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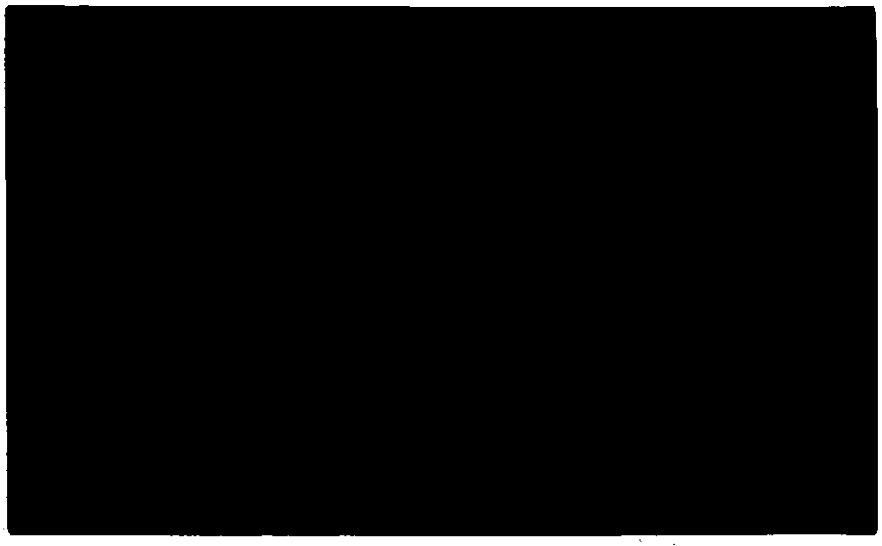
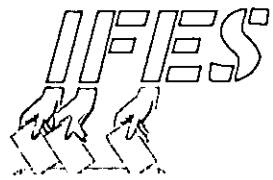
ELECTIONS • RULE OF LAW • GOVERNANCE • CIVIL SOCIETY

MAKING DEMOCRACY WORK



IFES MISSION STATEMENT

The purpose of IFES is to provide technical assistance in the promotion of democracy worldwide and to serve as a clearinghouse for information about democratic development and elections. IFES is dedicated to the success of democracy throughout the world, believing that it is the preferred form of government. At the same time, IFES firmly believes that each nation requesting assistance must take into consideration its unique social, cultural, and environmental influences. The Foundation recognizes that democracy is a dynamic process with no single blueprint. IFES is nonpartisan, multinational, and interdisciplinary in its approach.



MAKING DEMOCRACY WORK

CEE and NIS Regional Funds
Adjudication of Grievances Conference
FINAL REPORT

October 2001 –September 30, 2002

USAID COOPERATIVE AGREEMENT
No. EE-A-00-97-00034-00

Submitted to the

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

by the

INTERNATIONAL FOUNDATION FOR ELECTION SYSTEMS

CEE and NIS Regional Funds
Adjudication of Grievances Conference
FINAL REPORT

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I. EXECUTIVE SUMMARY

With funding from USAID through its Europe and Euraisa cooperative agreement, IFES sponsored a regional conference entitled "Election Dispute Resolution: Judicial Authority and Independence," in Sofia, Bulgaria from April 26-27, 2002. The notion to host a conference of this nature was in response to a need to establish more transparent, efficient, and consistent procedures for resolving election disputes in the countries of the former Soviet Union and Central and Eastern Europe. In June 2000, IFES held its first election dispute resolution conference in Ukraine which addressed similar concerns among the Ukrainian judiciary.

The IFES proposed conference was originally scheduled for October 19-20, 2001. However, due to security concerns stemming from the September 11 attack on U.S. targets and the resulting limitations on USAID-funded travel, it was necessary to postpone the Adjudication Conference scheduled in Sofia, Bulgaria until April 2002.

In many of the countries of the former Soviet Union and Central and Eastern Europe, the judiciary is in the process of establishing its credibility as an independent body. Election dispute resolution is a key arena for conflict between all three branches of government. In many of these countries, the jurisdiction between the Central Election Commission (an administrative agency) and the courts is unclear; the executive and legislative, as well as individuals and political parties, all have a strong interest in how disputes are resolved. They may, therefore, attempt to distort the process, exploit vagaries, and apply pressure to the courts.

If courts succumb to political pressure regarding election disputes, then their credibility and independence are likely to be undermined in other areas. Although the prime motivating factor to yield to pressure may be self-interest, judges' lack of knowledge in how these issues are handled in other countries and confidence in how they could or should be resolved in their own countries also contribute to their willingness to bow to pressure. Judges often make poor decisions due to limited knowledge and experience in relation to these types of disputes. Creating a forum for judges to exchange ideas and learn how similar issues are addressed in other countries may lead to more just and independent judicial action in the electoral disputes arena. As such, the conference carried out in Bulgaria focused on the following targets:

- Providing an opportunity for judges to exchange ideas and learn about various methods of resolving electoral disputes;
- Familiarizing judges with their role in the electoral process, particularly in regards to time constraints for consideration of election-related cases, so they are better prepared and more willing to meet their responsibilities;
- Identifying common legislative and procedural flaws that are perceived to hinder the efficient and fair resolution of election disputes; and
- Recommending general steps to take towards improving the transparency, efficiency, and consistency of procedures for resolving election disputes.

The following report summarizes the goals, findings and recommendations which developed out of the two day gathering in Sofia. Supreme and constitutional court judges from nineteen countries within the CEE and NIS were represented. All costs associated with sponsoring the conference were funded by IFES' E&E Cooperative agreement through both CEE and NIS

regional funds. Through the two funding mechanisms, two representatives from each CEE/NIS country were invited to attend in addition to international experts. (Central Asian participants were not allowed to participate at the instruction of the USAID Mission in Almaty). All activities described in this report were co-funded through both regional funds. The breakdown of funds per regional monies is detailed in the final financial reports.

II. OFFICE AND PERSONNEL

In order to facilitate a conference in a host country with no IFES office, key personnel were hired in Bulgaria to include:

On-Site Coordinator, Ventsislav Karadjov
On-Site Conference Planner, Profitours
On-Site Translation Services, Interlang

DC-based Project Team:

Victor Perea, IFES Deputy Director, E&E
Keith Henderson, IFES Senior Rule of Law Advisor
Dana Beegun, IFES Program Officer, E&E
Michael Kanaley, IFES Program Assistant, E&E
Keenan Howell, IFES Press Officer

In addition to the full-time project support team, IFES called on a number of international experts to assist with the drafting of background papers for the conference proceedings. International experts included:

The Honorable Judge Futey, US Court of Federal Claims
Mr. Robert Dahl, IFES Elections Advisor and former executive assistant to the FEC
Ventsislav Karadjov, Executive Director, Transparency International
Patrick Titium, Legal Advisor to the Council of Europe
Ewa Eliasz, OSCE/ODIHR Senior Legal Adviser
Victoria Airgood, ABA/CEELI

Other project partners included The Bulgarian Union of Jurists, USAID/W, and all relevant CEE/NIS Missions.

III. PROGRAMMATIC ACTIVITIES

A. Conference Proceedings

Through panel discussions, speakers examined the election legislation, jurisdictional issues, governmental structures and adjudication procedures involved in election dispute resolution. Participants were asked to identify problems in the process and to recommend general steps to take towards de-politicizing the adjudication process and improving the transparency, efficiency, and consistency of procedures for resolving election disputes.

Participants included Supreme Court and Constitutional Court justices from Albania, Armenia, Azerbaijan, Bosnia, Bulgaria, Croatia, Georgia, Latvia, Macedonia, Moldova, Montenegro, Poland, Romania, Serbia, Slovenia, and Ukraine. In addition to the participants, international experts on the rule of law and election dispute resolution were also included in order to share their knowledge and experiences. These experts represented governments, international organizations, and non-governmental organizations such as the United States Court of Federal Claims, the Organization for Security and Co-operation in Europe Department for International

Human Rights (ODIHR), the Council of Europe, the American Bar Association Central and Eastern European Law Initiative (ABA/CEELI), and United States Agency for International Development. (A complete participant list is included in the attached conference report). The conference proceedings were conducted simultaneously in four languages: English, Russian, Bulgarian and Serbo-Croatian; and transcribed and translated for the final report.

The conference was opened by USAID/Bulgaria Mission Director, Deborah McFarland; followed by distinguished members from the Government of Bulgaria to include, The Honorable Miglena Tacheva, Deputy Minister of Justice of Bulgaria; and The Honorable Nikolay Filchev, Prosecutor General of Bulgaria. Following opening remarks, the Honorable Judge Futey of the United States Court of Federal Claims provided participants with a comparative perspective of election dispute using the US as a case model.

Day one proceedings of the conference centered on emerging trends and standards in election dispute resolution. The panel presentation entitled "Emerging Trends and Standards in Election Dispute Resolution" allowed for a cross-regional examination of standards in election dispute resolution. The panel presenters included the Honorable Justice Vanya Puneva-Mihailova, Supreme Administrative Court of Bulgaria, The Honorable Alvina Gyulumyan, Member of Constitutional Court of Armenia, and Mr. Patrick Titiun, Legal Advice Department for the Council of Europe.

The second panel presentation looked at "Key Institutional Challenges and Legal Issues Confronting Judiciaries in Emerging Democracies" and included Ms. Ewa Eliasz, OSCE Department of International Human Right, The Honorable Liliana Misevic, Municipal Court Justice of Nis, Serbia, and Mr. Valentin Georgiev, Secretary of the Central Election Commission of Bulgaria. Both panel presentations were followed by a question and answer session allowing all participants an opportunity to share their concerns and experiences with the plenary.

The second day of the conference introduced the component of judicial independence and its importance and impact of elected officials when ruling on election dispute cases. To open the discussion, IFES Senior Rule of Law Advisor, Keith Henderson introduced international instruments used to promote reforms globally. Copies of the instruments noted in Henderson's speech can be found in the appendix of the final report. Henderson went on to discuss a new global document entitled "Guidance for Promoting Judicial Independence and Impartiality," which was completed by IFES in collaboration with USAID in November 2001. The guide represents research from twenty-three countries from around the world on a wide range of judicial independence issues, and eight countries from the E&E region.

The importance of the Guide and international instruments introduced by Henderson paved the way for further discussion on the necessity of transparency and accountability in judicial conduct and the need for a uniform and global judicial code of conduct. This opened the discussion for day two's panel presentation on "Judicial conduct: Holding the Judiciary to Higher Standards of Accountability." The panel comprised of Victoria Airgood, ABA/CEELI and Emilia Andeeva, Training Centre for Magistrates, Sofia.

In order to increase participation and regional scope, the conference concluded with two working groups and a final plenary discussion. The working group topics included Judicial Immunity and Business Interest, Income and Asset Disclosure. All participants were asked to review the background papers for each working group and divide into groups for smaller and focused discussions on how as members of the judiciary they deal with judicial immunity and disclosure

issues. After a half-day of working group discussion, participants reconvened in the plenary to present the group findings and close the session.

The group on Judicial Immunity discussed the underlying question of whether or not judges should be held to the same standards as normal citizens, if so, then how is a judge indicted, and if not then why not? The credibility of the judiciary as an institution was debated. The second breakout on disclosure, focused on who should be required to disclose, what should be disclosed, the requirements for disclosure, to whom it should be disclosed, and who enforces the rules for disclosure?

The conference closed with remarks from Ventislav Karadjov from Transparency International summarizing the two-day proceedings. Karadjov pointed out that it became clear from the comments made that the resolution of election problems depends entirely on the judicial system, and, with that in mind, this system should be independent and objective. For this reason, we should develop the appropriate mechanisms for building and securing this independence, and not just point out principles. Unfortunately, the judicial system in the region is still in transition. It is still weak compared to other democracies and the other two authorities, the executive and legislative, in the counties in transition. Karadjov closed the conference with a final call for continual assistance in the field of Rule of Law and Election Dispute Resolution regionally as well as globally.

Please see Appendix A for a full transcription of conference presentations and findings.

B. Press Events

The Adjudication of Election Grievances attracted media attention in Bulgaria. Media outlets with offices in Sofia attended an afternoon press conference on April 26, 2002 at the Hotel Rodina. Press conference speakers were Robert Dahl, IFES Consultant; Leon Weil, IFES Board of Directors Member; Keith Henderson, IFES Senior Advisor for Rule of Law; Ewa Eliasz, Legal Advisor for OSCE ODIHR; and Vestislav Karadjov, Executive Director of Transparency International. Keenan Howell, IFES Press Officer, served as moderator. With the aide of an interpreter, journalists asked speakers questions about the conference and its objectives. Also on the first day of the conference, three participants, Patrick Titium, Legal Advisor to the Council of Europe; Keith Henderson; and Vestislav Karadjov, gave live interviews on the BTV program, "Good Morning Bulgaria." BTV is the first private national channel and covers the whole territory of Bulgaria. "Good morning Bulgaria" airs from 6.30am-10:00am and covers policy topics pertaining to local and international issues, as well as culture events.

Four newspapers ran stories on the conference, all issued on April 27, 2002. Each article featured photographs of Nikola Filchev, Bulgaria' Attorney General, who spoke about judicial independence at the conference. The newspapers that carried the story were *Novinar, Kapital, Trud* and *24 Chasa.* The articles and an IFES press release announcing the conference are attached as appendix B. Appendix C, video from the BTV interview can be found at the IFES DC Resource Center.

IV. MATERIALS PRODUCED

All materials were made available in the four conference working languages: English, Russian, Bulgarian, and Serbo-Croatian. The English copies are attached as appendixes. Copies of materials in each language are available at the IFES Washington DC Headquarters Resource Center.

- IFES Working Papers: Ethics and Conflict of Interest Rules, Judicial Immunity, Asset and Income Disclosure for Judges (Appendix D)
- Topical Materials
    a. Code of Judicial Conduct The Bangalore Draft (draft ethics principles)
    b. Council of Europe Committee of Ministers, Recommendation No. R (94) 12 – On the Independence, Efficiency, and Role of Judges
    c. Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia
    d. Highlights from the USAID/IFES Global Judicial Independence Guide
    e. Judicial Independence Standards and Principles
    f. Basic Principles on the Independence of the Judiciary
    g. Universal Charter of the Judge (UN Judicial Independence Principles)
- Post Conference Publication, *IFES Election Dispute Resolution: Judicial Authority and Independence, Conference Transcripts and Proceedings.*

All of these document can be found in the IFES publication "Election Dispute Resolution: Judicial Authority and Independence," Conference Transcripts and Proceedings found in Annex A of this report.

V. IMPACT AND EVALUATION

Throughout the region, IFES has hosted a series of national conferences and workshops on such issues as the adjudication of election disputes. These conferences have demonstrated that, through this type of forum, judges gain a better understanding of their roles and responsibilities in the electoral process and thus become more confident and competent in considering cases. During national conferences, judges have indicated a desire to learn more about alternative and more efficient methods of resolving election disputes, such as the creation of specialized courts, improved training, or temporary colleges to preside over the resolution of election disputes. This conference provided an opportunity for judges facing similar difficulties in resolving election grievances to share their experiences and evaluate which procedures are most appropriate for their respective countries.

The conference highlighted that the issues of judicial independence and authority are in need of improvement, especially in the context of adjudicating election disputes. IFES's goal was to open the lines of communication between judges with similar experiences and similar problems, but from different countries, in the hopes that they would communicate and share ideas about how to improve the current regional situation. IFES did just that. The speakers represented a variety of international organizations as well as countries, and they offered valuable insights into the issues at hand. When encouraged to participate in the discussion groups, the participants were eager to explain the particular problems that they encounter and to offer guidance and suggestions to the participants from other countries.

The Practical Background and Lessons Learned Papers, designed to guide reformers with concrete case studies, research and organizational contacts, and references, was provided and discussed in detail with all participants. The two working groups, international organizations and regional judges, were able to work together and make the conference a success; if they continue cooperating and communicating, then the same success will take place in the region through judicial reform. In this regard, participants from the countries attending now know their international/European obligations (COE/OSCE/EU Accession) and have been introduced to international best practices in this field.

Since the concept of judicial reform is fairly new in the region, most countries are in the "information gathering" stage. This stage is arguably one of the most important because the more different ideas and experiences each country is exposed to, the better system they will be able to develop for their own country. By holding conferences such as this and by facilitating regional discussions, IFES is increasing the chances that these countries will eventually form credible and completely independent judiciaries. This conference also served as a reminder to the participating countries that there are organizations like IFES, ABA/CEELI, USAID, ODIHR, and the Council of Europe, who have the desire and the capabilities to assist them countries financially and with training in order to help them through this difficult beginning phase. The conference also focused on the important role the courts have played in the region in resolving key election disputes regarding constitutional/legal issues over the past decade. It also highlighted the role of all players in the election dispute resolution process, including the role of prosecutors in many civil code countries.

The comparative models of the courts in the US, Bulgaria, Armenia, and Western Europe discussed during the panel presentation highlighted that there is a need for a particular minimum of judicial independence standards from the point of view of the European integration of those democracies. Those principles that should be monitored by the transitional democracies and their systems can be found in various international documents, as well as in various governmental instruments and such created by the NGOs. Many of these principles are incorporated in the constitutions, under the common law, or in the codes of judicial ethics. The next step is to try to practically implement those principles.

VI. RECOMMENDATIONS AND CHALLENGES

The referenced IFES publication on conference proceedings provides a detail account of recommendations for follow on assistance in the field of dispute resolution and judicial independence. Highlights focus on the need for more international and regional assistance to be placed on election law and regulation, judicial independence and networking.

VII. CONCLUSIONS

In conclusion, the conference succeeded in linking the fair and effective resolution of election disputes issue with judicial independence issues, noting that, without an independent judiciary and the right of judicial review of CEC decisions, important election dispute issues may not be resolved fairly and legally, and public confidence and trust in the electoral process might be lost. The two-day event resulted in fruitful discussion regarding the adjudication of election disputes and the rights and obligations of the judiciary in rendering decisions. A number of recommendations were put forth by participants including the need for additional training in this field as well as introduction of additional judicial independence guidelines. IFES hopes that it can provide its expertise in this area to USAID as the need arises.

VII. APPENDIXES

A. English and Russian copies of the *IFES Election Dispute Resolution: Judicial Authority and Independence Conference Transcripts and Proceedings*.
The report is also available on line at www.ifes.org.

B. Press Articles and Release

C. Video of interview on BTV Program, "Good Morning Bulgaria." is available from the IFES Washington DC Office Resource Center

D. IFES Working Papers: Ethics and Conflict of Interest Rules, Judicial Immunity, Asset and Income Disclosure for Judges

Annex A: English and Russian copy, *IFES Election Dispute Resolution: Judicial Authority and Independence Conference Transcripts and Proceedings*. Attached as separate documents. (The report is also available on line at www.ifes.org)

Annex B: **Press Articles and Release.**

ГЛАВНИЯТ ПРОКУРОР:

Групировки влияят на съдебната власт

Мощни финансови и икономически групировки влияят на независимостта на съдебната система, заяви главният прокурор Никола Филчев вчера. Той участва в конференция за решаване на съдебни спорове при избори.

Медийната среда също оказвала натиск и върху съдебната система. Независимите магистрати се намират под влиянието на законодателната и изпълнителната власт, каза още обвинител №1. Законодателят държи съдебната власт със законите, които създава за нея. Изпълнителната власт пък винаги се е стремяла да разшири възможностите си за влияние върху съдебната, обясни Филчев.

Никола ФИЛЧЕВ

На стр. 2

Групировки влияят на съдебната власт

От стр. 1

Това ставало с намеса при формирането състава на съдебната система и с условията за работа, които й се създават. Исторически магистратите винаги са били между правото и политиката, посочи главният прокурор.

Независимостта ни не е самоцел, тя служи на обществото и справедливостта. Крайната независимост обаче е отрицание на справедливостта, каза Филчев. Правосъдието в световен мащаб преживява криза, смята той.

Необходимо е не само разделение на властите, но и сътрудничество и баланс между тях според Филчев. Според него е нужно намиране на корективи между независимостта на магистратите, от една страна, и тяхната отговорност пред обществото, от друга.

Филчев: Групировки и медии влияят на Темида

Никола Филчев

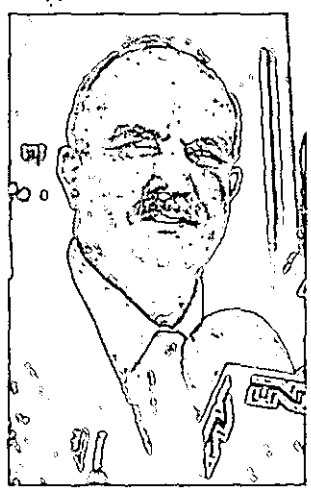
Иван Григоров

Съдебната власт изпитва влиянието на мощни финансово-икономически групировки и на медийната среда, заяви вчера главният прокурор Никола Филчев на провелата се в София международна конференция на тема съдебна власт и независимост.

Запитан от журналисти кои групировки има предвид, Филчев поясни, че изказването му е „в планетарен мащаб". По моя преценка днес правосъдието в световен мащаб е в криза, каза той. Според него Темида била независима само формално, но всъщност върху нея оказвали влияние законодателната и изпълнителната власт.

Същия ден в Русе и В. Търново шефът на касационния съд Иван Григоров обвини правителството на Симеон Сакскобургготски, че не обича съдебната власт. „По-негативно отношение от този министър на финансите не съм срещал, въпреки че съм работил с четири правителства", обяви Григоров, имайки предвид оскъдния бюджет на Темида. „Съдебният бюджет е сред най-привилегированите за т. г. и бе завишен с 25% спрямо предходната година заради съдебната реформа", опонираха му обаче от МФ. ■

СЪДЕБНАТА ВЛАСТ ИЗПИТВА ВЛИЯНИЕТО НА МОЩНИ ФИНАНСОВО-ИКОНОМИЧЕСКИ ГРУПИРОВКИ И НА МЕДИЙНАТА СРЕДА



Никола Филчев

Това каза в петък на международната конференция "Решаване на спорове, свързани с избори: съдебна власт и независимост" главният прокурор Никола Филчев. Пред журналисти той не назова конкретни финансови групировки. По моя преценка днес правосъдието в световен мащаб е в криза, каза Филчев. Съдебната власт е формално независима, но в действителност тя търпи влиянието на законодателната и изпълнителната власт, добави той. Според него съдебната власт винаги се е намирала между правото и политиката. Въпросът за независимостта на съдебната власт има и още един аспект, подчерта Филчев. По негово мнение независимостта на съдиите не може да бъде самоцел - тя трябва да обслужва интересите на обществото и на справедливостта. Поради това крайната независимост е отрицание на справедливото правосъдие. Нужно е не само разделение на властите, но и сътрудничество и баланс между тях, каза Филчев. Според него е необходимо намиране на корективите между независимостта на магистратите, от една страна, и тяхната отговорност пред обществото, от друга.

Според БСП и Никола Филчев

Групировки диктуват на кабинета и съда

Главният прокурор вини и медиите, социалистите вещаят крах на демокрацията

За първи път управляващо мнозинство не може да взема и реализира решения. Държавните и политическите структури са подменени, а правителството „групи и групички прокарват лични и корпоративни интереси". Това заявиха червените в парламента в парочна декларация, прочетена вчера.

Моции финансови и икономически групировки

влияят на съдебната власт,

заяви също вчера главният прокурор Никола Филчев на международен семинар за независимостта на съдебната система. Пред журналисти той не конкретизира кои групировки има предвид. Върху правосъдието оказва влияние и медийната среда, допълни Филчев в изказването си.

Според главния прокурор съдебната власт е само формално независима.

РУМЕН ОВЧАРОВ

НИКОЛА ФИЛЧЕВ

Чиновническата власт винаги се е стремила да разширява възможностите за влияние върху съдебната - и чрез формиране на състава на магистратите, и чрез материалните условия, които създава за работа на магистратурата", обясни той.

Зам.-министърът на правосъдието

Меглена Тачева веднага му опонира,

че не изпълнителната власт, а Висшият съдебен съвет назначава съдиите и прокурорите.

Атаката на БСП в Народното събрание пък бе по повод края на втората сесия на жълтите като управляващи. „Надеждата, която събудихте преди година, се удави в мизерия", заяви Румен Овчаров от името на левите.

Червените били готови пак да поставят националните приоритети над партийните, защото „силните са великодушни", каза Овчаров на мнозинството.

Той обаче посочи, че БСП ще остане конструктивна, ако има „недопускане намеса на недържавни интереси и структури в управлението" и диалог с всички политически сили за излизане от кризата.

Провалът на НДСВ ще роди българския Жо Пен, предупреждават още в декларацията си червените.

„Схващате ли своята отговорност - това ще е провал за цялата демократична политическа система, но

следващият спасител може да не е толкова изтънчен

и аристократичен като сегашния", обърна се към мнозинството Овчаров. Заради бедността хората ставали податливи на крайно дясна или крайно лява демагогия.

Пренебрежението към опозицията и унизителното положение на парламента пред изпълнителната власт според БСП потвърдиха управлението на Костов. *(24 часа)*

ЧЕРВЕНИ ФАКТИ ЗА УПРАВЛЕНИЕТО

- ✔ Инфлацията е скочила на 5,2%.
- ✔ Расте търговският дефицит: за 2 месеца е 160 млн. долара - 28% повече от миналата година.
- ✔ С 10% падат продажбите в индустрията.
- ✔ Издръжката на 1 човек за март е 288 лв. - с 13 лв. повече от декември 2001 г.
- ✔ 50% са хората под прага на бедността през март тази година - през декември 2001 г. са били 40%.
- ✔ 180 000 деца са отпаднали от училище.

24 ЧАСА БЪЛГАРИЯ

Сергей Станишев заминава за Лондон

на 7 май на работна визита по покана на управляващата Лейбъристка партия. Социлидерът ще се срещне с британския външен министър Робин Кук, който е и шеф на Партията на европейските социалисти.

Раздават безплатна книга за папата

в галерията на Полския институт в София от вчера. Изданието в България е специално за визитата на светия отец у нас от 23 до 26 май. Автор на книгата „Йоан Павел II - папа, какъвто не е имало" е отец Мочислав Малински, личен приятел на светия отец.

Закон срещу дискриминацията ще се приеме

до края на май, съобщи депутатът от ДПС Лютви Мостан на колоквиум за интеграцията на турците в Германия и България. Щяла да се създаде спецкомисия по спазване на човешките права. „Мостан бил притеснен от пропагандата на антисемитски и фашистки идеи у нас. Отчаяните от бедността си българи можело да обвинят за проблемите си малцинствата.

Увеличаване на руските инвестиции у нас

обсъдиха вчера посланикът на Русия Владимир Титов и зам.-шефът на НДСВ Даниел Вълчев. Дипломатът се интересувал и докъде е стигнала България с европреговорите

MAKING DEMOCRACY WORK

INTERNATIONAL FOUNDATION FOR ELECTION SYSTEMS

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IFES to Host Adjudication of Election Grievances Conference in Eastern Europe

Washington, D.C. – April 15, 2002 – The International Foundation for Election Systems (IFES) and the U.S. Agency for International Development (USAID) will host a two-day conference entitled "Election Dispute Resolution: Judicial Authority and Independence" in Sofia, Bulgaria, April 26-27, 2002. Law experts from around the world will focus on key election issues, standards and the role of the judiciary, and uniform enforcement of election laws. Speakers will include The Honorable Bohdan Futey, U.S. Court of Federal Claims; Patrick Titiun, Legal Advisor for the Council of Europe; Ewa Eliasz, Senior Legal Adviser with the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights; and The Honorable Enrique Arnaldo-Alcuvilla, Member of the General Counsel of the Judicial Council of Spain.

A global consensus has recently emerged that the institution of the judiciary is fundamental to the shared goals of promoting sustainable economic growth and democratic governance, as well as free and fair elections. The Conference will provide the audience of CEE and NIS Supreme and Constitutional Court Judges an opportunity to exchange ideas and learn about internationally recognized performance standards, best practices, and tools used to evaluate the performance of the judiciary in resolving election disputes. Relating topics from the USAID/IFES Judicial Independence Guide, the Conference will examine how emerging and transitional democracies can bolster this often-neglected institution.

"The Adjudication of Election Grievances Conference will help familiarize judges with their role in the electoral process, so they are better prepared and more willing to meet their responsibilities," said Keith Henderson, IFES' Senior Advisor for Rule of Law. "It will advance general steps towards improving the transparency, efficiency, and consistency of procedures for resolving election disputes and it will promote best practices and democratic legal norms throughout the region."

For more information regarding the "Election Dispute Resolution: Judicial Authority and Independence" conference, please contact Keenan Howell, IFES Press Officer, by telephone at +1-202-496-4186 or by email at khowell@ifes.org.

# # #

IFES provides professional advice and technical assistance in the promotion of democracy worldwide and serves as a clearinghouse of information on governance, rule of law, civil society, and elections.

Annex C: **Video of interview on BTV Program, "Good Morning Bulgaria" is available from the IFES Washington, DC office Resource Center**

Annex D: **IFES Working Papers: Ethics and Conflict of Interest Rules, Judicial Immunity, Asset and Income Disclosure for Judges**

MAKING DEMOCRACY WORK

IFES WORKING PAPER: Judicial Immunity

"Judges in most of the countries are subject to criminal prosecution, with minor limitations. The Supreme Judicial Council can lift the criminal immunity enjoyed by Bulgarian judges if the council is satisfied that there is sufficient evidence of serious, deliberate offense. (Grosev and Boev Report) In an effort to crack down on corruption, the Ukraine Parliament amended the Law on the Status of Judges in fall 1999, removing barriers to the prosecution of judges for criminal acts. (Fitzmahan Report)"[1]

I. Introduction.

Judges perform their function issuing binding decisions that resolve conflicts of juridical relevance. For that purpose, judges are invested with the legal power to resolve interagency disputes, settle property disputes and to protect peoples' legal rights within certain due process standards. However, in order to accomplish this complex public service and to maintain public trust, the time-tested policy of judicial immunity has been in place in both common law and civil law countries throughout modern world history.

The judicial function, however, can be disturbed by different factors. A typical case is the intrusion of the legislative or executive branch in judicial decisions. Also, the judicial function can be target of attacks by non-public interests either from individuals or from social actors. Protecting the judicial function against abuses and undue interference or harassment is a central aspect of judicial independence. Thus, the doctrines of judicial independence and judicial immunity are inextricably linked.

Historically, judicial immunity was absolute.[2] Thus, judges were immune to virtually any claim against them. Today, the predominant doctrine and legislation related to judicial immunity is moving more towards what may be called "limited immunity." It distinguishes between acts performed by the judge in his or her official capacity and acts those outside the scope of his or her official judicial jurisdiction. Only the former is viewed as deserving of judicial immunity in most countries. The rationale behind limited immunity is rooted in protecting the judicial function in itself and in not allowing those sitting in positions of public trust to abuse the judicial immunity privilege – if they are engaged in activities outside the scope of their official power.

While there are no uniform criteria at national, regional, and international levels regarding what kind of non-criminal acts would be protected by judicial immunity, judges in most countries are subject to criminal prosecution with minor limitations. The main variance from country to country relates to how this any form of judicial immunity is rescinded or how disciplinary action related to civil acts is handled. In most countries, non-criminal discipline is administered by the judicial council or judicial commissions.

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[1] *Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia* in *Guidance for Promoting Judicial Independence and Impartiality*, 2001, USAID Technical Publication

[2] Abimbola A. Olowofoyeku, Suing Judges : A Study of Judicial Immunity . Claredon Press Oxford. 1993 Chapter I

II. Judicial Immunity Standards and Norms in National Constitutions

While most national constitutions reviewed also recognize the principle of judicial immunity, the doctrine is subject to various conditions in different developing and transition countries. As illustrated below, there are differences in the scope and type of responsibility of judges:

The Czech Republic. The Czech Constitution in article 36 (3) prescribes that "everybody is entitled to indemnity for damages caused to him by an unlawful decision of a court."

Spain. Article 121 of the Constitution of Spain states: "Damages caused by judicial error, as well as those arising from irregularities in the administration of justice, shall give rise to a right to compensation by the State, in accordance with the law."

Peru. The Peruvian constitution of 1993 establishes as a principle of the jurisdictional function in Article 138 (7) that the individuals may ask for indemnity by judicial errors.

Bulgaria. Article 132 of the Bulgarian Constitution provides that ... (1) Justices, prosecutors and investigating magistrates shall enjoy the same immunity as the members of the National Assembly and (2) The immunity of a justice, prosecutor or investigating magistrate shall be lifted by the Supreme Judicial Council only in the circumstances established by the law."

China. The Constitution of China prescribes that judges shall be punished or fines if they purposely come to a wrong judgement and this causes damages to the State or citizens[3]

Poland. In the case of Poland constitution a judge is protected by immunity. He cannot be detained or prosecuted by any means juridical or administrative without the permission of the competent disciplinary court. The only exception is in case of **flagrante delicto**.[4]

Russia. For the Russian constitution judges are inviolable. According to the Federal Law of April 1995 "On the State Protection of Judges", inviolability of the judge includes inviolability of his home, office, property, documents and means of transport. A judge is not prosecuted for the expression of an opinion or the taking of a decision except if this decision constitutes an abuse of power.[5]

III. Judicial Immunity Standards and Norms in International and Regional Instruments

A review of a number of international and regional instruments related to the judiciary reveals they contain many similar judicial immunity standards and principles. A common aspect among these texts is the distinction between acts committed in the exercise of judicial function and acts committed beyond this function. For example:

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[3] Xu Chongde and Yansui Chang People's Republic of China In International Encyclopaedia of Laws Vol 2 Constitutional Law kluwer Law International 2001 pp87-88

[4] Aleksander Patrzalek, Boguslaw, Banaszak, Artur Preisner, Josef Repel and Kryzsztof Wojtowics Poland In International Encyclopaedia of Laws Volume 4 Constitutional Law Kluwer Law International 1993 p.120

[5] Irina Bogdanovskaia and Tatiana Vassilieva The Russian Federation In : International Encyclopaedia of Laws Vol 4 Constitutional Law Kluwer Law International 2000 p 114

The Declaration of the Independence of Justice of the Montreal Declaration, article 2:24 (1983), provides that: "Judges shall enjoy immunity from suit, or harassment for acts and omissions in their official capacity."[6]

The Basic Principles on the Independence of the Judiciary (1985) consecrates the rule of judicial immunity with respect to civil liability for damages caused by judges and the State's duty to compensate. According to article 15: "Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial function."[7] This principle is also ratified at regional level in **the Beijing Statement of Principles of Independence of the Judiciary (1995)** whose article is a reproduction of the article 15 above mentioned.[8]

The Universal Charter of the Judge (1999), article 10, has a broader scope regarding judicial responsibility: "Civil actions in countries where is permissible and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced."[9]

The Beirut Declaration, article 1.5, also notes a distinction between judicial and non judicial acts: "Judges shall have immunity associated with their jobs. Except in cases of illegal acts no judicial measures shall be taken unless upon a permission issued by the highest council."[10]

The Statute of the Inter-American Court of Human Rights, article 15 (2), states that "the judges of the Court be held liable for any decisions or opinions issued in the exercise of their function."[11]

The Statute of the European Court of Justice, article 3, provides an even more comprehensive position noting: "The judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written." The Court sitting in plenary session, may waive the immunity. Where immunity has been waived and criminal proceedings are instituted against a judge, he shall be tried, in any of the members States, only by the Court competent to judge the members of the highest national judiciary ".[12]

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[6] Abimola A. Olowofoyeku supra 1 at 1

[7] *Basic Principles on the Independence of the Judiciary,* 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53

[8] *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, 08/19/1995, Beijing, China, 6th Conference of the Chief Justices of Asia and the Pacific

[9] *Universal Charter of the Judge*, 1999, General Council of the International Association of Judges

[10] *Recommendations of the First Arab Conference on Justice, "Beirut Declaration"*, 06/14-16/1999, Conference on "The Judiciary in the Arab Region and the Challenges of the 21st Century", Beirut, Lebanon

[11] The Statute of the Inter-American Court is available at http://www.cidh.org/

[12] The Statute of the European Court of Justice is available at http://curia.eu.int/en/txts/acting/statut.htm

The European Charter on the Statute of the Judge, article 5.2, states the a judicial act would not be protected by: "illegitimate damages following a judicial decision or the behavior of a judge give rise to compensation from the State. The Statute may provide that the State may sue the judge for reimbursement if the grossly and unjustifiable disregarded the rules within which he exercises his functions."[13]

International Association of Judges (1980). In 1980, a Study Commission raised the issue of whether a judge's negligence in the exercise of his functions should give rise to civil liability.[14] Recognizing that judges may incur civil liability raises several concerns. First, it could affect their independence [the threat of civil proceedings may affect their impartiality]. Second, civil proceedings against judges could lead to the retrial of the dispute, whether directly or indirectly. Yet, some members thought that, despite these dangers, negligence should give rise to compensation. The Commission drew a distinction decisions resulting from mistake of fact or law, which should never give rise to liability, and cases of gross negligence and grave misconduct – "wrongful acts or omissions which could not arise in relation to judges who carry out their duties in a normal and reasonable manner." Yet, if judges may be held liable, when and against whom should compensation claims be made? First, the Commission held that "in principle no such liability could be considered unless and until all means of redress had been exhausted". Second, the Commission noted that civil proceedings could be brought "1. Against the State alone ... 2. Against the judge alone ... 3. Against the State, which in appropriate cases can have recourse against the judge. 4. Simultaneously against the State and the judge." It was however of the opinion of the majority that only the third solution was admissible.[15]

IV. A Comparison of Judicial Immunity and Parliamentary Immunity Principles

Judicial immunity and parliamentary immunity have traditionally been considered as two distinct institutions with different scopes; however, at present both kinds of immunities present more similarities than differences. These circumstances have led some to consider that both could be equated.

From a historical perspective, parliamentary immunity, like judicial immunity is a universal principle acknowledged in democratic societies governed by the rule of law and the separation of powers principle. Absolute judicial immunity is a historical remnant of the monarchal conception of the administration of justice and tracked the absolute immunity of the King (historically the judges were speaking for the King) and the modern trend is to qualify judicial immunity.

From a political perspective, parliamentary immunity relates more to the political activities and free speech rights of elected politicians. On the contrary, judicial immunity has the objective to eliminate whatever extra-legal element (political considerations) that might disturb

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[13] *European Charter on the Status of Judges,* 07/08-10/1998, Council of Europe, Strasbourg, France

[14] International Association of Judges, First Study Commission, Meeting in Tunis 24-25 October 1980 available http://www.iaj-uim.org/ENG/01/1980.html p. 1. This paragraph is based on the conclusions of the First Study Commission on *The Liability of Judges.*

[15] It should be noted that further work is being undertaken by the First Study Commission of the International Association of Judges. Indeed, the issue for reflexion in 2002 is "Civil Liability of Judges" and the questionnaire to be filled out by experts of each country is available at

the correct application of the rule of law. Judicial immunity protects the judicial function and, altogether, the compliance with the rule of law.

From a functional perspective, since members of parliament generally serve for limited tenures and are elected, they are more accountable through the political election process than most judges, which makes the issue of immunity less permanent in nature. Conversely judicial immunity is designed to be permanent in nature, since judges usually serve for longer periods of time.

V. Conclusion

Judicial immunity is a very important component of judicial independence and like other rule of law issues has become globalized. Thus, countries should consider harmonizing at their laws and policies with emerging national, regional and international norms. This challenge covers different areas, including civil, criminal and disciplinary actions. It is also important to define the role of the State regarding the duty to compensate the victims of judicial errors.

VI. Selected Bibliography

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Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 1993, 518th Meeting of the Ministers' Deputies, Council of Europe, Strasbourg, France

European Charter on the Status of Judges, 07/08-10/1998, Council of Europe, Strasbourg, France

Global Framework Action Plan for Judges in Europe, 2001, Appendix 11, 740th Meeting of the Ministers' Deputies, Council of Europe, Strasbourg, France

Code of Judicial Conduct – the Bangalore Draft, 2001, Judicial Group on Strengthening Judicial Integrity

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MAKING DEMOCRACY WORK

IFES WORKING PAPER: Asset and Income Disclosure for Judges

> "Although judges often balk at the invasion of privacy that disclosure of their private finances entails, it is almost uniformly considered to be an effective means of discouraging corruption, conflicts of interest, and misuse of public funds. Applicable laws generally require disclosure of judges' assets and liabilities when they are appointed and annually thereafter, so that unexplained acquisitions of wealth or potential conflicts can be challenged. Here again, civil society groups and the media play a key role in ensuring that these laws are enforced and the information disclosed is accurate, timely, and comprehensive."[1]

I. Introduction and Overview

In the fight against corruption, the disclosure of assets and incomes of public officers has become a core issue, particularly in the last ten years. This obligation was directed primarily to elected officials, as legislators, and to appointed officials, as well as those in central government. Several countries have adopted legislation on this issue[2], and some countries establish this obligation in their Constitutions[3].

More recently, the issue concerning the disclosure of assets and incomes related specifically to the judiciary has now also become an issue in many countries. However, only a few countries have specific legislation on this topic and even fewer have experience in implementing effective systems of disclosure.

There is not a clear consensus as to what countries are doing on this matter. The obligation of disclosure derives from different sources in different countries. As previously mentioned, some Constitutions address the issue, but most frequently, legislation and court rules are the sources of this obligation. Even then, there is no one model. Some countries have public officers' assets disclosure laws; others have access of information laws; and, in some countries, the judiciary itself regulates the matter.

II. International Principles

There are several treaties and conventions that address the issue of judicial independence standards and principles[4], but none of them address directly the issue of assets disclosure in the judiciary. Nevertheless, there are some provisions on these conventions that can be considered sources for the disclosure obligation. The UN Basic Principles on the Independence of Judiciary

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[1] *Guidance for Promoting Judicial Independence and Impartiality*, 2001, USAID Technical Publication

[2] See, *inter alia*, Great Britain, France, U.S, Mexico, Brazil, Argentina, Poland.

[3] See, *inter alia*, Colombia, Morocco

[4] UN Basic Principles on the Independence of the Judiciary (1985), the Universal Charter of the Judge (1999), the European Charter on the Statute of the Judge (1998), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995)

(UNBP) establishes that the judiciary shall decide matters impartially, without improper influences and inducements; and, there shall not be inappropriate or unwarranted interference with the judicial process.[5]

Based on these principles, the UN recognized the importance of developing practical tools to avoid improper influences on Judges. In 2000, it promoted a meeting of a group of experts – the Judicial Group on Strengthening Judicial Integrity – that drafted a Code of Judicial Conduct (the Bangalore Code) in 2001.[6] This code provides specific rules related to assets disclosure. The main provisions are the following:

- A judge shall not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person connected with a member of the judge's family and then only if such service will not interfere with the proper performance of judicial duty [rule 1.15].
- Save for holding and managing appropriate personal or family investments, a judge shall refrain from being engaged in other financial or business dealings as these may interfere with the proper performance of judicial duties or reflect adversely on the judge's impartiality [rule 1.16].
- A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties [rule 1.20].
- Subject to law and to any legal requirements of public disclosure, a judge may receive a small token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality [rule 1.21].
- A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if such payments do not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions [rule 1.22].
- Such compensation and reimbursement shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activities [rule 1.22a].
- Reimbursement shall be limited to the actual cost of travel and accommodation reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation [rule 1.22b].
- A judge shall make such financial disclosures and pay all such taxes as are required by law [rule 1.23].

[5] UN Basic Principles on the Independence of Judiciary (1985) (UNBP)

[6] Code of Judicial Conduct – The Bangalore Draft (2001) The following list of provisions is based on rules 1.15, 1.16, 1.20, 1.21, 1.22 and 1.23

III. Fight against Corruption Efforts

Several conventions have been drafted to prevent and combat corruption. The Council of Europe Criminal Law Convention on Corruption (CoE convention) regulates aspects of conduct of "public officers", but makes no provision about assets disclosure.[7]

The Economic Cooperation and Development (OCDE) Anti-bribery Convention of 1997, also deals with corruption. It is narrowly focused on obliging parties to make it criminal offense for a person or enterprise to offer, promise or give bribes to foreign public officials in international business transactions.

The Inter-American Convention against Corruption (OAS convention)[8] establishes rules to prevent corruption among public officers. The OAS convention defines as public officer any natural person who is on behalf of the State or to the service of the State or a state agency, no matter if the person has been appointed, selected or elected. The OAS convention provides definitions about different acts of corruption. It also establishes that the countries must consider as a crime the illegal enrichment, this means a significant increase in a public officer's patrimony related to his or her incomes, during his or her services, and it could not be properly justify.[9]

The OAS convention created the basis for the obligation of asset disclosure imposed on public officers in the Americas. Some countries have adopted legislation in this sense but judges are not always included among this public officers.

In accordance to this convention some countries, such as Brazil, Mexico, Colombia, El Salvador, Honduras, Costa Rica, Nicaragua, and Argentina have specific assets disclosure rules. Some of them mention specifically who are the obligated subjects. The OAS has made a sample of the legislation to be adopted by the nations, but it does not mention specifically judges.

The OAS convention is narrower than the CoE convention in regard to criminalization. It addresses both domestic and transnational bribery, but only when public officials are involved. However, its international cooperation aspects are similar to the CoE convention and it also includes a broad range of measures to prevent acts of public corruption, a feature not present in the CoE convention.

IV. The International Arena: Source of the Obligation

There are three basic sources of the assets disclosure obligation:

a) Constitutional Obligation: Some constitutions provide that public officials are obligated to disclose assets. For example, Colombia incorporated this obligation in its Constitution.[10]

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[7] Council of Europe Criminal Law Convention on Corruption (1999), ETS no.173
[8] Organization of American States Anticorruption Convention (1996)
[9] The CoE Convention explicitly includes judges among public officers, while the OAS Convention refers to them implicitly.
[10] Constitution of Colombia, article 122

b) Legal Obligation: The majority of the countries regulating this issue require disclosure by statute, although there are different types of Acts related to this conduct. Examples include:

> **Poland**. The draft law *Freedom of Information* Act[11], prepared by a coalition of NGOs, grants the access to information held by public authorities. The law requires that these authorities (judges are specifically included) shall provide information, *inter alia*, about: annual salaries, other incomes, benefits and privileges related to the function. Also provided shall be property statements.
>
> **El Salvador**. The *Illegal Enrichment Law*[12] requires public officials including judges to file an affidavit with a state entity. The subjects included in this legislation are public officials and any individual who is responsible for managing public assets. The law mentions specifically, *inter alia*, Supreme Court justices, Judiciary Council judges, electoral judges, court of appeals on taxes judges.
>
> **Uganda.** The Leadership Code of Conduct is enforced by the Constitutional office of the *Inspectorate of Government* (ombudsman) which is charged with the overall responsibility of fighting corruption. It is applicable to all public officers including judges. This Code establishes the obligation for all public officers of making disclosure of their assets.

c) Court rules: In some countries, such as Argentina, the judiciary itself regulates the conduct of the judges.

> **Argentina**. The Supreme Court adopted conflict of interest guidelines by Court Rule that are similar to those found in the 1995 *Public Ethics Law (which pertains to public officers in the Central Government).* This law establishes that every public officer in the Central Government shall make disclosure of his assets in an affidavit (which shall be deposited in the Anticorruption Office). However, the law does not include judges because the Constitution of Argentina and in the judicial precedents prohibits the executive and legislative branches from adopting rules for the judiciary. The law invited the other powers of the state to adopt similar rules.
>
> **The United States**. The *Judicial Code of Conduct* was passed in 1995. Its main provisions are the following[13]: a) A judge should uphold the integrity and independence of the judiciary; b) A judge should avoid impropriety and the appearance of impropriety in all activities; c) A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties; and, d) A judge should regularly file reports of compensation received for law-related and extrajudicial activities.

V. Kind of Assets and Incomes to be Disclose and Where the Information Should be Located

When addressing the issue of assets disclosure it is fundamental to find a balance between the kind of information available to the public needed to restrict the possibilities of corruption against a judge's rights to privacy and security. It is also important to consider whether judges' family members' assets are included in the reports that they must make. If family members are not included, the whole system could be undermined because judges can easily avoid controls.

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[11] Illegal Enrichment Law (1959, amended 1974, 1992)
[12] Freedom of Information Act (2001)
[13] Judicial Code of Conduct, canons 1, 2, 5 and 6

A cursory review of existing laws reveals there is no one model law or policy regarding exactly the range of assets judges should disclose. To some degree it depends, *inter alia*, on the development context of the country in question. Obviously, in some countries privacy and security concerns are greater than others, and these issues must be factored into the law and policy itself. For similar reasons, it is important to determine carefully the place where the information will be filed and who will be responsible for it.

> **United States**. Until a few years ago this information was only available by going to the Washington D. C. at the Administrative Office of the U.S. Judicial Conference. After strong criticism, judges agreed to post special order forms on the Internet, and at every federal courthouse in the U.S.
>
> **Argentina**. For security reasons, the decision of having the information available on the Internet that was debated over a two year period. The decision was made not to publish the information on the Internet (except for those judges that voluntarily accept to do so), and make it available to the public only upon personal request at a specific location.

Regarding the **kind** of assets to be disclose, different countries have likewise adopted different models depending on the development context:

> **Broad Disclosure.** In the **United States,** there is an obligation to make a broad accounting of financial holdings, including a list of gifts, lectures fees or other outside incomes. However, there has been some criticism of some judges not fully disclosing their having received trip expenses from private sources and these rules are still under debate.
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> **Medium-size disclosure.** In **Argentina,** judges are exempt from declaring some kinds of property if it might jeopardize their security. For example, judges are not obligated to submit details of the place where they live or their credit card numbers.
>
> **Narrow disclosure.** Judges must declare only incomes – assets are exempted.

VI. Procedure for Public Review of the Information

As noted above, if the procedure to consult the information is too restrictive, the risk of undermining the underlying objective to disclose looms large. On the other hand, if the privacy or security risks are too high in some countries, the likelihood of compliance or the propriety of providing the information may be questionable.

> **United States**. Until recently, the U. S. required a fairly complicated administrative process, which required someone to physically visit the Office of Administrative Courts in Washington, D. C. and a signature of a notary public before information could be made available to the public. However, the *Judicial Conference* has now streamlined the process and approved reforms to facilitate this procedure. For example, the Conference voted to slash charges for copies of the reports by 60%; dropped a requirement that each request must be signed by a notary public; provided that court officials should supply each of the nation's 2000 federal judges with standardized checklists to ensure that judges accurately complete disclosure reports and identify all financial conflicts; ordered development of computer systems to help judges and their clerks compare their stocks holdings with the names of litigants in their courtrooms; and, ordered a committee to consider requiring each corporation involved in litigation to list all its parent and affiliated companies as way to help judges identify conflicts.

Another issue under discussion in some countries is whether judges should have the right to know the identity of people consulting their files. If yes, the public could be discouraged from

checking these reports. On the other hand, prohibiting judges access to that information may encourage speculators and criminals to obtain information that can be used to bother the judges.

VII. Individuals Obligated to Disclose

Many civil code countries have laws that obligate "public officers" to disclose their assets. Thus, it is important to know the legal definition of a public officer in each country. It appears that in most countries judges are included in this definition, as well as other members of the judiciary such as prosecutors and judicial officers.

VIII. Judges Must Receive a Reasonable Salary

Many judges, policy makers and development specialists believe that it will be difficult to expect full compliance with any disclosure laws until judges are paid sufficient wages to maintain a respectable living. This is a huge problem in many developing and transition countries.[14] When the payment is not enough to live with dignity and feed their families, judges may be compelled, like other civil servants, to find another source of legitimate or illegitimate income to supplement their salary. United Nations experts have urged that pay raises should be instituted, citing the value of insuring the financial independence of judges and the appearance of propriety, alongside incentives for disclosure standards, compliance and enforcement.

IX. IFES Asset/Income Disclosure Checklist

The following are some key issues that must be addressed when thinking about drafting legislation on income and assets disclosure:

Is there any rule that makes assets disclosure mandatory for judges?
Is the disclosure obligation made by, Constitution, law or judiciary decision?
Who are the obligated subjects? Only judges, or other judicial officials also?
Does the judge have to report family members' assets?
Which kind of assets and incomes are to be disclosed?
Which is the procedure to access the information? Is it narrowly or broadly conceived?
Who receive and file the information?
Where is the information available?
Who can access the information?
Is there any punishment for those who do not present the information?
When are the judges obligated to present the information?
Is there any process for illegal enrichment based on this information? If it is finished, which are its results?
Which is the majority opinion among judges about the topic? Has this system been criticize?

[14] For example, in 1996, judges earned the equivalent of US$ 20 a month, in Cambodia.

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MAKING DEMOCRACY WORK

IFES WORKING PAPER: Ethics and Conflict of Interest Rules

"Many countries have adopted codes of ethics as part of a judicial reform process. Codes of ethics are valuable to the extent that they stimulate discussion and understanding among judges, as well as the general public, on what constitutes acceptable and unacceptable conduct. They may also inspire public confidence that concrete steps are being taken to improve the integrity of the judiciary."[1]

I. Introduction and Overview

International and regional human rights treaties recognize the right to an independent and impartial judiciary as part of the broad guarantee of the right to a fair trial.[2] Guidelines and principles have been drafted to define the meaning and scope of judicial independence and have been complemented by the case law of regional human rights courts.[3] Judicial independence has also been recognized domestically through constitutional or statutory provisions and case law.

Ethical rules and personal restrictions on conduct and activities acceptable from ordinary citizens are necessary to protect judicial independence and impartiality and should be accepted freely by judges.[4] Clear judicial and professional ethical principles must be respected. They should be designed to include, *inter alia*, effective conflict of interests rules which warrant restrictions on the activities undertaken and the interests retained by judges and members of their family.

II. International and Regional Principles and Trends

The UN Basic Principles on the Independence of the Judiciary (UNBP) recognize that judges must be free of unwarranted interferences and calls for conduct respectful of judicial independence and impartiality in connection with the exercise of freedom of association and expression, but it does not detail ethics principles or conflict of interest rules. Conversely, the Universal Charter of the Judge provides for broad restrictions of the conduct and activities of judges, prohibiting any function incompatible with judicial duties and status.[5] Recognizing the need for clear and effective judicial ethics rules, the Judicial Group on Strengthening Judicial Integrity – a group of experts which was set up within the framework of the United Nations in

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[1] *Guidance for Promoting Judicial Independence and Impartiality*, 2001, USAID Technical Publication

[2] See, *inter alia*, the International Covenant on Civil and Political Rights (1966) (ICCPR) art.14, the European Convention on Human Rights and Fundamental Freedoms (1951) (ECHR) art.6, the Inter-American Convention on Human Rights (1978) (ACHR) art.8 and the African Charter of Human and People's Rights (1981) (ACHPR) art.7

[3] See, *inter alia*, the UN Basic Principles on the Independence of the Judiciary (1985) (UNBP), the Universal Charter of the Judge (1998), the European Charter on the Statute of the Judges (the European Charter) and the case law of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission of Human Rights.

[4] Code of Judicial Conduct – The Bangalore Draft (2001) (the Bangalore Code) mandates that judges "must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

[5] Universal Charter of the Judge, art.7 "judge[s] must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge."

2000 – drafted a Code of Judicial Conduct (the Bangalore Code) in 2001 with reference to existing codes around the world and international instruments.[6] This document provides comprehensive conflicts of interest standards and recommended restrictions on a judge's freedom of expression and association, extra-judicial activities and involvement in judicial proceedings.

Conferences of Chief Justices, expert meetings and multilateral governmental efforts have also been pursued at the regional level, in all regions of the world. For example, in Europe, a Council of Europe recommendation affirms basic principles of judicial independence but does not highlight judicial ethics or conflict of interests.[7] The Council of Europe has however overseen the adoption of the European Charter on the Statute of the Judge (the European Charter) which affirms the freedom of judges to engage in extra-judicial activities as any other citizen – freedom which may only be restricted under certain strict conditions.[8] More generally, it is undertaking wide-ranging activities in the area of judicial independence and other issues affecting judges and, after creating a Consultative Council of European Judges in 2000, has adopted in 2001 a Framework Global Action Plan for Judges in Europe which includes the preparation of opinions on issues of professional conduct and ethics.[9]

There is a global consensus that any conduct of the judge in his private life which undermines his independence and the confidence of the public is reprehensible and should be prohibited. There is however little agreement as to what conduct is to be prohibited and how. In recent years, the need to design effective rules of judicial ethics has been recognized globally, but diverging approaches have been taken regionally and domestically. For example, the Bangalore Code lists prohibited activities and behaviors whereas the European Charter affirms the freedom of judges to engage in extra-judicial activities, which can only be limited under strict conditions.[10]

III. Conflict of Interest Rules and Principles

Some efforts have been made at the international and regional level to define minimum standards of judicial conduct – the most comprehensive effort to date is the Bangalore Code. The specificity of the rules of judicial ethics varies from country to country both formally and substantively. Formally, the source of ethical rules may be, on the one hand, constitutional or legal, or, on the other hand, judicial, or even a combination of both. Substantially, permissible conduct varies from country to country , and may even differ within a single country.

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[6] The Bangalore Code (2001)

[7] Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (1994) (Council of Europe Recommendation)

[8] The European Charter (1998) article 4.2

[9] Committee of Ministers, Framework Global Action Plan for Judges in Europe, 02/07/2001 The issues of professional conduct and ethics to be addressed include "the rules of professional conduct for judges ... the regulations of incompatibilities with judicial functions in the member states and the principles governing the appointment of judges to extra-judicial functions".

[10] See, the Bangalore Code (2001) articles 1.1 through 1.23; the European Charter (1998) article 4.2

1. Source of Judicial Ethics Rules

In some countries the judiciary itself has drafted codes of conduct or internal court regulations[11] whereas in other ethical rules have been laid down in the constitution, in laws organizing the judiciary or even in criminal law provisions[12]. Not all rules will apply similarly to all judges within a given country. For example, in Romania, the 1991 Constitution sets out the incompatibilities applicable to the judges of the constitutional court only and in France certain rules set out in the Law on the Status of the Magistracy do not apply to Supreme Court Judges.[13]

The statutes of the various ad hoc or permanent international and regional tribunals also provides a valuable source of information. For example, at the European level, both the European Court of Human Rights and the Court of Justice of the European Communities have drafted their own ethics and conflict of interest rules in their statutes. They broadly define activities incompatible with the judgeship, stressing "political and administrative office", and designate the entity responsible for resolving conflicts or granting exceptional authorizations, i.e. the President and the Plenary of the Court for the Court of Human Rights and the Council of Ministers for the Court of Justice.[14]

2. Public Sector Involvement: Political and Partisan Activities – Restrictions on the Freedom of Expression and Association

Democratic societies rely on the separation of power between three branches of government – the executive, the legislature and the judiciary. Traditionally, the executive and the legislature are political branches of government where as the judiciary must stand clear of any political or partisan affiliation. The neutrality of the judiciary is a means of ensuring its independence and of reducing its vulnerability to external (political) pressures. Consequently, judges should refrain from engaging in political and partisan activities.

Under international and regional standards and principles, judges have the same freedom of expression and freedom of association as any other citizen:

> "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly"[15]

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[11] See, *inter alia*, the Guidelines for Judges of South Africa, issued by the Chief Justice, the President of the Constitutional Court and the Presidents of the Hight Court, the Labour Appeal Court and the Land Claims Court (2000) and the Code of Judicial Conduct of the Philippines (1989)

[12] See, *inter alia*, France (Law on the Status of the Magistracy) and Romania (constitutional provisions regarding judges of the Constitutional Court)

[13] See, Romanian Constitution (1991) art.142 judges of the Constitutional Tribunal may not undertake any other public or private function, except pedagogical functions of higher judicial education and French O.58-1270 Law on the Status of the Magistracy (1958) art.9

[14] Statute of the European Court of Human Rights, Rule 4 "judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity. In the event of a disagreement between the President and the judge concerned, any question arising shall be decided by the plenary Court." EC Statute, Protocol on the Statute of the Court, 04/17/1957, Brussels, Belgium, as last amended by Article 6 III (3)(c) of the Treaty of Amsterdam, article 4 "judges may not hold any political or administrative office. They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council."

[15] UNBP 8

Both their freedom of expression and their freedom of association may however be restricted in order to preserve judicial independence and impartiality and insulate judges from external political pressure.

Freedom of Association and Political Party Membership. Political party membership and the degree of political involvement of judges is a controversial issue. At a Study Commission meeting in 1987, the International Association of Judges noted that

> "a distinction must be drawn between membership of [a political party] and public expression of a political opinion. Some do not even accept that a judge should belong to a political party. Others allow that he should belong to such a party but not that he should express himself publicly in any way in the political domain. Yet others are of opinion that a judge should be allowed the widest freedom to take part in political life. Everyone agrees, at all events, that, even where a judge's participation in political life is allowed, it must take such a form as to be compatible with his continued enjoyment of the confidence of his fellow citizens.
> In a word, he who accepts to become a judge must also accept the restraints pertaining to that office."[16]

There seems however to be a trend towards the depolitization of the judiciary, as judges are increasingly prohibited from becoming members of political parties. For example, the Bangalore Code advocates that "a judge shall refrain from membership in political parties; political fund-raising; attendance at political gatherings and political fund-raising events; contributing to political parties or campaigns".[17] On the other hand, in France, nothing in the Law on the Status of the Magistracy seems to prohibit political party membership and judges may therefore join political and partisan groups. Still, judges of the Constitutional Tribunal may not hold high-raking positions – direction or important responsibilities – within a political party.[18] Distinguishing between party membership and positions of authority within the party structure, only the latter being prohibited, may be an alternative to an absolute ban on party membership.

Other restrictions to freedom of associations may arise in order to protect judicial independence and guarantee the impartiality of judges, such as requiring that judges refrain from membership in groups "which, in the mind of a reasonable ... person, might undermine confidence in the judges' impartiality".[19]

Political or administrative office. The judgeship is traditionally incompatible with any office of political responsibility, e.g. elected office at the local, regional and national level and government office. At the national level, the protection of judicial independence mandates that judges refrain from simultaneous membership in other branches of government, including, *inter alia*, holding the office of member of parliament or minister. The Bangalore Code calls for the cessation upon appointment of "all partisan political activity or involvement" and prohibits the appointment of judges to government entities and commissions.[20]

In France, the judgeship is incompatible with any public office or with parliamentary functions. It follows that judges may not be appointed to the executive branch as members of government nor hold an elected mandate to the National Assembly or the European Parliament.

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[16] International Association of Judges, First Study Commission, Meeting in Dublin, 12-16 July 1987

[17] The Bangalore Code (2001) principle 1.8; such restrictions exist in countries including, *inter alia*, Bangladesh, Canada, India, Pakistan, the Philippines, Uganda and Zambia

[18] See, Institutions Politiques – Droit Constitutionnel, Pierre Pactet, Ed. Masson

[19] The Bangalore Code (2001) principle 1.6. See, also, the European Charter, UNBP 8

[20] The Bangalore Code (2001) principles 1.7 and 1.18

Incompatibilities with local elected functions are only conditional; the judgeship is incompatible with certain elected offices at the regional and local level which fall within the territorial jurisdiction of his court. This incompatibility lapses six months after the judge has left his functions. This applies to elections from the local level to the regional level. Conversely, a person who held a local, regional or national elected office or ran for such office in a given territorial jurisdiction may not be appointed as a judge in this jurisdiction for five years after the end of his elected term, [three for terms at the European Parliament].[21]

Freedom of expression and political speech. Like in the case of freedom of association, the main restrictions on freedom of expression may arise in connection with political and partisan activities. Indeed, the Bangalore Code advocates that "a judge shall refrain from ... taking part publicly in controversial discussions of a partisan political character."[22] Additionally, there are some less specific restrictions requiring that judges refrain from participation in public discussion "which, in the mind of a reasonable ... person, might undermine confidence in the judges' impartiality".[23]

3. Private Sector Involvement: Financial and Other Interests

Judges may not engage in activities which are incompatible with their duties and status. Consequently, it is necessary to restrict the involvement of judges in private sector activities and to monitor their past and present, direct and indirect, financial interests.

Legal professions. The Bangalore Code states that "a judge shall not practice law whilst the holder of judicial office".[24] This prohibition is widely accepted and reproduced in the domestic law of a number of countries, including in France, Nigeria, the Philippines, South Africa, Uganda, and Zambia. It may be limited in scope to private legal practice or cover other legal activities such as prosecutorial and investigative activities or judicial enforcement responsibilities. It is usually limited in time, either to the length of the term or to an additional limited period of time after the end of the term.

Business activities and financial interests. The Bangalore Code states that "a judge shall refrain from being engaged in ... financial or business dealings [other than the management of his personal or family investments] as these may interfere with the proper performance of judicial duties or reflect adversely on the judge's impartiality".[25] For example, in Poland, a 1997 Anti-Corruption Law imposes restriction on the involvement of high-ranking state officials, including the presidents of the Supreme Court and of the Supreme Administrative Court and the judges of the Constitutional Tribunal, in private business and mandates immediate dismissal in case of violations.[26] Similarly, activities previously undertaken by the judge may give rise to conflicts of interests. The European Charter calls for the determination through domestic

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[21] This paragraph is based on the French O.58-1270 Law on the Status of the Magistracy (1958) articles 8, 9, 9-2.
[22] The Bangalore Code (2001) principle 1.8; similar restrictions on speech exist in countries including Bangladesh, Canada, India, Pakistan, the Philippines, Uganda and Zambia.
[23] The Bangalore Code (2001) principle 1.6. See, also, the European Charter, UNBP 8
[24] The Bangalore Code (2001) principle 1.17
[25] The Bangalore Code (2001) principle 1.16
[26] See, Poland report in *Nations in Transit*, 1998, Freedom House

provisions of the situations in which previous activities of the candidate are an obstacle to a judicial nomination due to the doubts they shed on his impartiality or independence.[27]

4. Family Conflicts of Interests: Political, Legal and Business Activities

Activities of the members of the judge's family may potentially give rise to conflicts of interests in three areas, namely, political activities, exercise of the legal profession and business interests. The activities undertaken by family members or the interests retained by them may required the judge to disqualify himself where a case in which on of his family member is a party or the counsel of a party or has any direct or indirect interest in the outcome of the case is brought before him.[28] For an example of incompatibilities arising out of the political activities of a family member, in France, judges may not serve in the jurisdiction where their spouse has been elected as a representative or senator.[29]

5. Exceptionally Authorized Extra-Judicial Activities

Promotion of judicial independence and others issues affecting the judiciary. The UNBP encourages judges to form associations to "represent their interests, to promote their professional training and to protect their judicial independence"[30] and to actively participate in them. A similar recommendation can be found in the Beijing Principles, the Bangalore Code, the European Charter, the Singhvi Declaration and the Siracusa Principles. Judges' associations can play an important role in promoting judicial independence, including by defining acceptable professional conduct and helping drafting conflict of interest rules.

The Bangalore Code also advocates the membership and participation of judges in official or non-official entities whose purpose is the furtherance of judicial independence or other legal and judicial matters.[31] Similarly, judges should enjoy their freedom of expression fully to advocate or testify on matters relating to "the law, the legal system and the administration of justice or related matters", including *inter alia* judicial independence, impartiality and integrity.[32]

Educational activities. Judges are generally encouraged to engage in educational legal activities including training of other judges. They may also "speak publicly on non-legal subjects and engage in historical, educational, cultural, sporting or like social and recreational activities".[33]

Temporary leave of absence. In certain countries, judges may take a temporary leave of absence from the judgeship to engage in otherwise prohibited activities, especially activities of a political nature. This is the case in France and in Italy where judges may fill executive or parliamentary positions and then return to their judicial functions.[34] Similarly, former judges may

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[27] The European Charter art.3.2
[28] The Bangalore Code (2001) principle 4.6, the European Charter art.3.2
[29] French O.58-1270 Law on the Status of the Magistracy (1958) art.8 and 9
[30] UNBP 9
[31] The Bangalore Code (2001) principle 1.12
[32] The Bangalore Code (2001) principle 1.12
[33] The Bangalore Code (2001) principles 1.12.1 and 1.13
[34] In France, judges may ask for a leave of absence ("*mise en disponibilité*"), which must be approved by the Minister of Justice, to undertake activities normally prohibited or incompatible with the judgeship. The Minister of

engage in otherwise prohibited activities after the end of their term or their retirement from the judgeship.

IV. IFES Ethical Rules Checklist[35]

1. Is there a written code of ethics for judges?
2. If no, are ethics rules for judges provided in another document such as the law organizing the judiciary, the constitution or another code of professional conduct?
3. Who is responsible for adopting ethical rules applicable to judges?
4. Who is responsible for enforcing ethical rules and investigating violations?
5. Are there clear and effective mechanisms for the enforcement of ethical rules?
6. Are criminal laws applicable to judges clear?
7. If judges are allowed to become members of political parties, are there any conditions on their membership?
8. If judges are allowed to run for office, are there any conditions? Are there differences between elected terms at the national, regional or local level?
9. If judges are allowed to hold a political or administrative office in the executive branch, are there any conditions?
10. Due to the likelihood of conflicts of interests, aspects of each of the activities listed below are prohibited under the Bangalore Code and other documents[36]:

- political party membership
- position of authority within a political party
- political office within the executive branch
- administrative office within the executive branch
- candidacy in a national, regional and/or local election
- elected office in parliament
- elected office in regional representative entities
- elected office in local government
- business activities
- financial interests
- private practice of law
- prosecutorial and investigative functions

Justice may oppose the exercise of the proposed activity if it is contrary to honor and probity or likely to affect the normal functioning of justice or to discredit the magistracy. Judges may therefore choose to leave the magistracy for political activities in the executive or legislative branch; once they have finished their term, they will be reintegrated within the judiciary. See, French O. 58-1270 Law on the Status of the Magistracy (1958) article 9-2.

[35] This checklist attempts to summarize the key issues regarding ethical rules and conflicts of interests for judges as highlighted in this document, drawing from international and regional standards and principles as well as from country specific legislation and practice.

[36] The degree to which these activities or only some aspect of them are prohibited vary from one document to the other and among countries. The most comprehensive and detailled effort regarding conflicts of interests and prohibited activities for judges is the Bangalore Code which draws mainly from Codes of Conduct in Anglophone African and Asian countries.

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OECD *Principles for Managing Ethics in the Public Service*

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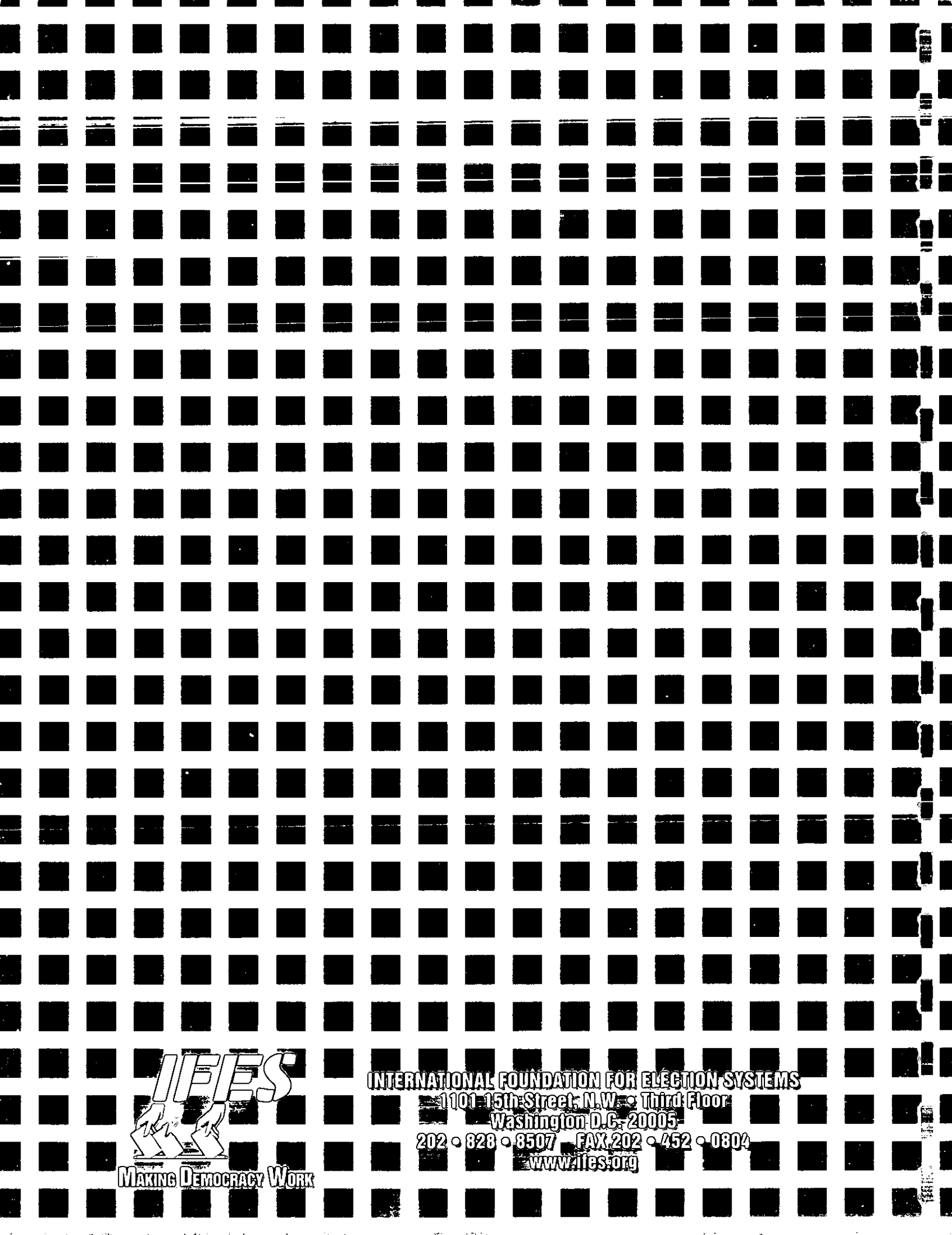

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