CORRUPTION IN JUDICIARY

Center for Liberal-Democratic Studies

Boris Begović, Boško Mijatović i Dragor Hiber (editors)
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Content

FOREWORD 7

I Introduction 9
Role of judiciary 9
Judiciary and economic life 10
Judiciary and corruption 12
Factors of corruption 13
Long tradition of corruption 15

II Entrepreneurs on Corruption in the Judiciary 19
Introduction 19
Sample 19
Legitimacy of the judiciary 20
Efficiency of judiciary and its services 22
Functioning of the judiciary 25
Satisfaction with the performance of the judge 30
Spread of corruption 31
Conclusion 49

III Results of the Survey of Judiciary Officials 53
Introduction 53
Evaluation of the situation in the judiciary 54
Court practice and corruption: 63
"Corruption nuclei" and "channels" of corruption 63
Perceptions of the extent of corruption in society and the judiciary 85
Conclusion 126

IV Comparing the results of the survey of judiciary professions and entrepreneurs 109
Introduction 109
Mechanisms of corrupt practices in the judiciary 109
Preception of corruption within the judiciary 123
Conclusion 99

V Corruption mechanisms 129
Introduction 129
The judge 135
Court president 141
Court clerks 143
Court experts 146
Attorneys 148
Conclusion 149

VI Factors of corruption in the judiciary 153
Introduction 153
Exogenous factors of corruption 156
Endogenous factors of corruption 172
Conclusion 183

VII Consequences of corruption in judiciary 187
Introduction 187
Economic effects of corruption in the judiciary 189
General legal effects of judicial corruption 207

VIII Strategy of the anti-coruption fight in the judiciary 211
Introduction 211
General strategy 212
Upgrading the legislation 214
Transparency 218
Upgrading the judiciary 220
Building up the motivation 226
Appointment, dismissal, and promotion of judges 231
Other actors 236

Annex
The Bangalore principles of judicial conduct 239

Foreword

Corruption in Serbia, although it has slightly decreased during the previous years, is still a serious social and economic problem. It endangers the basic civilization and democratic values, impairs the state's reputation and causes unnecessary economic costs.

The public estimates that judiciary is one of the areas of society most infected by corruption. Anecdotal evidence also shows that in these estimates there is plenty of truth. The consequences of judicial corruption, especially in courts, are very serious: they imperil the individual's rights and freedom, since they forfeit the right to a fair trial, and weaken the monitoring of executive and legislative government by courts. Without efficient courts there can be no rule of law.

The aim of this study is to examine the extent of judicial corruption, provide an institutional analysis of the causes and mechanisms of corruption and to suggest a comprehensive and effective programme for combating corruption in the judiciary.

Belgrade, August 22, 2004

Boris Begović
Dragor Hiber
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I Introduction

ROLE OF JUDICIARY

Public services are an extended hand of the state, which provide services to the citizens. At the same time, they are entrusted with, as Karl Schmidt puts it, "safeguarding public interest".[1] Quality and efficiency in safeguarding those interests serves as a measure of the operational efficiency of institutions and the system of political power. Similarly, public servants have to be incorruptible and must have a sense of duty (Weber). Since we are addressing the key institutions in a society here, analysis of their functioning is, by the same token, the analysis of the state's functioning. In the system of division of power, one public service – the judiciary – has a special significance, since the quality of its functioning influences the functioning of the whole society.

In contemporary democratic countries based on the rule of law, the role of the judiciary is twofold: first, to protect the rights and liberties of individuals, providing them with a right to fair trial by an impartial and competent court, and second, being one of the branches of the state administration, to supervise the other two branches by providing compliance with to the law and constitution. Indeed, without a sound and functioning judiciary there is no rule of law. While things are not in order in the court house, the judiciary cannot effectively protect human rights, nor can it perform effective supervision over executive and legislative power.

Poor protection of human rights, life and property may lead to the appearance of alternative, private mechanisms of protection, which usually bring more harm than benefit to the society. The simplest case is when a victimized individual takes justice in his own hands, because he cannot, or believes that he cannot get justice in court. A more complex situation arises with the establishment

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[1] Karl Schmidt – Legality and Legitimacy in: Norm and Decision, Karl Schmidt and its Critics, Filip Višnjić, Beograd, 2001, p. 309

of private "agencies" or alternative police, providing protection, to some extent, of the life and rights of certain individuals.[2] This kind of privatization of justice brings "harsh" justice, at best, and frequently very partial justice, or obvious injustice. The lack of a functioning justice system, may ultimately lead to the Hobbesian war of all against all, with devastating consequences. The third model leads to the case where individuals get accustomed to a weak judiciary, where it is difficult or impossible to get justice. Approaches to this adjustment vary: from involuntary participation in corruption, through avoiding actions, which may lead to dispute (for instance, signing a contract or giving up business), to emigrating to another state.

The most important institution for settling disputes is, by all means, the state judiciary. There are methods for informal dispute settlement in every country, as for example those in the family or local community, and they are more widespread in less developed countries. However, these informal methods are seldom capable of settling more complex business disputes.

JUDICIARY AND ECONOMIC LIFE

The importance of the judiciary for economic development has been reiterated through the centuries. It was the founder of economic theory, Adam Smith who already in XVIII century, wrote that factors which "considerably limited trade were imperfections of the law and its application". [3] All societies need institutions for dispute settlement and mechanisms for property protection and contract enforcement. If there are no such institutions, if there is widespread contract and ownership insecurity, commercial transactions will be limited only to the most simple forms and actors who trust each other, while risk averse trade, financial arrangements and especially productive investments will be severely limited.

Let us take a look at one real life example. The author of these lines asked, not so long ago, one of our leading business people,

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[2] Sicilian Mafia was initially established for the purpose of protecting land ownership rights from developed vandalism, at the time of weak state protection. See O. Bandiera - Land Reform, the Market for Protection and the Origins of the Sicilian Mafia: Theory and Evidence, Journal of Law, Economics and Organization, Vol. 19, No. 1, 2003

[3] A. Smith – *Lectures on Jurisprudence*, Oxford University Press, 1978, p. 528

how he secures collection of claims for delivered goods: with a hard contract, bank guarantee, collateral or through a collection agency? None of the above, responded the businessman: “I work only with a 100% advance payment”. Indeed, that is the most secure way of collection, but undoubtedly, it results in limited volume of transactions and economic activity in his company and the whole economy, due to elimination of credit transactions. And credit transactions between trading companies are necessary and common in the modern economy, while paying at the moment of delivery, or even before that, is a matter of economic history, a time when delayed collection was burdened with great insecurity.

The businessman mentioned is certainly not to blame for doing business in this way. He is aware of the fact that the requirement for advance payment limits his commercial relations to a small circle of customers, thus missing an opportunity for wider development of his business. However his distrust in the efficacy of collection of claims through court procedure, based also on his own bad experience, forces him to employ the strategy of choosing security over higher, but uncertain, profitability.

Here we will mention some examples depicting the relationship between court performance and economic development. In China, in less than two decades, after economic reforms bringing liberalization, entry of foreign investors, and a very significant surge of economic activity, there was a significant raise in the number of disputes to be settled in courts: from almost 14 thousand a year in the period between 1979 to 1982, to almost ten times more, 1.5 million in 1997.[4] In Poland and Slovakia individual farmers at the beginning of the 1990’s had huge problems in collecting claims for delivered goods, due to weaknesses, among other things, in the judicial system. The solution to this problem was found in the vertical integration of economic activities, thus diminishing the number of contracts with partners out of the firm, which was a reasonable solution to the given situation. In the other half of the 1990’s there was a significant strengthening of the judiciary in these countries, which meant that it was no longer necessary to seek alternative methods for decreasing risk, and that business diversification could be made at will, in accordance with profitability criteria.[5] Many studies have shown that those countries, in which the judicial

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[4] *Building Institutions for Markets*, World Development Report 2002, World Bank, 2001

[5] Ibid

system is more powerful, develop a tendency of establishing larger firms, since owners can rely on the courts for protection of their property rights and enforcement of more complex contracts.[6] The Nobel Price winner Douglas North was right when he said that lack of cheap methods for protection of contracts and property is probably "the most important cause of historical stagnation, as well as current underdevelopment of the Third World countries".[7] The moral is obvious: an efficient judiciary is a prerequisite of the fast and long lasting economic progress; in its absence, more expensive and less efficient alternatives shall be sought and found, however, at the expense of economic development.

JUDICIARY AND CORRUPTION

The weaknesses of judiciary as a whole may be caused by different factors, institutional or personal, to name two. One of the more important ones is corruption.

There are many definitions of corruption, and probably the most popular one is the definition of the World Bank, which identifies corruption as an "abuse of the public office for private gains". Let us examine some important elements of this definition. First, the crucial assumption of corruption is employment of individual(s) in public office, in state or quasi-state bodies, institutions and establishments, which provide them with an opportunity to make decisions which cause undeserved benefits to be granted, or undeserved damage to be incurred. Therefore, corruption relates only to actions, or the failure to act, by state representatives or the like, and does not concern actions between private persons (which is identified as bribery or fraud). The other crucial assumption of corruption is the existence of the conscious intention to acquire illegal benefit. If benefit or damage is brought to someone by mistake, or if there is a conscientious intention, which is, however, not related to private gains, this cannot be identified as corruption. Third, the definition of the gain benefiting an individual in public office is very broad: it may not be of pecuniary, but of some other nature

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6 K. Kumar, R. Rajan and L. Zingales – What Determines Firm Size?, NBER WP 7208, 1999; A. Bigsten et al – Contract Flexibility and Dispute Resolution in African Manufacturing, Journal of Development Studies, 2/2000

7 D. North – *Institutions, Institutional Change, and Economic Performance,* Cambridge University Press, 1990

(service, new employment or status gain etc.); also, it is not necessary that the person benefiting from corruption is the same as the individual in public office making the decision. It may be an associated person (natural or legal entity), a relative for instance or private firms owned by that individual or a relative, a political party etc.

A very important addition to this definition is provided by Vito Tanzi, who introduces the concept of impartiality. He defines corruption in the following way: corruption exist in cases where there is an intentional breach of the impartiality principle in the course of decision making, with the aim of acquiring a certain benefit. Foundation of the concept of justice and law lies definitely in an equal treatment for equals, and acting in conformity with this principle is an expression of impartiality towards the principle of equality before the law. It was John Lock who said that one rule should be equally applicable for the rich as well as for the poor man, for princes and for paupers.[8]

Abandonment of impartiality, or partiality in the treatment of parties in court means that a judge or a court official acts in favour or at the expense of a party, or refrains from acting, in cases where he should act, with the aim of bringing undeserved gain to someone. In other words, bias in this context means a breach of the rules of procedure, or unequal interpretation and application of these rules to different natural or legal entities – thus individuals in the judiciary are biased only in favour of certain parties.

Corruption is usually considered as a voluntary, though illegal activity, in which an interested party offers, and a judge or other court official receives a bribe in return for a specific action. However, there are different, and yet analogues activities: for instance, a judge may request payment from a party in a dispute, even for a decision that is in conformity with law, which does not represent corruption, but may be considered as extortion.

FACTORS OF CORRUPTION

Factors which influence the emergence and spread of corruption are numerous. The first is certainly the aspiration of an individual to improve his financial standing, even through illegal means. He usually tries to calculate the pecuniary and other benefits from cor-

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[8] John Locke – *Second Treatise on Government*, Chapter 11

ruption on one hand, and expected costs, measured by probability of apprehension and severity of the punishment, on the other. If the benefit is higher than the expected costs, an individual has a motive to engage in corruption, and vice versa. Since there are, by definition, benefits from corruption, (for instance, a judge receives money and a party benefit from his decision) and since penalties for corruption are usually serious, an important not to say crucial role in deciding whether to engage in corruption is the assessment of the participant on the probability of getting caught. If it is close to zero, there are almost no obstacles to corruption, apart from moral ones. If the probability of getting caught is higher, readiness to engage in corruption will be smaller.

The level of corruption in the judiciary is also influenced by the level of salaries, primarily of judges, but also of other officials and employees. If salaries are so low that they do not provide for decent living of judges and other employees, then it is possible for some of them to engage in corruption in order to provide an acceptable, even mediocre standard of living for themselves and their families. Raising salaries to a reasonable level shall certainly, lower the scope of corruption, since the cost-benefit analysis of an individual will show that it is better to preserve what he already has, than ask for more, by risking getting caught and losing that reasonable standard of living. Naturally, raising salaries to a decent level cannot fully eliminate corruption, since bribes may be many times higher than a salary and thus be very tempting and acceptable to risk-prone individuals. In other words, there is no sufficiently high salary which will deter all employees in the judiciary (or any other activity) from engaging in corruptive practices.

A powerful incentive to corruption in the judiciary is general and widespread corruption in the society as a whole, and in other branches of state administration. If the corruption is widespread at the top of the state administration and in other branches of state administration (police, tax administration, health care, education etc.), it is certain that it will be more developed in the judiciary as well. There are two reasons for this: first, if the corruption is widespread, control mechanisms for its elimination must be very weak, therefore any area, including the judiciary, becomes a favorable environment for corruption; second, in that kind of society there is usually a general attitude of tolerance towards corruption, or at least accommodation to its presence, so that even some of the people whose job is to fight corruption, such as judges and other em-

ployees in the judiciary, loose the sense of impartiality and start participating in lucrative, although illegal activities.

On the other hand, a discouraging factor of corruption is a combination of substantive and procedural rules, on one hand, and paper evidence, on the other. Material and procedural rules narrow the scope for free decision making on the part of judges and other judicial officials, which definitely decreases the "corruption potential". Hence, the wider the scope of discretionary decision making of a state official, the higher the potential for corruption. Paper evidence or recording, including the existence of the higher court instance, puts judges work under some kind of likely supervision, which usually serves as an effective deterrent from more serious breaches of substantive and procedural rules. While, for instance, a traffic policeman may take bribes and look the other way from the offender without much fear of getting caught, since there is no paper evidence of his behavior, a judge does not have that opportunity. This fact certainly does not lead to elimination of corruption in the judiciary, since even that decreased corruption potential is not negligible enough for some individuals. Besides, substantive and procedural rules may be inefficient – bureaucratic, bulky and confusing – and thus provide an opportunity for widening the scope of arbitrary decision making of employees in the judiciary, with positive feedback for increasing corruption.

LONG TRADITION OF CORRUPTION

Corruption of judges has a long tradition. That is how Anytus (one of the Socrates' plaintiffs) avoided punishment deserved due to the unaccomplished mission at the battle of Pylos, by bribing the judges. [9] One of the reasons for enacting Theodosius' Law on citing from 426 AD (*Lex Citationis*) was to stop arbitrary interpretations caused by the power of landowners and bribing judges.[10] The great philosopher and legal scholar Francis Bacon was caught accepting bribes 28 times, while he was Lord Chancellor - the highest legal position in England. His defense was: "I take bribes from both sides, therefore dirty money can not influence my deci-

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[9] Plutarch – *Parallel Lives of Noble Grecians and Romans*, Matica srpska, Novi Sad, 1978, p. 279

[10] O. Stanojević – Gaj i njegove institucije, u Gaj, Institucije, Nolit, Beograd, 1982, p. 21

sions." The Parliament removed him from public office and sent him to prison. In the eighteenth century bribing judges was quite common. There were all kinds of deals, including those between judges and thieves.[11]

Corruption is more of less developed in all societies. Even rich and regulated countries with a long democratic tradition are not resistant to it. However, experience tells us that it is higher in poor and legally chaotic societies. There are several reasons for this: first, poor and socially disintegrated societies are more prone to corruption; second, in legally chaotic societies corruption most usually remains unpunished, and that influences negatively givers and takers of bribes ("when others can, so can I"); and third, investigation of corruption scandals and legal protection of society from corruption entails, besides institutional order, significant funds. Moral punishments for corruption in these societies are less severe in spite of the widespread beliefs that it is dangerous for society. On the other hand, some segments of corruption in rich and developed societies are often legalized through the lobbying system.

Generally speaking, widespread corruption is an infallible symptom of serious weaknesses in a societal system as a whole. The corruption paradox actually lies in the fact that it is facilitated by bulky bureaucratic regulations and wide competences in the environment of an inadequate institutional framework and general inefficiency. It is, as a rule, rooted in public services, the decisions of which crucially affect realization of vital (material, health related etc.) interests and rights of citizens, and which also safeguard the interests of the state as a general guarantor of the community's life. It means that institutions of the system become a decisive factor, which, through abandonment of the impartiality principle in the course of decision making, significantly obstructs the exercise of individual rights, which, by favouring the private, fundamentally hinder the safeguarding of the public interest. That is why, in corrupted societies, distrust in institutions spreads endemically, as well as moral confusion and every other insecurity. The absence of visibility and supervision over the work of the representatives of a system, which is the basic symptom, provides impetus for further spreading of the discretionary competences of state authorities and

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[11] G. I. Ruche, O. Kircheimer – *Punishment and Social Structure*, Visio mundi, Novi Sad, 1984, p. 87

abuse of authority, which in turn, weakens public support of democratic institutions.

Widespread corruption in the judiciary, also undeniably shows that there is something seriously wrong with the current system and its functioning, on one hand, and societal norms and values, on the other. Pervasive corruptive practices in the judiciary preclude clear interpretation of the law by the highest authority, and obstruct universal and effective implementation of law and Constitution by those who are supposed to implement them. Thus, these corruptive practices become a paradigm for the absence of the rule of law, justice and social justice in the society as a whole.

A corrupted judiciary facilitates further survival of state voluntarism in all other spheres of life, since abandonment of law and order affects further widening of arbitrariness in the executive branch of power. It leads to violation of the principle of equality of citizens before the law, since it withholds provision of a public service – efficient and impartial decision making by courts and judiciary as a whole – to those who cannot pay for them (cannot afford to be part of the corruptive transaction). Corruption in commercial courts facilitates the emergence of a form of parallel system of law enforcement, which is characterized by exemptions from general rules and accommodation to private rules and interests (privatized law). On the individual level, a citizen, entrepreneur (natural person), or company (legal entity), which cannot get fair (efficient and impartial) service from the court since it cannot or will not pay for it, gives up addressing courts and seeks alternative mechanisms which often lead to other illegal action. "Taking justice in their own hands" in its literal and figurative meaning, may start a spiral of violence, or other extended violation of law and order, which has a certain societal price. The actions of a corrupted, i.e. biased judiciary weaken one of the fundamental beliefs of people which directs their behavior in different domains of life: the so called "hypothesis of fairness" - according to which "everyone gets what he deserves".

Partiality in court (especially economic) disputes, does not only infringe on the general principle of fairness, but affects the general perception of social justice. The perception of the degree of fairness in a social system pertaining to distribution of goods and rewards is, undeniably, an important precondition for motivating individuals to engage in productive activities. Systemic bureaucratic corruption promotes an unfair social system in which there is no clear relation between resource allocation and the merits of an in-

dividual. If people perceive that someone's living standard may not be measured only by his societal contribution, that is, that society is characterized by "unfair hierarchy", their working enthusiasm weakens, and the drive towards illegal methods for acquiring wealth strengthens. Therefore, individual and short term "gain" from corruption in the judiciary, mentioned by some analysts (due to simplification and acceleration of procedures and decrease in costs of a procedure) is canceled out by decrease of total economic activity in a society. All in all, perception of injustice and unfairness shared by members of a society in which the judiciary is corrupted, leaves long lasting consequences on social interaction and integration. Corruption which (at least for some, and at some point) may reduce the present, already proverbial inefficiency of courts, leads to anomy in the society which incurs much higher costs in the long run for a society as a whole.

One of the basic difficulties, in studying as in fighting corruption, is that it often, especially in underdeveloped "transitional" societies, becomes systemic. Systemic corruption represents abuse of public office for private gain and is embedded in a system, so that it becomes its integral part, almost a necessary condition, for the functioning of an institution. The problem lies in the fact that by becoming systemic, corruption becomes less visible. That is why classical measures used for reducing corruption (by punishing illegal activities) may not be effective, and it is necessary to pay more attention to the preventive measures. Prevention of corruption entails, on the one hand, significant institutional – organizational, procedural, staff related, financial etc. – changes, which should diminish the possibility of incidence and regularity of corruptive behavior. On the other hand, prevention also entails different modes of influencing habitual behavior, beliefs and attitudes which motivate people to engage in corruptive practices.

II Entrepreneurs on corruption in the judiciary

INTRODUCTION

The analysis of the causes and intensity of judiciary corruption, and of the extent to which it has already spread shall be based on data collected in a questionnaire on entrepreneurs' opinions and experiences. Therefore, it is necessary to start with the analysis of the extent to which entrepreneurs, or companies (commercial subjects) have faith in the judiciary, especially if one bears in mind that the analysis of trust is the key to understanding corruption in the Serbian judiciary. The next step is the analysis of entrepreneurs' perception of the functioning of the judiciary, including its (im)partiality. Thereafter, it is necessary to establish to what extent the judiciary is susceptible to corruption, how corrupt it actually is and which actors bear the brunt of the responsibility for such a situation. Therefore, one should determine what the main mechanisms of corruption in the judiciary are, how widespread it is and how it spreads. Finally, causes of corruption within the part of the judiciary dealing with commercial matters will be analyzed through the eyes of entrepreneurs, and measures for combating it will be proposed.

SAMPLE

The judiciary corruption research was carried out in the first half of April 2004 on a sample of 235 companies in Serbia that have had at least some experience with the judiciary, that is, companies that have engaged in litigation at least once. The planned sample was 97.9% achieved. A combination of a stratified and a random sample was used. Regional representation of the sample was as follows: Central Serbia 33.2%, Vojvodina 33.6% and the City of Belgrade 33.2%. With respect to the type of activity the proportions were as follows: industry, mining, construction, agriculture and water management 40.4%, trade 29.8%, services (transport,

catering, financial, personal services) 20.0% and institutions and societies 9.8%. The ownership structure of the surveyed companies was as follows; state owned and socially-owned 33.6%, mixed ownership 17.4% and privately owned 48.9%. In addition interviews were held with the following company officials; general manager or president 8.1%, owner 22.5%, partner 3.0%, manager 20.0%, head of legal sector 25.5% and others 20.8%.

LEGITIMACY OF THE JUDICIARY

One of the key elements of the political system of every society, especially those that are undergoing transitional processes, is trust.

Public opinion surveys show that the perception of the judiciary among Serbian citizens is quite negative. This can be deduced from the results of the survey presented in Table 1.

Table 1
Citizens' trust in the judiciary (%)[1]

Year	Trusts	Does not trust	Does not know
1995	38	54	8
1996	36	57	7
1997	24	65	11
1998	37	54	9
2000	42	49	9
2001	39	47	14
2002 (IV month)	42	49	9
2002 (XII month)	36	51	13
2003 (VI month)	30	51	19
2003 (XI month)	33	58	9

The next step in estimating the level of trust in the judiciary is to find out what the surveyed subjects think about the judiciary, that is, their estimation of the extent to which the judiciary is, according to their experience, just, fair, expedient, accessible, reliable and competent. The results of the earlier surveys are presented in following table (Table 2).

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[1] Source: Z. Slavujević - “Delegitimacija sistema i njegovih institucija” (Delegitimization of the system and its institutions), in: Z. Slavujević i S. Mihailović *Dva ogleda o legitimitetu* (Two essays on legitimity) IDN, Beograd. 1999, pp., 39, 43, 62.; Lj. Baćević - “Godina našeg (ne)zadovoljstva” (Year of our (dis)content), in: *Bilans promena* (Assesment of changes) Municipality of Kikinda and National library “Jovan Popović”, Kikinda, 2002, p. 417-418. i *Baza podataka (Database)*, Public opinion center IDN, Beograd, 2004

Table 2.
Judiciary is: (Indices 1-5)[2]

	Just	Fair	Expedient	Accessible	Reliable	Competent
Public opinion 2001	3.59	3.72	3.96	3.57	3.81	3.56
Private entrepreneurs 2001	3.60	3.79	4.10	3.51	3.80	3.56
Management of socially-owned companies 2002	3.19	3.64	3.97	2.63	3.52	3.23
Management of privately-owned companies 2002	3.26	3.34	4.04	3.40	3.66	3.57

Our research, presented in an advanced form (Table 3), shows that the surveyed subjects regard lack of speed and efficiency as the greatest problems in the judiciary, while its accessibility is perceived as the least significant problem, that is, its accessibility is regarded as its greatest virtue. All other problems are ranked in-between these two poles, however, there is no important statistical difference between the average grades they have received. Furthermore, the efficiency grade has a lower value than the theoretical average (2.50), and the discrepancy is of statistical importance (t-test, $p<0.01$), and the same goes for reliability, although the statistical importance is slightly lower (t-test, $p<0.05$). In contrast, the accessibility grade is higher than the theoretical average (2.50) and the difference is statistically significant (t-test, $p<0.01$). Participants in the survey obviously regard lack of speed and efficiency as the greatest deficiencies of the domestic judiciary, and perceive its accessibility as its best characteristic. One should be very careful about this conclusion, since it is quite probable that the participants in the survey estimate accessibility predominantly with regard to expenses, and not with regard to opportunity costs (primarily the cost of employees' work time) generated by the judiciary. Private entrepreneurs are somewhat more critical of the fairness of the judiciary (corruption) and reliability (t-test, $p<0.05$), while there is no statistically relevant difference with regard to other aspects of judiciary perception.

[2] Where value 1 means fair, just and value 5 unfair, unjust.

Table 3
Perception of the judiciary in 2004; judiciary is:

	Always	Mostly	Only exceptionally	Never	Doesn't know	Indices (1-4)[3]	Rank
Expedient and efficient++	1.7	17.4	46.8	32.3	1.7	3.12**	1
Reliable+	4.3	40.9	39.1	12.3	3.4	2.62	2-5
Fair (not corrupted)	4.7	41.7	38.3	9.8	5.5	2.56	2-5
Capable of enforcement	8.1	38.7	36.2	11.1	6.0	2.54	2-5
Just	3.8	47.7	37.4	7.7	3.4	2.50**	2-5
Accessible++	14.9	45.1	26.0	8.1	6.0	2.29	6

** Statistically significant difference to the next rank at level $p<0.01$ (t-test)
* Statistically significant difference with regard to the next rank at level $p<0.05$ (t-test)
+ Statistically significant difference with regard to the theoretically assigned average level index (2.50) at level $p<0.01$ (t-test)
++ Statistically significant difference with regard to the theoretically assigned average level index (2.50) at level $p<0.05$ (t-test)

The results presented above indicate the existence of a significant legal uncertainty, not only with respect to the outcome, but also with respect to the expediency of dispute settlement, since the model estimate has already shown that the average litigation in Serbia lasts 1,036 days. Under such circumstances, it is fairly difficult to estimate the next moves of one's competitors and to plan one's own next moves. This creates business uncertainty and generates a climate, which adversely affects inflow of foreign capital and triggers outflow of domestic capital.

EFFICIENCY OF JUDICIARY AND ITS SERVICES

Before one examines the efficiency of the judiciary and other relevant services, one should determine the current nature of business relationships and isolate the problems in relationships between entrepreneurs and state court officials, comparing them to the situation three years ago (Table 4). This information will serve to ascertain the extent to which their work has improved or deteriorated.

[3] Grades range from 1(always) to 4 (never).

Table 4
Problems with state court officials compared to the problems three years ago (%)

	More significant	Same	Less significant	Does not know	Indices (1-3)
Officials (services) at the level of the Republic	13.6	55.7	24.7	6.0	2.12^{++}
Police	8.5	46.8	28.1	16.6	2.23^{++}
Public prosecutors	7.7	50.2	23.0	19.1	2.19^{++}
Judiciary	15.3	56.6	24.3	3.8	2.09^{+}
Municipal or city services	18.3	52.2	24.7	4.7	2.07

\+ Statistically significant difference with regard to the theoretically assigned average level index (2.00) at level $p<0.01$ (t-test)

++ Statistically significant difference with regard to the theoretically assigned average level index (2.00) at level $p<0.05$ (t-test)

Comparison of the index with its theoretically assigned average level index (which means that the problems have remained the same) shows that in all cases, except with regard to municipal and city officials, there have been less significant problems, meaning that there has been a statistically significant improvement in this respect (t-test, $p<0.01$ i $p<0.05$ in case of the judiciary). In other words, when one examines the entrepreneurs' perception of the judiciary over time, one may notice that the problems have subsided. Every *fourth* entrepreneur considers that those problems have (after two years) become *less significant*. In contrast, there is a significant percentage that claim that the problems are more significant than they were three years ago. Actually, problems are more significant in 7.7% percent of the cases when it comes to public prosecutors, 8.5% in the case of the police, 13.6 in the case of services at the level of the Republic, 15.3% in the case of courts and 18.3% in the case of municipal and city services.

The general positions or perceptions of entrepreneurs with regard to the efficiency of the police, prosecutors and courts, and the services that assist them, are presented in Table 5. Average efficiency has been marked at a theoretically assigned average index level (3.00), where police and court administration score better than that (t-test, $p<0.01$), while court enforcement officials (bailiffs) score worse (t-test, $p<0.05$). There are no important statistical differences among converging efficiency grades of certain services, so it is not possible to rank them according to their (in)efficiency.

Table 5
Present efficiency of state institutions (%)

	Very efficient	Mostly efficient	Average	Mostly inefficient	Very inefficient	Does not know	Indices[4] (1-5)
Police +	2.1	27.7	43.8	10.6	5.1	11.1	2.87
Court ++ administration	6.8	32.3	39.1	10.2	7.2	4.3	2.78
Prosecutors	2.1	19.1	45.1	9.4	5.1	19.1	2.95
Courts	3.8	24.7	47.2	12.3	8.9	3.0	2.98
Enforcement officials (bailiffs) +	3.8	11.5	30.6	7.7	11.1	35.3	3.16

\+ Statistically significant difference with regard to the theoretically assigned average level index (3,00) at level p<0.05 (t-test)
++ Statistically significant difference with regard to the theoretically assigned average level index (3.00) at level p<0.01 (t-test)

Up to this point, we have analyzed, on one hand, quality and efficiency of court activities, including court administration and court enforcement officials as well, and on the other hand, police and prosecutor's offices. At this point, we are interested how entrepreneurs perceived these traits three years ago (Table 6). Have circumstances, from an entrepreneurs' perspective, changed over the last three years, following the democratic changes in Serbia, and to what extent and are those changes for better or worse?

Table 6
Efficiency of state institutions – three years ago (%)

	Very efficient	Mostly efficient	Average	Mostly inefficient	Very inefficient	Does not know	Indices (1-5)
Police ++	1.7	14.0	41.7	17.0	9.8	15.7	3.23
Prosecutors++	2.1	9.4	42.1	14.9	7.7	23.8	3.22
Courts++	0.9	14.9	48.1	15.7	12.3	8.1	3.26
Court administration	4.3	24.7	39.6	12.3	12.3	6.8	3.04
Court enforcement officials++	2.1	7.2	29.8	13.2	11.1	36.6	3.37

\+ Statistically significant difference with regard to the theoretically assigned average level index (3,00) at level p<0.05 (t-test)
++ Statistically significant difference with regard to the theoretically assigned average level index (3,00) at level p<0.01 (t-test)

The most important finding is that there is a statistically significant difference between all indices (average grades) of perception of the examined institutions at the present moment and three years ago (t-test, p<0.01). This shows that there has been improvement

[4] Lower index denotes greater efficiency, and higher index denotes less efficiency.

in this aspect. According to entrepreneurs' perceptions, there is no significant statistical difference between the relative efficiency of court administration, and three years ago court enforcement officials were the least efficient (t-test, $p<0.01$).

FUNCTIONING OF THE JUDICIARY

The functioning of the judiciary, especially the commercial judiciary, is of special importance for all societies undergoing transition. Therefore it is necessary to perform a detailed analysis of judiciary performance in commercial matters. This analysis shall be carried out with regard to reports on 'troubles' that the entrepreneurs are encountering before the courts. Those 'troubles', that is, facts in connection with litigation, are predominantly related to several key issues:

- performance of the judge, that is, his/her (im)partiality in handling the litigation,
- the method of introducing court experts (witness) in the litigation,
- quality of work and (im)partiality of the court experts (witness), and
- procedure of 'administratively' securing impartial handling of litigation.

The way in which litigation is handled and develops is of key importance for fairness and impartiality of the court decision. If the litigation is handled correctly from a procedural viewpoint, there are fewer chances for corruption in view of the outcome. Results of the survey on the way in which litigation is handled and on (im)partiality are shown in Table 7.

Table 7
How often have you experienced one of the following incidents during the course of commercial litigation (%):

	Often	Sometimes	Never	Does not know
Judge has been partial in determining content of the court record	3.8	32.3	61.7	2.1
Matters presented before the court were intentionally misinterpreted	6.0	29.4	62.1	2.6
Certain issues that have not been stated have been inserted and certain issues that have been stated have been omitted	5.5	31.9	60.0	2.6
Misunderstanding of the issues stated before the court (as recorded)	8.9	38.6	50.6	2.1
Pointless and confusing sentences contained in the record	11.9	30.2	54.5	3.4

Results of the survey present three key issues:

First, three fifths of the entrepreneurs claim that the litigation judge has, in litigation they have participated in, impartially formulated the court record, that he/she has not interpreted presented statements deliberately and without regard to what has been said, and has not deliberately omitted what has been stated or inserted statements that have not been presented. Second, more than half of the participants of the survey were of the opinion that the judge has understood the facts presented and had not entered in the record statements that are not understandable. Third, somewhat over a third complain that judges' wrongfully formulate the record of proceedings, omit facts stated or include statements that were never made.

The next trouble that the entrepreneurs encounter before the courts is the method of introducing court experts (witnesses) and the quality of their work. This is an important point, since their expertise often determines the outcome of the dispute, and affects its impartiality (Table 8).

Table 8
Percentage of litigation in which you have participated where one of the following took place:

	Not a single case	In less than 10% of the cases	Up to 30%	Up to 50%	Up to 75%	In almost all cases	Does not know
Judge appointed court expert (witness) without the request of one of the parties	55.7	21.3	5.5	6.8	0.9	6.4	3.4
You have requested appointment of a court expert (witness)	47.2	22.1	8.1	11.5	1.3	6.0	3.8
Opposite side has requested appointment of a court expert witness	42.1	20.9	9.8	11.9	1.7	8.9	4.7

Survey results indicate that the judges follow procedure quite well when appointing court experts (witness). In over three quarters of the cases, a court expert was not appointed without the knowledge (consent) of a party to the dispute, or, if such an appointment was made, it occurred in less than ten percent of cases. Answers to the question of the side who requested appointment of court expert are almost equal. Entrepreneurs report that the opposite side requested appointment of a court expert in 53% of the cases, while they, themselves, have requested such an appointment a little less frequently (49%). One may conclude that the courts appoint co-

urt experts in a relatively 'transparent' fashion, while their quality and the extent to which their services have satisfied the parties to the dispute represents another issue, which will be dealt with later.

The court expert's position before the court is very sensitive. Their expertise may to a great extent determine the outcome of the case. Therefore, we asked participants to estimate the percentage of the cases in which the judge has adopted the court expert's findings in full and has passed judgment in accordance with those findings. Answers to this question are presented in Table 9.

Table 9
Judge's adoption of court expert findings (%)

Less than 10% of the cases	8,5
Up to 30%	2,6
Up to 50%	6,8
Up to 75%	7,7
In almost all of the cases	34.0
Does not know, can not answer	10,6
No answer	29,8

Over a third of the participants to the survey claim that the judge has *always* adopted court expert's finding and has passed judgment based on those findings. In addition, every sixth participant claims that the judge has behaved in such manner in more than half of the cases. The data suggests two things, first that a judge may transfer great responsibility to the court expert and, second, that the court expert clearly plays a significant, and often crucial role in the litigation. Given his/her significant power in the litigation and the importance of the interests that are at stake in commercial disputes, the probability of corrupting a court expert increases. This means that his/her activities should be controlled appropriately.

A third set of facts relates to the competence, quality and (im)partiality of the court expert, according to the perception of the parties to the litigation. The results of that part of the survey are presented in Table 10. Only one fifth of the parties to commercial disputes are satisfied with competence levels of the court experts and the quality of their expertise. At the same time, a quarter of the participants to the litigation claim that the experts before the courts are impartial. Every third entrepreneur is half or partially satisfied with the competence, quality and impartiality of experts. Contrary to this, only every tenth participant is completely dissatisfied with court experts' services. Others (around 30%) are neutral, that is, they do not know the answer to the question or refuse to answer it.

Table 10
In cases where you participated as a party to litigation, how satisfied were you with (%)

	Fully	Partially	Not satisfied at all	Does not know/no answer	Indices[5] (1-3)
Court expert's competence	22.1	38.7	8.7	30.6	1.80
Quality of expertise in a particular dispute	20.4	37.4	10.6	31.5	1.86
Impartiality of expertise	25.1	31.9	11.5	31.5	1.80

There is no statistically significant difference between average grade (index) for competency of the court expert, quality and impartiality of the expertise. In other words, participants of the survey are equally (dis)satisfied with all of the above mentioned aspects of the expertise.

The fourth set of facts, related to the court as an institution and dealing with court procedure, may serve as a tool for estimating the courts' handling of litigation – this tool is 'administrative' servicing of the court procedure. 'Administrative' servicing of the procedure, that is, fostering its fairness and impartiality is of special concern, since it may decisively influence the outcome of the dispute. Non-observance of the procedural rules (with or without corruption) may provide an overwhelming advantage of one of the parties, and such an advantage may decisively influence the final outcome of the litigation. Results of that part of the survey are presented in Table 11.

Table 11
How often you encounter one of the following: (%)

	Very often	Often	Seldom	Almost never	Does not know	Index[6]	Rank
Acceleration or slowing down of service of process and other court documents	10.2	30.2	33.2	21.7	4.7	2.70**	1
Postponement of coercive enforcement	8.1	24.3	26.8	30.2	10.6	2.89**	2
Deliberate violation of rules on service of process and other court documents (lack of return receipt)	6.4	16.6	32.3	36.6	8.1	3.08**	3
Manipulation in delivering court documents to the parties	3.8	13.2	28.1	47.2	7.7	3.29*	4
Preventing the parties insight into court documents (record)	5.1	6.4	26.8	56.6	5.1	3.42	5-6
'Loss' or 'losing track of' documents	2.6	11.9	24.3	53.6	7.7	3.40	5-6
Permitting the parties only partial (selective) insight to the court documents	2.6	7.7	29.4	54.0	6.4	3.44**	7
Back-dating of submissions	2.1	5.1	15.7	64.7	12.3	3.63	8

** Statistically significant difference from next in rank at level $p<0.01$ (t-test)
* Statistically significant difference from next in rank at level $p<0.05$ (t-test)

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[5] Grades range from 1 (wholly satisfied) to 3 (wholly unsatisfied)
[6] Grades range from 1(very often) to 4 (almost never).

The most important problems of court administration are related to the acceleration or slowing down of delivery of court documents and deliberate infringement of the provisions regulating the service of process and other documents, while the problems of permitting the parties only selective insight into court documents or prohibiting such insight, or back-dating of submissions, seem to represent problems of lesser magnitude.

Only one-tenth of the participants to the survey regard selective insight or prohibition of insight into court documents to occur 'often' or "very often", while over a quarter claims that occurrence of such incidents is "rare", and over half of them claim that such things never happen. The situation is similar with regard to the deliberate loss of court documents: over half of the participants claim that such things never happen, and about a quarter of participants reckon that such things happen, but rarely, every seventh participant claim that such incidents occur "often" or "very often". The situation is somewhat different when it comes to other procedural misconduct, such as acceleration or slowing down of the service of process or other documents and records, on one hand, and postponement of coercive enforcement, on the other. About two-fifths of the surveyed participants estimate that such incidents occur with regard to service of documents "often" or "very often", a third claim that such occurrences are "rare", and only one-fifth of the participants claim that such things "almost never" happen. The situation is similar when it comes to postponement of coercive enforcement. All data should be estimated in the light of the fact that entrepreneurs talk about their own experience, that is, only about procedural misconduct that has been publicly revealed, or that is known to them, and one should bear in mind that they are probably not well informed about the quantity of procedural misconduct which has occurred.

The results of the survey do not reveal statistically significant differences with regard to the profession and regional representation of the entrepreneurs. This suggests that their positions on the functioning of "administrative" procedure before commercial courts are balanced to a great extent. Their answers on this issue, just as on many other issues, are influenced by their general disposition – their trust in the judiciary. Those who have more trust give a somewhat higher mark for procedural performance of court administration. This means that the trust, or distrust of the judiciary is nothing but a solidified judgment that has been formed on the basis of experience accumulated over many years, or, alternatively, a judgment formed after a string of "small" events that frequently accompany litigation and which may often influence its outcome.

SATISFACTION WITH THE PERFORMANCE OF THE JUDGE

Before estimating the overall spread and reach of corruption in the judiciary, one should examine the present level of satisfaction of entrepreneurs (parties to the litigation) with judge's performance and his/her observance of the procedural rules. The results of this segment of research are presented in Table 12. The most frequent complaint of the entrepreneurs is that the judges unnecessarily prolong the litigation and that sometimes, but not as a rule, pass unfair (partial) judgments. On the other side, judges very seldom make deliberate procedural mistakes, or fail to enable parties' insight into court documents.

Table 12
Would you say that, in commercial matters, judges: (%)

	Always	Sometimes	Never	Does not know	Index	Rank
Unnecessarily delay procedure	29.4	50.6	12.3	7.7	1.82**	1
Pass unfair (partial) decisions	4.3	65.1	21.3	9.4	2.19**	2
Conduct procedure in a non-professional (not objective) manner (hearings, record)	5.5	55.3	26.8	12.3	2.24	3-4
Suggest procuring expert opinion even when it is not necessary	8.9	45.1	28.9	17.0	2.24**	3-4
Deliberately make procedural mistakes	5.1	38.7	41.7	14.5	2.43**	5
Do not enable parties' insight into litigation records and documents	2.1	20.4	60.4	17.0	2.70**	6

** Statistically significant difference from next in rank at level $p<0.01$ (t-test)
* Statistically significant difference from next in rank at level $p<0.05$ (t-test)

The indices shown in the above table suggest that there is *no significant certainty* that the judgment will be impartial, that is, passed in accordance with the law, that litigation will be impartial, litigation conducted without unnecessary delay, etc. Since the parties face increased uncertainty under these circumstances, the probability for an "informal" way of settling the dispute increases, and that, save for some kind of political pressure, usually boils down to corruption.

It is interesting that there are no significant statistical differences between the answers of those who are more often on the winning or losing side, save for one understandable case. Those who are more often on the losing side are of the opinion that judges more often pass partial (wrong) decisions. Given this, subjective, standpoint of the survey participants in relation to the character of the judgment itself, one should moderate the findings on the passing of wrong (partial) judgments as a secondary problem facing litigants in commercial disputes.

SPREAD OF CORRUPTION

Perception of corruption

It is accepted that research on the spread of corruption and its intensity throughout a society or within some of its segments may not be regarded as reliable, given the fact that they reflect no more than the viewpoints and perceptions of the survey's participants. The real problem is that the actual corruption is lower than perceived, while at the same time there is a positive correlation between actual corruption and the perception of its spread and reach. This means that corruption surveys provide an approximate picture of its spread. This survey is, first and foremost, about perceptions of corruption, on one hand, and about the participation of entrepreneurs in corruption, on the other, and those two aspects provide for a survey wider than research on the perception of corruption only.

Speaking of the perception of corruption in general terms, entrepreneurs state in almost three quarters of the cases, based on their own experience, that it is present within the judiciary (to different degrees), as presented in Table 13.

Table 13
Spread of corruption within judiciary (%)

	Judiciary as a whole	Judiciary dealing with commercial matters
Almost all judges and other employees	3.0	2.6
Majority of judges and other employees	19.9	18.7
Minority of judges and other employees	51.9	49.8
Almost nobody	6.4	6.4
Does not know, does not want to answer	20.9	22.6
Average grade, index (1-4)	2.79	2.79

More precisely, somewhat over a fifth (22.9%) consider that all, or at least a majority of judges and employees of the court are corrupt, and that over a half (51.9%) are of the opinion that only a minority are corrupt. On the contrary, a distinct minority (6.4%) reckon that there is no corruption, while over a fifth have do not have knowledge on this matter. There are no significant statistical differences when it comes to the perception of the judiciary as a whole compared to the commercial judiciary. This, however, does not mean that, among companies that engage in such business, "additional payments" to court officials and judges occur regularly. About 8.9% of the surveyed participants regard such events as regular

(“always” or “in majority of the cases”, 12.3% consider that this happens sometimes, and 12.8% are of the opinion that such things occur rarely. On the other hand, almost one half of the entrepreneurs (49.4%) think that additional payments are not regular, while 16.6% do not know. In both cases there are no statistically significant differences with regard to the business specialization of the company, type of ownership or region. This means that entrepreneurs’ assessments are evenly balanced.

Corruption pressure

Corruption pressure within the judiciary may work in two directions, pressure of corruptors against the public official, and vice versa. There is no corruption if there is no readiness on behalf of the public official to accept or extort bribes, or if the public official is not ready to request and expect a bribe, and if there is not some kind of pressure coming from citizens and entrepreneurs who try to offer bribes in exchange for a corruption service.

There is a positive correlation between corruption pressure and corruption itself: the higher the corruption pressure, the more chance that actual corruption will take place. Corruption pressure depends on many factors, and one may definitely list among them: operative efficiency of a given public service, efficiency of law enforcement, efficiency of public prosecutors, powers vested with the public official, interests at stake, susceptibility to corruption, quality and reach of moral sanctioning of corruption, public anomies, external and internal public service controls (in this case, the judiciary), etc. The moral qualities of the individual may certainly be taken into account when considering susceptibility to corruption, but in this analysis we intend to abstract such considerations since the spread and degree penetration of corruption within a society does not depend on the individual morality of its members, but rather on the entire socio-cultural heritage and efficiency of the “Recthsstaat”, which more or less covers the above listed factors.

Susceptibility to corruption of judges and court officials, that is, the frequency of their requests or expectations of bribes – in money, gifts or services – is given in Table 14. Corruption pressure on the judiciary is not insignificant. Namely, just over one in seven entrepreneurs that had any dispute before a commercial court declared that judges or other court employees have directly requested (in the majority of the cases or in individual cases) “additional payments” for performance of their regular duties, or, even more

often, for adjustment of their actions (performance or non-performance) in line with the interests of the corrupting parties. Contrary to this, those who do not request bribes directly, expect to receive "just" equivalent for a favor they perform or a favor they only plan to perform. At the same time, over one-quarter of entrepreneurs claim that court employees do not request money, gifts or services directly, but nevertheless expect such considerations. This also constitutes corruption pressure from the susceptible public official directed at the corrupting party.

Table 14
How often judges and court officials request additional payments (%)

	In majority of the cases	In individual cases	Never	Does not know
Have directly asked for money, gift or service (favor)	1.3	13.6	49.8	35.3
Have not asked directly, but demonstrated that they expect money, gift or service (favor)	9.4	17.4	40.4	32.8

The results of the survey suggest the following: first, that there is a positive correlation between corruption pressure and the intensity and spread of corruption, and second, there are no significant statistical difference with regard to activity or the territorial location of the companies, or courts. The presented results are an indirect confirmation of the level at which corruption in judiciary has already spread, given that over 40% of the participants to the survey reject the notion of any corruption pressure, suggesting that there are no conditions for the occurrence of corruption.

Susceptibility to bribes of judges and court officials

The questionnaire contained with the following question: „Is it customary for companies engaged in this sort of business to know in advance what the amounts of "additional payments" to judges and court officials are?", and the answers to this question indirectly indicate the extent of corruption in the judiciary. Namely, the more wide-spread it is, the greater is its regularity, which in turn means that the conditions of its operation are known in advance – one knows how much one should pay. The results of the survey show that the inevitability of bribing judges and court officials on many occasions does not come as a surprise, since bribery has become a regular event and all parties have become used to it, that

is, every fourth entrepreneur answers positively and confirms the stated hypothesis to be true in the band ranging from “always” to “seldom”. More precisely: 0.9% always, 7.2% usually, 2.6% often, 5.1% sometimes and 8.9% seldom, that is, only every sixth participant to the survey has brought serious accusations against corruption in the judiciary and every eleventh claims that it exists, but that it is not very extensive. Contrary to this, more than two-fifths of the participants to the survey (43%) claim that they never pay and, therefore, do not know how much that “additional payment” amounts to, and a third (32.3%) simply answer that they “do not know”. Almost identical figures were recorded with regard to corruption pressure.

The scope and intensity of corruption in the Serbian judiciary cannot be fully understood and analyzed unless one finds out how often “additional payments” are made to judges and court officials according to the type of favor provided (Table 15). The results of the survey to the direct question posed, show without any doubt that the susceptibility of judges and court officials to corruption is somewhat lower than it appears when questions are posed in a general manner. The most frequent causes for corruption are acceleration and slowing down of court procedure, since there is no statistically significant difference regarding the frequency of those phenomena, but there is a statistically significant difference with regard to average frequency of corrupting in order to procure a lawful judgment, or to get a regular court procedure (t-test, $p<0.01$). Descriptively, 31% of the entrepreneurs claim, ranging from “always” to “seldom”, that it is fairly normal to pay if one seeks acceleration of court procedure, while at the same time only 13.2% state that such things occur “always”, in “a majority of cases” and “often”, which is about every eighth entrepreneur. Next in the line is bribery in order to slow the court procedure down, and this is mostly done by the party who is in a weaker position with regard to the dispute. Every fourth (22.1%) entrepreneur claims, ranging from “always” to “seldom”, that it is necessary to bribe judges or court officials in order to enjoy a regular procedure, and only 5.5% state that such things occur “always”, in “a majority of the cases” or “often. In addition, if one seeks judgment in accordance with law, one should intervene in a more informal way and try bribery.

Table 15
Additional payments to judges and court officials (%)

	Always	In majority of cases	Often	Sometimes	Seldom	Never	Does not know	Indices[7] (1-6)
Acceleration of court procedure	2.1	3.4	7.7	12.3	5.5	38.7	30.2	4.89
Delay of court procedure	3.0	3.0	8.9	8.1	5.5	40.4	31.1	4.91**
Procuring lawful judgment	1.7	1.3	4.3	11.5	6.8	40.9	33.6	5.15**
Procuring regular procedure	1.3	0.4	3.8	8.9	7.7	44.7	33.2	5.32

** Statistically significant difference from next in rank at level $p<0.01$ (t-test)
* Statistically significant difference from next in rank at level $p<0.05$ (t-test)

This means, first, that every tenth entrepreneur claims (ranging from "always" to "often" that obtaining a right through or before a court is not possible without corruption and, second, that the most common reason for bribing is acceleration or delay of procedure. It is certain that corrupting in order to obtain a fair trial, or for securing a fair application of legal provisions, is a rarer phenomenon in comparison with the corruption whose goal is manipulation of the duration of court procedure.

In order to obtain a more precise analysis, a direct question has been posed: "When was the last time your company made an "additional payment" in order to obtain a favor from the judiciary?". As expected, the number of direct answers to this question is significantly lower (Table 16). Only every eleventh entrepreneur (9%) who was engaged in a commercial dispute, directly answered the question as to when was the last time he/she bribed a judge or a court official. On the other hand, one quarter (26.4%) categorically claim that they have *never* done such thing, and the rest, almost two-thirds (64.7%), "do not know" when was the last time they did it. Among those who claim that they do not know if, or when, they have given bribe there is a certain percentage of those who do not dare or do not want to state when they last bribed someone in the court, and whether they have done it "sometimes" or "seldom". At first glance, the answers to the question posed are absurd. However, one should also examine incentives for the participants of the survey to respond in such manner to the question posed. If one takes into account that the survey was anonymous, and that participants, as those who corrupt, may face legal sanctions for corrupti-

[7] Grades range from 1 (always) to 6 (never)

ve behavior, a very high incidence of “does not know” answers becomes understandable. It is undeniable that a certain portion of participants who answered in such manner have encountered corruption, or have bribed at least someone in the judiciary, and this also stems from the very low figure of those who have clearly stated that they have never done such a thing. In this case, only 26% of the participants have done so, in comparison with 40-50% of the participants with respect to some other questions.

Table 16
Most recent bribery (%)

	Trust in judiciary			Ownership		Total
	Mostly has	Mostly has not	No answer	Predominantly socially-owned	Predominantly privately-owned	
We paid one month ago		1			1	0.4
W paid several months ago		2		1	1	0.9
We paid one year ago	3	6		3	6	4.3
We paid three years ago	2	5		5	1	3.4
Never	26	26	40	59	71	26.4
Do not know	69	61	60	32	20	64.7
Total	100					

On the basis of the above figures, one may conclude first, that corruption in the judiciary evidently exists, second, it is not as extensive as suggested by many of the public opinion surveys, that is, public perception. The first contention may be defended indirectly by reference to the fact that all the questions posed in a general manner, and not directed at the respondent’s own behavior, produced a significantly higher proportion of entrepreneurs who claim, on the basis of their own experience, that corruption in the judiciary is widespread. Finally, corruption of the judiciary is, according to the estimation of the entrepreneurs, more prevalent when it comes to the actual conduct of the court procedure.

Frequency of bribery

Multiple payments, especially additional payments, to a state official for the very same favor, are quite exceptional in organized bureaucratic societies. Those things occur in disorganized societies. The best way to examine whether society is organized or disorganized, or whether corruption is centralized or decentralized is by finding out, on one hand, whether one favor from corrupted public officials has to be paid for once or several times and, on the other

hand, whether such a favor is finally delivered at all. Our survey, when it comes to the judiciary (Table 17) shows that our society is bureaucratically disorganized, and corruption is therefore decentralized, meaning that the undertaken commitments are not always carried out. This may also mean that many individuals, pursuing a "quick buck", and taking into account that the corrupting party has to remain silent, undertake commitments which they are not actually in a position to fulfill. In that case, the corruptor is forced to approach another public official in order to carry out the desired "business", without regard to whether he/she is actually entitled to such a favor. The third reason for not carrying out "undertaken commitments" is perception of the corrupted official that he/she has not been paid enough for the favor expected or agreed upon – and he/she considers that he/she is not obliged to carry such an obligation out. These are the main three reasons inducing multiple payments for the same favor.

However, there can been one more reason for not carrying out "undertaken obligations". This reason rests on the fact that both parties to the dispute are equally ready to bribe judiciary officials in order to tilt procedural flow, outcome or duration in their favor. One should note that the judgment, or the outcome of commercial judiciary corruption, may only be brought in favor of one of the parties – one side has to lose and another has to win. This suggests that services procured for corruption will be given only to the party that has paid more than their "competitors", on the other side. This may also be a reason for not carrying out "commitments undertaken" towards one of the parties to the dispute.

Table 17
Following agreement on additional payment (bribing): (%)

	Other judge or court official requests additional payment	Favor is delivered as agreed
Always	0.4	3.8
Usually	2.1	7.7
Often	4.3	6.4
Sometimes	5.1	3.4
Rarely	6.4	3.0
Never/has not requested bribe	41.3	34.5
Does not know	40.4	41.3
Index[8]	5.33	4.72

[8] Grades range from 1 (always) to 6 (has not been requested).

The presented results fully confirm our initial contention that payment of the bribe does not guarantee procurement of the "agreed" favor. Namely, almost every fifth (18.3%) entrepreneur who was involved in disputes before commercial courts states that even after bribing one of the judges or officials, another judge or official has requested, with frequency ranging from "always" to "rarely", additional payments for favors already recompensed. Two-fifths of respondents claim that there were no additional payments. Others have no knowledge of such dealings. The difference between average estimates of frequency is statistically significant, so one can conclude that the favor is more often procured in a fashion agreed upon, and that requests for additional payments occur less frequently.

Given the fact that corruption, or carrying corruption out, generates significant transaction costs, decentralization of corruption (necessary in order to bribe more public officials in order to procure a single favor) represents a very dangerous phenomenon, if one takes into account that, instead of being used productively, the available resources of a society are engaged in carrying out corruption.

The opinion submitted above is confirmed by the results of the survey: once the "additional payment" is carried out, the agreed favor is procured, ranging from "always" to "seldom" in one quarter of the cases (24.3%). About 34.5% of the entrepreneurs claim that the bribe has not been requested. Those who claimed that they do not know the amount to two-fifths. The results confirm the above mentioned thesis, that corruption in the judiciary is more widespread than one may conclude on the basis of the available results, once we take into account replies to the directly posed question: when was the last time you made an "additional payment" to a judge or a court official? Comparative analysis of tables 15 and 17 reveals that every fourth respondent who was engaged in a commercial court dispute has direct experience of corruption, or has actually participated in carrying it out.

Corruption channels

One cannot complete the picture of the extent and reach of corruption in the judiciary without obtaining knowledge on the ways in which it develops, that is, the channels that are most frequently used for bribing judges and court officials. In the clo-

sed type questions, we have insisted on those that are most important (Table 18). This does not mean that the list of corruption channels is complete. Most frequently, bribes are conducted through attorneys, through judge's acquaintances and friends, through personal contacts and other representatives of public authorities. Contrary to this, the most rarely used channels for bribing are other judges or individuals employed in higher judicial instances. It is interesting to note that horizontal channels of corruption (personal contacts, judge's acquaintances and friends), even if one takes attorneys out of the picture, are much more represented than vertical channels (other state authorities, higher judicial instances).

Table 18
What is the most frequent channel of corruption (multiple answers, in %)

Personal contacts	26.8
Judge's friends and acquaintances	35.7
Other judges	6.8
Attorneys	40.9
Through higher judicial instances	6.8
Through people employed at other state authorities	23.0
Does not know, does not want to answer	31.1

This reveals that there are different channels of bribery, often invisible to an observer, and that, according to the statements of the entrepreneurs, higher judicial instances are the least involved as a conduit for corruption. The important position of state authorities within corruption in the judiciary indirectly testifies to the subrogation of the judiciary to political authorities, on one hand, and to the susceptibility to corruption of members of the political elite, on the other. When it comes to external pressures, they may consist not only of money or material services, but also of climbing the service ladder. As for attorneys, the money they request for bribes from the parties does not always end up in the pockets of the corrupted (judge or court official). It is quite common that bribes are made without participation of any witnesses, and that means that the presented figure (related to bribing through attorney) raises doubts with regard to the scope and spread of corruption in the judiciary. On this issue, one may refer to "additional" income of legal representatives.

Trust and perception of corruption – a look back

Is corruption in the Serbian judiciary spreading or retreating? There were no empirical studies on this issue, so we may not employ comparative analysis in order to find out whether corruption is spreading or retreating. At the same time, there is no statistical data in almost any segment[9], including the judiciary. Therefore, we have posed several questions to the entrepreneurs regarding the level of corruption in the judiciary, that is, how widespread it was three years ago, in order to determine to a certain extent, the dynamics of this phenomena (Table 19). Such data have limited value for two reasons: first, they get "confused" with the issue of trust in the judiciary and, second, it is about their estimations and perceptions. However, despite the stated limitations, we do not have any other more reliable data.

Table 19
I am convinced that the judiciary will protect my contractual rights (%)

	Fully agrees	Agrees in majority of the cases	Might agree	Might not agree	Does not agree in majority of the cases	Completely disagrees	Does not know	Indices (1-5)[10]
Presently	9.8	18.3	34.0	17.4	7.7	8.9	3.8	3.22
Three years ago	3.8	14.9	23.4	26.0	11.5	10.6	9.8	3.65

There is a statistically significant difference between average grades on expectations regarding contractual rights (t-test, $p<0.01$), so that entrepreneurs are at present convinced that there is a greater probability that the judiciary will protect their contractual rights than three years ago. Somewhat over three-fifths (62%) of the entrepreneurs reckoned that, at the time of the survey, the legal system would protect them when it came to commercial disputes, which suggests that their confidence in the judiciary has somewhat increased. On the other hand, more than a third (34%) considers that the judiciary would not protect them. According to the present statements of the entrepreneurs and bearing in mind the role of the desired answer, the situation was rather different three years ago. Over two-fifths (42%) believe that the legal system would have supported them three years ago, while 48% think that the old

[9] Unlike SFRY, Kingdom of Yugoslavia kept statistics on corruption between two world wars: *Statistički godišnjak Kraljevine Jugoslavije za 1937 i 1940* (Statistical Yearbook of the Kingdom of Yugoslavia), p. 416.

[10] Grades range from 1("fully agrees") to 6 (completely disagrees).

system would not have supported them. The data undoubtedly demonstrates that entrepreneurs, according to this research, have greater confidence in the commercial judiciary than they did three years ago.

Entrepreneurs' generalized views on the spread of corruption in the commercial judiciary, at present and three years ago as well (Table 20), are based on their years of experience. The only finding of comparative research on the perception of corruption in the commercial judiciary shows that the spread of corruption in the commercial judiciary has declined to a statistically significant extent (t-test, $p<0.01$), while the value of the index, that is, average estimation of the present extent of corruption, does not differ in a statistically significant degree from 3,00 (grade for mid-level spread of corruption), while three years ago that grade was statistically significantly different ("much" higher, according to estimations) in comparison with grade accorded to mid-level spread of corruption (t-test, $p<0.01$).

Table 20
Spread of corruption in the commercial judiciary (%)

	Very little	Little	Moderate	Much	Very much	Does not know	Indices
Presently	7.7	17.4	29.4	14.0	4.3	27.2	2.86
Three years ago	4.7	7.2	23.8	26.8	7.7	29.8	3.36

In order to better grasp the extent of the problem and the spread of corruption in the Serbian judiciary, that is, the extent it is spreading further or receding, we asked an additional group of questions regarding motives for additional payments. Answers to those questions are presented in Table 21.

Table 21
Present situation with additional payments in comparison with situation three years ago: (%)

	Better	Same	Worse	Does not know
For regular court procedure+	11.5	30.6	3.4	54.5
For acceleration of court procedure++	10.2	32.3	3.4	54.0
For slowing court procedure down	6.8	33.6	3.8	55.7
In order to get a lawful court judgment++	11.5	30.6	2.6	55.3

\+ Statistically significant difference with regard to the theoretically assigned average level index (2.00) at level $p<0.01$ (t-test)

++ Statistically significant difference with regard to the theoretically assigned average level index (2.00) at level $p<0.05$

The results presented and the accompanying statistical analysis show that corruption figures have improved in three out of four monitored situations. Namely, with regard to acceleration of court procedure and procurement of lawful court judgment, there is a statistically significant difference with regard to the theoretically assigned average index 2.00 which denotes a situation where there was no change (t-test, $p<0.01$). A similar difference has also been recorded with regard to regularity of court procedure (t-test, $p<0.05$). There is no change (for better or worse) with regard to corruption for prolonging court procedure. Descriptively speaking: first, less than half (45%) of the entrepreneurs admit or consider (in an indirect way) that corruption in the Serbian judiciary exists and they decide on the nature of the changes it has undergone over the past three years. Second, among those who reckon that there is corruption within judiciary, when it comes to regular court procedure, its acceleration or procurement of lawful court judgment, a convincing majority (71%) state that nothing changed regarding this problem, while 22% believe that things have changed for the better and 7% say the situation has deteriorated. When it comes to prolongation, 79% are of the opinion that nothing has changed, 15% that there was a change for the better and 9% that there was a change for the worse. Third, reviewing the whole sample, only one in ten of respondents believes that the corruption situation has improved over the past three years, and every thirtieth participant thinks that things have changed for the worse. Fourth, the scope and spread of corruption in the judiciary, measured in this way, is presently somewhat better than it was three years ago, that is, improvements are visible, but slow. Fifth, it is indicative that over half of the entrepreneurs do not know or do not want to estimate the level of corruption within the judiciary at present in comparison with the situation three years ago. This may, among other things, suggest that they have had no experience with corruption in the judiciary (this is confirmed in tables 14 and 15).

Responsibility for corruption

Responsibility is usually proportional to the place that the individual occupies in a ladder of official positions – the higher the position, the greater the responsibility. The same goes for the judiciary as well, and corruption within it. The task of this research is to check to what extent entrepreneurs agree with this hypothesis and what is the responsibility of certain judiciary professions in the co-

urt procedure (Table 22). This information will serve us to locate causes of corruption more easily and, therefore, measures for curbing it.

Table 22
Responsibility for corruption in judiciary as a whole (%)

	Large	Significant	Moderate	Small	No responsibility	Does not know	Index (1-5)	Rank
Judges	40.9	25.5	14.0	8.1	3.4	8.1	3.99	1-5
Prosecutors	40.4	25.1	14.5	7.2	2.6	10.2	3.98	1-5
Investigation judges	37.4	23.4	17.9	8.1	2.1	11.1	3.90	1-5
Attorneys	35.7	26.4	17.0	6.4	5.1	9.4	3.81	1-5
Court presidents	32.8	20.4	18.3	7.7	6.0	14.9	3.76	1-5
Court experts (expert witnesses)	25.1	25.5	20.0	9.4	4.3	15.7	3.66**	6
Secretaries of court councils	10.6	17.0	20.9	19.1	10.2	22.1	2.88	7-8
Court secretaries	9.4	15.7	20.4	23.4	11.0	20.0	2.83**	7-8
Clerks of the documents service	9.4	12.8	14.9	27.7	19.1	16.2	2.49	9

** Statistically significant difference from the next in rank at level $p<0.01$ (t-test)

* Statistically significant difference from the next in rank at level $p<0.05$ (t-test)

Responsibility for the extent and reach of corruption in the judiciary, according to entrepreneurs, rests primarily with judges, prosecutors, investigation judges, attorneys and court presidents. Indices are rather high, that is, indices for this group of judiciary professions are statistically different (higher) than the 3.00 grade (which represents description of moderate responsibility). According to the perceptions of the entrepreneurs, members of those professions are in two thirds of the cases responsible to a "large" or "significant" extent. Over half the entrepreneurs opt for "large" and "significant" responsibility as well when it comes to court presidents and court experts. Court presidents claim such a high place not only because they might be susceptible to corruption, but also because of the corruption already present in the courts which they did little to curb effectively. A second group of judiciary professions responsible for corruption consists exclusively of court experts. The relatively low position of court experts, who, as the analysis has shown, decisively influence the outcome of the dispu-

te, show that they are, to a certain extent, shielded from responsibility, and, therefore, a great danger is posed by his/her corruptive influence. The third responsibility group consists of court secretaries, secretaries of court councils and clerks of the documentation service. This means that the responsibility for corruption is distributed according to the hierarchical position, and according to the power of influence over a particular court decision.

The situation is almost identical when it comes to the *commercial judiciary*. There are no statistically significant differences in entrepreneurs' general perception between the judiciary as a whole and the part of judiciary dealing with commercial matters, except in the case of prosecutors and attorneys, where in the context of the judiciary as a whole, the prosecutor's role is regarded as more important, while the attorney's responsibility is more significant when it comes to the commercial judiciary than in the case of the judiciary as a whole.

Protection against corruption

At the moment, the opportunities to protect against corruption in the judiciary are not significant. Namely, two-fifths (40.9%) of the survey participants reject (answers "rarely" or "never") the possibility of approaching another judge or court president in order to avoid "additional payments". About a third reckon that they may get protection against corruption (32.8%) and the rest do not provide answers (Table 24). Entrepreneurs who have confidence in judiciary are more likely to view approaching another judge or court president as a potential solution, unlike the entrepreneurs who do not have confidence in judiciary. Regional representation and the specific area of trade, just as on many other issues, are not significant. This means that a wide-reaching consensus exists on this topic among entrepreneurs.

Table 24
Possibility of establishing a decent relationship with another judge or court president without corruption (%)

Always	Often	Rarely	Never	Does not know
23.4	9.4	19.6	21.3	26.4

There is no significant protection from judges and court officials who are susceptible to corruption. Entrepreneurs are more than aware of this. It seems that, despite extensive knowledge on the existence of corruption within the judiciary, there is a "conspiracy of silence" on particular names and the extent of the corruption. This "conspiracy of silence" results in no complaints being lodged. Every eleventh entrepreneur (8.9%) states that he/she had complained, but only 3.4% report that "sometimes" or "rarely" the complaint had some tangible results. On the contrary, almost every fourth entrepreneur (22.1) claims that lodging a complaint is completely useless, and 7.2% that they have absolutely no intention of complaining since such actions can bring more misfortune in the future. A very small proportion (1.7%) state that they do not lodge complaints because it is in their own best interest to bribe. About 2.1% of the participants admit that their own omissions are to blame. Given the fact that this was envisaged as a control question, it is interesting to point out that just under half the respondents (47.7%) clearly state that there was no corruption in their disputes. This information also suggests that entrepreneurs were indecisive about their replies. This means that more direct questions on the extent and depth of corruption elicit very reserved replies, while, if the question is less direct – corruption in the judiciary is more widely reported.

Causes of corruption

The extent of corruption depends on many factors, some of which are the absence of rule of law, state control over the economy, socio-historical circumstances, distortion of social values, etc. When it comes to the judiciary, the extent of corruption does not depend only on the general, above listed, factors, but also on some factors specific to this profession, such as: the modality of electing judges and prosecutors and the system of their promotion, quality and type of internal organization, quality of internal and external control, quality of legal provisions, level of salaries and many other factors (Table 25)

Table 25
Factors influencing existence of corruption in the judiciary (%)

	Very much	A lot	Moderately	Very little	Not at all	Does not know	Indices (1-5)[11]	Rank
Crisis of morality	57.4	25.5	8.9	2.6	1.7	3.8	4.40	1-4
Weak 'Rechtsstaat'	51.9	26.0	11.1	3.8	1.7	5.5	4.30	1-4
Dependence of courts on political and executive authorities	45.5	30.2	14.0	4.3	0.9	5.1	4.21	1-4
Inefficiency of internal (court) control	40.9	31.1	13.6	2.1	2.1	10.2	4.18**	1-4
Non-existence of external control of judiciary	35.7	30.2	12.3	6.0	3.4	12.3	4.01	5-9
Inefficient prosecutors	31.9	31.1	17.4	6.4	3.0	10.2	3.92	5-9
Conflict of interests	33.6	26.8	21.3	7.2	1.7	9.4	3.92	5-9
Inappropriate legislation	35.3	25.5	20.4	7.2	4.7	6.8	3.85	5-9
Imprecise laws	32.3	27.7	20.9	8.5	3.8	6.8	3.82**	5-9
Inefficient police	25.1	32.3	20.4	10.6	4.3	7.2	3.68**	10
Inefficient courts	34.5	32.3	19.1	3.8	2.1	8.1	3.64	11
Low salaries	31.9	23.8	17.4	13.6	8.1	5.1	3.61	12-14
Promotion system for judges and prosecutors	25.1	20.9	23.4	8.9	6.0	15.7	3.59	12-14
Problems inherited from the communist past	25.1	18.3	21.7	13.6	12.3	8.9	3.33	12-14

** Statistically significant difference from the next in rank at level $p<0.01$ (t-test)

* Statistically significant difference from the next in rank at level $p<0.05$ (t-test)

A casual glance at the table suggests that all the causes listed influence the existence and development of corruption in the judiciary to a great extent – the index is in all cases statistically significantly different (higher) than grade 3.00 (influences moderately, t-test, $p<0.01$), which shows that the respondents accord great importance to all the listed corruption factors. Entrepreneurs are of the opinion that the key factors are: morality crisis, weak "Rechtsstaat", dependence of the courts on executive authorities and inefficiency of internal court control. Factors that have the least influence on corruption in judiciary, according to entrepreneurs, are the low salaries of those employed in this branch, the promotion system for judges and prosecutors and problems inherited from the communist past.

[11] Grades range from 1 ("does not affect"), 3 ("affects moderately"), to 5 ("affects very much").

Earlier empirical research[12] has shown that the morality crisis is one of the main problems of Serbian society. That contention is confirmed by this research as well. Presently, we are witnessing all-encompassing anomy of the society, and state of anomy is characterized by, on one hand, disrespect for moral and legal rules and, on the other hand, disrespect of social institutions. Given the fact that individual moral standpoints are, according to Dirkem, only an echo of the moral state of society, [13] the admissibility of certain social rules, on one hand, and the breach of such rules, on the other, will depend on the general situation in the said society. Moral crisis brings about a lack of confidence in almost all key institutions of the society. One more element suggests that the crisis of morals is one of the keys for understanding such a spread of corruption. Namely, there are no firm moral condemnations of corruption. [14]

The problem of corruption, and entrepreneurs to a great extent (indirectly) concur with this, is at the same time a problem of the functioning the rule of law and Rechtsstaat, and that means the institutions of the society. This reflects itself in the low confidence people have in institutions. Corruption in the judiciary may not be examined in an isolated fashion. This is why, in the responses of the entrepreneurs, there was so much emphasis on relations between judiciary and political, primarily executive authorities. It is almost certain that entrepreneurs have noticed the weak functioning of the legal system as a clear symptom of the presence of corruption. And vice versa, widespread corruption, especially when it contaminates the very top of the pyramid of power, disintegrates social institutions and, consequently, the legal order of the state. This happens in a kind of enchanted spiral where every next circle is larger. Getting out of that spiral is a hard and laborious task for every society, and it requires not only political will, but also engagement of many individuals.

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[12] *Korupcija u Srbiji (Corruption in Serbia), CLDS, Belgrade, 2001*; M. Vasović - "Moralna klima, anomija i korupcija" (*Moral climate, anomy and corruption*) in: *Sistem i korupcija (System and corruption)*, IDN, Beograd, 2000; Z. Slavujević - "Delegitimacija sistema i njegovih institucija" (*Delegitimization of system and its institutions*); S. Vuković - *Čemu privatizacija (Why privatization)*, IKSI, Beograd.

[13] Dirkem, E., 1977, *Samoubistvo (Suicide)*, BIGZ; Beograd, p. 332.

[14] M. Vasović - "Moralna klima, anomija i korupcija" (*Moral climate, anomy and corruption*). Also: S. Vuković - *Korupcija i vladavina prava* (*Corruption and the rule of law*), 2003, pp.137-148.

Measures against corruption

We were interested to hear from the entrepreneurs, as participants in court procedure, what measures against corruption might give the best results. To that end, we offered them the following list of possible measures (Table 26), which may be carried out within the judiciary. At the same time, this does not mean that the list is exclusive (closed).

Table 26
Measures against corruption in commercial courts (%)

	Very much for	Somewhat supportive	A little supportive	Not supportive at all	Does not know	Index	Rank
Imposition of more stringent criteria for election of judges	72.3	20.9	3.0	2.1	1.7	1.34	1-3
Greater possibilities for supervision and control	67.2	22.6	8.1	0.9	1.3	1.42	1-3
Greater possibilities for disciplinary sanctions and punishment	69.4	17.9	6.0	4.3	2.6	1.44**	1-3
Encouraging judges (participants in court procedure) to report all irregularities they encounter	51.1	28.1	10.6	4.7	5.5	1.67	4-9
Introducing an efficient system of improving judges' professional qualifications	46.4	33.6	12.3	3.0	4.7	1.71	4-9
Securing greater transparency and openness of court's work	46.8	33.6	10.6	4.7	4.3	1.72	4-9
Introduction of regular evaluations of one's professional performance	37.0	39.6	11.5	2.6	9.4	1.77	4-10
Making further promotion dependant on performance	43.4	33.6	14.9	3.8	4.3	1.78	4-9
Amending procedural rules	34.5	35.7	17.0	3.0	9.8	1.87**	4-9
Introducing information systems	33.2	33.2	19.1	6.8	7.7	2.00	10-11
Increasing salaries of judges and court officials	31.9	41.7	14.5	9.4	2.6	2.01	10-11

** Statistically significant difference from next in rank at level $p<0.01$ (t-test)
* Statistically significant difference from next in rank at level $p<0.05$ (t-test)

All the above mentioned measures, save for three that will be analyzed later, are regarded by entrepreneurs as measures that are more than likely to be efficient in preventing corruption in commercial courts. Namely, in all but three measures there is a statistically significant difference of index in comparison with the 2.00,

grade which represents the estimation that a certain measure may be efficient only to a limited extent (t-test, $p<0.01$). Entrepreneurs also regard amendment of procedural rules as an efficient measure of preventing corruption in commercial courts, but on another level of statistical importance (t-test, $p<0.05$). Contrary to that, their estimations with regard to information systems, or increase of salaries of judges and court officials are not statistically different to a significant degree from 2.00 grade (which denotes that they may be of only limited efficiency). Among measures they regard as most important, or most likely to succeed in preventing corruption in the commercial judiciary, entrepreneurs single out introduction of higher criteria for election of judges, more opportunity for supervision and control, as well as more opportunity for disciplinary action and punishment. Following after those three measures is the second group of measures, and, at the very end of the list is the last group, which contains increase of salaries, and introduction of information systems.

Results of the research show that, according to the entrepreneurs' opinions, combating corruption in the commercial judiciary may be carried out through action of judiciary-dependent factors, but also by factors, which are under the "prerogatives" of the political authorities. They also show that isolated measures will not yield significant results (indices of almost all measures listed are very high). This means that measures for combating corruption in the judiciary have to be complex, that is, a multi-pronged approach is necessary.

CONCLUSION

Almost all surveys, including this one, clearly suggest that entrepreneurs and citizens have very unfavorable impressions of the judiciary. This means that they do not have complete confidence in the judiciary as an impartial umpire of disputes. Earlier surveys show that more than two-thirds of the surveyed citizens and entrepreneurs regard the judiciary as slow, unreliable, dishonest, unjust and incompetent. This latest survey paints a somewhat milder picture – now around three quarters of those surveyed regard it as slow and about one half perceive it as unreliable, incompetent and dishonest. When it comes to its partiality and accessibility entrepreneurs clearly do not have firm convictions.

Results of the survey clearly show that the efficiency of judiciary and its "auxiliary" services is rather low and that contacts between them, on one side, and entrepreneurs, on the other, are quite difficult. The most inefficient official is are the court enforcement officials (bailiffs), followed by the court and prosecutors, and the most efficient is the court administration. This corresponds to the trust enjoyed by institutions – the less entrepreneurs trust it, the less efficient they perceive it to be. At the same time, all these services, in the view of the entrepreneurs are more efficient than they were three years ago. The biggest improvement is recorded with regard to police, followed by courts and prosecutors, and the least improvement was made by court enforcement officials.

Operation of the judiciary is estimated on the basis of efficiency and quality of work of three key factors in court procedure: judge, court experts and court administration.

First, over a half of entrepreneurs assign positive grades for judges' performances. Three-fifths state that the judge has impartially formulated the litigation record, that he/she has not misinterpreted statements of fact laid out before the court, nor has he/she deliberately omitted or included presentations to the court.

Second, three-quarters of the participants state that the court did not appoint a court expert without the request of one of the parties, but at the same time they questioned the performance and competency of the court experts.

In three-quarters of cases entrepreneurs in general estimate that corruption exists within the commercial judiciary. At the same time, two-prong corruption pressure has been identified as one of the main causes for corruption, coming from the side of judges and court officials that request or expect bribes, and from the side of entrepreneurs who, in order to solve their "problems" in an easier fashion, do not hesitate to offer bribes. The most common corruption pressure concerns acceleration or prolongation of court procedure, while it is not uncommon that additional payments will be required in order to procure a lawful court decision, or in order to ensure regular conduct of court procedure.

The susceptibility of judges and court officials to bribes is in correlation with corruption pressure. Almost every fourth entrepreneur states (ranging from "always" to "seldom") that it is necessary to make additional payment in order to obtain a regular court procedure. When directly asked "when was the last time you have bribed a judge or a court official", only one in eleven state the exact date. This means that only one in eleven entrepreneurs di-

rectly confirm that there is corruption in judiciary. This suggests that entrepreneurs are not consistent in answering the questions posed regarding the extent of corruption within the judiciary. Statements differ depending on whether the questions were posed directly or indirectly, and this is understandable if one bears in mind the fact that the corruptor is also on the receiving end of state sanctions for corruption.

The channel most frequently used for corruption are attorneys, judge's friends and acquaintances. Rather highly placed are corruptor's personal contacts and individuals employed in state authorities. The results suggest that the state of corruption has improved, in comparison to three years ago. Seven-tenths of those who think that corruption exists, state that nothing has changed, somewhat over a fifth believe that the situation has improved, and less than one-tenth of entrepreneurs reckon that things have changed for the worse.

The largest proportion of responsibility for corruption in the judiciary rests on prosecutors, judges, investigation judges and attorneys. According to two-thirds of entrepreneurs, the above mentioned actors have "large" or "significant" responsibility. A somewhat lower, but still significant share of responsibility rests with court experts. Somewhat less responsibility is assigned to court secretaries and secretaries of court councils, and the least responsibility for corruption in the judiciary rests with clerks at court documents service.

According to entrepreneurs, the main reasons for corruption should be sought in the comprehensive moral crisis that has gripped Serbian society, weak Rechtsstaat and court dependence on political authorities. Also important are the following: inadequate external control of the judiciary, inefficient prosecution office, conflict of interests and inadequate internal court control. External and internal controls would increase efficiency of the judiciary, on one hand, and, on the other hand, increase the level of confidence that citizens and entrepreneurs have in the judiciary. Last but not least is the system of promotion for judges and prosecutors and problems inherited from the communist past.

All this means that corruption in the judiciary, as one of the main pillars of Rechtsstaat, cannot be examined in isolation, given the fact that the more corruption spreads in a society, the more visible is the symptom of malfunction of law mechanisms. To put it more precisely, a weak Rechtsstaat represents fertile ground for the emergence of corruption, on one hand, an on the other hand, the

more corruption spreads, the more it corrodes the legal framework of the state and corrupts institutions of the society.

Entrepreneurs view the following as key measures for combating corruption in the judiciary: higher standards for election of judges, stricter supervision and control of the judiciary, introduction of disciplinary measures and harsher punishment, encouraging court employees to report all irregularities and securing a greater level of publicity of court operations. The least important measures are increase of salaries and introduction of information systems.

Results of the survey also show that, for most of the characteristics, there exists a great dependence on the confidence entrepreneurs have in judiciary. This means that a lower level of confidence results in lower marks for its performance, a perception that it is more susceptible to corruption and, finally, a perception that it is more corrupt.

III Results of the Survey of Judiciary Officials

INTRODUCTION

In order to formulate an adequate public policy for combating all corruption, including the one concerning the functioning of the judiciary system, it is necessary to collect the corresponding information, which is at least twofold in nature:

- Firstly, information pertaining to the specific organization and operation, including procedural rules, duration of the procedure, complexity, the level of discretion in decision making etc, for all points which could be the "nuclei" of corruption and
- Secondly, information pertaining to some objective and subjective indicators of the state and, more specifically, the extent of corruption in this area.

These information forms the basis of the *diagnostic analysis* which should point to the specific organizational structures, socio-psychological predispositions (perceptions, positions, attributes, stereotypes) and behavioral frameworks, which make the institutions of the judiciary system susceptible to corruption.

This analysis has partially been enabled by a survey made of 220 respondents, all functionaries and/or employees of the judiciary from 15 cities in Serbia. Respondents included 14 court presidents, 62 judges, 22 prosecutors, 72 attorneys and 50 other employees in the judiciary (court administration). The survey mostly covered the work of commercial courts and, more specifically, litigation in commercial matters, so that all employees surveyed work in commercial courts (118) and in higher commercial courts (8), while the remaining respondents (94) were not employed by the courts directly (attorneys and prosecutors). The respondents varied greatly in their total work experience in the judiciary (from 1 to 40 years, average of 5.5 years) and also in the total time in their present position (from 1 to 40 years, 9.1 years on average).

EVALUATION OF THE SITUATION IN THE JUDICIARY

Judged on the basis of the evaluations exchanged in everyday communications, or by the reactions and information transmitted by the media, the judiciary system in Serbia, over the whole of the transition period, has not enjoyed serious public respect. The conclusions of numerous studies of public opinion dealing with the legitimacy of the system indicate, furthermore, that it does not enjoy sufficient trust from citizens. Several surveys of public opinion have shown that the judiciary system, along with the customs, police and revenue departments, are considered basic centers of corruption.

A common characteristic of the previous studies on the state of the Serbian judiciary system is that, as a rule, they avoided the opinions and attitudes of the legal and judicial profession. It is for this reason that the survey conducted as part of our research represents one of the rare opportunities to collect the opinions of legal professionals on the status of the judiciary system as a whole, on the specific problems they face and the level of corruption in this area of public service.

General evaluations of the state in the judiciary

The general evaluation of the state in the judiciary, given by the members of the judiciary profession, is significantly less extreme than the usual negative reactions characteristic of the lay public. This is clearly seen from the answer to the question "How would you evaluate the state of the judiciary today?" If we take our sample as a whole, extreme negative answers are somewhat more numerous than the extreme positive (the reply "very bad state" is three times more common than "very good"). However, taken as a whole, there is an almost normal distribution of answers in which the greatest number (41%) expresses an ambivalent opinion (the situation is graded as "medium", i.e. neither good nor bad), while the number of positive (29%) and negative (30%) answers is almost equal. Finally, the grade point average (2.94) is not statistically significantly different from the average grade (3.00). [1]

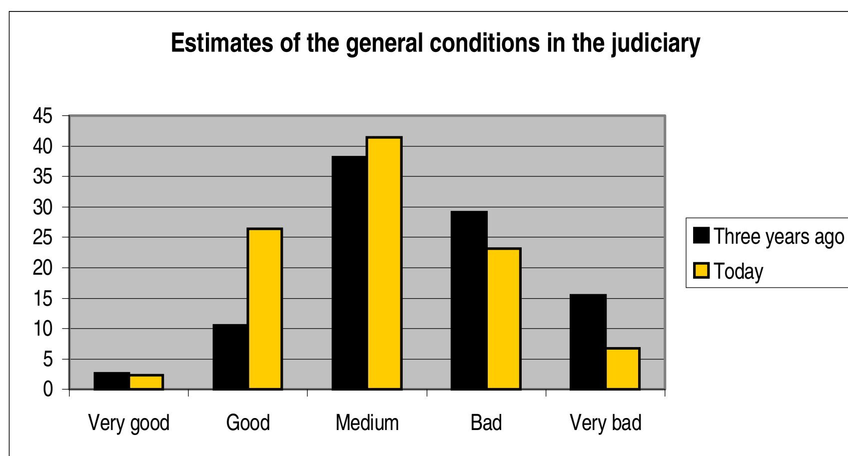
In effect, there is a difference in the evaluations made by the different professions within the system: attorneys express the greatest criticism of the state in the judiciary and are much more critical than the other judiciary professions; these differences are

[1] The grades go from 1 (very bad) to 5 (very good)

especially evident when their responses are compared to the evaluations made by court presidents and judges. For example, the majority of attorneys (61%) give negative responses about the judiciary up to four times more frequently than the judiciary employed in the courts. The average grade given by the attorneys is 2.37 and statistically significantly differs (t-test, $p < 0.01$) in relation to the average grade given by the judges, which is much higher (3.22). It is possible that the more critical attitude of the attorneys is the result of their independence, but in some aspects also the result of their relatively less favorable position in the judiciary (greater uncertainty, exposure to market economy, irregular and non-guaranteed income, absence of other advantages offered by a government job), which, in the final analysis, depends on the results they achieve "confronted" with the judiciary. This can also be the result of a lower level of auto-censorship, i.e. greater freedom in giving their opinions in the survey. Alternatively, attorneys, as members of an independent profession, have little (guild type) solidarity with the court cadres and do not think that the survey questions are an evaluation of their own work. An explanation of the difference in the level of criticism between attorneys and other judiciary professions, which is evident throughout the survey, is that the staff employed today in the judiciary is under the influence of "normative conformism", which makes them look much more favorably on their own work. It is, therefore, possible that the views of attorneys, as a relatively external group, are more critical than the auto-evaluation of those employed in the judiciary. The evaluation of the state in the judiciary system can also be the result of political loyalty and other political inclinations, which influence the view of "reality".

Members of the judiciary professions consider that the situation in the judiciary system as a whole (general evaluation) is today better (average grade 2.94) than it was three years ago (average grade 2.54) and the difference between these two results is statistically significant (t-test, $p < 0.01$). Although the majority of participants qualify the state of the judiciary system in both periods under study as "medium", the negative evaluations of the previous study are three times more common than the positive (45% answered "bad" and "extremely bad" in respect to 13% "good" and "extremely good" – Picture 1). There are no statistically significant differences in respect to the evaluation of the state in the judiciary three years ago by the judiciary professions.

Picture 1



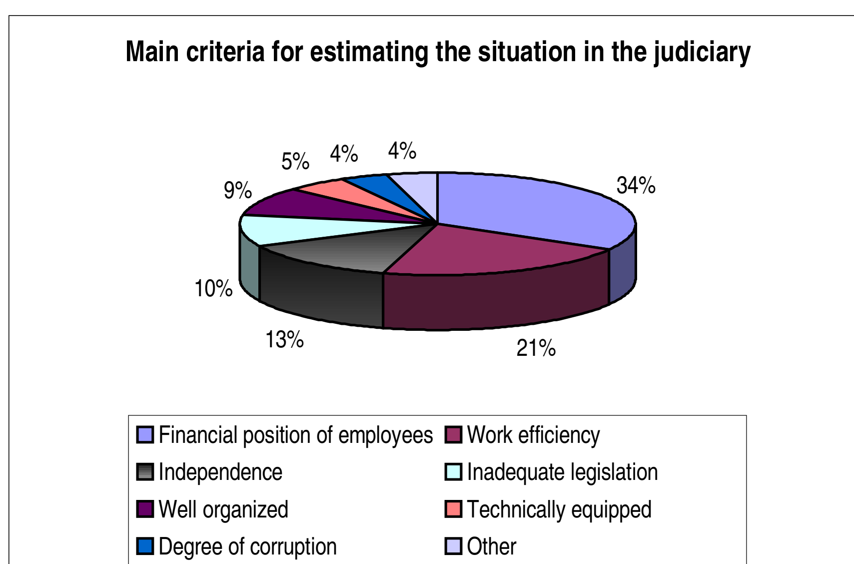
There is a statistically significant relation between the general evaluations of the state in the judiciary and the estimate of the extent of corruption in this area. Those who consider that corruption in the judiciary is widespread also evaluate the general state in this area as negative (average grade 2.48). Those who consider that corruption in the judiciary is not widespread, have a better opinion of the general state in this area (average grade 3.04). The difference is statistically significant (t-test, $p < 0.01$). This could indicate that corruption is a significant criterion in evaluating the general state – a significant influence on establishing the level of criticism towards the judiciary system as a whole. In other words, those that are exceedingly critical of the state in the judiciary have that opinion largely because they think that corruption is widespread in that area. This implicit criterion, however, is much less explicitly evident in the answers given herein.

When giving reasons (out of the four provided) for their opinion on the state in the judiciary system, instead of corruption, the principal reason they most frequently listed was the criterion of financial status (61%), work (in)efficiency (52%), (in)dependence of the justice system (44%), (dis)organization (42%), clarity of legal regulations (39%), etc. Corruption was in seventh place as the reason for the general state of affairs in this area (23% of the total number of answers).[2]

[2] Participants could list more than one answer which is why the total is more than 100%

Answers to the question “What most influenced your evaluation of the state in the judiciary” indicate also that the principal reason is the economic situation of the employees (33%), while the other replies follow, in declining order: work inefficiency (21%), level of independence (13%) and poor regulatory framework in this area (10%). More noteworthy is that, of all the most important reasons on which they based their evaluation of the judiciary, corruption came last (barely 4% – Picture 2)

Picture 2



There are statistically significant differences in the replies of the representatives of the different professions, which are indicative for understanding the problem of corruption in the judiciary (hi square test, $p < 0.01$). Attorneys – who are, as we saw, very critical of the judiciary – invoke, much more frequently than others, reasons such as corruption and inefficiency of the courts. The poor economic situation of the employees and the insufficient technical equipment of the courts do not worry them too much. This confirms the hypothesis that attorneys look on judiciary problems “from the side”. Furthermore, these findings in the case of attorneys could be the consequence of their desire to transfer the blame for all their failures and omissions in court onto court officials, i.e. to find the reasons for their own failures in the alleged inefficiency and corruption of the judiciary. The judges, on the other hand, blame inefficiency and corruption much more

rarely. All respondents employed in courts, especially court administration, mostly complain of their low financial status, while only the court presidents complain of the inefficiency of the judiciary. These differences are to be expected: the criteria on the basis of which different judiciary professions paint a picture of the state in the judiciary are by definition subjective. It could probably be said that it is completely natural and expected that their answers tend to reduce their own responsibility, or "blame", for the state in the judiciary. This, in itself, indicates that the state in the judiciary is not satisfactory – as nobody wants to take the "blame". A more critical conclusion wound indicate that the findings show that the people working in the judiciary are not ready to seriously tackle those problems which the public most frequently blames them for – their inefficiency and corruption. The fact that court presidents worry about the efficiency of the judiciary indicates that the higher they are in the hierarchy, the larger the responsibility of the officials.

Specific factors that influence the evaluation of the judiciary system

In attempting to study the views of the judiciary professions on the judiciary system and their evaluation of the situation, special accent was placed on certain aspects of their work that the public perceives as significant: the independence of courts, the efficiency of the prosecution and the cooperation between the courts and the prosecution.

Opinions on judicial independence

The most frequent replies on the independence of courts can be interpreted as ambivalent, as 40% answered that the independence is "medium". More determined replies (such as "not independent" or "independent" are relatively equally distributed (both around 30%). The respondents are less ready to give extreme opinions but, all in all, the number of replies that the judiciary is not independent is twice as large as the number of replies that it is "completely independent". It is crucial, however, that the average grade given by the respondents on independence (2.95)[3] does not statistically significantly differ from the theoretical average of the set,

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[3] Grades range from 1 to 5; larger number indicates "better"

confirmed by the ambivalent position of the judiciary professions on this issue. Attorneys are again mostly in the group which considers that the judiciary is not independent (average grade 2.31), while the judges are among those who consider that it is more independent (average grade 3.23) and there is a statistically significant difference between these two averages (t-test, $p < 0.01$). It was noted that court officials more frequently than others avoid answering this question, while court administration thinks that the judiciary is more independent than not. They, however, are not under the political pressure, which is constantly applied to court presidents.

The present independence of the judiciary is graded higher (average grade 2.95) than it was three years ago (2.51) and this difference is statistically significant (t-test, $p < 0.01$)

Evaluation of the prosecution (commercial offences)

There are different opinions expressed by the different judiciary professions on the subject of the efficiency of the prosecution, especially in the area of processing punishable infractions in the commercial sector. The two opposing evaluations come from attorneys on one side (who express an above average criticism) and prosecutors, on the other (whose criticism is below average).[4] The efficiency of the prosecution at this time is graded with an overall average of 2.89[5]. Analyzing by groups, the average given by attorneys is 2.26, the judges grade it at grade missing, while the average grade of the prosecutors is as high as 3.64. All the above grades have statistically significant differences (t-test, $p < 0.01$, in the case of attorneys and judges, and $p < 0.05$ in the case of judges and prosecutors).

The grades on the efficiency of the prosecution given in the previous period (three years ago) are not as good as those that are given at the present time. Three years ago, negative grades predominated, so that the overall average was 2.58, in contrast to 2.89 (present) and this difference is statistically significant (t-test, $p < 0.01$).

The cooperation of the courts and the prosecution in processing punishable infractions in the commercial sector is considered,

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4 For example, 73% of the prosecutors consider that the efficiency of the prosecution office is good, in comparison with 11% for the attorneys and 23% of the judges.

5 Grades are from 1 to 5, larger number indicates “better”

overall, to be more positive than negative; this pertains not only to the evaluation of the present situation (44% replied "good cooperation") but also to the situation of three years ago (31% positive answers); between 15% and 22% of respondents in both survey periods consider this cooperation is (was) not good. Average grades are 3.45 for the present and 3.16 for the period three years ago – the difference is statistically significant (t-test, $p < 0.01$). In this case also, attorneys are more critical than others, while prosecutors exhibit less than average criticism. It is indicative that the respondents who consider the overall state of the judiciary to be significantly corrupted also give more negative evaluations on the cooperation between the courts and the prosecution.

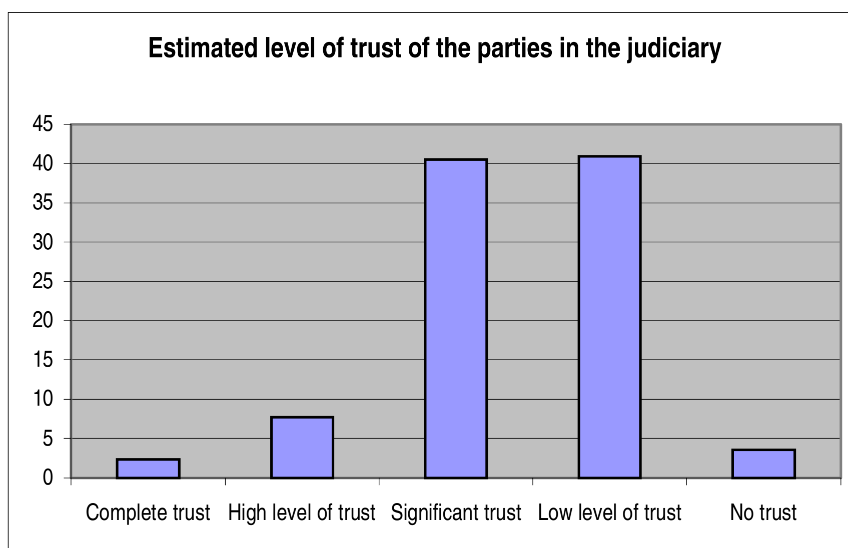
Evaluation of the trust that parties have in the judiciary

The support and the trust that state institutions enjoy in the public opinion is the basic indicator of the legitimacy of the system as a whole. The trust of the citizens in different institutions represents, in effect, the expression of their feeling that through these institutions they can safeguard their interests and realize their rights. Although the question of trust in the judiciary has been put forth in numerous studies of public opinion, it should be noted that this trust, or distrust is generated at the level of the perception of the characteristics of the judiciary and not on specific experiences with the judiciary system. Furthermore, it is not correct to compare the results of different studies of public opinion, because the comparison of different studies (different methods, different samples) is not methodologically correct and it is not possible to conclude if the differences are statistically significant.

In our study, we asked the question whether those employed in the judiciary, i.e. the judiciary professions, are conscious to what extent they enjoy the trust of the parties (both physical and legal) with whom they come into contact. The answers to these questions show that, although there is self-criticism, it is still more positive than the perception expressed by the public in general. From a global viewpoint, the evaluations are divided among those that think the parties have "little trust" in the judiciary or "do not have any trust" (44%) and others that think the trust is "rather high" (40%). The trust curve is "bent" toward the negative pole, which is confirmed by the average grade of 2.62 (statistically significantly different from the

theoretical average of 3; t-test, $p < 0.01$).[6] We have to note that it is possible the answer "rather good" could have attracted those that are not willing to pass extreme (either negative or positive) judgments. The attorneys and judges are on opposite ends, the first above and the latter below the average in their evaluations of the level of trust that parties have in the judiciary: the average grade of attorneys is 2.32 and is statistically significantly different (lower) than the average for all judiciary professions (t-test, $p < 0.01$), while the average grade of judges is 2.78 and is statistically significantly different (higher) than the average for all judiciary professions (t-test, $p < 0.05$)

Picture 3



Note: Responses "I do not know" (5%) have been left out.

Opinions on the parties' attitude to the judiciary process

The respondents under study were asked to evaluate some of the elements of the attitudes of the parties toward the judiciary process in which they (the respondents) participate. The general idea behind this question is not only for the respondents to project their own opinions, but also to detect some problem areas which usually appear, from experience in courts, between those that execute judiciary functions and outside parties ("customers"). The answers to the set of questions, which were formulated for this purpose, are shown in Table 1.

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[6] Grades are from 1 to 5; higher grade means "better".

Table 1
Basic problems employees in the judiciary encounter when dealing with parties (frequency[7] and average grades)

Problems	Frequency (%)	Average grade	Rank of average
Insufficient knowledge of process regulations	74	3.32 **	1
Excessive expectations of the time it takes to conclude a process in court	69	3.77	2-3
Insufficient knowledge of their own rights and obligations	66	3.73**	2-3
Discontent with the quality of the court process and judgments passed	35	3.21*	4
Uncivilized and rough behavior toward court employees and judges	12	2.46*	5
Attempts to influence the court process through illegal methods and activities	10	2.33	6

** Statistically significant difference with regard to the next rank at level $p < 0.01$ (t-test)

* Statistically significant difference with regard to the next rank at level $p < 0.05$ (t-test)

Judging by the average grades obtained, the basic problems as seen by judiciary staff on relationships with parties are tied to an insufficient knowledge of the rules and procedures followed by ignorance of their own rights and obligations and "excessive expectations of the parties on the speed of the judiciary process". On the other hand, judiciary officials much more rarely have comments on the quality of the trial, the interrelationship between the parties and the judiciary professionals and, especially, the use of illegal means to influence the outcome of court proceedings. This, in effect, means that the responsibility for the problems (i.e. objections concerning court proceedings) is placed at the "doorstep" of the parties and their unrealistic expectations and not on the judiciary staff and their (possibly) unsatisfactory, slow or illegal practices. Thus, the respondents were manifestly uncritical, which also means that they are not ready to change their positions and manner of work. Of notable interest is the fact that the idea of "the use of illegal means and procedures" in court proceedings (i.e. corruption) is rejected. There are no statistically significant differences among the judiciary professions in their answers to the above questions, except in the case of uncivilized and rough treatment by the parties, which is most frequently mentioned among the attorneys.

The professionals of Vojvodina courts more often than others point out that parties have insufficient knowledge of procedures and/or of their rights and obligations, while complaints on the inefficiency of

[7] Grades "always" and "frequently"

courts and uncivilized behavior are less frequent. In Vojvodina, the use of illegal means is not put forth as often, while respondents from Belgrade mostly try to avoid answering questions related to malpractice and corruption. Respondents from courts in Central Serbia are characteristic in their frequent complaints on the rough treatment of court staff by parties.

COURT PRACTICE AND CORRUPTION: "CORRUPTION NUCLEI" AND "CHANNELS" OF CORRUPTION

Court administration

Court administration as used in this study encompasses all employees in courts who come in (professional) contact with court cases, but who are not judges. Studies of corruption in other countries and societies in "transition" have shown that specific organizational structures and procedures in the framework of the court administration can make the whole judiciary system susceptible to corruption and contribute to the transformation of initially exceptional cases of corruption into an inherent part of the system. The importance court administration has in this sense is the result of its multiple role: on the one hand, an important internal support for the work of judges and court councils and, on the other, as the "technical" mediator between the court and (i) the parties who demand their rights or (ii) other institutions of a legal state with which the judiciary is functionally related. The court administration, therefore, cannot be viewed as a simple bureaucratic organizational structure, which merely manipulates and distributes court materials and documentation and performs other legal and material activities that are not part of the legal proceedings in the strict sense of the word. They also play an important role in guaranteeing the high quality of work of judges and court councils and, therefore, in confirming the independence of the judiciary. Good organization and functioning of courts in this domain can, based on its internal logic, be of considerable significance for the successful struggle against corruption in the judiciary and for the improved image of the judiciary system as a whole.

A question that was asked as part of this study on the conditions for the spread of corruption in our judiciary was if, in the opinion of the judiciary officials and court staff, the typical types of organization of work in the courts and corresponding procedures during court proceedings contain some internal organizational or procedural incentives for corruption. Existing laws and regulations and the level of

consciousness are not the only factors that can answer the question why the use of public office for personal gain can, under certain conditions, become the norm. In answering this question, the analysis of court practice should definitely be taken into account. It is particularly adequate for discovering the existing or potential systematic corruption in applying the law. Some specific and evident forms of organization in performing court administration, as well as a high level of discretion and the absence of efficient control of the process and the complexity of rules governing certain proceedings (e.g. submittals) can, "by nature of things" enable court staff, and through them the judges, to obtain unlawful gain for services they render. Furthermore, it is not only the absence of control, but also the internal organization of this work (distribution of roles), the unnecessary complication of procedures, the non-existence of clear and public rules, as well as the absence or avoidance of use of modern tools (computers with high levels of security, for example) that can foster the practice of corruption.

Manipulation of court documentation

Not all elements of organization or all phases of court procedure are equally "susceptible" to manipulation, which aims at "influencing" the final decision of the court. It is considered that the clerks in the document office (which first receives court cases), who have great autonomy in their work, are one of the "weak" links from the point of view of corruption. Court clerks have at their disposal a whole range of activities which can influence the flow and/or the outcome of court proceedings: dating and backdating of submissions; incorrect filing; manipulation of submissions (no receipts); manipulation of documentation presentation; manipulation of the content of submissions, etc. The abuse of these procedures enables the manipulation of deadlines, which indirectly influences the duration of court proceedings, i.e. the time that elapses before a decision is reached. The delay of a decision can have a significant effect on the parties in litigation, so they are interested in applying corruptive pressure on court clerks. Manipulation can be done by allowing selective access to (and insight into) the documentation, which all parties in litigation should have access to: this mostly happens at the time of distribution of transcripts and/or photocopies. Finally, it is possible to manipulate the content of the case documentation by removing certain submissions or by subsequently adding documents; this can place one of the parties in litigation into an unfair position and

can influence the flow and even the outcome of a process as the judgment is often based primarily on documentation.

Although the respondents generally more often refute than confirm the existence of manipulation of the documentation in certain phases of court proceedings, it is still possible to "list" certain activities, which, according to them, could be "nuclei" of corruption due to their high frequency (Table 2).

Generally speaking, not more than ¼ of the judiciary professionals surveyed is ready to "confess" that in their court practice they relatively frequently see one of the above attempts at manipulation of court documentation. According to the evaluations by the respondents, the most sensitive points of court proceedings and those most susceptible to manipulation are the coercive execution of court decisions which 25% of the respondents consider to be (unnecessarily) delayed; the second activity is considered to be the delay or acceleration of documentation submissions and minutes (also mentioned by 25% of the respondents). One fifth of the surveyed sample indicate frequent irregularities in handing over court summons, while all other irregular procedures are relatively rarely mentioned as relevant in our court practice.

Table 2
Types and frequency of manipulation of court documentation

Type of procedure	Average	% answers "very frequent" or "frequent"	% answers "rarely or never"	Rank of frequency
Delay of coercive enforcement	2.71	25	39	1-2
Slowing down or speeding up of court document submissions	2.70	25	41	1-2
Intentional disregard of rules when handing over court summons or other court submissions	2.50**	20	46	3
"Loss" or "incorrect" filing of documents	1.83**	7	71	4
Manipulation of document or case content (removing or introducing certain documents)	1.67	5	78	5-8
Backdating of submissions	1.66	4	75	5-8
Giving parties only partial (selective) insight into documentation	1.59	3	79	5-8
Giving parties insight into unauthorized documentation and court records	1.58	2	79	5-8

Note: 1 = almost never, 5 = very frequently

** Statistically significant difference with regard to the next rank at level $p < 0.01$ (t-test)

* Statistically significant difference with regard to the next rank at level $p < 0.05$ (t-test)

When evaluating the frequency of manipulation of court documentation, there is a polarization of opinions between attorneys (always the most critical) on one side, and the court administration staff and judges, on the other. For example, in 54% of cases attorneys indicate frequent irregularities in the submission of court documentation, while the court administration almost never mentions this. 35% of the attorneys point out that *Irregularities in handing over court summons to concerned parties* are a frequent occurrence, while more than a half of the court administration state that it "almost never happens". When talking of *Misuse of the right of parties to insight into court documents*, the viewpoints of judges and attorneys diverge: the former negate it completely (92% answer "rarely" or "never happens"), while one fifth of the latter think that it happens "sometimes"; even one tenth of prosecutors indicate that this type of irregularity exists. All respondents, for the most part, do not think that *Loss of documents* is a frequent event, although attorneys accept the possibility, while judges are firm that it never happens. The biggest difference appears in the evaluations of how often manipulations are used when delaying the execution of court decisions: one half of the attorneys think that this happens frequently or almost always, while more than a third of the court administration say that it "almost never happens". All the above differences are statistically significant (hi- square test, $p < 0.01$).

Redirection of cases

The process of directing the case to the "corresponding" judge can be one of the main mechanisms, which permit corruption in the judiciary. The defense against this is the application of the principle of the "random judge" – the parties do not know which judge will process their case, so they cannot corrupt him/her. Although our judiciary system legally regulated this principle some time ago[8], it is not applied systematically. There is always the question of how the principle of the "random judge" is applied in a given court. The principle can be compromised by irregular registration of the case, which again points to the court administration. If the sequence of submissions to judges is known, by manipulating the sequence of registration one can direct the case toward a certain judge. However, the method of the random

8 Introduced as a regulation on 1.1.2002

judge can be bypassed in a legitimate attempt by the court president to direct a case to the judge s/he considers the most competent for that type of dispute. The problem with the principle of random judges is precisely the fact that it makes it more difficult to use specialized knowledge to the maximum and has negative impacts on the specialization of judges. Also, this principle in our court practice frequently clashes with other organizational principles: e.g. the rule that courts must publish the annual distribution of judges by specialized areas (litigation, execution, bankruptcy, registration, criminal procedure, etc), as a function of the specialization of judges, particularly in smaller courts, courts with a small number of judges. This prevents the successful application of the method of the random judge.

According to the opinion of the respondents, the principle of the "random judge", which should be one of the guarantees of an impartial process, is for the most part respected in our court practice. 51% of the respondents consider this rule is applied "always" in the courts in which they work, while an additional 33% think that it is applied "very often"; less than 10% of the respondents claim that this method is not applied in courts in which they work. Although the respondents agree that this rule is for the most part respected, there are differences among the different professional categories as to the frequency (i.e. is it really respected always or are there exceptions). For example, court presidents are almost unanimous that this rule is "always " applied (79%), as are most of the other court staff (68%); attorneys think it is a frequent occurrence rather than regular, while one third of the prosecutors is not aware of this problem. The differences are also indicated by the statistically different average grades given by attorneys, on one side, and the remaining judiciary professions, on the other (t-test, $p < 0.05$).

There are also differences in views on the possible positive and/or negative effects of introducing the rule of the "random judge". However, all agree that positive effects outweigh the negative. Almost ¾ of the respondents thinks that introducing this rule can be an efficient dam against corruption (71%), while more than half (54%) that it breaks monotony and stops judges getting tired of certain types of cases. There is no statistical difference between the answers given by attorneys and judges on this issue – both agree on the beneficial influence of the "random judge" on

preventing corruption and monotony. On the other hand, half of the respondents see some negative consequences of the application of this rule: they ask if this does not prevent the most competent judge taking on the corresponding case (48%), i.e. does that prevent the specialization of judges (45%). Judges and respondents from Vojvodina raise the problem of specialization more frequently, while the problem of competence is raised mostly by the Belgrade judiciary (hi square test, $p < 0.05$)

Court presidents also indicate some objective circumstances, which prevent them from always respecting the principle of the "random judge", i.e. the difficulties they encounter in its application. One-third state that they have no difficulties in applying this rule, the others indicate as the primary difficulty the overloading of judges and, subsequently, some objective difficulties such as the limitation caused by the annual distribution of judges by specialized area and the frequent fluctuation of judiciary cadres. Although the problem of the incompetence of judges is mentioned, this is not put to the forefront. Also, according to the judges, almost all courts apply the practice of the annual distribution of judges; however, attorneys do not have a similar insight into this court practice (12% answer that in the courts where they work, this practice does not exist).

Engagement of court experts

There are good reasons to believe that corruption in courts can be relatively easily accomplished through court experts (court expert witnesses) who give biased (partial) opinions on respondents related to the litigation. As experts are not responsible to anyone for their (possibly biased or unprofessional) testimony, while this testimony frequently influences the court decision, they can easily become the key link in the chain of corruption in which attorneys and judges can also participate. Everybody can "hide" behind the expert's opinion (whose partiality, by the way, is more difficult to notice), or the expert can work together only with the judge. In any case, the judge is the one who decides on the flow of the case, accepts or denies the presentation of proofs and evaluates their validity, decides on accepting proof through expert testimony, decides on who the expert will be and is in a position to constantly choose the same person for this task, or to choose the expert at

his/her own discretion. This creates a suitable environment for corruption schemes in which they can jointly participate in reaching a biased decision, the expert through false testimony, the judge by accepting this “proof”, after which they split the proceeds from the payoff. Expert testimony is most frequently used for litigation in commerce (estimates and compensation for damages, financial transactions, bankruptcy, revaluation of financial obligations, etc), so that it is precisely in commercial courts where corruption of this type is most easily established. Although, in principle, judges can call on only those experts that are on the list of permanent (authorized) court experts, there are exceptions when it is possible to use discretionary powers and choose experts outside the list. There is a certain legal loophole in regulating the position of experts (i.e. who can be an expert, how s/he can act, to whom s/he is responsible, etc). Knowing this, it is not without significance that the list of experts is maintained at the Ministry of Justice in a relatively transparent manner. As the judge is the one who, at the request of one of the parties in litigation or at his own discretion, can ask for an expert, the decision whether there will be an expert testimony or not already carries in itself a certain possibility of bias. Furthermore, the judge independently decides on the need for super-expertise and chooses the expert to provide it from the same list of authorized experts.

The study of the practice and procedures used in taking on an expert in commercial disputes is based precisely on the analysis of conditions which can create corruption in the judiciary. Answers given by attorneys, on who proposed calling an expert in cases they defended, indicate that it is relatively rare for judges to ask for experts, without a prior request from one of the parties in the litigation.

Table 3
Who asked for the expertise? (replies of attorneys in %)

Who asked for the expertise	Relative frequency of cases		
	Rarely	Relatively frequently	Always
Judge	67	14	14
Attorney (party)	17	37	42
Opposing party	28	39	26

A little more than 2/3 of the attorneys surveyed state that it is rare for the judge to engage an expert directly and only a little

above 10% say that this is a regular event. The expert testimony in commercial processes in which they participated was mostly asked for by the attorneys themselves (31% answers “almost always”), almost two times more frequently than the opposing party in litigation. The evaluations of the attorneys concerning the practice of using experts in commercial litigation for the most part coincide with the experience of the judges and court presidents. The majority of judges (41%) state that it is extremely rare that they propose expert testimony (only some 10% state that is a regular occurrence) and that they call on experts on the basis of requests from one of the parties in litigation.

Attorneys mostly state that the calling of experts helped them, i.e. that the findings of the expert were, as a rule (1/4 of the answers) or almost always (1/5), beneficial for their side; less than 10% confess that such cases are rare. Judging by these evaluations, it could be concluded that attorneys have reason to be happy with the quality of expert testimony, i.e. that they do not suspect the exploitation of biased expert testimony in our court practice. This position is partially confirmed, but also placed partially in doubt by the answers to direct questions on the competence of experts and the quality and absence of bias of their findings (Table 4).

Table 4
Average grade of certain aspects of expertise[9]

	Competency	Quality	Impartiality
Judges	3.96	3.92	3.99
Attorneys	3.30	3.30	3.39
Total	3.63	3.61	3.69

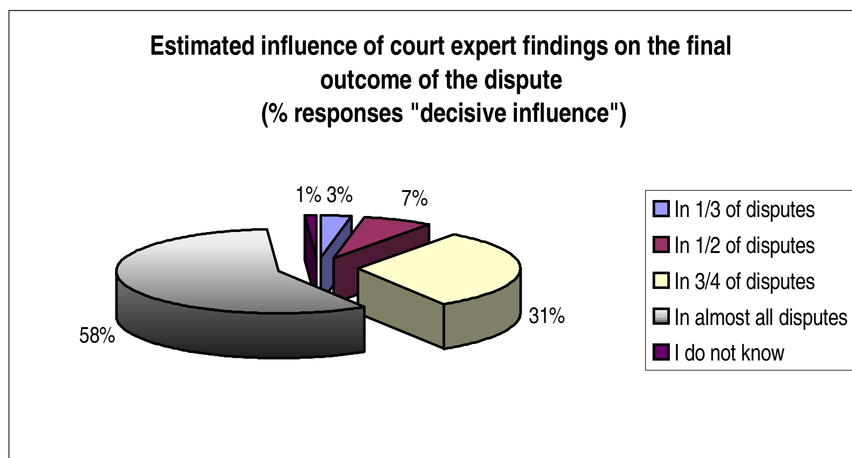
When looking at the answers in total, both judges and attorneys show a relatively high level of satisfaction with the level of competence and impartiality of the experts, i.e. the quality of their testimony in commercial court procedures. The average grades of satisfaction with each of the characteristics is the same – there is no statistically significant difference between them – while all are statistically significantly higher than the theoretical average of 3.00 (t-test, $p < 0.01$). Expressed in percentages and leaving out the answers “don’t know” over half of the respondents expressed satisfaction, a little less than a third are ambivalent (“both satisfied

[9] Grades range from 1 (very dissatisfied) to 5 (very satisfied)

and not satisfied”), while less than 10% express dissatisfaction. However, there are significant differences in the degree of satisfaction among attorneys on one side and judges, on the other. Although previous results indicate differently, attorneys are much more frequently ambivalent than satisfied with the work of experts and the difference is statistically significant in all three cases (t-test, $p < 0.01$).

A large number of attorneys (more than half) state that in almost all cases they defended before the commercial courts, the judge accepted the opinion of the expert and made his decision on the basis of these findings (only 3% say that this is rare), which indicates the significant influence expert testimony and the experts’ opinion have on the decisions by commercial courts. These statements by attorneys also indicate the practice of “covering” the judge’s decision by the findings of the expert i.e. that the expert’s testimony is not only important, but often crucial in determining the decision of the judge and that the judges in this manner “hide” behind the expert when making a ruling (Picture 4)

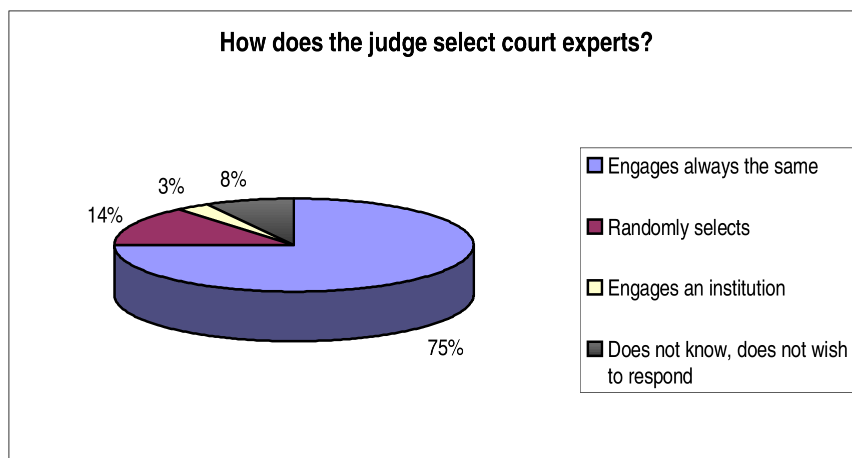
Picture 4



Precisely because the expert’s opinion is frequently crucial in the decision made by the judge and because the parties before the court cannot call their own experts (because then the process becomes a “battleground of experts”) the impartial choice of expert should be a guarantee of the impartial process. Judging by the experience of the respondents, the decision on the choice of a specific expert in our court practice depends mainly on the

discretion of the judge. Therefore, it is precisely this choice that can be one of the critical moments for the emergence of corruption. According to the survey, the majority of judges (75%) engage always the same, already known experts, who they choose on the basis of previous impressions and experience, i.e. on the basis of their subjective opinion concerning their professional knowledge and reliability. Only a small number of judges chooses experts randomly – i.e. a person from the list of permanent court experts (15%) – while an even smaller number (3%) engages the Municipal Council of experts or similar institution which then chooses the expert. This means that there is a significant discretionary right in the choice of experts which carries with it a danger of partiality i.e. the influence of "acquaintance", "hallo – effect" and free impressions. It is indicative that 1/3 of court presidents are not aware of the way in which experts are chosen in their courts, or that they were not capable (or did not want) to give an answer to this question (Picture 5)

Picture 5



When the respondents discussed the practice of expert testimony in commercial courts, they point out that the need for super-expertise is rare – the survey shows that 20% of judges and attorneys have never asked for super expertise, while 54% have asked, but only rarely (less than 10% of the total number of processes they participated in). Less experienced judges and attorneys (with work experience of less than 10 years) avoid super expertise much more than others. Super expertise is requested, essentially, by those members of the judiciary profession

that consider corruption to be significantly present in the judiciary, which indicates that it is used as a measure and/or verification of the impartiality and integrity of the participants in the court proceedings. Attorneys in this case also consider that for commercial processes, judges most often accept the findings of super experts and base their decisions on them. (57% – "in all cases")

Request for exemption of the judge

The judge plays a crucial role in any court process, as s/he is undoubtedly the central figure. Precisely for this reason the request for exemption of the judge is frequently misused and it can be done in order to prolong the duration of the court proceedings. In this sense the exemption procedure, i.e. the process for taking the decision on exemption (done by the court president or, for the court president, by the president of a higher court) is another "gray zone" in which corruption can take hold.

However, asking for exemption can in itself be a sign of fear by one of the parties that the proceedings are biased (and the suspicion that the bias is a result of corruption). Still, in our survey, attorneys for the most part state that it has never happened (50%) or that it has rarely happened (25%) that they ask for the exemption of the judge in cases they had; 20% do this on occasion and only 3% regularly submit to such a request. Judges that answered the same question (on the frequency of requests for their exemption) have only a slightly different view: 30% confirm the statement by attorneys that were never asked to be exempted, while most of them say that this is requested only rarely (47%). A little over one tenth (13%) confesses that exemption requests appear from time to time while only 1% state that this happens frequently. However, there is no statistically significant difference in the answers given by attorneys and judges. Also, judges and court presidents refuse to answer this question three times more frequently (9%) than attorneys, probably because they consider it some sort of check on their work. On the basis of these findings, it would seem that the request for exemption of judges is, in practice, used more rarely than is generally thought, and that this institution is not so easily used as a corruptive influence and that it is used generally (when it is not justified, i.e. when it is not an exemption by force of law) to prolong the proceedings.

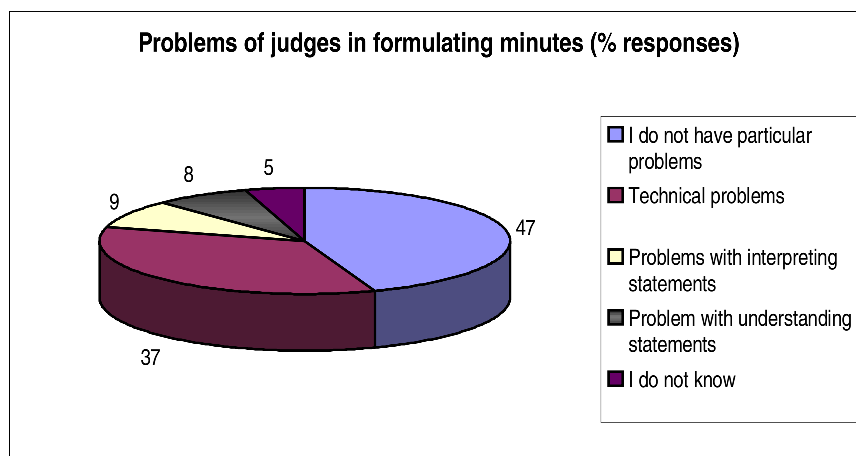
Minutes of proceedings

The composition of the minutes (as the basic document for reaching a decision in the process, resolve the appeal to the first level decision, etc.) is one of the crucial moments of any process. As a document that can significantly influence the evaluation of quality and even the impartiality of the process and the decision, the taking of minutes can be considered “critical” from the point of view of the analysis of the conditions that foster corruption. In the nature of things, and especially in conditions of technological backwardness of courts and unsatisfactory organization of court administration, the process of taking minutes carries a significant possibility of biased interpretation and incorrect registration of the testimony of the participants in the process and the parties and their representatives, witnesses and experts. Furthermore, it is considered (and this is a working hypothesis of this paper) that manipulations of the minutes which represents the only official written trace of the hearing, is among the best techniques used by corrupt and partial judges. A judge that closely controls the flow of proceedings has a crucial influence on the form and content of the minutes. Therefore, the procedures and methods used by judges to formulate the minutes are important: it is precisely the imperfections of any one of these techniques and methods that can be used to change the sense of the testimony, to stress or omit certain parts or make totally meaningless the testimony of participants in the hearing or court proceedings, which is then used as a basis for reaching incorrect or partial decisions. Bad interpretation of the statements in the minutes is not always the result of corruption but also other, unintentional errors (mistakes made by the clerk of the court, noise, etc), but in all cases results in the incorrect and possibly partial formulation of the minutes and can lead to the disruption of the principle of impartiality in reaching a decision.

In Serbian court practice the use of shorthand reports is rare and still rarer the use of complex audiovisual process registration techniques. The most frequently used procedure is for the judge to dictate the text of the minutes, which is registered using an (electrical) typewriter. Therefore, the most frequent procedure for formulating the minutes is, according to the statements by the judges themselves, to hear the testimony of a participant in the

proceedings (party, authorized representative, witness, expert) in totality (or in parts) and then to dictate to the clerk of the court a free interpretation of the basic facts (79% of the answers). In practice, it is rare to dictate the testimony sentence by sentence (3%), while a somewhat more frequent method is the "combined method" (13%). The majority of judges do not have difficulties or problems in formulating the minutes (47%), while a bit over one third has some purely technical difficulties (related to the speed of typing, absence of shorthand reports, absence of audio equipment). Less than one tenth of the cases point to difficulties in formulating the basis of the testimony and its interpretation (Picture 6)

Picture 6



Both judges and attorneys indicate that they rarely (less than 10% of the cases) or never (over 80% of the answers) had objections to the minutes for the processes they participated in. However, there is a statistically significant difference in relation to the answers given to the same question by judges: attorneys consider that objections are given somewhat more frequently (t-test, $p < 0.01$). The relative reliability of the minutes is indicated also by the evaluation of the frequency of objections to minutes: in processes in which almost all of them participated, this almost never happened or happened very rarely (92%).

A somewhat more detailed (and precise) picture on problems tied to the formulation of minutes from hearings can be obtained when analyzing specific remarks by attorneys on manifestations of partiality of judges during this process. Attorneys talk of their

experience with judges who preside over commercial hearings who sometimes manifest certain irregularities and attempts at manipulation through the formulation of minutes (Table 5).

Table 5
Most common errors in formulating the minutes – answers by attorneys (in %)

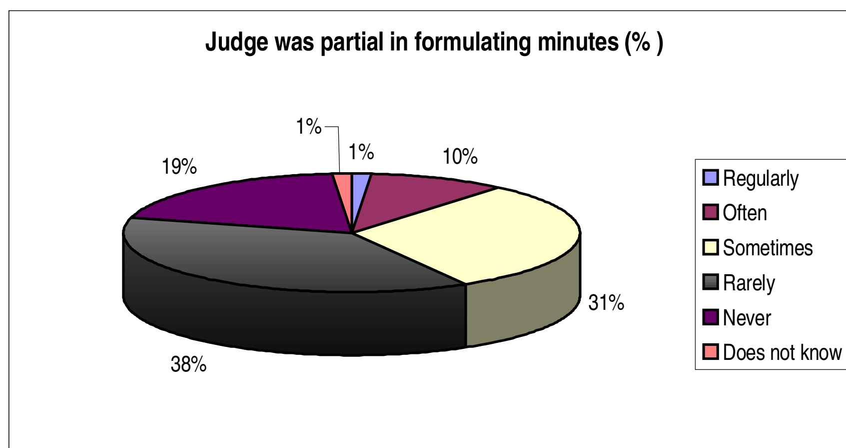
Irregularities	Average	Often	Sometimes	Rarely
Not understanding what was said	3.00	26	42	26
Unclear or not understandable sentences in the minutes	2.84	25	36	26
Purposefully arbitrary interpretation of what was said at court	2.61	21	32	46
Purposeful omission of something that was said or insertion of something that was not	2.57**	18	33	49
The judge was biased in formulating the minutes	2.35	11	31	57

Note: 1 = never, 5 = regularly

** Statistically significant difference with regard to the next rank at level $p < 0.01$ (t-test)

The above table shows that the respondents see the irregularities in the formulation of the minutes more as a consequence of misunderstandings or incorrect formulation of what was said rather than an intentional attempt on the part of the judge to warp the sense of the testimony. However, one fifth of the attorneys do consider that there are relatively frequent attempts of intentional manipulation of the minutes (arbitrary interpretation, intentional omission, etc) while one tenth think that open attempts of partial formulation of the minutes occur regularly. It should be noted that the differences in the average grade are not statistically significant in all cases (of replies offered), except in cases of the answers that the judge has been partial in formulating the minutes, as the frequency of this case, according to the answers given by the respondents, is statistically significantly lower (t-test, $p < 0.01$) than the other irregularities in formulating the minutes (Picture 7).

Picture 7



The majority of judges and attorneys interviewed think that introducing more modern techniques of registration of testimony is the most efficient method for preventing abuse and errors in formulating the minutes from the proceedings (71%), which indicates that judiciary professionals want to introduce modern technology to help them in their work. One tenth of the respondents think that attempts to obtain (on the spot) the agreement of all parties concerning the formulation of the conclusions represents the best solution to this problem, while an additional tenth considers that there is no need to introduce additional measures to secure the objectivity of the minutes. Court presidents in this case also avoid answering more frequently than other categories (1/5).

Procedure flow and passing of sentences

As judges play a central and decisive part in the court procedure, the general public most frequently equates the idea of corruption in the judiciary with this profession. Independently of that perception, experience has shown (and thus hypotheses were formulated) that the judge, as a participant in corruption, can indirectly and directly abuse his powers in the following ways:

- By directly disrupting the principle of impartiality in favor of one of the sides in the dispute and passing an incorrect, i.e. partial sentence;
- By influencing the flow of the procedure, tendentiously directing it in certain directions which, unavoidably, results

in a partial (biased) sentence (by accepting or refuting certain evidence, for example);

- By unnecessary prolongation of the process, i.e. by delaying the judgment which is impartial, i.e. which is against the interests of the corruptor;
- By unjustified acceptance or refusal of temporary measures which favors one of the parties, especially if combined with a long hearing;
- Finally, by making intentional procedural mistakes with the aim of avoiding the sentence and the repetition of the procedure i.e. prolongation of the court procedure and delay of the irrevocable sentence[10]

Apart from the manner of formulation of the minutes, the survey includes some other issues, which can be indicators of the partiality in the conduct of the procedure.

Firstly, a question was raised concerning the insight into the documents of both parties during cross-examination and the exercising of all procedural rights by both parties. The experience of attorneys in commercial courts for processes in which they participated shows that it is very rare that the judge prevents the parties from having insight into the court documents (65% answers “it never happens”). They mention, however, as a somewhat more frequent occurrence the unintentional procedural mistakes which, in their opinion, are more a result of ignorance than the intentional partiality of the judges. Also, a smaller share of attorneys (15%) sees a problem in the fact that, during the probative procedure, the judge requests expert testimony even when it is not necessary.

In fact, what the judges are most commonly accused of is the prolongation of the process. More than a half of the attorneys interviewed consider that judges from time to time prolong the process unnecessarily, while a little less than a third think that this is a regular practice, which can influence the impartiality of the process. The total distribution of answers is given in the following table (Table 6).

[10] This relates to an intentional procedural mistake against the corruptor, i.e. in favor of the other party. This permits the corruptor to appeal to a higher instance, which will return the matter to the first-degree court for renewed consideration, i.e. for a sentence by the first-degree instance that made the procedural error in the first place.

Table 6
How often do judges, according to attorneys ... (in %)

Actions	Average grade[11]	Regularly	Sometimes	Never
Prolong the process unnecessarily	1.83**	29	58	12
Unintentionally make mistakes in procedure	1.96	11	76	7
Manage the process unprofessionally (testimony, minutes)	2.03	11	72	14
Propose expert testimony even when not necessary	2.09	15	57	24
Pass partial (biased) sentences	2.10**	-	87	10
Make intentional procedural mistakes	2.33**	1	57	31
Prevent parties from having insight into court documents	2.66	3	26	65

Sum to 100% = I do not know

** Statistically significant difference with regard to the next rank at level $p < 0.01$ (t-test)

These answers partially confirm the intuitive conclusion that direct, partial judgments, even from corrupted judges, are something that is rarely done. On one side, it is indicative that attorneys do not once mention incorrect or partial judgments as a regular event in commercial courts, but 87 % answer that this “happens sometimes”. On the other hand, the average grade of the frequency of passing partial (biased) judgments is statistically significantly lower than the average for unnecessary prolongation of the proceedings and unintentional procedural mistakes and is not statistically significantly different from the averages for partial (biased) management of proceedings and requests for unnecessary expert testimony. The delay in ruling is, however, of crucial importance because a debtor who corrupts the judiciary bodies in a commercial sense, i.e. in the sense of allowing the continued management of his financial resources, gains a lot. Corruption of this type is therefore a very efficient action, which can influence the acceleration or slowing down of the process, depending on the interests of the corruptor.

The results of the survey indicate that the intentional procedural mistakes as a method of delaying the final

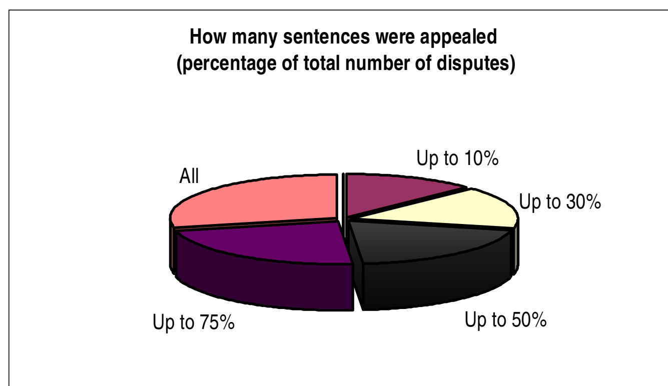
[11] Grades go from 1 = happens as a rule to 3 = it never happens

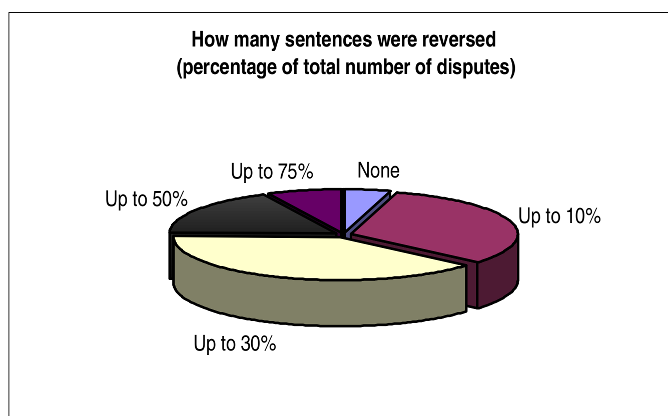
judgment is relatively rarely used, even less frequently than biased rulings in favor of the corruptor. However, we need to ask ourselves to what extent can attorneys evaluate whether the mistake was intentional or, as the results of the survey indicate, the much more common unintentional one. In that sense, the result does not present an empirical basis for rejecting the hypothesis on the intentional procedural mistakes as a method used by corrupt judges. On the other hand, it seems clear that preventing the insight of parties into court documentation is not a significant mechanism for influencing the flow of court proceedings.

The fact that judges rarely abuse their power by directly making biased unlawful judgments is corroborated by the *grades* of the number of judgments confirmed and/or rejected by a higher degree court. This is not an objective statistical datum, but an evaluation of the survey participants, which indirectly indicates their position on the validity of the judgments by first-degree courts. Answering the question on the number of overruled sentences in commercial processes which they represented in the last three years, one third of the attorneys thinks that very few have been overruled (less than 10%) while another third thinks that only 30% have been overruled; this means that, in total, only one fifth think that the number of overruled judgments is more than 30%. Estimates on the number of overruled judgments can be compared to the number of appeals, which is frequently practiced by attorneys. The appeal could, in principle, be a very significant means of preventing corruption in first-degree courts. (The condition being that there is no corruptive link in the vertical judiciary chain).

The following Pictures make a comparative review of the estimates made by attorneys in respect to the number of appeals and overruled judgments in cases they themselves represented (Pictures 8 and 9).

Pictures 8 and 9



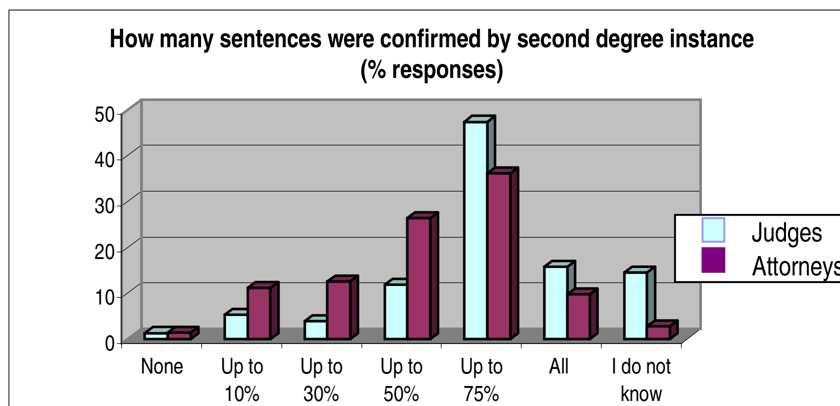


Note: without the answer "do not know"

The picture shows that, in total, almost half of the attorneys consider that “in almost all cases” (at least in 75%) they submitted an appeal; at the same time, however, as we have already said, most of these, more than 2/3, estimate that the number of overruled judgments is less than 30% and even less than 10%. This indicates that the appeals on decisions made in first-degree courts have, as a rule, been ineffective.

Estimates by attorneys on the “fate” of appeals in commercial processes do not always coincide with the estimates made by the judges (court presidents). The judges have a tendency to reduce and the attorneys to increase the number of overruled judgments and similarly for the estimates on the number of appeals. Also, judges indicate that the higher degree court has confirmed most of their rulings (Picture 10).

Picture 10



The majority of judges (half of the total number) consider that the number of appeals on their rulings was less than 30%; one third "confesses" that an appeal was made in more than 50%, while a significant portion (1/5) refuses to answer. Judging from the data, appeals are more characteristic for judgments of Vojvodina judges than for judges from other regions. The same percent (cca 50%) of the judges replay that their judgments in the past three years were overruled relatively infrequently (less than one tenth of the cases), while a little under a third of them indicate that 30% of their rulings were overruled. On the other hand, a majority states that the higher degree court has confirmed their judgment in more than 75% of the cases. In the last three years, according to most of the judges interviewed, the Supreme Court, in matters of legal remedy, more frequently confirms than overrules their judgments. It is evident that the judges saw this survey as some sort of verification of their work, so that they tried to present themselves in a good light. Moreover, the same could be said of attorneys. The judges, however, can hide the poor quality of their judgments.

Investigative (probative) procedure

The accent placed in this research was on commercial litigation, but some issues of criminal procedures in commerce were also included. There are several sensitive points, which favor the emergence of corruption in the investigative procedure. Some regulations give the investigative judge certain relatively extensive discretionary powers resulting from the nature of the process. A

similar situation occurs later for the prosecutor. For the above reasons they can be exposed (and possibly succumb) to strong corruptive pressures. The extensive power of the investigative judge to initiate procedures or reject criminal charges according to his/her free judgment is additionally extended due to blanket and poorly defined criminal acts in the area of commercial crime (for example, qualifications of the type: "conclude an unfavorable contract", "abuse of official position", etc). In practice, furthermore, there are problems in the division of jurisdiction and powers and the coordination of work between investigative judges, public prosecutors and police investigators, which causes relatively clear legal definitions to create both negative and positive overlapping of jurisdiction. The investigative judge not only evaluates the justification for initiating or rejecting the investigative procedure, but also influences the investigation procedure itself (by requesting, for example, the necessity to reconstruct the scene or act). A special discretionary power, which is given to the investigative judge, relates to the imposing (or withdrawal) of preventive imprisonment and its duration, which involves a pre-qualification of the criminal act. All these discretionary decisions – the initiation of penal procedures, qualification of the act, imposition, reduction or withdrawal of preventive imprisonment – are measures whose application should be determined by the need to protect society, but are frequently taken under the influence of different (political, criminal or corruptive) pressures.

Due to all of the above, one of the hypotheses of investigating corruption in the judiciary was to study uncommonly high frequencies of acts such as case dismissals, impositions or withdrawals of preventive imprisonment by specific individuals (or courts) and which could be an indication of irregularities in the work (or corruption) of investigative judges. This hypothesis was difficult, almost impossible to verify directly, because none of the respondents interviewed was an investigative judge; data on the frequency of these decisions was collected on the basis of answers given by court presidents and other judges who, unfortunately, either did not have the corresponding data or were not willing to impart it. Thus, more than half of the judges interviewed (57%) did not know how many decisions on preventive imprisonment were made in the last three years for criminal acts in commercial matters in their jurisdiction. Judging by the answers of one third of the judges, the decision on imprisonment was not made even once,

while a tenth states that the number of such cases was less than 10% of the total number of cases considered. Judges manifest a similar ignorance of facts when discussing the number of decisions on withdrawal of preventive imprisonment: 39% state that there were no such decisions, while 4% think there were very few.

Indictments

The investigative judge passes his/her findings and information on possible incrimination to the prosecutor, who is the next important link in the decision making chain (on issuing the indictment) and he is exposed to similar temptations and pressures. The prosecutor also enjoys a high degree of discretionary rights, which is based on the right to evaluate the level of social danger and the final qualification of the act performed. These two evaluations (and the high level of discretion) of the prosecutor are interrelated as the qualification of the act determines the level of danger to society and *vice-versa*.

According to the statements of the prosecutors interviewed, a relatively large number of criminal acts in commerce, which were in their jurisdiction in the last three years, resulted in an indictment. The majority estimates that an indictment was raised in 75% of cases (41%), while one-third thinks that this ratio was 50 – 50. Only a small number of charges are dismissed (cca 5%). It is indicative that the number of charges dismissed is somewhat higher for prosecutors with less judiciary experience. The basic reason prosecutors gave for dismissing charges for criminal acts in commerce is insufficient evidence (given in 95% of the cases). Other reasons mentioned by the prosecutors are:

Table 7
Other important reasons for dismissing charges for criminal acts in commerce

Reason	% of answers
Negligible danger to society of the act committed	32
Groundless incrimination	23
Procedural errors	9
Insufficient proof	4
Pressure from within the prosecution	5
Pressure from without the prosecution	0
I do not know	27

As can be seen from the table, these reasons include, first of all, the “Negligible danger to society of the act committed” and

"groundless incrimination". The high frequency of answers indicating groundless incrimination as the reason for charges being dismissed shows that the time has come for a fundamental review of the criminal legislation in the area of commercial crime. For almost a third of the prosecutors any reason for dismissing charges except insufficient evidence is not relevant.

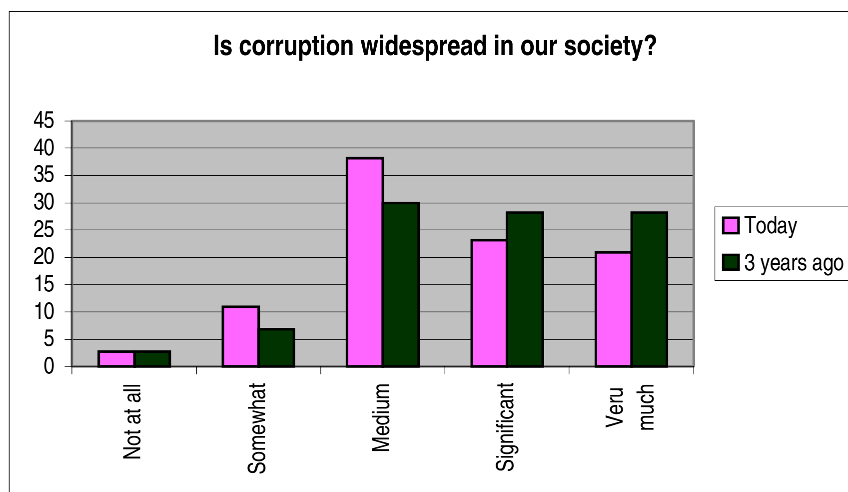
PERCEPTIONS OF THE EXTENT OF CORRUPTION IN SOCIETY AND THE JUDICIARY

In the previous part of the report we discussed some organizational, administrative and procedural issues, which can favor the emergence and spreading of corruption in the judiciary. The subjective predispositions for corruption are a complementary aspect of this problem and are contained in the perceptions, positions and values of the people who work in the judiciary. They represent the basis of a certain "psychological climate" which can favor (or counter) the establishment of corruption as a norm of behavior in an organization or social system. Our analysis encompassed the subjective views and convictions of the people employed in the judiciary on the extent, "carriers", basic reasons for, justification and ways of prevention of corruption in the judiciary. This was done because of the assumption that it is precisely this analysis, which can best serve as a basis for explaining and forecasting corruptive behavior.

Extent of corruption in the society as a whole and the judiciary

The results of research show that the judiciary profession sees the present society in Serbia as more corrupt than not, but it could be said that the predominant opinion is that the corruption in society is neither high nor low. The average level of the extent of corruption in Serbia today, obtained on the basis of different estimates by the respondents interviewed (on the scale from 1 – it is not extensive to 5 – very extensive) is 3.51, which is statistically significantly different (higher) from the theoretical average of 3.00 (t-test, $p < 0.01$) The respondents estimate also that the corruption in society in respect to the situation of three years ago, has decreased (Picture 11), as the average grade of three years ago is 3.75 and there is a statistically significant difference between the two grades (t-test, $p < 0.01$).

Picture 11



Respondents from the group of attorneys are more skeptical and critical when estimating the extent of corruption in society – the average grade is 3.86, which is statistically significantly different from the general average value (t-test, $p < 0.01$). On the other hand, the average grades on the extent of corruption given by lower grade court staff are somewhat below average: the average grade is 3.18, which is statistically significantly different from the general average (t-test, $p < 0.05$). This can mean that their view of society is better or that the need to present the situation in a better light is more pronounced.

The average grade of the extent of corruption in the judiciary given by the judiciary profession as a whole is 2.22[12] and is statistically significantly different (lower) than the average grade of the extent of corruption in society (t-test, $p < 0.05$). Generally speaking, 21% of persons interviewed from the judiciary professions think that corruption in the judiciary is very extensive, 64% say it is extensive, but not so much and 15% do not give an estimate. The research findings indicate that those categories of respondents that see corruption as a serious social problem are more inclined to link this phenomenon with the judiciary – and the link is statistically significant (hi-square test, $p < 0.05$). This indicates the existence of a statistically significant value of the correlation coefficient between these two variables ($r = 0.35$, two-tailed t-test, $p < 0.01$).

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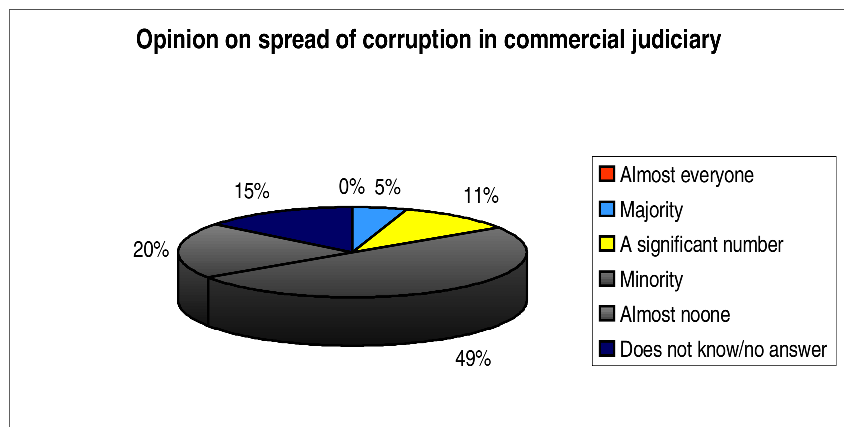
[12] Grades go from 1 – practically nobody in the judiciary is involved in corruption, to 5 – almost everybody i the judiciary is involved i corruption

Concerning the extent of corruption in the commercial judiciary, the respondents consider it is much better (it is viewed much less critically) than it is in the society, or the judiciary as a whole: the average grade is 2.05 and is statistically significantly different from the average grade of the extent of corruption in society and the extent of corruption in the judiciary as a whole (t-test, $p < 0.01$). Evidently, there is a great deal of subjectivity in these answers and the level of criticism decreases, as the theme of analysis gets closer to the subject.

Pictures 12



The most important differences in the estimates of the level of corruption in the commercial judiciary exist between attorneys, on one, and judges and court clerks, on the other side. The average grades of the extent of corruption in the judiciary given by attorneys (average grade 2.65) and the judges (average grade 1.90) are statistically significantly different (t-test, $p < 0.01$). Approximately 39% of attorneys think that the majority or significant number of people employed in the judiciary are involved in corruption, while 43% think that there is corruption but the numbers are lower and only 11% rejects the idea that there is corruption in this area. As a comparison, only 6-7% of the judges accept that one can talk about corruption in the commercial judiciary. Still, a very large number of prosecutors (27%), judges (19%) and other staff (14%) refuse to answer this question. The fact that a great many respondents refuse to answer questions about corruption in their own midst is expected behavior. One possible explanation of this phenomenon is based on the

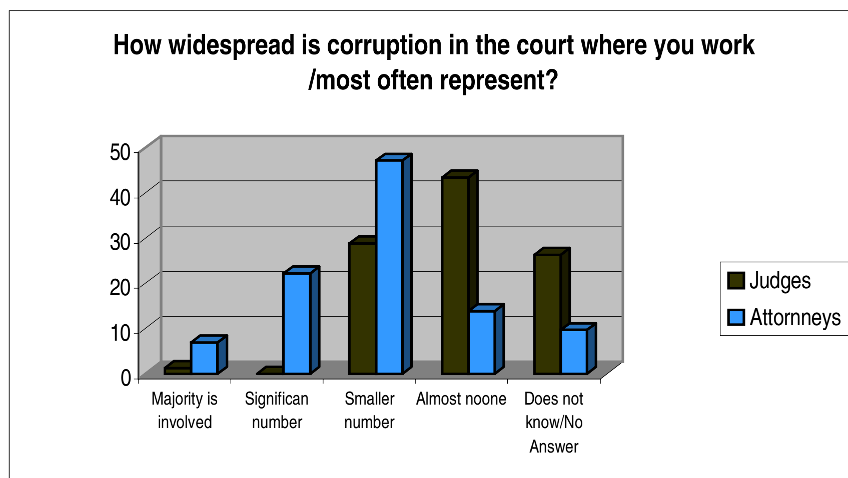
assumption that the respondents are aware of the great extent to which corruption is present in the organization they belong to, but do not want to publicly say so for two reasons. The first is to prevent further deterioration of the public image of their organization (as they are aware that this image is unfavorable) and the second is the fear that confirming the existence of corruption may result in further, not so benevolent, investigations. An alternate explanation of this behavior is that they refuse to speak of estimates, but only of the complete negation of the existence of corruption (or to avoid the answer altogether). It would appear that the conviction that exists among the general public of a totally corrupt judiciary has generated among its representatives a radical, opposite reaction: not only is the negative image of the judiciary rejected totally, but the problem itself is ignored.

Estimate of the extent of corruption in courts

As expected, the closer the framework of the estimate is to the subject, the estimate becomes less critical. Thus, the average grade of the extent of corruption in the court in which the subject works is very low – 1.45 and is statistically significantly different from the answers given by judges on the extent of corruption in the commercial judiciary in general (t-test, $p < 0.01$). This means that the respondents (in this case only the court officials) estimate that in their court there is practically no corruption. Exceptions who managed to "detect" corruption in their midst were registered only in Belgrade. Attempts at hiding the real situation are "natural" for this type of research i.e. for the study of behavior which "deviates from the norm", but is also legally sanctioned. However, the large number of abstainees in this case, as already mentioned, can have deeper and far-reaching consequences. This does not only mean that people refuse to see the reality but also refuse to accept responsibility for all that is happening in the judiciary (the courts).

When the question on corruption in courts is put to the attorneys, the average grade on the extent of corruption is somewhat higher (2.25) than in the case of judges – a difference that is statistically significant (t-test, $p < 0.01$) – as 7% considers that the level of corruption is high ("the majority of judges and other officials are involved"), while another fifth (22%) consider it to be significant ("a large number is involved")

Picture 13



"Carriers" of corruption in the (commercial) judiciary

Opinions of professionals in the judiciary on the responsibility of the titularies of certain judiciary functions for the emergence of corruption can be analyzed on the basis of comparisons of the average grades with the specific grades, i.e. the percent of answers "high responsibility" and "relatively high responsibility".[13]

Table 8
Responsibility for the corruption in the commercial judiciary and the judiciary in general

Function	Commercial judiciary		Judiciary as a whole	
	Avg	"high" + "rel high"	Avg	"high" + "rel high"
Judges	3.69	56%	3.76	56%
Attorneys	3.62	48%	3.66	50%
Prosecutors	3.61	50%	3.71	53%
Court experts	3.55**	53%	3.61	53%
Court presidents	3.27	44%	3.38	44%
Investigative judges	--		3.26	41%
Legal workers in companies	2.51**	18%	-	-
Clerks in the registration office	2.37	18%	2.46	19%
Secretaries of court councils	2.25**	14%	2.36	14%
Court secretaries	2.19	14%	2.35	17%

** Statistically significant difference with regard to the next rank at level $p < 0.01$ (t-test)

[13] The respondents were given the choices of :"high", "relatively high", "medium", "small" and "negligible" responsibility for the emergence of corruption i the commercial judiciary.

According to data (average grades and percentages) which relate to the commercial judiciary, the general opinion is that judges, attorneys and court experts are the main “carriers” of corruption and there is no statistically significant difference between the average grades on the responsibility of these judiciary professions. On the other hand, court presidents, legal workers in commercial companies and court clerks are to a certain extent less under attack from these accusations. Evidently, the estimate of the responsibility of individual professions for corruption is directly proportional to the significance of their role in court procedures (and the passing of judgment). Therefore, it would seem that there is justification in the claims of certain judges that they are frequently accused of corruption only because someone is not in agreement with their sentence and that this is a special form of pressure on the judiciary, which is applied in equal measure by the public and by the state. We have already determined, however, that administrative abuse, such as incorrectly delivered court summons, erroneous registration of the case or manipulation of documents can, both directly and indirectly, cause irregularities in the court procedures and facilitate corruption. Drawing attention only to those that are directly involved in passing sentence can be a sign that the nucleus of the problem of corruption in the judiciary is diverted from systematic issues (organization of work in courts, or legislation) to the area of personal moral values, which is not good from the point of view of the successful exorcism of all corruption in the judiciary.

It is interesting that, in dealing with corruption in commercial courts, attorneys criticize judges much more than other groups (71% consider them to be highly responsible for the existence of corruption). This antagonism exists on the other side as well (63% of judges consider attorneys to be principally responsible for the situation), so it would seem that these two professions accuse one another. Attorneys are also very critical of court secretaries and secretaries of court councils; every fourth attorney considers that the main responsibility for corruption lies in the above categories of court clerks with whom they are in direct contact by nature of their work. Although frequently groups do not accept their own responsibility in establishing and extending corruption, we have noted that prosecutors are much less critical toward members of their own profession than other groups. Court experts are

frequently accused of participating in corruption in the commercial judiciary, mostly by court presidents (64%) and least by prosecutors (32%) who, in this case, either do not have an opinion or refuse to give it.

On the subject of the corruption of clerks in the registration office, there are statistically significant differences between the evaluations of respondents from Vojvodina and Central Serbia. In Vojvodina, the clerks are not considered to be seriously involved in corruption and are frequently completely absolved of any guilt in this respect, while in Central Serbia they are considered major factors in the spreading of corruption in commercial courts.

Extent of corruption by type (level) of court

The estimates on the extent of corruption depend on the degree and type of courts. A good illustration is the following table, which gives average grades according to type (grades range from 1 - “no corruption” to 5 – “large scale corruption”)

Table 9
Extent of corruption by type of court

Degree (type) of court	Average grade	% “large” and “relatively large” corruption
Higher commercial	3.25	36
Supreme	3.2	34
District	3.04	30
Municipal	2.84	26
Commercial	2.80	24

* Statistically significant difference with regard to the next rank at level $p < 0.05$ (t-test)
** Statistically significant difference with regard to the next rank at level $p < 0.01$ (t-test)

Although the differences in average grades of corruption by court types in most cases are not large and are close to *medium level of corruption*[14], there is a statistically significant deviation from the theoretical mean of 3.00: upwards for the Supreme court and the Higher Commercial court (t-test, $p < 0.01$) and downwards for commercial courts (t-test, $p < 0.01$). All in all, according to the respondents interviewed, the courts in which

[14] Between ¼ and 1/5 of the answers for all types of courts, belongs to the category “medium level of corruption”

corruption is extensive are the Higher Commercial Court and the Supreme Court.

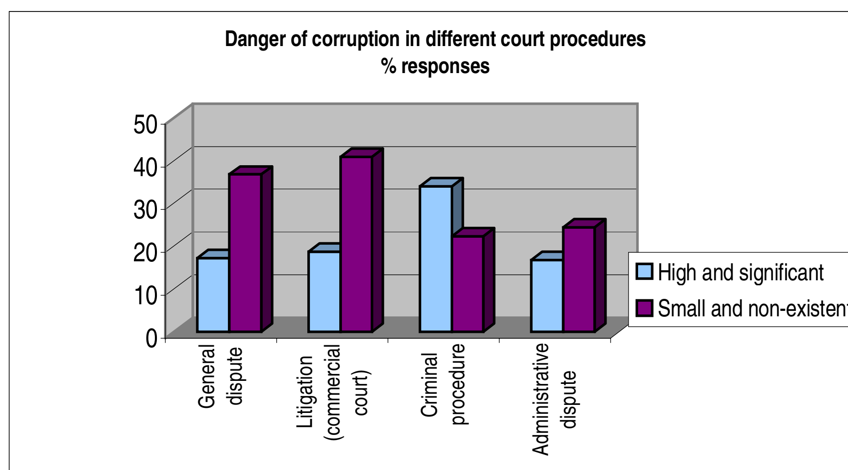
Attorneys, as always, are much more critical than others and estimate a higher level of corruption in municipal, district and commercial courts (46% and 44% “high” and “relatively high” corruption), which is confirmed by the statistically significant difference in comparison with the average values given to these courts (t-test, $p < 0.01$). This, however, does not hold for the estimates on the level of corruption in the Supreme and Higher Commercial courts, as there are no statistically significant differences in the evaluations.

Extent of corruption by type of procedure

Evaluation on the level of corruption by type of case or procedure show that the least disputed are general litigations and litigations conducted in commercial courts (average grade 2.61 and 2.67), and there is no statistically significant difference between the average grade on the extent of corruption in the case of these two types of court disputes. However, both estimates are statistically significantly different from the theoretical mean of 3.00 (t-test, $p < 0.01$). In effect, while 19% of respondents consider that corruption is significant in these two processes, twice that number (41%) consider it non-existent or very small.

Although the average value of the extent of corruption in executive disputes is somewhat higher than the estimate for litigation (2.84), there is no statistically significant difference in relation to litigation. Penal procedures are different in all respects. There is a statistically significant difference in the average value of the susceptibility of this type of procedure to corruption (3.17), in relation to other types of procedure and/or disputes, and a larger number of respondents consider it to be significant rather than non-existent (34% in comparison with 22%). However, the average grade of the susceptibility of the penal procedure to corruption does not statistically significantly differ from the theoretical mean (Picture 14).

Picture 14



There are no statistically significant differences in evaluations given by different judiciary professions, except in the case of the penal procedure. Attorneys see a higher danger of corruption in penal procedures, prosecutors do not (t-test, $p < 0.01$), while lower level court clerks generally refrain from giving an opinion (1/3) - probably with reason as they are less knowledgeable in this area than other judiciary professions.

Extent of corruption by type (level) of court procedure

According to the respondents, the danger of corruption as a significant factor in reaching a partial judgment steadily increases as the process flows from first degree to higher degree courts. However, there is no statistically significant difference between the evaluations on possibility of corruption in second degree procedures and procedures resulting from extraordinary legal remedies. 42% of people surveyed consider that the probability of corruption is small or non-existent for first-degree procedures, but only half that number (22%) consider corruption to be negligible in executive procedures. Judging by the average grades of susceptibility to corruption, the grade for the possibility of corruption in first degree procedures is statistically significantly different (lower) than the theoretical mean (t-test, $p < 0.01$), while the possibility of corruption in executive procedures is statistically significantly different (higher) than the theoretical average (t-test, $p < 0.01$). In the remaining two cases (second degree procedure

and extraordinary legal remedy) there is no statistically significant difference between the grades.

Attorneys are the most vociferous when speaking of the possibility of corruption in first-degree courts, while court presidents clearly deny this. It is interesting that there is no statistically significant difference in the grades given by the attorneys and the judges (excluding court presidents). Court presidents, however, along with attorneys, more frequently than others talk of the possibility of corruption in second degree courts, particularly in cases of extraordinary legal remedies (36% - "high susceptibility"). At the same time, these functionaries deny the possibility of corruption in the executive phase of the procedure (57% - "small" or "negligible" possibility of corruption).

Table 10
Danger of corruption by degree of court procedure

Degree	Average Grade	% "high" and "relatively high" danger
First degree	2.65**	20%
Second degree	3.05	30%
Extraordinary legal remedy	3.06*	30%
Executive procedure	3.15	34%

* Statistically significant difference with regard to the next rank at level $p < 0.05$ (t-test)

** Statistically significant difference with regard to the next rank at level $p < 0.01$ (t-test)

Corruptive pressure on court administration

Court administration is a significant factor in the successful operation of the judiciary, one of its guarantees of efficiency and impartiality. It is therefore reasonable to assume that the corruptive pressure on this group of court employees is very strong. The danger of corruption and possibilities for abuse in this part of the judiciary is further increased because courts, apart from some general rules of procedural legislation, do not have clear technical guidelines for manipulating court documents and performing other legal and material activities delegated to court employees. However, not all actors in the court administration are equally exposed to corruptive pressures, because certain phases are considered "more critical" than others. For this reason, a great majority of respondents consider court execution agents, i.e. the part of court administration that is responsible for the execution of

the court order, to be most exposed to corruptive pressures (74% of replies). This points to the great danger that exists in the execution phase, partly there because of the unsatisfactory solutions in the existing legislation, and partly because of the unresolved position of execution agents in the framework of the judiciary. Significantly below this first group, the court summons group occupies second place with 47% of replies. Respondents from Vojvodina courts, more than others, consider this group susceptible to corruption. A somewhat lesser susceptibility to corruption is given to those employed by the registration office (30% of total number of replies) and in the council secretariat and support services (16%). Belgrade judiciary, however, consider the latter to be more at risk than their average grade would indicate. The danger of corruption in court archives is almost never mentioned.

Table 11
Susceptibility to corruptive pressures of court clerks (total percent of replies given)

Court execution agents	74
Summons department	47
Registration office	30
Council Secretariat and support services	16
Archives	3
I don't know, do not wish to answer	19
Someone else	4

Note: Percent of replies is greater than a 100 because it was possible to circle more than one answer

Intermediaries in corruption

The basic forms of applying corruption in court are through direct personal contacts (29%) and through contacts of acquaintances and friends of the judge (22%). The same people are the basic intermediaries in corruption for other types of public office. Representatives of other branches of Government take third place as intermediaries (a high 16%). Here also, as in other areas of the survey where subjective evaluations on the corruption in the judiciary are required, attorneys and court officials tend to have differing views, to accuse one another and deny any responsibility for the situation. **Attorneys** (in fourth place with 14%) very rarely see themselves as intermediaries in corruption, while more than an average number of prosecutors (1/3 of them) and judges (1/4) think they are involved. The attorneys largely "point their finger" at court officials.

Table 12
Who are intermediaries in corruption (in % of replies)?

Personal contacts	29
Through friends and acquaintances of the judge	22
Through people from other branches of Government	16
Through attorneys	14
Through officials from higher degree courts	7
Don't know, do not want to answer	6
Through court clerks	3
Through other judges	2
Some other way	1

If we were to divide corruption channels horizontally (to include personal contacts and friends and acquaintances - indirect personal contacts) and vertically (to include other Government bodies, higher degree courts, etc.), it is clear that the horizontal channels are predominant.

Causes of corruption in the judiciary

The majority of respondents of this survey see the poor economic position of the employees in the judiciary ("low salaries of judges and court employees") and the "general moral crisis of the society in transition" as the main reasons for the existence and the spread of corruption in the judiciary. These two answers cover almost two thirds of all the reasons listed as important. When we look at the distribution of all listed causes (in cases where multiple answers were possible), the sequence of the reasons for corruption in the judiciary is the following:

Table 13
What most contributes to the existence and spreading of corruption in the judiciary? (% of answers)

General moral crisis in the period of transition	50
Low salaries of judges and court employees	41
Non-existence of the principle of independent judiciary	21
Absence of adequate punitive measures and replacement	18
Political connections and/or political convictions of the judge	16
Absence of efficient internal monitoring and control	13
Incomplete legislature in this area	10
Conflicts of interest	6
Desire for accelerated promotion	5
Feeling of omnipotence/immunity	4
System of promotion of judges and prosecutors	3
Don't know	7
Other	1

Note: Percent of replies is greater than 100 because it was possible to circle more than one answer

For the most part, reasons given by respondents belonging to different judiciary categories follow a uniform distribution. Certain differences in the order of causes for corruption exist only among attorneys: they mention "low salaries" less than other judiciary professions, while they more frequently stress the "absence of efficient internal monitoring and control". Court presidents, on the other hand, deviate from the mean in their frequent listing of "desire for accelerated promotion" and their refusal to answer the question on the principal reasons of corruption in the judiciary (1/5).

Measures for prevention of corruption in the judiciary (in commercial disputes)

The majority of people interviewed consider that the most efficient measures for preventing corruption in the judiciary are to introduce stricter criteria for the election of judges and, secondly, to improve the economic position of employees. A third measure is better monitoring and control. Finally, all other measures proposed were considered more or less efficient measures for reducing corruption.

Table 14.
How efficient can the following measures be in preventing corruption in commercial disputes? (average grades and % of answers)

Measures	Average	Efficient	Inefficient
Stricter measures for election of judges	1.58*	81	14
Increase salaries of judges and court employees	1.74	77	20
Better monitoring and control	1.82	73	21
Results based promotion	1.96	67	28
Efficient system of improving the professional qualification of judges	1.97	69	25
Changes of process rules	1.99	68	25
Encourage judges (participants in the court procedure) to report all irregularities in court operations	2.06	59	30
Greater possibilities of introducing disciplinary measures and punishments	2.09	63	31
Introduction of regular evaluations of professional achievements	2.09	64	29
Introduction of information system technology	2.13	58	35
Securing greater transparency and openness in the operation of courts	2.15	63	32

* Statistically significant difference with regard to the next rank at level $p < 0.05$ (t-test)

With the exception of the stricter criteria for the election of judges, whose grade is statistically significantly different (better) in relation to the following measure, the evaluations of all other measures are not statistically significant to such an extent that they could be unequivocally ranked according to their efficiency. Although there is a significant level of agreement of all respondents on the level of efficiency of individual measures, some professions differ from the mean in the stress they put on certain items. For example, when speaking of increasing the salaries of court employees, the opinion of attorneys differs from the rest: only a third thinks that this could be an efficient measure (while a further third consider to be inefficient) in comparison with 77% of prosecutors and over 60% of other professions, who consider this to be a very efficient measure. Those who consider that there is widespread corruption in the judiciary tend to think that increasing the salaries of employees can only partially reduce the problem, but not solve it entirely. A higher level of transparency is more frequently listed as an efficient method by the Vojvodina courts, and more rarely in courts from Central Serbia. Judges have a somewhat greater belief in the introduction of disciplinary measures and punishments, which is not shared by court clerks. Furthermore, those that have worked longer in the judiciary are not as convinced in the efficiency of disciplinary measures as their younger colleagues. Finally, court employees and attorneys from Vojvodina, more often than others, discard the measure "encourage participants in the court procedure to report all irregularities in court operations" as being largely inefficient.

Introducing norms of professional ethics

There are frequent requests to establish rules of professional ethics that are to be passed by associations of legal professions and approved by the Supreme Court. The articles of this ethical code would appeal to professionalism and the dignity of the profession, but would also clearly define what is meant by breaking of the norms and would introduce statutory mechanisms for monitoring and application of disciplinary measures.

There is a divided opinion among the respondents as to what extent would an appeal, to respect the rules of professional ethics, with the corresponding professional associations and courts of honor, contribute to reducing corruption in the commercial judiciary: most think that it would contribute significantly or

relatively significantly, but more than a third think that such measures would not be sufficiently efficient. There are differences in the replies of respondents from Vojvodina and Central Serbia. The former rarely believe in applying measures relating to professional ethics, while the latter more than others consider that this would yield significant results.

CONCLUSION

The basic aim of the empirical research into the problem of corruption in the judiciary system of Serbia was to give elements, which could enable an estimate of its extent and its principal causes and carriers in the framework of this specific branch. The research assumed that, for prevention of corruption in the judiciary to succeed, it would be necessary to make certain institutional changes related primarily to the organization of the system (court organizational law), material and process legislation and legislation on judges and other judiciary officials, on one side, and exert an influence on the subjective centers of corruptive behavior (bad habits, convictions and opinions which facilitate the participation in corruptive transactions), on the other. In order to establish a high quality *diagnostic analysis* which would enable valid conclusions on the potential and existing susceptibility of the Serbian judiciary to systematic corruption, it was necessary to collect two types of data: firstly, information pertaining to specific administrative and organizational frameworks, rules and procedures which, due to their inherent characteristics, could present potential "nuclei" of corruption; and, secondly, some objective and subjective evaluations of the general situation in this area and, particularly, estimates and indicators of the existence of corruption in practice. This information would then become a valid basis for formulating (and applying) a systematic, consistent and effective public policy for directing and coordinating the struggle against corruption in the judiciary as well as in other branches of the Government.

An impartial analysis of the state of corruption in the judiciary must confront and overcome unjustified generalizations, i.e. stereotypes, which are already entrenched in public opinion. In this sense, the survey of the wider judiciary public made as part of this project was a verification of existing biases, as well as their counterweight. The survey presented a rare opportunity to hear the

opinions and evaluations of the members of the judiciary profession ("those on the inside") concerning the situation in the judiciary as a whole and its specific problems, corruption among them, which will contribute to a much more balanced picture in this area.

The members of the judiciary branch consider the present state in the judiciary only somewhat better than the situation of three years ago.

The relatively moderate evaluations of the situation in the judiciary, which is evident when considering the sample as a whole, is a result, inter alia, of certain (frequently extreme) differences in opinion given by members of the different judiciary groups. Representatives of attorneys are, as a rule, the most critical in their evaluations of the situation in the judiciary, especially in comparison to those of court presidents and judges. The evaluations of the previous state given by different judiciary professions, however, are not statistically significantly different. The increased criticism of the judiciary by the attorneys is related to their specific position as an independent, market oriented judiciary profession, which results in their relatively less secure social and professional status.

There is a statistically significant relation between the general evaluations of the situation in the judiciary and the evaluation on the extent of corruption in this area. This means that the majority of those, who consider corruption to be widespread in the judiciary, tend to view the general state of the judiciary as negative and vice versa. This conclusion suggests that the estimate of the level of corruption represents a significant criterion for evaluating the state in the judiciary as a whole, so that a marked criticism of the judiciary implies the conviction that it is significantly corrupted.

Although the extent of corruption is a significant implicit criterion to measure the state of the judiciary, the same criterion rarely appears explicitly, particularly among court employees. For judges and court clerks, the primary problem of the judiciary is its (and their) economic situation; only court presidents in addition frequently mention the poor efficiency in court, while the problem of corruption is ignored. The attorneys, on the other hand, who are generally critical towards the judiciary, stress the criteria of corruption and inefficiency of courts. Judging by these findings, judiciary staff is less ready to confront those problems which society blames it for – namely inefficiency and corruption.

Opinions, on the level of independence of the judiciary, are uniformly distributed across the judiciary branch and are characterized by moderation. The independence of the judiciary is evaluated as “medium” (40%), although the number of those that think “the judiciary is not independent at all” is two times greater than those that believe it is “completely independent”. Attorneys are mostly among those that consider the judiciary not to be independent while the judges think it is independent and is not under undue influence from the Government.

The evaluations of judiciary professions on the extent of the trust they enjoy among the public in general are relatively critical, but are still more positive than what reality suggests. The representatives of the judiciary tend to switch the blame for the poor functioning of courts (their own poor, slow or illegal behavior) onto the citizens (parties in disputes) and their unrealistic expectations. Particularly noteworthy is the fact that they completely reject the idea of “using prohibited means and procedures” to influence a court process, which, of course, includes corruption. This absence of self-criticism indicates that the respondents are not ready to change their positions and manner of work, which can imply a reluctance to face the problems of corruption in their midst.

The survey indicates that only one fourth of the respondents from the judiciary are ready to “confess” that in court practice they are frequently faced with attempts at manipulation of the court proceedings or documentation. According to them, the most sensitive phases of the court proceedings, which are, therefore, most susceptible to corruption are the coercive execution of sentences, submission of court documents and minutes and the delivery of court summons. The biggest differences in opinion on the existence of manipulations of court proceedings exist between attorneys on one side and the other judiciary professions, on the other.

The judiciary professionals interviewed in this survey differ in their view on the use of the “random judge” principle and its effects on the prevention of corruption, although positive effects generally outweigh the negative. Almost ¾ of the respondents estimate that the introduction of this principle could be an efficient dam against corruption, while more than half think that it prevents routine and saturation of judges with the same type of cases. The negative side of this principle, according to the respondents, is that

it is in collision with the principle of competency and discourages the specialization of judges.

The study of the use of court experts in commercial disputes does not indicate the existence of conditions, which could lead to systematic corruption in the commercial judiciary, but does point to certain problems, which could become sources of corruption. The findings indicate that expert testimony in commercial disputes is mostly requested by attorneys, who are generally satisfied with the impartiality of experts (but are much less satisfied by their competency and quality). However, the fact that the testimony of the expert is not only significant but frequently crucial in defining the sentence in our court practice, we are faced with the problem of (im)partiality of the expert (who should be a guarantee of the impartiality of the proceedings). According to the experience of the respondents interviewed, this procedure is not regulated in an adequate manner in our court practice. There is a significant discretionary right in the choice of expert, which carries with it an inherent danger of partiality (bias). Therefore, it is precisely this choice that can represent one of the critical moments for the emergence of corruption.

Requesting the exemption of a judge in commercial disputes (which in itself is a mark of suspicion of biased proceedings), according to the attorneys and judges surveyed, is extremely rare in our court practice. This leads us to conclude that the request for exemption is, in practice, used much less than people think, so that this institution cannot be abused in any significant way to exert corruptive pressures on procedures.

Replies concerning applied methods and techniques for formulating minutes of proceedings indicate that their imperfection can be a basis for incorrect or partial sentences. The most common method of formulating minutes is for the judge to listen to testimony (in totality or in parts) and then to dictate to the clerk of the court, freely interpreting the content. This approach can inherently lead to a change in meaning, stressing or omitting of certain portions of the testimony or making the testimony totally meaningless. Nevertheless, the majority of judges does not see any special problem or difficulty with the formulation of minutes or consider the difficulties to be purely technical in nature (related to typing speed, absence of shorthand reports, absence of audio equipment). Court employees, furthermore, see the irregularities in the formulation of minutes more as a result of misunderstandings and clumsy formulation of what was said, rather than the

intentional attempt by the judge to warp the meaning of the testimony. On the other hand, almost a third of the attorneys think that there are relatively frequent attempts at intentional manipulation of the minutes (arbitrary interpretation, intentional omissions, etc) and that open attempts at partial formulation of minutes in court practice are relatively frequent.

The basic complaints of surveyed attorneys concerning the work of judges relate to the prolongation of the court process. Almost 80% of attorneys believe that judges, from time to time and even regularly, prolong processes unnecessarily, which can significantly endanger the impartiality of the trial. These opinions confirm the intuitive conclusion - which directly biased judgments happen rarely in our court practice, even with corrupt judges. It is indicative that attorneys never once mentioned incorrect or biased sentencing to be a regular event in commercial disputes, but 87% say that this "happens sometimes". Although this could be, at first sight, a sign of a relatively high level of trust in the impartiality of judges, it is more probable, especially when all answers are taken into account, that it means that the possibility of abuse of the function of judge is tied to the dynamics and procedure of the trial rather than the content of the final judgment.

The survey shows that appeals against sentences in commercial disputes are a regular event (almost half of the attorneys state that this happens in "almost all cases", or at least in 75% of the cases) but that the sentences are relatively rarely "overturned" (more than 2/3 estimate that the number of overturned sentences is less than 30% and even less than 10%). This indicates that appeals against sentences in commercial disputes in the first degree, are largely ineffective. This requires further research, especially as this is a court procedure, which is considered an efficient dam against corruption in the judiciary.

It was not possible to directly verify one of the assumptions made in investigating corruption in the judiciary: that the unusual frequency of resolutions such as dropping of charges, introduction or withdrawal of preventive imprisonment, which are passed by one individual (or court) can be an indication of irregularities in the work (or even corruption) of investigative judges. This was not possible because there were no investigative judges in the sample. It is clear, however, that the introduction or withdrawal of preventive imprisonment – for both general criminal acts and acts of commercial crime – is a sensitive subject and was not readily discussed by any of the judges.

According to the claims of surveyed prosecutors, the majority of charges for criminal offences in the economy in their jurisdiction in the last three years resulted in the issue of an indictment, while a very small percentage (around 5%) were dismissed charges. It is indicative that the number of dismissed charges is somewhat higher for prosecutors who have less years of service in the judiciary.

The findings show that representatives of judiciary professions are less critical towards the situation in the society regarding corruption than the general public. Compared to other judiciary professions, attorneys are somewhat more and lower court personnel somewhat less critical of the estimated spread of corruption of the society as a whole. As a rule, those categories of respondents who see corruption as a serious societal problem, more often link this occurrence with the judiciary as well. Generally speaking, 21% of the respondents claim that the spread of judicial corruption is significant, 64% think that it is less widespread, while 15% avoided the question.

Speaking of the spread of corruption, the situation in the commercial judiciary compared to the situation in the society and judiciary as a whole, is estimated to be much better (i.e. it is criticized much less). The most important differences in the estimates on the volume of corruption in commercial judiciary are found between those given by attorneys, on one side and judges and court officials on the other. Thus, approximately 39% of the attorneys are of the opinion that the majority or a significant number of judicial employees are involved in corruption, while only 11% completely rejects the idea that there is any corruption at all in this area. For the purpose of comparison, only 6% - 7% of judges and court officials (among whom there is not a single court president) admit that there could be some reason to talk about corruption in the commercial judiciary. An extremely large number of prosecutors (27%), judges (19%) and other court staff (14%) avoid this question. A high percentage of respondents who abstained indicate that this is not an estimate but is a complete negation of the existence of corruption (or evading to speak about it). The conclusion of the researcher is that the public's general stereotype of the judiciary as totally corrupt, has triggered a radical, opposite reaction among judicial representatives: not only the complete rejection of their negative image, but also, completely negating the problem as such.

This was to be expected, the closer the reference framework for estimating the spread of corruption is to the respondent, the less critical the estimates are. Thus the judges completely reject the existence of corruption close to their working environment (the court they work in). The large number of respondents who avoided answering in this case, as already stated, has more profound and long terms significance. It means not only ignoring the facts, but also rejecting responsibility for all that is happening in the judiciary (court).

According to the data (average estimates and percentages) related to the commercial judiciary, the general opinion is that judges, attorneys, prosecutors and court experts are the main "carriers" of corruption, while court staff are relatively sheltered. The responsibility of corruption assigned to different professions is directly proportional to their role in the court procedure (and passing court judgment). These estimates, where emphasis is placed primarily on the judges and attorneys are also characteristic for the general public. However, paying attention only to those who directly pass the sentence in a dispute is dangerous because it can draw attention away from systemic issues (organization of work flow in courts and legal regulation) as the source of corruption and thus become a barrier to corruption eradication.

Speaking of corruption in commercial courts, attorneys are more critical towards judges than towards others (they are considered the most responsible for corruption), and vice versa, so it is evident that these professions shift responsibility from one to the other. In addition, court experts are especially pointed out as participants in commercial judiciary corruption, in particular by court presidents. The respondents' opinions on the principle actors in corruption in the judiciary as a whole, according to the average estimates on the degrees of corruption, are not very different, although they are somewhat higher: judges, prosecutors, attorneys and court experts are once again on the top of the corruption list, while court council secretaries and court secretaries are at the bottom. Generally speaking, the situation in the judiciary as a whole regarding the spread of corruption is estimated as worse than the situation in the commercial judiciary. Although these estimates can be a reflection of the real situation, when having in mind that corruption is very effective in the area of criminal procedure law, they are also, at least in part a result of the fact that the survey encompassed mostly representatives from the commercial judiciary.

Although the differences in average grades on the existence of corruption in individual types of courts are not very different and are around the grade "medium spread", the Higher Commercial Court and Supreme Court are singled out as places where, according to the respondents' views, corruption is the most widespread. The group that highlights corruption in the Higher Commercial Court (and is also the most critical towards the work of the Supreme Court) is the current court presidents (the total responses "very much" and "quite large" are 13 percentage points above average).

The respondents' estimates on the volume of corruption according to the type of dispute show that the least problematic are litigations conducted in commercial courts. On the other hand, the respondents highlight criminal procedures claiming that the greatest danger for corrupt practices lies in these types of disputes.

The danger for corruption becoming a significant factor in passing partial court judgments, according to the respondents' opinions, gradually increases with the flow of the procedure from first degree to superior (executive) instances of court procedure. Somewhat less than 50% of the respondents estimate that susceptibility to corruption is small or non-existent in first-degree procedures, but these claims are twice less when talking about executive procedures. The corruption potential in first-degree procedures is emphasized by attorneys and is obviously negated by court presidents. Court presidents, however, besides attorneys, mention potential corruption in second-degree procedures more frequently than average, and in particular in using extraordinary legal remedies.

The vast majority (3/4) or the respondents claim that court enforcement officials, the part of the court administration responsible for executing the passed court judgment, are the most exposed to corruption pressure. The respondents ranked second, but way behind the first, the document delivery service (summonses, sentences).

Personal contacts, i.e. contacts through (the judges) friends and acquaintances, are stated as the principle mechanism of corruption pressure and corruption practices in court. These are the main middlemen in corruption in other public functions. The bearers of judiciary functions, however, rank high, in third place, government representatives as middlemen in corruption practices. Shifting responsibility "to others", i.e. mutual accusations between

attorneys and judges, characteristic of some previous subjective views on judicial corrupt practices, is also present here.

The basic causes for the existence and spread of judicial corruption the respondents see in the financial situation of the judiciary ("low salaries of judges and court staff") and the complete moral crisis in the transition period. The reasons cited by the respondents from different judicial categories are not very different. Some differences exist only in the attorney's responses regarding some of the causes of corruption: they mention "small salaries" less than other judicial professions and more often emphasize the "lack of efficient internal monitoring and control". Court presidents, again, responded somewhat differently than average by more frequently citing the response "tendency to quicker (early) promotion", and by refusing to answer the question on the main causes of judicial corruption (1/5).

According to the opinion of the majority of the respondents the most efficient measure for preventing judicial corruption is to introduce stricter criteria for the election of judges, improving the financial position of the employed, followed by better monitoring and control.

Among the respondents who estimate that judicial corruption is widespread, there are less of those who think that the solution lies in increasing the employees' salaries. In addition, judges show somewhat more trust in introducing disciplinary measures and punishment, but this cannot be said for lower court staff and for those working longer in the judiciary. There are some differences in the views of the respondents from Vojvodina who more often than others appeal for increased transparency in the work of court staff and reject the measure "encourage the employees to report irregularities".

Finally, the respondents' opinions on whether an efficient measure for preventing corruption in the commercial judiciary would be appeals to honor the rules of professional ethics, that entails engaging professional associations and courts of honor, are divided: although the majority thinks that this would significantly decrease corruption, over one third thinks that implementing moral sanctions would not be efficient enough.

IV Comparing the results of the survey of judiciary professions and entrepreneurs

INTRODUCTION

The survey's results have been analyzed in the previous two chapters. The survey posed a certain number of identical questions to both groups of respondents i.e. to judiciary professionals and to entrepreneurs. Comparing the results of the two surveys, i.e. comparing the answers of these two groups of respondents provides new insight into corrupt practices in the judiciary. Identical answers provide additional confirmation of the truthfulness of the response, i.e. the relevance of the information contained in the response. Where responses differ, research on the concrete conditions leading to different answers provides new knowledge on judicial corruption, especially regarding the respondents' motivation whether to express their opinions on corruption, which is certainly interesting with respect to verifying the truthfulness of the responses to other questions.

The first part of the chapter analyzes the answers provided by both groups of respondents. The second part deals with the answers to questions based on working hypotheses on mechanisms of corrupt behavior in the judiciary and will enable the testing of these hypotheses. The third part of the chapter analyzes the answers provided regarding the perception of trust in our judiciary, the spread of judicial corruption and the main measures for preventing it.

MECHANISMS OF CORRUPT PRACTICES IN THE JUDICIARY

Analysis of the mechanisms of corruption in the judiciary should begin with analyzing the opinions on the responsibility of different judicial professions for corrupt practices in the commercial judiciary. The analysis of these opinions provides direction for further research into those professions that have been identified as the most responsible.

Table 1
Evaluation of the responsibility of different judicial professions for corruption in the commercial judiciary[1]

Profession	Total	judiciary	entrepreneurs	rank (total)
Judges	2.16	2.31	2.01*	1-3
Prosecutors	2.19	2.39	2.02**	1-3
Attorneys	2.23^{++}	2.38	2.10*	1-3
court experts	2.40	2.45	2.34	4-5
court presidents	2.48^{++}	2.73	2.24**	4-5
company lawyers	2.80^{++}	3.49	2.19**	6
secretaries of court councils	3.42	3.75	3.11**	7-9
court secretaries	3.47	3.81	3.17**	7-9
clerks of the document service	3.57	3.61	3.51	7-9

* statistically significant difference at level $p < 0.05$
** statistically significant difference at level $p < 0.01$
\+ statistically significant difference from the next rank at level $p < 0.05$ (t-test)
++ statistically significant difference from the next rank at level $p < 0.01$ (t-test)

The analysis of opinions on the responsibility of different judiciary professions for corruption in the commercial judiciary shows that there are several groups with similar estimated responsibility, i.e. groups showing no significant statistical differences. The respondents' opinions show that the professions most responsible for corruption are judges, prosecutors and attorneys, immediately followed by court experts and court presidents. It is estimated that the least responsible are court secretaries, secretaries of court councils and clerks in the document services.

In all cases there is a statistically significant (t-test, $p < 0.01$) difference in the estimated responsibility when compared to the grade 3.00 ("average responsibility"), where the respondents estimate that court secretaries, secretaries of court councils and clerks of the document service have a responsibility that is less than average, while the responsibility of all other judiciary professions is above average and in some cases significantly approaches the grade 2.00 ("significant responsibility").

Comparison of the estimated responsibility for corruption as seen by judiciary professions, on one side, and entrepreneurs on the other, shows that in all cases, with the exception of court experts and clerks of the document service, there are statistically significant differences (t-test, $p < 0.01$). Moreover, in all cases of estimated responsibility, the entrepreneurs' estimates are harsher

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[1] The evaluations range from 1 ("great responsibility"), 3 ("average responsibility) to 5 ("no responsibility").

than those given by the judiciary professions. This result is completely expected given the subjectivity of the respondents in providing answers.

It is interesting that consensus exists only in the estimated responsibility of court experts and clerks of the document service. The estimated responsibility of court experts is quite high (closer to the grade “significant responsibility”, than to “average responsibility”), and is lower only compared to the three most prominent and thereby most responsible judiciary professions (judges, prosecutors and attorneys). This finding indicates the need for further research of the role of court experts in corrupt practices within the commercial judiciary.

Contrary to court experts (expert witnesses), the estimated responsibility of clerks of document centers in commercial judiciary is quite low. This estimate can be a result of the perception that corrupt (mal) practices in document centers are rare and insignificant, but can also be due to the estimate that everything that goes on in the document centre, especially corrupt practice, is not mainly the responsibility of the clerks working there, since they act according to given orders and in cooperation with higher court i.e. judiciary officials, primarily judges and court presidents. In line with the presented dilemma, a further analysis on administrative procedures, i.e. document centre procedures is necessary.

One of the main hypotheses before conducting the survey was that court administration is an area with a large potential for significant corrupt practices that can influence the result and case flow of court disputes in the commercial judiciary. Therefore, in order to test this hypothesis, a significant question was posed, partly related to the previous question. The question concerned the estimate of the respondents as to what part of the court administration is the most exposed to corruption pressure.

There are statistically significant differences (t-test, $p < 0.01$) in the answers provided by judiciary professions and those provided by entrepreneurs. Judiciary professions are of the opinion that corruption pressure is the highest in the submission office (30.5%) and in the department for delivering court documents to parties (31.3%). Entrepreneurs estimate that corruption pressure is highest in court enforcement officials (27.6%) and the council secretariat and administrative staff (12.7%). Having in mind the specific information available to these two groups of respondents, as well as their motivation to share this information with others, we can

conclude that the entrepreneurs are the ones that are better informed, or are more ready to share this information with the surveyors. It is very important that the entrepreneurs' responses identify the court enforcement officials as part of the court administration particularly susceptible to corruption pressure, since this finding is in line with the findings related to the enforcement procedures. Finally, the findings related to the submission office and the department for delivering documents to parties on one side, and those related to the council secretariat and the administration are not inconsistent, since it is fairly easy to imagine cooperation between these two parts of court administration in corrupt practices.

The hypothesis on court administration as an area prone to corruption, in other words, as a basis for implementing corrupt mechanisms in the judiciary evolved through developing several hypotheses on the mechanisms of this corruption. In order to check these hypotheses it is key to obtain information on the frequency of certain events within the court administration that are likely to be corruption-related (Table 2.).

Table 2
How often do you encounter the following situations in our judiciary practice?[2]

Situation	Total	Judiciary	entrepreneurs	rank (total)
Acceleration or slowing down of service of process and other court documents	2.98	3.30	2.70**	1-2
Postponement of coercive enforcement	3.08^{++}	3.29	2.89**	1-2
Deliberate violation of rules on service of process and other court documents (lack of return receipt)	3.46^{++}	3.50	3.42	3
Manipulation with the contents of cases and court documents	3.68	4.33	3.80**	4-6
"Loss" or "losing track" of documents	3.77	4.17	3.40**	4-6
Permitting the parties only partial (selective) insight to the court documents	3.82^{++}	4.41	3.29**	4-6
Preventing the parties insight into court documents	3.91	4.42	3.44**	7-8
Backdating of submissions	3.98	4.34	3.63**	7-8

* statistically significant difference at level $p < 0.05$
** statistically significant difference at level $p < 0.01$
\+ statistically significant difference from the next rank at level $p < 0.05$ (t-test)
++ statistically significant difference from the next rank at level $p < 0.01$ (t-test)

[2] Grades range from 1 ("very often"), through 3 ("sometimes") to 5 ("almost never").

In almost all cases (court procedures) there is a statistically significant difference regarding the estimated frequency claimed by the judiciary profession on one side and by the entrepreneurs on the other side, where the entrepreneurs always claim that the frequency of a particular occurrence is higher. The only instance where there is no significant statistical difference in the responses of the two groups is in their opinions regarding the deliberate violation of rules on service of process and other court documents.

The most frequent occurrence (although the estimated frequency is not statistically different from the grade 3.00 "sometimes") is the acceleration or slowing down of service of process and other court documents, which can influence the dynamics of judicial proceedings and consequently the time of passing sentence i.e. its irrevocability. The speed of judicial proceedings and the timing of a sentence are of key importance for the parties in a commercial dispute – both for the losing and for the winning party. For example, many commercial disputes are about creditor and debtor. In these cases, i.e. commercial disputes, the key issues (facts) are indisputable (e.g. the debtor knows exactly the amount of the debt and in that respect there are no misunderstandings with the creditor, however the dispute is caused by the fact that the debtor wishes to postpone the payment of the debt), the expected sentence is also undisputed, however the debtor has a major interest in slowing down the process, while the creditor wishes to speed it up. In such cases, slowing down or accelerating of service of process and other court documents has a decisive effect on the slowing down or accelerating of the whole court procedure and consequently on the timing of passing the irrevocable sentence and therefore both the debtor and creditor have an interest in bribing the court administration.

The relatively high frequency of acceleration or slowing down of service of process and other court documents as an (irregular) procedure of the court administration confirms one of the basic hypothesis on corruption in the commercial judiciary. This hypothesis states that corruptors, in the majority of cases, want to influence the dynamics of judicial proceedings, i.e. the timing of the sentence, and not so much the content of the judicial proceeding or the outcome of the dispute. This type of corruptor behavior is based on their estimation that they cannot use corruption to influence the outcome of the dispute, or rather that they cannot change the sentence that will be against them and they

therefore concentrate on postponement of this unfavorable sentence for as long as possible.

Another of the most frequent occurrences is postponing coercive enforcement (although the average estimated frequency is not statistically significantly different from 3.00 "sometimes"). There are no statistically significant differences between this situation and slowing down or accelerating of service of process and other court documents. This is also another situation that does not influence the contents but rather the dynamics of the judicial proceedings, and therefore the dynamics of its outcome. The difference between this situation and the one mentioned earlier is only in the fact that postponing coercive enforcement is always in the interest of the debtor, so in this case, only this party is motivated to bribe court administration officials. However, neither manipulation is aimed at the content of the trial and outcome of the dispute, but solely at the manipulation of the time taken to reach irrevocable sentence and its enforcement. The finding related to the high frequency of postponing enforcement is consistent with the previous finding on high exposure of court enforcement officials to corruption.

The next ranked type of situation or manipulation (the deliberate violation of rules on service of process and other court documents) is primarily aimed at manipulating the time frame of the judiciary proceedings, in other words, causing its postponement. Moreover, due to the principle of cross-examination, if it is proven that one party was not informed of the hearing, regardless of the cause, the hearing is postponed, thereby slowing down the judicial proceedings, and postponing sentencing.

The above are followed by those types of administrative manipulation (manipulation with the case contents or court documents, "loss" or "losing track" of documents, permitting the parties only partial insight to court documents or preventing insight into documents) which, in addition to influencing the dynamics of the procedure and the time necessary for its conclusion, also affect the substance of the judicial proceedings and the character of the sentence, since they can lead to inequality between the parties when presenting their legal arguments in court.

Finally, backdating of submissions was ranked last as something that occurs rarely (the average grade does not statistically significantly differ from the grade 4.00 – "seldom"). This finding is extremely important since the posed hypothesis was that backdating or manipulation with dates presents one of the

mechanisms for breaking the “random judge” principle. It is common practice that cases are awarded through the “random judge” principle to judges according to submission dates. The question is whether this finding can serve as a basis for concluding that manipulation with the principle of “random judge” is rare. Moreover, the answers of the respondents from the judiciary profession show that they consider this principle as a key barrier to corruption within the judiciary (85% of the respondents completely or partly agree that instituting this new principle efficiently prevents corruption in the judiciary). On one side, a possible interpretation of these findings is that there are no great manipulations with the “random judge” principle. On the other side, however, we need to allow for the possibility that manipulations in abiding by this principle are conducted in some other fashion (the right of the court president to give the case to another judge if the “random judge” has too many cases or for other justified reasons), other than by backdating submissions.

One of the hypotheses in researching corruption mechanisms in the judiciary is that a key role can be played by the court expert. Court experts are not accountable to anyone for the quality and substance of their expertise, in other words they are not as accountable for their findings as are the judges. In addition, it has been noticed that expertise has a decisive influence on the sentence in commercial disputes and that the judges in commercial disputes often “hide” behind court expert findings. This can be explained by the fact that the disputes in commercial judiciary are often quite specialized and specialized knowledge is needed for their solving (a knowledge that judges often lack). It is therefore natural that the judges want to shift responsibility for reaching a decision to the court expert, who at least gives the impression of being knowledgeable in a certain area. In other words, it can be presumed that a relatively small number of judges will oppose the findings of a court expert and in most cases the judge fully accepts the experts’ findings and only formulates them as his/her decision – the sentence.

In the case of corruption there are two possibilities. One is that there is no corrupt relationship between the court expert and the judge, i.e. the judge is not part of the corrupt practice, and only the court expert is corrupt. The other possibility is that there is a corrupt relationship between the court expert and the judge i.e. they each perform part of the job and both corrupt court officials will hide behind each other.

A key supposition in the functioning of this corruption mechanism is the decisive influence of the court expert on the judge, in other words, the hiding of the judge behind the expert's knowledge, regardless of whether this hiding is linked or not linked to corrupt relationships between the expert and judge.

The first question that provides elements for verifying or disproving this supposition is whether the judge alone, without proposals from the parties in the dispute, or contrary to their proposal – something the judge is entitled to under the law even when the parties agree on the matter of a court expert, orders the presentation of evidence by an expert. If something like this happens often, it would undoubtedly verify the supposition that judges hide behind court expert testimony.

Although the answers to these questions given by attorneys and by entrepreneurs statistically differ significantly (Chi square test, $p < 0.05$), it can be concluded that judges rarely engage court specialists on their own, without proposals from the parties. This can be concluded based on the data that 80% of the entrepreneur respondents and 57% of the attorneys claim that situations like this happen in less than 10% of court disputes. However, it is questionable whether this finding can serve as a basis for rejecting the supposition of judges "hiding" behind court experts or expert testimony. The answer is that this finding does not present sufficient evidence to reject the possibility that judges' do "hide" in this way. The fact is that since it is highly probable that one party in the dispute will propose the engagement of a court expert, it makes sense that the judge will wait for the request to be made by one of the parties and when it is, the judge will grant the request. This is consistent with the fact that the judge is the one who decides on appointing the court expert and the selection of a specific expert in a given dispute. Under these circumstances, the judge who, regardless of motive, "hides" behind the court expert, has no reason to "jump the gun" by requesting the appointment of a court expert earlier. In short, the mentioned finding cannot disprove the hypothesis of the judge hiding behind court experts.

Still in order to empirically confirm this hypothesis it is necessary to provide the answer to the question to what extent or how often judges accept the findings of the court experts and consequently, based on these findings, pass sentence. The question was formulated in such a way that the respondents graded the frequency of cases where the judge *fully* accepted the court experts' findings and ruled based on this expert testimony.

In this case there is also a statistically significant difference (Chi square, $p < 0.01$) between the attorneys' and the entrepreneurs' answers, whereby the attorneys (legal representatives) more often claim that judges fully accept the findings of the court experts and pass sentence (t-test, $p < 0.01$). It is realistic to presume that in this case attorneys are better informed than entrepreneurs since they are directly involved in disputes and certainly have a better overview of the frequency of appointing court experts and of the relation between expert testimony and sentencing. Therefore, it is logical to suppose that the attorneys' estimates are closer to reality.

However, regardless of the different estimates, the responses of both attorneys and entrepreneurs show that it is highly probable that the judge will fully accept the expert's findings and there will practically be no difference between the expert's findings and the sentence. This confirms the working hypothesis of corruption among court experts as one of the basic potential corruption mechanisms in commercial justice.

Table 3
In commercial disputes, what is the percentage where the judge fully accepted the findings of the court expert and passed sentence according to these findings?

	Total	Attorneys	entrepreneurs
up to 10% of the cases	11%	0%	16%
up to 50% of the cases	17%	10%	20%
over 50% of the cases	72%	90%	64%

Precisely because of this, there is a need to thoroughly review the status of court experts in commercial disputes, the conditions required for becoming a court expert and also the mechanisms of their accountability. This is particularly important since our domestic (continental) legislative system does not allow the parties in a dispute to engage their own court experts where the dispute would turn into a "court expert competition" and the preliminary hearing would involve presenting different professional arguments, where expert findings could be challenged by different expert opinions, creating a kind of "balance" of arguments and thereby confirming the validity of both experts' findings. The presumption that the party alone, by asking questions is able to refute the court expert's findings is unrealistic since it is in contradiction with the fact that the court expert is, by definition, someone with

specialized knowledge and is therefore more convincing than the party in dispute.

Regardless of the possibility of court expert corruption and ruining the integrity of commercial judiciary by corrupting the court experts, the key figure of each commercial dispute is certainly the judge who has great power to influence the flow of the judicial proceedings, its duration and its outcome. Therefore it is very important to analyze the frequency of a certain type of judicial behavior that significantly influences the flow, dynamics, substance and outcome of the commercial dispute and can be related to corruption or partiality (Table 4.)

Table 4
Behaviour of judges in commercial disputes[3]

Behaviour	total	judiciary	entrepreneurs	rank
Unnecessary delay of procedure	1.82+	1.83	1.82	1
Unintentionally commited procedural mistakes	1.96+	1.96	–	2
Passing unfair (partial) decisions	2.17	2.10	2.19	3-5
Non-professional (non objective) conduct of court procedure	2.19	2.03	2.24**	3-5
Proposing court expertise when it is not necessary	2.20++	2.09	2.24	3-5
Deliberatly commited procedureal mistakes	2.40++	2.33	2.43	6
Do not enable the parties isnight into litigation records and documetns	2.69	2.66	2.70	7

* statistically significant difference at level $p < 0.05$
** statistically significant difference at level $p < 0.01$
\+ statistically significant difference from the next rank at level $p < 0.05$ (t-test)
++ statistically significant difference from the next rank at level $p < 0.01$ (t-test)

Regarding the estimated frequency of the judge's behavior influencing the procedure there are no statistically significant differences between the views of the judiciary and those of the entrepreneurs, except in one case. This shows a high reliability of the stated views.

The findings show that both judiciary and entrepreneurs ranked "unnecessary delaying of court procedure" as the most important, that is, the most frequent behavior on the part of a judge that can be a consequence of partiality. The estimate is statistically significantly different from the grades 1 and grade 2, meaning that

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[3] Grades range from 1 ("as a rule"), more than 2 ("sometimes") to 3 ("never").

it falls somewhere between the grades “as a rule” and “sometimes”. Both groups of respondents show a high level of agreement regarding this grade and its ranking. This is very important since some of the respondents are debtors, who do not have an interest in grading the judges’ behavior as “unnecessary delaying of court procedure”. It should be emphasized that “unnecessary delaying of court procedure” is not necessarily caused by partiality, but can also be a consequence of court inefficiency and the lack of capacity for an efficient processing of commercial disputes or even imperfect procedural regulations. Therefore, this once again indicates that there are reasons for accepting the hypothesis that the inefficiency of domestic judiciary is a greater problem than its corruption.

The unintentional commitment of procedural mistakes is a type of behavior whose frequency is graded second following the already mentioned “unnecessary delaying of court procedure”. The estimated frequency of this behavior is not statistically significantly different from the grade 2.00 (“sometimes”). However, it is questionable to what extent observers (attorneys, and especially entrepreneurs) can estimate whether the judges mistakes are made intentionally or unintentionally, especially since there is a statistically significant difference between estimated frequencies of unintentional and intentional procedural mistakes. Regardless of the expressed skepticism, if we accept the possibility that a distinction can be made between unintentional and intentional, the frequent procedural mistakes on one hand lead to disturbances in the flow of proceedings, influencing the length of the procedure and the time needed to pass sentence (especially in view of the possibility to appeal and delay the irrevocability of the sentence) and on the other hand can influence its outcome. If we accept that the mistakes are really unintentional, this result can lead to the conclusion that it is not so much due to partiality or corruption, but that it definitely points to inefficiency and lack of competence.

Passing partial i.e. wrong sentences comes only as third in frequency. Furthermore, it is questionable how objective this judgment is since those losing a dispute are likely to be partial in their answers. This only serves to justify the working hypothesis that there is a relatively small probability that the judges will decide to pass a partial sentence, since corruption would be too visible if it resulted in passing a partial or wrong sentence. Also, proposing court expertise when it is unnecessary is not very

frequent. This finding supports the already mentioned thesis on strategies for engaging court experts – only if the parties do not propose court expertise, will the judge do so by widely interpreting the existing legal possibilities provided by article 3, paragraph 3, of the Law on Litigation Procedure. Since the parties, in a large number of cases initiate the procurement of expert opinion themselves, there is no need to use the “contingency” scenario often.

Testing the frequency of deliberate procedural mistakes is linked to the hypothesis (supported by information from practicing judges) that in cases where a judge cannot pass sentence in favor of the corruptor or cannot sufficiently delay sentencing that is not in their favor, the judge proceeds deliberately to commit a procedural mistake in favor of the other party (against the corruptor), enabling the corruptor to appeal with a high degree of certainty that the second instance court will return the case for review and renewed sentencing to the first degree court. This procedure results in buying extensive time, thus effectively delaying the passing of a irrevocable and enforced sentence, that is very important in commercial disputes. The survey shows that this type of practice (respecting the difficulty to distinguish between deliberate and unintentional procedural mistakes) is not very frequent. According to these findings we can conclude that this type of corruption mechanism is employed only when all other options fail.

When discussing the actions that are at the disposal of corrupt judges, one that should definitely be analyzed is determining the contents of the court records. Namely, the court records are a key document of every trial – the court records are the basis for passing sentence, and are also the basis for appeals against the decisions of the first degree court. The fact that the judge, as per the Rules of Court Procedure, dictates the court records as the only official written proof of the hearing shows how key the judge’s role is in probative procedure. Even more so, since the court records have the status of minutes of the meeting of a public institution i.e. a public document, and it is assumed that everything stated in the court records is true – anyone who claims differently must prove it. Everything mentioned shows that corrupt judges are motivated to manipulate the court records in order to reach their (corrupt) goals and in order to conceal their partiality.

Table 5
How often when formulating the court records did the following occurr [4]

Situation	total	judiciary (attorneys)	entrepreneurs	rank (total)
Misunderstanding of the issues stated before the court	2.56	3.00	2.43**	1-2
Pointless and confusing sentences contained in the record	2.61^{++}	3.16	2.44**	1-2
Matters presented before the court were intentionally misinterpreted	2.77	3.39	2.58**	3-4
Deliberate ommision of certain issues that have been stated and insertion of issues that have not been stated	2.77^{+}	3.43	2.56**	3-4
Judge was partial in determining content of the court record	2,84	3,65	2,59**	5

* statistically significant difference at level $p < 0.05$
** statistically significant difference at level $p < 0.01$
\+ statistically significant difference from the next rank at level $p < 0.05$ (t-test)
++ statistically significant difference from the next rank at level $p < 0.01$ (t-test)

All of the above show that there are statistically significant differences in the estimated frequency of the situations related to court record irregularities. The attorneys' responses (legal representatives) are more favorable than those provided by entrepreneurs. In other words, attorneys (legal representatives) estimate that the frequency of irregularities is lower. The estimates provided by attorneys can be considered as more accurate since they are, after all, direct participants in the disputes.

Regardless of the absolute frequency of the mentioned irregularities, it is estimated that the most frequent irregularities are due to the judges misunderstanding of issues stated before the court and with pointless and confusing sentences contained in the record. Both irregularities alone do not necessarily indicate the judges partiality or his/her corruption. On one hand they may be a result of the judges partiality, especially with the aim of covering-up this partiality, but, on the other hand, it is possible that these irregularities can be the result of the judges' inefficiency, underperforming on the job, fatigue, work overload and even incompetence. Cases that can be directly related to partiality or corruption of judges are somewhat less frequent: deliberate misunderstanding of the issues stated before the court, deliberate

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[4] Grades range from 1 ("it happens regularly"), 3 ("it happens sometimes") to 5 ("it never happens").

ommision of certain issues that have been stated and insertion of issues that have not been stated, as well as the situation where it is estimated that the judge was partial in determining the contents of the court record. Naturally, here again we have the problem of how reliable the estimates are, whether something was done deliberately - precisely the fact that something that is not allowed was done deliberately and is a purposeful injurious procedural error, should serve as the basis for identifying im(partiality) i.e. corruption of judges.

Two additional questions were posed related to court records and their formulation. The first of these two relevant questions was in how many court disputes were court records questioned and commented on. The estimate of judiciary professions (judges and attorneys) on one hand, and that of the entrepreneurs on the other, were practically identical – there is no statistically significant difference between these two average estimates. The total average grade of 1.59 is statistically significantly different (larger, t-test, $p < 0.01$) than the grade 1.00 ("not a single case"), and different (smaller, t-test, $p < 0.01$) than the grade 2.00 ("less than 10% of the cases"), showing a relatively small frequency of court records that were commented on.

The next relevant question, whether and how often the court records are subsequently changed, shows an average estimated frequency of 1.31 and is statistically significantly different (smaller) than the previous estimate on comments to the court record (t-test, $p < 0.01$). This result is completely to be expected, since it is natural that f changes made to the court records (according to the Rules of Court Procedure such changes are not allowed, except through a special procedure) are less frequent than comments on the court records – the latter being the views of the parties that request comments to be introduced into the court records.

Still, a general conclusion can be made that there are not many irregularities regarding court records (regardless whether they are a result of paritality, inefficiency or incompetence) and if there are such irregularities they are so well hidden that they cannot be identified even by the participants themselves which is very unlikely. Still, we need to bear in mind that a low frequency does not necessarily mean a small influence. Maybe the few manipulations with court records hide some big cases of corruption within the judiciary.

PRECEPTION OF CORRUPTION WITHIN THE JUDICIARY

The first question in this part of the analysis was linked to the amount of trust the parties have in our judiciary. Although the lack of trust as such does not necessarily imply the existance of corruption (distrust can be a result of inefficiency or incompetence), the lack of trust is very indicative and can very often be a hidden message that corruption exists, especially with those respondents who tend to use euphimisms.

On the trust scale ranging from 1 (“complete trust”), 3(“mostly trust”) to 5 (“no trust”), the total average grade from the survey is 3.47, statistically significantly different (larger, t-test, $p < 0.001$) than 3, meaning that the general view is somewhere between “mostly trust” and “little trust”. Additionally, there is a statistically significant difference (t-test, $p < 0.001$) in the estimates given by the judiciary professions (where the grade was 3.38) and entrepreneurs where the grade is less favourable, meaning that they show less trust in the judiciary than the judiciary professions. Still, the estimate on trust given by judiciary professions is low enough, so it can be concluded that these professions have no illusions that the parties have a great trust in the judiciary or that the situation in the judiciary is satisfactory.

The perception on corruption in the judiciary as a whole was graded depending on its extent, so the provided answers ranged from 1 (“almost all judges and other judiciary employees are involved”), 3 (“a significant number of judges and...), to 5 (“almost noone is involved”). The total average estimate on the spread of corruption in the judiciary is 3.29 and is statistically different (t-test, $p < 0.01$) from the grade 3, but also from the grade 4, meaning that the spread of corruption is viewed as somewhere between “a significant number of judges and other judiciary employees are involved” (grade 3) and “a smaller number of judges and other empolyees are involved” (grade 4). There is a statistically significant difference (t-test, $p < 0.01$) between the estimates on the extent of corruption given by the judiciary professions and those provided by entrepeneurs. According to the entrepreneurs corruption in the judiciary is much more widespread than estimated by judiciary professionals.

The perception of corruption in the commercial judiciary was also graded according to its extent. The answers offerred were from 1 (“alomost all judges and other employees are involved”), 3 (“a significant number of judges and ...) to 5 (“almost noone is

involved"). The total average grading for the extent of corruption in the commercial judiciary is 3.37 and is statistically different (t-test, $p < 0.01$) from the grade 3, but also from the grade 4. This means that the spread of corruption is ranked somewhere between "a significant number of judges and other judiciary employees involved" (grade 3) and "a smaller number of judges and other employees involved" (grade 4). Also, the estimate of the spread of corruption in the commercial judiciary is more favourable than that given for the judiciary as a whole (t-test, $p < 0.01$) – there is less corruption in the commercial judiciary.[5] There is a statistically significant difference (t-test, $p < 0.01$) between the estimated extent of corruption as seen by judiciary professions and those given by entrepreneurs. According to the entrepreneurs' opinion, corruption in the commercial judiciary is much more widespread than seen by the judiciary professions, whereby the estimates provided by these professions is not statistically significantly different from the grade 4 "a smaller number of judges and other judiciary employees are involved". Obviously the subjectivity of the respondents in the case of the commercial judiciary is more pronounced than in the case of the judiciary as a whole.

The estimates of the respondents regarding corruption within the judiciary (both in the judiciary as a whole and in the commercial judiciary) are somewhat more favorable than the estimates regarding trust in the judiciary. This shows that corruption is not the only, perhaps not even the main reason for low trust in the judiciary. The reasons for the lack of trust in the judiciary should be sought primarily in its inefficiency, slowness and even incompetence, and to a lesser extent in the extent of corruption. It is evident that the dissatisfaction with the overall functioning of the judiciary is higher than the dissatisfaction related to experienced or perceived corruption within the judiciary.

The next interesting finding is that corruption in the commercial judiciary is less widespread than corruption within the judiciary as a whole. This finding doubtlessly intrigues analysts and the question raised requires an explanation for such a perception – phenomenon. Two explanations can be offered, more in the form of assumptions. The first is that in the case of the commercial judiciary the parties are legal entities i.e. professionals representing these legal entities who know more that other parties – non

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[5] This finding is in line with the answers provided by the respondents from the judiciary who graded the commercial courts as those with the least spread corruption. Exceptions were the Higher Commercial Court, that, together with the Supreme Court, ranked as the courts with the most widespread corruption.

professionals (physical entities) about court procedure, are more capable of carefully following the flow of the court procedure and can therefore more easily identify irregularities – it is more difficult to bribe a judiciary professional against such a party. The other assumption is related to the behavior of socially-owned enterprises that still comprise, to a large extent, the parties in commercial disputes. Namely, these companies do not have, when compared to private companies and physical entities, strong motives to corrupt, since they do not function on the basis of maximizing their profits and do not have strict budget constraints.

All respondents were asked the question related to measures against corruption in the judiciary. In seven out of ten cases there was a statistically significant difference in evaluating each individual measure.

Table 6
How efficient would the following measures be for preventing corruption [6]

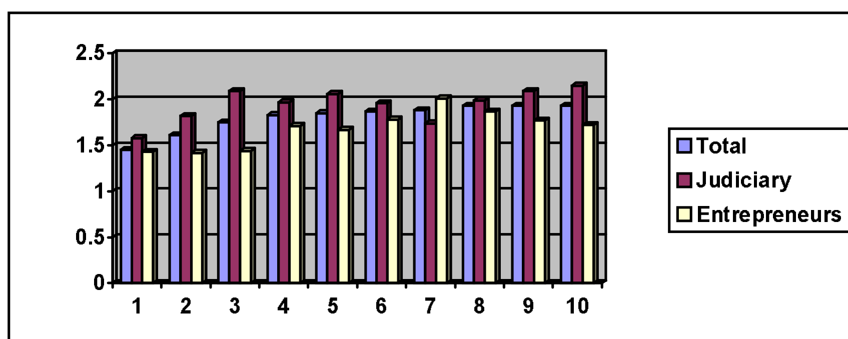
	total	judiciary	Entrepeneurs	rank (total)
Imposing more stringnet criteria for election of judges	1.45^{++}	1.58	1.34**	1
Greater possibilities for supervision and control	1.61^{++}	1.82	1.42**	2
Greater possibilities for disciplinary sanctions and punishment	1.75	2.09	1.44**	3
Introducing an efficient system of improving judges' professional qualifications	1.83	1.97	1.71**	4-10
Encouraging judges to report all irregularities in court functioning	1.85	2.06	1.67	4-10
Linking judge performance with promotion	1.87	1.96	1.78	4-10
Increasing salaries of judges and court officials	1.88	1.74	2.01**	4-10
Amending procedural rules	1.93	1.99	1.87	4-10
Introducing regular evaluation of professional performance	1.93	2.09	1.77**	4-10
Securing greater transparency and openness of court's work	1.93^{+}	2.15	1.72**	4-10
Introducing information systems	2.06	2.13	2.00	11

* statistically significant difference at level $p < 0.05$
** statistically significant difference at level $p < 0.01$
\+ statistically significant difference from the next rank at level $p < 0.05$ (t-test)
++ statistically significant difference from the next rank at level $p < 0.01$ (t-test)

[6] Grades range from 1 (“very much”) to 5 (“not at all”).

Introducing stringent criteria for election of judges is doubtlessly seen as the most important measure for combating corruption in the judiciary, where the entrepreneurs are even more convinced that this would be the most efficient measure. It is interesting that this finding shows that practically the complete guilt for corruption in the judiciary lies with the judges since the stringent criteria for their election would solve all problems. Contrary to this, a very low rating in the fight against corruption in the judiciary was given to reform of the judiciary that would entail, for instance, amendments in procedural rules and introduction of IT systems. As expected, the question related to increases in salaries as a means to prevent corruption was controversial. While the judiciary professionals consider this measure to be quite efficient (the only other measure they consider more efficient is the stringent criteria for election of judges), the entrepreneurs estimate that this measure is not very important. All this points to the conclusion that the respondents did not manage to provide consistent answers regarding measures for preventing corruption in the judiciary (Picture 1).

Picture 1
The influence of measures for preventing corruption



The figures show the measures as given in Table 6.

CONCLUSION

Comparing the results of the survey of judiciary professions and entrepreneurs shows that in a large number of cases there is a statistically significant difference in the answers provided. As a rule, the entrepreneurs are more critical in their views of the situation in the judiciary and therefore they claim to encounter

more often than judiciary professionals certain irregularities in the work of judges (formulating the court records) or the court administration, that can indicate the existence of corruption. Their estimates on the responsibility of all judiciary professions for judicial corruption are also higher than those provided by the judiciary professions themselves. As could be expected, the entrepreneurs consider the spread of corruption in the judiciary as a whole to be much larger than the estimates provided by judiciary professionals. It is interesting that there are no differences when evaluating behavior of the judges, that is, the estimated frequency of the judges actions that can point to the existence of corruption. Finally, there is a major difference in the views expressed regarding the measures for preventing corruption in the judiciary.

Comparing the results of the survey also enabled the verification of some of the working hypothesis on corruption mechanisms in the judiciary, on the ways that corruption is implemented. Related to corruption of the court administration, the findings show that the mechanisms most frequently used are delaying or accelerating delivery of court documents and postponing coercive enforcement, while the least frequent are preventing the parties insight into court documents and backdating of submissions. Additionally, the findings show that there are sufficient elements for accepting the working hypothesis on corrupt court experts as one of the potential mechanisms for influencing the sentence.

Regarding the views on judges (regardless of their motives), the survey shows that the most frequent behavior is the unnecessary delaying of procedure and the unintentional committing of procedural mistakes and the most seldom is not to enable the parties' insight into litigation records and documents. This finding is very important especially since all respondents are in agreement. Two conclusions can be drawn: first, the inefficiency of the judiciary is perceived as a problem of at least the same magnitude, if not a greater problem than corruption. Secondly, corruption in the commercial judiciary is to a large extent aimed at delaying the sentence and not at its content.

Finally, the findings show that the most frequent problems in formulating the court records are the inability of the judge to

understand issues stated before the court and pointless and confusing sentences contained in the record, while much less frequently the judge is seen to be partial in determining (formulating) the content of the court record. This once again shows that the inefficiency of the judiciary and the incompetence of judiciary professionals are at least equal, if not greater problems than corruption in the judiciary.

V Corruption mechanisms

INTRODUCTION

The only possible goal of this survey is to reveal the *subjective perception* of the extent of corruption, its manifestations and several of its causes. The a*ctual,* objective situation, can only be approached indirectly, or through control questions, and cannot be directly observed by means of a questionnaire. Consequently this survey does not offer empirical data on the causes and mechanisms of corruption. There is no other way to research corruption. We can neither count on self-incrimination, requesting participants to talk directly about their participation in cases of corruption, nor could we test the reliability and validity of such answers, if they were solicited; research cannot replace the state authorities which detect criminal activities and fight against them.

The only source of data on corruption in the Serbian judiciary that is objective and applicable at the same time is by no means extensive. In this respect, the situation is similar in other states as well. This refers to corruption cases that have been processed, primarily those where final judgment has been reached, but also those that touch on corruption or raise suspicion of its appearance, cases processed within judiciary, most notably dismissals of judges for unprofessional and illegal conduct, disciplinary cases against judiciary employees and procedures before bar associations.

The number of such cases that have been initiated is negligibly small, and those that resulted in a final judgment even smaller, and the importance of judiciary cases in which corruption has been detected so insignificant that it does not warrant a case study, let alone generalizations based on statistical analysis.[1]

One may only guess the "dark number" which is common for every type of corruption, including this. What is quite clear is the

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[1] On possible interpretations on the value of the 'dark number' see chapter on corruption factors, section *Detecting, indicting, incriminating.*

massive discrepancy between the extent of corruption as detected in a legally provable way and the perception of its extent. With regard to these differences in perception, it is also clear that they exist between those who are professionally active within the judiciary (judges, prosecutors, court employees), "connected to it" (attorneys, company lawyers that deal with the judiciary) and the parties that have taken their disputes to court. In short, the judiciary perceives itself as less corrupt than it is in the eyes of the general public.

The working hypothesis that prompted this research is that there is corruption in the judiciary, to an extent that may be considered dangerous. It is clear that the survey participants perceive corruption today less widespread than it was in earlier surveys, but this does not affect our verdict; the numbers are still high.[2]

Corruption ***mechanisms*** are meant to encompass *typical forms* or *models* of corruption events - what criminology terms its phenomenology (this comparison does not mean that we are tackling only criminological aspects of corruption; on the contrary, corruption is researched on a functional level, having in mind a strategy to curb and eliminate it).

Attempts to determine those models represent the first step toward pinpointing corruption ***causes***, the conditions that influence the extent of corruption, and in turn, the determined mechanisms and causes may serve as a basis for the development of a strategy for combating corruption in the judiciary.

One model, or rather group of models of corruption in the judiciary is defined by the legislator in the special criminal offence of corruption.

Recent amendments and additions to the Serbian Criminal code have envisaged several criminal offences which potentially cover corruption in the judiciary. This follows from the estimation that it is necessary to include these offences, and that the general criminal offence of corruption, as already included in the legislation, is not sufficient, either as a general prevention or a repressive measure. This means that corruption in the judiciary has been perceived as a dangerous phenomenon.

[2] See graphs 1, 2, 11 and 12 in the chapter *Judiciary officials on corruption in the judiciary* and tables 2 and 3 and especially 20 in chapter *Enterpreneurs on corruption in the judiciary*.

First and foremost is the criminal offence of Corruption in the judiciary[3]. This criminal offence may be carried out by a judge, a laymen judge, a public prosecutor or deputy public prosecutor, that is, a corrupted judiciary official. (This offence does not cover the act of corrupting such an official, implying that the corruptor would be charged under the general offence of corruption). The crime is deemed to have been committed by the procurement of any favor, either for themselves or for another party, on condition that this is related to the issuing of a court decision or other action carried out in official capacity. (a more serious category of this criminal offence exists when the favor procured exceeds the value of 200,000 and 600,000 dinars).

Certain aspects of the statutory definition require attention. First, the law sanctions (as a completed criminal offence) only the procurement of a favor and it is not necessary that the judicial official actually acts in the way requested/expected from the other party. Second, it is required that the favor is obtained with the issuing of a court decision or with another official action; the legislator accepts the contention, which has also been accepted in this research, that the corruptive goal is not only to issue an illegal decision, but may also be some other action[4], on condition that such an action is within the judicial authority of the corrupted individual. The illegality of the action performed (corruption favor) is not necessary.

Therefore, according to this model, corruption in the judiciary exists when the party to the procedure or somebody else (somebody who is not a conduit, who corrupts on behalf of the party and in agreement with the party, in which case they appear as joint defendants) gives something or provides some favor for the judge or another official.

The same amendments of the Criminal Code create the criminal offence of *Abuse of the function of legal representative* (Art. 255e). The culprit of this criminal offence may be a legal representative (in criminal and other cases, which means that in non-criminal cases this does not have to be an attorney, since any person acting in an official (legal) capacity may appear in litigation as a legal representative). Therefore, punishment is envisaged for those who corrupt. Corruption has to be directed towards a court

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[3] See article 255d Law on amendments to Criminal Code of the Republic of Serbia, Official Gazette RS no.11/2002.

[4] See the list of corruption factors in opening section of the chapter *Factors of corruption in the judiciary*.

expert, witness or some other person,[5] and the corruptive goal - influencing the outcome of court procedure. Although this offence does not require that the influence has to be carried out through illegal action (false testimony or expert testimony), this follows from the very definition of "influencing the outcome of the dispute" (although "positive" corruption is theoretically possible – paying the corrupted individual to give true testimony, corrupting a court expert to submit expert testimony in a shorter time...). While a judge may be corrupted for every action related to procedure (so one can envisage unjustified postponement of the hearing, or general delaying of procedure, but also a situation where he/she is not slowing procedure down, but is instead stimulated "to do his/her job properly") it appears that such a thing is not possible with regard to other actors; if a court expert receives money to postpone his/her expert testimony, this is not likely to influence the outcome of the dispute. In any case, this offence shows that corruption in the judiciary is possible even without the participation of a judge.

It is clear that these two offences do not encompass cases where some other judiciary official has been corrupted, e.g. a court president who circumvents principle of random judge and assigns the case to a "desired judge", the currier charged with delivery of official court documents falsely records that recipient does not live/exist at the stated address, an enforcement officer who

[5] This is not a criminal law essay, but one may ask two questions with regard to the main topic. First, to what extent is it justified, as implied in this offence, to accord a privileged position to a court expert. Namely, unlike the parties and the witnesses, who are incidental participants in judiciary procedures, since they appear for a particular purpose, legal representatives are professionals who perform services of a privileged quality, and it makes sense to formulate a special criminal offence to include them, where they abuse public trust (it is questionable whether this crime is committed when they bribe in the name of the party and using party's money?). However, the court expert's position is the same. He/she does not appear in the procedure based on his/her relation to the case at hand, but as an expert, professional. If corrupted, he/she squanders public trust, too. This relates to the hypothesis tested in this research regarding, on one hand, the importance of expert testimony, and on the other hand, the fact that it is under regulated. Second, it is unclear what 'other persons' means. This definitely should not encompass judiciary clerks, since they are involved in the process. This should actually relate, e.g. to members of the Ministry of Internal Affairs when they prepare records of traffic accidents, customs officers who estimate the value of disputed goods, etc.

“forgets” to invite the police to assist with bulldozing or evicting, or provides police with a false address or scheduled time.

A corrupted court clerk might possibly (besides falling under the general criminal offence of corruption) be incriminated for *Corruption in administration*, if court administration and court clerks are regarded as a special administration branch. However, this incrimination requires that the offender use his/her official position or overstep his/her official powers, that is, that the court clerk has acted in contravention to service regulations (e.g. an enforcement officer who requests money in order to carry out an action prescribed by the enforcement order could not be held responsible for this offence).

This survey of new offences allows a generalized presentation of corruption mechanisms in the judiciary. The model of corruptive practices in the judiciary presupposes several necessary elements:

- *At least two participants,* one of which, as a rule, acts as party to some court procedure, and the other, again as a rule, is a judge or some other judiciary official, exceptionally some other person that might influence the outcome of the dispute, e.g. court expert or witness; there may be several participants in the corruption chain, where some persons, who may, but need not be participants to the procedure, act as intermediaries.
- *The aim* of the party; that is actually a number of goals, but the only relevant goal in the context of corruption in the judiciary is the goal in a particular case (corruption motive), certain court decision or court action that fulfills some interest of the corruptor;
- *Actions of the judiciary clerk,* or some other corrupted participant to the procedure, not necessarily illegal, which fulfills such a goal; this represents the means of reaching the corruption goal.
- *A favor (gain)* corruptor promises to the corrupted.

Analysis of corruption mechanisms is quite dependant on analysis of *participants* and *means* of corruption. The final goal sought (e.g. avoiding debt payment, getting milder criminal punishment) is important to the extent it probably influences the amounts used for corruption, and the procedural goal (e.g. illegal decision, postponement or acceleration of procedure) to the extent it determines the course of action, and the exact means corrupted person uses in order to deliver promised favor.

Among participants, the judge is the first in order of importance, followed by other judiciary officials or judiciary clerks, and finally other corrupted participants that may influence the outcome of the case.[6] For analysis of corruption mechanisms, it is not important who the party requesting corruption is, except in cases of institutional corruption, which will be analyzed separately. However, it is important who acts as intermediary between the parties and other judiciary clerks. If those intermediaries are members of the judiciary (understood in its broader meaning), other judges, court presidents, prosecutors, court employees, as well as attorneys, since their intermediary role (accessories, as criminal law would label them)[7] points to the degree to which corruption has spread within the judiciary.

However, the procedure of "delivering" a paid favor or means of carrying it out, depend on the status of those who are corrupted, on the fact the one who is corrupted is a sitting judge, court president, prosecutor, clerk of court documentation office, court enforcement officer; every one of them has his/her own procedural competences. (It is possible, however, that some of them are corrupted, while at the same time acting as corruption conduit, or organizers of a corruption chain which involves several officials.)

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[6] One could, therefore, ask whether corruption of those other participants constitutes corruption in judiciary at all (as this study focuses on that harmful social phenomenon). There have bee 'false' and corrupted witnesses since the very inception of the judicary, just as there have been forged documents and other evidence, and their frequency and number perhaps say more about the moral state of society than the situation in the judiciary; at most, they testify to the judiciary's readiness to detect such problems. Corruption of other state officials which is finalized within judiciary (e.g. creation or certification of false public record, police, etc.) represents corruption of those services, and not of the judiciary. We have chosen to treat the corruption of a court expert (expert witness), given his/her position in our procedural laws, and given the hypothesis that corruption of court experts is often linked to the corruption of the judge, and cases of corruption in which an attorney appears. The attorney participates as someone who knows the law and who enjoys certain special trust, he/she takes procedural actions, is responsible for respecting professional standards and ethics and, if he/she appears as a participant in corruption, that reflects on the state of the judiciary as a whole.

[7] This is in addition to the offence contained in Article 255e; namely, the attorney will much more often appear as representatitve of the corrupting party, than asa corruptor himself/herself; we will not dwell upon criminal law's qualification of a 'normal' situation where attorney corrupts a court expert on instruction of the party.

According to the results of the survey, the most frequent model of judiciary corruption is the following event: a party, acting through a common acquaintance, attorney or another judge, bribes a judge. The judge prolongs procedure, or issues an illegal decision.[8]

Therefore, further, more detailed, analysis of the model (corruption mechanisms) will be carried out by following those fundamental corruption actors and their roles.

THE JUDGE

The judge or president of court[9] is potentially the most frequent participant in corruption.

In the litigation which serves as a basis for this research, the judge directs the procedure and, as a single or presiding judge, issues a final decision (judgment or ruling). This model is accordingly applicable to all other types of procedure.

Other potential participants in a chain of corruption may have a significant role; they may strongly influence the direction and final outcome of the dispute and its duration. However, their influence is mostly indirect, and in order to fulfill corruptive goals they usually create a situation in which the judge issues a decision which is not based on true facts and on the law.

The goal of corrupting a judge may be manipulation of time, prolongation (or acceleration) of procedure, and the mechanism for fulfilling this goal is entirely in the hands of the judge. The Judge

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[8] See tables 8 and 12 in the chapter *Judiciary officials on corruption in the judiciary* and tables 14 and 18 in the chapter *Entrepreneurs on corruption in the judiciary*.

[9] In first instance procedure, a professional judge is joined by two laymen judges sitting on the same panel. The mixed jury judge system which is traditionally accepted in our country, has been criticized by scholars. Jury members have only a symbolic role, the professionals dominate, to the extent that the most vocal and cynical critics of the existing system describe laymen judges as legally prescribed decor. In addition, it is hard to ensure the presence of laymen judges. Instead of postponing the hearing which the juror cannot attend, in practice this results in replacement of jurors and in fictitious repetition of already performed procedural actions, in order to comply with the principle of directness: the judge presiding over the panel issues a ruling to the effect of repeating all procedural actions by reading out court records and at the same time proclaims that records have been read. This fiction is, however, repeated even when the panel president or single judge is replaced.

is the master of procedure. Within constraints of procedural laws, he/she has an entire arsenal of discretionary competences which may be used for acceleration or prolongation of disputes.

First, the judge decides on the order of procedural actions and on their timing, e.g. the judge decides on the main hearings, their number, frequency and duration.

When accepting or rejecting submissions of evidence from the parties, or requiring certain evidence or actions on the part of the court, the judge may also influence the duration of the procedure. Taking unnecessary evidence (e.g. examination of ”witnesses” who have nothing of relevance to contribute) is “justified” by invoking the principle of material truth or the hope that something might be “fished out”. (The easiest way to detect an unnecessary witness is when party’s proposal for witness examination, or the judge’s ruling ordering examination of a witness, contains no identification of the circumstances on which the witness should testify.

Second, the judge or court president, according to our established practice (fully confirmed by survey opinions)[10] may, without any necessity, delay the end of the main hearing and postpone a decision on the case. A simple example follows. Whenever either side makes a contention or lodges a motion at the main hearing, the judge may (he does so on the justification that a contrary action would represent a fundamental breach of procedure) grant some time to the other side to address such a contention or motion. This, in turn, represents an excuse for postponing the hearing until the other side replies (in practice, for at least one month, and recently often for two and three months). Attorneys submit written preparatory submissions containing evidence proposals only at the hearing, opening up a new possibility. It is not rare to have judges accept parties’ new motions and evidence lodged at the very end of the evidentiary procedure. Requests by a party to postpone the hearing because of their inability, or inability of their representative to appear are easily accepted (instead of proceeding with the case in the absence of the duly informed party, which is possible), etc.

[10] According to the survey, acceleration or prolongation of the procedure are the most common causes of corruption, more common than the desire to obtain an illegal decision. See Table 17 in the chapter *Entrepreneurs on corruption in the judiciary*. On the other hand, unnecessary delay of procedure, deliberate or accidental, is perceived as the greatest shortcoming of the judiciary. See Table 4 in the chapter *Comparison of results of survey judiciary professions and entrepreneurs*.

According to the law, in the cases a judge issues decisions on directing procedure as rulings, and no appeal is allowed against such rulings, so there are limited means available against manipulations of procedure duration. Therefore, manipulation of procedure duration, as a corruption mechanism, is fairly "generous" for the corruptor and for the judge who "delivers" the favor. In an environment of general inefficiency, this is a low risk mechanism.

Namely, the survey has shown that with regard to this segment of procedure direction, verdicts are harsher when it comes to the incompetence of the judge (non-deliberate mistakes that lead to prolongation of procedure) than manipulation, but earlier segments of the survey have shown that respondents to the survey fail to distinguish between the deliberate and non-deliberate errors of the judge.[11] Poor and slow performance is good cove for deliberate manipulation.

If the purpose of corruption was to obtain an illegal or improper decision, if the judgment has to grant a right that does not exist or prevent some existing right from being exercised or enjoyed, etc., a corrupted judge has two basic ways of delivering such goals.

First, the "direct" way is to erroneously apply substantive law, that is, breach legal provisions, subsume the otherwise correctly determined facts of the case (or, more often, obvious facts) under an incorrect legal provision, assume an incorrect "interpretation" of the rule and apply an incorrect legal consequence (sanction). At first glance, this method is not only direct, but also crude and easy to spot. However, this is not always the case in a legal environment so unstable, incomplete and contradictory, as ours is today to a great extent. [12] (Testimony of just how real these concerns are might be found in Articles 176-180 of the Draft Law on Civil Procedure which, at the time of completing our study, has been prepared by the Working Group of the Ministry of Justice of the Republic of Serbia. Those articles implement the Recommendation of the Council of Europe R95, Chapter IV, Article 7, point; it is

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[11] See Table 4 in the chapter *Comparison of results of survey judiciary professions and entrepreneurs* and the accompanying comment.

[12] See section *Imperfect legal system (outdated, not harmonized, iustable...)* in the chapter entitled *Corruption factors*.

envisaged that, in cases where one issue appears as incidental in several cases, the procedure will be halted and the incidental issue referred to the Supreme Court for a decision, i.e. to take a stand.[13]

The second way is to "create" such a factual background – incomplete or false, which allows the desired decision to be reached through "correct" application of substantive rules. First, "the court shall judge which facts it considers to be proven, based on a thorough and careful estimation of every item of evidence in particular and all evidence taken together, as well as on the basis of the procedure as a whole".[14] Based on this clear provision, the judge may: (a) give precedence to one body of "evidence" over the other, e.g. to one instructed witness over several witnesses who have no stake in the dispute, or favor a witness over signed written evidence; (b) they may, while directing procedure, *de facto* prevent proof of certain facts (rejecting a proposal for their examination, e.g. refuse witness testimony or on-sight evidence gathering); (c) influence the outcome of certain evidence gathering, e.g. he/she may charge the court expert with determining the facts that are potentially in favor of only one side, or may examine witnesses in a similar way. (This kind of conduct creates the impression that is recorded in the court record and the judge controls that too).

It is clear that the judge may do all this in agreement with other litigation participants, e.g. the court expert, who will "deliver" the requested opinion; the mechanism of these corruptive links will be described later.

If the corrupt favor delivered is an irregular first instance decision, one should have in mind that such a decision might

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[13] The proposed novelty is important and interesting. Until now there were also mechanisms which were designed to harmonize court practice, and harmonized court practice represents an important barrier against corruption. Disputed issues regarding interpretation and implementation of the law are discussed at sessions of court departments (and General Session of the Supreme Court), and conclusions (positions) of the department bind all panels that comprise the department. In addition, according to the Court Regulation, a judgment is controlled by the Department of Court Practice for its compliance with practices adopted, before it is dispatched. The Department of Court Practice has been established at every court, and its task is to warn the panel about any discrepancies. The harmonization process, therefore, takes place within the court. A new mechanism should secure interpretation by the highest court, and such interpretation is binding for deciding the preliminary issue that triggered referral, and shall also be binding in all future cases.

[14] See Article 8 of the *Law on Civil Procedure*.

undergo control by an appellate court. Therefore, the corrupting party has to ensure the cooperation of the appellate panel as well.[15] "Securing" the appropriate judge in contravention to the random judge principle is done in a fashion similar to that used in first instance procedure. Finally, one should again mention that, according to participants of the survey, the corruption of a court increases with its level.[16] This may also mean that it is enough to exert corruptive influence on a higher level and expect the repeal of the judgment (which effectively leads to "buying time) or reversing judgment in favor of the corruptor. Sometimes, however, the second instance court appears as an unwilling assistant of a corruptive mechanism originating at the first instance: e.g. a party wants a procedure to be prolonged at any cost and the first instance court meets its demand by committing a fundamental breach of procedure. On appeal, such a procedural breach represents a reason for repealing the first instance decision – thus buying valuable time.

The appeals procedure also requires some time, but also opens up the possibility for manipulation of its duration. An appeal is submitted to the first instance court and, once that first instance court examines whether the appeal has been made in the required time frame and whether it may be lodged at all, it sends it to the higher court. All of this may be done more or less quickly.

Case 1

It seems safe to say that, in "important" and significant cases or in some cases of institutional corruption the "problem" is taken care of before higher courts. In such cases, unusual revisions of first instance decisions that are not in line with existing court practice and even law may indicate that something went wrong. For example, according to the press, one large and disputed telecommunication company, whose establishment is still a matter of dispute, was entered into the

[15] There are rumours within the judiciary, and it is practically imposible to prove them, that there are some 'preset' vertical lines between first and second instance panels. In any case, when it comes to higher instances, the easiest way is to 'secure' the reporting judge (more on that later) and, sometimes in addition, the judge presiding over the panel; his/her role is less significant than in the first instance.

[16] See in particular Table 10 in the chapter *Judiciary officials on corruption in the judiciary*

registry of companies by a second instance court, the High Commercial Court. Entry was made by the court president. According to the law in force at the time the company was established (Article 55 of the 1994 Law on Entries in the Court Registry), a second instance court may revise a first instance decision, but it may not perform entry into the registry, this has to be done by the first instance court *ex officio*.

As for the way in which "influence" is exerted over a judge, it seems, according to the survey, that a judge seldom requests money or gifts, but often makes known that he/she expects them. According to the replies of judiciary employees, corruptive contact is mostly carried out directly or indirectly through the judge's friends, while parties single out attorneys as middlemen. The judge often fulfills what he/she has promised, and additional requests for payment are rare.[17]

Case 2

At the time when this study was being completed, one case stirred the legal community. Two judges of the Commercial Court, one lawyer and one assistant professor of the Faculty of Law were investigated for a case of classical corruption. The investigation is currently under way, and the facts as they appear in the press, far from being confirmed by a court decision, are interpretations based on investigation sources. However, this case is characteristic because it corresponds quite well to the "average" corruption mechanism as perceived by survey participants – entrepreneurs. In brief, according to the charges, a judge requested 80,000 euros to deliver a judgment. The request was "communicated" via representatives – an attorney, and an assistant professor of the Faculty of Law (consultant) and another judge acted as intermediary. A party to the dispute reported case to the police, and then proceeded to hand over 10 000 euros (which were marked) to the consultant. According to the press, the judges deny the charges and the consultant claims that he received the money for expenses and fees.

[17] See tables 14, 17 and 18 in the chapter *Entepreneurs on corruption in the judiciary.*

COURT PRESIDENT

In principle, and according to the letter of the law, the court president in that capacity has no authority over individual cases (unless he/she acts as a sitting judge or panel member), nor does he/she adjudicate or issue procedural decisions.

One could derive from this that court president rarely appears in a position to become a direct participant in corruption in the judiciary, one who accepts a bribe in order to contribute to some procedural manipulation.

However, the survey has shown that court presidents occupy relatively high rank among those responsible for corruption in the judiciary, right behind judges, prosecutors, attorneys and court experts.[18] If one discounts the general responsibility for the situation in the court – including corruption – which rests on the court president as the person responsible for organizing efficient and lawful operation of the court, the powers of the court president as provided by the Court Regulation are the most likely "sources" of corruptive mechanisms in which court president participates.

First, choosing a judge who may be influenced seems like an important precondition or part of the corruption mechanism; it is necessary to "channel" the case to a judge who is already under influence or who may be influenced. One way in which this may be done is through the authority of the court president who, according to the Court Regulation, [19] may depart from the random judge rule for reasons of "heavy workload or incapacity of the judge" who would otherwise be chosen to adjudicate according to the time at which the case was filed. Such a wide exception from the general rule opens a very clear possibility to involve the court president in a corruption chain and use his/her authority to assign cases of "special importance" to the desired judge, one who is already involved with one of the parties. Although almost ¾ of the survey participants among those employed in judiciary perceive the random judge rule as an efficient obstacle to corruption (71%), and, although court presidents are almost unanimous in claiming this rule is "always" applied (79%), attorneys think that this is done often, and not always (49%). Therefore, there are exceptions to the random judge principle, and they are probably justified in most cases, however, their frequency suggests possibilities of manipulation.

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[18] See Table 8 in the chapter *Judiciary officials on corruption in the judiciary* and tables 22 and 23 in the chapter *Enterpreneurs on corruption in the judiciary*.

[19] "Official Gazette of the Republic of Serbia" no. 65/2003, Article 50.

The court president who decides on appeal has even wider powers. According to the Court Regulation, he/she may appoint a reporting judge among members of the panel; it is well known that the reporting judge, having both the right and duty to prepare the case, research it and propose a decision, has an almost decisive influence over the outcome of the appeal.

Another "source" also emanates from Regulation powers. Within their supervisory functions, the court president accepts and takes into account complaints submitted by parties and other participants to the court procedure, if they claim that the "procedure has been delayed, is being conducted in an irregular way or some *influence is being exerted over its outcome"* (Article 8 of the Court Regulation), and may revoke the assigned case from the judge if he/she determines that claims of procedural delay are well founded, or even if the annual schedule of judges has been altered.

Finally, if one takes into account all the powers of the president,[20] but also the way in which he/she is appointed, one may assume that the court president represents an important, if not decisive lever in cases of so-called institutional corruption (which is described in the chapter dealing with corruption factors).

Case 3

In a case of the dismissal of a court president, who was a judge at the same time, for illegal and unprofessional work, which took place in 2001 (at the time, she was presiding over a Commercial Court), the General Session of the Supreme Court of Serbia found that the most important reason for dismissal was manipulation of court cases, removal of "hot" cases from the documentation office and subsequent retaining of those cases for an indefinite time, without adjudicating on them, taking cases away from judges who were adjudicating them and self-assigning them, with special "urgency". Recently, the president of the same court has been suspended for the same reasons (taking cases away, issuing procedural decisions in such cases), the dismissal procedure was initiated, however, the Great Personnel Council found that there were no reasons for dismissal.

[20] See section *3.3. Court organizational regulations* in the chapter *Factors of corruption in the judiciary.*

COURT CLERKS

Court clerks[21] do not participate directly in court procedures, they do not, in principle, have public powers to decide on the merits of the dispute or issue procedural decisions, and therefore do not appear as a particularly attractive target for corruption. In the survey, too, they occupy a low rank among those responsible for corruption in the judiciary[22].

The performance of the court administration, is, however, not insignificant for the way in which procedure unfolds and the legality and efficiency of the courts. Some services and some clerks are particularly interesting with regard to this topic.

First of all, there is the court documentation office, which includes the office of submissions and delivery service. The documentation office receives all submissions, writings, telegrams, etc. (office for receiving documents), it opens them, records their reception, sorts them out, opens a new case or attaches them to the existing case, delivers them for further processing, handles cases which are neither with a judge nor archived, but also provides information on the status of the case, keeps an organizer in which it sorts out all cases that are up for processing during that particular month, and provides case materials for checking and copying.

In short, writing submitted to the court first arrives in the hands of an administration, whose task it is duly to record the arrival, arrange the contents of the case, enable insight into case documents and deliver individual documents to the parties in order to secure the proper course of the procedure.

Inevitably, mistakes can occur. Given the fact that most of the clerks are involved in dealing with every single case, this impedes detection of the person responsible for errors but, at the same time, also impedes possible manipulation of documents. Therefore, there are open possibilities for the following corruption mechanisms:

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[21] In a broader sense, the court clerks are all the employees of the court who are not judges. This analysis, however, does not cover expert assistants of the court and court interns. In practice, they are sometimes charged with carrying out procedural actions otherwise performed by the judge himself/herself (e.g. in succession or other non-litigious procedures), and then all that has been said about judges applies accordingly to them as well. When they perform other professional assignments, however, their position is akin to that of other clerks.

[22] See Table 8 *Judiciary officials on corruption in the judiciary* and tables 22 and 23 in the chapter *Entrepreneurs on corruption in the judiciary*.

- When recording a document or case which has arrived at the office (initial step in the procedure) – the moment of recording the arrival of the document (litigation action, motion in enforcement or extra-litigious procedures) determines which judge will be in charge of the case. According to the provisions regulating the structure and operation of the courts, cases are distributed to the judges in accordance with the time of their admission, irrespective of who the assigned judge should be and the circumstances of the case (except for annual scheduling of judges in certain departments or panels and distributing the cases with the same date of arrival in alphabetical order). The only way in which distribution of cases may be influenced on an administrative level is manipulation, wrong chronological entry of the time at which the case was submitted. This kind of manipulation undoubtedly points to a corruptive chain whose participants are court employees, party to the procedure and sometimes also the judge to whom the case is being assigned.
- Delivery of submissions to the court and delivery of submissions, invitations or summons also represents a situation where court staff may meet the corruptive expectations of the parties. Backdating may put submissions within the allowed time frame, even though they actually arrived late. The delivery procedure opens numerous possibilities for manipulation: backdating delivery time (so it seems to have arrived on time), the wrong person signing the delivery receipt (which makes the delivery invalid), physical removal of the delivery receipt from the case documents and their disappearance – all these incidents prevent a hearing from taking place. Some of these mechanisms serve to prolong the court procedure (which is later resumed once delivery is performed correctly) and may ultimately result in the rejection of the first instance decision for improper delivery, or non-delivery (e.g. if the delivery receipt has disappeared from the case materials), this represent a fundamental breach of procedure, due cause for the second instance court to over-turn the first instance decision.
- Enabling attorneys that remove the delivery receipt while examining case documents, with outcome identical to that described in the preceding paragraph,

- Enabling an attorney to remove the record of the case from case materials. The record of the case contains a complete "picture" of the actions undertaken at the hearing by the court and the parties. The primary role of the case record is to inform a higher court on the content of first instance hearing and evidence which served as basis for the first instance decision. The only impression the higher court can form on procedure before the lower court is based on the record of the case. Therefore, every manipulation of the case record is of great importance for later procedure on appeal.
- Untimely collecting of submissions or delivery receipts might prompt the court to postpone a hearing, which in turn again prolongs the procedure.
- Keeping case materials in the preliminary recording stage, which prevents finding out whether delivery has been made properly, which prevents scheduling of the hearing.

The mechanisms listed where court employees appear as providers of a corruption service may significantly influence the duration, and sometimes even the validity of the procedure. This type of conduct is hard to prove, and the low probability of proving it greatly increases the "popularity" of using such mechanism. For example, the delivery record is neither the only, nor irrefutable, evidence that delivery was made on a particular day. However, a party trying to prove that the date stated on the delivery receipt is false, or that delivery was made despite the fact that there is no delivery receipt among the case materials, faces obstacles that are almost impossible to overcome.

The other branch of the court "service" deserving attention on corruption matters are *court enforcement officers*. The very nature of the enforcement procedure entrusts them with a range of substantive and procedural actions for carrying enforcement out. For example, it is the court enforcement officer who will, in accordance with an enforcement order, make inventory of a debtor's property (which creates a court lien on them), and alongside an inventory estimation of their value, and later the dispossession of those items from the debtor. With police assistance, court enforcement officer carries out eviction, etc.

Court enforcement officers received poor grades from both groups of survey participants.[23] Data on the duration of

[23] See Table 2 in the chapter *Judiciary officials on corruption in the judiciary* and Table 8 in the chapter *Enterpreneurs on corruption in the judiciary.*

enforcement procedure[24] confirms that it represents one of the weakest links in our judiciary. This is confirmed by recent news: the court enforcement officer in the city of P. was arrested and charged with allegedly requesting money in order to carry out an enforcement action (eviction). The situation has deteriorated to such an extent that money is requested for correct performance of service.

There are numerous ways in which enforcement officers may act in an illegal or improper manner some of which may also be the result of corruption and are linked to the case and enforcement mechanism. For example, "not finding" or "incorrect" estimate of the value of moveable goods, postponed eviction from premises due to various "technical" reasons, etc.

The third "service" worth mentioning does not directly serve pending court procedures, but is of particular importance since, according to the Court Regulation, in course of providing it, court clerks independently perform legal actions. Among other things, the court documentation office independently performs the following actions:

- Determines finality and enforceability of a decision
- Certifies signatures, handwriting and copies.

There have been occasions when the enforceability clause was "mistakenly" affixed to decisions that have not yet obtained that quality. Also, some criminal procedures dealt with certification of signatures on contracts for sale of real estate that were based on false documentation (together with false proof of ownership).

COURT EXPERTS

Experts do not belong to the judiciary. The role of the court expert in a procedure is to provide expert knowledge to the court. Although one expects judge to know the law and he/she is expected to possess (at least some) level of general education, it is inevitable that his/her expertise on certain facts is limited or non-existent. If such facts have to be proven, the court may call on the help of the court expert, who will then present his/her findings and

[24] On average, an enforcment procedure in 2002 lasted more than 6 months, and this average includes procedures on orders for encashment (enforcment on claims of public utilitiy companies, which are much shorter. See *New Law on Enforcement Procedure*, Dragor Hiber (ed.), CLDS, Belgrade, 2004, pp. 45-47).

opinion, based on assessment of the facts of the case he was presented with or based on the facts he/she collected himself/herself, in accordance with the appropriate professional rules. Although the court expert represents only a source of evidence, his/her potential influence on the outcome of litigation is huge, and this creates strong motives for his/her inclusion in the chain of corruption.

One may ask whether corruption of court experts may be labeled as corruption in the judiciary in the real sense. If a party corrupts a court expert, just as where they bribe a “false witness”, the resulting decision which is contrary to the law need not to be the result of a bad judiciary at all. One should, however, bear in mind that court experts, individuals or institutions, are not just a source of evidence, that their appointment is related to their expert knowledge, and that that decision on who to appoint is up to the court.[25]

Therefore, since they appear in an expert capacity, the role of the court experts in all procedures, and especially in commercial disputes is of outstanding importance. In some disputes, expert testimony often represents evidence.

The court should always freely appraise the expert’s opinion, just as it does with other evidence. However, in practice, the court almost always adopts the expert’s opinion. In complex disputes, the opinion of the court expert actually decides the outcome of the case.

This creates motivation for creating the first corruption mechanism which includes the court expert, and that is a connection between the judge who is in charge of the case and the court expert who is appointed in that case. A corrupted judge wants to “deliver” appropriate judgment to the party. The judge’s direct manipulation of substantive and procedural rules might result in the desired decision, however, such manipulation is more or less obvious, and bears greater risk of being detected. The decisive importance of expert testimony, however, creates the opportunity of reaching this goal in a more elegant manner. The judge need only include “his/her” court expert in litigation, and then justify his/her wrong or partial decision by claiming that it was based on the expert’s opinion.

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[25] See Table 2 in the chapter *Judiciary officials on corruption in the judiciary* and Table 8 in the chapter *Enterpreneurs on corruption in the judiciary.*

Another mechanism is direct bribing of the court expert by one of the parties or their attorney, without the participation of the judge. Therefore, this scheme leaves the judge out of ranks of culprits, which leaves possibility, albeit minimal, that he/she will not accept the report of the corrupted court expert. This means that, for the corruptive party, a scheme which involves the participation of both judge and court expert represents a more reliable way of obtaining the desired outcome. If the judge is not corrupted, his acceptance of the report is professionally problematic.

Manipulation of expert testimony, (e.g. prolongation of procedure) is not so eye-catching due to other weaknesses of this type of evidence: it is ordered even when unnecessary, the expert may be charged with determining obvious facts, sometimes the experts appointed do not possess the required professional knowledge, or experts whose field of profession does not correspond to the qualifications required for assessing the facts under dispute. Court experts do not stay within the parameters of their task, but also provide their opinion on other facts, and those opinions often deal with legal positions on disputed facts, which is not only contrary to their task parameters, but also contradicts the *iura novit curia* principle.

Research has shown that that in most cases the judge decides on the exact court expert to appoint, that judges mostly appoint the same court experts over and over again, and in most of the cases accept their findings.[26]

ATTORNEYS

Just like court experts, attorneys do not fall under the strict scope of the judiciary, but as legal experts who perform services involving public trust and offering professional help to parties appearing before the court, their involvement in corruption may lead to harmful consequences that result from corruption in the judiciary.

It is conceivable for an attorney to be corrupted, to encounter a situation where one side bribes the other side's attorney. However dangerous, this phenomenon does not fall within judiciary corruption taken in its stricter sense.

[26] See Table 3 in the chapter *Comparison of results of survey judiciary professions and enterpreneurs.*

It is also conceivable to encounter a situation where an attorney bribes a judge (or a witness or a court expert, as described in the criminal offence already analyzed, or a court clerk) without knowledge or instruction of the party, e.g. when his/her fee is related to success in the dispute, where this bribe appears to him/her as a transaction cost.

However, the most logical situation appears when the attorney participates in corruption together with the party he/she represents, acting as intermediary, linking it with a judiciary clerk who accepts a bribe, or, alternatively, the attorney undertakes to bribe the clerk himself/herself in the name of and on behalf of the party.

Although judges who participated in the survey claim that corruption (if it exists) is usually initiated when a corruptor is brought into contact with the judge with the help of a friend of the judge the parties who appear before the court, say that such contact is usually established through the attorneys.[27]

Finally, there is an additional contentious situation that needs to be noted. There are quite a significant number of cases where attorneys represent parties (a) in a court where they previously held the function of judge, and (b) in a court where the judges are their spouses or close relatives. This can be an environment for hidden corruption where, for example a party pays a fee that includes the price of the attorney's influence in a particular court.

CONCLUSION

In order to research the mechanisms of corruption in the judiciary, in the situation where the "dark figure" is indeterminately high and the significance of legally proved cases extremely small, it is necessary to emphasize several facts which prove the working hypothesis that corruption in the Serbian judiciary exists and is relatively dangerous.

First is the extent to which corruption in general is widespread in Serbia. The extent to which corruption exists in Serbia may certainly be considered dangerous, and there are no reasons to believe that there is no corruption in the judiciary. Moreover, the judiciary is, in its very essence, an institution which plays a great role in combating corruption. If the policy against corruption is

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[27] See tables 14, 17 and 18 in the chapter *Entrepreneurs on corruption in the judiciary.*

inefficient, it is partly because of the judiciary, and corruption may be a reason for such inefficiency.

Second is the general climate within the judiciary, which makes it impossible to award it a passing grade. One element of such climate is the ***inefficiency*** of the judiciary. Resorting to court procedure in order to secure ones rights is, as a rule, slow, expensive and even uncertain. This is true for all types of procedure, even those which are presumed to be simple (e.g. the procedure of registering changes related to juridical persons, when change is wholly dependant on the will of that juridical person, e.g. entering another authorized representative in the record).

The length of the procedure is the most prominent factor characterizing this inefficiency.[28]

It is possible to pose the hypothesis that time often emerges as a corruption motive, since parties in court procedures often resort to corruption in order to manipulate with time, usually in order to prolong the passing of an irrevocable judgment and enforcement decision, and postpone its enforcement, or, alternatively, to shorten all of the above.

Third is Serbia's transition period that is, by definition, characterized on one side by the imperfection of the legal system and the co-existence of obsolete and new legal institutions, and on the other side by significant and rapid changes in the economy, starting with changes in enterprise ownership structure to sudden re-positioning on the social ladder. All this breeds strong corruption motives that can be realized in judicial procedures and where corruption costs, from the corruptor's viewpoint, are rational transaction costs.

In such an environment, the central figure in the judiciary - the *judge*, is the one who is the most exposed to corruption pressure; only he/she is capable of directly providing the "service" required by the corrupt party.

This is particularly, almost undetectably possible when it is an issue of buying time, postponing the passing of irrevocable and final judgments. The procedural legislation gives him/her wide discretionary rights in leading the procedure and the judge can

[28] Several figures illustrate the backlog in our courts. In the Supreme Court of Serbia in 2003 there were more than 40,000 cases, and in the Second Municipal Court over 255,000, 75,000 more than last year. In the Commercial Court in Belgrade in 2002 there were 15, 710 disputes, 19,946 requests for inscription into the register, 12, 243 bankruptcies, over 3000 compulsory executions, etc.

prolong it for a long period of time. (This breeds a specific corruption motive: to stimulate the judge to efficiently and legally conclude the case).

There is a risk of the illegal conduct being discovered and the "service" as the corruption motive not delivered - by annulling or changing the decision (reached through corruption) when the decision itself is illegal.

The un-harmonized and partly internally controversial legal system, unclear legal provisions, partly mitigate this risk. Furthermore, an illegal decision can be "hidden" by the fact that there is generally a low level of quality in performing judiciary functions; in a series of wrong decisions, mistakes, the intentional "mistake" that is a result of corruption is more easily hidden.

Finally, an illegal decision can be passed by manipulating the corresponding factual basis, and thus providing a skewed picture of reality. This often means the additional participation of other actors in the procedural sequence, for instance court experts who will provide the "necessary" finding.

Additional assistance in creating the "scene" for obtaining the corruption objective can be provided by those who can influence the distribution of cases to certain judges – court presidents or clerks in the submissions office, regardless of whether they act independently or in cooperation with the judge. The party's interests can be served by other persons also, especially those who are in a position to practically independently perform certain financial and legal activities, as for example enforcement officials.

The judge or other official is bribed directly by the party or via the attorney; the other actors, having more or less knowledge of the reason, mostly provide the corruptor with a channel to the judge.

It is difficult to estimate how extensive (in terms of quantity) these occurrences are; considering all the available data, there is much less corruption in the judiciary than perceived by the general public (who think it is widespread), much more than judiciary employees are willing to admit, sufficient for it to be estimated as dangerous for the judiciary itself, and thereby to all areas of society, especially the economy. This is true in spite of the fact that the survey results show that corruption in commercial courts is less present than corruption in the judiciary as a whole.

VI Factors of corruption in the judiciary

INTRODUCTION

The factors of corruption in the judiciary are the factors that influence the (wider) spread of corruption in the judiciary, the introduction of some particularly dangerous modalities of corruption, the increase in the harmful effects of corruption, shortly – factors that influence the susceptibility to corruption and the extent to which corruption has spread throughout the state and society.

The factors, therefore, are not limited to causes, but also encompass those mechanisms and processes that facilitate, enable or fail to prevent corruption, including those that "enable" corruption through low resistance to abuse.

At the same time, this is not about individual corruption factors, factors that in a manner describe the influence of the corruptive behavior of a particular individual, except to the extent to which it represents the sum and generality of all individuals. is the focus here, therefore, is not the etiology of individual corruptive behavior, but rather an attempt to decipher the factors of corruption in the judiciary, in order to decipher them as a social phenomena.

Factors, as understood in this paper, should be distinguished from motives for corruptive behavior.

The role of corruption participants, when it comes to corruption in the judiciary, is pre-determined, and so is, to a great extent, motivational mechanism.

On one side we have the corruptor. A textbook-like definition would describe him/her as a participant in a certain judicial procedure, that is, someone whose interest should be fulfilled through the mechanisms of the judiciary. His/her goals and motives are clear:

a. to procure a court decision that does not follow from the provisions of law, or does not follow from the facts that are

identified in the procedure (an illegal decision, a decision that does not follow from correct application of substantive provisions, that is, to secure something that he/she is not entitled to, to avoid the consequences of illegal behavior).

b. To procure a lawful decision on merits, which, however, he/she would not be able to obtain otherwise, since he/she does not possess the facts or evidence required by the law. Therefore the decision is illegal from the point of the court procedure that was marred by corruption, at least for breach of procedural rules, and this is in the end very close to the first scenario when it comes to consequences.
c. To slow down or postpone passing of a (lawful) decision against his/her interests, prolonging and evading justice.
d. To accelerate passing of a lawful decision, over and above the boundaries of normal conduct in the judiciary,[1]
e. To prevent engagement of the other side who is pursuing goals listed in points a. to d.

Without regard as to whether its goals are permitted or not, parties' corruptive activities have as their *sine qua non* on one side, the susceptibility of judiciary officials to corruption (subjective factor) and, on the other side, their ability to enable, or contribute in reaching parties' goals, to promise fulfillment of those goals or to send signals that those goals may not be reached without corruption.

The role of the judiciary officials, as the corrupted side, is to influence realization of the parties' corruptive goals, through their actions or omissions, or to condition such actions or omissions on corruption.

At the same time, the motives are (except partially in one of the cases)[2] external to the judiciary, those are "classical" lucrative motives, direct or indirect material gain.

Motives may, therefore, be linked to corruption factors, but they are not identical.

These several remarks are a basis to establish the broadest possible classification of the factors of corruption in the judiciary.

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[1] This is the case or a motive of corruption which is possible only when the proceedings usually last some time; it is about accelerating procedure above its optimal limit, and presupposes skipping the, otherwise normal, order of priority.

[2] These are cases of institutional corruption, to be discussed later, and the motive may be, e.g. promotion within the judicial hierarchy or avoiding dismissal for poor performance.

The classification is not wholly based on the empirical research outlined in the first chapters of this study. Basically it precedes everything else, it is deductive, and the results of the research and research of other materials and experience should confirm it. The survey itself, on the basis of working hypotheses, asked a number of questions that should contribute to the research of the factors of corruption, but this research may not be fully completed through a survey, and statistical analysis of the perceptions and opinions of the survey participants. If anything, the factors of corruption lend themselves even less to direct surveying than do the mechanisms of corruption.

A classification that serves as a basis for further research provides for two basic groups of factors.

- One group would be comprised, tentatively speaking, of *exogenous* corruption factors, external ones, those social factors that bring about corruption as a *recurring event* (and not an occurrence) in which professionals of the judiciary request or accept bribes. By nature, these factors are social, societal, and to a certain degree they represent causes of social pathology in general.
- The second group is comprised of *endogenous*, internal factors, related to the functioning of the judiciary as an institution, and are therefore predominantly of a *legal nature* (even as they mostly manifest as violation, evasion or abuse of law). They represent those elements of the legal order which enable or facilitate a situation where an official of the judiciary "delivers", without punishment, or bearing an acceptable risk of being punished, a favor that represents the party's corruption goal.[3] They may be connected with the organization of performing judiciary function, or with substantive and procedural laws that leave enough discretion for the judge (or other official in the procedure) to enable the corruptive goal to be reached.

This is the order in which the factors will be analyzed (in brief).

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[3] This does not refer to punishihment for a criminal offence of corruption that has been found out and subsequently proven, but rather to responsibility for the way in which a judiciary office (or some other task within the judiciary) has been served, and which results in one of the consequences sought by the party who resorts to corruption, e.g. unsanctioned prolongation of the procedure which remains under institutional "observation" of the judiciary, or sanctions provided by the set of judicary laws for illegal actions or actions conducted in bad faith.

EXOGENOUS FACTORS OF CORRUPTION

Exogenous factors in general

In principle, the "external" factors of corruption in the judiciary do not differ essentially from those generating corruption in other social segments that have already been researched in Serbia.[4] Researchers are bound to mention the economic situation ("crisis") which generates social crisis, and a particularly important crisis of common and professional morale, and finally the general condition and efficiency of legal and political institutions.

When noting and grouping exogenous factors, one should, however, consider the specific position and function of the judiciary. Within the system of the separation of powers, which is nominally accepted in Serbia/Serbia and Montenegro, the judiciary is, on one hand, one of the (equally important and mutually controlling) branches of government, and on the other hand, in sanctioning illegal behavior and determining and enforcing subjective rights, it is (sometimes) in a position to decide on the interests of the other two branches, perceived as institutions, and on the interests of those who are office-holders in the other two branches.

At the same time, the independence of the judiciary is a principle which is of the utmost importance for determining the way in which it will perform its function. Independence of the judiciary means, in turn, independence of those holding office in the judiciary, and is manifested in relation to the other two branches of government, in particular the executive branch.

Political relations in a society where independence has been eroded, institutionally and *de facto*, may represent a direct or indirect corruption factor. *Direct*, in the sense that the executive branch will "dictate" behavior and decisions (cases of so-called institutional corruption), *indirect*, since it is safe to assume that a judge who is not independent and is susceptible to the influence of the executive branch, is potentially more susceptible to corruption.

That is why, when it comes to exogenous corruption factors, one should single out ***the political factor*** (or political factors). It is neither necessary, nor possible, to investigate the causes of the institutional crisis, which in turn increased the importance of the

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[4] *Corruption in Serbia*, CLDS, 2001; *Corruption at the Customs*, CLDS, 2002

political factor, it is enough to pinpoint its most important manifestations.

The economic factor (factors) will be analyzed in a similar way. The hypothesis that the material position of holders of public offices is correlated to the degree of their susceptibility to corruption, has been confirmed by numerous pieces of research. However, one may also suggest a hypothesis that the material position of the judiciary as an institution also represents a milieu that influences the degree of coruptiveness. For instance, an insufficient number of judges and other judiciary employees, in comparison to the number of cases in the dock,[5] represents one of the potential causes of slowness (inefficiency) of the judiciary, but it also represents a milieu in which one may manipulate the timeframe, postpone issuing and enforcing of court decisions, or accelerate procedure as a special favor; lack of technical equipment in the courts facilitates abuse of documents, dictating the minutes and typing of the minutes on the typing machine, etc. Finally, it is possible to bring forward a hypothesis that the existing economic environment generates specific corruption motives and, therefore, represents a corruption factor in the sense this notion has been defined above.

The influence of the legal milieu, and the willingness and ability of the whole society to combat corruption lie on the border of external and endogenous corruption factors. This complex is marked as (exogenous) **legal factor**. One may especially single out a system of detecting suspicious behavior, a system within the judiciary itself and the "regular" system of detecting and prosecuting criminal offences.

Political factors

"Indirect" or "institutional" corruption

This modality of corruption manifests itself through issuing decisions as ordered, or with regard to the supposed wishes of the state or other branches of government,[6] and it represents one of the hardest consequences of the judiciary's lack of independence.

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[5] This subject could be examined further, e.g. on economic circumstances that result in a large number of court cases, or projected measure of judiciary's accessibility through the level at which court fees are set, mandatory professional representation, etc.

[6] *Corruption in Serbia*, p. 183.

If one analyses the position of a (corrupted) official of the judiciary, this modality does not essentially differ from "plain" corruption. The Judge, court president, prosecutor, court official, accepts some request or reacts to a perceived request, having in mind – unless a direct reward is at stake, in which case this modality of corruption is identical with "plain" corruption – as a rule, his/her position in hierarchy of the judiciary, promotion, or some other benefit related to occupying a judiciary function, e.g. housing, further education, employment for a related person, etc, or for a judge or other official who is incompetent, remaining within the judiciary, avoiding the consequences of his/her incompetent or illegal work, etc. This type of corruption is enforced via court presidents.

The political factor is still dominant when it comes to this form of corruption. It is founded on influence mechanisms that other branches of government have over the judiciary. While those mechanisms are not objectionable in themselves, they are not sufficiently resistant to abuse, have been or are being abused, and are still effective. Some of the most important mechanisms are: the appointment (election) system, the system of promotion or dismissal of judiciary officials and the system of financing the operation of the judiciary and within it system of rewarding and stimulating judiciary officials.

The system of appointing (electing), dismissing and promoting judiciary officials is also extremely important for establishing an independent judiciary and for improving the degree of resistance against institutional corruption.

Until recently, from a formal legal standpoint, judges were appointed by the parliament.[7] In practice, all the potential weaknesses of this system have been pronounced: the dominance of the executive branch and political parties were hidden behind the role of the parliament.[8]

Reform of the organizational judiciary legislation at the end of 2001 envisaged a decisive role for the *High Council of the Judiciary*. This authority was initially vested with the exclusive right to propose all holders of judicial functions (judicial officials) – (judges, prosecutors, court presidents) and the National Assembly could only chose between the candidates proposed (they

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[7] For more on systems, see V. Rakić Vodinelić *et al.* - *Pravosudni saveti (Councils of Judiciary),* Institut za uporedno pravo (Institute for Comparative Law), Beograd, 2003, p. 7 et seq.

[8] *Ibid,* p. 8, cf. *Corruption in Serbia, p.*. 92.

could confirm or reject appointment). The High Council of Judiciary is complex in composition, appointed partly from the ranks of judges, or prosecutors, by the Joint Session of the Supreme Court. Other members, from the ranks of renowned legal experts and attorneys, were to be appointed by the National Assembly. A third group was to be appointed because of the office in which they were serving. In addition, for the appointment of judges and court presidents the majority of the decision-makers were judges, and when forming proposals for appointment of prosecutors, the majority were prosecutors. Soon after the system was introduced it became apparent that the Council would not be formed by the statutory deadline. A conflict of interest between the judicial, on one hand, and legislative and executive branches, on the other, burst out. Following several occasions on which the National Assembly rejected proposals for the High Council of the Judiciary, statutory amendments gave the right to the National Assembly, in case it rejects a proposal made by the High Council of the Judiciary, to appoint instead a candidate who has not been proposed by the Council but who, at the same time, fulfills the conditions required for the office (this amendment was later declared unconstitutional). Further, the High Council of the Judiciary was stripped of its power to propose court presidents, and that right was assigned to the competent committee of the National Assembly, and, after the provision had been declared unconstitutional, to a special authority dominated by representatives of the legislative and executive.

When assessing the constitutionality of taking away of the powers of the High Council of Judiciary, the Constitutional Court held that this infringes the independence of the courts guaranteed by the Constitution (although that same court did not consider that independence had been infringed upon in the previous legal regime where the competent committee of the Assembly had exclusive power to propose judiciary officials. On the other hand, those who supported curbing the powers of the High Council of the Judiciary which was dominated by judiciary officials, invoked the fact that the composition of the judiciary has not been altered, that the overall view of it is rather bad, and that the structure of appointment proposals for positions in higher courts and for court presidents amounted to giving blessing to the judiciary as it existed under the previous regime.

Without any comparative evaluation of arguments, one may easily conclude that there was a power struggle with regard to

influence over the procedure for the appointment of judiciary officials, and this implies that the most important criteria were not those of professional quality. This further opens up the possibility of prolonged control of the appointed officials, or those who hope to be appointed – that is, for institutional corruption. Briefly, those who decide on appointment, or promotion, have leverage over appointees or candidates for appointment.

The situation regarding dismissal from office is identical. According to the provisions that were in force in October 2000, the proposal for dismissal of a holder of judiciary office had to be determined by the General Session of the Serbian Supreme Court. It is well known that this provision was evaded when it came to the dismissal of the judges who stood up to 1996 election fraud and later became activists of the Society of Judges, a professional association of judges, the operation of which government tried to hinder before 2000, by refusing to register it. A new set of laws on the judiciary vested power to propose dismissal and determine other causes for termination of judiciary functions with the High Personnel Council , which was in turn appointed by the General Session of the Serbian Supreme Court, and, following amendments, this power was transferred to National Assembly. This last amendment has been proclaimed unconstitutional by the Constitutional Court. This legal confusion, among other things, completely paralyzed the initiation of dismissal proceedings (there were only three cases by the end of 2003, save for cases of retirement or voluntary termination of employment). At the same time, the executive branch has repeatedly initiated the issue of banning existing members of the judiciary from office, introducing such a possibility in amendments to the Law on Judges, and reserving it primarily for so-called election frauds and sham political trials (such a focus has also been declared unconstitutional). During the Constitutional Court ruling, the mandatory retirement of the judges was halted by the decision of the president of the Court in according to the Labor Law effective at the time of supposed mandatory retirement.

Besides the significant legal uncertainty, different approaches to strategic questions, frequent amendments of legal provisions and frequent interventions of the Constitutional Court, the general view of the provisions on appointment and dismissal are characterized, on one hand, by a struggle for domination between judiciary officials and officials of other branches of power and, on the other hand, uncertainty and even fear of holders of judicial offices. This

is a milieu where institutional corruption is possible, whether it comes from executive officials or from holders of top judicial offices.

Party state

Behind the legislative, executive and even judicial branches of power, which had, among other things, different interests with regard to the procedure of appointment, promotion and dismissal of judicial officials, and have attempted to indirectly control the judicial branch, one can identify the structures of the political parties.

In the socialist system, participation or affiliation with the governing (sole) party was a must for appointment and promotion in the judiciary. However, in the absence of competition within the party or among parties, within a single-party structure, and having in mind that a career in the judiciary brought about adequate material standing and considerable prestige in the society, there was significant professional competition.

Erosion of professionalism under conditions of prolonged economic and societal crisis reached its peak in the early 90s. This was fostered by the very bad economic standing of the judiciary which led to a situation where many judges left the judiciary, mostly to join the ranks of the attorneys. The reasons for leaving the judiciary were also related to increased political pressures, which were more pronounced during the times of war and nationalistic hysteria. There is no collected data, but according to the published figures, over 800 of the judges left the judiciary in the period between 1992 and 1994. This figure, alone, represents a heavy blow to the judiciary, but even more devastating was the system of hiring new judiciary employees, based on party affiliation in a multi-party system. Furthermore, this fostered the creation of a judiciary that lacked competence. The reader may recall the oft-quoted statement of former Justice Minister (Mr. Ilic, in 1993) who said that he would replace the judges who were leaving by transporting new ones by bus from his hometown of Leskovac. Party coalitions forged during the creation of the executive branch of power resulted in agreements between the parties on appointment and promotion of judiciary officials. On the other hand, a lot of legislation was amended so as to widen discretionary powers, resulting in great dominance of parties over

judiciary and through the judiciary over other spheres of social life, including the economy.

Dominance of the parties in matters of state organization was, in fact particularly visible in their treatment of the judiciary. Given the environment of all-out party struggle and the branding of the opposition as enemies of the state, or as treasonous, the underlying goal was to make of the judiciary one of the instruments of party struggle. The role of judges and courts in forging election results, particularly in 1996, as determined, among others, by a special OSCE commission (the so-called "Gonzales Commission") represents a high water mark of this process. "*Lex specialis*" which recognized the election results without investigation of individual responsibility with regard to the abuse of election commissions where some of the members were judges of the courts that later annulled the election results without the support of legal provisions, resulted in the total absolution of those who had acted illegally, and the only ones who were sanctioned were those who had raised their voices against such misconduct. The most of them received concessionary mortgage loans or property ownership that they were not entitled to.

The change of power after October 5, 2000 did not bring about objective assessment of the situation. Practically no judge has been dismissed for participating in election fraud. The parties continued to operate through representatives they had in the legislative, executive and even judicial branch, and continued to behave as the sole decision-makers in the matters concerning the judiciary. Therefore, the domination of political parties over the judiciary has not been brought to a halt, and that consequently raises the possibility of institutional corruption. As one of the final proofs or illustrations, one may observe the fact that judiciary officials are appointed and dismissed in accordance with the election results, or balance of power within ruling coalitions. Under the circumstances of legal uncertainty, referred to in the previous paragraph, this means opening a confrontation for party influence over the judiciary.

The economic factor

The material position of those employed in the judiciary

It has already been pointed out that, in an environment of comprehensive economic erosion, the judiciary was hit particularly hard in the 1990s. The salaries of the judges and other employees in the judiciary were extremely low in absolute and relative terms

(e.g. in comparison with the salaries of attorneys). On one hand, this resulted in many of the best and most experienced judges leaving the judiciary and becoming attorneys.[9] On the other hand, one may suggest a hypothesis that those who stayed in the judiciary, and those who joined its ranks, were lawyers who were not prepared for competing on the open market for attorney services or other legal services, that is, that the end result was a significant drop of competence within ranks of judiciary. A well known joke doing the rounds at that time was that the judiciary was dominated by "ladies who married well" (those whose husbands had significant earnings), may serve as the best illustration of this fact.

Finally, the "rules" applicable to the emergence of corruption in general, the fact that poverty, or economic vulnerability is a decisive motive, or at least a condition for accepting bribes (that is, for the emergence of corruption), is also applicable to the judiciary, as may be observed in other professions and public services, health services and education. A poor judge or a poor court clerk, especially a judge or a clerk who cannot meet a bare existential minimum, is particularly susceptible to corruption.

Research has absolutely confirmed that the material standing of judges and court clerks influences the emergence of corruption and the extent to which it is spread, but also influences trust in the judiciary and estimation of its quality and competence. Research has identified the level of salaries as one of the most important "corruptive factors". [10]

Survey participants, across the board, perceived very positively the improvement of the material standing of judges in the last three years. Despite budgetary constraints and scarcity, the state has decided to reward judges, not only in comparison with other public officials (in 2002 the nominal salary of municipal court judges was

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[9] It has been noted that the unfettered transfer of judges to the attorney ranks represents a separate potential corruption factor in the judiciary. Bar associations were particularly vocal in claiming that a former judge, who appears as an attorney before his former court of employment, enjoys a privileged position and the possibility to influence the procedure and outcome of disputes, and that is a metaphor for corruption. Proposals of the bar associations to set a statutory obstacle to judges' transfer to attorney ranks was rejected for reasons of the potential unconstitutionality of such a provision. The proposal to restrict access to bar associations to former judges and prosecutors who were dismissed for "dishonorable causes" has also encountered resistance.

[10] See Table 13 in chapter *Judiciary officials on corruption in the judiciary*.

50% higher than the salary of Government ministers), but also in comparison with the salaries of the rest of judiciary employees. Strikes of other judiciary employees confirm this fact. One may conclude, using *a contrario* reasoning, that this factor has diminished in importance with respect to judges, while it has remained very significant when it comes to the rest of judiciary employees.

As an illustration, one may offer the perception of all strata of survey participants, that court enforcement officers are the most corrupt judiciary profession, and link it to the fact that their salaries are actually a bit lower than average salaries in Serbia.

Of course, the poverty factor, or factor of material security, cannot be observed in isolation, and the estimations stated above should be qualified with the fact that, even today, the increased salaries of the judges do not offer a particularly high standard of living. Therefore, this factor should definitely not be ruled out.

Poverty and unemployment

The improvement of judges' material standing has probably lowered their susceptibility to corruption. Financial need was previously perceived as a much better motive or justification than it is at present.

The general poverty in Serbia and turmoil on the social ladder, which characterize earlier phases of transition, mean, however, that one should not tie the material status of judicial officials to the absolute and relative value of their salaries alone. The outset of transition means increased economic expectations. Not even the increased salaries of the judges can meet those expectations. On the other hand, poverty of the whole environment and high unemployment rate necessitate observing judges and other employees of the court in the context of their environment, their own (family) environment, and the general one.

The family environment, low living standards of the family (in)ability to find employment for the spouse and/or children may provide a factor that makes judges vulnerable to corruption.

On the other hand, poverty has another effect – participants in the court procedure are more and more ready to resort to all available means in order to achieve one of the above described corruption motives. Shortly, poverty is a factor that makes people more ready to resort to corruption.

This is a mutual dependence relationship of being ready to accept corruption and being ready to offer bribes. This relationship

within a chain of relationships creates the third factor, which may be described as corruptive expectation. Bribes may be offered in expectation, no matter whether this is founded on real or erroneous perceptions, whether it is expected or mandatory, in the same way as they can be accepted with the rationalization reduced to the simple words “everybody does it”. Just as inflationary expectation operates as an independent inflation factor, the perception of the extent and level of corruption acts as a corruption factor. In both cases, economic poverty represents a premise which favors the emergence of corruption and its perception.

Financing of the judiciary

It is possible to establish the following equation: the efficiency of the judiciary is, among other things, dependant on the material and financial circumstances in which it operates. First, the number of judges, or number of cases per judge, the number of qualified assistants and other employees who facilitate unimpeded work, technical facilities, the number of courtrooms at their disposal – all of those are factors that undoubtedly affect the speed, and even the quality of delivering justice. (This also encompasses the salaries of the employees, discussed in the previous section). Second, an inefficient judiciary, a judiciary that suffers from an objective lack of facilities that could help it achieve optimal quality of operation, represents a milieu in which there are more corruption motives, and more conditions for corruption to emerge and spread, than there would be within an efficient and competent judiciary. In an environment of overall inefficiency and questionable quality it is easier to conceal corruption, and it is harder to detect it.

Therefore, unsatisfactory material and financial conditions may represent a factor that stimulates corruption.

Of importance, however, is not only the amount of money the State assigns for the functioning of the judiciary, but also the way in which decisions on the exact amount and purpose of the funds are taken, the way in which the money is collected and the issue of who exactly decides how it is spent. This represents the known problem of the so-called court budget, formed separately from the general State budget. Serbia made a first step in that direction, by channeling part of the profits of justice into judiciary spending. However, the true budgetary independence of judiciary, with regard to the executive branch, has not been attained, and this represents not just a potential key point of “institutional” corruption, but also a basis for relatively unclear financial

dealings, which may undermine the authority of the court, and make it vulnerable to corruption. The judiciary itself does not influence the size and the structure of funds/funding.[11]

Exogenous legal factors

Transition not controlled (insufficiently controlled) by law

In the chapter dealing with endogenous factors of corruption it will be shown how imperfections in the legal system, which are inevitable in a period of transition,[12] open up possibilities for abuse of judicial office, meeting the above described corruption motives, under the influence of corruption.

The role of law (and the state) in transition is, among other things, to set up and control the rules of the game which provide for a firm legal regulation of the transition processes. Certainly this is a goal that may only be strived for and there is no transition society where transition actions have not also took place in the grey area, on the fringes of the law, in a zone that erroneously had not been regulated for or through invoking completely illegal means. The history of privatization in Serbia, the fact that there were periods when more of it took part in the grey zone than within the bounds of the privatization model established by law,[13] may serve as an illustration of this fact.

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[11] As an illustration, we may offer a scandal that provided the press throughout last summer with a constant supply of verbal exchanges between the Justice Minister and acting President of the Supreme Court. Namely, the law requires that all judges of the Special department of the Belgrade Municipal Court charged with trying cases of organized crime have salaries three times higher than regular. Since the Supreme Court acts as an appelate court on first degree decisions of the Municipal Court, this was understood to mean that judges of the Criminal Department of the Supreme Court are also entitled to such a salary. The ministry objected to this reading of the law and retroactively challenged all past payments. Public trust in authority of the Supreme Courtwas certainly further undermined.

[12] See in more detail at D. Hiber - *Pravosudje i ekonomija* (*Judiciary and economy*), Bilten instituta G 17plus (G17 Institute Bulletin), No. 2/2002.

[13] For all of the above, see D. Hiber - *Privatizacija i denacionalizacija* (*Privatization and denationalization*) in "Pravna i ustavna pitanja jugoslovenske države" (*Legal and constitutional issues of Yugoslav state*) , Beogradski centar za ljudska prava (Belgrade Center for Human Rights), Belgrade, 1999, and D. Hiber - *Privatizacija, moć države i uloga prava* (*Privatization, power of the state and the role of the law*), Sociologija, No. 1/1993.

Under these circumstances, the potential beneficiaries of transition are ready to invoke any means in order to attain set economic goals and corruption is a tool they use against all state services, including the judiciary. The corruption motive is strengthened by very strong economic motives and corruption is regarded as transaction cost. An imperfect legal system, on the other hand, makes it easier for judges and other employees in the judiciary to issue decisions that meet the expectations of the corruptors, or to organize a model where corruption seems necessary.

Just as an illustration, one may give the example of very slow registration procedures, where corruption enters the scene as a potential factor of acceleration; or "use" of injunctions in order to enable the realization of (illegal or dubious) economic goals even without deciding on the merits of the dispute. The general public is inclined to believe that such things happen in bankruptcy cases as well.

In cases where these processes were directed predominantly to the detriment of socially-owned property, as a type of property without an identified owner, it seems that this mechanism was used rather frequently. Nothing new under the sun – this is a model recognizable from England during the primary accumulation with regard to the (mis)use of the system of enclosure.

Detecting, indicting, incriminating

According to the survey, corruption is present and relatively widespread in the judiciary, to a larger extent according to entrepreneurs and attorneys, to a lesser extent according to those employed in the judiciary. Corruption is also a criminal offence.[14] According to court statistics, however, there has been very little of it: the number of processed cases is negligible.

It is possible to defend the hypothesis that the "dark number", a number of cases of corruption in judiciary that have neither been detected, or registered, is larger than in most other criminal offences. This is supported by the respondents' answers to one of the survey questions: asked if they have given a bribe in the

[14] Amednments and additions to Criminal Law of ther Republic of Serbia, *Official Gazette of Republic of Serbia*, no.10/2002, art 255d, a new criminal offence of *Corruption in judiciary* has been introduced, as well as offence of *Abuse of position of legal representative* (art. 255e). For more on these incriminations, see chapter *Mechanisms of corruption in judiciary*.

surveyed period, 64.7% of them answered “I do not know”.[15] This is, of course, an impossible answer, and it may be read as “yes” or as concealment.

The extent of corruption and the need to strengthen the general prevention of crimes through the so-called legislative policy on crimes was probably what prompted the legislator to single out corruption in the judiciary as a separate criminal office (threatening serious punishment for it). However, this far from sufficient, just as one may not count too heavily on law enforcement authorities; let us repeat that it is very hard to detect these offences without the collaboration of one of the co-perpetrators.

One may, however, also present the opposite hypothesis. A small and stable number of processed cases of corruption in the judiciary could be explained by the fact that they actually do not occur in significant number and that the perception of the survey participants is unfounded when it comes to this survey and to many others. If the corruption is hard to detect, actually almost always on report of the one giving the bribes[16], if corruption had been widespread one would have had to detect irregularities of court procedure that are characteristic of corruptive behavior, illegal work or work that is below professional standards, that is, services rendered in bad faith, according to the terminology of the legislative provisions. This standard of work must, in turn, serve as a basis for the disciplinary (labor law) responsibility of judges and other employees in the judiciary or for initiating dismissal proceedings against the judges. Given the fact that the “statistics” of those cases are just as negligible as is the number of processed cases, one may conclude that seriously widespread corruption in the judiciary is figment of the imagination.

However, one more piece of survey data confirms the first hypothesis (that corruption in judiciary is a serious phenomenon and that the number of occurrences is serious) and works against the second one.

The respondents of both categories[17] emphasize the importance, and at the same time, the lack of, “internal control” of the judiciary, and the legal regulation of possible responses to illegal

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[15] See Table 16 in the chapter on *Entrepreneurs on corruption in the judiciary*.

[16] That is why criminal codes provide for milder sanctions and even exculpation of those who report that they have bribed someone. See Criminal Code, *Official Gazette of the Republic of Serbia 26/77 through 67/2003,* Article 255 (3).

[17] See Table 14 in chapter *Judiciary officials on corruption in judiciary* and Table 24 in chapter *Enterpreneurs on corruption in the judiciary*.

behavior. The same idea re-surfaces in the survey, again within the group of questions dealing with the causes of corruption and the management of the fight against corruption, where participants suggest that promotion within the ranks of the judiciary should be strictly related to the quality of performance.[18]

It is, therefore, possible to identify absence of efficient control, both internal and external, as a factor of corruption in the judiciary.

Further, one may also defend the hypothesis that this insufficiency of control mechanisms is further "strengthened" by some kind of personal solidarity between those employed in the judiciary (in contravention to professional ethics). There is talk about corruption, insiders reveal it even in this survey, but they regard it as something that happens somewhere else, and not in the closest and, therefore, most visible surroundings.

Therefore, one should single out as a corruption factor, the lack of internal "control" measures - detection and eradication of behavior that might be a result of corruption. Actual respect for certain principles and regulations in force, which will be pointed out, paints a clearer picture of this corruption factor. In particular, it will present the full complexity of "fine tuning" once this factor is related to the independence of courts and judges, given that the lack of independence presents, as we have already shown, a separate corruption factor; supervision over performance of judges may represent pressure of sorts, and even come as the result of corruption. Therefore, the following should be supported:

- Consistent monitoring of results (quality and quantity)[19], and equally consistent reference to these results when it comes to promoting judges, as well as in the case of initiating their dismissal;
- Higher courts' coordinated and consistent observation of lower courts' performance;
- Appropriate regulation of the right of redress, including instruments available in cases when complaints are justified, especially in the cases of prolonging court disputes.[20]

The essence, therefore, should be an institutionalized possibility of timely reaction and certainty that bad performance in the

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[18] *Ibidem.*

[19] *Law on Judges* (Zakon o sudijama) envisaged personal records for every judge. In addition, *Court Regulation* (Sudski poslovnik) envisaged periodical and annnual tracking of results of (every) court, department and judge, through work reports and statistical reports.

[20] Likewise, *Court Regulation*, articles 8-10.

judiciary will be sanctioned. Corruptive behavior will then be easier to detect, and will not be cloaked by widespread lack of discipline, improper and incompetent work of the judges and other judiciary employees.

After the completion of the survey which served as the basis for this research, certain legislative amendments, to the extent possible in this procedural framework, reacted to this need by forming a special *Supervisory Board*, which was charged with the task of investigating the justification of complaints on illegal or delaying behavior by the courts.[21]. Such a novelty is undoubtedly justified and useful, yet it is still too early to judge its effectiveness.

Finally, this corruption factor (and its reduction) is connected to reorganization of a whole set of procedural rules, but also to amendments to regulations and other internal procedures which regulate not only the behavior of courts and judges, but also that of parties and their representatives. Abuse of certain procedural entitlements by the parties and their representatives may, on one side, also contribute towards creating a picture very similar to the picture that comes as a result of corruption. Just as there can be no corruption without the active participation of a party to the dispute and, as research of corruption mechanisms has shown, without participation of their attorney on a considerable number of occasions. It is conceivable, and probably not that rare, to witness an illegal decision based on corruption in which those employed in the judiciary did not take part, e.g. when a party to the dispute or its attorney bribes the court expert.

Incompetence and erosion of profession and professional morale

In the previous paragraphs we have outlined and defended a hypothesis on the correlation between the degree of independence and degree of corruption in the judiciary.

It is possible, in the same fashion, to establish a hypothesis on the correlation between the vocational and the wider professional (in)competence of judges and other judiciary employees and (to the same extent) independence and (non-)corruption.

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[21] See art. čl. Law *on amendments to the Law on Judges* (*Zakona o izmenama i dopunama zakona o sudijama)*

A judge or some other judiciary professionals whose competence, knowledge and experience are not sufficient for normal exercise of the powers invested in him, becomes especially vulnerable to pressures, and even institutional or political corruption. Insecure about their position, they really are dependent on the president of the court they are in and on the presidents of the higher courts. It is conceivable to picture someone who asks for help and advice, then the presidents' suggestions and finally gets involved in institutional or classic corruption.

It is also possible to present a hypothesis that the Serbian judiciary suffers from a certain dose of competence insufficiency, and this hypothesis is confirmed by the survey which scores a high number of answers that have a common denominator: errors, insufficient knowledge or lack of attention.[22]

Some of the causes of this situation have already been described: the sudden loss of experienced judges, had the replacements even been made according to professional and not party criteria (as well), would have resulted in a radical lack of experience within the ranks of available judges. New judges, even of the higher or highest judicial instances, were recruited although they had no experience in the judiciary.

There are deficiencies in legal education, but they continue even after graduation. The final vocational exam necessary to become a judge, the judiciary exam, follows a disputed concept.

The deficiencies of education and examination are particularly pronounced during transition, which presupposes radical change in the legal system, and even in the "legal philosophy" and system of values.

Under such circumstances, and taking into account the insecurity of judiciary officials, the unsuccessful and incomplete judicial reforms, the trumpeted and then silently abandoned idea of banning certain judges from office, it is understandable to witness an erosion of professional ethics, the ethics of those employed in the judiciary, or those who are professionally linked to the judiciary (attorneys, court experts who participate in the procedure….). Respondents to the survey have confirmed that the general morality crisis and erosion of professional ethics represent one of the most important factors.[23]

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[22] See, e.g. tables 3 and 4 in the chapter *Comparing the results of the survey of judiciary professions and enterpreneurs*.

[23] See Table 13 in the chapter *Judiciary officials on corruption in the judiciary.*

ENDOGENOUS FACTORS OF CORRUPTION

General remarks on internal factors of corruption

Therefore, corruptive behavior in the judiciary is influenced by all the factors that affect corruption in a given society, including those factors that have a legal dimension. Their influence is, of course, marked by all specific characteristics of the judiciary.

The extent of corruption in the judiciary is also influenced by all the factors that facilitate, or foster the emergence of corruption, be it that they vest in holders of judicial office power to meet corruptive interests (more easily), be it that they enable them to do the same thing with less risk of behind detected or prosecuted, even when someone detects an aberration from legal (regular) behavior and suspects that corruption is the underlying cause for that aberration.

The following areas matter: the system of judiciary organization and its functioning, regulations on court organization and on the way in which they are implemented, procedural rules, but also substantive ones. Given that they regulate relations within the judiciary, we have chosen to regard all of the rules listed above as endogenous, or external, judiciary factors.

A complete analysis of legal institutes related to these corruption factors is clearly not possible. The remainder of this paper will concentrate on those points that our working hypothesis regards as key issues for establishing a legal milieu that favors the spread of corruption. As a rule, this will be carried out alongside the general *de lege ferenda* positions, since it is impossible to identify such “key issues” without questioning the existing regulatory solution and that, in turn, is not possible without comparing it with an alternative.

Imperfections of the legal system

In continental legal systems (to which our system also belongs), the judiciary (interprets and) applies the law, reacting to illegality or deciding on disputes between legal positions. The quality of the role that the judiciary actually enjoys is, therefore, dependent on the quality of the law itself, on the extent to which the normative side of legal order fulfills the needs of (a particular) society and of the principle of justice, as understood in that society. The quality of a particular law also has its technical legal dimension (internal

quality of the law), and it is mostly apparent through two principles: the totality and harmony (non-contradicting) of the legal system. A court cannot refuse to adjudicate, claiming that a certain legal provision is lacking, or that some provisions contradict each other. Even when they are actually lacking or contradict each other, which happens occasionally in virtually every legal system, the court has to deliver justice.

Serbia is undergoing transition. While creating a new legal framework for economic activities, the following issues have to be solved in parallel: (a) deregulation and liberalization, (b) creation and building of new legal institutions, and (c) thorough reform of the existing ones. This is a process that requires a certain amount of time, and therefore occasionally unavoidably generates not only imperfections, but also a (partially) non-harmonized and internally contradictory normative system. The parallel existence of the old and the new, even mistakes and distractions when creating the new, the clash of new institutions and the legal "tradition" which develops with well-known conservative inertia – all of these, over a certain period of time create the appearance of a chaotic and unreliable legal system. This is aggravated by necessary legal reactions against the quasi-law that preceded transition and against the fallout of such quasi-law. Formally, this reaction appears as something contrary to what should emerge from the transition processes. For instance, some transition societies faced the problem of re-privatization (denationalization), we faced the problem of a nomenclature which converted its political power, or proximity to ruling circles, into wealth (this is what the rules on "extra-profit" attempted to curb). At the same time, on one side there are requests for "revolutionary" change of property relations, on the other, there are attempts to establish respect for property rights. These contradictions have a wider reach, as affected interest groups use them in order to question the entire process of transition.

The challenges for the judiciary posed by transition are partially laid out in the section dealing with uncontrolled transition. What we want to show here is the role and position of the judiciary in creating a transition ambient, a legal framework for economic reforms, including the process of amending that framework. These constitute the elements of an answer to the question of how the judiciary should react when, due to insufficient speed of legislative reforms, or due to uncoordinated velocities between different segments, it has to apply obviously outdated rules, has to act in a

clearly anti-reform manner, or solve the problem of incomplete regulation or regulation that is not harmonized.

A basic legal principle that every lawyer is ready to embrace reads – *Dura lex sed lex*, strict law, but law; law has to be applied as it reads. A particular judgment may indeed be contrary to the system we are striving to build, nevertheless, judicial practice must be unified on that position. It is up to the legislature to do its job, but until then, the court is bound (by the law) to obey. Some would moderate such a strict stand by comparing principles of legality and legitimacy; this approach was very "popular" in our public arena for a while, and even applicable and actually applied when some fundamental legal values were at stake (hardly in the case when the issue was about the non-applicability of technical legal provisions). Perhaps the solution might be found in legal rules on the interpretation of law, application of teleological and value approaches, in order to arrive at the very frontier of the possible meaning of a rule. From a historical perspective, this is not an unknown model. Already at the time of the Roman praetors, legal fictions were used in order to broaden the borders of meaning of *ius civile* rules. When it comes to applying rules that regulate commerce, our recent legal history has sometimes embraced this "triumph of facts over the rule', e.g. when accepting the revalorization principle during the time of hyperinflation, in contravention to the statutory principle of monetary nominalism.

The imperfection of the legal system was further exacerbated by the re-composition of the former FRY federation into the state union of Serbia and Montenegro. Numerous legislative powers were transferred from the federal to the republic (Serbian or Montenegrin) level, the federal court ceased to exist, and the loyalty of the military judiciary is unclear (given that the Constitutional Charter envisages its dissolution). Earlier federal laws were taken over in such a way that confusion was created even with their titles (e.g. Serbia had at one moment two Criminal Codes, so the earlier federal one was branded with the name of a state that no longer exists (Yugoslav).

One thing is sure, An imperfect legal system not only gives power, it actually creates an obligation to decide in a discretionary manner, that is, to chose between several possibilities that are equally (il)legal.

This is, of course, a key point for corruption which permits the following hypothesis: an imperfect legal system represents one of the factors of corruption.

Court organizational regulations

When analyzing the political elements of corruption, we discussed attempts to create a new system of appointing, promoting and dismissing judges and other judiciary officials, and described how those attempts went astray. On one hand, retention of an inherited cohort of judges which was subject to numerous sharp criticisms and, on the other hand, insecurity and uncertainty, had to contribute to the erosion of professional ethics (while at the same time probably representing a basis for institutional and broader political corruption).

Actually, the whole process of *legislative* reform of the judiciary shared the same fate. Laws on the judiciary that were passed against, at first the silent, and later ever more open resistance of the relevant ministry, were amended, and even those amendments were challenged. furthermore, even three years after their adoption, some provisions have not yet been implemented.

The law envisaged a new structure for the judiciary network, that was meant to fulfill several goals, some of which could be regarded as anti-corruptive in content.

First, in order to increase efficiency, especially efficiency in the first court instance, municipal courts lost their appellate quality and remained only courts of first instance with regard to some more significant criminal offences and certain specific forms of litigation. The Appellate Court was introduced as a second instance court, and the Supreme Court was to keep only its power to reach a final decision.

Second, another step toward further specialization of courts has been undertaken (besides renaming the commercial courts) and the introduction of Administrative Court, which should relieve certain pressure from the Supreme Court (which also had powers of administrative adjudication), so that one may expect it to further establish and improve uniformity of court practice and case law.

Although *vacatio legis* has been set rather sensibly, transition to a new structure has been postponed twice, the second time involving quite a legal scandal, since the decision on postponement was delayed, resulting in a situation where Serbia at one moment had no second instance courts and the Constitutional Court had to temporarily undertake the regulating jurisdiction of the courts (by retaining the old structure). The latest amendments further postponed the introduction of appellate and administrative courts.

All of the above could not contribute to legal certainty and confidence in the judiciary, and insecurity and lack of confidence inevitably increase the tendency to reach goals at any cost, including corruption.

The judiciary laws have regulated the network of courts and their jurisdiction, as well as issues of judges and prosecutors. Quite understandably, some of the issues were left to sub-statutory regulation.

The most important of those is the Courts Regulation. [24] This regulation is a very detailed and extensive act (almost 400 articles), which attempts to establish firm and transparent procedures in internal court activities. When trying to regulate objectively different situations or conditions of work ("large" and "small" courts, for instance), it is not always consistent and precise and aside from possible technical shortcomings, there are several issues of interest worth mentioning for analysis of elements of corruption in the judiciary:

One deals with the *competencies and responsibilities of the court president*. The court president has manifold powers. On one hand, he/she embodies the court administration taken in its narrower sense, organizes and supervises operations of the court in material and technical matters. On the other hand, he/she exercises authority over delivery of justice, on issues ranging from monitoring (the efficiency) of court departments, to accepting and handling of complaints from litigants.

The court president may, in certain situations, influence the distribution of cases in court to particular panels (evading the random judge principle), and exceptionally even take the case away from one judge and assign it to another.

The court administration, including the court president, has, on the basis of the Regulation, quite wide-reaching powers. (Therefore it is not unusual to find competition for this position quite fierce, and attempts by political circles to exert decisive influence over the appointment of court presidents.

In preparation for this research, the working hypothesis contended that the overall position of the court president may be one of the key points of generating influence over the judiciary, including corruptive influence. The hypothesis has not been fully confirmed by the survey; those employed in the judiciary and commercial parties to court procedures do not perceive the court

[24] "Sl. glasnik RS" (Official Gazette of Republic of Serbia), no 65/2003.

presidents as highly responsible for corruption.[25] However, this "result" does not correspond to the perceived importance of internal control in eradicating corruption.

Another set of issues of interest are the competencies and responsibilities, and the overall status of court employees. Careful analysis of procedural laws, in particular the Law on Enforcement Procedure, reveals that court employees have a number of public powers, understood in their narrower sense. They are entrusted with deciding and acting on issues that have direct consequences on the rights of the parties.

However, their status has not been consistently regulated. In short, it is equal to the status of any clerk employed in the civil service, while judges and court presidents occupy a position above them akin to that of a superior in the administrative hierarchy. This further means that no special training is envisaged for their position, and that their responsibility is not adequate in judicial matters.

It is possible to offer a hypothesis that this undefined status opens the possibility for seemingly small corruption, "little" manipulations, in matters such as service of process, manipulation of submissions within the records office, etc.

However, according to the survey, neither court employees receive an especially high rating (in a negative sense) when it comes to corruption, except for court enforcement officers (bailiffs). One of the possible explanations is that these kinds of manipulations, meeting corruptive promises, are the most difficult to detect, and that such manipulations performed on request of the judge and under his/her supervision.

Procedural legislation

Rules of the Law on Civil Procedure as a corruption factor

When describing mechanisms of corruption in the judiciary, it has been shown that often the corruption expectation, or the corruption goal, is to delay a final court decision, which amounts to buying time. One can present a working hypothesis that rules regulating court procedures, in particular the Law on Civil Procedure, enable the judge, or court panel to direct procedure in a

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[25] See tables 8 i 12 in the chapter of *Judiciary officials on corruption in the judiciary* and tables 22 i 23 in the chapter *Enterpreneurs on corruption in the judiciary.*

certain direction, deliberately accelerating it or slowing it down. If this hypothesis is correct, we have a syllogism where rules of civil procedure enable (facilitate) corruption.

Promulgation of an illegal court decision, sanctioning of a right that does not exist or denial of right that exists, does not only represent a breach of substantive and procedural rules, but may also be a consequence of imperfect application of imperfect rules of procedure. If this is a result of deliberate actions, if possibilities offered by procedural rules are deliberately abused in order to reach an illegal decision, one may offer the hypothesis that corruption is behind it.

Rules of civil procedure are complex by nature and governed by formally opposite principles. For instance, on one side we have the principle of material truth, an attempt to base every court decision on wholly and completely true sets of facts. Opposed to this is the principle of procedural economy, which requires that procedure should be as short as possible and as cheap as possible. In shaping procedural institutions and rules of procedure on the basis of those principles, it is always possible, under certain circumstances and conditions, to favor one over another. In different periods and within different legal systems, preference was given to one set of principles or the other, while our procedural legislation is characterized by dominance of the principle of material truth over the principle of procedural economy. This means that in practice court procedures last a long time, and that, according to the presumptions laid out above, present corruptive incentives for manipulating the time frame both ways. Besides, a judge, or judge presiding over the panel, directs the procedure. His/her decisions on time and the order of procedural actions directly affect the length, but also the legality, i.e. correctness of the procedure.

The fact that the judge governs procedure follows from the very nature of court procedure, especially it accusatory, penal variant (criminal, misdemeanor, partly bankruptcy). But problems may occur even regarding those procedures that are based on the principle of disposition (litigation, enforcement to a great extent), especially if the judge takes too much latitude in deciding on procedural issues, within the discretion he/she enjoys, and consequently when it comes to the way in which such process is legally controlled. The judge’s wide discretion, limited and, especially, delayed control, enable varying use and abuse of this system. According to the Law on Civil Procedure (LCP), (Presiding) judge directs procedure by issuing rulings, and appeals are normally not allowed against such rulings. They may only be

challenged when challenging a decision which ended the procedure itself. Therefore, until the final decision is reached, the judge is allowed to accelerate or shorten the procedure, while influence over his/her behavior is rather limited. A party that is not satisfied or considers itself hampered may only object to his/her behavior before the court administration. The court administration, in turn, does not have any particular powers regarding procedure, as previously shown; if illegal or unprofessional behavior of the judge, especially when repeated, is detected, this may only serve as a reason for his/her dismissal, *capitis deminutio maxima*, which is by its nature a very rare sanction, and even rarer in our judiciary. Another legal recourse is the request to excuse the judge. If such requests were granted often and easily, this would ultimately have the effect of compromising the judiciary, but also delay of procedure (in accordance with the principle of directness, once a member of a panel is replaced, all procedural actions already carried out have to be repeated). It is known that in our court practice the excuse request is used, or abused, as tool for procedural delay (although the survey has not confirmed this completely). Finally, on the initiative (objection) of the party, or on its own supervising duty, the court president may, in accordance with the Court Regulation, order a certain action to be taken (e.g. scheduling of the main hearing), if he/she finds out that the procedure has lasted inexcusably long or there are some deficiencies in the way it is being handled, but again such actions have no consequence in the case itself. The court president may also "take the case away" from the judge or panel to which it has been assigned, and assign it to another judge or panel, but this means that the procedure starts anew with further loss of time.

The above should enable the following hypothesis: various factors make corruption lucrative or tempting for the active, as well as the passive side. Imperfect procedural rules, or rules not adapted to circumstances represent a factor which may facilitate or enable the fulfilling of corruptive goals.

Having in mind the corruption mechanisms described above, and using one "complete" litigation model, in the pages that follow, we will try to identify those institutes and rules of procedure which may be presumed to constitute factors of corruption in the sense already described.[26]

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[26] At the same time, what is at issue are the conditions in which corruption mechanisms are shaped. See introductory part on mechanisms, where they are determined in accordance with actors and procedures, means of fulfilling corruptive goals, which is carried out through (ab)use of a procedural rule.

Litigation starts when process is served on the defendant (delivery of action), naturally with the assistance of the court. Therefore, the court documentation office is the first instance that deals with a case (procedure). The way in which the court documentation office functions in this, and later phases, may decide the fate of the case, and even represent a source of manipulation (including corruption).

The way in which arrival of the claim is registered, first, influences the application of random judge rule, described in analysis of corruption mechanisms. Rules on entry records and entering of claims are provided in the Court Regulation, however, no matter how strict they appear to be, manipulation is technically possible.[27]

The action has to be served on the defendant. Since official registries of physical and legal persons are not perfect, and bearing especially in mind the way in which rules on service of process and documents are arranged and implemented, the start of the litigation may be delayed until the action is served on the defendant. This applies to all later documents that are served to one, or both of the parties (invitations, submissions). Therefore, the problem of *service of process (documents)* appears as an important field for corruptive activities.

Once this "obstacle" has been overcome, establishing the factual background of the case, as well as establishing and evidencing facts which serve as the basis for a court decision depends (save for exceptional circumstances) on the initiative of the parties. The way in which parties' rights and obligations with regard to invoking facts that they consider advantageous, or offer evidence, is of great importance for the efficiency of the litigation. At the same time, while directing procedure, a judge may react in different ways and enable extension of shortening of the time in which the parties may invoke facts and offer evidence.[28] Directing procedure is regulated in such a way that the disposition principle

[27] See arts. 136 – 145 of the *Court Regulation.* Employee of the court, for instance, alone determines the order of entry of several submissions that have arrived in the same batch of mail.

[28] According to LCP, parties may invoke facts, submit proposals and evidence until the very end of the main hearing, while also enjoying *benefitio novorum* on appeal, i.e. they may use facts and evidence they have not used in first the instance procedure. It is up to the judge to decide when the facts of the case, or evidence offered, suffice for issuing a decision, and therefore end the main hearing. This, in theory, opens up the possibility for never-ending litigation.

retreats before the principle of officiallity. Having this in mind that *rules on directing the procedure of gathering facts and evidence* may also act as a corruption factor.

While pursuing material truth and attempting always to reach a just decision, the law envisages several instruments which are designed to protect parties from omissions which are not their fault (e.g. *restitutio in integrum*). The way in which those rules are interpreted and accepted may also enable manipulation of the duration of litigation.

While pursuing material truth, our law proclaims free assessment of evidence and authorizes judges to accept or refuse evidence offered at any given moment of litigation, and also allows them to initiate demonstration of evidence, on their own initiative, even when the parties have not requested it. On one side, as it follows from corruption mechanisms already described, the direction of evidence gathering may represent a method for "justifying" illegal decisions, especially if some piece of evidence is given greater weight.[29] On the other side, this also represents a potential source of manipulating the duration and outcome of the procedure.

New facts and new evidence may be submitted by the parties not only during first instance procedure, and on appeal, but they enjoy this right without regard as to whether they were actually aware of those facts or in possession of such evidence, or such facts and evidence represent for them a genuine novelty.

The law prescribes instructive deadlines for a whole set of situations that deal with the duration of the litigation, especially on actions that are to be undertaken by the court. Exceeding these deadlines does not have any immediate consequences for litigation, and only rarely and indirectly, does it affect the career of the judge. For instance, the law prescribes a time limit in which, once main hearing is completed, the judgment has to be written and dispatched to the parties, but that time limit is only instructive. As another example, the law and Court Regulation prescribe what the first instance court should do in the appeal procedure, but one can never tell what the time frame in which first instance court will actually dispatch the case to the second instant court, and vice

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[29] See table 3 in the chapter *Comparison of the results of the surveys of judiciary professionals and entrepreneurs.* As the survey shows, in most of the cases judges trust expert testimony a lot and base their judgments on it. For the way in which court experts are appointed (always appointing the same experts) see chapter *Judiciary officials on corruption in the judiciary*.

versa will be, or the period in which the second instance court will, once it reaches its own decision, return the case to the first instance court for further processing. Listing similar examples could last quite a while.

We will now consider certain legislative solutions which appear rather suspicious in this respect, with the clear intention of initiating their amendment.

- *Service of documents (delivery)* is carried out, as a rule, through the mail, and it can also be carried out via a court delivery clerk, a competent municipal authority, or directly at the court. In cases when the law prescribes personal delivery, and especially in cases when proof of delivery ("return receipt") affects the way in which later actions may be taken or the very possibility that such actions be undertaken, delivery irregularities elevate it beyond being a simple material act of handing a document over or leaving it at a certain place. Experience, as well as this survey, shows that delivery presents a real procedural problem.[30] Relaxing delivery rules could, however, endanger the parties' undeniable right to state their case. This, however, does not mean that delivery rules could not be improved and modernized. One should consider electronic and fax delivery, but also licensing special organizations which would conduct delivery on a professional basis. Special rules might be prescribed for delivery to legal persons in commercial matters (e.g. mandatory P.O. box at court premises). When it comes to preliminary submissions, the same goes for direct delivery between the parties themselves.
- *Concentrating the facts of the case and benefitio novorum* is a matter that deeply affects the basic principles of existing procedural law in Serbia. Shall we accept a principle which would oblige the plaintiff and defendant to state all (possible) facts and evidence in the action and response to action, or shall we allow them to do that until the end of the main hearing, as currently stipulated by law; shall we limit the admission of new facts and evidence on appeal only for

[30] Delivery irregularities, including manipulations, are singled out as problems by procedural parties and judiciary employees and judges who participated in the survey. See Table 2 in the chapter *Judiciary officials on corruption in the judiciary* and Table 11 in the chapter *Entrepreneurs on corruption in the judiciary*.

justifiable reasons, and to what extent should the judge be allowed to change rulings on directing procedure.

- *Consequences of failure to appeal and of overstepping deadlines*, except for several occasions in which preclusion undoubtedly appears, are determined as possibilities to later undertake some procedural action, to postpone the hearing, and this permits purposeful or unplanned manipulation of the duration of the procedure. Where consequences are severe (judgment due to not appearing before the court, for instance), court practice shows that *restitutio in integrum* is granted easily. Procedural discipline, for both court and parties, favors the disposition principle of civil procedure.
- *Participation of laymen* is criticized for good reason. Even if this democratic legacy is still justified in criminal procedure, one could question its existence in civil matters.
- Given the discrepancy between the normative framework and actual reality*, regulating in a new way certain means of evidence through laws and sub-statutory regulation* is something that should be considered. The principle of material truth and free assessment of all means of evidence suggests that, in principle, all means of evidence are on an equal standing (except for the presumed truth contained in public records. Our survey has confirmed the hypothesis on a significant role reserved for court experts in commercial matters, and expertise as a potential key point of manipulation and even corruption. Regulating expertise in a separate piece of legislation and introduction of strict professional codes of conduct seems beneficial.

CONCLUSION

Illegal, unjust sentences, false witnesses, and bribed judges have existed since the beginning of the judiciary. However, the danger for a society increases with the spread of corruption. The first question in attempting to formulate a strategy for combating corruption is what factors lead, allow and facilitate corruption – turning it from an incidental occurrence into massive corruption, and what are the factors of corruption in the judiciary.

Corruption in the judiciary is influenced by all the factors that lead to corruption in society at large, with certain specific characteristics.

This can be seen in the analysis of the *economic* factors of corruption. An under-paid judge or court official will be more susceptible to corruption than those with a satisfactory economic status. The same applies to customs officers, doctors or policemen – those with small income are more susceptible to corruption than those better paid. This type of economic factor is certainly present in Serbia.

In addition, the economic factor also influences the complete judiciary environment. This environment determines the quality and efficiency of the judiciary – there is an inverse proportion between quality and efficiency and corruption: in an inefficient and not always competent judiciary, corruption is more easily hidden and this type of judiciary generates specific corruption motives (manipulation with time) etc.

Finally, economic transition, if its flow is not adequately legally determined and if the rules of the game are not clear, can also breed specific and strong corruption motives and be a strong factor of corruption pressure i.e. readiness of the corruptor to bear this "transaction cost".

Contrary to the principle of judicial impartiality as a guarantee for a fair judiciary we have *political* factors of corruption. In a state that was until recently ideological and still has noticeable elements of a party state, political pressure on the judiciary has different forms.

Firstly, there is the so called institutional corruption, sentencing according to state directive, primarily directives from the executive government. Following the democratization of the political scene, today it will rarely be seen in its classic form of staged political processes, and its contours are most visible in those segments of the economic system where the state strives to keep a commanding role.

Politics, or in other words the executive and legislative government strives to maintain the paths of influence over the judiciary. This can be seen, for example, in the meandering over the establishment of the new judge election and dismissal system. The pressures on judicial independence, however, emerge also as a separate corruption factor. They breed insecurity and a sense of the transitory and thus decrease resistance to corruption pressure.

Research has shown the special importance of *judicial* corruption factors. By judicial factors we mean those characteristics of the judicial system that facilitate manipulation in court procedures and make corruption less visible.

The analysis has shown that court organization law is neither stable nor stabilized, that Rules of Court Procedure provide significant discretionary powers to court officials and are insufficiently clear in defining the role of administrative court departments, and that certain rules are too complicated. All of this creates an environment prone to abuse.

Procedure legislation, with rigid procedural frameworks and with almost unlimited discretionary rights of the judge is the second judicial corruption node.

Finally, procedural and organizational rules do not guarantee sufficient control and monitoring tools (that would not endanger the independence of the judge) and timely reactions to unacceptable behavior.

In the transition period, where the Serbian judiciary suffers from weaknesses typical of transition judiciaries, the weaknesses seem over-pronounced. Therefore the judicial factors are not only important for (facilitating) the spread of corruption in the judiciary, but act as potential strongholds in the fight against corruption.

VII Consequences of corruption in judiciary

INTRODUCTION

The analysis of the consequences of judicial corruption, primarily in the commercial judiciary and its economic and legal aspects entails the need to first examine the economic characteristics of the services that are provided or should be provided by a country's judiciary and the economic specificities in providing these services. A competent, efficient and impartial judiciary of a country represents one of the basic elements and preconditions for the rule of law. From the viewpoint of economic subjects this rule of law is embodied in an efficient protection of private ownership rights and an efficient monitoring and support in contract execution. At the same time it is important to note that one of the key elements of the rule of law is efficient prevention (primarily general prevention), i.e. motivating economic subjects to refrain from violating private ownership rights of another entity and another's rights arising from a contract, that is, stimulating the fulfillment of contractual obligations.

The rule of law can be viewed as a public good, maybe the most important public good that the state can provide. A public good and therefore the rule of law have two main characteristics. First, there is no rivalry between the users of the rule of law, the fact that one economic subject enjoys the protection of ownership rights does not mean that the other economic subject is deprived of this protection. Second, there is no realistic possibility of excluding the user who has not paid the rule of law service – in economic terms, the costs of excluding a user are prohibitively high. In other words, the rule of law is a public good enjoyed by all economic subjects (physical and legal entities) located on the territory of a certain country.

Establishing and implementing the rule of law are linked to certain, very high fixed costs. These costs are related to the establishment of all institutions enabling the rule of law – creation of laws (efficient legal authorities), an efficient judiciary for implementing the laws and establishing other rule of law institutions (police, penal institutions, etc.). In addition to the costs for establishing the rule of law institutions, fixed costs are also the costs of maintaining the "capacity" of the legal state to act in the case when laws are broken, private ownership rights are violated and contracts are not honored, i.e. the costs necessary for the state to be a real threat to those who do not abide by the law or honor a contract. Not only are all these mentioned costs fixed (for a given country measured by, for example, the number of economic entities or volume of economic activity), but they are also almost completely irreversible (sunk costs), i.e. the allocated resources cannot be used alternatively, and it is therefore economically efficient (since the marginal costs or costs of providing the service to an additional customer, equal to zero) to provide the rule of law service free of charge to all those seeking the service – charging for the rule of law service is not only practically impossible it would also be economically inefficient.[1]

The characteristics of rule of law (public good) services, i.e. the characteristics of the institutions providing these services require that in modern states these services be paid from the budget, from funds collected through tax and other fiscal revenues. In other words, the rule of law services should not be paid directly by the users since they have already paid for them as taxpayers.

One of the key components of the rule of law is the judiciary. The question to what extent is the judiciary, and for this study even more importantly, commercial judiciary a public good can best be analyzed via an example. Let us look at the case of a dispute – a court procedure initiated by one interested party who thinks that his/her ownership rights have been violated or the contract has not been honored, and has therefore resulted in loss for this party. If we analyze the case according criteria of rivalry, we can see that all the resources directly engaged in solving the dispute, i.e. passing judgment cannot be engaged for any other job (for instance, another dispute), therefore we could say that there is rivalry between potential users. In addition, the participants in the

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[1] One of the basic rules of maximizing economic efficiency says that prices should equal marginal costs. Therefore, if the marginal costs are zero, the price should not be different from zero.

dispute are expected to cover all additional court expenses, that is, all expenses incurred in that particular dispute. According to the current legislation, these costs are borne by the losing party, while the party that initiated the dispute must make a down-payment in order to demonstrate his/her willingness to cover the price of the litigation. There is a very efficient way of excluding the user who does not pay litigation costs, i.e. the price of the litigation – without the down-payment, i.e. advanced money the litigation will not begin. This means that the costs of excluding a user that is not paying for the services is practically nil and demonstrates that the second criteria of public good is also not fulfilled. In view of the above, an individual dispute is not a public good, i.e. a public good is not a service for the protection of personal (ownership or contractual) rights through litigation.

In view of the above, in the case of a competent, impartial and efficient judiciary, justice is accessible to all economic subjects if they are ready to (in case they lose the litigation) pay the direct court expenses i.e. the direct litigation expenses. With regard to expenses, this type of judiciary generates relatively low expenses, the majority of which are covered through taxes by the economic subjects i.e. taxpayers (physical and legal entities), regardless of the fact whether they directly use judiciary services. In the area of service provision, a competent, impartial and efficient judiciary presents a key element of the rule of law i.e. of the economic subjects' legal security in the area of private ownership rights protection and the efficient monitoring of fulfilling contractual obligations. In this sense, the rule of law presents a precondition for establishing an efficient market economy.

ECONOMIC EFFECTS OF CORRUPTION IN THE JUDICIARY

What are the effects or consequences of corruption in the judiciary? From the viewpoint of economic subjects (entrepreneurs), corruption in the judiciary is a situation where the entrepreneur in seeking to win the dispute (litigation), in addition to the expected fixed costs, already covered through tax payments and the completely legal operational litigation expenses, also needs to corrupt some of the judiciary professionals and to make a certain number and amount of informal payments – bribes. These additional payments represent a direct corruption expense for the company, meaning that the company's expenses are directly

increased by corruption by the amount of the bribe that needs to be given to judiciary officials for securing the desired outcome of the dispute. Naturally, the higher the amount needed to bribe the officials, the higher the total company expenditures (costs), and the smaller the profit, i.e. profit rate. This is the first direct economic consequence of corruption in the judiciary.

However, we could pose the question on whether this finding (decreased profit of individual companies) related to corruption in the judiciary is relevant as such. This question can primarily be asked by those who, out of ideological reasons, do not consider that, in itself, decreasing profit is something to worry about. Economists could comment that this is a clear case of redistribution – a certain amount of funds, instead of staying in the pockets of entrepreneurs i.e. capital owners as profit, goes into the pockets of corrupt judiciary officials or judiciary professionals. The transferred amount remains unchanged, what is lost by one side is gained by the other, making it a case of redistribution (which some might define as unfair), without any allocation effects, or in other words, without affecting economic efficiency.

A decrease in profits of companies doing business in a certain area where there is corruption in the judiciary leads to a decrease in the relative profit rate i.e. profit rate that can be realized with corruption in the judiciary in relation to the profit rate that can be realized in some other area, where it is not necessary to corrupt judiciary officials. In this situation, capital will inevitably move to the area where a higher profit rate can be made. This will lead to capital flight from countries with a high level of judicial corruption. Moreover, direct corruption costs decrease the real profit rate and therefore decrease the expected profit rates, and the decisions on whether, into what and where to invest capital is based precisely on the expected profit rates. Decreasing the relative expected profit rate results in the situation where there will be no investments in the area with widespread corruption in the judiciary where its direct costs decrease the profit rate. Foreign capital owners will avoid such a country, and domestic capital will flee abroad where they can realize a higher profit rate.

All of the above leads to a decrease in the investment level, due to the flight of domestic capital and what is more important in countries lacking capital, due to the decreased inflow of foreign (direct) investment. This inevitably leads to a decrease in the total amount of investment, and in turn to the deceleration of economic growth i.e. lower growth rate. This is not the case of short term

economic recession, but rather of a deep structural disorder in economic growth that can last for an extended period of time and can deprive a country with high corruption in the judiciary, of dynamic and sustainable economic growth and the possibility to increase the wellbeing of its citizens.

The relative investment level in Serbia is only 15% of GDP, and this is certainly inadequate in relation to the huge investment needs i.e. the needs for intensive investment in new facilities and modernization of existing facilities required for accelerated economic growth. Naturally, a large number of factors influence the level of investment rates, however it is clear that in Serbia a certain influence on the low investment level is due to an inefficient and/or corrupt judiciary that indirectly causes a lower profit rate when compared to the one that could be made if the judiciary in Serbia was uncorrupt and efficient. Furthermore, the level of foreign direct investment in Serbia is too low, since this investment, in the situation where there is a lack of domestic capital, should be the basic motor of economic growth. The present low level of foreign investment must be viewed in light of completed direct foreign investments (since 2001) that enabled the purchase of the most profitable domestic companies i.e. companies doing business in the protected part of the market, such as the privatization of the tobacco industry. Serbia lacks direct foreign investment into new facilities, and especially export-oriented investment, since precisely that type of investment presents the key prerequisite for economic growth of a small and open market such as Serbia. There is no doubt that the inefficiency and corruption in the judiciary in Serbia is one of the causes of low level direct foreign investment.

The mechanism described shows that a cause – effect link has been identified between corruption in the judiciary and economic growth. The higher the amount that needs to be paid for bribing judiciary officials, i.e. to corrupt the judiciary, the lower the expected profit rate, and therefore the lower the investment level and consequently, the deceleration of economic growth. In other words, the higher the amount to be paid for bribing judiciary officials, the lower the economic growth rate. Because of this, the key question is: what influences the amount that needs to be earmarked for bribing judiciary officials – or what influences the equilibrium price of corruption that needs to be paid?

As in the case of any other service, the cost of corruption depends on demand and supply. The answer to the question how

demand and supply for corruption are formed can be found in the economic model of criminal behavior, since corruption is a model of criminal behavior, one that entails punishment i.e. criminal liability. The economic model of criminal behavior formulated by Becker shows that the decision of a potential criminal on whether he/she will break the law depends on his/her expected net benefit resulting from breaking the law, that is, from performing a criminal act.[2] The expected net benefit for the (potential) perpetrator of a criminal act depends on the expected benefit calculated as the difference between the total revenue stemming from this criminal act (including the monetization of the satisfaction derived from committing the criminal act itself) and the monetary equivalent of the punishment for that particular criminal act. Furthermore, calculation of the expected value includes the probability of discovering the perpetrator that committed the crime i.e. the probability that the criminal will be irrevocably condemned. Naturally, with the increase of the total revenue from the criminal act the expected net benefit of the perpetrator also increases, while it decreases with the increase of the impending punishment (and thereby its monetization) and with the increased probability of discovering the perpetrator of the criminal act and his/her irrevocable condemnatory sentencing.

Having this in mind, in the case of the criminal act of judicial corruption, the corruption offer from the judiciary officials will depend on: (1) the amount of corruption they are offered (a monetary expression of all material benefits); (2) the probability of discovering the perpetrator and condemning him/her; and (3) the impending punishment for the criminal act of corruption, i.e. abuse of official function. In addition, it is important to note that in this context the impending punishment is not only the penal sanction (jail sentence), but that the punishment also extends to job loss, i.e. losing the position in the judiciary where it was possible to acquire income through corruption. Thus, the punishment encompasses both the present value of lost future corruption income that would be realized if the perpetrator was not discovered, and the cost of penal sanctions. Since the values for (2) and (3) are always positive, there is a certain minimal bribe amount (threshold) that is

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[2] Becker, G.S. (1968): *Crime and Punishment: En Economic Approach,* Journal of Political Economy, Vol.76, pgs. 169-217. This study will not go into the specifics of the whole model and the suppositions on which it is based. This model has proved its validity almost 40 years after it was written.

larger than zero and that needs to be offered for corruption to be offered as a service. Below this threshold no one will be ready to offer this service. The greater the possibility of discovery and the larger the impending punishment, the higher the corruption threshold, i.e. the minimum bribe that needs to be offered in order to realize the corruption offer.

Contrary to the above, in the case of the criminal act of judicial corruption the supply of corruption services of judicial officials by the entrepreneurs will depend on: (1) the amount of material benefit acquired by the entrepreneurs through corruption of judicial officials (the monetary expression of all expected material benefits) decreased by the amount of corruption itself (the bribe) and the expenses of its realization; (2) the probability of discovering the perpetrator and his/her sentencing; and (3) the impending punishment for the criminal act of corruption, i.e. bribery. Since the values of (2) and (3) are always positive, there is a certain minimal amount (threshold) of net material benefit that is above zero and that is needed for creating demand for corruption services. By balancing the thus defined supply and demand, balance is created in the market, i.e. the balanced price (bribe) and balanced quantity of corruption.

However, in the case of judicial corruption there is one specific issue that becomes increasingly important with the increase in the level and spread of corruption in the judiciary. It is justified to suppose that both sides in the dispute are equally ready to bribe judiciary officials so the flow, outcome and time of the dispute will be in their favor. Additionally, it is important to note that the outcome in commercial judiciary corruption (in the case of litigation), can only be in favor of one party – one side must win, and the other must lose the court dispute (litigation).[3] In such a situation, the corruption service will be provided only to the party that offered and paid more than the other "competitive" party. For example, if one party requested an illegal acceleration of the procedure and paid a certain amount, and the other party illegally requested delaying of the same procedure and paid more than the first party, the outcome will be a delay in the procedure. In other words, the first party paid, but did not receive the service paid for. The amount paid by the first party represents a complete loss for

[3] A conflict of interest can also be something else. For instance, one party wants to accelerate, while the other wants to delay the litigation process. In this case as well, the outcome of corruption can only be exclusively in favor of one party – the process will either be accelerated or delayed.

this party: it lost the money, and did not receive what was expected through corruption – therefore resulting in so-called "bribe dissipation".[4]

This shows that for creating a balance on the corruption market the only relevant factor is the relative, and not the absolute amount of payments (bribes). The party offering more always wins, regardless of the absolute amount of the offered bribe (naturally, if that amount is above the minimum for which the judiciary official accepts to be corrupted). In other words, the relative corruption pressure on judiciary officials is the one that is relevant, not the absolute. This finding is completely in line with the findings of Becker's model of establishing a balanced political pressure of interest groups under whose influence state intervention, i.e. regulation is established.[5] Consequently, the findings of Becker's model of competition among pressure groups for political influence can be applied to the model of twofold corruption pressure in the judiciary.

Firstly, the established balance corresponds to the Cournot-Nesh eqilibirum in the case of duopolies, meaning that the established balance is inefficient, since the same outcome could have been achieved with a smaller amount of engaged resources, i.e. funds advanced for corruption. In other words, there is possibility for improvement in the Pareto sense i.e. improvement that would result in both sides/parties in the dispute, being in a better position. The optimum amount (from the corruptors' viewpoint) of the bribe offered by one party would be 1 dinar, under the condition that the other party does not offer anything. In

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[4] An alternative to the described system of judicial corruption, where the corrupted person receives bribes from all (both) parties in the procedure, is the system of bidding, where the corrupted person accepts only the highest bid of the corruptors. Without going into further analysis of this phenomenon, the following analysis of consequences of corruption in the judiciary is based on the premises that "bribe dissipation" exists. A detailed analysis of the probability of existence of one, or the other system of corruption in judiciary depends on the incentives provided to the corrupted, who wish to maximize the present value of their future net income from corruption. Additionally, due notice should be given to the fact that the increase of income in one moment (taking bribes from all parties in the dispute) can, due to the loss of reputation of the corrupted lead to a fall in income in the future. Two key variables in this study are the change in the probability of creating income from corruption depending on the existing reputation and the individual discount rate the corrupted uses to calculate the present value of future income.

[5] Becker, G.S. (1983): *A Theory of Competition among Pressure Groups for Political Influence*, Quarterly Journal of Economics, Vol. 97, p. 371-400.

that case, the outcome would be the same as in the case where one party offers 1,000,000 dinars and the other side only 999,999 dinars. Secondly, both parties in the dispute, i.e. potential corruptors, are stimulated to increase the amount of the bribe, in order to offer more than their competitor (the other party in the dispute). The only limitation is the expected benefit to be gained from the service i.e. the outcome of the court procedure. The rational behavior of the corruptor is limited by the fact that the offered bribe cannot be greater than the expected benefit to be gained. Thirdly, with the increase in the spread of corruption in the judiciary, the amounts of bribes the corruptors are ready to offer also increase. This is due to the fact that the potential corruptor bases his/her decision on the expected amount that the other party is willing to offer, that is, his/her corruption competitor. When judicial corruption becomes more widespread, the expectation on how much the competition is willing to pay also increases, and therefore the amount of the bribe that needs to be offered also increases. This way a positive feedback effect is established: the increase in the spread of corruption leads to increased expectations on the amount of bribe that will be effective, which further leads to the spreading of corruption.

In addition to direct costs, we need to investigate other effects as well, that is, costs generated by corruption in the judiciary. With the increase in the level and spread of corruption in the judiciary, insecurity also increases, i.e. the risk faced by the private entrepreneur or investor. An increased risk inevitably leads to an increase in the risk premium, that is, an increase in the price (acquisition costs) of capital. In the case of borrowed capital, the increased placement risk leads to the increase of interest rate to be paid to the creditor. In the case of personal capital (equity), the increased placement risk leads to an increased dividend expected by equity owners who wish to invest it. This means that investors acquire capital at a higher price since, in the situation of higher risk, capital owners are ready to invest it only for a higher profit rate, regardless of whether it is borrowed or equity capital. In other words, there is an increase in the "required" profit rate, i.e. the profit rate of a potential investment project, which leads to a decrease in the level of investment or investment rate and thus the deceleration of economic growth. This mechanism also, in a different manner, demonstrates the link between the spread and intensity of corruption on one side and decreased economic growth on the other side, in this case through private investors faced by an increased risk.

There is no doubt that the existence of high risk in investing borrowed capital in Serbia leads to very high interest rates charged by domestic banks. This interest rate is much higher than the

corresponding interest rates in EU countries and in advanced transition countries in Eastern Europe. This is a consequence of the higher risk faced by domestic banks when investing capital. Part of this risk is due to the generally weak protection of creditors in Serbia and the inefficient protection of their ownership rights, where corruption in the judiciary is, together with other factors, the reason for this inefficiency. Naturally, corruption in the judiciary is not the only factor resulting in inefficiency of ownership rights of creditors in Serbia. Other factors include, for example, inadequate legislation. For instance, the existing Law on Enforcement Procedure favors debtors and not creditors, where even a completely impartial judiciary would not be able to protect the ownership rights of the creditors. Understanding the sources of risk faced by banks is important for finding measures to lower these risk factors and thus lower risk premiums and interest rates. Political speeches and appeals to banks to lower interest rates in these circumstances are simply useless.

In addition to a general lowering of investment activities, the increase in investment risk generated by corruption in the judiciary results in a certain type of investor selection. Foreign investors, especially solid, direct (strategic) investors avoid this type of risk more than others. They are used to doing business in conditions of high legal security, i.e. low risk regarding the protection of ownership rights and honoring contractual obligations. That is why direct foreign investors more that other investors avoid countries with widespread corruption in the judiciary. This is particularly important for countries like Serbia that lack capital and where direct foreign investment represents a key source of capital and a key source of economic growth. Lowering the level of foreign investment, especially direct foreign investment, decelerates and halts these countries' economic growth. Even more so since direct foreign investments by strategic partners bring with them, in addition to capital, some other things that are usually missing in countries that are poor in capital. These types of investments bring with them the transfer of technology, specific business know-how, etc. – all lacking in Serbia and needed for its accelerated and sustainable economic growth.

Indirect corruption costs in the judiciary are the most worrying. The first group of costs are the, so called, corruption transaction costs. Corruption is not free of charge – there are significant costs in its implementation. Each individual corruption act is a type of contract: informal, incomplete and illegal. Since it is illegal, judiciary authorities cannot be engaged in its monitoring, so the parties themselves need to find a satisfactory mode of mutual

monitoring the implementation of the contract, especially since the contract is incomplete and can lead to numerous situations that are just not foreseen by this contract. Furthermore, the transaction costs of corruption also include the costs of preparing this contract, finding the judiciary officials prepared to conclude and execute this contract, where the most significant transaction costs are those incurred in executing this contract, since both sides are motivated to circumvent the contract, especially since judiciary authorities cannot be engaged in solving this type of dispute. All mentioned transaction costs and all mentioned activities in implementing corruption require the engagement of real resources. This primarily relates to the specialized work force engaged in corruption, although others are also engaged in these activities. Related to the engagement of specialized work force in corruption activities, there are estimates that managers in countries with widespread corruption spend approximately 20% of their working hours precisely in contracting and executing corruption activities and other activities described at the beginning of this paragraph.

All resources have the possibility of alternative use and therefore have their own opportunity costs – profit lost from the alternative use. Therefore, resources needed for implementing corruption result exclusively in redistribution, since the gist of corruption is value redistribution and not creation of new value. These resources cannot be used for creating new value since they are already used in implementing corruption. For this reason, the fact that resources used for implementing corruption could be used in a more productive manner, any corruption, and therefore corruption in the judiciary as well, decreases the economic efficiency of the allocation of resources in the economy and decreases societal welfare.[6]

The second type of indirect corruption costs in the judiciary is the costs of alternative types of protection of individual ownership rights or contractual rights. The primary function of the commercial judiciary is precisely the protection of these rights, and all taxpayers by paying their obligations expect to receive precisely this service. However, the existence of corruption in the

[6] An interesting question is whether corruption in the judiciary is more easily implemented than corruption in other areas, or to put it differently, are the transaction costs of this type of corruption higher than in other types of corruption. If this is so, we can conclude that this type of corruption engages above average resources compared to other types of corruption. Still, there are no empirical findings to confirm or refute the hypothesis on the difference in transaction costs for corruption in general and for corruption in the judiciary, although further research in this direction would be interesting.

judiciary disables its efficient and impartial functioning, therefore decreasing the possibility of truly protecting the ownership rights of those not involved in judicial corruption. The absence of the rule of law and the lack of legal protection of their rights forces entrepreneurs and enterprises to create alternative mechanisms for protecting their ownership rights. This leads to new costs, since applying new mechanisms involves engaging real resources. For example, insufficient legal protection of private ownership rights leads to increased costs for securing the facilities owned by the company. In the case of increased security of a company's plants, it is evident that this is not the type of activity that creates new value. All resources thus engaged, for this type of security have their opportunity costs and cannot be engaged in creating new value. Finally, creating alternative mechanisms for protecting ownership rights results in the need to create new business strategies that are inferior to those that would be created in an environment governed by the rule of law, with complete and full protection of the private ownership rights of commercial entities.

Absence of the rule of law, especially regarding the inefficient monitoring of contract execution, creates uncertainties in realizing contract rights, thereby influencing economic efficiency. Economic efficiency is, among other factors, based on the social division of labor and job specialization where an increasing number of companies perform an increasing number of specialized jobs. Such specialization and division of labor enables the increase in each company's productivity, consequently increasing social productivity, economic productivity and social wellbeing. A precondition necessary for such a division of labor is an efficient exchange between specialized companies. This exchange is economically efficient and profitable if the transaction costs of this exchange are low, i.e. the costs of formulating and executing the contract governing this exchange. If the rule of law exists and there is efficient monitoring of contract execution costs, the transaction costs will be low and the mentioned division of labor will take place. This specialization is manifested through contracts between companies, where companies acquire from other companies all they need in order to produce their own goods or service. In the case of high transaction costs, where, due to corruption in the judiciary, contract monitoring and execution becomes insecure and unstable, there will be no exchange. Rather, in line with the Coase's theory on enterprises and the reasons for the existence of an enterprise, all companies will produce everything they need,

there will be no social division of labor and specialization, thus additionally lowering economic efficiency.[7] A well functioning market presumes and leads to specialization and economic efficiency. Free and unhindered market transactions, a high level of exchange for a given social product and low transaction costs – these are the foundations of a modern market economy. Corruption in the judiciary is an attack on these foundations.

More than half a century ago, Stigler demonstrated that increased specialization and increased social division of labor leads to greater possibilities in using economies of scale and to increased social productivity and economic efficiency. [8] Stigler saw the size of the market as a limitation for the social division of labor and for utilizing economies of scale. We can easily show that corruption in the judiciary has the same effects on decreasing the level of specialization and social division of labor as does the decrease or closure of markets – the lack of exchange between frightened, legally unprotected commercial entities, as a typical indicator of institutional underdevelopment of an economy. The consequences are a drop in income and economically inefficient allocation of resources, leading to decreased societal welfare.

A large majority of enterprises in Serbia are not specialized commercial associations, but are rather vertically integrated enterprises, that produce a significant amount of goods and services for their own needs. These types of companies – combines – are one of the legacies of socialism and communism. In other words, we cannot say that an inefficient judiciary and an inefficient contract execution monitoring resulting from corruption led to the forming of these types of companies. However, it is evident that corruption in the judiciary in Serbia is not conducive to the restructuring of these companies, their fragmentation and the establishment of market (contractual) relationships between the entities thus created.

The basic presumption for investment is an efficient protection of private ownership rights. Efficient ownership rights protection creates incentives for good economic behavior and economic

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7 Coase, R.H. (1937): *The Nature of the Firm, Economica,* Vol.4, pp. 286-405. The mentioned finding on the change in specialization level is completely in line with Coase's conclusion that the amount of transaction costs determines whether a certain relationship will be created within the company or in the market by establishing contractual obligations between two companies.

8 Stilger, G.J. (1951): *The Division of Labor is Limited by the Extent of the Market*, *Journal of Political Economy*, Vol.59, pp. 185-193.

efficiency as a consequence of this behavior. Let us examine how corruption in the judiciary, by undermining efficient ownership rights protection, influences economic behavior. First, in the situation of corruption in the judiciary that leads to uncertainty in the protection of private ownership rights, the discount rate expressing inter temporal preferences of capital and property owners is extremely high. The principle becomes – everything immediately. Long term projects (those that have a longer payback period) are abandoned; everything inevitably turns into investment projects with a fast payback. This means there are no incentives or preconditions for investing into anything that requires a somewhat longer payback period since uncertainty breeds incentives for shortening the investment flow as much as possible. Consequently, many investment projects that are economically sound and socially desirable are eliminated and will not be realized because of corruption in the judiciary, the lack of ownership rights protection and the growth of individual discount rates.[9]

A high level of legal insecurity in Serbia, partly due to corruption in the judiciary, resulted in the fact that investments are dominant in those areas, such as non-specialized retail, where payback time is short. The characteristic expansion of retail kiosks in Serbian cities demonstrates the high degree of legal insecurity, i.e. risk. The Working capital necessary for this business is very small and the basic resources are also not large – irreversible costs are insignificant. It would be wrong to accuse city planers or the “urban mafia” for the kiosk boom that took place in Serbia not so long ago. The causes lie in another quarter, partly in corruption within the judiciary.

Corruption in the judiciary that leads to the depleted protection of private ownership rights and to elementary legal insecurity, creates an environment lacking incentives for property ownership and for the quality maintenance of this property and its value. In an environment without the rule of law, the owner is not certain whether he/she will remain the owner tomorrow, or whether someone, through a corrupt judiciary will take over his/her ownership rights. Therefore, owners are not motivated to invest in quality maintenance of their own property. Depleted real estate and devastated factories are the best indicators of this situation.

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[9] It could be argued that corruption in the judiciary that undermines private ownership rights protection results in creating a difference between social and individual discount rates. The value of these two discount rates in conditions of full protection of ownership rights must be identical.

An additional reason for such a situation can be found in the presumption that countries with widespread corruption in the judiciary are at a lower level of institutional development and therefore do not have a well developed used goods (equipment) market. This just inflates the problem, identified by Akerloff, regarding the information asymmetry existing in these markets. As demonstrated by Akerloff, in conditions of strong quality information asymmetry there are no incentives for quality maintenance of equipment and due to specific incentives to buyers on the used goods market, well maintained equipment cannot be sold for a price that covers its maintenance costs. [10]

Corruption in the judiciary opens an additional dilemma for entrepreneurs and enterprises. There are two options linked to future investment. One option is investing in research and development i.e. investing in new technologies, new sales channels and product improvement, while the other option is investing into new corruption channels and mechanisms. In conditions of widespread corruption investing in new technologies is not profitable, while it is profitable to invest in new corruption channels, recruit new corrupt state officials and bribe judges so they will be more efficient in corruption activities. Rivalry and free competition in corruption and not in productivity appears. Instead of the situation where the entire society profits, there is a benefit are only corrupt individuals in the judiciary. The society does not grow, but rather becomes more backward, since the resources are used for redistribution and not for creating added value. Business strategies for maximizing profit are developed based on the constant breaching of contracts (non fulfillment of contractual obligations – non-payment of bills and debts), infringement of the others' ownership rights and corruption of the judiciary in order to protect profits acquired through the these illegal activities – a strategy based on violating the rules of the game. This is a business strategy that can be particularly profitable in the initial phases of business development. A key issue for the future of a society is whether these types of business strategies will be dominant and whether resources will be invested in innovation and creating added value or into redistribution and searching for efficient redistribution methods, such as corruption.

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[10] Akerloff, G.A. (1970): *The Market for "Lemons": Quality, Uncertainty and Market Mechanism*, *Quarterly Journal of Economics,* Vol. 84, pp. 488-500.

Inadequate contract execution monitoring and high uncertainty of the type that leads to corruption in the judiciary decrease the probability of business creativity, business innovation, such as new types of contracts that increase economic efficiency. The problem, naturally, occurs due to the possibility of subjective interpretation of such contracts in conditions of corruption within the judiciary. Therefore there are no incentives for business innovation that enhance business relationships between commercial entities, leading to additional incentives for economic efficiency and a more pronounced social division of labor with positive effects on the societal welfare.

In conditions of corruption in the judiciary, where there is no rule of law and where consequently the legal system protects the debtors and not the creditors, there is simply no incentive for establishing and extending credit i.e. debtor-creditor relationships. The consequences can be examined according to two aspects: the number of approved credits and the increase in risk premiums leading to high interest rates. The underdevelopment of creditor-debtor relationships, the high price of credits i.e. the high price of borrowed capital have negative consequences for the volume of economic activity in a country and therefore on the economic growth of that country. Regarding production and goods supply, the underdevelopment of credit relationships leads to a decreased investment level and to the deceleration of economic growth. On the side of demand, the lack of credits or postponed payment of goods decreases the aggregate demand volume, especially in the case of durable consumer goods. Growth of credit supply drastically increases demand and consumption of durable consumer goods. Without a solid creditor protection there are no favorable credits and without credits there is no increase in domestic demand (consumption) and no increase in the populations' welfare – certain products are just not accessible to consumers. Finally, corruption in the judiciary disables the fulfillment of those rights rising from property ownership, such as mortgage loans, and this additionally decreases effective demand in an economy, especially demand for durable consumer goods.

There is no doubt that corruption in the judiciary represents a typical form of administrative corruption – where impartiality in enforcing rules is breached. Corruption in the case of commercial judiciary (disputes) presents an abuse of procedure and material rights and also the violation of discretionary rights at the disposal of judiciary authorities. However, in addition to administrative

corruption, there is one more type of corruption - corruption with the aim of passing partial rules (laws and by-laws) adapted to the needs of the corruptors' private interests. This type of corruption represents a kind of state capture and definitely, regardless of the methodological problems in defining this type of corruption, is extremely dangerous.

The existence of this type of corruption in the judiciary depends on the extent to which the judiciary itself is a source of legislation. However, there is no single reason to link corruption in the judiciary with state capture in Serbia (or in other transition counties). In continental, and in our domestic legal system, court practice is not a source of law. The sources of law are the statutes and sub-statutory acts passed by the legislative and executive authorities.[11] Having this in mind, corruptors who wish to change the rules of the game as such, and not only change their strict application, would be wasting their time corrupting judiciary officials, since they cannot do anything with the rules themselves. Rather, their activities need to be aimed at the other two official branches of government. In view of the above, it is quite surprising that the latest report of the World Bank on combating corruption in transition countries identifies "state capture" as the type of corruption that exists in commercial and general (criminal) courts.[12] One of the questions posed in the survey that served as an empirical basis for the mentioned report, was to identify to what extent were different state institutions affected by "capture". The report, based on the survey, claims that not only are the commercial and general (criminal) courts "captured", but that the influence of the corruptors in these two state institutions is more significant that their influence in parliament and in financing political parties. The presented result is a paradox and contradicts the definition of "state capture" and the character of the judiciary in the surveyed countries. Yet, the report itself provides no comment on these findings.

Generally speaking, corruption in the judiciary leads to discrimination – justice is not for all, but only for some, only for those ready to pay additionally. This presumes that they have

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[11] A possible minor exception regarding the viewpoint that court practice in a continental system of civil law is not a source of law are the binding decisions from the general sessions of the Serbian Supreme Court.

[12] Gray, C., *et.al.* (2004): *Anticorruption in Transition: Corruption in Enterprise-State Interactions in Europe and Central Asia 1999-2002,* Washington: World Bank.

sufficient money (or other resources) and that they are ready to break moral and legal rules by corrupting civil servants. In order to examine discrimination brought on by corruption in the judiciary and its effects we need to answer the question on who really needs corruption in the judiciary and who bribes judiciary officials in commercial procedures (disputes).

At first glance it seems that those who are powerful, rich and well positioned do not need corruption in the judiciary. There are some views that these types of entrepreneurs do not need to bribe judges and other judiciary officials and that they do not need to spend money on such things. It is sufficient that political bosses do this on their behalf by ordering (in a meeting, by telephone, or through intermediaries, i.e. the chief of cabinet) judges or judiciary officials to conduct the case in the desired way and pass the required sentence. The described mechanism is also a corruption mechanism, although the judge or some other judiciary official did not receive a bribe. The submissiveness of these officials will result in their promotion, enhance their (politically-related) reputation and their reputation in the society, and will verify them as successful judiciary professionals -all resulting in non-financial or financial benefit. Judges and other judiciary officials behave in a rational manner - exactly in the way Becker's model describes the incentives to enter into corruptive behavior. The effectiveness of this method (the blackmail method) is far greater than classic (direct) corruption, so there is no need to pose the question of relative corruption pressure.[13]

Still, this does not mean that an entrepreneur who, through the described method, received a court judgment that was in his/her favor did not pay a certain corruption fee (bribe). The only difference is that he/she did not pay this amount directly to the judiciary officials, professionals, but to the politicians – persons in the government (most often in the executive branch). These costs also include the regular, naturally voluntary, donations to their political party, election campaigns or anything else that needs to be financed. Even more, the entrepreneur who won the dispute as described, cannot ignore the next call with a request of the type:

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[13] Naturally, in a specific institutional framework, especially where informal rules and inherited tradition are dominant, the interested parties can also resort to blackmail as a method for reaching their goals. It is even possible that the selection of means for reaching this goal is left up to the judiciary official. For example, newly appointed judges in Columbia often received the message from narco-cartel leaders: "Silver or lead?".

"we need a little extra financing for our cause", since the other side has very strong arguments against refusing to comply with such a request.

Since it is highly probable that this type of indirect judiciary corruption is more efficient than the direct type, it can be presumed that, when there is corruption in the judiciary, this leads to justice for the rich, well situated, "old timer" businessmen with strong connections in the government. Although there is insufficient information related to this topic, we can still state that corruption in the commercial judiciary (indirect and direct) is manifested as the protection of the powerful at the expense of the small businessmen and newcomer investors. This is not a question of social justice but of economic efficiency, since there is no protection of private ownership rights, nor is there efficiency in contract execution monitoring for new and small investors. And small investors generate a significant portion of economic growth and employment in modern market economies. Corruption in the judiciary changes the industrial organization of the economy itself. It favors large businesses that, due to their close ties with politicians, are better placed to corrupt. [14]

However, sometimes the difference between social justice and economic efficiency can be unclear. This is especially true when social justice is defined as a precondition for economic efficiency. The cause and effect between corruption in the judiciary, social justice (equality) and economic efficiency have been studied by Buscaglia.[15] The mentioned cause and effect chain is based on the presumption that the perception of an individual regarding social justice of institutions and the equality generated by these institutions create incentives for this individual to become involved in production activities. Naturally, widespread judicial corruption can create the perception of widespread social injustice and inequality within the analyzed institutional framework, thus creating incentives for a certain type of production activity. However, when the author comes to the part of examining the types of these incentives and their effects on economic efficiency there is not sufficient information. The only thing the author states

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[14] This view is based on the presumption that links between large business, i.e. large companies and politicians in the area of forcing their partial interests are closer than those of small business and politicians.

[15] Buscaglis, E. (2001): *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences*, Vienna: Centre for International Crime Prevention.

is that those who consider that corruption in the judiciary results in the lack of protection of their ownership or other rights will search for an alternative form of protection. This finding is completely valid, and we already discussed it (indirect judicial corruption costs), but it is very difficult to understand how this relates to social justice and equality. It is even more difficult to follow the arguments that explain the viewpoint that judicial corruption leads "to diminishing economic efficiency over time because of the general perception that the allocation of resources is determined more by corrupt practices and less by productivity and, therefore, is inherently inequitable". The main analytical problem regarding this viewpoint is the fact that it has not been show that there is a connection between the perception of social injustice and incentives for a company's decision-making, and precisely these incentives are key for generating the economic efficiency of resource allocation.

As already explained, corruption in the judiciary generates behavior incentives that lead to lower economic efficiency and thereby societal welfare. However, the mechanism of this relationship has nothing to do with wealth distribution and social justice. There is no doubt that judicial corruption has an effect on wealth distribution, but there is something of crucial importance for establishing economic activity and this is: the set of incentives facing each entrepreneur or commercial entity, and this has nothing to do with his/her perception whether these incentives are fair or not. For example, an entrepreneur can be of the opinion that high tax rates are fair, since they lower the differences in income distribution, but these rates will force the entrepreneur to invest his/her capital somewhere else, where tax rates are lower and where, according to his/her opinion, there is social injustice, embodied in high economic inequality.

Finally, it must be mentioned that judicial corruption, although not in commercial but in criminal judiciary, eliminates the basic mechanism of discovery and punishment, and thereby prevents the general prevention of corruption in all other areas of the judiciary and in all other areas of state administration. This finding is irrefutable, but it is necessary to investigate the mechanisms where the elimination of judicial corruption will lead to decreasing corruption in general. In order for us to do so, we must go back to Becker's criminal model. In this model the probability of committing a crime (including corruption) decreases with the increase in the: (1) probability of being discovered and sentenced;

(2) impending punishment for the criminal act of corruption. In addition, the following question becomes interesting: which of these two elements has greater influence on decreasing the probability of corruption? Expert estimates show that the increase in the probability of discovery and sentencing has a stronger impact on the potential perpetrators than an increase in the threatened punishment. If this is true, it means that eliminating judicial corruption, and subsequently the increased probability of discovery and sentencing for corruption represents a better option than increasing the impending punishment for this crime. Becker's model, however, shows that the mentioned result depends on how risk prone is potential perpetrator of the crime of corruption. If the perpetrators are neutral to risk, it is completely irrelevant whether potential discovery or sentencing is increased, or whether the punishment is harsher. In cases where perpetrators are adverse to risk, prevention can be more effective by increasing impending punishment than by increasing potential discovery. Finally, if the perpetrators are prone to risk, only then can general prevention be made more effective by increasing the probability of discovery and sentencing, and consequently decreasing and eliminating judicial corruption. Therefore, for reaching a decision on the optimal general corruption prevention policy there is a need for information on the potential perpetrators' risk attitude, i.e. on whether they are prone to risk in the same way as already noted in perpetrators of other criminal acts.

GENERAL LEGAL EFFECTS OF JUDICIAL CORRUPTION

The analysis and mechanisms of judicial corruption offered the hypothesis that (in Serbia today) there are two main types of corruption objectives, i.e. effects that want to be achieved in the judiciary through corruption:

(a) getting an *illegal court judgment* (regardless of the type) i.e. leading the court to produce a legal consequence that it would not pass if it was not for corruption, if it acted in accordance with the law and the facts presented during the trial and

(b) manipulating the *length of the procedure*, most often by delaying the procedure (buying time) or more seldom by accelerating the procedure, both compared to the time that would be needed if there was no corruption.

In relation to these two legal consequences of corruption it is irrelevant where corruption occurred in the possible chain of events, who the corruptor was and who the corrupted (except that the last must be part of the judiciary, as explained in the analysis of corruption mechanisms). Whether the illegal judgment was passed because the judge "incorrectly" interpreted material law or because a corrupt court official approved a forged signature on a contract resulting in the judgment is irrelevant from the viewpoint of the legal validity of the judgment, when viewed from the aspect of corruption. Likewise, there is no difference if the procedure is delayed because the judge ordered the presenting of unnecessary evidence, or, because there was an intentional mistake made in the delivery of summons to the hearing.

For the concept of corruption in terms of criminal procedure law, it is unimportant whether the described consequence actually occurred. The act has been committed when the judge requests or accepts the bribe, regardless of whether he/she "provided" the service for which he/she was paid. This is understandable. The danger from this act is in the judges susceptibility to corruption, since he/she performs a public function of special trust, and not the effect of an individual case.

Speaking of the legal effects of judicial corruption, it does not deal with the effects of a particular legal case and the rights or status of parties as they would appear if there was no corruption or their outcome with corrupt practices at work.

The legal effects of corruption deal with the consequences of judicial corruption (its spread) on the judiciary itself and even the legislative system at large.

The analysis of the economic effects of judicial corruption inevitably encompassed the legal effects that are necessary for the economic effects to be produced. Having in mind that corruption by definition negates the role of the judiciary to impartially solve a dispute by applying the law, the purely legal effects (injustice to justice) can be examined only provisionally, by highlighting the most important.

Corruption has a disruptive effect on the judiciary as an institution. If the posed hypothesis proves true – for which there are arguments in the research findings, where judicial corruption is widespread, but not to the extent as perceived by the general public, this disrupting effect is visible in our country. Widespread corruption and the perception of widespread corruption in Serbia have the following consequences:

- low reputation of the court as an institution, with numerous further consequences: for example, insufficient attraction of a career in the judiciary and less competent personnel entering the judiciary, making it less resistant to corruption,
- increased corruption pressure,
- loss of motivation of judiciary personnel (the majority) that are not involved in corruption,
- readiness of the participants in the procedure to abuse procedural authorization (rights),
- decrease in quality of the judiciary,
- mistrust and discredit influence the execution of court judgments; statements that they are "not accepted" are almost a daily occurrence,

Corruption has a destructive effect on the complete legislation system, on the principles and standards of a legal state:

a. Corruption questions the *legality principle*. The essence of the legality principle is that the court is bound by legal norms i.e. it is obliged to pass sentence on a dispute according to set norms and to conduct the procedure according to these norms. Corruption is ultimately always aimed at breaking the law.[16] Abolishing the legality principle in numerous cases (depending on the extent of corruption) abolishes the legality of the state.

b. Corruption also negates the principles of *equality under the law*. Deviating from legality, in a judgment or procedure, in the case of corruption, the court acts unequally from case to case. Inequality under the law abolishes the legality of the state.

Widespread corruption and attempts to hide it can lead to *changing the legislation*; a corrupt court can continue to act in future cases as it acted under corruption and can thereby give another meaning to material law or procedure rules than those originally provided by the legislation. This creates a court practice

[16] It only seems that this is not so in the case when corruption is used so the court (judge, official…) would be "motivated" to work according to the law, for example, not to prolong the procedure, or in order to "neutralize" the other side's corruption. Firstly, corruption itself is a violation of rights and the whole procedure thereby moves outside the boundaries of legality. Secondly, if this type of corruption is necessary, a regular situation (which is outside the law) is created, it means an equal treatment for all, and corruption disrupts the principle of equality under the law. In addition, it is difficult to imagine that corruption will stop at this and that it will not produce additional "leniency" from the court.

with undesired consequences.[17] Court authorities assume a power that in continental law is not under their jurisdiction, thereby also abolishing the legality of the state.

Widespread corruption, the unexpected length and even more the unexpected outcome of the procedure cast a doubt on the law and the judiciary. In addition to the described economic consequences, there are legal consequences. If there is a feeling that the law will not be upheld, the subject will more easily resort to illegal activities. If the payment of a debt can be delayed through corruption in the court, the debt will not be paid in other situations either.

Mistrust in the law and the judiciary results in the search for and discovery of alternative means of fulfilling rights – not those regulated by the law such as mediation or arbitrage – but rather different forms of self help, with unforeseeable consequences for the legal state.

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[17] This can be illustrated by a practice that contains elements of institutional corruption. Under the bankruptcy law (article 153, paragraph 5), until recently in force, the pre-liquidation procedure could be initiated in a company that was not organized according to the law. This entailed the suspension of the existing management boards. Following October 5, 2000, in numerous companies so called "crisis committees" challenged the legitimacy of the existing management and this procedure was temporarily legalized by invoking the decree that the company was not organized according to the law. Later on, this same strategy was used in other companies with a mixed ownership structure.

VIII Strategy of the anti-coruption fight in the judiciary

All judges are to adjudicate consistent with the Codex
True to the word of the Codex,
And not to adjudicate fearing me, their Tsar.
(Article 172 of Tsar Dusan's Codex, 14th century)

INTRODUCTION

An impartial, independent, and accountable judiciary is one of the pillars of fair, equitable, and responsible governance. The impartiality of judicial proceedings is sometimes affected by corruption, when a judge or other court officer abuses his office out of self interest.

Corruption in the judiciary in Serbia is wide spread. It, on one hand, results from the deep crisis of the judiciary that was present in the previous period, and, on the other hand, seriously constrains proper administration of justice, both today and in the near future. Instead of being the most important factor in the fight against corruption in other business activities, the judiciary are themselves involved. The roots of corruption in the judiciary are deep and their extraction needs to be formulated and energetically implemented though a comprehensive program.

The foundation of any event of corruption is the calculation undertaken by public servants with regard to potential costs and benefits of their involvement in corruptive practices. Should a public servant calculate that the ratio between the benefits and the expected costs (the risk of punishment included) is more favorable than in case of honest work, he may opt for corruption. On the other hand, the parties have their interests in the proceedings and many of them do not hesitate to 'lend a hand' whenever they believe it is necessary for their interests to be met, whether justifiably or not. The readiness of the parties to become involved in corruption also depends on the benefits expected, and, in economic disputes it is expressed in the level of the amount that would be saved (and which, in turn, depends of the value of the dispute) from the expected costs which are constituted of the amount of bribe and the risk of punishment. That is how both the offer and the demand for

corruption arise. Naturally, the above mentioned calculation is primarily conditional upon external circumstances, namely upon the factors which are not entirely under the control of either the judge or the party and to which both have to adjust actually.

The sources of corruption in judiciary were addressed in the previous Chapter. Here below they are only listed:

- Political factors,
- Economic factors,
- Harmful legacy from the previous period,
- Imperfection of the law in transition period,
- Complex, sometimes inadequately defined procedures,
- Problems with the competency of individual judges and clerks,
- Erosion of ethics in the judiciary,
- Underdeveloped control system,
- Insufficiently efficacious discipline measures,
- Inadequate level of professionalism,
- Low salaries of employees and inadequate working conditions,
- Unsatisfactory information system, etc.

GENERAL STRATEGY

Corruption in the judiciary in Serbia is not an isolated phenomenon – it is rather a part of widespread corruption and shares the same or similar manifestation forms and related sources and mechanisms. The fight against corruption in the judiciary should therefore be:

- ***Integrated into the general fight against corruption***; since only a synchronized and comprehensive effort by the state and social institutions and organizations can be effective; otherwise, the effects will be limited and transient,
- ***Based on the same or similar principles***, shared with the fight in other areas, always ***with full respect for the specificities of judiciary***.

An anticorruption strategy is always founded in three core principles:[1]

1. ***Legislative-procedural reform***, which narrows the area that might be involved in corruption or diminishes the power of the

[1] See details in *Corruption in Serbia*, CLDS, 2001

incentives for corruption activities; for example, precisely defined terms for completion of certain activities make it impossible, or at least essentially difficult, to engage in the corruption practices related to the unreasonable extension of proceedings or the postponement of the pronouncement or execution of a verdict (such as in the Law on Execution Proceedings, for execution),

2. ***Transparency***, that is to say, much better public visibility of judiciary activities, which would make both positive and negative aspects, including corruption, much more apparent and thus enable the public to respond, exerting the pressure to have the situation improved and demanding accountability,

3. ***Change of the motivational system***, since an appropriate combination of measures may have a bearing on the corruption costs for individuals and thus discourage their misconduct; examples of such measures include: increase of salaries which are now at a low level, strengthening of surveillance and efficient sanctioning of wrongdoers, and development of ethical norms; the goal of the above mentioned and other measures is to replace the combination "low risk, great gain" with holders of judicial offices by the combination "high risk, low gain".

The assumptions for anticorruption reform in judiciary that may be derived from these core principles are the following:

- upgrade substantive and procedural legislation,
- advance the organization and the work of the judiciary,
- restrict to a proper level the freedom of decision making with regard to those who are decision makers in the judiciary and those who have control over the judicial system,
- reduce the undue presence of discretionary decision making or the possibility for administrative staff to meddle within the judicial system,
- strengthen visibility of work and accountability of all involved in the judicial system,
- improve conditions for work and employment in the judicial system, including appointment and promotion, salaries, education, etc,
- influence the change in public attitudes towards corruption, in general and in the judiciary in particular.

The fight against corruption in the judiciary must not be a one-off or campaign event, but rather a continuous effort focused on maintenance of results achieved to date and attainment of new ones. This effort is a part of the broader strategy of the fight

against corruption in Serbia and, generally, a strategy for creating efficient and equitable governance.

The fight against corruption must be comprehensive in character. It was proven elsewhere in the world that any partial measures undertaken in specific areas, even if vigorously implemented, can give only momentary results. The reason for this is that the corruption, in such cases, only "relocates" or gains momentum in other areas and any positive effects quickly disappear. Accordingly, any ambitious program for fighting corruption in the judiciary must be systematic in scope, namely it should attack the problem comprehensively, across the entire frontline, leaning on three classic elements: strong and unrelenting resolve to defeat corruption, increased risk involved in corruption practices, and stern sanctions.

Leaders of the anticorruption battle in judiciary should be the judges who, due to their reform ideas, enjoy the highest respect. It is highly unlikely that any anticorruption battle could be effective if it is initiated and conducted by elements outside the judiciary because such an approach would look as if it is imposed on the judiciary and therefore would be met with resistance from a part of judiciary, calling upon solidarity. The leadership in the anticorruption battle involves the participation in the exposure and the assessment of corruptive practices in judiciary, but also participation in the formulation of a program for fighting corruption and definition of priorities and timescale for implementation of such a program.

UPGRADING THE LEGISLATION

Regardless of the proceedings at issue, the court applies the law; in its basic form, the adjudication process is reduced to the syllogism where *praemissa maior* is a legal norm (of substantive law), *praemissa minor* is the factual status, and *conclusio* is the decision. Rules of procedure(s) regulate the conduct of the judiciary and other participants in the formation of this syllogism, beginning with the legally relevant motion to instigate the proceedings, the time and space in which the actions within the proceedings are to be completed, through the manner in which the facts are established, to the manner of passing the decision. The quality of the adjudication process is subject to the quality of the law, both substantive and procedural.

Through the analysis of corruption factors, it was revealed that flaws in the quality of the law constitute a corruption factor since such flaws either prevent the exposure of corruptive practices or make it possible for them to remain unexposed.

In order to be legitimate, in order to perform its function, the legal order should, *inter alia*, be founded on the legality principle. This principle implies comprehensibility and consistence between the constituent legal norms, but also the equality of all in front of the law, and respect of (internationally recognized) human rights and freedoms. Naturally, it is essential that the content of the law responds to the contemporary problems of the society. All this relates both to the rule of so-called substantive law, and of procedural law.

The status of the law in Serbia is far from being perfect. The highest legal act, the Constitution of the Republic of Serbia, is, to say the least, of reduced legitimacy and commencement of its application was announced a long time ago even though it is inconsistent with the Constitutional Charter which was enacted at a later date. The transformation of the former federation into the "state union" (and disintegration of former SFRY as well) opened the question of legislative and institutional authority to which no adequate answer has yet been supplied.

At the same time, despite of the Constitution being a large obstacle, the launch of the transition process started broad and fast legal reforms. It is only natural for the transition law to be inconsistent, controversial, and fraught with legal gaps. Only after the core reform of institutions is implemented, will it become possible to contemplate the codification which would ensure its comprehensiveness.

It seems, however, that the legal system of Serbia holds more flaws than necessary. It seems likewise that many faults may be found even with the technical quality of the regulations that are adopted within the reform process. Also, even though reception of the foreign law as a road to modernization is generally acceptable, reception of the concepts from different legal families (Continental, Anglo-Saxon) inevitably creates new controversies.

The regulations that have particularly "suffered from" the transition process include the trade (economy), status and market related laws. On one hand, it was necessary to legally "divest of power" a great number of legal institutions the functioning of which was possible only in the socialist (self-managed) economy (that is, in its legal framework), and to replace them with new,

completely novel and formerly unknown, institutes: legal regulation of the capital market is a good example. Since this process is long ongoing, since its beginnings in the 1990s were characterized by strong resistance from the ideological state - that means widely reluctant - it is only understandable that, first, we are dealing with the process of fast and frequent changes of laws, and, second, that the destiny of newly-adopted regulations is more often than not uncertain. Not only were they often replaced by new ones, many of them were never, in effect, applied.

Here are some illustrations: the central (first) Company Law was adopted in 1988; a new one was adopted in 1996; and application of some of its "central reform provisions" (incorporation of socially-owned companies, incorporation in one of the two forms of companies of capital) was postponed from one year to the next. The reasons for present work on preparing a new law are numerous. This new law should primarily eliminate the observed weak points, such as the system of corporate management and the system of protection of minority shareholders, for example. These weak points are shared with the judiciary which had many problems and in which some cases turned into, so-called, scandals. The law suffered many changes in the meantime.

Some laws that were trumpeted as very important when they were passed have practically never been implemented. A year has passed since expiry of the term in which implementation of the Law on Telecommunication was supposed to commence, and the implementation has not commenced yet. Consequently, chaos prevails in this very important market (and it unavoidably reflects on judicial practice related to this market). Also, we are still to wait for the law on collateral seizure and the law on financial leasing (we are waiting for establishment of registers), and the situation is similar with some parts of tax regulation. The list is quite long. The situation is particularly "complicated" with regard to the regulations related to the market. These went through essential changes, even of a conceptual nature, depending on the extent to which the government had influence over market developments.

In addition to failing to proffer clear signals to investors and suitable procedures to economic operators, the unfinished and internally contradictory legal system obviously constitutes a corruption "provoking" factor. Sometimes the corruption is utilized for attainment of legitimate legal goals which are very

hard to reach in an ambiguous legal environment. On the other hand, it was proven that the ambiguous and controversial legal system facilitates corruption since it makes it easier for the judge or other pubic servant to "camouflage" an unlawful decision or unlawful procedure.

Building, upgrading, and harmonizing the new legal system will take time. It may be expected that it will gain momentum with, first, adoption of a new Constitution, and second, hopefully, with harmonization of the law in Serbia (Serbia and Montenegro) with the law of the European Union. Bearing this in mind, and seeking to diminish the corruptive effect of the imperfect law, it is necessary to create a better quality *legislative policy*. With much more planning and systematic work, enhanced sensitivity to the entirety of the legal order and the sequence of legal reforms, with much more preparatory work for the implementation, we should resolutely and efficiently set off towards enactment of new legislation and judiciary should be involved in the process.

One of the measures that must be taken into account here is a timely education of court staff for application of new regulations and acquainting the public (addressees) about their essential nature.

With regard to procedural legislation, it might be said that Serbia (Serbia and Montenegro) generally has stable procedural laws[2] that are based on Austro-Hungarian tradition. It would be hard to find any conceptual faults with these solid and well-founded laws, except for those related to their ability for implementation (and the manner of implementation) at this moment and place.

The Law on Litigation Proceedings, inspired by the principle of substantive truth, proffers the opportunity to the parties to meddle with the duration of the proceedings, for instance, by presenting the procedural material only after the proceedings have been going on for a long time and still continues, or even in the appeal procedure by attempting to, through misuse of the rules on serving writs, delay hearings or similar. However, the opportunity given to the parties are insignificant compared with the opening left to the court (the judges) to, by conducting the proceedings, protract their duration.

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[2] The most essential changes, inspired by the idea to introduce modern perceptions of human rights protection, were implemented in the Law on Criminal Procedure.

The result of this is, on one hand, a slow and inefficient judicial system in which duration of proceedings often becomes a motive around which different corruptive nets are spun, and, on the other hand, which is a "curtain" behind which corruption can be concealed.

The situation is even worse with the Law on Execution Proceedings. The average duration of execution is basically the same as the duration of litigation,[3] and its outcome is almost equally uncertain.

It seems that this requires a serious reform of procedural legislation. The Law on Litigation Proceedings must seek to find a balance between the principles of substantive truth and the principle of cost-effective proceedings that would not be as much at the expense of the latter. With regard to the execution proceedings, the draft law prepared in CLDS may serve as groundwork for future execution legislation.

TRANSPARENCY

Transparency, or visibility of the work of the judiciary and courts, is one of the most efficient devices for diminishing or eliminating corruption, but also for extenuating the perception of corruption in the judiciary. When justice is administered hidden from the public eye, including the professional eye; when not even the basic documents related to the case, such as the verdicts, are accessible to all interested persons but end up in the dark of the court archives; then we can hardly expect the public to exert its, potentially strong, influence and forestall the willful pronouncement of wrong verdicts or other court decisions. And when justice is administered publicly and when basic documents of the case are easily accessible to the public, then even the usually corrupted judge would think twice before taking dishonest or very questionable steps. Visibility of work is more significant in the judicial systems which are more widely involved in corruption and in those where even some judges of second-instance courts cannot be fully trusted.

All hearings, i.e. that phase of the proceedings when evidence is adduced, in Serbia are public and anybody, those without legal interest including, is entitled to attend them. This means that

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[3] See *New Law on Execution Proceedings,* CLDS, 2004, pp. 45 - 46

members of the public may attend first-instance and litigation and criminal proceedings, except in some specific and rare cases when hearings are held in camera. On the other hand, all other steps in the proceedings are not public, such as court deliberation on verdict, even when the decisions are made in the proceedings without adducing of evidence (on introduction of temporary measures, or on permitting the execution, for example), or in determination in second-instance proceedings where no evidence is adduced but the decision is made based on the documents from the first-instance proceedings. This system seems to be reasonable since it enables members of the public to attend the part which is the most important in view of determination of the factual status – the hearings. The only exception may be the one when decisions are reached on temporary measures which are, as experience shows, very questionable and which is sometimes an expression of corruption. If determination on them were public, it is likely that they would be smaller in number and less abused than otherwise.

The second important way of ensuring the visibility of work of the judiciary is announcement of court decisions, accompanied with the rationale behind it. In Serbia, upon conclusion of the proceedings the verdicts are relegated to the court archives and may be reviewed, like any other documents pertinent to the case, only by those who are able to prove their legal interest in the issue in question. Although there are some publications in which case law is published, it is not done in a sufficiently systematic manner. Even the universally adopted and understandable system of classification of court decisions, which would enable tracking, is not in place. The possibility of reviewing or making transcripts of the case files in the court registry office, or archive, is given only to the parties or persons with a legal interest in the case. Together, this does not enable one to draw a conclusion that court decisions are publicly accessible. This means that it is practically impossible for the public, including legal professionals, to assess the verdicts, to look for errors in implementation of the law, to establish, for example, that similar cases were proceeded differently by different judges or, which is more important from the perspective of corruption, to ascertain that the same judge proceeded differently in very similar disputes. Even if everybody were entitled to review the documents, or at least the verdicts, placed in the court archives, it would not be enough from the perspective of the transparency of the work or judiciary because anyone who intends to review and assess the work of the courts and the judiciary would necessarily

encounter many obstacles of a technical nature, and it would be quite time consuming. Failure to publish court decisions is not a feature of the judicial system in Serbia only, it is common in many countries of Continental law – contrary to Anglo-Saxon law where the verdicts are often published and stenographs made during the trial are easily accessible.

Therefore, the idea to consider in Serbia is that of publishing all verdicts along with the elaborations.[4] This would surely be useful for many purposes, not only and not primarily as a device for fighting corruption, but also as a way to increase efficiency and raise the level at which justice is administered. The fact that verdicts are published would surely not bother the good judges; quite the opposite, they would enjoy the opportunity to serve as a model to other judges, but also the fact that good verdicts, well founded in law and in the facts, would protect them from any negative opinion that members of the public may develop with regard to the judiciary in general.

With computerization of court work, the problem of collecting all the verdicts passed in Serbia would fade away. Namely, when a verdict is entered and stored in a computer, the task of collecting them all in a centralized database is trivial. Such a database in itself, if suitably classified and accessible on Internet or CDs, would be a valuable asset for broad use, and it would be quite cheap to establish. The next step would be publishing of verdicts in the form of printed compilations, which requires greater financial resources; however, the commercial potential of this job should not be overlooked either, since many members of the legal profession, particularly lawyers, would be keen on prescribing to such a compilation.

UPGRADING THE JUDICIARY

A judiciary which is not well structured, across the vertical and across the horizontal axis, a judiciary which lacks good procedures, one that has less judges and supporting staff than needed, that has no available necessary technical capacity and whose budget is too low, can hardly be capable of providing for the rule of law, and even to resist corruption. Serbian judiciary doubtlessly suffers some or many of these flaws and this inevitably reflects on the quality of trials.

[4] However, it is necessary to provide protection of confidential information.

In Serbia, the court organization law is an example of poor reform of the judicial system. The “set” of laws which regulate the judiciary (Law on Judges, Law on High Judicial Council, Law on Regulation of Courts, Law on Public Prosecutors)[5] was adopted in 2001 and its adoption brought many a controversy: it was proposed by a parliamentary party and not by the Government; many, particularly a part of the judiciary, maintained that it had not passed through an appropriate public debate, especially in professional circles. It has been mentioned above that this set of laws were amended more than once and that some of the amendments were declared unconstitutional. Moreover, a great number of the provisions of these laws have not been implemented, starting from the ones related to the scheme of courts (introduction of appellate courts and administrative court), and consequently related to the jurisdiction, individual provisions about the judges, etc. The court rules of procedure is a bulky volume: with regard to some issues it is superfluously detailed, with regard to other it leaves too wide discretionary power to judicial administration, some issues are not regulated at all (necessary training of court staff, for instance, when this issue is not regulated by legislation).

It seems that codification of the court organization law should be started all over again. Adoption of the new constitution – if it occurs relatively quickly – is quite a good opportunity for this. It would be beneficial to preserve some of the valuable novelties introduced in these laws – the role of the High Judicial Council, for example – but to avoid repetition of the situation where implementation of the law is not prepared for.

Education. There is a correlation between corruption and (un)awareness since a person who does not know the law and its implementation in the judicial system usually surrenders to the temptation of money more easily. That is why, but also because of the professional development, the continuous professional training of judges and other court staff is an ongoing task. In Serbia, as a transition country, education of judges is gaining importance with the quick and essential changes in general and commercial legislation and with the emergence of completely new institutions, which make a part of the judges’ knowledge outdated and irrelevant.

[5] More generally speaking, this includes the Law on Legal Practice and the Law on the Bar Examination, which were not changed.

A serious program of continuous professional training for judiciary should include:

- professional education, which would include both classic knowledge and the innovations caused by the transition process,
- education in ethics, especially concerning the code of ethics,
- education related to technical knowledge required for a judge, beginning with use of PC through to the organization of team work (to the extent suitable for performing the judicial office), the use of "services" provided by expert associates, for example.

The problem of education, however, does nor relate solely to the existing judicial staff, but also to the future judges, those yet to be recruited.

We would go too far if we were to engage in the analysis of the conception of law studies in our country. However, that issue must be addressed some day. For example, when the question arises whether to maintain the system whereby the law school diploma is a pre-requisite for practicing the judicial or prosecutors' profession, whether to accept the diplomas in specialist law studies gained at newly-founded private universities, the question of the attitude to assume towards the new model of grading the university studies if it is adopted, etc. It is surely necessary, however, to reconsider the existing bar examination – the precondition for involvement in judicial, prosecutors', or lawyers' profession (on equal terms). Those who have first-hand knowledge of what this examination looks like surely know how urgent it is to solve this issue.

Familiarity with laws and other regulations is a must for any proper adjudication. If the judge has no regular and immediate access to amendments, he will not be able to conduct the proceedings in the prescribed manner and will not have a proper defense form outside influence. Such unfavorable conditions would make even the innocent judge susceptible to suspected corruptive practice.

In Serbia, the accessibility of laws is (was) not at the satisfactory level. The judges complained that they do not receive a sufficient number of Official Gazettes and Official Bulletins, which made their work more difficult and made it hard for them to act in accordance with law.

In future, all judges and other employees in the judiciary should be provided with regular, fast and easy access to the laws and their amendments, and to all other necessary documents. This would require a sufficient number of copies of official journals, but also easy access to electronic databases and other compilations of regulations, interpretations made by higher courts, good examples of case law, comments on the laws made by legal experts, and similar.

Improvement of administrative activities. Thanks to the complex administrative procedures, considerable discretionary powers are available to judicial staff in the course of the proceedings. This is doubtlessly a significant factor of the (in)efficiency of court proceedings and it opens possibilities of corruptive practice.

In Serbia, the Court Rules of Procedure has lain down the details of the administrative procedure and obligated the court staff to work properly and efficiently. The main problem with these procedures is not associated with flaws in the rules of procedure but with their infringement by court staff. The most important options for improvement of the work of court staff, but also for the fight against corruption, are the following two:

First – much more active control over their work by the court administration, with proper sanctioning of deliberate offences. This would strongly encourage the court staff to act in accordance with the relevant regulations and ethical standards.

Second - enhanced surveillance over the flow of administrative activities in the court. The system of registering the undertaken procedural steps in every individual case (dispute) should be enhanced and computerized. In other words, each individual step that is taken within the proceedings – from the instigation to the conclusion – should be registered and dated at one place and this register should be maintained in electronic format (as well). Computerized tracking of the proceedings will improve the transparency of the work of the judicial administration and enable all interested persons to keep track of their acts and detect the errors, particularly those associated with non-adherence to the prescribed terms.[6]

[6] The Bulgarian Supreme Administrative Court, for example, has computerized the flow of administrative activities and enabled interested persons to keep track of individual procedural steps taken in the individual disputes over the Internet. See www.sac.government.bg.

Working conditions in the courts are often a great restrictive factor on the efficient work of judges and other employees in the judiciary. When several judges sit in the same chamber, when even the basic office equipment is not available, when they are overloaded with administrative activities due to the lack of supporting staff – meaning, when the working conditions are much below the dignity of their office, we cannot expect that the judiciary will operate at the highest level. Errors, regardless of whether they are deliberate or not, are in such conditions much more frequent than they would be otherwise.

The working conditions of judges and other court staff in Serbia are often poor. Consequently, one of the preconditions for improvement of the work of the judiciary is to enhance working conditions and thus allow all court employees and particularly the judges to fully devote themselves to their main tasks.

Funding of judiciary. The volume and manner of funding the judiciary affects the performance of the judiciary, and, to some extent, the corruption level as well.

The budget level has only an indirect impact on the decrease of corruption: both through increasing the salaries and improving the working conditions for the employees in courts, and through the improvement of the very decision making process – passing the verdict, and all through the increase of disposable educative devices, better transparency and improvement of the overall impression the public has about the judiciary (higher level budget, particularly in poor countries, indicates that the government and the parliament care about justice. This then positively influences the respect for the court and judiciary as public institutions, and this in turn results in a reduced demand for corruption).

The manner in which the judiciary and courts are funded is directly indicative of the degree of the judiciary's independence. If the judiciary has no influence on the manner in which it is funded, it is very likely that it does not enjoy full independence. Some interesting mechanisms for the de-politicization of the decision on the judiciary budget are based on entrusting budget proposals to the judiciary council, the judiciary, or judicial councils within the judiciary. In Hungary, for example, the judiciary budget is not proposed by the ministry of justice but rather by an independent body – the National Judiciary Council. The government can adjust the proposed budget but, when presenting it to the parliament, it must elaborate on any deviation from the proposal. Bulgaria and Georgia have similar mechanisms for diminishing the direct influence of the government on the judiciary budget.

Allocation of funds for the approved use and for the courts is a critical factor in case of any direct hierarchical dependency of the lower courts on the higher courts (when the higher courts are authorized to determine the budgets of the lower courts). This dependence may be conducive to corruption from top to bottom.

Alternative ways for dispute resolution. A significant component of the program for diminishing corruption in judiciary, but also for general improvement of dispute resolution is a system which enables alternative ways for dispute settlement. That is a process in which the interested parties attempt to solve their mutual dispute out of court, through arbitrage, mediation or settlement. The role of judiciary is greatly diminished though employment of this way of dispute resolution, hence the effect or corrupted or inefficient state judiciary is eliminated.

Accordingly, big corporations often include in their contracts with the partners from developing countries the option that any disputes will be solved through international commercial arbitrage (such as in Paris, London or Stockholm), and in this way steer clear of the judicial systems which they do not completely trust. For smaller enterprises, however, international arbitrage is a prohibitively costly process and this makes it impossible for them to use this method for eschewing the flaws of the domestic judiciary system.

Although current regulations in Serbia do not allow alternative methods of dispute resolution – even if contractual parties are entitled to envisage in their contracts that they shall resolve any disputes through arbitrage or settlement out of court – the state and the judiciary system may encourage or discourage this method of dispute resolution. For example, local courts may relieve a local party or a witness of the obligation to take part in the arbitrage or may be lenient in execution of the arbitrage decision.

Encouragement of alternative methods of dispute resolution could be awkward for the state since it is indicative of the admittance of failure to properly regulate the state judiciary system and ensure fair administration of justice. This awkwardness may, nevertheless, have a positive side since the orientation towards the alternative methods for dispute resolution may increase the attractiveness of a country for foreign investors and strengthen domestic companies through increasing their competitiveness on the domestic and foreign market. Chile, Ecuador and some other countries have had positive experience with this.[7]

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[7] E. Buscaglia - *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences*, Hoover Institution, 2002

BUILDING UP THE MOTIVATION

Low ***salaries of the employees*** doubtlessly constitute one of the sources of corruption in judiciary in many developing and transition countries. In our judiciary system, the salaries are more often than not too low. This surely cannot serve as discouragement of corruptive practice; quite the contrary, this is an incentive for some people to try and earn some money the "other" way.

When the salaries for judges were increased in 2002 (for the judges of municipal courts to some thirty thousand dinars a month), it was welcomed as a great achievement. And it was a great achievement compared with earlier miserable salaries. However, inflation in the meantime has devalued these salaries, and the salaries in other professions have increased so that the salary of a municipal judge of 400 euros as it is today cannot be considered high, not even satisfactory. Yet another problem is posed by the salaries of court staff, which remained very low and are far from being conducive to good performance.

The salaries of both the judges and other employees in courts should be considerably raised if any reduction of corruption is intended. It is not our wish here to maintain that low salaries are the only source of corruption in judiciary, nor that their increase would make corruption disappear, we would just like to point out that salaries which do not cover the minimum sustenance needs or are even degrading, directly induce corruption.

Increase of legal earnings will not induce the judiciary staff to give up corruption since the possibility of earning through corruption is often much greater than through legal earnings, no matter how much the latter are increased. All the same, raising the legal earnings would contribute to the decrease of corruption in two ways: first, a part of the employees in the judiciary, those who are forced to engage in petty corruption to survive, would stop taking (or receiving) bribes and would begin to behave honestly; and, second, the existing moral justification for corruption "our salaries are so low that we simply have to…" which has developed the tolerance towards corruption would disappear, or would appear less convincing, and this would in the longer term produce apparent results.

For a number of administrative jobs, in addition to the increase of basic salaries, an incentive system of bonuses could be developed. The bonuses would have to be based solely on the quality of work and performance and in no way should they be

based on private connections or nepotism. The criteria for obtaining the right to a bonus would have to be accurately defined and the level of bonus compared with the performance should be known in advance and well defined by the rules. The obtained, that is paid out, bonuses should be, in the interest of stimulation and transparency, made known in the courts and at similar places.

A good side of the bonus is that it is acceptable for political circles which are always sensitive to the increase of salaries in public services (and with good reason since increasing the salaries in one service inevitably leads to increasing the salaries in other services). Namely, the awards which result from good performance of the employees are always more straightforward to defend, particularly when performance is easily measurable, compared with the general increase of salaries for all.

For the leading actors in the judiciary, such as for the judges and prosecutors, the common periodical bonuses are not an appropriate device for inducing better performance because they conflict with the concept that appointed officials work painstakingly in the public interest. However, even for them it is possible to establish rewards for excellent performance which would be granted once a year and would include a financial component.

Reporting the property of judges and prosecutors and members of their families is a possible method for fighting corruption in the judiciary. Reports are usually made at the beginning and at the end of the mandate period, but may be made periodically and may be supervised by an independent official or body. The efficiency of this measure is generally considered to be significant since it serves to steer individuals away from corruption due to the high probability that 'extraordinary' incomes will be discovered.

However, the question remains whether to apply this method for fighting corruption in the judiciary. The reasons for this dilemma are many. Firstly, if other professions in Serbia, and politicians in the first place, are not required to report their property and to prove the origin of their money – why is it required of the judges? Secondly, this method is insulting for respectable people – and a great majority of judges and prosecutors belong to this group – and we are not sure whether corruption in the Serbian judiciary is so widely spread as to justify resorting to such a draconic measure. Thirdly, the actual efficacy of this measure is not quite certain since there are many possibilities to sidestep

having the controller get a full view of your total volume of property, especially in its financial form. While real estate is relatively easy to control, cash and securities are not.

Liability of the judge. The presumption of good quality and efficient judicial system is that the judge is answerable for his work. At the same time, liability is a safeguard against corruption.

A judge who incompetently or negligently performs his duties may be dismissed. This necessary correction of the principle of permanence of judicial office is the ultimate measure of the liability of a judge within the judiciary system, and as such it is subject to specific (strict) rules and will be later considered in detail.

Apart from dismissal, any legal system must find the right balance between the forms of judicial liability and the need to preserve his independence and prevent the rules on judicial liability becoming a threat through which it would be possible to exert pressure on or influence the judge.

One aspect of seeking for the right measure is the judicial entitlement to error. No participant in the adjudication process (judge, juror) may be held liable for the opinion proffered when passing a court decision. Anyway, while one cannot be held liable for his judicial opinion even if it is erroneous, when the corruption or conscious violation of law or apparent negligence, according to the internationally recognized standards, underlie his error, the following three forms of liability may be considered:

- *Internal, "disciplinary" liability.* In our law, a judge against whom the dismissal procedure has been instigated due to his incompetent or negligent performance may be pronounced a measure of warning or removal from office for a period between a month to a year. In practice, suspension has been pronounced (in a negligible number of cases) against judges against whom the dismissal procedure has been instigated, and this was meant as a preventive measure. At the same time, there are some other measures and it would be useful to consider whether they could be accepted: seizure of cases (envisaged as an exceptional measure by the Court Rules of Procedure in our country), temporary relocation to another court, seizure of salary. The guarantees involved in the specific procedure for dismissal must be respected in this case as well.

- *Criminal liability*, envisaged for the event of corruptive practice by the criminal offence of corruption in the judiciary[8] and formerly by the violation of law by a judge for the purpose of obtaining financial benefit for himself or somebody else. It has already been explained that only a small number of complaints have been filed against judges in Serbia. There is no doubt that it is difficult to expose this offence, and several recent cases show that lately there has been a lack of resolve to prosecute such offences. A judge, however, enjoys impunity and, in the process instigated due to a criminal offence committed in performance of judicial function, he cannot be detained without the prior approval of the National Assembly. While any impunity is disputable, the justification for this one is protection of judges against any interference.
- *Property liability.* The state owes compensation for damages to anyone who suffers damage as a result of an unlawful court decision. According to the general rules of civil law, application for regress may be filed against a judge who has deliberately or due to gross negligence violated the law and thus caused damage which the state has had to compensate. This is compliant with the European Charter on the Statute of Judges. Such practice, however, has no firmer foundations in our law.

However, if the rules on judicial liability are considered comprehensively, it seems that, bearing in mind their potentially anti-corruptive function, their main flaw is the fact that they are implemented inadequately and inconsistently. If the strict rules on all aspects of liability are made, and if there is implementation is made binding and if liability is defined for failure to implement them by the judicial administration and the responsible governmental bodies (prosecution, public attorney), anti-corruption policy will be more effective.

Code of ethical conduct. In the course of the official work of the employees in the judiciary, and particularly in case of judges, many questions of an ethical nature arise to which no answer can be found in substantive and procedural laws. For example, whether it is permissible for a judge to adjudicate for a relative; or, whether, and in what form, is it permissible for a judge to engage

[8] See Chapter: *Mechanisms of Corruption in Judiciary*

in politics (and what does engagement in politics really mean?). These and similar issues are usually not to be found in the laws on judges and courts, or are only dealt with, as in the Law on Judges of Serbia, at a most general level.

In order to induce (or force) judges and court staff to respect usual ethical norms, but also in order to define precisely what is the operative meaning of such norms, many countries have passed codes of ethical conduct for judges, and somewhat less often, for court staff. The idea was doubtlessly to use these codes as yet another method of strengthening the integrity and impartiality of judges and the court system in general.

Lately, in an international framework and under the auspices of the United Nations, a lot of work has been invested in the development of the *Bangalore Principles of Judicial Conduct*. The text of the Principles was drafted by chief justices from a great number of countries and in 2003 it was forwarded to the UN Commission on Human Rights for adoption. The text of these Principles is enclosed as an appendix.

The United States of America, for example, has separate codes for judges and for other employees in the judicial system. They were adopted by the Judges Conference comprising highly regarded judges from the courts of different levels (with the exception of the Supreme Court). Abiding by the codes is considered mandatory even though their infringement in itself does not constitute grounds for determination of criminal or civil liability.

In the Ukraine the rules for professional conduct are mandatory and they are promulgated by the parliament, while in the Slovak Republic they are facultative in nature and prescribed by non-governmental professional associations.

No code of conduct for judges and judicial officers is in place in Serbia.[9] The Law on Judges only obligates the Supreme Court to prescribe 'which acts are contrary to the dignity and sovereignty of a judge and detrimental to the reputation of the court'. Only a Statues for evaluation of non-court behavior of the judges, in which the activities that are not consistent with the judges profession, though without sanctions for violating them.

There are two possible ways to improve the work of judges and courts in Serbia. The first is that the Supreme Court exercises the

[9] Code of Judicial Ethics of the Judges Association is overly general in character and is definitely not binding.

right granted to it by the Law on Judges and, after assiduous preparations, promulgates the code(s) which will be binding for the judges and other court staff. The other is that some broader body, such as the US Judicial Conference, promulgates the suitable codes. One way or the other, it is obvious that there is a need for the Serbian judicial system to accentuate the issue of integrity, independence, impartiality, and competence of judges and the issue of proper work of court staff.

APPOINTMENT, DISMISSAL, AND PROMOTION OF JUDGES

The role of the judge is to conscientiously and competently interpret and apply the law, in view of the fact that entitlement to a fair trial before an impartial court is considered to be a universally recognized human right. The appointment, promotion and dissolution must be conducted in a politically neutral and transparent manner, based on objective criteria.

The individuals who are appointed to judicial office must possess the integrity, competence and appropriate knowledge of the law. The procedure of appointment may not discriminate persons based on their gender, religion, ethnical or social origin, political views, property, or status.

The manner of selecting the judges is of essential importance for their independence and impartiality. They may not be perceived as politically coloured, because that would destroy their credibility, i.e. their trustworthiness to the public and members of the legal profession. Judges must be selected based on their competence and merits so that their clients and the public will be given reasons to believe in their work.[10] The appointment of judges must be transparent so as to reduce the risk of nepotism and political patronage.

Different countries have different procedures for appointment of judges, and main actors involved are the legislative power, the executive power, and the judiciary themselves.[11] Experience shows that the risk of error increases if the appointment procedure is ceded to only one of the three above mentioned factors; therefore,

[10] In Georgia, disatisfaction with adjudication reached such a level that all judges had to undergo rigorous examinations and many of them were dismissed.

[11] In the USA judges are also selected on elections, which implies the risk that populism prevails over professionalism.

the advantage should be given to a combination of at least two forms of power. The role of judicial councils[12] has of late gained popularity in the procedure of appointment, or at least nomination of candidates. They are independent of the ministry of justice and comprised of the representatives of various structures (for example, judges of the supreme court, honorable professors of law, or possibly, the minister of justice, a representative of the president of the state, etc), and they represent a form of cooperation between different factors which is supposed to ensure their mutual supervision and de-politicized appointment.

By promulgation of the current Law on Judges, the procedure of appointment of judges in Serbia implies a system where a judicial council holds the exclusive right to propose the feasible candidates while the final appointment is made by the National Assembly. The system should provide a balance between judicial power (representatives of judiciary prevail in the judicial council) and legislative power, with the participation of executive power which is in charge of the competitions for appointment. Hence, it goes like this: the competition is announced, the High Judicial Council makes proposals, and the National Assembly makes the appointment.

Turbulences in the system are shown in the chapter about the sources of corruption in judiciary. Frequent changes in laws and the battle for supremacy in the procedure of appointment, however, are not only a manifestation of the battle for indirect control over the judiciary, they also have an objective role. The decisive role of the judiciary's power in development of proposals for appointment is alleged to lead to reproduction of the judicial staff that was inherited and which is for many reasons believed to lack professional competence and moral firmness. And the principle of the permanence of judicial office makes this appointment pretty much definitive.

The impression that cannot be avoided is that politics and political structures are still a great influence behind the appointment; it may also be exercised through the representatives of judiciary in the bodies which take part in the appointment. On the other hand, there is no doubt that efforts have been made to make the criteria more objective: within the High Judicial Council efforts were made to establish, through an appropriate rulebook,

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[12] For example, many countries of Latin America, according to L. Hammergren – *Do Judicial Councils Further Judicial Reform? Lessons from Latin America*, June 2002

the criteria for ranking of candidates. These criteria, however, are rather flexible and may serve to defend quite different proposals. The sessions of the Serbian Assembly, public debates, disproval of candidates, and appointments with a very near majority vote, show that these problems are still unresolved.

It seems that the system that is based on the High Judicial Council, with the parliamentary appointment, is still the most acceptable one for Serbia, and in a forthcoming new codification of the court organization law it would be better to improve rather than to abandon it.

An idea that is worthy of consideration, however, is that the principle of the permanence of judicial office does not apply in the first appointment and for a certain (short) term; reappointment would mean definite appointment. This possibility has been recognized in the European Charter on the Statute of Judges, and accepted by the Draft Constitution of the Republic of Serbia as forwarded to the National Assembly by the Government of the Republic of Serbia in the summer of 2004. If this system of probation is adopted, it must be carefully modeled. In any case, even if it might seem appealing, it should not replace verification of the existing judicial staff by "translating" it in its entirety in the probation phase. The constitutional divorce from the principle of permanence of judicial office must, if that is what is wanted, be performed in an unambiguous manner, not indirectly.

More radical move would be substantial replacement of incumbent judges, as considerable number of them is not competent, is corrupted or their integrity has been violated in various ways. These elements not only that deteriorate the reputation of the judiciary, but also harm functionality of judiciary and violates the rule of law altogether. The rationale for such a move can be only partially founded in the anti-corruption combat; the more important aim would be improvement of judiciary and justice in Serbia. Such a change of incumbent judges can be implemented ads a part of forthcoming change of the Constitution, and support for than move have already been obtained by many judges and other legal professionals.

There are three basic difficulties regarding the idea of substantial replacement of incumbent judges. The first one is its political sensitivity, hence it is open question whether such an operation can be implementing by this or any other Government. The second one stems from the principle of permanency, i.e. immovability of judges as crucial precondition so needed

independence of judiciary from other branches of government, i.e. form the political sphere, and the principle of permanency will be, by definition, violated with the substantial replacement. Nonetheless, there is a convincing counter-argument: the principle of judges' permanency keeps bad judiciary alive and it is better to be temporarily suspended, hence it could be returned permanently afterwards. The third difficulty is as follows: it would be necessary to enable impartial way for removal of incumbent and election of the new judges, and it is difficult to be sure that this venture will be free from partisan politics pressures. It is more likely that the concept of substantial replacement of incumbent judges will be successfully enforced by the comprehensive and stabile parliamentary coalition majority.

No one is beyond the law, and this includes the judges. They must be held liable for their conduct or the temptation of corruption would be too strong. There must be sanctions in place for those who have abused their office or manifested a high level of professional incompetence. Dismissal of a judge is only one measure, the other one is criminal prosecution.[13]

The dismissal of a judge is a serious matter and may not be resorted to easily: because some members of executive power do not much like a particular judge, for example. In standard circumstances, dismissal of a judge should be an exceptional tool that would be allowed only in case the judge is incompetent or in cases of conduct which renders him unsuitable for performance of the judicial function.

The procedure for dismissal must be clearly defined and solely the court or a body that is judicial in nature should conduct it. Otherwise the independence of judiciary would suffer. It would be appropriate that a higher court conduct the dismissal procedure, the supreme court, for example.

This is a system that is accepted in the positive law. The proposal for dismissal of a judge may be determined by the High Judicial Council, and it may be made because of incompetent or neglectful performance of judicial duties. The National Assembly decides on the proposal.

In practice, this measure is employed extremely rarely. The problems with the changes of the Law on Judges, including those concerning the manner of appointment to the High Personal

[13] Compensation for damage incurred due to any erroneous judicial decision is requested from the state, and not of the judge who have made it.

Council practically froze this possibility for a while. On the other hand, at one moment the executive power initiated a large number of dismissal procedures and this produced great anxiety in the courts.

There still remains the impression, however, that a great number of the instigated procedures and adopted proposals do not reflect the actual situation in the judiciary.

This is not to say that the existing system, which corresponds to European standards, should be entirely abandoned. It is possible and even necessary to make some adjustments. The first among them should concern the composition and the manner of appointment to this body.[14] The second concerns further detailed definition of the procedure, particularly starting the initiative for dismissal. Finally, and in connection with the above, it is possible to upgrade the standards based on which it would be possible to (more objectively) evaluate the cases of incompetent or negligent work. It is possible to establish through the procedural laws that recurrent infringement of procedure may constitute a reason for instigation of the dissolution procedure.[15]

Possibilities of promotion for judges and prosecutors is a strong, and it should also be a positive, incentive for good performance to anyone, judges and prosecutors included. The same as with the appointment, the promotion procedure is susceptible to the undue interference of politics so that judges and prosecutors are promoted based on the criteria of loyalty, political relatedness, and nepotism.

Promotion of judges would surely have to be based on objective factors, particularly on specific competency, honesty, and experience, and it should not be extended as a reward for some earlier 'services rendered'. Therefore, in the promotion procedure for the judges, other judges, particularly those from higher courts, should play a major role, and the influence of the executive power should be as slight as possible.

Serbian law does not recognize promotion of judges in the formal sense of the word; promotion is realized though

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[14] See *Judicial Tips, 217 – 218.*

[15] Thus, the draft Law on Execution Proceedings, as prepared by CLDS, envisages that failure to abide by a certain number of deadlines constitutes unwarranted extension of proceedings by the judge. See *New Law on Execution Proceedings,* CLDS, Belgrade, 2004, Articles 5 and 13 for example

appointment to the judicial office at a higher court, in the regular appointment procedure. Naturally, the performance of a judge in his previous work is a primary criterion both for his proposal for appointment and, on the opposite side, for the negative attitude with regard to the appointment to a judicial office in a higher court.

In practice this criterion is more or less respected, and performance statistics and personal file are made available to the High Judiciary Council. There are some exceptions and they only confirm how imperfect is the (application of) the appointment system discussed above.

OTHER ACTORS

In addition to the judiciary themselves and the state in general, an important role in the battle against corruption in judiciary may be played, and should be played, by other institutions and organizations which are, to a greater of lesser extent, linked with the judiciary, such as media, law schools, associations of lawyers, private sector, and non-governmental organizations.

Media may play a major role in the creation of anti-corruption pressure and is the actor which can most efficiently build public awareness about the forms, depth, and harmfulness of corruption.

The media in Serbia almost shyly and without any deeper analysis reports on individual cases of suspected corruption in the judiciary. It would be good if a wave of the investigative approach to corruption in judiciary is launched in the media, that is, if it was the media that started a complicated, but potentially interesting and useful, undertaking of closer and more thorough analysis of the phenomenon of corruption in judiciary.

A program aspiring to be efficient in suppression of corruption in the judiciary would have to comprise the organization of a media campaign, TV programs, documentary programs on the phenomenon of corruption in the judiciary; reports on the activities of competent authorities, findings of specific investigations, etc.

Law schools have the task of imparting the professional education to students who want to become lawyers but also of directing them towards honest practice of the legal profession. The bribing culture can sometimes be adopted at a very early age, at

the university, and sometimes from the lecturers or administrative staff who, occasionally and given the financial incentive, show readiness to help young people in an out-of-the-ordinary way.

To be able to respond to the expectations and to contribute to the fight against corruption, law schools in Serbia should be well funded, on one hand, and, on the other hand, they should come out on top of the corruption in their own ranks and educate the students about the ethical performance of the legal profession.

Association of Lawyers is not only an organization for the promotion of lawyers' immediate interests. This association also has the task of achieving a higher level of legal practice and to contribute to development of the judiciary in general.

Since the lawyers sometimes play the role of an intermediary between the parties and the judges in corruption practices, the liability for corruption in the judiciary is partly with them. Lawyers' associations should assist in exposure of their members who are involved in corruption practices and should play a role in reduction of corruption through imposing sanctions on their members.

Non-governmental organizations can contribute to the battle against corruption in judiciary in several ways. Firstly, they can raise the awareness of the public about the profundity and effects of corruption and about the methods of its reduction. Secondly, they can investigate individual cases of corruption in the judicial system. Thirdly, they can disseminate information about legal procedures and human rights, which can increase resistance of the society to corruption in the judiciary. Fourthly, they may exert pressure on the government to intensify the anticorruption battle and reform of the judicial system, etc.

Annex

The Bangalore principles of judicial conduct

Preamble

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the United Nations Basic Principles on the Independence of the Judiciary are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

Value 1:

INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2:

IMPARTIALITY

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3:

INTEGRITY

Principle:

Integrity is essential to the proper discharge of the judicial office.

Application:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4:

PROPRIETY

Principle:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practice law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5:

EQUALITY

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation

on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Value 6:

COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation

to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"Court staff" includes the personal staff of the judge including law clerks. "Judge" means any person exercising judicial power, however designated.

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"Judge's spouse" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

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