

The case for asset declarations in the judiciary: Identifying illicit enrichment and conflicts of interests



Asset declarations serve in many countries as a tool for detecting and preventing illicit enrichment and conflicts of interests among public officials. However, not all countries with an asset declaration regime in place require members of the judiciary to make such declarations. A closer analysis shows that asset declaration regimes do not pose a significant risk to the independence and security of judges. On the contrary, the author finds that anti-corruption benefits provide strong reasons to require judges to file asset declarations along with other public officials.

The case for asset declarations by judges

Asset declarations by public officials can reveal and deter cases of illicit enrichment and conflicts of interests. The case for applying asset declaration regimes to judges is simply that the judiciary is, like other branches of government, a potential site of corruption. Indeed, numerous countries suffer from rampant judicial corruption.

The United Nations Office on Drugs and Crime called more than a decade ago for “rigorous obligations should be adopted to require all judicial officers to declare publicly the assets of the judicial officer concerned and of his or her parents, spouse, children and other close family members.

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Such publicly available declarations should be regularly updated. They should be inspected after appointment and monitored from time to time by an independent and respected official" (UNODCCP 2000). With a focus on conflicts of interests, the United Nations Convention against Corruption (UNCAC) calls on Member States to establish declaration regimes for all public officials, including judges (article 8, paragraph 5). The African Union, Arab, and inter-American conventions against corruption contain similar provisions on financial declarations by public officials (article 7, article 28, and article III, respectively).

The Council of Europe's Group of States against Corruption (GRECO) is focusing specifically on judges during its fourth evaluation round, including "declaration of assets, income, liabilities and interests" by judges (GRECO 2012b). It has already issued recommendations for intensifying scrutiny of declarations (GRECO 2012a, 2013a).

Of 90 countries surveyed by the World Bank in 2013, approximately 80% had asset declaration regimes in place for some or all public officials (PAM 2013). In the majority of cases, this includes members of the judiciary.

Income and asset declarations require public officials to declare where all their income comes from and where it is invested, such as in real estate, corporate stock, or a savings account. This can help reveal cases of illicit enrichment. In Kosovo in 2008, for example, a court president declared two flats owned by his children, and the Anti-Corruption Agency examined how these properties had been financed. The judge stated only that they had been given to the family as "gifts." A full investigation revealed that the flats had been purchased with cash and that the family owned additional assets of unexplained origin. Continuing investigation by the Agency uncovered a scheme of real estate fraud in which the judge played a pivotal role: he would issue court orders transferring ownership of state-owned real estate to his accomplices. In the end, 10 suspects including the judge and his son-in-law, a lawyer, were prosecuted for participating in organised crime (ReSPA 2013).

Asset declarations can also play an important role in detecting conflicts of interests. In 2012, for example, the California Supreme Court declined to hear an appeal filed by a couple who had accused financial giant Wells Fargo of predatory lending. A review of asset declarations revealed that one justice participating in the decision owned as much as US\$1 million of Wells Fargo stock. In other cases, California judges had ruled on cases even when they or their family members had received income or lavish gifts from one of the parties, including a US\$50,000 trip from a lawyer (Center for Public Integrity 2013).

By substantially raising the risk of detection, asset declaration systems also have a deterrent effect, both for illicit enrichment and for conflicts of interests. The credibility and deterrent power of an asset declaration system, of course, depends on checking at least a reasonable sample of declarations for accuracy (StAR 2012).

An additional benefit that is often overlooked is that

asset declarations may provide key evidence in criminal investigations triggered by evidence from other sources. For example, allegations of bribery, including anonymous charges or press reports, may lead to an investigation that is inconclusive without additional evidence. Such supplementary evidence may be found in an asset declaration on file and accessible to prosecutors. When discrepancies exist, they may provide grounds for search warrants or other investigative measures, or simply offer useful leads for further investigation. In Ukraine and Indonesia, for example, where there is no central database of bank accounts, the information in asset declarations may help prosecutors identify bank accounts of suspects.

Good practices in processing asset declarations

When judges are subject to asset declarations, the regulations regarding content of the declarations are usually the same as those for other public officials. Good practices include requiring income and asset declarations to show the fullest picture possible of cash flows, both incoming and outgoing (OECD 2011). On the incoming side, all cash flows, including loans and gifts, should be declared. On the outgoing side, a growing number of countries require declaration of all expenditures, both asset and non-asset, above a certain threshold. This is because large expenditures that may signal illicit enrichment can also include non-asset expenditures, such as outlays for private schools or luxurious vacations. It is important that declarations show sufficient detail rather than only aggregated amounts of deposits or gross nominal value of securities. Specifics, such as account numbers and the names of creditors, are needed to verify the credibility of information. They are also essential for identifying conflicts of interests, as illustrated by the cases of the US judges mentioned above.

In processing asset declarations of judges, as well, good practices are similar to those applied to other officials' declarations. Ideally, declarations should be submitted electronically, if the level of computerisation of the country permits. This facilitates data searches. In some cases, as in Argentina, advanced online systems can automatically process and produce an initial financial analysis of a declaration (StAR 2013).

Once all judges have filled out and submitted their declarations, it is essential that a sample of declarations undergo an audit procedure. The selection of the sample should be based on certain risk criteria, targeting, for example, judges working in sensitive areas such as anti-corruption courts. In addition, some declarations should be chosen at random for audit (StAR 2012). Each year a different sample should be chosen, so that over time practically all judges will be covered. At minimum, the audit procedure consists of analysing the plausibility of the data, based on reasonable estimates for ordinary expenses, as well as checking external databases for corroborating information on aspects such as real estate, taxes, vehicles, and banking (OECD 2011).

The oversight body which performs the audits needs sufficient investigative powers (StAR 2012), as lifestyle

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checks may help to identify discrepancies. In one example in Kosovo, oversight officials found that a home declared at a modest value turned out to be a large mansion (ReSPA 2013). In other countries, for example in Montenegro, the oversight body does not have sufficient authority to do such checks and can only review data in the office.

Infringing judicial independence, privacy, and security?

In occasional cases, judges have tried to oppose asset declarations by claiming that they may be misused by the executive branch to put political pressure on the judiciary, endangering judicial independence. Although this concern is based on hypothetical reasoning, there have nonetheless been prominent cases in which such manipulation has been alleged. In 2012, the Philippine Parliament impeached the Supreme Court chief justice for failing to declare US\$2.4 million in assets held in foreign currency accounts. The chief justice claimed that he had amassed his millions in foreign exchange deals as a student and that he was prohibited from declaring them under a law on secrecy of foreign currencies (BBC 2012), even though the law explicitly allows depositors to reveal all information (Republic Act No. 6426, sec. 8). Some attacked the dismissal procedure as politically motivated, whereas others found the judge's defence simply preposterous. In the end, 20 of 23 senators did not accept the judge's explanation.

It should be noted that the executive branch already has more effective tools that can be – and have in fact been – misused for harassing judges, such as “thorough” tax audits or job transfers to remote districts. There is no indication that asset declarations offer significant additional scope for pressure. In addition, it is normally a peer judge who in the end decides on a disciplinary or even criminal measure against a judge based on an asset declaration.

Some have argued that concerns about abuse might be reduced by assigning the task of verifying declarations to a judicial self-administration body. Others question this option, citing the lack of financial expertise within the judiciary.

In many countries, judges are subject to the same oversight body that monitors other public officials, such as the tax administration (e.g., Latvia) or an anti-corruption commission (e.g., Kosovo, Indonesia). Some countries, however, have opted to give the judiciary itself the responsibility of verifying asset declarations by its members, invoking the constitutional separation of powers. In Poland, for example, at each court of appeal, a board consisting of six judges has the task of verifying judges' declarations. This means that the board of judges has to determine the accuracy of the numbers in each declaration, request the respective financial data from other state agencies, and analyse and appraise all financial information.

However, identifying patterns of hidden cash flows requires expertise which a judicial board will not commonly have.

Building this capacity within the judiciary takes time and resources, especially in transition and developing countries. Above all, it implies duplication of efforts. Since a tax administration already has a team of experts and investigators versed in a wide range of financial issues (OECD 2011), it seems problematic to duplicate this by building such capacity in a judicial council.

In the case of Poland, GRECO concluded, it “would appear that the boards' control activities and competences [for verification of declarations] are quite limited” (2013b, 42). On the other hand, GRECO did not object to the fact that in Estonia and Latvia audits of judges were performed by the executive, including the tax administration (GRECO 2012a, 2013a).

In addition, “self-regulation may add to a perception that judges are getting off” (MacKay 1995). According to Albania's former general prosecutor, referring to criminal trials against judges, “There is a sort of corporatism between judges to protect each other [...]. They don't view the case as an indictment against a judge [...] but rather as an indictment against a friend or colleague” (Likmeta 2012). If such a strong esprit de corps is perceived in public trials of peer judges, collegiality is likely to apply to an even greater extent to the non-public handling of asset declarations. In any case, one might question why the judiciary, which “represents one of the biggest corruption markets” in certain countries (GRECO 2013c), should be entrusted with monitoring the illicit enrichment of its own judges.

So it comes as no surprise that, although no systematic data are available, anecdotal evidence from published cases suggests that investigations are more successful when an external body with sufficient expertise, rather than a body within the judiciary, verifies judges' declarations.

Another concern regarding asset declarations by judges and all public officials is the loss of privacy through public declarations. However, experience shows that it is often journalists or concerned citizens who scrutinise published asset declarations and trigger investigations by questioning implausible data (ReSPA 2013). Most of these cases would probably never be investigated if the declarations were not accessible online.

National policies and court rulings differ on the extent to which declarations can be made public. Federal appeals courts in the United States and constitutional courts in countries such as Albania, Chile, Germany, Peru, and Romania have decided that financial disclosures by public officials do not contravene the constitutional right to privacy.

A few countries exempt certain declarations from online publicity for security reasons. In Serbia, this applies to judges working on organised crime, corruption, and other particularly serious crimes. One of the arguments for shielding declarations is the risk of extortion or even kidnapping should judges' home addresses and the number plates of their cars become public. In any country, however, such sensitive information can be and routinely is redacted from declarations before they are

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published. A recent survey in Western Balkan countries could not identify a single case in practice where a public official was exposed to any threat because a declaration was made public (ReSPA 2013).

Implications for donors

Asset declarations can serve as tools for identifying and deterring illicit enrichment and conflicts of interests. The vulnerability of the judiciary to corruption implies that requirements for asset disclosure applied to other public officials should apply to judges as well. As for verifying asset declarations, it is likely that an independent body also in charge of all other public officials will have more relevant financial expertise for this task and will be more insulated from collegial pressures than a self-administration body within the judiciary. Given the limited resources of developing countries, donors should consider providing support for building the capacity of existing structures, such as the tax administration or anti-corruption agency, rather than opting to establish new structures.

International experience also calls for maximising public

accessibility to asset declarations. Concerns have been raised about possible threats to the security of judges if their personal information becomes public. However, experience in countries that require judges to file asset declarations suggests that concerns about security, to the extent they are valid, can be met by redacting sensitive information from the public versions.

It should be borne in mind that a system of asset declarations for all public officials may not be realistic in some countries, given limited administrative and technical capacity. Requiring all public officials to submit declarations may overwhelm a weak system with more information than it can absorb, imposing a privacy and paperwork burden on officials without concomitant benefit. In such cases, the most realistic immediate option may be to require declarations by a limited set of higher officials or those most at risk of corruption. In the case of judges, this would include judges in charge of corruption or organised crime cases.

In all cases, donors need to consider carefully whether their support for an asset declaration system is matched by meaningful implementation. If it is not, declarations will be a mere window-dressing exercise.

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