

IMPROVE THE CAPACITY OF THE INDEPENDENT JUSTICE INSTITUTIONS

EU4JUSTICE PROJECT

Position Code: 1/EU4Justice/2024

ON THE MONITORING REPORT FOR HIJ BY EU4JUSTICE

Contest

High Inspector of Justice (HIJ) has benefited from a three-year collaboration with the EU4Justice project, “Improving the Capacities of Independent Justice Institutions in Albania,” within the framework of which a dedicated component has been devoted to supporting the development of the HIJ’s institutional and professional capacities, as well as the consolidation of the disciplinary investigation process, based on meritocracy and transparent procedures, in accordance with European standards and best practices.

Within this framework, HIJ has been a beneficiary and partner in cooperation activities with its European counterpart institutions and, in the specific case, with the Spanish inspectorate, which has monitored the activities of the HIJ, precisely in support of Specific Objective 3 of the EU4Justice project, contributing to the strengthening of the HIJ’s capacities and the consolidation of a disciplinary investigation process based on meritocracy, transparency, objectivity, and applicable European standards. The Spanish inspectorate has prepared the detailed report transmitted by EU4Justice.

Findings of the monitoring report:

I. The purpose of the report is to provide technical guidance and identify gaps, overlaps, and inconsistencies in the disciplinary procedures followed by the High Judicial Council (HJC) and the High Prosecutorial Council (HPC), regarding which the HIJ has provided suggestions and recommendations in accordance with national legislation and European standards of judicial accountability.

Furthermore, this report aims to convey practical recommendations to promote the harmonization and unification of disciplinary procedures across all three institutions, the HIJ, HJC, and HPC, based on best practices in countries that are Member States of the European Union. The document also aims to include coordination mechanisms and operational measures to standardize disciplinary procedures and strengthen inter-institutional cooperation, not only with domestic actors but also with international actors.

The report of the Spanish inspectorate contains an analysis of 46 disciplinary decisions of the HIJ, for which the investigation has been closed, the initiation of disciplinary proceedings has been announced, and a specific disciplinary measure considered appropriate has been proposed as a result of the facts analyzed.

Depending on the content of the proposals/requests, the necessary reflections for achieving the aforementioned objectives have been presented.

First and foremost, the report emphasizes that all the HIJ proposals/requests analyzed are characterized by a high technical level, detail, and comprehensive reasoning.

From the comments made on each of these proposals/requests, the report indicates that the right of defense of the person under investigation (the magistrate who is the subject of disciplinary proceedings) appears to have been fully guaranteed from the moment they were notified, through being informed of all the facts, details, and circumstances on which the measure requested in the disciplinary proceedings against the subject of the investigation is based.

According to the HIJ practice, the proposal/request notified to the subjects of the disciplinary investigation informed them of each of the procedures carried out, with the aim of establishing the facts, their results, the conclusions reached by the HIJ following the analysis, the reasons why the initiation of disciplinary proceedings is considered appropriate, the violations considered to have been committed on the basis of the proven facts, and the proposed measure, together with the proportionality criteria followed to determine the severity of these measures. Similarly, a response has been provided to every argument presented by the person under investigation in protect of their rights.

In assessing this practice of the HIJ, the report proposes, as a suggestion, reviewing the length of the proposals/requests. The report considers that the long list of procedures carried out, together with their results, makes the proposal submitted to the councils a very lengthy document, which is not easy to summarize and may even make it difficult to understand as a whole. Therefore, the proposal is to consider the possibility of reducing the length of the disciplinary report so that it becomes more accessible and easier to understand.

The first point, which is important in relation to these decisions, does not consist solely of reproducing all procedural details and their results (which are recorded in the proceedings and a complete copy of which will be made available to the person under investigation to guarantee their right of defense), but rather of preparing a chronological, accurate, and detailed document describing the conduct attributed to the person against whom the measure is sought, with references to the evidentiary procedures that will be included in the case file. This factual summary, together with the subsequent legal reasoning that explains the reasons for the facts described, constitutes the disciplinary violation in question and supports the value and effectiveness of the type of decision, making it easier to read, understand, and exercise the right of defense.

Therefore, if a broader synthesis is desired when drafting these types of decisions, the law governing disciplinary procedures may establish its structure, which may consist of:

- (i) a title, in which all the elements allowing the identification of the procedure and the person against whom the measure will be taken are recorded (date, protocol number, the person under investigation with all their personal and professional details, job position, etc.);
- (ii) a second section establishing the factual background (the chronological order of procedural events from the beginning of the investigation until the moment the decision is issued);
- (iii) a chronological list of the facts considered proven, referring to the evidence obtained to support that disciplinary measure;
- (iv) the legal reasoning considered applicable to the case: a) how these facts fit into the disciplinary category; b) assessments of the violation (intent, negligence, and the combination of possible exculpatory, aggravating, or mitigating circumstances); c) the assessments used to determine the measure requested;
- (v) the proposal submitted to the body responsible for the requested disciplinary measure and the resolution of the case, with rigor and precision, as is currently carried out by HIJ.

A second issue expected to be examined is the possibility that, following the legal reform, those who have been convicted by a final criminal judgment may be excluded from disciplinary proceedings.

In such cases, exclusion from the judicial or prosecutorial career could be provided for directly by law, specifying the crimes whose commission would lead to such exclusion. In this way, the relevant governing bodies of judges and prosecutors would automatically adopt the formal decision on exclusion, once the legal requirements had been verified: a final judgment and confirmation that the conviction was for the commission of a criminal offense that determines the loss of the relevant status of judge or prosecutor.

This automatic process would shorten the time between the finalization of the measure (specifying the rule governing when it occurs) and exclusion and would avoid unnecessary disciplinary measures (with all the procedures and legal requirements that this entails), the sole purpose of which is to verify whether certain objective conditions have been met.

On the other hand, the court that issues the final conviction would have a legal obligation to immediately send a copy of it to the relevant Council, which, after verifying whether the aforementioned conditions have been met, would issue a decision excluding the convicted person, without prejudice to the latter's right to challenge the validity of such a decision in court, if they consider this feasible.

Finally, it is also important to emphasize the importance that this document will attach to the necessary and essential distinction between the exercise of disciplinary functions (which

corresponds to the governing body of judges and prosecutors) and the exercise of strictly judicial functions by members of the judiciary.

Disciplinary check must be exercised rigorously, swiftly, and efficiently, as it acts as a safeguard for the judiciary itself, protecting the system from harmful and unacceptable conduct that undermines the rights of individuals seeking judicial protection and, at the same time, discredits and devalues an entire branch of government, with all the consequences that this entails.

However, what would constitute a violation of the principles of the rule of law would be disciplinary liability where the administrative authorities, namely the governing body of judges, based it solely on their disagreement with the content of the decisions issued.

As is well known, the liability of judges and magistrates has a broader scope than that of civil servants. Because of the constitutional work they perform, judges and magistrates are both public employees and custodians of state power. For this reason, the inspection and disciplinary powers that fall within the remit of the High Judicial Council concern the verification and monitoring of compliance with the obligations incumbent upon them under their professional status.

However, these powers are limited by respect for the exclusivity of the magistrate's function, meaning that disciplinary measures cannot be taken in relation to work consisting of the interpretation and application of legal rules, the assessment of evidence, the determination of factual assumptions, the resolution of procedural issues in dispute, or the legal resolution given to the disputes raised.

The imposition of disciplinary liability on magistrates is legitimate in a state governed by the rule of law when exercised against conduct outside the exercise of judicial functions or in exceptional cases related to such functions, but concerning aspects that are entirely unrelated to the legal assessment of the specific case. When the disciplinary regime focuses on the content of judicial decisions, it ceases to fulfill this corrective function and potentially becomes a control mechanism incompatible with judicial independence.

Therefore, whatever the scope of the power to impose penalties may be, it cannot become an instrument or pretext for correcting the exercise of judicial power. If a disciplinary measure could be imposed because the bodies responsible for exercising this power consider that one or more decisions are erroneous, this would open up the possibility of threatening any member of the judiciary with penalties if they do not resolve a case in one way or another.

In this regard, it can be concluded from the case law of the Court of Justice of the European Union that any disciplinary system allowing a judge to be sanctioned, directly or indirectly, for the content of their decisions violates Article 19(1) of the Treaty on European Union, as it compromises effective judicial protection. More specifically, the possibility of a judge being sanctioned for their interpretation of the law or for making a reference for a preliminary ruling is sufficient to generate pressure that is incompatible with the independent exercise of judicial functions.

II. Analysis of the Disciplinary Measure

The report provides an analysis of 46 decisions of the High Inspector of Justice, which resulted in disciplinary investigations against magistrates, as well as the disciplinary measures requested, depending on the violation identified on the part of the magistrates subject to disciplinary investigation. These decisions are grouped according to the type of disciplinary measure requested by the HIJ, as follows:

1. Cases of disciplinary proceedings in which the dismissal of the magistrate was requested by the HIJ.

Convictions for corruption: In several cases, magistrates who were convicted by a final court decision for passive corruption or false declaration of assets were subject to proposals for dismissal. The conclusion in these cases was that a criminal conviction for actions related to the function automatically discredits the image of the magistrate.

Gross negligence in decision-making: In cases where magistrates demonstrated clear and repeated disregard for both substantive and procedural law (e.g., in relation to conditional release or sentence reduction), the HIJ concluded that such conduct was incompatible with the dignity of judicial office, leading to proposals for their dismissal.

Systematic and unjustified delays: In the case of magistrates who failed to issue or file hundreds of decisions over several years without an objective justification (e.g., health conditions or an extreme workload), the investigation concluded that the systematic nature of this negligence justified proposing the disciplinary measure of dismissal from office in order to protect the public's right to a trial within a reasonable time.

Abandonment of duty: A magistrate who did not return to duty after a leave granted in accordance with the law, without obtaining a formal extension or proving an objective impossibility of returning to duty, was found to have effectively abandoned the job position resulting in a proposal for dismissal.

2. Cases of disciplinary proceedings in which the imposition of the disciplinary measure of salary reduction was requested.

Repeated inaction and procedural delays: In cases involving significant delays (ranging from months to years) in investigations or in the notification of decisions, HIJ proposed the disciplinary measure of a temporary salary reduction (often up to 40% for one year). These conclusions focused on the failure to comply with the "duty of care" and the negative impact on the rights of the parties.

Procedural errors and inappropriate communication: For magistrates found to have engaged in inappropriate communications outside formal hearings, or to have made significant procedural errors that damaged the institutional image, it was concluded that financial sanctions were required as a corrective measure proportionate to the violation assessed as having been committed by the magistrate.

3. Cases of disciplinary proceedings in which the imposition of the disciplinary measure of a public reprimand was requested.

Minor or isolated violations: For violations considered minor, such as isolated delays in notifications, unauthorized signing of documents without the intention to interfere, or internal professional conflicts, the HIJ concluded that the disciplinary measure of a “public reprimand” was the appropriate and proportionate measure to be requested against the magistrate assessed as having committed a violation.

Professional experience as a mitigating circumstance: In cases where it was established that the magistrate subject to disciplinary proceedings had limited professional experience or no prior disciplinary record, the investigation often concluded that the disciplinary measure of a public reprimand served the educational and corrective purpose of the disciplinary regime.

4. Cases of disciplinary proceedings in which the suspension of the magistrate from duty was requested.

Serious procedural and jurisdictional violations: In cases of disciplinary proceedings where serious procedural irregularities or actions undertaken outside the magistrate’s legal jurisdiction were identified, the HIJ concluded that proposing suspension from duty for a period of one to two years was the appropriate disciplinary measure to be requested against the magistrate assessed as having committed a violation.

5. Cases of non-initiation or closure of proceedings.

Loss of status: It was found that in several cases, investigations into disciplinary violations were closed without a final decision because the magistrate had lost their status as a result of the implementation of Law No. 84/2016, “On the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania” (vetting).

Lack of evidence: Where the investigation failed to establish the existence of the “subjective element” (fault or negligence), or where delays were justified by objective systemic factors (e.g., staffing levels of 52%), HIJ considered the complaints unfounded and dismissed them.

III. Application of the Principle of Proportionality in Requesting and Imposing Disciplinary Measures.

HIJ and the Councils use a multifactorial approach to ensure that disciplinary measures are balanced and comply with the principle of proportionality.

The conclusions analyzed were based on the following criteria:

Nature of violated rights: An assessment of whether the action undermined legality, impartiality, or the fundamental rights of citizens (e.g., cases relating to liberty and the right to appeal).

Degree of fault (subjective element): The distinction between intent and different levels of negligence. Intentional violations of clear legal orders generally lead to the most severe sanctions.

Impact on public trust: An assessment of the extent to which the conduct discredits the image of the judiciary or the prosecution service. Conduct occurring in public (e.g., misuse of social media or outbursts during court hearings) is given considerable weight.

1. **Professional Context and Record:** Consideration of the magistrate's workload, available resources (staffing levels), and previous disciplinary record. Long-term professional experience may be considered an aggravating factor in cases of fundamental legal errors, while limited experience may serve as a mitigating factor.

On the other hand, the report has emphasized disciplinary sanctions that involve a reduction in financial remuneration (salary) for judges or prosecutors. Here, the report notes that this measure arises for various reasons and draws on experience from other countries. It is pointed out that, in many legal systems, this disciplinary measure isn't imposed for public officials, as it represents a reduction or decrease in remuneration for their work by the entity that pays them, affecting not only the person against whom the disciplinary measure is applied, but also the persons who depend on them.

In this regard, in Opinion No. 27 (2024) ("On the Disciplinary Liability of Judges"), the Consultative Council of European Judges (CCJE) emphasizes that the disciplinary liability of judges is closely linked to judicial independence and that, if it is not clearly regulated, it may undermine this independence, particularly when disciplinary measures have financial consequences. Specifically, the section relating to "Disciplinary Sanctions against Judges" provides that:

The Consultative Council of European Judges opposes salary reductions as a disciplinary measure, since judges should receive equal remuneration for equal work.

Furthermore, it has been assessed that any failure to comply with procedural deadlines gives rise to disciplinary liability; this arises only when delays in issuing decisions are serious, unjustified, repeated, and unreasonable, thereby undermining the prestige of the judiciary or public trust.

Indeed, when assessing the disciplinary liability of the person under investigation, various circumstances must be taken into consideration in order to determine the extent of the delays.

The term "delay," for disciplinary purposes, constitutes an imprecise legal concept, the definition of which requires consideration of several elements:

- The human and material resources of the court or tribunal where the person under investigation performs their duties;
- The volume of cases processed;

- The actual extent of the delay, both in terms of the number of cases affected and the duration of the delays;
- The connection between the delay and the importance of the activity that has been delayed;
- The commitment or actual performance of the person in carrying out their judicial duties, since it is unreasonable to hold a person disciplinarily liable who performs their duties beyond what is required if, due to external factors for which they are not responsible, they fail to meet the statutory deadlines.

Consequently, it is incumbent upon the investigating body to prove clearly and unequivocally that the temporary failure to comply with the deadlines established for issuing the relevant decisions is the result of intentional inaction or negligence on the part of the person under investigation.

Furthermore, even in cases where a judge or prosecutor appears to have achieved considerable performance, he or she may be subject to disciplinary liability if this performance has been achieved through the selection of cases to be resolved and those not to be resolved; that is, when the person under investigation repeatedly uses “selective” criteria to determine which proceedings will be examined and concluded and which will not, thereby bypassing the seniority criterion. This results in certain cases (those selected arbitrarily) accumulating considerable delays (often due to their complexity), while other cases, which were registered or became available much later, are resolved beforehand.

As has also been acknowledged by the HIJ, not every delay or irregularity in the processing of judicial proceedings should give rise to disciplinary liability. On the contrary, this occurs only when the delay or irregularity in question is attributable to the failure to exercise one of the powers legally provided for a judge or prosecutor, based on evidence that the temporary failure to comply with deadlines is the result of intentional or negligent conduct, unjustified by the absence of any objective reason that would allow the proven delay to be accepted as reasonable.

Public employees, (judges and prosecutors in particular), are obliged to respect organizational order (including compliance with decisions concerning leave), to act with care and vigilance (by formalizing requests, submitting evidence, and taking preventive measures), and to be informed and up to date regarding the provisions governing their legal status.

In cases where it is established that a judge has misinterpreted the law, according to the assessment of the higher court, he or she may have committed a disciplinary violation. This would be such a case, and for this reason, HIJ initiates disciplinary proceedings. The report emphasizes that if a reasoned decision can give rise to disciplinary consequences for the judge who issues it, the judicial function ceases to be a free exercise of the law and becomes an activity conditioned by the fear of punishment, which is equivalent to undermining the principle of judicial independence.

The report further discusses the factors that should be taken into account to determine whether the duration of an investigation into a case should have disciplinary consequences, such as: investigative activity materialized in judicial decisions that is necessary and essential to ensure the proper progress of the investigation; the existence or absence of appropriate and required oversight of the relevant proceedings; the absence or inadequacy of checking and monitoring of the security measures imposed; the initiation of significant and numerous disputes arising from such inactivity or from the lack of supervision or monitoring across a variety of cases; or inactivity in promoting solutions in response to the poor performance of staff under his or her supervision or in promoting concrete measures to ensure the proper processing of the case.

Therefore, in cases of disciplinary violations arising from temporary breaches, the disciplinary proceedings must demonstrate unequivocally that the delay or mere inaction, the mere temporary failure to comply with deadlines, is the result of the investigator's intentional inactivity or negligence.

For this reason, a person should not be held responsible for delays arising from the performance of ordered actions, particularly those carried out by persons outside the body that orders them, without prejudice to the obligation to remind, encourage, or promote their completion as quickly as possible.

The report finds that it is important for the disciplinary system to also provide a channel for internal complaints, through which members of the judiciary or prosecution service can report possible violations committed by any other judge or prosecutor to the competent authority, regardless of their position. This, together with an appropriate reporting system open to the public, is essential not only for the proper functioning of the system, but also for strengthening the confidence of potential whistleblowers in reporting irregular conduct.

The disciplinary regime aims to preserve the proper order of the Judiciary, both in its internal functioning and in its external image in relation to society, in accordance with constitutional requirements. Consequently, judges and prosecutors, in addition to being obliged to perform their functions properly, are also bound by a duty of loyalty to the institution and must refrain from any conduct that could undermine public trust in the justice institutions, which constitutes a fundamental element of the democratic system.

Another important point emphasized in the report is the distinction between criminal proceedings and disciplinary proceedings. A single act may simultaneously constitute a disciplinary violation and a criminal offense. The disciplinary sphere aims to protect internal organization and institutional trust, whereas the criminal sphere aims to punish conduct that constitutes criminal offenses. (E.g., corruption).

Precedence of criminal judgments: The facts established in criminal proceedings are binding on the disciplinary body.

It is often recommended that disciplinary proceedings be suspended for as long as criminal proceedings relating to the same facts are ongoing, in order to guarantee the rights of the defense and ensure consistency in the facts established.

HIJ's oversight is limited by the principle of the exclusivity of the judicial function. Disciplinary action is valid when directed against conduct unrelated to the exercise of judicial function or in exceptional cases where there is gross negligence or intentional illegality unrelated to a legitimate legal assessment of the case.

When the disciplinary regime focuses on the substantive content of decisions, it risks becoming an inappropriate mechanism for controlling the independence of the Judiciary.

IV. Review of Disciplinary Violations (Measures)

The report has stated that it would be appropriate to examine the suitability of updating certain disciplinary violations in order to ensure their full compliance with European standards, by excluding or, at the very least, defining much more precisely the circumstances in which the annulment or revocation of judicial decisions on the basis of strictly jurisdictional criteria may constitute grounds for disciplinary liability.

Where appropriate, consideration should also be given to strengthening criminal legislation to ensure the effective accountability of judges and prosecutors when, in the exercise of their respective functions, they issue decisions that are manifestly contrary to the legal order, whether as a result of intent or particularly serious negligence.

V. Regarding the Implementation of the Principle of Transparency

In order to ensure public perception of the proper functioning of the system and to enable everyone to have direct access to data relating to the number of investigations and disciplinary proceedings initiated against judges and prosecutors over the years by the relevant governing bodies, together with their outcomes, it is considered useful to adopt the following measures:

- Preparation of an annual report summarizing all actions undertaken, including investigations, decisions, disciplinary proceedings, and disciplinary measures imposed. This report may also include any appropriate observations on matters of interest, such as the allocation of resources, proposals for amendments, or an examination of the areas that have generated the largest number of complaints.

- Along the same lines, it is considered essential that any decision to close an investigation initiated as a result of a complaint submitted by an individual, together with the relevant part of the reasoning, be notified to the complainant, who should have the right to appeal it only when he or she considers that the investigative measures have not been fully exhausted. However, the complainant should not be considered entitled to request the initiation of disciplinary proceedings or to participate in them as a party in the absence of *locus standi* (understood as a direct and personal interest in pursuing a claim), since the imposition of a disciplinary measure on a judge or

prosecutor does not affect the sphere of the complainant's rights, provided that it confers no benefit on them and imposes no burden on them.

- It may be useful for those responsible for the disciplinary investigation institution to hold regular meetings with legal professionals, during which anonymized statistical information on disciplinary activity carried out over a given period may be shared, together with explanations and discussions of the interpretative criteria applied. At the same time, these sessions would provide an opportunity to receive feedback from these actors on matters involving the possible commission of disciplinary violations, the reporting and investigation systems in place, or any other relevant information that could serve to increase the effectiveness of the disciplinary system.

VI. Proposals for Improvement

It is recommended that the types of disciplinary measures provided for be reviewed in order to ensure substantive compliance with European standards. In particular, the aim should be to avoid categorizing conduct that is inaccurate or insufficiently described, that is, describing general conduct in such a way that discretion is left to the interpreter to decide whether the facts investigated justify a disciplinary measure. In this regard:

It is acceptable for a sanctioning provision to refer to other regulations or to use vague legal concepts; however, the definition of unlawful conduct must contain the essential substance of the prohibition, so that it is always possible to know with certainty which actions constitute disciplinary violations and the disciplinary measure associated with them.

Furthermore, the principle of classification requires, for reasons of legal certainty, that disciplinary regulations describe violations rigorously, making it impossible to impose disciplinary measures for conduct that is not expressly provided for in the regulations, even if it is similar to conduct that is provided for. Under no circumstances are general references permitted if they prevent the identification of the punishable conduct under the provision making the reference.

In accordance with this:

- It is advisable for legal provisions to classify conduct as minor, serious, and very serious (regardless of the fact that the same conduct, depending on its intensity, may be classified in any of the three categories).
- There must be a correlation between the aforementioned classification (minor, serious, very serious) and the disciplinary measures imposed under the regulations themselves.
- A clear distinction must be made between the principles of judicial ethics and disciplinary violations. General or imprecise references to these principles cannot be accepted; rather, a specific and precise description of the conduct that will constitute a disciplinary violation must be required, defining it as such (both its nature and its essential characteristics) and assigning the corresponding disciplinary measure.

- Any provision that fails to meet the requirements of the principle of classification by containing excessive, imprecise, or open-ended wording, the effectiveness of which depends on an almost arbitrary decision by the interpreter, must be eliminated or amended.