

SPOT REPORT

**THE INSTITUTION OF
ADDITIONAL JUDGES
AS A POTENTIAL THREAT TO
JUDICIAL INDEPENDENCE
IN BOSNIA AND HERZEGOVINA**

Spot Report

The Institution of Additional Judges as a Potential Threat to Judicial Independence in Bosnia and Herzegovina

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Acronyms and abbreviations

BiH	Bosnia and Herzegovina
CCJE	Consultative Council of European Judges
CEPEJ	European Commission for the Efficiency of Justice
CoE	Council of Europe
DJA	Department for Judicial Administration of the HJPC
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HJPC	High Judicial and Prosecutorial Council
Mission	OSCE Mission to Bosnia and Herzegovina
Rules	The Book of Rules of the High Judicial and Prosecutorial Council
Standing Committee	HJPC's Standing Committee for Judicial Administration and Judicial and Prosecutorial Budgets
UN Principles	United Nations Basic Principles on the Independence of the Judiciary

1. KEY MESSAGES

- ❑ The appointment of temporary **additional judges** – two-year appointments made outside of usual judicial appointment procedure and permissible under current BiH legislation as a tool for reducing case backlogs – in practice presents serious risks to judicial independence, opening space for undue influence while failing to achieve its primary goal to efficiently process backlogged cases.
 - ❑ There is no basis in the Law on the High Judicial and Prosecutorial Council (HJPC) for mandate extensions for additional judges, yet of 79 currently serving additional judges, 70 are serving a renewed mandate; some have had their mandates renewed up to six times, demonstrating that this mechanism, explicitly limited in the legislation to short-term use, has become semi-permanent.
 - ❑ Although the Law on HJPC provides that court presidents must initiate the process to appoint an additional judge when the need arises, practice sometimes diverges from this requirement, raising concerns that the HJPC oversteps its role, potentially to the detriment of court presidents' authority and independence.
 - ❑ The appointment and mandate extension of additional judges occurs even where regular judicial positions remain vacant, affecting the resolution of both new and backlog cases.
 - ❑ The HJPC should take a number of steps to rectify these and other challenges identified in this report. Most urgently, the Council should cease the practice of extending mandates of additional judges. Moving forward, the HJPC should prioritize filling vacant positions for regular judges over appointing additional judges while continuing to explore alternative means to address the case backlog by law, policy, or practice.
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2. INTRODUCTION

Through regular and systematic monitoring of judicial institutions, the OSCE Mission to Bosnia and Herzegovina (Mission) has observed that the practice of appointing so-called **additional judges** in Bosnia and Herzegovina (BiH) raises serious concerns about impartiality, judicial independence, efficiency, and fairness. A system unique to the judiciary of Bosnia and Herzegovina (BiH), the Law on the High Judicial and Prosecutorial Council (Law on the HJPC)¹ allows for the appointment of temporary judges either to reduce case backlogs or to fill a seat during the prolonged absence of a sitting judge.² The Law on the HJPC established this approach to address a shortage of judges while avoiding a permanent increase in the size of the bench.³ This is based on the policy that additional judges should assist courts in handling a sudden or unexpected increase in cases over a specific period, while allowing the size of the bench to return to normal once the workflow stabilizes. Regular judges, by contrast, enjoy permanent tenure and, once appointed to a particular court, cannot be removed due to a lack of cases to be processed.

The HJPC appoints additional judges with surprising frequency. Seventy-nine additional judges currently preside over cases in BiH courts, representing a significant 7 per cent of all judges currently serving on the bench in BiH. Of these, 70 have had their mandates extended at least once.⁴

Ample need exists for an expanded judicial corps to handle pending case backlogs; in spite of some progressive reduction in the number of pending cases and their duration, the courts face an overall backlog of 2.2 million cases, of which 1.9 million relate to unpaid utility bills.⁵ While in theory an effective and flexible option to address case backlogs, the current system of additional judges raises concerns both as to its effectiveness and to unintended consequences.

Unfortunately, in its current form, not only has the system of additional judges not effectively dealt with the backlog, it also presents serious risks to judicial independence. While perhaps justified at the time of its introduction, owing

¹ Official Gazette of BiH no. 25/04; 93/05; 48/07 and 15/08.

² Article 48(1) of the Law on HJPC.

³ See Functional Review of the BiH Justice Sector, financed by the European Commission, March 2005, p. 85; Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts*, July 2008, section IV.A, available at: https://www.hrw.org/report/2008/07/10/still-waiting/bringing-justice-war-crimes-crimes-against-humanity-and-genocide#_ftnref71. It is worth noting that the issue of judicial independence was indeed raised as a concern during the introduction of the institution. *Id.*

⁴ As of 15 June 2020. Information obtained from the HJPC's Department for Judicial Administration (DJA).

⁵ European Commission Analytical Report accompanying the Commission Opinion on BiH, Brussels, 29 May 2019, p. 36. Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-analytical-report.pdf>. The total number of unsolved cases excluding utility bills cases as of 30 June 2020 was 289,331; information provided at the HJPC plenary session, 15-16 September 2020.

to the unique challenges facing BiH's judiciary at the turn of the century, the system of additional judges no longer seems fit for purpose, with its inherent shortcomings outweighing any potential benefit. Many members of legal and judicial communities in BiH share a sense that how additional judges are utilized in practice frustrates the institution's initial purpose, as, rather than focusing on backlogs, additional judges often deal with new cases and seem to serve as replacements for the appointment of regular judges.⁶

Further, the two-year temporary appointments of additional judges, along with inconsistent practices pertaining to the extension of their mandates, do not comport with international standards and best practices related to judicial independence. The Law on HJPC speaks only of the "appointment of additional judges," referring to the initial appointments, suggesting that these appointments last for two years and no longer.⁷ The Law is silent as to mandate extensions, a possibility introduced subsequently and without full legislative process in the HJPC's Book of Rules (Rules).⁸ The concerns identified in this report pertain to initial appointments and equally to the renewal of mandates of additional judges, the qualitative difference between the two being that mandate extensions lack a legal basis, and that they amplify the concerning issues observed in the initial appointments.

Given these issues, the Mission has identified a range of recommendations to address shortcomings in the institution of additional judges. Additional judges should only be appointed on an exceptional basis, upon request of the court in question, and with clear substantiation of need. The extension of additional judges' mandates should cease, as they are inconsistently awarded and lack a basis in law. In the absence of these reforms to practice, the new Law on the HJPC should abolish the institution of additional judges entirely, with the Rules and laws pertaining to entity level courts amended accordingly. According to the HJPC's Annual Report for 2019, the total number of vacant positions for regular judges is 136, whereas the number of filled judicial posts is 1011.⁹ This serves to underline that the HJPC should prioritize filling the plethora of vacant positions for regular judges, while continuing to explore alternative means to address the case backlog by law, policy, or practice.

⁶ Evidenced by interviews conducted by the Mission with justice sector officials, as well as through the direct monitoring of these appointments. See also "The Status of Additional Judges", presentation by the President of the Municipal Court in Travnik, delivered at the 14th Conference of the presidents and chief prosecutors of BiH, 16 May 2018. Available at: https://pravosudje.ba/vstv/faces/docservlet?p_id_doc=46657.

⁷ See European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems. Efficiency and quality of justice*, CEPEJ Studies No. 23, 2016, p. 88. Available at: <https://rm.coe.int/evropski-pravosudni-sistemi-efikasnost-i-kvalitet-rada-pravosu-a-izvje/1680789853>

⁸ HJPC Book of Rules, Official Gazette of BiH nos. 55/13, 96/13, 46/14, 61/14, 78/14, 27/15, 46/15, 93/16, 48/17, 88/17, 41/18, and 64/18.

⁹ HJPC Annual Report for 2019, page 36. Available at: https://www.pravosudje.ba/vstv/faces/docservlet?p_id_doc=63649

3. METHODOLOGY

Data gathered through the Mission's monitoring of the HJPC and extensive document review formed the basis of the analytical conclusions of this report. The Mission began systematically monitoring the work of the HJPC in 2017, including attendance at all plenary sessions. In addition, for this report the Mission conducted interviews with a range of counterparts, including members of the judicial community and of the HJPC itself. Based on a detailed analysis of this information, this report outlines issues with appointment trends and highlights concerns regarding the institution of additional judges, the role of the HJPC, and the potential impact on judicial independence. Finally, this report provides several recommendations for justice sector actors, including the HJPC, regarding the discussed practices.

4. ADDITIONAL JUDGES AS A RESPONSE TO THE CASE BACKLOG

The system of additional judges was established as a policy response to the case backlog issue that presented, and continues to present, a formidable challenge to the judiciary in BiH. While the Mission acknowledges the continued existence of this challenge, a full analysis of the backlog and various policy responses to address it falls outside the scope of this report.¹⁰ Instead, it focuses on the effectiveness and appropriateness of the specific policy response of the creation of short-term additional judge posts to reduce the backlog.

The Mission's assessment reveals that, while the system of additional judges does not effectively address the backlog, it does have many negative effects. While the official primary aim of additional judge appointments is to clear backlog cases, in practice, such judges are also assigned newly received cases. When this happens, then the backlogs are not being properly addressed, and the calculation of the balance between permanent and additional judges can no longer be considered accurate. These points are further elaborated in Section 7.1.

Furthermore, there are better alternatives to address the backlog, which are less costly, have less overall impact on the judicial system, and build on best practices from the region and EU member states.¹¹ Targeted assistance on increasing the efficiency of the judiciary is also provided by various international partners.¹² The backlog itself must be examined systematically and in an overarching way, and solutions other than the appointment of additional judges must be considered more thoroughly.¹³

¹⁰ Although a comprehensive analysis of viable alternative approaches is outside the scope of this report, potential measures could include, *inter alia*, case management improvements, a reduction of small value claims, and the promotion of alternative dispute resolution mechanisms.

¹¹ See notes from the TAIEX Multi-Country Workshop on "Reforming the Enforcement Procedure – a Way to Improve Judicial Efficiency", 15 September 2017, available at: <https://www.pravosudje.ba/vstv/faces/vijesti.jspx?id=69663>

¹² For instance, "EU Support to Effective Justice" under the European Commission's Instrument for Pre-accession 2014-2020, and the Project "Improving Court Efficiency and Accountability of Judges and Prosecutors in BiH" (ICEA), Phase 2, financed by the government of Sweden between 2016 and 2019, implemented by the HJPC in co-operation with the courts in BiH and the Swedish National Courts Administration.

¹³ For instance, see the EC Opinion on EU membership application of BiH; the recommendations of the Stabilisation and Association Agreement Sub-Committee on Justice, Freedom and Security related to the backlog and enforcement procedures, as well as the 2020 European Commission Report on BiH.

At the outset, for the sake of clarity and consistency, here are some key terms defined:

- **Systematization** refers to job classification, namely, the process by which the HJPC determines the number of judges required in a given jurisdiction to adequately meet the demands of a court's workload, following consultations with presidents of courts, respective finance authorities, and the respective ministries of justice.¹⁴ In doing so, the HJPC is required to apply clear criteria to assess the number of judicial office holders necessary to process the inflow of cases, allowing for the achievement of the "annual orientation norm" of one hundred per cent.¹⁵
- The **annual orientation norm** refers to the expected number of cases that a given judge should resolve per year and serves as one of the indicators contributing to the performance evaluation of judges.¹⁶ These norms differ depending on the types of cases a judge hears or the court's level or department.
- **Case backlog** lacks a generally accepted definition. According to the HJPC Instruction on the Plan for Solving of Old Cases, issued on 1 December 2010, case backlogs are defined per case category and court instance and are those "cases which are not completed within a year from the day of the submission of the initial act to the court".¹⁷ For example, a "backlogged" criminal case in the first instance will be considered one in which the main hearing is not completed within a year from the filing of the indictment.

¹⁴ Articles 16 and 17 (25) of the Law on HJPC.

¹⁵ Criteria for Assessment of the Number of Judicial Office Holders, adopted at the HJPC plenary session on 16–18 December 2013.

¹⁶ Provisions governing the calculation of the achieved annual orientation norm, or quota, are set out in the Rulebook on Orientation Criteria for the Work of Judges and Legal Associates in BiH ("Official Gazette BiH", no. 25/04, 93/05, 48/07, 15/08, 43/12, 38/13, 2/14). Consequently, based on the percentage of the achieved quota, the judge receives points that are taken into account in the calculation of their performance appraisal score. See Criteria for the Performance Appraisal of Judges in BiH ("Official Gazette BiH", no. 93/18), adopted by the HJPC at its Plenary session of 27 November 2018.

¹⁷ Instruction on the Plan for Solving of Old Cases Based on the Age of the Initial Act, adopted at the HJPC plenary session on 1 December 2010. On file with the Mission.

5. DOMESTIC LEGAL FRAMEWORK

As noted, the Law on the HJPC regulates procedures related to the appointment and mandate of additional judges appointed to assist in the reduction of case backlogs or during the prolonged absence of a regular judge.¹⁸ When appointed on the grounds of assisting in reducing a case backlog, from a logical standpoint, this refers to additional judges working solely on backlog cases. All potential additional judges “shall meet the professional requirements of judges of the court to which they would be assigned,” i.e. anyone who fulfils the general criteria for a regular judicial post can apply and be appointed, including retired judges and prosecutors.¹⁹ In general, the same procedures govern the appointment of regular and additional judges, with a few key differences, namely that the HJPC may not initiate the recruitment process for an additional judge *ex officio*, as the appointment requires an initial request by the president of a court.²⁰

In addition to the Law on the HJPC, the Rules further delineate the process of appointing additional judges. Pursuant to the Rules, the president of the court seeking the appointment of an additional judge shall state the reason for and duration of the appointment, including concrete indicators justifying the court’s need for an additional judge; the types of cases over which the additional judge will preside; and evidence that the relevant ministry will fund the additional judge’s position.²¹ After the HJPC’s Standing Committee for Judicial Administration and Judicial and Prosecutorial Budgets (Standing Committee) considers the request,²² the Standing Committee “shall

Understanding the scope (data as of June 2020)

Current number of additional judges presiding in BiH:	79
Number of additional judges serving an extended mandate:	70
Total percentage of additional judges relative to overall number of judges:	7%
Total number of vacant positions for regular judges:	136

¹⁸ Article 48(1) of the Law on HJPC. Article 17(1) of the Law on HJPC establishes the HJPC’s authority to appoint additional judges in all courts (excluding the constitutional courts).

¹⁹ Article 33(1) of the Law on HJPC. Additionally, Article 33(2) of the Law on HJPC stipulates that “Retired judges and prosecutors shall be eligible to be appointed and serve as reserve judges until they reach the age of seventy-two (72). Similar provisions are found in Article 64 of the Law on Courts of the Republika Srpska, as well as Article 38 of the Law on Courts of the Federation of BiH.

²⁰ Article 48(1) of the Law on HJPC.

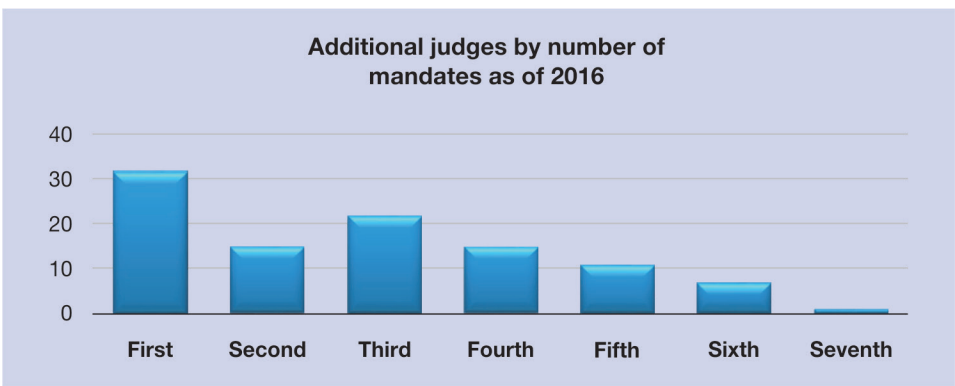
²¹ Article 48 of the Law on HJPC and Article 65(2) and (3) of the HJPC Book of Rules.

²² Article 65(4) of the HJPC Book of Rules.

present a proposal to the HJPC to decide on the request.”²³ The HJPC will then conduct the appointment procedure in accordance with the law and the Rules.

There is no legal basis for mandate extensions in the Law on the HJPC. The Rules, however, later introduced an option to extend an additional judge’s mandate,²⁴ going beyond the scope of the Law on the HJPC – or arguably running contrary to it. According to the Rules, there is no limit on mandate extensions, which has led to multiple extensions of mandates in practice. The Rules provide that the president of the relevant court may file a request for extension of an additional judge’s mandate 90 days prior to the completion of his or her two-year term.²⁵ The issue holds particular importance since the HJPC appears to rely much more on the extensions of mandates than on initial appointments. In 2016, for example, out of 103 sitting additional judges, 32 were in their initial appointment, whereas the rest were serving a renewed mandate (Figure 1); seven were in their sixth mandate, and one additional judge was serving a seventh, equalling 14 years of “temporary” appointment.

Figure 1



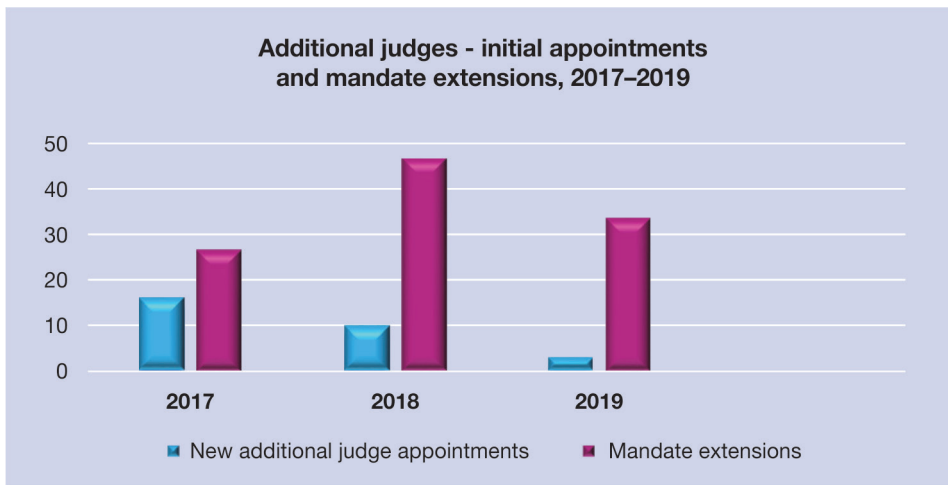
From 2017 onwards, when the Mission started systematically monitoring the work of the HJPC, it observed the continuation of this trend. Between 2017 and 2019, the number of mandate renewals continued to outpace initial appointments (Figure 2).

²³ Ibid.

²⁴ Article 66 of the HJPC Book of Rules.

²⁵ Article 66 (1) and (2) of the HJPC Book of Rules. According to Article 66 (4), the performance results of the additional judge shall be considered when determining the mandate extension. The HJPC subsequently decided to reduce the deadline to file the request for extension to 60 days before the expiry of the mandate, through the letter no. 06-08-2598/2010 of 14 July 2010 to the courts of BiH.

Figure 2



Currently, out of 79 serving additional judges, only nine are in their initial mandates, whereas 70 are serving a renewed mandate. This trend calls into question whether the “temporary” measure envisaged by the legislature in adopting the additional judges’ provision in the Law on the HJPC may be discerned from today’s practice of seemingly limitless mandate extensions.

In June 2018, the HJPC adopted an initiative to amend the Law on the HJPC as part of its broader reform process targeting overall procedures and practices.²⁶ This effort included a suggestion to retain the institution of additional judges with the possibility to transform a given additional judge’s mandate into a permanent one, should the performance appraisal justify doing so and given the securing of necessary funding.²⁷ At the time of writing of this report, these amendments remain under consideration.

²⁶ ‘Inicijativa VSTV-a BiH za reviziju Zakona o VSTV-u BiH’, adopted by the HJPC during its session of 28 and 29 June 2018. Available at: <http://vstv.pravosudje.ba/vstv/faces/vijesti.jsp?id=75066>.

²⁷ Ibid., ‘Prelazne i Završne Odredbe’ (Transitory and Final Provisions).

6. INTERNATIONAL LEGAL STANDARDS

Numerous international legal standards highlight the link between judicial appointment processes and judicial independence, including the role of lifetime tenure in protecting judges from undue influence. In BiH, the European Convention on Human Rights (ECHR) and its Protocols have supremacy over all domestic law by virtue of the Constitution of BiH, while other international instruments serve as soft law to further corroborate or illuminate the Convention's principles.²⁸ Article 6 of the ECHR provides for the “right to be heard by an independent tribunal”, while the case-law of the European Court of Human Rights (ECtHR) further outlines the criteria within the meaning of “independent tribunal”, noting that for a judicial body to be considered independent, “regard must be had, inter alia, to the manner of appointment of its members **and their term of office**” as well as “to the existence of guarantees against outside pressure.”²⁹ The United Nations Basic Principles on the Independence of the Judiciary (UN Principles) provide that “[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”³⁰ The Bangalore Principles of Judicial Conduct, in referencing the UN Principles, highlight security of tenure as one of several essential minimum conditions for judicial independence.³¹

These standards also emphasize the risks to judicial independence posed by short-term appointments, which in the current context would apply to additional judges. The European Commission for Democracy through Law (commonly referred to as the Venice Commission), an advisory body of the Council of Europe (CoE), determined that, while not strictly forbidden, the practice of short term appointments “present[s] difficulties if not dangers from the angle of independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed.”³² The

²⁸ The European Court of Human Rights uses these standards as a source of inspiration. See for example ECtHR *Harabin v. Slovakia*, Application no. 58688/11, Judgment of 20 November 2012, para. 139.

²⁹ ECtHR, *Lanborger v. Sweden*, Judgment of 22 June 1989, para. 32 (emphasis added). See also ECtHR, *Bryan v. The United Kingdom*, Application no. 19178/91, Judgment of 22 November 1995, para. 37; ECtHR, *Baka v. Hungary [GC]*, Application no. 20261/12, Judgment of 23 June 2016, para. 172.

³⁰ See UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985, para. 12. These principles further call on states to institute structural and functional safeguards against inappropriate or unwarranted interference with the judicial process.

³¹ Commentary on the Bangalore Principles of Judicial Conduct, published by UNODC in September 2007, para. 26(a), available at: https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf

³² The Venice Commission Report on Judicial Appointments, CDL-AD(2007)028, adopted at its 70th plenary session (16-17 March 2007), para. 38. The Recommendation of the Committee of Ministers of the Council of Europe similarly states, “Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.” Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, para. 49, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afb78.

Recommendation of the Committee of Ministers of the CoE states that decisions to appoint judges for probationary or fixed terms must be based on objective pre-established criteria to ensure full respect for the independence of the judiciary.³³ Similarly, the Consultative Council of European Judges (CCJE) in its Opinion no. 1, on standards concerning the independence of the judiciary and the irremovability of judges, has explicitly considered that the “irremovability of judges should be an express element of the independence enshrined at the highest internal level.”³⁴

Although the Venice Commission allows for certain circumstances under which the temporary appointments of judges should be considered, none apply to the system of additional judges in BiH. Specifically, while concluding that, as an element of independence, the irremovability of judges should be protected,³⁵ the Venice Commission observed that the possibility of temporary appointment of judges should not be excluded altogether, especially in relatively new judicial systems still assessing their own functionality and the capacity of individual judges to fulfil their duties before receiving permanent appointments.³⁶ However, this does not apply in BiH, which has an established judicial system and where additional appointments do not precede permanent appointments but rather, in effect, preclude them by introducing a parallel cadre of judges.

The role of lifetime tenure as a fundamental tenet of judicial independence implies that, by contrast, short-term judicial appointments are more susceptible to undue influence and manipulation. As demonstrated below, the concerning practices in the appointment of additional judges only reinforce this impression.

³³ Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, Para. 51 (in relation to para. 44). Note the distinction between probationary judges, who are meant to become permanent judges after a successful probation period, and additional judges, who are never meant to permanently stay on the bench.

³⁴ Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE), for the attention of the Committee of Ministers of the Council of Europe, on standards concerning the independence of the judiciary and the irremovability of judges, 23 November 2001, para. 60.

³⁵ See the Venice Commission Report on Judicial Appointments, CDL-AD(2007)028, adopted at its 70th plenary session (16–17 March 2007), para. 40. The Venice Commission further concluded: “Setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.” Ibid.

³⁶ Ibid, para. 41.

7. CONCERNING PRACTICES RELATED TO THE INSTITUTION OF ADDITIONAL JUDGES

Based on its systematic monitoring and analysis of the institution of additional judges in BiH, the Mission observes three critical concerns that may threaten judicial independence and rule of law, namely: 1) inconsistent caseload calculations that undermine the sustainability of judicial appointments; 2) inconsistent appointment procedures that violate the Law on HJPC and challenge court presidents' role in backlog management; and 3) questionable factors impacting the appointment and the extension of the mandates of additional judges that undermine the overall integrity of the judiciary in BiH.

7.1. Inconsistent caseload calculations that undermine the sustainability of judicial appointments

The appointment of additional judges, contrary to aiding in the administration of justice in BiH, appears to ultimately undermine it by becoming an obstacle to the efficient appointment of the appropriate number of permanent judges needed to process the overall caseload, as explained below.

The HJPC determines the number of judges required to meet the burdens of each court *ex officio* and in consultation with court presidents and ministries of justice.³⁷ If properly calculated, the number of regular judges should be able to process all incoming cases, allowing for achievement of the annual orientation norm of one hundred per cent.³⁸ With new cases handled by regular judges, the number of additional judges should depend solely on the resources required to address a given court's backlog. When properly determined, this balance of necessary regular and additional judges should be able to process all cases effectively and efficiently, both new and backlogged, with additional judges dealing exclusively with the latter.

The HJPC has not conducted a comprehensive *ex officio* analysis to determine the number of judges needed since 2009. Based on the assumption that all courts would settle their backlog of cases within two years, as of 31 December 2008, this analysis demonstrated a need for 157 more additional judges, raising the total projected number of additional judges required from 173 to 330.³⁹

³⁷ Article 17 of the Law on HJPC states: "The Council shall have the following competencies: [...] 25) Determining the number of judges, prosecutors and/or Deputy Chief Prosecutors of each court or prosecutor's office within the Council's competence, after consultation with the relevant Court President or Chief Prosecutor, relevant budgetary authority, and the relevant Ministry of Justice."

³⁸ Criteria for assessment of the number of judicial office holders, adopted at the HJPC session held on 16-18 December 2013.

³⁹ HJPC Publication "A Decade of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, The Judicial Reform and its Achievements", p. 36. Available at: <https://advokat-prnjavorac.com/legislation/Decade-of-the-High-Judicial-and-Prosecutorial-Council-of-BiH.pdf>

Unfortunately, the way in which the BiH judicial system uses additional judges distorts the accuracy of these calculations. Several factors undermine the accuracy of this estimation:

- **Work on new incoming cases:** The data from the Mission’s monitoring shows that additional judges adjudicate a large percentage of new cases. For example, additional judges whose mandates were renewed in 2019 achieved their orientation norms based on the resolution of 70 per cent new cases versus 30 per cent backlogged cases.⁴⁰ This alters the calculation of regular versus additional judges needed, which relies on the assumption that only regular judges receive new cases. However, if the additional judges also work on new cases, then the backlog will take longer to resolve, and the calculation of the balance between permanent and additional judges can no longer be considered accurate. In 2015, the HJPC adopted a new Instruction on the Plan for Solving of Cases,⁴¹ thereby obliging all courts to adopt plans for solving backlogged cases. The plans are compiled on the level of the court and on the level of individual judges, whereby each (regular) judge should achieve at least 70 per cent of their orientation norm with cases from this plan.⁴² The summaries of these plans do not provide the absolute number of backlogged cases, nor do they disaggregate data that would allow for distinguishing between regular and additional judges’ contributions to reducing the backlog. This makes it even more difficult to calculate the required number of additional judges.
- **Expenditure of resources for appointments:** The appointment of additional judges occurs even where regular judicial positions remain vacant, affecting the resolution of both new and backlog cases. The systematization of permanent judges – positions designated to adjudicate *all* cases – and of additional judges – positions designated to address the backlog – run in parallel. Despite this process relying on the assumption that no projected positions remain vacant, many often do. As an illustration, during its 19 June 2019 plenary session, the HJPC appointed two additional judges to the Cantonal Court in Sarajevo, despite vacancies for 14 permanent judges at the same court. Figure 3 below illustrates the balance of regular and additional judges within the Cantonal Court in Sarajevo as of that date.

⁴⁰ These refer to the so-called “percentage of cases” from the plan for resolving of old cases in the realized norm. This figure varies hugely between courts and judges, from 0 per cent of work on older cases (extension of mandate of a judge at Basic Court Modrići at the HJPC plenary session held on 27–28 March 2019), to 76 per cent (extension of mandate of a judge at the Cantonal Court in Tuzla at the HJPC plenary session held on 6–7 November 2019).

⁴¹ HJPC plenary session, 21–22 January 2015.

⁴² Article 10 of the HJPC Instruction. On file with the Mission.

Figure 3

Cantonal Court Sarajevo	Regular judges	Additional judges
Designated positions	55	7
Filled positions	41	2
Unfilled positions	14	5

- **Fluctuations in case inflow:** The expected inflow, defined as the annual average number of cases received over the previous three years, should determine the number of designated permanent and additional judges. In practice, case fluctuations complicate these projections. As an illustration of the effects of such fluctuations, according to the 2009 systematization, there are 1,202 designated positions for permanent judges, whereas calculations based on 2015–2017 data showed a need for 1,373 permanent judges.⁴³ This means that the number of designated positions for permanent judges was not sufficient to resolve the inflow, eventually leading to new backlog cases.
- **Lack of a needs assessment:** Finally, it should be noted that the HJPC often extends the mandates of additional judges without conducting an assessment to determine whether the need for an additional judge still exists within the court in question.

Discussions during the HJPC's plenary sessions illustrate that the respective impacts of each of these issues cannot be disentangled. For example, on 10 June 2019, the President of the Municipal Court of Lukavac requested the appointment of an additional judge, despite having vacancies for two regular judges. When contacted by the HJPC's Department for Judicial Administration (DJA)⁴⁴ to determine the reasons for appointing an additional judge rather than filling these vacancies, the President of the Municipal Court in Lukavac explained that the Ministry of Justice of Tuzla Canton had suggested this approach as it simplified the securing of funding for an increase in the overall number of judges. The HJPC discussed this request during its 18 July 2019 plenary session. In clarifying the Tuzla Canton Ministry of Justice's suggestion, it became clear that the budget of Tuzla Canton for 2019 could fund the salaries and allowances of one additional judge in addition to the eight regular positions. As a result, the HJPC unanimously adopted a conclusion approving the request of the President of the Municipal Court in Lukavac to increase the systematization by one additional judge, resulting in the appointment of an additional judge.

⁴³ HJPC, Excel table with an overview of the calculation results, June 2018. On file with the Mission.

⁴⁴ At its 20 December 2018 plenary session, the HJPC adopted a conclusion by which the DJA and the Standing Committee on Judicial Administration and Judicial and Prosecutorial Budgets are instructed to, according to the valid criteria adopted at the 16–18 December 2013 plenary session, analyse each request for the appointment and/or extension of the mandate of an additional judge. Based on the results of the analysis and the explanation provided by the president of the court in question, the HJPC makes a final decision on the requested appointment or extension.

This example shows a tendency to approve funding more readily for the appointment of additional judges. As the HJPC session did not question or further elaborate on this decision, the Mission is not aware of the reasoning behind it. However, the decision *prima facie* does not appear to be based on considerations of the backlog.

Furthermore, the sheer number of cases pending before several courts in BiH patently requires the appointment of more permanent judges, and in some cases, a more systematic solution. This is illustrated in the chart below, which shows the DJA's 2017 calculation of the number of additional judges required to clear the backlog in a specific number of years given the current number of permanent judges in each of several courts (Figure 4). The projection for Sarajevo Municipal Court – where it would take 97 additional judges 10 years to clear the current backlog – plainly demonstrates that the backlog requires a policy level intervention.

Figure 4

Court	No. of positions for additional judges based on the 2009 systematization of the HJPC	Results of calculations (number of positions of additional judges based on the backlog of cases as of 31.12.2017)				
		The number of additional judges required to solve the backlog of cases in				
		2 years	4 years	6 years	8 years	10 years
Court of BiH	1	16	8	5	4	3
Supreme Court FBiH	13	26	13	9	6	5
Supreme Court RS	1	8	4	3	2	2
Appellate Court BD	1	0	0	0	0	0
Cantonal Court Mostar	0	24	12	8	6	5
Cantonal Court Sarajevo	7	61	31	20	15	12
Cantonal Court Tuzla	9	24	12	8	6	5
Municipal Court Bihać	0	23	12	8	6	5
Municipal Court Cazin	3	15	8	5	4	3
Municipal Court Lukavac	0	20	10	7	5	4
Municipal Court Sarajevo	11	486	243	162	122	97
Municipal Court Tuzla	14	82	41	27	20	16
Municipal Court Zenica	7	65	32	22	16	13
Basic Court Banja Luka	17	23	11	8	6	5

If used as intended and where their appointment is a realistic solution for clearing a short-term backlog, additional judges may indeed contribute to raising efficiency in the justice system. However, the figures above show that the enormity of the issue requires a more carefully considered approach, as mentioned in Section 4.⁴⁵ In the absence of a more efficient strategy, the use of additional judges will continue to skew overall judicial appointment numbers and harm overall judicial efficiency.

7.2. Inconsistent appointment procedures that violate the Law on HJPC and challenge court presidents' role in backlog management

Although the Law on the HJPC provides that court presidents must initiate the process of appointment for an additional judge, actual practice sometimes varies, raising concerns as to whether the HJPC oversteps its role to the detriment of court presidents' authority and independence.⁴⁶ The announcement of a vacancy should accompany a justification for the additional judge by the court president⁴⁷ and confirmation of available funds by the competent ministry.⁴⁸

However, through its monitoring, the Mission has observed several inconsistencies in the appointment of additional judges, noting that the HJPC often encourages court presidents to request additional judges and either promotes mandate extensions or questions court presidents who do not make such requests. Additional judges therefore depend upon both the HJPC and the court presidents for the extension of their two-year mandates, and thus for their jobs, at regular intervals. This relationship of dependency contradicts the principle of judicial independence, which should protect individual judges from directives or pressure from the president of the court or others when adjudicating cases.⁴⁹

On multiple occasions, during general discussions on the issue of additional judges at the HJPC's plenary sessions, some HJPC members have questioned the decisions of court presidents who did not request mandate extensions.⁵⁰ During

⁴⁵ Although a comprehensive analysis of viable alternative approaches is outside the scope of this report, potential measures could include, *inter alia*, case management improvements, a reduction of small value claims, and the promotion of alternative dispute resolution mechanisms.

⁴⁶ Article 48(1) of the Law on HJPC.

⁴⁷ The performance appraisal of court presidents includes overall court management, which therefore depends upon the performance of the other judges sitting in the court. Where individual judges within a court lack the cases to meet their quotas, this may negatively affect the appraisal of the court president.

⁴⁸ Article 65 of the HJPC Book of Rules.

⁴⁹ See ECtHR, *Parlov-Tkalčić v. Croatia*, Application no. 24810/06, Judgment of 22 December 2009, para. 86: "The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified."

⁵⁰ Information obtained from the monitoring of the HJPC plenary sessions on 9 July and 6 September 2018, items 16 and 35, respectively. In the three-year period between 2016 and 2018, the courts have not requested the renewal of the mandates of five additional judges.

one plenary session discussion, the President of the HJPC suggested that a court president's decision not to extend an additional judge's mandate could signify a reprisal against that additional judge and urged the court president to request the extension.⁵¹ In 2018, the HJPC adopted a conclusion obliging court presidents to inform the HJPC of their decision on extension at least three months prior to the mandate's expiration; the same conclusion requires that court presidents not requesting extensions demonstrate that a reduction in judges will not impact the court's productivity.⁵² However, this conclusion runs contrary to an earlier conclusion adopted by the HJPC, which declared that the president of the court has the sole authority to request mandate extensions.⁵³

In two instances, despite the absence of any formal request by the court president, the HJPC nevertheless extended the mandate of the additional judge in question.⁵⁴ This contravenes the Law on the HJPC, which clearly states that the HJPC "may appoint additional judges upon application by the president of a court, provided the application is supported by evidence indicating the need and sufficient funding for the additional judges."⁵⁵

More recent events related to the Cantonal Court in Bihać illustrate the HJPC's apparent disregard for the requests and needs of court presidents on occasion. The President of the Cantonal Court in Bihać formally informed the HJPC that she would not request an extension of the mandate of an additional judge whose tenure would expire in January 2020.⁵⁶ She explained that, due to a lack of new cases, the other judges could manage the court's workload, rendering the additional judge unnecessary. The HJPC concluded that the President of the Cantonal Court in Bihać must further submit a proposal to reduce the number of systematized positions of additional judges, accompanied by a justification that included a projection of the court's expected workload. The Cantonal Court in Bihać responded to the HJPC by requesting a reduction in the number of systematized positions, including systematized positions of additional judges.⁵⁷ At the time, 14 of 18 systematized regular judicial posts were filled, leaving four posts vacant. The Standing Committee adopted a conclusion in favour of the court's request, which the full HJPC then rejected at the subsequent plenary session, along with the first request of the court president not to extend the

⁵¹ Ibid. At the plenary session held on 6 September 2018, the President of the HJPC stated that it was becoming a practice that "presidents deal with additional judges by conditioning them with the extension of the mandate."

⁵² Adopted at the HJPC plenary session on 6 September 2018.

⁵³ HJPC plenary session, 20–21 December 2017.

⁵⁴ HJPC plenary session, 26 September 2018 and HJPC plenary session, 17–18 October 2018.

⁵⁵ Article 48(1) of the Law on HJPC.

⁵⁶ HJPC plenary session, 6–7 November 2019.

⁵⁷ Ibid.

additional judge's mandate, stating that both requests lacked justification.⁵⁸ The mandate of the additional judge in question was therefore renewed above the court president's objection.

While the Mission has no information pertaining to the HJPC's motivation to renew additional judges' mandates in contradiction to the explicit requests of court presidents, these cases raise concerns. In addition to contravening the Law on HJPC, the HJPC's September 2018 conclusion and those related to the Cantonal Court in Bihać place additional burdens on court presidents, who must not only justify the need for additional judges but must also demonstrate why no such need exists. This undermines the authority of court presidents, who by law serve a critical function in the management of the courts and the overall administration of justice.

On the other hand, by virtue of this same expansive authority – including a decisive role in the assignment of cases to individual judges – court presidents' power over additional judges' mandate renewals opens room for manipulation. Presidents of the courts have the power to make decisions to allocate cases to particular judges, recuse judges from certain cases, and to reassign cases from one judge to another.⁵⁹ This, combined with the relationship of dependency stemming from a court president's authority to request (or not) the renewal of an additional judge's mandate, could create situations where additional judges face pressure to decide in a certain manner in a case assigned to them or face the loss of their livelihood, an obvious threat to judicial independence.

The risk is more evident given that, as noted above, Mission data from 2019 shows that about 70 per cent of the workload of additional judges consisted of new cases rather than backlog cases. These include cases pertaining to sensitive matters such as abuse of authority and other corruption-related offences, in which the patent independence of the adjudicating judges is of paramount importance. HJPC discussions have not, thus far, addressed the issue of why additional judges receive new cases, or focused on how to ensure that presidents of courts remedy this issue.

These examples illustrate the fragility and vulnerability to manipulation of the additional judges' mandate renewals, dependent on court presidents on one side and the HJPC on the other. At the very least, the HJPC should refrain from overextending its authority, instead deferring to the justified requests of court presidents pertaining to workload management, including the appointment of

⁵⁸ HJPC plenary session, 27–28 November 2019.

⁵⁹ Article 88 of the Rules on the Automatic Case Management System (CMS), Official Gazette of BiH no. 25/04, 93/05, 48/07, 15/08, 34/19.

additional judges.⁶⁰ At the same time, the HJPC should exercise its function in the efficient overall administration of justice by encouraging court presidents to consider better ways of using existing resources, rather than resorting to requesting additional judges when this does not present the most expedient solution. Ultimately, court presidents are responsible for the overall management of their courts and the HJPC should respect that role⁶¹ while working to minimize vulnerabilities in the existing system.

7.3. Questionable factors impacting the appointment and extension of the mandates of additional judges that undermine the overall integrity of the judiciary in BiH

Another concerning practice pertains to the HJPC's failure to apply consistent and valid criteria in the selection and mandate extension of additional judges. Given the number of these judicial officers currently serving on the bench in BiH, this has implications for fairness, as well as the potential to significantly impact the quality of the justice system as a whole.

The HJPC's selection criteria during the initial appointment of additional judges do not always give due weight to quality. On one recent occasion, for example, the HJPC appointed the fifth-ranked candidate as an additional judge, based on the proposal of the Standing Committee and without any justification as to why this appointment was more appropriate than that of any of the four higher-ranked candidates.⁶²

However, far more concerning due to the relative proportion of mandate renewals to new appointments is the HJPC's lack of consistency in examining performance and integrity criteria when considering extensions. According to the Rules, the HJPC should consider both the inputs of the court president and the performance of the additional judge in question when assessing a proposal for the extension of a mandate.⁶³ In practice, the HJPC accepts requests for two-year mandate extensions but often does so without regard to the quantity or quality of the judge's work, and does not assess whether the court actually requires the extended mandate to process its case backlog. Instead, mandate extensions generally follow receipt of a generic letter stating simply that the court requires an additional judge to resolve its backlog.⁶⁴ Out of the 74 mandate

⁶⁰ See for example the Consultative Council of European Judges (CCJE), Opinion no. 19, 10 November 2016 para. 24: "[...] The CCJE considers that any central authority responsible for managing the judiciary should only perform those tasks which cannot be performed effectively at the level of courts."

⁶¹ Ibid, para. 27.

⁶² HJPC plenary session, 27 November 2018. The Committee put forward the proposal but did not remark at all on the candidate's capacity or why they were proposed even being fifth ranked.

⁶³ Article 66 of the HJPC Book of Rules.

⁶⁴ Direct observation by the Mission.

extensions observed by the Mission in 2018 and 2019, only two such extensions assessed concrete factors relating to the additional judge's competences and performance.⁶⁵

The Mission's monitoring shows that the HJPC rarely rejects requests for the extension of additional judges' mandates for any reason at all. The example above related to the Cantonal Court in Bihać demonstrates that the HJPC has even granted a mandate extension when the court president declined to submit a timely or properly justified request.

While the HJPC has on occasion demonstrated its willingness to take substantive factors into account when considering mandate extensions, such factors are inconsistent at best. On a positive note, the Mission is aware of two instances in recent years when the HJPC has either postponed or further reviewed a mandate extension based on a lack of information or the poor performance of the judge in question, which demonstrates respect for the Rules and best practices. However, at other times, the HJPC has addressed poor performance with questionable means; in 2017, the HJPC extended the mandate of three additional judges by one year rather than the usual two years because of poor performance.⁶⁶ Two similar instances also occurred in 2018.⁶⁷

Even more concerning, the HJPC has repeatedly extended the mandate of additional judges who demonstrated poor performance with no consideration of such. One additional judge, whose mandate was recently renewed, had seen a judgment reversal rate of 44 per cent;⁶⁸ another's decisions were reversed at a rate of 34 per cent.⁶⁹ Another additional judge received a mandate extension despite an unsatisfactory performance assessment during their previous mandate.⁷⁰ This lack of due attention to the performance of additional judges manifestly impacts upon the quality of the judiciary.

One of the more striking examples occurred when the HJPC extended the mandate of an additional judge at the Cantonal Court in Sarajevo, despite the judge's reportedly poor performance, including in evidence provided by the Appointments Department of a high number of reversed decisions.⁷¹ During

⁶⁵ Extension of a mandate of a judge of Municipal Court of Sarajevo at the HJPC plenary session on 9–10 July 2018, and extension of a mandate of a judge at the Municipal Court of Sarajevo at the HJPC plenary session on 19–21 June 2019.

⁶⁶ HJPC plenary session, 5–6 July 2017.

⁶⁷ HJPC plenary session, 9–10 July 2018.

⁶⁸ Extension of a mandate of an additional judge at the HJPC plenary session, 20 December 2018.

⁶⁹ Extension of a mandate of an additional judge at the HJPC plenary session, 19–21 June 2019. The reversal rate is the percentage of reversed v. reviewed decisions at higher instance.

⁷⁰ Extension of a mandate of an additional judge evaluated with "unsatisfactory performance", at the HJPC plenary session 9–10 July 2018.

⁷¹ HJPC plenary session, 17–18 July 2019. The judge in question had a 34 per cent reversal rate, with many decisions reversed on the grounds of gross violations of the law.

a lengthy discussion, members of the HJPC suggested extending the judge's mandate by only one year, assigning him less complex cases, or providing him with a chance to improve his performance through a two-year unconditional mandate extension. With seven in favour, two against, and two abstaining, the HJPC extended the additional judge's mandate for two years with no conditions attached. In August 2019, following this decision by the HJPC, the Delegation of the European Union to BiH addressed a letter to the HJPC, highlighting the judge's criminal record and an ongoing disciplinary proceeding for failure to disclose a previous conviction.⁷² The HJPC responded by blaming an inadequate system of background checks for judicial appointees, stating in its written response that the members of the HJPC were not informed of the ongoing disciplinary proceedings against the judge.⁷³

To its credit, the HJPC has subsequently reviewed the possibility of requiring additional information on disciplinary records, as well as ongoing complaints and procedures, which would be taken into account when deciding on mandate extensions.⁷⁴ Following these discussions, the HJPC has made efforts to improve its practices by requiring that the DJA include information on disciplinary complaints and other procedures related to additional judges considered for initial appointments or mandate extensions. The HJPC continues to discuss the best ways to assess circumstances that may call the suitability of an additional judge into question.

These examples underscore the overall need for the HJPC to address the question of what should serve as a satisfactory standard for someone to be a member of the judicial community. By halting the practice of appointing (and renewing the mandates of additional) judges with poor performance records, the HJPC could signal its respect for outstanding and dedicated professionals, rather than rewarding those judges who perform poorly with compromise solutions, such as renewing their mandates for "just" one year.

⁷² Letter of the European Union Delegation to BiH addressed to the HJPC, 1 August 2019: "It would appear that judge [...] has a criminal record, a situation that goes against the requirements on "Integrity and High Moral Standing" as provided by the Law on High and Judicial and Prosecutorial Council article 22."

⁷³ HJPC Response to the Letter of the European Union Delegation, 8 August 2019.

⁷⁴ HJPC plenary session, 4–5 September 2019.

8. CONCLUSIONS AND RECOMMENDATIONS

8.1. Conclusions

Given current practices, the *de facto* system of additional judges comports neither with its intended purpose to reduce the backlog, nor with the laws and rules that should govern it. These deficiencies appear to violate the principle of judicial independence, leaving the system vulnerable to manipulation and potentially rendering sitting additional judges susceptible to undue influence. This applies most of all to mandate renewals, administered inconsistently and which are neither explicitly nor implicitly envisioned in the Law on HPJC.

Furthermore, procedures by which the HJPC decides upon the number of required additional judges undermine the sustainability of all judicial appointments. The appointment of additional judges often occurs even when the court in question has vacancies for regular judges. The use of additional judges as a *de facto* substitute for regular judges is inconsistent with the Law on the HJPC and the Rules. The assignment of new cases to additional judges prevents them from focusing on the backlog, contrary to the stated purpose of the institution, and, as a result, many courts still carry large backlogs. The backlog itself must be examined systematically and in an overarching way, and solutions other than the appointment of additional judges must be considered more thoroughly.

Finally, decisions by the HJPC to appoint additional judges or to extend their mandates often do not account for the requests of the court president or the additional judge's actual performance, contrary to applicable regulations. On the other hand, given the power that court presidents wield over case allocation, the reliance upon a mandate extension request could jeopardize additional judges' independence.

Ultimately, the extent of the flaws in this fragile system, and the vulnerabilities they create for a judiciary that must grapple with complex cases involving abuses of power and undue influence, point to an urgent need to reform the institution of additional judges. Until the development and implementation of a strategy to tackle the root problems that led to the introduction of this solution, the existence of additional judges will continue to risk doing more harm than good.

8.2. Recommendations

1. Additional judges should only be appointed as an exceptional practice, with proper substantiation of the need of the court in question and without the possibility of the extension of the mandate. Should these guidelines not be respected, the new Law on the HJPC should abolish the institution of additional judges. Implementing rules, as well as laws pertaining to courts at the entity levels, should be amended accordingly.
2. The HJPC, by law, policy, or practice, should continue exploring alternative means to address the case backlog. Such options could include, *inter alia*, introducing a more efficient system for appointing regular judges; introducing a more flexible system for the assignment of cases and for the transfer of cases between departments; more efficiently utilizing the option to temporarily transfer regular judges from one court to another that faces a large backlog; reforming enforcement procedures by introducing professional bailiffs and removing the enforcement of small value claims out of the courts; encouraging better retirement planning; and supporting alternative dispute resolution mechanisms to reduce overall caseloads.
3. While a complete overview of the appointment system is beyond the scope of this report, given the lack of a systematization process since 2009, as a matter of priority, the HJPC in consultation with court presidents should undertake an analysis to determine the number of judges required by each court.
4. The HJPC and presidents of courts should ensure that additional judges focus on the backlog, rather than routinely receiving newly initiated cases, to avoid distortion of the number of required judges in each court.
5. The HJPC should encourage objective efforts by court presidents to consider better ways of using existing resources, rather than resorting to requesting additional judges.
6. The HJPC should prioritize filling systematized vacant positions for regular judges over appointing additional judges.