

Report on the Monitoring of Peer Elections to the High Judicial Council of the Republic of Serbia

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EXECUTIVE SUMMARY

This report is the result of the OSCE Mission to Serbia's (hereinafter: the OSCE Mission) efforts to monitor the peer elections of judges to the High Judicial Council (HJC), conducted from October to December 2020. The Serbian non-governmental organization YUCOM served as an implementing partner in monitoring the election.

Activities included: monitoring the nomination processes in selected courts; monitoring peer elections across Serbia; analysing the underlying legal framework; and interviewing judges who participated in the process. Due to the restraints related to the COVID-19 pandemic, the presence of monitors was reduced in comparison to the elections in 2015.

The analysis of the international standards governing judicial and prosecutorial councils, as well as of the relevant legal framework in Serbia, is summarized from the last report as they did not undergo any changes since the 2015 report on the Monitoring of the Elections was published.¹

As hardly any of the Mission's recommendations from the 2015 report have been addressed, many of the same challenges occurred in the 2020 elections. Therefore, the recommendations remain largely the same:

- Amend the legal framework to change the election process for the HJC so that the role of the National Assembly in the election process is lessened and the HJC remains free from undue external influence;
- Amend the rules and regulations on candidate nomination so that the process of proposing candidates is made clearer;
- Further develop the legal framework to enhance the procedures for the resolution of disputes and to provide effective remedies.

This report aims to inform the ongoing judicial reform process in Serbia and to provide the relevant state institutions and justice stakeholders with an objective assessment and concrete recommendations to further strengthen the independence, accountability and efficiency of the Serbian judiciary.

¹ For a detailed analysis of both the international standards and the Serbian legal framework, see the Report on the Monitoring of Peer Election for the High Judicial Council and State Prosecutors' Council of the Republic of Serbia (Report on 2015 elections), available at <https://www.osce.org/odihr/242346>.

BACKGROUND

The creation of the HJC and the State Prosecutors' Council (SPC) is the result of, and integral to, the ongoing legal reforms in Serbia.² Indeed, the 2006 Constitution established the HJC and SPC and mandated them *inter alia* with the appointment, transfer, evaluation and discipline of judges and prosecutors respectively.³

The HJC includes, *inter alia*, six judges-members elected by their peers. The criteria and standards for their election are regulated by the Law on the High Judicial Council ("Law on the HJC")⁴.

These are the third elections for the High Judicial Council under the 2006 Constitution. Two previous elections were held in 2011 and 2015. The Mission has monitored all the elections that have been held so far.

The European Commission's Serbia 2020 Report emphasises that: *The scope for political influence over the judiciary is a continuous and serious concern. The delay in the adoption of the constitutional amendments has repercussions on the adoption of related judicial legislation that is needed to increase safeguards for judicial independence [...] Pressure on the judiciary still remains high. Government officials, some at the highest level, as well as members of parliament, continue to comment publicly on a regular basis about ongoing investigations or court proceedings, and on individual judges and prosecutors. Articles in tabloid newspapers target and seek to discredit members of the judiciary.*⁵

METHODOLOGY

For the monitoring of the HJC elections, the OSCE Mission applied the methodology that was developed for previous elections. Twelve monitors who monitored the HJC elections on Election Day had participated in the monitoring of the HJC elections in 2015, when they underwent specific training on the Code of Conduct and election monitoring methodology developed by a joint ODIHR/OSCE Mission to Serbia team. As a reminder, an overview of the relevant documents and practices was provided to them by the implementing partner's project co-ordinator in October 2020.

OSCE Mission and YUCOM personnel monitored the elections in order to assess the validity of the electoral results, the soundness of the voting process and its conformity with the Serbian legal framework. They did so by monitoring joint sessions in courts for nominating candidates, sessions of the Electoral Commission, and the voting processes at selected polling stations on Election Day, as well as by conducting interviews with relevant judges. The data and information collected through monitoring and interviews, as well as a desk review of legal documents, constitute the basis of this final report.

² The elections for the SPC were held on 12 November 2020. They were also monitored by the OSCE Mission. The findings are published in a separate report.

³ Available in English at <http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution> (last visited 17 February 2021). See Article 154 on the High Judicial Council and Article 164 on the State Prosecutors Council.

⁴ Law on the High Judicial Council ("Official Gazette of Republic of Serbia", No. 116/2008, 101/2010, 88/2011 and 106/2015). Available in the Serbian language. All references to Serbian laws are in the Serbian language unless otherwise noted.

⁵ COMMISSION STAFF WORKING DOCUMENT, Serbia 2020 Report, p. 18 and 20. See: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/serbia_report_2020.pdf

Code of Conduct

Throughout the entire monitoring exercise, the monitors abided by the code of conduct developed by the joint ODIHR/OSCE Mission to Serbia team, which emphasised four main principles: impartiality, non-intervention, professionalism and confidentiality. To be impartial meant that monitors could not express an opinion or act in a way that seemed to indicate their personal opinion regarding a particular candidate, a set of procedures or the overall process. Non-intervention meant that monitors could not respond to questions, physically intervene, or volunteer information to remedy on-the-spot shortcomings of the election process. Monitors were not allowed to give any public statements about the election process or their observations or opinion of the same. If they were asked for such an opinion, procedure dictated that they would refer such questions to the OSCE Mission to Serbia's communication office. The duty of professionalism required that monitors conduct themselves according to appropriate professional standards. Confidentiality meant that all observations, sources and information obtained would not be shared beyond those directly involved with the project until the results were made public, in order to ensure the integrity of the process and to encourage interviewees (candidates, voters and other interlocutors) to freely share their views and opinions without fear of public disclosure.

Election Monitoring

Twelve monitors were deployed to 12 polling stations throughout Serbia. In selecting polling stations for monitoring, consideration was given to geographical diversity, representation of areas with significant minority populations, and locations where challenges could be anticipated based on prior experience or information received. The monitors were instructed to remain at their assigned polling stations throughout the day, arriving prior to the official start and remaining until after the collection and count of the votes. The monitors used pre-established questionnaires that directed them to observe and report upon the most relevant elements as described in the Serbian legal framework.

Interviews

In addition to observing the election process, the monitors interviewed a number of voters and candidates to obtain more detailed qualitative information about their perception of the process, to identify any challenges, and to propose suggestions for reform. Questionnaires were developed in advance to ensure that the most relevant issues were addressed and to make data collection more streamlined. Efforts were made to interview as many voters and candidates as possible given the relatively limited human resources.

Reporting

Building upon the responses to the questionnaires used for election monitoring and interviews of voters and candidates, the monitors were then asked to report upon their findings. The individual reports were peer-reviewed for clarity and accuracy and verified against peer reports from other regions, as well as public reports on election outcomes. The information was then analysed and compiled by the OSCE Mission to Serbia to form this final report.

INTERNATIONAL AND REGIONAL STANDARDS AND GOOD PRACTICES

Introduction

Across the OSCE area, challenges exist concerning the role and function of the judiciary and prosecutorial service. Being independent and accountable is an integral part of the effectiveness of these institutions. The proper functioning of these institutions, rooted in the separation of powers, is essential to ensuring effective access to justice and the implementation of an individual's right to a fair trial and effective remedy. Among the OSCE participating States, judicial councils' functions vary from administration and management to more substantive functions including the selection, discipline, promotion and removal of judges.⁶ Prosecutorial councils are a more recent phenomenon, and thus less common, emerging over the last ten to fifteen years and primarily concentrated in Southeast Europe.⁷

As the Venice Commission reiterates, “there is no standard model that a democratic country is bound to follow when setting up its Supreme Judicial Council as long as the function of such a Council falls within the aim of ensuring the proper functioning of an independent judiciary within a democratic State”.⁸ In contrast, OSCE ODIHR's *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* are less prescriptive.⁹ It is common for these councils to contain at least a simple majority of judge or prosecutor-members alongside other representatives, which are often chosen from academia, bar associations or executive structures. Judge and prosecutor members are usually chosen through a peer-election process, as is the case in Serbia.

Although there are no established international standards on the elections process for these members,¹⁰ the election of such members and the overall role, composition, and function of such councils should always be viewed through the lens of judicial independence and accountability as an important precondition to an individual's right to a fair trial¹¹ and effective remedy.

International and Regional Good Practices

Judicial and prosecutorial councils can be instrumental in promoting the effective functioning of the judiciary and prosecutorial service, including adherence to the principles noted above. Like judges and prosecutors, councils must simultaneously be independent and accountable. Striking this balance through the role, composition and function of these councils is vital in a democratic society and for ensuring effective access to justice. Given the power vested in the council to govern the activity of the judiciary or prosecutorial service, the appointment or

⁶ For more information on the differences in the role, function and composition of judicial councils across Europe, see i.e. the Venice Commission Report on Judicial Appointments (2007).

⁷ Specialized prosecutorial councils exist, for instance, in, Moldova, Montenegro, North Macedonia, and Serbia. Bosnia and Herzegovina, France, Italy and Turkey have judicial councils that cover both judges and prosecutors. See the Venice Commission Report on European Standards Regarding the Independence of the Judiciary Part II: The Prosecutorial Service (2010) at footnote 6.

⁸ Report on Judicial Appointments (CDL-AD (2007)028), paragraph 28, available at [https://www.venice.coe.int/webforms/documents/CDL-AD\(2007\)028.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2007)028.aspx) (last visited on 11 December 2020).

⁹ They speak of the “use of independent body[ies]” and “where a judicial council is established...” See OSCE/ ODIHR 2010: <https://www.osce.org/odihr/KyivRec>

¹⁰ See the Venice Commission Compilation of Opinions and Reports Concerning Prosecutors available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)009-e) (last visited 11 December 2020).

¹¹ For more information on fair trial rights see OSCE/ ODIHR Legal Digest of International Fair Trial Rights (2012) available at <http://www.osce.org/odihr/94214>.

election process to the council becomes a key consideration in promoting the overall effectiveness of the institutions.

International and Regional Good Practices: Judicial Councils	
	Good Practices
Role	<ul style="list-style-type: none"> • The role of the judicial council is to act as a watchdog for the independence of the judiciary and to protect democratic checks and balances. • Independent judicial bodies can provide accountability for the judicial profession.
Composition	<ul style="list-style-type: none"> • It is recommended that a substantial part, if not the majority, of council members should be judges.¹² • The Minister of Justice, State President and other politicians should not sit on the council, or if they do, they should not have the ability to exert undue influence and should ideally be non-voting members. • The Council should also comprise civil society members including law professors and lawyers. • Judges from all levels should be included amongst the judge-members. • Non-judge members should be selected according to clear criteria and transparent processes.
Function and powers	<ul style="list-style-type: none"> • When judicial councils are responsible for the selection and training of judges, they should not be under executive control and should operate independently of regional governments. • Councils themselves should not be competent to both receive and conduct disciplinary investigations or hear a case and render a decision on disciplinary matters. • Judicial councils should have a decisive influence in the selection, promotion and discipline of judges. • Annual public reports detailing the councils’ activities are a good practice.
Election/ Appointment to the Council	<ul style="list-style-type: none"> • Judge members shall be elected by their peers. • Methods other than the direct election of judges that guarantee the widest representation of the judiciary with diverse and territorial representation in the Council may be developed. • It is recommended that non-judge members should be elected according to criteria laid down in the law by a qualified majority of Parliament rather than the executive to avoid partisanship.

Peer Elections to Judicial and Prosecutorial Councils

As noted above, there are no explicit international or regional European standards regarding judicial and prosecutorial councils, let alone the specific methodology or technical requirements for peer elections to such councils. However, the principles of transparency,

¹²Venice Commission Compilation on Courts and Judges 2015 (quoting its own language – “substantial part, if not the majority” - used in recent opinions prepared for Kyrgyzstan and Kazakhstan). See the Report of the UN Special Rapporteur on the independence of judges and lawyers (2014), which recommends that “a commission or council for the judiciary should preferably be composed entirely of members of the judiciary, retired or sitting, although some representation of the legal profession or academics could be advisable. No political representation should be permitted.” The European Network of Councils for the Judiciary (ENCJ) recommends a “majority.” See ENCJ Self Governance for the Judiciary: Balancing Independence and Accountability. Regarding the composition of the Councils for the Judiciary: a. the Council can be composed either exclusively of members of the judiciary or members and non-members of the judiciary; b. when the composition is mixed, the Council should be composed of a majority of members of the judiciaries, but not less than 50%.

fairness, due process, independence and separation of powers provide the guidance necessary for finding the right model within each national context.

SERBIAN LEGAL FRAMEWORK GOVERNING THE PROCESS OF ELECTING MEMBERS OF THE HIGH JUDICIAL COUNCIL OF SERBIA

Constitutional and Legal Framework

The legal framework governing the HJC is set out in the Constitution of the Republic of Serbia and the Law on the HJC.

The HJC has 11 members. Three of them are *ex-officio* members and eight are elective. The *ex-officio* members are the President of the Supreme Court of Cassation, the Minister of Justice, and the Chair of the relevant parliamentary committee. Six of the eight elective members are judges. The remaining two are representatives of legal academia and the Bar Association respectively, nominated in separate procedures. The elective members are appointed for a five-year term and can be re-appointed to the same function but not in successive terms.¹³ During the term, a judge-member does not perform his/her judicial duties in court and cannot be appointed as a judge of a different court.¹⁴

Election Procedure

The election procedure for the six judge members is governed by the Law on the HJC and the bylaws of the HJC (“Bylaws”) and its Electoral Commission (EC).¹⁵ Elections are conducted and overseen by the HJC.

The Law on the HJC divides the appointment procedure into several phases. It begins when the President of the HJC issues a decision, at least six months before the term of the sitting members expires, to open the election process for new members.¹⁶ This decision is followed by the nomination procedure, the campaign and elections. Once the new members have been elected by their peers, their names are submitted to the National Assembly for confirmation or rejection. The HJC is obliged to propose to the National Assembly candidates who were elected in the procedure regulated by the Law on the HJC.¹⁷

The EC is a permanent working body established within the HJC and tasked with organizing the elections.¹⁸ It consists of a president of the EC and four members, and their deputies, who are all elected from the ranks of judges with permanent tenure. The transparency of the EC’s work is facilitated by press conferences, communiqués and the placement of public announcements on its website. All members of the EC are allowed to vote.¹⁹

¹³ *Ibidem*, article 12, paragraph 2.

¹⁴ *Ibidem*, article 11, paragraph 2 and article 12, paragraph 3.

¹⁵ These documents can be found on the HJC website: <https://vss.sud.rs/sr-lat/postupak-predlaganja-kandidata-za-izborne-%C4%8Dlanove-visokog-saveta-sudstva>, last visited on 26 December 2020.

¹⁶ Law on the HJC, article 21, paragraph 1.

¹⁷ *Ibidem*, article 20, paragraphs 1-3.

¹⁸ *Ibidem*, article 15, paragraph 1.

¹⁹ Rules of Procedure of the Electoral Commission (“Official Gazette of Republic of Serbia”, No. 83/2015), art. 4.

Nominations

All levels and types of judges are represented in the HJC. Article 22 of the Law on the HJC sets out the structure of the representation:

1. one member from the Supreme Court of Cassation, the Commercial Appellate Court and the Administrative Court
2. one from the appellate courts;²⁰
3. one from the higher and commercial courts;
4. two from the basic, misdemeanour and higher misdemeanour courts; and
5. one from the territory of autonomous provinces.

Voters must vote for a candidate from the list of candidates from the type of court in which they preside as judges.

An exception to this rule is the election procedure for judges sitting in courts located in the autonomous provinces. They vote for two candidates: one coming from the same type and level of court and the other from the list of candidates representing judges from the autonomous provinces. Candidates standing for election to represent judges from the autonomous provinces may come from any type of court located in an autonomous province.²¹ It should be noted that only the provinces are territorially represented in the HJC, while the other parts of the country are not.

Judges must be tenured in order to be eligible as a candidate and to vote,²² which means that those appointed for an initial three-year term are excluded.²³ Presidents of the courts cannot be candidates.²⁴

A judge can obtain candidate status in one of three ways. One is that a joint session of one or more courts of the same level and type must nominate him/her. Judges may also become candidates if proposed by a court from the territory of the autonomous province in which the judge sits. Secondly, the status of a candidate can be obtained through the expressed support of at least 20 judges from the courts of the same level and type as the court to which he or she is appointed or courts from an autonomous province. Finally, candidates from the ranks of judges of the Supreme Court of Cassation, the Appellate Misdemeanour Court, the Commercial Appellate Court and the Administrative Court become candidates simply by applying.²⁵

A joint session may nominate only one candidate. Voting at the sessions is secret.

There are no rules on whether the same person can be both a candidate from his/her level and type of courts and a candidate for the autonomous province in the same elections.

²⁰ The appellate court representative in the HJC was elected on 2 November 2016. Thus, there were no elections for the representative of appellate courts in this election process.

²¹ Law on the HJC, article 23, paragraphs 4 and 5.

²² *Ibidem*, article 23, paragraph 1.

²³ *Ibidem*, article 24, paragraph 3.

²⁴ *Ibidem*, article 23, paragraph 5.

²⁵ *Ibidem*, article 23, paragraphs 2 and 4. The Electoral Commission issued Instructions on the implementation of the nomination procedure of candidates for elective members of the HJC from the ranks of judges on 7 October 2020. The Instruction contains, among others, different candidacy application forms for judges.

Judges may apply to stand as candidates for elections within a 15-day timeframe, starting from the day of publication of the decision on the initiation of the elections process. Depending on whether they apply individually or they are nominated by a joint session of a court, the application is submitted by the candidate or by the president of the court in question. The EC reviews all applications and must notify an applicant regarding an incomplete application within 24 hours of receipt. The applicant has 48 hours to complete the application. Within eight days of the conclusion of the 15-day timeframe, the EC must publish a final list of candidates.²⁶

Campaign

The Rules of Procedure of the EC contain some basic provisions on the candidates' presentation of their programmes,²⁷ but there are no detailed rules on permissible and impermissible campaign activities.

Candidates submit their biographies and accompanying material to the HJC, which then publishes their biographies and programmes (if submitted – there is no explicit requirement to submit a programme) on its website. Candidates may campaign in support of their candidacy but there are no explicit rules allowing them to take a leave of absence in order to do so.

Election Day

Voting is conducted at polling stations located in the courts as determined by the EC.²⁸ Privacy screens are provided to separate voting booths and ensure secrecy. Ballots are printed in minority languages where appropriate.²⁹ In order to vote, a judge must be registered in the electoral register. Electoral registers are kept for each court to determine the names and number of eligible voters and are closed 15 days before Election Day. The EC is responsible for maintaining accurate records.³⁰

The EC appoints electoral boards (EB) for each polling station to organize the election process.³¹ An EB directly oversees and organizes the election process at a polling station, ensures the secrecy of the ballot, establishes the results of the vote, preserves order during the election process, and performs other tasks as defined by the EC. The EC appoints the boards' permanent and additional members from the ranks of judges who are not standing candidates in the elections. The three additional members co-ordinate voting by judges unable to make it to the polling station. Voting outside of the polling stations may be allowed if the voter notifies the EB one day in advance.³²

The EB should verify the identity of each voter by reviewing his/her ID and verifying the name against the electoral roll.³³ The EB verifies the ballot box in the presence of the first voter by placing a control slip into the ballot box, which is then sealed.³⁴

²⁶ Law on the HJC, art. 28 – 30.

²⁷ Article 28 of the Rules on Procedure of the EC.

²⁸ The Electoral Commission determined 49 polling stations, adopting the Decision on Polling Stations on 30 October 2020 (decision no. 119-04-175/2020-02)

²⁹ Rules of Procedure of the Electoral Commission, art. 22, para. 3.

³⁰ *Ibidem*, art. 18 and 19.

³¹ Law on the HJC, article 31, paragraph 3 and article 32, paragraphs 1. and 2.

³² Rules of procedure of the Electoral Commission, article 31.

³³ *Ibidem*, article 30.

³⁴ *Ibidem*, article 36.

After the voting process is concluded, the EBs determine the results for each polling station.³⁵

Complaint Procedure

Voters and candidates have the right to file a complaint with the HJC in case of an alleged breach of their election rights or other irregularities in the elections process. The complaint must be filed within 24 hours from the moment that an alleged breach or irregularity occurred. The HJC will decide on the complaint within 48 hours from receipt and shall notify the applicant of its decision. If no decision is reached by the HJC within the prescribed 48-hour deadline, the complaint is considered valid. If this happens, the contested election will be annulled and repeated within ten days.

The decision of the HJC concerning the complaint can be challenged by filing a lawsuit with the Administrative Court. The lawsuit is submitted to the EC, which then must submit information concerning the dispute to the Administrative Court within 24 hours of the filing of the lawsuit. If the complainant is successful and the Administrative Court annuls the elections, it must be repeated within ten days from the day of the court decision.³⁶ However, there is no deadline for when the Administrative Court must reach a decision.

Monitoring

Domestic and international observers who wish to monitor the HJC elections must submit a request to the EC.³⁷ The request must contain the name of the organization and the proposed number of observers, their names, ID numbers and which activities they are interested in monitoring. The EC decides on the requests.

Appointment of HJC elective Members by the National Assembly of Serbia

The names of the judges elected by their peers must be submitted to the National Assembly for consideration at least 90 days before the term of the sitting members expires.³⁸ There are no deadlines for Parliament to decide on candidates.

Before the proposed members are voted on in a plenary session, the names are considered by the competent committee of the National Assembly. A member of Parliament can dispute the proposal of a certain judge. In the plenary, members of Parliament vote on each disputed judge separately, with the possibility of rejection, but cannot propose a different candidate. The HJC proposes one judge per position so the National Assembly does not have the opportunity to choose between several options. However, neither the Law on the HJC nor the Rules of Procedure of the National Assembly regulate the situation where a proposed candidate is rejected.

³⁵ All EBs use the same form of minutes, issued by the Electoral Commission within the Instruction on the implementation of the nomination procedure of candidates for elective members of the HJC from the ranks of judges.

³⁶ Rules of procedure of the Electoral Commission, articles 40-42.

³⁷ Decision on monitoring elections for elective members of the HJC from the ranks of judges of 26 November 2020, No. 7-00-106/2020-02.

³⁸ Law on the HJC, article 21, paragraph 4.

FINDINGS

This section will present the main findings related to the nomination and election processes for the HJC. All legal deadlines were respected in the election process. On 1 October 2020, six months before the expiry of the mandate of the elective members of the sitting Council, the President of the HJC adopted the decision on initiating the election process.³⁹

Interviews

The OSCE Mission and YUCOM conducted interviews with 115 judges from 41 courts: 14 Basic Courts, ten Higher Courts, ten Misdemeanour Courts, six Commercial Courts and one Court of Appeal.⁴⁰ The great majority of interviewees (87.8 per cent) responded that the elections were important for judges to choose their representatives, and because of the HJC's responsibility in the functioning of the judiciary. A small number (8.7 per cent) responded negatively, saying that the HJC in its former composition had failed to meet expectations, and that the body was subject to political influence; they did not believe that a change in membership would improve the situation. 3.5 per cent of respondents gave no reply to the question.

35.7 per cent of respondents identified the selection of judges as the HJC's primary role, while 32.1 per cent stated that the role of the HJC was to secure the independence of the judiciary and counter political and other undue influence on judges. Five judges (0.43 per cent) saw the HJC's main role as managing the career advancement of judges.

Nomination

Joint sessions to discuss support for potential candidates were held in less than half of the courts where interviews were conducted (45 per cent). In the courts where no joint sessions were held, the respondents stated that their courts did not nominate any candidates because no judges were interested in standing the candidacy. The reasons for this lack of interest were explained in diverse ways: that only candidates from Belgrade and Novi Sad stood a chance, for example, or that their preferred candidates would not have a chance, or were simply not interested in the elections. Higher courts had the highest percentage for holding joint sessions while commercial and misdemeanour courts had the lowest percentage, with the basic courts in the middle.⁴¹

Most respondents stated that they were informed about the rules of the electoral process during the joint session.

When asked "Have you been invited to nominate candidates in advance?" 27.5 per cent of the respondents replied that they had not, while 40 per cent stated that they had. For those courts that held joint sessions, the judges on average were informed two or three days in advance about the possibility of nominating candidates. When asked about the way it was decided who would be nominated, most respondents said that their colleagues suggested candidates at the joint session or that the candidates announced their own nominations. Respondents from five of the 18 courts in which joint sessions were held considered that secrecy was guaranteed. Two respondents said that the secrecy of voting was violated because the voting

³⁹ Decision 119-01-742/2020-01 of 1 October 2020.

⁴⁰ Out of a total of 159 courts in Serbia

⁴¹ Out of 41 courts covered by the interviews, joint sessions were held in six higher courts, six in basic courts, three in misdemeanour courts, two in commercial courts and one in the Court of Appeal in Novi Sad.

was done publicly – the voters were raising hands instead of casting ballots. This was also directly observed by the election monitor in one instance. However, this went unnoticed by the EC. It seems that the EC does not examine how the process of the nominations is conducted, as it only takes note of the submitted candidacies, and the candidacy forms do not state whether the voting was secret or not.

None of the respondents had any direct knowledge of colleagues who wanted to run in the election but had given up before the nomination session, and only two of the respondents took part in collecting signatures to support the candidacy of their colleagues from other courts. There were no incomplete applications, and the EC confirmed all candidacies.

All candidate biographies, with the exception of one,⁴² were published on the webpage of the EC.⁴³ In total, 24 applications were confirmed and of those only one was withdrawn.⁴⁴

Campaign

The programmes of all 24 candidates who submitted them to the EC were available on the HJC website, including four video presentations. Despite the lack of norms regulating the campaign, as many as 99.1 per cent of the interviewed judges confirmed their familiarity with the candidates' programmes, and 71.4 per cent of these respondents learned about the programme through the candidates' personal presentation. In 44.6 per cent of the cases, the respondents learned about the programme from the web site, or from the e-mails that had been sent.

Four out of five candidates interviewed travelled to other courts to present their programmes. One candidate felt that gatherings in order to present their programmes were not appropriate due to the pandemic. The EC informed all the courts' presidents on 10 October 2020 that they had to allow all candidates to personally present their programmes to the judges, while respecting all the epidemiological measures, and that, in addition, they should disseminate their programmes to all the judges via mail or e-mail.

Common themes in most candidates' programmes included a more independent HJC to serve the interests of the judiciary, better working conditions and reduced workload. The candidates were little aware of the planned constitutional changes regarding the judiciary and their proposed substance. This shows either unawareness on their part of one of the most important tasks of the HJC – to maintain judicial independence – or that they were focused on other aspects of HJC work.

Out of 115 respondents, 12 stated that they were given suggestions to vote for a certain candidate. While some believe that recommendations by colleagues or lobbying for certain

⁴² One candidate decided to run a personalised campaign and rather than having his program published on the EC webpage, he sent out personalised emails to the judges. Later, he withdrew his candidacy.

⁴³ See [in Serbian]: <https://vss.sud.rs/sr-lat/postupak-predlaganja-kandidata-za-izborne-%C4%8Dlanove-visokog-saveta-sudstva>

⁴⁴ One judge withdrew, due to the inability to run a personalized campaign in the short timeframe. The Electoral Commission published all the candidates' lists on 2 November 2020 (decisions 119-04-877/2020-02, 119-04-878/2020-02, 119-04-879/2020-02 and 119-04-880/2020-02). Out of the 24 candidates, 2 were on the list of candidates to be elected by the Supreme Court of Cassation, the Commercial Appellate Court and the Administrative Court, 4 were on the list for higher and commercial courts, 16 were on the list of basic and misdemeanour courts and 2 on the list of the autonomous regions. Because one candidate from the misdemeanour and basic courts list withdrew, the total number of candidates running in the elections was 23. Out of the 23 candidates, 13 were women and 10 were men.

candidates were a normal part of the election process, others felt that such suggestions were unjustified, naming the executive branch, professional associations (the Association of Judges and Prosecutors, the Judges Association of Serbia) and in one case the court president as the source of such suggestions.

Electoral Commission

The EC confirmed the election lists⁴⁵ and set the total number of polling stations⁴⁶ by 2 November 2020. In a press release⁴⁷ published on 26 November 2020, the EC informed the public of the date and time of the elections, obliging the court presidents to inform voters at least seven days in advance. The EC issued instructions with respect to epidemiological measures, taking into account the size of the room, the number of persons present, their distance and the mandatory wearing of facemasks.

One candidate withdrew on 3 December, and consequently the EC made two decisions: first, to annul the candidacy,⁴⁸ and second,⁴⁹ to amend the election list. New, corrected ballots were not printed. The EC's decision regarding the withdrawal of one of the candidates was posted at the polling stations. The legal framework on the electoral process does not contain any rules as to what should be done if a candidate withdraws after the final lists have been proclaimed by the EC. In the absence of clear guidance in the legal framework, the EC could defer to the rules used for political elections (e.g. for president of the republic). These rules specify that candidates may withdraw only until the lists are proclaimed as final.

On 30 October 2020, a complaint was filed against the EC's decision on determining the number and the seats of the polling stations. The applicant was from the ranks of the appellate misdemeanour judges and requested three additional polling stations instead of one for the appellate misdemeanour judges, since the appellate misdemeanour judges effectively work in four towns (Belgrade, Niš, Novi Sad and Kragujevac). The appeal was rejected since it was not submitted on time.

One judge submitted a complaint about alleged irregularities during the process of the nomination of the candidates in the Misdemeanour Court in Belgrade. The applicant underlined that the nomination for the candidate had not been submitted in the appropriate form; that the results of the voting from the nomination session were not entered into the form; and that there was no quorum at the session when the candidate was nominated. The HJC and the Administrative Court found that the complaint had not been submitted in a timely manner, and thus it was rejected.

Election Day

Elections were held on 7 December 2020 at 49 polling stations from 7:30 to 15:30 hrs. Most of the 12 monitored polling stations opened at 7:30, except for one that opened at 7:40 due to a technical issue with setting up a ballot box. The number and name of the polling stations, as well as the lists of candidates, were displayed at most polling stations. In two cases, the number

⁴⁵ The Electoral Commission published all the candidates' lists on 2 November 2020 (decisions [119-04-877/2020-02](#), [119-04-878/2020-02](#), [119-04-879/2020-02](#) and [119-04-880/2020-02](#)).

⁴⁶ The Electoral Commission published the [Decision on determining polling stations No. 119-04-875/2020-02](#) on October 30th, 2020.

⁴⁷ See [in Serbian]: <https://vss.sud.rs/sites/default/files/files/Saopstenje.pdf>.

⁴⁸ Electoral Commission decision 119-04-986/2020, from 3 December 2020.

⁴⁹ Electoral Commission decision 119-04-987/202, from 3. December 2020

and name of the polling station were not displayed.

The high turnout (78 per cent) is becoming a standard in Serbian judicial elections.

All the monitored polling stations complied with the legal requirement to use national minority languages on the ballots. During the elections, the ballot box was checked and the control slip was inserted into the ballot box at all the monitored polling stations.

At eight of the 12 monitored polling stations, voters were routinely asked to present their ID, while at four polling stations voters who were known to the EB were not asked for proof of identification.

The EC's decision on the withdrawal of one of the candidates was posted at the polling stations. Since the voting ballots had not been amended in time, voters were given an oral warning that a vote cast for the withdrawn candidate would make the ballot invalid. Most voters were aware that one candidate had withdrawn his candidacy. Since written and oral explanations were made, the impression of the monitors was that there was no confusion regarding this matter. Despite that, three voters checked that candidate's name on their ballot. As mentioned above, the legal framework does not provide solutions for this situation. However, once the final list has been proclaimed by the EC, if a candidate withdraws, the lists should not be amended and the votes cast for the candidate should be counted.

At three out of the 12 monitored polling stations, judges voted elsewhere under the supervision of the additional EB members: one person registered to vote at polling station number 16 in Kraljevo; one person registered to vote at polling station number 26 in Novi Sad and one registered to vote at polling station number 5 in the same city. Some voters were on sick leave or in isolation due to COVID-19; however, they didn't ask for the extended composition of the EB to visit them. Some respondents voiced concerns about whether people on sick leave or in isolation had been properly informed about the possibility of voting.

Members of the extended EB were present at the polling stations even if no voters were registered to vote from home, increasing the number of people present. At times, the total number of people present (EB members, voters and observers) exceeded the prescribed COVID-19 safety limit.

In one polling station, a case of photographing a ballot was registered.

There were no irregularities related to the ballot boxes and privacy screens. Privacy screens were provided at all 12 polling stations where monitors were present. There were no complaints regarding the secrecy of voting. During the elections, the three-member EBs were permanently present at all 12 monitored polling stations. All the polling stations that were monitored were closed at 15:30.

The work of the EBs after the closure of the polling stations was in accordance with the regulations. During the vote count at all 12 polling stations, the ballot box was first checked for the control slip. A number of unused ballots were separated into special envelopes with the appropriate markings and sealed. Having determined the number of judges who voted by checking the electoral roll, all the ballots were removed from the box and counted. Valid and invalid ballots were separated. The number of votes was determined for each candidate. The ballots for each candidate were put in a special envelope with a stamp. Finally, the EB prepared minutes on the final results.

In addition to the OSCE Mission and YUCOM monitors, observers from other organizations were present.

Overall voter impressions

According to the results of the survey conducted by the monitors, the overall impression of the respondents was that the election process was clear, transparent and went well. However, the respondents in the survey pointed out several shortcomings in the process that were not covered by the questionnaire.

Some respondents noted concerns regarding the length of the campaign and the quality of the presentations, stating that the candidates' programmes were identical and there was no possibility to gauge their opinions on various issues. There was also a suggestion for the candidates to have joint presentations in order for the voters to be able to compare them side by side. There were other suggestions regarding the need to improve the uneven geographical composition of the HJC and to allow judges from towns other than Belgrade and Novi Sad to be elected in the HJC.

Media coverage

The elections for the HJC gained more media coverage than the elections for the SPC (the OSCE Mission noted 40 media articles for HJC and 29 for the SPC). The elections were covered by news agencies,⁵⁰ public broadcasters,⁵¹ commercial TV stations,⁵² traditional daily newspapers,⁵³ tabloids,⁵⁴ and web portals.⁵⁵ While most articles were covering agency news and as such were informative and neutral, an example of a negative campaign was noted as well.

A candidate of the Association of Judges and Prosecutors was covered in five articles published by the Public Broadcasting Service of Vojvodina (RTV)⁵⁶, a commercial TV station Pink⁵⁷ and in daily *Kurir*,⁵⁸ and web-portal Republika affiliated with the tabloid *Srpski Telegraf*.⁵⁹ The president of the Judges Association of Serbia who won the election at her level, was not covered in any of the articles as a candidate. The views expressed by the Judges Association of Serbia concerning the election procedure were covered in six articles in RTV,⁶⁰ *Fonet*,⁶¹ *Krstarica*,⁶²

⁵⁰ *Tanjug, Fonet and Beta*

⁵¹ RTS and RTV

⁵² N1

⁵³ *Danas, Politika, Večernje Novosti and Radio Free Europe*

⁵⁴ *Embargo, Kurir, Espresso, Pink, Nova-S, Direktno and Republika*.

⁵⁵ *Boom93, Krstarica, B92 and Urban City Radio*

⁵⁶ See [in Serbian]: https://www.rtv.rs/sr_lat/vojvodina/novi-sad/sudija-iz-novog-sada-ivana-josifovic-kandidat-za-clana-vss_1172414.html

⁵⁷ See [in Serbian]: <https://pink.rs/vesti/243053/sudija-iz-novog-sada-ivana-josifovic-kandidat-za-clana-vss>

⁵⁸ See [in Serbian]: <https://www.kurir.rs/vesti/drustvo/3553413/sudija-iz-novog-sada-ivana-josifovic-kandidat-za-clana-visokog-saveta-sudstva>

⁵⁹ See [in Serbian]: <https://www.republika.rs/vesti/drustvo/96938/ivana-josifovic-jedan-odlican-jedan-los-sudija-proseku-jedan-los-sudija>

⁶⁰ See [in Serbian]: https://rtv.rs/sr_lat/drustvo/drustvo-sudija-podseca-visoki-savet-sudstva-na-svoje-predloge_1167559.html

⁶¹ See [in Serbian]: <https://fonet.rs/drustvo/35857276/transparentnost-izbora.html>

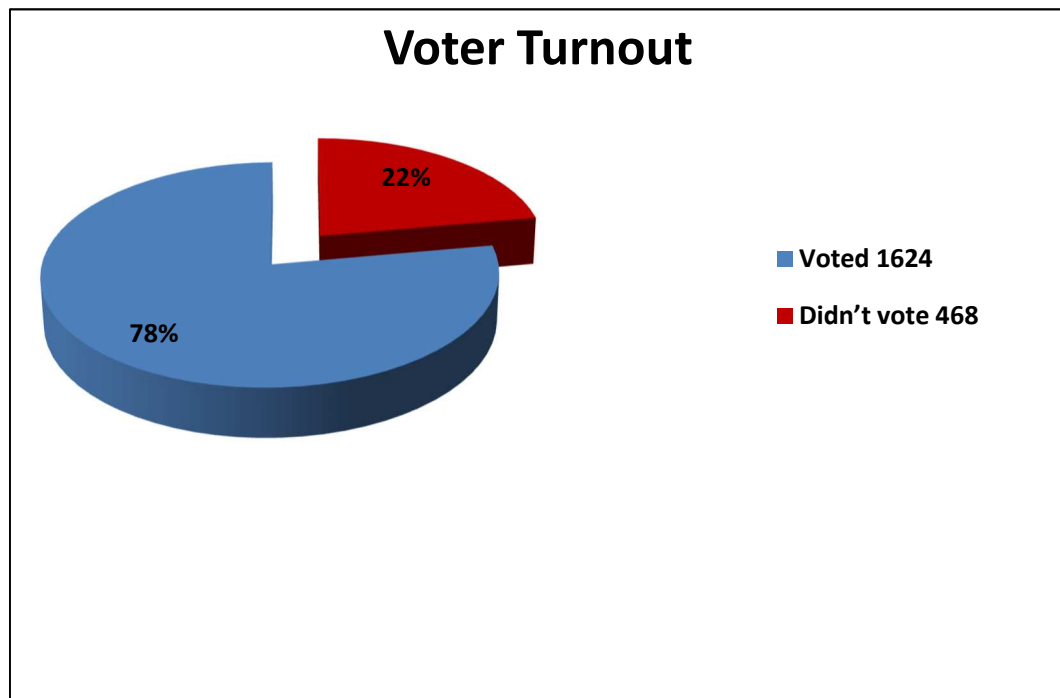
⁶² See [in Serbian]: <https://www.krstarica.com/vesti/srbija/drustvo-sudija-srbije-bjelogrljic-najbolja-ocekujemo-da-novi-vss-resava-goruca-pitanja/>

*Pravni portal*⁶³ and *NI*.⁶⁴ In addition to voicing concerns regarding the short timeframe for the campaign, the Judges Association of Serbia also made a proposal⁶⁵ to the HJC for supplementing the Rules of Procedure of the Electoral Commission, which was supposed to contribute to a more transparent and democratic electoral process. The articles mostly concerned the lack of response from the HJC regarding the Judges Association of Serbia's proposal. While the articles covering the Judges Association of Serbia were longer and more substantive, none of them focused on the candidates that the Judges Association of Serbia had supported. In contrast, the candidate of the Association of Judges and Prosecutors of Serbia gained considerably more media coverage due to the TANJUG agency news item that was taken up by a number of media with a larger outreach than the media covering the candidates of the Judges Association of Serbia.

FACTS AND FIGURES

Turnout

- Total number of eligible voters: 2092
- Total number of voters who cast ballots: 1624
- Total number of judges who did not vote: 468

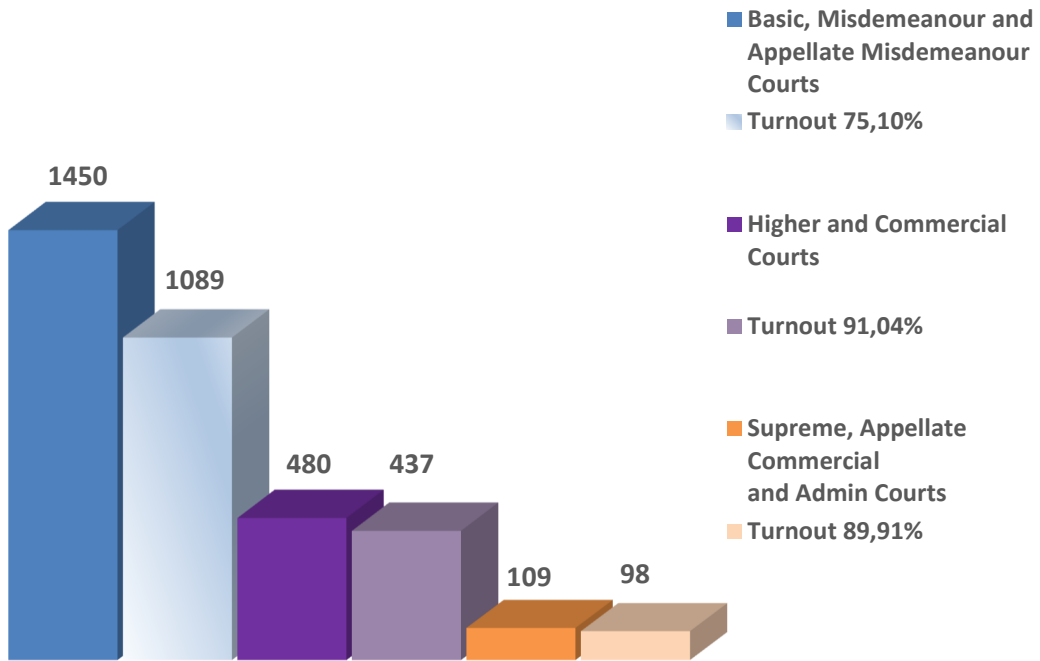


⁶³ See [in Serbian]: <https://www.pravniportal.com/novi-dopis-drustva-sudija-visokom-savetu-sudstva-povodom-izbora-za-vss/>

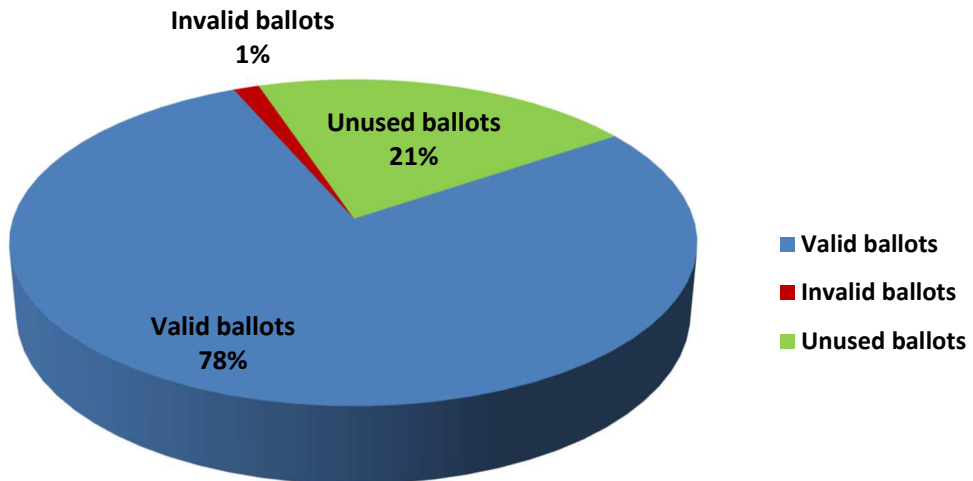
⁶⁴ See [in Serbian]: <http://rs.n1info.com/Vesti/a639558/Drustvo-sudija-trazi-unapredjenje-procesa-izbora-clanova-Visokog-saveta-sudstva.html>

⁶⁵ See [in Serbian]: <https://www.sudije.rs/Item/Details/890>

No. of voters and turnout by courts



Composition of Ballots



RECOMMENDATIONS

Based on the undertaken monitoring of the elections, as described above, the OSCE Mission has identified the following recommendations for improving the national legal framework and practice. The recommendations are based on the existing legal framework.

HJC Composition

- *Amend the constitutional and legal framework regarding the composition of the HJC and the election of its members.* Future reform of the composition of the HJC should consider allowing judges from all levels and types of courts to vote for judges from all levels and types of courts.

- *Consider ways of ensuring geographic diversity in the HJC.* The reform should aim at ensuring broader territorial representation while maintaining the representation of all levels and types of courts.

- *Clarify the role of judges selected for the initial three-year period in the election process.* Judges are currently appointed by the National Assembly, upon proposal of the HJC for an initial 3-year term, then confirmed for lifetime terms by the HJC. The role of the National Assembly in the first appointment raises concerns about susceptibility to political influence. - If this practice remains of electing judges for an initial period, their role should be clarified in terms of their eligibility to vote and stand for election to the HJC. However, given the perception of such judges as lacking in independence and impartiality according to international and regional standards, abandoning the practice of electing judges for the initial three year period should be considered.

Role of the National Assembly

- *Amend the Constitution regarding the procedure for appointing HJC members.* The role of the National Assembly should be reconsidered. Its current broad involvement makes the composition of the HJC subject to the control and influence of the National Assembly, thereby undermining the separation of powers. This recommendation is consistent with similar recommendations made by the Venice Commission and GRECO with equal application to the SPC and HJC. Future amendments of the Constitution should aim at eliminating the influence of the National Assembly on the work of the HJC. The judges-members should be in the majority.

- *Amend the legal framework regarding the National Assembly procedure for the appointment of HJC members.* Currently, the legal framework does not contain any deadlines for when Parliament must decide on candidates. There are no procedures for what to do if the National Assembly rejects an elected candidate.

- *Regulate the election procedure for other elective members in more detail.* Elections for the other elective members of the HJC are not regulated by law. The member of the Bar and the professor should be elected through a transparent process based on objective criteria.

Nomination rules

- *Amend the legal framework to mandate that joint sessions on eventual support for candidates should be held.* This would make the process more inclusive for all judges.

- *Clearly stipulate the way in which joint nominations should be made, as well as the rules on when and how a joint session acquires the consent of the judge it wishes to nominate if he/she is not from the same court.*

- *Clearly stipulate how joint sessions should determine the quorum.* There should be precise rules regarding the quorums necessary to ensure proper voting for candidates when probationary judges are not participating in the sessions.

Candidacy and campaign issues

- *Clarify the legal framework regarding whether one candidate can apply for two different voting lists.* This is only possible if somebody runs candidacy simultaneously for the list of his/her type and rank of appointment and for an autonomous province. This situation has to be regulated in more detail.

- *Campaign rules should be further developed.* In order for candidates to be better able to present their programmes to their peers public benefits such as paid leave, the reimbursement of travel costs and similar would help enable candidates to raise awareness of their programmes and how they would serve their peers on the HJC. Another way to increase the visibility of the candidates could be to encourage the use of online platforms that are accessible to all voters. These initiatives could also aid in reaching out to peers from other geographical areas and thus potentially contribute to more diverse geographical representation in the HJC. The timeframe for the campaign is also very short and does not allow candidates adequate time to travel and present their programmes.

Electoral administrative dispute

- *Develop the rules on the procedure before the Administrative Court.* There are no specific provisions for effective remedies before the Administrative Court. Currently, there are no rules on the timeframe for when the Administrative Court must act and decide. This legal deficiency could potentially lead to significant delays in the election procedure

CONCLUSION

Overall, the peer elections processes for the HJC were transparent, organized and conducted in line with the Serbian national legal framework, which is generally consistent with international and regional good practices. The monitors noted a few minor shortcomings in terms of gaps in the legislation and uncertainties or inconsistencies in the application of certain procedures. The implementation of the recommendation from this Report would increase transparency and fairness of the election process. The OSCE Mission to Serbia stands ready to continue supporting the legal reform efforts of the Serbian authorities in line with the recommendations of this report and OSCE commitments.