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JUDICIAL INDEPENDENCE AND FINANCIAL DISCLOSURE

INPROL Consolidated Response (07-003)

With contributions from Tyler Rauert, Scott Worden, Laura Mercean, Meghan Stewart, David Ennis, Nathalie Ndongo-Seh, Rick Messick, Zafar Gondal, Natalia Djurickovic, Claudia Baroni



Prepared by Scott Worden and
Leigh Toomey

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March 25, 2007

Submitted by: [Justice Sandra Day O'Connor](#), INPROL Advisory Council Member and Former US Supreme Court Justice

Drafted by: [Scott Worden](#), Rule of Law Advisor, U.S. Institute of Peace and [Leigh Toomey](#), INPROL Rule of Law Facilitator

With contributions from:

1. [Tyler Rauert](#), Assistant Professor, Near East South Asia Center for Strategic Studies, Department of Defense
2. [Scott Worden](#), Rule of Law Advisor, U.S. Institute of Peace
3. [Laura Mercean](#), Dept. of Judicial Affairs, UN Mission in Kosovo (1999-2001)
4. [Meghan Stewart](#), Senior Peace Fellow, Public International Law & Policy Group
5. [David Ennis](#), Resident Director, Judicial Development and Grassroots Engagement Project (JUDGE)
6. [Nathalie Ndongo-Seh](#), Senior Legal Adviser to the Special Representative of the Secretary-General, United Nations Mission in Liberia
7. [Rick Messick](#), Co-Director, Law and Justice Thematic Group, World Bank
8. [Zafar Gondal](#), Program Legal Counsel, International Development Law Organization Program Office, Afghanistan
9. [Natalija Djurickovic](#), Senior Rule of Law Advisor Europe and Eurasia, United States Agency for International Development.
10. Claudia Baroni, Crime Prevention and Criminal Justice Officer, United Nations Office on Drugs and Crime.

The full text of the responses provided by these INPROL members can be found at <http://www.inprol.org/node/1628>. INPROL invites further comment by members.

Note: All opinions stated in this consolidated response have been made in a personal capacity and do not necessarily reflect the views of particular organizations. INPROL does not explicitly advocate policies.



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JUDICIAL INDEPENDENCE AND FINANCIAL DISCLOSURE

Background:

Judicial integrity is a cornerstone of the rule of law. Yet judges in transitional countries often face immense political and financial pressure to issue corrupt rulings. Judicial corruption is especially damaging to people's faith in justice – and governance in general – but uncovering and eradicating corruption is particularly difficult in countries that have neither strong investigative capacity nor transparent financial systems. Requiring routine financial disclosures from judges and other judicial officials can be a powerful tool in preventing corruption, aiding the discovery and prosecution of corrupt activity, and increasing judicial transparency by illuminating potential conflicts of interest.

Query:

What are the international standards or best practices for mandating financial disclosure by judges? What mechanisms should be put in place to implement these requirements? What are the key variables that must be considered to implement a financial disclosure regime in a country emerging from conflict, and are there any “lessons learned” that can be applied from recent experience with enacting judicial financial disclosure legislation?

Response Summary:

Financial disclosure by judges is recognized in developed countries as a useful tool for policing the judiciary to protect against corruption in the form of illicit enrichment and conflicts of interest. The form and effectiveness of judicial financial disclosures in war-torn societies emerging from conflict, however, vary significantly based on the type and level of sophistication of the legal system where it is being applied.

In the context of an international peace operation, financial disclosure regimes often have limited potential to act as a deterrent against corruption because those countries lack effective systems to implement and monitor the disclosures. In countries without electronic banking records, for example, it is extremely time consuming to verify financial records. Oversight bodies may themselves be corrupted, with the result that sensitive financial information may not only be lost but also criminally exploited. There are no easy answers to these significant challenges and there are few examples of successful implementation of such regimes in countries emerging from conflict.

A basic financial disclosure regime may still be useful as an additional tool for prosecuting judges who are otherwise accused of corruption. At their most basic level, financial disclosure regimes require judges to declare their assets on record which, if later found to be incomplete or false, may assist in proving criminal intent in any subsequent proceeding taken against a judge. Financial disclosure regimes may also begin to impart a greater sense of accountability for financial actions in countries that previously have had no effective rule of law.

Asset disclosures are an increasingly prevalent anti-corruption tool. This response addresses several common features that should be considered when contemplating

implementation of a judicial financial disclosure regime. It concludes with some cautionary observations regarding implementation in societies searching for a sustainable peace.

1. Legal authority.

- a. *Multilateral Instruments:* Financial disclosure by judges is emerging as an international standard practice, reinforced by general principles of judicial integrity, such as those espoused in the [UN Basic Principles on the Independence of the Judiciary](#)¹, and by specific international and regional anti-corruption treaties. The [UN Convention Against Corruption](#) includes a wide range of corruption prevention issues – including measures to prevent opportunities for corruption in the judiciary (Art. 11) – and recommends that signatory states adopt financial disclosure regimes for public officials and criminalize illicit enrichment, which regular financial disclosures may help to reveal. More broadly, the [UN Code of Conduct for Public Officials](#) calls for public officials to comply with requirements to declare or to disclose personal assets and liabilities as well as, if possible, those of their spouses or dependants.

Regionally, a number of relevant conventions also include financial disclosure regimes for public officials, including the [Council of Europe Criminal Law Convention on Corruption \(1999\)](#), the [OECD Anti-Corruption Convention \(1997\)](#) and the [Inter-American Convention against Corruption \(1996\)](#).

- b. *National Regulations:* At the national level, financial disclosure obligations for judges are found in three sources: constitutions, legislation (or codes of conduct) and, less frequently, judicial decisions or court rules. Generally speaking, when crafting a financial disclosure regulation, particular attention must be paid to any constitutional or other legal requirements about the separation of powers in that country to ensure that laws regulating judges are not an infringement of their rights as judicial officials independent from the executive branch. Further information on asset disclosure legislation and disclosure forms from various jurisdictions is found in the Resources section below.
- c. *Best Practices:* In the absence of more specific universally recognized standards for financial disclosure by judges,² IFES has produced a list of ten [best practices](#) for income and asset disclosure by judges.

¹ Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985. These principles do not specifically address the issue of financial disclosure, but provide the basis for judicial ethics and disclosure legislation. The principles state that persons selected for judicial office shall be individuals of integrity and shall conduct themselves so as to preserve the dignity of their office and the impartiality and independence of the judiciary (Principles 8 and 10). Appropriately drafted financial disclosure laws support these ethical requirements by reducing the possibility and the perception of conflict of interest and corruption.

² In 2001, an attempt to produce a more specific model code on the financial disclosure requirements for judges was made by a UN convened group of experts - the Judicial Group on Strengthening Judicial Integrity. The group produced a draft Code of Judicial Conduct in 2001, which contained several guidelines including:

- **Rule 1.15** prohibition on serving as a fiduciary, except for the estate of a family member;

2. Scope of Disclosure

- a. *Who must disclose?:* Do the requirements apply to all judges, or only to judges at some levels, or to all judicial employees and officials such as prosecutors and clerks? Ideally, financial disclosure will be required of all judicial officials whose positions give them sufficient potential to influence the outcome of a case as a result of a bribe or other improper influence. In many legal systems, this would include prosecutors and clerks/registrars, and they should also be included in disclosure requirements. In doing so, however, special attention should be paid to which branch or division of government has regulatory authority over each type of employee. Thus, judicial disclosure may be required by a law on the functioning of the judiciary, whereas clerks may be covered by a law on the civil service. Special attention should also be paid to the budgetary implications of requiring more employees to file disclosures. In cases where countries are enacting a comprehensive anti-corruption act and financial disclosure regime for a wide range of public officials, each relevant category of judicial officials should be explicitly identified.
- b. *What must be disclosed?:* The contents of financial disclosure regulations vary, but normally include elements similar to that required by income tax systems, including basic income from all sources, assets such as investments (stocks, bonds etc), bank accounts, pensions and intangibles, real property and major items of personal property. Requiring disclosure of fiduciary interests (board memberships, for example) in an asset disclosure is also important to guard against real or potential conflicts of interest. Disclosure should cover both domestic and international holdings and transactions, as well as the dates and locations of payment and other basic information to permit verification of any element of the disclosure. Disclosure should also include any significant financial liabilities.
- c. *Family Members:* Many disclosure regimes also include the assets of spouses and minor children to prevent judges from hiding income and assets under their relatives' names or from receiving bribes indirectly via family connections. This is particularly true in societies where assets are held by

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- **Rule 1.16** prohibition on financial and business dealings that would interfere with judicial independence or the appearance thereof, except for personal or family investments;
 - **Rule 1.20** prohibition of judicial bribery, whether the beneficiary of the gift or advantage is the judge or a family member;
 - **Rule 1.21** authorization of gifts and benefits, subject to public disclosure requirements;
 - **Rule 1.22** authorization of compensation and expenses for extra-judicial activities;
 - **Rule 1.22a** reasonable amount and proportionality to what a non-judge would receive for the same activities;
 - **Rule 1.22b** limitations on reimbursement;
 - **Rule 1.23** requirement of financial disclosure and payment of taxes required by law.

The Code was developed primarily by judges from a common law background. When it was revised in 2002 (see [the Bangalore Principles of Judicial Conduct](#)) by judges from other legal traditions, these guidelines were not included.

and shared freely among relatives. However, a definition that is too broad can raise privacy issues and overburden the disclosure mechanism.

- d. *How often will disclosures be made?:* The frequency of disclosures may vary depending on the typical tenure of serving judges and the administrative resources at hand. Generally speaking, disclosures should be made before employment begins, when employment ends, and no greater than two years in between. Annual disclosures are preferable in that they assist in detecting corruption earlier, particularly in the post-conflict environment, though the costs of doing so may be burdensome and would have to be taken into account. Disclosure should also be required if the judge is promoted to a higher court.

3. Use of Disclosures

- a. *Public or Private:* A critical piece of any financial disclosure regulation is the extent to which information is available to the public. Generally speaking, the more public the information, the better that corruption and conflicts of interest can be effectively monitored (by the public and interest groups, as well as by any anti-corruption agencies). But this will necessarily infringe on general privacy rights of the public employees and their families. Reasonable national standards will balance this right to privacy with the public interest in transparency. Thus, some states have adopted a two-tier system, whereby judges must disclose detailed information to an authorized monitoring body, but only relevant summary details (such as the names of business interests without any amounts) are made publicly available. Likewise, access to disclosed information may be technically “public”, but only at limited locations and possibly only with valid reasons.
- b. *Misuse of Information:* Protecting privacy of financial information is particularly important in countries where wealthy individuals may be targeted for bribes or for kidnapping. Any promise to keep certain disclosed information secret must be evaluated according to the integrity of the monitoring agency. In some countries, information given in unsecured financial disclosures may be used as a tool of intimidation, either by the government or by criminal groups, to apply pressure to particular judges (and their families) or to extort money from them. Financial disclosures must be well protected to guard against such abuse and to accomplish the purpose behind the disclosure - judicial integrity - rather than furthering other forms of corruption.
- c. *Investigative Uses:* Ideally, review and monitoring of disclosures will take place on a regular basis rather than only when there is an allegation of wrongdoing. This will help to prevent the appearance or occurrence of conflicts of interest or fraud. Disclosure legislation should specify the extent to which the information is available for use as evidence in any subsequent criminal or other judicial process.

4. Administration and Monitoring of Disclosures

Different bodies can be tasked with monitoring financial disclosure, including anti-corruption commissions, public oversight bodies, auditors general, etc. The key is that the body should be independent from the judiciary and government. Once policy decisions are made as to how much financial disclosure information is to be publicly available, procedures should be put in place for the public to access it from this body (physically, online, or by mail). The body should have investigative capacity to verify disclosed information. It should also have the power to impose appropriate sanctions for judges that do not comply with financial disclosure requirements or, depending on the requirements of the legal system in question, to recommend appropriate sanctions. Successful enforcement requires an entity with a clear mandate, capacity and resources to establish and maintain a system that records and monitors the timeliness and completeness of declarations.

5. Penalties for Non-Compliance

No asset disclosure regime will work if there are not serious and credible penalties for failure to comply. Non-compliance with disclosure requirements ranges from failure to file a declaration, filing an incomplete or false declaration, or failing to submit a timely declaration without good cause. Possible sanctions include warnings, criminal penalties and removal of judges from office. Penalties must be severe enough to deter. The same penalties that would apply for the misconduct that the disclosure is intended to discover, are needed to address non-compliance. The sanctions regime should also include penalties for those who misuse disclosed information.

6. Practical Considerations in Post-Conflict Countries

- a. *Capacity*: The key variables to consider in implementing a financial disclosure regime in a country emerging from conflict include the reliability of the local financial system, the level of development of key institutions, and political will to fight corruption. The level of development of key institutions, such as civil society, the media, and institutions of public administration, will determine the level of support for financial disclosure and other anti-corruption initiatives. In post-conflict societies, these institutions have often been weakened or are non-existent. Thus, a vital ingredient for generating support for reform, and pressing for government accountability, may be missing. An effective program to tackle the problem of judicial corruption will focus not only on building capacity in the judicial institutions and relevant government bodies, but also on capacity-building in these other elements of society.
- b. *Verification*: Countries emerging from conflict often lack sophisticated and reliable financial systems, which makes it extremely difficult to verify asset disclosures. Financial disclosure requirements need to take into account that most transactions in war-torn economies are cash-based. There may only be a basic non-computerized banking system, and auditing standards, property registers, and insurance systems to assist in the verification process may be lacking. This can be addressed to a limited extent by requiring full disclosure of assets which are easier to verify, such as real and tangible personal property.

- c. *Adequate Judicial Pay*: It is difficult to expect full compliance with financial disclosure laws if judges and judicial officials do not receive a sufficient wage to at least maintain a respectable standard of living and feed their families. In many countries – Afghanistan, Cambodia, and Liberia, to name a few – judicial officials, magistrates and judges still receive extremely low wages, and wages are often paid late or not at all (particularly in rural areas). It is therefore common for judges and others working in the justice system to resort to taking outside income, including charging illegal fees for undertaking court work or hearing cases which would normally form part of their employment. Some are seen as being open to bribes.

7. Complementary mechanisms

The features outlined above are the minimum requirements that should be considered in implementing a financial disclosure regime. However, over the long term, financial disclosure laws can be made more effective if they are seen as part of a larger institutional reform process, which includes appropriate budgetary allocation and provision of resources to the judiciary. Training and the transparent appointment and promotion of judges also assist in promoting a professional and accountable judiciary. A comprehensive package of policies needs to be developed and implemented, including public information campaigns and whistleblower protection. Laws on privacy, national security and access to information should also be promulgated to protect the rights of judges and those involved in the disclosure process.

INPROL would welcome further comments from members on this query, particularly examples of financial disclosure regimes, which have proven successful in the post-conflict context, and any details about the cost of different levels of disclosure.

Compilation of Resources:

This Consolidated Response draws from many of the following resources. All listed documents with a hyperlink are uploaded to the INPROL Digital Library unless otherwise noted.

INTERNATIONAL AND REGIONAL STANDARDS AND BEST PRACTICES

- [UN Basic Principles on the Independence of the Judiciary \(1985\)](#)
- [UN Convention Against Corruption \(2003\)](#)
- [The Bangalore Principles of Judicial Conduct \(2002\)](#)
- [UN Code of Conduct for Public Officials \(1996\)](#)
- [Council of Europe Criminal Law Convention on Corruption \(1999\)](#)
- [OECD Anti-Corruption Convention \(1997\)](#)
- [Inter-American Convention against Corruption \(1996\)](#)

MODEL ASSET DISCLOSURE LEGISLATION

- [Albania \(Chapter I, Arts. 1 – 10\)](#)
- [Ghana \(Parts I and II\)](#)

- [Latvia \(Sections 9, 13, 14, 16, 21\)](#)
- [Peru](#)
- [Philippines \(Sections 7-11\)](#)
- [Sri Lanka \(Sections 2-4\)](#)
- [Tanzania \(Part III\)](#)
- [Thailand \(Chapter III, Part II\)](#)
- [Uganda \(Parts II and III\)](#)
- [United States \(Sections 101-103\)](#)

See also: <http://www1.worldbank.org/publicsector/civilservice/assetsDimensions.htm>

EXAMPLES OF FINANCIAL DISCLOSURE FORMS

- [Kosovo](#) (This disclosure form is part of the application process for judges, rather than a part of disclosure after taking judicial office.)
- [Romania](#)
- [Uganda](#)
- [United States](#)

LITERATURE ON JUDICIAL INDEPENDENCE AND FINANCIAL DISCLOSURE REQUIREMENTS FOR JUDGES

- [“Judicial Accountability Mechanisms: A Resource Document”](#), Institute for Democracy in South Africa, 2007.
- [“Global Best Practices: Income and Asset Disclosure Requirements for Judges”](#), Elena, Buruiana and Autheman (Keith Henderson (ed)), IFES Rule of Law White Paper Series, 2004 (this consolidated response relies extensively on this source of information and INPROL extends its thanks and acknowledgement to the authors).
- [“Global Best Practices: A Model State of the Judiciary Report”](#), Keith Henderson and Violaine Autheman, IFES Rule of Law White Paper Series, 2004.
- [“The Global Program Against Corruption”](#), UN Anti-Corruption Toolkit, United Nations Office on Drugs and Crime, 2004 (Tool #13 describes ways of increasing transparency with respect to the assets and liabilities of public officials).
- [“Judicial Transparency Checklist, Key Transparency Issues and Indicators to Promote Judicial Independence and Accountability Reforms”](#), Keith Henderson et al, IFES, 2003.

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