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FACULTY OF LAW

THE LAW OF ASSETS DECLARATION IN MALAWI

by

ELLEN CHIYAMIKO CHAPITA

(Student No. 3569085)

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Supervised

by

Professor Raymond Koen

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Declaration

I, **Ellen Chiyamiko Chapita**, declare that *The Law of Assets Declaration in Malawi* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student: Ellen Chiyamiko Chapita

Signature:

Date:



Supervisor: Professor Raymond Koen

Signature:

Date:

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Dedication

To the memory of Janet Chapita (1989–2012).



Abbreviations and Acronyms

ACB	Anti-Corruption Bureau
AU Convention	African Union Convention on Preventing and Combating Corruption
CPA	Corrupt Practices Act
DPP	Director of Public Prosecution
PAC	Public Appointments Committee
SADC Protocol	Southern African Development Community Protocol against Corruption
UN	United Nations
UNCAC	United Nations Convention against Corruption



Key Words

Accountability

Assets declaration

Business interests

Conflict of interests

Corruption

Illicit enrichment

Liabilities

Malawi

Public officer

Transparency



CHAPTER ONE

INTRODUCING THE STUDY

1.1 Background to the Study

The fight against corruption is now a central theme for most democratic governments. Like many other developing countries, Malawi has joined the fight and enacted anti-corruption legislation. One such piece of legislation is the Corrupt Practices Act (CPA) of 1996. This Act criminalised specific acts of corruption, including bribery, extortion and abuse of office. It also established the Anti-Corruption Bureau (ACB), a body that investigates and prosecutes corruption, among other things. Malawi is a state party to the United Nations Convention against Corruption (UNCAC), which it ratified in 2007.¹ Malawi also ratified the African Union Convention on Preventing and Combating Corruption in 2007.

Despite this anti-corruption legal regime, corruption persists. It exists both in the private and public spheres and manifests itself in various forms, such as bribery, extortion and nepotism. The public service in Malawi is one of the sectors most infected with corruption. According to the Corruption Perceptions Index of 2014, published by Transparency International, on a scale of zero to 100 of perceived levels of public sector corruption, Malawi scored 33.² This score shows that Malawi is perceived to be seriously corrupt.

For public officers, corruption entails the abuse of their office for personal, political or other gain. It usually manifests itself through bribery, which involves a public officer accepting or demanding a material or other personal profit in connection with the performance of a service to the public.

Lack of transparency and accountability is believed to be one of the factors that created an environment for corruption to thrive in the public service. Measures that would promote

1 See United Nations Convention against Corruption Signature and Ratification Status, available at www.unodc.org/unodc/en/treaties/CAC/signatories.html (accessed on 6 July 2015). There are 177 states parties to this Convention as at 1 April 2015.

2 On this scale, zero represents the most corrupt and 100 very clean.

transparency and accountability therefore would be a means of fighting corruption in the sector.³ Neuman asserts that “transparency is the remedy to the darkness under which corruption thrives”.⁴

The Malawi Constitution provides for the adoption and implementation of policies, measures and legislation that are aimed at guaranteeing accountability, personal integrity, transparency and financial probity.⁵ UNCAC encourages states parties to promote integrity, honesty and responsibility among public officers. It also encourages states parties to establish measures that would require public officers to make declarations of their investments, assets, employment and other benefits accruing to them.⁶ Furthermore, UNCAC urges states parties to enact legislation that criminalises illicit enrichment, which is defined as “a significant increase in the assets of a public officer that he or she cannot reasonably explain in relation to his or her lawful income”.⁷ The systems of assets declarations are intended to be one of the tools for fighting corruption. They promote transparency and accountability and also safeguard against illicit enrichment.

In accordance with its obligations under UNCAC, Malawi enacted the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act in 2013. For the sake of convenience, this Act will be referred to hereafter as the Declarations Act. The Special Law Commission that drafted this piece of legislation stated that the Act had been passed to comply with the country’s obligations under international and regional treaties and that it would be a tool for the prevention of corruption in Malawi.⁸ With the introduction of this law, Malawi

3 Hussein (2005) 91 has reported that principles of good governance and transparency have assumed greater significance in most developing countries, including Malawi.

4 Neuman (2002) 7.

5 See Section 13 of the Constitution of the Republic of Malawi (1994).

6 See Articles 8(1) and 8(5) of UNCAC.

7 Article 20 of UNCAC.

8 See the Report of the Special Law Commission on the Development of Legislation on Declaration of Assets, Liabilities and Business Interests by Public Officers and Elected Officers, *Malawi Gazette Supplement*, 28 August 2008.

joined “a great number of countries around the world [that] have introduced systems of assets declarations for public officials in order to prevent or combat corruption”.⁹

Prior to the Declarations Act, the President, cabinet members, members of the National Assembly and other specified senior public officers were required to declare their assets, and to do so within three months of assuming office.¹⁰ Although this was provided for in the Constitution, which is the supreme law of the land, the declarations were laden with controversy. Presidents in the past were reluctant to declare their assets and some only did so after pressure from civil society and well beyond the three months as required by the law. President Joyce Banda was one such president who was not eager to declare her assets.¹¹ Members of the cabinet, although required by law to make assets disclosures, rarely did so. This failure was attributed to lack of political will and lack of mechanisms to enforce the declarations requirement.¹²

Various social sectors had advocated for the need to have enforcement measures for the declarations and also for a broader number of public officers to declare their assets. The Declarations Act, therefore, was seen as a response to such calls and thus as a step forward in the fight against corruption.

When the first declarations were made in terms of the Act, many people’s attention was on what had been declared by various public officers. Little regard was given to the substance of the Act itself. The impact of the Act on the fight against corruption rarely has been assessed. This study analyses the substantive law. It investigates the relationship between assets declarations and the fight against corruption, and the extent to which the various provisions of the Declarations Act indeed can promote the fight against corruption in Malawi. The contribution of this Act to the fight against corruption is analysed, with a view to comprehending its strengths and weaknesses.

9 OECD (2011) 9.

10 Sections 88A(1) and 213 of the Constitution of the Republic of Malawi.

11 See <http://en.starafrika.com/news/malawi-civil-societies-want-presidents-assets-declared.html> (accessed on 29 June 2015).

12 Daka (2013) 3.

The study analyses how this legislation has responded to the nature of corruption as manifested in the public service. An attempt will be made to understand how well coordinated the legal regime for assets declaration is. The study will consider also the relationship between the Corrupt Practices Act, which is the primary anti-corruption statute, and the Declarations Act.

1.2 Significance of the Study

Serving public officers made their first declarations under the Declarations Act in 2014 and it remains to be seen whether the Act can achieve its purpose(s). This study is significant because it may lead to the identification of weak points in the legislation that may be addressed directly by the legislature or other policy makers. This will be necessary if the fight against corruption is to progress.

1.3 Research Questions

The study seeks to answer the following questions:

- How can the declaration of assets contribute towards the fight against corruption in Malawi?
- How adequate are the provisions of the Declarations Act for fighting corruption in the public service in Malawi?

1.4 Methodology

The study takes an in-depth look at the Declarations Act. It will employ a qualitative desktop methodology. Primary and secondary sources will be used and these will be analysed critically in order to develop answers to the research questions.

1.5 Defining Corruption

It is important to understand that there is no single, comprehensive and universally accepted definition of corruption.¹³ It has been difficult to arrive at a common and acceptable definition of corruption and, according to Babu, this is so because corruption is a value-laden concept that is influenced by a particular culture.¹⁴ An act that is viewed as corrupt in one culture may not be viewed as such in another. For example, the practice in some African societies of giving the chief gifts before he presides over one's case in his court may be frowned upon in the West and raise ethical issues.

Some writers have attributed this lack of a common definition to the varieties of corruption, as well as to legal, criminological and political problems.¹⁵ Corruption manifests itself in different forms and it becomes difficult to agree on one definition.

Transparency International defines corruption as the "misuse of entrusted power for private gain".¹⁶ Chinhamo and Shumba define it as "the abuse or complicity in the abuse of private or public power, office or resources for personal gain".¹⁷ With such disunity regarding the definition of corruption, it comes as no surprise that there is no definition of corruption in UNCAC. The drafters of the Convention opted not to define corruption at all but to take a descriptive approach.¹⁸ They described certain acts as being corrupt.¹⁹ This is not unexpected, because corruption is a term that "covers a broad range of human actions".²⁰

The AU Convention followed the same descriptive approach. For it, corruption simply means "the acts and practices including related offences proscribed in this Convention".²¹ The SADC

13 Babu (2006) 'The United Nations Convention against Corruption: A Critical Overview', available at <http://ssrn.com/abstract=891898>.

14 Babu (2006) 4.

15 Senior (2006), as cited in Chinhamo and Shumba (2007) 1.

16 Transparency International 'Faq's on Corruption', available at https://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/.

17 Chinhamo & Shumba (2007) 6.

18 This was a deliberate move by the drafters of the Convention. See UN Document A/AC.261/3/Rev.3.

19 These include bribery, embezzlement, trading in influence, abuse of functions and illicit enrichment.

20 World Bank (1997) 8.

21 Article 1 of the AU Convention.

Protocol defines corruption more broadly than the other instruments. Article 1 of the Protocol refers to corruption as:

“any act referred to in Article 3 and includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others”.

Any act by which any officer violates his duty and obtains an undue advantage for himself or a third party falls within the ambit of this definition. It encompasses both private and public corruption. This is in addition to the specific acts of corruption defined in Article 3 of the Protocol.

Malawi’s Declarations Act does not define corruption and does not refer to any corrupt acts. By contrast, section 3 of the CPA defines a corrupt practice as:

- “(a) The offering, giving, receiving, obtaining or soliciting of any advantage to influence the action of any public officer or any official or any other person in the discharge of the duties of that public officer, official or other person;
- (b) influence peddling;
- (c) the extortion of any advantage.”

This definition recognises corruption by both public officers and private individuals. However, corruption is broader than the bribery, extortion and influence peddling which are specified in section 3 of the CPA.

The World Bank defines corruption as the “abuse of public office for private gain”.²² However, limiting corruption to public office ignores the fact that corruption exists in the private sphere as well. The World Bank, however, uses this definition because it is “simple and sufficiently broad to cover most of the corruption that the Bank encounters and it is widely used in the literature”.²³ Clearly, the World Bank has chosen this definition as appropriate for its operational requirements. It is a definition which, despite its insufficiencies, is appropriate also for purposes of this paper, which focuses on corruption among public officers who abuse their

22 World Bank (1997) 8.

23 World Bank (1997) 9.

positions through the commission of various forms of corrupt acts for private gain. This is the definition that this paper adopts.

1.6 Forms of Corruption

Because of the lack of a common definition of corruption, there is no typology of corruption that is accepted universally.²⁴ Different corruption researchers have grouped acts of corruption into varying typologies. Corruption can be categorised as active or passive corruption depending on who is giving and who is receiving the undue advantage. Active corruption covers the supply side and is committed by the one who gives or promises an undue advantage. Passive corruption covers the demand side and is committed by the one who receives the undue advantage.²⁵

Another typology considers the magnitude of the corruption. Here we have grand and petty corruption.²⁶ Grand corruption occurs in the upper echelons of power and involves the misuse of huge amounts of public resources. Petty corruption covers individual acts of low-level public officers who usually abuse their office through the demand for bribes or by diverting public funds.²⁷

A third typology considers the depth of the corruption and categorises acts of corruption into systemic and individual corruption. Systemic corruption is integrated into the entire social and economic system, and the rule of law usually is compromised because state custodians no longer are constrained by the law.²⁸ This form of corruption is organised well and the public have to pay bribes at every level to gain access to goods and services. Individual corruption is sporadic. Government institutions are not compromised and can function normally. Individual corruption is not organised and takes the form of isolated acts.²⁹ Importantly for this paper,

24 Vargas-Hernandez 'The Multiple Faces of Corruption: Typology, forms and Levels', available at <http://ssrn.com/abstract=1413976> (accessed on 6 August 2015).

25 Vargas-Hernandez 'The Multiple Faces of Corruption: Typology, Forms and Levels'.

26 Vargas-Hernandez 'The Multiple Faces of Corruption: Typology, Forms and Levels'.

27 Mbaku (2007) 24.

28 Mbaku (2007) 23.

29 Mbaku (2007) 24.

corruption can be private or public. Private corruption is carried out by particular, private individuals in their private transactions; public corruption takes place “in the public sphere of politics and government administration”.³⁰

1.7 Public Corruption

According to Mbaku, modern social scientists have defined corruption in terms of three elements. Firstly, corruption is related to the performance of the duties of a public office; secondly, it is related to the concept of exchange derived from the theory of the market; and lastly, it is associated with the public interest concept.³¹ In most literature, corruption is conceived as the abuse of public office for private gain. Since so much corruption involves public officers and their offices, this definition could be used to account specifically for public corruption, which is the concern of this paper. Thus a public officer may receive a monetary advantage corruptly in order to do what he is not supposed to do or for him to forgo what he is supposed to do under normal circumstances.

This paper conceives of public corruption as the abuse of office by public officers for personal or other gain. Public corruption can be either grand, involving high-ranking public officers, or petty, involving low-ranking officers who may demand bribes from the public as they come to seek various services which such officers are responsible to deliver.

1.8 Structure of the Research Paper

The following chapters make up the remainder of the paper.

Chapter two

This chapter discusses Malawi’s international obligations and its national legal framework for assets declarations.

30 Hernandez ‘The Multiple Faces of Corruption: Typology, Forms and Levels’.

31 Mbaku (2007) 14.

Chapter three

This chapter discusses the importance of declarations of assets for public officers. The characteristics of effective assets declaration systems are also considered.

Chapter four

This chapter analyses the Declarations Act in order to assess its effectiveness as an anti-corruption tool. It includes a consideration of the strengths of the Act and any weaknesses that may undermine its effectiveness.

Chapter five

This chapter discusses recommendations drawn from the study and includes the conclusion.



CHAPTER TWO

LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE DECLARATION OF ASSETS

2.1 Introduction

This chapter will discuss Malawi's legal and institutional framework against corruption in relation to the declaration of assets. It will look at how the various anti-corruption instruments provide for assets declarations. The legal framework includes UNCAC, the AU Convention, the SADC Protocol, the Malawi Constitution, the CPA and the Declarations Act. The institutional framework includes the Anti-Corruption Bureau and the Office of the Director of Public Officers' Declarations (Office of Declarations).

2.2 UNCAC

The UN General Assembly, through resolution 55/61 of 22 January 2001, decided that there was a need for a comprehensive instrument against corruption.¹ This instrument would express the aspirations of the UN members in relation to corruption. This same resolution established an *ad hoc* committee to formulate the instrument. This committee negotiated the text of the instrument in seven sessions between January 2002 and October 2003.² UNCAC was adopted on 31 October 2003 and came into force in 2005. Malawi became a state party to it in 2007.

UNCAC represents the international consensus on the minimum standards that states parties should adopt in order to counter corruption in their territories. It provides an opportunity for a global response to corruption.³ It obliges or urges states parties to implement these standards or incorporate them in domestic law by enacting new laws or amending existing ones.

1 Vlassis D 'The United Nations Convention against Corruption: Origins and Negotiation Process', available at http://www.unafei.or.jp/english/pdf/RS_No66/No66_16VE_Vlassis2.pdf.

2 Babu (2006) 7.

3 Shehu (2005) 224.

The substantive content of UNCAC encompasses prevention, criminalisation, international co-operation and asset recovery. This content is contained in UNCAC's provisions, some of which are mandatory, thus obliging states parties to adopt them, and others hortatory, leaving it up to the states parties to consider adoption.

The inclusion of so-called soft provisions may be seen as weakening the structure of UNCAC, but it most likely played a role in speeding up the negotiations that took place over less than two years.⁴ If these soft provisions had not been an option for the negotiators, they could have been dropped altogether from the text or the negotiations could have taken extremely long.⁵

2.2.1 Prevention

Prevention of corruption is one of the pillars of UNCAC.⁶ The strong focus on prevention makes UNCAC an innovative instrument.⁷ It mandates states parties to develop and implement anti-corruption practices aimed at preventing corruption, including policies that promote the participation of civil society, and that reflect the rule of law, integrity, transparency, accountability and the proper management of public affairs.⁸

The whole of chapter II of UNCAC is dedicated to the prevention of corruption. The preventive measures exist "to reduce the likelihood of corrupt practices",⁹ so that corruption does not occur. The declaration of assets by public officers is one of the preventive measures that UNCAC urges states parties to implement.¹⁰ They are encouraged to put in place systems requiring their public officers to disclose, among other things, their assets, outside activities, employment, investments and substantial gifts and benefits,¹¹ in order to prevent possible conflicts between private and public interests. This provision, however, is couched in non-

4 Rose (2015) 22.

5 Rose (2015) 22.

6 Babu (2006) 17.

7 Wouters, Ryngaert & Cloots (2013) 14.

8 Article 5 of UNCAC.

9 Shehu (2005) 224.

10 Article 8(5) of UNCAC

11 Article 8(5) of UNCAC.

mandatory terms. Hence, states parties are at liberty to enforce it or not, and it would require political will on the part of a state party to implement such a soft obligation.

UNCAC also recognises the need for the active participation of civil society in order to prevent corruption effectively.¹² It is in pursuance of this aspiration that some assets declaration laws provide that the declarations be accessible to the public. Public divulgence of the declarations allows the public to scrutinise them and hold their leaders to account by reporting any discrepancies between an officer's declared wealth and income.¹³

Other measures in UNCAC aimed at preventing corruption include the establishment of independent and well-staffed anti-corruption bodies to implement policies and disseminate anti-corruption information.¹⁴ States parties to UNCAC have established these bodies with different mandates to suit local conditions. Some bodies are tasked with the management of corruption only; others combine this with the management of declarations of assets made by public officers.¹⁵ Whatever the case, countries need to choose what is appropriate for them. Whatever course is chosen, the body that manages a system of assets declarations needs independence from political leaders or any other body in order to implement the system without fear, favour or influence.

The nature and mode of public procurement makes it fertile ground for corruption. UNCAC members thus are required to take measures for the regulation of public procurement and must ensure that there are transparency, competition and objective criteria in the decision-making process. In addition, public procurement officers must be required to adhere to a code of conduct and ethics, and to declare their assets and business interests as a preventive measure against corruption.¹⁶

12 Article 12 of UNCAC.

13 Transparency International (2013).

14 Article 6 of UNCAC.

15 Malawi's ACB does not manage declarations.

16 See Article 9 of UNCAC.

2.2.2 Criminalisation

UNCAC has established and defined specific corrupt acts as crimes and states parties are to criminalise these acts domestically. The core crimes include bribery of national public officers, bribery of foreign public officers and bribery of officers of public international organisations.¹⁷

UNCAC's mandatory criminalisation of corruption by national public officers is to be welcomed. Bribery involving public officers is "a hard-core form of corruption".¹⁸ UNCAC has criminalised the direct or indirect promising, offering, giving, soliciting and acceptance of an undue advantage. This makes one guilty of corruption even if intermediaries are used. Article 15 of UNCAC renders it irrelevant whether the undue advantage is for oneself or another person or entity. The net is cast wide to cover as many beneficiaries as possible. In this way, charities, political parties and other entities can become implicated in corruption.¹⁹

UNCAC has defined the central figure of public corruption, the public officer, as any elected or appointed officer who holds a legislative, executive, administrative or judicial office in a state party. The definition includes "any other person who performs a public function" for a public agency, public enterprise or any entity that performs a public service as defined in the domestic law of a state party. To ensure that no one is let off the hook by any technical deficiency, the definition of a public officer includes any other person defined as a public officer in the domestic law of a state party.²⁰

This definition is especially important for states parties that want to implement assets disclosure systems as it determines which individuals can be required to declare assets. Thus, both elected and appointed public officers or anyone performing a public service can be required to make the declarations.

17 See Chapter III of UNCAC.

18 Kubiciel (2009) 142.

19 See Kubiciel (2009) 148.

20 Article 2(a) of UNCAC.

2.2.3 Asset Recovery

Another important dimension of UNCAC is its recognition of the need for asset recovery. The provisions on asset recovery constitute a “fundamental principle” and recovering stolen assets is one of the main objectives of UNCAC.²¹ Asset recovery is considered an inalienable right of the country of origin,²² allowing it to reclaim what belongs to the public purse. Recovering proceeds of corruption has become an important issue, especially for developing countries.²³ These countries lose vast amounts of resources to corruption. It is understandable, therefore, that they had been hugely in favour of asset recovery during UNCAC negotiations.²⁴ The provisions express the determination of the states parties to “prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international co-operation in asset recovery”.²⁵

The disclosure of assets by public officers is relevant for detection of illicit acquisitions and transfers of assets. States parties are to consider establishing effective financial disclosure systems for public officers, with appropriate sanctions for non-compliance.²⁶ The importance of disclosure of assets need not be emphasised here. It would expose the location, value and description of assets held illicitly by a public officer. This information could facilitate their recovery.

2.2.4 International Co-operation

UNCAC obliges states parties to co-operate with one another in criminal matters. It encourages states to offer mutual legal assistance to the widest extent possible in investigations, prosecutions and judicial proceedings pertaining to the conventional offences.²⁷

21 See Articles 1 and 55 of UNCAC.

22 Article 64(2) of UNCAC.

23 Babu (2006) 21.

24 Wouters (2013) 58.

25 Paragraph 8 of the Preamble to UNCAC.

26 Article 52(5) of UNCAC.

27 Article 46 of UNCAC.

In this connection, UNCAC encourages states parties to share the information obtained via assets disclosures with one another's competent authorities when this is necessary for the recovery of proceeds of corruption. To achieve this, the declarations need to be as detailed as possible. Malawi's Declarations Act requires that particulars of assets be provided by public officers in their declarations. Each description of an asset must include its location, its value and how it was accessed.²⁸ This facilitates easy identification of assets for quick recovery.

2.3 The AU Convention and the SADC Protocol

The AU Convention was adopted by the AU in 2003 and Malawi became a state party in 2007. The SADC Protocol was adopted by SADC member states, including Malawi, in 2001.²⁹ The adoption of these instruments indicates the determination of the AU member states and SADC heads of governments to rid their regions of corruption.

The AU Convention is more detailed than the SADC Protocol but they share certain key subjects. The AU Convention was born out of the concern "about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African states and its devastating effects on the economic and social development of African peoples".³⁰ The objectives of the AU Convention include the development of mechanisms for detecting, preventing, punishing and eradicating corruption in both the private and public sectors of African states. With the AU member states already having acknowledged that corruption undermines accountability and transparency in the management of public affairs,³¹ it was intended that the Convention would establish the conditions to foster the transparency and accountability needed in public affairs.³²

Through the SADC Protocol, SADC members admit to the seriousness of the corruption problem and recognise the need for concerted action to tackle it. The Protocol expresses the knowledge

28 Section 15(e) of the Declarations Act.

29 Matsheza (2001) 5.

30 See paragraph 6 of the Preamble to the AU Convention.

31 Paragraph 7 of the Preamble to the AU Convention.

32 Article 2 of the AU Convention.

of the SADC heads of governments that corruption undermines principles of accountability and transparency.³³ A system of assets declaration would be a means to promote such transparency and accountability in the public service. The Protocol encourages SADC members to adopt measures that will create and strengthen standards of conduct for the proper fulfilment of public functions.³⁴

2.3.1 Criminalisation

The AU Convention adopts an ostensive approach and identifies acts that African states must establish as offences domestically. Its definition of corruption is narrower than the one in the SADC Protocol which, besides the specific acts listed in Article 3, includes “bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties”.³⁵ One of the notable acts of corruption criminalised by the AU Convention is illicit enrichment, which is defined as “the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income”.³⁶ Illicit enrichment can be uncovered from the analysis of assets disclosures filed by an officer. The disclosures are thus important in the prevention of the corruption to which public officers are prone.

2.3.2 Fighting Corruption in the Public Service

Public officers have power in the allocation of resources and in the provision of services to the public. When these are tainted by corruption, the public suffers. The AU Convention expresses the determination of the AU member states to fight public sector corruption by requiring public officers to declare their assets upon assumption of duty, during and after their term in office.³⁷

33 Paragraph 7 of the Preamble to the SADC Protocol. See also paragraph 7 of the Preamble to the AU Convention.

34 Article 4(1)(a) of the SADC Protocol.

35 See Article 1 of the SADC Protocol.

36 Articles 1 and 4(g) of the AU Convention.

37 Article 7(1) of the AU Convention.

It is important to make the declarations during these times in order effectively to analyse wealth increases against income so that illicit acquisitions are detected easily.

Public officers need to be subject to a code of conduct, and the member states of the AU recognised the need for a body that would establish and monitor this code of conduct, and also train public officers on issues of ethics.³⁸ Disciplinary measures can help to keep in line those tempted to deviate from the code of conduct and member states of the AU are encouraged to put in place these measures,³⁹ to ensure transparency, equity and efficiency. Although the SADC Protocol has no clear section in favour of the adoption of assets declaration laws, it nevertheless recognises the role that standards of conduct play, especially for the proper fulfilment of public functions.⁴⁰

2.3.3 Access to Information and the Role of Civil Society

AU member states are obliged to provide for the right of access to information that may be required to combat corruption.⁴¹ Access to information is important in the fight against corruption as it places those in power under the scrutiny of the public, who may take them to task as a result of the information gathered. The states parties commit to work with and encourage participation of civil society; and to create the necessary conditions enabling civil society and the media to work with ease and hold the government to the highest levels of accountability and transparency.⁴²

States parties can promote the right of access to information by allowing the public to have access to declarations. Declarations of assets that are made public operate to promote transparency and accountability on the part of public officers and ensure that they live within

38 Article 7(2) of the AU Convention.

39 Article 7(3) of the AU Convention.

40 Article 4(1)(a) of the SADC Protocol.

41 Article 9 of the AU Convention.

42 Article 9 of the AU Convention. See also Article 4(1)(i) of the SADC Protocol.

their means.⁴³ Nkhata has noted the important role that civil society can play in holding the government and its public officers to account.⁴⁴

2.3.4 Co-operation of Member States

The AU member states are required to co-operate in dealing with requests from one another's national authorities. They are obliged to offer legal mutual assistance to one another for the effective investigation, prosecution and punishment of corruption.⁴⁵ The member states are obliged also to co-operate in matters of extradition and in the confiscation and seizure of proceeds of corruption.⁴⁶ Declarations of assets are relevant here for the identification and the location of proceeds which need to be recovered.

2.4 The Malawi Constitution

The Malawi Constitution (Act No 20 of 1994) was adopted provisionally in 1994 and became fully operational in 1995. It replaced the 1966 Republican Constitution and it is a product of a process of emancipation from the one-party repressive rule of Dr Kamuzu Banda that was marked by an intolerant political culture.⁴⁷ The Constitution is founded upon the following principles.

2.4.1 Constitutional Supremacy and the Rule of Law

A fundamental principle in Malawi's legal system is the supremacy of the Constitution. Hence, any law that is inconsistent with it is invalid to the extent of the inconsistency.⁴⁸ In keeping

43 See Neuman (2002) 8.

44 Nkhata M 'Malawi', available at http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf.

45 Article 10 of the SADC Protocol and Article 18 of the AU Convention.

46 Articles 15 and 16 of the AU Convention and Articles 9 and 10 of the SADC Protocol.

47 Nkhata M 'Malawi', available at http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf.

48 Section 5 of the Malawi Constitution.

with the principle of the rule of law, which holds that no one is above the law, the Constitution emphasises the equal status of everyone before the law.⁴⁹

All public officers are therefore equal before the Constitution and any other law, including the Declarations Act. If the law says all officers must declare their assets within a given time, they must do so or face the consequences of default. The principles of constitutional supremacy and the rule of law promote the implementation and success of the Declarations Act and warrant its application to all officers who fall within its ambit.

2.4.2 Accountability and Transparency

The Constitution is founded upon the core concept that the exercise of all state power is conditional upon the sustained trust of the people, which is maintained through open, accountable and transparent government and democratic choice. Further, all legal and political authority is derived from the people and is to be exercised to serve and promote their interests.⁵⁰

Through the Constitution, the state binds itself to promote the welfare and development of the people of Malawi and to adopt and implement policies and legislation aimed at ensuring that appropriate measures are put in place to guarantee accountability, transparency, personal integrity and financial probity. Such measures are intended to strengthen confidence in public institutions.⁵¹

It is perhaps with this goal in mind that the Constitution and the Declarations Act require that the President and his cabinet, members of the national assembly, and other public officers as determined by the national assembly, declare their assets within three months of assuming office.⁵² Such declarations would promote the people's trust in these offices and ensure that

49 Section 4 of the Constitution.

50 Section 12 of the Constitution.

51 Section 13(o) of the Constitution.

52 Section 88A and Section 213 of the Constitution.

they are transparent and accountable. The aim here is to assure that the officers do not abuse their office for personal gain and that, therefore, public trust in them is maintained.⁵³

Although the Constitution provides for means to ensure transparency and accountability, the implementation of the assets declaration requirement has been problematic in the past because of open disregard for it.⁵⁴ Presidents and public officers, more often than not, were reluctant to abide by this provision. The problem was made worse because the Constitution does not prescribe a penalty for anyone who disregards the requirement. It was thus difficult to determine the extent to which an office had been abused, if at all.

2.4.3 Separation of Powers

This is another fundamental principle of the Constitution. The government has three arms: the executive, the legislature and the judiciary. These arms of government have clearly distinguished duties. The executive initiates policies and legislation and implements the laws in furtherance of the Constitution. The legislature is responsible for enacting laws, while the interpretation, protection and enforcement of the laws are reserved for the judiciary.⁵⁵ The implementation of the current system of assets declaration requires the collaboration of all three organs of the state, and its success depends on their continued co-operation.

The Constitution requires that all derogations from people's rights be provided for by law.⁵⁶ The legislature enacted the Declarations Act, thereby justifying as legal any infringement of public officers' right to privacy entailed in the disclosures. The judiciary interprets and enforces the laws and this includes the interpretation and enforcement of the Declarations Act and any other anti-corruption law. All in all, the separation of powers in Malawi provides constitutional support for the assets declaration system.

53 Nkhata MJ 'Malawi', available at http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf.

54 Nkhata MJ 'Malawi', available at http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf.

55 Sections 7, 8 and 10 of the Constitution.

56 Section 44(1) of the Constitution.

2.5 The Corrupt Practices Act (CPA)

This Act, which became operational in 1996, makes comprehensive provision for the fight against corruption in Malawi. It established a range of corruption offences and created the Anti-Corruption Bureau (ACB), a body that leads the fight against corruption.

The CPA is the first statute in Malawi that contains a comprehensive list of corrupt acts and of means and ways of preventing corruption. As noted in chapter one, the CPA defines corruption in terms of bribery, influence peddling and extortion.⁵⁷ This definition, however, is narrow as it does not account for all acts of corruption that actually are included in the CPA itself. The offences which are catalogued in Part IV of the Act include active and passive bribery, abuse of office, attempted corruption, illicit enrichment, extortion and bribing a foreign officer. It is possible to discover public officers who have committed these acts from an analysis of their assets declarations. Wealth-income discrepancies and conflicts of interests that are detected from the declarations can form the basis of investigations and later prosecutions of these acts. There is, therefore, a dependent relationship between the CPA and the Declarations Act in this regard.



2.6 The Anti-Corruption Bureau (ACB)

This body is established by Section 4 of the CPA and it became operational in 1997, following the appointment of its first director. It was established to receive complaints of corruption, investigate the complaints and prosecute corruption cases. The ACB is mandated also to take measures necessary to prevent corruption in both public and private bodies.⁵⁸ These tasks are carried out through its four divisions: civic education; investigation and prosecution; prevention; and the support section. These are housed in the bureau's offices located in all three regions of Malawi.

The ACB is responsible for disseminating information on the evils of corruption; advising public and private bodies on the means and ways of preventing corruption; and advising them on any

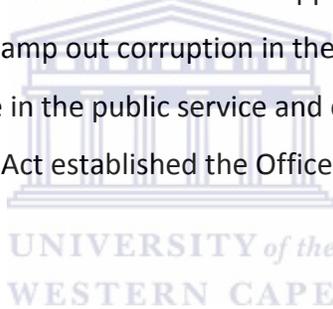
57 Section 1 of the CPA.

58 Section 10 of the CPA.

changes needed pertaining to work methods and procedures assessed to be prone to corruption. The ACB also examines the activities of these bodies with the aim of discovering corruption, and of fostering public support against corrupt practices.⁵⁹ It is empowered to prosecute corruption cases, but such prosecution is subject to the consent and directions of the Director of Public Prosecutions (DPP).⁶⁰

2.7 The Declarations Act and the Office of Declarations

The international legal instruments against corruption discussed earlier in the chapter encourage the adoption of laws that require public officers to declare their assets as a means of combating corruption. Various countries have adopted laws to this effect and Malawi did so in 2013 when the Declarations Act was enacted. This law supplements sections 88A and 213 of the Constitution and its aim is to stamp out corruption in the public service. It is hoped that the law will promote public confidence in the public service and enhance transparency and accountability.⁶¹ The Declarations Act established the Office of Declarations which manages the declarations regime in Malawi.



2.8 The ACB and Office of Declarations

As observed above, the ACB is the body that spearheads Malawi's anti-corruption efforts. The Office of Declarations is one of the bodies established to supplement the work of the ACB, especially its efforts against corruption by public officers. The ACB investigates and prosecutes corruption and in doing so it can rely on information gathered by the Office of Declarations. Section 11(2)(j) of the Declarations Act provides for this. If the director of the Office of Declarations has evidence or suspects any criminal activities upon verifying the declarations, he or she has the power to report the matter to the ACB for further action.⁶²

59 See Section 10 of the CPA.

60 Section 10(1)(f) of the CPA.

61 See the Memorandum of the *Malawi Gazette Supplement* of 11 October 2013.

62 Section 11(2)(j) of the Declarations Act.

2.9 Conclusion

Anti-corruption efforts in Malawi need to be well-grounded if success is to be achieved. A solid basis is provided legally through the various international and domestic instruments that Malawi has ratified or adopted. UNCAC and the AU Convention have standards that require Malawi to adopt measures to criminalise corruption and prevent corruption in both the public and private spheres.

Under these instruments, Malawi is required to establish an anti-corruption body and develop a system for public officers to declare their assets as a way of preventing corruption. In line with these standards, Malawi enacted the CPA and the Declarations Act that established the ACB and the Office of Declarations respectively, bodies responsible for streamlining anti-corruption efforts and the declaration of assets. The principles of transparency, accountability and the rule of law established by the Malawi Constitution create an environment conducive to the application and implementation of these instruments.

This chapter indicates that Malawi has the legal and institutional framework that may steer it to a corruption-free status. However, without the political will to implement the instruments, success will be elusive.

CHAPTER THREE

THE NEED FOR ASSETS DECLARATIONS

3.1 Introduction

Systems of assets declarations for public officers are advocated as an anti-corruption tool. Corruption thrives in institutions which have weak governance structures and which lack transparency and accountability. These systems have gained prominence now as anti-corruption prevention and enforcement mechanisms take centre stage and the promotion of transparency and accountability becomes increasingly important. Assets declarations are a great way to prevent abuse of power and looting of public resources. UNCAC and other international anti-corruption instruments encourage states parties to require their public officers to disclose, among other things, their outside activities, employment, investments, assets, substantial gifts or benefits.¹

This chapter discusses the importance of having public officers declare their assets. The chapter looks also at the characteristics of effective assets declarations systems.

3.2 Importance of Assets Declarations

Systems of assets declarations prevent conflicts of interests and corruption among public officers and help in the detection, investigation and prosecution of corruption. They promote transparency and accountability and foster public trust in the government and the public service.

3.2.1 Assets Declarations, Transparency and Accountability

Bureaucratic institutions need to be grounded in transparency and accountability in order to fight corruption effectively. A country which lacks institutions of transparency and

1 Article 8 of UNCAC. See also Article 4(g) of the AU Convention.

accountability creates room for corruption to flourish, thereby making illicit acquisitions of property easy to conceal. A system of assets declarations is a symbol of transparency and accountability. It brings an aura of openness to the acts of public officers and builds a climate of integrity among them. This is a deterrent against corruption. It discourages the less determined from plundering public resources, and it makes those tempted to steal from the public fearful that their wrongdoing will be revealed.²

3.2.2 Detection of Conflicts of Interests

In many countries public officers are given wide discretionary powers over important matters, enabling them to deal with situations as and when they arise. However, discretion can be abused. Tanzi links corruption to monopoly and discretionary powers of the state.³

Government activities that are characterised by discretion and monopoly carry the risk of conflicts between private and public interests, which create a fertile ground for corruption.

Information gleaned from assets declarations helps to avoid situations that lead to such conflicts by helping the public officers to identify potential conflict areas. Thus, they or others are able to seek ways to avoid the conflicts before they arise.⁴ For example, a public officer's interests in firms or companies are revealed and this information can form the basis on which to exclude the officer from any decision-making process.⁵ In this way, the officer is prevented from awarding himself or herself a public contract.

Regrettably, this did not happen in the case of Malawi's former clerk of Parliament, Mathilda Katopola, who was accused of abuse of office that originated from an award to her own firm of a tender to supply printing services to Parliament during the time she was in office.⁶

2 Messick (2009) 7.

3 Tanzi (1998) 565.

4 Davies (2002) 53.

5 Messick (2009) 7.

6 Dzimbiri (2009) 443.

3.2.3 Detection of Illicit Acquisitions and other Corrupt Conduct

Assets declarations divulge public officers' wealth and assets, allowing for their easy monitoring. The disclosures facilitate the detection, investigation and prosecution of corrupt officers and thus serve as anti-corruption tools.⁷ This is especially important in countries that have criminalised illicit enrichment, as has Malawi.⁸ Assets disclosures help to determine whether an officer has acquired a lot more than his income can justify and can form the basis of illicit enrichment proceedings during which an officer is required to give an explanation for his excess wealth.

The publication of assets declarations made by public officers affords civil society the opportunity to detect officers who are corrupt, especially when their disclosed income does not match their assets or lifestyle as publicly observed. This empowers civil society to hold the government and its servants accountable.⁹

3.2.4 Assets Declarations and Public Trust

Assets declarations foster public trust and confidence in the government and its public services. They indicate that the assets and income of public officers are subject to scrutiny, and that something is being done to forestall conflicts of interests.¹⁰ They engender public faith in the public service as public officers are seen to be living within their means and not squandering public resources. This removes undue suspicions, helps promote the perception of integrity in government and checks allegations of corruption against public officers.¹¹ Assets disclosures also signify the government's commitment to fighting corruption and, thereby, give the public reasons to trust that the government has its welfare at heart.

The maintenance of trust in the government is of paramount importance for Malawi. The Constitution states that the exercise of power is conditional upon the sustained trust of the

7 Messick (2009) 7.

8 Section 32 of the CPA.

9 Transparency International (2013).

10 Barnes *et al* (2012) 8.

11 See Neuman (2002) 8.

people of Malawi.¹² This trust can be maintained only through open, transparent and accountable systems, which include a system of assets declarations.

3.2.5 Assets Declarations and Asset Recovery

Assets disclosures have the potential to support other anti-corruption efforts such as recovery of assets. The information recorded in the declarations made by public officers can aid in the identification and tracking of proceeds of corruption as a prelude to their recovery.¹³ Further, the information may enhance the monitoring of politically exposed persons (PEPs) and assist with bringing to light suspicious transactions in which they become involved. This helps with the identification of corrupt PEPs.¹⁴

3.3 Challenges of Assets Declarations

There are a number of challenges that are attached to implementation of systems of assets declarations. The success of assets disclosures is dependent on the availability of human and financial resources. Substantial administrative costs are incurred in maintaining the system and managing the declarations. This is a challenge for countries with meagre resources. Issues of privacy and security of public officers also pose challenges within these systems.

3.3.1 Assets Declarations and Privacy

A significant drawback of assets disclosures is the invasion of privacy that is inscribed in it. Regardless of whether they are open to the public or not, assets disclosures, by their very nature, constitute an infringement of public officers' basic right to privacy.¹⁵ The privacy of certain third parties is infringed also by the requirement that the officers declare assets of relatives who are not even privy to the contract between the officer and his or her employer.

12 Section 12(1) of the Constitution.

13 This is recognised in Article 52(5) of UNCAC.

14 See Rossi *et al* (2012) 1.

15 De Speville (2002) 35.

Be that as it may, countries still proceed to establish disclosure systems because of the purposes they serve and the contribution they make to the fight against corruption. However, they seek to strike a balance between the invasion of privacy and the need to prevent corruption. In order to mitigate the invasion, Davies suggests that the laws for assets declarations should not be overly intrusive and should call only for information that is strictly relevant.¹⁶

It bears noting that the violation of privacy that assets declarations entail may affect an individual's willingness to join public service for fear of being open to on-going public scrutiny.

3.3.2 Lack of Common Enforceable Standards

Another challenge to be navigated when operating an assets disclosure regime is that there are no agreed international standards or guidelines on how a country should design and implement the regime. Anti-corruption instruments advise on the need to adopt legislation on assets declarations but do not dictate what form such legislation should take. Countries therefore choose whatever is appropriate for them. This allows countries to design the system to suit their local conditions. However, countries which have no political will to implement assets disclosures may opt for inane legislation with lax implementation and never concern themselves about adherence to obligatory minimum standards. This, in the end, leads to inefficient and ineffective systems.

3.3.3 Lack of Political Will

Assets declarations systems are subverted by lack of political will on the part of leaders and politicians who are supposed to implement them.¹⁷ A key factor in combating corruption effectively is the political commitment of political leaders to do so.¹⁸ Leaders are the ones who make and operationalise the laws. They allocate the resources that are needed to enforce the

16 Davies (2002) 53.

17 Chene (2008) 6.

18 De Speville (2002) 34.

laws. If there is no political will, assets declaration laws may be enacted but likely will lack the substance required for success. The leaders probably also will fail to allocate adequate resources to manage and monitor the declarations.

Recalcitrant leaders well may support the enactment of an assets declaration law but then may choose to ignore it completely. This was the case in Malawi. The political leaders failed to declare their own assets as required by the Constitution and no sanction followed. That the defaulters went unpunished was attributed to lack of political will on the part of the political elite.¹⁹

3.4 Characteristics of Effective Assets Declaration Systems

Despite the lack of common standards, there are certain characteristics that have come to be regarded as important for effective assets disclosure systems. In this regard, countries need to make fundamental decisions about the specific objectives of the system; the public officers who will be required to make the declarations; the content of such declarations; how public the declarations will be; how the information declared will be used and managed; when and how frequently the declarations will be made; whether there will be any follow-up mechanisms to ascertain the truthfulness (or otherwise) of the declarations; and whether there will be any penalties for non-compliance. These issues go to the heart of an assets declaration regime and determine how and whether the declarations indeed can achieve what they are meant to achieve.

3.4.1 Clear Objectives

One of the first decisions to be taken pertains to the aims and objectives of an assets declaration system. Without a clear definition of the purpose of the system, it will descend into ineffectiveness.²⁰ There seem to be two distinct purposes of assets declarations: prevention of

19 Daka (2013) 3.

20 Burdescu (2009) 6.

illicit enrichment and prevention of conflicts of interests. A country has to decide whether it will adopt a system motivated by either objectives or both. This decision delineates the form the system takes and prescribes its particulars.

A system with the primary goal of preventing illicit enrichment emphasises means of monitoring a public officer's wealth. Its focus, therefore, is on strengthening the verification of the declarations with the aim of detecting any concealment of assets.²¹

A system that focuses on avoiding conflicts of interests is concerned with providing means which would allow public officers to discover situations that are likely to lead to unethical behaviour. The system is tailored to guide them avoid conflicts that may steer them into corruption.²²

The designated objective of the regime also determines the human resources that are allocated for its implementation. If the purpose is the detection of illicit enrichment, the workforce must include those with skills in assets verifications and investigation techniques. Its members must be conversant also with the legal definition of illicit enrichment and how it differs from other manifestations of corrupt conduct. By contrast, the workforce for a system aiming to prevent conflicts of interests should know the definition of a conflict of interest and be able to recognise its manifestations. Here the personnel must be familiar with procedures for recusal and with the means for eliminating the conflicts they encounter.²³

3.4.2 Ambit of the Law

An assets declaration law has to define clearly who its subjects are. This determination is important for deciding upon the human and financial resources that need to be injected into the system. The target of the law has a bearing on its success in achieving its general objective of curbing corruption. In this regard, the country needs to decide whether it will target all public officers or just some of them. Experience has shown that systems requiring all public

21 Barnes *et al* (2012) 14.

22 Barnes *et al* (2012) 12.

23 See Burdescu (2009) 7-8.

officers to declare assets end up with a vast amount of information that is difficult to verify and monitor.²⁴ Therefore, it is “neither necessary nor practicable to subject all public servants to assets declarations provisions”.²⁵ Whatever number is settled upon, it should not overstretch the capacity of the body that manages the declarations. The decision should consider the resources available, the levels of perceived risk in different areas of the public service and the overall objectives of the system.²⁶

Senior public officers who possess significant decision-making powers need to make declarations because they are likely to find themselves in situations where their private interests and official duties conflict. Officers who have discretionary power to allocate substantial amounts of money and public resources are prone to corruption and must be included as well. The system should encompass also the top officers in the three arms of government and top officers in public companies and departments. Those working in public procurement, taxation and customs collection are at a high risk of corruption and too need to be incorporated into the assets declaration law.²⁷

Low-level public officers may be excluded depending on the resources available. Requiring them to disclose assets may not prevent them from accepting or soliciting petty bribes which do not change their financial standing significantly enough to be detected through assets disclosures.²⁸

3.4.3 Content and Comprehensiveness of Declarations

Assets disclosure legislation needs to spell out what assets, liabilities and interests public officers must declare. The purpose of declarations is to generate information against which later declarations can be compared to identify wealth which cannot be attributed to any

24 Burdescu (2009) 11.

25 Chene (2008) 3.

26 Burdescu (2009) 10.

27 Messick (2009) 11.

28 See Messick (2009) 11.

income sources of an officer.²⁹ Assets disclosure frameworks should be based on the understanding that a declaration is a person's balance sheet. Being so, it should cover all the person's assets, all liabilities and all sources of income. It should extend also to gifts, sponsorship deals, and all areas that have potential for conflicts of interests, such as unpaid employment contracts and even membership of non-governmental organisations.³⁰ The aim is to obtain the whole picture of an officer's finances and wealth. Lack of clarity about what an officer has to disclose threatens the effectiveness of an assets declaration system.³¹

Some jurisdictions require that the actual value of the assets be disclosed, whereas others do not.³² This decision depends on the objective of the system in question. If the goal is to detect and measure illicit acquisitions, then the value of the assets and liabilities has to be revealed.³³ However, when the purpose is to detect and avoid conflicts of interests, the value of the assets does not matter because the conflicts are discoverable even if the value is not disclosed. Here sources of the assets are more significant than their actual value.³⁴

An important issue with regard to the content of declarations is whether or not to include information on the assets of family members of public officers. The fear of invading the privacy of such family members counts against extending the disclosures to them. However, there is a danger that when assets of family members are excluded, public officers may evade the law by registering their property in the name of family members.³⁵ This both defeats the essence of assets declarations and distorts the intended results. It is argued also that the finances and property of a couple are so intertwined anyway that any separation is artificial, which counts in favour of disclosing the assets of a spouse.³⁶ It seems good practice to disclose assets of

29 Chene (2008) 2.

30 Transparency International (2013). See also Chene (2008) 4.

31 Chene (2008) 2.

32 Malawi, for example, requires that the value of the assets be disclosed.

33 De Speville (2002) 36.

34 Burdescu (2009) 11.

35 Burdescu (2009) 9.

36 Messick (2009) 11.

specified family members, especially when the goal of the system is to measure illicit enrichment.³⁷

3.4.4 Filing Frequency

The frequency with which assets declarations must be made will depend upon a number of factors. For example, the need to have up-to-date information and the need to achieve desired goals have to be considered. In addition, care has to be taken not to overburden the agency managing the declarations or place an enormous burden on the designated public officers.³⁸

While it is common and desirable for declarations to be made upon the declarant assuming and on leaving public office, there are differences as to what happens in between. Some countries opt for *ad hoc* declarations that must be filed whenever there is an increase in the assets of a public officer, while others opt for fixed-date declarations.³⁹

The *ad hoc* declarations have the advantage that they are filed when necessary, which lessens the work that the Office of Declarations has to do. However, they carry a real danger of non-compliance since the onus to file a declaration rests completely on the public officer. What is more, non-submission cannot be queried since there are no filing deadlines. Disclosures that are filed at determined times generate lots of work for the responsible agency because declarations come even from those who have had no significant change in their assets profile.⁴⁰

Whatever filing option is chosen must depend on local circumstances, but periodic declarations must be required of designated public officers. Such declarations ensure that the information regarding an officer's wealth remains current and promotes the effectiveness of the system in detecting illicit accumulation of wealth and conflicts of interests. It is imperative, therefore, that any system of assets disclosure provide for recurrent filing in pursuit of its chosen goals.

37 De Speville (2002) 35.

38 Messick (2009) 11.

39 Barnes *et al* (2012) 38.

40 Burdescu (2009) 37.

3.4.5 Verification and Review of Declarations

Any credible assets declaration system has to provide for contents verification. The verification of contents of declarations has been associated with lower perceived levels of corruption.⁴¹

The review and verification process scrutinises and confirms the authenticity of the recorded information. Through the review process, comparisons are made with information generated from earlier declarations and this may lead to the discovery of irregularities and falsities.⁴²

Barnes *et al* outline a number of approaches that can be employed in the verification processes. To begin with, the verification may include checking the individual declarations for internal consistencies in the responses. It may also involve comparing two or more declarations of an individual to monitor the changes over time. Valuable information can be gathered also by comparing the declarations with external sources such as banking databases and land registers. Further, the declarations may be analysed for any incompatibilities. Lastly, lifestyle checks can be conducted to verify that an officer's lifestyle is consistent with the declarations.⁴³

What approach is chosen will depend on the resources at hand, on the availability of external data sources and on the country's laws. The constitution of each system also matters. If the system has generated a large number of declarations, a risk-based approach could be applied to make verification cost-effective.⁴⁴ This may involve prioritising the verification of declarations of top officers or of those whose duties put them at high risk of corruption or of those working in particular agencies.

If the verification process is to succeed, those attending to it need to know what they are doing and for what they are looking. A system that revolves around illicit enrichment has to look for any changes in an officer's wealth over time to detect any questionable acquisitions. A system that focuses on conflicts of interests will be concerned with information about the declarant's

41 Chene (2008) 3.

42 Chene (2008) 2.

43 Barnes *et al* (2012) 60.

44 Barnes *et al* (2012) 62.

business interests, ownership of shares or property and membership of companies or organisations.⁴⁵

3.4.6 Enforcement

An effective system of assets declarations should include a credible threat of consequences for violations. In other words, the system needs to be crafted with appropriate and proportionate sanctions that are applied consistently in order to ensure compliance with disclosure requirements. Sanctions play an important role in guiding human behaviour and a law without enforcement measures can be disregarded with impunity.⁴⁶ Sanctions confer legitimacy on assets declarations systems.⁴⁷ They also impose punishment on corrupt officers who falsify information to hide their improper acquisitions, which need to be exposed when the actual underlying acts of corruption cannot be proved.⁴⁸

A number of considerations are important here. The specific behaviours that warrant punishment need to be determined and defined clearly. Examples of punishable behaviours include late filing, non-filing, incomplete declarations and falsified declarations. When these are determined, the type of sanction to suit the behaviour needs to be stipulated.⁴⁹ The possibilities encompass administrative sanctions, criminal sanctions and reputational penalties. Administrative sanctions are likely to ensure compliance in countries where criminal cases take time; they can be applied expeditiously and without the rigorous procedures that accompany court sanctions. Administrative sanctions include suspension of salary, demotion, dismissal and disqualification from public office. Reputational sanctions include the publication of names of defaulters. These, however, can work only in countries with a generalised culture of compliance, where a social stigma attaches to the violations.⁵⁰ Needless to say, the severity of

45 Barnes *et al* (2012) 67.

46 Carr (2007) 230.

47 Mukherjee & Gokcekus (2008) 2.

48 Burdescu (2009) 39.

49 See Burdescu (2009) 13.

50 Barnes *et al* (2012) 76.

the sanctions needs to be regulated also, in the sense that they should be proportionate to the infringement.

Inter-agency co-operation would be needed in countries where the declarations agency does not enforce any sanctions but relies on other agencies, such as the police and the courts. The participating agencies would need to establish a working relationship and collaborate for successful implementation of the sanctions.⁵¹

3.4.7 Public Access

The effectiveness of assets declarations has been related partly to the amount of access that members of the public have to them.⁵² Allowing for the public to have sight of declarations is a way of allowing the public to participate in the implementation of anti-corruption measures. A civil society with access to declarations can scrutinise them and contribute to their verification by relaying useful information to the Office of Declarations. A civil society with access to declarations is given an opportunity to focus its attention on the conduct and lifestyles of the public officers and thereby to engage practically with anti-corruption policies. Such engagement may affect voting decisions and empower citizens to hold their elected public officers accountable.⁵³

Publicised assets declarations encourage compliance. With the knowledge that the declarations they make will be disclosed, public officers are more likely to comply with the requirements of the system and are less likely to lie for fear of being found out through public scrutiny of their declarations. Publication ensures that political leaders and public officers do not abuse their powers.⁵⁴ It allows the media and civil society to enforce and enhance the assets declaration programme.⁵⁵

51 Barnes *et al* (2012) 72.

52 Mukherjee & Gokcekus (2006) 3.

53 Barnes *et al* (2012) 84.

54 Transparency International (2013).

55 Messick (2009) 9.

Open access declarations increase the perceived credibility of the system. They promote public trust and confidence in the declarations programme and in the public service. Further, they have a positive impact on the fight against corruption, in that countries that allow public access to assets declarations tend to have significantly lower levels of corruption than those that deny or restrict it.⁵⁶

However, it must be noted that there are a number of dangers associated with public access to assets declarations. For example, it may endanger the personal security of declarants. Some countries with high crime levels have opted not to publicise the assets disclosures for fear that the public officers in question would become targets of thieves and robbers. Colombia and Haiti decided against making the disclosures public for this reason.⁵⁷ This is a danger which cannot be ignored. If open access would put the lives of the public officers at risk, it needs to be reconsidered. Alternatives could be to allow public access only to the declarations of a few high-ranking elected public officers whose safety can be guaranteed; or to place restrictions on the use of and access to declared information; or to disclose only a part of the declared information. In some cases the declarations remain confidential.⁵⁸ However, this option comes with the risk of losing the confidence of the people.

Another disadvantage of publicising declarations is that it erodes the privacy of the declarants.⁵⁹ A country wanting to implement an assets declaration system has to consider whether the need for an effective regime open to the public overrides the right to privacy of the public officers. A sensible balance has to be struck. Open access works only if an active civil society and independent media are available to use the publicised declarations to pursue the purpose of publication.⁶⁰

56 Mukherjee & Gokcekus (2006) 327.

57 Messick (2009) 9.

58 Guatemala keeps declarations confidential unless a court order rules otherwise. See Barnes *et al* (2012) 91.

59 See Messick (2009) 9.

60 Barnes *et al* (2012) 86.

3.4.8 Institutional and Technical Requirements

There are certain institutional and technical factors that contribute to the success of an assets disclosure system. Thus, for example, it needs well-trained personnel who are professional and independent enough to carry out their tasks, which often are politically sensitive.⁶¹ Coping with the onerous responsibility of reviewing and verifying submitted declarations depends crucially on the availability of a competent work force.

Financial resources are also important. Without adequate funding, any assets declaration system will function poorly.⁶² These systems thrive when there are sufficient and predictable budget allocations. They can perform their functions and achieve their goals only to the extent that their human and financial resources allow.

Technological requisites must be addressed too. There is a need for investment in computers and computer programmes to allow for timely and accurate filing, to facilitate the verification exercise and to manage the collected data easily. Electronic submission of declarations reduces the workload of system staff. Technologically-based systems are also public-friendly, facilitating ready online access to data. Use of computers enables easy tracking and monitoring of the performance of the managing agency.⁶³

3.5 Conclusion

Despite the challenges that come with implementation of assets disclosure systems, they remain a great tool for preventing corruption and promoting public trust and confidence in the public sector and the government.

The discussion in this chapter indicates that implementing an effective system of assets disclosure is dependent on a number of factors. A successful system, it seems, allows for content verification, public access and the compulsory filing of periodic declarations. However,

61 Burdescu (2009) 19.

62 Barnes *et al* (2012) 40.

63 Barnes *et al* (2012) 48.

crucial system components must be contextualised always. Each country must develop a system of assets declaration that fits and works for it.



CHAPTER FOUR

THE DECLARATIONS ACT¹

4.1 Introduction

This chapter discusses the Declarations Act which regulates disclosure of assets by public officers in Malawi. A brief background to this Act is given below, followed by a discussion of its contents with a focus on its strengths and weaknesses.

4.2 Background of the Act

The work leading to the Declarations Act started as early as 2006, when a Special Law Commission was established to consider and make recommendations on the creation of legislation and a body that would regulate the declaration of assets for public officers.² In 2008, the Commission produced a report containing its recommendations and attached a proposed bill to the report. This bill was debated by Parliament and the passage of the Act followed in 2013.

4.3 Objectives and Principles

The overarching objective of the Declarations Act is to promote public confidence in the public service, which comprises elected and public officers.³ The guiding principles of the Act are integrity, honesty, accountability, responsibility, fairness, transparency, rule of law, professionalism and impartiality in relation to public officers. These principles are included to reinforce the implementation of the Act and to actualise its objectives.⁴ They embody values

1 Public Officers (Declaration of Assets, Liabilities and Business Interests) Act 22 of 2013.

2 See the Report of the Law Commission (2008) 7.

3 See Section 3 of the Declarations Act.

4 See the Report of the Law Commission (2008) 11.

that any country serious about ending corruption needs to consider and adopt for its public service.

The drafters of the Act recognised that these principles are necessary in order to prevent public officers from using their positions to enrich themselves or others; to place themselves in situations of conflict between their personal interests and their official duties; or to involve themselves in activities that are inconsistent with their office. The Act is meant to enable public officers to avoid misusing or misappropriating public property and to prevent them from receiving concurrent payments from their office and private employment or businesses, unless they make disclosures.⁵

4.4 The Office of the Director of Public Officers' Declarations

One of the key features of the Declarations Act is the establishment of the Office of the Director of Public Officers' Declarations (Office of Declarations).⁶ This office became operational in 2014. It comprises the director, the deputy director and other officers as suitably appointed to put into effect the objectives of the Act. The establishment of an office that is tasked with the sole duty of managing declarations by public officers and its attendant obligations is a good initiative because its undivided focus is on declarations.

The Office of Declarations is not affiliated or attached to any other body, which promotes its autonomy.⁷ Declarations bodies need independence to fulfil their mandates.⁸ In Malawi, independence of the Office of Declarations is necessary to enable it carry out its many functions, including the often politically sensitive task of reviewing declarations.⁹

5 Section 4(2) of the Declarations Act.

6 Section 6(1) of the Declarations Act.

7 See Section 6(3) of the Declarations Act.

8 Burdescu *et al* (2009) xi.

9 Regrettably, attempts to influence the Office of Declarations have been reported already. Kamlomo (2014) notes the existence of political pressure to compel the Office to extend the deadline for submissions of the first declarations under the new Declarations Act.

4.4.1 Duties of the Director

The Declarations Act outlines an elaborate list of the duties and functions of the director of the Office of Declarations. He is responsible generally for the regulation, enforcement and monitoring of declarations.¹⁰ His specific duties include receiving, verifying and managing declarations; advising public officers concerning their obligations under the Act; and providing technical assistance to listed public officers on the correct method of filing declarations and their obligations as a way of soliciting their compliance with the Act. In addition, he can make recommendations to the Minister on the development of rules and regulations necessary for the proper implementation of the Act. This ensures that the Act is up to date and that it responds to organisational needs and changing circumstances. The director also is to ensure that the Act is accessible to the general public.¹¹

The director has the further duty to submit annual assessment reports of compliance by public officers to the Minister and to publish the names of public officers who have made declarations and those who have not. However, and inexplicably, the Act fails to identify the Minister to whom the director is to present his report or make his recommendations. Presumably it is the Minister of Justice.

These duties of the director accord with the functions of assets declaration bodies. According to Barnes *et al*, the core functions of these bodies include: providing guidance on fliers and public outreach; submission compliance management; content verification; management of public access to data; inter-agency co-ordination for enforcement of sanctions; and reporting on compliance and agency performance.¹² The Declarations Act incorporates these functions which, if implemented, will enhance its effectiveness.

The deputy director's duty is required to assist with tasks as assigned to him by the director from time to time.¹³

10 Section 11(1) of the Declarations Act.

11 Section 11(2) of the Declarations Act.

12 Barnes *et al* (2012) 54.

13 See Sections 6(2) and 11(1) of the Declarations Act.

4.4.2 Appointment of Officers

The director and deputy director of the Office of Declarations are appointed by the Public Appointments Committee (PAC). The PAC is a body consisting of members of Parliament from different parties and this gives it independence from the ideology of a specific political party. Its sole duty is to make public appointments. It appoints the two senior officers of the Office of Declarations from nominations made by the public in response to an advertisement published by the clerk of Parliament.¹⁴ Their terms and conditions of employment are determined by the PAC.¹⁵

Entrusting the PAC with the appointments secures the independence of the office. It limits the use of discretionary power, which usually breeds dependence, in the appointments. It ensures that the appointments are based on merit and are not determined by the interests of some or other individual.¹⁶ This method of appointment compares favourably with the appointment of the director of the ACB by the President, which has been criticised heavily as undermining the independence of the bureau.¹⁷

The director and his or her deputy have to be persons of high integrity and properly qualified for the job.¹⁸ The office was established to promote people's confidence in the public service and requiring these senior officers to have integrity makes sense in relation to this designated purpose.

It is integrity that will help the top officers develop a work ethic that will enable them to enforce the law without fear or favour, affection or ill-will. Such a work ethic is necessary if the Act is to achieve its objectives. Of great importance is the fact that they are public officers and thus bound by the provisions in the Act to which all public officers are subject.¹⁹ Thus, they are not expected, among other things, to enrich themselves or compromise their official duties

14 Section 7 of the Declarations Act.

15 Section 7(4) of the Declarations Act.

16 See OECD (2011) 41.

17 See Daka (2013) 26.

18 Sections 7(3) and 7(8) of the Declarations Act.

19 Section 4(2) of the Declarations Act.

with personal interests or activities inconsistent with their positions. They, too, are accountable to Parliament and have to submit assets declarations to it.²⁰

The provision in the Act granting the President the power to appoint any acting director or acting deputy director may undermine the otherwise independent Office of Declarations.²¹

4.4.3 Removal of Officers

The Declarations Act allows for the removal of the director and his or her deputy on account of three reasons: gross misconduct, inability to perform and disqualification.²² The director and the deputy director are deemed to be disqualified if, had they not been in office, they would not have qualified for appointment. This suggests that they can be removed if they lose their record of integrity, which is a requirement for appointment.

Only the PAC has a mandate to remove them from office.²³ This protects the tenure of the officers and limits opportunities for political interference in their dismissal, which can erode independence. The Act, however, has not defined what sort of behaviour would amount to gross misconduct. This leaves room for abuse, allowing for them to be removed from office on flimsy grounds, as long as the PAC deems them guilty of gross misconduct.

Another problematic aspect of the Act is its provision empowering the President to suspend the director and deputy director.²⁴ Granting such discretionary powers to the President, who did not appoint the officers nor determine their terms of employment, seems odd and may be open to abuse. The President may choose to replace them, temporarily at least, with persons whom he knows he can influence.

20 See Sections 14(7) and 6(3) of the Act.

21 Section 9 of the Declarations Act.

22 Section 8(1) of the Declarations Act.

23 Section 8 of the Declarations Act.

24 Section 8(2) of the Declarations Act.

4.5 Monitoring Committee

This Committee is established by the Constitution. It is a committee of Parliament appointed by the National Assembly and has the overall function of monitoring compliance with the requirements governing the disclosure of assets.²⁵ This is to be commended.

The Declarations Act gives the Monitoring Committee the duty to monitor the powers and duties of the director of the Office of Declarations.²⁶ The director is to submit an annual declarations report to this Committee. This requirement operates as a check against laxity on the director's part and fosters adherence to the Act. The Monitoring Committee is tasked also with confirming that all public officers are in compliance with the Act and taking any appropriate action to enforce compliance by them.²⁷

4.6 Subjects of the Act

One of the important questions to be settled before the enactment of any declarations legislation is who has to declare assets. It has to be decided whether the law will require all public officers to make disclosures or just some of them.

The Declarations Act does not require all officers to make disclosures, and rightly so. Malawi's public service is vast and enjoining all public officers to make declarations could have entailed serious enforcement challenges for the newly established Office of Declarations.²⁸ The Act does specify that those chosen must make disclosures regardless of whether they are temporary or permanent, paid or unpaid, whole- or part-time. These "listed public officers" include all the three heads of government, namely, the President, the Speaker of Parliament and the Chief Justice; all judicial officers; and all ministers and members of Parliament.²⁹

25 Section 213(4) of the Constitution.

26 Section 13(1) of the Declarations Act.

27 Section 13(2) of the Declarations Act.

28 See the Report of the Law Commission (2008) 13.

29 See Section 5 of and the First Schedule to the Declarations Act.

Although the Act does not require all public officers to declare assets, the list of those required to do so is vast. Disclosures infringe upon the right to privacy and this infringement should be carried out only as, and to the extent, necessary.³⁰ According to Davies, only those public officers who work in positions that carry a significant risk of conflicts of interests should be required to disclose their assets.³¹ The Act, however, includes even officers who are not prone to corruption.

The command that all police officers above the rank of superintendent, all public officers of the same grade as director and head of department, and executives and board members of all public bodies declare their assets, regardless of the work that they do, seems an unnecessary invasion of their privacy. It may overburden the Office of Declarations with thousands of submissions which it may be unable to verify and manage. Instead of requiring such a wide range of officers to declare assets, “a pragmatic recognition of internal enforcement” could have worked to guard against conflicts of interests or corrupt acts.³²

Among the public officers who are required to make declarations are leaders and treasurers of political parties that are represented in Parliament.³³ It is questionable if these political officials are public officers under the Declarations Act, which defines a public officer as any member or employee of the government, statutory body or any body appointed by the government.³⁴ It would be stretching this definition too far to apply it to leaders and treasurers of political parties. Their inclusion as subjects of the Act could be interpreted as over-zealousness on the part of the drafters of the Act in their quest to cover as many individuals as possible.

4.7 Content of Declarations

The content of the declarations should be relevant to their purpose and only such information as serves and furthers the objectives of the Act should be solicited. The declarations already

30 De Speville (2002) 35.

31 Davies (2002) 53.

32 Mukherjee & Gokcekus (2006) 327.

33 See section 5 of and First Schedule to the Declarations Act.

34 Section 2 of the Declarations Act.

call for very personal information from the public officers, and they should not be burdened further with questions that are useless and irrelevant. The officers need to comply with the declarations law and inconsequential questions may de-motivate them. Questions, therefore, need to be simple and pertinent.³⁵

For easy identification, the Act requires public officers to give their names, positions, date of appointment or election to office and information on any previous posts held.³⁶ The Act requires that the initial disclosures be made of all the assets that the officers or their immediate family members own partly or fully or have financed recently. Assets which the officers own in their own or different names and assets which the officers or their immediate family members have sold or transferred 24 months prior to the declaration need to be disclosed too.³⁷

Assets are defined as “holdings of value, whether tangible or intangible, movable or immovable, including cash, property, goods, savings, investments, equipment, as well as other quantities possibly having no market value, pre-paid expenses, or goodwill”.³⁸ This definition is wide and general enough to cover all assets that a public officer possesses or would possess. Assets to be declared include all income received by the officer or any immediate family member, all bank accounts held singly or jointly, and all shares, stocks, bonds, treasury bills and life insurance policies held by the officer severally or jointly with a family member or a business partner or anyone else.³⁹

The particulars of liabilities and debts of the officer and immediate family members have to be disclosed. Other likely sources of income of the officer have to be declared also. The officer thus is required to declare all business interests, including any commercial or any entrepreneurial activities 12 months prior to the declarations. The Act defines business interests as:

35 See Davies (2002) 53.

36 Section 15(1) of the Declarations Act

37 Section 15(1)(e) of the Declarations Act.

38 Section 2 of the Declarations Act.

39 Section 15(1)(e) of the Declarations Act.

“Participation with any individual in a commercial enterprise or venture, or participation in any association, institution, organisation or entity, whether of a commercial nature or otherwise, regardless of whether a pecuniary benefit or other assets are derived from such participation.”⁴⁰

This definition covers possible sources of conflicts between the public officer’s private interests and public obligations.

The requirement that the officers disclose the assets of immediate family members is commendable. The Act recognises the practice by corrupt officers of hiding assets under the names of family members and other individuals.⁴¹ The inclusion of immediate family members is therefore important to further the objectives of the Act. It has been argued also that the assets and finances of husbands and wives are so intertwined that separating them is artificial.⁴² This argument supports disclosing the assets of family members. Corrupt public officers could use friends or non-immediate family members to conceal assets, since these parties are not covered by the Act. However, for proper management of the Act, a cut-off point had to be established to avoid enforcement problems and unnecessary invasions of privacy.⁴³

The information required in follow-up declarations that public officers must make annually and upon expiry of service is different from the initial declaration. The follow-up declarations merely require a description of any additional assets acquired or sold, any additional liabilities incurred and any business interests acquired.⁴⁴ There is no reference to assets or liabilities of family members in the form that solicits this information. This is a loophole that can be exploited by public officers. They can register their assets in the names of family members after the initial declaration is made since they know they will never be obliged to disclose such assets in subsequent declarations. This loophole diminishes the requirement for disclosure of family members’ assets in the initial declaration and it weakens the effectiveness of the Act in preventing illicit acquisitions of wealth.

40 Section 2 of the Declarations Act.

41 OECD (2011) 14.

42 See Messick (2009) 11.

43 See Messick (2009) 11.

44 Section 14(3) and Section 14(4) of the Declarations Act. See also the Third Schedule to the Declarations Act.

4.8 Timing and Frequency of Declarations

The time when declarations are made and the frequency with which they are made determine their effectiveness. To achieve their purpose, declarations must be made upon the public officer taking office, at regular intervals thereafter, upon his leaving the public service and, sometimes, even at a specified time after his leaving the service.⁴⁵ This must be done in order easily to compare and measure any increases in an officer's wealth against his income.

Under the Declarations Act, public officers are required to submit their declarations within three months after assuming office and within three months before expiry of service, unless another declaration already has been made in this period of time. Should his employment be terminated without notice, the officer is to disclose assets and liabilities within thirty days after the termination, unless there is a recent declaration already. Annual declarations are to be filed within thirty days after the commencement of each financial year, unless another declaration has been made in the last three months.⁴⁶

Requiring officers to make disclosures at appointment and at yearly intervals is a great improvement upon the constitutional provision that merely requires the President, the cabinet, the legislature and some senior public officers to make declarations within three months of assumption of office. This constitutional rule has been criticised severely as giving room for abuse,⁴⁷ since public officers still could enrich themselves illicitly, knowing that they would not be compelled legally to make follow-up disclosures. The requirement of yearly declarations thus is to be welcomed, although the information solicited is somewhat deficient, as explained above.⁴⁸

The declarations have to be retained for a period of seven years after a declarant ceases to be a public officer, or for longer than seven years should the declarations be subject to on-going investigations.⁴⁹

45 De Speville (2002) 35.

46 Section 14 of the Declarations Act.

47 See the Report of the Law Commission (2008) 15.

48 See page 58 above.

49 Section 16(1) of the Declarations Act.

4.9 Content Verification

Verification of the content of declarations is necessary because it assesses their truthfulness. Also, it has been linked to reduced levels of corruption.⁵⁰ A good regime of declarations therefore must have means of determining whether the information provided is accurate. Without such means of verification, public officers can submit false information without being exposed, thereby defeating the core purpose of obtaining a true account of an officer's wealth and income and an outline of his interests. The Declarations Act gives the director of the Office of Declarations the duty to verify the information submitted by public officers.⁵¹

Proper verification can take place only if particulars are given regarding the value of the declarant's assets, liabilities and business interests.⁵² The Act facilitates verification by requiring that all disclosures be accompanied by the necessary particulars. Thus, disclosed assets must be described fully. Their location, date of acquisition, cost and present value, as well as their source, must be recorded.⁵³ The amount of money received for disposed assets needs to be disclosed also. Particulars for easy verification of liabilities are required.⁵⁴ These include the details of the debtor and the date on and circumstances in which the debt was incurred. For business interests, the nature and location of any businesses have to be revealed.

The Declarations Act further gives the director of the Office of Declarations the power to order the production of any information, documents or testimony relating to submitted declarations from a public officer, a governmental agency or private companies or any other person.⁵⁵ This power can be used by the director to verify the accuracy of such declarations.

The Declarations Act provides well for the verification of the contents of declarations. Its stipulations in this regard promote its purpose of preventing corruption and ensuring integrity among public officers.

50 Mukherjee & Gokcekus (2006) 327.
51 Section 11(2)(b) of the Declarations Act.
52 Mukherjee & Gokcekus (2006) 13.
53 Section 15(e) of the Declarations Act.
54 See Section 15(e) of the Declarations Act.
55 See Section 12(b) of the Declarations Act.

4.10 Use and Efficacy of Declarations

An effective declarations system requires a definite plan for how the disclosures will be used. The declarations are not meant to be shelved and gather dust. They need to be reviewed, which may involve comparing them with other databases in order to identify which wealth is not attributable to lawful income.⁵⁶

The Declarations Act authorises the director of the Office of Declarations to report any evidence or any reasonable suspicions of criminal activity by a public officer to the DPP, the police, or the director of the ACB, upon verifying the declarations.⁵⁷ This provision is important because it indicates the relevance of declarations in initiating the process of investigating and prosecuting public officers for corruption.

4.11 Public Access

UNCAC recognises the need for states parties to partner with non-governmental organisations and the general public in the fight against corruption.⁵⁸ Under Malawian law, the declarations are treated as public information and can be accessed by the general public upon an application to the director of the Office of Declarations specifying the information sought and the reason it is wanted.⁵⁹ The public may access the declarations also through the director's annual publication of a summary of each public officer's filed declarations.⁶⁰ These provisions allow the public to exercise an oversight role over public officers and help to uncover acts of illicit enrichment. They promote transparency and ensure that public officers do not hide behind a veil of secrecy while accumulating wealth corruptly.

56 Chene (2008) 2.

57 Section 11(2)(j) of the Declarations Act.

58 Paragraph 10 of the Preamble to UNCAC.

59 Section 17 of and the Fourth Schedule to the Declarations Act.

60 Section 11(2)(g)(iii) of the Declarations Act.

Declarations violate the right to privacy. The infringement of the public officers' right to privacy is aggravated when the declarations are made public.⁶¹ However, the Constitution of Malawi allows for limitation of rights if prescribed by law, as the Declarations Act does in this case.⁶²

A danger associated with public access to declarations is that members of the public may use information from the declarations to threaten the security of the officers. To prevent this possibility, the Declarations Act makes it an offence to misuse or abuse the information in the declarations in whatever way. A person seeking access to the declarations has to undertake to use the accessed information to further the interests of the Act and for no other purpose. Any member of the public who misuses or abuses the declarations is liable to two years' imprisonment and a fine of Malawi K500 000.⁶³ This punishment is appropriate and severe enough to deter those who may want to misuse the information.

However, the Declarations Act provides for an unnecessary limitation upon public access to declarations. To be granted access, one has to make an application to the director of the Office of Declarations. The director has absolute discretion whether to grant the application or not; and he can disallow the application if there are reasonable grounds to do so, taking into consideration the objectives of the Act.⁶⁴ There is the danger here that the director's discretionary powers can be abused. Although any person aggrieved by the decision of the director in this regard can seek judicial review from the courts to determine whether the director abused his powers or not,⁶⁵ the restriction does undermine the need for public access to the declarations.

4.12 Enforcement

The constitutional provisions on declarations had no enforcement mechanisms. To remedy this omission, the Declarations Act provides means of enforcing its declarations requirements. It is the fear of consequences that compels people to abide by laws and regulations. Without

61 Messick (2009) 9.

62 Section 44 of the Constitution.

63 Section 18(4) of the Declarations Act.

64 Section 17(2) of the Declarations Act.

65 Section 17(4)(b) of the Declarations Act.

enforcement mechanisms, a law is undermined easily by massive default. Assets declaration laws have failed in some instances due to lack of effective sanctions for intentional non-disclosure.⁶⁶

The lack of effective sanctions and of clarity over prosecution of offences can hamper the effectiveness of assets declarations.⁶⁷ Levels of corruption were found to be lower in countries that allowed for prosecution of officers who offended against declarations laws.⁶⁸

4.12.1 Director's Powers of Enforcement

One of the main duties of the director of the Office of Declarations is to enforce the Declarations Act. In this connection, the director has the power to refer any public officer who has not complied with the Act to “relevant employment authorities with recommendations for appropriate sanctions”.⁶⁹ He also can report the public officer to the Monitoring Committee.

The director has the power to order an inquiry into any alleged or suspected act of non-compliance with the Act. Also, he can order a public officer to amend any declaration that is procedurally and substantively defective;⁷⁰ he can order the production of any information or document relating to the declarations from any person or body;⁷¹ he can order a public officer to submit declarations; and he can publish the names of those who have not complied with the Act in the Gazette.⁷²

4.12.2 Offences and Sanctions

The Declarations Act establishes a number of offences and sanctions as enforcement mechanisms. Thus, in terms of section 18(1), a public officer who fails to submit a declaration

66 Chene (2008) 5.

67 Chene (2008) 2.

68 Mukherjee & Gokcekus (2006) 327.

69 Section 11(2)(i) of the Declarations Act.

70 Gondwe (2015) refers to the director's intention to use this power to ask the President, who submitted his declaration without any information on his wife's assets, to amend the declaration.

71 Section 12 of the Declarations Act.

72 Section 11(2)(g) of the Declarations Act

of his assets and liabilities without reasonable cause, commits an offence and is liable to be dismissed from public office. Although the section is not clear as to who effects the dismissal, it can be read with the section that gives the director the power to report any act of non-compliance to the employer of the public officer and recommend sanctions. In this case, the director would recommend dismissal of the public officer to the employer. Dismissal is one of the administrative sanctions in the Act.

In addition to dismissal, the officer is to be disqualified from holding any public office for a period of three years. If the officer is convicted of an offence, the disqualification period will be increased to seven years.⁷³ There is a lack of clarity here regarding the offence that would lead to the seven-year disqualification period. The section in question merely refers to “an offence”, which could mean the offence established in the section or any other offence established in the Act or even any offence in another Act. There is a need for clarity here, especially considering that its absence can hinder the effectiveness of a declaration of assets law.⁷⁴

Another offence in the Declarations Act relates to the submission of inaccurate or misleading declarations. Any public officer who submits such a declaration commits an offence and is liable to a fine of Malawi K500 000 and imprisonment for two years upon conviction. Further, he will be liable to dismissal,⁷⁵ he will be disqualified from holding public office for a period of seven years, and he will be referred to the police, ACB or the DPP for further investigation.⁷⁶

Anyone who is granted access to the declarations and abuses or misuses the information so accessed commits an offence punishable with a fine of Malawi K500 000 and imprisonment for two years.⁷⁷ The inclusion of this offence in the Act is to be applauded because it safeguards the interests of public officers and shields them from violations. The Act has not described or defined explicitly the acts which would amount to abuse and misuse of the accessed information. However, any person who applies for access to any public officer’s declaration has

73 Section 19 of the Declarations Act.

74 Chene (2008) 2.

75 Section 18(2) of the Declarations Act.

76 Section 19 of the Declarations Act.

77 Section 18(4) of the Declarations Act.

to declare that he or she is going to use the information sought only to further the objectives of the Act. This suggests that any use of the information for a purpose other than furthering the objectives of the Act is encompassed by this offence.

To have a deterrent impact, sanctions for non-compliance with declaration rules have to be as severe as possible.⁷⁸ The sanctions in the Declarations Act are severe enough to compel public officers to abide by the requirements. The fear of dismissal and disqualification from public office is enough to force officers to submit accurate declarations.

4.13 Protection of Whistle-Blowers

The Declarations Act recognises the important role that whistle-blowers can play in the promotion of its objectives. It thus encourages anyone who believes or suspects that a declarant has furnished false or inaccurate information to make a report to the director of the Office of Declarations.⁷⁹ This provision indicates the importance of public access to declarations.

The Act goes on to grant protection to whistle-blowers. No person is obliged or permitted to disclose the identity of a whistle-blower in any administrative or court proceedings. And, if a person knows the identity of a whistle-blower and punishes or victimises him or her, such person commits an offence.⁸⁰ The Act, in fact, makes it a crime to disclose the identity of a whistle-blower and anyone who does so is liable to imprisonment for two years and a fine of Malawi K500 000.⁸¹ Conversely, in order to protect public officers from false accusations, the Act makes it an offence for whistle-blowers to furnish the Office of Declarations with false information. This offence is punishable with a fine of Malawi K500 000 and imprisonment for two years.⁸²

78 Chene (2008) 5.

79 Section 20 of the Declarations Act.

80 Section 20 of the Declarations Act.

81 Section 21 of the Declarations Act.

82 Section 22 of the Declarations Act.

4.14 Conclusion

The enactment of the Declarations Act was a step forward in the fight against corruption. Its establishment of the Office of Declarations, its requirements for public officers to file declarations upon entering and leaving public service as well as annually while in service, and its provision allowing for public access to the filed declarations all are meant to ensure that public officers do not use their positions to enrich themselves. Public officers must disclose also the assets and liabilities of their immediate family members. These and other features of the Act discussed in this chapter can help curb corruption among public officers. However, the shortcomings of the Act identified in this chapter may hamper its overall effectiveness.



CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This paper has discussed the Declarations Act as an anti-corruption tool. Corruption is well and truly amongst us. Not even countries that place well in Transparency International's Corruption Perceptions Index are totally free of it. Corruption has ravaged societies and its consequences are seen in people's lives. The international community recognises now that good laws are needed to fight it.

International instruments against corruption such as UNCAC, the AU Convention and the SADC Protocol express the need for countries to adopt measures aimed at curbing corruption. They advocate clear and comprehensive anti-corruption strategies that are backed by effective laws. These strategies must incorporate prevention, with a view to forestalling corruption. The international instruments encourage the use of systems of assets declarations to prevent corruption for public officers.

This paper has highlighted the importance of having assets declaration laws. Assets declarations can be used as avenues for detecting illicit acquisitions, other forms of corruption and conflicts of interests. Public officers who are required to submit assets declarations may become fearful that their secret corrupt acts will be detected through their declarations, which may indicate that they are living beyond their means. This may prevent them from resorting to corruption. Assets disclosures help also with the identification of PEPs and assist with asset recovery. In addition, they promote transparency in the public service and enhance public trust in the government.

It is imperative for national leaders to have strong political will in order effectively to implement assets declaration laws. Leaders who do not care about corruption are bad role models for the public. All strategies that a country employs to handle corruption should be

accompanied by the zeal to fight it. In like manner, the strategy involving assets declarations must be put into effect with determination for it to be successful.

It is such political will that would drive the leaders to allocate sufficient human and financial resources to their systems of assets declarations. Such resources are crucial for declarations bodies which must carry out verifications and other resource-dependent activities. Without adequate resources even a well-established declarations body, notwithstanding clear laws for implementation, will fail. It will fail to manage the content verification process and it will fail properly to sanction defaulters.

This paper has noted the lack of international obligatory standards pertaining to the contents of assets declaration laws. While it is important that countries should formulate such laws to suit local conditions, there are important general characteristics that ought to be incorporated in them. These include provisions that allow members of the public access to submitted declarations; that provide for verification of the contents of declarations; and that create enforcement mechanisms suited to monitoring conflicts of interests and illicit accumulation of wealth. Such provisions compel compliance by declarants and cultivate public trust in the law and in the declarations regime at large. In addition, clarity about the objectives of the law and what is expected of public officers has a positive impact upon the success of assets declaration systems.

In keeping with its international obligations, Malawi enacted the Declarations Act in 2013 to regulate its assets declaration regime. This Act established the Office of Declarations to manage the declarations regime in Malawi. Although the Declarations Act is new and its real impact cannot be measured fully now, it has characteristics that can actualise its objectives. Its prescription of what a public officer must declare is good. Thus, he has to declare all bonds, shares, bank accounts and life insurance policies; all property sold and transferred; all liabilities and their particulars; and all business interests, including businesses and outside employment. The disclosure obligation extends to the assets of the public officer's immediate family.

These declarations are required on appointment to office and on termination of employment. In between there are yearly declarations to be submitted. There are sanctions for default which may help to convince public officers to comply with the law.

Nevertheless, there are a number of issues that need consideration.

5.2 Recommendations

Assets declarations that are publicised provide civil society with a chance to hold public officers accountable by monitoring their wealth and ensuring that they do not accumulate assets in secret. However, the need to apply to the director of the Office of Declarations in order to access the declarations defeats the whole purpose of having them as public documents. Further, leaving the decision to grant the application entirely in the hands of the director is disturbing. The director can abuse this discretion easily. An amendment to the Declarations Act thus is proposed, so that the declarations are made truly public, without the need to apply to the director to access them. Alternatively, the director's discretionary powers can be removed and a special committee of three or more people can be created within the Office of Declarations to process the applications.

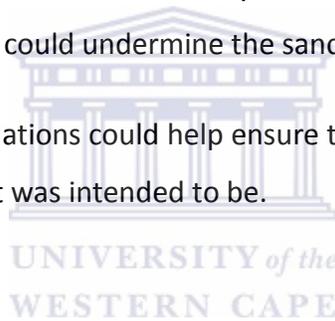
The requirement that a public officer should disclose the assets, liabilities and business interests of his or her immediate family members is laudable because it responds to public officers' potential and actual use of their family members to hide assets, while they remain in full beneficial control. However, the Declarations Act is deficient in restricting this requirement to the initial declaration, excluding any subsequent ones. This defeats the very purpose of the requirement, in that public officers may hide their assets in family members' names once the initial declaration has been made, in the sure knowledge that they never can be discovered. The Declarations Act thus should be amended to incorporate the requirement to disclose assets of family members in the follow-up declarations too.

It is a curious feature of the Declarations Act that the President carries the mandate to employ the acting director and deputy director while it is the PAC which appoints the director and

deputy director. The President may use this power to his advantage and appoint hand-picked officers to fill those positions. The danger of abuse is heightened because it is the President also who is granted the power to suspend the director and deputy director. This means that he can suspend the director and then appoint his favourite person as an acting director. It is recommended that the Declarations Act be amended so that the PAC is competent to suspend the director and deputy director and also to appoint any acting director or deputy director when the need arises.

Clarity with regard to some sections of the Act is needed too. For example, the identity of the Minister referred to in the Act should be resolved. There is also a need to clarify the nature of the offence which would necessitate a change of a public officer's disqualification period for non-submission of a declaration from three to seven years. Persistent lack of clarity may lead to divergent interpretations which could undermine the sanction altogether.

If implemented, these recommendations could help ensure that the Declarations Act becomes the effective anti-corruption tool it was intended to be.



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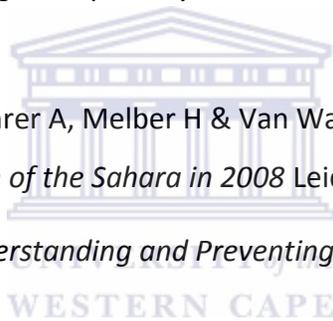
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