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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# COMMENTS

# ON THE DRAFT CRITERIA AND STANDARDS FOR THE ELECTION OF JUDGES AND COURT PRESIDENTS

# AND

# ON THE DRAFT RULES OF PROCEDURE ON CRITERIA AND STANDARDS FOR THE EVALUATION OF THE QUALIFICATION, COMPETENCE AND WORTHINESS OF CANDIDATES FOR BEARERS OF PUBLIC PROSECUTOR'S FUNCTION

# OF SERBIA

**by**
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**Appointment of Judges and Public Prosecutors in the Republic of Serbia**

1. The opinion of the Venice Commission has been sought in relation to two draft legal instruments. The first is a document entitled "Criteria and standards for elections of judges and court presidents" which is proposed to be made by the High Judicial Council of the Republic of Serbia pursuant to Articles 45 and 69 of the Law on Judges published on 27 December 2008. The second is an instrument intended to be made by the State Prosecutorial Council pursuant to Article 82 of the Law on Public Prosecutors and Article 13 of the Law on State Prosecutorial Council entitled "Rules of procedure on criteria and standards for evaluation of qualification, competence and worthiness of candidates for bearers of public prosecutors function".

2. The background to these two legal instruments is the reform of the judiciary and the prosecution service. The purpose of these reforms is set out in the fourth report of the Secretary General of the Council of Europe dated 29 January 2009 as follows:

> "Reform of the judiciary and prosecution have been amongst the main priorities of the new government in its first few months. The inefficiency of the justice system has led to increasing numbers of cases concerning the length of procedures before the European Court of Human Rights. The high number of criminal cases dropped due to the statutory limitations, the low rate of conviction and the prevalence of minimum or sub-minimum penalties for criminal cases related to corruption, have only driven higher the public perception of an incompetent, or even corrupt, justice system which is not capable of self-regulation or of reforming itself. The lack of effective government sponsored reform in this area after the transition to democracy has been a source of disappointment for the citizens, government and international community alike. After many years of stumbling and delayed efforts at wide-ranging systemic changes, the justice system continues to struggle under a substantial case backlog, lack of public confidence and growing insecurity amongst legal professionals."

3. The report goes on to refer to the laws adopted on 22 December 2008, namely the Law on the Organization of Courts, the Law on Judges, the Law on the High Judicial Council, the Law on the Public Prosecution, the Law on the State Council of Prosecutors, and the Law on Court and Public Prosecutors Seats and Districts. A number of controversial elements in the reforms which stem from the constitution are referred to, including the role of parliament in the appointment of the members of the High Judicial and Prosecutorial Councils. The report also comments on the strong opposition from the professional associations of judges and prosecutors and from opposition political parties to the re-organization of the court network, including a decrease in the overall number of judges, and the procedure and timeframe for a general re-election of judges.

4. The Venice Commission has previously adopted opinions on the draft laws on the High Judicial Council, on Judges and on the Organization of Courts (CDL-AD (2008) 006 and 007 of 14-15 March 2008). In those opinions the Commission expressed its concern that the Constitution of Serbia did not sufficiently support judicial independence in the country and that there was a risk of politicization of the judiciary by the election of judges and of the High Judicial Council by the parliament. While the draft laws were deemed to be generally in line with European standards a

number of provisions which weaken judicial independence were referred to. At that time the draft provided no guarantee that existing judges against whom no incompetence or misbehaviour was alleged would be reappointed. Indeed an earlier draft contained a requirement that the parliament be presented with two candidates for each vacancy. At a seminar in Belgrade in February 2008 representatives of the Venice Commission were present and expressed their concerns that such a procedure would leave open the possibility of removal of judges from office who had not been guilty of any misbehaviour. The authors of the draft explained that there was a problem concerning corruption involving some of the judges who had been appointed during the Milosevic regime but nonetheless the representatives of the Venice Commission felt that the proposals then being put forward were a disproportionate response to this problem. At that seminar the view was expressed that existing judges should not be removed from office unless they could be shown to have engaged in misbehaviour or were incompetent to hold the office of a judge. Under the Law on Judges as passed in December 2008 the parliament elects first-time judges from among the candidates nominated by the High Judicial Council (Article 51) and one or more candidates may be proposed for each vacancy (Article 50). Permanent judges are elected by the High Judicial Council (Article 52).

**Criteria and Standards for Election of Judges and Court Presidents**

5. The draft criteria are intended to set out objective criteria for the recruitment and appointment of judges. However, the actual election of judges is still governed by the Constitution and the laws previously assessed by the Commission. The criteria first of all specify that the requirements for the office of a judge are qualification, competence and worthiness. Qualification implies both theoretical and practical knowledge necessary to perform the judicial function. Competence implies skills which enable the efficient application of legal knowledge to the work of the judge. Worthiness implies the ethical qualities a judge should possess and behaviour in accordance with those qualities. (paragraph 1)

6. The scope of the instrument concerns (1) the first election of a temporary judge who is to have a three year mandate, (2) the election to permanent functions of judges who were previously appointed, (3) the election of judges for permanent function at the expiry of their three-year mandate, (4) the promotion of judges from one court to the next highest court and (5) the election of court presidents.

7. The criteria and standards set out in some detail what is expected of candidates for appointment under all three headings. In relation to the first appointment of judges with a three year mandate theoretical knowledge is to be evaluated depending on such matters as average grade during studies, duration and conditions of studies, the publication of scientific and professional papers, and the acquisition of degrees. Practical knowledge is to be evaluated on the basis of experience after passing the bar examination. Under Article 4.4 of the draft candidates are to be evaluated according to reports by the bodies, organizations, bar associations and principals they have performed practical work with. For example, the competence of a person who has been a judicial assistant will be evaluated on the basis of performance in that function taking account of the opinions of the judges with whom the person had practical training. The criteria also provide for the carrying out of interviews and tests. (Paragraph 6.5) The criteria set out in some detail the ethical qualities required of a judge. These include honesty, conscientiousness, equity, dignity, persistence and the setting of good example. Under the latter heading such matters

as refraining from any indecent act, refraining from any action causing suspicion, raising doubts, weakening confidence, or in any other way undermining confidence in the court, refraining from hate speech, indecent or blunt behaviour, impolite treatment, expressing partiality or intolerance, using vulgar expressions, wearing indecent clothing and other improper behaviour are referred to. These factors are to be evaluated on the basis of results of interviews, and other methods such as carrying out of tests and other psychosocial techniques. They may also be evaluated on the basis of getting the opinions of persons the candidates have worked with, such as judges or members of the bar.

8. The second matter referred to is the election of persons who are already serving as judges. In this regard the concerns of the Commission that existing judges who had not been guilty of any wrongdoing might not be reappointed are partially addressed in the draft. The draft provides for a presumption that already appointed judges applying for election to the court of the same type or at the same level where they are already judges fulfil the criteria and standards mentioned in the Act. However, this presumption can be overturned if there are reasons for doubt that the candidate does fulfil these criteria and standards, because he or she has shown incompetence, a lack of qualifications or unworthiness for performing judicial functions (Article 9.2).

9. Where a judge has had a number of revoked decisions significantly higher than the average in the court he or she works in this can be regarded as a negative factor. It seems to the writer that this is a matter which should be approached with a great degree of caution. It does not necessarily follow that because a judge has been overruled on a number of occasions that that judge has not acted in a competent or professional manner. It is certainly reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question, but any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled. Furthermore, a distinction might validly be drawn between decisions made on the basis of obvious errors which any lawyer of reasonable competence should have avoided and decisions where the conclusion arrived at was a perfectly arguably one which nonetheless was overturned by a higher court.

10. Similarly, one of the criteria which can be looked at is the workload of the judge concerned. Where a judge has concluded a lesser number of cases than required by the orientation norm or where criminal cases have had to be abandoned due to delays for which the judge is responsible, these are matters to be considered. Again, it is important that the actual cases be evaluated. It cannot be ruled out that some judges may be given more difficult cases than others as a result of which their workload appears to be less than that of their colleagues. It is also important that the mere counting of workloads not be used in such a way as to put pressure on a judge to make decisions without proper consideration. However, it seems reasonable that these criteria should be used as a means of identifying possible problems, provided that a proper evaluation is then carried out and not simply be treated as a numbers exercise.

11. The third form of election dealt with is the election of a permanent judge following the expiry of a three-year mandate. This is done on the basis of the grading during the three-year mandate. The grading is a tripartite one, with grades of “does not satisfy”, “successful performance of judicial function” and “exceptional performance of judicial function”. A judge with the grade “does not satisfy” for each year of the

mandate cannot be elected to permanent function. A judge is eligible to be elected for permanent function if graded with either of the two higher grades for each of the years concerned or if his or her grades have improved during each year of the mandate.

12. The three-grade system has the merit of simplicity and is easily understood. If the writer has understood the grading procedure correctly, this is done by the High Judicial Council on the basis of data obtained from the board of all judges of the court in which the candidate sits, boards of all judges of immediate higher courts, presidents of the court in which the judge sits, supervision boards and the High Personnel Council of the Supreme Court of Serbia as well as bodies of the ministry which is in charge of the judiciary. The writer does not have sufficient information to be able to form a judgment on how exactly this material is put together and again a similar comment to that already made in relation to the evaluation of statistical material needs to be made. It is not in the writer's view sufficient simply to say that a judge is unsatisfactory because a higher number of cases than average are reversed on appeal without an examination of the actual facts.

13. The criteria also deal with promotion. The draft provides that certain matters are to have "a decisive impact" on a choice for promotion. These include the percentage of cases dealt with, the number, type and complexity of cases, the time taken for decision making, as well as the number of cases which are reversed. (Paragraphs 10.1 and 12.1) I have already expressed some reservations about applying such formulas in a mechanistic fashion while accepting that of course they form a basis on which to conduct a preliminary assessment of the actual work and efficiency of the judge in question. In addition, other matters are to be taken into consideration, such as publications, additional qualifications, conduct in extremely difficult and complex cases, acknowledgment by professional organizations, involvement in training, knowledge and application of international standards and rules, membership in managing bodies of professional associations, participation in various working groups, computer skills, knowledge of foreign languages, and exceptional activities in improving an organization of the courts performance. These type of criteria seem appropriate to take into account in relation to promotions.

14. The criteria also refer to the election of presidents of courts. Not surprisingly, they provide that in addition to having the normal qualifications, competence and worthiness to perform the judicial function, candidates for president must also have the capacity to manage and organize the activities of the courts. This includes the capacity to organize the court and its working activities collectively, a knowledge of the courts administration, the possession of respect and authority among his or her peers, the skills to manage human and technical resources, communication skills, the ability to cooperate with other institutions and bodies, the capacity to solve organizational problems and to overcome crisis situations, ability to make an effective choice of personnel, the ability to innovate and improve working activities, dignity in representing the court, and maintenance of the court's reputation with the public. All of these criteria appear to be appropriate ones to take into account in choosing a president of a court. In evaluating these matters account is to be taken of the candidate's record in any court where he or she has performed a managerial function, the duration of his or her judicial experience and experience as a manager, the opinion of the board of all judges of the court to which the candidate belongs, as well as the candidates judicial experience. Before proposing a candidate for president of a court, the opinions of the board of judges in which the candidate performs a judicial function, of the court for which the president is proposed, as well as of boards of all judges of an immediate higher court are to be taken into account. If a previous president is among the candidates, the evaluation of his or her

previous mandate is to be taken into consideration. Again these criteria appear to the writer appropriate.

15. The Sector for Normative Affairs and International Cooperation of the Ministry of Justice have put forward two proposals for amendment to this draft text. In the first place, they wish to add to the category of existing judges persons who were formerly judges but who have ceased to hold office. Secondly, this Sector has suggested that the presumption that an already appointed judge applying for election fulfils the criteria and standards offends against a principle of equality. It is not clear to me what exactly is the thinking behind the two proposals. On the face of it, it seems reasonable that former judges who had been qualified should remain qualified unless they have been dismissed for failing to maintain standards, in which case no presumption of competence as a judge should apply. In such a case I would have thought they should be treated on the same basis as first time applicants. For the reasons already put forward I think it is important that this presumption should remain in the criteria, as otherwise the possibility arises that an existing judge who is competent and who has done nothing improper will be dismissed or will not be appointed simply because a better qualified candidate exists. For the reasons already advanced this does not seem compatible with judicial independence.

**Rules of Procedure on Criteria and Standards for Evaluation of Qualification, Competence and Worthiness of Candidates for bearers of Public Prosecutors' Function**

16. These draft rules of procedure are proposed to be adopted by the state prosecutorial council. They concern the criteria for election to the position of public prosecutor and deputy public prosecutor. Public prosecutors are elected by the National Assembly on the basis of a proposal from the Government and are elected for a term of six years with the possibility of re-election. Deputy public prosecutors are elected for the first time by the National Assembly and thereafter by the State Prosecutorial Council. The provision for re-election of public prosecutors, especially where such re-election takes place in the National Assembly, leaves open the possibility of bringing political pressure to bear on public prosecutors and is for that reason undesirable. In relation to deputy public prosecutors this does not seem to be a problem since their re-appointment is by the State Prosecutorial Council.

17. The purpose of the rules of procedure are to set out, in the words of Recommendation (2000) 19 on the Role of Public Prosecutors in the Criminal Justice System of the Committee of Ministers of the Council of Europe "fair and impartial procedures …. that are governed by known and objective criteria, such as competence and experience" for the appointment of public prosecutors.

18. The central basis for assessment is an evaluation to be carried out in two separate ways, firstly, by the superior of the public prosecutor concerned, and secondly by his colleagues in the collegium of the prosecutor's office in which he or she works.

19. The qualifications follow similar lines to those set out in the criteria for election of judges. In the first place a prosecutor requires both general expert knowledge as well as possession of particular knowledge which is required to perform the function of a public prosecutor (Article 2). Secondly, the prosecutor requires to have competence. This consists of demonstrated capability, demonstrated professional skill, analytical thinking, capacity to form opinions and make decisions, skill in explanation and quality of expression, communications skills and ability to participate in team work. Finally, the prosecutor is evaluated under the heading of

"worthiness" and required to possess appropriate ethical standards. This is established based on the prosecutor's reputation in his or her professional surrounding, through his or her behaviour within the performance of the public prosecutor's function and outside it. Evaluation takes place according to three grades "does not satisfy", "does satisfy" and the highest grade "does satisfy for promotion". This three grade scheme, which is relatively simple and straightforward, is an appropriate one for carrying out such evaluation.

20. The evaluation is carried out by the State Prosecutorial Council on the basis of the data obtained from both the superior of the prosecutor concerned and the candidates peers in the collegium (Article 4).

21. The State Prosecutorial Council is obliged to establish and announce the average standard number of cases received and decisions rendered by each prosecutor within the period of the previous three years. Evaluation of efficiency in procedure of prosecutors is then measured according to the number of decisions rendered by the individual as compared with the data on average of the number of decisions rendered by his or her colleagues. (Article 8.1) A prosecutor whose number of decisions is less than 50% of the average number obtains the grade "does not satisfy". Between 50% and 120% of the average number the grade is "does satisfy". Where a prosecutor has more than 120% over the average number he or she obtains the grade "does satisfy for promotion". (Article 8.2) However, an exception can be made in relation to a prosecutor who worked on particularly complex problems or performed particularly complex duties and in such cases a prosecutor with less than 50% of the average standard can be graded as "does satisfy" and a prosecutor above 50% and below 120% can be graded as "does satisfy for promotion". But, such an exception has to be "particularly justified". In relation to all of this, the writer would have a similar concern to that expressed in relation to the measurement of judges' output in the criteria for election of judges. While an output significantly below the average is certainly grounds for examining the work record of a prosecutor, it cannot necessarily be assumed that either a high or a low number of cases is more than an indication of high or low performance unless one is also aware of the quality of the work being evaluated and its difficulty. In this regard the exception provided for is itself somewhat mechanistic. It would be appropriate to modify this proposal by adding a provision that the State Prosecutorial Council may disregard these percentages where it is satisfied that notwithstanding an apparently low or high number of cases by reason of the nature of the work performed by the particular prosecutor the statistics do not give a true reflection of the work that has been performed.[1]

22. The rules of procedure go on to deal with various other matters including demonstrated qualification (Article 9), demonstrated competence (Article 10), ability to relate to and cooperate with co-workers and other stakeholders (Article 12), and ethical questions (Article 13). In each case these matters are assessed according to the tripartite criteria already referred to based on reports both from superior officer and from colleagues. These procedures seem to be generally speaking

[1]The writer can give an example from his own experience of how figures of this sort can be misleading. Some time ago a management consultant preparing a report on his Office noticed that one of the prosecutors had a rate of decisions not to prosecute significantly above the average and also appeared to be dealing with a very heavy caseload. The explanation was very simple: the person concerned had the function of assigning work. While doing so he was himself taking a decision not to prosecute in cases which were quite clearly time-barred rather than assigning these cases to other prosecutors. Consequently his individual figures both for workload and for rates of decisions not to prosecute were significantly higher than might have been expected.

appropriate. However, the writer has a slight concern that so far as concerns evaluation by colleagues, particularly when as is proposed it is intended to be anonymous, there could be scope for victimization of a candidate, perhaps on the grounds of jealousy or some other wrong motive. Secondly, it is not clear to the writer that all prosecutors will necessarily have an informed view of the competence or ability of each of their colleagues under all of the particular headings. How can somebody who has not read a dossier have an informed view on whether it has been correctly handled? There is a danger that gossip, rumour and hearsay could play a role in assessments. Does every colleague working in the same unit of the prosecutors' office participate in this process or a selected number only? This is a matter which requires careful thought and it may be that only selected colleagues who are known to have knowledge of and to work closely with candidates should be invited to perform this task, and then only when their own impartiality and objectivity was recognized. The idea of anonymity is questionable since it would make it impossible for the candidate to contest an unfavourable report.

23. The rules of procedure go on to evaluate the criteria for evaluating the senior public prosecutor. These provide for special criteria for evaluating candidates under the heading of general capacity for heading the public prosecutor's office, capacity for realization of supervision, capacity for the improvement of work of the office, and the capacity to manage a crisis. Under the heading of general capacity a number of sub-headings are identified, such as capacity to manage, organizational skills, ability to define targets, goals and priority tasks, and the ability to represent the office. (Article 15) Article 16 deals with the capacity to carry out supervision, and involves ability to supervise the work of deputies and other employees, to recognize and follow complex cases, to be ready to provide help and give instructions and advice to subordinates, and the ability to transfer the instructions and information of higher public prosecution to lower public prosecutors as well as to make correct and timely decision and to deal with objections and complaints concerning the work of employees. Article 17 deals with capacity to improve the work of the office based on the use of the most efficient methods, the capacity to steer employees towards the implementation of new ideas, information technologies, introducing innovations and teambuilding among other matters. Article 18 deals with the capacity to manage crises.

24. Finally there are a number of other specific provisions. For example, there is a specific provision relating to persons who review the decisions of others (Article 21). There are provisions in relation to specialized areas of prosecution (Article 22).

25. Generally speaking, the criteria which are established seem to be remarkably detailed and comprehensive. The principal concern relate to two matters, firstly, the risk of an over mechanistic approach to statistical information concerning workloads and the like, and secondly, the risk that evaluating persons through the use of questionnaires by their colleagues which are filled anonymously poses some risks. This latter idea may need to be looked at again and some safeguards built in to avoid the possibility that a prosecutor could be evaluated unfairly.

## Conclusions

26. On the whole, both these instruments are welcome and provide a good basis on which to establish objective criteria for the appointment and promotion both of judges and prosecutors. In particular, it seems desirable that there should be a presumption in relation to serving judges that they are fit to hold office, with the onus being on persons who think they are not to demonstrate this, as otherwise judicial independence could be fatally undermined. This is, however, a very delicate

question given the apparent inefficiency of the judicial system to date and given the apparently widespread view that some persons serving within the system would not appear to be fit to hold office. However, any reform has to be based on a fair assessment of every individual concerned before anybody is removed from office. Apart from that, a principal concern relates to the risks identified in relation to prosecutors and judges as to the possibly over-mechanistic method of counting cases and workloads, and, in relation to the prosecutors, the risks inherent in evaluating persons based on anonymous surveys of their colleagues.