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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

Adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009)

on the basis of comments by

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INTRODUCTION

1. By letter dated 18 March 2009, the Minister of Justice of the Republic of Serbia, Ms Snezana Malovic, requested an opinion on the (1) draft Criteria and standards for the election of judges and court presidents and on the (2) 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.

2. The present opinion is prepared jointly with the Judiciary and Law Reform Division of the Directorate of Co-operation of the Council of Europe on the basis of comments by Mr Pierre Cornu (Switzerland), Mr James Hamilton (Ireland), Mr Jean-Jacques Heintz (France) and Mr Guido Neppi Modona (Italy), who were invited by the Venice Commission and the Judiciary and Law Reform Division to act as rapporteurs. Their comments are in documents CDL(2009)088, 089 and 090 respectively.

3. This opinion was adopted at the 79th Plenary Session of the Venice Commission (Venice, 12-13 June 2009) in the presence of the Minister of Justice of the Republic of Serbia, Ms Snezana Malovic .

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BACKGROUND

4. The Venice Commission adopted two opinions for Serbia during its 74th Plenary Session (14-15 March 2008), one on the draft Law on the High Judicial Council (draft Law on the High Court Council CDL(2008)013 and the Opinion CDL-AD(2008)006) and one on the draft laws on judges and on the organisation of courts (draft Law on judges CDL(2008)014 and the Opinion CDL-AD(2008)007). In these opinions, the Commission expressed its concern that the Constitution of Serbia did not sufficiently support judicial independence and that there was a risk of politicisation of the judiciary by the election of judges and of the High Judicial Council by Parliament.[1] The draft laws were deemed, in general, to be in line with European standards, but there were a number of provisions which weaken judicial independence that the Venice Commission referred to.[2]

5. On 21 February 2008, the rapporteurs Mr Pierre Cornu, Mr James Hamilton, Mr Jean-Jacques Heintz and Mr Guido Neppi Modona accompanied by Ms Tanja Gerwien and Ms Ana Rusu from the Secretariat, visited Belgrade, where they met with representatives of the Ministry of Justice, the Working Group for drafting laws related to the organisation of the judiciary and the Judges Association of Serbia.

6. During this meeting, the rapporteurs expressed their concern that the proposed procedure regarding the reappointment of existing judges would leave open the possibility of removal of judges from office who had not been guilty of any misbehaviour. The drafting group explained, however, that there was a problem concerning corruption involving some of the judges who had been appointed during the previous regime. The rapporteurs nevertheless felt that the proposals at the time were a disproportionate response to this problem and 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.

[1] CDL-AD(2008)006, paragraph 74 ; CDL-AD(2008)007, paragraph 122.

[2] CDL-AD(2008)006, paragraphs 17, 76; CDL-AD(2008)007, paragraphs 49, 52, 82, 112, 114, 120, 124, 128.

7. The draft Law on judges at the time provided no guarantee that existing judges against whom no incompetence or misbehaviour was alleged, would be reappointed. It also contained a requirement that Parliament be presented with two candidates for each vacancy.
8. The Law on Judges, as adopted on 22 December 2008, states that 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).[3]

9. This Law also refers to the criteria and standards for the election of judges and presidents of courts (hereinafter the "draft criteria on judges") in its Article 45 paragraph 6[4], which were drafted by a working group of the Ministry of Justice, and are the subject of this Opinion (CDL(2009)091).

GENERAL REMARKS

10. A number of international instruments[5] have recognised that evaluating judges' performance is a useful exercise and do so mainly by assessing a judge's career. However, it should be noted that "individual evaluation" is far from being considered as indispensible by European judicial systems in general.

11. Countries that have decided not to proceed with an individual evaluation of judges (such as Denmark, England and Wales, Finland, Ireland, Netherlands, Sweden and, to some extent, Spain), have instead developed general performance evaluations of the judicial procedure.

12. In addition, in the majority of member states, the criteria for the recruitment or the promotion of judges are established by laws or regulations. The only tacit or explicit exceptions to this are those judicial systems where a discretionary power of selection exists through the election by the people (legislative power) or an independent authority, including a judicial one, which can sometimes have political characteristics.

13. Recommendation no. R(94)12 on the independence, efficiency and role of judges, sets out that:

"All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency."

14. The European Charter on the statute for judges states that: *"The rules of the statute relating to selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity."*

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[3] The Judges Association of Serbia (JAS) contests a number of provisions in the new Law on the High Court Council (HCC) and is currently awaiting a judgment from the Constitutional Court of Serbia on this matter. Furthermore, the results of the vote for the first composition of the High Court Council (30 March 2009) seem to highlight the problems already raised by the Venice Commission in previous opinions regarding the Constitution of Serbia which provides that all the members of the HCC are directly or indirectly elected by the National Assembly.

[4] The Criteria are also referred to in Article 59 paragraph 1 of the Law on the High Judicial Council.

[5] United Nations Basic Principles on the Independence of the Judiciary (1985), Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges, European Charter on the Statute for Judges (July 1998), Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system.

15. Therefore, the main European norms and standards may be set out as follows:

- procedures that provide guarantees for impartiality in front of an independent institution in charge of ensuring that candidates (including those for presidents of courts) fulfil the conditions set out by the applicable laws;
- decisions founded on objective criteria and concerning:
  - merit, taking into account qualifications,
  - integrity,
  - competence and diligence,
  - efficiency.

DRAFT CRITERIA AND STANDARDS FOR THE ELECTION OF JUDGES AND PRESIDENTS OF COURTS

16. The draft criteria on judges are intended to set out objective criteria for the recruitment and appointment of judges. The actual election of the judges, however, is still governed by the Constitution and the laws previously assessed by the Venice Commission.

Paragraphs 1-2

17. Paragraph 1 sets out the general definitions, specifying that the requirements for the office of a judge (and court president) are "*qualification*", "*competence*" and "*worthiness*" (paragraph 1/1), which will probably also include upper age limit, nationality, health, etc. It also mentions the degrees required as well as working experience. It is noteworthy that there is a requirement of having passed the bar exam, but that this condition replaces a classification exam after an initial professional training within the framework of a specific training for judges.

18. "*Qualification"* implies both theoretical and practical knowledge necessary to perform the judicial function (paragraph 1/2). "*Competence*" implies skills which enable the efficient application of legal knowledge to the work of the judge (paragraph 1/3). "*Worthiness*" implies the ethical qualities a judge should possess and behaviour in accordance with those qualities (paragraph 1/4).

19. Paragraph 2, sets out the scope of the criteria, which concern (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 presidents of courts.

I. First election of a judge with a three-year mandate

20. This part deals with judges who are elected for a first mandate, which seems to be the equivalent of a probationary period.

1. Qualification

Paragraph 4

21. This paragraph defines, in great detail, the criteria for the evaluation of candidates' theoretical knowledge and practice. Sub-paragraphs 1 to 5 set out the different criteria for the evaluation of judges and as regards the first appointment of judges with a three-year mandate, theoretical knowledge is to be evaluated on the basis of grade point average obtained during

their studies, taking into account the duration and conditions of their studies and the publication of scientific and professional papers. Practical knowledge is to be evaluated on the basis of experience acquired after having passed the bar exam. **Paragraph 4/5, sub-paragraph 5** "*other circumstances influencing the level of knowledge necessary for performing a judicial function*" **is too vague, leaving room for subjective interpretation and should therefore be revised**.

22. The draft criteria do not indicate **what weight is to be given to the different elements for the evaluation of judges.** For instance, it is not clear what weight (number of points) is attributed to scientific work as opposed to an expertise.

23. **Paragraph 4/2 should be clarified**, however this could be due to the translation. What is meant by *"a candidate's practical knowledge is evaluated…depending on a state after passing the Bar exam*"?

24. Paragraph 4/3 should recall **who is in charge of carrying out an evaluation of the performances of judicial assistants**.

25. Paragraph 4/4 states that candidates are to be evaluated according to reports by the bodies, organisations, bar associations and principals they have performed work with. For instance, the competence of a person who has been a judicial assistant will be evaluated on the basis of performance in that function, taking into account the opinions of the judges with whom the person had practical training. However, **no objective criteria are defined, which should be remedied.**

Paragraph 5

26. This paragraph deals with magistrates who apply for a position at a magistrate's court of the same level. The draft seems to make a distinction between theoretical knowledge (paragraph 5/2, sub-paragraphs 1 to 7) and practice. As regards practice, account must be taken of magistrates' work carried out during their previous work in this profession. With respect to theoretical competences, the comments made above, under Paragraph 4 regarding the lack of references, may be repeated here: what is the respective weight attributed to publications, participation in training courses, length of studies? Further clarifications would be welcome, failing which a very subjective evaluation could result.

27. The elements set out in paragraph 5/3 apply to a magistrate's efficiency. **However, the draft does not explain how the work is going to be taken into account.** For instance, how is the quality and quantity weighed and how are the difficulties of cases taken into account without clear definitions on how this should happen? Who will be responsible for evaluating which case is more complex than another? It is hard to imagine that the High Judicial Council will systematically request to receive all cases dealt with by a judge. **It is therefore important to identify the body that will have the power to carry out this selection and evaluation**.

2. Competence

Paragraph 6

28. This paragraph defines the competence criteria in great detail. **However, there is a values scale missing in this draft in order to take account of the different criteria.** For instance, in paragraph 6/1, although the definition of competence is clearly established, the manner in which it is to be evaluated is not.

29. In paragraph 6/2, the list of conditions provided is clear, but it is not clear **who will define the capacity for analytical and synthetic opinion, self-control and cultured behaviour– and on what basis**.

Paragraph 7

30. 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, 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.

31. These factors are to be evaluated on the basis of the 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. **This may be very difficult to evaluate in practice**.

Paragraph 8

32. This paragraph describes the ethical conduct expected in a court and by a magistrate **without,** however, **providing for any explanation on how these qualities will be evaluated**.

II. Election of already appointed judges for permanent function

Paragraph 9

33. The concerns of the Venice Commission that existing judges who had not been guilty of any wrongdoing might not be reappointed are partially addressed in the draft criteria on judges. The provisions of paragraph 9 set out the presumption that the judges already appointed applying for election to the court of the same type or at the same level where they already are judges, fulfil the criteria and standards mentioned in the draft criteria on judges.

34. The draft nevertheless also provides a number of exceptions to this presumption, if there are reasons to doubt that this is true because he or she has shown incompetence, lack of qualifications or unworthiness for performing judicial functions (paragraph 9/2).

35. The drafters have managed to introduce criteria that are objective and verifiable, for instance quantitative evaluations (number of overruled decisions is significantly higher than the average in the court where he or she works (paragraph 9/3), less number of cases were concluded than are required by the orientation norm (paragraph 9/4)) and so on.

36. However, **this is a matter that 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 the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, **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**.

37. In addition, **a distinction might 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 arguable one which nonetheless was overturned by a higher court.

38. With respect to the workload of the judge concerned, where he or she 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. **It is important**, once again, 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.**

39. Paragraph 9/5 ("*It is considered that a candidate is not worthy of a judicial function if his/her qualities, actions and decisions have undermined the court's reputation and confidence in judicial authority*") – **this criteria should only apply where concrete facts are proven and where the person in question has undergone a disciplinary procedure which has not been discontinued**. It would indeed be unusual that such facts not be dealt with and are unearthed months/years later to be used in order to dismiss a judge. Furthermore, **it is going to be difficult to evaluate the criteria in this subparagraph insofar as the reputation of the court or confidence in judicial authority are values that are difficult to determine objectively**.

40. Given the exceptional nature of the re-appointment procedure, **every currently serving judge who has permanent tenure (whether or not they apply for re-election) should only see his or her tenure terminated by a reasoned decision, which is appealable to a court of law**. It seems that Article 56 (on when a judge is deemed as not elected) and Article 67 (on Appeal to the Constitutional Court against a dismissal) of the Law on Judges are not applicable in this case. To the extent that the non-election of a judge is an individual act, an appeal in front of the Constitutional Court should, however, be open under Article 82 of the Law on the Constitutional Court. In addition, **it should be ensured that this appeal is an effective one, allowing the Constitutional Court to deal with the facts of each case.**

Paragraph 10

41. This paragraph sets out clear quantitative criteria and clearly provides the manner in which data is collected and by whom they are provided (paragraph 10/3).

42. Furthermore, **the mere counting of workloads should not be used in such a way as to put pressure on a judge to make decisions without proper consideration**. For instance, there may be a higher number of cases in a given region due to the fact that this region has an overzealous lawyer who systematically appeals when his or her clients have lost a case - which that could skew the scales with respect to the case-load in favour of that region. However, **it seems reasonable that these criteria should be used as a means of identifying possible problems, provided that proper evaluation is then carried out and not simply be treated as a numbers exercise**.

III. Election of a permanent judge following the expiry of a three-year mandate

Paragraph 11

43. The election of a permanent judge, following the expiry of a three-year mandate, is done on the basis of their grading during the three-year mandate. Paragraph 11 places a particular condition at the end of the three-year period, which seems to amount to a probationary period.

44. The grading system is a tripartite one, with grades of "*does not satisfy*", "*successful performance of judicial function*" and "*exceptional performance of judicial function*". According

to paragraph 11/1, during this three-year period, the judge must have been evaluated as having provided an "*exceptionally successful performance of judicial function*" in order to be necessarily elected. A judge with the grade "*does not satisfy*" for each year of the mandate, cannot be elected to permanent function.

45. The **condition under paragraph 11/1 seems to be clearly excessive, as it is unreasonable to require a newly appointed judge, who is starting his or her career, to immediately provide an exceptional performance.** For this reason, it seems appropriate for paragraph 11/3 to provide that 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. If only paragraph 11/1 were to apply, it is likely that only very few candidates would fulfil the conditions set out by this draft.

46. The tripartite grading system has the merit of simplicity and is easily understood. It seems that the grading procedure is implemented by the High Judicial Council on the basis of data obtained from the board of all judges of immediate higher courts, court presidents in which the judge sits, supervision boards, the High Personnel Council of the Supreme Court and bodies of the ministry which is in charge of the judiciary. Based on the information made available to the Venice Commission, it is not possible to determine how this material is put together. However **it is very important that the evaluation of statistical material does not become a mere counting exercise, not taking into consideration the various elements set out above.**

IV. Promotion

Paragraph 12

47. This paragraph deals with all types of promotions, including moving from one jurisdiction to another higher one. The draft criteria on judges provide that certain matters are to have "*a decisive impact*" on a choice for promotion (paragraph 12/2). These include the percentage of cases dealt with, the number, type and complexity of cases, the time taken for decision-making and the number of cases which are overruled (paragraph 10/1). **While it is acceptable to use such formulas as a basis on which to conduct a preliminary assessment of the actual work and efficiency of the judge in question, they should not be applied in a mechanistic fashion**.

48. Paragraph 12/3 lists 13 elements that may be taken into account in addition to those in 10/1, which include publications, additional qualifications, conduct in extremely difficult and complex cases, acknowledgment by professional organisations, 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 organisation of the courts' performance. These criteria seem appropriate to take into account in relation to promotions.

49. **However,** once again, **what weight is attributed to these different elements**? Is it more important to have published scientific or professional papers than having taken a foreign language course? Is the participation (even passive) in various organisations or associations more or less important than knowledge of international standards and rules? Who defines – and on what basis – what an "*extremely difficult and complex*" case is?

V. Election of presidents of courts

Paragraph 13

50. Paragraph 13/2 sets out that candidates for president of courts, in addition to having the normal qualifications, competence, and worthiness to perform the judicial function, must also have the capacity to manage and organise the activities of the courts. This includes (paragraph 13/3) the capacity to organise 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 co-operate with other institutions and bodies, the capacity to solve organisational problems and to overcome crisis situations, the 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 these criteria appear to be appropriate to take into account in choosing a president of a court. It is also to be welcomed that these prerequisites are set out in a normative text, which is far from being the case in all member States.

51. In evaluating these matters, account is to be taken of the candidate's record (paragraph 13/4) 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 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 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. These criteria appear to be appropriate.

52. **Nevertheless, the question is once again the manner in which these criteria are evaluated**. This is all the more important as, by definition, a person who is a candidate for president of courts for the first time will not have had the opportunity to show his or her managerial skills. This means that **the criteria seem to be subjective: does the candidate have the skills required, taking into account that he or she will not have had the opportunity to show said skills? This might be revisited.**

53. Although paragraph 13/4 aims to define the standards, this will not change the fact that the candidate, with no prior experience, will not be able to show his or her skills.

VI. Data sources, tables, questionnaires and modes of acquiring data

Paragraph 14

54. This paragraph sets out the nature and manner in which data is acquired and provides that the High Judicial Council evaluates the statistical data that relate to the activity of judges and presidents of courts.

55. Furthermore, the High Judicial Council has the power to obtain relevant information, by using questionnaires, which will allow it to make objective decisions.

Proposals for amendment made by the Sector for Normative Affairs and International Co-operation of the Ministry of Justice

56. The Sector for Normative Affairs and International Co-operation of the Ministry of Justice have put forward two proposals for amendment to this draft text: (1) to add to the category of existing judges persons who were formerly judges, but who have ceased to hold office; (2) that the presumption that an already appointed judge applying for election fulfils the criteria and standards offends against the principle of equality.

57. **The Venice Commission would like to underline the importance of keeping the presumption that an already appointed judge fulfils 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 – this is not compatible with judicial independence.

CONCLUSION

58. The Venice Commission welcomes these draft criteria on judges and its concerns with respect to the reappointment procedure for existing judges, who had not been guilty of any wrongdoing, are partly addressed by this draft criteria on judges. The presumption that judges already appointed fulfil the criteria mentioned in this draft is encouraging. However, this presumption may be overturned, and in this respect, great caution must be applied.

59. As such, the draft criteria are in line with European standards (recommendations of the Council of Europe and good practices identified in member States) and are forward-looking as they define a precise framework for the skills required of the various categories of judges. However, reservations are raised with respect to the manner in which the various skills are going to be evaluated and balanced against one another.

60. These reservations notably apply to the following provisions:

- Paragraph 4/2 should be clarified: what is meant by *"a candidate's practical knowledge is evaluated…depending on a state after passing the Bar exam*"?
- Paragraph 4/3 should recall who is in charge of carrying out an evaluation of the performances of judicial assistants.
- Paragraph 4/4 should include objective criteria with respect to the evaluation of candidates based on reports.
- Paragraph 4/5, sub-paragraph 5 with respect to judges' qualifications is too vague, leaving room for subjective interpretation and should therefore be revised. Furthermore, it should be indicated what weight is attributed to the different elements in the evaluation of judges.
- Paragraph 5/3 should clarify how the work of magistrates will be taken into account to evaluate their efficiency. Also, a body other than the High Judicial Council should be identified that should have the power to carry out the selection and evaluation under this paragraph.
- Paragraph 6 on competence, is missing a values scale in order to take account of all the different criteria.
- Paragraph 6/2 clearly defines a list of conditions, but should also provide for who will define these conditions and on what basis.
- The criteria set out in paragraph 7 on worthiness are going to be difficult to evaluate in practice. The same applies to paragraph 8 (worthiness continued).
- Paragraph 9 containing the presumption that already appointed judges fulfil the criteria and standards mentioned in this draft, also provides exceptions to overturn this presumption. This matter should be approached with a great degree of caution as these criteria are going to be difficult to evaluate in practice. Also, every currently serving judge who has permanent tenure (whether they have applied for re-election or not) should only see his or her tenure terminated by a reasoned decision, which is appealable to a court of law. The Commission has been informed that these judges have the right to a constitutional appeal in accordance with existing legislation.
- Paragraph 10 sets out criteria on the basis of which reasons for doubts in candidate's qualification and competence are made. It is important that proper evaluation is carried out and that these criteria are not simply treated as numbers exercises.

- The conditions provided in paragraph 11/1 on the election for a permanent function upon expiration of a three-year mandate, seem to be excessive as it is unreasonable to require a newly appointed judge to immediately provide an exceptional performance – especially if he or she is starting her career.
- The formulas used in paragraph 12 on promotion are acceptable for a basis on which to conduct a preliminary assessment of the actual work and efficiency of a judge, but should not be used in a mechanistic manner.

61. It seems to the Venice Commission that the timeframe in which the implementation of the re-appointment procedure is to take place is very short: 1 December 2009, as set out in Article 100 of the Law on Judges.

62. The Venice Commission remains at the disposal of the Serbian authorities for any further assistance on this issue.

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