



Public Officer Ethics Act Provisions for Declarations of Income, Assets, and Liabilities Evaluation and Recommendations

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Kenyan citizens and leaders have long believed that requiring government officials to declare their wealth might help stem abuse of power and looting of government resources. In May, Parliament finally enshrined wealth declaration requirements into law with the Public Officer Ethics Act. However, while the Act is a good starting point, the scheme it creates has some serious shortcomings that threaten its effectiveness as a tool against corruption:

- The Act does not provide for public access to officials' asset declarations.
- The Act fails to spell out clearly what assets, liabilities, and interests public officers must declare.
- The Act fails to provide a framework for review or inspection of asset declarations.

Further legislation is needed to strengthen the asset declaration scheme, but in the meantime, government offices can make up for some of the system's shortcomings by adopting solid internal procedures for handling wealth declarations. In addition, although the law allows public officers to make their disclosures confidentially, top leaders can show their dedication to the public trust and the spirit of transparency by going farther and voluntarily disclosing their wealth to the public.

Summary of Provisions

Part IV of the Public Officer Ethics Act sets out the requirements for declarations of income, assets, and liabilities. The requirements demand that all public officials and employees declare their income, assets, and liabilities and those of their spouses and dependent children.¹ Officials must submit declarations when they join the public service, once a year while they are in the public service, and when they leave the public service.² A schedule to the Act specifies the form for declarations,³ which the Minister of Justice and Constitutional Affairs may amend with approval from the National Assembly.⁴

The Act designates eight responsible Commissions to receive employees' asset declarations. National Assembly members, including the President, will report to Parliament's ethics committee. Civil servants will report to the Public Service Commission. Judges and magistrates will report to the Judicial Service Commission.⁵

A Commission may demand clarification of a declaration within 6 months after its submission.⁶ The Act requires public officers to provide accurate information in their

declarations and makes it a crime to provide false information or to fail to submit a declaration.⁷

A Commission must retain declaration information for 30 years after the filer leaves the public service.⁸ Commissions must keep declaration information confidential—they may only release the information to authorized Commission staff, law enforcement authorities, persons authorized by court order, and the persons who originally submitted the information.⁹

There has been some confusion in the press and inconsistent information from the government about when the declaration requirements take effect. According to the text of the Act, each responsible Commission must publish procedures for administering the declaration system within 90 days of the commencement of the Act, that is, by July 31, 2003.¹⁰ Once a Commission has published its administration procedures, public officers have an additional 60 days to submit reports reflecting the state of their finances on the day the Commission published its procedures.¹¹ All public officers therefore should have filed their first declarations before September 29, 2003.

At last report, all eight responsible Commissions either had already finalized their administrative procedures or were close to completing them. The procedures should be published in the Kenya Gazette shortly.

At the recent Kenya National Anti-Corruption Workshop, Minister for Justice and Constitutional Affairs Kiraitu Murungi confirmed that preparations are on track for having all public officers file their declarations by October 1. The Ministry could help to avert some confusion by stating more clearly that the exact deadline will be September 29 and doing its best to ensure that all public officers make their declarations before that date.

Scope

The Public Officer Ethics Act's declaration requirements reach all public officials and government employees, from the President to government messengers. Efforts to reduce corruption certainly must target government at all levels. But by requiring all public employees to declare their assets, the government has created a monumental administrative task. According to the most recent Economic Survey, public sector employment in Kenya stood at 659,000 persons in 2002.¹² Declaration requirements may apply to some additional persons who are not included in that figure.

Mandatory wealth declaration is not a one-size-fits-all remedy that is equally valuable whether applied to a top minister or a low-ranking immigration officer. An asset declaration system, like any reform program, should balance the need for comprehensiveness against the costs and practicalities of administration and enforcement. It should take into account that in some areas asset declaration may not be the most effective or efficient means of monitoring and controlling conduct.

Judged in these respects, the Public Officer Ethics Act probably goes too far in applying declaration requirements to all public officials and employees. In the long term, Parliament should consider narrowing the declaration requirements to exclude employees in low-level or nonsensitive positions. In the short term, perhaps the best the government can do is to prioritize its enforcement efforts, concentrating enforcement resources on higher-level officials and key areas of government.

Some have objected to the Act's requirements for declaration of spouses' and dependent children's finances. Internationally, it is fairly standard for declaration requirements to cover immediate family members, for the simple reason that the boundaries separating the assets and interests of family members are often quite fluid.¹³ Including spouses' and dependent children's assets still does not account for assets or interests held by public officials' grown children, extended family members, and friends and associates. However, as declaration requirements extend farther beyond personal finances and interests, the problems of fairness, constitutionality, and enforceability grow increasingly difficult. Drawing the line at spouses and dependent children is a reasonable compromise.

Public Disclosure

One major weakness of the Public Officer Ethics Act is that it requires each Commission to keep all asset declarations confidential. Kenya is not the only country that keeps wealth declarations out of public view. Nevertheless, the experiences of many countries in various parts of the world suggest that allowing public access to officials' declarations greatly enhances the value of an asset-declaration scheme. Public access to declarations facilitates public scrutiny of government and government officials, backs up enforcement of the declaration requirements, and promotes public confidence in the declaration system and the government.

States throughout the world, representing a wide range of cultures, histories, and political and economic systems, require their high officials to disclose their wealth publicly. The United States requires all top federal officials, including legislators and federal judges, to file publicly accessible declarations of their finances and interests.¹⁴ Other countries that require public declaration from some or all of their top officials include the United Kingdom, France, Portugal, Italy, South Korea, Japan,¹⁵ the Philippines,¹⁶ Georgia, Latvia,¹⁷ Argentina,¹⁸ South Africa,¹⁹ Uganda,²⁰ and Zambia.²¹

These countries use various methods to make the declarations available to the public. Some publish the declarations in official gazettes or in registers open to public inspection. Others release individual declarations to members of the public on request, free of charge or for a small fee. Information on officials' wealth frequently spreads further through media reports.

The Organization of American States' recommendations for implementing the Inter-American Convention Against Corruption urge countries to allow the public to access asset declarations whenever possible, in keeping with the Convention's commitment to promoting public confidence through transparency.²² The analogous African treaty, the recently adopted African Union Convention on Preventing and Combating Corruption, does not explicitly state a preference for making asset declarations public. However, it, too, emphasizes transparency and accountability as core values in public affairs.²³

Thailand's 1997 constitution and national law establish a multifaceted asset-declaration scheme that requires officials to submit documentation of their assets, income, and liabilities along with their declarations and requires the state anticorruption commission to inspect and verify each asset declaration. Even with these checks in place, public scrutiny has been crucial to the system's effectiveness. Many of the anticorruption commission's major asset-declaration cases have grown out of public complaints, not out of routine

inspection.²⁴ Also, the press has extensively used details from asset declarations to report on government officials' wealth.²⁵

The chief disadvantage of requiring public disclosure is that it can compromise government employees' privacy and personal security. These are important concerns, but declaration schemes can be constructed in a way that keeps these harms to a minimum.

Many countries have adopted hybrid schemes that demand public disclosure only where it is likely that the public interest in exposure outweighs the personal interest in privacy. For example, in many countries, such as the United States and the United Kingdom, public disclosure requirements only apply to high-level officials. Lower-level government employees file confidential asset declarations or do not have to file asset declarations at all. In some other countries' schemes, such as the South African Parliament's register of members' interests, officials disclose some details of their finances and interests publicly and disclose other details confidentially.²⁶

Uniform compulsory public disclosure can only be introduced in Kenya through additional legislation, but that does not mean Kenyan leaders' wealth must remain secret under the current scheme. Leaders are free to voluntarily disclose details of their finances and interests to the public. If prominent officials, such as Cabinet ministers and members of Parliament, stepped forward to make such voluntary disclosures, they could send a powerful message to the public and put pressure on other government officials to disclose their wealth as well.

Voluntary wealth disclosure campaigns in other countries have fizzled out quickly in some cases. In other cases, however, voluntary declaration has been quite successful. In 1993, as part of a broad anticorruption initiative, South Korean President Kim Young Sam publicly disclosed his wealth and called on ministers, MPs, and other high officials to follow suit. More than 300 officials complied, and later the same year the country adopted mandatory public disclosure requirements for public officials.²⁷ In 1984, in the wake of a corruption scandal, Japanese Cabinet ministers agreed to voluntarily declare their assets,²⁸ beginning a practice that continues today. U.S. Presidents from Carter through Clinton also voluntarily released their complete income tax returns to the public.²⁹

Administration, Review, and Inspection of Wealth Declarations

Other countries' experiences show that procedures for review and verification of asset declarations are critical to a disclosure scheme. Some blame inadequate administration and inspection systems for the failures of asset-disclosure schemes in Nigeria and Russia.³⁰

Internal review, inspection, and verification are especially crucial when officials' asset disclosures are not open to public scrutiny. Unfortunately, the Public Officer Ethics Act does not establish any mechanisms for review of declarations and does not require responsible Commissions to include review mechanisms in their administrative procedures. Also, it is not clear whether the various responsible Commissions have the capacity, resources, or independence needed for effective administration of asset-disclosure systems.

Commissions should establish internal procedures for reviewing asset declarations. Reviews should adhere to set timetables to ensure that they are completed in a reasonable time and that problems are resolved quickly. They should follow clear, rule-based procedures

that limit individual discretion; clear procedures are necessary to prevent inconsistent enforcement and abuse of the disclosure system for personal or political reasons.

The new asset declaration scheme is meant to serve two distinct purposes. The first purpose is preventive: The declaration requirements are meant to help government offices anticipate potential conflicts of interest before any misconduct takes place. The second purpose is investigative: The declaration scheme is intended to help uncover actual wrongdoing and illicit enrichment after it occurs.

It is important that review procedures thoroughly address both the preventive and investigative functions. On the preventive side, Commission administrative schemes should include procedures for heading off potential conflicts of interest. For example, reviewers should be able to order civil servants to dispose of problematic investments or recuse themselves from certain decisions. These preventive measures should not take on an accusatory or antagonistic character; Commissions should take care to ensure that public servants do not interpret the preventive measures as punishment.

Review procedures should also address the investigative function of wealth disclosure. Procedures should mandate automatic referral to the Kenya Anti-Corruption Commission or other authorities when a review uncovers evidence of possible abuse of office or other criminal activity. Procedures should also provide for internal disciplinary action when an official has acted improperly but law enforcement authorities either cannot prosecute the official or elect not to prosecute the official.

Procedures should allocate resources in a sensible way: Declarations filed by low-level employees who have few assets, little discretionary authority, and little control of public resources probably merit less attention than declarations filed by officials of greater wealth or authority. A review should follow a different approach depending on whether conflict of interest, misconduct, or both appear to pose risks, given the characteristics and history of the individual and his or her job function and department. In addition to conducting targeted reviews, Commissions might also select a number of declarations for random audits.

At minimum, a review should verify that a declaration appears to have been completed properly and that no information appears to be missing, inconsistent, or incorrect. A basic review should also consider whether any information in the declaration indicates a possible conflict between official duties and private interests.

A more thorough review might check a declaration against public records like property and company registrations. An even deeper review might also examine private records like tax and bank records. However, the current law does not provide a way to compel individuals and government agencies to provide such private records outside the context of a criminal investigation.

Procedures will be useless if Commissions lack the capacity to execute them. Commissions should have systems in place for storing and retrieving asset declarations. Commissions should ensure that staff conducting reviews have appropriate training and expertise and should furnish them with sufficient resources. Each Commission should designate a high-level official who is personally accountable for the proper administration of the declaration scheme.

It remains to be seen whether Commissions will produce sound plans for administering their declaration schemes and how well Commissions are able to carry out those plans. Further regulation or legislation may be necessary to provide adequate review mechanisms if some Commissions' systems fall short.

Thailand, Uganda, and some other countries have established independent bodies to inspect public officials' wealth declarations. Parliament should consider legislation to provide for independent review of declarations by the Kenya Anti-Corruption Commission or another independent body.³¹

Disclosure Requirements

The Public Officer Ethics Act and its schedule fail to precisely state what information public officers must declare. This allows unscrupulous filers too much room to avoid declaration requirements. According to a report in the *Sunday Nation*, some officials have already started moving assets into trusts in hopes of removing some assets from the reach of declaration requirements.³²

The government must establish clearer guidelines specifying what income, assets, and liabilities public officers must declare. Requirements should include all significant income, assets, and liabilities, whether inside or outside Kenya, including vested beneficial interests in trusts, high-value personal property, gifts, forgiven debts, and receipt of free or discounted goods, services, or other benefits, including travel, hospitality, and use of vehicles or property.

The Public Officer Ethics Act's disclosure requirements also fail to require declaration of additional interests that could conflict with public duties or indicate illicit enrichment. The schedule does include a category for "other information that may be useful or relevant," but it is not clear what information this category includes.

Beyond current assets, liabilities, and income, the disclosure scheme should also require public officers to declare directorships in companies and other significant outside positions, affiliations, and agreements. A 1999 survey by the Organization for Economic Community and Development found that 16 of the 29 OECD member countries at the time required public officers to declare certain outside positions.³³ In the United States, for example, executive-branch officials must declare a variety of interests, including agreements for future employment, deferred compensation agreements, and positions in companies and organizations outside government, whether paid or unpaid.³⁴

The Minister of Justice and Constitutional Affairs may not expand disclosure requirements or otherwise amend the declaration schedule without approval from the National Assembly.³⁵ However, pending parliamentary action, the Ministry can at least issue nonbinding interpretive guidelines expressing its own opinion of what assets and interests must be included on declaration forms.

Conclusions and Summary of Recommendations

As enacted, the Public Officer Ethics Act fails to deliver the strong wealth-declaration scheme many citizens may have hoped for. However, the Act is not so flawed that it cannot serve as a starting point for more meaningful efforts.

In the immediate future, the responsible Commissions should devise clear procedures for conducting reviews of high-level officials' wealth declarations. The Ministry of Justice should issue guidelines to help public officials determine what information they should include on their declaration forms.

In the longer term, the National Assembly should adopt legislation to strengthen the asset-declaration scheme. Parliament should cut the number of persons who must file declarations to a more manageable level. It should expand and clarify declaration requirements to make sure that all crucial information is included. Parliament should require responsible Commissions to review asset disclosures and should consider providing for in-depth auditing and inspection of selected disclosures. Parliament must grant the necessary legal authority and funding to properly administer the declaration scheme. Finally, Parliament should consider allowing the press and the public to access at least some of the information that top officials declare.

Before Parliament takes further action, the President and top ministers can lead the way by voluntarily informing the public about the nature and sources of their wealth and encouraging other leaders to do the same. After all, while legal and institutional reforms are important, personal commitments from individual leaders can often do more to advance openness and accountability in government.

Notes

¹ Public Officer Ethics Act (2003) §§ 2, 26.

² § 27.

³ § 26(2), Schedule.

⁴ § 34.

⁵ §§ 3, 4, 26.

⁶ § 28.

⁷ §§ 29, 32.

⁸ § 31.

⁹ § 30.

¹⁰ § 33(3). The Act entered into force on May 2, 2003.

¹¹ § 27(7).

¹² Ministry of Planning and National Development, *Economic Survey 2003*.

¹³ See United Nations Global Programme Against Corruption, *Anti-Corruption Tool-Kit, Version 5* 242 (2003), available at http://www.unodc.org/unodc/en/corruption_toolkit.html. International statements against corruption have noted the importance of including spouses' and dependents' assets in declarations. See, e.g., International Code of Conduct for Public Officials, G.A. Res. 51/59, U.N. GAOR, 51st Sess., 82d mtg., U.N. Doc. A/RES/51/59 (1996), available at <http://www.un.org/documents/ga/res/51/a51r059.htm>.

¹⁴ Jane S. Ley, "Managing Conflicts of Interest at the Federal Level in the United States" 90, in Organization for Economic Community and Development, *Public Sector Transparency and Accountability: Making It Happen* (2002), available at <http://www1.oecd.org/scripts/publications/bookshop/redirect.asp?422002081P1>.

¹⁵ Organization for Economic Community and Development, *Trust in Government: Ethics Measures in OECD Countries* (2000), available at <http://www1.oecd.org/scripts/publications/bookshop/redirect.asp?422000061P1>.

¹⁶ Code of Conduct and Ethical Standards for Public Officials and Employees (Philippines), Republic Act No. 6713 § 8, available at <http://www.ombudsman-phil.net/legislations.html>.

¹⁷ World Bank, *Anticorruption in Transition: A Contribution to the Policy Debate* 41 (2000), available at <http://www.worldbank.org/wbi/governance/pdf/contribution.pdf>.

¹⁸ Nicolás R. S. Raigorodsky, "Can New Technologies Be a Solution? Conflicts of Interest Cases in Argentina" 97, in Organization for Economic Community and Development, *Public Transparency and Accountability: Making It Happen*.

- ¹⁹ Code of Conduct for Assembly and Permanent Council Members (South Africa), available at http://www.parliament.gov.za/pls/portal/web_app.utl_output_filter3?p_index=doc_index&p_name=343.DOC; Executive Members' Ethics Act (South Africa) § 2(2)(c)–(d) (1998).
- ²⁰ Leadership Code Act (Uganda) § 7 (2002), available at <http://www.igg.go.ug/leadershipcode.htm>.
- ²¹ Transparency International-Zambia, *2001 State of Corruption Report* 62 (2001).
- ²² Julio Roberto Piza Rodríguez, "Ley Modelo Sobre Declaración De Ingresos, Pasivos Y Activos, Por Parte De Quienes Desempeñan Funciones Públicas" (Model Law Concerning Declaration of Income, Liabilities, and Assets by Persons Who Perform Public Functions), available at http://www.oas.org/juridico/spanish/preventivas/guate_docs/Dr._Julio_Roberto_Piza_Rodr%EDguez.htm.
- ²³ Draft African Union Convention on Preventing and Combating Corruption, Min/Draft/AU/Conv/Comb/Corruption (II) Rev.5, available at <http://www.au2003.gov.mz/maputodocs/asscorruption.pdf>.
- ²⁴ See "Student Seeks Inquiry into Thaksin; Petition Centres on Share Transfers," Bangkok Post, September 23, 2000; "Dateline Bangkok: Commission Has Big Task;" Bangkok Post, October 9, 2000.
- ²⁵ James R. Klein, *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy* 31 (Asia Foundation Working Paper Series No. 8, 1998), available at <http://www.asiafoundation.org/pdf/WorkPap8.pdf>.
- ²⁶ Code of Conduct for Assembly and Permanent Council Members (South Africa).
- ²⁷ Clayton Jones, "South Korea's Kim Wins Plaudits For Anticorruption Campaign," *Christian Science Monitor*, June 3, 1993.
- ²⁸ "Assets of Mori, Cabinet Average 258 Mil. Yen," *Japan Policy & Politics*, August 7, 2000.
- ²⁹ "The Bushes Report Income But Only Part of the Returns," *The New York Times*, late edition, A8, April 12, 2003.
- ³⁰ Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System (TI Source Book)* 189 (2000), available at <http://www.transparency.org/sourcebook/index.html>.
- ³¹ Under § 30 of the Act, law enforcement authorities may access wealth declarations. The Kenya Anti-Corruption Commission therefore clearly has authority to inspect declarations of public officers whom it suspects of wrongdoing. However, it is not clear whether the current Act would allow the Commission to conduct routine inspections of declarations without suspicion of corrupt behavior.
- ³² "Looters Turn to Private Trusts," *Sunday Nation*, June 8, 2003, available at <http://www.nationaudio.com/News/DailyNation/08062003/News/News080620037.html>.
- ³³ Organization for Economic Community and Development, *Trust in Government: Ethics Measures in OECD Countries* 51.
- ³⁴ United States Office of Government Ethics, *Public Financial Disclosures: A Reviewer's Reference* 3-25, 3-26 (1996), available at http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reference/rf278guide_96.pdf.
- ³⁵ § 34.