

# BRIEFING PAPER

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## Enhancing the credibility of the public office holders asset declaration regime

*✍ Editor's Note: The Public Office Holders (Declaration of Assets and Disqualification) Act 1998 (Act 550) has been in existence for close to seven years but till date, it is impossible to access basic information such as; how many public office holders have complied with the Act? This absurdity of the regulatory framework became apparent during the 2005 Ministerial vetting process when even the Appointments Committee of Parliament could not access the declarations of public office holders in order to properly deal with petitions submitted by members of the public alleging corruption by nominees. The issue came to the fore in April 2005 when a Ghanaian newspaper, "The Enquirer" published on its front page that the Auditor-General had refused to grant its Editor access to the asset declaration forms of Ministers of State. The Auditor-General's basis for refusal was that he was just a custodian of the forms and did not have the legal authority to disclose the declarations. In May 2005, the Center held a Round Table Discussion to critically assess the credibility of Act 550 and to offer suggestions for enhancing the regulatory framework drawing on the accountability ethos of the 1992 Constitution of Ghana, the mandate of constitutional bodies charged with the administration of the regime and best practices with emphasis on regulatory frameworks in African jurisdictions. This Briefing paper captures the submissions made by the Auditor-General's Department and CHRAJ, who are constitutionally mandated to administer the regime, as well as Professor Gyimah-Boadi and Kojo Asante of CDD. The Roundtable also featured Mr. Yonny Kulendi, a legal practitioner and the Editor of "The Enquirer, Mr. Raymond Archer. The discussion was chaired by Justice Theresa Striggner Scott.*

*A desk research paper on the regime of asset declaration including best practices and recommendations is attached to the four presentations as an addendum.*

### Introduction

*E. Gyimah-Boadi, Executive Director, CDD*

#### **The need for an effective asset declaration regime:**

A credible and effective asset declaration regime is an essential component of the ensemble of rules and structures necessary for democratic governance. It helps to:

- Prevent abuse of power by holders of public office
- Protect public assets and the public interest
- Deter public corruption
- Promote the integrity of public officials
- Foster public accountability and trust as well as governmental legitimacy.

A credible asset declaration regime is also good for public officials. It helps to:

- Protect the private assets of public officials from wrongful and extra-legal confiscation
- Protect public officials from undue suspicion, baseless allegations of wrongdoing, and all manner of calumny.

The public office holder asset declaration has been a feature of our constitutional and legal framework, at least, since the promulgation of the 1969 Constitution. The 1979 Constitution also had asset declaration provisions. Similar provisions also existed in the Public and Political Party Office Holders (Declaration of Assets and Eligibility) Law (PNDC 280), curiously passed in 1992 (when the PNDC was preparing to fold up), which was repealed by the current legal framework. In essence, the existence of an asset

declaration regime in our current constitutional framework is consistent.

However, compliance with the provisions of public official asset declaration regulations has a checkered history in Ghana. It is worth recalling that compliance with the asset declaration provisions (Article 67) of the 1969 Constitution caused a confrontation between the Progress Party and General Albert Ocran, a member of the Presidential Commission. The General was branded as an “exhibitionist” when he threatened legal action against the Progress Party (PP) government in 1970 for failing to comply with the declaration requirements of the Constitution.

Moving the clock forward to the early 1990s when Ghana returned to democratic rule and the media had recovered its “voice”, the nation was shocked by media reports of ridiculous asset declarations by leading figures in the PNDC regime. The asset declarations made by some long-serving public officials featured items such as “broken down” gramophone players and 1971 Ford Capri cars.

Indeed, it is very tempting to believe that some of the weaknesses in the present asset declaration legislation, *the Public Office Holders (Declaration of Assets and Disqualification) Act 1998 (Act 550)* were intentionally designed to provide public officials of the Fourth Republic with maximum latitude against the background of previous hassles with compliance and the rise of an ethos of accountability in the same Republic. That would seem to be the only plausible explanation for a parliament controlled by the NDC to have passed a piece of legislation that doggedly refused to go beyond the minimum required under Chapter 24 of the 1992 Constitution, and one that also represented a significantly watered down version of the more enabling PNDC Law 280. In short, the Public Office Holders (Declaration of Assets and Disqualification) Act 1998 (Act 550) was a *sop to Paribus*.

Seven years on, after the coming into force of Act 550, Ghanaians have had an opportunity to judge how well or badly the regime has operated. We believe that the time has come to review the existing regime, identify weaknesses and develop interventions to improve it.

We take comfort in the fact that while in opposition, some members of the present ruling party (NPP) had attempted valiantly but were thwarted from rendering the draft provisions of the present asset declaration legislation far more enabling than it eventually became. Now that this party is in power and has seen some of the apprehensions of its

parliamentarians vindicated, we have reason to trust that we have a fertile soil for discussing improvements in the Act.

### **Key principles of a credible asset declaration regulatory framework, drawing examples from international/comparative best practices**

*K. Asante, Research Officer (Governance & Legal Policy), CDD*

An asset declaration law is one of the most effective compliance mechanisms adopted by nations to prevent or cure the incidence of conflict of interest among public office holders. The principles served by addressing conflicts among public officials are to promote impartiality; integrity and public trust thereby enhancing public confidence in public institutions. I should also note that most asset declaration rules are enacted as part of a broader code of conduct for public office holders to regulate their activities in order to safeguard the integrity of the public service and deter corruption. In this regard, our Constitutional provisions captured in Chapter 24 on the Code of Conduct for Public Officers is consistent.

The key principles are:

- (1) Accessibility
- (2) Verifiability
- (3) Frequency of filing
- (4) Sanctions
- (5) Coverage

This is not in any way an exhaustive list, however these principles are fundamental to a credible regulatory framework.

#### **Accessibility**

Accessibility refers to provisions within a framework which allows for the public to access information on compliance. Most countries reviewed make provisions for disclosure with a few limitations. Some require the payment of a fee and/or an application to a relevant authority and in some cases a person seeking disclosure must state reasons for the request. For example, in Tanzania and South Africa, the particulars of a declaration are kept in a register which is accessible to the public, while in South Africa; the register has a confidential and public part. Liabilities of public office holders are recorded in the confidential part of the register. The existence of a register is a common feature of countries that allow public disclosure. In Romania, the particulars are published in the Internet page of legal entities responsible for policing the regime.

## Verifiability

Secondly, on verification, a credible asset declaration regulatory framework should mandate a relevant institution or authority not only to receive declarations, but also to process the declarations to ascertain the following: the authenticity of the declaration, the completeness of the declaration, inaccuracies and inconsistencies. Additionally, the relevant institution must be empowered, discretionary or otherwise to remind public office holders of their obligations, to ask public office holders to rectify any discrepancies or redress inconsistencies and such. Uganda for example, has an Inspector General of Government (IGG) who examines all declarations and has the discretionary power to ask a public officer to account for an omission or discrepancy in a submitted declaration. The officer after receiving such a request has 30 days to answer. To give you an inkling into the operation of the Uganda regime, I refer to a recent news report in March 2005 reported on the *allafrica.com* website. In the report the IGG was reported to have asked all public officers to have filed their declarations by March 31<sup>st</sup> or be dismissed. He then proceeded to mention prominent public officers who had not yet declared their assets and liabilities, including President Museveni but he was quick to add that he expected the President to fulfill his obligations, as he has never defaulted in the past.

## Frequency of Filing

Most countries reviewed make provision for a yearly filing interval in addition to the requirement to file before assumption of office and after the end of term. The choice of a shorter filing requirement is particularly important if the regulatory framework is preventative. To put it simply “a stitch in time saves nine”. It is important when a country is setting an interval to appreciate the absolute truth that it stands a better chance of detecting corruption with a shorter filing interval. From the countries examined only Nigeria replicates the Ghanaian filing requirement whilst Uganda has a two year filing requirement. All the other countries provide for annual declarations. On the Nigerian point, it is interesting to note that the regulatory framework is contained in the 1999 Constitution of the Republic of Nigeria which incidentally was promulgated a year after our 1998 Act came into force.

## Sanctions

In respect of sanctions, certainly to make a regulatory framework achieve its objectives of promoting public accountability and deterring corruption, there must be

applicable sanctions in case of a breach of the provisions. Some countries provide specific sanctions, which subjects the regime to stricter scrutiny and enhances its credibility. In Kenya, a guilty officer is liable to a fine of 1 million shillings (about 118m cedis) and/or a year imprisonment whilst in Tanzania, it is between 1 to 5 million shillings or up to a year imprisonment. The offences include failing to file or submitting a false declaration. In some countries like the USA, India and others the sanctions are contained in other legislation. In South Africa, the Office of the Public Prosecutor must investigate an allegation that a public office holder has contravened that Act and must report to the President/Premier within 30 days. The President/Premier then has 14 days to submit a report to the Assembly stating his comments and actions he has taken.

## Coverage

Lastly, a very important aspect of a credible regulatory framework is the extent of its coverage. Most regimes cover appointed and elected officials including, the President, Vice, Ministers and parliamentarians. Significantly, most countries include the spouses and dependent children of public office holders. However, separated spouses are excluded. It is understandable why spouses are included. A recent report on a statement released by the Private Newspaper Publishers Association of Ghana (PRINPAG) confirmed what we already know, that African leaders have been hiding stolen wealth with Swiss Banks. What is relevant for our purposes is the information that these public office holders use the names of their children, relatives, spouses and even bodyguards to open these accounts. This fully supports a requirement of this nature. The South Africa regime even introduces the concept of a “permanent companion”. Also most jurisdictions extend the obligations to members of the armed forces who are rightly deemed as public office holders.

It is hoped that we can draw from these experiences and examples to fill the obvious gaps in the law thereby strengthening our regulatory framework and making it more credible.

## **The Auditor – General’s Position on his Role in the Implementation of Article 286/Act 550**

*E. Akowuah, Deputy Auditor-General - Central Government Audit Department*

The Auditor-General’s remit regarding the declaration of

assets by public office holders is stipulated in Article 286 of the 1992 Constitution which requires specified public office holders to submit to the Auditor-General a written declaration of all property or assets owned by, or liabilities owed by them directly or indirectly. This article is reiterated in Section 1 of Public Office Holders (Declaration of Assets and Disqualification) Act 550.

The Office of the Auditor-General upon request hands out Assets Declaration Forms and the completed forms are returned, already sealed, to the Auditor-General. The Secretary to the Audit Service Board receives the sealed envelope on behalf of the Auditor-General and issues a receipt for it. He places it in secure custody until it may be required.

The Constitution does not grant the Auditor-General access to the content of the declaration submitted before it is sealed. Therefore, the Auditor-General has no knowledge of the content of any declaration. The Auditor-General is thus, merely a custodian of the declarations. He is required, on demand, however, to produce it in evidence:

- before a court of competent jurisdiction; or
- before a commission of inquiry appointed under Article 278 of the Constitution; or
- before an investigator appointed by the Commissioner for Human Rights and Administrative Justice.

In view of this, the Auditor-General is not in a position to honour any request for access to assets declared by Ministers or other public officials either upon assuming office or upon leaving office.

This is in contrast to Section 1, subsection 3 of Public and Political Party Office Holders (Declaration of Assets and Eligibility) Law, 1992, P.N.D.C.L. 280, which allowed or required the Auditor-General to cause to be published in the Gazette the declaration submitted by the specified officers under subsection (2) of Part 1 of PNDCL 280, within fourteen (14) days of receipt of the declaration. Under that Law, the Auditor-General caused to be published everything that was declared by any of the specified public and other office holders.

Section 3 subsection 4 of PNDCL 280 made provision for sanctions for failure to enter a declaration. The sanctions included a fine of 1 million cedis and/or up to two years imprisonment

I believe the lack of public access to the contents of assets declarations has brought us to this Round Table Discussion.

Specifically, the Editor of a newspaper, “**The Enquirer**”, published on its front page on Thursday, 21 April 2005 that the Auditor-General had refused to grant him access to the Assets Declaration Forms of Ministers. The Audit Service as a good governance institution is one of the pillars of transparency, probity and accountability in this country. The Auditor-General is a servant of the people and the “watchdog” who always acts within and in accordance with his constitutional mandate.

Let us set the records straight concerning this allegation by “**The Enquirer**”, be it known to all persons that the Auditor-General did not refuse The Enquirer access to those Asset Declaration Forms. The Auditor-General was simply not in a position to grant access where he himself did not have that access. Rather than a refusal, it was the lack of authority to do so.

### **Conclusion**

Without the possibility of verification to confirm the authenticity of assets and liabilities declared by public office holders at the beginning and conclusion of their term of office and at the end of every four years, it seems an exercise in futility to require public office holders to declare their assets and to hide such declaration “in a closet” without any authentication whatsoever. Such a practice is in nobody’s interest and, needs to be revisited.

In the view of the Auditor-General, the purpose for assets declaration would be best served and more enhanced if there is a legal or constitutional requirement for the verification and confirmation of assets declarations and opportunity for public scrutiny. This will be a deterrent to corruption.

With the power of the right of access to records, books, documents and information that has been vested in the Auditor-General, he would be in the best position to scan every public officer’s assets declaration to confirm that the Form has been properly completed with supporting documentary evidence.

### **Suggestions for credibility enhancement:**

- The Auditor-General should be made to have access to the contents of the declarations and gazette the contents within 14 days as done previously under PNDCL 280;
- The Auditor-General should be empowered to do preliminary review of submissions to ensure

compliance with prescribed format and obtain substantiating evidence;

- Sanctions should be prescribed against defaulting public officers for false declarations and illegal acquisitions;
- The public should be educated about how to access assets declarations through CHRAJ and the courts. Allegation and evidence that a person has made a false declaration in his assets published in the gazette or illegally acquired assets may be lodged with CHRAJ;
- The Auditor-General has raised concern that the assets declaration Forms are kept in ordinary steel cabinets which are not resistant to fire and burglary. He has requested for funds to procure fireproof vaults or safes to secure the Forms against fire and burglary. There is the need for an emergency intervention to release funds for that purpose; and
- It is advisable to identify best practices elsewhere and use lessons learnt to enrich our assets declaration regime.

## **The Role of CHRAJ in Enforcing the Law and Promoting Public Officer Integrity and Anti-Corruption**

*Abena Bonsu, Deputy Director, Legal & Investigations Dept., CHRAJ*

### **Introduction**

According to Professor Yaw Saffu, high level or grand corruption does the most damage to our capacity to develop our nation and economy, and lift ourselves out of poverty. Professor Yaw Saffu defines 'high level (or grand or elite) corruption', as 'the misuse and abuse of office for illegal and unethical acquisition by leaders - people we have freely chosen or who have imposed themselves on us, as well as those they appoint to help them make policy, manage resources, and enforce laws on our behalf. Corrupt leaders betray our trust, set a bad example for everybody, plunder our common wealth, and stifle the growth of an enabling environment for investors and entrepreneurs. It is evident that their corrupt practices have the capacity to affect - and do affect - millions of people adversely. They make the lives of millions of ordinary people worse than they would otherwise be.'

I will discuss CHRAJ's role under the headings, CHRAJ's

mandate, discharge of our anti-corruption mandate, challenges and CHRAJ Today.

### **CHRAJ's Mandate**

The Commission on Human Rights and Administrative Justice was established in 1993 and charged with the investigation inter alia of breaches of the Code of Conduct of Public Officers in all instances of alleged or suspected corruption and the misappropriation of public moneys and abuse of power by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations.

### **The Discharge of the Anti-Corruption Mandate**

CHRAJ's mandate to investigate corruption is peculiar in that whereas CHRAJ commences its investigations into human rights violations and administrative justice in response to specific complaints lodged by interested parties, in the case of corruption, CHRAJ is mandated to investigate *allegations or suspicions of corruption and the misappropriation of public moneys by officials*. A tall order indeed. And one that the Commission was notably called upon to fulfill in 1995 when in response to certain newspaper allegations, CHRAJ commenced investigations into acts of corruption, illegal acquisition of wealth and abuse of office by 2 serving ministers of state, a presidential adviser and a highly placed public official.

Those investigations were also to determine whether the officials had complied with the 1992 Constitution Art. 286, which requires all public officers to submit a declaration of all their assets within 3 months of the coming into force of the constitution, at the end of every 4 years and at the end of their term of office.

After the initial 1995 investigations, the Commission has investigated several other complaints of allegations of corruption, conflict of interest and mismanagement of public resources by public officials. These include:

1. JOY 99.7 FM v. SSNIT
2. Ampofo Ampiah v. NIC
3. Prof Kwaku Asare v. Clerk of Parliament (March 2004 - MPs Cars Case)
4. Concerned Citizens v. Hon Bondong & Anor
5. Youth Development Association of Yilo Krobo & Others v. DCE of Yilo Krobo
6. DCE of Goaso & Others Case
7. Hon Alban Bagbin v. President of the Republic, Pres. J. A. Kufuor & 3 Others.

## Challenges

1. ENFORCEMENT / PROSECUTION: The law as it stands now precludes the prosecution of public officials found by CHRAJ to be culpable of corruption and misappropriation of public moneys as CHRAJ's mandate is limited to making reports to the Attorney-General and the Auditor-General, on the results of such investigations. In the 1995/96 investigations, following the submission of its report to the President, the government issued a White Paper on the CHRAJ report which effectively cleared the affected officials of any wrongdoing. It must be noted however that these public officials thereafter ceased to hold those offices.

Obviously the requirement to merely submit a report on its findings and not to prosecute is not enough of a deterrent to public officers. Indeed history has shown, specifically in the case of the government white paper on the 95/96 investigations that a government can conveniently set the Commission's findings aside through the issuance of a whitewashing white paper and allow its ministers to continue on their merry way down the path of non-accountability. The effect of this is that the nation remains robbed of revenue and assets which these public officials by the abuse of their office, retain for their own ends. This sends wrong signals to the nation that the government does not believe in the accountability of its officials and emboldens public officials to take the path of corruption if they so choose.

It has been argued that CHRAJ's function *'to take appropriate action to call for the remedying, correction and reversal of instances specified in paragraphs (a), (b) and (c) of this clause through such means as are fair, proper and effective, including (iii) bringing proceedings in a competent Court for a remedy to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures;*, is all the authority that CHRAJ needs to enforce its recommendations for prosecution of corruption cases; if after three months the superior officer of the corrupt official has taken no action, just as that section serves as the Commission's authority to enforce its Decisions if they are not complied with (within 3 months after the Decision has been given).

It has also been argued on the other hand that it is only the Attorney-General who has the authority to conduct prosecutions. Therefore unless the Attorney-General gives the Commission authority to prosecute as it has with the SFO, CHRAJ has no authority to prosecute anybody. It must be noted here that the SFO's prosecution licence still requires the prior approval of the Attorney-General and the

Attorney-General has the discretion to halt prosecution of a particular case at anytime.

2. ASSETS DECLARATION: The constitution requires that public officials file a declaration of their assets with the Auditor-General only. It must be stated here that whilst the Auditor-General has wholly cooperated with the Commission in its corruption investigations, it is submitted that, were public officials required to file a declaration of their assets with a body such as the CHRAJ (which has shown both commitment and ability to investigate allegations of corruption), it would serve as a deterrent to would-be corrupt officials and be more in keeping with the Directive Principles of State Policy espoused in the Constitution which provides; *'the State shall take steps to eradicate corrupt practices and the abuse of power.'* Act 456 s. 7 (1)(d), 1992 Constitution Art. 218 (d)(iii) 8 1992 Constitution Art. 35(8)

3. BUDGET: CHRAJ continues to face financial constraints; this is in spite of the government's declared commitment to good governance for the 2nd Chapter of 'Positive Change'. To our surprise and dismay, CHRAJ's modest request for increased budgetary allocation for 2005 was not merely kept at 2004 levels but was actually reduced from 2004 levels.

It appears that the Ministry of Finance is not aware that CHRAJ is supposed to be independent and also that its budgetary requirements should be provided in toto as long as the Commission can justify its budget. The routine response of the Ministry of Finance in reducing CHRAJ's agreed budget constitutes interference to CHRAJ's independence, undermines our effectiveness and is a violation of the Paris Principles. Parliament's Finance Committee has agreed with CHRAJ that the Ministry of Finance should not regard CHRAJ as a regular MDA and that under the constitution CHRAJ should be adequately resourced in order to execute its mandate.

4. STAFF TURNOVER: Consequent to the financial challenges facing the Commission is the acute depletion of the Commission's human resource base due to poor remuneration. One inexplicable reason for this is the fact that the CHRAJ legal class receives a salary at a considerably lower level than their colleagues in other public services, contrary to the Legal Services Law. The gap between the remuneration is so wide that former CHRAJ staff can be found not only in public services such as the Attorney-General's department and the Council for Law Reporting but also in the Judiciary. Numerous appeals to governments past and present have

yielded no response. CHRAJ would wish the President to know through the Honourable Attorney-General, that more than any other institution, the Commission is praying that 'Positive Change Chapter 2' will positively change the human resource situation of CHRAJ. Already we are well into the 2nd quarter of the year and we earnestly wish to see some positive change. I would like to take this opportunity to invite the Attorney-General to take a walk with our Commissioner through the offices of our Head Office and Greater Accra offices, being so close to his own office, which will surely bring our message home more eloquently than any words or letters will.

### **CHRAJ Today**

Whereas CHRAJ initially investigated corruption allegations alongside routine complaints, CHRAJ today has established a specialised unit of anti-corruption with its own director and staff.

CHRAJ intends to take a preventive approach to anti-corruption through public education at all levels; educating the public from the creche to the boardroom on the negative effects of corruption on the development of the nation.

CHRAJ is a member of the Ghana Anti-Corruption Coalition.

CHRAJ is in the process of developing guidelines for public officers on interest and gifts, which is being discussed in a pilot scheme with the aim to complete collaborative process.

CHRAJ'S position on the restriction of assets declaration to the Auditor-General only is that asset declarations of high public officials should be made public, as a commitment to transparency and accountability in public office. The present position allows the assets held by these public officers to remain shrouded in secrecy and as has been shown since Ghana's independence promotes corruption, abuse of office and acquisition of illegal wealth. It is the belief of the Commission that the constitution is not against the self-improvement and the betterment of one's life but that the constitution is against the abuse of public office to improve oneself at the expense of the citizens of this country.

### **Conclusion**

It is our hope that there will be demonstrated commitment to eradicating corruption through increased resourcing of CHRAJ (being the constitutional anti-corruption agency) and prosecution of corrupt officials, rather than whitewashing their actions and limiting government action to requests for

resignations. If these positive steps are taken by government, CHRAJ will be able to play its role in ensuring a just and corrupt-free society through good governance which is the dream and hope of all Ghanaians.

## **ADDENDUM**

### **Public Office Holders Asset Declaration Regime**

The Public Office Holders (Declaration of Assets and Disqualification) Act 1998<sup>1</sup> (referred here on as the Act or Act 550) was enacted in conformity with Article 286 of the Constitution of 1992. The Act provides for the declaration of assets and liabilities owned and owed respectively by public office holders in Ghana.

Section 1 of the Act provides for the class of persons to whom the provisions apply: these are listed in Schedule 1 to the Act as stipulated in Section 3. The list is a long one and covers most elected senior public officials, like the President, Members of Parliament and appointed senior officials like Judges, Heads of public corporations and ministries<sup>2</sup>. Significantly, persons covered by the Act have a duty to declare assets and liabilities owned and owed directly or indirectly<sup>3</sup>. Written declarations are to be submitted to the Auditor-General: before a public officer takes office, at the end of every four years and at the end of his/her term of office. In the case of the Auditor-General, a declaration should be made to the President. The responsibility for obtaining and submitting a declaration form rests solely on the shoulders of the affected public officer<sup>4</sup>. Section 4 of the Act lists all the things to be declared with the complete list found in the specified declaration form, also in the Act. The list covers both movable and immovable property.

Section 6 provides for circumstances in which the declaration may be disclosed and these include: disclosure before a competent jurisdiction; before a commission of inquiry appointed under Article 278 of the Constitution and disclosure before an investigator appointed by CHRAJ.

Generally, a failure to declare one's assets or liabilities without reasonable excuse or knowingly making a false declaration is in contravention of the Act<sup>5</sup>. CHRAJ is mandated, upon an allegation of failure to declare or knowingly making a false declaration, to cause the matter to be investigated unless the person concerned makes a written admission to his guilt<sup>6</sup>. CHRAJ is then empowered, based on the written admission or the

outcome of its investigations, to take appropriate action.

As part of the consequences for making a false declaration, Section 5 stipulates that “Any property or assets required under section 1 of this Act to be declared, acquired by a public officer after the initial declaration and which is not reasonably attributable to income, gift, loan, inheritance or any other reasonable source shall be regarded as acquired illegally.” Unfortunately, the Act does not specify the individual or organization responsible for verifying the declaration in order to arrive at any such conclusion. Whether Section 5 provides some kind of evidential guideline for CHRAJ in the conduct of its investigations under the Act, is also not known.

The Act also regulates the circumstances in which a public office holder may be disqualified; it is however not within the remit of this discussion.

As noted earlier the Act was enacted in conformity with Article 286 of the 1992 Constitution. Prior to the enactment, the regime of asset declaration was governed by PNDCL 280<sup>7</sup>. Article 286 is one of the major compliance mechanisms crafted by the Constitution to hold public officers accountable and forms part of Chapter 24 of the Constitution on the Code of Conduct for Public Officers. Chapter 24 is a general regime of prevention and cure of incidences of conflict of interest among public officers which is intended to build on the principles of probity and accountability and help fulfill the State’s mandate to eradicate corrupt practices under Article 37 and 35 (8)<sup>8</sup> of the Constitution respectively.

### **The Absurdity of the Current Asset Declaration Regime**

Currently, it is almost impossible to critically assess the performance of the regime as to whether public officers are in compliance. The regime has been in effect for seven years now and yet, bar the invocation of Article 286(3) and section 6 of the Act<sup>9</sup>, the public is unable to access the following information:

- (1) Whether a listed person under the Act has submitted a declaration
- (2) Whether the declaration was authentic
- (3) Whether all declarations submitted for a relevant period can be reconciled
- (4) Who is responsible for verifying the submitted declarations?
- (5) What possible sanctions can be applied to a person in breach of his/her obligations?

Even under an invocation of section 6 of the Act, there is no guarantee that public disclosure will occur. An April 2001

statement made by the President at his maiden press conference<sup>10</sup> at the Castle Osu to mark his first 100 days in office in his first term illuminates the absurdity of the regime. In response to a question posed by a journalist, the President stated that himself, his ministers, parliamentarians and members of the government would finish declaring their assets by the end of April 2001. Now since the President did not come back at the end of April 2001 to announce that he had fulfilled his promise, the public had no recourse to ascertain the truthfulness of such an important requirement, instead they were just expected to trust the President’s word as the first citizen of the country. Further to these concerns, the limitations of other provisions have been called into question. In a 2001 signed statement to the press<sup>11</sup> Mr. Emile Short, Commissioner of CHRAJ called on the government and parliament to urgently address concerns about verifiability, accessibility and limitations in the coverage of the Act in the interest of justice and fairness. For example, he stated that it was difficult to justify why only officers of the Armed Forces seconded to civilian institutions and establishments should declare their assets. Clearly, this was not the intention of the framers of the Constitution. Such a state of affairs is neither in furtherance of the objectives for which Chapter 24 was promulgated and Article 286 was entrenched<sup>12</sup>.

### **The Legislative Flaws**

The gaps in the constitutional and statutory provisions governing the declaration of assets and liabilities are further illuminated below.

#### Section 1(3)

*“It shall be the responsibility of the officers required to make the declaration under this Act to obtain the forms from the office of the Auditor-General”.*

On a narrow literalist reading of this provision the extent of the required officer’s duty is to collect the form from the Auditor – General’s office. In other words the Auditor – General is absolved from any duty to ensure that required officers collect or receive forms to help facilitate their compliance with the provisions of the Act. This position is unsatisfactory especially where the Constitution and the Act is silent on who is responsible for processing the declaration. What is worrying is the possible interpretation by the Auditor – General that in essence section 1(3) absolves him from any duty to ensure compliance in general. A position it appears he has taken in reality.<sup>13</sup>

#### Section 1(4)



*“The declaration shall be made by the public officer-*  
*(a) before taking office;*  
*(b) at the end of every four years; and*  
*(c) at the end of the term of his office”*

One can certainly see the sense in requiring a declaration to be submitted before a public officer takes office and at the end of his term. It is however difficult to understand why the framers of the Constitution decided to peg the interval at every four years. Presumably, the argument being that most elected and appointed officials required by the Act to declare their assets have a four-year mandate. Such officials include the President, ministers and parliamentarians. If that presumption is true then the requirement to declare at the end of a public office holder’s term becomes a redundant exercise to the extent that it covers public office holders with a four-year tenure. For example, the current President, assumed office in 2001 and should have declared his assets for the first time. Under the Act he expected to again declare his assets not later than six months<sup>14</sup> after the fourth year for the second time (which is due 6<sup>th</sup> June 2005), and not later than six months after the end of term, for the third and last time. In President Kufour’s case his due date for declaring his assets and liabilities for four years and the end of term will fall on the same day. This is because the President’s term of office is four years after which time he can be reelected for a second term of office<sup>15</sup>. The same applies to his ministers, if the President does not remove them prematurely, even if they are holdover ministers and also parliamentarians<sup>16</sup>. In addition, it is inexplicable to extend that requirement to cover all public officers. Certainly, not all public officers enjoy a four-year tenure.

Besides that point, why shouldn’t these public officers be required to submit a declaration yearly? If the regime is meant to prevent corruption and hold public office holders to account then it is defeatist to wait for a full four years to determine if a public office holder has been accountable. In fact the 1979 Constitution and preceding legislation (PNDCL 280) to the current Act, pegged the filing interval at 2 years and therefore a more frequent filing requirement is not alien to Ghanaian legal framework. The public could save monies from a yearly authentic declaration, which is likely to reveal any potential rot earlier and prevent corruption.

#### Section 5

*“Any property or assets required under section 1 of this Act to be declared, acquired by a public officer after the initial declaration and which is not reasonably attributable to income, gift, loan, inheritance or any other reasonable source shall be regarded as acquired illegally.”*

Two issues arise from this particular section. The first is this:

what is reasonably attributable to a gift or any other reasonable source? Secondly, who determines the meaning of those words, is it the CHRAJ investigator investigating an allegation, the court determining an issue, or the Commission set up under Article 278. For example during the 2005 ministerial vetting process, one nominee claimed to have friends abroad paying his child’s maintenance expenses. Would that be reasonably attributed to a gift or other reasonable source? This clearly highlights the vagueness of the provision and opens it up to abuse.

#### Section 6

*“A declaration made under this Act shall, on demand, be produced in evidence*

- (a) before a court of competent jurisdiction;*
- (b) before a commission of inquiry appointed under Article 278 of the Constitution or*
- (c) before an investigator appointed by the Commissioner for Human Rights and Administrative Justice.”*

This is the only provision that speaks to disclosure of a submitted declaration. Again, on a narrow literalist interpretation it suggests that it is only these individuals or bodies who are implicitly empowered to demand disclosure of a declaration. Secondly, since the Constitution is silent on disclosure the three circumstances represent the only circumstances under which a declaration may be disclosed. It means that disclosure under this Act and the Constitution is confidential and the public has no right to access any declaration made by a public officer. Thirdly, if a narrow literalist approach is adopted then it means CHRAJ can only demand the disclosure of a declaration after an allegation has been made and it has decided to investigate. In other words, CHRAJ has no power to demand disclosure on its own accord to ensure compliance of the provisions of the Act. This could not have been the intention of the framers of the Constitution bearing in mind that Article 286, as part of Chapter 24, was designed to make public officers accountable to the people. How then does the Constitution remove the people’s power to exact accountability from its leaders? This is clearly inconsistent with the letter and spirit of the Constitution.

#### Section 7

*“An officer required to declare his assets and liabilities under this Act who -*

- (a) without reasonable excuse fails to declare;*  
*or*
- (b) knowingly makes a false declaration contravenes this Part and shall be dealt with in accordance with section 8 of this Act.”*

Read with section 1(3), it is unfortunate that it does not

provide for the public officer to be reminded of his duty to declare. It totally fails to provide for an authority to oversee the processing. It means that the Auditor-General is supposed to sit and wait for declarations to be submitted so that he can keep them. He is not forced to ensure that all those required to declare their assets and liabilities, submit their declarations accordingly.

### Section 8

- “(1) An allegation that a public officer has contravened or has not complied with a provision of part of this Act shall be made to the Commissioner for Human rights and administrative Justice and in the case of the Commissioner for Human Rights and Administrative Justice, to the Chief Justice who shall, unless the person concerned makes a written admission of the contravention or non-compliance, cause the matter to be investigated.*
- (2) The Commissioner for Human Rights and Administrative Justice or the Chief Justice may take such action as he considers appropriate in respect of the results of the investigation or admission.*

There is clearly the absence of a trigger mechanism to invoke the powers of CHRAJ to investigate an allegation. The presumption implied in section 8 is that the person making the allegation has access to information that a public office holder has contravened the Act. Interestingly, it is only the declarant and the Auditor-General who have access. It is highly unlikely that the declarant will own up to his breaches and as noted the Auditor-General maintains he is just a custodian. In that sense, the Act fails to institute any trigger to invoke the mandate of CHRAJ while strangely suspending the process of detection on an apparent belief in the high moral turpitude of the public office holder in Ghana.

Worse still, section 8 also fails to provide specific sanctions for the contravention of the Act.

## **ASSET DECLARATION - INTERNATIONAL PRACTICE<sup>17</sup>**

Asset declaration laws or rules are said to be one of the effective compliance mechanisms adopted by nations to prevent or cure the incidence of conflict of interest among public office holders. The principles served by addressing conflicts among public officials are to promote impartiality; integrity and public trust thereby enhancing public confidence in public institutions<sup>18</sup>. Most asset declaration rules are enacted as part of a broader code of conduct for public office holders to regulate their activities in order to safeguard

the integrity of the public service and prevent corruption. This is reflective of Chapter 24 of the 1992 Constitution. The common features of an Asset Declaration Regime are to do with (1) the class of public office holders covered under it (2) the type of property that has to be disclosed (3) the number of times a declaration has to be made (4) verification of the declaration (5) punishment for breach (6) whether there is public access.

A desk research was conducted on international practices of the asset declaration regime. It covered eleven (11) countries with vastly different cultural, political, social and economic backgrounds as well as varying capacities for legal enforcement. However, there was a conscious effort to select for examination legal frameworks in African countries. The countries are as follows: Kenya, Tanzania, Uganda, Nigeria, South Africa, United States of America, Romania, Korea, Bangladesh, India and Sri-Lanka.

### **Public Disclosure**

Six countries (Tanzania, Uganda, South Africa, USA, Romania and Korea) out of the 11 examined provide for public disclosure in their statutory instruments. The countries differ in terms of resources available to individual countries to facilitate the effective implementation of their public asset declarations regimes and historical and cultural factors informing the enactment of their public disclosure provisions.

In Tanzania's case the particulars of a declaration are kept in a register which is made accessible to the public. Most countries place some limited restriction in access to ensure that such information is not used for anything mischievous. Some require an application to the receiving authority with stated reasons for use, plus a fee as in the case of the USA. In Romania, the information is published in the Internet page of the legal entities responsible for policing the regime, or the official journal of Romania. In South Africa the contents of the declaration are kept in registers managed by the relevant receiving authorities including the Secretary to Cabinet in respect of members of the Cabinet. The register has a confidential and public part. The confidential information includes the value of interests held in a corporate entity other than a private or public company, liabilities and interests of spouse, permanent companion and dependent children. Every thing else not classified as confidential is accessible by the public. The provisions are replicated for MPs and councilors at local government level.

It is difficult to draw any particular pattern in the

representation of countries that do not provide for public access which includes Kenya, Nigeria, Bangladesh, India and Sri Lanka. The common characteristics are the fact they are all developing countries in Africa and Asia. In all the five cases except Nigeria, the law leaves much of the processing details to self-regulation. It is interesting to note that currently Kenyans are agitating for public disclosure of the declaration forms.

### **Verifiability**

Unsurprisingly, the six countries that provide for public disclosure have a credible framework for verification of the declared forms. They are joined by Kenya and Sri Lanka. A credible verification process should provide for the receiving authority to issue reminders to public officer holders to meet their obligation. Additionally, the receiving authority must have the power to request explanation, clarification and correction of inconsistent information, omission or discrepancy. Most countries examined grant this power (mandatory or discretionary) to a list of bodies responsible for some section of public office holders or a general ethics body to undertake these functions. In the case of Uganda, it is the Inspector General of Government (IGG) who examines all declarations and has the discretionary power to ask a public officer to account for an omission or discrepancy. The officer after receiving the request has thirty days to respond. In the USA, the relevant institutions like the presidency, vice-presidency, Federal Election Commission and office of Government Ethics have a designated ethics official who performs these functions. The South African legal framework on the other hand appears to imply the verification of declared assets. Section 5.4 allows Cabinet members and deputy ministers who are members of the National Assembly to comply with the provisions of the Executive Code if they fulfill their obligation under the Parliamentary code except where their disclosure does not meet the requirements under the Executive Code. Then they are required to file additional information. It implies that the receiving authority should verify if a declaration is in compliance and request for further information if it is not. Also section 5 of the Parliamentary Code empowers the Registrar of Members' Interest to amend entries in the register when necessary and to perform other functions in connection with the implementation of the code. However, it appears the Registrar only verifies on the directive of the Parliamentary Committee on Members' Interest. This arrangement is seen by some CSOs like IDASA, as hampering the effective implementation of the code<sup>19</sup>.

### **Frequency of Filing**

All the countries examined make provisions for filing at most every two years, in addition to (in most cases) a requirement to file before assumption of office and after the end of term. Out of the eleven countries only Nigeria requires that public officials file every four years, all other countries stipulate filing annually with the exception of Uganda which stipulates two years.

Though the Nigeria case is unique in this sense, it is a complete replica of the Ghanaian example. Coincidentally, the legal framework for the regime is contained in the 1999 Constitution of the Republic of Nigeria, promulgated a year after the 1998 Act (Act 550) came into force in Ghana.

### **Coverage**

Another interesting observation is that all the countries provide that public office holders declare the assets of their spouses and children in one form or another and mostly in a separate declaration, except Korea. There are however variations in the stipulations. . Kenya, Tanzania, Uganda, South Africa, USA, Romania and Sri Lanka framework covers spouses and children some provisions make a distinction between separated, married spouses and, unmarried and dependent children. Tanzania and Nigeria require declarations for unmarried children whilst South Africa, USA and Romania require declarations for dependent children. . India and Bangladesh on the other hand, refer to family members and it is not clear if it (the Bangladeshi requirement) means the nucleus or extended family. The India law on the other had defines family to mean blood related or by marriage. It does not cover spouses who are separated or children who are independent. However, it provides that the public officer declares assets held in the name of a family member, which is different from requiring the public officer to declare the property owned by family members. The former is similar to the provision in Section 1 of the Ghanaian 1998 Act which requires that the public officer declare all assets and liabilities owned or owed directly or indirectly. Indirectly in this sense, falls within the circumstances where a family member holds a property on behalf of a public officer.

South Africa introduces the concept of a "permanent companion" which is defined as a person publicly acknowledged by the public office holder as a permanent companion. A provision that perhaps

captures legally accepted non-traditional relationships in South Africa.

## Sanctions

Generally, all the countries examined impose sanctions on public office holders who fail to comply with the provisions of the particular law/rule. Among the East African countries examined, i.e. Kenya and Tanzania, the legal framework spells out clearly the punishment for contravening the asset declaration laws. In Kenya, a guilty officer is liable to a fine of 1 million shillings and/or a year imprisonment whilst in Tanzania; it is between 1 to 5 million shillings or up to a year imprisonment. The Sri-Lanka regime also stipulates specific sanctions for contravening the Act. In Uganda, the sanction is not clear, yet comments made by the Inspector General of Government (the responsible authority) in a recent news report indicate that specific sanctions like dismissal is provided for<sup>20</sup>. In other jurisdictions like the USA, Romania and India, sanctions are stipulated elsewhere. In South Africa, whilst the Executive Code is silent on the exact sanctions applicable in case of a breach, the Parliamentary code stipulates penalties. They include reprimands, a fine to the value of 15/30 days salary and loss of privileges. In a news report on the release of a report on government ethics in post-apartheid South Africa by the Institute of Democracy in South Africa (IDASA), it was noted that compliance was not effective because of the lack of clear and stringent penalties for breach<sup>21</sup>.

## Summary

The general impression gathered from the overview of asset declaration laws/rules indicates an acceptance of the following ingredients as essential for an effective asset declaration regime.

- (1) Most regimes cover appointed as well as elected officials holding public office. It could be a wide class of officials or all officers of the executive branch as well the other two arms of government, i.e. parliament and judiciary.
- (2) Majority of regimes require assets and liabilities of spouses and children to be declared.
- (3) Declarations are made frequently; the preference is yearly in addition to a requirement to declare at the beginning and at the end of an official's term.
- (4) Most regimes require the receiving or independent authority to process the declaration, i.e. remind officers to file, require them to amend inconsistent declarations and a general process of verification.
- (5) Not too many specify the punishment for a breach

of laws or rules, however the relevant authorities are not granted a wide discretion to apply appropriate sanctions. Rather, they are expected to refer to other relevant rules to apply specific sanctions.

- (6) Most regimes provide public disclosure through a register or some sort of governmental or organizational publication.

There are a couple of features in a few of the regimes reviewed here which are of great interest. For example, The Leadership Code Act 1992 of Uganda provides that public office holders must declare cash assets in banks and financial institutions within Uganda and abroad<sup>22</sup>.

Though most regimes require a declaration of assets owned and is expected that assets owned abroad are included, the specific mention of it is an acknowledgement of an old age problem in Africa of public officials stealing public monies and hiding them in banks outside Africa. More importantly, the law adequately equips the authority (Inspector General of Government (IGG)) charged with policing the regime to fulfill its mandate effectively. In a recent news report<sup>23</sup>, the IGG (Faith Mwendha) was reported to have asked all officials to file their declaration by March 31<sup>st</sup> or be dismissed. Again the newspaper reported that the IGG gave the number of officials who had declared and even mentioned individuals names who had not as yet declared, including President Museveni. Overall, there are sufficient examples to draw from in proposing reforms of The Public Office Holders (Declaration of Assets and Disqualification) Act 1998.

## PROPOSED REMEDIES

The CDD Round Table Discussion on asset declaration produced consensus on the following:

1. The need for the declarations to be made accessible
2. The need for the Auditor-General to be empowered to verify declarations
3. The need for specific sanctions
4. The need for the assets of spouses and dependent children to be declared
5. The need for the Auditor-General to make more use of Article 286 of the Constitution and s.13 of the Act
6. The need for the issue of Gifts to be clarified

Below, we offer remedial options for enhancing the credibility of the asset declaration regime in Ghana.

## Constitutional and Statutory Interpretation

In our opinion, under both a narrow and broad interpretation of the constitutional and statutory provisions governing asset declaration, the enforcement agencies have the capacity and the legal grounding to remedy some of the legal flaws and to enhance the credibility of the asset declaration regime. Principally, the enforcement agencies are capable of curing the gaps in accessibility, verifiability, coverage and sanctions.

### 1. Narrow Literalist Constitutional/Statutory Interpretation

Section 13 of Act 550 states: “***Auditor-General may by legislative instrument make such regulations as he considers necessary for the effective implementation of Part 1 of this Act***”

Even a narrow literalist interpretation shows that the Auditor-General is given wide powers under Section 13 to implement the regime of asset declaration under Act 550 and not just to take custody of declaration forms. The section mandates the Auditor-General to effectively implement Part 1 of the Act. Part 1 of Act 550 contains sections 1-8 of the Act. These covers the following issues:

- Accessibility (s.5)
- Verifiability (ss.1 (1-3), 7)
- Filing Frequency (s.1 (4))
- Coverage (ss.1, 3, schedule 1)
- Contents of declaration (s. 4)
- Sanctions (ss.5, 8)

In essence the Auditor-General is empowered, albeit by discretion, to promulgate laws to effectively implement the whole regime. The current practice where by declarations are submitted already sealed to the Secretary of the Audit Service Board to be kept in a secured place is a clear example of the operation of section 13. The Auditor-General could only have lawfully added these requirements which are neither expressed nor implied in the Act by invoking his powers under section 13. It is therefore within the powers of the Auditor-General, if he considers the present position as unacceptable, to duly remedy it by promulgating laws to institute a process of verification and public scrutiny.

A continuation of the current practice, however where a declaration is sealed before it is received by the Auditor-General’s office will produce the following absurd results:

- The Auditor-General cannot ascertain if a public office holder has submitted a written declaration of assets and liabilities which are in accordance with the requirement, contained in schedule II and section 1. As it currently stands a declaration could contain blank sheets of paper and the Auditor-General will not know.
- The Auditor-General will not be able to ascertain if a declaration is true or false or whether there has been a failure to declare or if a failure was accompanied by reasonable excuse in accordance with s. 7(a).

In view of the above, if the Auditor-General is serious about enhancing the credibility of the regime, section 13 grants him the necessary powers to promulgate laws to cure the problems of verification and accessibility.

### 2. Broader Literalist Constitutional/Statutory Interpretation

A broader interpretation of other relevant Constitutional/Statutory provisions further supports the submission above.

- a. The Constitution devotes a whole chapter to a “Code of Conduct for Public Officers” within which Article 286 is located and entrenched. This is consistent with the accountability ethos colourfully displayed in Articles 35(8), 37(1), 41(f) under the Directive Principles of State Policy in Chapter 6. Therefore it is inconsistent with the Constitution to create a scenario where it imposes a duty on public office holders to declare with the objective of ensuring public accountability and deterring corruption only to require that those declarations be kept under lock and key and only be known to the declarant. Such an absurdity will be inconsistent with the totality of Chapter 24 and the accountability ethos of the Constitution. Instituting a process of verification and public scrutiny will not only be consistent but also advance the principles enunciated in the Constitution.
- b. It is no coincidence that of all the institutions that the framers of the Constitution designated as the receiving authority it selected the Office of the Auditor-General. In our opinion it makes sense that the Auditor-General was chosen because as the Auditor of the public purse he has the skills

and resources to audit declarations of public office holders efficiently and effectively. An assessment the Auditor-General endorses. If the mandate of the Auditor-General was just as a custodian, the Constitution could have designated a security oriented institution like the Ministry of Defence or the Bank of Ghana who have the storage facilities for keeping such valuables secure. Coincidentally, the Auditor-General has even admitted that the storage facilities currently being used by him to keep the declarations is neither fireproof nor burglar proof.

- c. In our opinion, though Article 286(3) and section 6 of the Act deal with limited disclosure it does not put a ceiling on disclosure. It states that a “*declaration made under clause 1 of this Article shall, on demand, be produced in evidence...*” then it list the three circumstances. It does not say that those are the only circumstances. In the absence of clear stipulations and in the understanding that the Constitution provides a floor and not a ceiling, it invokes the discretionary powers of the Auditor-General under section 13 to promulgate laws to ensure the effective implementation of the Act, which include making the declarations accessible.
- d. Additionally, Article 286 is regulating ethical standards and therefore it could not be said to be legislating to limit the policy makers’ (Parliament’s) ability to raise the ethical bars if it is necessary to achieve the objectives set by the Constitution. Ethics is a dynamic concept that evolves with time and as such even if it is accepted that the Constitution provides for a lower standard than required, the standard could be rightly raised to address any shortfall.
- e. On Spouses: The issue of spouses fall squarely within the confines of the preceding argument which is expounded below. Unfortunately, the Constitution does not specifically cover spouses or dependent children, a practice common in other jurisdiction with asset declaration regulatory frameworks. It has been argued that PNDCL 280 which was repealed by Act 550 covered spouses and therefore an absence of spouses in Act 550 was a deliberate omission on the part of the framers of the Constitution. It follows therefore that the Constitution precludes spousal declaration<sup>24</sup>. As H. K. Prempeh<sup>25</sup> rightly puts it, what it simply proves is that the framers of the Constitution choose not to make spousal declaration a Constitutional requirement. But it does not in any

way preclude it as a statutory requirement. In fact, by not making it a constitutional requirement and yet not explicitly prohibiting Parliament from supplementing the constitutional requirement, the only sensible implication is that Parliament is free, if it so chooses, to supplement the constitutional provision by statute. As long as the statutory provision does not fall below the constitutional minimum, there is no problem of unconstitutionality.

Further, H.K. Prempeh states that this indeed is the standard relationship between Constitutions and Statutes in a democracy. A democratic constitution typically defines a framework and leaves it to the democratic process to make additional policy choices to expand on the principles and norms established in the constitution. It would be ludicrous to expect a Constitution to exhaust the range of possible policy responses to any given public problem. In a constitutional democracy, that function is typically left for the legislature to perform. Thus, the mere fact that the 1992 framers decided not to impose a spousal requirement as a constitutional mandate does not make the imposition of a spousal requirement by statute unconstitutional; rather, it means that the framers decided to leave that policy decision to the people acting through their representatives in Parliament. That is a sensible approach. And this applies to all the other aspects of article 286.

On Members of the Armed Forces: The Constitutional requirements of asset declaration do not cover all public office holders. Article 286 (5)(j) empowers Parliament to add “*such officers in public service and any other public institution*”. Parliament exercised its powers to expand the list of declarants in Act 550, under Schedule 1 by including members of the security forces, Police, Prisons, Fire Service, CEPS and Immigration but not the armed forces except those seconded to civilian institutions. The rationale it was argued was that the members of the armed forces are only exposed to corruption when they interact with civilians. That basis has been shown to be untrue and therefore renders the rationale untenable. In fact the army procures food, equipment, clothing, arms and ammunition and these service providers are most times, civilian operators.

## Statutory Legislative Amendment Option

The following statutory amendments to Act 550 are proposed to correct the legislative flaws and to strengthen a proper interpretation of the provisions of the Act:

### (1) Verifiability

The Act must be amended to provide for the following processes of verification:

- (a) Mandate the recipient of the declaration (Auditor-General) to verify all declarations received and to require public officers to amend declarations or seek clarification appropriately in cases of any inconsistencies or inadequacies.
- (b) Mandate the Auditor-General to remind public office holders of their duties at reasonable intervals prior to a deadline for a declaration.

The Auditor-General is placed strategically to perform this function effectively considering the accounting and auditing resources available to him and crucially his independence; guaranteed under the Constitution<sup>26</sup>.

- Of the countries examined, power is granted, in the case of eight countries, to the receiving authority to verify the declaration and request for clarification or additional information.

### (2) Clarification of “Gift”

The Act must be amended with the insertion of a guideline provision as to what is reasonably attributable to “gift” as stipulated in Section 5 of the Act.

Some regimes have duly provided for a definition of what amounts to a gift within the context of their laws. Section 11 of “The All Indian Services (Conduct) Rules”<sup>27</sup> is worth mentioning here:

*11. Gifts- 11(1) A member of the service may accept gifts from his near relatives or from his personal friends having no official dealings with them, on occasions such as wedding, anniversaries, funerals and religious functions when the making of gifts is in conformity with the prevailing religious and social practice, but he shall make a report to the Government if the value of such gift exceeds Rs.5, 000/-.*

*Explanation- For the purposes of this rule “gift” includes free transport, free boarding, free lodging or any other service or pecuniary advantage when*

*provided by a person other than a near relative or personal friend having no official dealings with the member of the Service but does not include a casual meal, casual lift or other social hospitality.*

*11 (2) Save as otherwise provided in sub-rule (1), no member of the service shall accept any gift without the sanction of the Government if the value of gift exceeds Rs.1, 000/-.*

*11(4) Member of the Service shall avoid accepting lavish hospitality or frequent hospitality from individuals having official dealings with them or from industrial or commercial firms or other organizations.*

A clear set of rules on this issue will go a long way strengthening the regime if we are to address the kind of claims made in respect of gifts at the recent (2005) ministerial vetting process.

- Most countries examined provide for some rules on Gifts, normally not within the confines of the asset declaration regime but in the broader legislation of a Code of Conduct.

### (3) Public Disclosure

The Act must be amended to provide for public disclosure, limited or otherwise, but certainly not in its current form. It is proposed that we take a second look at the amendment proposed by Hon. Felix Owusu- Agyapong during the consideration of the bill in 1998<sup>28</sup> or better still revert to the framework that existed under PNDCL 280 as proposed by the Auditor-General.

The American example offers useful suggestions on ensuring that information obtained by the citizen is put to proper use, i.e. facilitating the objectives of the regime. The relevant section is stated below:

#### • **Section 105 of ETHICS IN GOVERNMENT ACT**

1. Notwithstanding paragraph (1), a report may not be made available under this section to any person nor may any copy thereof be provided under this section to any person except upon a written application by such person stating

§ (A) that person’s name, occupation and address;

§ (B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

§ (C) that such person is aware of the prohibitions on the obtaining or use of the report. Any such application shall be made available to the public throughout the period during which the report is made available to the public.

§ (1) It shall be unlawful for any person to obtain or use a report -

§ (A) for any unlawful purpose;

§ (B) for any commercial purpose, other than by news and communications media for dissemination to the general public;

§ (C) for determining or establishing the credit rating of any individual; or

§ (D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited in paragraph (1) of this subsection. The court in which such action is brought may assess against such person a penalty in any amount not to exceed \$10,000. Such remedy shall be in addition to any other remedy available under statutory or common law.

- Six countries provide for public disclosure with a few limitations, including payment of a fee, applying to the relevant authority and stating reasons for a request.

#### (4) Sanctions

(a) The Act must be amended to specify the sanctions applicable to public officers in breach of the provisions of the Act, including punishment for failure to declare after being duly reminded, making a false declaration or any other breaches. A look at the class of offences comparable to those under the Act can help us determine what punishment is appropriate.

- The countries that provide for clear sanctions stipulate a fine and in the alternative, up to a year imprisonment.

#### (5) Coverage

(a) The justification for excluding public office holders in the Ghana Armed Forces to declare their assets except those seconded to civilian institutions is still weak<sup>29</sup>. The argument that the armed forces have limited contact with civilians and as such do not have an opportunity to be corrupt is flawed. The common factor that binds the public officers listed and referred

to in the Constitution is the fact they are public officers who exercise control of the public purse and can use their position and influence to abuse the public trust in them. As Honourable A.O. Aidoo argued during the consideration of the bill, the Armed Forces procure their own clothes, food, ammunitions, weapons, etc. Therefore the Act should be amended to rope in members of the Armed Forces.

(b) Also the initial bill covered declaration by the spouse of the public officer but this was deleted. The argument was that the Constitution referred to the public officer not the spouse, though some members argued strongly that historically, it was important to acknowledge the role that spouses have played in helping corrupt officials to steal from the public purse or abuse their offices. Within the Ghanaian context this consideration is absolutely vital and must be reexamined. It is important to note that both in the 1979 Constitution and in PNDCL 280 spouses' assets were declarable and no arguments were advanced during the consideration of the bill that the operation of the regime in the past was adverse to the spouses of public office holders. The only competing consideration is ensuring that a spouse's right to privacy, guaranteed under Article 18, is not violated. In our opinion providing for spousal declaration will fall well within the exceptions provided under Article 18.

- The laws of Kenya, Tanzania and USA cover the armed forces; those of India and Sri Lanka do not exclude the armed forces.
- 9 out of the 11 countries examined clearly require public officers to declare the assets and liabilities of their spouses. The only limitation is a distinction drawn between married and separated spouses.

#### (7) Frequency of submission

(a) Though an amendment of Section 1(4)(b) is required, preferably to say "annually", it will not only require a constitutional amendment but a referendum since Article 286 is entrenched.

- Except Nigeria and Uganda which stipulates 4 and 2 years respectively, all other countries examined require annual filing.



## Other Considerations

### The Right to Information Bill 2003 and the Whistle Blowers Bill 2003<sup>30</sup>

In the State of the Nation Address to Parliament in February 2005<sup>31</sup>, President Kufour recommitted his government, as a major priority, to the passage of the Right to Information and the Whistle Blowers Bills. The passage of these Bills will go a long way to redress some of the difficulties currently experienced as shortfalls in the Asset Declaration Regime. However, any optimism must be met with caution. The broad list of exemptions from public access in respect of the Right to Information Bill may severely restrict the rights guaranteed under Article 21(1)(f) of the 1992 Constitution. At the time of going to press the Whistle Blowers Bill had been laid before Parliament and it is expected that the Right to Information Bill will follow suit.

### Challenges

#### (1) Lack of Political Will

It is interesting to note that during the debate on the consideration of the Public Office Holders (Declaration of Assets and Disqualification) Bill, members of the current government then in opposition strongly supported an amendment (referred in this discussion earlier) to allow for public disclosure and to include the army as persons required to declare. However, having assumed power and placed in the position to redress what was considered a major flaw in the system, nothing has materialized. The debate also exhibited the strong resistance of parliamentarians to public disclosure. All sort of reasons were canvassed to reject the need for public disclosure. Some argued that it would deter persons who had already succeeded materially in private life from entering public service. Others argued that it would give armed robbers information to target certain individuals. Ironically the regime under PNDCL 280 had a disclosure clause and yet it did not deter members of Parliament from participating in public service nor did it lead to the targeting of public office holders by armed robbers. Public disclosure has been adapted in Uganda, Tanzania and other countries successfully with no signs of any doomsday prophecies manifesting. The argument against public disclosure has no real foundation and should be swept aside sooner than later.

Though, President Kufour showed enthusiasm at the beginning of his first term of office to be transparent in respect of asset declaration, that enthusiasm died down very quickly and not much has been heard about it. It is not certain

whether the President's Office of Accountability has been assigned the responsibility of processing declarations of Ministers. Against this background, obtaining political support for the proposed amendment remains a challenge.

#### (2) Historical and Cultural Constraints

The era of unconstitutional rule in Ghana, in particular under the Armed Forces Revolutionary Council (AFRC) and Provisional National Defence Council (PNDC) fostered a culture of secrecy among public office holders to some extent. The establishment of extra-judicial bodies like Citizen Vetting Committees (CVCs), Peoples Defence Committees (PDCs) and Workers Defence Committees (WDCs) to adjudicate allegations of corruption leveled against the bourgeois in society<sup>32</sup>, created discomfort with ownership of property. Additionally, Ghanaians in general are reluctant to publicly disclose what they own or owe. This may be due to the fact that the wealthy people in society including public office holders tend to have many economic dependents and responsibilities as a result of the extended family system and cultural values. Therefore, a declaration that reveals a persons capacity to take care of most of his family members is not particularly palatable for most people. Interestingly, Honorable Yaw Barimah, during the consideration of the 1998 bill, openly boasted that as an Ashanti, he had no problem in letting people know what he had if he had legally acquired it. So maybe this may not be the case for all public office holders.

### Conclusion

The regime of asset declaration by public office holders must always been seen in the larger sense of a conflict of interest regime, ensuring public accountability and preventing corruption within the public service. It is a constitutional mandate, which must be approached with all seriousness to uphold and defend the Constitution of the Republic of Ghana.

The present state of the law is unsatisfactory and must be addressed. In particular, problems with disclosure, verification, coverage and frequency of filing urgently need attention. Though a lot of arguments have been canvassed in the past against disclosure in particular, it is not persuasive enough to dislodge the overwhelming arguments in support of it. If public disclosure was available, it is likely that the Appointments Committee during the 2005 ministerial vetting process would have received more accurate information on the assets of nominees so that they could appropriately evaluate the authenticity of some the petitions they received regarding particular nominees. Additionally, it is likely to aid the media in supplying accurate information to the public on such matters.

Difficulties such as the frequency of filing will need a constitutional amendment, however most of the required reforms could be achieved through a proper interpretation and utilization of the powers granted under the Act to enforcement agencies as well as through parliamentary intervention. ■■

## Legislative History of Asset Declaration in Ghana

	1969 Constitution (Arts. 67&89)	1979 Constitution (Art. 205)	PNDCL 280	1992 Constitution/ Act 550
Disclosure	Silent	Limited disclosure under 205 (3); same as present provision.	Auditor-General & Electoral Commission mandated to publish submitted declarations within 14 days of receipt, s. 1(3).	Limited disclosure; same as under 1979 Constitution.
Verification	Silent	Silent	It is silent on verification but it is argued that it is implicit within this context.	Silent
Frequency of filing	Before assumption & after assumption for parliamentarians and <u>only</u> on assumption for prime minister and ministers.	Before assumption, <u>every two years</u> and at the end of term.	Every two years and at the end of term.	Before assumption, every four years and at the end of term.
Coverage	Prime minister, ministers and members of parliament.	Apply to all high public office holders, appointed and elected. Similar to the present provisions. <u>Properties owned by spouses are also declarable.</u>	It covers similar persons under the 1979 Constitution. Does not include property owned by spouse.	Similar to 1979 Constitution. Does not include property owned by spouse.

### End Notes

<sup>1</sup> Public Office Holders (Declaration of Assets and Disqualification) Act, 1998. (Act 550)

<sup>2</sup> Ibid. schedule 1

<sup>3</sup> It does not cover assets & liabilities owned and owed by spouse(s) and child(ren).

<sup>4</sup> Ibid. section 1(3)

<sup>5</sup> Ibid. section 7

<sup>6</sup> Ibid. section 8

<sup>7</sup> Public and Political Party Office Holders (Declaration of Assets and Eligibility Law 1992, PNDCL 280.

<sup>8</sup> Article 37 mandates the state to secure and protect social order based on principles of probity and accountability, among

others and Article 35 (8) imposes a duty on the state to eradicate corrupt practices and abuse of power.

<sup>9</sup> i.e. unless a request is made by the court, CHRAJ investigator or Commission there will be no disclosure.

<sup>10</sup> Ghanaian times, 19<sup>th</sup> April 2001.

<sup>11</sup> [www.mcglobal.com/history/Jan2001/12a2001/12a1n.htm#a](http://www.mcglobal.com/history/Jan2001/12a2001/12a1n.htm#a) (12<sup>th</sup> January 2001)

<sup>12</sup> Article 290 (q) entrenches Article 286 under the Constitution and therefore requires a referendum to amend it.

<sup>13</sup> Auditor-General's Statement at CDD Roundtable Discussion on Asset Declaration, 28<sup>th</sup> April 2005.

<sup>14</sup> Ibid Section 1(4)(c)

<sup>15</sup> Article 66 of the 1992 Constitution.

<sup>16</sup> Conveyed in Articles 97 and 113 of the 1992 Constitution

<sup>17</sup> Based on information extracted from <http://www1.worldbank.org/publicsector/civilservice/assets.htm>: A World Bank Group web page on Administrative and civil service reform and modified.

<sup>18</sup> <http://www.parl.gc.ca/information/library/PRBpubs/bp362-e.htm>, obtained from a Conflict of Interest paper by Margaret Young of the Law and Government Division of the Canadian Parliament, revised, 1998.

<sup>19</sup> <http://iafrica.com/news/sa/280579.htm>: News reports on IDASA's release of the report on Ethics in Post-Apartheid South Africa, 2003.

<sup>20</sup> <http://allafrica.com/stories/200503090528.html>.

<sup>21</sup> <http://iafrica.com/news/sa/280579.htm> The research evaluated the implementation of the Executive Members' Ethics Act and the pursuant Code of Ethics, the Code of Conduct for Members of Parliament, the codes for provincial legislature members, and the financial disclosures regulations for senior public servants.

<sup>22</sup> Refer to table

<sup>23</sup> Refer to footnote 20 above

<sup>24</sup> Dr. Obed Asamoah, the then Attorney General, made this submission

to Parliament during the consideration of Act 550.

<sup>25</sup> H. Kwasi Prempeh Professor at Seaton Hall University, NJ.

<sup>26</sup> Article 187(6) of the 1992 Constitution

<sup>27</sup> <http://persmin.nic.in/ais/condrule.htm><sup>28</sup> His proposed amendment to the then bill was as follows: *Any person may: (1) Inspect a declaration under this law and deposited with the Auditor-General upon payment of a prescribed fee. (2) Require a copy of the declaration lodged with the Auditor-General on payment of such fees as may be prescribed.*

<sup>29</sup> Ibid.

<sup>30</sup> <http://www.ghana.gov.gh/pbcopin/index.php>

<sup>31</sup> [http://www.ghana.gov.gh/dexadd/state\\_of\\_nation2005.pdf](http://www.ghana.gov.gh/dexadd/state_of_nation2005.pdf)

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