that after a certain statutory deadline each party should have to submit good reason for any request to invoke new evidence. The procedural discipline of parties is certainly crucial for accelerating the proceedings but it should not be brought to unacceptable extremes that prevent the establishment of the real facts and are at odds with the inherent peculiarities of the process of proving a case.

- **Revisiting the current possibility of prosecutors to modify the charges at trial**. Should that power of prosecutors be limited, the quality of preliminary proceedings would improve and it would be much easier for the court to hear the case.

- **Improving the legal rules on appeals** so as to accelerate criminal proceedings.

Several possibilities exist to amend the rules on appeals under the *Code of Criminal Procedure*. On the one hand, parties may be provided with an option to **„skip“ some appeal instances** and directly lodge a cassation appeal. For example, where the parties have no disagreement as to the facts and after the time limit to refer the matter to the court of appeal has lapsed, they could lodge a cassation appeal provided that the problem at hand relates to an alleged erroneous application of the law. Another option would be for **criminal judgments delivered by a court with jurors to be subject solely to cassation appeal but not to appeal before lower instances** (*i.e.* district courts and/or courts of appeal would be skipped). A third option is also there, namely to provide that **cassation appeals shall constitute an exceptional remedy**, rather than a regular means of review. In other words, after the expiration of the time limit to lodge appeals with the competent higher court, or after that court delivers judgment, the act of the first instance would still be subject to cassation appeal but shall meanwhile enter into force and be executed, unless the court orders otherwise.

- Introducing various types of **differentiated procedures**. Such procedures are widely used in Europe and in the US and enhance the efficient administration of justice in criminal cases. In most of those jurisdictions traditional (general) criminal procedure would be an exception, rather than the rule. By putting in place new, alternative methods and paths for deciding a matter on the merits many cases would be diverted from the traditional proceedings. That path for reform has been recommended by the Council of Europe[9] and by the United Nations, and this has proven to be an efficient legislative approach to accelerating the procedure in almost all domestic legal systems.

The differentiated forms that might be implemented in Bulgaria are *e.g.* transaction, criminal warrant, victim-offender mediation organized by the prosecutor, and numerous other schemes known as efficient and useful

[9] See *e.g.* Resolutions of the Committee of Ministers of the Council of Europe Nos. R (84) 5, R (86) 12, R (87) 18, etc.

tools in most of the modern legal systems. Those new rules should certainly be taken over very carefully, while strictly respecting Bulgarian national traditions, the national mentality and perception of legal regulation and the prevailing socio-economic relations in the country.

- Rethinking the principle of legality at the point of bringing the indictment to court. A possibility here is to provide for **discretionary powers of prosecutors** to make a case-by-case evaluation of whether bringing the indictment to court would serve the state or the public interest. For example, where the offence is petty, the offender pleads guilty and is prepared to remedy the damage, a public prosecutor should be able, with the victim's consent, to decide whether to proceed to trial at all.

- Introducing the so-called **pre-trial hearings** which are known to the common law system and to a number of European countries (*e.g.* Italy). That instruments enables the accused to request the court[10] to assess the well-foundedness of the charges and, hence, spares the trial in cases where the indictment is not really supported by the evidence on the file.

3.3. Proposed reforms in the execution of penalties

Reforms in the execution of penalties should continue along the following main lines:

- Refining the rules that lay down **the procedure and the conditions for relocating accused individuals detained on remand from investigation arrest places to prison facilities**.

The conditions in investigation arrest places, which anyway form part of the penitentiary system, are much worse than those in prisons. Therefore, accused and defendants often times strive to be transferred from detention places to prisons which, in turn facilitates the attempts to exert corrupt influences. An efficient measure to suppress corruption in that respect would be to provide detailed rules on when such transfers would be admissible and on the possible duration of a transfer. Along with the legislative changes, however, specific measures must be taken to improve the conditions in investigation arrest places and to bring them closer to those in prisons.

- **Putting in place detailed legal rules on the rights and obligations of convicts, of individuals detained on remand and of supervising and security officers at the penitentiary facilities**.

- **Improving the system of control over those steps of the administration** that might affect the rights of sentenced persons. An important requirement here is to enhance public control on the operation of penitentiaries, *e.g.* by creating a system of checks and inspections in prisons and correctional houses while involving the NGOs concerned.

[10] In the United States this is the trial judge, as it is not that judge but the jury who decide on guilt, whereas in Italy, for example, this is the investigative judge as he is not involved in hearing and disposing of the merits.

- **Improving the system of medical service in penitentiary facilities** in order to reduce the cases of convicts being accommodated in hospitals outside the penitentiary system. Accommodation elsewhere should only be possible in serious cases where no treatment can be offered in prison.

- **Urgently adopting rules on the execution of the penalty of probation**. Once those rules are drafted, a careful thought should be given to the possible setting up of probation hostels within the penitentiary system, on the model of open prison hostels.

PART THREE

REFORM IN CIVIL LAW AND PROCEDURE

1. General

While the development of civil legislation does not always bear directly on corruption, it can provide conditions that are either favorable or hostile to the forms of corruption. The past thirteen years have seen fundamental changes in Bulgarian civil law in response to the need for new rules on civil relationships, given the transition from a planned to a market economy and the introduction of European standards in this area. The numerous legislative amendments, however, have not always been well-thought-over and consistent with each other and have entailed contradictory enforcement and, finally, inadequate rules and protection of the rights of the subjects of civil law. In addition, half-way, superficial and often unsuccessful reforms have failed to prevent corruption in the administration of justice in civil cases, whereas the enforcement of already adopted legislation has not revealed any tangible corruption-deterring potential. This virtually undermines the very idea of the rule of law or even the elements of statehood.

One of the explanations for that inconsistency and for the failure of man attempted reforms is that the changes are often drafted by experts lacking the required multi-faceted knowledge who are politically allied or connected with the interests of various economic groups. In addition, there has been a growing practice for judges to draft the reforms of their own activities, of prosecutors and investigators to do the same about their own work, for attorneys to be required to develop the rules on their operations, etc. In this situation, some inertia inevitably comes to surface and the majority of judges prefer the status quo in quite a good faith as they are tired of reforms. On the other hand, the stand of an insider is rarely sufficient to pinpoint the defects of any system. At the same time, if an attempt is made to overcome corrupt phenomena and practices, those benefiting from the status quo would be the ones to offer the most serious resistance.

The indiscriminate reliance on advice by foreign experts, and the automatic copying of legal rules existing elsewhere have not proven to be any more successful. This is also valid for the formalistic and mechanical transposition of provisions from the EU directives.

The disturbing findings about the situation with civil law and procedure (including the enforcement of judgments and the provision of collateral) generate the **need for a swift and radical anti-corruption reform** in respect of civil procedure and for a further systematic, coherent and consistent development of substantive civil law. To outline the parameters of that development and the specific reforms to be proposed, it is compelling to identify the existing problems and to carry out a serious and in-depth analysis of any factors that impede the problem-free development of a modern civil turnover in the setting of a free market economy and under the rule of law.

1.1. Problems in substantive civil law

Substantive civil law is aimed at providing comprehensive regulation of an extremely important sphere of social relations. Not only is it applied by judicial bodies, but it is also binding on all subjects of law. As long as the disputes resulting from alleged transgressions of the laws are resolved by the court, the shortcomings and inconsistencies in substantive law affect adversely the quality of the administration of justice and, hence, public trust in the Judiciary. The problems in substantive civil law are therefore interwoven with those in civil procedure and these two sets of problems should indeed be addressed jointly.

1.1.1. In the field of **property law**, the main spots of corrupt pressures could be said to exist in the following areas:

- **notarial law**

The imperfect rules on the operation of private notaries seriously undermine the notarial form of authentication and often pave the way to corruption or serve as an incentive to crime in civil relationships or in the course of court proceedings.

- **the system of registration of real estate transactions**

The existing system fails to provide **for genuine guarantees and certainty** in the case of real estate transactions. Real estate registers are currently kept and entries are made in the 100 regional courts scattered across the country, and in paper form. This generates enormous problems as far as the reliability of the information and legal certainty are concerned. For objective reasons, the process of changes (building up a national electronic cadastre and developing that cadastre into a nation-wide data base) launched with the enactment of the *Law on the Cadastre and on the Real Estate Registry* (in force since January 1, 2001) is lengthy and expensive, and would hardly be finalized soon. At the same time, that process has not been linked yet to the required changes in the system of registries in general, or in the system of company registration, in particular.

1.1.2. In the field of **commercial law** as well, there are statutory preconditions for actions that might, directly or indirectly, entail corruption:

- **company law**

Despite the attained high level of harmonization of Bulgarian company law with EC company law, **no satisfactory degree of certainty has been achieved yet** in the commercial and economic turnover, nor has it been put on a transparent and corruption-free basis. Such an objective has been pursued with the last amendments to the *Commercial Law* of June 2003 (published, SG, issue 58 of 2003) and in particular the detailed regulation of companies' transformation and conflict of interest prevention. In addition, while amendments have been initiated to protect minority shareholders, the excessive aspiration to uphold their rights sometimes yields the opposite effect - there have been cases of abuse against majority shareholders, and this serves as a vehicle to impede the

day-to-day operation of companies.

- **the legal framework of corporate insolvency**

Previous amendments to the rules on corporate insolvency have not resulted in any material acceleration of insolvency proceedings. **The potential therefore persists for attempts to obtain appropriate judgments more quickly by resort to corrupt methods**. References to the rules on execution laid down in the *Code of Civil Procedure* also contributed to complicating and delaying the proceedings. The number of cases instituted in previous years and the number of newly-opened insolvency proceedings remain excessive. The last amendments to the *Commercial Law* aim at to overcome most of these shortcomings, however it is too early for the results of their implementation to be predicted.

- **the system of company incorporation**

The status of company incorporation forms part of the problem with the status of registration in general. The inefficient system of court registration in Bulgaria[11] is among the factors that predetermine the high level of corruption in court. The existing registers in Bulgaria are primarily decentralized and the courts keep them in paper form. Some courts have experimented with automated information systems but electronic records have no legal effect as yet. As the volume of information in the registers is growing, the data become ever less accessible and handling those data becomes slower and slower, or even impossible. This, in turn, contributes to a **strong corruption pressure both when certain entries are made in the registers and when information from the registers is to be obtained**.

Given the non-contentious nature of incorporation procedure that develop before the company divisions of district courts, the judges are deprived of any genuine opportunity to control the lawfulness of the resolutions that are passed by a legal entity and are subject to registration, *e.g.* those for changing the members of company governing bodies. Work organization in company divisions is not based on unified standards that might ensure the speediness and reliability of the registrations and entries made, so these factors become dependent on non-magistrates (*e.g.* court clerks). The obsolete, or even antediluvian, manner of keeping the registers and browsing them for information, and the extremely complex procedure of modifying or rectifying the information in them form a powerful weapon to „take over the control of companies" to the detriment of minority shareholders. People involved in registration proceedings believe that a number of courts have unwritten „rates" for every service that is provided. Not only does that situation inhibit the normal development of business and turnover, it also **fuels the resistant public perception of corruption in the judicial system**.

1.1.3. In the field of **labor law**:

Irrespective of the positive developments in the legal framework of employment relationships designed to bring those in conformity with modern economic conditions, labor cases are still the largest share of all

[11] This is true both of the registration of legal entities in general, including those with non-for-profit objectives, and for the real estate register.

court cases in Bulgaria, while substantial unemployment persists. A number of essential issues are still on the agenda, namely to provide better guarantees for and protect the right to work as proclaimed by the Constitution, and to define the effects of the unlawful settlement of labor disputes. Employment relationships and labor disputes also mirror the problems which exist in other sets of connected legal relationships, such as administrative, civil service, social security, pension, social assistance and unemployment benefit relations, etc. which could transfer elements to corruption to labor cases.

1.1.4. Contemplated reforms in the field of **family law** have not taken place yet, regardless of the ongoing debate. The inadequate rules on **adoption** nurture myriad corrupt practices, sometimes with international involvement.

1.1.5. As regards **consumer protection**, consumers whose interests have been harmed are not yet able to defend their rights collectively (i.e. no class actions are possible).

Last but no least, account should be taken of the fact that in most cases corrupt practices linked to substantive civil law are due not to the imperfections of the legal framework *per se* but to the corrupt attitudes of the entire society, to defective civil procedure, to the flawed administrative law, to the lack of liability for public officials and to inefficiency of criminal legislation.

1.1.6. As regards **civil liability for criminal offences**, including corruption-related crimes, the *Draft Law on Forfeiture by the State of Property Acquired through Criminal Activity* (prepared by MoI) has kindled vivid discussions. Particularly debatable are the proposals to introduce a **supplementary pecuniary sanction** (parallel to and independent of any criminal liability), as well as **summary procedures**, referred to as **special procedures** for freezing and seizure with a view to forfeiture. While the draft law provides for a machinery for the quick freezing and forfeiture of assets derived from criminal activity (and this could enhance the combat against crime), it fails to provide any guarantees against the unlawful application of its measures so as to serve improper economic or political interests. The intended benefits of the future law could thus produce nega-

OPINION ON THE POSSIBLE INTRODUCTION OF FORFEITURE BY THE STATE (INCLUDING FREEZING AND SEIZURE) OF PROPERTY ACQUIRED TROUGH CRIMINAL ACTIVITY

	Yes	No	*Does not know/ No response*
It would be a tool to quickly forfeit and freeze assets derived from criminal activity, thus contributing to a more efficient suppression of corruption	70.0	18.3	11.7
A good idea but no sufficient guarantees against possible abuse	75.8	11.9	12.3
It would not contribute to deterring corruption	19.8	61.0	19.2

Source: CMS of *Coalition 2000*

tive effects in that the law could support corruption instead of preventing or penalizing it.

The polls conducted during the debates on the draft to identify the public opinions about the importance and the expected results of the draft have revealed a high level of approval and support of the measures proposed. This could be attributed to the awareness of the need to resist growing crime by resort to more stringent and quicker measures. At the same time, despite the large-scale approval of the draft and its expected positive effect as an efficient deterrent of corruption, many respondents have voiced concerns about possible abuse.

1.2. Problems in civil procedure

Unlike substantive civil law where the separate institutes exist relatively autonomously and the drawbacks of existing rules that entice into corrupt practices could be rectified relatively independently, this is impossible for civil procedure as, on the whole, it is of crucial importance to the combat against corruption in all its forms. This is so as, on the one hand, civil procedure is both a general technique of protecting substantive legal relationships and a key tool to resist corrupt phenomena.

On the other hand, civil procedure in its nature is a means to protect substantive civil rights and legal relationships in an environment of adversarial litigation and clashing interests of disputants where the resolution of a legal dispute depends on the pronouncement made by the competent authority (which consists in steps undertaken by natural persons forming the personal substratum of the authority in question). Therefore, civil procedure itself is a focal point where corrupt practices become easily visible.

The previous endeavors for reforms could be given a two-fold description:

1.2.1. **In the first place**, the law-maker has failed to even attempt to identify and incorporate in the legal framework the modern trends in the law of civil procedure. Instead, the Legislature undertook, yet in a rather straightforward manner, to reproduce old rules created and used in the past and not quite fit for the contemporary conditions. Moreover, those rules were not particularly familiar to that generation of Bulgarian lawyers who were supposed to apply them. The implementation of the reform naturally highlighted a number of flaws in the rules. The approach widely used to remedy those was rather „cosmetic" in that the amendments designed to improve the rules not only failed to hit their target but in a number of occasions evoked other serious problems.

1.2.2. **Secondly**, those amendments were not provided with a sound material and financial basis and most of them turned out to be populist moves. Therefore, they only deepened the divide between the public and the Judiciary.

The numerous incompetent attempts to improve the rules of civil procedure have resulted in a situation which often amounts, for all practical purposes, to a **denial of justice**.

Besides, some other key factors have also contributed to the failures in civil procedure, such as:

- The inefficient or totally lacking criminal repression. This is the core reason for all sorts of abuse when adversarial proceedings, collateral proceedings or enforcement are in progress.

- The lack of working mechanisms for attaching disciplinary, administrative or civil liability to unlawful or improper behavior. The rules on liability (in all its forms) give the impression that „everything is allowed - or at least goes unpunished“. A sustainable public disrespect for justice is thus perceived. This is a **negative factor of a particular weight** in itself. Those moods have recently been reinforced by the overall discontent with the work of the courts and by the day-to-day encounters of ordinary citizens with the impunity of individuals whose unlawful behavior (in the widest sense of this term) deserves the strictest possible sanctions but who tread the public domain as „successful people“, in contrast to those who have „failed“ because they have been law-abiding and respectful of the legal order.

All those factors generate legal nihilism and a total disrespect for law which could finally prevent the functioning of the state on the basis of the rule of law.

Some other specific problems of civil procedure deserve a special mention as well:

- The introduction of **three-instance procedure** has resulted mostly in a „lavish“ civil procedure where the functions of the first and the second instance largely overlap; procedural discipline is poor as evidence can be submitted even when the case is reheard by the instance of cassation. There are no good reasons why all cases should be handled by all the three instances. It is especially unacceptable for the facts of a case to be established by two instances in a row which, moreover, have similar powers in that respect.

- **Irregular summoning** and the infinite dodges the parties are used to employ represent key factors for the lengthy proceedings in any individual case.

All previous changes have modestly attempted to place the burden of obtaining information about the procedural developments on the party itself. Nonetheless, there are still opportunities now (after several amendments along these lines since 1997) to delay the proceedings by interrupting the order of summoning, and also because of the need to serve notice that the written judgment is ready (after the end of the procedure before first and second instance).

- Substantial amendments to **enforcement procedure**: an area which is susceptible to corruption has remained almost unreformed over the past 13 years. The latest amendments to the *Code of Civil Procedure* (in force as from 11 November 2002) were geared towards improving and accelerating the proceedings. At the same time, one could be skeptical about the expected suppression of corruption as there are still statutory possibilities to procrastinate cases, *inter alia* by use of corrupt means.

SPREAD OF CORRUPTION IN DIFFERENT SEGMENTS OF CIVIL PROCEEDINGS

	%
Adversarial litigation	20.0
Collateral proceedings	5.9
Enforcement proceedings	14.8
Non-contentious litigation (including registration proceedings)	13.9
Other (please specify)	0.9
Equally spread in all segments	12.1
No corruption exists in civil proceedings	5.3
Does not know/No response	27.1

Source: CMS of *Coalition 2000*

- The existing framework of **enforcement and collateral procedures** reveals another shortcoming which is essential in terms of deterring corruption. In most cases collateral and enforcement (which largely predetermine the economic contents and the efficiency of the legal protection) are decided on by a district (usu. second-instance) court and the disputed facts can never be invoked again before the Supreme Court of Cassation. This entails all sorts of „inventions", let alone the fact that corrupt practices develop much easier at local level (for example, there could be an award by a reputable international arbitration court in favor of a party and the three-instance proceedings for recognition and enforcement of the award in Bulgaria could have been finalized successfully; later, the same party might fail to obtain collateral or to enforce the award and such cases could only be reviewed by district courts).

According to the results of the survey, one out of four magistrates is of the view that corruption is most widespread in adversarial litigation. It is noteworthy that this opinion is mainly shared by public prosecutors and investigators, whereas judges mostly believe corruption exists in non-contentious litigation (including registration proceedings) and enforcement.

2. The objective of reforms in civil law and procedure

The reforms are intended **to propose measures whereby all factors** whose manifestation hinder, in one way or another, the modern and efficient administration of justice in civil cases **should come under attack**. The result should be court orders and judgments of high quality, lawful and fair. In the long run, reforms in civil law and procedure should bring about a serious change in the current paradigm of all social relations which can be depicted as a superficial and formalistic perception of law and failure to respect the government institutions, coupled with high levels of crime and corruption even among those vested with the exercise of public functions, and all this to the detriment of the helpless ordinary citizen.

Apparently, there is a compelling need for a comprehensive and in-depth reconsideration of the „overall design" of the rules on civil law and procedure in all their aspects. Along these lines, it is very important, though insufficient, to draft a good model of a civil procedure law.

3. Proposed reforms

3.1. Amendments to commercial law

The half-way solutions and the inefficient amendments made so far have imposed the need for a fundamental and substantial reworking of insolvency procedure, as these are now endlessly inefficient and formalistic, and form a major source of corruption. The *Amendments to the Commercial Code* passed in June of this year contain some provisions to accelerate insolvency proceedings and to improve corporate governance (better legal guarantees for the participation of shareholders in the General Meeting, improved corporate management and supervision rules, and avoidance of conflict of interests). These should **reduce the chances for corruption and enhance transparency**.

Changes in this sphere are a must for the development of commercial and economic operations in the country on a non-corrupt basis. Those changes, however, should be carefully thought over and discussed with all stakeholders. That would help establish a statutory framework matching the everyday needs and avoid the turbulence of frequent amendments that generate instability and uncertainty.

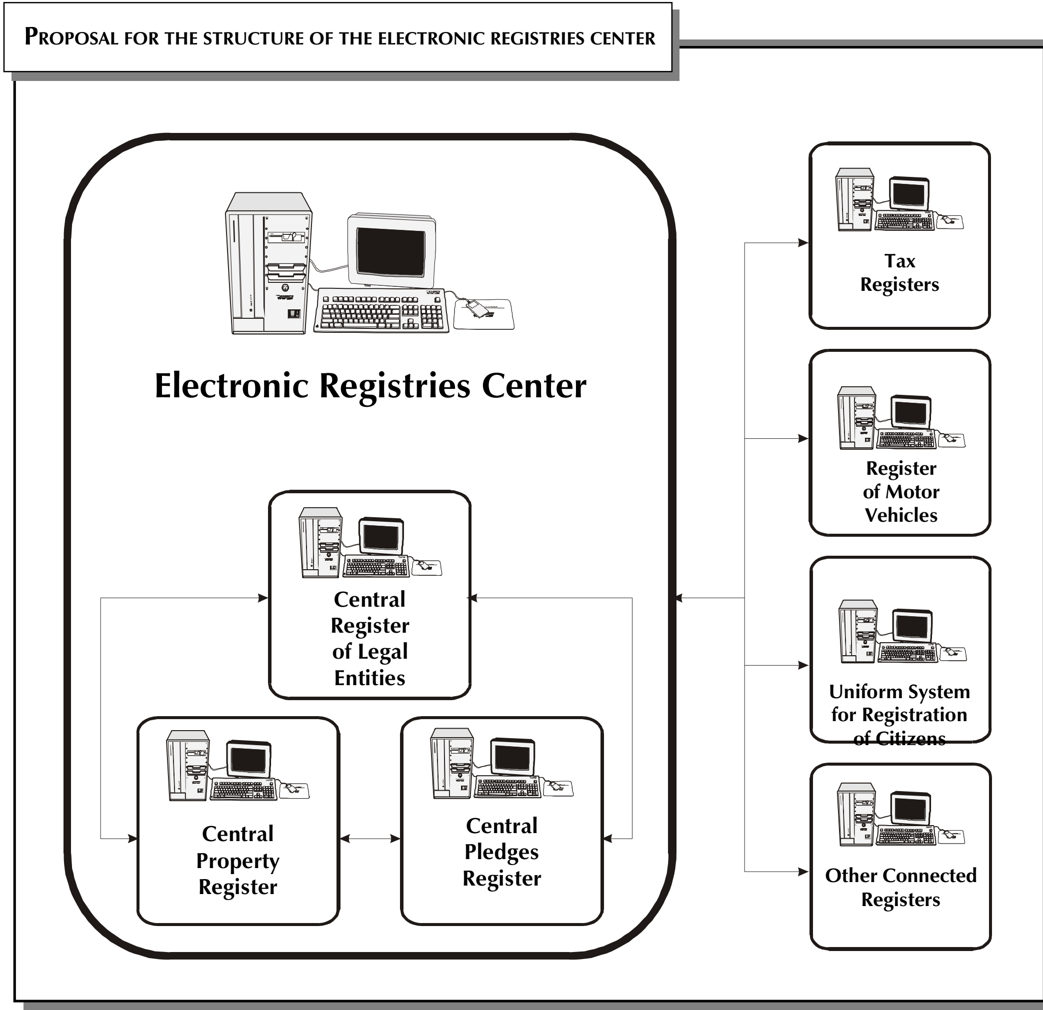
3.2. Registration reform

To meet the needs of modern turnover, the registration system should be centralized, kept in an electronic form and enable the making of entries and the provision of information by way of electronic real-time telecommunication. The persons concerned could thus notify any third party of newly-occurred circumstances and facts within the matter of hours, by way of electronic registration. Third parties, in turn, would be able to check the status at the register virtually at the time when transactions occur. The **possibilities for any illegal moves** in relation to registration and to the receipt of information **would thus be reduced to a minimum**.

A good possibility to modernize the registration system and to reduce its corruption potential would be to replace the current manual registration in court with registration at a Central Register of Legal Entities. This should be a public institution (a state agency) attached to a central authority (the Ministry of Justice or the Ministry of Economy, etc.).

The existence of such a Central Register would form the basis for building up an **Electronic Registries Center**.

The **Central Register of Legal Entities** could compile the registration data for all legal persons governed by private law and for all state-owned enterprises (political parties and trade unions will be excluded). The legal entities register could be merged with the Central Pledges Register. Such a single register would contain all the information on the persons and on any collateral provided by them, thus avoiding the useless duplication of information in the commercial register, and in the pledges register and the ensuing risks of mistakes and inconsistencies. In the longer run, we could think of merging the legal entities register and the real estate register so as to produce an **Electronic Registries Center**. Of course, this could only be done after the national electronic cadastre has been finalized and incorporated in the single national data-base. In parallel, the registration reform should gradually boost the merger of or linking to other existing or newly-set registers (tax registers, motor vehicle registers, etc.).



The move to a **Central Register of Legal Entities** and to an **Electronic Registries Center**, coupled with the projected inclusion of the real estate register in that system, would act as a strong deterrent to corruption and would narrow down substantially the possibilities for any unlawful practices in the operation of the registers.

3.3. Amendments to labor law

The objective is to introduce **an adequate statutory framework to counter the discriminatory practices** of employers, as these essentially come down to a violation of the right to work as proclaimed by the *Constitution*.

- a national program (strategy) should be drafted for the abolition and prevention of discrimination with respect to employment and the professions;

- a legal definition should be provided of direct discrimination which should cover *inter alia* harassment at work (including sexual harassment);

- work of comparable value should be provided for and regulated;

- a list of supplementary payments should be drawn up in order to uphold the equal pay principle (s. 243 of the *Labor Code*);

- the employer (defendant) should assume the burden of proof in cases where allegations are made of discriminatory practices at the workplace;

- the idea is discussed to set up **labor courts** to meet the need for specialized, quick and competent administration of justice in labor disputes.

In the field of labor law, attention should be given to the practices of **indirect (hidden) discrimination** in the exercise of employment rights and obligations. The making or termination of contracts of employment partially depends on personal and political relationships and connections. Sometimes privileges or restrictions can be found which are based on nationality, origin, sex, race, color, age, political or religious belief, memberships of particular trade unions or other public organizations or movements, family, social or property status, or disability. These issues have not been debated yet but bear directly on the development of corrupt processes and on the possibility to prevent such processes right at the outset or as substantive legal relationships develop. They also affect the way in which cases are heard and resolved. Last but not least, this topic is particularly important and relevant in the context of aligning Bulgarian legislation with EC law, and needs to be specifically addressed.

3.4. Proposed reforms in civil procedure

3.4.1. The number of instances and other general issues of civil procedure

The entire paradigm of the existing three instances civil procedure should be revisited:

- It is recommended to introduce regular **two-instance procedure, with a possibility for an extraordinary review** by the Supreme Court of Cassation of all aspects of the substantive and procedural rules involved in a case, while carefully developing the criteria for allowing such reviews. The procedure under s. 231 *et seq.* of the *Code of Civil Procedure* should be kept.

It is unacceptable to preserve the proceedings before the second instance in their current form. The view that prevails in practice is that the appellate instance is „another first instance". Regretfully enough, that view is no more than a primitive textbook clichè (and regretfully, again, it is that view that underlies Interpretative Decision No. 1/99 of the Supreme Court of Cassation). Modern requirements would be matched far better if the appellate court just had the power to review the judgment and reverse it (this was in fact the second-instance procedure before the start of the reform). In addition, the admission of new evidence should only be confined to newly-occurred circumstances or to the disclosure of existing facts or evidence that could not have been known to (or established by) the parties despite their best care and good faith. The remittance of cases to the lower instance should only be reserved for judgments that are void and inadmissible (provided that it is still the court that has to pronounce) and to the most flagrant procedural violations.

The judgments should become final after the pronouncement of the second instance.

Rulings (*i.e.* court acts other than final judgments on the merits) which are explicitly subject to appeal by virtue of the law should be reviewed by the Supreme Court of Cassation.

- It is of the essence to define **the powers of the separate instances** and to avoid the unnecessary redundancy in their work[12]. The powers of the Supreme Court of Cassation should be regulated in such a way that the supreme instance could no longer be used as a regular instance in almost all cases. At the same time, a genuine possibility should be preserved for the Supreme Court of Cassation to perform its constitutional function to ensure the accurate and uniform application of the laws by all courts. It could also be provided that the Supreme Court of Cassation shall pronounce in cases where substantial financial interests are involved.

Irrespective of the technical form to be used for that purpose (the Supreme Court of Cassation could either stop acting as a regular instance and *extraordinary review* could be introduced similar to that existing before, or could alternatively keep its nature of a third regular instance with a possibility to pronounce selectively (like the Supreme Court of the United States), thus the work of the Supreme Court of Cassation would largely be relieved and its quality is expected to improve as a result of that. Indeed, the workload of that institution is currently unbearable.

On the other hand, the possibilities to remit the case back for rehearing by the lower instance (whichever it is) should be very limited.

- An alternative would be to keep the regular three-instance proceedings but sharply reduce the number of cases on which the Supreme Court of Cassation would pronounce (it should ensure the accurate and uniform application of the laws by all courts when it comes to fundamental issues of law-enforcement, and then (optionally) pronounce on cases where very large public or financial interests are at stake).

If the three-instance regular procedure is kept (regardless of whether the Supreme Court of Cassation would be empowered to pronounce selectively), parties should be allowed to „skip instances“ where the issue at stake only concerns the correct application of substantive rules.

- The number of instances involved in the recognition and enforcement of foreign judgments and arbitral awards also needs to be reconsidered (two instances are recommended, the first of them being Sofia Court of Appeal (or the appellate courts) and the second being the Supreme Court of Cassation.

- The **participation of counsel in civil proceedings** should be radically revised. At present, attorneys bear no responsibility for any abusive exercise of procedural rights stemming from the law. Responsibility must be provided for, including suspension or disbarment for clearly unreasonable procedural steps (similarly to the arrangements in other countries, *e.g.* the United States).

As a guarantee for the liability of counsel, any steps on behalf of a party should be prohibited where there is authorized counsel, etc. A requirement should be introduced for the illness of a party or attorney

[12] The rules on the operation of the first instance will be addressed separately, see below.

involved in a case to be established only by „medical doctors of confidence" with the respective court. To that effect, stringent rules should be put in place to regulate not only the ethics of judges but also that of attorneys.

- Rules must be enacted to outlaw contempt of court; the existing obstacles to serving summonses and notices on natural and legal persons should be removed.

- Strict legislative action should be taken to counter the widespread tendency of the administration and the municipalities to disregard the orders of the court and effective legal liability (criminal and administrative) should be introduced for failure to respect court acts. The existing rule of s.296 of the *Criminal Code* is clearly inadequate to resist this trend which has become disturbing.

- The so-called „mandamus proceedings" should be introduced (an institute known to Bulgarian legal history and to the modern legal systems in many countries, *e.g.* the Czech Republic, Israel, etc.).

- The idea should be discussed of setting up specialized labor courts that should act as a sole fast-track instance (two instances should only be provided for some very important categories of labor disputes), with a possibility for review by the Supreme Court of Cassation (the principle of selection should apply here as well).

3.4.2. Changes in procedure at first instance

Procedure at first instance should be seriously revized. At present, the parties tend to disclose their cases step by step and any new submission or objection by one of them forces the court to grant leave for counter-allegations by the other party. The procedure thus gets procrastinated. Moreover, the parties are able to keep their trumps for the last minute of the procedure at first instance (and with the liberal regime of appellate proceedings, trumps can even be played on appeal). In order to avoid that, the following steps are suggested:

- A **compulsory exchange of memoranda between the parties should be required before an open hearing is scheduled**. The parties should be obliged to make (or otherwise be precluded from making) all their relevant allegations and induce any evidence at their disposal, including authenticated depositions by individuals who could be summoned as witnesses (if there are new rules on the involvement of experts in the proceedings, they should also be required to provide beforehand their expert opinions on the case). There should be a double exchange of papers. Thus, before the parties appear in the courtroom for an open hearing, they will have disclosed all their possible allegations and evidence.

Of course, the existence of such a system requires an **effective and working system of legal aid** for the people unable to engage in legal proceedings on their own account because of financial constraints.

One possible effect of that approach would be a larger number of settlements already at the outset of the process. Depending on the

evidentiary material collected prior to the court stage, the court should have the power to instruct (or oblige) the parties to resort to **mediation or conciliation** with the help of qualified experts. This could make even larger the number of settlements (especially if the facts of a case are more complex than its legal aspects). At the same time, account should be taken of the potential for corruption that would be inherent in that arrangement. Such a framework would help root out the attitudes dating back to the classical period of adversarial proceedings, *viz*. to fight with all forces and means and to use the procedural possibilities to the maximum extent, even though the factual and legal aspects of the case are clear from the outset.

- It is necessary to rethink the rules concerning the **statements by the parties to a case**. The current situation where the parties can factually „conceal truth or state untruth" in the process without any attaching liability is grossly unacceptable from the point of view of modern requirements. In particularly, the rule of s.114 of the *Code of Civil Procedure* should be reworded as it currently excludes the possibility for a defendant who is a legal person to answer questions.

- Any opportunity should be excluded to submit evidence (other than newly-occurred facts or newly-discovered or newly-created evidence within the meaning of s.231 of the *Code of Civil Procedure*) after the exchange of memoranda and papers between the parties. That, however, should be effected by way of precluding the possibility to induce evidence later, rather than by imposing sanctions (as the latter are usually inadequate).

- The rules on the various types of **evidentiary means** should be updated. This is especially relevant in light of the latest technological developments, *e.g.* the large-scale use of the Internet, the introduction of e-signatures and e-commerce. On the other hand, though, abuse of the existing rules has reached disproportionate dimensions. Such abuse is an essential tool that benefits corruption.

- The **role of expert witnesses** in the proceedings should be reconsidered. It is no secret that the existing form of involvement of experts in the process is a major technique whereby a judgment can be obtained for a given party, at odds with the facts and the law. On the other hand, the provision of s.291 of the *Criminal Code* is far too narrow and fails to provide a decent list of possible forms of bad-faith conduct by the experts. It is high time to also introduce an ethics code for experts.

Proposals have been made as well to rely on the experience of common law systems in involving experts: each party could draw in an expert who provides an opinion and the final assessment would be in the hands of the court. Initially that would certainly make the work of the courts more difficult but it seems to be the only possible exit from the current practice.

- The rules on the **modifications of the claim** should be changed and there should be an explicit mention that a plaintiff „may modify or complement his or her claim".

- The rules on **keeping minutes** at open court hearings should be

reformulated. Given the modern technical methods of recording the statements made by parties, witnessed and experts, it is no longer thinkable for proceedings to be recorded „under the dictation" of the president of the panel (or of the judge). This is especially inopportune with respect to witness testimony as witnesses face criminal liability for false statements[13].

- The provisions should be improved on the **award of costs and expenses** and it should be provided that „reasonable" expenses for counsel (or for the involvement of experts, if the rules on experts are modified) shall be subject to reimbursement; the flippant requirement that expenses should only be incurred to pay „one" counsel should be removed. An express possibility should be provided to recognize contingency fees - for example, one could think of awarding such expenses on a conditional basis, the expense should then be proven or agreements to retain counsel, authenticated by a notary, could be recognized.

- Minimum rules should be introduced on the so-called **class actions**.

- The rules on **fast-track proceedings** should be revisited, including those on **appeals against delays**. Such appeals should be lodged with the president of the court where the case is pending and this route should also be available in proceedings before the Supreme Court of Cassation (if the current workload of that institution remains unchanged).

3.4.3. Summoning and serving notice

The rules on summoning and those on serving notices should be fundamentally revised.

- The **initial summoning for hearings** should be based on new rules. The requirement that the initial summoning of all legal entities is to take place at the address of their management should be refined. As regards natural persons, there should be a rule on the situation where the summonsing officer is physically unable to contact the addressee of the summons as the entrance of the building is not readily accessible (*e.g.* in estates with heightened security arrangements where the access of outsiders is prohibited).

- The person who signs the summons should be required to enter in it all his or her names and the address, regardless of the capacity in which they receive the summons (for that purpose, even an amendment to the existing framework could empower the summonsing officer to check the signatory's identity papers).

- **Serious liability should attach to any failure of summonsing officers** to issue the summons as prescribed by law. It should be explicitly

[13] There is a very good probability for someone sentenced for perjury based on court hearing minutes drawn up „under the dictation of the president of the chamber" to succeed in proceedings against Bulgaria before the European Court of Human Rights for the existence of such a rule.

provided that such offences would entail „disciplinary dismissal". This proposal is based on the existing widespread practice of summonsing officers to receive bribes in order to fail to summon a party properly, and those bribes largely exceed the fine they face (50 Levs). At the same time, the profession of summonsing officers does not require any special qualification and there are many unemployed people who could perform those functions.

- Where the case is adjourned and the next hearing is not immediately scheduled, **the party should take care to inform itself of the date of the next hearing** (to obviate the possible abuse by judges acting in bad faith, a minimum period of 10 or 15 or any other number of days between the date of scheduling the case and the date on which the actual open hearing takes place could be envisaged, so that parties would not be forced to inquire every day).

- **The pronouncement of judgments in civil cases could take place in an open hearing** (and in line with the principle described, and with the facility proposed above, a party should keep track of when the hearing is to be held). In that situation it would become unnecessary to serve the party with notice that the text of the judgment and its reasons are ready as that is a major factor contributing to procedural delays. In addition, pronouncement in an open hearing would mean that the judge will face both parties, when delivering the judgment, as opposed to the parties learning about the judgment from the court registers.

- After a careful examination of the existing internal regulations and taking account of the relevant international instruments, a rule should be introduced that if an individual cannot be found at his or her permanent address for more than 15 days, the summons should be left at the municipality in question and the summoning should be deemed regular.

The introduction of a radical rule should be considered, namely that once a party has been properly summoned for the case, that party should bear the burden of informing itself about the development of the proceedings up to their end at all regular instances. This would certainly require the supply of technical equipment and facilities for the remote provision of information to those citizens who need it.

3.4.4. Collateral proceedings and enforcement

It is urgent to uphold the rights of those seeking protection in collateral and enforcement proceedings by allowing review by the Supreme Court of Cassation (as restricted and selective as that review might be). In relation to that, the following steps are suggested:

- The rules on **allowing and obtaining collateral** should be fundamentally changed. It should not be forgotten, though, that security may be necessary regardless of the type of action brought; such a need exists also where the effects of a legal proceeding could entail secondary legal relationships.

- Tthe **grounds for enforcement** should be reconsidered (*e.g.* is it appropriate to maintain grounds for enforcement like the ones in s. 237(e) of the *Code of Civil Procedure* (like promissory notes). Such grounds for enforcement may enable horrific abuse while the instruments listed in the provision are not used for their key functions as prescribed by law.

- The rules on **enforcement** should be entirely revised. The existing provisions on the different methods of enforcement are in a completely intolerable shape - the paradigm needs to be changed. The only acceptable modern solution about foreclosure is to have auctions with open bidding, coupled with an unrestricted right to submit bids.

- It is compelling to discuss and introduce private enforcement (due consideration being given to the rights and wrongs of the rules on private notaries).

As to the specific proposals for reform in civil procedure, a contradiction comes to light when that matter is analyzed. On the one hand, the proposed reform is aimed at curbing and combating corruption in the area of civil procedure and civil law. On the other hand, some of the proposed options for a new framework of civil procedure may be expected to give rise to new sources of corruption. It could be safely assumed that giving the courts wider freedom (selective pronouncement of the Supreme Court of Cassation, etc.) would generate such new hubs of corruption.

Nonetheless, the building up of a system of a high-quality and effective civil procedure should be given priority, as the very fact of its existence would serve as a guarantee that corruption will be reduced and fought against.

PART FOUR

REFORM IN ADMINISTRATIVE LAW AND PROCEDURE

1. General

Corruption in the administrative area undermines the trust in State authority, in the judicial system and in public administration, and tends to be increasingly perceived as a criminal feature of the system itself rather than as a series of criminal acts committed by individual organizations, institutions or officials.

Some essential reasons for the significant growth of corruption in the administrative sphere, which are also relevant to the reform of the Judiciary, could be summarized as follows: the lack of a clear system of judicial review over the steps undertaken by the administration; somewhat obscure rules on administrative disputes; rather ambiguous limits of operational autonomy for the administration which is not always subject to control; a slow and clumsy bureaucratic machinery; no specific attention to ethics in public administration and in administrative justice; lacking or weaker confidence of citizens in the steps made by the administrative and judicial authorities.

A major problem of administrative law now is the **lack of consistent administrative legislation and procedures**. The numerous amendments to substantive administrative laws are frequently discrepant and incompatible, give rise to many gaps and ambiguities, and invite conflicting interpretation. The existing rules on the issuance and challenging of secondary legislation and of individual administrative acts are rather obsolete and should be fundamentally revised. At present, administrative proceedings are governed by the following instruments and rules: the *Constitution* of Bulgaria (s. 120, subs 1) which generally provides for judicial review of the lawfulness of any acts issued or steps made by administrative authorities; the *Law on Administrative Proceedings* (published, SG, issue 90 of 1979); the *Law on Administrative Offences and Penalties* (published, SG, issue 92 of 1969); the *Law on Legislative Instruments* (published, SG, issue 21 of 1973) and the *Law on the Supreme Administrative Court* (published, SG, issue 122 of 1997). Those legal instruments were adopted at different times, there is no consistency among them and they reflect different sets of values. Their enforcement and interpretation are therefore especially difficult and inhibit the access of citizens to justice.

All these factors should be in the focus of reforms in administrative law and procedure if those reforms are to become an efficient tool to suppress corruption by way of subjecting the acts and the decisions of public administration to judicial scrutiny.

1.1. Problems in substantive administrative law

In view of combating corruption in the process of enforcing administrative law, the following major problems in substantive administrative provisions should be singled out:

- problems relating to the legislative framework of **public administration** and to its consistent implementation

In spite of the legislative measures undertaken to implement a uniform organizational pattern for the administration and common internal rules for the administrative structures of all executive bodies, be they central or regional or municipal (*Law on Administration*, *Ordinance Laying Down the Conditions and the Procedure for Keeping a Register of Administrative Structures and of the Acts of the Bodies of the Executive*), corruption still affects to a larger or lesser degree the administration of all those bodies.

The measures aimed to make the work of individual administrations more **transparent** are far from sufficient. While almost all administrations have provided special reception rooms where citizens can file applications or complaints, there are no particularly efficient feedback mechanisms or adequate legal rules. While legislative provisions exist on how to exercise the **right of access to public information** (*Law on Access to Public Information*, published, SG, issue 55 of 2000, amended and supplemented, issues 1 of 2002 and 45 of 2002), their implementation has identified the lack of sufficient guarantees for transparency and accountability and a persisting strive of the administration to keep for official use only much of the information about its operations. The *Law on Access to Classified Information* (in force as from 4 May 2000) covers the creation, processing and storage of any information that represents a **State or official secret**, and lays down the conditions and the procedure for providing access to such information. Nonetheless, there are still opportunities to refuse, by reference to obscure criteria, access to information constituting an official secret and that environment is quite conducive to corruption.

At the same time, though, the annual *reports on the situation in the administration as a whole*, and *of some individual administrations* offer no **findings of corrupt practices, nor are there any suggestions for specific anti-corruption measures**. It is still rather difficult to pinpoint the indices that could be used to assess the efficiency of administrative operation and to manage performance in a purpose-oriented manner.

- problems with the framework of **professional civil service** and with its consistent implementation

The impression of the public that those working in the administration are highly corruptible strongly invites an in-depth analysis of the implementation of the *Law on the Civil Servant* and of the anti-corruption measures envisaged therein.

In line with the *Law on the Civil Servant*, the **status of civil servants** has been introduced in all structures of the central administration, in the regional administrations and in 95 per cent of the municipal administrations. It is somewhat perplexing, however, that **this status is inapplicable to those working in the National Audit Office and in the tax administration**. This is even more surprising given the responsible supervisory functions vested in those bodies. Expert positions in the general administration are still subject to the *Labor Code* and the contemplated extension of *Law on the Civil Servant* to those positions has been delayed without good cause. There has been a recent trend to insert in sector-specific legislation (*i.e.* the *Law on the Judiciary* as regards court clerks, the *Law on the Ministry of Interior*, the *Law on Defense and on the*

Armed Forces, the *Law on the Constitutional Court*) only a few „beneficial" elements of the civil servants' status, without taking the status as a whole on board in the respective sector. Any deviations from, and exceptions to, the status of civil servants may easily become an obstacle to the promotion of a system of professional civil service based on corruption-free behavior and culture.

As **competitions** are not compulsory when someone is appointed in the civil service, that method is simply not applied by most administrations. This brings forth the reasonable suspicion that improper influences are, or might be, exerted when people are appointed as civil servants. The lack of clear criteria to evaluate the professional knowledge and skills of applicants is favorable to corruption and fails to guarantee any objective selection or recruitment based solely on professional merit. The possibility given to any head of administration to appoint at his own choice any of the three applicants ranked by the competition committee, rather than the best-performing candidate, also benefits corruption.

The statutory guarantees for stability, which should be a crucial corruption-deterring factor in the administration, are by far insufficient. In quite a few cases the formal internal restructuring of some units of the administration is used to remove specific civil servants from office. The higher levels of the administration **aspire to dilute the divide between political and career-based appointments**. This puts a serious strain on the overall implementation of the status of civil servants, as **stability** lies in its very heart.

The draft amendments to the *Law on the Civil Servant* prepared by the Government envisage a series of anti-corruption measures, such as: a mandatory requirement of holding **competitions** upon appointment; introducing **incompatibility** between the position of a civil servant and the functions of a trustee or liquidator; **conflict-of-interest** rules; abolishing the possibility for **premature promotion in rank** that is not based on clear criteria, etc.

- problems in **the system of administrative services and with the access to information**

The expected results of the implementation of the *Law on Administrative Services to Natural and Legal Persons, viz.* **lawfulness, speed, accessibility, good quality of the service provided and deterrence of corruption**, have not materialized yet. There is no shared understanding that efficient services are unthinkable of unless the procedures within each separate administration improve. There are great discrepancies in the level of administrative services attained in different administrations. This virtually thwarts the gradual development of administrative work from the mere provision of services by a given administration into an integrated administrative servicing, or into a common pattern of „one-stop shop" servicing by all administrations in the Executive. This finding is reconfirmed by the fact that the legislation rarely provides for procedures where several administrations are bound to co-ordinate among themselves *ex officio*. The process of improving administrative services is also severely frustrated by meager funding which prevents the supply of documents, equipment and information required for the operations.

- the lack of a clear-cut division between the **powers of the central and local administration**

The interweaving of powers most often results in duplicating work and reshuffling duties which, in turn, is conducive to abuse and irresponsibility.

- no **uniform concept of „administrative act“** exists

Different legal instruments prescribe different contents and scopes for the concept of „administrative act“. This can be easily seen in s. 120(2) of the *Constitution*, s. 2 and 3 of the *Law on Administrative Proceedings,* s. 19(5) and (4) of the *Law on Administration*, the *Law on the Supreme Administrative Court*, and many others.

To further confuse the situation, a number of instruments do not refer to concept of „administrative act“ at all, thus inviting hesitation as to how the acts they provide for should be defined and reviewed. One example is the term „decisions of the land commission“: when these are challenged, regional courts sometimes believe that they are not administrative acts but concern property matters, so the ensuing disputes should not qualify as administrative, but as civil ones.

The *Law on Administrative Proceedings* does not provide an exhaustive definition of the concept of administrative acts. There is no uniform legal criterion to be used for excluding some administrative acts from judicial review.

A significant source of corruption is the lack of distinction between two clearly distinct capacities of the State: its capacity as the carrier of Executive power and its capacity as an economic operator who manages and disposes of state-owned property. Similarly, no distinction is made between individual administrative acts whereby the State exercises its public function of regulating and organizing public life, and the acts whereby the State merely carries out specific activities relative to the management of State-owned assets[14]. The identical arrangements for appealing against such essentially different instruments therefore frequently blocks normal economic life, thus creating preconditions for corrupt practices.

- the lack of legal rules on **key concepts and legal structures**

Bulgarian administrative legislation does not contain any legal definition of the concepts of **„nullity“ and „voidability“ of administrative acts** and the interpretation of those concepts is entirely left to administrative-law theory and to the courts.

[14] Judgment No. 19 of the Constitutional Court of 23 December 1993 in case No. 11/93 describes the power of the Council of Ministers, which is the highest administrative authority in the country, to organise the management of State-owned property as a „typically managerial function“. The vast material scope of that constitutional power is defined as covering not only the two types of property the State may have in Bulgaria, *i.e.* public and private property, but also other rights and duties of the State that can be valued in money“. Express mention is made of the fact that in the context of that organisational activity, the Council of Ministers may issue acts but the same activity could also be carried out by individual ministers or by other bodies empowered by the Council of Ministers to do so. In other words, in its capacity as a high Executive body, the Council of Ministers decides on the basis of expediency who and how should manage that property, unless otherwise provided in law. At the same time, attention is drawn to the fact that the regime of sites which form either private or public (other than exclusive) property of the State or the municipalities shall be laid down by law, and in the exercise of their right to private property the State and the municipalities shall be placed on an equal footing with all citizens and legal entities.

There are no clear criteria to define the concept of **„interested parties" in administrative proceedings**, and improper influences and practices can boost at ease on that account.

- the lack of adequate provisions on the situations where **the administration fails to pronounce within the time limits set in the law (the so-called „tacit refusal"**)

This structure persists in the shape in which it existed in an earlier social setting, where there was no division of powers, so it provides no guarantees for the respect of citizens' rights. The rules on challenging tacit refusals before the court are equally unsatisfactory under the new circumstances. The appeals procedure is slow and dear, so many private individuals prefer to dispense with it. As a matter of fact, in numerous cases the protection of citizens' rights is used to shield their actual infringement, as the administration simply keeps silent when it receives requests.

The frequent instances of tacit refusals, which are more often than not the result of corrupt practices, entails the uncontrollable transfer of functions which are typical of the administration, to the court. The courts thus engage in unusual activities (they decide on issues of governance and power which fall entirely into the competence of public administration) and this fuels secondary corruption at the level of the administration of justice.

- **operational autonomy**

The widest field for corruption in the administrative sphere is the so-called operational autonomy, *i.e.* the legal possibility of the administration of any Executive body to assess and define its conduct on grounds of advisability, albeit within the framework and in line with the objectives of the law.

When entrusting an administrative body with the power to rely on operational autonomy, the law-maker normally has in mind the attainment of specific targets through the exercise of that body's competence. In such cases, the Legislature believes that the body in question will best perform the functions assigned to it if it has the legal possibility to assess and choose its own steps on a case-by-case basis. The lack of adequate controls for lawfulness or advisability, though, frequently makes operational autonomy translate into arbitrary or illegal steps by the administration, and all these factors contribute to corruption to the largest possible extent.

At the same time, some laws contain legal rules which pave the way for corruption as they give powers to the administrative authorities but fail to identify any criteria or to give any instruction as to why a particular law should regulate specific cases of clashing interests (for example, the *Law on Civil Registration*, in its s. 12, subsections 2 and 3, provides as follows: „Where both parents fail to reach an agreement on the name, the public official shall enter in the certificate of birth only one of the names proposed by the parents. Where the parents fail to identify a name, the public official shall determine the name which he or she deems most appropriate in the case at hand." How would a public official determine which of the names proposed by the parents should be entered in the certificate?). „Undefined" concepts or expressions in some laws also enable broad

interpretation and enforcement and, hence, corruption. Such an example might be „incongruous speed", a concept used in s. 20(2) of the *Law on Road Traffic*. Such provisions greatly risk to become corruption-generating incentives, especially when used in privatization and public procurement laws.

A detailed analysis is needed of the norms which enable the administration to exercise discretion and to decide in favor of one party or the other, while not allowing for any creativity, nor requiring that a matter be settled also in view of the public interest involved.

1.2. Shortcomings in the legal framework of administrative procedure

In view of judicial reform in general, and of administrative procedure in particular, the following major drawbacks and problems emerge from the analysis of the legal framework of administrative procedure:

- the existence of **plenty of sources of administrative-procedure law, which are moreover inconsistent**

The existence of many and diverse sources of administrative-procedure law makes control over the administration rather inefficient, waters down the responsibilities of the different supervisory authorities, undermines the reputation of judicial review, and results in poor information for the citizens about how and where they should challenge illegal or incorrect administrative acts (for instance, in administrative practice the existing *Law on Citizens' Proposals, Petitions, Complaints and Applications* is often applied in parallel to, or instead of, the *Law on Administrative Proceedings*).

Legal instruments belonging to other areas of law, *e.g.* constitutional law, civil law and civil procedure, criminal law and criminal procedure, labor law, fiscal law and fiscal procedure, tax law, public international law, sometimes contain administrative provisions.

There is no clear distinction between administrative-procedure law and other sets of procedural provisions, in particular between tax proceedings and administrative proceedings. The *Code of Tax Procedure*, for instance, provides for a route of challenging administrative acts other than the one set out in the *Law on Administrative Proceedings* or the *Law on the Supreme Administrative Court*. The *Code of Tax Procedure* has introduced the compulsory challenging of tax reassessments following an administrative procedure as a precondition for any subsequent judicial review, and precludes the challenging of initial tax assessments in court.

Because of the different approaches used, references to the *Code of Civil Procedure* and the *Code of Criminal Procedure* result in inaccuracies, gaps or even inconsistencies with the laws on administrative procedure. This is due to the different legal nature of the relations covered by any of those instruments. That situation frustrates enormously the examination of administrative disputes by district (second-tier) courts when they hear appeals lodged under the *Law of Administrative Proceedings*. It also creates difficulties when certain disputes fall within the competence of the Supreme Administrative Court (SAC), as the *Law on the Supreme Administrative Court* provides for a special procedure in such cases.

Under the existing rules on administrative procedure, the *Code of Civil*

Procedure has subsidiary application and this fails to mirror the specific nature of administrative legal relationships. The aspiration of the law-maker to put a coherent body of procedural rules in place is thus compromised, as is efficient administrative justice.

The interpretative decisions of the Supreme Administrative Court are binding on the bodies of the Judiciary and on the bodies of the Executive, as well as on the authorities of local self-government, but this does not imply that they could substitute for statutory rules. The lasting relations of administrative procedure (*e.g.* those concerning cassation proceedings or the rights of third interested parties) must not be governed by interpretative decisions, or else there would be conflicting pronouncements, fragmentation and inconsistency.

The existing legal rules on administrative justice fail to contribute to the development and operation of a consistent and uniform system of justice as far as administrative procedure is concerned. Those rules form a substantial obstacle to the development of administrative justice and to identifying the strategic legislative priorities for its improvement.

The discrepant, non-standardized sets of administrative proceedings may even push the courts to adopt different approaches, and this is beneficial to corrupt practices.

- the absence of **unambiguous legal rules on some procedures and on major legal structures**

The **cassation appeals** against court judgments in administrative cases give rise to issues which have no definite or explicit legislative response in the pieces of administrative-procedure legislation, at least not so far. The subsidiary application of the *Code of Civil Procedure* is insufficient, nor is the Code fit to serve as a comprehensive legal basis for the complex and specific area of administrative justice. Moreover, this approach fails to take on board the specificity of administrative procedure and the enhanced *ex officio* principle which underlies it. Gaps and inconsistent interpretations on issues such as grounds for cassation, evidence, time limits for lodging or challenging appeals, cassation appeals before the district courts, etc. quite naturally produce divergent case-law.

Bulgarian law has no provisions on corporate liability, be it civil or criminal or administrative.

- no **specialization at courts of first instance**

The lack of specialization at first-instance courts results in some administrative cases being handled by civil or criminal judges who find it more difficult to sink into the peculiarities of administrative proceedings. This affects essentially the quality of their judgments and overloads the instance of cassation, *i.e.* the Supreme Administrative Court, with cases abundant in poor examination of both the facts and the law, and not accompanied by the requisite evidentiary material. Administrative disputes are currently heard by the Supreme Administrative Court; special administrative divisions exist in some district courts and yet another group of courts have no specialization whatsoever when it comes to administrative cases.

- **failure to respect and comply with court acts**

Respect for and compliance with court acts form a fully-fledged manifestation of the principle of the rule of law. The rule of law is upheld not only when cases are resolved, but also when judgments are fulfilled. Failure to respect and comply with court judgments is a common problem across the country.

In the sphere of administrative law, the relations between the court, on the one hand, and the administrative bodies having issued the acts under attack, on the other hand, are somewhat problematic. The forwarding of administrative files is often delayed, the court is not assisted in clarifying the case through relevant facts and submissions, and there are instances of failure to fulfil the judgments.

The judgments of the Supreme Administrative Court are binding on the authorities and on the persons having participated in a case. If the administrative act appealed against is reversed, the judgment is binding *erga omnes* (s. 30, *Law on SAC*). The judgments delivered by the Supreme Administrative Court are subject to immediate enforcement by the authorities having issued, or applying the act reversed (s. 32, *Law on SAC*). Corrupt practices transpire when the administrative body which must act so as to fulfil the court judgment and the instructions of the court either fails to comply with the judgment or refrains from taking on board the instructions and the spirit of that judgment: for example, a privatization deal is not terminated although the court has repealed the illegal administrative order whereby the buyer was selected, or a privatization procedure starts from scratch instead of being resumed from the stage where the violation occurred, etc. The administrative penalties envisaged for such cases are extremely inefficient and, even worse, are often not enforced in practice.

2. The objective of reforms in administrative law and procedure

The reform of administrative law and procedure is aimed at improving the legal and organizational framework of administrative justice so as to prevent corruption by introducing a modern system of administrative legislation and setting out efficient mechanisms to keep the work of public administration under judicial review.

3. Proposed reforms

3.1. Proposed reforms in administrative law

Changes are compelling in substantive administrative law, and especially in the legal instruments that regulate the work of the administration, along the following lines:

3.1.1. Introducing **wider accountability and access to the information** kept by public authorities which could reduce the chances for corrupt acts or omissions.

3.1.2. **Regulating operational autonomy** by adopting internal rules that should define the method of decision-making when operational autonomy is granted. The internal rules will not be the same for all administrative bodies, they will not even be binding but will largely facilitate the work of the corresponding authority and articulate clearly the methods, approaches, criteria and measures to be used

by that authority when it operates autonomously. At the same time, all possible actions that could be undertaken by the respective authority in exercising its operational autonomy should be provided for in law. They should form part of the authority's competence and should correspond, in their content and objective, to the legislation in force. That process needs clear regulations and control.

The lawfulness of any exercise of operational autonomy must be subject to judicial review. A more problematic issue, though, is the possible review of the expediency of the steps made by the administration, as operational autonomy implies expediency.

It is debatable whether or not review could be entrusted to the so-called **special jurisdictions**. The grounds to resist the revival of the wide resort to administrative jurisdictions derive from the *Constitution*, as it provides for an overall judicial review of the acts and steps of the administration. The view in favor of special jurisdictions (that should *inter alia* review the expediency of administrative decisions) is substantiated with the argument that the *Constitution* only prevents bodies other than the courts listed in the *Constitution* or set up by virtue of special laws, from administering justice, *i.e.* from deciding on legal disputes. It is claimed that review by a special jurisdiction does not represent a genuine legal dispute but a dispute concerning the lawful exercise of an indisputable right.

The usefulness of special jurisdictions in controlling operational autonomy requires further debate and a solution should be forged that will be both working and faithful to the *Constitution*.

3.1.3. Career promotion of civil servants depending on their performance when they exercise their official duties, based on **fair and transparent career development procedures**. Such steps should contribute to eliminating the existing conditions for inside corruption.

3.1.4. Promoting a **general system to improve the professional knowledge and skills of those working in the administration.** An important element could be the introduction of a **systematic training for civil servants in corruption-related matters** at the Institute of Public Administration and European Integration, an institution that has been involved for nearly two years now mostly in the provision of compulsory or specialized training to civil servants.

3.1.5. Putting a reliable **feedback mechanism** in place to stay in touch with service users, so that their skills could be used both to better the process of administrative servicing and to suppress corruption. Special attention should be given to the provision of different lines of access to services (telephones, mail, e-mail, Internet portals), and to the implementation of floating working hours in administrative service units. Offering specialized training to civil servants at those units, so as to inspire a new administrative culture and to amplify their competence, would contribute to make the provision of administrative services more efficient and, hence, restrain

the causes for corruption. Such training should prepare the servants to meet the novel requirements in their contacts with citizens, *viz*. the provision of information, transparent decision-making, right to appeal. It is necessary to implement, stage by stage and consistently, the *State E-Government Strategy* and the *Government Concept Paper for Improving Administrative Services Based on the One-Stop Shop Principle*. These two documents outline the directions for a future modern and efficient governance in response to the needs of the public for high-quality and easily accessible administrative services, *inter alia* by way of electronic links between the citizens and the various agencies of public administration. Although in the most optimistic scenario at least 7 to 10 years will be needed to complete the automation of administrative processes, the gradual introduction of electronic operations within that process will enhance its transparency, accountability, flexibility and speed, and will reduce the costs. The exercise of state power, *inter alia* by providing administrative services though information technologies, would in all cases contribute to curbing bureaucracy and building up a corruption-deterring environment.

3.1.6. Devising legislative rules, adequate to the novel conditions, to regulate the constitutional right of citizens to file complaints, as the existing *Law on Citizens' Proposals, Petitions, Complaints and Applications* of 1980 is hopelessly outdated.

3.1.7. Revising completely the „**tacit refusal**“ and the appeals against such refusals. Two options are offered for discussion. **The first** is to retain tacit refusals but only provided that on appeal the court will invariably review the decision and handle the liability of the corresponding administrative body or of the person who failed to pronounce on time, while imposing **penalties** in the same proceedings. **The second** option is to establish the principle that failure of the administration to pronounce on time shall be construed as a reply in the affirmative to the request addressed to it. That would imply extending the structure of „**tacit refusals**“ as enshrined in the newly-adopted *Law on Limiting Administrative Regulation and Administrative Control* (published, SG, issue 55 of 17 June 2003, in force since 17 December 2003) to a wider number of cases.

3.2. Proposed reforms in administrative procedure

Further improvements in the legal and organizational framework of administrative justice are associated with the following specific proposals:

3.2.1. Drafting a ***Code of Administrative Procedure*** (CAP). The latter should cover the subject matter of administrative proceedings in the widest possible sense, as currently governed by the *Law on Administrative Proceedings*, the *Law on SAC*, the *Law on Administrative Offences and Penalties*, the *Law on Legislative Instruments*, and other laws relevant to the relations between citizens and legal entities, on the one hand, and public administration, on the other hand, and to court proceedings in administrative cases. Likewise, explicit rules are

needed to address the open issues in the administrative procedure, while interpretative decisions should be reserved for the essential interpretation of specific cases in court.

At the same time, CAP should not copy provisions or matters from the *Code of Civil Procedure*. Unfortunately, this has been the experience with the *Tax Procedure Code* which repeats, sometimes with minor discrepancies and deviations, texts from other procedural laws, thus entailing situations where the same court might apply different sets of rules to identical circumstances.

CAP should comprise the general rules of administrative procedure, including the procedure of issuing administrative acts, the enforcement of such acts, the imposition of administrative penalties, the appeals against those acts before another administrative body or before the court. Special procedural rules should exist for urgent and justified cases but they should also be contained in CAP, for example in a separate chapter. References to other procedural codes should be made according to the same approach and should be restricted, *i.e.* applicable only where principles and solutions common to all legal procedures are at stake.

In order to draft a *Code of Administrative Procedure* meeting the above requirements, the following steps are required:

- conducting an in-depth analysis of Bulgarian administrative legislation in view of its streamlining and future codification in a thorough *Code of Administrative Procedure*. The idea is to fully set apart administrative-procedure law and administrative justice and to ensure their autonomy in relation to civil and criminal justice;

- carrying out a general evaluation of the Bulgarian system of administrative justice and presenting the practices of the member states of the European Union to enable comparison;

- to fulfil the tasks identified above, international and European lecturers and experts must be involved, training and exchange of experience for Bulgarian experts and practicing judges should be organized;

- setting up a task force with the wide involvement of practicing judges, scholars and experts to draft a *Code of Administrative Procedure*. That task force should form part of a larger expert team developing, at conceptual level, the subject matters to be regulated by all procedural codes.

3.2.2. When elaborating CAP, references to the *Code of Civil Procedure*, the *Code of Criminal Procedure* or other procedural laws should be avoided. Should that prove impossible, such references should be reduced to a minimum.

3.2.3. The rules in CAP should be conform to the principles embedded in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and to other relevant international conventions ratified by the Bulgaria, as well as to any international conventions on the suppression of corruption to which Bulgaria has acceded.

3.2.4. In terms of structure, CAP should cover at least the following elements of proceedings relative to administrative acts:

- definition of the concept of „individual administrative act";
- definition of the concept of „general administrative act";
- definition of the concept of „instrument of secondary legislation";
- accurately developed criteria for the exclusion of certain administrative acts from the scope of judicial review; any exceptions should be strictly justified and kept to a minimum, in line with the European principles of administrative justice;
- definition of the concept of „interested parties";
- rules on the issuance of administrative acts and on the challenging of such acts before other administrative bodies;
- updating and specifying the prerequisites under which an administrative body may allow for the preliminary enforcement of an administrative act;
- further to introducing substantive legal rules on the nullity and voidability of administrative acts, providing for procedures that should help overcome the practical difficulties in distinguishing between the two concepts;
- providing exhaustive rules on proceedings at first instance and on proceedings before SAC;
- preserving the current two-instance court procedure, in line with the proposed reforms in civil law and procedure;
- providing autonomous rules, other than those in the *Code of Civil Procedure*, on summoning, notices, evidence and evidentiary means; the latter, in particular, should be modernized and brought into line with modern trends in the development of social life, such as the Internet, e-documents, etc.;
- explicitly providing an opportunity for interested parties who have not participated in the administrative proceedings to be able to initiate the reversal of effective court judgments; this possibility is currently covered by Interpretative Decision No.1 of 2001 of the General Assembly of Judges at SAC;
- providing for corporate pecuniary liability;
- providing for specific rules on collateral to match the demands of administrative procedure;
- providing rules on the enforcement of judgments by the administration. The legal procedure whereby sanctions are imposed for failure to comply with the instructions of the court should be fundamentally revized;

- to achieve the aforementioned objective, administrative authorities should be placed under a more severe threat of administrative penalties for any failure to comply with judgments; such liability should match the seriousness of the violation, *e.g.* higher fines and other appropriate sanctions should be envisaged;

- providing rules on the liability of the State and on remedying the damage that may have occurred as a result of an administrative act or of the failure to issue an act. Redress could take various forms, *viz.* compensation in the form of paying an amount of money or ensuring another benefit (if the damage cannot be directly rectified) or reinstating the affected parties in their rights. The remedy should not depend on whether or not there has been any attempt to bring the individual perpetrator to court; should be fully payable where the administrative act is found to be illegal, with partial compensation where the act entailed some damage; should not be payable or should go down where the victim partially contributed to the damage; and should be immediately decided on and paid in due course.

It is necessary to introduce unified rules on the steps of the administration in issuing administrative acts. On grounds of those rules, the administrative bodies should adopt their own internal regulations for each type of individual or general administrative acts, and those internal regulations should be announced in public and be accessible. That would assist statutory judicial review on the discretionary powers of the administration in issuing a specific act.

3.2.5. Setting up **a new unified system of administrative courts - regional administrative courts and a Supreme Administrative Court:** ***pros and cons***

Support for setting up a new unified system of regional administrative courts is based on the current drawbacks of administrative justice which stem from the lack of specialization at first instance (regional administrative courts). This entails the need to amend the *Constitution* of Bulgaria, and in particular to provide expressly in its s. 119(1) that the system of courts in the country shall include regional administrative courts.

Should this option be adopted, it is mandatory to examine well the number of cases heard by district and regional courts at present, so as to rectify the imbalance in the workload of different courts and to avoid impeding the access of citizens to justice. Where those courts are set up, professionals at district courts with operational administrative divisions should be relied upon.

When building up a new system of administrative courts, any potential „remoteness of justice from people" should be prevented. The lesson with the existing *Code of Tax Procedure* should be learnt well, as that Code entrusted the examination of tax cases only to five district courts located within the territory of the courts of appeal.

The views **against** such a system also take account of the need to have specialization in administrative cases at first instance, but this should allegedly be achieved along the current model of the specialization in civil or criminal cases. The arguments against the proposal for separate administrative courts mainly suggest that this would be unreasonable in

terms of quantity, structure and financial resources needed.

It is therefore recommended that the studies and discussions on this issue should go on, so that all pros and cons could be carefully weighed and taken into consideration.

Regardless of the path to be taken, it is necessary to clearly define the competence of SAC and to devise criteria to streamline the number and the type of cases heard by that court at first instance, *inter alia* by evaluating the underlying public interest. This is required as the Supreme Administrative Court should be enabled to efficiently implement its constitutional powers to carry out the supreme supervision for the accurate and uniform application of the laws by all courts. To that effect SAC should also issue interpretative decisions to overcome inconsistent case-law.

A careful thought should be given to the introduction of single-member, three-member and five-member chambers at the Supreme Administrative Court and to an extended use of closed hearings as a tool to assess on a preliminary basis the procedural admissibility of complaints.

3.2.6. **Training** of judges and court clerks

The need should be analyzed for training in administrative law, and specific training programs should be developed to tackle the implementation of the future *Code of Administrative Procedure*. Those programs should be implemented in the context of the proposals for an overall reform in the training of magistrates and court clerks (see Part One, section III).

3.2.7. Creating a **computer system** where the cases should be loaded (similar to that in the Supreme Administrative Court) and providing access to both systems via the Internet.

3.2.8. The need to promote the role of public prosecution as an efficient anti-corruption factor in administrative proceedings

Unlike its role in criminal procedure, public prosecution is not involved in administrative proceedings as a body of criminal repression, nor does it necessarily represent the interests of the State. This finding is reconfirmed by the fact that public prosecutors must participate in court proceedings where the legality of administrative acts is questioned but are not bound to do so in administrative liability proceedings where fines are challenged.

In administrative proceedings, public prosecutors **uphold the principle of legality and supervise the lawfulness of the acts and steps issued or undertaken by the administration**. The public prosecutor pronounces and gives conclusion on the lawfulness of the administrative act at stake or on the well-foundedness of the appeal, thus participating in the dispute-resolution process. An explicit provision is therefore necessary for the **compulsory participation of a public prosecutor in proceedings where administrative acts of a legislative nature are appealed against before SAC**. That would help reaffirm the role of public prosecution in administrative procedure and would turn it into a powerful anti-corruption factor.

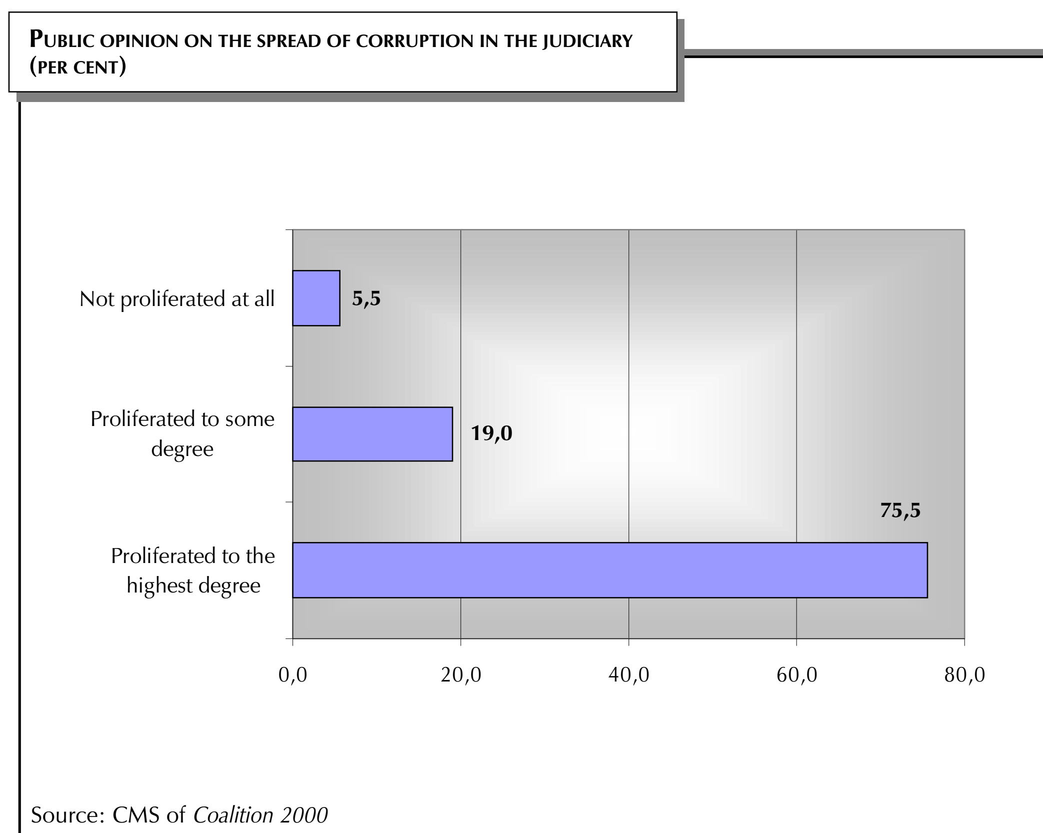
The mandatory participation of prosecutors from district prosecution offices or from the Prosecution Office with SAC in all court hearings where administrative acts are appealed against, in cassation proceedings (possibly initiated on appeal from the Deputy Prosecutor General with SAC on grounds of s. 33(2) of the *Law on SAC*), in proceedings for the delivery of interpretative decisions and for the reversal of effective judgments (Deputy Prosecutor General with SAC), and the power to propose the resumption of administrative liability proceedings (district prosecutors) reinforce the guarantees for compliance with the principle of legality and appear to be efficient supplementary mechanisms to fight corruption. Therefore, the recommendations of some foreign experts that the general supervision of public prosecution to ensure legality or the participation of public prosecutors in administrative cases should be abolished are unacceptable, as they result from an insufficiently detailed knowledge of the institution of public prosecution and of its functions in administrative justice.

CONCLUSION

Opening the Judiciary towards the public

Due to the specific nature of its work, the Judiciary has a peculiar, relatively autonomous status in the structure of social relations, although its development naturally depends on law-making by the political class. The Judiciary is therefore more resistant to changes and relatively remote from what might be a burning public issue at a given time. In established democracies, the third power guarantees legal stability and confidence in state institutions, it is a symbol of national continuity and traditions. The Judiciary in transition societies, however, is faced with different expectations. The extraordinary dynamics of democratic reforms make the civil society place too much of a hope on the institutions called upon to uphold citizens' rights and the legitimacy of the state based on the rule of law. Those attitudes partly derive from the overall disillusionment of the majority of Bulgarians with the performance of the post-communist state. In those circumstances, the Judiciary is often perceived as an *ultima ratio* - the instance of last resort which is expected to fix all imperfections and the unfair decisions made by other bodies endowed with state power. It is therefore understandable that when the social defects of transition persist, or even intensify, the public finally feels betrayed in its hope that institutionalized law will take its side. This somehow explains why magistrates and the general public differ so mush in their assessments of the spread of corruption within the Judiciary.

PUBLIC OPINION ON THE SPREAD OF CORRUPTION IN THE JUDICIARY (PER CENT)



Source: CMS of *Coalition 2000*

The data from public opinion polls suggest that there is a high level of corruption in the Judiciary. On the contrary, every other magistrate is confident that public perceptions of the spread of corruption are unfounded.

Unlike the population and businessmen, magistrates derive their information primarily from personal experience and observation. The media are

HOW OFTEN DO CITIZENS WITH WHOM YOU ARE IN CONTACT WHEN FULFILLING YOUR PROFESSIONAL DUTIES - (PER CENT)

	Normally	Sometimes	Seldom	Never	*Does not know/ No response*
- have excessive expectations of magistrates and their work?	56.2	28.0	8.1	2.6	5.1
- fail to know their rights?	52.4	31.5	11.9	2.0	2.2
- show discontent with the work of magistrates?	34.6	47.1	14.1	2.0	2.2
- prefer to engage in corrupt acts rather than uphold their rights lawfully?	15.4	34.6	26.9	8.8	14.3
- think they can achieve whatever they want by offering money or gifts?	12.6	30.4	32.2	15.2	9.7
Behave rudely or impolitely with court clerks or magistrates?	9.5	37.4	42.7	6.8	3.5

Source: CMS of *Coalition 2000*

not particularly important for magistrates. Their assessments of and ideas about corruption and its spread in the Judiciary are mostly formed on the basis of information exchanged via informal communication channels (contacts with acquaintances and colleagues), and of the mismatch between the personal income and the standard of living of some magistrates.

The majority of magistrates think that **citizens normally entertain excessive expectations of the work of the members of the Judiciary**. At the same time, magistrates are of the view that many citizens with whom they come into contact **fail to know their own rights, merely fuss about the work of magistrates** and are inclined to resort to various corrupt practices in order to settle the disputable issues „informally".

The above findings do not undermine the importance of those reasons for the drastic decline of public confidence in the Judiciary that are inherent in the system. The prevailing public perceptions of slowness, inefficiency and bias, of widespread corruption in the system called upon to resist crime, are well-founded. The discrepancy between the opinion of the public and that of magistrates on the level of corruption in the Judiciary reconfirms the existence of a **serious problem in the communication** between the Judiciary and the civil society.

This is further proven by the inability of magistrates or the individual branches of the Judiciary **to respond adequately to critical assessments of their work**. According to the results of the survey conducted by *Vitosha Research* Agency only a few of them (25.1 per cent) think they should inform the public about any shortcomings in the operation of the system they have come across. Moreover, as public pressure grows, some branches of the Judiciary perceive as hostile even the well-meaning opinions and recommendations voiced by the civil society, foreign governments and international organizations. That reaction in turn enhances public suspicion that members of the Judiciary use their immunity as a shield, that they are uncontrollable and unapproachable.

An increasing number of magistrates and experts become aware of the urgent need to change the style of communication between the Judiciary and the public. Moreover, the first steps have been made to open some units of the Judiciary towards the problems, the questions and the criticism

featuring its work. New practices are being developed which first of all demonstrate the aspiration of the Judiciary, or of some of its structures and representatives, to enter into a public dialogue to discuss the issues of justice in a transitional environment. The following examples could be given:

- **press officers**

Over the past two or three years, some bodies of the Judiciary have started opening themselves to the society and explaining the nature of their work to the community. As a result press officers were appointed for that purpose at some courts[15]. That was expressly envisaged by the amendments to the *Law on the Judiciary* made in 2002 and the staff positions should be provided for by the Supreme Judicial Council.

In 2002, press officers were appointed at the appellate, district and regional courts in Bourgas, the appellate, district and regional courts in Veliko Tarnovo, the appellate, district and regional courts in Plovdiv, Sofia Regional Court, at Sofia District Court, Sofia Court of Appeal, and the Supreme Administrative Court. The officers provide information about the development of cases (scheduled hearings, progress, key points, judgments or verdicts) which are of interest to the public.

- **access to information about the work of the Judiciary**

The opening of the Judiciary towards the public must include the provision of access to information about the operation of the Judiciary. A guideline in that respect is *Recommendation No. R (81) 7 of the Committee of Minister of the Council of Europe on Measures Facilitating the Access to Justice*. A major principle underlying the Recommendation is for member states to undertake all necessary steps to inform the public on the means open to an individual to assert his rights before courts easily, speedily and inexpensively. As regards information for the public, it is recommended to give special attention to and undertake the following measures:

1. Appropriate measures should be taken to inform the public of the location and the competence of courts, and the way in which proceedings are commenced or defended before those courts.

2. General information should be available from the court, or a competent body or service on the following items:

- procedural requirements, provided that this information does not involve giving legal advice concerning the substance of the case;
- the way in which, and the time within which a decision can be challenged, the rules of procedure and any required documents to this effect;
- methods by which a decision might be enforced and, if possible, the costs, involved.

[15] The process of involving press officers to facilitate the communication between the public and the Judiciary was initially assisted in the framework of a project implemented by the Legal Initiative for Training and Development (PIOR) and supported by the Open Society Foundation (COLPI Fund, Judicial Reform), and the American Bar Association, Central and Eurasian Law Initiative, in partnership with the Association of Judges in Bulgaria.

3. States should take measures to ensure that all procedural documents are in a simple form and that the language used is comprehensible to the public and any judicial decision is comprehensible to the parties.

A suitable step towards opening the system is for the individual courts to develop web sites. Such sites already exist for the Supreme Administrative Court, Plovdiv Court of Appeal, Plovdiv District Court, the Palace of Justice in Varna, Varna Regional Court, the Palace of Justice in Shoumen, the Palace of Justice in Gabrovo. The Supreme Judicial Council has also launched a web site recently.

- The web site of the Supreme Administrative Court is an impressive achievement and citizens and attorneys equally believe that it is very useful. It provides information on current and forthcoming events, as well as on every pending case, its progress, the possible instructions to the parties, the judgments, etc.

The following clusters of up-to-date information are available on the web-site of the Supreme Administrative Court:

- legislative framework of administrative justice;
- jurisdiction of SAC at first instance and on cassation, in private proceedings, to reverse effective judgments, etc.;
- answers to key questions about the operation of the court, plus information about the European Court of Human rights;
- current information on the cases brought before and decided by SAC.

- Varna District Court has the useful practice of providing on-line access to its information and even loads on the web its annual reports to the public. Steps in this direction have been also undertaken by other courts.

Public initiatives at Varna District Court

- public report: Varna District Court reports on its work during the previous year and informs how its operations might benefit the citizens;
- web-site with separate headings and instructions on how to ask questions and receive answers;
- an information system that keeps track of and provides statistics on „fast-track“ criminal proceedings, and involves Varna Regional Directorate of Interior, the Regional Court, the Regional Prosecution Office, and the District Court;
- the Open Doors initiative aims at providing basic legal knowledge to adults and younger people between 15 and 19 years of age. It is an out-of-class form of learning by doing where training, case studies and simulation proceedings help the participants to address specific legal topics and issues (violence at home and among the children, deprivation of parental rights, drugs and drugs cases, etc.).

Blagoevgrad District Court and Blagoevgrad Regional Court

- work with document-processing software enabling the quick access to data about the progress of cases;
- have provided the journalists reporting on their activities, with an electronic manual with basic information about the organization of those two courts.

The document-processing software and the manual have been developed by the Judicial Strengthening Program which is financed by the United States Agency for International Development.

Nonetheless, further steps are required **to improve the communication between the Judiciary and the public. The following could be specified *inter alia*:**

- introducing the practice of Varna District Court, *viz*. to provide reports to the community, at all district courts in the country;
- widely promoting the „Open Doors" initiative of Varna District Court in the different structures of the Judiciary;
- carrying out awareness campaigns to explain the functions, the objectives, the powers and duties of the various branches of the Judiciary;
- publicizing the work of the Supreme Administrative Court both through its web site and by publicly announcing the cases heard by that court;
- publicizing the work of appointed court press officers and accelerating the appointment of such officials in all district towns;
- drafting manuals and leaflets with practical information;
- regularly organizing joint seminars for magistrates and media representatives;
- organizing an awareness campaign with respect to the *Law on Personal Data Protection*;
- providing access to the essential CV details of magistrates, and to the public register of their property.

When putting in place the indispensable measures for opening the Judiciary towards the society, special attention should be attached to the **implementation of modern technology**, for example:

- initiating projects to facilitate receipt on the Internet of information about the cases and their progress, and of other information contained therein. (It might be helpful to make judges and prosecutors regularly answer questions addressed to them via the Internet);
- introducing automated document-processing systems that should provide a quick and secure processing of the cases and give timely and easy access of citizens to the information they need;

- ensuring the use of and access to the registers kept in the judicial system;
- including the Supreme Court of Cassation and Sofia City Court, which understandably attract a lot of public attention and interest, in the public information projects.