



**UNIVERSITY OF THE WESTERN CAPE  
FACULTY OF LAW**



**THE WEALTH DECLARATION SYSTEM IN KENYA:  
A CRITICAL STUDY**

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## DECLARATION

I, **Mungai Moses Kahiga**, declare that **THE WEALTH DECLARATION SYSTEM IN KENYA: A CRITICAL STUDY** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources that I have used or quoted have been indicated and acknowledged by complete references.

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## ABBREVIATIONS AND ACRONYMS

AU Convention	African Union on Preventing and Combating Corruption
DPP	Directorate of Public Prosecutions
Draft EAC Protocol	Draft East African Community Protocol on Preventing and Combating Corruption
EACC	Ethics and Anti-Corruption Commission
POEA	Public Officer Ethics Act
UNCAC	United Nations Convention against Corruption





## KEY WORDS

Accountability  
Anti-Corruption  
Assets Declaration  
Code of Conduct  
Conflict of Interests  
Corruption  
Integrity  
Kenya  
Public Interest  
Public Officer  
Public Sector  
State Officer  
Transparency  
Unexplained Wealth  
Wealth Declaration



## CHAPTER ONE

### INTRODUCTORY OBSERVATIONS

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#### 1.1 Background to the Study

The culture of corruption is rooted deeply in Kenya. It may be described as an incurable infectious disease.<sup>1</sup> Kenya has been ranked as one of the most corrupt countries in the world. For the last three years, Kenya has scored less than 27 percent in the Corruption Perceptions Index published by Transparency International.<sup>2</sup>

Corruption persists mainly because those in public office benefit from it and the existing institutions lack both the will and capacity to stop it. It persists despite the legislation, institutions and measures that have been put in place to fight it.<sup>3</sup> The Ethics and Anti-Corruption Commission is the main institution mandated to combat corruption in Kenya. The primary anti-corruption laws are the Public Officer Ethics Act No 4 of 2003, the Leadership and Integrity Act No 18 of 2014, the Public Officer Ethics (Management, Verification and Access to Financial Declaration) Regulations of 2011 and the Kenyan Constitution of 2010. One of the key anti-corruption measures is the system of wealth declarations by public officials established by the Public Officer Ethics Act (POEA).

The POEA did not have an easy passage into law. When it was introduced in 2002, Kenya was governed by the Kenya African National Union (KANU), led by President Moi. The regime was characterised by autocratic rule, high levels of politically sanctioned corruption, rapid economic decline and massive accumulation of wealth for the politically connected.<sup>4</sup> Unsurprisingly, President Moi did not assent to the enactment of the POEA. The National Rainbow Coalition (NARC) came into power in 2003 and re-commenced the process to pass the POEA into law. This was done with a view to curbing corruption and bolstering donor confidence.<sup>5</sup> Regrettably, the NARC administration quickly replicated the corrupt practices of its predecessor, despite being elected on a platform of zero tolerance towards

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1 Mogeni (2009) at 1.

2 Transparency International Report on Kenya (2019).

3 Hope (2012) at 493.

4 Gachigua (2010) at 114.

5 Biau (2007) at 6.

corruption. The new administration, which had promised war on corruption, instead was embracing corruption and denying citizens constitutional reforms.<sup>6</sup>

The POEA was the subject of heated debate amongst members of parliament. There was an objection to the clause on wealth declarations by public officials and specifically to the possibility of public access to such declarations. The aim was to make implementation of a wealth declaration system difficult by limiting public disclosure. The objection came primarily from members of the new regime with links to the past regime, which was regrouping to circumvent efforts to fight corruption.<sup>7</sup> Among the reasons advanced for rejection of public declarations were security concerns for the declarants, invasion of privacy and violation of constitutional rights.

The POEA was enacted eventually and made wealth declarations compulsory. However, it also made it difficult for the public to gain access to the information contained in the declarations. The main objective of the POEA was to advance the ethics of public officers by requiring wealth disclosure from them.<sup>8</sup> The restriction on access to declared information was a strategy to foreclose exposure of corruption involving public officials.

The wealth declaration system in Kenya is now sixteen years old. The compliance rate since the adoption of the POEA has been more than eighty-six per cent.<sup>9</sup> However, it has not made a significant contribution to combating or reducing corruption. This may be attributed partly to ineffective or inadequate implementation of the Act. The verification, monitoring, enforcement and sanctioning mechanisms of the system are weak.

There is an administrative burden upon the responsible commissions to implement the system. The limitations upon access to the declared information hinder public, civil society and media scrutiny of the declarations. Another contributory factor is “the invasion of privacy” issue. This is also the most significant drawback to wealth declarations.<sup>10</sup> Their

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6 Clay (2006) at 4.

7 Matiangi (2004) at 8.

8 Kenya Gazette Supplement (2003) at 69.

9 Transparency International (2013) at 32.

10 Messick (2009) at 6.

constitutionality has been challenged for infringing privacy rights, for reversing the presumption of innocence and the burden of proof and for allowing self-incrimination.<sup>11</sup>

## **1.2 Objectives of the Study**

The study seeks to review the efficiency and effectiveness of the wealth declaration system in Kenya and the role it plays in combating corruption. The specific objectives of the study are:

- To review the legal, policy and institutional framework of the wealth declaration system in Kenya;
- To identify the mandate, power, duties and role of the responsible commissions which administer the wealth declarations;
- To identify the mandate, duties and role of the Ethics and Anti-Corruption Commission of Kenya in relation to the wealth declaration system;
- To review the legislative and administrative challenges which the responsible commissions face in the management of the wealth declaration system.

## **1.3 Research Questions**

The study will attempt to answer the following questions:

- What role does the wealth declaration system play in combating corruption in Kenya?
- To what extent has the Ethics and Anti-Corruption Commission made use of the wealth declaration system to combat corruption in Kenya?
- What is the role of the responsible commissions in the wealth declaration system in Kenya?
- What are the legal and administrative challenges facing the wealth declaration system in Kenya?

To help in answering the above questions, the following auxiliary questions are proposed:

- Should the wealth declarations be confidential or public?
- Who should be responsible for the administration of the declarations?
- What should be declared?

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11 Dr Chris Murungaru vs KACC and Attorney General KLR [2003].

- What should be the penalties for non-compliance and untruthful declarations?

#### 1.4 The Concept of Wealth Declaration

Wealth declaration is known also as financial disclosure or income and assets declaration.<sup>12</sup>

A declaration or a disclosure is an act of revealing information to other people that was previously known to oneself alone. This in itself is a public act, which makes known hitherto secret information.

A wealth declaration has the following elements: (1) a public official (2) declares or makes known to others, usually to the government (3) all information about his wealth, both tangible and intangible, as well as that of his spouse and children (4) for a specified period.<sup>13</sup> It is important to note that this information is within his knowledge. The public official has an obligation to declare truthfully what he owns, as well as what his spouse and children own.<sup>14</sup> This information becomes government information once declared.

A wealth declaration system is used as a tool to fight corruption by preventing, detecting and assisting in the investigation and prosecution of corruption cases. It can contribute also to combating corruption either by reducing the incidence of conflicts of interests or by helping to identify cases of illicit enrichment by public officials.<sup>15</sup>

Experts suggest that perhaps the single most important preventive tool for combating money laundering and corruption is the registering of officials' assets and incomes.<sup>16</sup> This, in turn, can promote accountability amongst public institutions.<sup>17</sup> A wealth declaration regime can provide an effective reminder to public officials of the duty of accountability that comes with public office.<sup>18</sup> It is an attestation of their commitment to public service.

Wealth declarations by public officials have become part of the global anti-corruption standards and are embodied in international conventions such as the United

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12 Transparency International (2013) at 12.

13 Muzila *et al* (2012) at 13.

14 Section 29 of the POEA.

15 Burdescu *et al* (2009) at 1.

16 Chaikin *et al* (2009) at 9.

17 Transparency International (2013) at 12.

18 Burdescu *et al* (2009) at 1.

Nations Convention against Corruption (UNCAC)<sup>19</sup> and the United Nations Convention against Transnational Organised Crime (UNTOC).<sup>20</sup> At the regional level, the African Union Convention on Preventing and Combating Corruption (AU Convention) and the Draft East African Community Protocol on Preventing and Combating Corruption Protocol (Draft EAC Protocol)<sup>21</sup> deal with the subject. Kenya is a member of all the above instruments.

Wealth declarations invariably form part of wider codes of conduct for public officials. The use of codes of conduct has been recognised globally in anti-corruption law. Among the first international conventions to identify codes of conduct as essential in the prevention of corruption are the Inter-American Convention against Corruption and UNCAC.<sup>22</sup> The POEA contains the code of conduct for Kenyan public officials, alongside the Constitution.<sup>23</sup> The code of conduct in the POEA provides for wealth declarations by Kenyan public officials.<sup>24</sup>

The codes of conduct usually provide sanctions for non-compliance. These may be either administrative or criminal.<sup>25</sup> The POEA provides for both. The primary objective of a code of conduct is to cultivate a behaviour that is focused on public service. However, sanctions are necessary to ensure compliance. The sanctions should be commensurate with the violations in order to be effective and have a deterrent effect.<sup>26</sup> A code of conduct without effective sanctions cannot have any impact on the fight against corruption.

## **1.5 Corruption and Wealth Declaration**

Wealth declaration measures are aimed at preventing corruption in the public sector.<sup>27</sup> The main motive for public officials engaging in corruption is to reap monetary rewards.<sup>28</sup> At “the heart” of almost any public sector corruption case is the pecuniary benefit flowing to corrupt officials.<sup>29</sup> The beneficial transfer from a payer to a corrupt official is in most cases

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19 Articles 8 & 52 of UNCAC.

20 Articles 9 & 12 of UNTOC.

21 Article 7 of Draft EAC Protocol.

22 Article 8 of UNCAC and Article 111 of the Inter-American Convention.

23 Chapter Six of the Constitution of Kenya.

24 Sections 7-25 of the POEA.

25 Barnes *et al* (2012) at 72.

26 Barnes *et al* (2012) at 69.

27 Posner (1985) at 1193.

28 Boles (2014) at 846.

29 Wagner & Jacobs (2008) at 225.

the only evidence of corruption. This can be traced through the wealth declaration of a public official. A wealth declaration can reveal that a public official has benefited from corruption. In some cases it could be the only pointer to engagement in corruption.

Public officials usually try to conceal the proceeds of corruption. This is done mostly by the official transferring said proceeds to third parties, while ultimately retaining control. The third parties are usually people who can be trusted. In most cases, these are close family members, friends and associates.<sup>30</sup> This explains the inclusion of spouses and children in the wealth declarations.

Corruption is synonymous with unlawful wealth accumulation. A wealth declaration system is used as a mechanism to detect wealth accumulation that is linked to corruption.<sup>31</sup> Herein lies the nexus between corruption and wealth declaration. The latter can be used to prove the former and facilitate the prosecution of corruption cases.

Corruption is clandestine in nature and, usually, it is hard to link the offence with the perpetrator. Corruption has been described as the most difficult crime to investigate and prosecute.<sup>32</sup> The biggest obstacle is detection of corruption itself.<sup>33</sup> All parties involved have a motive to conceal their ill-gotten wealth and maintain secrecy.<sup>34</sup> The victims usually are also the witnesses. In most cases, they only report when a deal has gone sour. There are also high constitutional standards of proof that must be met. The investigators routinely have to rely on circumstantial evidence.

A wealth declaration can assist in overcoming some of these difficulties by showing the disparity between what is declared and what the public official is earning officially. A wealth declaration can be used also as a preventive measure against corruption. It may induce a public official to refrain from undertaking official duties that are directly in conflict with his personal interests.<sup>35</sup> For instance, a public official taking part in the proceedings of a tender committee involving a company in which said official owns shares can be detected by

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30 Hatchard (2014) at 10.  
31 Hatchard (2014) at 40.  
32 Henning (2001) at 804.  
33 Boles (2014) at 845.  
34 Wilsher (2006) at 27.  
35 Section 21 of the POEA.

a wealth declaration. This detection probably would not be possible if there were no wealth declaration.

Although a wealth declaration system, by itself, is unlikely to prevent corruption completely, it can be a powerful tool for helping to discourage engagement in corrupt activities and building a culture of integrity and transparency amongst public officials.<sup>36</sup> A public declaration can expose a public official to press coverage and public disgrace. This can cost the public official his career.<sup>37</sup>

## **1.6 Wealth Declarations as Public Documents**

In Kenya, the content of wealth declarations is prescribed in forms contained in the schedule to the POEA.<sup>38</sup> Declarations can be made to a single agency or multiple agencies. In the Kenyan case, they are made to multiple authorities defined as “responsible commissions” in the POEA.<sup>39</sup> These commissions operate as depositories for wealth declarations and are responsible for the employment and discipline of public servants under their respective jurisdictions.<sup>40</sup> They manage the completion, monitoring, verification and retention of wealth declarations.

The responsible commissions are public entities.<sup>41</sup> Thus, when a public official files the wealth declaration forms, they become part of the records of the responsible commissions and are therefore public documents. As a general rule, public documents should not be inaccessible to the public. The state is obligated to publish and publicise any important information that affects the public. Information on the wealth of public officials relates to their conduct while in public service. It can establish incidents of corruption or conflicts of interests. These are matters that directly affect the nation and, therefore, should be made public and publicised.

Perhaps the most important issue concerning wealth declaration is not the declaration itself but access to the information declared.<sup>42</sup> In the parliamentary debate

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36 Burdescu *et al* (2009) at 14.

37 Boles (2014) at 849.

38 Section 26(2) of the POEA.

39 Section 26(1) of the POEA.

40 Section 79(1) of the Evidence Act.

41 Article 260 of the Constitution of Kenya.

42 Mukherjee *et al* (2006) at 326.



around the POEA, the clause on access to wealth declarations elicited divergent opinions. A majority of the legislators were against public access to them.<sup>43</sup> They were prepared to declare their assets but they were not ready to share the information with the public. The main objective of a wealth declaration system is to fight corruption. This objective can be achieved only if the information declared is available to the public. Limited access to the information would defeat the objective of the measure.

Wealth declaration can be either public or confidential. Public disclosure is where the information declared is available to the public without any conditions. The authority that receives the information publishes it in a manner that is readily accessible to the public. Confidential disclosure implies that the information is available only to the authority which receives the declaration.<sup>44</sup>

Access to information is not automatic. In the Kenya declaration system, there is conditional access to information. The POEA provides that an application should be made to the relevant responsible commission and approval must be sought from the affected officer.<sup>45</sup> An applicant must demonstrate legitimate interest and good cause. Grounds on which the responsible commission may deny access are stipulated in the POEA Management, Verification and Access to Financial Declarations Regulations of 2011.<sup>46</sup>

Access to wealth declaration information can assist in initiating an investigation of corruption. According to Lawal, the symbiotic relationship between unhindered access to information and a public declaration of assets is self-evident. This is because access to information, especially information that is held by government, can promote transparency, accountability and effective governance. This, in the long run, will reduce corruptive tendencies, which is the aim of the declaration of assets system.<sup>47</sup>

## **1.7 Structure of the Research Paper**

The following chapters make up the remainder of the research paper.

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43 Gachigua (2010) at 115.

44 Helibrunn (2004) at 3.

45 Section 30 of the POEA.

46 Regulation 7 of the POEA Regulations.

47 Lawal (2009) at 240.

**Chapter Two** will discuss the legislative framework of the wealth declaration system in Kenya. It will explore the relevant provisions on wealth disclosure.

**Chapter Three** will discuss the institutional framework of wealth declaration system in Kenya. This will entail an analysis of the responsible commissions and their functions.

**Chapter Four** will analyse the challenges facing the wealth declaration system in Kenya. It will attempt to offer solutions to these challenges.

**Chapter Five** will comprise a general conclusion to the research paper. It will give also the general recommendations arising from the research.



## CHAPTER TWO

### LEGISLATIVE FRAMEWORK OF WEALTH DECLARATION IN KENYA

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#### 2.1 Introduction

This chapter discusses Kenya's international obligations in respect of and its national legal framework on wealth declaration. Kenya is a signatory to various international instruments that provide for wealth disclosure. It is bound by these instruments. Both domestic and international provisions relating to wealth declaration will be analysed. The chapter will start with a brief consideration of the evolution of wealth disclosure legislation. There was no wealth declaration system in Kenya before the enactment of the POEA in 2003.

#### 2.2 Evolution of Wealth Declaration Legislation

The concept of wealth declaration has existed for some time. However, it gained momentum as the discourse of corruption expanded in the 1990s.<sup>1</sup> According to Schroth, the discussion of any measures against corruption internationally begins with the United States.<sup>2</sup> Already in the 1950s, President Harry Truman had proposed a disclosure system to inject transparency and accountability into the public service. In his address to Congress in 1951, he said that "with all the questions that are being raised about the probity and honesty of public officials, I think all of us should be prepared to place facts about our income on the public record".<sup>3</sup>

Later, President Lyndon Johnson introduced a requirement that federal officials disclose their private finances.<sup>4</sup> The disclosure was confidential.<sup>5</sup> There were similar attempts to introduce public financial disclosure at the state level and by 1969 eleven states in the US had legislation requiring public disclosure.<sup>6</sup>

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1 Burdecsu *et al* (2009) at 28.

2 Schroth (2002) at 595.

3 Cited in Mackenzie & Hafken (2002) at 19.

4 Mackenzie & Hafken (2002) at 24.

5 Executive Order 11222.

6 Anechiarico & Jacobs (1996) at 47.

The catalyst for increased attention to and legislation on financial disclosure systems was the Watergate scandal of the 1970s.<sup>7</sup> Schroth describes the scandal as the *sine qua non* of contemporary efforts to combat corruption by law.<sup>8</sup> It resulted in the enactment of one key statute, namely, the Ethics in Government Act of 1978. The aim was to restore confidence in the public service that had been dented by the Watergate scandal.<sup>9</sup>

The Ethics in Government Act established financial disclosure for public officials in the federal government. Each arm of government was to be supervised by a separate office. One of the notable characteristics of the Act is the provision for public disclosure by high-ranking government officials and confidential disclosure by lower-ranking officials and officials who hold positions that are prone to conflicts of interests. The officials who are required to file public declarations are the President, the Vice-President and Secretaries of Agencies (Ministers).<sup>10</sup>

The Ethics in Government Act was met with resistance. There were concerns that it infringed upon the privacy rights of public officials. This resulted in a wave of litigation against the Act. A general consensus emerging from the cases was that the government's power to compel disclosure outweighed a public official's right to privacy.<sup>11</sup> The same resistance based on similar arguments would occur in Kenya and other countries as financial disclosure statutes were being enacted there.

The wave of assets disclosure legislation increased in the 1970s.<sup>12</sup> The United Kingdom adopted the Register of Interests in 1974. However, it was not clear what interests should be declared and disclosure was considered optional.<sup>13</sup> This can be explained by the historical reluctance to enact strict financial disclosure legislation. European countries followed suit, with Spain, Italy and Portugal each adopting wealth declaration legislation in 1982. Other countries continued the trend, improving on the scope and scale of disclosures.<sup>14</sup> However, the United States system remained superior in terms of the range of

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7 Schroth (2002) at 595.

8 Schroth (2003) at 87.

9 Schroth (2002) at 593.

10 Section 101 of Title 1 of the Ethics in Government Act.

11 Rohr (1998) at 44.

12 Anechiarico & Jacobs (1996) at 47.

13 Doig (1996) at 42.

14 OECD (2011) at 23.

officials required to declare, the complexity of the legislation and the enforcement mechanism.<sup>15</sup>

The wave of democratisation which swept through Africa and Central and Eastern-Europe in the late 1980s encouraged the enactment of financial declaration laws for public officials.<sup>16</sup> There was pressure placed by international financial organisations on developing countries to implement anti-corruption policies and legislation. Corruption was being identified increasingly as a major problem besetting transitional economies and developing countries.<sup>17</sup> International organisations exerted pressure on these states to align their domestic institutions and laws with universal norms to fight corruption.<sup>18</sup> As the concern with corruption increased in the 1990s, financial disclosure clauses emerged as soft measures to combat corruption in the major international instruments.<sup>19</sup> Wealth declaration by public officials became part of the international anti-corruption standard and was incorporated into international conventions.

At the continental level, African countries were pursuing a common anti-corruption policy. There was a general consensus that corruption was impeding development.<sup>20</sup> The African Regional Ministerial Workshop was one such initiative and resulted in the Dakar Declaration. This was followed by the second Pan-African Conference which produced the Rabat Declaration in 1998.<sup>21</sup> The third Pan-African Conference adopted the Charter for the Public Service.<sup>22</sup> The Charter formulated the objectives of the public service, including the adoption of a code of conduct for African public service employees and wealth declaration by public officials.<sup>23</sup> Corruption was identified as being predominant in the public service. There was, therefore, a need to establish mechanisms that would prevent and combat it. Codes of conduct and wealth disclosure legislation were the main preventive mechanisms.<sup>24</sup>

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15 Doig (1996) at 44.

16 OECD (2011) at 24.

17 Bukovansky (2006) at 181.

18 Bukovansky (2006) at 182.

19 OECD (2011) at 23.

20 Kolawole (2004) at 78.

21 Kofele (2006a) at 713.

22 Charter for the Public Service in Africa, available at <https://africog.org/wp-content/uploads/2015/10/Implementation-of-Chapter-Six-of-the-Constitution-of-Kenya-2010.pdf> (visited on 3 February 2017).

23 Article 13 of the Charter for African Public Service.

24 Kofele (2006a) at 714.

The Kenyan Constitution provides that any treaty or convention ratified by the country forms part of Kenyan law.<sup>25</sup> Kenya has ratified UNCAC, UNCTOC and the AU Convention and thus is bound by them and their provisions pertaining to wealth declaration. In addition, Kenya has signed the Draft EAC Protocol on Combating and Preventing Corruption.

### **2.3 United Nations Convention against Corruption**

UNCAC is the only global instrument against corruption. It has prevention as one of its pillars.<sup>26</sup> Prevention aims to reduce the likelihood of corruption taking place.<sup>27</sup> Preventive measures include the establishment of anti-corruption bodies, the development of procedures for the appointment of public officials, the formulation of codes of conduct, sound financial systems in public procurement, and public reporting. Most preventive measures are aimed at the public sector. UNCAC, therefore, presumes that the public sector has a significant role to play in combating corruption.

The Convention mentions wealth declaration in two instances: firstly, as a preventive measure in Chapter II and, secondly, as a preventive and detection measure in Chapter IV.<sup>28</sup> The latter provision stresses the fact that wealth declaration is important in asset recovery. The asset recovery process takes place after the offence has been committed and is particularly important for developing countries such as Kenya. Vast amounts of money are looted from state coffers and hidden abroad for safe-keeping. A recent example involves two former high-ranking public officials in Kenya who were found to have laundered the proceeds of their corruption abroad.<sup>29</sup>

Wealth disclosure can aid in the confiscation of proceeds of corruption hidden in other jurisdictions. The wealth declaration system is integral to combating corruption both before and after it has occurred. UNCAC provides for wealth declaration as a soft measure in both Article 8(5) and Article 52(5). States parties have discretion to adopt the measure. The

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25 Article 2(6) of the Constitution of Kenya.

26 Babu (2006) at 17.

27 Shehu (2005) at 224.

28 Article 8(5) and Article 52(5) of UNCAC.

29 Samuel Gichuru and Chris Okemo Case, available at <http://star.worldbank.org/corruption-cases/node/18426> (visited on 3 February 2017).

rationale for its inclusion as a soft obligation was to speed up the negotiation process.<sup>30</sup> This also signifies the constitutional challenges which a wealth disclosure system may pose. States parties therefore had to strike a balance between prevention of corruption and key provisions in their constitutions. UNCAC is fairly detailed on what should be declared by a public official. It provides that:

Each state party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, *inter alia*, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.<sup>31</sup>

The Convention identifies other activities that may lead to conflicts of interests. However, it does not mention the issue of the accessibility of wealth declaration information. The POEA was enacted before ratification of UNCAC by Kenya.

#### **2.4 African Union Convention on Preventing and Combating Corruption**

The AU Convention identifies wealth declaration as a measure that can be used to fight corruption. It provides that:

In order to combat corruption and related offences in the public service, state parties commit themselves to require all or designated public officials to declare their assets at the time of assumption of office, during and after their term of office in the public service.<sup>32</sup>

This provision is non-mandatory. States parties can subject all public officials to wealth declaration or choose those who should declare. The AU Convention limits what should be declared to assets. Unlike UNCAC, it is not detailed as to the items that should be declared. The AU Convention has a mandatory provision governing access to information. It stipulates that:

Each state party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.<sup>33</sup>

States parties thus are obligated to ensure there is a right to information that can be used to fight corruption. Wealth declaration information can be used to investigate and prosecute

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30 Rose (2015) at 22.

31 Article 8(5) of UNCAC.

32 Article 7(1) of the AU Convention.

33 Article 9 of the AU Convention.

corruption offences. It therefore qualifies as information that should be availed to the public without any restrictions.





Kenya is a state party to the AU Convention.<sup>34</sup> It therefore is bound by the wealth declaration provisions and should ensure that declarations are available freely to the public. However, this is not the case, as the POEA gives the public only conditional access to wealth declaration information.

## **2.5 Draft East African Community Protocol on Preventing and Combating Corruption**

The Draft EAC Protocol identifies wealth declaration as an anti-corruption measure. It provides as follows:

[P]artner states shall adopt measures and strategies to strengthen systems of declaration and verification of income, assets and liabilities by public officials.<sup>35</sup>

States parties therefore are obligated to implement wealth disclosure systems. The Draft EAC Protocol states this in clear terms, unlike other conventions. The Draft EAC Protocol not only identifies wealth declaration as an anti-corruption measure. It goes further to single out verification as a constituent part of the declaration system. Verification is crucial to establishing the correctness of the declared information. It is through verification, which can establish a disparity between an official's income and declared assets, that corruption may be detected. Conflicts of interests can be established also by verification of the declared information.

The Draft EAC Protocol system should apply to all public officials. It identifies the items to be declared as income, assets and liabilities. This classification is not as detailed as UNCAC's. States parties are obligated to ensure access to wealth declaration information without any restrictions.<sup>36</sup> This assists in combating corruption since it ensures that declarations are available to the public. Access to wealth declarations is a key determinant of how effective the measure will be.

The enactment of the Draft EAC Protocol has been delayed by contention about whether to vest prosecution powers in anti-corruption agencies.<sup>37</sup> The other clauses, and particularly the wealth declaration clause, are not in contention.

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34 Adopted on 11 July 2003.

35 Article 6(2)(i) of the Draft EAC Protocol.

36 Article 6(2)(e) of the Draft EAC Protocol.

37 Dimauro (2014) at 1.

## 2.6 Kenyan Legislation

Alongside the international instruments to which Kenya is a state party, there exists domestic legislation in support of the wealth declaration system. This section will highlight the provisions pertaining to wealth declaration in the various domestic statutes.

### 2.6.1 Anti-Corruption and Economic Crimes Act

The Anti-Corruption and Economic Crimes Act is the main statute dealing with corruption offences in Kenya. It was enacted in 2003.<sup>38</sup> It establishes the Ethics and Anti-Corruption Commission (EACC) as the only body that is mandated to investigate corruption offences. One of the objectives of a wealth declaration system is to assist in such investigations.

However, the Anti-Corruption and Economic Crimes Act does not refer to wealth declaration as an investigative tool. It provides for a separate procedure for obtaining information from a person about his property suspected to be proceeds of corruption. The Director of the EACC can require a statement from a suspect about his property if there are grounds to believe it is connected with corruption. This procedure is required if the suspect is not a public official.<sup>39</sup> For public officials, that information can be retrieved easily from the declarations, which are mandatory. However, according to section 26(3) of the Anti-Corruption and Economic Crimes Act, the Director of the EACC is the only person with the authority to call for such information.

This provision is a bureaucratic limitation that can hinder the effective investigation of corruption offences. In order to obtain information about the property of a suspect who is a public official, the EACC should utilise the wealth declaration forms as a matter of course. Access to the information should not depend upon the discretion of the Director. This would be more effective and efficient. It would also deter public officials from engaging in corruption. The knowledge that the declarations are in the hands of the EACC is itself a reason to discourage the accumulation of illicit wealth.

The EACC can order a person to produce records that are connected to a corruption investigation. The records are identified as books, returns, bank accounts, reports, and legal or business transactions. Wealth declarations are the main records containing such

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38 Act 3 of 2003.

39 Section 26 of the Anti-Corruption and Economic Crimes Act.

information on a public official's property. They should be the starting point of an investigation. They can offer valuable background information about whether an official is involved in corruption. The EACC can apply also for an order that an associate of a suspect provide such information.<sup>40</sup>

The penalty for not providing this information when served with a notice to do so is rather lenient. The Anti-Corruption and Economics Crimes Act provides for a fine of KSh 300 000 or imprisonment for three years.<sup>41</sup> Bearing in mind the high values associated with corruption, a corrupt public official likely would face the penalty rather than provide information incriminating himself.

The Anti-Corruption and Economics Crimes Act further provides that unexplained assets may be used as corroboration that a corrupt act has occurred.<sup>42</sup> This provision is non-mandatory, which limits the effectiveness of the wealth declaration system. The information being declared is within the public official's domain. Any unexplained assets that are in his possession or control should be *prima facie* evidence that he has engaged in corruption. The task of providing exculpatory evidence should be left to the public official. In the first instance, the declaration should be truthful. Therefore, any discrepancies should be indicative of engagement in corruption. The advantage of such a strict approach is that it discourages corruption and raises the risk of detection.

## 2.6.2 Public Officer Ethics Act

The Public Officer Ethics Act (POEA) is the statute which establishes the wealth declaration system in Kenya.<sup>43</sup> It was enacted in 2003.<sup>44</sup> It stipulates the procedure for declarations, the sanctions for non-compliance, the contents of the declarations, and offices responsible for management of the declarations. The declaration is mandatory for all public officials and should be made every two years. The various responsible commissions are mandated to

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40 Section 27 of the Anti-Corruption and Economics Crimes Act.

41 Section 26(2) of the Anti-Corruption and Economics Crimes Act.

42 Section 57 of the Anti-Corruption and Economic Crimes Act.

43 The Public Service Code is the precursor of POEA. It did not cover all public officials and had no provisions on wealth declarations. See "A Guide to POEA", available at [www.kirdi.go.ke/downloads/.../18-policies-procedure...21:public-officers-ethics-act](http://www.kirdi.go.ke/downloads/.../18-policies-procedure...21:public-officers-ethics-act) (visited on 3 February 2017).

44 Act 4 of 2003.

receive, manage and verify the information. They are to maintain the records for five years after the official has left the public service.<sup>45</sup>

There is no mechanism for how the declared information is to be forwarded to the EACC. Since the EACC is the sole body mandated to investigate corruption, there ought to be a provision in the POEA for the information to be forwarded to the Commission.<sup>46</sup> The responsible commissions do not have investigative powers. However, they can initiate investigations on contraventions of the code of conduct or pursuant to a complaint.<sup>47</sup> They may refer the matter to an appropriate body for investigation.<sup>48</sup> In a corruption-related complaint, the EACC has the sole mandate to investigate. Therefore, it would be logical and desirable to ensure that the wealth declarations are presented to the EACC. This lack of inter-agency collaboration undermines the effectiveness of the system.

The time limit for retention of wealth declarations is also a loophole that can facilitate corruption.<sup>49</sup> In grand corruption offences, huge amounts of money are involved. A public official can engage in grand corruption and wait for five years before retrieving the proceeds.<sup>50</sup> After five years, the responsible commission can destroy the records. If this happens it would be impossible to prove any allegations of corruption against the public official who has been patient about enjoying the fruits of his corruption. A public official who engages in grand corruption can resign and enjoy the illicit proceeds after the five years have elapsed.

### **2.6.3 POEA Management, Verification and Access to Financial Declarations Regulations**

The POEA Regulations of 2011 establish the administrative functions of the responsible commissions. Declarations are made to the commission responsible for area in which the public official works. The major commissions are the Judicial Service Commission, the Public Service Commission and the Parliamentary Service Commission. The Judicial Service Commission deals with the judicial arm of government, the Public Service Commission deals

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45 Section 57 of the Anti-Corruption and Economics Crimes Act.

46 Section 11(1)(d) of Ethics & Anti-Corruption Commission Act.

47 Section 35 of the POEA.

48 Section 35(3) of the POEA.

49 Section 31 of the POEA.

50 Muzila *et al* (2012) at 13.

with the executive, while the Parliamentary Service Commission deals with the legislature. The responsible commission is vested with disciplinary control over the public official in its sphere of operation.<sup>51</sup>

The functions of the responsible commissions are to receive, analyse, evaluate, inspect and verify the declaration information.<sup>52</sup> They also are to perform audits of the declarations and report to the responsible minister. This follow-up mechanism is meant to take stock of the process, identify challenges and suggest remedial action where necessary.

The POEA Regulations also provide for the procedure that should be followed when an applicant requests information from a responsible commission. The request should contain the details of the public official in question, and the applicant should specify why he wants the information.<sup>53</sup> The responsible commission has a lot of discretion as to whether to allow the application or not. It can refuse the request on grounds that it is frivolous, vexatious, against the public interest or on grounds of the safety of the public official. This discretion to refuse a request for declaration information has been one of the major limitations of the wealth declaration system in Kenya.<sup>54</sup>

An applicant can appeal to the Minister in charge of integrity issues if the application is denied. There are no provisions specifying when the appeal should be filed, how long the process should take, or what reasons are to be considered in the appeal.

#### **2.6.4 Constitution of Kenya**

The Kenyan Constitution, in particular Chapter Six, is the backbone of anti-corruption and public integrity standards.<sup>55</sup> The Constitution does not refer explicitly to wealth declaration. However, it sets the standards required of public officials. These are in line with the objectives of wealth declaration, one of which is to prevent conflicts of interests. Avoiding such conflicts reduces the chances of engagement in corruption.

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51 Section 3(11) of the POEA.

52 Section 9 of the POEA Regulations.

53 Section 4(1) of the POEA Regulations.

54 Section 7 of the POEA Regulations.

55 "Report on Implementation of Chapter Six", available at <https://tikenya.org/index.php/press-releases/350> (visited on 3 February 2017).

Chapter Six addresses financial probity and restrictions on activities of state officers.<sup>56</sup> State officers should not engage in meaningful business or have a bank account outside Kenya. State officers fall within the definition of politically exposed persons. They are known to conceal corruption proceeds in foreign bank accounts to avoid detection locally. Such accounts can be detected by evaluating their wealth declarations.

The greatest challenge to wealth declaration has been identified as the invasion of fundamental constitutional rights. Wealth disclosure has been challenged as infringing privacy, violating the presumption of innocence, abetting self-incrimination and reversing the burden of proof.<sup>57</sup> The Constitution lays the background for the interpretation of these key principles.<sup>58</sup>

The right to privacy is guaranteed under Article 31 of the Constitution. The information of a person, his family or private affairs should not be revealed unnecessarily. The POEA provides that a public official is to declare information about himself but also about his immediate family members.<sup>59</sup> Thus, a public official's compliance with the POEA requirements implies that the privacy rights of his family members may be infringed, especially if they themselves are not also public officials.

It is also a constitutional guarantee that an accused person should not give self-incriminating evidence.<sup>60</sup> The wealth declaration itself is self-incriminating because it can be used to prosecute the declarant. The information is obtained from a public official as a mandatory requirement. In other words, it is not obtained necessarily in a consensual manner.

Article 35 of the Constitution justifies the infringement of fundamental rights. Every citizen has a right to information held by the government for the exercise or protection of any right or fundamental freedom. Corruption affects the human rights of the public. It deprives them of the resources that can be utilised to provide basic rights such as health, food and shelter. It depletes the resources of the national treasury, thereby incapacitating it from financing essential sectors such as health, education and agriculture. This, in the long

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56 Articles 76 & 77 of the Constitution of Kenya.

57 Messick (2009) at 6.

58 Chapter Four of the Constitution of Kenya.

59 Section 26 of the POEA.

60 Article 50 of the Constitution of Kenya.

run, ensures that the government is not able to provide for basic needs, thus violating the fundamental rights of the general public.

The government and the citizenry have a right to obtain information about a public official who is committing corruption. That information is obtained from the wealth declarations submitted by the public official. It is this information that is used to investigate and prosecute corruption, the same corruption that is violating the rights of citizens to basic services.

The government is obligated to publish any information that affects the general public.<sup>61</sup> Corruption is an offence that affects the general public. It involves misuse of office for personal gain. The office is entrusted to a public official but is owned by the citizenry. Public officials hold their offices in trust. Anything short of this runs counter to the legal convictions of the community and is therefore reprehensible. The Constitution therefore justifies infringement of certain constitutional rights in the fight against corruption.

#### **2.6.5 Access to Information Act**

The Access to Information Act deals with public access to information held by the Kenyan public entities. It was enacted in 2016.<sup>62</sup> Its primary objective is to give effect to Article 35 of the Constitution.<sup>63</sup> Oversight and enforcement of the Access to Information Act is the responsibility of the Commission on Administrative Justice.<sup>64</sup> The Act does not mention wealth declaration expressly. However, it provides guidelines that should be followed when accessing information from public entities.

As noted in Chapter One above, wealth declaration forms are public documents which are in the custody of public entities. The public entities are the responsible commissions. When a public official declares and files the declaration form, the information it contains is transformed from being private to becoming public. Public information is any information held by a public entity, notwithstanding the source or when it was produced. The process of obtaining access to public information is set out in Section 8 of the Access to

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61 Article 35(3) of the Constitution of Kenya.

62 Act 31 of 2016.

63 Article 35 deals with access to information.

64 Section 3 of the Commission and Administrative Justice Act 23 of 2011.

Information Act. It is more detailed than the application process under the POEA Regulations.

The Access to Information Act provides guidelines on the storage and management of records, as well as on the appeal process from a rejected application. It also provides for the grounds on which an application may be rejected. These are stipulated clearly, unlike in the POEA.<sup>65</sup> The storage and management of records is important to ensure their preservation for future use. Well preserved records can be useful in the investigation and prosecution of corruption cases. Such cases can be complicated and difficult to investigate. This is because all parties to the corruption have a motive to maintain secrecy. The only evidence may be the financial disclosure of a public official. That is why the records should be protected from damage and interference. Any alteration of records with the intention of preventing disclosure by a public entity is punishable<sup>66</sup> with a fine of KSh 500 000 or imprisonment for one year.<sup>67</sup>

Public officials who disclose information which is of public interest are protected.<sup>68</sup> Such information relates to mismanagement of funds, conflicts of interests, corruption and abuse of public office. These are issues that are linked directly to corruption. The Access to Information Act, therefore, is facilitating the fight against corruption and, by extension, aiding wealth declaration. A declaration of a corrupt official may contain such information and publication of such declaration is lawful.

Perhaps the most innovative part of the Access to Information Act is the provision that requires public entities to ensure that all records are kept in electronic form. The public entities have to computerise their records within three years of the enactment of the Act, which deadline came and went in 2016. Whether this goal will be achieved remains to be seen. Wealth declaration forms still are filed in hard copy. They are stored also in hard copy. As will be discussed in the next chapter, this is one of the challenges that has limited the efficiency of the wealth declaration system in Kenya. Storage in electronic form will facilitate accessibility and retrieval of the information.

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65 Section 6(1) of the Access to Information Act.

66 Section 18(1) of the Access to Information Act.

67 Section 18(3) of the Access to Information Act.

68 Section 16(1) & (5) of the Access to Information Act.



### 2.6.6 Leadership and Integrity Act

The Leadership and Integrity Act was enacted in 2012.<sup>69</sup> Its main objective was to provide a mechanism for the administration of Chapter Six of the Constitution, which provides guidelines on leadership and integrity benchmarks for state officers. The Leadership and Integrity Act incorporates the provisions of the POEA. In the case of a conflict with provisions of the POEA, the Leadership and Integrity Act prevails.<sup>70</sup>

The Leadership and Integrity Act provides that a state officer, on appointment, shall submit to the EACC a self-declaration.<sup>71</sup> The EACC is the commission that is mandated to receive the self-declaration of appointed state officers. The elected state officers are to submit their self-declarations to the Independent Electoral and Boundaries Commission.<sup>72</sup> There is, therefore, a clear distinction between elected and appointed public officials and where they should submit their self-declarations.

The POEA recognises the responsible commissions as the administrators of wealth declarations. There is thus a conflict with the Leadership and Integrity Act as to whether the EACC or the responsible commissions should administer the wealth declarations. The declaration under the Leadership and Integrity Act is also different from that under the POEA as to the scope of what is to be declared. The self-declaration under the Leadership and Integrity Act is to be done once, whereas wealth declaration under POEA is required on appointment into public service, during service and upon leaving the service.

The self-declaration form is set out in the first schedule to the Leadership and Integrity Act. The contents of this declaration and of the wealth disclosure form under the POEA are very different. The POEA form is detailed. The official has to provide his income, liabilities and assets as well as those of his spouse and dependants below eighteen years. The Leadership and Integrity Act declaration is a summary of the personal details of a public official. These details relate to personal information, academic qualifications and employment details, and the declarant has to complete a moral and ethical questionnaire. The latter declaration falls short of being a wealth disclosure proper. The only link with the POEA is the questionnaire on moral and ethical issues. A public official is to state whether he

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69 Act 31 of 2012.

70 Section 6(3)(4) of the Leadership and Integrity Act.

71 Section 12A of the Leadership and Integrity Act.

72 Section 13(2) of the Leadership and Integrity Act.

ever has failed to declare his wealth and whether he has been convicted of any offences under the POEA.

The Leadership and Integrity Act introduces a register of conflicts of interests for each public utility.<sup>73</sup> Every public officer is to register particulars of his registrable interests. This information is to be kept by the public utility for a period of five years.<sup>74</sup> For elected officials, the custodian of the register is the clerk of the Senate, National Assembly or County Assembly.<sup>75</sup> This register is open to the public for inspection.<sup>76</sup> The contents of the register are the financial interests of the public official, his non-financial interests, any pending civil or criminal cases, and his citizenship status. These items are included because they are capable of influencing a public official's decision-making.

The Leadership and Integrity Act is a dilution of both Chapter Six of the Constitution and of the POEA in the sense that it fails to meet the standards spelled out in those two statutes.

## 2.7 Conclusion

This chapter has identified the major legislation that governs and facilitates the wealth declaration system in Kenya. It may be categorised into two groups: the international instruments and the domestic statutes. The international instruments are those which Kenya has ratified. It therefore is bound by them.<sup>77</sup> They, in turn, may be categorised into two groups, namely, those that provide for wealth declaration as a soft measure and those that provide for it as a hard measure.

The Draft East African Protocol on Preventing and Combating Corruption provides for wealth declaration as a hard preventive measure. States parties are obligated to introduce wealth declaration. Although the Protocol is yet to come into force, the inclusion of wealth declaration as a hard preventive measure attests to how important states parties regard it.

The Draft EAC Protocol and African Union Convention provide for access to information as mandatory. The POEA provides for conditional access to information. There

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73 Section 16(11) of the Leadership and Integrity Act.  
74 Section 16(13) of the Leadership and Integrity Act.  
75 Section 16(10) of the Leadership and Integrity Act.  
76 Section 16(10) of the Leadership and Integrity Act.  
77 Article 2(6) of the Constitution of Kenya.

is a need to review the POEA provision regarding access to declared information to ensure that it conforms to the international instruments. As observed above, access to information is a key determinant of the success of a wealth declaration system. It facilitates the fight against corruption by other interested parties. Non-governmental organisations, civil society, the media and the public can fight corruption only if they have access to information that can unearth corruption.

The POEA is the main domestic statute pertaining to the wealth declaration system. The other statutes facilitate the system with provisions that are in line with the objectives of wealth declaration. The responsible commissions established by the POEA deal with the bulk of the work of administration of the system. They, however, do not investigate corruption, which is the ultimate goal of obtaining the information. The EACC has the duty to investigate but does not have access to the information declared. There is a lack of inter-agency collaboration by which the effectiveness of the system could be ensured.

The Access to Information Act is a good pointer that accessibility of and access to information are being taken seriously. This Act seems to cure the inefficiencies of the POEA regarding access to information. However, this is a relatively new piece of legislation and its success is yet to be observed. The success of the Access to Information Act will depend also on the resources available to the responsible commissions.

The next chapter will discuss in detail how the wealth declaration system works and identify what limits its effectiveness.

## CHAPTER THREE

### THE INSTITUTIONAL FRAMEWORK OF WEALTH DECLARATION IN KENYA

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#### 3.1 Introduction

The previous chapter highlighted the legislative framework of the wealth declaration system in Kenya. The main piece of legislation governing wealth declaration is the Public Officer Ethics Act (POEA). This chapter will discuss the salient features of the POEA, in an effort to understand how the system functions and to identify the impediments to the implementation of the POEA.

#### 3.2 Multiple Agencies and Single Agency

The management of a wealth declaration system can be the responsibility either of a single agency or of multiple agencies. In a single agency model, all public officials are obligated to declare their wealth to one body. It has the sole mandate for the collection of the declaration forms, verification of the content, storage of the information, retrieval of the information and handling of appeals.<sup>1</sup> The advantage of this model is that it facilitates the monitoring of the declarations since they are collected in one pool. Information can be retrieved easily after a request, and the appeal procedure is expedited. It also avoids duplication of duties.

In a multiple agency model, the wealth declarations are managed by various bodies. They perform the same functions according to the same timelines. The information to be declared and sanctions for any violations are similar.<sup>2</sup> In Kenya, the wealth declarations are managed by multiple agencies known as responsible commissions. Each commission is responsible for the public officials who work within its sphere or those over whom it has disciplinary powers.<sup>3</sup>

There is no model that is intrinsically superior. What is important is that the body responsible for receiving and scrutinising the declarations is independent and effective in

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1 Messick (2009) at 6.  
2 Barnes *et al* (2012) at 28.  
3 Section 3(11) of the POEA.

the performance of its duties. The agency not only should be independent financially but also should have adequate resources in terms of personnel and infrastructure, with the ability to establish a proper record-keeping system and to monitor the wealth declaration regime regularly.<sup>4</sup>

### **3.3 Responsible Commissions**

The POEA establishes the responsible commissions.<sup>5</sup> They function as depositories for wealth declarations. They also manage requests for information, appeals and storage of collected forms. Each commission is required to establish a committee to oversee the management of, verification of and access to declarations. These committees report to the chief executive officer of the commission. No qualification criteria for appointment or terms of reference for committee members are provided.<sup>6</sup> This omission is a challenge, since such a committee usually will deal with functions that require professionals across diverse fields.

The Constitution updated the responsible commissions after 2010. The Kenyan government is a presidential system with three arms of government. The responsible commissions fall under the respective arms of government.<sup>7</sup>

### **3.4 Functions of the Responsible Commissions**

The functions of the responsible commissions are outlined in the POEA Regulations<sup>8</sup> and in the POEA itself. The POEA Regulations are subsidiary legislation enacted to assist in the implementation of the provisions of the POEA.<sup>9</sup>

#### **3.4.1 Receipt of Wealth Declaration Forms**

The receipt of wealth declarations by the responsible commissions is the first step in the wealth declaration system. It usually is conducted every two years, during the initial and final phases of declaration. The responsible commission collects the completed forms from the work stations of public officials. The work stations are spread throughout the forty-seven counties of Kenya, according to the decentralisation of government departments. The

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4 Burdescu *et al* (2009) at 17.

5 Section 30 of the POEA.

6 Regulation 10 of the POEA Regulations.

7 Article 248 of the Constitution of Kenya.

8 Regulations 3-9 of the POEA Regulations.

9 Section 42 of the POEA.

forms then are forwarded to the headquarters of the commission which usually is in Nairobi, the capital city of the country.<sup>10</sup>

The heads of the work stations usually circulate the forms to their staff. The human resources departments are tasked with the collection of the forms from all work stations. They also should collect declaration forms from public officials who have ceased working in the public service.<sup>11</sup> The collected forms are sent in sealed envelopes to the commission's headquarters. The collection of the forms is not documented. It therefore is entirely possible that a public official who does not declare goes unnoticed.<sup>12</sup>

### **3.4.2 Verification of the Contents of Declarations**

The verification process is the second step in the wealth declaration system. It is also the most important step. Verification means ascertaining the authenticity of the contents of declarations. Countries which verify wealth declarations tend to have lower corruption levels than countries in which wealth declarations are filed but not verified.<sup>13</sup> The responsible commissions have a duty to countercheck what has been declared. Regulation 9 of the POEA Regulations provides that responsible commissions should analyse, evaluate, inspect and verify the declarations. They also should compare and contrast the information provided against independent sources.<sup>14</sup>

Public officials who give misleading information or omit some information should face sanctions. On conviction, a public official is to be fined KSh 1 000 000 or is to receive a custodial sentence not exceeding one year.<sup>15</sup> This is a lenient sanction, especially when the corruption in question is grand corruption. Grand corruption involves huge sums which easily exceed the fine of a million shillings. A public official who is involved in this type of corruption may opt not to declare his wealth and face the consequences. The fines can be paid with the corruptly acquired money.

Verification usually is bypassed by the responsible commissions. This occurs despite its being the key to a successful system. The responsible commissions have been reduced to

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10 Transparency international (2013) at 32.  
11 Section 31 of the POEA.  
12 Transparency international (2013) at 26.  
13 Mukhereje *et al* (2006) at 325.  
14 Regulation 9(b) & 9(c) of the POEA Regulations.  
15 Section 32 of the POEA.

collection centres when they should be operating as managers of the system.<sup>16</sup> They are not performing their statutory obligations.<sup>17</sup> Their failure to conduct verification may be attributed to various factors. These factors include lack of political will, of financial independence, of human personnel, of infrastructural resources and of collaboration with other government departments which can assist with verification.<sup>18</sup>

Corruption proceeds take the form of tangible and intangible property. A public official may use these proceeds to buy assets such as land and cars. The proceeds can be deposited into bank accounts or invested in shares. The verification process thus will have to make use of the land registries, the motor vehicle registry, and the records of revenue departments.<sup>19</sup> A corrupt public official may declare a property but deliberately undervalue it. The verification process thus also requires appraisal of declared property to ascertain its true value.

### **3.4.3 Storage of Wealth Declarations**

The third function of the responsible commissions involves storage of the wealth declaration forms. The declared information is recorded on prescribed forms. These are kept in the custody of the responsible commission at its headquarters. The POEA provides that this information should be kept for a period of five years after a person ceases to be a public official, as a result of retirement, suspension or expulsion.<sup>20</sup> The POEA Regulations provide that the responsible commissions may store the information in electronic form, microfilm or any other form as may be appropriate.<sup>21</sup>

The responsible commissions are overwhelmed by the large number of declaration forms. They do not have the requisite facilities to store a large number of forms, which are completed every two years by thousands of civil servants. There should be adequate storage facilities to protect the declaration forms against destruction. It is possible that a corrupt public official colludes with the human resources department to tamper with the information relevant to an ongoing investigation. The storage facilities thus should take into

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16 Chene (2008) at 7.

17 Transparency International (2013) at 33.

18 Transparency international (2013) at 34.

19 Barnes *et al* (2012) at 18.

20 Section 31 of the POEA.

21 Regulation 3 of the POEA Regulations.

account the security of the forms and the danger of interference with them. It should be noted here that the officials who manage the collection and storage of the forms work in departments under the same roof. Therefore, destruction of or tampering with the information is a real possibility.

#### **3.4.4 Handling of Complaints**

The responsible commissions investigate complaints from any person. They can initiate investigations of public officials under their jurisdictions. A complaint also may be filed by a colleague or it may be initiated by the commission itself.<sup>22</sup>

A complaint relating to corruption will involve retrieving the relevant wealth declaration forms. The responsible commission then can proceed to analyse whether the public official has acquired any proceeds of corruption. It has the discretion to refer the complaint to another appropriate body for investigation.<sup>23</sup> A corruption-related complaint would be better referred to and investigated by the Ethics and Anti-Corruption Commission (EACC). However, this provision is non-mandatory, which means that the responsible commission may elect whether to hand over the complaint or not.<sup>24</sup>

The responsible commissions are obligated only to hand over to another appropriate body after it has completed its investigation and found that a public official has contravened the code of conduct. There thus is a potential conflict of interests which can be abused by corrupt public officials. For the responsible commission to handle a complaint is akin to one investigating oneself, which violates the rules of natural justice.

The responsible commissions also have the discretion to initiate investigations of former public officials.<sup>25</sup> This provision should be mandatory. A complaint that leads to investigations should be entertained as a matter of course, whether the public official is in service or not.

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22 Section 35(2) of the POEA.

23 Section 35(3) of the POEA.

24 Section 35 of the POEA.

25 Section 35(4) of the POEA.



### 3.4.5 Access to Information

The responsible commissions also receive applications for access to the declared information. This is probably one of their most important functions because they are the sole depositories for wealth declarations and access to the information is crucial in the fight against corruption.<sup>26</sup>

A responsible commission has the discretion to give or to refuse access to the information. An applicant has to demonstrate a legitimate interest and good cause.<sup>27</sup> This is an ambiguous provision that can be manipulated by corrupt public officials in collaboration with colleagues who handle the applications.

The responsible commission has to inform the affected public official of the application. Approval must be sought from the affected public official.<sup>28</sup> It is unlikely that a corrupt public official, who knows that the information sought will implicate him, will concede to the application. The POEA Regulations provide grounds upon which a commission may deny access to wealth declaration information. It may do so if the application is vexatious, frivolous or a security threat to the public official.<sup>29</sup> This kind of provision is not conducive to the fight against corruption.

### 3.4.6 Annual Reports

The responsible commissions are required to examine their own practices, systems and procedures in order to identify any weaknesses. They are required to submit a report annually to the Minister in charge of integrity issues. These requirements are aimed at taking stock of the process so as to identify any challenges and make appropriate recommendations.<sup>30</sup>

The reports should advise the Minister in charge of integrity issues of trends in and challenges to the wealth declaration system, and they should contain proposals for any improvements. The success of a self-review by a responsible commission will depend on proper functioning of the system. Such proper functioning is not limited to the completion

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26 Mukherjee *et al* (2006) at 326.

27 Section 30 of the POEA.

28 Regulation 6 of the POEA Regulations.

29 Regulation 7 of the POEA Regulations.

30 Regulation 9(e)-(g), of the POEA Regulations.

and submission of declaration forms but includes verification of the information and enforcement of sanctions for any violations. The intended review and submission of reports to the Minister either will be impossible or inaccurate if there is no verification of the declarations.

### 3.5 Sanctions

A wealth declaration system without effective enforcement and sanctions cannot succeed. Sanctions ensure that the process is adhered to, that there is no complacency or concealment of information and that timelines are followed.<sup>31</sup> The gravity of these sanctions should match the violations and have a deterrent effect. Lenient sanctions are equivalent to not having any sanctions.

The sanctions may take the form of administrative, criminal or reputational penalties. The POEA provides for criminal and administrative sanctions.<sup>32</sup> Each responsible commission is required to establish procedures for the management of sanctions. Administrative sanctions usually are enforced by accounting officers through withdrawal of salaries and other forms of remuneration. They are more effective than criminal and reputational sanctions. This is because they are easier and less costly to enforce. Criminal sanctions are more appropriate for serious offences such as submitting false or misleading information. Reputational penalties take the form of publication of the names of late filers, non-filers or convicted public officials. They are appropriate for elected public officials.<sup>33</sup>

The offences in the POEA generally may be divided into two categories, namely, those related to the veracity of submissions and those related to the deadline for the declaration. A public official should declare information which is correct to the best of his knowledge.<sup>34</sup> Offenders either submit false or misleading information or fail to submit any information at all.<sup>35</sup> On conviction, a public official is to be fined KSh 1 000 000 or is to receive a custodial sentence not exceeding one year. The sanction applies to both categories of offences. There ought to be a distinction between offences of late filing and false or

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31 Barnes *et al* (2012) at 69.

32 Section 36 of the POEA.

33 Barnes *et al* (2012) at 72.

34 Section 27 of the POEA.

35 Section 32 of the POEA.

misleading filing. The latter are more serious. They should be accompanied by more serious sanctions.

The prescribed sanction is lenient for grand corruption cases. As noted earlier, such cases involve big money. A public official may omit incriminating information if the value of the proceeds of a corrupt act is higher than the fine. The POEA is silent about what should follow if it is discovered that a public official concealed information that would have exposed proceeds of corruption. The Access to Information Act provides that the EACC may commence proceedings to confiscate any unexplained assets after an investigation.<sup>36</sup> The best approach would be automatic confiscation of the concealed property.

Other sanctions established by the POEA relate to the use and misuse of information in wealth declaration forms. For example, any information obtained from the responsible commissions should be published only with their consent. A contravention of the provision carries a sentence of five years' imprisonment or a fine not exceeding KSh 500 000.<sup>37</sup> This provision implies that the fact that information has been given to a party does not constitute consent to publish that information.<sup>38</sup> It, therefore, creates a two-layered process for any declared information to be used publicly: an application for access to the information; and an application to publish the information provided.

Persons who divulge information acquired in the course of their work under the POEA without a lawful excuse are liable to conviction.<sup>39</sup> They may be staffers in the responsible commissions or any other persons who, in the course of their work, come across such information. Persons working in the commissions have more direct access to wealth declarations than the media and the public. This provision is meant to protect public officials against malicious publication. Conviction under the provision attracts a fine not exceeding KSh 5 000 000 or imprisonment for a term of five years or both.

### **3.6 Enforcement**

Sanctions alone cannot be effective in ensuring the success of a wealth declaration system. They need to be supplemented by an enforcement mechanism. Part IV of the POEA deals

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36 Section 55(2) of the Access to Information Act.

37 Section 30(3) of the POEA.

38 Section 30(2) of the POEA.

39 Section 41 of the POEA.

with the enforcement mechanism. The responsible commission has wide discretion in the enforcement of the POEA. It can commence an investigation either on its own initiative or pursuant to a complaint by an independent person.<sup>40</sup> The latter is more likely than the former.

The responsible commission can proceed to investigate the complaint itself or refer the matter to an appropriate body. The EACC has the investigative powers over corruption offences while the Office of the Director of Public Prosecutions has the prosecutorial powers. The responsible commission, therefore, should refer the complaint to the EACC.

After the responsible commission conducts an investigation and finds a public official culpable, it can proceed with administrative action or refer the matter to a civil or criminal institution. This is because civil or criminal proceedings can be instituted only by other independent bodies.<sup>41</sup> The administrative action usually taken is suspension on half pay upon the suspect being charged.<sup>42</sup> On conviction, a public official is dismissed from the service. A convicted public official can be re-appointed to the service only after ten years.<sup>43</sup>

### **3.7 Subjects of the POEA**

The POEA provides that all public officials should file wealth declaration forms every two years.<sup>44</sup> The POEA takes a descriptive approach to the definition of a public official.<sup>45</sup> The Constitution defines a public official as a state officer or any other person who holds a public office.<sup>46</sup> All state officers are public officials but not all public officials are state officers. A public office is any office either in the national or county government that is funded from the Consolidated Fund or by funds approved by Parliament. Since all public offices are funded by the government, their holders are public officials and are subjects of the POEA. So, too, are their spouses and any dependants below eighteen years of age.

The POEA envisions a nuclear family. In African society generally and in Kenya in particular, the meaning of the family encompasses the extended family.<sup>47</sup> Thus, public

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40 Section 35(1) of the POEA.

41 Section 38 of the POEA.

42 Section 62 of the Access to Information Act.

43 Section 64(1) of the Access to Information Act.

44 Sections 23 & 26 of the POEA.

45 Part 1 Preliminary of the POEA.

46 Article 260 of the Constitution of Kenya.

47 Transparency international (2013) at 21.

officials defeat the declaration requirements by registering corruptly obtained proceeds in the names of extended family members. It is not possible to require wealth declarations from all extended family members. However, such abuse may be checked by providing that those who assist a public official in concealing any corrupt proceeds should be liable equally. It is recommended that such a provision be followed by a punitive sanction. This will discourage members of the extended family from allowing themselves to be used as conduits of corruption.

### **3.7.1 Appointed Public Officials**

This class of public officials is appointed through a recruitment process for a specific or for an indefinite period of time. They are referred to also as civil servants. The recruitment process usually is handled by the employer. Some responsible commissions recruit their own staff. Most civil servants are employed for an indefinite period unless their jobs are terminated for a particular reason. Most serve in the public service until retirement. The public officials in this group have been receptive to the wealth declaration system. However, it still is debatable whether they submit declarations as a matter of routine or whether they are committed to doing so willingly.<sup>48</sup>

These public officials fall into high-ranking and lower-ranking categories. The former, though appointed, usually have close links with the ruling elites. Appointment to the upper echelons of the public service in most cases is influenced by the political elites of the day.<sup>49</sup> They usually hold administrative positions. The chief executives of the responsible commissions may be counted in this category.

### **3.7.2 Elected Public Officials**

This class of public officials is appointed through an election process, which usually takes place every five years. Their main function is drafting legislation and heading the executive arm of government. They are considered as political elites or politically exposed persons. The Constitution describes them as state officers, although not all state officers are elected.<sup>50</sup> There is no guarantee that an elected public official will be re-elected.

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48 Transparency international (2013) at 32.

49 Williams (1987) at 83.

50 Article 260 of the Constitution of Kenya.

Elected public officials are not involved directly in the day-to-day running of government. However, they have a lot of influence on other public officials and government functions. They usually are implicated in grand corruption scandals alongside high-ranking appointed public officials. Parliamentarians, in particular, are known to use their legislative powers to demand bribes. They usually are influenced to vote in favour of business and political interests.<sup>51</sup> Unlike appointed public officials, they have not been receptive to wealth declaration.

The POEA provides that wealth declaration forms should be preserved for five years.<sup>52</sup> This information can be used to investigate and prosecute a public official for any offences committed while in service. An elected official ceases to be a public official if not re-elected. This follows from the uncertainty of elections. They then are obligated to make a final declaration.<sup>53</sup> However, they typically do not do so, which is a contravention of the POEA.

All public officials are subjects of the POEA. This has resulted in challenges arising from the large number of declarations submitted by them. The volume of declarations is difficult and time-consuming to manage. A systematic approach is needed,<sup>54</sup> which can be based on the functions or ranks of public officials.<sup>55</sup> Disclosure ought to start with high-ranking officials and those performing functions susceptible to corruption.

### **3.8 Contents of Wealth Declarations**

What is to be disclosed is a key feature determining the effectiveness of a wealth declaration system. UNCAC states that disclosure should include outside activities, investments, assets, liabilities, employment and any substantial gift from which conflicts of interests may arise.<sup>56</sup> The African Union Convention is silent on the issue. Particularly important is a requirement to disclose any foreign bank accounts and interests in offshore companies and trusts. These have been the main avenues to syphon proceeds of corruption

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51 Otieno (2005) at 76.  
52 Section 31 of the POEA.  
53 Section 27(5) of the POEA.  
54 Demmke *et al* (2007) at 132.  
55 Chene (2008) at 3.  
56 Article 8(5) of UNCAC.

from African countries.<sup>57</sup> They have the advantage of concealing the corrupt proceeds and avoiding detection by local law enforcers.<sup>58</sup> This aspect of disclosure matters especially for high-ranking appointed officials and elected public officials.

The POEA provides that all public officials are to declare income, assets and liabilities of themselves, their spouses and their dependants below the age of eighteen years.<sup>59</sup> The POEA does not define assets and liabilities. The declaration is completed on a form contained in the schedule to the POEA. The first part of the form deals with identification details of the official, his spouse and his children. These details do not include where the spouse works or in what form of employment he or she is engaged. This information is important since it can assist in detecting conflicts of interests. The other part of the form contains a description of the official's income, assets and liabilities and their approximate value. The form does not require declaration of a public official's outside activities or interests.<sup>60</sup>

A wealth declaration form should be comprehensive and clear, to ensure that there is no possibility of hiding illicit proceeds amongst the assets and liabilities.<sup>61</sup> The Ministry in charge of integrity issues has the power to amend the form through a Gazette notice after a resolution of the National Assembly.<sup>62</sup> In 2013 an improved declaration form was presented to the National Assembly but it was not approved.

### **3.9 Filing Frequency**

Filing frequency refers to how often the wealth declaration information should be submitted during the period of service of a public official. There are different approaches to how often the information should be filed. The information may be filed once, when the public official is appointed to the public service. Alternatively, it may be filed upon appointment to public service with periodic renewals of the information during the course of employment.<sup>63</sup>

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57 Hatchard (2014) at 275.

58 Moiseienko (2015) at 400.

59 Section 140 of the POEA.

60 See Appendix B.

61 Transparency international (2013) at 21.

62 Section 34(2) of the POEA.

63 Habershon *et al* (2012) at 38.

The POEA provides that public officials are to submit declarations on assumption of office, then every two years while in office, and again when leaving the service.<sup>64</sup> The declarations originally were filed on an annual basis but this was changed to biennial filing in 2007. A public official should submit a wealth declaration within thirty days of assumption of office. A final declaration should be filed within thirty days after the declarant ceases to be a public official.<sup>65</sup> This provision applies to both appointed and elected officials.

It is proposed that filing should precede appointment to any public office. Also, public officials already in service should be promoted only upon proof of their having filed the wealth declarations as required during their past years of service. Elected public officials should file their wealth declarations before taking the oath of office. In Nigeria, for example, President Umaru Musa Yar'Adua declared his assets before taking his oath of office in 1999. This prompted other elected public officials to follow suit.

In Kenya, the compliance rate for submission of the initial wealth declaration has been impressive. However, the provision on filing a final declaration upon departing the public service largely has been overlooked. Public officials simply do not submit the final declaration when they leave office. This last declaration is crucial since a corrupt public official may resign in order to avoid detection.<sup>66</sup> It can be used as a follow-up mechanism to pursue a former public official suspected of in-service corruption. It appears that public officials are not aware of Section 27(5) of POEA or disregard it in order to evade any follow-up investigation. A majority of the responsible commissions admitted that they never have received a final declaration or requested one when a public official left office.<sup>67</sup>

The requirement to file a declaration every two years presents an administrative challenge to the responsible commissions. This is because the same information tends to be duplicated each year. The responsible commissions thus often have to verify the same information, thereby straining their already meagre resources. The relevant statutory provisions should be amended so that a public official adds information only if there has been a considerable change in his wealth.

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64 Section 27(5) of the POEA.

65 Section 27(6) of the POEA.

66 Boles (2006) at 854.

67 Chene (2008) at 7.



### 3.10 Conclusion

This chapter has discussed the salient features of the wealth declaration system in Kenya. The main Statute governing the system is the POEA. The responsible commissions manage the system. The enactment of the POEA was a step in the right direction. However, many provisions of the POEA remain ambiguous and are not in conformity with international legislation to which Kenya is a signatory. The responsible commissions therefore cannot exercise their functions effectively.

Wealth declaration is mandatory for all public officials. However, the high volume of declarations presents a challenge. A systematic approach is recommended to enable the responsible commissions to perform their functions effectively. The key function is verification of information declared. The ability of the responsible commissions to perform verification extends to the overall success of the system. Verification can lead to the identification of illicit enrichment and conflicts of interests. The successful prosecution of cases also depends upon proper verification.

Public officials have a vital role to play in the functioning of the wealth declaration system. They should declare truthfully before appointment, during their tenure and after ceasing to be public officials. The final declaration is overlooked routinely but is critical to the success of the system.



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## CHAPTER FOUR

### CHALLENGES FACING THE WEALTH DECLARATION SYSTEM IN KENYA

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#### 4.1 Introduction

The previous chapters have discussed the foundations of the wealth declaration system in Kenya. The system has been in place for more than a decade already. However, it has failed to have any impact on the fight against corruption. The objectives of wealth declaration, therefore, have not been achieved in Kenya. This may be attributed to the various challenges that impede the system. These challenges are the subject of this chapter.

#### 4.2 Institutional Capacities

Institutional capacities relate to human resources, facilities, budgetary allocation and technology. These are considered below.

##### 4.2.1 Human Resources

The wealth declaration system involves a process that requires adequate qualified personnel. This is lacking in the Kenyan system. The system is managed by the human resources departments of the responsible commissions. Each responsible commission is to constitute a committee to oversee the system. This committee reports to the chief executive. Its key functions are management and verification of the declarations and providing access to them.<sup>1</sup>

The wealth declaration system requires not only adequate staff but also professionals across various disciplines. Verification is a process that involves authenticating the information against independent sources. It requires personnel with a background in areas such as valuation, law, taxation and land registration. These are skills which cannot be taught through short-term, in-house training as is being done currently.<sup>2</sup>

There is a lack of qualified staff in the human resources departments to manage the wealth declaration regime. This undermines the ability of the responsible commissions to

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1 Regulation 10 of the POEA Regulations.

2 Mutonyi (2002) at 32.

execute their functions. The committees constituted in the responsible commissions should have qualified personnel. Their terms of reference should be spelled out clearly.

#### **4.2.2 Storage Facilities**

The responsible commissions do not have adequate storage facilities to handle the wealth declaration forms. There are about 600 000 public officials who should file the forms every two years.<sup>3</sup> This is a vast volume of paper that accumulates. The declared information should be preserved by the responsible commission until the public official ceases to work for the public service, whereafter it should be preserved for another five years. For public officials who work until retirement, the information should be preserved for their entire period of service.

The paper load produced by the wealth declaration system requires proper storage facilities to ensure that there is no destruction of the information. It also will discourage any interference by a corrupt public official seeking to conceal any incriminating information. Storage of declarations under the same roof where declarant officials are employed raises questions about data protection. The possibility of tampering with the information in sensitive and incriminating documents is a reality. Safety of the declared information should be ensured, both in a paper-based declaration system and in an electronic submission system. In the latter, there should be an effective backup and firewall in case of destruction or theft of the original data.

#### **4.2.3 Technology**

The Kenyan system is entirely paper-based. Electronic systems are more effective and secure.<sup>4</sup> They also reduce the cost of administration. The declarations have to be transported physically from various offices across the country to the headquarters of the responsible commissions which are based in Nairobi. There is a risk of destruction during such transportation. It is an additional cost and time consuming. In a paper-based system retrieval of data is a challenge. Corrupt public officials can use this as an excuse to derail access to information while they use the opportunity to tamper with the documents and

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3 Kenya National Bureau of Statistics (2015) at 17.

4 Kossick (2002) at 10.

alter the data. Electronic declarations can be retrieved easily and stored for longer periods, as opposed to hard copies.<sup>5</sup>

The newly enacted Access to Information Act provides that public utilities are to computerise their records for efficient access to information.<sup>6</sup> This is to be done within three years from the date of commencement of the Act, which was in 2016. This is commendable. The POEA Regulations provide that a responsible commission may store the declarations in electronic form, microfilm or any other form as it may consider appropriate.<sup>7</sup> The responsible commissions may not be aware of this provision or they do not have the means to use electronic storage or they have resorted to paper-based declarations deliberately. Electronic declarations will aim to meet the following objectives:

- Facilitate the submission of declarations and monitoring of submission compliance. Declarants can submit their information through an online platform. The responsible commission can check compliance online which will be more efficient than counter-checking the hard copies manually.
- Facilitate data management and verification of declarations. The responsible commission can process the data and verify the contents. It also can transfer the data to other agencies. This will enhance inter-agency collaboration. It will assist in tracking and verification of data and improve on efficiency.
- Facilitate public access to wealth declarations. An electronic system will enable the ready recovery of the declared information upon request. The responsible commission staff will not have to dig physically in the archives to retrieve data. This is an added advantage for both public disclosure systems and non-public disclosure systems. In a public disclosure system the information can be made available through an online platform. In a non-public disclosure system the information is retrieved easily.

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5 Barnes *et al* (2012) at 48.

6 Section 17(3)(c) of Access to Information Act.

7 Regulation 3 of the POEA Regulations.

#### 4.2.4 Finance

Without proper financial support even the best wealth declaration system is doomed to failure. There is a need for adequate and consistent budget allocation. This would ensure that the entity overseeing the system is insulated from executive interference and is capable of providing the infrastructure to support the system.<sup>8</sup>

The above-mentioned institutional capacities largely depend on the budgetary allocation of the responsible commissions. The responsible commissions are not designed to deal exclusively with wealth declarations. Their core functions and mandates vary, depending on the terms of their establishment. Their budgetary allocations do not cater specifically for their functions as administrators of the wealth declaration system. There are no statutory provisions on how these functions ought to be funded.

This is a challenge that hinders the responsible commissions in the implementation of their objectives. UNCAC provides that bodies dealing with prevention of corruption should be granted independence, material resources and specialised staff.<sup>9</sup> Responsible commissions are such bodies. Their independence can be secured only if they have financial autonomy. This will enable them to provide their own material resources and pay specialised staff in order to perform their functions.

#### 4.3 Inter-Agency Collaboration

As noted above, the wealth declaration system in Kenya is managed by multiple agencies referred to as responsible commissions.<sup>10</sup> One of the challenges facing the system is a lack of co-ordination amongst the agencies combating corruption.<sup>11</sup> The power to prosecute lies solely with the office of the Director of Public Prosecutions, while the power to investigate corruption offences is vested in the EACC.

There should be a mechanism to forward to the EACC, for enforcement of any violations, the wealth declaration forms which have been verified. Alternatively, the EACC could be tasked with managing the entire wealth disclosure system and hence with performing the critical function of verification. This would mean that after the responsible

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8 Barnes *et al* ( 2012) at 40.

9 Article 6(2) of UNCAC.

10 See §3.2 above.

11 Transparency International (2013) at 34.

commissions have collected the forms and ensured compliance with declaration requirements, they transmit the forms to the EACC for verification.

An effective disclosure system also depends on the availability of data from other agencies, such as the land registries, tax departments and banks. For the responsible commissions to check the contents of declarations and their accuracy, effective collaboration is necessary.<sup>12</sup> This collaboration should be extended to investigative and prosecution agencies. Enhanced collaboration raises the prospectus of detection and ensures that the objective of the system is met. Restrictions on information sharing are a real challenge in the Kenyan wealth declaration system.

#### 4.4 Political Will

The political class never has been receptive to wealth declaration and especially public access to the information contained in declarations. This has been evident since the enactment of the POEA. Section 30 of the POEA was the most contentious item during the passage of the Act. Even after the enactment of the POEA, the political class never has embraced fully the idea of public declaration. This is because its members are beneficiaries of corruption.<sup>13</sup> This class consists of the elected and high-ranking appointed public officials.<sup>14</sup>

In Kenya, corruption always has been perceived as two-fold, that is, petty and grand corruption. This categorisation is based on the magnitude of the corrupt proceeds.<sup>15</sup> Petty corruption is perpetrated by the lower cadre of civil servants through rent-seeking behaviour. Grand corruption is the preserve of high-ranking appointed public officials and elected officials. It is perpetrated in a systematic manner and on a large scale.<sup>16</sup>

Rent-seeking behaviour is a result of poor remuneration and limited opportunities for career advancement. While this is probably tolerable and economically defensible, grand corruption, which results in large-scale theft of state assets, defeats any explanation. The

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12 Burdescu *et al* (2009) at 18.

13 "Declare Wealth, Karua Tells Rivals", available at [www.standardmedia.co.ke/article/2000076562/declare-wealth-karua-tells-rivals](http://www.standardmedia.co.ke/article/2000076562/declare-wealth-karua-tells-rivals) (visited on 3 February 2017).

14 Hough (2013) at 66.

15 Gathii (1999) at 412.

16 Mutonyi (2002) at 26.

high-ranking appointed public officials and the elected public officials who commit grand corruption are also the most highly paid members of the public service.<sup>17</sup>

There is a relationship between the high-ranking appointed officials and the political elite in that appointment to the top echelons of government usually is influenced by the political elite.<sup>18</sup> While petty corruption may bypass high-ranking appointed officials and elected officials, large-scale systematic corruption normally requires their acquiescence and most likely their personal involvement.<sup>19</sup>

This explains why these public officials never have been receptive to wealth declaration. They are the main beneficiaries of corruption. It is highly unlikely that corruption would occur in the public service without their blessing.<sup>20</sup> Even if corruption were to persist, it would not continue at the current magnitude and rate. There is, therefore, an intentional demonstration of lack of political good will by senior public officials.<sup>21</sup> Wealth declaration and, especially, public declaration would expose their misdeeds to the public and diminish their fortunes.

The lower cadre of civil servants have learnt from their superiors. This category extends to middle-class civil servants. They have followed in the footsteps of their seniors, thus rendering the system ineffective.<sup>22</sup> If elected and high-ranking appointed officials were to declare their wealth publicly, it would send a signal to other public officials that corruption will not be tolerated. It would advance greatly the fight against corruption.

Wealth disclosure enforcement should focus on these upper officials. To start with, the responsible commissions should commence verification of documents submitted by high-ranking officials. This contrasts with the wholesale approach to verification, which does not take place anyway. Fighting corruption has been likened to washing a staircase. This approach ensures that the “dirt” is cleaned from the top down.<sup>23</sup>

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17 Mutonyi (2002) at 27.

18 Ogwang (2007) at 18 & 33.

19 Kofele (2006a) at 737.

20 Kofele (2006a) at 736.

21 Dawit (2004) at 175.

22 Mutonyi (2002) at 24.

23 Klitgaard *et al* (2000) at 79.

Focusing corruption policies and measures from the top down, if coupled with political will, can lead to prosecution of high-ranking officials.<sup>24</sup> Fighting corruption is generally a long-term project, but such an approach will have visible early wins. It will have far-reaching consequences in the fight against corruption, and especially against politically engineered corruption.<sup>25</sup>

#### **4.5 Public Participation**

There is a lack of knowledge amongst the public of the existence of the wealth declaration regime. UNCAC points out the importance of civil society, the media and the public in fighting corruption.<sup>26</sup> In this regard, the first step is to have an informed public that is aware of the wealth declaration regime.

Most knowledge of corruption is disseminated through the media. Usually, this occurs when a senior official is arrested. Generally, public knowledge of corruption is limited to knowledge of the existence of the anti-corruption commission. The public is not aware of preventive measures, such as wealth declarations, that it can utilise to assist in combating corruption.<sup>27</sup>

Members of the public, with the help of civil society or the media, can file applications for access to information about a public official whom they think is engaged in corruption. In many cases, the public is the first to become aware of public corruption. An informed public can use its observations to assess whether a public official is corrupt.<sup>28</sup> For example, members of the public can gather evidence of corruption by observing the lifestyle of an official who is living beyond his means.

In this connection, it is proposed that the EACC take a more aggressive approach and engage the media in educating the public on laws and regulations concerning access to information pertaining to corruption. This will inform the public about how to utilise the information contained in wealth declarations to assist in the fight against corruption.<sup>29</sup>

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24 Hough (2013) at 69.

25 Kofele (2006a) at 709.

26 Article 13(1) of UNCAC.

27 Transparency international (2013) at 42.

28 Byrne *et al* (2010) at 5.

29 Byrne *et al* (2010) at 35.



## 4.6 Legal Challenges

Wealth declaration has been challenged as infringing upon fundamental rights guaranteed in the Constitution. It is true that wealth declaration trespasses on constitutionally guaranteed rights relating to privacy, the presumption of innocence, self-incrimination and proof of guilt beyond a reasonable doubt. These legal challenges are not peculiar to Kenya and have been experienced in other jurisdictions which have introduced wealth declaration. This explains why the provisions on wealth declaration in most international instruments are “soft law”.

There is a relatively wide consensus that the public’s interest in curbing corruption outweighs a public official’s constitutional rights. However, the wealth disclosure system continues to be challenged as violating the constitutional rights of public officials.

### 4.6.1 Right to Privacy and Wealth Declaration

Wealth declaration has been accused of violating the privacy of public officials, especially of their spouses who are not actually public officials. This was a key issue during the enactment of the POEA. Legislators were concerned that wealth declaration, and especially public wealth declaration, would undermine the privacy of public officials. It was argued that this would expose them to criminals and result in crimes such as kidnapping, extortion and robbery.<sup>30</sup> These are not far-fetched concerns, given the experience of other jurisdictions which have public wealth declaration regimes. However, such concerns should be handled on a country-by-country basis.

The right to privacy is a constitutional guarantee.<sup>31</sup> The right to privacy usually is associated with the right to private property and the right to liberty in one’s private affairs.<sup>32</sup> Most of the theories on the right to privacy claim that it is the right to restrict access to the person of the holder himself or herself. In other theories, it is the right to restrict access to personal information.<sup>33</sup> This implies that information relating to a public official’s family or private affairs should not be revealed or made available unnecessarily.

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30 Gachigua (2010) at 129.

31 Article 31(c) of the Constitution of Kenya.

32 Lawal (2009) at 240.

33 Lawal (2009) at 239.

The declaration of wealth may be categorised as information pertaining to the family and private affairs of the declarants.

There is an overriding public interest in fighting corruption. Corruption is in the public domain and the public has an interest in combating it by virtue of paying taxes. Members of the public, therefore, have a right of access to any information that may be related to corruption. Wealth accumulation by a public official that is not consistent with his known remuneration may be related to corruption. In such circumstances, the privacy of the public official may be restricted.

The right to privacy is not an absolute right. The Constitution of Kenya enumerates instances when rights may be abrogated.<sup>34</sup> However, certain factors should be taken into consideration before rights are limited. These are the nature and extent of the limitation, the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve the objective of the limitation.<sup>35</sup> The nature of corruption offences justifies abrogation from this right. The clandestine nature of corruption offences makes the right to privacy an obstacle in the fight against corruption. It follows, therefore, that the limitation is necessary.

#### **4.6.2 The Presumption of Innocence and Wealth Declaration**

The presumption of innocence is guaranteed by the Constitution of Kenya.<sup>36</sup> It is guaranteed also by international human rights treaties. For example, the International Covenant on Civil and Political Rights (ICCPR) sets out the international legal standards for a fair trial and identifies the presumption of innocence as one of the minimum fair trial guarantees.<sup>37</sup> Further, according to the Human Rights Committee, the presumption means that the “burden of proof is on the prosecution and the accused has the benefit of doubt”.<sup>38</sup>

The presumption of innocence compasses the right to remain silent and the right not to incriminate oneself or testify against oneself or confess guilt.<sup>39</sup> These accessory rights are

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33 Articles 24 & 25 of the Constitution of Kenya.

35 Malherbe (2000) at 121.

36 Article 50(2) of the Constitution of Kenya.

37 Article 14 of the ICCPR.

38 Article 11 of the Universal Declaration of Human Rights.

39 Kofele (2006b) at 916.

guaranteed constitutionally in Kenya.<sup>40</sup> The presumption of innocence applies before the commencement of a criminal trial, during the trial and after the trial if the accused is not convicted.<sup>41</sup> The presumption applies until the public prosecutor proves beyond a reasonable doubt that the public official is guilty of corruption as charged.

An accused public official is innocent until proved otherwise. This right is in conflict with the act of wealth declaration, because where a discrepancy is detected between a public official's wealth and his declaration, there is a presumption that he is corrupt. He may face charges of illicit enrichment and have irreparable damage done to his character.

#### **4.6.3 The Equality of Arms Principle**

This principle justifies infringement of the presumption of innocence. It means that the opposing sides are to be treated equally during the trial. As a general rule, the prosecution has to prove its case beyond a reasonable doubt. It is assumed that it has all the machinery of the state behind it. It is, therefore, privy to all the evidence to be adduced. The principle, however, applies to both the accused and the prosecution.<sup>42</sup>

It ensures that both parties are in the same position to make their case and have equal access to the evidence available. The principle is violated where the prosecution does not disclose all the material information it will rely on in the trial. Likewise, it is violated when the accused does not disclose all material information in his possession and which is not accessible to the prosecution.

In corruption-related offences and especially in instances of grand corruption, evidence may be more accessible to the accused than to the prosecution. The investigation and prosecution of grand corruption offences is a complicated and costly affair. The state may not have the same resources as an accused person to investigate and prosecute these cases.<sup>43</sup> This is especially true in least developed countries such as Kenya. The infamous Anglo-Leasing scandal and the Goldenberg affair are prime examples of how frustrating it can be to prosecute corruption cases in which the accused are politically connected.<sup>44</sup> Rich

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40 Article 50(i)(l) of the Constitution of Kenya.

41 Kofele (2006b) at 918.

42 Kofele (2006b) at 936.

43 UN Anti-Corruption Tool Kit, available at [www.undoc.org/pdf/crime/toolkit/fq.pdf](http://www.undoc.org/pdf/crime/toolkit/fq.pdf) (visited on 3 February 2017).

44 Wrong (2009) at 45.

and powerful accused have the means and ability to employ the best legal services and derail the case against them.<sup>45</sup> In illicit enrichment cases, the accused regularly enjoy an unrivalled advantage. This advantage justifies why a public official should declare his wealth. The act of disclosure may be interpreted as an infringement of the right to be presumed innocent. However, in the circumstances it is justifiable.

Disclosure of information by an accused to the prosecution ensures that both parties are on equal terms during the trial. Neither party is at a substantial disadvantage to the other. The equality of arms principle thus justifies the violation of the presumption of innocence. An accused person cannot hide behind the veil of the right to be presumed innocent.

#### **4.6.4 Limited Public Access and the Right to Information**

The effectiveness of a wealth disclosure system is related to the public's access to what has been declared.<sup>46</sup> Access enables the stakeholders, including civil society, the public and other public officials, to scrutinise declarations. This kind of scrutiny raises the risk of detection, enhances enforcement, and builds credibility in the eyes of the public. Declared information that is not available or is subject to access control just as well may not have been disclosed. What is done with the disclosed information is more important than the disclosure itself.

Public access cannot substitute for verification and monitoring by the responsible commissions. However, it can facilitate scrutiny by other stakeholders.<sup>47</sup> For elected public officials, access and scrutiny ensure that the electorate can make informed decisions. Voters can hold public officials to account.<sup>48</sup> It is conceivable that a disclosure system can be robust even where it is not public. The accessibility of the declared information holds the key to its success.

Wealth declaration information is public information. In Chapter One, the information that has been declared was categorised as public information. The right to information is enshrined in the Constitution and in conventions to which Kenya is a state

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45 Kofele (1995) at 66.

46 Mukherjee & Gokcekus (2006) at 327.

47 Barnes *et al* (2012) at 83.

48 Barnes *et al* (2008) at 84.

party. The Constitution provides that the right to information is a fundamental right of a citizen.<sup>49</sup> Wealth declarations fall into this category since they contain information that is held by responsible commissions on behalf of the government. Further, the state is obligated to publicise any information affecting the nation. Corruption is a matter of national concern that greatly affects the economic, political and social spheres of the country. Any information that is corruption-related or can lead to combating corruption should be available to the citizens.

The Windhoek Declaration contains principles of freedom of expression in Africa.<sup>50</sup> Kenya is a signatory to the Declaration. These principles were re-affirmed by the African Platform on Access to Information. Public entities hold information as custodians for the public. The public has an inalienable right to any information held by public utilities. The principles enumerated by the Windhoek Declaration are the right to access information held by public entities, the establishment of an appeal mechanism when access is denied, the publication of information even where it is not sought, the amendment of secrecy laws to conform to the freedom of expression principles, and the lifting of sanctions when information is released in good faith.<sup>51</sup>

The POEA is in direct contravention of the above principles. Access to information that has been declared by public officials is limited. This did not occur by accident but was a deliberate decision by the legislators. A complainant has to file an application to acquire the information from the responsible commission. The applicant has to demonstrate legitimate interest and good cause. There is no elaboration of the content of these criteria.

The responsible commission has the authority to reject the application, on grounds such as the application being vexatious or frivolous. The permission of the affected public officials has to be sought. It is unlikely that consent will be forthcoming if the official is engaged in corruption. There is also the likelihood of the official receiving protection from colleagues at the responsible commission.

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49 Article 35(1)(a) of the Constitution of Kenya.

50 Windhoek Declaration, available at <http://www.achpr.org/sessions/32nd/resolutions/62/> (visited on 20 January 2017).

51 Article IV of the Windhoek Declaration.

Corruption in public entities usually involves multiple officials who work under the same roof. There is, therefore, a possibility of their frustrating any efforts to link a colleague to corruption. This risk can be avoided by having a public disclosure system that does not tie access to the declared information to approval from the responsible commission. The appeal process is also important in ensuring effective access to the information contained in the declarations. When an application is rejected, the applicant can appeal to the Minister in charge of integrity. The POEA Regulations do not elaborate how the appeal process is to be undertaken.<sup>52</sup>

#### **4.7 Lack of Whistle-Blower Protection**

A wealth declaration system is put in place with the hope that corruption offences will be detected. Detection can be done by the responsible commission, private citizens or the media. The public can assist in exposing corruption by reporting suspicious lifestyles of public officials. Public officials themselves can uncover corruption by observing the lifestyles of their colleagues and reporting their suspicions to the authorities. They are in an excellent position to make such observations and file genuine complaints. However, in Kenya this is not likely because of the lack of an efficient system of protection for whistleblowers.

Public officials are obligated to report to an appropriate authority any orders from a superior that contravene the POEA.<sup>53</sup> An order that may lead an official to commit a corruption offence should be reported. There is no assurance of security or safety for officials who report corruption. Public officials who raise the red flag and are keen to be part of the anti-corruption cause face intimidation through sacking, transfers and threats to their safety and lives. Transfers to far-flung counties or departments that are not susceptible readily to corruption are a common means of intimidation. Threats to life and limb are also a reality.<sup>54</sup>

Grand corruption involves huge amounts of money, is systematic and co-ordinated. In some cases there are powerful cartels that will stop at nothing to achieve their objective of looting state coffers. Honest public officials have no alternative but to watch in silence,

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52 Regulation 8 of the POEA Regulations.

53 Section 25 of the POEA.

54 "Whistle Blower Transferred", available at, <http://www.standardmedia.co.ke/article/2000226247/health-ministry-scandal-whistle-blower-transferred> (visited on 2 November 2017).

resign or join the corruption bandwagon. Perhaps this explains why petty corruption thrives. Civil servants in lower stations cannot report high-ranking officials and have no option but to take part in small-scale corruption.

What is more, the POEA provides for sanctions against anyone who discloses information obtained from wealth declarations.<sup>55</sup> One has to obtain authorisation from the responsible commission for any such publication. It is unlikely that authorisation will be forthcoming if the information is corruption-related.

Civil society and investigative journalists face the same challenges as public officials. They can be intimidated to discourage them from pursuing and publicising incriminating information from wealth disclosures. This limits their capacity to utilise effectively the wealth disclosure information.

Where wealth disclosure information is readily available and there is no mechanism to protect whistleblowers, publishing or pursuing such information is risky. This defeats the very logic of a wealth disclosure system.

#### **4.8 Conclusion**

This chapter has considered the challenges that bedevil the Kenyan wealth disclosure system. These have been identified as institutional capacities, administrative challenges and violation of constitutional provisions.

Institutional capacities encompass financial independence, human resources, storage facilities and technology. The lack of these capacities condemns the system to ineffectiveness. Adequate institutional capacities depend on the structure of the wealth disclosure legislation. Financial autonomy is the key to ensuring that the system is independent of the government. It also ensures that it is free from manipulation by the executive arm of government and, by extension, the political class.

Administrative challenges concern the management of the wealth declaration system. The responsible commissions do not have the administrative capability to oversee the system. There is no uniform procedure to determine how the system should operate. There is also a lack of co-ordination across the anti-corruption agencies.

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55 Section 30(3) of the POEA.

The system continues to face constitutional challenges for allegedly trespassing on fundamental rights. The counter-argument has been that there is an overriding public interest in fighting corruption. The courts have upheld this argument on several occasions. This is commendable. However, concerns persists that wealth declaration infringes on certain fundamental rights of accused persons.

These challenges are glaring loopholes which allow corruption to thrive. The POEA was not only a noble idea but could be a powerful tool to combat corruption. However, it has failed to meet its objectives in the face of these challenges.





## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

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#### 5.1 Conclusion

This research paper has discussed the wealth declaration system in Kenya. Corruption is especially prevalent in the public sector. It may be described as an incurable infectious disease. Kenya has been ranked as one of the most corrupt countries in the world. Successive governments since independence always have given the impression that they are fighting corruption, accompanied by a series of high-profile, top-down campaigns involving new legislation, institutions, policies and measures, as well as dramatic arrests of public officials. However, these measures have proved to be ineffective and have done little to advance the war against corruption.

The media have warned about it, civil society has denounced it, and the public continues to lament it. Ironically, public officials also condemn it. However, it persists, despite being frowned upon in all quarters. The Kenyan scenario reflects the “paradox of corruption”, which is a formulation used to describe the situation where corruption flourishes despite its being disapproved of universally and despite the existence of anti-corruption mechanisms.<sup>1</sup> Significantly, Transparency International owes its existence to the persistent, culture of corruption in Kenya. Its co-founder, Peter Eigen, a former director of the World Bank, conceived the idea of a global anti-corruption organisation after experiencing the devastating effects of corruption in Kenya first-hand.<sup>2</sup>

One undeniable characteristic of Kenyan corruption is the involvement of public officials. In all the major scandals that have erupted, there always has been a public official involved, either directly or indirectly. Close family members or proxies are common conduits for the proceeds of corruption. It is unlikely that corruption would thrive without the acquiescence of public officials and especially high-ranking public officials. The public,

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1 David & Thomas (2000) at 593.

2 Wrong (2014) at 4.

regrettably, has accepted corruption as the norm. They tolerate the vice through emulation and admiration of corrupt public servants. Corruption cases tend to take on an ethnic or political angle. Public officials have devised this strategy to divert attention when apprehended and seek public sympathy from their ethnic and political constituencies. This compounds the problem.

In Kenya, working in the public sector is synonymous, more or less, with becoming rich overnight. The wealth of public officials often is not commensurate with their known sources of income. They exhibit lavish lifestyles in full view of the public. The logical conclusion is that the source of their wealth is corruption. The amounts involved in corruption are not only shameful but almost beyond imagination. For example, it was estimated that the taxpayers lost 635 billion Kenyan shillings during the 24-year reign of President Moi.<sup>3</sup> The trend continues today, with the 2018 Transparency International report on Kenya giving it a score of 27 per cent in the Corruption Perceptions Index.

This research has focused on public corruption and wealth disclosure as a policy aimed at exposing corrupt public officials living beyond their means. As noted earlier, the legislation governing wealth disclosure, the POEA, was not only a noble idea but could be a powerful tool to combat corruption. The aim of the research was to identify why it has failed to meet its objective.

The research has identified the loopholes in the POEA. These can be rectified by amendment of the ambiguous sections. The amendments should aim at reviewing the administrative structure, allowing public access to declarations, and revising the sanctions for violations. It has been argued that mere enactment of a statute can do little to fight corruption. There is a need for continuous training and educating of all concerned parties and for constant enforcement and assessment of the law.<sup>4</sup>

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3 Wrong (2009) at 184.

4 Gilman (2005) at 25.

## **5.2 Recommendations**

### **5.2.1 Promote Public Awareness**

There is a tendency amongst the public to emulate, tolerate and even defend corrupt public officials. The fight against corruption usually is politicised, especially when a high-ranking public official is arrested. There is a need to educate the public that corruption is not victimless. A critical analysis of the attitude of the public towards the anti-corruption war indicates it is not embraced by the public. The public needs to appreciate that corruption affects all members of society negatively. A public official engaging in corruption does so for his own selfish needs and not on behalf of a particular ethnic group.

The EACC should engage the media and civil society to educate the public on the laws and regulations that may be used to fight corruption. The public is not aware of preventive measures, such as wealth declarations, that can assist in combating corruption. It is proposed that the salaries of public officials be publicised. This will enable the public to make an informed decision on whether a public official is living beyond his means. In most cases, the public is the first to observe the exorbitant lifestyle of a corrupt public official. Even in cases where the proceeds of corruption have been diverted to family members and proxies to evade detection, the citizens are likely to have this information first-hand. A more vigilant citizenry will discourage public officials from engaging in corruption.

A starting point would be to educate the public about wealth disclosure, and to make it known that the wealth declarations are public documents which can be inspected by any private individual. The information contained in the declarations can be used to fight corruption. When the public plays an active role by questioning what is owned by public officials, it sends a signal that corruption will not be tolerated. Also, members of the public should be educated on the law pertaining to whistleblowing.

### **5.2.2 Verification**

The compliance rate for submission of the initial wealth declaration has been impressive. The verification process, however, is sidestepped routinely. Ascertaining the authenticity of the contents of the declarations is, arguably, the most important step. The Draft EAC Protocol singles out verification as a constituent part of wealth declaration. The responsible

commissions should focus on this crucial step. Indeed, this step should be made mandatory for the responsible commissions. Alternatively, it should be handled by the EACC, the main entity responsible for the investigation of corrupt offences. The final prevention strategy in any anti-corruption regime is to deprive the corrupt of their criminal proceeds. This can be achieved by detecting such proceeds through verification.

### **5.2.3 Review Administrative Structure**

The responsible commissions are in charge of the wealth declaration regime. The current internal administration undermines transparency and the independence of the administrators. Chief executives of responsible commissions are political appointees. They head the wealth declaration committees in their respective commissions. The core mandate of the responsible commissions is not to administer wealth declarations. There is no separate budget to administer wealth declarations. This possibly could explain why a crucial process such as verification is sidestepped.

The responsible commissions are not independent administratively and financially. There is a need to review the administrative structure to create an entity that has full autonomy financially and administratively. It is recommended that an independent assets declaration office be established. Alternatively, the EACC can be mandated to handle the wealth declaration regime. A common administrative structure will address the lack of common enforceable standards in the responsible commissions. Also, it will enhance inter-agency collaboration. Ideally, the entity should be entrenched in the Constitution to avoid manipulation by the executive.

### **5.2.4 Public Access**

Public access to wealth declarations was and is still the most contentious clause in the POEA. There is a need to revisit the issue with a view to amending the clause and allow public access to wealth declarations. The main opposition to public access comes from the high-ranking public officials and the political class. Wealth declaration is a mirror of integrity for public officials. Being a public official comes with the obligation to prove your integrity. Public scrutiny of a public official's private life cannot be avoided.

As earlier noted, wealth declarations are public documents. The information, therefore, should be available to the public on demand. Any restrictions amount to condoning and aiding corruption. This issue can be resolved if there is political goodwill. Corruption is a matter of public concern. It involves the illegal acquisition of wealth from public funds. This redistributes wealth in ways which bring harmful social and economic effects. It compromises public investment, revenues and the provision of government services. It follows that any information pertaining to corruption should be readily available to the public.

The EACC should engage public officials themselves in the fight against corruption. They are the key parties in corruption cases. They should be educated constantly about their codes of conduct. A corrupt public official is affected by the detrimental effects of corruption, like everyone else. Fighting corruption promotes the wider interests of society, including those of public officials.

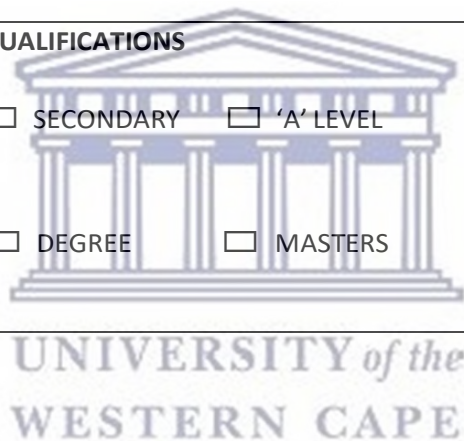


## APPENDIX A

### LEADERSHIP AND INTEGRITY ACT, 2012 FIRST SCHEDULE: (S.13) SELF-DECLARATION FORM

1. GENERAL INFORMATION				
Title	Surname	First Name	Middle Name	Other Names
Mr./Mrs./Prof/ Miss/Ms/Dr.				
ID CARD NO.	PASSPORT NO.	EXPIRY DATE OF PASSPORT		PIN NO.
SEX (Tick)	MALE	FEMALE	OCCUPATION	E-MAIL ADDRESS
	<input type="checkbox"/>	<input type="checkbox"/>		
TELEPHONE NO.	MOBILE NO.		OTHER NUMBERS	
RESIDENCE	ESTATE/TOWN/LOCATION		POSTAL ADDRESS	P. O. BOX
	DISTRICT			CODE
				TOWN/CITY
	COUNTY		OTHER ADDRESSES	
	COUNTRY			
2. BIRTH INFORMATION				
DATE OF BIRTH	BIRTH CERTIFICATE NO.		PLACE OF BIRTH	
DISTRICT OF BIRTH	COUNTY OF BIRTH		COUNTRY OF BIRTH	

<b>3. NATIONALITY</b>	
Kenyan	Dual <input type="checkbox"/>  (Provide details _____)
<b>4. MARITAL STATUS</b>	
<input type="checkbox"/> <input type="checkbox"/> SINGLE <input type="checkbox"/> MARRIED <input type="checkbox"/> SEPARATED <input type="checkbox"/> DIVORCED <input type="checkbox"/> WIDOWED	
IF MARRIED GIVE NAMES OF THE SPOUSE (S) (Surname, First name, middle name, others)	
NATIONALITY OF SPOUSE	
NAMES OF CHILDREN UNDER THE AGE OF 18 YEARS	
<b>5. EDUCATIONAL QUALIFICATIONS</b>	
<input type="checkbox"/> PRIMARY <input type="checkbox"/> SECONDARY <input type="checkbox"/> 'A' LEVEL <input type="checkbox"/> CERTIFICATE <input type="checkbox"/> DIPLOMA <input type="checkbox"/> DEGREE <input type="checkbox"/> MASTERS <input type="checkbox"/> PHD OTHERS	



<b>HIGHEST ACADEMIC QUALIFICATION OBTAINED</b>		
Qualification	Institution	Year
<b>6. LANGUAGE SPOKEN</b>		
First Language	Second Language	Other
<b>7. MEMBERSHIP OF PROFESSIONAL ORGANIZATION(S) (IF ANY)</b>		
Name of Organization	Date of Admission	Membership No.
<b>8. REASON(S) FOR DECLARATION</b>		
Purpose for which declaration is required		
<input type="checkbox"/> Election <input type="checkbox"/> Employment <input type="checkbox"/> Others (Specify)		
State office for which the declaration is being submitted		
<b>9. MORAL AND ETHICAL QUESTIONS</b>		
Answers to the following questions are mandatory. If <b>YES</b> to any question you must provide additional information on a supplementary sheet.		



	YES	NO
a) Have you ever engaged in any form of dishonesty in the conduct of public affairs?		
b) Have you ever abused a public office?		
c) Have you ever misrepresented information to the public?		
d) Have you ever engaged in wrongful conduct whilst in the furtherance of personal benefit?		
e) Have you ever misused public resources?		
f) Have you ever discriminated against anyone on any grounds other than as provided for under the Constitution or any other law?		
g) Have you ever falsified official or personal records?		
h) Have you ever been debarred or removed from the Register of Members of your professional organization?		
i) Have you ever had any occupational or vocational license revoked and/or otherwise subjected to any other disciplinary action for cause in Kenya or any other country?		
j) Have you ever been dismissed from employment on account of lack of integrity?		
k) If you have been a public officer, have you ever failed to declare your Income, Assets and Liabilities as required under the Public Officer Ethics Act,2003?		
l) Have you ever been the subject of disciplinary or criminal proceedings for breach of the Public Officer Ethics Act,2003 or a Code prescribed thereunder?		
m) Have you ever been convicted of any offence and sentenced to serve imprisonment for a period of at least six months?		
n) Have you ever had an application for a Certificate of Clearance or a Certificate of Good Conduct or for a visa or other document authorizing work in a public office denied and/or rejected for cause in Kenya or any other country?		

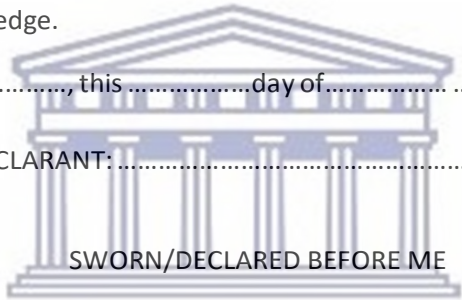
<b>10. EMPLOYMENT INFORMATION</b>			
NAME OF EMPLOYER	POSITION/RANK	DATE OF FIRST APPOINTMENT	DATE OF PRESENT APPOINTMENT
WORKSTATION	NATURE OF EMPLOYMENT (Constitutional/Elective/Permanent/Contractual/Other)		

**OATH AND AFFIRMATION**

I solemnly swear (or affirm) and certify, under penalty of false declaration under the Oaths and Statutory Declarations Act (Cap. 15 of the Laws of Kenya), that all the foregoing statements in this declaration are true and correct to the best of my knowledge.

Dated at ....., this ..... day of.....

SIGNATURE OF DECLARANT:.....



SWORN/DECLARED BEFORE ME

This ..... day of....., 20....., at.....

UNIVERSITY of the  
WESTERN CAPE

.....

*Commissioner for Oaths/Magistrate.*

## APPENDIX B

**PUBLIC OFFICER ETHICS ACT, 2003**  
**DECLARATION OF INCOME, ASSETS AND LIABILITIES**  
**(Section 26 of the Public Officer Ethics Act, No. 4 of 2003)**

1. Name of public officer

\_\_\_\_\_

(Surname)

(First name)

(Other names)

2. Birth information

a. Date of birth: \_\_\_\_\_

b. Place of birth: \_\_\_\_\_

3. Marital status: \_\_\_\_\_

4. Address

a. Postal address: \_\_\_\_\_

b. Physical address: \_\_\_\_\_

5. Employment information

a. Designation: \_\_\_\_\_

b. Name of Employer: \_\_\_\_\_

c. Nature of employment (permanent, temporary, contract, etc.):

\_\_\_\_\_



6. Names of spouse or spouses

(Surname)

(First name)

(Other names)

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7. Names of dependent children under the age of 18 years.

(Surname)

(First name)

(Other names)

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8. Financial statement for: \_\_\_\_\_

(A separate statement is required for the officer and each spouse and dependent child under the age of 18 years. Additional sheets should be added as required.)

a. Statement date: \_\_\_\_\_

b. Income, including emoluments, for period from \_\_\_\_\_

to \_\_\_\_\_

(Including, but not limited to, salary and emoluments and income from investments. The period is from the previous statement date to the current statement date. For an initial declaration, the period is the year ending on the statement date.)

Description	Approximate amount

c. Assets (as of the statement date)

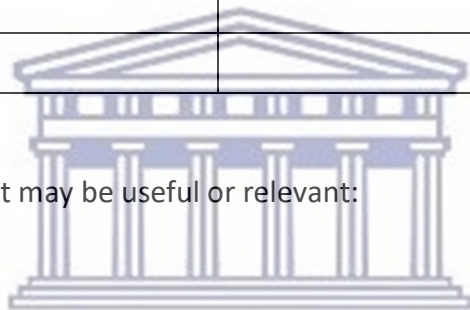
(Including, but not limited to, land, buildings, vehicles, investments and financial obligations owed to the person for whom the statement is made.)

Description (include location of asset where applicable)	Approximate value

d. Liabilities (as of the statement date)

Description	Approximate amount

9. Other information that may be useful or relevant:



UNIVERSITY of the  
WESTERN CAPE

I solemnly declare that the information I have given in this declaration is, to the best of my knowledge, true and complete.

Signature of officer:

Date:

Witness:

Signature:

Name:

Address:

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